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The Shifting Sands of Standing in Wisconsin

Who can bring suit in Wisconsin courts? The Wisconsin Supreme Court's standing decisions reveal a doctrine in fluctuation, particularly in administrative review cases. The decisional stress points of standing law are crucial for civil attorneys to consider when selecting plaintiffs and deciding whether and how to raise standing as an issue.

Not everyone can access judicial remedies. Justiciability is a bundle of related principles and doctrines that together dictate when the exercise of judicial authority is appropriate. Among these is the concept of standing, which answers who can bring suit in Wisconsin courts.

The Wisconsin Supreme Court's decisions on this important threshold matter have not yielded analytical clarity for lawyers. This article endeavors to provide a concise overview of standing doctrine and highlight some recent decisions on that issue. *Brown v. Wisconsin Elections Commission*,[1] released in February 2025, provides the impetus for this discussion. The dissenting views also warrant a look at *Brown*'s immediate predecessors, *Friends of Black River Forest v. Kohler Co.*[2] and *Teigen v. Wisconsin Elections Commission*.[3]

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A Historical Look at Standing

In 1975, *Wisconsin's Environmental Decade Inc. v. Public Service Commission*[4] provided foundational standing principles for appeals under the administrative review statutes now found in Wis. Stat. sections 227.52 and 227.53. At issue in *Wisconsin's Environmental Decade* (*WED*) were predecessor statutes that, like the current statutes, used the phrase "person aggrieved" to describe who could seek judicial review of an administrative ruling. In defining that phrase, the court likened Wisconsin standing principles to those of the federal courts, which had adopted a "substantial liberalization of the standing requirements."[5]

WED endorsed a two-part process for determining whether a party had standing. The first component requires the plaintiff to demonstrate an "injury in fact."[6] This prong assesses whether the person has suffered an injury as a direct result of the opposing party's conduct.[7] Hypothetical injuries are nonjusticiable,[8] but the injury need not be of a pecuniary nature.[9] An injury can be sufficiently direct even if it is remote in time or occurs only at the end of a sequence of events initiated by the defendant.[10]

WED described the second component as looking to whether the plaintiff's injury is "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[11] In *Friends of Black River Forest*, the supreme court jettisoned the "zone of interests" terminology, labeling it an "anachronistic misnomer" that unnecessarily injected judicial policy considerations into the standing calculus.[12]

The *Friends of Black River Forest* majority anticipated this linguistic change would have little effect.[13] The court retained the "well-established" substance of the second component: the injury must be to an interest that the law recognizes or seeks to regulate or protect.[14] In the context of administrative appeals, "this inquiry centers on a textually driven analysis of the language of the specific statute cited by the petitioner as a source of its claim to determine whether the statute 'recognizes or seeks to regulate or protect' the interest advanced."[15] Despite this reorientation to a statutory focus, the court reaffirmed that the law of standing is construed liberally and even an injury to a trifling interest will suffice.[16]

Waste Management of Wisconsin Inc. v. Wisconsin Department of Natural Resources is a good illustration of the foregoing concepts. Waste Management sought judicial review of an agency decision to approve a landfill site for one of the disposal company's rivals.[17] Applying the two-part standing test, the supreme court concluded Waste Management adequately alleged economic losses stemming from the agency decision, thereby satisfying the injury-in-fact requirement.[18] However, the agency-approval authority was structured to address potential environmental harm to residents, not economic harm to a competitor.[19] Because the alleged harm was not to an interest recognized, protected, or regulated by the substantive law on which Waste Management's challenge was based, the company lacked standing to seek judicial review of the agency determination.

Post-*WED* Status of Standing. In the decades that followed, the law of standing became a somewhat chaotic mass of case law decided under a variety of standards. Surveying this body of law, Chief Justice Shirley Abrahamson in 2011 remarked that Wisconsin courts had "inconsistently used a variety of terminologies as tests" and there appeared to be "no single longstanding or

uniform test to determine standing."[20] Her lead opinion in *Foley-Ciccantelli v. Bishop's Grove Condominium Ass'n* attempted to bring order to the chaos.

Chief Justice Abrahamson's efforts to distill the "essence of the determination of standing" into a three-part test applicable in all cases – whether the claim was brought under the constitution, a statutory enactment, or the common law – has not caught on.[21] Recent standing decisions barely acknowledge it, if at all. Even in the moment, it did not quite garner the crucial fourth vote from Justice Prosser, who lauded the lead opinion's efforts to provide a restatement of the law of standing but expressed concern with its use of "new and different terms," which could imply that the law was being changed.[22] The other justices, too, perceived the lead opinion to be making new law and declined to join it.[23]

After *Foley-Ciccantelli*, the supreme court's standing decisions tended not to linger on the issue. The court addressed the matter summarily in several high-profile cases.[24] Occasionally, it relegated its standing discussion to footnotes.[25] Sometimes, it even assumed without deciding that a plaintiff had standing.[26]

On this last point, it is important to note that unlike federal law, Wisconsin law does not impose a jurisdictional standing requirement.[27] Rather, courts often say that standing for state purposes is a matter of "sound judicial policy."[28] The result is a more malleable standard than in federal courts, though Wisconsin courts have historically looked to federal law for guidance.[29]

It is unclear whether that will continue to be true going forward. In *Friends of Black River Forest*, all justices, including the dissenters, agreed that the federal "zone of interests" terminology was inapt.[30] Although the majority regarded the change as superficial[31] (a notion the dissenting justices were not buying),[32] there appears to have been at least some wariness of federal standing concepts as *Brown* entered the court's docket.

Brown v. Wisconsin Elections Commission

Wisconsin law provides authority for municipalities to designate alternative absentee-ballot voting sites under Wis. Stat. section 6.855. In 2022, Kenneth Brown observed procedures in the city of Racine that he believed violated that statute. He filed a complaint with the Wisconsin Elections Commission, which the commission dismissed as lacking probable cause.[33]

Brown sought review in the circuit court. The court determined he had standing because the alleged voting improprieties affected his right to vote.[34] On bypass from the court of appeals, a majority of the Wisconsin Supreme Court concluded otherwise and held that Brown lacked standing to obtain judicial review of the dismissal.[35]

As is typical in administrative appeals, the supreme court grounded its standing determination on the statute authorizing judicial review – in this instance, Wis. Stat. section 5.06(8). The statute permits

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"[a]ny election official or complainant who is aggrieved" by a commission order to appeal to the circuit court. The *Brown* court focused on the meaning of the phrase "who is aggrieved."

"Aggrieved" is not an unusual word to find in a statute authorizing judicial review. Indeed, in *Brown* the supreme court called out several statutes that use the term, including – much to the consternation of the dissenting justices – the statute generally authorizing judicial review of administrative decisions, Wis. Stat. section 227.53.[36] Recognizing that Wis. Stat. section 5.06(8) does not define "aggrieved," the court sought to interpret that term by ascribing to it the statutory meaning identified in older case law interpreting the general administrative review statute, among others.

Surveying the various statutes, the court held that "aggrieved" means the same thing under all of them: for standing purposes, the plaintiff must have "suffered an injury to a legally recognized interest" because of the administrative decision.[37] According to the court, this interpretation was in keeping with the two-part test that had been historically applied in standing cases.[38]

The supreme court concluded Brown had not demonstrated he was affected personally in any way by the complaint's dismissal. He had not, for example, asserted that the challenged election protocols made it harder for him to vote.[39] In a key footnote, the court also observed that Brown had not argued the election practices diluted or polluted his vote, explicitly leaving for another day the question of whether allegations advancing those legal theories would have sufficed for standing purposes.[40] In short, Brown did not show he was differently positioned than any other person who might disagree with how a local election had been run, and that general interest was not enough to access judicial remedies.

Brown also argued he had standing because the commission had dismissed his complaint. That idea was soundly rejected by the court majority, which held that Brown was not "aggrieved" merely because he was the losing party in an administrative proceeding.[41] The court's holding in that respect appears consistent with many cases rejecting standing despite a party's loss before the administrative agency, some of which explicitly held that a party's participation in administrative hearings does not guarantee a right to judicially challenge the resulting order.[42]

Dissent Among the Dissenters

Three justices – Justice Hagedorn, Justice R.G. Bradley, and Chief Justice Ziegler – dissented and concluded that Brown had standing to challenge the commission's decision. The three justices, however, offered a fractured dissent structure that produced their unified agreement on only a single paragraph of Justice R.G. Bradley's dissent. Though the dissenting justices raised many objections, two main themes warrant attention here.

First, Justice R.G. Bradley and Justice Hagedorn argued the majority erred by ignoring the statutory definition of "aggrieved" under Wis. Stat. chapter 227.[43] For purposes of that chapter, "person aggrieved" means "a person or agency whose substantial interests are adversely affected by a determination of an agency."[44] *Brown* was not a Wis. Stat. chapter 227 case. But the meaning of "aggrieved" under that chapter was necessarily implicated by the majority's reliance on Wis. Stat. section 227.53 and associated case law when fashioning the definition of "aggrieved" for purposes of Wis. Stat. section 5.06(8).[45]

Justice R.G. Bradley had featured the chapter 227 definition of "aggrieved" only a few years earlier in the majority opinion in *Friends of Black River Forest*. Tracing the history of the two general administrative review statutes,

Wis. Stat. sections 227.52 and 227.53, the *Brown* dissenters had in that case wielded the Wisconsin Legislature's adoption of a statutory definition of "aggrieved" as justification to dispense with the "zone of interests" nomenclature.[46] *Friends of Black River Forest* placed substantial emphasis on statutory language, looking to the "substantive criteria" in the statutes underlying administrative challenges to measure whether plaintiffs had standing.[47]

By ignoring the Wis. Stat. chapter 227 definition of "persons aggrieved," *Brown* may have been subtly eroding the "substantive criteria" analysis outlined in *Friends of Black River Forest*, which Justice Karofsky (*Brown*'s author) had vigorously opposed in dissent. At a minimum, *Brown* raises some practical questions about how to describe standing in administrative appeals under Wis. Stat. section 227.53. Should the analysis focus on whether a plaintiff has "suffered an injury to a legally recognized interest," per *Brown*, or whether the plaintiff's "substantial interests are adversely affected by a determination of an agency," per *Friends of Black River Forest*? Is there any daylight between these standards, or are they simply different ways of saying the same thing? *Brown* did not explicitly overrule *Friends of Black River Forest* or provide clarity about those issues.

Second, the dissenting justices in *Brown* argued the elector complaint statute itself granted every voter a broad right to have elections that comply with the law.[48] The majority opinion, however, construed Wis. Stat. section 5.06 narrowly.[49] Under *Brown*, the statute essentially provides voters an opportunity to be heard by the commission on election grievances, but it does not guarantee that those grievances will be adjudicated by the courts absent a demonstrable injury to the person's vote.

Though the *Brown* dissenters were united on a broader interpretation of Wis. Stat. section 5.06, standing under that statute had fractured those justices just a few years before in *Teigen*. The three *Brown* dissenters were part of the *Teigen* majority that concluded two Wisconsin voters had standing to challenge elections commission guidance documents authorizing absentee-ballot drop boxes.[50] The four justices in *Teigen* were, however, unable to agree on a controlling rationale for voter standing.[51]

The lead opinion in *Teigen*, authored by Justice R.G. Bradley and joined by Chief Justice Ziegler and Justice Roggensack, concluded that a statute recognizing the constitutional right to vote guaranteed voters elections that comport with the law – and standing to obtain judicial review of allegedly unlawful practices.[52] Justice R.G. Bradley, dissenting in *Brown*, accused the majority of reversing course on this "inconvenient precedent," leaving "litigants in the painful position of Charlie Brown naively relying upon Lucy's insincere promise to hold the football steady for his kick, only to find himself flat on his back after Lucy pulls the ball away."[53]

Justice Hagedorn did not join the lead opinion's standing analysis in *Teigen*. He believed the lead opinion, which described Wisconsin as having a "permissive, policy-oriented approach to standing,"[54] used "far looser terms" than had been used historically to describe standing principles.[55] In particular, the lead opinion opened its standing discussion by citing judicial efficiency and the parties' zealous representation as reasons to adjudicate the dispute.[56] It also suggested that a relaxed standard might apply in cases in which the court "owe[s] the public an answer to … important questions of law."[57]

Justice Hagedorn was unpersuaded that such admittedly broad[58] judicial policy considerations should have a role in the standing analysis. In concurrence, he argued that those considerations would render the judiciary a "roving legal advisor, answering any questions about the law that may arise."[59] He underscored that a more rigid adherence

to traditional standing requirements was in line with the judiciary's "limited and modest role in constitutional government."[60]

Though *Teigen* was not a Wis. Stat. section 5.06 elector-complaint case, Justice Hagedorn nonetheless concluded that statute gave a voter the "right to have local election officials in the area where he lives comply with election laws."[61] This drew a sharp rebuke from the *Teigen* lead opinion, whose justices mockingly referred to Justice Hagedorn's analysis as "penumbra standing" and deemed Wis. Stat. section 5.06 inapplicable given *Teigen*'s procedural posture.[62] *Brown*, then, provided an opportunity for these justices to finally come together, albeit in dissent, on the scope of voter rights for purposes of standing.

The Future of Standing Law in Wisconsin

Far from elucidating standing principles in Wisconsin, *Brown* provides ample fodder for future litigation. Incongruity seems to be a consistent feature of state standing doctrine, which continues to shift like sand under litigants. The malleable nature of state standing in comparison to its federal counterpart might explain some of this, but there is also significant disagreement among Wisconsin Supreme Court justices on the very nature of the doctrine. Litigators must be aware of these standing trends and the justices' differing viewpoints to ensure the courthouse doors are open for their clients. **WL**

ENDNOTES

[1]*Brown v. Wisconsin Elections Comm'n*, 2025 WI 5, 414 Wis. 2d 601, 16 N.W.3d 619.
[2]*Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, 402 Wis. 2d 587, 977 N.W.2d 342.
[3]*Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, *overruled on other grounds by Priorities USA v. Wisconsin Elections Comm'n*, 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 429.
[4]*Wisconsin's Env't Decade Inc. v. Public Serv. Comm'n of Wis.*, 69 Wis. 2d 1, 230 N.W.2d 243 (1975), *overruled in part by Friends of Black River Forest*, 2022 WI 52, 402 Wis. 2d 587.
[5]*Id.* at 10.
[6]*Id.*
[7]*Friends of Black River Forest*, 2022 WI 52, ¶ 21, 402 Wis. 2d 587.
[8]*Milwaukee Brewers Baseball Club v. Wisconsin Dep't of Health & Soc. Servs.*, 130 Wis. 2d 56, 65, 387 N.W.2d 245 (1986).
[9]*Chenequa Land Conservancy Inc. v. Village of Hartland*, 2004 WI App 144, ¶ 17, 275 Wis. 2d 533, 685 N.W.2d 573.
[10]*Friends of Black River Forest*, 2022 WI 52, ¶ 21, 402 Wis. 2d 587.
[11]*Wisconsin's Env't Decade*, 69 Wis. 2d at 10.
[12]*Friends of Black River Forest*, 2022 WI 52, ¶ 30, 402 Wis. 2d 587.
[13]*Id.*
[14]*Id.* ¶¶ 30-31.
[15]*Id.* ¶ 28 (quoting *Waste Mgmt. of Wis. Inc. v. Wisconsin Dep't of Nat. Res.*, 144 Wis. 2d 499, 505, 424 N.W.2d 685 (1988)).
[16]*Friends of Black River Forest*, 2022 WI 52, ¶ 19, 402 Wis. 2d 587 (citing *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d 1, 783 N.W.2d 855).
[17]*Waste Mgmt.*, 144 Wis. 2d at 502-03.
[18]*Id.* at 505-06.
[19]*Id.* at 506-13.
[20]*Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n*, 2011 WI 36, ¶ 5, 333 Wis. 2d 402, 797 N.W.2d 789 (lead opinion).
[21]*See id.* ¶¶ 38-57.
[22]*See id.* ¶¶ 118-136 (Prosser, J., concurring).
[23]*See id.* ¶¶ 151-161 (Roggensack, J., concurring).
[24]*See Clarke v. Wisconsin Elections Comm'n*, 2023 WI 79, ¶¶ 38-39, 410 Wis. 2d 1, 998 N.W.2d 370; *Fabick v. Evers*, 2021 WI 28, ¶ 11, 396 Wis. 2d 231, 956 N.W.2d 856; *Wisconsin Legis. v. Palm*, 2020 WI 42, ¶¶ 12-13, 391 Wis. 2d 497, 942 N.W.2d 900.
[25]*See Wisconsin Mfrs. & Com. v. Evers*, 2022 WI 38, ¶ 1 n.2, 401 Wis. 2d 699, 977 N.W.2d 374; *Applegate-Bader Farm LLC v. Wisconsin Dep't of Revenue*, 2021 WI 26, ¶ 17 n.7, 396 Wis. 2d 69, 955 N.W.2d 793; *Moustakis v. Wisconsin Dep't of Just.*, 2016 WI 42, ¶ 3 n.2, 368 Wis. 2d 677, 880 N.W.2d 142.
[26]*See Service Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 113, 393 Wis. 2d 38, 946 N.W.2d 35; *Wisconsin Mfrs. & Com.*, 2022 WI 38, ¶ 1 n.2, 401 Wis. 2d 699; *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶ 26, 382 Wis. 2d 1, 913 N.W.2d 131.
[27]*McConkey v. Van Hollen*, 2010 WI 57, 326 Wis. 2d 1, 12, 783 N.W.2d 855.
[28]*Friends of Black River Forest*, 2022 WI 52, ¶ 17, 402 Wis. 2d 257.
[29]*See, e.g.*, *McConkey*, 2010 WI 57, ¶ 15 n.7, 326 Wis. 2d 1.
[30]*See Friends of Black River Forest*, 2022 WI 52, ¶¶ 25-31, 402 Wis. 2d 587; *id.* ¶¶ 55-58 (Karofsky, J., dissenting).
[31]*Id.* ¶ 30.
[32]*Id.* ¶¶ 61-76 (Karofsky, J., dissenting).
[33]*Brown*, 2025 WI 5, ¶¶ 5-8, 414 Wis. 2d 601.
[34]*Id.* ¶ 9.
[35]*Id.* ¶¶ 25-26.
[36]*Id.* ¶ 13.
[37]*Id.* ¶ 14.
[38]*Id.* ¶ 15.
[39]*Id.* ¶ 16.
[40]*Id.* ¶ 16 n.5.
[41]*Id.* ¶¶ 20-24.
[42]*See Fox v. Wisconsin Dep't of Health & Soc. Servs.*, 112 Wis. 2d 514, 526, 334 N.W.2d 532 (1983); *Waste Mgmt.*, 144 Wis. 2d at 502 n.2.
[43]*Brown*, 2025 WI 5, ¶¶ 35-36, 414 Wis. 2d 601 (R.G. Bradley, J., dissenting).
[44]Wis. Stat. § 227.01(9).
[45]*See Brown*, 2025 WI 5, ¶ 12, 414 Wis. 2d 601.
[46]*See Friends of Black River Forest*, 2022 WI 52, ¶¶ 25-28, 402 Wis. 2d 587.
[47]*Id.* ¶¶ 33-34.
[48]*Brown*, 2025 WI 5, ¶ 45, 414 Wis. 2d 601 (R.G. Bradley, J., dissenting).
[49]*Id.* ¶ 19.
[50]*See Teigen*, 2022 WI 64, ¶¶ 14-36, 403 Wis. 2d 607 (lead opinion); *id.* ¶¶ 158-167 (Hagedorn, J., concurring).
[51]*See id.* ¶ 157 (Hagedorn, J., concurring).
[52]*Id.* ¶¶ 21-22 (lead opinion).
[53]*Brown*, 2025 WI 5, ¶ 46, 414 Wis. 2d at 631 (R.G. Bradley, J., dissenting).
[54]*Teigen*, 2022 WI 64, ¶ 14, 403 Wis. 2d 607 (lead opinion).
[55]*Id.* ¶ 160 (Hagedorn, J., concurring).
[56]*Id.* ¶¶ 17-18 (lead opinion).
[57]*Id.* ¶ 31 (lead opinion).
[58]*Id.* ¶ 30 (lead opinion).
[59]*Id.* ¶ 160 (Hagedorn, J., concurring).
[60]*Id.*
[61]*Id.* ¶¶ 164-166 (Hagedorn, J., concurring).
[62]*Id.* ¶¶ 32-36 (lead opinion). **WL**