Administrative Law

Department of Natural Resources – PFAS – Rulemaking – Guidance Documents

***Wisconsin Mfrs. & Com. Inc. v. Wisconsin Nat. Res. Bd.*, 2025 WI 26 (filed June 24, 2025)**

HOLDING: The multiple holdings in this case are discussed in the analysis that follows.

SUMMARY: Wisconsin's Spills Law, Wis. Stat. chapter 292, requires parties responsible for a hazardous substance discharge on their property to notify the Wisconsin Department of Natural Resources (DNR) immediately. Then they must initiate "actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state." Wis. Stat. § 292.11(3). The overriding question in this case was whether the DNR must promulgate rules identifying every substance, including its quantity and concentration, that qualifies as a "hazardous substance" under Wis. Stat. section 292.01(5) before responsible parties must comply with the Spills Law; more specifically, whether the DNR must promulgate rules listing perfluoroalkyl and polyfluoroalkyl substances (PFAS) and other emerging contaminants as Wis. Stat. section 292.01(5) "hazardous substances" before it may apply the Spills Law to them (*see* ¶ 1).

Plaintiff Wisconsin Manufacturers & Commerce Inc. (WMC) argued that the DNR must promulgate rules listing the substances, quantities, and concentrations that satisfy Wis. Stat. section 292.01(5)'s definition of "hazardous substance" before individuals must comply with the Spills Law. It specifically contended that the DNR's application of Wis. Stat. section 292.01(5) to PFAS and emerging contaminants is an unpromulgated rule, which is invalid and unenforceable under Wisconsin law. The circuit court agreed and granted summary judgment in favor of the plaintiffs. In a split decision, the court of appeals affirmed. In a majority opinion authored by Justice Protasiewicz, the supreme court reversed the court of appeals.

The parties asked the court to decide whether three provisions of Wisconsin's Administrative Procedure and Review Act, Wis. Stat. chapter 227, require the DNR to promulgate rules before applying the Spills Law in specific situations. The court held as follows:

1) Wis. Stat. section 227.01(13) did not require the DNR to promulgate rules identifying PFAS and other emerging contaminants, including their quantities and concentrations, as "hazardous substances" under Wis. Stat. section 292.01(5) before it made statements to that effect on its website and in letters to responsible parties. These communications fail to satisfy Wis. Stat. section 227.01(13)'s criteria for a rule because they lack the effect of law. Therefore, the DNR was not required to promulgate these communications as rules (*see* ¶ 32). The communications were "guidance documents" that do not have the effect of law (¶ 39).

2) Wis. Stat. section 227.01(13) did not require the DNR to promulgate a rule before issuing an interim decision informing participants in the Spills Law's voluntary party remediation and exemption from liability program that it would award only partial liability exemptions, rather than broad liability exemptions, for properties with PFAS discharges. This interim decision was at most a guidance document (*see* ¶ 40).

3) Wis. Stat. section 227.01(13) did not require the DNR to promulgate rules imposing a standard or threshold at which individuals must report discharges of PFAS and other emerging contaminants to the DNR before making statements to that effect in a letter to plaintiff Leather Rich Inc. and on its website. The statements are guidance documents (*see* ¶ 48).

4) Wis. Stat. section 227.10(1) did not require the DNR to promulgate rules before stating that emerging contaminants such as PFAS satisfy Wis. Stat. section 292.01(5)'s definition of "hazardous substance." The challenged statements are guidance documents and Wis. Stat. section 227.10(1) does not apply to guidance documents (*see* ¶ 51).

5) Wis. Stat. section 227.10(2m) does not prevent the DNR from enforcing a threshold for reporting a discharge of PFAS or other emerging contaminants.

Justice Hagedorn filed a concurring opinion. Justice R.G. Bradley filed a dissent that was joined in by Justice Ziegler.

Administrative Rules – Legislative Oversight of Rules

***Evers v. Marklein*, 2025 WI 36 (filed July 8, 2025)**

HOLDING: The statutes under scrutiny in this case are facially unconstitutional under the Wisconsin Constitution's bicameralism and presentment requirements.

SUMMARY: The Joint Committee for Review of Administrative Rules (JCRAR) is a Wisconsin legislative committee with the power to pause, object to, or suspend administrative rules for varying lengths of time, both before and after promulgation, pursuant to Wis. Stat. §§ 227.19(5)(c), (d), and (dm) and 227.26(2)(d) and (im).

In this original action before the Wisconsin Supreme Court, Governor Tony Evers and other plaintiffs contended that the five statutory provisions amount to unconstitutional legislative vetoes. They asserted that once an agency has complied with all statutory rulemaking requirements, JCRAR may not pause, object to, or suspend a rule's implementation without legislation. Respondents (the Wisconsin Legislature and several senators and representatives) argued that the challenged statutes are permissible in all cases because rulemaking is an appropriate extension of legislative power. And when an agency makes a rule, it must necessarily remain subordinate to the legislature with regard to their rulemaking authority (*see* ¶ 2).

In a majority opinion authored by Chief Justice Karofsky, the supreme court concluded that the five statutory provisions under scrutiny are facially unconstitutional under the Wisconsin Constitution's bicameralism and presentment requirements, which mandate that a bill be passed by both houses of the legislature and presented to the governor before it becomes a statute.

Said the majority: "We adopt the reasoning from *Immigration and Natural-*

BLINKA

HAMMER

In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize all decisions of the Wisconsin Supreme Court (except those involving lawyer or judicial discipline).

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ization Service v. Chadha, 462 U.S. 919, 952-59 (1983), in which the U.S. Supreme Court determined that bicameralism and presentment are required when legislative action alters the legal rights and duties of others outside the legislative branch. The challenged statutes empower JCRAR to take action that alters the legal rights and duties of the executive branch and the people of Wisconsin. Yet these statutes do not require bicameralism and presentment. Therefore, we hold that each of the challenged statutes, Wis. Stat. §§ 227.19(5)(c), (d), (dm), and 227.26(2)(d), (im), facially violates the Wisconsin Constitution's bicameralism and presentment requirements" (¶ 3) (citation omitted).

Before concluding its opinion, the majority noted that "the Legislature retains power over the administrative rulemaking process regardless of our determination here. The Legislature created the current process. It alone maintains the ability to amend, expand, or limit the breadth of administrative rulemaking in the other branches – as long as it adheres to the constitution, including the provisions of bicameralism and presentment" (¶ 44).

Justice Hagedorn filed an opinion concurring in part and dissenting in part. Justice Ziegler and Justice R.G. Bradley filed separate dissents.

Civil Procedure

Class Actions – Certification of Class – Claim Viability

***McDaniel v. Wisconsin Dep't of Corr.*, 2025 WI 24 (filed June 24, 2025)**

HOLDING: When assessing the commonality and typicality requirements for class certification, a court should not consider the viability of the class's claim.

SUMMARY: Two Department of Corrections (DOC) officers claimed that they are owed compensation for time spent at correctional facilities before and after their shifts. They also sought certification for a class of DOC officers. The circuit court certified the class, but the court of appeals reversed this ruling on the ground that the class would lose on the merits.

The supreme court reversed the court of appeals in a majority opinion authored by Justice Protasiewicz. Certification of class actions is governed by Wis. Stat. section 803.08. The supreme court only addressed the commonality, typicality, predominance, and superiority elements for class certification (*see* ¶ 19).

Following federal case law, the court held that the commonality element does not include "the viability of the class's claim on the merits" (¶ 26). "[T]here is a difference between identifying whether a common question exists and deciding its answer .... A court 'must walk a balance between evaluating evidence to determine whether a common question exists and predominates, without weighing that evidence to determine whether the plaintiff class will ultimately prevail on the merits'" (¶ 28). "A party opposing certification should not be able to shoehorn class certification into another opportunity to win on the merits, especially because class-certification standards are not tailored toward merits determinations. Instead, the party should make those arguments under procedures designed for merits determinations and with the benefit of discovery on the merits" (¶ 29).

The same is true for the elements of "commonality" (¶ 40), "typicality" (¶ 44), and "predominance and superiority" (¶ 45). As to the latter, "the circuit court [reasonably] determined that the common issue of compensability predominates over other issues, including damages and the de minimis doctrine" (¶ 56). The circuit court's findings on "superiority" also were reasonable. "A class action is a more fair and efficient way to handle this controversy than individual wage claims. Indeed, each individual officer would face significant cost and effort to navigate a wage claim" (¶ 59).

Justice Ziegler, joined by Justice R.G. Bradley, concurred in part and dissented in part. They agreed to the reversal but not with the majority's decision to address the DOC's other arguments on which the court of appeals had not ruled.

Criminal Law

Abortion – Wis. Stat. § 940.04(1)

***Kaul v. Urmanski*, 2025 WI 32 (filed July 2, 2025)**

HOLDING: Wisconsin Statutes section 940.04(1) does not ban abortions in Wisconsin.

SUMMARY: In *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), the U.S. Supreme Court overruled *Roe v. Wade*, 410 U.S. 113 (1973), and held that the U.S. Constitution does not protect the right to abortion. In the wake of that decision, plaintiffs filed this lawsuit seeking a declaration that Wis Stat. section 940.04(1) (2023-24) – which dates back to 1849 – does not ban abortion (*see* ¶ 1). This criminal statute prohibits "intentionally destroy[ing] the life of an unborn child" subject only to a narrow exception for a "therapeutic abortion" that is necessary to save the life of the mother (¶ 7). The circuit court granted declaratory judgment that the statute does not prohibit abortions. In a majority opinion authored by Justice Dallet, the supreme court affirmed.

In reaching the conclusion that Wis. Stat. section 940.04(1) does not ban abortion in Wisconsin, the court relied on the doctrine that a statute may be repealed "by implication." Though implied repeal is not a favored concept in the law (*see* ¶ 11), such a repeal occurs "when the legislature adopts comprehensive legislation through one or more acts that so thoroughly covers the entire subject of the earlier statute that it was clearly meant as a substitute for that earlier law" (¶ 12). Applying this doctrine, the court concluded that "the legislature impliedly repealed § 940.04(1) as to abortion by enacting comprehensive legislation about virtually every aspect of abortion including where, when, and how health care providers may lawfully perform abortions. That comprehensive legislation so thoroughly covers the entire subject of abortion that it was clearly meant as a substitute for the 19th century near-total ban on abortion" (¶ 10).

In the decades since *Roe v. Wade* was decided, the Wisconsin Legislature has enacted "a myriad of statutes" governing abortion (¶ 17). "Collectively, these statutes constitute 'comprehensive legislation' encompassing the 'entire subject' of abortion and establishing 'elaborate inclusions and exclusions of the persons,

things and relationships ordinarily associated with the subject.' Indeed, these statutes specify, often in extraordinary detail, the answer to nearly every conceivable question about abortion. Who may perform abortions? Only doctors. *See* § 940.15(5). Where may abortions be performed? Within 30 miles of a hospital where the doctor has admitting privileges. *See* § 253.095(2). When may abortions be performed? Prior to viability or 20 weeks of pregnancy except when necessary to preserve the life or health of the mother or in a medical emergency. *See* §§ 940.15(2)-(3); 253.107(2)-(3)" (¶ 23).

"What must happen before an abortion is performed? Information must be provided to patients regarding the risks of an abortion, fetal age, pregnancy and birth control resources, and adoption; voluntary and informed consent must be obtained (as well as parental consent or court waiver for minors); and an ultrasound and 24-hour waiting period must take place except in an emergency. *See generally* §§ 48.257, 48.375, 253.10. When may state, county, or municipal funds be used to fund abortions? Only when the abortion is medically necessary to save the life of the mother or to prevent grave, long-lasting physical harm, or in cases of sexual assault or incest that have been reported to law enforcement. *See* § 20.927(2)(a)-(b). The list goes on" (*id.*) (citation omitted).

In sum, the court concluded that "the last 50 years of comprehensive legislation thoroughly covering the entire subject of abortion must be understood as a substitute for any earlier prohibition on abortion in § 940.04(1)" (¶ 26). Accordingly, it held that "[Wis. Stat. section] 940.04(1) does not prohibit abortion in Wisconsin" (¶ 10).

Chief Justice Karofsky filed a concurring opinion. Justice Ziegler, Justice R.G. Bradley, and Justice Hagedorn each filed a dissent.

Defenses – Coercion

***State v. Stetzer*, 2025 WI 34 (filed July 3, 2025)**

HOLDING: A coercion defense requires proof that the defendant was coerced for the entire duration of the act.

SUMMARY: The defendant was convicted of operating an automobile with a blood alcohol concentration over the legal limit. At her bench trial she asserted a coercion defense under Wis. Stat. sections 939.45(1) and 939.46(1). She claimed that an earlier "violent attack" by her husband caused her to escape him by driving drunk because it was her only means of preventing imminent death or great bodily harm.

After hearing the evidence, the trial judge decided that the defendant's initial decision to drive away from the home was excused by her husband's alleged coercion but that her later driving was not. She could have made other choices. In an unpublished decision, the court of appeals affirmed her conviction.

The supreme court affirmed in an opinion authored by Justice Dallet. Two issues were present. First, "must the elements of the coercion defense be met for the entire duration of the [criminal] act"? Second, is the defendant's personal history relevant to the reasonableness of her belief that committing the crime was the only means of preventing her imminent death or great bodily harm? The supreme court answered "yes" to both questions (¶ 4).

The coercion defense has three elements: 1) a threat by another, 2) the threat causes the defendant to reasonably believe that a criminal act is the only means of preventing imminent death or great bodily harm, and 3) the threat causes the defendant to engage in the criminal act (*see* ¶ 19).

"The most natural reading of this statutory language is that the coercion defense is available only when all three elements laid out in § 939.46(1) are met. Section 939.45(1) makes clear that the coercion defense is available only when an individual's 'conduct occurs under circumstances of coercion.' And those circumstances are present only when all three elements of § 939.46(1) are met. Thus, although the coercion defense may be available at the beginning of an ongoing act, it may become unavailable if circumstances change so that the act is no longer 'occur[ing] under circumstances of coercion'" (¶ 20). This conclusion is consistent with the court's construction of the statutes concerning self-defense and defense of others (*see* ¶ 21).

In applying this defense, the defendant's personal history is admissible to prove the reasonableness of her beliefs. "Whether evidence of a defendant's personal history is admitted or not, the underlying legal question remains the same: what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at that time. In answering that question, the defendant's past experiences, like her present ones, may be probative of what a reasonable person in the defendant's position would have believed under the circumstances. The standard remains objective, however, because a mere subjective belief on the defendant's part is insufficient to support the coercion defense" (¶ 29).

In sum, the supreme court concluded that the circuit court correctly applied the law in convicting the defendant.

Justice Ziegler concurred, declining to join various parts of the majority's opinion, particularly some passages about the effect of personal history on reasonableness.

Chief Justice Karofsky dissented. Her opinion highlights issues unique to domestic violence cases (*see* ¶ 48).

Criminal Procedure

Probation Revocation – Procedures

***State ex rel. Wis. Dep't of Corr. v. Hayes*, 2025 WI 35 (filed July 3, 2025)**

HOLDING: Under certiorari review standards, an administrator's decision appropriately reversed an administrative law judge's (ALJ's) decision to revoke a prisoner's probation.

SUMMARY: Sellers was placed on probation for a drug offense in 2019. In 2022, he was accused of various serious offenses, including a sexual assault. At a probation revocation hearing, the Department of Corrections (DOC) did not call the sexual assault victim as a witness, relying instead on other witnesses and hearsay statements by the victim. The ALJ revoked Sellers' probation. Sellers then appealed to the Division of Hearings and Appeals administrator, who overturned the revocation on the ground that due process required testimony by the victim absent a showing of "good cause" for reliance on her hearsay. The circuit court reversed the administrator's decision, the DOC appealed, and the court of appeals agreed with the administrator's decision.

The supreme court affirmed in a majority opinion, authored by Justice A.W. Bradley, that reviewed the decision of the DHA administrator. Review in such cases is generally limited to whether the decision followed the law, whether the action was arbitrary or unreasonable, and whether the evidence reasonably supported the determination (*see* ¶ 18). The court held that the administrator's decision was supported by substantial evidence (*see* ¶ 28) and was made "according to law." In particular, the record contained no

evidence that bore on "barriers" to calling the victim as a witness or that the hearsay was admissible under the rules of evidence. "Because the administrator did not erroneously exercise his discretion in excluding the hearsay testimony, we determine that his decision that good cause [for revocation] was not present was made according to law" (¶ 44).

Justice Ziegler concurred but was unwilling to join the majority's conclusion that the administrator's exclusion of the victim's hearsay was "simply a question of whether the administrator acted 'according to law.'" The issue could have been reviewed for whether it was arbitrary or unreasonable (¶ 47).

Justice R.G. Bradley dissented. She disagreed with how the majority applied the certiorari standard of review to the facts before it and said that the petition for review was improvidently granted (*see* ¶ 65).

Restitution Hearing – Defendant's Appearance by Videoconference Technology – Due Process – Attorney-Client Privilege

***State v. Grady*, 2025 WI 22 (filed June 13, 2025)**

HOLDINGS: 1) The circuit court did not deny the defendant a fundamentally fair restitution hearing. 2) The defendant's conversation with his attorney at the restitution hearing was not protected by the attorney-client privilege.

SUMMARY: This case involved a restitution hearing after the defendant was convicted of multiple offenses arising out of a high-speed chase. The defendant (who was incarcerated in a state prison) appeared at the hearing via the Zoom videoconferencing platform; everyone else appeared in person in the courtroom. During the hearing, Grady's counsel argued that Grady did not have the ability to pay the requested restitution amount. Grady interrupted the proceeding as his counsel was making her argument. The circuit court asked Grady whether he wished to speak with his attorney, and Grady stated that he did. Grady conversed with his lawyer even though the circuit court warned Grady that he could be heard by everyone in the courtroom, including the assistant district attorney (ADA). While speaking with his attorney, Grady made statements that undermined his attorney's argument regarding restitution, which the ADA highlighted when later making his argument about the same. The circuit court ordered Grady to pay the full restitution amount requested.

Grady then filed a motion for postconviction relief, arguing that he was entitled to a new restitution hearing because the circuit court violated his due-process right to a fundamentally fair proceeding by failing to structure the hearing in such a way that Grady could consult confidentially with his counsel. Grady also argued the circuit court erred by allowing the ADA to hear Grady's conversation with his attorney and reference the contents of that conversation in the ADA's argument before the circuit court. Grady claimed that his conversation with his attorney during the restitution hearing was a privileged attorney-client conversation under Wis. Stat. section 905.03(2) (attorney-client privilege).

The circuit court rejected Grady's arguments, finding that Grady did not intend for his conversation with his counsel to be confidential. Grady appealed, and the court of appeals summarily affirmed.

In a majority opinion authored by Justice Ziegler, the supreme court affirmed the court of appeals. The majority deferred to the circuit court's findings of fact because they were not clearly erroneous. "The circuit court found that Grady

did not intend for his conversation with his counsel during the restitution hearing to be confidential. Therefore, Grady's due process argument must be rejected. The circuit court did not deprive Grady of a fundamentally fair proceeding by failing to provide a means by which Grady could privately speak with his attorney. Grady never sought to have a confidential conversation with his attorney. For the same reason, Grady's conversation with his attorney at the restitution hearing was clearly not privileged under Wis. Stat. § 905.03(2)" (¶ 25).

Justice Dallet, joined by Chief Justice A.W. Bradley, joined the majority opinion but wrote separately "to describe the ways in which this situation was avoidable and to set forth a few straightforward best practices that will ensure the fairness of all remote and partially remote proceedings going forward" (¶ 26).

Justice Protasiewicz filed a dissent from the majority's decision to deny Grady's claim that he was deprived of due process at his restitution hearing (*see* ¶ 32).

Speedy Trial – Application of *Barker* Factors

***State v. Ramirez*, 2025 WI 28 (filed June 27, 2025)**

HOLDING: The defendant was not denied his Sixth Amendment right to a speedy trial.

SUMMARY: Defendant Ramirez, already serving a lengthy sentence for felony convictions, stabbed a corrections officer on May 5, 2015. On Feb. 1, 2016, the state filed a criminal complaint charging him with battery by a prisoner and disorderly conduct. However, the trial in this matter, at which the defendant was convicted, did not occur until 46 months later. Delays occurred for a host of reasons variously attributable to the state and the defense. Thirty-two months passed before the defendant made a speedy trial demand.

Both before trial and after conviction, the defendant sought dismissal of the case, claiming that he had been denied his constitutional right to a speedy trial. The circuit court denied both motions. In a published opinion, the court of appeals reversed. *See* 2024 WI App 28. In an opinion authored by Justice R.G. Bradley, in which a majority of justices joined except for one paragraph and one footnote, the supreme court reversed the court of appeals.

When confronting a speedy trial claim, the court begins by looking at the length of the delay between accusation and trial to determine whether that interval crossed the threshold dividing ordinary from presumptively prejudicial delay. Delays considered presumptively prejudicial for this purpose are generally longer than one year. If this threshold is met, the court considers and balances four factors articulated by the U.S. Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972): length of the delay; reasons for the delay; assertion of the speedy trial right; and prejudice in the form of oppressive pretrial incarceration, anxiety and concern experienced by the defendant, and impairment of the defense.

In this case, the majority concluded that the defendant's speedy trial right was not infringed. At most, the court assigned the state responsibility for 958 days of delay, caused by neutral reasons that were weighed against the state but not heavily. (As a general matter, examples of neutral reasons might involve overcrowded courts, inadequate judicial resources, mounting caseloads and negligence by the state (*see* ¶ 41).)

Ramirez waited 32 months before filing a speedy trial demand and waited nearly another seven months before filing his second speedy trial demand; he was self-represented for both. His trial occurred 14 months after he filed his first demand. Ramirez failed to make any particularized showings of prejudice and relied exclusively on the total length of the delay attributable to the state to show prejudice as a matter of law.

"Given the significant time it took Ramirez to assert his right and the absence of prejudice as a matter of fact, we are not convinced that even 958 days of neutral delays warrant dismissal" (¶ 54). "Under the circumstances of this case – involving (at worst) only neutral reasons for delays, and a defendant who waited 32 months to assert his speedy trial right and who failed to make any particularized showing of prejudice – we cannot conclude that Ramirez was denied his constitutional right to a speedy trial" (¶ 55).

With respect to the defendant's argument that the total length of delay (46 months) showed prejudice as a matter of law, the supreme court noted that courts typically require a delay of six years or more before prejudice is presumed (*see* ¶ 33). However, even if prejudice is presumed as a matter of law, such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria (*see* ¶ 34).

Lastly, when this case was before the court of appeals, that court concluded that under *State v. Borhegyi,* 222 Wis. 2d 506, 588 N.W.2d 89 (Ct. App. 1998), the state's inability to explain why trial dates were not scheduled more promptly showed a "cavalier disregard" for Ramirez's speedy trial right, warranting weighing those periods heavily against the state (¶ 42). The supreme court disagreed and overruled *Borhegyi* to the extent it introduced a "cavalier disregard" standard into the constitutional speedy trial analysis (¶ 43).

Chief Justice A.W. Bradley filed a concurring opinion in which Justice Protasiewicz joined. Justice Dallet filed a concurring opinion in which Justice Karofsky joined. Justice Karofsky filed a separate concurrence.

Employment Law

University of Wisconsin Hospitals – Employees – Collective Bargaining – Act 10

***Service Emps. Int'l Union v. Wisconsin Emp. Rels. Comm'n*, 2025 WI 29 (filed June 27, 2025)**

HOLDING: Act 10 ended the collective bargaining requirements that had previously existed for University of Wisconsin (UW) hospital employees.

SUMMARY: The opinions in this case addressed two significant issues. The first is whether UW hospital employees have any collective bargaining rights after Act 10. The answer is no. Second, more generally, the supreme court attempted to clarify its methodology for statutory construction.

Employees contended that their collective bargaining rights survived Act 10, but the Wisconsin Employment Relations Commission ruled they had not, and the circuit court affirmed. On bypass from the court of appeals, a unanimous supreme court affirmed.

The supreme court's majority opinion, authored by Justice Hagedorn, traced the origin of collective bargaining rights for UW hospital employees from 1995 until Act 10 (2010). (On the issue of statutory construction, however, the "Dallet concurrence" – below – is the majority opinion.)

The Hagedorn opinion addressed the court's approach to statutory interpretation since *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110, which took up the meaning of "intrinsic sources" and "extrinsic sources" when construing statutes (¶ 8).

Kalal does not compel a "myopic focus on the singular statutory provision in question." "It was not necessary, we said, for the language of a statute to be deemed ambiguous before a reviewing court looks at intrinsic sources such as scope, history, and context. Instead, we clarified that these other sources are perfectly relevant to a plain-meaning interpretation of an unambiguous statute as long as the scope, context, and purpose are ascertainable from the text and structure of the statute itself. To be sure, a careful examination of the particular statutory text in question is necessary. But a statute's context and structure are likewise critical to a proper plain meaning analysis. Therefore, determining a provision's plain meaning requires consideration of all relevant intrinsic sources" (¶ 10) (internal quotations and citations omitted).

Moreover, "statutory history" is an intrinsic source when comparing a statute with its prior versions (¶ 11). "In short, [the] argument – that statutory history should not be consulted when the 'plain meaning' of the disputed provision is unambiguous – is simply mistaken and inconsistent with decades of statutory interpretation cases from this court. Rather, all intrinsic sources – text, context, and structure – are essential components of a plain meaning analysis" (¶ 12).

Applying this approach to Act 10's undoing of the 1995 legislation, the court held that it "strain[ed] credulity to suggest that Act was just doing non-substantive legislative clean-up and made no changes" to the collective bargaining

rights of UW hospital workers (¶ 31). The court's analysis of the intrinsic evidence was confirmed by Act 10's legislative history (*see* ¶ 32).

Justice R.G. Bradley concurred, joined by Justice Ziegler. In their opinion, they chastised Justice Dallet's construction of *Kalal* as one that would "unmoor the judiciary from the rule of law" (¶ 36).

Justice Dallet concurred, joined by Chief Justice Karofsky, Justice A.W. Bradley, and Justice Protasiewicz, thereby making it a majority opinion. She pointedly observed that "a majority of the court joins this opinion," which did not overrule *Kalal* "or purport to bind our court or any other to use any particular methodology when interpreting statutes in the future" (¶ 51). The Dallet concurrence criticized *Kalal*'s two-step approach to statutory construction and its treatment of "statutory history" (¶ 54). "Rather than treat *Kalal* like an ironclad rulebook of statutory interpretation, I would dispense with its fictions and formalistic labels. Instead, we should … start with the text of the statute but also be 'upfront and honest about considering relevant extrinsic sources to interpret a statute's meaning,' conscious of course of those sources' limitations. Doing that would allow us to focus less on labeling statutes ambiguous or unambiguous or arguing about where a particular source fits in *Kalal's* one-size-fits-all hierarchy and more on our real task, interpreting statutes" (¶ 65) (citations omitted).

Evidence

Opinions – *Haseltine* Rule – "Statistical" Evidence

***State v. Molde*, 2025 WI 21 (filed June 13, 2025)**

HOLDING: An expert witness's testimony in a child sex assault case did not violate the rule precluding opinions on whether other witnesses are being truthful.

SUMMARY: A jury convicted the defendant of sexually assaulting a young child; the crime came to light when the victim attempted suicide at age 13. The state called a "licensed child abuse pediatrician" to testify about the victim's forensic interview. A juror asked how frequently children "make up a story of sexual abuse," and the witness responded that it was "extraordinarily rare, like in the one percent of all disclosures are false disclosures." Defense counsel did not object but did establish that the witness could not recall "off the top of [her] head" the "studies" she relied on (¶ 4).

Following his conviction, the defendant contended that by failing to object to the expert witness's testimony on the ground that the pediatrician had vouched for the victim's credibility, trial counsel had been ineffective. The court of appeals reversed.

The supreme court reversed the court of appeals in a unanimous opinion authored by Justice Hagedorn. Case law has long held that no witness, lay or expert, may offer an opinion about whether another witness is lying or being truthful – the "*Haseltine* rule" (*see* ¶ 12). *See State v. Haseltine,* 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984).

"Statistical evidence alone is precisely the kind of generalized evidence that might assist the jury, not usurp its role. It does not matter that typical behavior helps one side or another. Statistical evidence by itself does not tell the jury which category – truthful or untruthful – a particular witness belongs to. The jury still must assess the credibility of the statistical evidence and that of the expert, and then weigh that along with the other evidence in the case" (¶ 21). Here the pediatrician had not taken the impermissible "extra step" of "opining on the truthfulness of the complainant." The court overruled prior opinions that had held to the contrary.

Importantly, the court stopped short of declaring all such evidence to be admissible or "impervious to attack," observing that rules on expert testimony (Wis. Stat. § 907.02) and probative value (Wis. Stat. § 904.03) may be invoked to block it.

Justice Karofsky filed a concurring opinion that stressed the need to support the credibility of child witnesses in assault cases.

Motor Vehicle Law

Operating While Under the Influence – Reinstatement of Dismissed Count After Conviction on Related Count Reversed on Appeal

***State v. McAdory*, 2025 WI 30 (filed July 1, 2025)**

HOLDINGS: The numerous holdings in this case are presented in the analysis that follows.

SUMMARY: A jury found defendant

McAdory guilty of both eighth-offense operating a motor vehicle while under the influence of a controlled substance (OWI) and eighth-offense operating a motor vehicle with a detectable amount of a restricted controlled substance in the blood (RCS). *See* Wis. Stat. § 346.63(1)(a), (am).

At sentencing, and on the state's motion, the circuit court dismissed the RCS charge and guilty verdict and sentenced McAdory only on the OWI charge pursuant to Wis. Stat. section 346.63(1)(c). This statute provides that an individual may be charged in a single complaint with any combination of OWI, RCS, or operating with a prohibited alcohol concentration (PAC) arising from the same incident. When that happens, the offenses are joined for trial, and if the individual is convicted of one or more of those offenses, "there shall be a single conviction for purposes of sentencing and for purposes of counting convictions" under Wis. Stat. sections 343.30(1q) and 343.305.

The court of appeals reversed the defendant's conviction for OWI because of a jury instruction problem regarding the elements of OWI and remanded the case to the circuit court "for a new trial" on the OWI charge. *See* 2021 WI App 89. The state did not seek to retry McAdory on remand. Instead, it asked the circuit court to reinstate the previously dismissed RCS charge and guilty verdict, enter a judgment of conviction for RCS, and dismiss the OWI charge. The circuit court agreed and proceeded to sentencing on the RCS charge and guilty verdict alone, granting McAdory sentence credit for the time he had already served on the invalidated OWI conviction. Another appeal followed, and the court of appeals affirmed the circuit court. *See* 2024 WI App 29. In a majority opinion authored by Justice Dallet, the supreme court affirmed.

The defendant claimed on appeal that circuit courts lack the authority under Wis. Stat. section 346.63(1)(c) to reinstate a previously dismissed OWI, RCS, or PAC charge and verdict under Wis. Stat. section 346.63(1). The supreme court disagreed: "We conclude that § 346.63(1) implicitly authorized the circuit court to reinstate the previously dismissed RCS charge and guilty verdict. That authorization flows from the text and structure of § 346.63(1)(c) itself, which establishes a procedure whereby multiple offenses from a single incident can be charged and tried in a single proceeding resulting in a single conviction for purposes of sentencing and counting convictions. *See* § 346.63(1)(c). What the circuit court did – first by dismissing the RCS charge and guilty verdict and later by reinstating it – implemented that statutory structure in a way that gave effect to its central premise, namely that guilty verdicts for the enumerated offenses are fundamentally interchangeable for purposes of § 346.63(1)(c). Moreover, there is no suggestion that the RCS charge and guilty verdict itself was somehow invalid, or legally insufficient in a way that would otherwise make reinstating it improper. In short, the circuit court's approach did not violate any provision of § 346.63(1) or any other statute, and ensured that a statute designed to result in 'a single conviction for purposes of sentencing and for purposes of counting convictions' was not transformed into one that results in no conviction at all" (¶ 19).

The supreme court also rejected defense arguments that the procedure the circuit court used on remand from the court of appeals violated the court of appeals' mandate and that the state forfeited its right to seek reinstatement of the RCS charge by failing to raise that prospect in the first appeal to the court of appeals. Lastly, the supreme court concluded that reinstatement of the RCS charge and guilty verdict did not violate the defendant's right to be free from double jeopardy; he was not prosecuted or tried twice for the OWI offense after the RCS charge and guilty verdict were reinstated (*see* ¶ 33).

Justice Ziegler, joined by Justice R.G. Bradley, filed an opinion concurring in the judgment.

State Government

Attorney General – Power to Settle Civil Lawsuits

***Kaul v. Wisconsin State Legis.*, 2025 WI 23 (filed June 17, 2025)**

HOLDING: The statute prohibiting the Wisconsin Department of Justice (DOJ) from settling most civil cases without the approval of the Wisconsin Legislature's Joint Committee on Finance (JFC) violates the Wisconsin Constitution's separation of powers.

SUMMARY: The legislature has conferred upon the Wisconsin attorney general

through various statutes the ability to pursue civil enforcement actions and agency-directed lawsuits. Until 2017, the DOJ could settle any civil suit it pursued without legislative approval. However, in 2018, the legislature amended the relevant statute such that the DOJ can no longer settle civil cases without the approval of the JFC. *See* Wis. Stat. § 165.08(1).

In this case, Attorney General Josh Kaul, the DOJ, and Governor Tony Evers challenged the application of this statute to two specific categories of cases: civil enforcement actions and cases the DOJ brings at the request of executive-branch agencies for programs those agencies are statutorily charged with administering. The DOJ argued that litigation in these two categories of cases constitutes core executive power, and as such, the legislature cannot interfere. The legislature contended it should have the final say in approving settlements in at least some cases within these categories because of its constitutional interests in the power of the purse and in setting policy for the state (*see* ¶ 2).

The circuit court agreed with the DOJ and granted it summary judgment. In a published opinion, the court of appeals reversed. *See* 2025 WI App 3.

In a unanimous opinion authored by Justice Hagedorn, the supreme court reversed the court of appeals. It held that settling these two categories of cases is within the core powers of the executive branch, and the statutory requirement to obtain the JFC's approval before settling these cases violates the Wisconsin Constitution's separation of powers (*see* ¶ 3). Said the court: "Just as the pursuit of these claims is unequivocally an executive function, so is the settlement of them. When the Legislature gives authority to the Attorney General to pursue these claims, it necessarily confers discretion on how to pursue the claims to completion, through settlement or otherwise" (¶ 23). Within the two categories of cases challenged in this lawsuit, the legislature has not identified a constitutional interest for itself (*see* ¶ 46).

Wisconsin Constitution – Governor – Partial Veto Power – Appropriations Bill

***Wisconsin State Legis. v. Wisconsin Dep't of Pub. Instruction*, 2025 WI 27 (filed 25 June 2023)**

HOLDING: The governor's partial veto power only applies to appropriation bills.

SUMMARY: This litigation arises out of Governor Tony Evers' use of the partial veto power in a case in which the Wisconsin Department of Public Instruction (DPI) unsuccessfully sought funds held by the Wisconsin Legislature's Joint Finance Committee (JFC). The circuit court granted partial summary judgment to each party, concluding that the governor had properly exercised his partial veto power and that the JFC had not improperly withheld funds from the DPI.

A unanimous supreme court affirmed in part and reversed in part in an opinion authored by Justice R.G. Bradley. "The governor partially vetoed S.B. 971 and modified substantive portions of its policies. The governor and DPI maintain S.B. 971 was an 'appropriation bill' and was therefore subject to the governor's partial veto authority. The circuit court agreed with the executive branch. We disagree and hold that S.B. 971 was not an appropriation bill" (¶ 16).

The opinion carefully recounted the history of the partial veto power. "Precedent has consistently held that a bill's interaction with, interplay between, or indirect bearing on an appropriation bill cannot transform a non-appropriation bill into an appropriation bill. To qualify as an appropriation bill, a bill must set aside public funds for a public purpose within its four corners" (¶ 25). In this case, "the text of S.B. 971 did not set aside public funds for a public purpose; therefore, S.B. 971 was not an appropriation bill. Instead, S.B. 971 created accounts into which money could be transferred to fund the programs established under Act 19 and Act 20, and it changed other aspects of the 'literacy coaching program.' The bill, however, does not set aside any public funds; in fact, it expressly states that '$0' was appropriated" (¶ 26).

Over the years, including this same term, the supreme court has "reiterated the separation of legislation from appropriation bills as a method of avoiding a gubernatorial veto" (¶ 29). The court rebuffed the governor's contention that prior cases had taken a "bifurcated" approach to the definition of an appropriation bill (¶ 30).

Finally, the court held that it lacked the power to "override" the legislature's choice and give the money to the DPI. "DPI and the governor do not identify any legal authority permitting this court to unilaterally change an appropriation to [the JFC] into an appropriation to DPI. Even if they were correct that appropriating money to [the JFC] is unlawful, no remedy under law entitles DPI to receive it instead. We affirm the circuit court's holding that [the JFC] did not improperly withhold funds from DPI" (¶ 36). **WL**