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Wisconsin Supreme Court accepts four new cases

Madison, Wis. (June 14, 2013) - The Wisconsin Supreme Court has voted to accept four new cases. The Court also acted to deny review in a number of cases. The case numbers, issues, and counties of origin are listed below. The Court of Appeals' opinions for the newly accepted cases are hyperlinked.

2012AP2067 Madison Teachers, Inc. v. Scott Walker

This certification from the Court of Appeals, District IV, examines the constitutionality of various statutory changes made by 2011 Wis. Act 10 and 2011 Wis. Act 32, more commonly referred to respectively as the collective bargaining law and 2011-13 state budget.

The Court of Appeals wrote: "We certify this appeal because of its sweeping statewide effect on public employers, public employees, and taxpayers and because of the need to clarify and develop law relating to associational rights and the home-rule authority of municipalities."

A decision by the Supreme Court is expected to clarify the effect of Act 10 and provide guidance to public employers and employees on how to approach collective bargaining. A decision also may help settle other pending cases spawned from Act 10 and possibly reduce future litigation on similar issues.

Some background: The plaintiffs in this action are Madison Teachers, Inc. and one of its members and Public Employees Local 61, a labor union representing employees of the City of Milwaukee, and one of its members.

The plaintiffs filed a complaint contending that specific provisions of the Municipal Employment Relations Act (MERA), as amended by Act 10 and Act 32 violate the constitutional associational and equal protection rights of the employees they represent. They contend the legislation creates similarly situated, but differently treated, classes of employees, namely, municipal employees who choose to associate with a certified agent and municipal employees who do not.

The state argues on behalf of Gov. Scott Walker and defendants James R. Scott, Judith Neumann and Rodney G. Pasch of the Wisconsin Employment Relations Commission. It says that because public employees have no constitutional right to collectively bargain, it makes no sense to say that Act 10 unconstitutionally burdens the right of public employees who choose to participate in statutory collective bargaining.

According to the state, Act 10 does not impose any restrictions on any public employee's right to speak, assemble, or petition government and, therefore, does not infringe on any associational rights of public employees. As to the equal protection claim, the state takes the position that there is no violation because all public employees are treated equally with respect to constitutionally protected associational rights.

Siding with the plaintiffs, the circuit court declared the following statutory provisions unconstitutional:

- The provision prohibiting collective bargaining between municipal employers and the certified representatives for municipal general employee bargaining units on all subjects except base wages. Wis. Stat. § 111.70(4)(mb)1.
- The provisions limiting negotiated base wage increases to the increase in the Consumer Price Index, unless a higher increase is approved by voter referendum. Wis. Stat. §§ 111.70(4)(mb)2., 66.0506, and 118.245.
- The provisions prohibiting "fair share" agreements that previously required all represented employees to pay a proportionate share of the costs of collective bargaining and contract administration. Wis. Stat. § 111.70(1)(f) and the third sentence of Wis. Stat. § 111.70(2).
- The provision prohibiting municipal employers from deducting union dues from the wages of municipal employees. Wis. Stat. § 111.70(3g).
- The provision requiring annual recertification elections of the representatives of all bargaining units, requiring 51% of the votes of the bargaining unit members (regardless of the number of members who vote), and requiring the commission to assess costs of such elections. Wis. Stat. § 111.70(4)(d)3.

On October 22, 2012, the circuit court denied the state's motion for stay pending appeal. The Court of Appeals denied the state's motion for relief pending appeal on March 12, 2013. It concluded that the circuit court acted within its discretion in denying the stay. The Court of Appeals certified the case on April 25, 2013.

The state contends Act 10 is a proper exercise of authority because it affects only *statutory* rights, not *constitutionally* protected rights. According to the state officials, Act 10 does not "impose a single restriction on [public employees' rights] to speak, assemble or petition their government."

The state's arguments, according to the Court of Appeals, include:

- Act 10 leaves untouched municipal employees' constitutionally protected right to engage in associational activities, that is, protected associational activities that government officials are free to ignore.

- Act 10 deals solely with a statutory right to collective bargaining, which is *different* and *purely statutory* because it allows employees who opt to comply with the statutory requirements, and under the parameters set by the statutes, to force government employers to listen to their demands and bargain in good faith.
- Thus, the legislature was free, in Act 10, to make changes to the requirements and parameters relating to statutory collective bargaining.

Amicus briefs supporting the plaintiffs' position have been filed by: (1) Laborers Local 236 and AFSCME Local 60; (2) Wisconsin Education Association Council, AFSCME District Councils 24 and 40, AFT-Wisconsin SEIU-Healthcare Wisconsin, Wisconsin Federation of Nurses and Health Professionals and State of Wisconsin AFL-CIO; (3) the City of Madison; and (4) the City of Milwaukee. Amicus briefs supporting the state's position have been filed by: (1) Wisconsin County Mutual Insurance Corporation and Community Insurance Corporation and (2) Elijah Grajkowski, Kristi Lacroix, and Nathan Berish, three non-union public employees.

A decision by the Supreme Court also may clarify the test for determining whether a state statute violates Wisconsin's Home Rule Amendment. More specifically, the parties in this case dispute whether Wis. Stat. § 62.623, a statute prohibiting the City of Milwaukee from paying its employees' contributions to the Milwaukee Retirement System, violates the Home Rule Amendment, Wis. Const. art. XI, § 3(1). The Court of Appeals indicates a decision on this issue also may determine whether provisions of Act 40 violates the constitutionally protected right of parties to contract with each other. **From Dane County.**

2011AP1572 Appling v. Doyle (Fair Wisconsin)

In this case, the Supreme Court interprets the meaning of a constitutional amendment ratified by voters. Specifically, the issue presented is whether Wis. Stat. ch. 770, the domestic partnership law, violates Art. XIII, § 13 of the Wisconsin Constitution.

The Court of Appeals concluded the legislation is constitutional. The Supreme Court previously denied a petition for leave to commence an original action (2009AP1860-OA) on Nov. 3, 2009 and later refused a Court of Appeals' certification on Sept. 17, 2012.

Some background: In November 2006, Wisconsin voters adopted a marriage amendment to the Wisconsin Constitution that provides:

"Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." - Wis. Const. art. XIII, § 13.

In June 2009, the Wisconsin legislature "establish[ed] and provid[ed] the parameters for a legal status of domestic partnership" for same-sex couples in Wis. Stat. ch. 770. See 2009 Wis. Act 28, § 3218. Wisconsin Stat. ch. 770 contains eligibility requirements and prescribes the manner in which such partnerships are formed and terminated. The mechanism the legislature chose for conferring rights and obligations was to select a subset of rights and obligations found in other

parts of the statutes that already apply to marriages and then indicate, in the text of those other statutes, that they apply to domestic partnerships.

Julaine Appling and several others (collectively Appling) filed suit challenging the constitutionality of the domestic partnership legislation. Fair Wisconsin, Inc. and several individuals (collectively Fair Wisconsin) intervened as defendants. Appling and Fair Wisconsin both moved for summary judgment.

The state Attorney General has declined to defend the statute, agreeing with Appling that Chapter 770 is unconstitutional. On Jan. 3, 2011, Gov. Scott Walker ceased the government's defense of the lawsuit on the grounds that Chapter 770 is unconstitutional. The statute was defended by the intervening defendants-respondents, Fair Wisconsin and other named intervenors.

On June 20, 2011, the circuit court concluded that Chapter 770 is constitutional because "the sum total of domestic partners' legal rights, duties, and liabilities is not identical or so essentially alike that it is virtually identical to the sum total of spouses' legal rights, duties, and liabilities." Appling appealed, and on Dec. 20, 2012, the Court of Appeals rendered a published decision affirming the circuit court's decision.

The Court of Appeals ruled that the same-sex domestic partnerships created by the Legislature are substantially different than marriages because, among other differences, domestic partnerships carry with them substantially fewer rights and obligations than those enjoyed by and imposed on married couples. The analysis focused on: (1) whether the eligibility requirements for marriage and domestic partnerships are substantially similar, (2) whether the formation requirements for marriage and domestic partnerships are substantially similar, (3) whether the two entities enjoy the same rights and obligations, and (4) whether the termination procedures for domestic partnerships and marriages are substantially different. Without repeating the court's analysis and conclusions with respect to each factor, the Court of Appeals decided that "[t]he differences we have identified above, viewed collectively, show that the 'legal status' of a domestic partnership is not 'substantially similar' to the 'legal status' of marriage."

Appling maintains that the domestic partnership law violates the marriage amendment because the partnership law creates a "legal status" that is "substantially similar to that of marriage." She contends the term "legal status" is a reference to the eligibility and formation requirements for a marriage, but not to the rights and obligations incident to a marriage. The eligibility requirements to which Appling refers include things such as limitations based on age, ability to consent, and consanguinity. The formation requirements refer primarily to the process for obtaining a marriage license.

Appling does not contend that the marriage amendment is a blanket prohibition on domestic partnerships. Rather, Appling contends that the particular domestic partnership law at issue here is unconstitutional because the means it uses to identify eligible couples and formalize their relationships is too similar to the corresponding requirements of marriage. Appling asserts that the Supreme Court is limited to comparing the eligibility and formation requirements of

marriages with the eligibility and formation requirements of domestic partnerships and then, based on this limited comparison, determining whether they are "substantially similar."

The parties also dispute the extent to which the court should consider advertising and statements made by proponents and opponents of the marriage amendment during the amendment adoption process.

Fair Wisconsin contends that voters understood the term "legal status" to more broadly refer to all legal aspects of marriages and domestic partnerships, including eligibility, formation, and termination requirements, along with the rights and obligations of such relationships. Appling argues that persons who voted for the marriage amendment intended that the amendment preserve the "conjugal model" of marriage. Appling explains that the "conjugal model" is based on the premise that marriage is for sexual procreation and is "child-focused." The Court of Appeals agreed with the circuit court's statement that "there is no evidence that voters ratified the Marriage Amendment with the intent to further a conjugal model of marriage."

A decision by the Supreme Court is expected to determine whether Wis. Stat. ch. 770, the domestic partnership law, violates Art. XIII, § 13 of the Wisconsin Constitution. **From Dane County.**

2011AP2608 Phillips v. Parmelee

This insurance case examines whether the language of an asbestos exclusion in a business owner's commercial liability policy should be read to deny coverage essentially whenever the claim against the insured is based on the presence of asbestos.

Some background: Daniel G. Parmelee, through his limited liability company, Aquila LLC, (collectively, Parmelee) purchased an apartment building in New London in April 2006. One month before, Parmelee hired a building inspector, who inspected the property and issued a written report. The report stated that there were various defects in the building. It explicitly mentioned the likelihood of asbestos.

Parmelee went through with the purchase of the building and did not pursue testing or mitigation of the possible asbestos in the building. After several months, Parmelee asserts that he realized he did not have the necessary time to devote to managing the building and consequently put it back on the market. During the time Parmelee owned the building, it was insured under a policy issued to Aquila by American Family Mutual Insurance Co.

Michael D. Phillips contacted Parmelee by phone about the building and met with him the same day – Sept. 14, 2006. Before Phillips arrived for the meeting, Parmelee downloaded a real estate condition form and quickly filled it out. Parmelee claims that, given the limited time he had to fill out the form, he did not recall the potential presence of asbestos. He therefore did not check the box on the condition form indicating he was "aware of the presence of asbestos or asbestos-containing materials on the premises." He also did not check the box indicating that he was "aware of a defect caused by unsafe concentrations of . . . other potentially hazardous or toxic substances on the premises."

Phillips and Parmelee met again the next day to discuss details of the purchase and to allow Phillips to review a file that Parmelee maintained for the building. Parmelee claims that the file contained a copy of the March 2006 inspection report, but Phillips contends the report was never provided to him prior to the closing on the purchase for $419,000 on Sept. 27, 2006. In the offer to purchase, Parmelee represented that "as of the date of acceptance [he had] no notice or knowledge of conditions affecting the Property."

After buying the building, Phillips hired a contractor to convert the heating system from steam to hot water heat. The contractor cut up and removed some of the steam pipes and pipe wrap between July and September 2007, creating and spreading dust containing asbestos throughout the building.

Phillips states that he did not initially know about the presence of asbestos in the pipe wrap but learned of it after a contractor began removing pipes. According to American Family, which intervened in the subsequent lawsuit between Parmelee and Phillips, approximately three months passed between the time that Phillips learned of the presence of asbestos and it was confirmed by professional testing. In the meantime, removal of the pipes and the asbestos-containing pipe wrap continued.

After an anonymous tip and inspections by the state Department of Natural Resources and the U.S. Environmental Protection Agency in December 2007, the Waupaca Department of Health and Human Services (Waupaca DHHS) issued an order to abate the asbestos hazard by February 19, 2008. The New London Building and Fire Inspector then declared the building unfit for human habitation and informed Phillips that it could not be used for any purpose until cleared by the Waupaca DHHS. Without rent-paying tenants, Phillips was unable to make mortgage payments and the lender foreclosed on the property. Phillips further asserts that, as a result of the problems with this building, he lost other buildings to foreclosure as well.

In November 2010, Phillips sued Parmelee in Milwaukee County circuit court based on the allegations that Parmelee made misrepresentations in the property condition report and offer to purchase and failed to disclose the presence of asbestos. Phillips sought to recover lost profits and lost equity in the subject building and other buildings.

In March 2011 American Family moved to bifurcate the insurance and liability/damage issues and subsequently filed a motion for declaratory/summary judgment. American Family argued that there was no coverage under the grant of coverage and that, even if covered by the initial grant of coverage, Phillips' claims were subject to several exclusions in American Family's policy.

The circuit court concluded that while Phillips' negligence claim was within the policy's initial grant of coverage, coverage was excluded by the asbestos exclusion in the policy. The court granted summary judgment on both coverage and duty to defend to American Family.

In affirming the trial court, the Court of Appeals agreed both that there was an initial grant of coverage and that coverage was ultimately excluded by the asbestos exclusion. It therefore did not reach a number of other arguments against coverage that were made by American Family.

This case will provide the Supreme Court with an initial opportunity to interpret an asbestos exclusion in a commercial general liability insurance policy, as well as possibly to address other insurance policy provisions. Justice David T. Prosser did not participate. **From Milwaukee County**.

2011AP2887 Steve P. v. Maegan F.

This case involves a dispute over the custody of a girl who was raised for several months by prospective adoptive parents, including Steven P., before the biological parents decided they wanted to retain parental rights. The Court of Appeals affirmed the trial court's order dismissing a third-party guardianship petition filed under Wis. Stat. § 54.10 by the prospective adoptive parents.

The Supreme Court reviews several issues, including the following:

1. The extent, if any, to which the legal standard for guardianship of a minor announced in Barstad v. Frazier, 118 Wis. 2d 549, 348 N.W.2d 479 (1984) should apply to biological parents who have not exercised custody over the child; and
2. Whether children possess a constitutional right to preserve an existing, sound parental or parent-like relationship, and if so, whether the removal of the child from the home of the prospective adoptive parents violated that constitutional right.

Some background: Both of the biological parents in this case have had run-ins with the law. The biological mother has a history of drug and mental health issues and has a propensity toward violent behavior. The biological father is currently in prison on charges related to armed robbery and drugs.

When the biological mother was eight months pregnant, she decided to place the baby for adoption. Neither the biological father nor his family was involved during the pregnancy. The prospective adoptive parents were present at the birth and gave the girl their last name. They took placement several hours after her birth and returned with the baby to their home out of state.

A few days later, the prospective adoptive parents signed a "Legal Risk Placement Agreement," acknowledging that Wisconsin requires a termination of parental rights before the child is eligible for adoption. They also acknowledged that, because the placement had occurred before the termination of parental rights, there was a possibility that the girl would be returned to the biological mother. Likewise, the biological mother signed a "Voluntary Placement Agreement Using Legal Risk Placement" agreeing to the placement, and further agreeing that adoptive placement was "in the child's best interests and in my best interest."

During the process of voluntarily terminating her parental rights, the biological mother learned through genetic testing the identity of the biological father, who, from prison, refused to voluntarily terminate his parental rights. After a trial, a jury found that grounds did not exist to involuntarily terminate his parental rights. The biological mother also changed her mind about the adoption and withdrew consent to terminate her parental rights.
The prospective adoptive parents filed a petition for temporary and permanent guardianship over the child. The circuit court (Judge Christopher R. Foley, presiding) granted a temporary guardianship to the prospective adoptive parents. The court ruled that doing so was necessary "to preserve a safe environment for this child pending further proceedings in this matter." The court held that the biological mother's home was dangerous for the child.

A different circuit court judge (Judge Marshall B.Murray) presided over the permanent guardianship proceedings. During the pendency of these proceedings, the biological mother was arrested and sent to jail on a probation revocation. Also during the pendency of these proceedings, the guardian ad litem assigned to the case filed a petition alleging that the child, if left in the biological parents' care, would be in need of protection or services.

Ultimately, the circuit court dismissed the prospective adoptive parents' permanent guardianship petition. The court held that the Barstad court "rejected the 'best interests' standard in custody dispute[s] between parents and third parties." The court also ruled that while it is possible that one could conclude that the biological mother was unfit or unable to parent the child, the court believed her positive attributes outweighed her negative attributes. The court also ruled that it could not conclude that the incarcerated biological father was unfit or unable to parent the child.

The Court of Appeals affirmed. It concluded that it was bound to follow Barstad's direction that the best interests of the child should not be considered absent a finding that a parent is either unfit or unable to care for his or her child or there are compelling reasons for awarding custody to a third party. The court further held that the trial court properly exercised its discretion when it found that the biological mother was fit and able to parent, and that there were no other compelling circumstances to deny her custody of the child. The court further held that the biological father's incarceration did not in itself demonstrate that he was unfit as a parent.

Since the conclusion of the circuit court guardianship proceedings, the child has lived in one foster home; then with a grandmother; and now resides in a different foster home. The biological father remains incarcerated and the biological mother has been minimally motivated toward meeting the conditions of return of the child.

A decision by the Supreme Court could address several issues relating to Barstad, including the extent, if any, to which the Barstad standard should apply to biological parents who have not exercised custody over the child, and whether children possess a constitutional right to preserve an existing, sound parental or parent-like relationship. **From Milwaukee County.**

Review denied: The Supreme Court denied review in the following cases. As the state's law-developing court, the Supreme Court exercises its discretion to select for review only those cases that fit certain statutory criteria (see Wis. Stat. § 809.62). Except where indicated, these cases came to the Court via petition for review by the party who lost in the lower court:

Dane

2012AP279	Flowers v. City of Madison
2012AP910-W	Flowers v. Sumi
2013AP307-W	Flowers v. COA

Fond du Lac

2011AP1320	Austin v. Jenkins

Grant

2008AP1436-CRNM	State v. Dearborn

Milwaukee

2010AP1856	State v. Davis
2011AP1725-CR	State v. Cain
2012AP102	Montalvo v. U.S. Title and Closing

Rock

2011AP2285	Ritter v. Penske Trucking

Winnebago

2012AP1341-CR	State v. Garrett

Justice David T. Prosser, Jr. did not participate.