



Activist Decisions Extended and Exported

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Introduction

Many scholars and analysts say that the Wisconsin Supreme Court has been on an activist trajectory since the addition of Justice Butler.¹ Four of the Court's recent cases, in particular, have been labeled "landmark" decisions that were new to Wisconsin and unique nationally: *Ferdon v. Wisconsin Patients Compensation Fund*,² *Thomas v. Mallett*,³ *State v. Dubose*,⁴ and *State v. Knapp*.⁵

When those particular decisions were handed down, conservative analysts predicted they would spread to other states and contexts. For instance, the Wall Street Journal editorial board said of *Thomas*, "This decision is the first of its kind in the country and establishes a dangerous precedent. ... There's every reason to believe those same lawyers will try to export this same unfair theory to other states."⁶ Judge Diane Sykes said of the same case, "The extension of risk contribution theory in *Thomas* may signal the court's willingness to modify the causation requirement in other contexts."⁷

This paper looks at the four cases above and asks: in just the two years since each was decided, have they been used as precedent for further decisions? Have other courts accepted or rejected the rationale and rule offered in these cases?

¹ See generally Richard Esenberg, *A Court Unbound?*, The Federalist Society, available at http://www.fed-soc.org/doclib/20070329_WisconsinWhitePaper.pdf (2007) and citations therein.

² 2005 WI 125.

³ 2005 WI 129.

⁴ 2005 WI 126.

⁵ 2005 WI 127.

⁶ "Alabama North," Wall Street Journal, Aug. 9, 2005, available at <http://online.wsj.com/article/SB112354398666108112.html>.

⁷ Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 Marquette Law Review 723, available at <http://law.marquette.edu/lawreview/Summer%202006/Sykes%2002.pdf> (2006).

Ferdon v. Patients Compensation Fund

Ferdon struck down the statutory cap on noneconomic damages awards in medical malpractice cases by employing rational review “with bite” and “with teeth.”

In *State v. Lynch*,⁸ the Wisconsin Court of Appeals applied rational basis review to a criminal statute using *Ferdon* as the framework. Lynch urged the Court to use the five-part rational basis test articulated by *Aicher v. Patients Compensation Fund*,⁹ which is considered a more deferential decision than *Ferdon*. “Because *Ferdon* is the most recent supreme court opinion discussing the standard to be employed when using the rational basis test, we use *Ferdon*’s formulation of that standard, not *Aicher*’s” (17 fn5). If future courts also use *Ferdon* as their starting point for rational basis analysis, we may see more decisions striking down statutes.¹⁰

In *Love v. Blue Cross of Georgia*,¹¹ a federal judge had to choose whether Wisconsin or Georgia state law applied to an insurance case based in diversity jurisdiction. In choosing Wisconsin’s more plaintiff-friendly law, he reasoned, “[G]iven the State Supreme Court’s opinion in *DeChant*, as well as its more recent pronouncements on liability damage caps [*Ferdon*], it is abundantly clear that the Wisconsin Supreme Court views damage caps with a jaundiced eye” (896). He quotes extensively from *Ferdon*, and then concludes the Court has a “general distaste for damage limitations” (897).

In *Arrington v. ER Physicians Group*,¹² the Louisiana Court of Appeals cited *Ferdon*, among cases from other states, and then held that the medical malpractice damages cap fails to provide an “adequate remedy” under the state constitution.

In *N.J. Bar Association v. State*,¹³ the New Jersey Superior Court’s appellate division explicitly rejected the type of rational basis review adopted in *Ferdon*, saying, “if we were to adopt the approach urged here by plaintiffs, we would ignore those limitations and substitute our judgment for that of the Legislature.”

“In a decision that raises further questions and concerns about the long-term shape of Georgia tort reform, the Wisconsin Supreme Court last week struck down as

⁸ 2006 WI App 231.

⁹ 2000 WI 98.

¹⁰ The Court of Appeals upheld the statute in *Lynch*. I think Prof. Esenberg is probably right when he says, “Even if the *Ferdon* analysis is rarely used, its existence provides something to be pulled out and put away as may be required to invalidate a troublesome statute.” Richard Esenberg, *A Court Unbound?*, The Federalist Society, available at http://www.fed-soc.org/doclib/20070329_WisconsinWhitePaper.pdf#page7 (2007).

¹¹ 439 F.Supp.2d 891 (2006).

¹² 940 So. 2d 777 (2006); vacated on procedural grounds and remanded at 947 So. 2d 724 (La. 2007).

¹³ 902 A.2d 944, 956 (N.J. Sup. App. 2006).

unconstitutional that state's limit, or "cap," on noneconomic damage awards. ... Like Wisconsin, Georgia's state constitution includes a clause that guarantees her citizens equal protection under the law. Accordingly, although it is not controlling authority in Georgia, the Wisconsin Supreme Court's reasoning in striking down that state's damage cap may be considered by Georgia courts facing similar challenges."¹⁴
Powell Goldstein LLP, 2005

In *Kaul v. St Mary's Hospital – Ozaukee*¹⁵ and *Zak v. Zifferblatt*,¹⁶ the Court of Appeals applied *Ferdon* retroactively to reinstate jury decisions that were above the cap.

Thomas v. Mallett

In *Thomas*, the Wisconsin Supreme Court decided that lead paint manufacturers may be held liable for damages to a child who had ingested lead paint even if the child could not prove that the paint he ingested was made by that particular manufacturer.

"When a state supreme court takes this kind of bold move, it's definitely going to be used by whoever will challenge the Missouri provision as a precedent worth following," Thomas L. Stewart, vice president of the Missouri Association of Trial Lawyers, said to a Missouri newspaper about *Thomas*.¹⁷ In *City of St. Louis v. Lead Industry Association, Inc.*, the City has pushed the Missouri courts to adopt *Thomas* as the governing rule. While the trial court followed Missouri's current precedent and declined,¹⁸ things could change on appeal.

The Rhode Island attorney general is using *Thomas* as part of a public nuisance suit against the lead paint industry. *State v. Lead Industry Association, Inc.*¹⁹

"[A]s if it could get any worse, nothing in the ruling limits the 'risk contribution' theory to lead pigment. It could, arguably, apply to any product. So it was no surprise when a Chicago plaintiffs' firm recently filed a case against 13 Wisconsin companies alleging that a client died from asbestos exposure, but not necessarily from asbestos manufactured by any of the 13 named defendants."²⁰

Maureen Martin, senior fellow for legal affairs at the Heartland Institute, 2006

¹⁴ Powell Goldstein LLP, Client Alert: Health Care Law, Aug. 8, 2005, available at <http://www.pogolaw.com/articles/1606.pdf>.

¹⁵ 287 Wis.2d 507 (2005).

¹⁶ 2006 WI App 79.

¹⁷ Dan Margolies, "Damage-cap ruling relevant to Missouri," *Kansas City Star*, July 19, 2005.

¹⁸ 2006 WL 4547877 (Trial Order).

¹⁹ Rhode Island Superior Court. 2005 WL 4712947 (Brief by the Plaintiff). See generally Molly McDonough, "A Lead-Paint Can of Worms?," *ABA Journal E-Report*, July 9, 2005.

²⁰ Maureen Martin, "Eat Paint, Get Rich," *Wall Street Journal*, January 19, 2006, available at <http://www.heartland.org/Article.cfm?artId=18429&CFID=10625311&CFTOKEN=36613777>.

“The *Thomas* decision was groundbreaking in tort law and, through the clear and precise definition of fungibility articulated by the *Thomas* court, risk contribution theory has the opportunity to expand well beyond the scope of DES.”²¹
Laura L. Worley, *Marquette Law Review*, 2006

“Wisconsin is pioneering ground here and provides some very persuasive precedent for those who haven't considered this question and for those who have considered it very narrowly in the DES context.”²²
Peter G. Earle, Milwaukee attorney for Thomas, 2005

State v. Dubose

In *State v. Dubose*, the Wisconsin Supreme Court decided that showup identifications were inherently unreliable and should be very rarely used. The Court based this decision in a reading of the state constitution that was different than, and more protective of defendants' rights than, the U.S. Constitution.

In *State v. Knapp*,²³ the Wisconsin Supreme Court cited *Dubose* for the proposition that the Court may interpret cognate state constitutional provisions differently than the U.S. Supreme Court's federal constitutional interpretation.

In *State v. Cooper*,²⁴ the Wisconsin Court of Appeals granted a new trial to the defendant because the police used a showup identification procedure on site and later as the basis for an identification in court.

In *State v. Dodd*,²⁵ the Wisconsin Court of Appeals held that *Dubose* applied retroactively to cases still open on appeal, and ordered a new hearing.

In *State v. Shomberg*,²⁶ a dissenting Justice Louis Butler cited *Dubose* to argue that an expert should be allowed to testify in a criminal trial as to the scientific reliability of eye witness testimony.

In *Dane County v. McGrew*,²⁷ a dissenting Justice Louis Butler cited *Dubose* for the New Federalist proposition: “[T]hat the United States Supreme Court has concluded in

²¹ Laura L. Worley, *The Iceberg Emerged: Wisconsin's Extension of Risk Contribution Theory Beyond DES*, 90 *Marquette Law Review* 383 (2006).

²² Molly McDonough, “A Lead-Paint Can of Worms?,” *ABA Journal E-Report*, July 9, 2005.

²³ 2005 WI 127, 61.

²⁴ 2007 WL 4233004 (slip opinion only available currently).

²⁵ 2006 WI App 101.

²⁶ 2006 WI 9, 70.

²⁷ 2005 WI 130, 98.

Williams v. Florida (1970), that the Sixth Amendment did not require that a jury be comprised of 12 persons has limited import on what the Wisconsin Constitution secures. See *State v. Knapp*; *State v. Dubose*.” (Internal citations omitted).

In *State v. Herrera*,²⁸ the New Jersey Supreme Court explicitly rejected *Dubose*, deciding instead to follow the U.S. Supreme Court’s rule on identification evidence.

Cited by a dissenting justice of the Connecticut Supreme Court for the proposition that “[t]his court would not be the first to increase protection of criminal defendants under its state constitution in light of recent evidence of wrongful convictions.”²⁹

Cited by a dissenting justice of the Supreme Judicial Court of Massachusetts: “While I do not suggest that we presently adopt the Wisconsin standard, which, among other things, would fundamentally change our jurisprudence on showups conducted in the immediate aftermath of a crime, its analysis of the subject is worthy of consideration.”³⁰

Criminal defendants often urge Wisconsin courts to extend *Dubose*’s pro-defendant rule to other contexts. See, e.g., *State v. Hibel*,³¹ *State v. Drew*,³² *State v. Garcia*,³³ *State v. Klumpyan*,³⁴ *State v. Denson*,³⁵ *State v. West*,³⁶ *State v. Nguyen*,³⁷ *State v. Jarosinski*,³⁸ and *State v. Bruski*.³⁹

Criminal defendants in other courts also often urge those bodies to extend *Dubose*’s pro-defendant rule to their jurisdiction.⁴⁰ See, e.g., *United States v. Adams*,⁴¹ *Perez v. United States*,⁴² *People v. Hernandez*,⁴³ *In re Miguel V.*,⁴⁴ *People v. Ontiveros*,⁴⁵ *Gutierrez v.*

²⁸ 902 A.2d 177, 181 (2006).

²⁹ *State v. Lawrence*, 920 A.2d 236, 267 fn7.

³⁰ Commonwealth v. Martin, 850 N.E.2d 555, 577 fn19 (2006).

³¹ 2006 WI 52.

³² 2007 WI App 213.

³³ 2007 WI App 216.

³⁴ 2007 WI App 162.

³⁵ 2007 WI App 19.

³⁶ 2007 WI App 19.

³⁷ 2007 WL 4105199 (slip opinion only available currently).

³⁸ 2007 WI App 251.

³⁹ 2005 WL 5808040 (Brief of Defendant).

⁴⁰ Unfortunately, only a small handful of jurisdictions have electronically-available party briefs on Westlaw. However, in just these six jurisdictions, the case has been cited well over a dozen times.

⁴¹ 238 Fed.Appx. 326, 327 (9th Cir. 2007) and 2007 WL 1406066 (Brief of petitioner).

⁴² U.S. Supreme Court: 2006 WL 368905 (Reply brief of petitioner); 2006 WL 236165 (Brief of amicus Innocence Project); 2006 WL 247281 (Brief of amicus National Association of Criminal Defense Lawyers).

⁴³ California Supreme Court: 2007 WL 1645451 (Brief of petitioner).

⁴⁴ California Supreme Court: 2006 WL 3886846 (Brief of petitioner).

⁴⁵ California Supreme Court: 2005 WL 3955281 (Brief of petitioner).

Garcia,⁴⁶ *State v. Scott*,⁴⁷ *Commonwealth v. Aulet*,⁴⁸ *Bridgeford v. State*,⁴⁹ *Purnell v. State*,⁵⁰ *State v. Barnes*,⁵¹ *State v. Damous*,⁵² and *State v. Steward*.⁵³

State v. Knapp

In *State v. Knapp*, the Wisconsin Supreme Court suppressed evidence that was identified by a suspect before the suspect's *Miranda* rights were read to him. The Court based the decision in a reading of the state constitution that was different than, and more protective of defendants' rights than, the U.S. Constitution.

In *State v. Dubose*,⁵⁴ the Wisconsin Supreme Court cites *Knapp* for the proposition that the Court may interpret cognate state constitutional provisions differently than the U.S. Supreme Court's federal constitutional interpretation.

In *State v. Cleaver*,⁵⁵ the Wisconsin Court of Appeals suppresses statements given to the police when the suspect was in custody but before she was *Mirandized*. It further suppressed statements given after she was *Mirandized* as fruit of an earlier violation.

In *State v. Peterson*,⁵⁶ the Vermont Supreme Court cited *Knapp* and two other state supreme court decisions when holding that the Vermont Constitution provided broader pre-*Miranda* evidence gathering protection than the U.S. Constitution.

In *State v. Farris*,⁵⁷ the Ohio Supreme Court cited *Knapp* and one other state supreme court decision to hold that the Ohio Constitution provided broader pre-*Miranda* evidence gathering protection than the U.S. Constitution.

Criminal defendant's briefs filed before appellate courts in Wisconsin,⁵⁸ Ohio,⁵⁹ Nebraska,⁶⁰ Kansas,⁶¹ and Maryland⁶² have cited *Knapp* to argue for interpretations of their state constitutions that grant broader rights to criminal defendants.

⁴⁶ Ninth Circuit: 2007 WL 2468588 (Brief of petitioner).

⁴⁷ Kansas Supreme Court 2007 WL 2891930 (Brief of petitioner).

⁴⁸ Appeals Court of Massachusetts: 2006 WL 2303676 (Defendant's brief).

⁴⁹ Maryland Court of Special Appeals: 2007 WL 2724656 (Appellant's brief).

⁵⁰ Maryland Court of Special Appeals: 2006 WL 2364427 (Appellant's brief).

⁵¹ Missouri Court of Appeals: 2007 WL 4230870 (Appellant's brief).

⁵² Missouri Court of Appeals: 2006 WL 4026400 (Appellant's brief).

⁵³ Missouri Court of Appeals: 2005 WL 3735961 (Appellant's brief).

⁵⁴ 2005 WI 126.

⁵⁵ 2005 WI App 254.

⁵⁶ 923 A.2d 585 (2007).

⁵⁷ 849 N.E.2d 985 (2006).

⁵⁸ E.g. *State v. Anderson*, 2005 WL 4687969 (Brief in Support of Motion to Dismiss).

⁵⁹ Supreme Court of Ohio: 2006 WL 4823279 (Appellant's Brief).

⁶⁰ Court of Appeals of Nebraska: 2007 WL 1911390 (Appellant's Brief).

⁶¹ Supreme Court of Kansas: 2007 WL 508991 (Appellant's Brief).

⁶² Maryland Court of Special Appeals: 2006 WL 2364427 (Appellant's Brief).

Conclusion

Justice Louis Butler's vote was crucial in each of these four-vote majority decisions. Voters should consider how Justice Butler's vote in these cases has affected the Court's role and power in Wisconsin's system of government. They should also consider the implications of these cases for the jurisprudence used by our state courts in making decisions.

At the time it was decided, each case was more or less unique nationally. In just the two years since the decisions, they have been relied on by parties in Wisconsin and in other jurisdictions scores of times. Unfortunately, the early results show that courts in Wisconsin and nationally have picked up the decisions and incorporated them further into the common law. They will likely become more solidified as time passes, to the further detriment of the safety, prosperity, and health of the citizens of many states, especially Wisconsin.