

# WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES NOVEMBER 2021

The cases listed below will be heard in the Supreme Court Hearing Room, 231 East, State Capitol. The cases originated in the following counties:

Brown  
Dane  
Kenosha  
Pierce  
Racine  
Walworth

## MONDAY, NOVEMBER 1, 2021

9:45 a.m.      19AP1618      Nudo Holdings, LLC v. Bd. of Review for the City of Kenosha  
10:45 a.m.      21AP802      Andrew Waity v. Devin Lemahieu

## TUESDAY, NOVEMBER 16, 2021

9:45 a.m.      20AP940      Brown County v. Brown County Taxpayers Association  
10:45 a.m.      19AP2090      Claudia B. Bauer v. Wisconsin Energy Corporation

## MONDAY, NOVEMBER 22, 2021

9:45 a.m.      19AP1565-CR      State v. Ryan Hugh Mulhern  
10:45 a.m.      20AP1271-AC      James Sewell v. Racine Unified School Dist. Bd. of Canvassers

**Note:** The Supreme Court calendar may change between the time you receive it and when a case is heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at (608) 266-1880. If your news organization is interested in providing any type of camera coverage of Supreme Court oral argument, you must contact the media coordinator at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

**WISCONSIN SUPREME COURT**

**November 1, 2021**

**9:45 a.m.**

2019AP1618 Nudo Holdings, LLC v. Board of Review for the City of Kenosha

*Nudo Holdings, LLC, seeks review of a Court of Appeals, District II, decision affirming an order of the Kenosha County Circuit Court, the Honorable Anthony G. Milisauskas, presiding, regarding the City Assessor's classification of undeveloped property.*

Nudo Holdings purchased a parcel of land located in the City of Kenosha. At the time of purchase the property was classified as tax exempt, with zero value for assessment purposes. In 2018 the property was re-assessed as residential. Nudo objected, arguing that the property should be classified as agricultural. The Board of Review for the City of Kenosha held firm that the property was correctly classified as residential, rather than agricultural.

Initially the trial court reversed and remanded the Board's decision, concluding that the Board had incorrectly required the parcel to have a "business purpose" in order to qualify as agricultural land (land does not need to be farmed for a "business purpose" in order to be classified as "agricultural land" for property tax purposes, State ex rel. Peter Ogden Family Trust of 2008 v. Bd. of Review, 2019 WI 23, ¶32, 385 Wis. 2d 676, 923 N.W.2d 837).

The trial court remanded to the Board to reconsider Nudo Holdings' appeal. On remand, the Board took into account testimony and other evidence.

Mr. Nudo (the individual who organized Nudo Holdings) testified to the Board that Nudo Holdings purchased the property to eventually develop it into subdivided residential lots, but at the time of assessment, the parcel remained in an "unimproved" state, with no habitable structures or improvements, such as sewer or water. Mr. Nudo explained that even though the long-term goal was residential development, the property's current use was agricultural. He stated that the property contained a significant walnut grove that was there when he purchased the property, and that Christmas trees were growing scattered at the site.

The City Assessor acknowledged that Nudo Holdings' property was located in an A-2 Agricultural Land Holding District, but explained that the key determination for classification is use of the property, not location, zoning, or other factors. Nudo Holdings' property, in fact, was located within the St. Peters Neighborhood Plan, and the city had slated the location for single-family residential development, in line with Nudo Holdings' goals. Therefore, the City Assessor classified the property as "residential," based on its likely future use.

The City Assessor next explained why he determined the land was not devoted primarily to agricultural use. He pointed out that land classified as agricultural "shall typically bear physical evidence of agricultural use, such as furrows, crops, fencing or livestock," see Wis. Admin. Code § Tax 18.06(1) (July 2018), and that he did not see any such "physical evidence," or any other indication that the land was being farmed.

The City Assessor further testified that despite being asked to provide it, Nudo Holdings did not provide any additional information that might indicate agricultural use, such as: a profit and loss statement and/or tax records documenting agricultural activities; documentation of the harvesting of trees and nuts at the parcel; evidence of keeping livestock on the parcel; evidence of furrows, crops, or fencing; and evidence of agronomic practices defined in the Property Assessment Manual.

After considering all of the evidence, the Board sustained the assessment.

On certiorari review, the trial court affirmed the Board's decision, concluding that the Board "had sufficient basis to affirm the assessor's valuation based on the evidence presented."

Nudo Holdings appealed from the trial court order affirming the Board's decision. The Court of Appeals affirmed the trial court order, in a published decision.

Nudo Holdings, LLC asks the Supreme Court to resolve the following issues:

1. Was the [Board's] decision in affirming the property tax assessment for [Nudo Holdings'] land, classifying it as residential land instead of agricultural land, according to the law?
2. Was the Board's decision supported by sufficient evidence?

**WISCONSIN SUPREME COURT**

**November 1, 2021**

**10:45 a.m.**

2021AP802

Waity v. LeMahieu

*Pursuant to an order granting the petition of defendants-appellants, Senate Majority Leader Devin LeMahieu and Assembly Speaker Robin Vos, for bypass of the Court of Appeals, this is a review of an order of the Dane County circuit court, Judge Stephen E. Ehlke presiding, granting summary judgment to the plaintiffs-respondents, Andrew Waity et al., declaring two contracts for legal services void, and permanently enjoining the defendants-appellants from making any further payments on those two contracts.*

Essentially, this case is about whether the Wisconsin Legislature, through two of its leaders, may lawfully enter into contracts with “outside” (i.e., non-governmental) lawyers for legal services in the absence of existing litigation. Specifically, the case asks whether the Senate Majority Leader and the Assembly Speaker could lawfully retain outside lawyers to represent the Senate and Assembly in connection with redistricting following the 2020 census prior to the time that redistricting lawsuits were filed.

In December 2020 the Assembly (by Speaker Robin Vos) and the Senate (by Majority Leader-elect Devin LeMahieu) entered into an “Engagement Agreement” with the law firm of Consovoy McCarthy PLLC in association with Attorney Adam Mortara (collectively “Consovoy”). (Pet. App. 94-98) That Engagement Agreement stated that Consovoy would represent the Assembly and Senate “in possible litigation related to decennial redistricting (the ‘Litigation’).”

On January 4, 2021, at the beginning of the Legislature’s 2021-22 term, Senator LeMahieu became the Senate Majority Leader for the first time. Representative Vos continued as Speaker of the Assembly for the 2021-22 term.

On January 5, 2021, Senator LeMahieu sent a memorandum to the members of the Committee on Senate Organization memorializing the committee’s 3-2 vote adopting the following motion:

It is moved that this committee authorizes the senate or the senate in conjunction with the assembly, to retain and hire legal counsel to represent the senate or the legislature in any matter or action affecting the senate or the legislature; the validity, construction, application, or constitutionality of a statute; the legality of a senate or legislative action; redistricting; or any administrative proceeding. This authorization shall be in force the entire 2021-2022 legislative session, unless revoked by this committee. Senator Devin LeMahieu shall approve all financial costs and terms of representation.

On January 6, 2021, Senator LeMahieu and Representative Vos entered into an engagement agreement with the law firm of Bell Giftos St. John (BGSJ). That engagement agreement stated that “[s]ervices within the scope include all services in furtherance of this attorney-client relationship relating to redistricting,” including providing legal advice relating to

constitutional and statutory requirements for redistricting, as well as appearing for the Legislature in litigation and administrative proceedings related to redistricting, but not including drawing redistricting maps.

On March 2 and 3, 2021, Senator LeMahieu and Representative Vos entered into a “Revised Engagement Agreement” with Consovoy.

On March 24, 2021, Representative Vos sent a memorandum to the members of the Committee on Assembly Organization memorializing that the committee had passed the following motion:

It is moved that the authorization granted to Speaker Robin Vos on February 2, 2017, to “hire the law firms of Kirkland & Ellis LP and Bell Giftos St. John LLC and any other law firms, entities or counsel necessary for services related to the matter of Whitford v. Gill and legislative redistricting and all ancillary matters” authorizes, and has always authorized, Speaker Robin Vos to hire any law firms, entities or counsel he deems necessary for the legislative redistricting beginning as of January 1, 2021, including—but not limited to—Consovoy McCarthy PLLC, Bell Giftos St. John LLC, and Adam Mortara.

On March 10, 2021, after the Revised Engagement Agreement with Consovoy had been signed, the plaintiffs, four individuals, filed an action in the Dane County circuit court. The plaintiffs contended that Senator LeMahieu and Representative Vos were without legal authority to enter into the two legal engagement agreements, that those agreements provided only for pre-litigation and litigation representation regarding redistricting, and that there was no redistricting action pending at the time the legal engagement agreements were executed that could justify those agreements. The plaintiffs sought a declaratory judgment that the legal engagement agreements were void ab initio, as well as accompanying injunctive relief (both temporary and permanent injunctions).

On March 24, 2021, the defendants filed a motion to dismiss the plaintiffs’ complaint and a brief in opposition to the plaintiffs’ motion for a temporary injunction.

The circuit court converted the defendants’ motion to dismiss into a motion for summary judgment. On April 29, 2021, the circuit court issued a written decision and order on the summary judgment motion.

It considered whether the two legal engagement agreements were authorized under the Legislature’s constitutionally granted powers. The circuit court concluded they were not.

It also considered whether the legal engagement agreements were authorized under Wis. Stat. § 13.124, which provides that the Majority Leader or Speaker may obtain legal counsel (other than the Department of Justice (DOJ)) “in any action in which the assembly [or the senate] is a party or in which the interests of the assembly [or the senate] are affected.” The circuit court interpreted this statute to mean that because counsel can be retained “in any action,” there must be a pending action in order for this statute to apply. Because there was no redistricting “action” pending when the defendant legislators entered into the engagement agreements at issue, the circuit court concluded that this statute did not authorize the engagement agreements.

The circuit court further concluded that the legal engagement agreements were not authorized under Wis. Stat. § 16.74, which states that “[a]ll supplies, materials, equipment, permanent personal property and contractual services within the legislative branch shall be

purchased by the joint committee on legislative organization” or by the appropriate service agency. The circuit court construed the term “contractual services” in this statute to refer only to the list of items that precedes that term. In other words, the circuit court read this statute as authorizing the Legislature to obtain contractual services only when those services are connected to a purchase of supplies, materials, equipment, or permanent personal property.

Finally, the circuit court rejected the defendants’ arguments that the legal engagement agreements were authorized by Wis. Stat. § 20.765, which provides that the Legislature shall have a “sum sufficient” appropriation to carry out its functions. The circuit court read this statute as not providing any authority for action by the Legislature. It said that the provision only guaranteed that there would be money for the Legislature to carry out its functions, but that the authority to perform any function must come from the constitution or other statutory source. The circuit court indicated that the Legislature’s function is to pass laws, not to become involved in litigation (except in limited circumstances) because that would violate the rule that this state’s constitutional structure does not contemplate unilateral rule by any one branch of government.

Because the circuit court concluded that the legal engagement agreements were not authorized by either the state constitution or statutes, its decision declared those legal engagement agreements to be void ab initio. It also permanently enjoined the defendants from making any further payments for legal services provided pursuant to either of the two engagement agreements.

The circuit court denied the defendants’ motion to stay its decision pending their appeal.

The defendants filed an appeal in the Court of Appeals, but they then filed a petition to bypass the Court of Appeals and to have the Supreme Court consider their appeal immediately. In addition, they asked the Supreme Court to stay the circuit court’s decision and injunction pending appeal.

The Supreme Court granted the bypass petition. It also issued an order staying the circuit court’s permanent injunction temporarily while the appeal is pending in the Supreme Court.

The defendants-appellants’ bypass petition, as supplemented, asks the Supreme Court to decide the following issues:

1. Whether Wis. Stat. § 16.74 gives the Legislature—acting through its leadership—the authority to enter into those “contract[s]” for legal “services” that the Legislature determines to be “required within the legislative branch.” Wis. Stat. § 16.74(1), (2)(a)-(b).
2. Whether the Wisconsin Constitution gives the Legislature—acting through its leadership—the authority to enter into those contracts for legal services that the Legislature determines to be necessary for the discharge of its constitutional duties.
3. Whether Wis. Stat. § 20.765 gives the Legislature—acting through its leadership-- the authority to enter into those contracts for legal services that the Legislature determines to be necessary for carrying out its “functions.” Wis. Stat. § 20.765(1)(a)-(b).
4. Whether Wis. Stat. § 13.124 gives the Legislature—acting through its leadership—the authority to obtain legal advice for impending, but not yet filed, litigation.
5. Whether the Circuit Court erroneously exercised its discretion in failing to stay its summary judgment Order pending appeal.