

Litigating Language in Wisconsin

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The Plan

- Shifts on Wisconsin Supreme Court – good opportunity to take stock.
- ***Part I:*** Where are we at with interpreting:
 - Written instruments
 - Statutes
 - Wisconsin Constitution?
- ***Part II:*** “Canon... er no?”



2

Note that this presentation frequently omits internal citations or alterations, cites per curiam decisions, or modifies/cleans up quotes. Check cases before citing.

Written Instruments: Guiding Principle?

“Our goal is to ascertain the true intentions of the parties as expressed by the contractual language.”

Town Bank, 2010 WI 134, ¶33.



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Written Instruments: Interpretative Principles?

- “Language in a business contract is construed in the manner in which it would be understood by persons in the business to which the contract relates.” *Ash Park*, 2015 WI 65, ¶37-38.

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Written Instruments: Rationale?

“A founding principle of freedom of contract is that individuals should have the power to govern their own affairs without governmental interference. Courts protect parties’ justifiable expectations and the security of transactions by ensuring that the promises will be performed.” *Rosecky*, 2013 WI 66, ¶56.



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Written Instruments: Extrinsic Evidence/Sources?

“Only when the contract is ambiguous, meaning it is susceptible to more than one reasonable interpretation, may the court look beyond the face of the contract and consider extrinsic evidence to resolve the parties’ intent.” *Town Bank*, 2010 WI 134, ¶33.



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Written Instruments: Including?

- Contracts
- Deeds
- Wills
- Government permit?
- “Any written instrument?”



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Law (Statutes +): Guiding Principle?

“Statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.” *Kalal*, 2004 WI 58, ¶45.



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Law (Statutes +): Rationale?

- “It is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.” *Kalal*, 2004 WI 58 (quoting Scalia, A Matter of Interpretation).
- “Crafting judicial doctrines based on the collective intent of a large body relies on the false premise that a deliberative body acts with a single purpose.” *Town of Wilson*, 2020 WI 16, ¶68 (Rebecca Grassl Bradley, J., concurring).



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Law (Statutes +): Rationale?

Veering too far from the text “is not unlike the practice of [Roman Emperor] Caligula, who reportedly ‘wrote his laws in a very small character, and hung them up upon high pillars,’ so that he could ‘‘more effectually to ensnare the people’’ for failing to follow the law. *Flores-Figueroa*, 556 U.S. at 658, (2009) (Scalia, J., concurring) (quoting 1 W. Blackstone, *Commentaries on the Laws of England* 46 (1765)).



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Law (Statutes +): Including?

- Statutes
- Regulations
- Municipal codes
- Constitution?



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Law (Statutes +): A holistic method of statutory interpretation?

- “I would dispense with [*Kalal*’s] fictions and formalistic labels. Instead, we should embrace the ‘more comprehensive’ and ‘holistic’ approach to statutory interpretation.” *SEIU Healthcare Wisconsin*, 2025 WI 29, ¶65 (Dallet, J. concurring)
- “Although a majority of the court joins this opinion, it does not overrule *Kalal*, or purport to bind our court or any other.” *Id.*, ¶51.



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Constitution: Guiding Principle?

- Like all other interpretative exercises, start with the text.
- “In interpreting the Wisconsin Constitution, we focus on the language of the adopted text[.]” *State v. Halverson*, 2021 WI 7, ¶22.



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Constitution: Extrinsic Evidence/Sources?

- “Historical Evidence”:
 - practices the time constitution adopted
 - debates over adoption of a given provision
 - early legislative interpretations as evidenced by first laws passed

Halverson, 2021 WI 7, ¶22; *State ex. rel Kaul v. Prehn*, 2022 WI 50, ¶12.



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Constitution: Federal Interpretations?

- Sometimes controlling, especially where language is nearly identical. *McAdory*, 2025 WI 30, ¶29; *Jennings*, 2002 WI 44, ¶39.
- But not necessarily so:
 - “Fulfilling our duty to uphold the Wisconsin Constitution as written could yield conclusions affording greater protections than those provided by the federal Constitution.” *Halverson*, 2021 WI 7, ¶23.
 - “But we must break this self-perpetuating cycle whereby lawyers fail to develop state constitutional arguments because they lack clear legal standards, which further prevents courts from developing clear legal standards.” *A. M. B.*, 2024 WI 18, ¶59 (R.G. Bradley, J., concurring)



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Constitution: A holistic method of constitutional interpretation?

- “A more pluralistic method is needed to interpret faithfully the Wisconsin Constitution … under such an approach text and history of course matter, but so do precedent, context, historical practice and tradition.” *Wis. Just. Initiative*, 2023 WI 38, ¶94 (Dallet, J., concurring).
- “The concurrence’s open pining for the freedom to go beyond the meaning of constitutional language must be and is rejected.” *Id.*, ¶22 n. 6 (comparing *Kalal* with traditional constitutional interpretation)



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Where do we go from here?

- “I think we’re all textualists now.” – Justice Elena Kagan, 2015
- “As a result [of *Kalal*], the Wisconsin court system has a growing culture where the meaning of the text reigns supreme. And for that, we should be grateful.” *Wis. Just. Initiative*, 2023 WI 38, ¶22 n.6.



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“Canon... Er No?”

- “Canons of construction ... are not inflexible rules and no single canon will always take precedence over all other principles of construction.” *Oconomowoc Area Sch. Dist.*, 2025 WI 11, ¶18.
- But emphasis on text is here to stay; canons are tools in litigating language.



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Cogito, ergo sum



19

Cogito, ergo sum

“I think, therefore I am”



20

*Expressio unius est
exclusio alterius*



21

*Expressio unius est
exclusio alterius*

“the expression of one thing implies the
exclusion of others”



22

Expressio unius est exclusio alterius

- Is a “community based residential facility” a “service provider” subject to Chapter 665
- “The legislature expressly identified individuals and service providers covered by Chapter 655 and did not include CBRFs on the list. This is a textbook example of the canon expressio unius est exclusio alterius, the expression of one thing implies the exclusion of others.” *Andruss, 2022 WI 27, ¶30.*



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*Res iucunda, iudiciaria
controversias de inventione
revera amant*



24

*Res iucunda, iudiciaria
controversias de inventione
revera amant*

Fun fact, the judiciary actually loves
discovery disputes.*



**Allegedly, per Google Translate*



25

Eiusdem generis



26

Eiusdem generis

“Of the same kind”



27

Eiusdem generis

- “Possessor of real property” is defined as an “owner, lessee, tenant, *or other lawful occupant of real property.*”
- “When general words follow specific words in the statutory text, the general words should be construed in light of the specific words listed.” *Stroede*, 2021 WI 43, ¶14.
- “Those terms suggest that an ‘other lawful occupant of real property’ is a person who, like an owner, lessee, or tenant, has possession or control of the real property.” *Id.*, ¶15.



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Noscitur a sociis



29

Noscitur a sociis

“Known by its associates”



30

Noscitur a sociis

- *Stroede* again.
- “Other lawful occupant” cannot mean anyone on the property; must be a class of people like “owner, lessee, or tenant.”



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Oculi legis in speculis fractis errant



32

Oculi legis in speculis fractis errant.

“The eyes of the law wander in broken
mirrors.”*



**Pure Chat GPT nonsense.*



StaffordRosenbaum LLP
Attorneys

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*Verba cum effectu
sunt accipienda*



StaffordRosenbaum LLP
Attorneys

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Verba cum effectu sunt accipienda

Every word and every provision should be given effect/be construed to avoid surplusage.



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Verba cum effectu sunt accipienda

- “The legislature’s use of the terms ‘vacate the conviction’ or ‘order the record be expunged’ in the disjunctive demonstrates the legislature’s decision to distinguish vacatur from expunction as two alternative, independent options.”
Braunschweig, 2018 WI 113, ¶24.



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*Habetne quis viginti quinque
miliones dollariorum ad
exercitatem pediludii
Visconsinensis dimittendum?*



37

*Habetne quis viginti quinque
miliones dollariorum ad
exercitatem pediludii
Visconsinensis dimittendum?*

Does anyone have 25 million dollars to fire the
Wisconsin football coach?*



**Allegedly, per Google Translate*



38

Contra proferentem



39

Contra proferentem

“Against the offeror”



40

Contra proferentem

- “The warranty does not clearly state whether damage must render the home uninhabitable within the ten-year warranty period, or whether it is sufficient that damage occurring within the ten-year period will impair the home’s future habitability [more than ten years after construction].”
Dierl, 2012 WI App 27, ¶13.



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Generalia specialibus non derogant



42

Generalia specialibus non derogant

“Things general do not derogate from
things special”



43

Generalia specialibus non derogant

- Wisconsin Consumer Act has its own venue provision, Wis. Stat. § 421.401, which says that “the issue of improper venue is to be addressed whenever it is raised by a defendant, not only when it is raised at the outset of litigation.” *Brunton*, 2010 WI 50, ¶40.
- “Accordingly, § 421.401 is the more specific statute governing venue, and we conclude that it controls here.” *Id.* ¶20.



44

*Legislatura opus suum in
nubibus involvit*



45

*Legislatura opus suum in
nubibus involvit*

“The legislature wraps its work in
clouds.”*



* Pure Chat GPT nonsense.

46

*Casus omissus pro omissio
habendus est*



47

*Casus omissus pro omissio
habendus est*

“A case omitted is to be held as
intentionally omitted”



48

Casus omissus pro omissio habendus est

- Wis. Stat. § (Rule) 809.51, “describes what the petitioner must allege in the petition” and “what the court of appeals may do upon receipt of the petition.” *Lopez-Quintero*, 2019 WI 58, ¶18.
- “The statute does not impose any deadline within which a petitioner must bring a habeas petition. In the absence of language imposing a time limit on filing a petition for the court of appeals to issue a writ of habeas corpus, we will not read one into the statute.” *Id.*



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