Readers' Picks: Unusual Wisconsin Supreme Court Decisions in 2017-18

Now that the court has filed its last substantive decision for the 2017-18 term, it's time to take stock of readers' "nominations" of decisions with surprising or humorous aspects. As promised to those who furnished information, I have not identified them or their law firms.

More than one reader noted the concurrence by Justice R.G. Bradley (joined by Justices Abrahamson and Kelly) in *State v. Anthony Jones*. Part of their interest stemmed from the unexpected trio of justices, but the primary feature of attention was the concurrence's topic—an issue of scholarship. The misgivings expressed by the concurrence did not pertain to the majority opinion's ruling but to the practice of its author (Justice Ziegler) of citing her own concurrences in other cases as persuasive authority in the case at hand. Justice Bradley concluded: "Parlaying a justice's own concurrence into a majority opinion under these circumstances is not good practice. Reliance on the majority opinion author's own separate writings six times in an opinion that cites only four precedential cases raises concerns over the soundness and scholarship of this opinion."

One other contribution also touched on scholarship—this time, Justice Kelly's majority opinion in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*. According to the reader who submitted this item, "the majority in paragraph 15 cited to the paper of an attorney (Daniel Suhr) in support of a position. It is a bit unusual to cite a paper not published in an academic journal or legal publication such as the *Wisconsin Lawyer*, which usually means the article has been peer reviewed."

Another reader nominated *John Y. Westmas v. Selective Insurance Company of South Carolina*, because it struck her as odd that Justice Abrahamson was present for oral argument but then did not participate in the decision, while Justice Roggensack did not take part in the oral argument but did participate in the decision—and, indeed, wrote it.

A second contributor observed this aspect of *Westmas* and then wondered if it could be connected to the concluding paragraph of Justice Abrahamson's concurrence in *State v. Ginger M. Breitzman*, which reads:

> Lawyers and litigants should know that it is my practice not to participate in a decision when I do not fully participate in every stage of the decision-making process. Thus, for example, if I were present at oral argument but did not participate in the decision conference, I would be shown as not participating in the decision.

The contributor speculated that Justice Abrahamson may have been commenting not only on the voting in *Breitzman* but also in *Westmas*.[1]

Be that as it may, a number of readers highlighted something else of interest in *Westmas*. They pointed out that it was one of four cases this term in which Justices R.G. Bradley and Kelly co-

[1] In *Breitzman*, oral argument took place on September 20, 2017, and the decision was filed on December 1, 2017. In *Westmas*, oral argument occurred on October 3, 2017, with the decision following on February 7, 2018.

authored dissents, and some also asked whether this was the first time that two justices had co-authored an opinion of any sort.[2] A quick scan of the last 20 terms revealed that co-authoring arrangements do occur, but very rarely. In 2003-04, for example, Justices Abrahamson, A.W. Bradley, and Crooks co-authored a dissent, and in the next term Justices Butler, Wilcox, Prosser, and Roggensack co-authored a majority opinion.[3] The closest we come to the quartet of dissents authored by Justices R.G. Bradley and Kelly in a single term is the pair of dissents jointly authored by Justices Abrahamson and A.W. Bradley in 2015-16.[4]

In addition to asking how this co-authoring process works—does one justice write a draft and the other polishes it? Does each justice write a different section of the opinion? Do they pool their clerks?—nominators were interested to see Justices Bradley and Kelly working together so intimately when, in other cases, they attacked each other's opinions with gusto. Nothing like the following critical exchanges took place between Justices Abrahamson and A.W. Bradley in 2015-16, the term in which they co-authored their two dissents.

In *Milwaukee Police Association v. City of Milwaukee,* for instance, Justice Kelly's 16-page dissent—the bulk of which critiqued Justice R.G. Bradley's concurrence—closed with this passage: "How does the ['other rights'] clause accomplish such a feat? The concurrence did not say because it simply assumed it could, and it baked that assumption into its conclusion. Classic. We should avoid such illogic. Perhaps there is some gnosis to which I have not been initiated that can explain what the court has done here, but I don't see it."

Responding at length to Justice Kelly in her concurrence, Justice Bradley protested: "My judgments are based on the law, not on emotion or value judgments about parties' actions, and Justice Kelly's dissent is unable to identify any language in my concurrence to the contrary."

In a case decided several months earlier (*State v. Frederick S. Smith*), Justice Kelly's dissent presented a hypothetical Mrs. Brown to explain his concern that the majority opinion, written by Justice Bradley, would expose law-abiding citizens to treatment from police officers that violated their Fourth Amendment rights:

> So Mrs. Brown may spend an evening fielding calls from irate parents asking why their children were lined up along the roadside while a narcotics-detection dog searched the minivan. After the last call, perhaps she will pull out her pocket Constitution and puzzle over why the promise of freedom from unreasonable seizures means she can be seized for no reason at all. Because I can't explain that to her, I respectfully dissent.

To this, Justice Bradley replied in her majority opinion: "Justice Kelly's strawman overlooks a significant restraint on law enforcement: constitutional reasonableness. The parade of horribles

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[2] The four cases are: *Westmas v. Selective Insurance Company* (2015AP001039); *Voters with Facts v. City of Eau Claire* (2015AP001858); *Porter v. State of Wisconsin* (2016AP001599); and *Metropolitan Associates v. City of Milwaukee* (2016AP000021).

[3] *Mary E. Panzer v. James E. Doyle* (2003AP000910) for the joint dissent; and *Clean Wisconsin, Inc. v. Public Service Commission of Wisconsin* (2004AP3179) for the joint majority opinion.

[4] *St. Croix County Department of Health and Human Services v. Michael D.* (2014AP002431) and *State v. Patrick J. Lynch* (2011AP002680-CR).

Justice Kelly proffers is as probable as the proverbial boogeyman's existence. They are designed to frighten despite materializing only in imagination and myth."

Thus, in 2017-18, Justices R.G. Bradley and Kelly delivered court watchers an arresting combination of unparalleled authorial collaboration on the one hand, and repeated contentiousness on the other.

Finally, let's return to Justice Kelly's hypothetical Mrs. Brown, who attracted attention for another reason as well. Not just an upstanding citizen, she is a "soccer mom"—a character introduced in judicial opinions when the author requires the most wholesome, unthreatening person conceivable to whom a particular law or procedure can be applied.

As noted above, Justice Kelly's soccer mom was recruited to stand in for an unsympathetic defendant in order to advance an argument that the majority's ruling could subject an entirely innocent citizen to treatment that would trample her constitutional rights. Soccer moms have been cast in this role in numerous courts around the country,[5] including the Wisconsin Supreme Court just six months before Justice Kelly's warning in *Smith*. Dissenting in *State v. Floyd*, Justice A.W. Bradley quoted approvingly from a separate opinion at the Court of Appeals:

> Applying the *Floyd* facts to the "objectively reasonable suspicion" test dictates that a white, suburban, soccer mom from Kenosha, driving alone at 6:45 p.m. in the month of July near the S.C. Johnson plant in Racine, Wisconsin, with multiple air fresheners (perhaps to mask the smell of old happy meals, spilled milk, and soiled athletic gear), and tinted windows (to protect the privacy of her children) evidences reasonable suspicion that she is involved in drug-related criminal activity. Substitute young, black male for soccer mom in this hypothetical and we have the facts of this case.

The majority opinion—that Justice Bradley feared could ensnare even the most virtuous soccer mom—was written by Justice Kelly.

It would be interesting to know if any other stereotypical character has been enlisted more frequently than soccer moms to play this part in recent judicial opinions. Perhaps a different candidate will emerge a year from now, when we review the nominations submitted by readers for the 2018-19 term.

In the meantime, thanks again to those who contributed suggestions this year.

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[5] A cursory Lexis search turned up several examples, including this (from the Supreme Court of Pennsylvania): "The danger my colleagues seek to prevent is prosecution of the innocent, the soccer mom who offers a ride home to a neighborhood kid without prior express parental permission" (*Commonwealth of Pennsylvania v. Hart*). And this (from the New Mexico Court of Appeals): "… the circumstances are not comparable to the hypothetical advanced by Defendant of a soccer mom chauffeur surprised by a child passenger's possession of a hidden marijuana pipe" (*State of New Mexico v. Funderburg*).