

**Criminal Procedure  
Substitutions – Timeliness –  
Supervisory Writs**

**State ex rel. Davis v. Circuit Ct. for Dane Cnty., 2024 WI 14 (filed March 26, 2024)**

**HOLDING:** Davis was not entitled to a supervisory writ because the circuit court had no plain duty to treat his request for substitution as timely.

**SUMMARY:** Davis was arrested on Aug. 16 and requested Wisconsin State Public Defender (SPD) representation the next day. On Aug. 30, the state charged him with several misdemeanors and a court commissioner held an initial appearance and an arraignment at the same time. Sixty-five days later, on Nov. 2, the SPD appointed counsel. On Nov. 9, Davis requested substitution of judge, which was denied as untimely. Citing a “government-created obstacle,” as set forth in case law, he petitioned in the court of appeals for a supervisory writ, which was denied. The supreme court accepted Davis’s petition for review.

The supreme court affirmed the court of appeals in a majority opinion authored by Justice Protasiewicz. First,

assuming without deciding that Davis was procedurally barred from making his substitution arguments, the supreme court exercised its discretion to hear them to clarify the procedures for challenging an order denying a request for substitution of judge as untimely (see ¶ 22).

Second, the supreme court considered and rejected Davis’s contention that the timing of the arraignment constituted a government-created obstacle that should have rendered his untimely request timely (see ¶ 23). The analysis hinged on the “narrow functions” of a supervisory writ, particularly the requirement that a circuit court must have had a “plain duty” to act (¶ 26). All parties agreed that Davis filed his request after the expiration of deadlines in the statutes and local rules (see ¶ 30).

The supreme court held that Davis failed to show that the circuit court had a plain duty to act. “First, although Davis asserts that he did not know his assigned judge until after he entered his plea, the record is unclear. We have no transcript, and there has been no evidentiary hearing on this point” (¶ 34). “Second, even

if we accept Davis’s assertion that he did not know his assigned judge before arraignment, the court did not have a plain duty to treat his request as timely under our precedent” (¶ 35). Case law did not support a 71-day delay (see *id.*). Although a circuit court may have considered his lack of representation, it was not required to do so (see ¶ 36).

For similar reasons, the supreme court rejected the argument that under the “equitable tolling” doctrine the circuit court should have granted his request – an “equitable doctrine” is a “poor fit” for any “plain duty” (¶ 41).

Finally, the majority opinion addressed the more general question of appellate review. “We clarify that a petition for supervisory writ is not the preferred vehicle for appellate review of a judge’s ruling on the timeliness of a request for substitution of judge that was filed after arraignment. In that situation, a petitioner should file a petition for interlocutory appeal or an appeal from a final judgment or order, not a petition for supervisory writ” (¶ 44).

Justice R.G. Bradley concurred but asserted the supreme court should have addressed “the errors this court made” in prior case law interpreting the substitution statute (¶ 46).

Justice Hagedorn also concurred, contending that Davis forfeited his right to bring these arguments and the best course was for the court to “call it a day” (¶ 76).

**Reach Wisconsin’s Legal Community,  
Grow Your Business**

The State Bar of Wisconsin has NEW targeted monthly and quarterly opportunities to reach Wisconsin’s legal community through a variety of marketing channels, in addition to the following:

- *Wisconsin Lawyer*™ magazine display and classified advertising
- Digital advertising through WisBar website, *InsideTrack*, CaseLaw Express, or WisLawNOW
- Sponsorships
- Legal expos
- Mailing lists

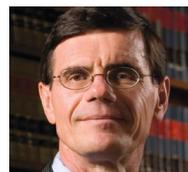


**Crystal Brabender**  
Advertising Sales Manager  
(800) 444-9404, ext. 6132  
(608) 250-6132  
cbrabender@wisbar.org

**Contact Crystal to learn how these business development opportunities will build your reputation, increase awareness of your practice, generate business, and grow revenue!**



STATE BAR OF WISCONSIN



**BLINKA**



**HAMMER**

In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize all decisions of the Wisconsin Supreme Court (except those involving lawyer or judicial discipline).

Want faster access to Wisconsin Supreme Court and Court of Appeals decisions? Get weekly updates on the previous week’s supreme court and court of appeals decisions. Subscribe to CaseLaw Express, a benefit of your membership, delivered to your inbox every Monday.

**Prof. Daniel D. Blinka**, U.W. 1978, is a professor of law at Marquette University Law School, Milwaukee.  
[daniel.blinka@marquette.edu](mailto:daniel.blinka@marquette.edu)

**Prof. Thomas J. Hammer**, Marquette 1975, is an emeritus professor of law and the former director of clinical education at Marquette University Law School, Milwaukee.

[thomas.hammer@marquette.edu](mailto:thomas.hammer@marquette.edu)

Chief Justice Ziegler dissented, contending that the review had been “improvidently granted” and that the majority opinion offered “no new law” (¶ 79).

**Unemployment Compensation Religious-Purposes Exemption – Wis. Stat. section 108.02(15)(h)2. Catholic Charities Bureau Inc. v. LIRC, 2024 WI 13 (filed March 14, 2024)**

**HOLDINGS:** 1) The petitioners are not operated primarily for religious purposes within the meaning of Wis. Stat. section 108.02(15)(h)2. and are therefore not exempt from payment of unemployment compensation taxes. 2) The application of Wis. Stat. section 108.02(15)(h)2. to the petitioners does not violate the First Amendment because the petitioners have failed to demonstrate that the statute as applied to them is unconstitutional beyond a reasonable doubt.

**SUMMARY:** This case involves Wisconsin’s unemployment compensation laws, Wis. Stat. ch. 108, and an exemption therefrom for people “in the employ of an organization operated primarily for religious purposes and operated, supervised, controlled, or principally supported by a church or convention or association of churches.” See Wis. Stat. § 108.02(15)(h)2.

Every Roman Catholic diocese in Wisconsin has a Catholic Charities entity that functions as that diocese’s social ministry arm. One of the petitioners in this case is the Catholic Charities Bureau (CCB), which is the Catholic Charities entity for the Diocese of Superior. The other petitioners are separately incorporated nonprofit sub-entities operating under the CCB’s umbrella. The CCB provides management services and consultation to its sub-entities, establishes and coordinates the sub-entities’ missions, and approves capital expenditures and investment policies. The sub-entities provide services to individuals with developmental and mental health disabilities regardless of their religion. Services include job training, placement, and coaching and services related to activities of daily living (see ¶ 62).

The Labor and Industry Review Commission (LIRC) determined that the CCB and its sub-entities do not qualify for the religious-purposes exemption of Wis. Stat. chapter 108. The circuit court

disagreed. But the court of appeals, in a published decision, upheld LIRC’s determination. See 2023 WI App 12. In a majority opinion authored by Justice A.W. Bradley, the supreme court affirmed the court of appeals.

To qualify for the religious-purposes exemption, the subject organization must be operated primarily for religious purposes. Second, the organization must be operated, supervised, controlled, or principally supported by a church or convention or association of churches (see ¶ 32). In this case it was undisputed that the second condition was satisfied. The CCB and the sub-entities are operated, supervised, controlled, or principally supported by the Diocese of Superior. Thus, the main question to be addressed was whether the CCB and its sub-entities are operated primarily for religious purposes.

The focus here is on the purposes of the CCB and its sub-entities – not the church’s purpose in operating the organization (see ¶ 34). To determine whether an organization is operated primarily for religious purposes, the motivations and the activities of the organization must be examined (see ¶ 57).

In this case, the court accepted at face value the profession of a religious motivation by the CCB and its sub-entities (see ¶ 59). But the evidence indicated that the activities of the CCB and its sub-entities as described above are not primarily religious but rather

secular in nature. “Although CCB and the sub-entities assert a religious motivation behind their work, the statutory language indicates that this is not enough to receive the exemption. An objective examination of the actual activities of CCB and the sub-entities reveals that their activities are secular in nature. We therefore conclude that CCB and the sub-entities are not operated primarily for religious purposes within the meaning of Wis. Stat. § 108.02(15)(h)2.” (¶ 67).

Lastly, the court considered and rejected the petitioners’ First Amendment arguments that the statutory interpretation summarized above causes excessive state entanglement with religion, violates the church-autonomy principle, and discriminates “against religious entities with a more complex polity” and “penalize[es] CCB for its Catholic beliefs regarding how it must serve those in need” (¶ 78). The supreme court concluded that “the application of [Wis. Stat. section] 108.02(15)(h)2. as applied to the petitioners does not violate the First Amendment because the petitioners have failed to demonstrate that the statute as applied to them is unconstitutional beyond a reasonable doubt” (¶ 108).

Justice R.G. Bradley filed a dissenting opinion that was joined in part by Chief Justice Ziegler.

Justice Hagedorn filed a separate dissent. **WL**



## Wisconsin’s Insurance Claim Attorneys

**MGW Law is the only firm specializing in representing claimants facing wrongfully-denied or delayed insurance claims.**



**Bad Faith • Commercial • Residential • Medical • Life insurance**  
**mgwlawwi.com • 920.683.5800 • Manitowoc, WI**