

Constitutional Law - Small Claims Actions - Statute Requiring Prepayment of Jury Fee and Costs upon Filing of Demand for Jury Trial Held Constitutional. (County of Portage v. Steinpreis)

Nancy L. Van Swol

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CONSTITUTIONAL LAW — Small Claims Actions — Statute Requiring Prepayment of Jury Fee and Costs upon Filing of Demand for Jury Trial Held Constitutional. *County of Portage v. Steinpreis*, 104 Wis. 2d 466, 312 N.W.2d 731 (1981).

In Milwaukee County Small Claims Court, 44,882 small claims actions were filed during 1981.¹ The litigants in roughly twenty of those actions requested jury trials² and were required by statute to pay jury fees in advance of trial.³ Once the fees were paid, the actions proceeded as if originated as "large claims," that is, civil actions governed by Wisconsin statutes on civil procedure which do not require payment of jury fees.⁴ In 1981 only about three Milwaukee County small claims actually went to jury trial.⁵

Throughout the state of Wisconsin, small claims procedure operates in the same manner.⁶ The defendant in one Portage County small claims action, who requested a jury trial, questioned why he should advance jury fees merely because he was a party in a small, rather than a large, claim.⁷ The Wisconsin Supreme Court answered in *County of Portage v. Steinpreis*⁸ that prepayment of jury fees in small claims actions is reasonable and constitutional considering the high cost of operating courts⁹ and the need to guarantee the sincerity of a party's jury demand.¹⁰ By so ruling, the court rejected the argument of the court of appeals that treating small claims litigants differently from large claims litigants denies them equal protection.¹¹

1. Telephone interview with Marvin Kopitzke, Assistant Chief Deputy Clerk, Milwaukee Circuit Court, Civil Division (July 7, 1982).

2. *Id.*

3. WIS. STAT. § 799.21(3) (1979).

4. WIS. STAT. § 799.21(4) (1979). Applicable civil procedure statutes are WIS. STAT. chs. 801-807 (1979).

5. Telephone interview, *supra* note 1.

6. WIS. STAT. § 799.21(3)-(4) (1979).

7. *County of Portage v. Steinpreis*, 104 Wis. 2d 466, 468-69, 312 N.W.2d 731, 732 (1981).

8. 104 Wis. 2d 466, 312 N.W.2d 731 (1981).

9. *Id.* at 477, 312 N.W.2d at 736.

10. *Id.* at 481, 312 N.W.2d at 738.

11. *Id.* at 483-84, 312 N.W.2d at 739. The unpublished court of appeals decision is *County of Portage v. Steinpreis*, Nos. 80-037, 80-038 (Wis. Ct. App. July 28, 1980) (available on LEXIS, Wis library, Ct App file).

This note will highlight the majority's holding and the dissent's argument in *Steinpreis*. It will also analyze the decision's possible implications for reform of Wisconsin's small claims procedure.¹²

I. THE CASE

Plaintiff Portage County filed two separate small claims actions¹³ against defendant Robert J. Steinpreis to recover unpaid costs of ambulance services provided by the county.¹⁴ Steinpreis, acting pro se, denied he owed the money and requested a jury trial.¹⁵ The clerk of courts informed him that he would first have to pay the court forty-three dollars¹⁶ as required by statute.¹⁷ Steinpreis refused to pay and filed a motion challenging the constitutionality of the statute. The trial court denied his motion, and judgment was entered against him. The Wisconsin Court of Appeals reversed, saying the statute denied small claims litigants equal protection¹⁸ since no prepayment of jury fees is required in a regular civil court action.¹⁹ Portage County appealed. The Wisconsin Supreme Court reversed.²⁰

While the court of appeals decided the case solely²¹ on

12. An in-depth analysis of the constitutional issues raised by the *Steinpreis* majority, including trial by jury, purchase of justice and equal protection, is beyond the scope of this note.

13. The two claims were consolidated on appeal. *County of Portage v. Steinpreis*, 104 Wis. 2d 466, 468 n.1, 312 N.W.2d 731, 731 n.1 (1981).

14. *Steinpreis*, 104 Wis. 2d at 468-69, 312 N.W.2d at 732.

15. *Id.*

16. *Id.* The \$43.00 included suit tax, clerk's fee and jury fee. *Id.* Steinpreis did not file an affidavit of indigency, pursuant to Wis. STAT. § 814.21(1) (1979), which, if approved, would have permitted him to avoid paying the clerk's fee and suit tax. The supreme court let stand the court of appeals decision that this failure to file for indigency status precluded Steinpreis from challenging the suit tax and clerk's fee. *Id.* at 474, 312 N.W.2d at 734-35. As a result, his challenge and the court's decision relate only to the prepayment of jury fees.

17. Wis. STAT. § 799.21(3)(c) (1979). The statute provides: "The fee for a jury is \$24, plus an additional amount as suit tax which will result in a suit tax payment of the amount which would have been payable had the action been commenced under chs. 801 to 807 and additional clerk's fees of \$6." *Id.*

18. *County of Portage v. Steinpreis*, Nos. 80-037, 80-038, slip op. at 7 (Wis. Ct. App. July 28, 1980) (available on LEXIS, Wis library, Ct App file).

19. *Id.* at 3-5.

20. *Steinpreis*, 104 Wis. 2d at 484, 312 N.W.2d at 739.

21. *Steinpreis*, Nos. 80-037, 80-038, slip op. at 2, 7.

the issue of equal protection,²² the supreme court also addressed the issues of whether the jury fee violated the right to trial by jury²³ and whether the fee constituted a "purchase of justice."²⁴ Relying on the premise that "[t]he Constitution does not guarantee to the citizen the right to litigate without expense . . . ,"²⁵ the majority noted that the added costs of a jury trial should be borne by the litigant who demands that the court incur these extra expenses.²⁶ The majority said the court's role when fees are challenged is to determine whether the fee is a reasonable amount.²⁷ By ruling that the twenty-four dollar jury fee required of *Steinpreis* was not excessive but "insignificant when compared to the actual cost of the courtroom procedures,"²⁸ the court ruled that the fees were neither a purchase of justice nor a violation of the right to trial by jury.²⁹ In addition, the court said that imposing the fees "helps to insure the sincerity of the litigant's jury demand."³⁰

The supreme court attacked the equal protection issue by first addressing the standard for reviewing the validity of legislative classifications. The court said the test is not whether the classification results in any inequality, but whether there is any rational basis for the disparate classification.³¹ This test requires that a statutory category bear some rational relationship to a legitimate legislative purpose.³² Applying the test to the *Steinpreis* case, the majority

22. U.S. CONST. amend. XIV, § 1; WIS. CONST. art. I, § 1.

23. WIS. CONST. art. I, § 5.

24. WIS. CONST. art. I, § 9.

25. *Steinpreis*, 104 Wis. 2d at 472, 312 N.W.2d at 733 (quoting *Adams v. Corriston*, 7 Minn. 456 (1862) and citing *State v. Graf*, 72 Wis. 2d 179, 240 N.W.2d 387 (1976)).

26. *Steinpreis*, 104 Wis. 2d at 473, 312 N.W.2d at 734.

27. *Id.*

28. *Id.* at 474, 312 N.W.2d at 734.

29. *Id.* at 474-76, 312 N.W.2d at 735-36.

30. *Id.* at 476, 312 N.W.2d at 735.

31. *Id.* at 479-80, 312 N.W.2d at 736-37 (quoting *Omernik v. State*, 64 Wis. 2d 6, 218 N.W.2d 734 (1974) and citing *State v. Graf*, 72 Wis. 2d 179, 240 N.W.2d 387 (1976)).

32. *Steinpreis*, 104 Wis. 2d at 479, 312 N.W.2d at 737 (quoting *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 371, 293 N.W.2d 504, 512 (1980)). The rational relationship test is the less demanding of the two main tests recognized by the United States Supreme Court and Wisconsin courts. The more exacting test subjects a statutory classification to "strict judicial scrutiny" and is used when a fundamental right or

said the purpose of small claims court is to provide a speedy, inexpensive method of handling minor claims.³³ A costly, time consuming jury trial thwarts this purpose.³⁴ Therefore, the court concluded, the jury fee requirement fairly allocates the costs involved, discourages jury demands where last minute settlements are anticipated, insures the sincerity of the jury demand, and thus meets the legislative purpose of promoting "summary" small claims proceedings.³⁵ By contrast, the court noted, large claims procedures "are intended to provide for a more complete resolution of complex cases,"³⁶ with the cost of resolving these disputes reflected in a higher suit tax and clerk's fee.³⁷ The court concluded that the different treatment given litigants in the different courts is in accord with the courts' different purposes and, therefore, does not deny equal protection.³⁸

Justice Abrahamson, writing for the dissent, persuasively countered the majority's arguments, following essentially the equal protection reasoning of the court of appeals.³⁹ The dissent said that the small claims jury fee does not bring the expenses into proportion with the higher clerk's fee and suit tax in a large claim action.⁴⁰ Rather, the small claims jury fee is in addition to extra charges which bring the suit tax and clerk's fee up to the amount required in a large claims

suspect category is involved. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 155 (1973); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 506, 261 N.W.2d 434, 441 (1978). The majority said its finding that the fees did not violate the right to trial by jury rendered the strict scrutiny test inapplicable. *Steinpreis*, 104 Wis. 2d at 479 n.12, 312 N.W.2d at 737 n.12.

33. *Steinpreis*, 104 Wis. 2d at 479-80 & n.13, 312 N.W.2d at 737 & n.13 (citing Note, *Uniform Small Claims Court Act*, 1950 Wis. L. Rev. 363, 365, 372).

34. *Steinpreis*, 104 Wis. 2d at 481, 312 N.W.2d at 738.

35. *Id.* at 480-81, 312 N.W.2d at 737-38.

36. *Id.* at 482, 312 N.W.2d at 738.

37. *Id.*

38. *Id.* at 484, 312 N.W.2d at 739. The *Steinpreis* court did not address the general constitutional questions raised by requiring payment of court fees in advance of trial. Analysis of such questions is beyond the scope of this note. For discussion of the due process and equal protection issues raised when prepayment of court fees is required, see, e.g., *United States v. Kras*, 409 U.S. 434 (1973); *Boddie v. Connecticut*, 401 U.S. 371 (1971). For discussion of the right to equal litigation opportunity, see generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1008-10 (1978).

39. See *supra* notes 11 & 21 and accompanying text.

40. *Steinpreis*, 104 Wis. 2d at 489, 312 N.W.2d at 741 (Abrahamson, J., dissenting).

action.⁴¹ The dissent noted that prepayment of jury fees is not needed, as the majority suggested,⁴² to discourage jury demands when settlement is anticipated.⁴³ Wisconsin statutes already give the court discretion in large and small claims to assess one day's jury fee if a jury demand is made and then withdrawn within two days of the trial date.⁴⁴ The dissent also said jury fee prepayment is not needed to test a litigant's sincerity since statutes already impose sanctions on a party bringing a frivolous suit.⁴⁵ Finally, the dissent rejected the argument that discouraging small claims jury requests to promote summary small claims trials is a legitimate state objective justifying unequal treatment of litigants.⁴⁶

The dissent said the majority erred in thinking a summary small claims trial would be a "quick, informal, and inexpensive proceeding."⁴⁷ While the small claims procedure simplifies summons, service, pleadings and trial to a court commissioner,⁴⁸ a small claims trial to the court or jury is no more or less summary than a large claim trial to the court or jury.⁴⁹ This is so because a small claims jury request transforms the entire proceeding into a large claims action.⁵⁰ The small claim is then treated as if it had originated as a large claim. The sole difference is that the party requesting the jury must pay a jury fee. Had the claim actually originated as a large claim, no jury fee would have been imposed at all. Rather, the jury cost would have been covered by the suit tax and clerk's fee.⁵¹ The dissent concluded that requiring small claims litigants to prepay jury fees when large claims litigants are not so required violates the equal protection clauses of the federal and state constitu-

41. *Id.* See WIS. STAT. ch. 814 (1979) for court cost and fee allocation.

42. *Steinpreis*, 104 Wis. 2d at 481, 312 N.W.2d at 738.

43. *Id.* at 485 n.2, 312 N.W.2d at 740 n.2.

44. *Id.* See also WIS. STAT. § 814.51 (1979).

45. *Steinpreis*, 104 Wis. 2d at 494, 312 N.W.2d at 744. See also WIS. STAT. § 814.025 (1979).

46. *Steinpreis*, 104 Wis. 2d at 491-97, 312 N.W.2d at 742-45.

47. *Id.* at 491, 312 N.W.2d at 742.

48. *Id.* at 493-94, 312 N.W.2d at 743-44.

49. *Id.* at 495, 312 N.W.2d at 744.

50. *Id.*

51. See WIS. STAT. ch. 814 (1979) for court cost and fee allocation.

tions.⁵² Thus, the rational relationship test for disparate statutory classifications is not met.⁵³

II. ANALYSIS AND IMPLICATIONS OF THE CASE

The essential difference between the majority and the dissent in *Steinpreis* is that the majority decided that the small claims prepayment statute passed the rational relationship test, while the dissent decided that it failed. Both the majority⁵⁴ and the dissent⁵⁵ recognized that analysis under the test requires first determining the purpose of the challenged statute and then determining whether the statute's requirements bear a rational relationship to that purpose. To understand further the impact of the court's ruling, it is helpful to consider the original purposes for creating small claims courts, and to consider Wisconsin's practice in light of this general background.

Small claims courts were established, at least in part, in response to Dean Pound's 1913 *Harvard Law Review* article⁵⁶ decrying the "cumbrous and expensive"⁵⁷ legal system which denied the poor access to the courts.⁵⁸ The advent of small claims practice was heralded as "a method for improving the quality of justice at the lowest level of the judicial system."⁵⁹ Between 1920 and 1945, cities and states developed small claims courts billed as "forum[s] of common sense" which aimed "to settle disputes quickly, understandably, and in a fair and just manner."⁶⁰ These courts were to

52. *Steinpreis*, 104 Wis. 2d at 496-97, 312 N.W.2d at 745.

53. See *supra* notes 31 & 32 and accompanying text.

54. *County of Portage v. Steinpreis*, 104 Wis. 2d 466, 479-80 & n.12, 312 N.W.2d 731, 736-37 & n.12 (1981) (citing *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)).

55. *Steinpreis*, 104 Wis. 2d at 486-88, 312 N.W.2d at 740-41 (Abrahamson, J., dissenting) (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 184 (1981) (Brennan, J., dissenting)).

56. Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302 (1913).

57. *Id.* at 315.

58. See, e.g., Allison, *Problems in the Delivery of Legal Services*, 63 A.B.A. J. 518, 518 (1977). That author noted that experiments with small claims courts began in the United States after publication of Dean Pound's article. *Id.* See also Kosmin, *The Small Claims Court Dilemma*, 13 HOUS. L. REV. 934, 937 (1976).

59. Allison, *supra* note 58, at 518.

60. Kosmin, *supra* note 58, at 965.

be the legal system for the poor.⁶¹

In recent years small claims courts have created more problems for the poor than they have resolved.⁶² The majority of poor persons involved with small claims courts are defendants.⁶³ Most of the plaintiffs are collection agencies,⁶⁴ small businesses⁶⁵ and public utilities.⁶⁶ Plaintiffs are often represented by counsel; defendants are not.⁶⁷ Defendants may be given the option of requesting a jury trial, but may also be required to pay in advance some form of security or other court fee.⁶⁸ A recognized purpose of this requirement is to discourage small claims jury trials.⁶⁹ Suggestions for reform of these practices and problems have dominated legal commentaries on small claims.⁷⁰

Cook County, Illinois, attacked the problem of its small claims court by creating in 1972 a pro se branch of the court. The new court's goal repeated the aims advocated by small claims proponents of the first part of the century: the new pro se branch would "offer a forum wherein individuals can obtain a prompt and relatively inexpensive hearing and adjudication of their small claims."⁷¹ The distinguishing characteristics of the court are that a claim cannot exceed three

61. Eovaldi, *The Pro Se Small Claims Court in Chicago: Justice for the "Little Guy"?*, 72 NW. U.L. REV. 947, 948 n.6 (1978) (citing W. CHAMBLISS & R. SEIDMAN, LAW, ORDER, AND POWER 104 (1971)).

62. For studies of small claims origins and problems, see Boden, *Wisconsin Small Claims Practice Under ch. 299: A Discussion and Some Suggestions*, 47 MARQ. L. REV. 38 (1963); Eovaldi, *The Pro Se Small Claims Court in Chicago: Justice for the "Little Guy"?*, 72 NW. U.L. REV. 947 (1978); King, *Small Claims Practice in the United States*, 52 ST. JOHN'S L. REV. 42 (1977); Kosmin, *The Small Claims Court Dilemma*, 13 HOUS. L. REV. 934 (1976); Ward, *Uniform Small Claims Court Act*, 1950 WIS. L. REV. 363. See also the sources, including studies on Wisconsin small claims practice, cited by Justice Abrahamson in *County of Portage v. Steinpreis*, 104 Wis. 2d 466, 492 n.5, 312 N.W.2d 731, 743 n.5 (1981) (Abrahamson, J., dissenting).

63. *E.g.*, Eovaldi, *supra* note 61, at 948, 950; Kosmin, *supra* note 58, at 939-40, 942.

64. *E.g.*, Eovaldi, *supra* note 61, at 948; King, *supra* note 62, at 44, 47; Kosmin, *supra* note 58, at 939-40.

65. *Id.*

66. *E.g.*, Kosmin, *supra* note 58, at 940.

67. *Id.* at 957; King, *supra* note 62, at 62 n.154.

68. *E.g.*, Ward, *supra* note 62, at 367; Annot., 32 A.L.R. 865 (1923 & Supps. 1946-1976).

69. Ward, *supra* note 62, at 366; Boden, *supra* note 62, at 48.

70. *See supra* note 62.

71. Eovaldi, *supra* note 61, at 958.

hundred dollars; a corporation, partnership or association cannot be a plaintiff; a plaintiff cannot file more than three actions per year; a plaintiff cannot be represented by an attorney;⁷² and jury trials are not permitted.⁷³ A study of the court after two years of operation concluded that it had overcome many of the problems of pro se litigation in small claims court and had to a large extent achieved the original purposes behind establishing such courts: redress of small grievances at low cost to litigants.⁷⁴

Small claims in Wisconsin have been handled through a variety of mechanisms from justices of the peace, to municipal courts, to a small claims branch of civil court.⁷⁵ Throughout this judicial evolution, discouraging jury trials was considered necessary to ensure small claims proceedings that were "summary in nature."⁷⁶ Jury trials were available, but the judge had discretion to require the party requesting the jury to pay jury fees in advance of trial.⁷⁷ Even when an action was begun before a justice of the peace, a party requesting a hearing in small claims court had to first pay seventy-five cents before the case would be transferred.⁷⁸ As new and revised rules for small claims procedures were drafted, legal scholars recognized that requiring advance payment of fees might raise constitutional questions⁷⁹ or, at the very least, would unduly burden those litigants the procedures were designed to help.⁸⁰ The court noted as early as 1868 that requiring advance payment of court costs as security would prevent poor persons from litigating.⁸¹ But, the court added, "if the suit of the plaintiff should prove ground-

72. For a discussion of the difficulties presented by attorney representation in small claims court, see King, *supra* note 62, at 61, and Kosmin, *supra* note 58, at 956.

73. Filing an action in the pro se branch waives the right to representation by counsel and the right to jury trial. Requesting a jury trial turns the case over to the small claims court where an attorney may be retained. The waiver of constitutional rights may withstand a constitutional challenge as long as an alternative forum is available. Eovaldi, *supra* note 61, at 957.

74. *Id.* at 994-95.

75. Boden, *supra* note 62, at 39.

76. Ward, *supra* note 62, at 366.

77. *Id.* at 367.

78. *Id.*

79. WIS. STAT. ANN. § 302.04 advisory committee comment (West 1958).

80. Campbell v. Chicago & Northwestern Ry., 23 Wis. 490 (1868).

81. *Id.* at 491.

less, unless security is given, the officers of the court could get no pay for their services."⁸² The court concluded that any change in the rules should come from the legislature.⁸³

The small claims procedure currently in use has been called a cross between an informal, administrative-type process and an essentially judicial procedure.⁸⁴ With few exceptions, however, the process is far from being an easily accessible judicial forum for litigants who cannot afford an attorney.⁸⁵ Several statutes require transferring the small claims case to regular civil court when a litigant takes certain designated actions.⁸⁶ Other statutes grant the litigant rights and provide technical procedures for exercising them, but many litigants would neither be aware of nor understand them without the assistance of an attorney.⁸⁷ The low rate of jury demands could be a result of procedural ignorance on the part of the litigants rather than a reluctance to pay jury fees. Perhaps a more obvious reason for the few jury demands is that both plaintiffs and defendants are reluctant to spend the time needed for a jury trial.⁸⁸ These deterrents, combined with the alternative methods available for discouraging frivolous claims,⁸⁹ render the jury fee requirement a superfluous device for discouraging small claims jury trials.

Returning to the "rational basis" analysis of legislative categories, it is apparent that the purpose of the statute imposing jury fees is to discourage small claims jury trials. The dissent in *Steinpreis* argued that this is not a legitimate state objective⁹⁰ and concluded that the statute effecting the objec-

82. *Id.*

83. *Id.*

84. Boden, *supra* note 62, at 40.

85. See WIS. STAT. ch. 799 (1979) (procedure in small claims actions).

86. WIS. STAT. § 799.02 (1979) (filing counterclaims and cross complaints); WIS. STAT. § 799.20(3) (1979) (motion to implead a third party).

87. See, e.g., WIS. STAT. § 799.205 (1979) (substitution of judge); WIS. STAT. § 799.21(3) (1979) (trial by jury); WIS. STAT. § 799.28 (1979) (motions for new trial).

88. In early small claims practice in Hartford, Connecticut, a party could request a transfer from small claims court to the regular civil docket without incurring any fees whatsoever. During an 18-month study period, fewer than one percent of all small claims filed were transferred. Ward, *supra* note 62, at 369.

89. See *supra* notes 44-45 and accompanying text.

90. *Steinpreis*, 104 Wis. 2d at 496-97, 312 N.W.2d at 745 (Abrahamson, J., dissenting) (quoting *LaBowe v. Balthazar*, 180 Wis. 419, 423, 193 N.W. 244, 246 (1923)).

tive was unconstitutional.⁹¹ Even if it is assumed that discouraging jury trials is a legitimate objective given the desire for speed in small claims adjudication,⁹² it is not apparent that placing a higher cost on small claims litigants than on large claims litigants is a rational way to achieve that purpose. Why should a party in a small claims action pay the same clerk's fee and suit tax as a party in a regular civil action, and also pay a jury fee? The majority opinion in *Steinpreis* fails to answer that question satisfactorily. In fact, since the jury trial of a claim commenced in small claims court does not necessarily cost the state more than one begun in regular civil court, there is no rational basis for treating the different classes of litigants differently; the result is an unconstitutional denial of equal protection.⁹³

III. CONCLUSION

Although the supreme court's decision in *Steinpreis* lets stand the unequal treatment of small claims and large claims litigants, the four to three decision is not an overwhelming display of enthusiasm for the rule. The decision should serve as a starting point for legislative reconsideration of Wisconsin small claims practice. If the state is serious about promoting a speedy, informal and inexpensive small claims system, then it should replace the current morass of small claims rules and consider a strictly pro se or administrative process. It should adopt procedures that create a small claims "forum of common sense." At the very least, the legislature should eliminate the requirement that small claims litigants prepay jury fees.

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91. *Steinpreis*, 104 Wis. 2d at 497, 312 N.W.2d at 745 (Abrahamson, J., dissenting).

92. Speedy resolution of disputes is also a goal in regular civil court cases. Wis. STAT. § 801.01(1) (1979). Section 801.01(1) provides that the civil procedure statutes "shall be construed to secure the just, speedy and inexpensive determination of every action and proceeding." *Id.*

93. *Steinpreis*, 104 Wis. 2d at 489-90, 312 N.W.2d at 741-42 (Abrahamson, J., dissenting) (quoting *County of Portage v. Steinpreis*, Nos. 80-037, 80-038, slip op. at 5 (Wis. Ct. App. July 28, 1980) (available on LEXIS, Wis library, Ct App file)).