STATE OF WISCONSIN **CIRCUIT COURT** **MILWAUKEE COUNTY**

Dennis Eucke et al vs. Wisconsin Elections Commission et al

Notice of Hearing

Case No: 2024CV007822

COURT ORIGINAL

This case is scheduled for: **Motion hearing**

NOTICE OF HEARING		
Date 10-04-2024	**Time** 11:00 am	**Location** Milwaukee County Courthouse - Room 404 901 N. Ninth Street Milwaukee WI 53233
Circuit Court Judge/Circuit Court Commissioner Thomas J. McAdams-07		
Re Petition for Writ of Mandamus		

This matter will not be adjourned by the court except upon formal motion for good cause or with the specific approval of the court upon stipulation by all parties.

This hearing is being held via video and/or telephone conferencing. ALL PARTICIPANTS SHOULD APPEAR BY VIDEO UNLESS PRIOR PERMISSION TO CONNECT TO ZOOM BY PHONE IS GRANTED BY THE COURT.

https://wicourts.zoom.us/j/84964381551?pwd=b29vYlhVNVlFQ1RxU3hHVXArWk15UT09

BY VIDEO: https://zoom.us/join
BY PHONE: 1-312-626-6799 US (Chicago)

Meeting ID: 849 6438 1551
Passcode: 643002

If you have questions or problems connecting to zoom hearing, please call court at (414) 278-4523.

If you require reasonable accommodations due to a disability to participate in the court process, please call 414-985-5757 prior to the scheduled court date. Please note that the court does not provide transportation.

Milwaukee County Circuit Court
Date: October 2, 2024

DISTRIBUTION	Address	Service Type
Court Original		
Jennifer DeMaster		Electronic Notice
Daniel J Eastman		Electronic Notice
Wisconsin Elections Commission	212 East Washington Avenue, Third Floor, Madison, WI 53703	Mail Notice
City of Milwaukee Election Commission	Milwaukee City Hall, 200 E. Wells Street, Milwaukee, WI 53202	Mail Notice

FILED
09-30-2024
Anna Maria Hodges
Clerk of Circuit Court
2024CV007822
Honorable Thomas J. McAdams-07
Branch 7

STATE OF WISCONSIN **CIRCUIT COURT** **MILWAUKEE**

Dennis Eucke et al vs. Wisconsin Elections Commission et al

Electronic Filing Notice

Case No. 2024CV007822
Class Code: Petition for Writ of Mandamus

WISCONSIN ELECTIONS COMMISSION
THIRD FLOOR
212 EAST WASHINGTON AVENUE
MADISON WI 53703

Case number 2024CV007822 was electronically filed with/converted by the Milwaukee County Circuit Court office. The electronic filing system is designed to allow for fast, reliable exchange of documents in court cases.

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If you have questions regarding this notice, please contact the Clerk of Circuit Court at 414-278-4140.

Milwaukee County Circuit Court
Date: September 30, 2024

FILED
09-30-2024
Anna Maria Hodges
Clerk of Circuit Court
2024CV007822
Honorable Thomas J. McAdams-07
Branch 7

STATE OF WISCONSIN **CIRCUIT COURT** **MILWAUKEE**

Dennis Eucke et al vs. Wisconsin Elections Commission et al

Electronic Filing Notice

Case No. 2024CV007822
Class Code: Petition for Writ of Mandamus

CITY OF MILWAUKEE ELECTION COMMISSION
200 E. WELLS STREET
MILWAUKEE CITY HALL
MILWAUKEE WI 53202

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If you have questions regarding this notice, please contact the Clerk of Circuit Court at 414-278-4140.

Milwaukee County Circuit Court
Date: September 30, 2024

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DENNIS EUCKE
3239 N. Cramer St
Milwaukee, WI 53211,

JUSTIN GAVERY,
730 N. Plankington Ave, 7D
Milwaukee, WI 53203
and

JOE NOLAN,
2909 S. 52nd Street
Milwaukee, WI 53219

Plaintiffs,

v.

Class: 30952

Case No. _____

WISCONSIN ELECTIONS COMMISSION,
212 East Washington Avenue,
Third Floor,
Madison, WI 53703

and

CITY OF MILWAUKEE ELECTION COMMISSION
Milwaukee City Hall
200 E Wells Street
Room 501,
Milwaukee, WI 53202,

Defendants.

COMPLAINT FOR EXPEDITED DECLARATORY AND INJUNCTIVE RELIEF OR, IN THE ALTERNATIVE, FOR EXPEDITED WRIT OF MANDAMUS

Plaintiffs Dennis Eucke, Justin Gavery, and Joe Nolan bring this action for emergency declaratory and injunctive relief—or, in the alternative, for expedited alternative writ of mandamus—against the Wisconsin Elections Commission and the City of Milwaukee Election

Commission in time for the requested relief to be completed prior to the November 5, 2024 election. In support thereof, Plaintiffs state as follows:

NATURE OF THE CASE

1. This is a lawsuit to enforce Wisconsin's laws that protect the right to vote from dilution. Wisconsin's current voter rolls have almost 150,000 voter registrations that appear to be invalid, e.g., because the voter in question permanently moved out of state and is no longer a citizen of Wisconsin.

2. Despite having had years to fix these issues, including notice provided to the City of Milwaukee Election Commission in June of 2024, both the Wisconsin Elections Commission and the City of Milwaukee Election Commission have indicated that they will not look into these registrations or take action to confirm their validity as required by law, and certainly will not do so prior to the 2024 election.

3. To be clear, Plaintiffs do not ask that these registrations be canceled out of hand. Instead, Plaintiffs simply ask that Defendants follow the statutory procedures to confirm whether these registrations are valid.

4. The requested relief not only serves to protect Wisconsin's voters from vote dilution, but also serves to protect the people listed in the anomalous registrations. For example, if a voter permanently moved out of state, and another individual uses that voter's information to cast an illegal ballot, this could result in the former Wisconsinite being wrongfully accused of having cast the illegal vote. Properly maintaining the voter rolls would protect against such identity theft. Any voters who are active despite anomalies in their registrations can easily confirm their status, either by responding to the requests for confirmation or, if they fail to make this confirmation, by simply reactivating their voter status.

THE PARTIES

5. Plaintiff Dennis Eucke is a resident, taxpayer, elector, and registered voter in the City of Milwaukee, Wisconsin.

6. Plaintiff Justin Gavery is a resident, taxpayer, elector, and registered voter in the City of Milwaukee, Wisconsin.

7. Plaintiff Joe Nolan is a resident, taxpayer, elector, and registered voter in the City of Milwaukee, Wisconsin.

8. Defendant Wisconsin Elections Commission ("WEC") is a commission of the state of Wisconsin established to administer and enforce election laws in the state.

9. Defendant City of Milwaukee Election Commission ("Milwaukee Commission") is the municipal board of election commissioners for the City of Milwaukee, and was established to enforce election laws at the municipal level for the City of Milwaukee. *See* Wis. Stat. § 7.20(1) ("A municipal board of election commissioners shall be established in every city over 500,000 population.").

JURISDICTION AND VENUE

10. This Court has jurisdiction over this matter pursuant to Wis. Stat. § 753.03.

11. Venue is proper in this Court pursuant to Wis. Stat. § 801.50(2)(a), (2)(c), and (3)(a), as this is the county where the claim arose and where the Milwaukee Commission resides and, moreover, the defendants are commissions in their official capacities and this is the county designated by Plaintiffs.

FACTUAL BACKGROUND

A. Election Law Background

12. In Wisconsin, any United States citizen resident is generally able to vote in the municipality in which they reside, including by absentee ballot. Wis. Stat. §§ 6.20, 6.85.

13. When a person moves to a new address in a different county within Wisconsin, or in a different state, they are generally not allowed to vote in the former municipality, unless the move occurred within 28 days of the election. Wis. Stat. § 6.10(10).

14. To uphold the integrity of elections, to prevent voter fraud, and to protect our citizens' trust in the election process, the federal government has enacted multiple laws requiring states to maintain their lists of voters and designate as inactive those registrations that are no longer active.

15. This is particularly important in the context of absentee voting, where a person could potentially vote multiple times, or third parties could submit votes without the person's knowledge.

16. The Help America Vote Act requires each state to implement "a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level." 52 U.S.C. § 21083(a)(1)(A); *see* Wis. Stat. §§ 5.061 *et seq*.

17. Thus, Wisconsin is required to "remove the names of ineligible voters from the computerized list in accordance with State law." 52 U.S.C. § 21083(a)(2)(A)(iii); *see* Wis. Stat. §§ 5.061 *et seq*.

18. Like many states, Wisconsin splits the responsibility for this task into two groups: a statewide commission—the WEC—and local municipal authorities—like the Milwaukee Commission.

19. Unlike many states, Wisconsin places the primary obligation for list maintenance upon the local authorities instead of the WEC. Wis. Stat. § 6.50; *see State ex rel. Zignego v. Wis. Elections Comm'n*, 396 Wis. 2d 391, 392 (2021) ("Unlike many places around the country, Wisconsin has a highly decentralized system for election administration.").

20. However, the WEC is still ultimately responsible for the administration of the lists and ensuring that the municipalities are fulfilling their obligations to ensure that the voter rolls are properly maintained. Wis. Stat. § 5.05(15) (" The commission is responsible for the design and maintenance of the official registration list under s. 6.36."); Wis. Stat. § 6.36 (setting forth the WEC's duties with respect to this list); *see also* Wis. Stat. § 5.05(1), (2w) (requiring the WEC to administer and enforce Wisconsin's elections statutes); *Jefferson v. Dane Cty.*, 394 Wis. 2d 602, 617 (2020) ("It is the WEC that is responsible for guidance in the administration and enforcement of Wisconsin's election laws, not the county clerks.").

21. These are critical tasks to our democracy. As the United States Supreme Court has held, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *accord Anderson v. United States,* 417 U.S. 211, 227 (1974) (holding that the right to vote includes the right "to have [one]'s vote fairly counted, without its being distorted by fraudulently cast votes").

B. Plaintiffs' Data Set Showing Defendants' Failure to Fulfill Obligations

22. In late May 2024, the WEC provided a new list of active registrations in the City of Milwaukee.

23. 271,962 active registrations were then run through an automated system to screen for any registration issues and to confirm that Defendants were fulfilling their statutory obligations.

24. When this screening discovered a number of issues, each name and address was submitted through the United States Postal Services ("USPS") Coding Accuracy Support System ("CASS") evaluation system to determine whether or not they were still resident at their address of registration.

25. The USPS CASS evaluation is run against several progressively deeper-leveled databases, such as by state, city, five-digit zip code, a check on those three columns together, then a check against the street name with in them, then a street number range check, then a check against the actual street number in the "Zip_4" database, and then a check on the apartment unit at that specific building, then a check if that address is unoccupied, as well as other specialty checks.

26. The WEC accepts and uses this same USPS filtering from the Electronic Registration Information Center organization to maintain the voter registration list.

27. These checks confirmed that tens of thousands of errors were present in the voter registration lists.

28. The WEC has claimed that all voter maintenance until 2027 was complete as of August 1, 2023. *See* Wis. Elections Comm'n, *2023 Four-Year Voter Record Maintenance Complete*, https://elections.wi.gov/memo/2023-four-year-voter-record-maintenance-complete. Thus, both the Milwaukee Commission and the WEC apparently failed to detect the tens of thousands of errors in the voter list.

29. The Milwaukee Commission failed to properly maintain its voter list, and the WEC failed to fulfil its obligations to maintain the official registration list or oversee the Milwaukee Commission. Moreover, neither the Milwaukee Commission nor the WEC have the intention of taking any further actions.

C. Plaintiffs' Request to the Milwaukee Commission

30. On June 7, 2024, Plaintiffs submitted a request via email directly to the Milwaukee Commission describing the issue and asking that the Milwaukee Commission update the voter rolls to ensure the integrity of the state's elections. A copy of this request is attached hereto as **Exhibit A**.

31. Plaintiffs' request to the Milwaukee Commission included a complete excel spreadsheet data with detailed information on over fifty thousand active voter registrations in Milwaukee that contain errors, not counting the errors in active voter registrations outside Milwaukee.

32. Specifically, Plaintiffs provided the Milwaukee Commission with the following sheets:

a. In the first tab, Plaintiffs listed 2,250 active voter registrations tied to a commercial address instead of residential;

b. In the second tab, Plaintiffs listed 24 active voter registrations tied to incomplete addresses, where a secondary number is missing;

c. In the third tab, Plaintiffs listed 32 active voter registrations tied to addresses where the door was not accessible to the USPS;

d. In the fourth tab, Plaintiffs listed 606 active voter registrations tied to invalid addresses, which are not in the USPS database;

e. In the fifth tab, Plaintiffs listed 13 active voter registrations tied to a physical address of a USPS office, instead of a residential address;

f. In the sixth tab, Plaintiffs listed 5,080 active voter registrations, where in each case, the voter did not live at the address they used to register;

g. In the seventh tab, Plaintiffs listed 6,187 active voter registrations, where in each case, the voter submitted a form to the USPS stating that they would be permanently moving out of state;

h. In the eighth tab, Plaintiffs listed 4,907 active voter registrations, where in each case, the voter submitted a form to the USPS stating that they would be permanently moving out of the county;

i. In the ninth tab, Plaintiffs listed 1,528 active voter registrations, where in each case, the voter submitted a form to the USPS stating that they would be permanently moving, but not listing a new address; and

j. In the tenth tab, Plaintiffs listed 35,699 active voter registrations, which included all moves of voters, inclusive of tabs seven through nine, that submitted a form to the USPS stating that they would be permanently moving.

33. The Milwaukee Commission did not respond to this request.

34. Plaintiffs later received updated voter registration information from August 19, 2024 that had been run through CASS. This information showed that 42,043 voters labeled "active" had permanently moved out of Wisconsin and 56,457 voters labeled "active" had permanently moved to a different county within Wisconsin. Coupled with the 45,242 Milwaukee registrations from the May 2024 data that had issues other than the voter permanently moving out of the county or state, at least 143,742 active registrations in the August 19, 2024 voter roll appear to be invalid ("Anomalous Registrations").

35. 56,336 of the Anomalous Registrations were in Milwaukee.

36. To date, neither the WEC nor the Milwaukee Commission has done anything to remedy these tens of thousands of irregularities in the voter rolls. And neither has given any response indicating that it has made any investigation of this matter whatsoever.

37. Plaintiffs cannot file an administrative complaint with the WEC against the Milwaukee Commission because the statute only allows such complaints to be filed against human individuals. *See* Wis. Stat. § 5.06(1) (providing that such a complaint can be brought against "an election official"); Wis. Stat. § 5.02(4e) ("'Election official' means an *individual who* is charged with any duties relating to the conduct of an election." (emphasis added)).

38. Meanwhile, filing an administrative complaint with the WEC about the WEC itself would be futile. That is because such a complaint would be heard by the WEC, and the WEC has taken the position that it cannot hear complaints against itself. *See Teigen v. Wis. Elections Comm'n*, 403 Wis. 2d 607, 642 (2022) (noting that "the remedies WEC can impose under Wis. Stat. § 5.06(6) would be senseless if they were applied by WEC against itself"), *abrogated other grounds by Priorities USA v. Wis. Elections Comm'n*, 412 Wis. 2d 594, 611, 8 N.W.3d 429, 437 (2024); *Wis. Voter All. v. Millis*, __ F. Supp. 3d __, No. 23-C-1416, 2024 U.S. Dist. LEXIS 44025, *15 (E.D. Wis. Mar. 13, 2024) (noting that "the WEC claims it has a conflict of interest and is therefore required to recuse itself from addressing . . . complaints" against itself).

D. Defendants' Omissions Violate Wisconsin Law

39. The above-referenced failures by the Milwaukee Commission have violated the requirements of Wis. Stat. §§ 6.32(1)–(2), 6.325, 6.50(3), 7.15(g), 7.21(1). For example, and without limitation, the Milwaukee Commission has failed to ensure the correctness of all registrations, Wis. Stat. §§ 6.32(1)–(2), 7.21(1), including confirming any addresses that appear to

be incorrect or outdated, Wis. Stat. §§ 6.325, 6.50(3).* *See also Voter Integrity Project NC, Inc. v. Wake Cty. Bd. of Elections*, 301 F. Supp. 3d 612, 620 (E.D.N.C. 2017) (holding that "a reasonable inference can be drawn that [a county board of elections] is not making a reasonable effort to conduct a voter list maintenance program in accordance with the NVRA" where a plaintiff has made an allegation, "supported by reliable data," that the county is failing to remove ineligible voters and the county board failed to use available information to remove such ineligible voters).

40. Likewise, these failures by the WEC have violated the requirements of Wis. Stat. §§ 5.05(1), (2w), (15), 6.32(1)–(2), 6.36(1)(a)(1). For example, and without limitation, the WEC is "responsible for the . . . maintenance of the official registration list." Wis. Stat. § 5.05(15), which "shall contain" the correct "name and address of each registered elector in the state," Wis. Stat. § 6.36(1)(a)(1). To that end, the WEC is required to oversee the local election officials in ensuring that their voter lists comply with all state requirements, including the requirements that they state the electors' correct addresses and designate voters who are no longer active in their locales as inactive. *See* Wis. Stat. §§ 5.05(1), (2w). By failing to take such actions, the WEC has refused to perform its duties under these statutes.

* *See* Wis. Stat. § 6.325 ("If it appears that the challenged elector is registered at a residence in this state other than the one where the elector now resides, the municipal clerk or board of election commissioners shall, before permitting the elector to vote, require the elector to properly register and shall notify the municipal clerk or board of election commissioners at the former residence."); Wis. Stat. § 6.50(3) ("Upon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, the municipal clerk or board of election commissioners shall notify the elector by mailing a notice by 1st class mail to the elector's registration address stating the source of the information. . . . If the elector no longer resides in the municipality or fails to apply for continuation of registration within 30 days of the date the notice is mailed, the clerk or board of election commissioners shall change the elector's registration from eligible to ineligible status. Upon receipt of reliable information that a registered elector has changed his or her residence within the municipality, the municipal clerk or board of election commissioners shall change the elector's registration and mail the elector a notice of the change.").

41. These improperly maintained voter rolls undermine Plaintiffs' confidence in the electoral process, burden Plaintiffs' right to vote via vote dilution, and constitute an actionable injury in fact. *See, e.g.*, *Green v. Bell*, No. 3:21-cv-00493-RJC-DCK, 2023 U.S. Dist. LEXIS 45989, *9, 2023 WL 2572210 (W.D.N.C. Mar. 19, 2023) (holding that such harm constitutes an injury in fact); *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919, 924 (S.D. Ind. 2012) (same); *Judicial Watch, Inc. v. Griswold*, No. 20-cv-02992-PAB-KMT, 2022 U.S. Dist. LEXIS 153290, *5–6, 2022 WL 3681986 (D. Colo. Aug. 25, 2022) (same); *see also Wis. Voter All. v. Millis*, __ F. Supp. 3d __, No. 23-C-1416, 2024 U.S. Dist. LEXIS 44025, *12 (E.D. Wis. Mar. 13, 2024) ("[V]oter disenfranchisement through dilution caused by illegal votes might constitute the kind of harm required [to seek judicial review.]").

42. Accordingly, Plaintiffs ask that the Milwaukee Commission be ordered to promptly mail a notice pursuant to Wisconsin Statute § 6.50 to each of the individuals associated with the Anomalous Registrations in Milwaukee and, 30 days after mailing such notices, change any registrations for which no response has been received from active to inactive status, as required by Wis. Stat. § 6.50. *See also* Wis. Stat. § 6.325 ("If it appears that the challenged elector is registered at a residence in this state other than the one where the elector now resides, the municipal clerk or board of election commissioners shall, before permitting the elector to vote, require the elector to properly register and shall notify the municipal clerk or board of election commissioners at the former residence.").

43. Plaintiffs also ask that the WEC be ordered to instruct all municipal clerks and boards of election officers in Wisconsin to (1) promptly mail a notice pursuant to Wisconsin Statute § 6.50 to each of the individuals associated with the Anomalous Registrations in their jurisdictions and, (2) 30 days after mailing such notices, change any registrations for which no response has

been received from active to inactive status, as required by Wis. Stat. § 6.50. *See* Wis. Stat. §§ 5.05(15), 6.36(1)(a)(1). Plaintiffs further ask that the WEC be ordered to take any and all actions in its power to enforce these instructions, as well as the laws the WEC is charged with administering. *See, e.g.*, Wis. Stat. § 5.05(1)(d).

44. In light of the above-referenced statutes, Defendants' duties to perform the requested tasks are clear and unequivocal.

45. Importantly, such relief would not harm any active voters. That is because active voter associated with the Anomalous Registrations can simply respond to the notices from Defendants, and even those who fail to respond can readily contact the election authorities to reactivate their registrations. Moreover, all voters can vote in person at the Milwaukee Commission's office up to two weeks before the election or at the polling place on election day. As such, nobody would be disenfranchised by this action.

46. Instead, this relief will help protect former Wisconsin residents from having their identities stolen and used to vote illegally in their names. Moreover, this relief would protect Plaintiffs' and all Wisconsin voters' right to vote by safeguarding them from improper vote dilution. *E.g.*, *Reynolds*, 377 U.S. at 555.

COUNT I - DECLARATORY JUDGMENT CONCERNING COMPLIANCE AND VIOLATIONS OF WIS. STATS. § § 5.05(1), (2w), (15), 6.32(1)–(2), 6.325, 6.36(1)(a)(1), 6.50(3), 7.15(g), AND 7.21(1)

47. All of the foregoing paragraphs are incorporated as though restated herein.

48. Plaintiffs have a right to have the WEC and the Milwaukee Commission properly maintain the voter rolls as provided in Wis. Stat. §§ 5.05(1), (2w), (15), 6.32(1)–(2), 6.36(1)(a)(1) and Wis. Stat. §§ 6.32(1)–(2), 6.325, 6.50(3), 7.15(g), 7.21(1), respectively.

49. This right stems not just from the statutes themselves, but from Plaintiffs' constitutional right to vote. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (holding that allowing vote dilution is a denial of the right to vote).

50. Defendants' choice to accept the Anomalous Registrations without further investigation violates this right.

51. As a direct and proximate consequence of Defendants' aforementioned failures, Plaintiffs' confidence in the electoral process has been, is being, and will continue to be undermined and Plaintiffs' right to vote has been, is being, and will continue to be burdened, unless this Court requires Defendants to remedy these issues by granting the relief requested herein.

52. Specifically, the Milwaukee Commission must timely confirm the status of the individuals associated with the Anomalous Registrations in Milwaukee by sending notices to those individuals pursuant to Wis. Stat. § 6.50, and must switch to inactive status any registrations for which no response is received within 30 days, as required by Wis. Stat. § 6.50. *See also* Wis. Stat. §§ 6.32(2), 6.325, 7.21(1).

53. Likewise, the WEC must instruct *all* municipal clerks and boards of election officers in the state of Wisconsin to (1) promptly mail a notice pursuant to Wisconsin Statute § 6.50 to each of the individuals associated with the Anomalous Registrations in their jurisdictions and, (2) 30 days after mailing such notices, change any registrations for which no response has been received from active to inactive status, as required by Wis. Stat. § 6.50. *See* Wis. Stat. §§ 5.05(15), 6.36(1)(a)(1). The WEC must further take any and all actions in its power to enforce these instructions. *See, e.g.*, Wis. Stat. § 5.05(1)(d).

54. Accordingly, Plaintiffs ask the Court to declare that Defendants must take such actions pursuant to the statutes.

COUNT II - INJUNCTIVE RELIEF ORDERING COMPLIANCE WITH WIS. STATS. § § 5.05(1), (2w), (15), 6.32(1)–(2), 6.325, 6.36(1)(a)(1), 6.50(3), 7.15(g), AND 7.21(1)

55. All of the foregoing paragraphs are incorporated as though restated herein.

56. Plaintiffs are also entitled to injunctive relief requiring the Milwaukee Commission to maintain the voter rolls pursuant to Wis. Stat. §§ 5.05(1), (2w), (15), 6.32(1)–(2), 6.36(1)(a)(1) and requiring the WEC to oversee the maintenance of the voter rolls pursuant to Wis. Stat. §§ 6.32(1)–(2), 6.325, 6.50(3), 7.15(g), 7.21(1).

57. Absent an injunction, Defendants will continue to fail to perform these duties, thereby violating Plaintiffs' right to vote and injuring Plaintiffs by depriving them of this right. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (holding that allowing vote dilution is a denial of the right to vote).

58. As a direct and proximate consequence of Defendants' aforementioned failures, Plaintiffs' confidence in the electoral process has been, is being, and will continue to be undermined and Plaintiffs' right to vote has been, is being, and will continue to be burdened, unless this Court requires Defendants to remedy these issues by granting the relief requested herein.

59. Moreover, money damages cannot compensate for the loss of the right to vote free from vote dilution or the loss of confidence in the electoral process.

60. Accordingly, Plaintiffs ask that this Court issue an emergency injunction enjoining Defendants and providing as follows:

a. The Milwaukee Commission must promptly mail a notice pursuant to Wis. Stat. § 6.50 to each of the individuals associated with the Anomalous Registrations in Milwaukee; and

b. 30 days after mailing such notices, the Milwaukee Commission must change any registrations for which no response has been received from active to inactive status, as required by Wis. Stat. § 6.50. *See also* Wis. Stat. §§ 6.32(2), 6.325, 7.21(1).

c. The WEC must instruct all municipal clerks and boards of election officers in the state of Wisconsin to (1) promptly mail a notice pursuant to Wisconsin Statute § 6.50 to each of the individuals associated with the Anomalous Registrations in their jurisdictions and, (2) 30 days after mailing such notices, change any registrations for which no response has been received from active to inactive status, as required by Wis. Stat. § 6.50. *See* Wis. Stat. §§ 5.05(15), 6.36(1)(a)(1). The WEC must also take any and all actions in its power to enforce these instructions. *See, e.g.*, Wis. Stat. § 5.05(1)(d).

IN THE ALTERNATIVE, REQUEST FOR EMERGENCY ALTERNATIVE WRIT OF MANDAMUS UNDER WIS. STAT. § 783.01 SEEKING PERFORMANCE OF DUTIES PRESCRIBED IN WIS. STATS. §§ 5.05(1), 5.061, (2w), (15), 6.32(1)–(2), 6.325, 6.36(1)(a)(1), 6.50(3), 7.15(g), AND 7.21(1), AND ALL OTHER RELEVANT FEDERAL AND CONSTITUTIONAL AUTHORITIES

61. All of the foregoing paragraphs, excluding Counts I and II, are incorporated as though restated herein.

62. In the alternative to declaratory and injunctive relief, Plaintiffs seek a writ of mandamus ordering Defendants to perform their respective legal duties regarding voter roll maintenance.

63. Plaintiffs' right to have Defendants properly maintain the voter rolls as requested herein is clear, specific, and free from substantial doubt. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (holding that allowing vote dilution is a denial of the right to vote).

64. Likewise, the duties of the WEC and the Milwaukee Commission to maintain the voter rolls are positive and plain, stated expressly by Wis. Stat. §§ 5.05(1), (2w), (15), 6.32(1)–(2), 6.36(1)(a)(1) and Wis. Stat. §§ 6.32(1)–(2), 6.325, 6.50(3), 7.15(g), 7.21(1), respectively.

65. Substantial damage will result to Plaintiffs if these duties are not performed. *E.g.*, *Reynolds*, 377 U.S. at 555.

66. Specifically, as a direct and proximate consequence of Defendants' aforementioned failures, Plaintiffs' confidence in the electoral process has been, is being, and will continue to be undermined and Plaintiffs' right to vote has been, is being, and will continue to be burdened, unless this Court requires Defendants to remedy these issues by granting the relief requested herein.

67. No other adequate remedy exists at law, as money damages cannot compensate for the loss of the right to vote free from vote dilution or the loss of confidence in the electoral process.

68. Accordingly, Plaintiffs request that mandamus be issued to the Milwaukee Commission requiring it to promptly mail a notice pursuant to Wisconsin Statute § 6.50 to each of the individuals associated with the Anomalous Registrations in Milwaukee and, 30 days after mailing such notices, change any registrations for which no response has been received from active to inactive status, as required by Wis. Stat. § 6.50. *See also* Wis. Stat. §§ 6.32(2), 6.325, 7.21(1).

69. Plaintiffs also request that mandamus be issued to the WEC requiring it to instruct all municipal clerks and boards of election officers in the state of Wisconsin to (1) promptly mail a notice pursuant to Wisconsin Statute § 6.50 to each of the individuals associated with the Anomalous Registrations in their jurisdictions and, (2) 30 days after mailing such notices, change any registrations for which no response has been received from active to inactive status, as required by Wis. Stat. § 6.50. *See* Wis. Stat. §§ 5.05(15), 6.36(1)(a)(1). This mandamus should further

require the WEC to take any and all actions in its power to enforce these instructions. *See, e.g.*, Wis. Stat. § 5.05(1)(d).

PRAYER FOR RELIEF

WHEREFORE Plaintiffs respectfully pray that this Court enter an emergency order and expedited schedule, ***in sufficient time to allow compliance in full prior to the November 5, 2024 election***, ADJUDGING, ORDERING, and DECREEING:

a. That declaratory judgment be issued that the Milwaukee Commission is required to timely confirm the status of the individuals associated with the Anomalous Registrations in Milwaukee by sending notices to those individuals pursuant to Wis. Stat. § 6.50, and to switch to inactive status any registrations for which no response is received within 30 days, as required by Wis. Stat. § 6.50, *see also* Wis. Stat. § 6.32(2), 6.325, 7.21(1), that the WEC must instruct all municipal clerks and boards of election officers in the state of Wisconsin to (1) promptly mail a notice pursuant to Wisconsin Statute § 6.50 to each of the individuals associated with the Anomalous Registrations in their jurisdictions and, (2) 30 days after mailing such notices, change any registrations for which no response has been received from active to inactive status, as required by Wis. Stat. § 6.50, *see* Wis. Stat. §§ 5.05(15), 6.36(1)(a)(1), and that the WEC must take any and all actions in its power to enforce these instructions, *see, e.g.*, Wis. Stat. § 5.05(1)(d);

b. That Defendants be enjoined as follows:

   A. The Milwaukee Commission shall promptly mail a notice pursuant to Wis. Stat. § 6.50 to each of the individuals associated with the Anomalous Registrations in Milwaukee;

B. 30 days after mailing such notices, The Milwaukee Commission shall change any registrations for which no response has been received from active to inactive status, as required by Wis. Stat. § 6.50, *see also* Wis. Stat. §§ 6.32(2), 6.325, 7.21(1);

C. The WEC shall instruct all municipal clerks and boards of election officers in the state of Wisconsin to (1) promptly mail a notice pursuant to Wisconsin Statute § 6.50 to each of the individuals associated with the Anomalous Registrations in their jurisdictions and, (2) 30 days after mailing such notices, change any registrations for which no response has been received from active to inactive status, as required by Wis. Stat. § 6.5, *see* Wis. Stat. §§ 5.05(15), 6.36(1)(a)(1); and

D. The WEC shall take any and all actions in its power to enforce these instructions, *see, e.g.*, Wis. Stat. § 5.05(1)(d).

c. In the alternative, that mandamus be issued to the Milwaukee Commission requiring it to promptly mail a notice pursuant to Wis. Stat. § 6.50 to each of the individuals associated with the Anomalous Registrations in Milwaukee and, 30 days after mailing such notices, change any registrations for which no response has been received from active to inactive status, as required by Wis. Stat. § 6.50, *see also* Wis. Stat. §§ 6.32(2), 6.325, 7.21(1), and that mandamus be issued to the WEC requiring it to instruct all municipal clerks and boards of election officers in the state of Wisconsin to (1) promptly mail a notice pursuant to Wisconsin Statute § 6.50 to each of the individuals associated with the Anomalous Registrations in their jurisdictions and, (2) 30 days after mailing such notices, change any registrations for which no response has been received

from active to inactive status, as required by Wis. Stat. § 6.50, *see* Wis. Stat. §§ 5.05(15), 6.36(1)(a)(1), and further requiring the WEC to take any and all actions in its power to enforce these instructions, *see, e.g.*, Wis. Stat. § 5.05(1)(d).

d. That Plaintiffs be awarded such other and further relief as the Court deems just and proper, including without limitation their attorneys' fees and costs.

Dated at Mequon, Wisconsin this 26th day of September 2024.

Respectfully submitted,

Electronically signed by: /s/ Daniel J. Eastman
Daniel J. Eastman (local counsel)
Wis. Bar No. 1011433
Eastman Law, LLC
PO BOX 158
Mequon, Wisconsin 53092
Phone: (414) 881-9383
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Electronically signed by: /s/ Jennifer DeMaster
Jennifer DeMaster (local counsel)
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jennifer@demasterlaw.com

Cortland C. Putbrese
Va. Bar No. 46419, *pro hac vice pending*
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Richmond, Virginia 23230
Phone: (804) 977-2688
cputbrese@dbllawyers.com

Attorneys for Plaintiffs

EXHIBIT A

Gmail

Peter <pmbmap123@gmail.com>

Re: Submitting legal challenge to voter registrations in the City of Milwaukee

Justin Gavery <justin_gavery@yahoo.com> Fri, Jun 7, 2024 at 9:12 AM
To: voterinfo@milwaukee.gov, terrell.martin@milwaukee.gov, paruizc@milwaukee.gov, douglas.haag@milwaukee.gov
Cc: josephus.the.centurion@gmail.com, eucke62den@gmail.com, elizabethbruders@proton.me, robertbruders@gmail.com, akuglitsch@yahoo.com

TO:
1. Executive Director of Milwaukee Elections Paulina Gutierrez June 7, 2024
2. City of Milwaukee Board of Elections
3. Terrell Martin
4. Patricia Ruiz-Cantú
5. Douglas Haag

City Hall, Room 501
200 E. Wells Street
Milwaukee, WI 53202

Re: submitting legal challenge to voter registrations in the City of Milwaukee
It is critical to keep clean, accurate and up-to-date voter rolls to ensure election integrity. It is also mandatory: "HAVA imposes on states a mandatory duty to deactivate ineligible voters, independent of state law." State v Wisconsin Elections Commission, 957 NW 2d 208 Wis. Supreme Court 2021. HAVA requires each state to implement a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level." 52 U.S.C. § 21083(a)(1)(A). WEC is responsible also to maintain the voter registration list. Wis. Stat § 5.05(15), 6.36(1)(a), HAVA Section III.

Our TITAN system screens voter registrations for various issues. On May 30, 2024 we purchased a new list of Active registrations in the City of Milwaukee from the Wisconsin Election Commission. 271,962 Actives were run through TITAN, and we found an astounding number with issues of one type or another. Each name and address were submitted through the USPS CASS® (Coding Accuracy Support System) evaluation system. The USPS CASS® evaluation is run against several progressively deeper-leveled databases, such as: state, city, zipcode-5-digit, a check on those 3 columns together, then a check against the street name with in them, then a street number range check, then a check against the actual street number in the "Zip_4" database, and then a check on apt_unit at that specific building, then a check if that address is unoccupied, and then other specialty checks. It returns many columns, each with detailed codes describing one or more problems with each address on this list. More on CASS: (Coding Accuracy Support System) Certification is a program that was developed by the USPS to test the accuracy of address-matching software and improve the accuracy of postal coding, such as ZIP+4 Code®, carrier route and 5-digit ZIP Code coding. https://postalpro.usps.com › CASS › CASSTECH_N The bottom line is that the USPS has declared that all of the items in this report cannot be mailed without mailing address correction(s).

Two (2) recent State Supreme Court cases reinforced that municipal clerks in Wisconsin are required to keep the voter registration list clean. See State v. Wisconsin Elections Commission, 957 NW 2d 208 - Wis: Supreme Court 2021; and Teigen v. WISCONSIN ELECTIONS COM'N, 976 NW 2d 519 - Wis: Supreme Court 2022.

The attached spreadsheet contains ten individual worksheets (tabs along the bottom), each containing a separate issue. Pursuant to Wis Stat 5.061(1),6.27, 6.32(1),(2), 6.325, 6.33(1),(2), 6.36(1)(a),6.50, 6.50(3), 7.15(1), 7.15(1)(g) and the federal HAVA act, we are formally challenging each registration in the city of Milwaukee's municipality and ask for each of the noted problems and irregularities be resolved. Specifically, to a) refer for prosecution those who registered unlawfully – such as to a UPS store, b) send out postcards, c) turn the registrant to Inactive status.

We would like to draw your attention to an important note. The US Postal Service's National Change of Address, to which we have a subscription and access to their national database, was set to flag only the movers who checked the "permanent" box on the voter's form they filed with the federal government. Due to the size of the excel spreadsheet in google drive we will send it in a separate email. We request your cooperation and look forward to your response within five days.

Respectfully, Dated: June 7, 2024

Justin Gavery
Electronically Signed By: Justin Gavery
730 North Plankington Ave 7D
Milwaukee, WI 53203
justin_gavery@yahoo.com, 408-8584527

Annette Kuglitsch
Electronically Signed By: Annettee Kuglitsch
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Robert Bruders
Electronically Signed By: Robert Bruders
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robertbruders@gmail.com, 414-313-1998

Elizabeth Bruders
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414-313-8060 elizabethbruders@proton.me

Joe Nolan
Electronically Signed By: Joe Nolan
2909 South 52nd street
Milwaukee, WI 53219
414-639-0736 joesphus.the.centurion@gmail.com

Dennis Eucke
Electronically Signed By: Dennis Eucke
3239 N Cramer St
Milwaukee, WI 53211
414-416-3167 eucke62den@gmail.com

Guidelines For Issues with Active Voter Registrations
City of Milwaukee
June 7, 2024

Some of these issues are further described below in more detail. "DPV" stands for Delivery Point Validation; in short, an address. There will be some crossover as the system looks at the same registration from more than one view.

Along the bottom of the attached workbook, you will see ten (10) individual tabs (sheets), each sorted alphabetically by city and labeled as follows:

First Tab -
Commercial Address: address is a commercial address such as a UPS, FedEx, Pack N Ship or a retail store. It is unlawful to be registered to a location that is not where you normally sleep at night. § 6.33(1). See Column N for the address. For this one there nine (9) on the list. 2250 in count.

Second Tab -
APT missing: the leading number of the address is present, but the secondary number (apartment, unit or suite) is missing. See Column GB for "N1" designation by the USPS. This is an incomplete address. 24 in count.

Third Tab -
Door Not Accessible: these are based on written and signed reports by the US mail carrier stating there is no place to put/deliver mail. 32 in count.

Fourth Tab -
DPV N or BLANK: If the cell in the spreadsheet column GI is "N or Blank" it is not a valid delivery address. It means the address is not in the USPS database; it has not been verified through their CASS system. 606 in count.

Fifth Tab -
USPS address: these voters used the physical address of a US Post Office location, not the physical place where they normally sleep at night. 13 in count.

Sixth Tab -
Vacant: this is an official term used by the USPS. It means the particular person is no longer at the address he or she used to register to vote. The physical location may, or may not, have other people living at it. See Column FY. 5,080 in count.

Seventh Tab -
Moved Out Of State: The voter checked the permanent box on the NCOA move form. The new city the person moved to is shown in column P, the new state in column Q. The move date is shown in column GW. 6,187 in count.

Eight Tab -
Moved Out Of County: the voter checked the permanent box on the NOCA form they signed and filed with the federal government. The County they moved to is shown in Column P. 4,907 in count.

Nineth Tab –
Moved Left No Address: the voter checked the permanent box on the NOCA form they signed and filed with the federal government. But they provided no new address. The move date is shown in Column GW. 1,528 in count.

Tenth Tab -
NCOA Movers: the voter checked the permanent box on the NOCA form they signed and filed with the federal government. The move date is shown in Column P and Column M shows the new address. 35,699 in count.

Gmail Peter <pmbmap123@gmail.com>

Re: Submitting legal challenge to voter registrations in the City of Milwaukee- Active Voter Registrations their are 10 tabs

6 messages

Justin Gavery <justin_gavery@yahoo.com> Fri, Jun 7, 2024 at 9:12 AM
To: voterinfo@milwaukee.gov, terrell.martin@milwaukee.gov, paruizc@milwaukee.gov, douglas.haag@milwaukee.gov
Cc: josephus.the.centurion@gmail.com, eucke62den@gmail.com, elizabethbruders@proton.me, robertbruders@gmail.com, akuglitsch@yahoo.com

TO:

1. Executive Director of Milwaukee Elections Paulina Gutierrez June 7, 2024
2. City
of Milwaukee Board of Elections
3. Terrell Martin
4. Patricia Ruiz-Cantú
5. Douglas Haag

City Hall, Room 501
200 E. Wells Street
Milwaukee, WI 53202

Please see the link below in google drive to download the excel spreadsheet Guidelines For Issues with Active Voter Registrations their are 10 tabs.

https://drive.google.com/file/d/1dsE0vbJyChuzqV5JMlWbXsTHpTS_X8bC/view?usp=drive_web

Respectfully,

Dated: June 7, 2024

Justin Gavery
Electronically Signed By: Justin Gavery
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justin_gavery@yahoo.com, 408-858[illegible]

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Joe Nolan
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Dennis Eucke
Electronically Signed By: Dennis Eucke
3239 N Cramer St
Milwaukee, WI 53211
414-416-3167 eucke62den@gmail.com

Peter <pmbmap123@gmail.com> Sun, Jun 9, 2024 at 5:27 PM
To: "Michael Yoder, Esq." <michael@yoderesq.com>

Final challenge that went into the city of Milwaukee against their inflated voter rolls, the text plus the one spreadsheet with 10 tabs along the bottom. We'd like to get going on the lawsuit against these parties, we know they are not going to do anything to take action on our legal challenges.

Peter Bernegger
Election Watch, Inc
920-551-0510

[Quoted text hidden]

Peter <pmbmap123@gmail.com> Mon, Jun 10, 2024 at 11:14 AM
To: Julie Seegers <Julies53597@yahoo.com>

2nd of 2 emails sent into City of Milwaukee challenge:

-------- Forwarded message ---------
From: **Justin Gavery** <justin_gavery@yahoo.com>
Date: Fri, Jun 7, 2024 at 9:13 AM
Subject: Re: Submitting legal challenge to voter registrations in the City of Milwaukee- Active Voter Registrations their are 10 tabs
To: <voterinfo@milwaukee.gov>, <terrell.martin@milwaukee.gov>, <paruizc@milwaukee.gov>, <douglas.haag@milwaukee.gov>
Cc: <josephus.the.centurion@gmail.com>, <eucke62den@gmail.com>, <elizabethbruders@proton.me>, <robertbruders@gmail.com>, <akuglitsch@yahoo.com>

[Quoted text hidden]

Peter <pmbmap123@gmail.com> Thu, Jun 20, 2024 at 11:34 AM
To: Peter Bernegger <peter@electionwatch.info>

--------- Forwarded message ---------
From: **Justin Gavery** <justin_gavery@yahoo.com>
Date: Fri, Jun 7, 2024 at 9:13 AM
Subject: Re: Submitting legal challenge to voter registrations in the City of Milwaukee- Active Voter Registrations their are 10 tabs
To: <voterinfo@milwaukee.gov>, <terrell.martin@milwaukee.gov>, <paruizc@milwaukee.gov>, <douglas.haag@milwaukee.gov>
Cc: <josephus.the.centurion@gmail.com>, <eucke62den@gmail.com>, <elizabethbruders@proton.me>, <robertbruders@gmail.com>, <akuglitsch@yahoo.com>

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DENNIS EUCKE, et al.,

Plaintiffs

v.

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants

Case No. _____

PLAINTIFFS' EX PARTE MOTION FOR AN ORDER SHORTENING NOTICE UNDER WIS. STAT. § 801.15(4)

PLEASE TAKE NOTICE:

Plaintiffs Dennis Eucke, Justin Gavery, and Joe Nolan, through their undersigned counsel, move this Court, ex parte, pursuant to Wis. Stat. § 801.15(4), for leave to move for an order requiring expedited response on less than five days' notice. The grounds for this motion is that a five-day notice is impractical for the reasons set forth in the Plaintiff's complaint, the urgency of this matter based on the upcoming November 5, 2024 presidential election, and the facts and relevant grounds set forth in Plaintiff's Notice and Motion for a Shortened Response time. This Motion is supported by the accompanying affidavit of Jennifer DeMaster.

Dated: September 27, 2024

Respectfully submitted,

Electronically signed by: /s/ Daniel J. Eastman
Daniel J. Eastman (local counsel)
Wis. Bar No. 1011433
EASTMAN LAW, LLC

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Mequon, Wisconsin 53092
Phone: (414) 881-9383
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Electronically signed by: /s/ Jennifer DeMaster
Jennifer DeMaster (local counsel)
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Fax: (262) 536-0515
jennifer@demasterlaw.com

Electronically signed by: /s/ Cortland C. Putbrese
Va. Bar No. 46419, *pro hac vice pending*
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Attorneys for Plaintiffs

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DENNIS EUCKE,

JUSTIN GAVERY,

and

JOE NOLAN,

Plaintiffs,

v. Case No. _____

WISCONSIN ELECTIONS COMMISSION,

and

CITY OF MILWAUKEE ELECTION COMMISSION,

Defendants.

ORDER SHORTENING NOTICE

Plaintiffs moved ex parte for an order shortening the five-day notice period in Wis. Stat. § 801.15. No hearing was held the court decided the motion on Sept. __, 2024, based on the supporting papers of the movant.

IT IS ORDERED:

1. Plaintiffs may move for an Order for Shortened Response Pursuant to Wis. Stat. §

801.02(5) on less than five days' notice.

2. The moving party shall serve this order along with all other papers relating to the motion as follows:

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DENNIS EUCKE, et al.,

Plaintiffs

v.

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants

Case No. _____

PLAINTIFFS' EX PARTE NOTICE AND MOTION FOR ORDER RE UIRING SHORTENED RESPONSE TIME PURSUANT TO WIS. STAT. § 801.0 (5)

TO: All Counsel of Record

1. PLEASE TAKE NOTICE that pursuant to Wis. Stat. § 801.02(5), and due to the emergency circumstances described herein, Plaintiffs Dennis Eucke, Justin Gavery, and Joe Nolan hereby request that the Court issue the attached order requiring Defendants to respond to the Complaint within five days of the date of service of the order.

2. This motion will be heard at a time, date, and place to be set by the court, requested within five days of the filing of this Complaint, Motion, Order and Accompanying Affidavit and Exhibits. *See* Pls. Ex Parte Mot. Under Wis. Stat. § 801.15(4).

3. An action seeking a remedy available by . . . mandamus . . . may be commenced . . . by filing a complaint demanding and specifying the remedy . . . and of an order signed by the judge of the court in which the complaint is filed is made upon the defendant under this chapter within the time period specified in the order. Wis. Stat. § 801.02(5). Although the usual statutory

deadline for a response is 20 days, it is 45 days for an agency of the state. Wis. Stat. § 801.09(2)(a)(2). owever, the order under § 801.02 may specify a time period shorter than that allowed by s. 802.06 for filing an answer or other responsive pleading. *Id.* § 801.02(5).

4. The purpose pursuant to § 801.02(5)'s of using an order to shorten the time for filing a response to the complaint in lieu of a summons is for the emergency situation when the case may be moot before a response would be filed. *Tobler v. Door Cty.*, 158 Wis. 2d 19, 24 25 (1990) (quoting Judicial Council Note, Sec. 13, ch. 289, Laws of 1981).

5. This is precisely such a situation. The present lawsuit seeks the following relief: (1) that the Wisconsin Elections Commission (WEC) instruct the local municipalities to send notices to voters with irregular registrations, who then have thirty days to reply, and (2) that the City of Milwaukee Election Commission (Milwaukee Commission) send such notices to voters whose irregular registrations are in Milwaukee. This must take place before the November 5, 2024 election occurs so that the municipalities can rectify the registration irregularities. Notice was given to the Milwaukee Commission in early June notifying it of tens of thousands of such irregularities, but the Milwaukee Commission has apparently chosen to take no action. Expedited relief is required here as without requiring an earlier response, the defendants can otherwise simply wait out the election without responding. Expedited relief would permit the recipients of any notices the full thirty days to reply.

6. Although the Wisconsin statutes do not prescribe a specific time frame for such actions, it is common for such actions to be allowed close to an election. *Cf., e.g.*, 52 U.S.C. § 20510(b)(3) (allowing a private cause of action under the National Voter Registration Act to be filed within thirty days of a federal election).

7. Wisconsin courts have the authority to adjust the time requirements for filing

responsive materials through their own scheduling orders to suit the particulars of each case. *Hefty v. Strickhouser*, 2008 WI 96, 312 Wis. 2d 530, 752 N.W.2d 820.

8. Shortening the response time and disposition of this matter will not burden nor interfere with the upcoming November 2024 election because it does not seek any change in laws, but rather only compliance with current laws, and delaying this matter could infringe on rights of lawfully registered voters to have their votes meaningfully counted.

9. Plaintiffs seek to enforce Wisconsin's laws that protect the right to vote from dilution.

10. Plaintiffs have empirical data showing that Wisconsin's current voter rolls have almost 150,000 voter registrations that appear to be invalid, e.g., because the voter in question permanently moved out of state and is no longer a citizen of Wisconsin.

11. Despite having had years to fix these issues, including notice and a full list of data provided to the City of Milwaukee Election Commission in June of 2024, both the Wisconsin Election Commission and the City of Milwaukee Election Commission have indicated that they will not look into these registrations or take action to confirm their validity as required by law, and certainly will not do so prior to the 2024 election.

12. The requested relief not only serves to protect Wisconsin's voters from vote dilution, but also serves to protect the people listed in the anomalous registrations. For example, if a voter permanently moved out of state, and another individual uses that voter's information to cast an illegal ballot, this could result in the former Wisconsinite being wrongfully accused of having cast the illegal vote. Properly maintaining the voter rolls would protect against such identity theft. Any voters who are active despite anomalies in their registrations can easily confirm their status, either by responding to the requests for confirmation or, if they fail to make this

confirmation, by simply reactivating their voter status.

13. To be clear, Plaintiffs do not ask that these registrations be canceled out of hand. Instead, Plaintiffs simply ask that Defendants follow the statutory procedures to confirm whether these registrations are valid.

14. Defendants would normally have 45 days to respond as an agency of the state. Wis. Stat. § 801.09(2)(a)(2). owever, this Court may specify a time period shorter than that allowed by s. 802.06 for filing an answer or other responsive pleading. *Id.* § 801.02(5). ere, that is necessary as the present lawsuit seeks the following relief: (1) that the Wisconsin Elections Commission instruct the local municipalities to send notices to voters with irregular registrations, who then have thirty days to reply, and (2) that the City of Milwaukee Election Commission send such notices to voters whose irregular registrations are in Milwaukee. This must take place before the November 5, 2024 election occurs so that the municipalities can rectify the registration irregularities.

15. Plaintiffs are concurrently beseeching this Court to shorten the time within which Defendants must respond by filing an answer or other responsive pleading for the reasons stated in that notice and motion. owever, this order is necessary to first serve Defendants under Wisconsin's complaint and order procedure. *Id. see also Nickel River Inv. v. La Crosse Bd. of Rev.*, 156 Wis.2d 429, 457 N.W.2d 333 (1990) (permitting the use of an order and complaint in lieu of summons under 801.02(5) to shorten the response time).

16. Defendants suffer no harm or prejudice by allowing the motion and notice to be brought in less than five days because they have not yet been served. In contrast, allowing Defendants to be served immediately increases the time that Wisconsin has to send notices and attempt to fix voter regularities. Further, Defendants have been put on notice that this lawsuit was

incoming by their failure to respond to Plaintiffs' letter from early June.

17. The Affidavit of Jennifer DeMaster is attached in support of this Motion.

18. W EREFORE, pursuant to Wis. Stat. § 801.02(5), Plaintiffs respectfully request the onorable Judge require Defendants to respond within five calendar days of receiving the complaint and order.

Dated: September 27, 2024

Respectfully submitted,

Electronically signed by: /s/ Daniel J. Eastman
Daniel J. Eastman (local counsel)
Wis. Bar No. 1011433
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Electronically signed by: /s/ Jennifer DeMaster
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Phone: (414) 235-7488
Fax: (262) 536-0515
jennifer@demasterlaw.com

Electronically signed by: /s/ Cortland C. Putbrese
Va. Bar No. 46419, *pro hac vice pending*
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Attorneys for Plaintiffs

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DENNIS EUCKE,

JUSTIN GAVERY,

and

JOE NOLAN,

Plaintiffs,

v. Case No. _____

WISCONSIN ELECTIONS COMMISSION,

and

CITY OF MILWAUKEE ELECTION COMMISSION,

Defendants.

ORDER ON MOTION PURSUANT TO WIS. STAT. § 801.0 (5)

Plaintiffs moved for an order requiring shortened response pursuant to Wis. Stat. § 801.02(5). No hearing was held the court decided the motion on September ____, 2024, based on the briefs and supporting papers of the parties.

IT IS ORDERED:

1. Defendant WISCONSIN ELECTIONS COMMISSION is hereby required to respond to Plaintiffs' complaint within ___ calendar days of receipt of this order and complaint.

2. Defendant CITY OF MILWAUKEE ELECTION COMMISSION is hereby required to respond to Plaintiffs' complaint within ___ calendar days of receipt of this order and complaint.

DATED, this ____ September, 2024

_____
onorable Judge

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DENNIS EUCKE, et al.,

Plaintiffs

v.

Case No. _____

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' EX PARTE MOTIONS FOR ORDER SHORTENING NOTICE AND NOTICE AND MOTION FOR SHORTENED RESPONSE TIME UNDER WIS. STATS. §§ 801.02(5) & 801.15(4)

STATE OF WISCONSIN
MILWAUKEE COUNTY

I, Jennifer T. DeMaster, being sworn, state:

1. I am an attorney for the Plaintiffs in this action and make this affidavit on personal knowledge.

2. The hearing on the attached notice and motion for an Order Pursuant to § 801.02(5) must take place on less than five days' notice for the reasons set forth herein.

3. Attached as Exhibit 1 is a true and accurate copy of *Tobler v. Door Cty.*, 158 Wis. 2d 19, 24–25 (1990).

4. Attached as Exhibit 2 to this Affidavit is a true and accurate copy of 52 U.S.C. § 20510 referenced in the Plaintiff's Notice and Motion for Shortened Response time.

5. Attached as Exhibit 3 to this Affidavit is a true and accurate copy of *Hefty v. Strickhouser*, 2008 WI 96, 312 Wis. 2d 530, 752 N.W.2d 820.

6. Attached as Exhibit 4, to be delivered to the Court and filed *under seal*, is the Spreadsheet data referenced in the Complaint, Ex. A showing non-compliant voter registration data.

Dated in Ozaukee County, Wisconsin: Sept. 27, 2024

Jennifer DeMaster

Subscribed and sworn before me
On this 27th date of September 2024.

Electronically notarized by Daniel J. Eastman
Notary Public, State of Wisconsin
My commission is permanent.
☒ This notarial act involved the use of communication technology.

EXHIBIT 1

KeyCite Yellow Flag - Negative Treatment
Distinguished by Thorp v. Town of Lebanon, Wis., June 21, 2000

158 Wis.2d 19
Supreme Court of Wisconsin.

John TOBLER and Beth Tobler, individually and as a member of similarly situated property owners, Plaintiffs–Appellants–Petitioners,
v.
DOOR COUNTY and Door County Board of Adjustments, Defendants–Respondents,
Kurt Koerting, and Ruth Koerting, Intervening Defendants–Respondents.

No. 89–0580.
|
Argued Oct. 4, 1990.
|
Nov. 6, 1990.

Synopsis
Property owners sought writ of certiorari to review decision of county board of adjustments. The Circuit Court, Door County, John D. Kochn, J., found no subject matter jurisdiction. Appeal was taken. The Court of Appeals, 152 Wis.2d 406, 449 N.W.2d 338, affirmed. Review was granted. The Supreme Court, Steinmetz, J., held that action for remedy available by certiorari could be commenced by filing and serving summons and complaint.

Reversed.

West Headnotes (1)

[1] **Certiorari**—Formal requisites and necessity in general
Certiorari—Service of writ or notice of proceeding
Action for remedy available by certiorari could be commenced by filing and serving summons and complaint. W.S.A. 801.02(1, 5).

17 Cases that cite this headnote

Attorneys and Law Firms

**775 *20 William J. Corrigan, argued, and Menn, Nelson, Sharratt, Teetaert and Beisenstein, Ltd., on brief, Appleton, for plaintiffs-appellants-petitioners.

Dennis D. Costello, Door County Corp. Counsel, for defendants-respondents.

Opinion

STEINMETZ, Judge.

The issue in this case is whether a certiorari review under sec. 801.02(5), Stats., may be commenced by the filing of a summons and complaint pursuant to sec. 801.02(1).

The trial court answered "no" and the court of appeals affirmed. 152 Wis.2d 406, 449 N.W.2d 338. We hold to the contrary. An action for a remedy available by certiorari may be commenced by filing and serving a summons and complaint pursuant to sec. 801.02(1), Stats.

On May 26, 1988, the plaintiffs, John Tobler and Beth Tobler, individually and as members of a group of similarly situated property owners (hereafter plaintiffs), filed a summons and complaint in Door county circuit court, John D. Koehn, Judge. The complaint asked the circuit court to issue a writ of certiorari and to review the decision of the Door County Board of Adjustments. *21 The defendants, Door county and Door County Board of Adjustments, answered and alleged that the circuit court did not have subject matter jurisdiction. Defendants then filed a motion to dismiss. They argued that the court lacked subject matter jurisdiction because the plaintiffs did not follow the procedure required by sec. 801.02(5), Stats., for an action seeking a remedy available by certiorari.

The trial court concluded that sec. 801.02(5), Stats., provides only two methods to commence an action seeking a remedy available by certiorari. A person can commence such an action by filing and serving a petition for a writ, together

with the original writ, or, alternatively, by service of a complaint and order, the trial court said. Since the plaintiffs did not follow one of these two methods but instead commenced this action by filing and serving a summons and complaint pursuant to sec. 801.02(1), the court held that it had "no subject matter jurisdiction" because no action was commenced.

The interpretation of a statute is a question of law and therefore no special deference is owed to the trial court's determination. *DeMars v. LaPour,* 123 Wis.2d 366, 370, 366 N.W.2d 891 (1985).

In *Marshall–Wis. v. Juneau Square,* 139 Wis.2d 112, 133, 406 N.W.2d 764 (1987), we held:

> Under the rules of statutory construction, we are to give effect to the intent of ****776** the legislature. In determining that intent, first resort must be to the language of the statute itself. If the meaning of the statute is plain, we are prohibited from looking beyond the language of the statute to ascertain its meaning. Only if the statutory language is ambiguous or unclear may we refer to outside sources to aid statutory construction. [citation omitted.]

***22** In *County of Columbia v. Bylewski,* 94 Wis.2d 153, 164, 288 N.W.2d 129 (1980), the court stated:

> [I]n construing statutes, effect is to be given, if possible, to each and every word, clause and sentence in a statute, and a construction that would result in any portion of a statute being superfluous should be avoided wherever possible.

Section 801.02, Stats., provides:

> **(1)** A civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon the defendant under this chapter within 60 days after filing.
>
> ....
>
> **(5)** An action seeking a remedy available by certiorari, quo warranto, habeas corpus, mandamus or prohibition may be commenced under sub. (1), by service of an appropriate original writ on the defendant named in the writ if a copy of the writ is filed forthwith, or by filing a complaint demanding and specifying the remedy, if service of an authenticated copy of the complaint and of an order signed by the judge of the court in which the complaint is filed is made upon the defendant under this chapter within the time period specified in the order. The order may specify a time period shorter than that allowed by s. 802.06 for filing an answer or other responsive pleading.

Shortly after the parties to this action filed their briefs to this court, the court of appeals issued a published decision of a case involving the same issue. In *Nickel River Inv. v. City of La Crosse Review Bd.,* 156 Wis.2d 429, 432, 457 N.W.2d 333 (Ct.App.1990), the ***23** court of appeals concluded that the appellant, who had commenced a certiorari action under sub. (1) by filing a summons and complaint, had properly commenced the certiorari action for purposes of sub. (5). *Id.* In view of *Nickel River Inv.*, the defendants in this action conceded their position at oral argument.

We agree with the outcome in *Nickel River Inv.* and reach the same outcome in this case, although our conclusion is based upon our own independent analysis.[1]

The meaning of sec. 801.02, Stats., taken as a whole, is plain. It is neither unclear nor ambiguous. Giving effect to each and every word, clause and sentence of the section requires that the language "under sub. (1)" of sec. 801.02(5) refers to sec. 801.02(1). Such a reference, in turn, requires that an action for a remedy available by certiorari under sec. 801.02(5) may be commenced by filing and serving a complaint pursuant to sec. 801.02(1). Any other construction of sec. 801.02(5) would render superfluous the language "under sub. (1)."

No inquiry into the intent of the legislature is necessary because it requires no more than a mere facial reading of the statute to conclude that the statute permits the use of a summons and complaint to commence a certiorari action. Reference to the legislative history of ***24** sec. 801.02, Stats., simply spotlights what already is at center stage. The legislature, when it enacted secs. 12 and 13, ch. 289, Laws of

1981, removed certain restrictive language **777 from sec. 801.02(1) (1979–80) and created ch. 781, which deals with extraordinary remedies such as certiorari. The result of the legislative action is to make extraordinary writs unnecessary and to allow extraordinary remedies to be reached via the provisions used for ordinary civil actions. Actions for "certiorari, habeas corpus, mandamus or prohibition," which previously were excluded from the summons and complaint procedure specified in sec. 801.02(1), no longer are excluded under the statute.

Expounding upon the obvious meaning of the legislature's action, the 1981 Judicial Council Notes pertaining to sec. 781.01, Stats., read as follows:

> Note: This section renders the use of the writ procedure unnecessary. It makes the remedy available by one of the extraordinary writs also available by a final judgment or a provisional remedy in an ordinary action in circuit court. This section follows the approach taken in sec. 813.01, stats., by which the injunction remedy was made available in an ordinary action, and in sec. 809.01(1), stats., by which the writ of error procedure was made the same as the procedure for appeals.

Judicial Council Note—Sec. 12, ch. 289, Laws of 1981.

With respect to sec. 801.02, Stats., the Judicial Council Notes show that:

> Note: Sub. (1) is amended to allow an action seeking an extraordinary remedy to be commenced in the same manner as any other civil action. Sub. (5) allows the additional option of using an order to shorten the time for filing a response to the complaint *25 in lieu of a summons. This option is for the emergency situation when the case may be moot before a response would be filed. The order serves the same purpose as the alternative writ and the order to show cause used to initiate the action under writ procedures. In all other matters of procedure, the rules of civil procedure govern to the extent applicable. Sub. (5) applies only to procedure in the circuit court. In seeking an extraordinary remedy in the supreme court or court of appeals, s. 809.51, stats., should be followed.

Judicial Council Note—sec. 13, ch. 289, Laws of 1981.

Thus, under the plain language of sec. 801.02(5), Stats., there are three methods by which a certiorari review "may be commenced:" (1) "under sub. (1)," by use of a summons and complaint; (2) "by service of an appropriate original writ;" or (3) "by filing a complaint ..., if service of ... the complaint and of an order ... is made upon the defendant." Clear legislative intent supports this construction.

Accordingly, the plaintiffs properly commenced an action seeking a remedy available by certiorari under sec. 801.02(5), Stats., by filing a summons and complaint pursuant to sec. 801.02(1).

The decision of the court of appeals is reversed.

All Citations

158 Wis.2d 19, 461 N.W.2d 775

Footnotes

1 In reaching its conclusion in *Nickel River Inv.*, 156 Wis.2d at 431 n. 2, 457 N.W.2d 333, the court of appeals withdrew "[its] *dictum* in *Schwochert v. Marquette County Bd.*, 132 Wis.2d 196, 201, 389 N.W.2d 841, 843 (Ct.App.1986), that 'certiorari actions may be commenced in one of two ways—by obtaining and serving an original writ or by filing and serving a complaint and an order.' " In this case, we do not reach the question of whether the language in *Schwochert* was in fact dictum or, if it was not dictum, whether the court of appeals properly could overrule what it said in *Schwochert*, because our decision is based upon our own construction of sec. 801.02, Stats.

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FILED
09-30-2024
Anna Maria Hodges
Clerk of Circuit Court
2024CV007822
Honorable Thomas J. McAdams-07
Branch 7

EXHIBIT 2

Civil enforcement and private right of action

§20510. Civil enforcement and private right of action

(a) Attorney General

The Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as is necessary to carry out this chapter.

(b) Private right of action

(1) A person who is aggrieved by a violation of this chapter may provide written notice of the violation to the chief election official of the State involved.

(2) If the violation is not corrected within 90 days after receipt of a notice under paragraph (1), or within 20 days after receipt of the notice if the violation occurred within 120 days before the date of an election for Federal office, the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation.

(3) If the violation occurred within 30 days before the date of an election for Federal office, the aggrieved person need not provide notice to the chief election official of the State under paragraph (1) before bringing a civil action under paragraph (2).

(c) Attorney's fees

In a civil action under this section, the court may allow the prevailing party (other than the United States) reasonable attorney fees, including litigation expenses, and costs.

(d) Relation to other laws

(1) The rights and remedies established by this section are in addition to all other rights and remedies provided by law, and neither the rights and remedies established by this section nor any other provision of this chapter shall supersede, restrict, or limit the application of the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.) [now 52 U.S.C. 10301 et seq.].

(2) Nothing in this chapter authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.) [now 52 U.S.C. 10301 et seq.].

(Pub. L. 103–31, §11, May 20, 1993, 107 Stat. 88 .)

Editorial Notes

References in Text

The Voting Rights Act of 1965, referred to in subsec. (d), is Pub. L. 89–110, Aug. 6, 1965, 79 Stat. 437 , which is classified generally to chapters 103 (§10301 et seq.), 105 (§10501 et seq.), and 107 (§10701 et seq.)

of this title. For complete classification of this Act to the Code, see Tables.

Codification

Section was formerly classified to section 1973gg–9 of Title 42, The Public Health and Welfare, prior to editorial reclassification and renumbering as this section.

EXHIBIT 3

312 Wis.2d 530, 2008 WI 96
Supreme Court of Wisconsin.

Jeannie HEFTY d/b/a Heft–Kat Farm, Plaintiff–Appellant,
v.
Daniel R. STRICKHOUSER, Defendant–Respondent–Petitioner,
ABC Insurance Company and ADM Alliance Nutrition Inc., Defendants.

Nos. 2006AP1094, 2006AP1956
|
Argued Jan. 15, 2008.
|
Decided July 15, 2008.

Synopsis
Background: Dairy farmer brought negligence action against company that provided nutritionist services. The Circuit Court, Walworth County, Michael S. Gibbs, J., granted company summary judgment as a sanction for farmer's noncompliance with local rule for deadline for filing summary judgment response. Farmer appealed. The Court of Appeals reversed and remanded. Company appealed.

Holdings: The Supreme Court, David T. Prosser, J., held that:

[1] trial court was not required to explain its reasoning on the record for departing from statutory deadlines for summary judgment motions, abrogating *Hunter v. AES Consultants, Ltd.*, 300 Wis.2d 213, 730 N.W.2d 184;

[2] local court rule that established time for responding to summary judgment motion that was different from time set out in statute was invalid; and

[3] trial court abused its discretion in sanctioning farmer for violating the deadline.

Affirmed.

Annette Kingsland Ziegler, J., dissented and filed opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (20)

[1] **Appeal and Error**—Statutory or legislative law
Appeal and Error—Rules of court in general
Interpretation and application of statutes and local circuit court rules are questions of law that are reviewed de novo.
11 Cases that cite this headnote

[2] **Appeal and Error**—Application of law to or in light of facts
A discretionary decision will be sustained if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.
26 Cases that cite this headnote

[3] **Costs, Fees, and Sanctions**—Mandatory duty or discretion
Costs, Fees, and Sanctions—Discretion as to type
The decision to impose sanctions and the decision of which sanctions to impose are within a circuit court's discretion.
8 Cases that cite this headnote

[4] **Trial**—Trial Dockets or Calendars in General
Wisconsin circuit courts have discretion to control their dockets. W.S.A. 802.10.
10 Cases that cite this headnote

[5] **Pretrial Procedure**—Failure to attend; sanctions
A court's discretionary sanction for violation of a

scheduling order is generally well grounded when a scheduling conference has taken place at which all interested parties were present to be heard.

6 Cases that cite this headnote

[6] **Pretrial Procedure**—Nature and conduct in general

A scheduling questionnaire may be used in place of a live conference for the sake of convenience; the questionnaire can be mailed, faxed, or e-mailed to parties and their attorneys and then returned to and filed with the court and forwarded to other parties.

[7] **Pretrial Procedure**—Nature and conduct in general

The scheduling questionnaire used by the circuit court was sufficient to satisfy statute regarding calendar practice; although the form consisted of a single sheet, it addressed many of the basic scheduling questions faced by a circuit court attempting to accommodate the potentially complex timing needs of several parties and their counsel, including such issues as joinder of parties, amendment of pleadings, the timing and length of a potential trial, the number of witnesses and expert witnesses expected to be called, the timing of discovery, the likelihood of motions for summary judgment and judgment on the pleadings, whether a jury trial was requested, and the option of alternative dispute resolution. W.S.A. 802.10(3).

1 Case that cites this headnote

[8] **Statutes**—Language

Statutory interpretation begins with the language of the statute.

2 Cases that cite this headnote

[9] **Summary Judgment**—Notice and service

By its plain language, summary judgment statute establishes a rule that a response to a motion for summary judgment is to be served at least five days before the hearing on the motion; however, a scheduling order may provide for an earlier deadline. W.S.A. 802.08(2).

2 Cases that cite this headnote

[10] **Summary Judgment**—Time for motion

Local circuit court rules may not trump the statutory deadlines for summary judgment motions. W.S.A. 802.08(2).

2 Cases that cite this headnote

[11] **Pretrial Procedure**—Order and Record or Report

A court's failure to consult with the parties before issuing a scheduling order is grounds for seeking relief from the order. W.S.A. 802.10(3).

4 Cases that cite this headnote

[12] **Pretrial Procedure**—Order and Record or Report

After a party has consulted with the court, its objections to the scheduling order, if any, should be directed to the unreasonableness or inconvenience of one or more specific deadlines in the order; the party should ask or move to have the deadline changed. W.S.A. 802.10(3).

[13] **Pretrial Procedure**—Order and Record or Report

In the absence of some specific dispute, there is no need for the court to explain scheduling decisions on the record; there is a presumption that a court is acting rationally and impartially in constructing a scheduling order, and thus, there is no need for the court to go on the record to explain the fact that it deviated from a state rule to accommodate the needs of a party or to give a party the time to file a reply brief, abrogating *Hunter v. AES Consultants, Ltd.*, 300 Wis.2d 213, 730 N.W.2d 184.

1 Case that cites this headnote

[14] **Summary Judgment**—Time for motion

Trial court was not required to explain its reasoning on the record for departing from statutory deadlines for summary judgment motions in issuing scheduling order, abrogating *Hunter v. AES Consultants, Ltd.*, 300 Wis.2d 213, 730 N.W.2d 184. W.S.A. 802.08(2).

1 Case that cites this headnote

[15] **Courts**—Operation and Effect of Rules

Local rules regarding trial court practice may not be inconsistent with state rules or statutes; they may supplement state statutes and rules, but they may not supersede state statutes and rules. W.S.A. 753.35(1).

3 Cases that cite this headnote

[16] **Summary Judgment**—Time for response

Portion of local circuit court rules that established a time for responding to a summary judgment motion that was different from the time set out in statute was invalid, and thus, circuit court's scheduling order's deadline for responding to a motion for summary judgment, which order incorporated the local rule by attachment, was also invalid. W.S.A. 802.08(2).

3 Cases that cite this headnote

[17] **Costs, Fees, and Sanctions**—Violation of court orders

A trial court has both statutory and inherent authority to sanction a party for failing to obey a court order.

5 Cases that cite this headnote

[18] **Appeal and Error**—Discretion of lower court; abuse of discretion

The circuit court's discretionary decision to sanction a party will be upheld if the court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.

27 Cases that cite this headnote

[19] **Pretrial Procedure**—Order and Record or Report

Litigants are expected to follow circuit court scheduling orders.

4 Cases that cite this headnote

[20] **Costs, Fees, and Sanctions**—Summary judgment

Although dairy farmer's counsel failed to fully review the trial court's scheduling order and the farmer's untimely submission of a summary judgment response flowed directly from that deficiency, the circuit court incorporated by attachment a void local rule into its scheduling order, and thus, the trial court abused its discretion in sanctioning farmer for violating the deadline. W.S.A. 802.08(2), 802.10(7).

1 Case that cites this headnote

Attorneys and Law Firms

****822** For the defendant-respondent-petitioner there were briefs by Paul E. Benson, Joseph Louis Olson, and Michael Best & Friedrich LLP, Milwaukee, and oral argument by Paul E. Benson and Joseph Louis Olson.

For the plaintiff-appellant there was a brief by Ward Richter, Sheila M. Sullivan, and Bell, Gierhart & Moore, S.C., Madison, and oral argument by Sheila M. Sullivan.

Opinion

¶ 1 DAVID T. PROSSER, J.

***535** This is a review of an unpublished opinion and order of the court of appeals,[1] which summarily reversed the Walworth County Circuit Court, Michael S. Gibbs, Judge.

¶ 2 The case requires us to review two discretionary decisions of the circuit court. Both decisions involve the circuit court's scheduling order, which incorporated by attachment a filing deadline for a summary judgment

response that departed from the deadline in Wis. Stat. § 802.08(2).[2] Judge Gibbs issued a scheduling order that had a then-existing Walworth County local circuit court rule appended to it. The rule required that a response to a summary judgment motion be filed and served within 20 days of service of the motion. Defendants ADM Alliance Nutrition, Inc. (Alliance) and ***536** Daniel Strickhouser[1] filed a motion for summary judgment in accord with the court's scheduling order, but plaintiff Jeannie Hefty (Hefty) filed and served her response to the motion after the deadline. As a result, the court struck her response, dismissed her complaint with prejudice, and granted summary judgment ****823** to Strickhouser as a sanction for noncompliance. Hefty appealed.

¶ 3 The court of appeals reversed, concluding that the circuit court did not properly exercise its discretion when it failed to demonstrate on the record why deviation from the deadline of Wis. Stat. § 802.08(2) was necessary and appropriate, as required by the court of appeals' recent decision in *Hunter v. AES Consultants, Ltd.*, 2007 WI App 42, ¶ 15, 300 Wis.2d 213, 730 N.W.2d 184 (holding that "with regard to scheduling orders, trial courts that deviate from the statutory time requirements for responding to a motion for summary judgment should explain on the record why that deviation is necessary and appropriate").

¶ 4 We are asked to determine whether the circuit court properly exercised its discretion when it: (1) issued a scheduling order with deadlines different from Wis. Stat. § 802.08(2) without expressly indicating its reasoning on the record; and (2) sanctioned Hefty for failing to comply with the scheduling order by striking her response, which ultimately resulted in the dismissal of her suit with prejudice and summary judgment to Strickhouser.

¶ 5 We affirm the decision of the court of appeals, but on different grounds. The circuit court was not ***537** required to demonstrate on the record why its scheduling order deviated from § 802.08(2) to properly exercise its scheduling discretion under Wis. Stat. § 802.10. However, the circuit court erroneously exercised its discretion by entering a scheduling order that incorporated a void local rule and by striking Hefty's response as a sanction for untimely filing, which ultimately resulted in dismissal of her complaint with prejudice and summary judgment to Strickhouser. Accordingly, we affirm and remand.

I. BACKGROUND

¶ 6 The facts giving rise to the underlying civil suit have little to do with the issues before us. Nonetheless, they provide context and reveal the stakes involved in this procedural dispute.

¶ 7 Hefty owns a dairy farm in Elkhorn. In 2000 she entered into a contract with defendant Alliance through its disclosed agent, Daniel Strickhouser, who was to provide services to Hefty as a dairy cow nutritionist. Hefty engaged Mr. Strickhouser in this capacity for approximately two years. His advice regarding the management and control of feed and silage initially resulted in a large increase in milk production for Hefty's herd. In November 2002, however, milk production fell, allegedly due to Mr. Strickhouser's rationing of food and other nutrients. Hefty was forced to stop milking some of her herd to allow it to regain the strength and health necessary to maintain consistent milk production. Because of this decreased milking, Hefty allegedly suffered financial losses.

¶ 8 On February 3, 2004, Hefty sued Mr. Strickhouser and Archer–Daniels–Midland Company (ADM), Alliance's parent company, asserting a cause of action ***538** for negligence in providing dairy nutritionist services. On July 14, 2005, Hefty amended the complaint to assert causes of action for negligence, negligent misrepresentation, strict responsibility misrepresentation, intentional deceit misrepresentation, and breach of contract against Daniel Strickhouser, ADM, and Alliance. The circuit court dismissed all causes of action against ADM and dismissed Hefty's breach of contract claim against Mr. Strickhouser. Alliance remained a defendant to all five causes of action in the amended complaint.

¶ 9 On July 19, 2005, Walworth County Circuit Judge James L. Carlson sent counsel for the parties an order for scheduling information under Wis. Stat. § 802.10(3).[4] ****824** The order included a scheduling questionnaire that was to be completed by the parties and returned to the clerk of courts, who would then send copies to all the parties. The order

stated that "answers [to the questionnaire] will be referred to by the court in the setting of the time and date requirements mentioned in Wis. [Stat. §]802.10(3)(a)." The questionnaire included the question: "Do you intend to file a motion ***539** for judgment on the pleading under Wis. Stats. 802.03 or for summary judgment under Wis. Stats. 802.08? Yes No If yes, specify: _____".

¶ 10 Counsel for Strickhouser indicated on the completed form that he intended to file a motion for summary judgment by circling "Yes" and specifying "[m]otion for summary judgment" in the blank space.

¶ 11 On August 3, 2005, Judge Gibbs entered a scheduling order, which was forwarded to counsel for the parties. The order[5] included several deadlines related to the case, including one for filing a motion for summary judgment. The order indicated that a "[m]otion for judgment on pleadings/summary judgment must be filed by *02/01/2006.*" Below this language, the following appears: "*(SEE ATTACHED SHEET FOR MOTION PROC[E]DURE)* ". The sheet attached to the scheduling order was part of then-existing Walworth County local circuit court rules. The attached rule was entitled "Standard Summary Judgment Procedure." The fourth of seven points in the rule read:

> 4. Upon service of the motion for summary judgment, within 20 days, any party opposing a pending motion shall serve and file:
>
> a. A response to the moving party's Proposed Undisputed Facts[,] and
>
> ***540** b. A response to the moving party's Proposed Conclusions of Law, and
>
> c. A brief in opposition to the motion for summary judgment, and
>
> d. Any supporting papers, pursuant to sec. 802.08(3), Wis. Stats. that the party chooses to submit.

¶ 12 The scheduling order stated that "[f]ailure to abide by this scheduling order may result in sanctions being imposed—See [Wis. Stat. §§] 802.10(3)(d); 805.03; 802.10(7) and [Wis. Stat. ch.] 785."

¶ 13 The record reflects that the parties exchanged barbs early in this litigation. In a filing opposing Hefty's motion for leave to amend her first complaint, Strickhouser alleged that Hefty failed to provide the court or the defendants with a copy of the amended complaint. In August 2005 Hefty filed a motion for sanctions against Strickhouser for failure to comply with discovery requests under Wis. Stat. § 804.12. In September 2005 Strickhouser ****825** filed a response opposing this motion and alleging that Hefty was similarly delinquent in meeting discovery deadlines. As noted above, Strickhouser was successful in moving the court to dismiss portions of Hefty's amended complaint.

¶ 14 On February 1, 2006, Strickhouser filed a motion for summary judgment, which was served on Hefty via regular mail on February 6, 2006. The notice of motion provided to Hefty indicated that the motion would be heard by Judge Gibbs on March 13, 2006. Pursuant to the rule attached to Judge Gibbs' August 3, 2005, scheduling order, Hefty's response to the defendants' motion for summary judgment was due to be filed and served 20 days after service, namely, by March ***541** 1, 2006.[6] Hefty filed her response to Strickhouser's motion for summary judgment on March 6, 2006. She served it on Strickhouser via facsimile at 5:58 p.m. that day.

¶ 15 On March 9 Strickhouser filed a motion to strike Hefty's untimely summary judgment response papers.

¶ 16 On March 13 Judge Gibbs held a hearing regarding Strickhouser's motions to strike Hefty's response papers and for summary judgment. At the hearing, counsel for Hefty indicated that he "simply followed [Wis. Stat. § 802.08(2)]" when he determined that the date he filed and served the response was timely. Judge Gibbs then commented that the "scheduling order dated August 3, 2005, has attached to it and very specifically outlines standard summary judgment procedures" including that a "response to the motion for summary judgment must be filed within twenty days." Judge Gibbs also stated:

> ***542** We don't write [scheduling orders] for fun. We don't write these for our health. We write these to be followed. There's a slight trend that I've noticed lately. People don't follow scheduling orders and basically their arguments [are], well, nobody got hurt. Well, that's not the

> reason we do it. We do it for orderly administration of justice and this is clearly beyond the time of the—beyond the twenty days. It's thirty-eight days, roughly. [7] Well, with February in there, it's not quite so tight, but, ah, even still, I question whether it was five business days even, which is what the statute is going to require being scheduled for the 13th.

¶ 17 Judge Gibbs then orally struck Hefty's summary judgment response papers and granted summary judgment to Strickhouser. Judge Gibbs stated that "based on the failure to respond to [Strickhouser's motion], I will find that Defendants are entitled to summary judgment as a matter of law." In doing so, the circuit court refused to consider oral argument ****826** presented by counsel for Hefty addressing disputed issues of material fact with regard to her claims. The court's decision was preceded by the following colloquy between Hefty's counsel and Judge Gibbs:

> COUNSEL: Your Honor, would you accept oral argument at this time in regards to [Strickhouser's] motion for summary judgment in light of the fact that you disregarded our paperwork? I mean, ah, because the statute does allow for oral argument on summary judgment motions.
>
> ***543** THE COURT: Okay. So you want me to consider what? Everything that you would have submitted in writing? That's your response.
>
> COUNSEL: I would certainly like a chance to make an argument regarding their motions in light of the fact that the Court isn't going to consider our paperwork.
>
> THE COURT: Well, what does that do? That just gives you the right to basically read your paperwork into the record.
>
> COUNSEL: I have no intention of reading my entire paperwork into the record, but, Your Honor, the statute does [ ] allow for oral argument and I would ask the Court for an opportunity to do that....

¶ 18 Hefty's counsel proceeded to argue that genuine issues of material fact remained and that summary judgment was therefore inappropriate. Judge Gibbs responded: "I'm going to refer you to the local rules, paragraph 4, under Standard Summary Judgment Procedures, which is a special attachment." The court then read the local rule at issue, which had been appended to the scheduling order, and concluded by saying, "[f]ailure to comply with these rules has left me with no factual issue to consider. And I will grant summary judgment as requested finding there is no genuine issue of material fact that's been presented to me and that Defendants are entitled to judgment as a matter of law."

¶ 19 The court's March 13 oral ruling was formalized in a March 29 written order granting Strickhouser's motions to strike and for summary judgment, adopting Strickhouser's proposed findings of fact and conclusions of law, and dismissing Hefty's complaint with prejudice.

***544** ¶ 20 On March 21 Hefty filed three motions: (1) a motion for enlargement of time to file a response to Strickhouser's motion for summary judgment; (2) a motion for relief from Judge Gibbs' March 13 order granting summary judgment to Strickhouser; and (3) a motion for reconsideration. Hefty's counsel filed an affidavit in support of the first two motions, in which he stated that he was "aware that [the] Walworth County Circuit Court Rules for civil actions, in particular ¶ 2B Pretrial and Motion Proceedings, require a response to a motion in a civil case to be filed five days before the date of the motion hearing." His affidavit also stated:

> Although I had in my file a copy of the Court's scheduling order, which required motions for summary judgment to be filed by February 1, 2006, I failed to fully review the notice accompanying that scheduling order entitled "STANDARD SUMMARY JUDGMENT PROCEDURE." Thus, I did not realize that the Court's standard procedure required any opposition to the defendants' pending motion to be filed within 20 days.

¶ 21 On April 7 Judge Gibbs held a hearing to address Hefty's March 21 motions. At the hearing Judge Gibbs denied Hefty's three motions and reiterated that his scheduling order was "not put out for [his] health" and that it was issued "to insure the order of the operation of the Court." A written order was entered on ****827** April 17 denying Hefty's three March 21 motions.

¶ 22 On May 2 Hefty filed a notice of appeal, No.2006AP1094, which appealed the circuit court's March 29 and April 17 orders.

¶ 23 On May 10 Judge Gibbs ordered judgment in favor of Strickhouser. On June 12 Hefty filed three additional motions, all related to the circuit court's May 10 judgment: (1) a motion for reconsideration; (2) a ***545** motion for relief from judgment; and (3) a motion for enlargement of time to respond to Strickhouser's motion for summary judgment. On July 21 the circuit court denied Hefty's three June 12 motions.

¶ 24 On August 8 Hefty filed a second notice of appeal, No.2006AP1956, to challenge the circuit court's May 10 and July 21 orders. The court of appeals consolidated the appeals on August 16, 2006.

¶ 25 On May 23, 2007, the court of appeals issued an unpublished opinion and order reversing summary judgment in favor of Strickhouser and remanding Hefty's case to the circuit court. The court of appeals relied upon its recent decision in *Hunter* to support its conclusion that the circuit court erred in imposing a scheduling order at variance with Wis. Stat. § 802.08 without a demonstrable exercise of discretion.

¶ 26 Strickhouser petitioned this court for review, which we granted on September 13, 2007.

II. STANDARD OF REVIEW

[1] ¶ 27 This case involves the interpretation and application of statutes and local circuit court rules, which are questions of law we review de novo. *State v. Sorenson,* 2000 WI 43, ¶ 15, 234 Wis.2d 648, 611 N.W.2d 240.

[2] [3] ¶ 28 This case also involves a circuit court's discretionary decisions to control its docket through a scheduling order, and to impose sanctions for an untimely filing in response to that order. "A discretionary decision will be sustained if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a ***546** conclusion that a reasonable judge could reach." *Johnson v. Allis Chalmers Corp.,* 162 Wis.2d 261, 273, 470 N.W.2d 859 (1991) (citing *Loy v. Bunderson,* 107 Wis.2d 400, 414–15, 320 N.W.2d 175 (1982)). "The decision to impose sanctions and the decision of which sanctions to impose ... are within a circuit court's discretion." *Indus. Roofing Servs., Inc. v. Marquardt,* 2007 WI 19, ¶ 41, 299 Wis.2d 81, 726 N.W.2d 898 (plurality opinion) (citation omitted); *see also Sentry Ins. v. Davis,* 2001 WI App 203, ¶ 19, 247 Wis.2d 501, 634 N.W.2d 553.

III. ANALYSIS

¶ 29 This case requires us to explore the limits of circuit court discretion to manage the court's calendar. It implicates scheduling orders, procedural statutes, local court rules, and sanctions for noncompliance. The critical importance of circuit court discretion is pitted against other compelling considerations.

¶ 30 Two discretionary decisions of the circuit court are at issue. The first is the circuit court's decision to enter a scheduling order that included summary judgment deadlines for filing and service. This decision is largely governed by Wis. Stat. §§ 802.10 and 802.08(2). The second is the circuit court's sanction for violating the terms of its scheduling order, namely, the striking of Hefty's late response, which ultimately led to dismissal of her suit with prejudice and the grant of summary judgment to the defendants. Sanctions for violation of a circuit court's scheduling order are provided by Wis. Stat. § 802.10(7).

A. Wisconsin Stat. § 802.10

828 [4] ¶ 31 Wisconsin circuit courts have discretion to control their dockets. This power is inherent to their ***547 function.[8] It is also granted by statute. Wisconsin Stat. § 802.10 addresses "calendar practice" and provides that a circuit court "may enter a scheduling order on the court's own motion or on the motion of a party." Wis. Stat. § 802.10 (3). "The order shall be entered after the court consults with the attorneys for the parties and any unrepresented party." *Id.* By its terms, the statute requires that the circuit court engage in some type of consultation before entering a scheduling order, although it does not define consultation or specify methodology. Once the court has satisfied the consultation

requirement, its scheduling order may address, as pertinent here, both "[t]he time to file motions" and "[t]he appropriateness and timing of summary judgment adjudication under s. 802.08," Wis. Stat. § 802.10(3)(c), (3)(h).

¶ 32 Circuit courts engage in various types of consultation under Wis. Stat. § 802.10(3). The primary example is a scheduling conference,[9] which differs from ***548 ****829** the pretrial conference outlined in § 802.10(5).[10] A pretrial conference allows the court to " consider any ***549** matter that facilitates the just, speedy and inexpensive disposition of the action, including the matters under [Wis. Stat. § 802.10 (3)]." Wis. Stat. § 802.10(5). The scheduling conference is essentially a "pre-pretrial" conference. *See* Judicial Council Committee's Note, 1974, § 802.10, Stats.

[5] ¶ 33 Scheduling conferences, although often informal and conducted off the record,[11] provide parties the occasion to impact the court's scheduling of their litigation. At the conference, parties can object to scheduling decisions that are viewed as inconvenient or unfair. Scheduling becomes a collaborative process.[12] In addition, the scheduling conference is likely to provide justification for future sanction if explicit, negotiated, and amicable deadlines are breached. An attorney who has knowledge of deadlines because of active participation in a scheduling conference will have little excuse for tardiness and cannot reasonably claim ignorance. A court's discretionary sanction for violation of a scheduling order is generally well grounded when a scheduling ***550** conference has taken place at which all interested parties were present to be heard.

[6] ¶ 34 A scheduling questionnaire is another form of circuit court consultation for devising scheduling deadlines. A questionnaire may be used in place of a live conference (whether in person, by telephone, or by other electronic means) for the sake of convenience. The questionnaire can be mailed, faxed, or e-mailed to parties and their attorneys and then returned to and filed with the court and forwarded to other parties.

¶ 35 A scheduling questionnaire was used here. An order for scheduling information[13] and a scheduling questionnaire were mailed to attorneys for the parties on July 19, 2005. The order for scheduling information was entered by Judge Carlson, not Judge Gibbs. The parties' attorneys completed the questionnaire, and it was filed in circuit court. Judge Gibbs then entered a scheduling order on August 3, 2005. The record is silent with regard to the judge's consideration of the completed questionnaires, but we infer that Judge Gibbs considered the questionnaires inasmuch as the scheduling order set a deadline of February 1, 2006, for a motion for summary judgment. Strickhouser's completed questionnaire had indicated that he intended to file a motion for summary judgment.

¶ 36 Hefty argues that the circuit court failed to properly "consult" with the parties before entering its scheduling order, as the scheduling questionnaire "can hardly ****830** be considered an adequate consultation as that ***551** process is contemplated in [Wis. Stat. § 802.10(3)]." Hefty asserts that the questionnaire used was "preprinted" and "gave the parties no opportunity to address the [scheduling] issues in any depth."

[7] ¶ 37 We disagree. The scheduling questionnaire used by the circuit court was sufficient to satisfy Wis. Stat. § 802.10(3). The form was a convenient means to ascertain important scheduling information. Although the form consisted of a single sheet, it addressed many of the basic scheduling questions faced by a circuit court attempting to accommodate the potentially complex timing needs of several parties and their counsel. The form addressed such issues as joinder of parties, amendment of pleadings, the timing and length of a potential trial, the number of witnesses and expert witnesses expected to be called, the timing of discovery, the likelihood of motions for summary judgment and judgment on the pleadings, whether a jury trial is requested, and the option of alternative dispute resolution. Importantly, the form added: "[l]ist any other information pertinent to scheduling (for instance, times when you or key witnesses will not be available for trial due to vacations, etc.)" followed by three blank lines.

¶ 38 Hefty's counsel filled in these blank lines with numerous dates that were inconvenient because of other obligations. Hefty cannot now argue that the circuit court failed to properly consult with her in entering its scheduling order when: (1) the court ordered her to submit a scheduling questionnaire; (2) her counsel did so, even volunteering additional information to the court outside of the "standard"

yes-or-no answers on the form; and (3) the court used the questionnaire to fashion its scheduling order. The form stated that "[t]he answers [to the questionnaire] will be ***552** referred to by the court in the setting of the time and date requirements mentioned in Wis. [Stat. §] 802.10(3)(a)." We find no erroneous exercise of discretion in the circuit court employing a scheduling questionnaire to create its scheduling order. We perceive no attempt in the questionnaire to limit input from the parties.

B. Wisconsin Stat. § 802.08(2)

¶ 39 This brings us to the validity of the scheduling order. Judge Gibbs entered a scheduling order which attached a portion of the Walworth County Circuit Court Rules—Civil, relating to "Standard Summary Judgment Procedure." The attachment reads in part: "Upon service of the motion for summary judgment, within 20 days, any party opposing a pending motion shall serve and file: [responsive materials]."

¶ 40 Hefty's counsel admittedly did not adhere to the 20 day filing and service deadline in this local rule.[14] Hefty argues, however, that the circuit court erroneously exercised its discretion by entering a scheduling order that departed from the deadlines in Wis. Stat. § 802.08 without demonstrating reasons for the departure on the record. *See Hunter,* 300 Wis.2d 213, ¶ 15, 730 N.W.2d 184 ("[T]rial courts that deviate from the statutory time requirements for responding to a motion for summary judgment should explain on the record why that deviation is necessary and appropriate.").

¶ 41 Wisconsin Stat. § 802.08(2) provides in pertinent part: "Motion. *Unless earlier times are specified* ***553** *in the scheduling order,* the [summary judgment] motion shall ****831** be served at least 20 days before the time fixed for the hearing and *the adverse party shall serve opposing affidavits, if any, at least 5 days before the time fixed for the hearing.*" (Emphasis added.)

[8] [9] ¶ 42 Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Cir. Ct. for Dane County,* 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110. By its plain language, Wis. Stat. § 802.08(2) establishes a rule that a response[15] to a motion for summary judgment is to be served at least five days before the hearing on the motion. *However,* a scheduling order may provide for an earlier deadline.

¶ 43 Wisconsin Stat. § 802.08 ("Summary judgment") was created by supreme court order, effective January 1, 1976. S.Ct. Order, 67 Wis.2d 585, 630 (effective Jan. 1, 1976). It has since been amended several times. The "[u]nless earlier times are specified in the scheduling order" language was added in 1992 as part of an overhaul of the statute. *See* S.Ct. Order, 168 Wis.2d xxi, xxi-xxiii (effective July 1, 1992).

¶ 44 Prior to 1992, Wis. Stat. § 802.08(2) read in part: "The [summary judgment] motion shall be served at least 20 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits." Wis. Stat. § 802.08(2) (1989–90). ***554** In practice, this rule proved to be unfair because the nonmovant could serve opposing affidavits the day before the hearing, giving the court and the movant minimal notice and opportunity to prepare. In response, "a plethora of local court rules resulted." Judicial Council Note, 1992, § 802.08, Stats. (citing *Cmty. Newspapers, Inc. v. City of West Allis,* 158 Wis.2d 28, 461 N.W.2d 785 (Ct.App.1990)). The problem was that these local rules created a serious lack of uniformity. To remedy the situation, this court acted by amending § 802.08 to its current form. The court made the change to "preclude such local rules and promote uniformity of practice." Judicial Council Note, 1992, § 802.08, Stats.[16]

¶ 45 Significantly, however, the court's 1992 amendment added the "[u]nless earlier times are specified in the scheduling order" provision to Wis. Stat. § 802.08. S.Ct. Order, 168 Wis.2d xxi, xxii (effective July 1, 1992). Thus, the statute's plain language and the Judicial Council Note indicate that *scheduling orders* may trump Wis. Stat. § 802.08(2). Judicial Council Note, 1992, § 802.08, Stats. ("Courts may require earlier filing by scheduling orders, however.").

[10] ¶ 46 By contrast, local circuit court rules may not trump the deadlines in Wis. Stat. § 802.08(2). This principle is undisputed. *See, e.g., David Christensen Trucking & Excavating, Inc. v. Mehdian,* 2006 WI App 254, ¶ 13, 297 Wis.2d 765, 726 N.W.2d 689 (holding that a Marathon County local circuit court rule could not trump the deadlines of Wis. Stat. § 802.08(2)); ***555** *Ricco v. Riva,* 2003 WI App

182, ¶¶ 25–26, 266 Wis.2d 696, 669 N.W.2d 193 (holding that the filing of an opposing affidavit was timely under Wis. Stat. § 802.08(2), even though it did not satisfy ****832** a conflicting Waukesha County local circuit court rule).

¶ 47 The difference between cases like *David Christensen* and *Ricco* and this case is that in this case we evaluate a scheduling order that implicitly incorporates a deadline from a local court rule, not a local court rule standing alone. The question is whether this difference is significant enough to change the outcome.

¶ 48 Recognizing that a scheduling order's deadlines may supersede statutory deadlines, Hefty contends that the circuit court must explain on the record why its scheduling order deviates from Wis. Stat. § 802.08(2). She relies on *Hunter,* where the court of appeals stated:

> [W]e hold that, with regard to scheduling orders, trial courts that deviate from the statutory time requirements for responding to a motion for summary judgment should explain on the record why that deviation is necessary and appropriate. We appreciate that this places a burden on trial courts, but without this requirement courts could make an end-run around § 802.08(2) and continue to enforce local rules through their scheduling orders.

Hunter, 300 Wis.2d 213, ¶ 15, 730 N.W.2d 184.

¶ 49 We note that the language quoted above includes the word "should." *Id.* One might attempt to focus on this word and rationalize that the court of appeals' holding in *Hunter* is merely aspirational. However, such an effort would be disingenuous. In the present case, the court of appeals said:

> In *Hunter,* we pointed out that Wis. Stat. § 802.08(2) grants courts the authority "to adjust the ***556** time requirements for filing responsive materials *to suit the particulars of each case* through their own scheduling orders." *Hunter,* 2007 WI App 42, ¶ 42 [300 Wis.2d 213, 730 N.W.2d 184] (emphasis added). From this, we concluded that "when a trial court enters a scheduling order, it may, in the sound exercise of its discretion, deviate from the requirements of § 802.08(2) 'for cause shown and upon just terms.' " *Hunter,* 2007 WI App 42, ¶ 14 [300 Wis.2d 213, 730 N.W.2d 184] (citing § 802.08(2)).

Hefty, Nos.2006AP1094 & 2006AP1956, unpublished order. Thus, we are confronted head-on with the question of what explanations are required of a circuit court when it exercises its discretion, in a scheduling order, to depart from the deadlines in state law. Must the circuit court "explain on the record why" a deviation from the deadline in state law is "necessary and appropriate"? *Hunter,* 300 Wis.2d 213, ¶ 15, 730 N.W.2d 184.

¶ 50 We think not. The language from *Hunter* requiring a trial court to explain on the record why it has deviated from the scheduling deadlines in Wis. Stat. § 802.08(2) is hereby withdrawn.

[11] [12] ¶ 51 As noted above, the circuit court has authority to enter scheduling orders "after the court consults with the attorneys for the parties and any unrepresented party." Wis. Stat. § 802.10(3). A court's failure to "consult" with the parties before issuing a scheduling order is grounds for seeking relief from the order. But after a party has consulted with the court, its objections to the order, if any, should be directed to the unreasonableness or inconvenience of one or more specific deadlines in the order. The party should ask or move to have the deadline changed.

¶ 52 Many scheduling orders come out of a scheduling conference at which the interested parties are ***557** present and participating. Most of these conferences are informal and off the record. In an atmosphere of accommodation and agreement, there is no discernible need to go on the record to ****833** explain scheduling decisions that are not in complete conformity with state law.

[13] ¶ 53 A party who simply disagrees with a scheduling order from the outset or who later encounters changed circumstances may move the court for relief from the order. The court's response to such a motion will normally require explanation, especially if the motion is not granted. In the absence of some specific dispute, however, we see no need for the court to explain scheduling decisions on the record. There is surely a presumption that a court is acting rationally and impartially in constructing a scheduling order. There is no need for the court to go on the record to explain the fact

that it deviated from a state rule to accommodate the needs of party A or to give party B the time to file a reply brief. The time for the court to explain a scheduling decision is when it must resolve a dispute. Ideally, the court should be given the opportunity to explain its order or change its order *before* the order is violated.

[14] ¶ 54 In this case, the record does not indicate why the scheduling order departed from Wis. Stat. § 802.08(2) at the time the order was issued. In other words, Judge Gibbs did not explain in August 2005 the reasons why he chose specific dates for the procedural deadlines in the order. This is not unusual for a discretionary scheduling decision, which is not typically made on the record. The lack of a record for the court's decision is not fatal. *See Kustelski v. Taylor,* 2003 WI App 194, ¶ 16, 266 Wis.2d 940, 669 N.W.2d 780 ***558** ("[W]here a court fails to articulate the basis for a discretionary decision, [the reviewing] court may independently review the record to determine whether a proper basis exists."); *State v. Pharr,* 115 Wis.2d 334, 343, 340 N.W.2d 498 (1983).

¶ 55 If we had to go through an independent review, we would point to several factors. First, the order for scheduling information alerts the parties that the answers in the scheduling questionnaire "will be referred to by the court in the setting of the time and date requirements mentioned in Wis. [Stat. §] 802.10(3)(a)." Second, the scheduling order itself states that pursuant to the provisions of Wis. Stat. § 802.10(3)(c) "and upon information provided by the parties," the court orders the following. Third, the rule attached to the order provides for the filing of a reply brief, a contingency not mentioned in Wis. Stat. § 802.08(2). Finally, in hearings subsequent to Hefty's delinquency, the court relied on the "orderly administration of justice" and "order of the operation of the [c]ourt."

¶ 56 Hence, we do not fault the court for issuing a scheduling order that departed from the deadline in Wis. Stat. § 802.08(2) without explaining its reasoning on the record.

¶ 57 This, however, does not settle the issue. In *Hunter,* the court of appeals held that the circuit court erroneously relied on a local rule to reject the Hunters' affidavits as tardy. *Hunter,* 300 Wis.2d 213, ¶ 12, 730 N.W.2d 184. The court said:

> [T]he court's time requirements are not spelled out *in the scheduling order itself.* Rather, the time requirements are laid out in an attachment to the order entitled "Standard Summary Judgment Procedure" ***559** that is a nearly verbatim recitation of the Walworth County Circuit Court Rules. Therefore, *the scheduling order, via the attachment, simply enforces the local rules.* Again, these rules are precluded as being in conflict with the uniform rule contained in Wis. Stat. § 802.08(2).

Id., ¶ 13 (emphasis added).

¶ 58 These passages raise questions about the validity of the local rule and the validity of a scheduling order that relies on that local rule.

****834** [15] ¶ 59 A circuit court has the authority to "adopt and amend rules governing practice in that court that are consistent with rules adopted under s. 751.12 and statutes relating to pleading, practice, and procedure." Wis. Stat. § 753.35(1). The clear implication of this statute is that *local rules may not be inconsistent with state rules or statutes.* They may supplement state statutes and rules, but they may not supersede state statutes and rules.

¶ 60 Wisconsin Stat. § 802.08 is the most prominent example of this tension. Once again, this statute was amended in 1992 in response to "a plethora of local court rules" concerning deadlines related to summary judgment. *Phelps v. Physicians Ins. Co. of Wis., Inc.,* 2005 WI 85, ¶ 77, 282 Wis.2d 69, 698 N.W.2d 643 (Prosser, J., concurring in part, dissenting in part) (quoting Judicial Council Note, 1992, § 802.08, Stats.). "The court made the change to '*preclude such local rules* and promote uniformity of practice.' " *Id.* (quoting Judicial Council Note, 1992, § 802.08, Stats.) (emphasis added).

¶ 61 In 2003 the court of appeals in *Ricco* had addressed the same Judicial Council note. *Ricco,* 266 Wis.2d 696, ¶ 25, 669 N.W.2d 193. The court stated: "Wis. Stat. § 802.08(2), *not the local rule,* governs this issue [late ***560** filing]. The Wantz affidavit was timely." *Id.,* ¶ 26 (emphasis added).

¶ 62 In 2006 the court of appeals in *David Christensen* held that "Marathon County *local rule* 4.20(1)(b) *is precluded* as

being in conflict with the uniform rule contained in Wis. Stat. § 802.08(2)." *David Christensen,* 297 Wis.2d 765, ¶ 13, 726 N.W.2d 689 (emphasis added).

¶ 63 *Ricco* and *David Christensen* help explain why the *Hunter* court wanted circuit courts to explain deviations from Wis. Stat. § 802.08(2) on the record. The court of appeals did not want circuit courts to make "end-run [s]" around § 802.08(2) by enforcing invalid local rules through scheduling orders. *Hunter,* 300 Wis.2d 213, ¶ 15, 730 N.W.2d 184. This is why the court of appeals determined that the scheduling order in the *Hunter* case "simply enforces the local rules." *Id.,* ¶ 13.

[16] ¶ 64 We conclude that the portion of the Walworth County Circuit Court Rules—Civil that establishes a time for responding to a summary judgment motion that is different from the time set out in Wis. Stat. § 802.08(2) is invalid. We need not rely solely on *Ricco*, *David Christensen*, and *Hunter* for this conclusion. The Walworth County Circuit Court Rules, as revised in February 2006, themselves state, under the heading "Adoption/Amendment of Court Rules," that: "These rules ... are intended to supplement state statutes and Supreme Court Rules, and if in conflict therewith, *shall be deemed void.*" (Emphasis added.)

¶ 65 Because the court's scheduling order attempted to apply a void rule by attaching it to the order, the scheduling order's deadline for responding to a motion for summary judgment was invalid.

¶ 66 It is important to note that the circuit court could have imposed the same 20–day time frame for ***561** responding to a summary judgment motion by specifying the response time "*in the scheduling order itself.*" *Hunter,* 300 Wis.2d 213, ¶ 13, 730 N.W.2d 184. If the court had entered a notation on the face of the scheduling order that "materials opposing the motion for summary judgment shall be filed within 20 days after the motion is served," or words to that effect, the scheduling order would likely have been upheld.

¶ 67 We have no reservations in requiring that a response time different from the response time in Wis. Stat. § 802.08(2) be specified in the scheduling order, directly below the deadline for filing a motion for ****835** summary judgment. This requirement complies with a literal reading of Wis. Stat. § 802.08(2): "Unless earlier times are specified in the scheduling order." Placement of the response time in the text of the scheduling order gives the clearest possible notice to the non-movant so that the non-movant can seek relief from the scheduling order promptly if the time to respond is deemed inadequate. This placement avoids the necessity of the non-movant poring over an elaborate local rule to find three key words: "within 20 days." This placement also severs the court's scheduling date from a local rule that may be invalid.

¶ 68 In Walworth County's case, there are at least two additional reasons why the response deadline should be specified in the text of the scheduling order. Walworth County's rules have been and still are internally inconsistent with respect to summary judgment motions. *Compare* Walworth Cty. Ct. R. 2. B. *with* Walworth Cty. Ct. R. 2. F. 4.[17] Moreover, Walworth County amended its ***562** rules again in May 2007, so that rule 2. F. 4. now provides only "five (5) days" to respond to a motion for summary judgment. We suspect that on occasion a party may seek additional time to respond and will ask that the additional time be specified in the scheduling order.

¶ 69 To sum up, the circuit court properly exercised its discretion in entering a scheduling order that sought to set a 20 day time period for responding to a summary judgment motion. However, the circuit court erroneously exercised its discretion by relying on a void local rule to establish the time to respond and by failing to specify its time "in the scheduling order itself." *Hunter,* 300 Wis.2d 213, ¶ 13, 730 N.W.2d 184.

C. Sanction

¶ 70 This brings us to the circuit court's exercise of discretion in sanctioning Hefty by striking her summary judgment response, which ultimately resulted in dismissal of her complaint with prejudice and granting of summary judgment to Strickhouser.

[17] [18] ¶ 71 It is well established that a trial court has both statutory and inherent authority to sanction a party for failing to obey a court order. *See Johnson,* 162 Wis.2d at 273–74, 470 N.W.2d 859; *Belich v. Szymaszek,* 224 Wis.2d 419, 428, 592 N.W.2d 254 (Ct.App.1999). The circuit court's

discretionary decision to sanction a party will be upheld if the court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Indus. Roofing,* 299 Wis.2d 81, ¶ 41, 726 N.W.2d 898 (citing *Johnson,* 162 Wis.2d at 273, 470 N.W.2d 859). The question is not whether this court would have ***563** granted the same sanction if it had decided the original matter; it is whether the circuit court erroneously exercised its discretion when it made its decision. *See Johnson,* 162 Wis.2d at 273, 470 N.W.2d 859 (citing *Nat'l Hockey League v. Metro. Hockey Club,* 427 U.S. 639, 642, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976)).

¶ 72 Violations of a circuit court's scheduling order are governed by Wis. Stat. § 802.10(7). Wisconsin Stat. § 802.10(7) provides: "Sanctions. Violations of a scheduling or pretrial order are subject to [Wis. Stat. §§] 802.05, 804.12 and 805.03." Section 805.03 permits discretionary sanctions and reads:

> ****836** For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a).

¶ 73 Wisconsin Stat. § 805.03 is based on Federal Rule of Civil Procedure 41(b), and replaced former Wis. Stat. § 269.25. Judicial Council Committee's Note, 1974, § 805.03, Stats. Section 805.03 permits strong sanctions for three kinds of dilatory and evasive tactics: (1) failure to prosecute; (2) failure to comply with procedure statutes; and (3) failure to comply with any court order. 3A Jay E. Grenig, Wisconsin Practice: Civil Procedure § 503.1, at 12 (West, 3d ed. 2003).

¶ 74 Under Wis. Stat. § 805.03, a court may make such orders "as are just," including dismissal of actions or entry of default judgment, where a party fails to obey any court order. Wis. Stat. § 805.03; *see* 3 Jay E. Grenig, *Wisconsin Practice: Civil Procedure,* § 210.7, at 376 (West, 3d ed. 2003).

***564** ¶ 75 The circuit court sanctioned Hefty by granting Strickhouser's motion to strike Hefty's response. It is clear from the record that the impetus for the circuit court's sanction was Hefty's untimely response. The court commented during the April 7 motion hearing that it did not rule on the merits of Strickhouser's summary judgment motion because it was instead ruling on procedural grounds, namely, the untimely filing.

[19] ¶ 76 Litigants are expected to follow circuit court scheduling orders. Failure to do so is subject to sanction at the discretion of the circuit court. Wis. Stat. § 802.10(7); *Indus. Roofing,* 299 Wis.2d 81, ¶ 41, 726 N.W.2d 898. We acknowledge that a circuit court has broad discretion to sanction a party for the failure to comply with a court order, including a scheduling order. *See Johnson,* 162 Wis.2d at 273, 470 N.W.2d 859. There is no question that Hefty's counsel failed to fully review the court's scheduling order and that Hefty's untimely submission flowed directly from that deficiency. Failure to fully review the scheduling order prevented Hefty from either challenging or complying with the order, instead of violating it.

[20] ¶ 77 Nonetheless, as we concluded above, the circuit court incorporated, by attachment, a void local rule into its scheduling order. The fact that the court's sanction was premised upon the violation of a deadline based upon a void local rule indicates that the court applied an improper standard of law. Consequently, we cannot sustain the circuit court's sanction because it constituted an erroneous exercise of discretion.

¶ 78 Overturning the circuit court's sanction on the circuit court's error of law obviates any need to review whether the sanction was "just" under Wis. Stat. § 805.03.

***565** III. CONCLUSION

¶ 79 We affirm the decision of the court of appeals, but on different grounds. The circuit court was not required to demonstrate on the record why its scheduling order deviated from § 802.08(2) to properly exercise its scheduling discretion under Wis. Stat. § 802.10. However, the circuit court erroneously exercised its discretion by entering a scheduling order that incorporated a void local rule and by striking Hefty's response as a sanction for untimely filing, which ultimately resulted in dismissal of her complaint with

prejudice and summary judgment to Strickhouser. Accordingly, we affirm and remand.

****837** The decision of the court of appeals is affirmed and the cause is remanded to the circuit court.

¶ 80 ANNETTE KINGSLAND ZIEGLER, J. (dissenting). I agree with much of the majority opinion, but I write separately because I respectfully disagree with the majority's conclusion that "the circuit court erroneously exercised its discretion by entering a scheduling order that incorporated a void local rule...." Majority op., ¶ 5.

I

¶ 81 I agree with a number of the majority's conclusions: To begin with, I agree with the majority's determination that "Wisconsin circuit courts have discretion to control their dockets." Majority op., ¶ 31. I further agree with the majority that "Wisconsin Stat. § 802.10 addresses 'calendar practice' and provides that a circuit court 'may enter a scheduling order on the court's own motion or on the motion of a party.' " *Id.*

***566** ¶ 82 We must be cognizant, however, of the fact that circuit courts are required to adequately manage a busy docket, and they need the discretion to render justice. Circuit court judges are responsible for an enormous volume of cases. In order to fairly, effectively, and efficiently administer justice, the judge needs the ability to set meaningful deadlines. This court has acknowledged the value of timely processing cases at the circuit court level. In fact, in addition to the requirement that circuit courts certify that they have no "matters awaiting decision beyond" the 90–day period, *see* SCR 70:36, this court also sets case processing guidelines for Wisconsin circuit court judges. By way of example, the circuit court "case processing time standards" for a civil case such as this indicates that this case should be concluded within 360 days.

¶ 83 For any number of reasons, this case was not concluded within 360 days. The case at issue was filed February 3, 2004. The scheduling order was sent to counsel on August 3, 2005. Various motions for sanctions were filed by both parties. On February 1, 2006, the defendants filed a notice of motion and motion for summary judgment. Thereafter, the plaintiff's counsel failed to comply with the scheduling order, which incorporated the local rule on its face, when filing a response to the defendant's motion for summary judgment.

¶ 84 I agree with the majority that "[t]he scheduling questionnaire used by the circuit court was sufficient to satisfy Wis. Stat. § 802.10(3)." Majority op., ¶ 37. I also agree with the majority that there is "no erroneous exercise of discretion in the circuit court employing a scheduling questionnaire to create its scheduling order." Majority op., ¶ 38. Here, the court engaged in consultation with the parties through the scheduling questionnaire.

***567** ¶ 85 The majority correctly states that Wis. Stat. § 802.08 provides flexibility for a trial court to specify earlier times in the scheduling order. This makes sense because trial courts need to be given broad discretion in how to handle their calendars and in how to properly address individual issues reflected in individual cases. I agree with the majority that "the statute's plain language and the Judicial Council Note indicate that *scheduling orders* may trump Wis. Stat. § 802.08(2)." Majority op., ¶ 45.

¶ 86 Correctly, the majority opinion recognizes that scheduling order deadlines may supersede statutory deadlines. Majority op., ¶ 48. I agree with the majority opinion that the language in *Hunter v. AES Consultants, Ltd.*, 2007 WI App 42, 300 Wis.2d 213, 730 N.W.2d 184, requiring a trial court to explain on the record its ****838** deviation from the scheduling deadlines, should be withdrawn. Majority op., ¶ 50.

¶ 87 I likewise agree with the majority that:

> There is surely a presumption that a court is acting rationally and impartially in constructing a scheduling order. There is no need for the court to go on the record to explain the fact that it deviated from a state rule to accommodate the needs of party A or to give party B the time to file a reply brief. The time for the court to explain a scheduling decision is when it must resolve a dispute. Ideally, the court should be

> given the opportunity to explain its order or change its order *before* the order is violated.

Majority op., ¶ 53.

II

¶ 88 While I agree with much of the majority opinion, I disagree with the majority's conclusion that deadlines must be placed in the scheduling order before ***568** the judge's signature in order for those deadlines to be enforceable. The majority states that "[i]t is important to note that the circuit court could have imposed the same 20-day time frame for responding to a summary judgment motion by specifying the response time '*in the scheduling order itself.*' " Majority op., ¶ 66. The majority determines that the scheduling order only implicitly incorporated a void local court rule. Majority op., ¶ 47.

¶ 89 I part ways with the majority's determination that this scheduling order merely implicitly incorporates deadlines from a void local court rule. In the case at issue, the scheduling order specifically stated the following: "Motion for judgment on pleading/summary judgment must be filed by 02/01/2006." Below this language the following language appears: "[SEE ATTACHED SHEET FOR MOTION PROCEDURE]." It is undisputed that the parties in this case were provided with the scheduling order and the attached sheet. The attached sheet for motion procedure is just over one page long. It is also undisputed that counsel, who failed to meet the deadlines required in the scheduling order, also failed "to fully review the notice accompanying that scheduling order."

¶ 90 I write separately because the majority's conclusion that the motion practice must be specified in the order itself is a distinction without a difference. While placement of a response time in the text of the scheduling order may give clear notice to the parties, that notice is irrelevant if a party fails to carefully review the scheduling order. Reading the order gives notice to the party whether the motion practice is in the first page or in the referenced attachment. It seems curious to conclude that if the order has the same information printed in a page that precedes the circuit court judge's signature it is enforceable, but if the ***569** information appears on a clearly referenced attached sheet after the judge's signature, it is unenforceable.

¶ 91 It is reasonable for a judge to expect that the parties to a lawsuit will adhere to a scheduling order. Here, the scheduling order on its face puts the parties and counsel on notice of the court's expectations regarding the deadlines.

III

¶ 92 As a part of handling a busy calendar and giving parties their day in court, circuit court judges must possess sufficient discretion. In a hectic schedule, it is imperative that the parties follow court orders. When deadlines are disregarded a court calendar can quickly become unmanageable. One can imagine the repercussions from a circuit court judge's order only having meaning on occasion. Judges must have the ability to make discretionary ****839** case-by-case distinctions and allowances in order for justice to be properly dispensed.

¶ 93 I agree with much of the majority opinion, but I write separately because I respectfully disagree with the majority's conclusion that "the circuit court erroneously exercised its discretion by entering a scheduling order that incorporated a void local rule ..." Majority op., ¶ 5.

¶ 94 For the foregoing reasons, I respectfully dissent.

All Citations

312 Wis.2d 530, 2008 WI 96, 752 N.W.2d 820

Footnotes

1 *Hefty v. Strickhouser,* Nos.2006AP1094 & 2006AP1956, unpublished order (Wis.Ct.App. May 23, 2007).

2 Wisconsin Stat. § 802.08(2) reads: "Motion. *Unless earlier times are specified in the scheduling order,* the motion shall be served at least 20 days before the time fixed for the hearing and the adverse party shall serve opposing affidavits, if any, at least 5 days before the time fixed for the hearing." (Emphasis added.)
All references to the Wisconsin Statutes are to the 2005–06 version, unless otherwise noted.

3 Defendants Alliance and Daniel Strickhouser will be referred to collectively as "Strickhouser." Daniel Strickhouser will be referred to individually as "Daniel Strickhouser" or "Mr. Strickhouser."

4 Wisconsin Stat. § 802.10(3), which deals with calendar practice, provides in pertinent part:

> Scheduling and planning. Except in categories of actions and special proceedings exempted under sub. (1), the circuit court may enter a scheduling order on the court's own motion or on the motion of a party. The order shall be entered after the court consults with the attorneys for the parties and any unrepresented party. The scheduling order may address any of the following:
>
> ....
>
> (c) The time to file motions.
>
> ....
>
> (h) The appropriateness and timing of summary judgment adjudication under s. 802.08.

5 The scheduling order appears to be a template word-processed document that includes "blanks" that can be modified on a computer to tailor the template scheduling order to the procedural timing deadlines specified by the circuit court for a particular case. All deadlines appear as underlined text. Some blanks in Judge Gibbs' scheduling order, such as that for a motion for default judgment, were filled in with "*n/a* " to indicate that the deadline in question did not pertain to Hefty's case.

6 By its reference to the local rule, the scheduling order required Hefty to file and serve her response to Strickhouser's motion for summary judgment within 20 days of receiving it on February 6, 2006. Ordinarily this deadline would have been February 27, taking into consideration that February 26 was a Sunday. However, Hefty was entitled to three additional days to file and serve her response to Strickhouser's motion under Wis. Stat. § 801.15(5)(a) because Strickhouser's motion was served by mail. Wisconsin Stat. § 801.15(5) provides in part:

> (5) Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party:
> (a) If the notice or paper is served by mail, 3 days shall be added to the prescribed period.

The parties appear to agree that Wis. Stat. § 801.15(5)(a) allowed Hefty until March 1 to file and serve her motion on Strickhouser.

7 The circuit court's comment that Hefty took 38 days from the time she received the defendants' motion to file and serve her response was not correct. Hefty's response was filed 28 days after the motion was served, which was five days late.

8 "Every court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket with economy of time and effort." *Latham v. Casey & King Corp.,* 23

Wis.2d 311, 314, 127 N.W.2d 225 (1964) (citation omitted); *see also Lentz v. Young,* 195 Wis.2d 457, 465, 536 N.W.2d 451 (Ct.App.1995) ("The filing of motions is a matter that directly impacts the trial court's administration of its calendar. Trial courts have the inherent power to control their dockets to achieve economy of time and effort."); *Rupert v. Home Mut. Ins. Co.,* 138 Wis.2d 1, 7, 405 N.W.2d 661 (Ct.App.1987) ("We recognize the trial court's inherent discretionary power to control its docket with economy of time and effort." (citing *Latham,* 23 Wis.2d at 314, 127 N.W.2d 225)).

[9] Wisconsin Stat. § 802.10 was created by supreme court order in 1975. *See* S.Ct. Order, 67 Wis.2d 585, 634 (eff. Jan. 1, 1976). The statute has since been amended several times, and the scheduling conference procedure has persisted, although it is no longer explicitly part of Wis. Stat. § 802.10. Wisconsin Stat. § 802.10(3)(a) (1993–94) provided for a "scheduling conference" to address such matters as setting a date for the pretrial conference and trial, setting times for hearing on a motion for default judgment, completion of discovery, and service and hearing of motions at or prior to the pretrial conference. Reference to a "scheduling conference" was removed from § 802.10 in 1995. *See* S.Ct. Order 95–04, 191 Wis.2d xxi-xxiv (eff. July 1, 1995).
Professor Charles Clausen and David Lowe explained the purposes behind the scheduling conference:

> [Scheduling conferences are] based on the practice of many federal district courts to call in the attorneys in an action shortly after commencement for a report on the status of the action and for the setting of dates. This scheduling conference is essentially a "pre-pretrial." The purpose of the scheduling conference is to get the litigation moving and keep it moving. In probably the most significant change from the current practice, the new rules—most especially section 802.10—place the responsibility for moving the case on the court, as well as on the attorneys.
> At the scheduling conference, the attorneys should be sufficiently familiar with the case to form a realistic opinion as to the amount of time necessary to complete discovery and to discover whether impleader of third parties will probably be necessary. The judge's decision on dates for pretrial conference and trial will necessarily be predicated on the time required for discovery and impleader.
> At the conference, the judge issues a scheduling order reciting the dates established. This order controls the course of the action and relief from it should not be granted lightly. One of the primary goals of the rules is to establish a system in which lawyers and litigants may confidently expect their cases to move along apace. The scheduling order is intended to provide the framework in which lawyers can realistically allocate time to the pretrial activities in each case.

Charles D. Clausen & David P. Lowe, *The New Wisconsin Rules of Civil Procedure Chapters 801–803,* 59 Marq. L.Rev. 1, 68 (1976).

[10] *See Guelig v. Guelig,* 2005 WI App 212, ¶ 34, 287 Wis.2d 472, 704 N.W.2d 916 (recognizing that " '[p]retrial conference' and 'scheduling conference' are legal terms of art that refer to different types of proceedings").

[11] A committee comment to the *Wisconsin Judicial Benchbook* notes that "[scheduling] [c]onference[s are] rarely held on [the] record unless [they are] highly complex matters." *Wisconsin Judicial Benchbook: Civil,* CV 4–4 (3d ed. 2007).
We note that the *Benchbook* is not intended to stand as independent legal authority for any proposition of law, and we cite it merely as an informed and insightful discussion of practice.

[12] "[Wisconsin Stat. § 802.10] places the responsibility for moving a case on the court as well as the attorneys." Judicial Council Committee's Note, 1974, § 802.10, Stats.

[13] The order referenced Wis. Stat. § 802.10(3)(c) in its caption. The order stated that "[f]ailure to comply with this Order will subject that party to sanctions provided by Wis. Stat[. §] 805.03."

[14] We note that Hefty's counsel complied with the summary judgment response service deadline that is generally applicable absent a contrary scheduling order. *See* Wis. Stat. §§ 801.15 and 802.08(2).

[15] We note that the statute includes the phrase "opposing affidavits." Wis. Stat. § 802.08(2). These words have been construed to include all submissions made by an adverse party in response to a motion for summary judgment. *See David Christensen Trucking & Excavating, Inc. v. Mehdian,* 2006 WI App 254, ¶¶ 13–14, 297 Wis.2d 765, 726 N.W.2d 689 (referring to Mehdian's "submissions," not merely his "opposing affidavits," in applying Wis. Stat. § 802.08(2)).

[16] *See Phelps v. Physicians Ins. Co. of Wis., Inc.,* 2005 WI 85, ¶ 77, 282 Wis.2d 69, 698 N.W.2d 643 (Prosser, J., concurring in part, dissenting in part).

[17] These rules can be retrieved online on the State Bar of Wisconsin's website at the following address: http://www.wisbar. org/AM/Template.cfm? Section =Civil_rules (last visited July 2, 2008).

EXHIBIT 4

Excel Spreadsheet showing voter registration data to be provided to Court.

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DENNIS EUCKE, et al.,

Plaintiffs

v.

Case No. 2024-CV-007822

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants

NOTICE OF APPEARANCE

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that Plaintiffs appear by Daniel Eastman, of Eastman Law, LLC, in this action. A copy of all papers in this action should be served on the undersigned at the address stated below or via the electronic case filing system for the Milwaukee County Circuit Court.

Dated: Sept. 27, 2024

Respectfully submitted,

Electronically signed by: /s/ Daniel J. Eastman
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