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OPINIONS AND ORDERS

RECONSIDERATION ORDER

APPENDIX TABLE OF CONTENTS (Cont.)

OTHER DOCUMENTS

ORDER DENYING PETITION FOR REVIEW, SUPREME COURT STATE OF WISCONSIN (OCTOBER 6, 2025)

FILED
10-06-2025
CLERK OF WISCONSIN
SUPREME COURT

OFFICE OF THE CLERK
SUPREME COURT OF WISCONSIN
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688 MADISON, WI 53701-1688
TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
WEBSITE: WWW.WICOURTS.GOV

SCHMIDT

v.

EMC INSURANCE

No. 2025AP128

L.C.#2023CV177

To:

Hon. Bryan D. Keberlein
Circuit Court Judge
Electronic Notice

Michael S. Murray
Electronic Notice

Danielle Baudhuin Tierney
Electronic Notice

Desiree Bongers
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Stephen M. Warner
Electronic Notice

Benjamin D. Brand
Electronic Notice

Dan Schmidt
Electronic Notice

You are hereby notified that the Court has entered the following order:

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-appellant-petitioner, Dan Schmidt, pro se, and considered by this court;

IT IS ORDERED that the petition for review is denied, with $50 costs.

Samuel A. Christensen
Clerk of Supreme Court

**ORDER DISMISSING APPEAL,
COURT OF APPEALS
STATE OF WISCONSIN
(APRIL 9, 2025)**

FILED
04-09-2025
CLERK OF WISCONSIN
COURT OF APPEALS

OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215 P.O. BOX 1688
MADISON, WI 53701-1688 TELEPHONE (608) 266-1880
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WEBSITE: WWW.WICOURTS.GOV
DISTRICT II

April 9, 2025

DAN SCHMIDT

v.

EMC INSURANCE

No. 2025AP128

L.C. # 2023CV177

Before: NEUBAUER, GROGAN, and LAZAR, JJ.

To:

Hon. Bryan D. Keberlein

Circuit Court Judge
Electronic Notice

Michael S. Murray
Electronic Notice

Danielle Baudhuin Tierney
Electronic Notice

Desiree Bongers
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Stephen M. Warner
Electronic Notice

Benjamin D. Brand
Electronic Notice

Dan Schmidt
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

Counsel for respondents Employers Mutual Casualty Company d/b/a EMC Insurance Company (EMC) and Andrew Caruso have filed a motion to dismiss Schmidt's appeal as to these respondents on grounds that Schmidt did not timely appeal the dismissal of EMC and Caruso from the circuit court case.

The motion explains that by order entered on July 27, 2023, the circuit court dismissed Schmidt's complaint against EMC and Caruso on the merits and with prejudice. The order stated:

> IT IS HEREBY ORDERED AND ADJUDGED that, in accordance with *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 74, 307

> N.W.2d 256, 265 (1981), Plaintiff has no viable cause of action against Defendants Employers Mutual Casualty Company d/b/a EMC Insurance Company or Andrew Caruso for breach of contract or bad faith failure to settle and that Defendants Employers Mutual Casualty Company d/b/a EMC Insurance Company and Andrew Caruso are therefore hereby dismissed with prejudice as parties to the action for all the reasons set forth on the record.

Schmidt filed a motion for reconsideration of the dismissal with prejudice, which the circuit court denied in an order entered on January 22, 2024.

On January 17, 2025, Schmidt filed a notice of appeal from the original order and the order denying reconsideration. EMC and Caruso argue that this court is without jurisdiction because Schmidt's notice of appeal of those circuit court orders was untimely filed. We agree with EMC and Caruso.

Pursuant to Wis. Stat. § 808.04(1), an appeal must be initiated within forty-five days of a final judgment or order appealed from if written notice of the entry of the final order or judgment is given within twenty-one days of its entry, or within ninety days if notice of entry is not given. "The filing of a timely notice of appeal is necessary to give the court jurisdiction over the appeal." Wis. Stat. Rule 809.10(1)(e). This court has no power to extend the time to file a notice of appeal in a civil case of this nature. Wis. Stat. Rule 809.82(2)(b); Wis. Stat. § 801.15(c). Further, a motion for reconsideration does not affect the time to appeal a final order unless it follows a trial to the court or other evidentiary hearing. *See Continental Casualty*

Co., v. Milwaukee Metro Sewerage Dist., 175 Wis. 2d 527, 535, 499 N.W.2d 282 (Ct. App. 1993).

A judgment or order is final for purposes of appeal when it disposes of the entire matter in litigation as to one or more parties. Wis. Stat. § 808.03(1). A judgment or order disposes of the entire matter in litigation when the text of that judgment or order leaves nothing else to be decided as a matter of substantive law. *Morway v. Morway*, 2025 WI 3, ¶ 25, ___Wis. 2d __; *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, 299 Wis. 2d 723, ¶ 39, 728 N.W.2d 670; *Harder v. Pfitzinger*, 2004 WI 102; 274 Wis. 2d 324, ¶ 17, 682 N.W.2d 398. When a judgment or order does not clearly dispose of the entire matter in litigation as to one or more of the parties, then we will liberally construe ambiguities in that judgment or order to preserve the right to appeal. *Wamboldt.*, 299 Wis. 2d 723, ¶ 50.

Circuit courts are required to indicate that their final judgments and orders are final for purposes of appeal with a finality statement. *Id.* Schmidt appears to argue that we should construe both the dismissal order and the reconsideration order as nonfinal because they did not contain an explicit finality statement, such as, "This order is final for purposes of appeal." However, an incorrect or nonexistent finality statement will not render ambiguous an otherwise unambiguous final judgment or order. *Admiral Ins. Co. v. Paper Converting Mach. Co.*, 2012 WI 30, 339 Wis. 2d 291, ¶ 29, 811 N.W.2d 351. There is no indication that there was anything left to be decided as to EMC and Caruso when the circuit court entered its dismissal order and order denying reconsideration. *See Morway*, 2025 WI 3, ¶ 25. We conclude that the circuit court orders entered on July 27, 2023, and January 22, 2024,

were both final for purposes of appeal. The lack of an explicit finality statement does not render either order non-final. *See Admiral Ins. Co.*, 339 Wis. 2d 291, ¶ 29.

Under the circumstances here, Schmidt's appeal of the dismissal order was due on or before October 25, 2023. It was clearly untimely filed. Schmidt's notice of appeal was also untimely as to the order denying reconsideration, so even if he were to persuade this court that the motion for reconsideration extended the time to appeal, Schmidt's appeal would still be untimely filed. Because the notice of appeal was not timely filed, Schmidt cannot challenge the dismissal of EMC and Caruso from the circuit court case or the denial of Schmidt's motion for reconsideration.

Separately, Schmidt has filed a motion to supplement the record with documents issued after the record was transmitted to this court. For purposes of ruling on this motion to dismiss, documents that post-date the motion to dismiss are not pertinent. Therefore,

IT IS ORDERED that this appeal is dismissed as to respondents EMC and Caruso. Both shall be removed as parties to this appeal.

IT IS FURTHER ORDERED that the motion to supplement the record is denied.

Samuel A. Christensen
Clerk of Court of Appeals

ORDER, COURT OF APPEALS
STATE OF WISCONSIN
(FEBRUARY 28, 2025)

OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688 MADISON, WI 53701-1688
TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
WEBSITE: WWW.WICOURTS.GOV
DISTRICT II

February 28, 2025

DAN SCHMIDT

v.

EMC INSURANCE

No. 2025AP128

L.C. # 2023CV177

Before: GUNDRUM, P.J.

To:

Desiree Bongers
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Benjamin D. Brand
Electronic Notice

Danielle Baudhuin Tierney
Electronic Notice

Stephen M. Warner
Electronic Notice

Dan Schmidt
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

Before Gundrum, P.J.

The respondents by counsel, have filed a motion to dismiss this appeal as untimely. The appellant has filed a response objecting to dismissal. We have not yet received the record in this case and are unable to decide the motion without the benefit of the record. We will hold the motion to dismiss in abeyance pending receipt of the record. In the meantime, if counsel for the respondents wish to reply to the appellant's response to their motion to dismiss, we will accept such a reply if it is filed on or before March 7, 2025.

Separately, the statement on transcript required by Wis. Stat. Rule 809.11(4)(b) is delinquent. On our own motion, we will grant the appellant a short extension of time in which to file a compliant statement on transcript. The appellant's failure to file a statement on transcript is construed as a statement that no additional transcripts are needed for prosecution of the appeal. The appeal will proceed without the benefit of transcripts not already prepared. The appellant is warned that the lack of a transcript limits review to those parts of the record available to the appellate

court. *Ryde v. Dane County Dept. of Social Services*, 76 Wis. 2d 558, 563, 251 N.W.2d 791 (1977). Therefore,

IT IS ORDERED that the motion to dismiss will be held in abeyance pending this court's receipt of the circuit court record.

IT IS FURTHER ORDERED that the respondents may file a reply in support of their motion to dismiss on or before March 7, 2025.

IT IS FURTHER ORDERED that the time for the appellant to file a statement on transcript is extended to March 7, 2025. Upon the appellant's failure to file a statement on transcript, the clerk of the circuit court shall proceed as if a statement was filed that no additional transcripts are needed for the prosecution of the appeal and shall compile and transmit the record within twenty days. *See* Wis. Stat. Rule 809.15(4)(a).

Samuel A. Christensen
Clerk of Court of Appeals

ORDER DECLINING TO ISSUE FINAL ORDER, CIRCUIT COURT OF WISCONSIN, WINNEBAGO COUNTY ORDER (JANUARY 17, 2025)

FILED
01-17-2025
Clerk of Circuit Court
Winnebago County, WI
2023CV000177

FILED
01-17-2025
Clerk of Circuit Court
Winnebago County, WI
2023CV000177

DATE DECLINED: January 17, 2025

The Court will not sign an order that adds the word "Final" to an existing order when IN FACT the order is NOT A FINAL ORDER.

Electronically signed by Bryan D. Keberlein
Circuit Court Judge

THE COURT ATTACHED A COPY OF THE JULY 27, 2023 ORDER WITH WATERMARK STAMPED "DECLINED"

STATE OF WISCONSIN
CIRCUIT COURT
WINNEBAGO COUNTY

DAN SCHMIDT,

Plaintiff,

v.

EMPLOYERS MUTUAL CASUALTY COMPANY D/B/A EMC INSURANCE COMPANY; EMC INSUR-

ANCE COMPANY SENIOR CLAIMS ADJUSTER ANDREW CARUSO; THE CITY OF OMRO; CITY OF OMRO MAYOR STEVE JUNGMRTH; CITY OF OMRO PUBLIC WORKS DIRECTOR STEVE BILKEY; CITY OF OMRO CHIEF OF POLICE JOE SCHUSTER, NEB CORPORATION D/B/A NATIONAL EXCHANGE BANK AND TRUST ("NEBAT"), CURRENT NEBAT PRESIDENT ERIC STONE; FORMER NEBAT PRESIDENT JAMES CHATTERTON; NEBAT OMRO MANAGER DAN LENZ; KELLY AND BRAND, ATTORNEYS AT LAW, LLC, ATTORNEY BENJAMIN D. BRAND; ATTORNEY JOHN M. KELLY; ALL UNNAMED AND UNNKNOWN CULPABLE EMPLOYEES AND/OR AGENTS OF NEBAT, THE CITY OF OMRO, AND EMC Insurance COMPANY; AND ALL DEFENDANTS ARE SUED INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY,

Defendants.

Court File No. 2023CV000177

Before: Bryan D. KEBERLEIN, Circuit Court Judge.

FINAL ORDER

This matter came on for hearing before me on July 25, 2023, at 10:15 a.m. on the Motion to Dismiss Plaintiff's First Amended Complaint filed by Defendants Employers Mutual Casualty Company d/b/a EMC Insurance Company and Andrew Caruso (Docs. No. 98 and 99).

Plaintiff Dan Schmidt appeared personally without counsel; Attorney Stephen M. Warner of Arthur, Chapman, Kettering, Smetak & Pikala, P.A. appeared

for Defendants Employers Mutual Casualty Company d/b/a EMC Insurance Company and Andrew Caruso. Attorneys Benjamin D, Brand and John M. Kelly of Kelly & Brand, Attorneys at Law, LLC appeared for Defendants National Exchange Bank Foundation, Inc., Defendant James Chatterton who also appeared in person, Defendant Dan Lenz who also appeared in person, Defendant Benjamin D. Brand who also appeared in person, and Defendant John M. Kelly who also appeared in person. Attorney Danielle Baudhuin Tierney of Axley Brynelson, LLP appeared for Defendant City of Omro, Defendant City of Omro Mayor Steve Jungwirth, Defendant City of Omro Public Works Director Steve Bilkey, and Defendant City of Omro Chief of Police Joe Schuster.

The Court, having considered all of the pleadings and files herein, as well as the arguments of Plaintiff and counsel, and being fully advised in the premises, makes the following ORDER:

NOW THEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that, in accordance with *Kranzush v. Badger State Mut. Cas. Co.*, 103 wis.2d 56, 74, 307 N.W.2d 256, 265 (1981), Plaintiff has no viable cause of action against Defendants Employers Mutual Casualty Company d/b/a EMC Insurance Company or Andrew Caruso for breach of contract or bad faith failure to settle and that Defendants Employers Mutual Casualty Company d/b/a EMC Insurance Company and Andrew Caruso are therefore hereby dismissed with prejudice and on the merits as parties to the action for all the reasons set forth on the record.

ORDER GRANTING EMC MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT, CIRCUIT COURT OF WISCONSIN, WINNEBAGO COUNTY (JULY 27, 2023)

FILED
07-27-2023
Clerk of Circuit Court
Winnebago County, WI
2023CV000177

FILED
07-27-2023
Clerk of Circuit Court
Winnebago County, WI
2023CV000177

Date Signed: July 26, 2023

Electronically signed by Bryan D. Keberlein
Circuit Court Judge

STATE OF WISCONSIN
CIRCUIT COURT
WINNEBAGO COUNTY

DAN SCHMIDT,

Plaintiff,

v.

EMPLOYERS MUTUAL CASUALTY COMPANY D/B/A EMC INSURANCE COMPANY; EMC INSURANCE COMPANY SENIOR CLAIMS ADJUSTER ANDREW CARUSO; THE CITY OF OMRO; CITY OF OMRO MAYOR STEVE JUNGMRTH; CITY OF OMRO PUBLIC WORKS DIRECTOR STEVE BILKEY; CITY OF OMRO CHIEF OF POLICE JOE

ORDER GRANTING EMC MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT, CIRCUIT COURT OF WISCONSIN, WINNEBAGO COUNTY (JULY 27, 2023)

FILED
07-27-2023
Clerk of Circuit Court
Winnebago County, WI
2023CV000177

FILED
07-27-2023
Clerk of Circuit Court
Winnebago County, WI
2023CV000177

Date Signed: July 26, 2023

Electronically signed by Bryan D. Keberlein
Circuit Court Judge

STATE OF WISCONSIN
CIRCUIT COURT
WINNEBAGO COUNTY

DAN SCHMIDT,

Plaintiff,

v.

EMPLOYERS MUTUAL CASUALTY COMPANY D/B/A EMC INSURANCE COMPANY; EMC INSURANCE COMPANY SENIOR CLAIMS ADJUSTER ANDREW CARUSO; THE CITY OF OMRO; CITY OF OMRO MAYOR STEVE JUNGMRTH; CITY OF OMRO PUBLIC WORKS DIRECTOR STEVE BILKEY; CITY OF OMRO CHIEF OF POLICE JOE

SCHUSTER, NEB CORPORATION D/B/A NATIONAL EXCHANGE BANK AND TRUST ("NEBAT"), CURRENT NEBAT PRESIDENT ERIC STONE; FORMER NEBAT PRESIDENT JAMES CHATTERTON; NEBAT OMRO MANAGER DAN LENZ; KELLY AND BRAND, ATTORNEYS AT LAW, LLC, ATTORNEY BENJAMIN D. BRAND; ATTORNEY JOHN M. KELLY; ALL UNNAMED AND UNNKNOWN CULPABLE EMPLOYEES AND/OR AGENTS OF NEBAT, THE CITY OF OMRO, AND EMC Insurance COMPANY; AND ALL DEFENDANTS ARE SUED INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY,

Defendants.

Court File No. 2023CV000177

Before: Bryan D. KEBERLEIN, Circuit Court Judge.

ORDER

This matter came on for hearing before me on July 25, 2023, at 10:15 a.m. on the Motion to Dismiss Plaintiff's First Amended Complaint filed by Defendants Employers Mutual Casualty Company d/b/a EMC Insurance Company and Andrew Caruso (Docs. No. 98 and 99).

Plaintiff Dan Schmidt appeared personally without counsel; Attorney Stephen M. Warner of Arthur, Chapman, Kettering, Smetak & Pikala, P.A. appeared for Defendants Employers Mutual Casualty Company d/b/a EMC Insurance Company and Andrew Caruso. Attorneys Benjamin D. Brand and John M. Kelly of

Kelly & Brand, Attorneys at Law, LLC appeared for Defendants National Exchange Bank Foundation, Inc., Defendant James Chatterton who also appeared in person, Defendant Dan Lenz who also appeared in person, Defendant Benjamin D. Brand who also appeared in person, and Defendant John M. Kelly who also appeared in person. Attorney Danielle Baudhuin Tierney of Axley Brynelson, LLP appeared for Defendant City of Omro, Defendant City of Omro Mayor Steve Jungwirth, Defendant City of Omro Public Works Director Steve Bilkey, and Defendant City of Omro Chief of Police Joe Schuster.

The Court, having considered all of the pleadings and files herein, as well as the arguments of Plaintiff and counsel, and being fully advised in the premises, makes the following ORDER:

NOW THEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that, in accordance with *Kranzush v. Badger State Mut. Cas. Co.*, 103 wis.2d 56, 74, 307 N.W.2d 256, 265 (1981), Plaintiff has no viable cause of action against Defendants Employers Mutual Casualty Company d/b/a EMC Insurance Company or Andrew Caruso for breach of contract or bad faith failure to settle and that Defendants Employers Mutual Casualty Company d/b/a EMC Insurance Company and Andrew Caruso are therefore hereby dismissed with prejudice as parties to the action for all the reasons set forth on the record.

ENTERED, nunc pro tunc this 25th day of July, 2023.

ORDER DENYING RECONSIDERATION, WISCONSIN COURT OF APPEALS (APRIL 23, 2025)

FILED
04-23-2025
CLERK OF WISCONSIN
COURT OF APPEALS

OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688 MADISON, WI 53701-1688
TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
WEBSITE: WWW.WICOURTS.GOV
DISTRICT II

April 23, 2025

DAN SCHMIDT

v.

EMC INSURANCE

No. 2025AP128

L.C. # 2023CV177

Before: NEUBAUER, GROGAN, and LAZAR, JJ.

To:

Hon. Bryan D. Keberlein

Circuit Court Judge
Electronic Notice

Michael S. Murray
Electronic Notice

Danielle Baudhuin Tierney
Electronic Notice

Desiree Bongers
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Stephen M. Warner
Electronic Notice

Benjamin D. Brand
Electronic Notice

Dan Schmidt
Electronic Notice

You are hereby notified that the Court has entered the following order:

The appellant moves for reconsideration of the opinion and order entered April 9, 2025. Wis. STAT. RULE 809.24(1). The motion does not persuade us that reconsideration is warranted. Therefore,

IT IS ORDERED that the motion for reconsideration is denied. Wis. Stat. Rule 809.24(2).

Samuel A. Christensen
Clerk of Supreme Court

EMC MOTION TO DISMISS APPEAL, FILED IN THE WISCONSIN COURT OF APPEALS (FEBRUARY 19, 2025)

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

DAN SCHMIDT,

Appellant,

v.

EMPLOYER'S MUTUAL CASUALTY COMPANY D/B/A EMC INSURANCE COMPANY; ANDREW CARUSO, CITY OF OMRO, STEVE JUNGWIRTH, STEVE BILKEY, JOE SCHUSTER, NEB CORP. D/B/A NATIONAL EXCHANGE BANK AND TRUST, ERIC STONE, JAMES CHATTERTON, DAN LENZ, KELLY AND BRAND ATTORNEYS AT LAW, LLC, BENJAMIN D. BRAND, JOHN M. KELLY,

Respondents.

Appeal No. 2025AP000128

RESPONDENTS EMPLOYER'S MUTUAL CASUALTY COMPANY AND ANDREW CARUSO'S MOTION TO DISMISS APPEAL

COME NOW Respondents EMPLOYER'S Mutual Casualty Company d/b/a EMC Insurance Company ("EMC") and Andrew Caruso, and pursuant to Wis. Stat. § 809.14(1), Wis. Stat. § 808.04(1) and Wis. Stat. § 801.15(c), hereby move the Court for an Order dismissing Appellant Dan Schmidt's appeal as it relates to them.

Appellant's appeal of the Circuit Court's July 26, 2023 Order dismissing EMC and Caruso with prejudice and on the merits, and a January 22, 2024 Order denying Petitioner's motion for reconsideration of the July 26, 2023 Order is untimely, as Petitioner served his Notice of Appeal on or about January 17, 2025 and filed it on January 23, 2025, long after his time for appeal had expired. This Court therefore lacks jurisdiction to hear Petitioner's Appeal as it relates to these Respondents.

Appellant commenced this action on or about March 13, 2023. [Doc. 7]. His initial Complaint and his Amended Complaint asserted claims against EMC and its claims adjuster, Andrew Caruso, for breach of contract and bad faith. [Doc. 7 at ¶¶ 82-84; Doc. 68 at ¶¶ 82-85]. EMC and Caruso initially brought a motion to dismiss Appellant's original Complaint [Docs 63, 64] and then renewed their motion to dismiss when Appellant filed an Amended Complaint. [Docs. 98, 99]. The Circuit Court heard EMC's and Caruso's Motion to Dismiss on July 25, 2023 and granted the motion by an Order electronically signed on July 26, 2023 and filed by the Clerk of Winnebago County Circuit Court

on July 27, 2023. [Doc. 136]. The Circuit Court's Order stated:

> IT IS HEREBY ORDERED AND ADJUDGED that, in accordance with *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis.2d 56, 74, 307 N.W.2d 256, 265 (1981), Plaintiff has no viable cause of action against Defendants Employers Mutual Casualty Company d/b/a EMC Insurance Company or Andrew Caruso for breach of contract or bad faith failure to settle and that Defendants Employers Mutual Casualty Company d/b/a EMC Insurance Company and Andrew Caruso are therefore hereby dismissed with prejudice as parties to the action for all the reasons set forth on the record.

Id. (emphasis added).

Appellant subsequently brought a motion for reconsideration of the Order dismissing EMC and Caruso [Doc. 163], which the Circuit Court denied by Order dated January 22, 2024. [Doc. 230].

Appellant served his Notice of Appeal regarding the dismissal of EMC and Caruso on or about January 17, 2025, and filed the Notice of Appeal on January 23, 2025, nearly eighteen months after the Circuit Court issued its Order dismissing EMC and Caruso from the action with prejudice, and almost a year after the Circuit Court issued its Order denying Appellant's motion for reconsideration.

A party must file a notice of appeal to initiate an effective appeal. Wis. Stat. § 809.10(1)(a). The notice of appeal must be filed within the time specified by law. *Id.* at subpart (1)(e). "The timely filing of a notice

of appeal is necessary to give the court of appeals subject matter jurisdiction over an appeal." *State v. Sorenson*, 2000 WI 43, ¶ 16, 234 Wis.2d 648, 611 N.W.2d 240 (citing Wis. Stat. § 809.10(1)b)). "If a party fails to comply with the statutory requirements for filing a timely notice of appeal, the court of appeals lacks jurisdiction, and the court must dismiss the appeal as defective." *Id.* (citing Wist. Stat. § 809.10(1)(b); additional citation omitted).

Civil appeals are governed by Wis. Stat. § 808.03 (1), which provides in relevant part:

> A final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more parties, whether rendered in an action or special proceeding, and that is one of the following:
>
> (a) Entered in accordance with s.... 807.11(2).

Id. Under Wis. Stat. § 807.11(2), "[a]n order is entered when it is filed in the office of the clerk of court." *Id.*

Regarding the finality of circuit court orders, the Wisconsin Supreme Court has observed that "when an order or judgment is entered that disposes of all of the substantive issues in the litigation, as to one or more parties, as a matter of law, the circuit court intended it to be the final document for purposes of appeal, notwithstanding the label it bears or subsequent actions taken by the circuit court." *Harder v. Pfitzinger*, 2004 WI 102, ¶ 2, ¶ 19, 274 Wis. 2d 324, 682 N.W.2d 398. An

order disposes of the entire matter in litigation as to one or more parties when the text of the order leaves nothing else to be decided as a matter of substantive law. *Morway v. Morway*, 2025 WI 3, ¶ 25, __ Wis. 2d __, 15 N.W.3d 886 (citing *Harder* at ¶ 17). And, while circuit courts are supposed to designate that their final judgments and orders are final for purposes of appeal with a finality statement, "an incorrect or nonexistent finality statement will not render ambiguous an otherwise unambiguous final judgment or order." *Id.* (citing *Admiral Ins. Co. v. Paper Converting Machine Co.*, 2012 WI 30, ¶ 29, 339 Wis. 2d 291, 811 N.W.2d 351)). Finality is based on the text of the judgment or order at issue, not the subsequent actions taken by the circuit court or the court's intent. *Id.* at ¶ 20. "Thus, when a judgment or order disposes of all substantive matters with respect to a party, then that indicates that the circuit court intended the document to be final as a matter of law." *Id.* (citations omitted).

Pursuant to Wis. Stat. § 808.04(1), an appeal must be initiated within 45 days of a final judgment or order appealed from if written notice of the entry of the final order or judgment is given within 21 days of its entry, or within 90 days if notice of entry is not given. *Id.* The time for initiating an appeal under § 808.04 "may not be enlarged." Wis. Stat. § 801.15(c).

In this matter, the Circuit Court rendered its Order granting EMC's and Caruso's motion to dismiss, and dismissing them from the action with prejudice and on the merits, on July 26, 2023. [Doc. 136]. That Order was entered by filing in the office of the Clerk of Winnebago County Circuit Court on July 27, 2023. *Id.* The Order was a final order because it expressly disposed of all substantive issues in the litigation as

to EMC and Caruso by stating that the only two claims asserted by Plaintiff against EMC and Caruso—breach of contract and bad faith—were not viable and by dismissing EMC and Caruso as parties to the action with prejudice. When that Order was rendered and entered, there was nothing else to be decided in the case with respect to EMC and Caruso as a matter of substantive law. They were dismissed with prejudice from the action as to all claims that were or could be asserted against them.

No party served Appellant with a notice of entry of the Order dismissing EMC and Caruso from the action with prejudice. Consequently, Appellant had ninety days within which to appeal the Order under Wis. Stat. § 808.04(1). This meant that Appellant's time to appeal ran on October 25, 2023. Appellant did not appeal within that time. His attempt to appeal the Order dismissing EMC and Caruso from this lawsuit with prejudice on January 17, 2025 is clearly not timely under the law. Accordingly, this Court lacks subject matter jurisdiction to hear the appeal and it must be dismissed to the extent it purports to appeal the Order dismissing EMC and Caruso.

Appellant also seeks to appeal from the Circuit Court's Order [Doc. 230] denying his motion for reconsideration of the Order dismissing EMC and Caruso with prejudice. However, no right of appeal exists from an order denying a motion to reconsider which presents the same issues as those determined in the order or judgment sought to be considered. *Marsh v. Milwaukee*, 104 Wis. 2d 44, 46, 310 N.W.2d 615, 616 (1981); *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 26, 197 N.W.2d 752, 754-55 (1972). Appellant's motion for reconsideration raised no issues beyond those deter-

mined in the Circuit Court's order dismissing EMC and Caruso with prejudice. The Order denying Appellant's motion for reconsideration is therefore not appealable. Moreover, even if the Order denying Appellant's motion for reconsideration was appealable, which it is not, Appellant's time to appeal that Order would have expired long before January 17, 2025.

Respondents EMC and Caruso therefore respectfully request that this Court dismiss Appellant's appeal to the extent it seeks review of the Order dismissing EMC and Caruso from this action with prejudice or the Order denying Appellant's motion for reconsideration of the initial Order for dismissal with prejudice.

Dated this 19th day of February, 2025.

respectfully submitted.

ARTHUR, CHAPMAN, KETTERING,
SMETAK & PIKALA, P.A.
Attorneys for Respondents EMPLOYER'S Mutual Casualty Company d/b/a EMC Insurance Company and Andrew Caruso

Electronically signed by Stephen M. Warner
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SCHMIDT RESPONSE IN OPPOSITION TO MOTION TO DISMISS, FILED IN THE WISCONSIN COURT OF APPEALS (FEBRUARY 25, 2025)

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
APPEAL NO. 2025AP000128

DAN SCHMIDT,

Appellant,

v.

EMPLOYERS MUTUAL CASUALTY COMPANY D/B/A EMC INSURANCE COMPANY; EMC INSURANCE COMPANY SENIOR CLAIMS ADJUSTER ANDREW CARUSO; THE CITY OF OMRO; CITY OF OMRO MAYOR STEVE JUNGMRTH; CITY OF OMRO PUBLIC WORKS DIRECTOR STEVE BILKEY; CITY OF OMRO CHIEF OF POLICE JOE SCHUSTER, NEB CORPORATION D/B/A NATIONAL EXCHANGE BANK AND TRUST ("NEBAT"),CURRENT NEBAT PRESIDENT ERIC STONE; FORMER NEBAT PRESIDENT JAMES CHATTERTON; NEBAT OMRO MANAGER DAN LENZ; KELLY AND BRAND, ATTORNEYS AT LAW, LLC, ATTORNEY BENJAMIN D. BRAND; ATTORNEY JOHN M. KELLY; ALL UNNAMED AND UNNKNOWN CULPABLE EMPLOYEES AND/OR AGENTS OF NEBAT, THE CITY OF OMRO, AND EMC INSURANCE COMPANY; AND

ALL DEFENDANTS ARE SUED INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY,

Respondents.

RESPONSE AND AFFIDAVIT IN OPPOSITION TO RESPONDENT'S EMPLOYERS MUTUAL CAUSUALTY COMPASNY AND ANDREW CARUSO'S MOTION TO DISMISS APPEAL

Appellant, Dan Schmidt, respectfully files this timely Response in Opposition to EMPLOYER'S MUTUAL CASUALTY COMPANY D/B/A EMC Insurance COMPANY and EMC Insurance COMPANY SENIOR CLAIMS ADJUSTER ANDREW CARUSO's Motion to Dismiss Appellant's Appeal for lack jurisdiction.

Appellant requests this Court to deny Respondent's Motion to Dismiss.

As grounds, Appellant states the following:

FACTS

1. Appellant filed a timely Notice of Appeal from the orders listed in his Notice of Appeal on file in this Court.

2. On February 19, 2025, Respondents EMPLOYER'S MUTUAL CASUALTY COMPANY D/B/A EMC Insurance COMPANY and EMC Insurance COMPANY SENIOR CLAIMS ADJUSTER ANDREW CARUSO

(hereafter "EMC") filed a Motion to Dismiss Appellant's Appeal arguing:

> "Appellant's appeal of the Circuit Court's July 26, 2023, Order dismissing EMC and Caruso with prejudice and on the merits, and a January 22, 2024, Order denying Petitioner's motion for reconsideration of the July 26, 2023, Order is untimely, as Petitioner served his Notice of Appeal on or about January 17, 2025, and filed it on January 23, 2025, long after his time for appeal had expired. This Court therefore lacks jurisdiction to hear Petitioner's Appeal as it relates to these Respondents."

3. This Response in Opposition now follows.

REASONS FOR GRANTING THIS MOTION APPELLANT'S NOTICE OF APPEAL WAS NOT UNTIMELY FILED

3. Ambiguity existed in the trial court's orders dismissing EMC because there was no language stating that Appellant's position was rejected "on the merits" and "were final for purposes of appeal." *See* DE 136 (Order Granting EMC's Motion to Dismiss); DE 230 (Order denying Motion for Reconsideration).

4. Additionally, the trial court did not inform Appellant that he was required to file his Notice of Appeal within the time required by state law. *Id.*

5. In fact, at all times prior to filing his Notice of Appeal, the trial court judge (by its orders, words, and/or implication) affirmatively misinformed and/or misadvised Appellant on and off the record that said

orders were not final and thus not appealable. And *see e,g.*, DE 322-325.

6. This fact is illuminated by the trial court's order as to EMC when Appellant attempted to correct that affirmative incorrect information to make sure he was not misunderstanding what the trial court intended in its orders and portrayed to him.

7. Specifically, as to EMC, the trial court reaffirmed what Appellant had understood the moment that the trial court granted EMC's Motion to Dismiss when it stated as follows:

> **The Court will not sign an order that adds the word "Final" to an existing order when IN FACT the order is NOT A FINAL ORDER.**

DE 323 (original emphasis with all caps but bold emphasis added by Appellant).

8. Notably, Appellant, a pro se litigant, was required to ignore the affirmative incorrect information provided by the trial court judge and to go on ahead and file his Notice of Appeal in this Court, for this Court to confirm that he was right and not the trial court judge.

9. But for the trial court's affirmative incorrect information, Appellant would have filed his timely Notice of Appeal.

10. Accordingly, this Court should resolve the misinformation that Appellant received from the trial court orders, words, and/or implications in Appellant's favor to enable him to exercise his absolute right to appeal.

11. Effective September 1, 2007, final orders and judgments shall state that they are final for purposes of appeal. A document does not fulfill this requirement with a particular phrase or magic words, but must make clear on its face, that it is the document from which appeal may follow as a matter of right under sub. (1). Absent such a statement, appellate courts should liberally construe ambiguities to preserve the right of appeal. *Wambolt v. West Bend Mutual Insurance Co.*, 2007 WI 35, 299 Wis. 2d 723, 728 N.W.2d 670, 05-1874.

12. Stated another way, a document constitutes the final document for purposes of appeal when it: 1) has been entered by the circuit court; 2) disposes of the entire matter in litigation as to one or more parties; and 3) states on the face of the document that it is the final document for purposes of appeal. When a document would otherwise constitute the final document, but for not including a finality statement, appellate courts will construe the document liberally in favor of preserving the right to appeal. *Tyler v. Riverbank*, 2007 WI 33, 299 Wis. 2d 751, 728 N.W.2d 686, 052336. *Accord*, *Morway v. Morway*, 2025 WI 3, P23, 2025 Wisc. LEXIS 5, *11-12 (Wis. January 22, 2025) ("in an effort to provide greater clarity to litigants, we required that a final judgment or order contain on its face a statement indicating that it is final for purposes of appeal. Absent such a statement, we instructed courts to liberally construe any ambiguities in the judgment or order at issue to preserve the right to appeal." (citations omitted)).

13. The legal authority cited by Respondents, however, is incomplete because it fails to appreciate the continual misinformation provided to Appellant

from the trial court judge that Appellant could not appeal yet because the orders were not final and his ultimate catch-22 to finally realize that he must disbelieve the judge.

14. Respondents have not cited any case where an Appellant was denied his absolute right to appeal based on the ambiguity and/or absence of the mandatory language to inform Appellant of his right to appeal and continual affirmative misinformation provided by the trial court judge, nor has Appellant located any.

15. The Wisconsin Supreme Court's decision in *Morway* and authority preceding it is specifically distinguished from this case because the trial court judge's statements and actions were not just "subsequent actions taken by the circuit court nor the Court's intent" but continual after granting EMC's Motion to Dismiss to date and under the totality of the circumstances. *See also* DE 338: pg. 3, lns 8-11, and pgs. 8-13.

16. In sum, based on the above and aforestated reasons, facts, and grounds, Appellant rights to due process, equal protection, and access to courts were prejudicially violated, contrary to the First and Fifth Amendments of the United States Constitution, as applied to the States through the Fourteenth Amendment, and Wisconsin Constitution Article I § 1, § 4, § 5, § 8, § 9, §21(2), because Appellant did not knowingly, intelligently, and voluntarily waive or abandon his absolute right to appeal. *See also State v. Perry*, 136 Wis. 2d 92, 99, 401 N.W.2d 748, 751 (Wis. 1987) ("Any failure of the appellate process which prevents a putative appellant from demonstrating possible error constitutes a constitutional deprivation of the right to appeal."); *Boykin v. Alabama*, 395 U.S. 238, 239, 89 S. Ct. 1709, 1710, 23 L. Ed. 2d 274, 277 (1969)(waiver of

constitutional rights will not be presumed from a silent record).

APPELLANT DID NOT FILE AN UNAUTHORIZED MOTION FOR RECONSIDERATION

17. Respondents also argue that Appellant's Motion for reconsideration was unauthorized and it did not toll time to file a Notice of Appeal because Appellant presented "the same issues as those determined in the order and judgment to be considered." *See* Motion to Dismiss at page 6. This is not true.

18. After the trial court granted EMC's Motion to Dismiss, DE 136, Appellant's raised in his Motion for Reconsideration, DE 163, that:

(1) that the trial court erroneously exercised its discretion by failing to exercise it by not make findings of fact and conclusions in law in law, and then taking those facts and rationally relate them to the law to show that Appellant was not an intended third-party beneficiary of the EMC contract (DE 118);

(2) the Court made no findings of fact and conclusions in law in relation to his substantive causes of action in compliance with the *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, ¶ 19, 849 N.W.2d 693 requirements; and

(3) that "manifest error of law occurred by [the trial court] further erroneously exercising its discretion by failing to consider Plaintiff's Motion for Leave to File his Second Amended

> Complaint and to Accept It As Is and Filed before ruling on Defendant EMC and Caruso's Motion to Dismiss."

19. Plaintiff emphasized that if the trial court should have considered his Motion for Leave to File His Second Amended Complaint before ruling on EMC's Motion to Dismiss because when granted it renders his First Amended Complaint a nullity, citing *Holman v. Family Health Plan*, 227 Wis. 2d 478, 487, 596 N.W.2d 358 (1999). *Id.*

20. Appellant went on to state:

> "12. Regardless of the sequence in which this Court disposed of Plaintiff's Motions, however, manifest error of law occurred by this Court also erroneously exercising its discretion by (1) not granting Plaintiffs unopposed Motion For Leave to File His Second Amended Complaint and to Accept It As Is and Filed, (2) by not making findings of fact and conclusions in law in relation to those facts to support why it was denying that Motion, and (3) by failing to allow Plaintiff to introduce his evidence to support his unopposed legally and facially sufficient motion, prejudicially violating his rights to due process, equal protection, and access to courts, as stated in his Motion for reconsideration of Plaintiff's Motion for Leave to File His Second Amended Complaint and to Accept It As Is and Filed that is filed herewith, which Plaintiff incorporates here, entirely by reference, to support this Motion.

DE 163, at pg. 4, ¶ 12.

21. To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact. *See* DE 163, pg. 2, ¶ 2 (emphasis added), citing "*Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000). *See also Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 275 Wis. 2d 397, 416-417, 2004 WI App 129, P44, 685 N.W.2d 853, 862, 2004 Wisc. App. LEXIS 498, *23 (Wis. Ct. App. June 16, 2004). A "manifest error of law" is demonstrated the "wholesale disregard, misapplication, or failure to recognize controlling precedent." Id. (citation omitted). A manifest error of fact is made when the fact found by the trial court was overlooked or not supported by the record. *Id.*

22. In this case, all of the issues raised by the Appellant were valid bases to file a Motion for reconsideration because none of these issues were "the same issues as those determined by the trial court" that would make it invalid and not toll time. *Id.* Appellant presented claims of manifest errors of law and fact.

SUMMARY THAT RESPONDENT'S MOTION TO DISMISS IS MERITLESS

23. Working in a reverse order, Appellant properly filed a Motion for reconsideration in a genuine effort obtain relief raising new issues that materialized after the trial court granted EMC's Motion to Dismiss and are all authorized by law. *Id.*

24. The trial court's order granting EMC's Motion to Dismiss could be considered final from the trial court judge speaking from one attorney to another if

you speak the coded and/or arcane language that lawyers and judges use daily.

25. However, when this Court considers the totality of the circumstances in this case of: (1) Appellant being a pro se litigant; (2) adding that the fact that the trial court judge continually provided affirmative misinformation or affirmative misadvice concerning the right to appeal from the beginning to present; and (3) that Appellant would have timely filed his Notice of Appeal but for the trial court's affirmative misinformation or affirmative misadvice, the facts change and this Court is required "liberally construe [the] ambiguities in the [trial court's] order[s and other acts of affirmative misadvice or misinformation] at issue to preserve the [Appellant's absolute constitutional] right to appeal." Here's why this issue of first impression should be resolved by this Court.

ARCANE LANGUAGE OF THE TRIAL COURT'S ORDERS AND THE RESPONDENT'S RELIANCE UPON IT IS ERROR

26. It is implied more than stated that Respondents' Motion to Dismiss should be granted because the trial court's order dismissing EMC from the case was sufficient to alert Appellant of his right to appeal, by the use of the words "with prejudice" and "has no valid cause of action." This is not true.

27. The trial court did not inform Appellant at the hearings or in any of its orders: "You have a Right to Appeal. This is a final order for purposes of appeal. Your claim is "denied on the merits." "You have 45 days from the date of this order to file your Notice of Appeal if you disagree with my orders and decision."

That is what should have been stated by valid established precedent and template. But established precedent is unconstitutional.

28. On the one hand, if the Plaintiff is represented by counsel, Appellant assumes that the attorney would know that the arcane language—"with prejudice" and "has no valid cause of action,"—indicates the right to appeal is triggered. Appellant classifies those parties represented by counsel as "Audience 1."

29. As stated by the California Appellate Court in 1964:

> "The legal profession knows no worse headache than the client who mistrusts his attorney [and the judge(s) involved in their case]. The lay litigant enters a temple of mysteries whose ceremonies are dark, complex and unfathomable. Pretrial [trial, sentencing, appeals, and post-conviction] procedures are the cabalistic rituals of the lawyers and judges who serve as priests and high priests. The layman knows nothing of their tactical significance. He knows only that his case remains in limbo while the priests and high priests chant their lengthy and arcane [ ] rites. He does know this much: that several years frequently elapse between the commencement and trial of lawsuits. Since the law imposes this state of puzzled patience on the litigant, it should permit him to sit back in peace and confidence without suspicious inquiries and without incessant checking on counsel [and the judge(s)]."

Daley v. County of Butte, (Cal. App. 3d Dist. 1964) 227 Cal. App. 2d 380, 392, 38 Cal. Rptr. 693, 701.

> "[Attorneys and judges] with this skill can speak, read, and write one of the arcane languages. Arcane languages are used only for the purposes of magic and they are never spoken merely to communicate - indeed that would be largely impossible. All books, scrolls, and other inscriptions of a truly magical nature are written in one of the secret arcane languages. A magical book or inscription may be written in an ordinary language, but it will have no power to teach a magical spell and will not in itself be magical - it would be a mere curiosity."

See e.g., Warhammer Fantasy Roleplay First Edition Wiki, https://wfrp1e.fandom.com/wiki/Arcane_Language#:~:text=Arcane%20languages%20are%20used%20only, of%20the%20secret%20arcane%20languages (emphasis added). Accordingly, competent counsel informs the party of their rights and protects them and the party itself may be clueless.

30. On the other hand, if a trial court judge does not inform a pro se litigant (like Appellant herein, for example,) that they have a right to appeal and must do so with the time required by law, then the only conclusion any person of ordinary intelligence (meaning not an attorney) will conclude is that they do not have the right to appeal yet, no matter how intelligent or educated they appear, because subjectively the assumption of the court rests upon circumstances, facts, and knowledge of the *pro se* person that are unknown and not apparent from the record. Scalia and Garner, *Cannons of Construction*,

/https://www.law.uh.edu/faculty/adjunct/dstevenson/2018Spring/CANONS%20OF%20CONSTRUCTION.pdf ("Nothing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered.") & (Negative-Implication Canon. The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)"); *James v. Heinrich*, 2021 WI 58, P18, 397 Wis. 2d 516, 535, 960 N.W.2d 350, 359 ("Under the doctrine of *expressio unius est exclusio alterius*, the "express mention of one matter excludes other similar matters [that are] not mentioned." (emphasis added). Appellant classifies a *pro se* party (himself) as "Audience 2."

31. All courts of this Great Nation are required to liberally construe the work and pleadings of *pro se* parties in the trial and appellate courts with a view to achieve substantial justice and the objective of obtaining relief, short of rewriting a pleading or raising arguments not raised. *See e.g., Haines v. Kerner*, 404 U.S. 519, 521, 92 S. Ct. 94, 30 L. Ed. 2d 652 (1972) (per curiam). *Accord Amek Bin-Rilla v. Israel*, 113 Wis. 2d 514, 521, 335 N.W.2d 384, 388 (Wis. 1983). However, Wisconsin law does not combine these two classes of parties to avoid manifest injustice and the constitutional violations that exist that deprive *pro se* parties of their rights to timely appeal.

32. Instead, the Wisconsin Supreme Court and all the state appellate courts have blurred the separate distinction made between Audience 1 and Audience 2 into one analysis with the unconstitutional use of arcane language holding the pro se party to the same standards as an attorney. This is error.

33. Although the trial courts are required to inform a party of their right to appeal, equitable exceptions are made by looking to the trial court's order(s) to determine if the order meets the finality requirement. This is just another way of saying "the party" was informed of their right to appeal, as pointed out by Respondent's reliance on it in this case on page 4 of their Motion to Dismiss. *Id.*, citing *Morway v. Morway*, 2025 WI 3, P25, 2025 Wisc. LEXIS 5, *13 (Wis. January 22,2025) ("an incorrect or nonexistent finality statement will not render ambiguous an otherwise unambiguous final judgment or order.").

34. This equitable exception was wrongly established in precedent and rests upon a prejudicial violation of due process, equal protection, and access to courts, contrary to the First and Fifth Amendments of the United States Constitution as applied to the States through the Fourteenth Amendment, and Wisconsin Constitution Article I § 1, § 4, § 5, § 8, § 9, § 21(2), because it fails to provide the required constitutional notice and opportunity to file the timely notice of appeal.

35. As pointed by Justice Scalia in his dissenting opinion in *Jones v. Thomas*, 491 U.S. 376, 396 (1989) (dissenting opinion), "[w]ith technical rules, above all others, it is imperative that we adhere strictly to what we have stated the rules to be. A technical rule with equitable exceptions is no rule at all. Three strikes is out. The State [trial court judge] broke the rules here, and must abide by the result." (modifications provided by Appellant).

36. This means a plain statement rule advising the parties of the absolute right to appeal and required time limits to file the notice exists in Wisconsin or it

does not. But, at present, it does not! It can't be both an equitable exception and strict compliance with the advisement requirement; they cancel each other out if one or the other is present.

37. The unconstitutional practice of hiding behind arcane language used in the legal profession alerting Audience 1 only of the rights of their clients must stop.

38. Instead, courts must use the plain language rule to alert Audience 2 on the record and in its orders to make clear in the case (which includes Audience 1) in and for all time that the historical death knell sounded to ceremoniously trigger the absolute right to appeal. This sounding reaches back into the intent of the Framers of both the United States and Wisconsin Constitutions. *See e.g., Evitts v. Lucey*, 469 U.S. 387, 393, 105 S. Ct. 830, 834, 83 L. Ed. 2d 821, 827-828 (1985) ("Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to [ ] seek [ ] review of alleged trial court errors. *McKane v. Durston*, 153 U.S. 684 (1894). Nonetheless, if a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S., at 18, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."); *Perry, supra.*

39. The reason why the plain statement rule must be created as a template by all courts and scrupulously followed and rigidly applied is because it provides <u>all</u> parties of basic due process and equal protection of law to obtain access to courts.

40. It eliminates the procedural "gotchya" of litigation that the Respondents are attempting to benefit from in this case for which only Audience 1 benefits and their clients. *See e.g., Gregory v. Ashcroft*, 501 U.S. 452, 464, 111 S. Ct. 2395, 2403, 115 L. Ed. 2d 410, 426 (1991) (Application of the plain statement rule [] thus avoid[s the] constitutional problem."). That gotchya situation should never happen again because it does not promote justice, it defeats it, and operates as an unconstitutional deprivation of the constitutional the right to appeal. *Perry, supra.*

41. To hold that the Audience 1 & 2 parties are not entitled to be on equal footing in this regard unconstitutionally creates a class of one in violation of the First and Fifth Amendments of the United States Constitution as applied to the States through the Fourteenth Amendment, and Wisconsin Constitution Article I § 1, § 4, § 5, § 8, § 9, § 21(2). *See, e.g., Chambers v. Vill. of Oak Park*, 2024 U.S. Dist. LEXIS 117528, *10, 2024 WL 3292814 (Northern Dist. III. July 3, 2024) ("a class-of-one plaintiff must prove that '(1) a state actor has intentionally treated him differently than others similarly situated, and (2) there is no rational basis for the difference in treatment.'" *Amin Ijbara Equity Corp. v. Vill. of Oak Lawn*, 860 F.3d 489, 493 (7th Cir. 2017), quoting *Reget v. City of LaCrosse*, 595 F.3d 691, 695 (7th Cir. 2010) (emphasis added). Here, Appellant meets both components, based on all that stated above.

41. Additionally, denying Appellant of his constitutional rights and to not allow him to appeal would also perpetuate the very evils for which the Appellant complains.

42. It would also endorse and promote a denial of the constitutional and statutory right to appeal by the actions of the trial court judge that states, as in this case, the orders relating to EMC are not final; when in reality, when talking to Audience 1 they were; but not final when talking to Audience 2 who believed the judge and relied on that affirmative misadvice or affirmative misinformation, until being forced to recognize that said judge was wrong; and the unconstitutional gotchya that Appellant found himself in and why, as stated above.

43. It would also allow EMC a windfall and their lawyers to continue to use the tool that weaponizes the legal profession and the judiciary to eliminate appellate review and reversal in this Court for a party's client by acting in concert (knowingly or not), violate the real public policy, and violate the real public interest.

44. The real public interest and policy that "everybody counts, or nobody counts"[1] when making the decision to appeal meets constitutional standards and carries out the Legislative intent creating the statutory right to appeal in all cases from the enabling constitutional authority. The current interpretation does not appear to embrace constitutional standards.

RELIEF SOUGHT

WHEREFORE, Appellant prays that Respondents' Motion to Dismiss is **DENIED**.

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[1] Apologies to Detective Harry Bosch and the use of his mantra that "every person counts, or nobody counts," from the fiction novels written by author Michael Connelly.

OATH

I swear and affirm, under the penalty of perjury, that the information above, that I have provided this 25th day of February 2025, is true and accurate.

respectfully submitted,

Electronically signed by

Dan Schmidt on February 25, 2025
Dan Schmidt

EMC REPLY TO RESPONSE IN OPPOSITION TO MOTION TO DISMISS, FILED IN THE WISCONSIN COURT OF APPEALS (MARCH 7, 2025)

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
APPEAL NO. 2025AP000128

DAN SCHMIDT,

Appellant,

v.

EMPLOYER'S MUTUAL CASUALTY COMPANY D/B/A EMC INSURANCE COMPANY; ANDREW CARUSO, CITY OF OMRO, STEVE JUNGWIRTH, STEVE BILKEY, JOE SCHUSTER, NEB CORP. D/B/A NATIONAL EXCHANGE BANK AND TRUST, ERIC STONE, JAMES CHATTERTON, DAN LENZ, KELLY AND BRAND ATTORNEYS AT LAW, LLC, BENJAMIN D. BRAND, JOHN M. KELLY,

Respondents.

REPLY TO APPELLANT'S RESPONSE TO RESPONDENTS EMPLOYER'S MUTUAL CASUALTY COMPANY'S AND ANDREW CARUSO'S MOTION TO DISMISS APPEAL

Appellant's opposition to the Motion to Dismiss his appeal brought by EMC and Caruso boils down to

the erroneous proposition that, as a pro se litigant, he was entitled to, but deprived of, special treatment by the Circuit Court, and particularly that the Circuit Court was required to, but did not, inform him of the jurisdictional time limit for bringing his appeal of the dismissal with prejudice of EMC and Caruso. But, as Appellant eventually concedes, Wisconsin courts afford no such special treatment to litigants who are proceeding without legal representation, and impose no such duties upon the courts.

The Wisconsin Supreme Court has observed that, "[w]hile *pro se* litigants in some circumstances deserve leniency with regard to waiver of rights, . . . the rule applies only to pro se prisoners." *Waushara Cty. v. Graf*, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992) (citations omitted). The rationale for this leniency afforded to *pro se* prisoners has been explained as follows:

> We recognized that the confinement of the prisoner and the necessary reasonable regulations of the prison, in addition to the fact that many prisoners are "unlettered" and most are indigent, make it difficult for a prisoner to obtain legal assistance or to know and observe jurisdictional and procedural requirements in submitting his grievances to a court.

State ex rel. Terry v. Traeger, 60 wis.2d 490, 496, 211 N.W.2d 4 (1973). Those concerns "have not been extended to persons who are not incarcerated." *Graf*, 166 Wis.2d at 452, 480 N.W.2d at 20.

In *Graf*, the Supreme Court therefore noted that, with respect to civil litigation:

> "*Pro se* appellants must satisfy all procedural requirements, unless those requirements are wived by the court. They are bound by the same rules that apply to attorneys on appeal. The right to self-representation is "[not] a license not to comply with relevant rules of procedural and substantive law." *Farretta v. California*, 422 U.S. 806, 834 n.46, 95 S.Ct. 2525, 2541 n.46, 45 L.Ed.2d 562 (1975).

Id. Accordingly, "neither a trial court nor a reviewing court has a duty to walk pro se litigants through the procedural requirements or to point them to the proper substantive law." *Id.*

Appellant chose to proceed in this matter without counsel. That choice did not absolve him of responsibility for compliance with the relevant rules of procedural and substantive law. Specifically, it did not eliminate Petitioner's obligation to bring an appeal within the jurisdictional time limit prescribed by law. His decision to proceed pro se also did not impose any duty on the Circuit Court to advise Appellant about when his time to appeal the dismissal of EMC and Caruso with prejudice expired.

Appellant nonetheless argues that the Circuit Court misled him into believing the order dismissing EMC and Caruso with prejudice was not a final order and could not be appealed. Appellant's support for this contention is a supposed quote from the Circuit Court *See* Appellant's Response Brief at p. 2, ¶ 7. It is not clear what the source of this alleged quote is. Appellant's Response Brief is entitled "Response And Affidavit" in opposition to EMC's and Caruso's motion to dismiss his appeal, but he did not attach an affidavit or any referenced exhibits to the brief. Moreover, no

transcripts are currently part of the record on appeal due to Appellant's failure to comply with Wis. Stat. § 809.11(4)(b). Consequently, EMC and Caruso can only speculate about the source and context of this alleged statement from the Circuit Court referenced in Appellant's brief.

If the Circuit Court actually made this statement, it was certainly in reference to the several non-final orders that Appellant has also included in his appeal, and it was made in January of 2025. On January 13, 2025, just prior to serving and filing his Notice of Appeal, Appellant and his former counsel submitted proposed amended orders seeking to modify the Circuit Court's prior orders that Appellant wished to appeal in a futile effort to restart the clock on the time for appealing those orders. [Doc. 308]. The Circuit Court declined to modify the orders. *See e.g.* [Doc. 323]. However, the Circuit Court allowed Appellant, and would have allowed his counsel if counsel had not withdrawn, to make a record in a January 22, 2025 hearing. During that hearing, the Circuit Court repeatedly pointed out that, while some of the orders being discussed were non-final orders, the order dismissing EMC and Caruso was a final order. [Doc. 338, attached as Exhibit A to the Affidavit of Stephen M. Warner, at p. 9:15-23; 11:20-25].

Whatever they were, comments made by the Circuit Court in January of 2025, could not have hoodwinked Appellant into failing to bring a timely appeal of the dismissal of EMC and Caruso with prejudice. After all, Appellant's time for appeal of the order dismissing EMC and Caruso expired in October of 2023.

Moreover, finality is based on the text of the order in question, "not the subsequent actions taken by the circuit court or the court's intent." *Morway v. Morway*, 2025 WI 3, ¶ 25, __ Wis. 2d __, 15 N.W.3d 886. Therefore, even if the Circuit Court did at some point in a hearing in January of 2025 inadvertently lump the final order dismissing EMC and Caruso with prejudice in with the other non-final orders from which Appellant is appealing, doing so would not change the finality of the order dismissing EMC and Caruso with prejudice based on its text.

Finally, Appellant argues that the order denying his motion for reconsideration of the order dismissing EMC and Caruso with prejudice and on the merits is independently appealable because it raised "new" issues. In truth, these supposed "new issues" in the motion for reconsideration were arguments addressing the "manifest error of law or fact" standard that must be met to bring such a motion. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶ 44, 275 Wis. 2d 397, 685 N.W.2d 853. Appellant raised no new issues going to the merits of his claims against EMC and Caruso. Accordingly, the order denying his motion for reconsideration is not appealable. *Marsh v. Milwaukee*, 104 Wis. 2d 44, 46, 310 N.W.2d 615, 616 (1981); *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 26, 197 N.W.2d 752, 754-55 (1972).

In addition, the order denying Appellant's motion for reconsideration was issued on January 22, 2024. [Doc. 230]. As a result, even if that order was appealable, Appellant's time for appeal expired in late April of 2024 at the latest. His current appeal, which

Appellant served on January 17, 2025 and filed on January 23, 2025, is therefore clearly not timely.

Appellant has forfeited his right to appeal by failing to commence the appeal within the statutory time limit laid out in Wis. Stat. § 808.04(1). This Court lacks jurisdiction to hear untimely appeals. Therefore, Respondents EMC and Caruso request that this Court dismiss Appellant's appeal of the order dismissing EMC and Caruso from the action with prejudice and the order denying Appellant's motion for reconsideration of that dismissal order.

Dated this 7th day of March 2025.

respectfully submitted.

ARTHUR, CHAPMAN, KETTERING,
SMETAK & PIKALA, P.A.
Attorneys for Respondents EMPLOYER'S Mutual Casualty Company d/b/a EMC Insurance Company and Andrew Caruso

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SCHMIDT MOTION FOR RECONSIDERATION, FILED IN THE WISCONSIN COURT OF APPEALS (APRIL 22, 2025)

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
APPEAL NO. 2025AP000128

DAN SCHMIDT,

Appellant,

v.

EMPLOYERS MUTUAL CASUALTY COMPANY D/B/A Insurance COMPANY; EMC INSURANCE COMPANY SENIOR CLAIMS ADJUSTER ANDREW CARUSO; THE CITY OF OMRO; CITY OF OMRO MAYOR STEVE JUNGWIRTH; CITY OF OMRO PUBLIC WORKS DIRECTOR STEVE BILKEY; CITY OF OMRO CHIEF OF POLICE JOE SCHUSTER, NEB CORPORATION D/B/A NATIONAL EXCHANGE BANK AND TRUST ("NEBAT"),CURRENT NEBAT PRESIDENT ERIC STONE; FORMER NEBAT PRESIDENT JAMES CHATTERTON; NEBAT OMRO MANAGER DAN LENZ; KELLY AND BRAND, ATTORNEYS AT LAW, LLC, ATTORNEY BENJAMIN D. BRAND; ATTORNEY JOHN M. KELLY; ALL UNNAMED ANT) UNNKNOWN CULPABLE EMPLOYEES AND/OR AGENTS OF NEBAT, THE CITY OF OMRO, AND EMC INSURANCE COMPANY; AND

ALL DEFENDANTS ARE SUED INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY,

Respondents.

Winnebago County Case No. 2023-CV-177

MOTION FOR RECONSIDERATION AND OTHER RELIEF

Pursuant to Wis. Stats. § 809.14(1) and § 809.24 by this Motion, the Appellant, Dan Schmidt, respectfully moves this Honorable Court for reconsideration of its April 9, 2025, Order because it is contrary to clearly established law as determined by the United States Supreme Court and/or a reasonable application of it, and to add EMC Insurance Company and Adjuster Caruso back into this appeal. In support, Appellant states and shows this Court as follows:

1. This Court is constitutionally required to follow clearly established law as determined by the United States Supreme Court, pursuant to Article VI, clause 2 of the United States Constitution.

2. If state law conflicts with clearly established law as determined by the United States Supreme Court and/or a reasonable application of it, the state court decision and statute is void. *Id.*

3. In this case, this Court ignored that

> "Appellant rights to due process, equal protection, and access to courts were prejudicially violated, contrary to the First and Fifth Amendments of the United States Consti-

> tution, as applied to the States through the Fourteenth Amendment, and Wisconsin Constitution Article I § 1, § 4, § 5, § 8, § 9, § 21(2), because Appellant did not knowingly, intelligently, and voluntarily waive or abandon his absolute right to appeal. *See also State v. Perry*, 136 Wis. 2d 92, 99, 401 N.W.2d 748, 751 (Wis. 1987) ("Any failure of the appellate process which prevents a putative appellant from demonstrating possible error constitutes a constitutional deprivation of the right to appeal."); *Boykin v. Alabama*, 395 U.S. 238, 239, 89 S. Ct. 1709, 1710, 23 L. Ed. 2d 274, 277 (1969) (waiver of constitutional rights will not be presumed from a silent record)."

Id.

4. Respectfully, all this Court's decision had done was to illuminate that the Wisconsin Supreme Court has two positions when it comes to determining the finality of the trial court's order: one that follows the plain statement rule and the constitutional guarantees listed above and one that does not and contains coded language requiring a crystal ball to interpret with a medium . . . or a law degree.

5. Look at it like this: if a criminal defendant had just been convicted and the trial court judge failed to admonish the Defendant of the right to a direct appeal and to file a Notice of Intent to Pursue Post-Conviction Relief, would there be any question in the mind of this Court of whether the Defendant was entitled to a belated appeal?

6. Of course, the answer is "no" as far as this question goes, and the Defendant would be allowed to appeal.

7. Here, there is a distinction—criminal versus civil—but no difference because the constitutional rights and protections are the same according to clearly established law as determined by the United States Supreme Court and/or a reasonable application of it.

8. Yet this Court ignored Appellant's constitutional issue by merely following the two faces the Wisconsin Supreme Court's decisions it cited in its decision to resolve this case while ignoring federal law! That just isn't right! *See, e.g., Smith v. Digmon*, 434 U.S. 332, 332-334, 98 S. Ct. 597, 598-599, 54 L. Ed. 2d 582, 584-585 (1978).

9. Though the cases are opposite in almost all regards, *Smith v. Digmon* and the presentation of the constitutional issue therein and the state appellate court's ignoral of it are the same.

10. In *Smith*, the Court held:

> It is too obvious to merit extended discussion that whether the exhaustion requirement of 28 U.S.C. § 2254 (b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in Petitioner's brief in the state court, and, indeed, in this case, vigorously opposed in the State's brief. It is equally obvious that a district court commits plain error [*334] in assuming that a habeas petitioner must have failed to raise in the state courts a meritorious claim

> that he is incarcerated in violation of the Constitution if the state appellate court's opinion contains no reference to the claim.

Id.

11. Thus, Appellant's issue was properly presented and preserved but unconstitutionally ignored.

12. Appellant's constitutional issue was not addressed in this Court's order granting EMC and Adjuster Caruso's Motion to Dismiss.

13. This is error because it perpetuates the very evils of which Appellant complains and is plaguing this case and ignoral of federal law.

14. Likewise, EMC and Adjuster Caruso avoided Appellant's constitutional issue in their response which this Court should construe as a concession of error. *See State v. Quinsanna D.*, 2002 WI App 318, P41, 259 Wis. 2d 429, 655 N.W.2d 752 (Unrefuted arguments are deemed admitted); *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

15. Yet, Appellant loses? So what's the deal?

16. EMC and Adjuster Caruso and this Court cannot defeat Appellant's constitutional issues because they are not addressed and Appellant loses? That makes no sense in a courtroom or any other place in life. Right is right and wrong is wrong.

17. If a state creates a direct appeal as of right—whether it is civil or criminal—due process, equal protection, and access to courts constitutionally require state trial court judges to inform the parties in plain

statements of their rights to appeal when the time to appeal is triggered under state law pursuant to the First and Fifth Amendments of the United States Constitution, as applied to the States through the Fourteenth Amendment, and clearly established law as determined by the United States Supreme Court and/or a reasonable application of it, and Wisconsin Constitution Article I § 1, § 4, § 5, § 8, § 9, § 21(2) . *See Evitts v. Lucey*, 469 U.S. 387, 401, 105 S. Ct. 830, 839, 83 L. Ed. 2d 821, 833 (1985) ("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution -- and, in particular, in accord with the Due Process Clause [and equal protection clauses to provide access to courts as required by clearly established law as determined by the United States Supreme Court and/or a reasonable application of it].") and its progeny.

18. "[C]ontext, including th[e] Court's interpretation of similar provisions in many years past, is relevant." *Henderson v. Shinseki*, 562 U.S. 428, 436, 131 S. Ct. 1197, 1203, 179 L. Ed. 2d 159, 167 (2011).

19. State law cannot contain a constitutional defect that deprives a party of the constitutional rights attached the absolute right to appeal created under state law. *Evitts, supra.*

20. Conspicuously absent from this Court's opinion is also any decision from any court in any state that defeats Appellant's constitutional analysis and position pursuant to clearly established law as determined by the United States Supreme Court and/or a reasonable application of it.

WHEREFORE, Appellant prays that this Motion is GRANTED.

FURTHER, Appellant also prays that this Court issues such and further orders it deems law, justice and equity require.

Dated this 22nd day of April 2025.

respectfully submitted,

Electronically signed by Dan Schmidt
Dan Schmidt

SCHMIDT AMENDED PETITION FOR REVIEW, FILED IN THE WISCONSIN SUPREME COURT (MAY 27, 2025)

STATE OF WISCONSIN SUPREME COURT
Case No. 2025-AP- 128

DAN SCHMIDT,

Appellant-Petitioner,

v.

EMC INSURANCE COMPANY AND ADJUSTER ANDREW CARUSO,

Defendant-Respondent.

On Appeal from an Order Dismissing EMC Insurance Company and Adjuster Adrew Caruso in Schmidt v. EMC Insurance Company, Winnebago County Case No. 2023-CV-177, The Honorable Brian Keberlein, Presiding

AMENDED PETITION FOR REVIEW

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PETITION FOR REVIEW

Petitioner, Dan Schmidt, hereby petitions the Wisconsin Supreme Court for Review, pursuant to Wis. Stats. § (Rule) 809.62, of the District II Court of Appeals decisions, in *Schmidt v. EMC Insurance Company and Adjuster Andrew Caruso*. Case No. 2025-AP-128, filed on April 9, 2025, Exhibit E, the order denying his timely motion for reconsideration, Exhibit F, issued April 23, 2025, Exhibit G, dismissing his appeal for lack of jurisdiction.

ISSUES PRESENTED FOR REVIEW

The issues presented for review are

I. Did the appellate court erroneously exercise its discretion by not addressing Petitioner's issue that he has a constitutional and statutory right to be informed of the right to appeal in a civil case, as protected by the First, Fifth, and Fourteenth Amendments of the United States Constitution and Wisconsin Constitution Article I § 1, § 4, § 5, § 8, § 9, and § 21(2) from unconstitutional deprivation? If so, is Petitioner entitled to have the trial court's order construed in favor of allowing Petitioner to prosecute his appeal?

The appellate court refused to address Petitioner's issue.

II. Did the appellate court erroneously exercise its discretion by not finding Petitioner filed a timely Notice of Appeal from the Order dismissing EMC Insurance Company and Adjuster Caruso (who insure the City Omro), pursuant to the precedent from this Court that favored Petitioner?

The appellate court recognized both the favorable and unfavorable positions this Court has taken and dismissed Petitioner's Notice of Appeal as untimely using the unfavorable equitable exception to the admonishment rule.

BRIEF STATEMENT OF CRITERIA

Petitioner's first issue is that a trial court judge must inform a civil litigant that they possess a constitutional and statutory right to be informed of their absolute right to appeal at the hearing and in written orders is apparently one of first impression in Wisconsin, but required pursuant to clearly established law as determined by the United States Supreme Court and this Court, and/or a reasonable application of it. As such, the appellate court's dismissal of Petitioner's appeal must be reversed with directions to reinstate it.

Alternatively, Petitioner's second issue is also of great public importance because it appears that the cases of this Court favor informing a civil litigant of their constitutional and statutory right to appeal by requiring a plain admonishment; while, at the same time, it also provides that an equitable exception exists that negates the plain statement admonishment requirement. The appellate court applied the equitable exception to Petitioner's case and prejudicially denied him of his absolute right to appeal. This is error. A technical rule with an equitable exception is no rule at all. Three strikes is out. As such, this Court should strictly adhere to the plain statement admonishment requirement and recede from the equitable exception rule that was applied in the appellate court below. Review and reversal should be granted by this Court

with directions for the appellate court to reinstate Petitioner's appeal, holding that the trial court judge must inform the parties of the right to appeal in Wisconsin in all civil cases at the hearing, if any, and in all written final orders and judgments, to satisfy the constitutional rights to due process and equal protection to provide access to courts.

STATEMENT OF FACTS AND CASE

On March 13, 2023, Petitioner filed a civil lawsuit in Winnebago County Circuit Court alleging five causes action:

COUNT 1
NEGLIGENCE OF MAYOR JUNGWIRTH, PUBLIC WORKS DIRECTOR BILKEY, AND CHIEF OF POLICE SCHUSTER AND THE CITY OF OMRO PRIOR TO AND DURING THE INSTALLATION OF THE NEW NEBAT CONCRETE PARKING LOT

COUNT 2
INTENTIONAL MISCONDUCT AND DELIBERATE INDIFFERENCE INFLICTED BY MAYOR JUNG WIRTH, PUBLIC WORKS DIRECTOR BILKEY, AND CHIEF OF POLICE SCHUSTER, AFTER COMPLETION AND CONSTRUCTION AND BEING INFORMED OF PLAINTIFFS DAMAGES AND ITS CAUSE BEING NEBAT'S NEW CONCRETE PARKING LOT BEING INSTALLED AND NOW BEING MAINTAINED TO CONTINUE TO DAMAGE PLAINTIFF'S PROPERTY ON A DAILY BASIS SINCE INSTALLATION TO PRESENT

COUNT 3
EMC INSURANCE AND ADJUSTER CARUSO ARE GUILTY OF BREACH OF CONTRACT AND BAD FAITH REFUSAL TO SETTLE ON BEHALF OF THE CITY OF OMRO TOWARD PLAINTIFF SCHMIDT AS AN INTENDED THIRD-PARTY BENEFICIARY

COUNT 4
CREATING AND/OR MAINTAINING A PRIVATE NUISANCE (DEFENDANTS NEBAT, CHATTERTON, LENZ, AND STONE)

COUNT 5
THREATENING AND INTIMIDATING PLAINTIFF NOT TO PURSUE LITIGATION TO COVER-UP NEBAT'S TORTIOUS ACTIONS SURROUNDING THE INSTALLATION OF ITS NEW CONCRETE PARKING LOT WITHOUT A PERMIT AND THE DAMAGES IT CAUSED, AND CONTINUES TO CAUSE, TO AVOID LIABILITY, BY ACTING IN CONCERT

DE 7. Defendants' actions almost killed him. *Id.* Petitioner sought three million dollars in damages. *Id.*

On April 19, 2023, EMC Insurance Company and Adjuster Caruso filed a Motion to Dismiss alleging that Petitioner could not sue them because he was not an intended third-party beneficiary of the Insurance Policy with the City of Omro and thus did not evidence bad faith refusal to settle, DE 63 and 64 and DE 118. Defendants argued that this Court's decision in *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 73, 307 N.W.2d 256 (1981) (explaining "[t]he insurer's duty of good faith and fair dealing arises from the Insu-

rance contract and runs to the insured" and holding that "[n]o such duty can be implied in favor of the claimant from the contract since the claimant is a stranger to the contract and to the fiduciary relationship it signifies") foreclosed his cause of action. *Id.*

On May 1st, 2023, Petitioner then filed his First Amended Complaint (FAC) adding National Exchange Bank and Trust (NEBAT) with bank officials and their attorneys as Defendants for their roles in the criminally tortious acts. DE 68.

EMC and Adjuster Caruso then filed a Renewed Motion to Dismiss because the Appellant's First Amended Complaint became the operative pleading. DE 98-99.

On July 21, 2023, Petitioner filed a Second Amended Complaint (SAC), DE 119, a Motion for Leave to Amend to correct a misnomer from National Exchange Bank Foundation to National Exchange Bank Corp. (NEB Corp.), DE 112, with a separate and detailed Memorandum of Law in support of Petitioner's SAC. DE 177. Petitioner argued that the appellate court's decision in *Meleski v. Schbohm LLC*, 2012 WI App 63, Pl. 341 Wis. 2d 716, 717, 817 N.W.2d 887, 888 (Injured individual's entitlement to medical expenses was fixed when she fell in a covered area, and as the policy obligated the insurer to pay expenses regardless of fault, the individual's claim was vested. The insurer was subject to the individual's bad faith action, and she could enforce her third-party beneficiary rights against the insured.) was directly on point and distinguished Kranzush from other cases in this Court.

On July 25, 2023, a hearing was held on various motions including EMC and Adjuster Caruso's Renewed

Motion to Dismiss. DE 171. The trial court granted EMC and Adjuster Caruso's Motion to Dismiss, notwithstanding Petitioner's argument that he was and is an intended third-party beneficiary under *Meleski, supra*, which distinguished it from this Court's decision in *Kranzusch. supra. Id.*, at pages 28-38.

On July 27, 2023, the trial court issued a written order which states as follows:

> IT IS HEREBY ORDERED AND ADJUDGED that, in accordance with *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 74, 307 N.W.2d 256, 265 (1981), Plaintiff has no viable cause of action against Defendants Employers Mutual Casualty Company d/b/a EMC Insurance Company or Andrew Caruso for breach of contract or bad faith failure to settle and that Defendants Employers Mutual Casualty Company d/b/a EMC Insurance Company and Andrew Caruso are therefore hereby dismissed with prejudice as parties to the action for all the reasons set forth on the record.

DE 130.

On August 14, 2024, Petitioner filed a motion for reconsideration of the dismissal with prejudice, DE 163, which the circuit court denied in an order entered on January 22, 2024. DE 230.

The trial court judge did not inform Petitioner of his right to appeal at the hearing and did not include any plain language informing Petitioner of his right to appeal in its written orders granting EMC and Adjuster Caruso's Motion to Dismiss, and did not

include any language in its order denying Petitioner's Motion for Reconsideration. DE 130, 163, 171, and 230.

On January 17, 2025, Petitioner filed a letter in the trial court with several proposed orders that contained the required information to trigger the finality of the Court's orders to invoke appellate jurisdiction, inclusive of the order granting EMC and Adjuster Caruso's Motion to Dismiss. DE 319-325. The trial court judge declined to issue the proposed orders declaring that the orders issued thus far WERE NOT FINAL. *Id.*

A Notice of Appeal was also filed on January 17, 2025. DE 320.

On February 19, 2025, EMC and Adjuster Caruso filed a Motion to Dismiss for failing to file a timely Notice of Appeal based on its perception of the controlling precedent of this Court. *See* Exhibit A.

On February 25, 2025, Petitioner filed a timely Response and Affidavit in Opposition, Exhibit B, pointing out that

- the trial court judge did not inform him of his constitutional and statutory right to appeal at the hearing and also did not do so in its written order granting EMC and Adjuster Caruso's Motion to Dismiss, despite being required to do so in plain terms, and said orders should be construed as enabling Petitioner to prosecute his appeal;
- this Court's decisions in the area of requiring an admonishment of the right to appeal contains an equitable exception that, if applied, cancels out the required admonishment and operates as an unconstitutional

deprivation of the constitutional right to appeal and should be disavowed forthwith;

- he was led to believe that his right to appeal was not triggered yet because the trial court judge did not inform him of his rights in any of its orders nor at any hearings, and had just recently refused to issue final orders to enable Petitioner to appeal stating the Orders he wants to appeal from are "NOT A FINAL ORDER";
- the plain statement rule should require the trial court judge in every civil case to inform the parties of their right to appeal at the hearings and in its written order and judgment.

See Exhibit B.

On February 28, 2025, the appellate court afforded EMC and Adjuster Caruso an opportunity to file a timely Reply to Petitioner's Response and Affidavit in Opposition *See* Exhibit C.

On March 7, 2025, EMC and Adjuster Caruso filed their Reply with a separate Affidavit in Support in opposition to Petitioner's position based on the equitable exception. *See* Exhibit D.

On April 9, 2025, the appellate court granted EMC and Adjuster Caruso's Motion to Dismiss, without analyzing the merits of Petitioner's constitutional issues, applying the equitable exception, posing that Petitioner was informed of his right to appeal when the trial court dismissed his lawsuit stating it was with prejudice" or "on the merits." *See* Exhibit E.

On April 22, 2025, Petitioner filed a timely Motion for reconsideration arguing the court below erroneously exercised its discretion by not exercising it by not addressing the merits of the Petitioner's constitutional claims and applying the equitable exception, because it prejudicially denies Petitioner of his absolute constitutional and statutory rights to appeal. *See* Exhibit F.

On April 23, 2025, the appellate court denied Petitioner's Motion for Reconsideration. *See* Exhibit G. This timely Petition for Review is timely e-filed within thirty (30) days of the appellate court's denial of Petitioner's Motion for reconsideration on April 23, 2025.

This Amended Petition is now filed on April 27, 2025 before any action had been taken by the Court.

ARGUMENTS

I. The Appellate Court Erroneously Exercised Its Discretion By Not Exercising It When It Did Not Address Petitioner's Issue That He Has a Constitutional and Statutory Right to Be Informed of His Right to Appeal in a Civil Case, Pursuant to the First, Fifth, and Fourteenth Amendments of the United States Constitution, Wisconsin Constitution Article I § 1, § 4, § 5, § 8, § 9, and § 21(2), Clearly Established Law as Determined By the United States Supreme Court and This Court, and/or a Reasonable Application of It. Thus, This Court Is Constitutionally Required to Reverse the Appellate Court's Orders Dismissing His Appeal Against EMC Insurance

Company and Adjuster Caruso With Directions to Reinstate His Appeal

The United States Constitution does not require that the states provide any appeals in criminal and civil appeals. *See, Evitts v. Lucey*, 469 U.S. 387, 388, 105 S. Ct. 830, 832, 83 L. Ed. 2d 821, 825 (1985), citing *McKane v. Durston*, 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894) (held that a State need not provide a system of appellate review as of right at all). However, when a state opts to act in a field where its action has significant discretionary elements, such as the establishment of a system of appellate review as of right although not required to do so, it must nonetheless act in accord with the dictates of the Federal Constitution, and, in particular, in accord with the due process and equal protection clause of the Fourteenth Amendment. *Id.*

As observed by this Court in *State v. Perry*, 136 Wis. 2d 92, 98, 401 N.W.2d 748, 751 (Wis. 1987):

> As a matter of Wisconsin constitutional law, the right to an appeal is absolute: "Writs of error shall never be prohibited, and shall be issued by such courts as the legislature designates by law." Wisconsin Const., art. I, sec. 21(1). Since the reorganization of the Wisconsin court system in 1977, the court so designated is the court of appeals, which has initial appellate jurisdiction as set forth in Wis. Const., art. VII, sec. 5(3). The legislature has specifically stated, "A writ of error may be sought in the court of appeals." Section 808.02, Stats, Thus, the right of appeal to the court of appeals is constitutionally guaranteed in the State of Wisconsin.

Id.

For over 50 years, the legislature created laws that this Court has interpreted and considered in a variety of contexts relating to both criminal and civil appeals. In both contexts, the trial court judge is required to inform the parties of their right to appeal.

In the criminal context, the legislature created Section 973.18. Wis. Stats., requiring trial courts to inform defendants of their right to appeal. *Id. See also Peterson v. State*, 54 Wis. 2d 370, 382, 195 N.W.2d 837, 845 (Wis. 1972) ("we now emphasize that the trial court is obligated in all cases to inform the defendant of his right to appeal from the conviction—whether after a plea of guilty or after trial.").

> This court has said previously that the trial judge should inform the defendant of "the right to appeal or seek other postconviction relief, the time limits on seeking the relief and, if indigent, the right to publicly compensated counsel in those proceedings," and should inform the trial counsel of his or her obligation to continue representation during the post conviction stage of the proceedings. Sec. 809.30(1) (b), Stats. 1979-80; *Peterson v. State*, 54 Wis.2d 370, 195 N.W.2d 837 (1972); *Whitmore v. State*, 56 Wis.2d 706, 203 N.W.2d 56 (1973); *Thiesen v. State*, 86 Wis.2d 562, 273 N.W.2d 314 (1979). Wis. J—Criminal SM-33 was drafted to aid the judge in complying with this obligation.

State v. Argiz, 101 Wis. 2d 546, 563, 305 N.W.2d 124, 132 (Wis. 1981).

In the civil context, the requirements for a trial court judge to inform a civil litigant of their absolute right to appeal have a more recent beginning. Effective September 1, 2007, final orders and judgments shall state that they are final for purposes of appeal. A document does not fulfill this requirement with a particular phrase or magic words, but must make clear on its face, that it is the document from which appeal may follow as a matter of right under sub. (1). Absent such a statement, appellate courts should liberally construe ambiguities to preserve the right of appeal. *Wambolt v. West Bend Mutual Insurance Co.*, 299 Wis. 2d 723, 728 N.W.2d 670.

A document constitutes the final document for purposes of appeal when it: I) has been entered by the circuit court; 2) disposes of the entire matter in litigation as to one or more parties; and 3) states on the face of the document that it is the final document for purposes of appeal. When a document would otherwise constitute the final document, but for not including a finality statement, appellate courts are directed to construe the document liberally in favor of preserving the right to appeal. *Tyler v. Riverbank*, 2007 WI 33, 299 Wis. 2d 751, 728 N.W.2d 686. Accord, *Morway v. Morway*, 2025 WI 3, P23, 2025 Wisc. LEXIS 5, *11- 12 (Wis. January 22, 2025) ("in an effort to provide greater clarity to litigants, we required that a final judgment or order contain on its face a statement indicating that it is final for purposes of appeal. Absent such a statement, we instructed courts to liberally construe any ambiguities in the judgment or order at issue to preserve the right to appeal." (citations omitted)).

Although the trial court judge is required to inform a criminal defendant of the right to appeal and to seek post-conviction relief prior to filing the Notice of Appeal by filing a Notice of Intent to Pursue Post-Conviction Relief, Petitioner has not found any authority nor Herculean efforts requiring the same sacred protection of the right to appeal in civil cases when compared to those in criminal cases.

For example, no requirement requires a trial court judge to admonish the parties when a final order is entered, not the time limits to do so. Nor is there any requirement to inform the parties of the time limits in its written orders and judgments. The absence of this information renders the otherwise valid requirements unconstitutional for failing to provide actual notice and an opportunity to exercise the absolute right to appeal. *Perry, supra,* ("Any failure of the appellate process which prevents a putative appellant from demonstrating possible error constitutes a constitutional deprivation of the right to appeal.")

In this case, the trial court judge did not inform the Petitioner of his right to appeal at the hearing held when it granted EMC and Adjuster Caruso's Motion to Dismiss, DE 171, at pages 28-28; it did not contain any admonishment in the order granting EMC's Motion to Dismiss, DE 130; and no admonishment was provided in the order denying Petitioner's Motion for Reconsideration, DE 163, and 230. Waiver or forfeiture of the right to appeal will not be presumed from a silent record. *See e.g., Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

Accordingly, the appellate court erroneously exercised its discretion by not addressing Petitioner's issue that his constitutional rights to due process and

equal protection of law, access to courts, and his absolute right to appeal, were prejudicially violated and denied to him in violation of the First, Fifth, and Fourteenth Amendments of the United States Constitution and Wisconsin Constitution Article I §1, §4, §5, §8, §9, and §21(2). See Evitts, supra. As such, Petitioner requests this Court to reverse the appellate court's order granting EMC Insurance Company and Adjuster Caruso's Motion to Dismiss Petitioner's appeal against them, and the denial of his Motion for Reconsideration, with directions to reinstate his appeal.

II. The Appellate Court Erroneously Exercised Its Discretion By Not Finding Petitioner Filed a Timely Notice of Appeal from the Order Dismissing EMC Insurance Company and Adjuster Caruso, Pursuant to the Precedent from This Court That Favored Petitioner. The Equitable Exception Rule Must Be Abolished in Favor of the Clear and Plain Statement Rule. Thus, This Court Must Reverse the Appellate Court's Orders Dismissing His Appeal Against EMC Insurance and Adjuster Caruso With Directions to Reinstate His Appeal

"With technical rules, above all others, it is imperative that [courts' adhere strictly to what we have stated the rules to be. A technical rule with equitable exceptions is no rule at all. Three strikes is out." *See Jones v. Thomas*, 491 U.S. 376, 396, 109 S. Ct. 2522, 2533, 105 L. Ed. 2d 322, 341 (1989) (SCALIA, J., dissenting, with BRENNAN and MARSHALL, B., concurring).

Here, the parties' filings, see Exhibit A (EMC Motion to Dismiss, Petitioner's Response in Opposition,

Exhibit B, EMC's Reply, see Exhibit D, and the appellate court's decision, Exhibit E, reveals that there are two ways to view the decisions of this Court. One that is anchored in constitutional principles that appears to require a trial court judge to inform the civil parties of their rights to appeal at the hearing, the written order granting a motion to dismiss, and in the denial of a Motion for Reconsideration, but actually does not, as in this case, as stated above. The second way focuses on the "particular phrase or magic words" such as the lawsuit is "dismissed with prejudice" and/or "on the merits," an incantation in which the legal community attaches significant meaning to trigger the time to file a timely appeal for their client.

In this case, the trial court judge granted EMC and Adjuster Caruso's Motion to Dismiss Petitioner's lawsuit "with prejudice," DE 130, without ever informing Petitioner of his right to appeal nor the time constraints to appeal, and the like, for example, as found in the comparative criminal context, i.e., Wis. J I—Criminal SM-33 admonishment used in criminal cases. The absence of such information renders Wisconsin's practice and procedure unconstitutional because the lack of actual notice fails to inform a person of normal intelligence that they have the right to appeal. The Introduction of the United States Constitution says it best: "We the People," not "We the lawyers." The whole purpose of informing a person of their absolute right to appeal is to inform the person, not their lawyer, if they have one (which, in this case, Petitioner appeared pro se); or to just inform the attorney for the Defendants who oppose a pro se party's lawsuit. "Either everybody counts, or nobody counts." See Exhibit F.

Accordingly, in the alternative to Petitioner's Issue I herein, this Court should grant review and reversal of the appellate court's orders with directions to reinstate Petitioner's appeal, overruling those cases that use the "particular phrase or magic words" to Find the appellate court does not possess jurisdiction to allow a person to appeal as the appellate court in this case had done to Petitioner herein.

CONCLUSION

Petitioner prays that this Court reverse the appellate court's orders with directions to reinstate Petitioner's appeal against EMC Insurance Company and Adjuster Caruso, and to issue such and further orders it deems law, justice, and equity require.

{ Certificates omitted }

respectfully submitted,

electronically signed by
Dan Schmidt

Amended May 27, 2025

EMC RESPONSE TO PETITION FOR REVIEW, FILED IN THE WISCONSIN SUPREME COURT, RELEVANT EXCERPTS (JUNE 10, 2025)

STATE OF WISCONSIN SUPREME COURT

DAN SCHMIDT,

Petitioner,

v.

EMPLOYER'S MUTUAL CASUALTY COMPANY D/B/A EMC INSURANCE COMPANY; ANDREW CARUSO, CITY OF OMRO, STEVE JUNGWIRTH, STEVE BILKEY, JOE SCHUSTER, NEB CORP. D/B/A NATIONAL EXCHANGE BANK AND TRUST, ERIC STONE, JAMES CHATTERTON, DAN LENZ, KELLY AND BRAND ATTORNEYS AT LAW, LLC, BENJAMIN D. BRAND, JOHN M. KELLY,

Respondents.

Case No. 2025AP000128

RESPONDENTS EMPLOYER'S MUTUAL CASUALTY COMPANY AND ANDREW CARUSO'S RESPONSE TO PETITIONER'S PETITION FOR REVIEW

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[. . .]

ARGUMENT

I. There Is No Constitutional or Statutory Right to be Informed of a Right to Appeal in a Civil Case

After claiming a constitutional right to have the Circuit Court inform him of his right to appeal, Petitioner concedes that the Circuit Court is only required to do this in criminal cases. *See* Petition at p. 8. Indeed, Petitioner advises this Court that he "has not found any authority nor [sic] Herculean efforts requiring the same sacred protection of the right to appeal in civil cases when compared to those in criminal cases." *Id.* This is because no such authority exists. But, the State of Wisconsin does provide a ready resource to inform civil litigants of their appeal rights. Indeed, the legislature has enacted an extensive

statutory scheme for appeals that tells civil litigants nearly everything they need to know about their appellate rights. These statutes clearly vindicate any constitutional obligation the state may have to advise civil litigants of their rights on appeal.

Wis. Stat. § 809.10(1) informs litigants that they must file a notice of appeal to initiate an effective appeal, and that the notice of appeal must be filed within the time specified by law. *Id.* at subparts (a) and (e). Wis. Stat. § 808.03(1) teaches that a civil litigant has a right to appeal a final judgment or final order and explains that "a final judgment or final order is a judgment, order, or disposition that disposes of the entire matter in litigation as to one or more parties." *Id.*

Petitioner seems to suggest that, because he proceeded *pro se* in this matter, he was entitled to special accommodations from the Circuit Court to preserve his appeal rights. This is clearly not the case. In fact, with respect to civil litigation, this Court has observed that:

> "*Pro se* appellants must satisfy all procedural requirements, unless those requirements are waived by the court. They are bound by the same rules that apply to attorneys on appeal. The right to self-representation is "[not] a license not to comply with relevant rules of procedural and substantive law." *Farretta v. California*, 422 U.S. 806, 834 n.46, 95 S.Ct. 2525, 2541 n.46, 45 L.Ed.2d 562 (1975).

Waushara Cty. v. Graf, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992). Because they are bound by the same rules as attorneys concerning civil appeals,

"neither a trial court nor a reviewing court has a duty to walk *pro se* litigants through the procedural requirements [of an appeal] or to point them to the proper substantive law." *Id.* In short, because Petitioner decided to litigate this case *pro se*, it was his obligation to apprise himself of the rules governing appeals. The Circuit Court had no obligation to assist him in that regard.

Neither the Circuit Court nor the Court of Appeals deprived Petitioner of his due process or equal protection rights. He has had access to the courts. He had every opportunity to timely appeal the dismissal of Respondents. He simply failed to do so.

II. The Court of Appeals Property Dismissed Petitioner's Appeal as Untimely

"When an order or judgment is entered that disposes of all of the substantive issues in the litigation, as to one or more parties, as a matter of law, the circuit court intended it to be the final document for purposes of appeal, notwithstanding the label it bears or subsequent actions taken by the circuit court." *Harder v. Pfitzinger*, 2004 WI 102, ¶ 2, ¶ 19, 274 Wis. 2d 324, 682 N.W.2d 398. An order disposes of the entire matter in litigation as to one or more parties when the text of the order leaves nothing else to be decided as a matter of substantive law. *Morway v. Morway*, 2025 WI 3, ¶ 25, 414 Wis. 2d 378, 15 N.W.3d 886 (citing Harder at ¶ 17). And, while circuit courts are supposed to designate that their final judgments and orders are final for purposes of appeal with a finality statement, "an incorrect or nonexistent finality statement will not render ambiguous an otherwise unambiguous final judgment or order." *Id.* (citing *Admiral Ins. Co. v. Paper Converting Machine Co.*,

2012 WI 30, ¶ 29, 339 Wis. 2d 291, 811 N.W.2d 351). Finality is based on the text of the judgment or order at issue, not the subsequent actions taken by the circuit court or the court's intent. Id. at ¶ 20. "Thus, when a judgment or order disposes of all substantive matters with respect to a party, then that indicates that the circuit court intended the document to be final as a matter of law." *Id.* (citations omitted).

By its plain text, the July 27, 2023 Order of the Circuit Court granting Respondents' motion to dismiss was a final order. The Order stated:

> IT IS HEREBY ORDERED AND ADJUDGED that, in accordance with *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis.2d 56, 74, 307 N.W.2d 256, 265 (1981), Plaintiff has no viable cause of action against Defendants Employers Mutual Casualty Company d/b/a EMC Insurance Company or Andrew Caruso for breach of contract or bad faith failure to settle and that Defendants Employers Mutual Casualty Company d/b/a EMC Insurance Company and Andrew Caruso are therefore hereby dismissed with prejudice as parties to the action for all the reasons set forth on the record.

[Doc. 136] (emphasis added). The Order informed Petitioner that he had no viable cause of action against Respondents, that his claims against Respondents were dismissed, and that Respondents were dismissed with prejudice from the lawsuit. The Order disposed of all substantive issues between Petitioner and Respondents. It left nothing undecided, and was therefore a final order.

Admittedly, the Order did not include a finality statement. However, the clear and unambiguous language of the Order, and the nature of the motion the Order was granting (a motion to dismiss), left no reasonable doubt that it was in fact a final order. Consequently, Petitioner had until October 25, 2023 to appeal from that Order. Petitioner's motion for reconsideration of the dismissal order raised no new substantive issues and did not extend the time for appeal. But even if it had, the Circuit Court issued its Order denying the motion for reconsideration on January 22, 2024. Petitioner did not file his notice of appeal until January 17, 2025. Accordingly, his appeal was untimely and the Court of Appeals properly dismissed it for lack of jurisdiction.

[...]

respectfully submitted.

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