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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II

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Appeal Case Nos. 2020AP1421 & 2020AP1422  
Circuit Court Case Nos. 2018TR001179 & 2018TR001910

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FOND DU LAC COUNTY,  
Plaintiff-Appellant,

v.

JOHN A. HETTWER,  
Defendant-Respondent.

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ON APPEAL FROM AN ORDER TO DISMISS WITH PREJUDICE  
ENTERED IN FOND DU LAC COUNTY CIRCUIT COURT, THE  
HONORABLE ROBERT J. WIRTZ, PRESIDING

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**APPELLANT'S RESPONSE BRIEF**

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**Statutes**

Wis. Stat. §805.03

## I. The County's Conduct was not Egregious.

This issue presented by Hettwer is whether the court abused its discretion when it dismissed the civil forfeiture cases with prejudice based on the County's failure to prosecute. Specifically, Hettwer analyzes the two situations in which dismissal for failure to prosecute is an abuse of the court's discretion, as described in *Monson*. The court in *Monson* found a dismissal is an abuse of discretion "if there is no reasonable basis to support the circuit court's determination that the aggrieved party's conduct was egregious" or "if the aggrieved party can establish a clear and justifiable excuse for the delay in prosecuting the action." *Monson v. Madison Family Inst.*, 162 Wis.2d 212, 214 (Wis. 1991).

Under §805.03, the court in which the action is pending has discretion to make orders "as are just," with regard to a claimant's failure to prosecute. Wis. Stat. §805.03 (2019). However, the comments provide additional detail related to requirements prior to a dismissal based on finding in *Theis v. Short*. The comments are as follows:

"Dismissal for failure to prosecute violated due process requirements when the petitioner had no actual or constructive notice that her conduct might result in dismissal before the motion to dismiss for failure to prosecute was filed. More than notice of a motion to dismiss for failure to prosecute and a hearing are required to provide due process. Before imposing a sanction as drastic as dismissal, advanced notice is required that a party's conduct might result in dismissal to satisfy due process requirements."

*Theis v. Short*, 328 Wis. 2d 162 (Wis. Ct. App. 2010).

Here, the County's conduct cannot be considered egregious because the County was prepared to move forward with the jury trial on January 23, 2020. When the court ruled the blood test results would not be admitted without the phlebotomist, ADA

Lindo specifically told the court he would be willing and able to move forward with the jury trial on the OWI alone. There was no delay in the County's prosecution of Hettwer's case because ADA Lindo was prepared to move forward on January 23, 2020 with the Jury Trial. ADA Lindo made the decision not to move forward that day only after the court said it would dismiss without prejudice. Additionally, the court had stated at the Jury Trial on July 11, 2019 that the phlebotomist's reason for not being present was "fair and legitimate." (A.App. 3, CR 32:9-25).

Finally, the County was given no advanced warning that not moving forward with the Jury Trial on January 23, 2020 would, or even could, result in a dismissal with prejudice. ADA Lindo specifically informed the court he was prepared to move forward with the Jury Trial on the OWI only, which was a fair compromise, after the court's ruling regarding the admissibility of blood testing results. ADA Lindo's decision to refile the charges as opposed to complete the Jury Trial January 23, 2020 was based upon statements of the court.

Therefore, the County's conduct cannot be considered egregious and the court did find the phlebotomist's reason for being unavailable on July 11, 2019 was fair and legitimate. Additionally, the only reason the Jury Trial was not held on January 23, 2020 was because the court agreed to dismiss Hettwer's case without prejudice and there was no warning ADA Lindo's decision could result in a dismissal with prejudice.

### **Conclusion**

The County would respectfully request that the Court grant the County's Appeal.

Dated: May 20, 2021

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**CERTIFICATION OF WORD COUNT**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the body of this brief is 1,166 words.

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**CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)(f)**

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated May 20, 2021.

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### CERTIFICATION OF MAILING

I hereby certify, pursuant to Wis. Stat. § 809.19(8)(a)(2), that on the date below, I mailed 3 copies of this brief to the Respondent at:

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by depositing the same in a mailbox designed for deposit by the United States Postal Service, contained in packaging with the proper amount of prepaid postage thereon.

Dated this May 20, 2021.

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