STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT IV

Case No. 2022AP000361-CR

In the Matter of Sanctions in:
STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SUZANNE LEE SHEGONEE,

Defendant-Appellant.

On Appeal from an Order for Sanctions,
the Honorable Richard Radcliffe, Presiding,
Entered in the Monroe County Circuit Court

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

The court entered an order requiring the attorneys to finalize negotiations 15 days prior to trial. For several reasons explained by the prosecutor, the attorneys continued to negotiate after the deadline and resolved the case 3 days prior to trial, and then promptly notified the court. The court acknowledged the attorneys' role in the late settlement, but then, sanctioned only Ms. Shegonee, an indigent defendant, $500 for accepting the late offer. Did the court err in imposing the $500 sanction?

The circuit court entered the $500 sanction.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Ms. Shegonee would welcome oral argument if the court felt it would be beneficial but is not requesting it. This is a fact-specific case, requiring application of established legal principles to the facts of the case, therefore publication is not requested.

STATEMENT OF THE CASE

This appeal stems from sanctions imposed upon Suzanne Shegonee for accepting a new offer presented by the state after the court's final deadline for resolution of the case. The order for sanctions constitutes a final order from a special proceeding pursuant to Wis. Stat. § 808.03(1). *State v. Heyer*, 174 Wis. 2d 164, 168, 496. N.W.2d (Ct. App. 1993).

On December 9, 2021, Ms. Shegonee entered pleas and was sentenced in Monroe County case 19-CF-157. After imposition of sentence, the court separately addressed sanctions for the late settlement agreement. (101:27-29; App. 15-17). The court ordered Ms. Shegonee to pay a $500 sanction for accepting the state's new offer, which was presented to her shortly before her attorney notified the court of the resolution. (101:27-29; App. 15-17). The court ordered that the $500 cash bail Ms. Shegonee previously posted be applied to the sanction rather than the $929 of costs and surcharges associated with her convictions. (101:29; App. 17; 96).

On March 9, 2022, Ms. Shegonee filed a notice of appeal. (124). On the same day, Ms. Shegonee filed in this court, a motion to hold the case in abeyance pending Ms. Shegonee's Wis. Stat. § (Rule) 809.30 proceedings or alternative resolution. The motion laid out the unique procedural posture, here, where Ms. Shegonee had both a Rule 809.30 direct appeal and civil appeal stemming from the same hearing.

In the motion, Ms. Shegonee asked for one of three orders: (1) hold this case in abeyance pending Rule 809.30 postconviction proceedings in her underlying criminal case, (2) clarify that this appeal from the sanctions order is separate and distinct from the Rule 809.30 proceedings in her underlying criminal case, and thus, this appeal will not preclude any future claims raised in her Rule 809.30 direct appeal, or (3) dismiss this appeal and permit Ms. Shegonee to raise this issue as a part of her Rule 809.30 direct appeal. In an order issued March 14, 2022, this court chose the first option and stayed this appeal pending Ms. Shegonee's

Rule 809.30 proceedings. On June 20, 2022, Ms. Shegonee filed a motion to lift the stay, as she was not continuing with her Rule 809.30 direct appeal, and asked for a briefing deadline of July 29, 2022, which this court granted.

STATEMENT OF THE FACTS

Ms. Shegonee, a 58-year-old woman, was sitting at Dimensions Bar around midnight when two officers approached her and told her she had a warrant. (86:6). The warrant was filed with a contempt action for failure to provide a DNA sample. (106:4). The officer told Ms. Shegonee she was under arrest. According to the officer, Ms. Shegonee picked up her beer and "attempted to take one last drink before going to jail." (1:2). A second officer grabbed the bottle as she brought it to her mouth. Ms. Shegonee then "brought her left arm up and swung backwards" at the officer who grabbed the bottle. (1:2; 86:6). She did not hit the officer. (86:7). He moved. (86:7).

When Ms. Shegonee stood up from the barstool, the officers grabbed her arms and described her as "slightly resistive" putting her arms behind her back. (1:2; 86:10). She walked herself to the pool table, was "stabilized on the pool table," and secured in handcuffs. (1:2). At the preliminary hearing, the officer testified Ms. Shegonee "made the swinging motion and right after that, [the officers] grabbed each of her arms, that was the extent of it." (86:12).

For this single encounter Ms. Shegonee was charged with three offenses, one felony and two misdemeanors: (1) attempted battery to a law enforcement officer, an attempted Class H felony,

(2) resisting an officer, a Class A misdemeanor and (3) disorderly conduct, a Class B misdemeanor. (1:1). In total, she faced a maximum penalty of 4 years.

Ms. Shegonee is indigent. She qualifies financially for State Public Defender representation but was still able to post a total of $500 cash bond to be released from custody. (5; 12; 23).

The preliminary hearing in this case was held on September 24, 2019, a few months before the COVID-19 pandemic. In the early stages of the pandemic, a few scheduling conferences were held virtually. (115; 116; 117; 118). By March 22, 2021, the case had not yet resolved. At that point, the state's offer included entering guilty pleas to four offenses - one felony and three misdemeanors. The state also added a second count of disorderly conduct. The plea offer included:

- **Plead to:** (1) attempted battery of a law enforcement officer, (2) resisting, (3) disorderly conduct, and (4) an added (second) count of disorderly conduct.
- **On the felony: 30-month diversion agreement** that must be completed prior to dismissal of that count. The conditions were:
    - AODA and follow-up,
    - a letter of apology to the officers,
    - 80 hours of community service + monthly reports and fees,
    - comply with conditions of probation on the misdemeanors.
- **On the 3 misdemeanors:** impose but stay 180 days jail without Huber privileges with two

> years of probation. The conditions of supervision would be the same as the diversion agreement and "other assessments, conditions and no contacts per the agent and the costs of the action."

(120:11-12).

After the final pretrial conference on March 22, 2021, the court filed an order regarding resolution after the final pretrial. The order stated the defense had until April 1, 2021, to reach a negotiated agreement. (70). The trial was scheduled for April 15, 2021. (120:12). The order stated failure by either attorney to follow the order could result in sanctions. (70).

On April 1, 2021, defense counsel filed a letter indicating Ms. Shegonee accepted a misdemeanor offer in the case, however, on April 9, 2021, defense counsel filed another letter indicating Ms. Shegonee wanted to continue with a jury trial. (71; 75). The court then scheduled a final pretrial hearing for November 9, 2021 and a jury trial was scheduled for December 9, 2021. (77).

At the final pretrial, the state's last offer included pleas to four misdemeanors, with a significant jail sentence and probation. The offer included:

- **Plead to:** (1) attempted misdemeanor battery, (2) resisting, (3) disorderly conduct, and (4) an added (second) count of disorderly conduct.

- **On the two disorderly conduct counts:** 180 days jail (90 days consecutive on each count).

- **On the attempted battery and resisting counts:** impose but stay 180 days jail (90 on each count consecutive without Huber privileges), 2 years of probation with the following conditions:

    - AODA and follow-up,
    - Letter of apology,
    - 80 hours community service,
    - Other conditions per agent,
    - Costs.

(121:5-6). With this offer, for a single incident, Ms. Shegonee would have 4 convictions, 6 months in jail and another 6 months without Huber privileges hanging over her head while on probation for 2 years. She rejected this offer. At this point, there had been a lot of back and forth about potential resolutions and some discussion of a felony diversion as well. (121:7).

The court told Ms. Shegonee "this is the offer that the State is willing to – to extend to you to resolve this. There is a deadline for resolution which is going to be the day before Thanksgiving. Any resolution after that date could result in sanctions." (121:5). After the final pretrial conference, the court issued an order stating "[t]he district attorney and defense have until November 24, 2021 to reach a negotiate [sic] plea agreement and notify the court of the same. Both the district attorney and defense shall make every possible attempt to resolve this matter by the date given with the understanding that plea agreements

beyond this date will not be accepted" absent extraordinary circumstances. (80; App. 22).

The order also stated "Failure **by either attorney** to follow this order may result in motions being denied or sanctions being imposed pursuant to Sec. 802.10(7), 805.03, or 814.51, Stats. and any other applicable statute or case law." (80; App. 22; emphasis added).

After the resolution deadline and after significant negotiations between the attorneys, the state made a new offer that narrowed the differences between the parties. (102:4; App. 6). The new offer was "much closer to what would be acceptable" with Ms. Shegonee. (102:4; App. 6). As a result, 3 days before trial, on Monday, December 6, 2021, defense counsel filed a letter indicating Ms. Shegonee wanted to accept the new offer made by the state. (83; App. 23).

The court questioned the state and defense counsel about the changed offer at a hearing on December 7, 2021. The state agreed the offer had changed and explained why negotiations continued beyond the court's deadline. (102:5). The prosecutor explained he had a five- or six-day homicide trial that began the day after the final pretrial conference, which consumed the entirety of his time and then there was Thanksgiving. (102:5; App. 7). He also noted several trials were stacked that day so he was trying to get through negotiations on all of them. (102:6; App. 8). Then, he was out of the office with limited cell phone and internet service. (102:7; App. 9).

Ultimately, the changes the prosecutor made to the offer recognized that Ms. Shegonee had been out of trouble while the case was pending for two years. (102:7; App. 9). While Ms. Shegonee was still pleading to all counts, the accepted offer decreased the length of the diversion agreement on the felony from 3 years to 6 months, cut the probation time in half, and included no jail time. The specifics were:

- **Plead to:** (1) attempted battery of a law enforcement officer, (2) resisting, (3) disorderly conduct, and (4) an added (second) count of disorderly conduct.

- **On the felony**: **6-month diversion agreement** that must be completed prior to dismissal of that count. The conditions were:

    - letter of apology,
    - monthly reports and fees,
    - comply with all conditions of probation. (87:3).

- **On the 3 misdemeanors:** 12 months of probation, with the following conditions:

    - AODA and all follow up,
    - letter of apology,
    - any other assessments conditions or no contacts per agent, costs.

The court told Ms. Shegonee that the clerk "did a bunch of work to make sure that your jury was present here on Thursday when you were supposed to go to trial." (102:11; App. 13). The court said if he accepts her plea, he could impose some costs on her for the extra work that wouldn't have been necessary if

the court's orders were followed. (102:11-12; App. 13-14).

On December 9, 2021, the court accepted the plea agreement. It withheld sentence on the felony count and approved a 6-month diversion agreement. (101:24). On the misdemeanor counts, the court withheld sentence and placed Ms. Shegonee on probation for 12-months. (101:24-25; 92). The court did not order any jail time.

After the court imposed sentence and explained Ms. Shegonee's appeal rights, it stated "Okay. Then I am going to address the issue of sanctions." (101:27; App. 15). The court started by addressing the state's role in the late plea agreement. The court concluded caseload and vacation were not extraordinary circumstances preventing an attorney "from adequately addressing resolution of the case by the deadline." (101:28; App. 16). The court's position is that prosecutors should resolve the case by the deadline or be able to articulate some change in the evidence that would justify changing an offer. (101:28; App. 16).

As for defense counsel's role, the court stated "there is no question that defense attorneys bear the predominant burden for making sure that cases resolve and that their clients understand the deadline and the potential for them being sanctioned, **and I'm unclear whether Ms. Shegonee had full understanding of this deadline or not**." (101:28; App. 16; emphasis added). The court then stated "the fact that the attorneys continued to negotiate after the deadline I think indicates a lack of respect for the court

order, but in the end it's Ms. Shegonee that made the decision to accept a plea." (101:28-29; App. 16-17).

The court concluded the plea offer was "substantially largely similar" to what was offered to her prior to the final pretrial and she knew accepting the plea could result in a sanction. (101:29; App. 17). The court concluded it would "sanction her for changing her mind." (101:29; App. 17), The court concluded a lot of time and energy went into preparing for a jury trial during the pandemic from the court staff and the jurors that were summoned. (101:29; App. 17). The court then concluded it would impose a $500 sanction against Ms. Shegonee. The court noted Ms. Shegonee posted a $500 cash bond and it would be forfeited and applied to the sanction, instead of being applied to her court costs, which totaled $929. (96; 101:29; App. 17). It will "pay the County back for all the time that it spent notifying jurors not only of the trial, but also of the cancellation of the trial, as well as the efforts of court staff in preparing for the trial, and also for canceling the trial based on the late resolution." (101:29-30; App. 17-18).

ARGUMENT

The court erred when it imposed a $500 sanction on Ms. Shegonee for accepting a new offer presented by the state 3 days prior to trial.

A. Introduction.

The court issued an order stating it would not accept a negotiated resolution absent extraordinary circumstances after November 24, 2021, 15 days before the trial date. The order also stated failure *by*

either attorney to abide by the order could result in sanctions. The attorneys continued to negotiate after the set date. The prosecutor explained why: he had a homicide trial right after the pretrial conference, he was negotiating multiple stacked cases, then Thanksgiving, and he had a vacation without reliable cell phone or internet service. All of which created obstacles to completing negotiations. Still, the parties were able to resolve the matter 3 days before the trial was to commence and promptly notified the court of the resolution. The new agreement was significantly different than prior offers. The diversion agreement was 2 years shorter, probation was half as long (1 year), and there was no jail time or community service recommended.

Even though the court acknowledged the attorneys' role in the late resolution - framing it as a "lack of respect" for negotiating beyond the deadline - and the order for resolution recognized it was a "failure by either attorney" that could prompt sanctions, the court ultimately faulted Ms. Shegonee, alone, for accepting the new offer. The court erred because sanctions for late settlement agreements are governed by Wis. Stat. § 814.51, which provides the court with discretionary authority to assess costs against a party when a case is settled within 2 business days prior to trial. That did not occur here. And, the court erroneously exercised its discretion in sanctioning Ms. Shegonee, because she was treated disparately, she had no control over when negotiations occurred, the court's conclusion that the new agreement was "substantially largely similar" was clearly erroneous, and the scheduling order at issue governed the attorneys' conduct, not Ms. Shegonee's conduct.

B. The court erroneously exercised its discretion when sanctioning Ms. Shegonee for accepting a new offer.

The court's order regarding resolution after the final pretrial stated failure **by either attorney** to follow the order may result in sanctions imposed pursuant to Wis. Stat. §§ 802.10(7), 805.03, or 814.51, "and any other applicable statute or case law." (80; App. 22). When sanctioning Ms. Shegonee, the court did not specify what authority it relied upon. The three statutory references listed in the court's order will be addressed below, none of which permits the $500 sanction the court imposed upon Ms. Shegonee for accepting a new plea offer 3 days before trial. But, first, this brief will address the court's overarching erroneous exercise of discretion.

Regardless of what authority the court relies on, it must always appropriately exercise its discretion, which it did not do here. The court's decision to sanction a party is a discretionary decision. *Flottmeyer v. Circuit Court for Monroe County*, 2007 WI App 36, ¶ 16, 300 Wis. 2d 447, 730 N.W.2d 421. "A circuit court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion that a reasonable court could reach." *Id.* at ¶ 17.

1. The court erroneously exercised its discretion because negotiating is beyond Ms. Shegonee's control and she was treated disparately.

It is an erroneous exercise of discretion to sanction Ms. Shegonee for conduct out of her control. In *O'Neil v. Monroe County Circuit Court*, both the state and the defense were ordered to file a witness list "within a reasonable time prior to jury trial." 2003 WI App, ¶ 2, 266 Wis. 2d 155, 667 N.W.3d 774. The trial was scheduled for January 3, 2002, and the state filed its list on December 27, 2001. *Id.* The general practice in Monroe County was for the defense to wait until receiving the state's list before responding with its own list. *Id.* at ¶ 4. Defense counsel was on vacation over the holidays when the state filed its list, and therefore, filed the list on the next working day, January 2, the day before trial. *Id.* A witness on the state's list prompted the defense to obtain an expert, whose name was included on their list. The state objected to the expert the day of trial. The court proposed a choice of either adjourning the trial or proceeding without the defense expert. *Id.* at ¶ 6. An adjournment request was then granted but the court also ordered the State Public Defender to pay the cost of impaneling the jury. *Id.*

The trial court concluded the state also failed to provide its witness list "within a reasonable time before trial." *Id.* at ¶ 18. Yet, the state was not sanctioned. *Id.* The court of appeals determined this disparate treatment to be a problem. *Id.* "A trial court's proper exercise of discretion ensures public and attorney confidence that all will receive equitable treatment." *Id.* at ¶ 21. The trial court erroneously

exercised its discretion, in part, because the order did not reflect the prosecutor's role in the ensuing problem. *Id.*

Similarly, it is an erroneous exercise of discretion for a circuit court to enter a sanction of dismissal with prejudice, imputing the attorney's conduct on the client, where the client is blameless. *Industrial Roofing Services, Inc. v. Marquardt*, 2007 WI 19, ¶ 61, 299 Wis. 2d 81, 726 N.W.2d 898. One of the reasons for such a rule includes that "as a practical matter, a layperson ordinarily cannot be expected to supervise his or her attorney through every pretrial phase of litigation." *Id.* at ¶ 62. Although this case does not involve the same sanction as in *Industrial*, the concept still holds true. Ms. Shegonee was sanctioned for conduct of the attorneys, negotiating beyond the resolution deadline. Ms. Shegonee was not in a position to negotiate her case. That is the attorneys' role.

Ms. Shegonee accepted a new offer negotiated by the attorneys *after* the court's deadline for resolution. "Plea bargaining plays a central role in our criminal justice system." *State v. Myrick*, 2014 WI 55, ¶ 15, 354 Wis. 2d 828, 848 N.W.2d 743 (citing *Lafler v. Cooper*, 566 U.S. 156, 170 (2012)). When properly administered plea bargaining can benefit, the state, defendants, and the public as a whole. *Id.* It is the attorneys, not the defendant, who negotiate plea agreements.

In addition, sanctions issued pursuant to s. 805.03, are limited to what is "just." For example, in *Anderson v. Circuit Court for Milwaukee County*, the court sanctioned a defense attorney $50 for being

8 minutes later for commencement of a jury trial. 219 Wis. 2d 1, ¶¶ 4-8, 578 N.W.2d 633 (1998). The Wisconsin supreme court concluded s. 802.10(7) and s. 805.03 can apply in criminal cases, but concluded the court erroneously exercised its discretion in sanctioning defense counsel for being late to the jury trial without articulating its reasoning and explaining what problems were caused. *Id.* at ¶ 27.

In this case, the attorneys engaged in significant negotiations, but only reached a resolution shortly before trial. The prosecutor provided a reasonable explanation for why the late negotiations occurred: a homicide trial, negotiating multiple cases, Thanksgiving, and then a vacation. However, even though the court concluded the continued negotiations showed a "lack of respect" to the court and the prosecutor's explanation did not rise to an extraordinary circumstance, it did not sanction the attorneys. Instead, the sanction fell on Ms. Shegonee, an indigent defendant facing multiple convictions and punishment for a single incident. This disparate treatment was an erroneous exercise of discretion, as in *O'Neil*.

2. The court erroneously exercised its discretion in concluding the new offer was largely similar to previous offers.

The court's conclusion that the the accepted offer was "substantially largely similar" as previous offers was clearly erroneous. The three offers explained on the record were as follows:

March 22, 2021 offer	**November 9, 2021 offer**	**December 6, 2021 offer**
4 counts: attempted battery of a law enforcement officer, resisting, disorderly conduct, an added (second) count of disorderly conduct. Felony: **30-month** diversion agreement, 80 hours community service. 3 misdemeanors: impose but stay 180 days jail, **2 years of probation**. No jail.	4 misdemeanors: attempted misdemeanor battery, resisting, disorderly conduct, an added (second) count of disorderly conduct. 2 disorderly conduct counts: **180 days jail**. Attempted battery and resisting counts: impose but stay 180 days jail, **2 years of probation,** 80 hours community service.	4 counts: attempted battery of a law enforcement officer, resisting, disorderly conduct, an added (second) count of disorderly conduct. Felony: **6-month** diversion agreement. 3 misdemeanors: **12 months** of probation. No jail, no community service.

The accepted offer included a diversion agreement that was 2 years shorter than previously offered, the length of probation was half of what was previously offered, and there was no jail time or community service. In short, this offer was significantly different. Thus, Ms. Shegonee's acceptance of a new offer presented 3 days prior to trial did not warrant sanctions.

3. The court erroneously exercised its discretion in sanctioning Ms. Shegonee to "pay the County back" for its work.

The court concluded that Ms. Shegonee should be sanctioned to "pay the County back for all the time that it spent in notifying jurors not only of the trial, but also of the cancellation of the trial, as well as the efforts of court staff in preparing for the trial." (101:29-30). The purpose of assessing jury fees pursuant to s. 814.51 "is not to create a means of recouping sums expended by the court to impanel a jury." *Collins*, 1537 Wis. 2d at 488. The right to recover costs "is statutory in nature, and to the extent the statute does not authorize the recovery of specific costs, they are not recoverable." *State v. Foster*, 100 Wis. 2d 103, 106, 301 N.W.2d 192 (1981). As explained below, the court has the discretion to assess costs for "one day's juror fees for a jury, including all mileage costs" for withdrawing a jury demand within 2 business days of trial. Wis. Stat. § 814.51.

As for other costs of prosecution, there is statutory authority to impose several costs and surcharges upon criminal defendants for their prosecution. For Ms. Shegonee, who is indigent, her total costs without the $500 sanction totaled $929. (96). This includes $163 per conviction for clerk of court fees, totaling $489 for Ms. Shegonee. Wis. Stat. § 814.60. Therefore, the court erroneously exercised its discretion in ordering reimbursement of costs outside those authorized by statute.

C. Section 814.51 does not authorize the $500 sanction because the case resolved more than 2 days before trial.

Sanctions for late settlement agreements are governed by Wis. Stat. § 814.51. *State ex. rel. Collins v. American Family Mutual Insurance Co.*, 153 Wis. 2d 477, 489, 451 N.W.2d 429 (1990). This analysis requires interpretation of s. 814.51. Statutory interpretation begins with the language of the statute and should be given its common, ordinary, and accepted meaning. *State ex. rel. Kalal v. Circuit Court of Dane Cnty.*, 2004 WI 58, ¶¶ 45-46, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). Any issue of statutory interpretation is reviewed de novo. *Noffke v. Bakke*, 2009 WI 10, ¶ 9, 315 Wis. 2d 350, 760 N.W.2d 156.

According to its plain language, sanctions pursuant to s. 814.51 can be imposed when a case is resolved within 2 days prior to the commencement of a jury trial. Specifically, s. 814.51 states:

> The court shall have discretionary authority in any civil or criminal action or proceeding triable by jury to assess **the entire cost of one day's juror fees for a jury, including all mileage costs**, against either the plaintiff or defendant or to divide the cost and assess the cost against both plaintiff and defendant, or additional parties plaintiff or defendant, if a jury demand has been made in any case and if a jury demand is later withdrawn **within 2 business days prior to the time set by the court for the commencement of the trial**. The party assessed shall be required to make payment to the clerk of circuit court within a prescribed period and the payment thereof shall be enforced by contempt proceedings.

(Emphasis added).

The purpose of s. 814.51 is "not to create a means of recouping sums expended by the court to impanel a jury." *Collins*, 153 Wis. 2d at 488. Rather, it is "to regulate conduct which is disruptive of the orderly business of the court." *Id.* Section 814.51 was intended to remedy the problem of late settlement agreements. *Id.* at 487.

Thus, "the sanction to be imposed upon parties for disrupting the court's calendar by a last minute settlement **must be consistent with that authorized under sec. 814.51**." *Id.* at 489 (emphasis added). "If the defendant decides to waive a jury or change a plea of not guilty, he or she may avoid the penalty of sec. 814.51 by simply timely notifying the court." *Id.* at 490 (quoting *Foster*, 100 Wis. 2d at 110). Timely notification of a settlement agreement, pursuant to s. 814.51, is "within 2 business days prior to the time set by the court for the commencement of the trial."

In *Collins*, the court established a "stip or stack" system to decrease the disruptions and costs associated with last minute settlement agreements. *Collins*, 153 Wis. 2d at 480. Parties were required to be prepared for trial and settlement at the time of the pretrial conference. *Id.* If they were unable to reach a resolution by that date the court would require the parties to choose between a "stipulated" or "stacked" trial date. A "stipulated" date provided the parties with a date certain for trial. To obtain this option, the parties had to provide a written stipulation stating the final settlement offer and their agreement that if a settlement was later achieved, a "stipulated penalty"

would be paid by the parties into a "general fund"of the court. *Id.* On the stacked dates, five cases are set and everyone must be prepared for trial. The court then selects the costliest case to cancel and tries that one. *Id.* at 481. The others get a new trial date. *Id.*

The parties in *Collins* chose a "stipulated" trial date. *Id.* 4 days before trial, the parties reached a resolution and sought to be released from the stipulation. *Id.* at 482. The court would not release the parties from the stipulation. *Id.* at 483. On review, the court of appeals concluded the policy resulted in arbitrarily imposed sanctions that were inconsistent with acts of the legislature and prior cases. *Id.* at 490. The policy unreasonably restricted parties' ability to control the prosecution of their case and violated "the court's long-standing policy in favor of settlements." *Id.* (citation omitted).

The court also concluded the parties' constitutional right to settle their case was more compelling than the court's efforts – although commendable – to address late settlement agreements. *Id.* at 491 (citing Wis. Const. art. 1 § 9). Ultimately, the stipulated sanction for resolving the case 4 days prior to the jury trial was not permitted.

On the other hand, sanctions have been upheld pursuant to s. 814.51 when notification that a jury trial could not proceed is provided within 2 days of its commencement. For example, in *Flottmeyer*, the state was properly assessed a $250 sanction for informing the court a day and half before trial that it could not proceed. *Flottmeyer*, 300 Wis. 2d 447, ¶¶ 19-20, 26-28. Likewise, in *Foster*, the defendant was properly sanctioned pursuant to s. 814.51, for accepting a

previously proposed plea offer on the eve of trial. *Foster*, 100 Wis. 2d at 104, 110. Again, s. 814.51 controlled, and thus, sanctions were appropriate because resolution occurred within 2 days of trial. *Id.* at 109.

In this case, like in *Collins*, the court established its own system for sanctioning late settlement agreements, despite s. 814.51. However, *Collins* is clear that sanctions for a last-minute settlement "must be consistent with that authorized under sec. 814.51." Here, defense counsel notified the court within the parameters of s. 814.51 that Ms. Shegonee intended to accept the state's new offer. The jury trial was scheduled for 9:00 am on December 9, 2021. (77). On December 6, 2021, *3 days prior to the commencement of trial*, defense counsel filed a letter notifying the court that Ms. Shegonee accepted the state's new offer and requested a plea hearing. (83). Therefore, the court could not impose sanctions pursuant to s. 814.51.

D. Section 814.51 governs sanctions for late settlement agreements, not Wis. Stat. §§ 802.10 and 805.03.

The court's order about resolution after the final pretrial also listed Wis. Stat. §§ 802.10(7), 805.03 as authority for potential sanctions when there is a "failure by either attorney" to follow the order. (80). Section 802.10(3), permits the court to enter a scheduling order to address a variety of events during the pendency of a case, such as, time to join parties or amend the pleadings. However, the list does not include a scheduling order for when a final settlement

must be reached.[1] The catchall provision allows a scheduling order for "Any other matters appropriate to the circumstances of the case…" Wis. Stat. § 802.10(3)(k). Then, s. 802.10(7), states: "**Sanctions.**

[1] Wis. Stat. § 802.10(3): Scheduling and planning. Except in categories of actions and special proceedings exempted under sub. (1), the circuit court may enter a scheduling order on the court's own motion or on the motion of a party. The order shall be entered after the court consults with the attorneys for the parties and any unrepresented party. The scheduling order may address any of the following:

(a) The time to join other parties.

(b) The time to amend the pleadings.

(c) The time to file motions.

(d) The time to complete discovery.

(e) The time, not more than 30 days after entry of the order, to determine the mode of trial, including a demand for a jury trial and payment of fees under s. 814.61(4).

(f) The limitation, control and scheduling of depositions and discovery, including the identification and disclosures of expert witnesses, the limitation of the number of expert witnesses and the exchange of the names of expert witnesses.

(g) The dates for conferences before trial, for a final pretrial conference and for trial.

(h) The appropriateness and timing of summary judgment adjudication under s. 802.08.

(i) The advisability of ordering the parties to attempt settlement under s. 802.12.

(j) The need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems.

(jm) The need for discovery of electronically stored information.

(k) Any other matters appropriate to the circumstances of the case, including the matters under sub. (5) (a) to (h).

Violations of a scheduling or pretrial order are subject to ss. 802.05, 805.03, and 895.044."[2]

Section 805.03, in relevant part, states:

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

Reliance on s. 802.10(7) and s. 805.03 to sanction Ms. Shegonee is misplaced. First, as explained above, s. 814.51 governs sanctions for late settlement agreements and the facts here do not satisfy the requirements laid out in s. 814.51. Second, the order for resolution after the final pretrial entered here addressed the attorneys conduct, not Ms. Shegonee's conduct. It governed plea negotiations, a task of the attorneys. Specifically, as to sanctions, it stated "[f]ailure by either attorney" to follow the order could result in sanctions. It did not say Ms. Shegonee. That makes sense. The order addressed when negotiations between the attorneys were to cease. A represented defendant does not participate in negotiations. And, defense counsel has limited ability to negotiate if the prosecutor is unavailable – even if there is good reason – as was the case here. Thus, Ms. Shegonee did not violate a scheduling order, as her conduct was not the

[2] Section 802.05 addresses signing of pleadings, motions, and other papers and representations in court. Section 895.044 addresses damages for maintaining certain claims and counterclaims.

subject of the order and she cannot be sanctioned under s. 802.10(7) and s. 805.03.

CONCLUSION

For these reasons, the court did not have the authority to sanction Ms. Shegonee $500 for accepting a new plea offer after the court's settlement deadline. As such, Ms. Shegonee respectfully requests this court reverse the circuit court and vacate the sanction order.

Dated this 29th day of July, 2022.

Respectfully submitted,

Electronically signed by Katie R. York

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,653 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 29th day of July, 2022.

Signed:
Electronically signed by
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