**STATE OF WISCONSIN**
**SUPREME COURT**
**APPEAL NO. 2023-AP-58**

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**IN RE THE ESTATE OF RAYMOND J. KAISER:**
**ARNOLD R. KAISER AND KATHERINE G. CHRISTECK,**

**Appellants,**

**v.**

**TOWNLINE CTH-N LLC,**

**Respondent-Petitioner,**

**and**

**CHRISTINE OLSEN,**
**SUCCESSOR PERSONAL REPRESENTATIVE**
**FOR THE ESTATE OF RAYMOND J. KAISER,**

**Respondent.**

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**On Appeal from the Court of Appeals of Wisconsin,**
**District III**
**Reversing the Circuit Court for Marathon County**
**The Honorable Michael K. Moran, Presiding**

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# PETITION FOR REVIEW

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**Shane J. VanderWaal**
**Arthur M. Scheller III**
**VANDERWAAL LAW, S.C.**
**Attorneys for Respondent-Petitioner,**
**Townline CTH-N LLC**

**226411 Rib Mountain Drive, Suite 2**
**Wausau, WI 54401**
**Phone: (715) 845-9401**
**E-mail: shanev@vanderlaw.net / ams@vanderlaw.net**

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## INTRODUCTION

In 2019, Respondent-Petitioner, Townline CTH-N LLC ("Townline"), purchased approximately 33 acres of property in the City of Wausau with a deed restriction limiting the property to single family residential or agricultural use only. Before purchasing the property, Townline had two title companies examine the deed restriction and, based on those investigations, concluded that the restriction was unenforceable.

Townline's investigation discovered that the property had been owned at one time by the Estate of Raymond J. Kaiser (the "Estate"). During the informal administration of the Estate, Arnold Kaiser ("Arnold"), Raymond J. Kaiser's son, and Attorney F.E. Bachhuber, Jr. ("Bachhuber") were designated as co-personal representatives. In their application to be co-personal representatives, Arnold and Bachhuber attested, under oath that they "made diligent inquiry" and were "unaware of any unrevoked will of the decedent and believe[d] that the decedent died leaving no will." (Appendix ("App."), Court of Appeals Decision, App. 3 at ¶ 4)

There is no dispute that Arnold's and Bachhuber's representations about the Will were false. Raymond had a Will but it did not evince any intent to restrict the use of his property in any way. And that was a problem for Arnold and his sister, Katherine Christeck (collectively the "Heirs"), who desired to place a restriction on their father's property before the Estate sold it to a third party. Rather than file the Will, the personal representatives buried it in Bachhuber's files where it remained for many years. With the Will concealed, the Heirs then instructed Bachhuber, who handled the administration of the Estate, to sell the property and to insert a deed restriction limiting it to single family residential or agricultural use only. Neither the Heirs nor Bachhuber had legal authority to restrict the use of the Estate's property before it was sold.

The Estate was closed in July 2005. After investigating the property's history, Townline purchased it in 2019 knowing of the illegal deed restriction. In

2020, one year after purchasing the property, Townline moved to reopen the Estate for the sole purpose of removing the restriction. After this litigation commenced, the Heirs allegedly discovered the Will in Bachhuber's file and filed it with the circuit court. The circuit court found the Heirs and personal representatives' conduct with respect to the Will troubling, questioning whether they had engaged in fraud or acted in bad faith as the Will "disagreed" with what they were trying to accomplish through the informal administration. (R. 49, pp. 3-5.)

On May 7, 2021, the circuit court exercised its discretion and reopened the Estate, appointing Attorney Christine R.H. Olson as successor personal representative. (R. 47.) Attorney Olson was instructed to investigate and report to the circuit court concerning the deed restriction. (Id.) On July 13, 2021, Attorney Olson filed her report, concluding there was a "pervasive stench of fraud to the case that the will was suppressed" and recommending that "the restrictive covenant should not have been placed in the chain of title by Attorney Bachhuber and should therefore be set aside." (R. 56.)

On July 20, 2022, the circuit court held an evidentiary hearing which, among other things, demonstrated that the deed restriction negatively impacted the property by reducing its value. (R. 99, 102.) On November 29, 2022, the circuit court entered its Decision Regarding Deed Restriction. (App. 33-35.) The court found that the personal representatives exceeded their authority by inserting a deed restriction that reduced the property's value. (Id.) Accordingly, the court held that the deed restriction should be stricken. (Id.)

The court of appeals admittedly did not consider the merits of either parties' position, noting that it was "sensitive to the importance of the underlying legal rights at issue, including otherwise potentially valid claims aimed at protecting those rights." (App. 12 at ¶ 26.) Indeed, in reaching its decision, the court of appeals concluded that "we pass no judgment on the underlying merits of the parties' claims or defenses, as well as on the circuit court's decisions regarding those issues." (Id.) Instead, the court of appeals reversed on the sole ground that the public policy

calling for finality in estate administration barred Townline's motion to reopen the Estate because it had come "too late." (Id.)

In reaching its decision, however, the court of appeals clearly struggled, recognizing that this case is "novel" and concluding that there was no law on point:

> We are not aware of any controlling precedent addressing a motion by a party that acquires real property previously sold by an estate to reopen that estate in order to challenge anything related to that property. We are also unaware of any case law from other jurisdictions in which such a situation has been addressed. There also appears to be little case law, if any, regarding if and when a motion to reopen an estate is too late in time after an estate closes.

(App. 10-11 at ¶ 22.)

Nonetheless, the court of appeals held, as a matter of law, that finality of estate administration was so important that it trumped every other consideration. But in so ruling, the court never balanced that public policy against the competing policies at issue in this case. Wisconsin public policy favors the free and unrestricted use of property. Further, while Wisconsin public policy favors the sanctity of estate administration it also favors preventing fraud on the court. Those countervailing policies were never considered by the court of appeals in reaching its decision. In addition to the public policy issues, the court of appeals ignored the circuit court's broad discretion in ruling on motions to reopen estates. Finally, as demonstrated below, the court of appeal's reliance on Wis. Stat. § 806.07 and the equitable doctrine of laches to conclude that Townline's motion was "too late" is flawed.

Given the extraordinary circumstances of this case, the competing policy concerns, the lack of case law in this area, and the admittedly novel issue under consideration – which the court of appeals recognized was a case of first impression in Wisconsin and likely in the country – this Court should grant Townline's petition for review.

## STATEMENT OF THE ISSUES

**1. Whether Wisconsin's public policy calling for finality in estate administration bars Townline's motion to reopen the Estate given the extraordinary circumstances of this novel case and the competing public policies implicated by the personal representatives' misconduct?**

The circuit court answered "no." The court of appeals answered "yes."

**2. Whether Townline, the current owner of real estate that belonged to the Estate of Raymond J. Kaiser, had standing to reopen the Estate and challenge a deed restriction that was illegally inserted by the original personal representatives when they sold the property on behalf of the Estate?**

The circuit court answered "yes." The court of appeals did not address standing although it was raised in Townline's brief.

**3. Whether the personal representatives exceeded their authority by inserting a deed restriction when they sold property on behalf of the Estate where the evidence demonstrated that the restriction reduced the property's value?**

The circuit court answered "yes." The court of appeals did not address this issue although it was raised in Townline's brief.

**4. Whether the Wisconsin Supreme Court's decision in *In re Estate of Scheibe*, 30 Wis. 2d 116, 140 N.W.2d 196 (1966) supports the circuit court's decision to strike the deed restriction?**

The circuit court answered "yes." The court of appeals did not address this issue although it was raised in Townline's brief.

## CRITERIA FOR REVIEW

The court of appeals reached its decision as a matter of law based on public policy. The court concluded that finality in estate administration trumps competing public policies where, in the court's opinion, too much time has passed between when an estate is closed and a motion to reopen is filed. But, as the court of appeals acknowledged, there is no law "regarding if and when a motion to reopen an estate is too late." (App. 11 at ¶ 22.) Accordingly, instead of reviewing whether the circuit court abused its discretion (as it should have) or applying Wisconsin law to the unique facts in this case, the court of appeals made new law. And to "support" this new legal principle, the court of appeals looked to general probate statutes, Wis. Stat. § 806.07, and the equitable doctrine of laches "to inform [its] analysis." (App. 11-12, 22 at ¶¶ 25, 49.)

The court of appeal's own reasoning demonstrates that this Petition meets the criteria under Wis. Stat. § 809.62(1r)(c). A decision by the Supreme Court will help develop and clarify the law, something that the court of appeals admittedly attempted to do. Further, this case presents a novel question which, again, the court of appeals conceded. The question of when it is "too late" to reopen an estate under the type of extraordinary circumstances presented in the case *sub judice* has never been answered by a Wisconsin court before now. As such, the resolution of this issue calls for the application of a new doctrine to a factual situation and will have statewide impact by establishing new law in this area. Wis. Stat. § 809.62(1r)(c)1, § 809.62(1r)(c)2. Finally, the question of law presented in this case, when it is "too late" to reopen an estate, is the type that is likely to recur unless resolved by the Supreme Court. Wis. Stat. § 809.62(1r)(c)3. The court of appeals found that Townline was "too late" but never established any guideposts for future litigants who seek to reopen an estate due to a fraud on the court.[1]

[1] The court of appeals found that an Estate cannot be reopened 15 years after it closes even where there is fraud on the court and no other time limit bars the motion. But what is the rule for future cases? 10 years? 5 years? The court of appeals left the issue unresolved for future litigants.

On the issue presented by this case, there is no settled law. Accordingly, only this Court can resolve the uncertainty created by the court of appeals' decision.

## STATEMENT OF THE CASE

The court of appeals' opinion sets forth the relevant background facts and procedural history. (App. 3-10 ¶¶ 4-21.) The following facts and procedural history supplement the court's opinion.

On March 20, 2019, Townline purchased the property by Special Warranty Deed from ABS 1, LLC, a wholly-owned subsidiary of Investor's Community Bank. (R. 25, p. 5; R. 26, ¶ 4.) Prior to purchasing the property, Townline had two title companies examine the deed restriction, Runkel Abstract & Title Co. and County Land & Title, LLC. (R. 26, ¶ 5.) Both title companies concluded that the deed restriction was unenforceable. (Id., ¶ 6; R. 99, p. 143, lines 3-9.) Townline then proceeded to purchase the property. (R. 26, ¶ 7.) In order to have certainty with respect to its rights to the property and to prevent future legal challenges relating to the deed restriction, Townline instituted this lawsuit on September 10, 2020. (Id., ¶ 8.)

On May 7, 2021, the circuit court granted Townline's motion to reopen the Estate and appointed Attorney Olson as Successor Personal Representative tasked with investigating and reporting back to the court her recommendations regarding the deed restriction. (R. 47.) At the hearing on Townline's motion to reopen, the circuit court was clearly troubled by the fact that the Heirs and Bachhuber ignored the Will, which did not support the Heirs' claim that their father "wanted" to restrict his property:

> [W]hat concerns me about this case, and this is what has always concerned me, and I guess the testimony this morning was very helpful on it, is that I'm being asked to appoint Arnold Krueger (sic) as the personal representative based upon a will that was never meant to see the light of day for some reason. I mean, I can't think of any reason why this will was not brought forth.
>
> * * *

> The question comes down to is Mr. Kaiser vicariously responsible for what I consider to be, do I say it, fraud? Do I call it bad faith? Do I call it malpractice? What do I call it? But there is something not right here and I cannot just close my eyes like they did for the will that was never brought forward and just pretend this did not happen.
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> * * *
>
> I have no idea why [the Heirs] would not have brought this to the attention of the attorney. Hey, Attorney Bachhuber, I got a will in front of me and I go to court cases and they say it's an intestacy here. That means that there is no will. I don't understand even for the lay person to say I have a will, I provided you with a will and yet you're saying in court there was no will, suggesting to me that if not intentionally but certainly complicitly participating in what I consider to be bad faith if not almost fraud and I just can't get around that feeling in this case that something was not right here and something was done in a way that suggests to me that this will was never going to see the light of day because it did something or said something that disagreed with the position of what was trying to be done by the attorney and then vicariously or whomever, his client or the estate, and I just have real concerns about that and that has been something that has really caused me consternation at best – at worst.

(R. 49, pp. 3-5.)

On July 13, 2021, Attorney Olson filed her Successor Personal Representative Analysis. (R. 56.) Attorney Olson relied on the Wisconsin Supreme Court's holding in *In re Estate of Scheibe,* 30 Wis. 2d 116, 140 N.W.2d 196 (1966), finding that the executor failed in his trust by selling property to his sister at appraised value rather than attempting to sell the property at its highest and best use. (Id., p. 4.) Attorney Olson further concluded that "the term 'restrictive covenant' alone suggests that the inclusion would limit the value and buyers for the property, and as such would have been improper under the Schiebe (sic) analysis." (Id.) Accordingly, Attorney Olson recommended that the restrictive covenant should not have been placed in the chain of title, and therefore, should be set aside. (Id., p. 5.)

On November 29, 2002, the circuit court entered its Decision Regarding Deed Restriction. (App. 33-35.) The circuit court concluded that it was "willing to assume that the Personal Representatives could have added the deed restriction at issue if doing so had increased the value of the property and thereby provided the

best return for the Estate." (Id. 33.) The court found that the evidence adduced at a July 20, 2022 evidentiary hearing demonstrated that the deed restriction actually reduced the value of the property. (Id. 34.) Accordingly, the circuit court struck the restriction, ruling that the personal representatives, like the executor in *Scheibe*, acted outside the scope of their duties. (Id.)[2]

The court of appeals reversed the circuit court on September 4, 2024. (App. 1-32.) The court of appeals acknowledged that the circuit court reasonably expressed its concerns about the fraudulent misconduct by the personal representatives but concluded that finality of estate administration barred Townline's motion to reopen. (Id. 2, 9, 30-31 at ¶¶ 2, 18, 65.) This petition was then timely filed.

## ARGUMENT

### THE COURT SHOULD REVIEW THIS ISSUE OF FIRST IMPRESSION REGARDING WHETHER A MOTION TO REOPEN AN ESTATE IS "TOO LATE" WHEN IT INVOLVES AN ILLEGAL DEED RESTRICTION AND THE PERVASIVE STENCH OF FRAUD.

The court of appeals held that the public policy of finality in estate administration barred Townline's motion to reopen the Estate, although the court admitted it could not find any Wisconsin law directly on point. (App. 2, 10-11 at ¶¶ 2, 22-23.) Townline does not dispute the importance of this policy. What Townline does dispute, however, is the court of appeals' failure to balance this policy against the other important policies implicated by this case. Further, Townline contends that the court of appeals erred by failing to consider the case through the proper lens --- whether the circuit court abused its discretion, and

[2] The record does not contain any admissible evidence that Raymond J. Kaiser, the decedent, wanted to impose a restrictive covenant on the property. (R. 56, p. 3.) Notably, Raymond fully understood restrictive covenants and placed one on another parcel of his property while he was alive. (R. 99, p. 98, line 4 – p. 99, line 4; R. 131, pp. 1-4.)

instead, developed new law in a novel case which is entirely the province of the Supreme Court. Wis. Stat. § 809.62(1r)(c).

It is well-settled that when a case involves equally important public policies, a court must balance those competing interests in reaching its decision. *See, e.g. Democratic Party of Wisconsin v. Wisconsin Department of Justice,* 2016 WI 100, ¶ 33, 372 Wis. 2d 460, 888 N.W.2d 584. That was not done in this case. Again, there is no dispute about the importance of finality with respect to administering estates. But this case implicates equally important, competing policies that were never fully addressed by the court of appeals.

For instance, Wisconsin public policy favors "the free and unrestricted use of property." *Forshee v. Neuschwander,* 2018 WI 62, ¶ 16, 381 Wis. 2d 757, 914 N.W.2d 643, quoting *Crowly v. Knapp,* 94 Wis. 2d 421, 434, 288 N.W.2d 815 (1980). For that reason, courts must "strictly construe[]" restrictive covenants "to favor unencumbered and free use of property." *Id.* The policy is so deeply woven into the fabric of Wisconsin property law that all doubts about a covenant's restrictions "should be resolved in favor of" the owner's "free use." *Schneider v. Eckhoff,* 188 Wis. 550, 556, 206 N.W. 838 (1926). While the court of appeals mentioned *Forshee* in passing, it never truly balanced the competing policies and disregarded the undisputed record evidence showing that the personal representatives inserted the deed restriction without any legal authority to do so. In essence, the court of appeals found that finality of estate administration trumped the free use of property – permitting an illegal restriction to stand simply because "too much time had passed." Further, as demonstrated below, even its analysis of "too much time" is not sound.

Similarly, the court never balanced the policy of finality in estate administration against the "pervasive stench of fraud" the surrounded that administration. Nor did the court of appeals consider, let alone balance, the fraud on the court that was demonstrated in this case. There is no dispute that the personal representatives (including Bachhuber) swore in a court filing that there was no Will

when, in fact, they had possession of the Will but concealed it because it did not support a restrictive covenant on the property. That is not simply fraud, but a fraud on the court as it constitutes egregious misconduct involving an officer of the court. *See, e.g. Porcelli v. Joseph Schlitz Brewing Co.,* 78 F.R.D. 499, 500-01 (E.D. Wis. Apr. 19, 1978) (recognizing that a fraud on the court "is a fraud perpetrated by officers of the court so that the judicial machinery can not (sic) perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.") The court of appeals never addressed this important policy concern.

Accordingly, the court of appeals reached a results-oriented decision by focusing on only one policy and ignoring the countervailing policies at issue in this case: fraud on the court in order to illegally restrict the free use of real property. Indeed, a court of appeals cannot truly weigh competing policy concerns when it views a case solely through the prism of one of those policies. Townline submits that, under these unique circumstances, the policy of finality in estate administration must bow to these other policies and a court's duty to ensure fairness in the resolution of a dispute.[3] Given the policy issues raised by the court of appeals, the Supreme Court should grant the petition. Wis. Stat. § 809.62(1r)(b), § 809.62(1r)(c).

***The Court of Appeals Ignored the Proper Standard of Review*.**

The court of appeals correctly noted that an estate may be reopened under Wis. Stat. § 879.31, which specifically makes Wis. Stat. § 806.07 applicable to probate proceedings for relief from orders. (App. 16 at ¶¶ 35-36.) *See also In the Matter of Estate of O'Neill,* 186 Wis. 2d 229, 234, 519 N.W.2d 750 (Ct. App. 1994). Under Wis. Stat. § 806.07(1)(h), circuit courts have "broad discretionary authority" as the statute "invokes the pure equity power of the court." *Allstate Ins. Co. v.*

[3] The Heirs' oral argument that estates would always "be open" and subject to re-administration is misleading. (App. 11 at ¶ 24.) This case is not about changing public policy with respect to finality in estate administration. Rather, this case raises the issue of the proper balancing of that policy with multiple other important policies that implicate the fundamental fairness of proceedings that permitted an unauthorized restrictive covenant.

*Brunswick Corp.,* 2007 WI App 221, ¶ 6, 305 Wis. 2d 400, 740 N.W.2d 888. "A circuit court's discretionary decision will not be reversed unless the court erroneously exercised its discretion." *Sukula v. Heritage Mutual Insur. Co.,* 2005 WI 83, ¶ 8, 282 Wis. 2d 46, 698 N.W.2d 610. "A discretionary decision contemplates a process of reasoning that *depends on facts that are in the record*, or reasonably derived by *inference from facts of record*, and a conclusion based on the application of the correct legal standard." *Id.* (Emphasis added.)

Despite the fact that the circuit court has broad discretionary authority to reopen an estate, the court of appeals ignored that discretion. Instead, the court simply believed it had been "too long" between the closing of the estate and the motion to reopen, and therefore, resolved the case as a "matter of law." (App. 24-25 ¶¶ 54-55.) But again, there is no law in Wisconsin on point nor could the court of appeals find law in any other jurisdiction to support its holding.

Further, the court of appeals concluded that "intervening circumstances" made it inequitable to reopen the Estate, including the death of Bachhuber and the loss of some documents from Bachhuber's file. The court of appeals concluded that "Bachhuber's unavailability and his incomplete file would place the Estate at a disadvantage *in defending a claim challenging its administration*." (App. 29-30, ¶ 62 (emphasis added).) But that ignores the record below where the Estate fully defended the claim. Importantly, in exercising its broad discretion, the circuit court held an evidentiary hearing at which time the court heard the evidence presented by both parties with respect to reopening the Estate and evaluated the credibility of the witnesses. (R. 99.) Accordingly, the court of appeals not only failed to fully consider the abuse of discretion standard, but also, gave no deference to the circuit court's findings. Instead, the court of appeals chose to make new law which is not its proper function. Therefore, review is warranted under Wis. Stat. § 809.62(1r)(c)1, § 809.62(1r)(c)2.

***The Court of Appeals' Analysis of Wis. Stat. § 806.07 and Laches Is Flawed***.

Review should also be granted given the court of appeals flawed reasoning with respect to what it believes constitutes "too much" time. The court of appeals placed "prominent consideration" on the fact that the Estate was closed in 2005 and Townline brought its motion to reopen in 2020, 15 years later. (App. 26 at ¶ 57.) But Townline never discovered that the deed restriction was legally defective until 2019, when it performed its due diligence and two title companies concluded it was not proper. (R. 26, ¶¶ 5-7; R. 99, p. 143, lines 3-9.) By filing suit in 2020, Townline acted within one year of obtaining knowledge of the illegal deed restriction. But the court of appeals improperly charged them with knowledge over the entire 15-year time frame.

The court of appeals compounded its error by concluding that due to this 15-year "delay," Townline had failed to reopen the Estate within a "reasonable time" under Wis. Stat. §§ 806.07(1)(h), 806.07(2). (App. 20-21 at ¶ 46.) As the court of appeals noted, the relevant factors regarding "reasonableness" vary from case to case but "undoubtedly include 'the reasons for the moving party's delay' and the prejudice to the party opposing the motion." (Id., citing *State ex rel. Cynthia M.S. v. Michael F.C.*, 181 Wis. 2d 618, 627, 630, 511 N.W.2d 868 (1994).) But Townline did not delay – it moved to reopen the Estate approximately one year after purchasing the property. Nor is there any prejudice to the Heirs in reopening the Estate as they no longer own the property, and thus, removal of the deed restriction would not impact them in any way. As a result, the court of appeals' holding that Townline did not file its motion within a "reasonable time" is not supported by either the law or the record evidence.

Indeed, the court of appeals decision to ignore the circuit court's broad discretion under Wis. Stat. § 806.07 cannot be understated. "To determine whether relief from a judgment is appropriate, the circuit court 'should examine the allegations accompanying the motion … with the assumption that all assertions contained therein are true.'" *Allstate*, 2007 WI App 221, ¶ 6, quoting *Sukala*, 2005

WI 83, ¶ 10. "If the facts alleged are, *in the court's assessment*, 'extraordinary or unique such that relief may be warranted,' a hearing must then be held to ascertain the truth or falsity of the allegations." *Id.* (Emphasis added.) The court, in its broad discretion, may reopen a proceeding provided the following conditions are met: (1) that the petitioner is without fault; and (2) that "justice requires a revision of the order." *Korleski v. Estate of Korleski*, 22 Wis. 2d 617, 622, 126 N.W.2d 492 (1964).

That's exactly what happened in the circuit court – and which the court of appeals ignored. The circuit court assessed Townline's motion, found extraordinary relief may be warranted, and accordingly, held a hearing. The circuit court properly reopened the Estate because Townline was "without fault" having played no role in improperly restricting the property. Further, this case is clearly extraordinary and required revision to ensure justice. Bachhuber exceeded his statutory authority as personal representative by inserting a restriction into the deed, thereby acceding to the request of the beneficiaries. (R. 27, ¶ 6.) Arnold also exceeded his authority as personal representative by directing Bachhuber to insert the deed restriction admitting "*this is what my sister and I agreed should be properly done*." (R. 17, Ex. 1 at ¶ 12 (emphasis added); R. 27, ¶ 6.) Arnold further filed a sworn statement that no Will existed when, in fact, he knew (i) Raymond Kaiser had a Will, (ii) the Will was given to Bachhuber, and (iii) the Will was never submitted to probate. (R. 27, ¶ 7.) Given these extraordinary facts (where one personal representative directs another personal representative to exceed his authority based on what the first representative *allegedly believes* the decedent would have wanted and, together, they commit a fraud on the court), the sanctity of the final judgment is outweighed by "the incessant command of the court's conscience that justice be done in light of *all* the facts." *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 550, 363 N.W.2d 419 (emphasis in original).

Further, the court of appeals misconstrued Wis. Stat. § 806.07(2) in concluding that Townline's motion was time barred. (App. 26-28 at ¶¶ 58-59.) The statute contains no time limitation for a court "to entertain an independent action to

relieve a party from judgment, order, or proceeding, **or** to set aside a judgment for fraud on the court." Wis. Stat. § 806.07(2).[4] Based on the statute's plain language, Townline's motion to reopen should not have been barred by the one (1)-year time limit under Wis. Stat. § 806.07(2) as the court of appeals concluded. Again, it appears the court of appeals was attempting to fit a square peg into a round hole in order to achieve a result it deemed fair.

For similar reasons, the court of appeals' laches analysis misses the mark. Although acknowledging that it is "doubtful" that laches applies, in and of itself, to Townline's motion to reopen, the court of appeals relied on the doctrine as "support" for its public policy reasoning. (App. 11-12, 21-24 at ¶¶ 25, 47-52.) Specifically, the court of appeals held that the only time limit on a claim under Wis. Stat. § 806.07(2) is determined by laches. (Id. 21, 27 at ¶ 47, fn. 15.) However, the court ignored the well-settled law on this issue: that "[a]s to laches, the time for moving to vacate an order constituting fraud upon the court for concealment of facts *does not arrive until discovery of the concealment* that constituted that fraud." *In re Cosgrove's Will,* 236 Wis. 554, 295 N.W. 784, 789 (1941) (emphasis added). In its analysis, the court of appeals overlooked the critical fact in this case – that *the concealment of the Will was first discovered after this litigation had commenced* when the Will was finally produced. (App. 5-6, ¶ 10; R. 19, p. 10; R. 35.) Basic logic dictates that laches cannot apply under these circumstances. Because the court of appeals misinterpreted the statute and disregarded the critical facts regarding concealment, its holding that Wis. Stat. § 806.07(2) bars Townline's motion was error.

Finally, the court of appeals' suggestion (based on oral argument and the court's belief in the merit of Townline's claim) that there is a "more appropriate method for the legal relief" may or may not be true. (App. 28-29, 31 at ¶¶ 60-61,

[4] Notably, Wis. Stat. § 893.33(6) does not bar an action to *enforce* a restrictive covenant for a period of 40 years after the date of recording such instrument, suggesting that the same time period should apply to an action to *remove* a restrictive covenant.

66, fn. 16, 17.) Whether or not Townline can pursue an alternative action is not the issue, nor is it the court of appeals' role to determine which claims or remedies a party should pursue. Further, it is not entirely clear if a quiet title action is "more appropriate." Who claims an "interest" in the property, other than Townline? Certainly not the Heirs as the Estate is closed. The neighbors? Which ones? Further, the court of appeals relied on laches in its analysis. It would seem that a defendant in a quiet title action would raise that same defense and point to the court of appeals opinion as support. As a result, is there truly "an alternative and more appropriate method for the legal relief sought" as the court of appeals opines? (App. 31 at ¶ 66.) The court of appeals' suggestion that Townline should pursue a different remedy demonstrates the results-based decision reached in this case and further underscores the need for review by this Court.

## CONCLUSION

The court of appeals' opinion acknowledges the need for further review of this case. The court stresses the "novelty" of this case and the lack of law on this issue in Wisconsin. Further, as the court of appeals acknowledges, it never addressed the merits of the parties' arguments, although it appears to concede that Townline's challenge does indeed have merit. Instead, the court decided this case on policy grounds alone, appearing to invite the Supreme Court to intercede. For these reasons, this Court should accept review of the decision of the court of appeals.

Dated this 3rd day of October 2024.

VANDERWAAL LAW, S.C.
Attorneys for Respondent-Petitioner,
Townline CTH-N LLC

Electronically Signed by Shane J. VanderWaal
Shane J. VanderWaal
State Bar No. 1020149
Arthur M. Scheller III
State Bar No. 1115973

226411 Rib Mountain Drive
Suite 2
Wausau, WI 54401
715-845-9401
shanev@vanderlaw.net
ams@vanderlaw.net

**FORM AND LENGTH CERTIFICATION:**
**WIS. STAT. § 809.19(8g)**

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 5,245 words.

Dated this 3rd day of October 2024.

VANDERWAAL LAW, S.C.
Attorneys for Respondent-Petitioner,
Townline CTH-N LLC

Electronically Signed by Shane J. VanderWaal
Shane J. VanderWaal
State Bar No. 1020149

226411 Rib Mountain Drive
Suite 2
Wausau, WI 54401
715-845-9401
shanev@vanderlaw.net