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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT

In re the marriage of,

KAREN ELIZABETH MORWAY

Petitioner-Respondent-
Respondent,

v. Appeal No. 2023AP001614

DAVID SETH MORWAY,

Respondent-Appellant-
Petitioner.

Appeal from May 24, 2023 Order of the
Circuit Court for Ozaukee County,
Honorable Sandy Williams Presiding
Ozaukee County Case No. 2017FA00184

BRIEF OF RESPONDENT-APPELLANT-PETITIONER DAVID MORWAY

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ISSUES PRESENTED FOR REVIEW

David Morway ("David") filed a motion to modify maintenance because his job with the Utah Jazz was ending. In the circuit court proceedings, Karen Morway ("Karen") claimed David engaged in overtrial. At a post-trial hearing, the circuit court found that no overtrial occurred in the trial but stated it had "insufficient evidence" to determine if overtrial occurred prior to the trial. Karen's counsel said she would file another motion for overtrial. The ensuing May 24, 2023 Order confirmed the overtrial issue would still be litigated:

> As to Karen's request for contribution to attorney fees for overtrial, the Court presently has insufficient information to address that issue and Karen will file a separate Motion on this issue.

(Appx. 14). The Order did not include any language stating it was final for purposes of appeal pursuant to *Wambolt v. West Bend Mut. Ins. Co.,* 2007 WI 35, 299 Wis. 2d 723, 728 N.W.2d 670.

Karen subsequently filed the motion for overtrial (R. 422), which was litigated and resolved by an August 28, 2023 order. (Appx. 18-19). On September 1, 2023, David filed a Notice of Appeal from the August 28, 2023 order and all prior non-final orders. (R. 445).

On October 16, 2023, the Court of Appeals, *sua sponte*, instructed the parties to address whether the May 24, 2023 Order was a final order. On November 17, 2023, the Court issued an order finding that the Order was a "final order" that disposed of "the entire matter in litigation." (Appx. 4-7). The Court of Appeals noted that while an overtrial motion was "contemplated," it "had not yet been filed when the May 24, 2023 Order was issued." (Appx. 3).

Accordingly, the issues presented for review are:

1. **Is an order that: (a) includes no finality language as required by *Wambolt v. West Bend Mut. Ins. Co.,* 2007 WI 35, 299 Wis. 2d 723, 728 N.W.2d 670, and (b) expressly contemplates additional substantive litigation between the parties, a "final order" under Wis. Stat. § 808.03(1) for purposes of appeal?**

The Court of Appeals held the May 24, 2023 Order was a final order because the motion for overtrial had not been filed at the time the Order was entered. (Appx. 3).

2. **Does the attorney fee exception to finality under Wis. Stat. § 808.03(1), which has been applied to statutory and contractual fee-shift provisions, extend to a common law motion claiming a party engaged in overtrial, which requires a substantive analysis and, if granted, awards attorney fees as damages?**

The Court of Appeals held the May 24, 2023 Order was final "even though the post-judgment attorney's fees motions were not resolved by the motion," citing *Campbell v. Campbell,* 2003 WI App 8, 259 Wis. 2d 676, 659 N.W.2d 106 (Appx. 6).

3. **Should this Court exercise its superintending authority to expand the *Wambolt* rule to require that circuit courts state whether every dispositive or post-trial order is, or is not, a final order for purposes of appeal?**

Not addressed by the lower courts.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Oral argument is necessary to fully explore the issues presented, which involve the fundamental right to an appeal and the way courts and parties can and should unambiguously establish the finality of an order or judgment, so as to promote consistency and avoid unintentional waivers of the right to appeal and multiple appeals.

Publication of the Court's opinion is warranted under Wis. Stat. § 809.23(1)(a), as the opinion will establish or clarify the rules for determining finality under Wis. Stat. § 808.03(1).

STATEMENT OF THE CASE

Nature of the Case

Karen and David Morway were divorced on March 25, 2019. (R. 147). At the time David was an Assistant General Manager for the Utah Jazz. In 2021, the Utah Jazz moved David from Assistant General Manager to Senior Advisor, with a reduction in pay and a 10-month contract expiring June 30, 2022.

On September 15, 2021, David filed a motion to modify maintenance in light of his reduced income. (R. 159). The parties filed a Stipulation Amending Judgment of Divorce to reduce the monthly payments. (R. 168).

On May 27, 2022, David filed a second motion to modify maintenance, asking that maintenance be held open as of July 1, 2022, due to the substantial change in circumstances from the expiration of his Utah Jazz contract on June 30, 2022. (R. 173, 174).

The family court commissioner held a trial on the motion on October 27-28, 2022. (R. 302). The commissioner found a substantial change in circumstances and reduced maintenance from $7,000 per month to $2,000 per month. *Id*.

Karen appealed, and a *de novo* trial occurred on February 1-3, 2023. (R. 410-412). In post-trial briefing, Karen sought an award of attorney fees "as an innocent party who is the victim of overtrial." (R. 392, pp. 30-31). In addition, Karen argued that her motion to compel had been granted by the family court commissioner and "such an Order mandates an award of attorney's fees." (R. 392, p. 31). David responded that no overtrial occurred and confirmed that the family court commissioner who decided the motion to compel did not award fees. (R. 398, pp. 13-15).

On April 19, 2023, the circuit court rendered an oral decision on the motion to modify maintenance and addressed the issues relating to overtrial and fees. (R. 401) (Appx. 20-32). As to

maintenance, despite finding that David was not "shirking," the court imputed annual income of $200,000 to David and awarded maintenance to Karen retroactive to November 1, 2022. (R. 401, pp. 18, 28) (Appx. 21, 31).[1]

As to Karen's requests for fees, the circuit court granted fees relating to the motion to compel, but stated it did not have sufficient information in front of it to grant a motion for overtrial:

> THE COURT: Now there wasn't a whole lot of closing arguments, but I still believe that there's a request for attorney fees from petitioner. I'm looking at it -- I might have misinterpreted this, but really I see it as because of discovery. You know, a trial can happen; I don't think that in the trial that it was overtried, but I am concerned about the response to exchange of information prior, and then the forcing of formal discovery, and then even a motion to compel discovery before petitioner can get information. And I'm limiting it to that. It -- was -- am I close to what you were requesting or did you want for the actual trial? Because I'm not going to grant that. I think people should be able to have a trial.

---

[1] At the close of the circuit court's oral decision, the circuit court specifically found David was not "shirking":

> MS. ANSAY: Your Honor, could I just clarify one thing just so that I don't have any issues? So on your findings about not making reasonable efforts to seek employment, as to that you found shirking; is that correct?
>
> THE COURT: No, I found his efforts were unreasonable.

(Appx. 31). David's appeal from this decision has substantial merit. This Court held that a circuit court may impute income to a payor spouse "only if it has concluded" that the party was "shirking," defined as making a "voluntary and unreasonable" decision to "reduce or forego income." *Chen v. Warner*, 2005 WI 55, ¶ 20, 280 Wis. 2d 344, 355-56, 695 N.W.2d 758.

MS. ANSAY: Yeah.

THE COURT: You kind of de novoed, so it was your trial.

MS. ANSAY: Right. Yes, I mean you're correct, everybody has the right to trial. The bulk of the workload here was the constant and ongoing discovery to try to pinpoint what was happening. If the Court would like to have us submit something, we have a separate hearing on that, that would be fine with us.

THE COURT: All right. So Attorney O'Neill, were you addressing in your brief -- you didn't address it a whole lot, but do you want to say anything specific about the discovery –

MR. O'NEILL: Right.

THE COURT: -- because I'm limiting it to that.

MR. O'NEILL: I will say, initially when the discovery came early prior to the hearing with Commissioner Boline, we gave responses and gave objections. We thought it was outside the scope of discovery. There was a motion to compel, it was decided against us, we then gave supplemental and more supplemental responses as time went by informing them of things going on.

And what Commissioner Boline said on fees on that motion to compel, he would decide it at the end of the hearing. And at the end of the hearing, what I came away with, he was not awarding fees for the discovery because he was putting in place – I'm sorry.

THE COURT: Did you want to argue anything in terms of the Court, whether it should grant attorney fees for the discovery?

MR. O'NEILL: Oh, right. I don't think it is appropriate. I think that was the decision that was made by the Commissioner not to or to at least wrap it into not ordering any payback of the 7,000 per month that had been in place on a temporary basis. So I don't think it's appropriate at this point to be awarding fees for discovery. The discovery in the case took place, there were no more motions to compel –

THE COURT: But there was a motion to compel.

MR. O'NEILL: Yeah, before Commissioner Boline --

THE COURT: Right.

MR. O'NEILL: -- just one, and after -- that's the point I was making.

THE COURT: Okay.

MR. O'NEILL: The Commissioner addressed it, didn't order fees, and the discovery that went forward was pretty much both ways and pretty straightforward after that point.

MS. ANSAY: That's so far from accurate. I do want to just comment though, the Commissioner never mentioned fees.

THE COURT: Okay.

MS. ANSAY: And as far as the discovery is concerned, it went way beyond just interrogatories, requests for production of documents. There were depositions that needed to be taken because of allegations that they started with that they abandoned by the time they came to this trial. So there was a ton of overtrial here as it related to all the discovery. And I do want the Court to hear it in addition to need and ability to pay. I mean, my client just

> doesn't have it, but -- I mean the bottom line here is from the very beginning, all he had to do was give us the information. I shouldn't have had to ask for the information, but that's – that's where the overtrial comes in, Your Honor.
>
> THE COURT: Okay. I do think awarding of attorney fees through the point of the motion to compel is appropriate. ***Now here's the problem with requesting anything after it; this is new to me hearing you say that we had to take depositions because a theory was abandoned, that's not in front of me.*** I didn't hear anything about that –
>
> MS. ANSAY: ***I'll file a separate motion for overtrial and we can have a hearing on that, Your Honor.***
>
> THE COURT: All right. Because –
>
> MS. ANSAY: I understand.
>
> THE COURT: -- based on your request now, I'm denying it because there wasn't anything that I can consider for that and it's not fair.

(R. 401, pp. 18-22) (Appx. 21-25) (emphasis supplied).

In the ensuing May 24, 2023 Order, the circuit court confirmed the substantive litigation would continue:

> Karen requested a contribution from David to attorney's fees regarding the Motion to Compel Order. The Court believes awarding attorney fees through the point of the Order on the Motion to Compel is appropriate. As to Karen's request for contribution to attorney fees for overtrial, the Court presently has insufficient information to address that issue and ***Karen will file a separate Motion on this issue***.

(R. 416, ¶ 17) (Appx. 14) (emphasis supplied).

On June 5, 2023, as promised and as indicated by the Order, Karen filed the overtrial motion. (R. 422). David opposed the motion. (R. 427, 428). On June 28, 2023, the circuit court held a hearing and granted the motion for overtrial, in part. (R. 441) (Appx. 34-59). The Court confirmed its prior determination that no overtrial occurred during the trial before the court. (Appx. 47-48). However, the Court found there was overtrial as to three specific issues: a "health issue," a "job search issue," and an "Arizona house" issue. (Appx. 47-48, 51-53). The circuit court ordered Karen to submit her requested fees as to those issues and allowed David to object upon his review. (R. 440, 443).

On August 28, 2023, the circuit court issued a "Decision" ordering David to pay Karen $11,967.50 in overtrial fees and costs. (R. 444) (Appx. 18-19).

Procedural Status of Case Leading to Appeal

On September 1, 2023, David filed a Notice of Appeal from the August 28, 2023 order and all prior non-final orders resolving the motion to modify and Karen's motion for attorney fees on the motion to compel. (R. 445).

On October 16, 2023, the Court of Appeals, *sua sponte*, instructed the parties to file memoranda addressing whether the May 24, 2023 Order was a final order for purposes of appeal. The Court noted that while *Wambolt* requires courts to explicitly state that an order is final for purposes of appeal, an earlier Court of Appeals case, *Campbell v. Campbell,* 2003 WI App 8, 259 Wis. 2d 676, 659 N.W.2d 106, held that a family court order resolving a post-divorce child support and arrearages motion was final, even though the order left open a request for attorney fees under a family law statute.

On November 17, 2023, the Court of Appeals issued an order finding the May 24, 2023 Order was in fact a "final order" that disposed of "the entire matter in litigation," despite the lack of finality language and despite the language expressly contemplating further substantive litigation as to whether overtrial occurred. (Appx. 4-7). The Court noted in its order that while the overtrial motion was "contemplated," it "had not yet been filed when the May 24, 2023 order was issued." (Appx. 6). The Court thus held that, while David's appeal was timely as to the overtrial decision and fee award, his appeal from the ruling on the underlying motion to modify was untimely.

On December 14, 2023, David filed a Petition for Review, which this Court granted on April 16, 2024.

ARGUMENT

I. *Wambolt* and *Tyler* Attempted to Provide Certainty to Determining Finality Under Wis. Stat. § 808.03(1) by Requiring a Circuit Court to State in an Order that the Order is Final for Purposes of Appeal.

An appeal can only be taken from a final order or judgment. Wis. Stat. § 808.03(1). "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 of the parties." *Id.*

The statute is intended to ensure that there is only one appeal in each case. *See State v. Alles*, 106 Wis. 2d 368, 394, 316 N.W.2d 378 (1982) ("[T]he purpose of the final-judgment rule is to avoid piecemeal appeals which delay and interfere with trial court proceedings and destroy the integrity of trial court judgments."); *ACLU v. Thompson*, 155 Wis. 2d 442, 448, 455 N.W.2d 268 (Ct. App. 1990) ("A strong policy disfavors interlocutory, multiple, or piecemeal appeals. . . . The provisions of sec. 808.03, Stats., are designed to discourage such appeals.") (citation omitted).

In *Wambolt v. West Bend Mut. Ins. Co.,* 2007 WI 35, 299 Wis. 2d 723, 728 N.W.2d 670, this Court examined the question of whether and when a circuit court's memorandum decision is a final order for purposes of appeal. The Court began by noting that the finality inquiry presents two questions: (1) whether the document is "final as a matter of substantive law insofar as it disposes of the entire matter in litigation as to one or more parties"; and (2) whether the document is the "last document in the litigation, which is to say that the circuit court did not contemplate a subsequent document from which an appeal could be taken." *Id.*, ¶ 27 (citing *Harder v. Pfitzinger*, 2004 WI 102, ¶ 12, 274 Wis. 2d 324, 331, 682 N.W.2d 398).

The Court noted that despite several previous efforts to define finality in a manner that removed uncertainty, the issue continued to arise with alarming frequency:

> In numerous cases, the finality questions continue to arise despite our past efforts to provide certainty. This is unacceptable in our system where the determination of finality is the lynchpin for jurisdiction on appeal.

Id., ¶ 41. The Court rhetorically asked:

> We all agree that the rules for appellate procedure should be clear. We nod our collective heads in affirming that the rules should not serve as traps for the unwary. But why, we ask, do the unwary continue to be trapped?

Id., ¶ 42.

Because the Court's prior rulings regarding the finality issue "have not had the desired effect," the Court, exercising its superintending authority under Article VII, Section 3(1) of the Wisconsin Constitution, created a new rule:

> Going forward, ***we therefore will require that final orders and final judgments state that they are final for purposes of appeal***.

> A document does not fulfill this requirement with a particular phrase or magic words. Rather, the document must simply make clear, with a statement on its face, that it is the document from which appeal may follow as a matter of right under § 808.03(1).

Id., ¶ 44-45 (emphasis supplied).

The Court's intent in creating the rule was explicit and simple: "With the requirement that a final document state that it is final for purpose of appeal, litigants will need look only to the face of the document." *Id.,* ¶ 48.

Tyler v. The RiverBank, 2007 WI 33, 299 Wis. 2d 751, 728 N.W.2d 686, issued the same day as *Wambolt*, added a message directly addressed to lower courts and counsel:

> The bench and bar should note the focus when identifying the final document for purposes of appeal: a final document must include an explicit statement either dismissing the entire matter in litigation as to one or more parties or adjudging the entire matter in litigation as to one or more parties. Focusing on the existence of an explicit statement will clarify when a document disposes of the entire matter in litigation and is final for purposes of appeal.

Id., ¶ 3 (emphasis supplied). *See also Admiral Insurance Co. v. Paper Converting Machine Co.*, 2012 WI 30, ¶ 27, 339 Wis. 2d 291, 304, 811 N.W.2d 351 (*Wambolt* requires "that final orders and final judgments state that they are final for purposes of appeal.").

II. *Wambolt* and *Tyler* Instructed that Any Ambiguity as to Finality Must be Resolved in Favor of the Right to Appellate Review.

Of course, even after *Wambolt,* errors may occur. Despite some protestations to the contrary, attorneys and judges remain human. An order can be final without the required statement, and an order including a finality statement can be non-final. *See*

Admiral Ins. Co., 339 Wis. 2d 291, ¶ 29. Against this risk of error, the Court in *Wambolt* and *Tyler* created a safety net requiring that any and all ambiguities concerning finality must be construed in favor of the right to appellate review:

> [A]bsent explicit language that the document is intended to be the final order or final judgment for purposes of appeal, appellate courts should liberally construe ambiguities to preserve the right of appeal.

Wambolt, 299 Wis. 2d 723*,* ¶ 46.

> In the (hopefully) rare cases where a document would otherwise constitute the final document, but for not including a finality statement, courts will construe the document liberally in favor of preserving the right to appeal.

Tyler, 299 Wis. 2d 751, ¶ 26. *See also In re Estate of Sanders*, 2008 WI 63, ¶ 33, 310 Wis. 2d 175, 190, 750 N.W.2d 806 (when applying the liberal construction mandated by *Wambolt* and *Tyler*, the court must look at the "scope of the entire 'matter in litigation'" and any "unresolved issues" before concluding that a party waived his or her right to appeal).

III. The Court of Appeals Erred by Refusing to Liberally Construe the May 24, 2023 Order to Preserve David's Right to Appeal.

As discussed in Section IV below, overtrial is a substantive legal doctrine, which does not fall within the mélange of cases holding that pending statutory or contractual fee-shift issues have no impact on an order's finality for purposes of appeal. Nonetheless, even if those cases could be expanded to encompass overtrial, the Court of Appeals erred by refusing to liberally construe the May 24, 2023 Order in favor of David's right to appeal.

To start, the record reflects that both the parties and the circuit court viewed the May 24, 2023 Order as a non-final order.

Karen's counsel, who was pursuing the overtrial motion, drafted and filed the proposed Order which the circuit court later signed. (R. 408). The proposed order contained no *Wambolt* finality language, which demonstrates that Karen's counsel did not view it as a final order. The circuit court did not add any finality language when it executed the order, demonstrating the court likewise did not view the order as final. (R. 409). David's own proposed order did not include any finality language because David's counsel did not view the order as final given the impending overtrial litigation. (R. 415). The documents all show that the parties and circuit court understood the Order to be non-final.

During a June 28, 2023 hearing on the motion for overtrial, the parties and court explicitly discussed the intent that the appeal would follow entry of the final order resolving the overtrial issue, so that all of the circuit court's related orders would be included in one appeal. After the circuit court found overtrial had occurred as to three discrete issues, it looked to set a schedule for the submission of proposed fees and any objection thereto. Karen's counsel noted she had a scheduled vacation that would cause some delay in the filings, and the following colloquy occurred:

> THE COURT: And everyone is entitled to a vacation. I'm not sure that this is such a pressing issue that we have to – you're not concerned about it, are you?
>
> MR. O'NEILL: I'm not concerned about the timing, no. I will let Your Honor know that we are going to appeal your decision and I've been waiting to file because I wanted it to be the complete set of decisions.
>
> THE COURT: I kind of thought that would happen. All right, so tell me the time period that you want.

(R. 441, p. 23). Neither the circuit court nor Karen's counsel suggested at that time that the previous May 24, 2023 Order was a final order and the clock was ticking for its appeal.

This shared understanding of the parties and the circuit court, that the pending overtrial motion meant substantive "matters in litigation" remained to be resolved demonstrates at a minimum that ambiguity existed as to whether the order was final for purposes of appeal. A contrary conclusion would encourage parties to lay traps for unwary opponents, hoping that the unsuccessful party would unwittingly fail to timely appeal.

The circuit court's intent, of course, is no longer a dispositive factor in determining finality as a substantive matter. *Wambolt* specifically noted that one effect of *Harder* was to "dispense with the 'intent' part of the finality test." *Wambolt*, 299 Wis. 2d 723, ¶ 30 n.9. Here, however, the parties' and circuit court's omissions, in failing to include a finality statement in the Order, and commissions, in discussing and contemplating continuing substantive litigation as to the overtrial claim, demonstrate that the Order was not unambiguously a final order, and should have been liberally construed by the Court of Appeals to protect David's right to an appeal on all issues.

Further, in a very practical sense, had Karen's counsel or the circuit court inserted finality language in the initial Order, David's counsel would have been forewarned that a finality issue existed and, irrespective of his own construction of the Order as being non-final, would have filed at least a protective notice of appeal from it.

Wambolt requires that the Court of Appeals "liberally construe ambiguities to preserve the right to appeal." 299 Wis. 2d 723, ¶ 46. *Tyler* went a step further, noting that even if the order "would otherwise constitute the final document, but not for including a finality statement, courts will construe the document liberally in favor of preserving the right to appeal." 299 Wis. 2d 751, ¶ 26. Thus, even if the Court of Appeals was correct that an overtrial motion could fall within the statutory attorney fee exception identified in *Campbell* (which David disputes), the court was nonetheless bound to construe the document in favor of protecting the right to appeal.

In *Admiral Ins. Co.*, this Court held the "focus of the ambiguity inquiry is on the language of the order or judgment, not on the finality statement." 339 Wis. 2d 291, ¶ 29. The order in that case stated: "The court hereby orders this case dismissed." *Id.*, ¶ 30. The Court commented that, "[o]n its face, that language disposes of the entire matter in litigation between the parties and the order would appear to be final for purposes of appeal." *Id.* Even in that circumstance, however, the Court found the order was not unambiguously final, because the circuit court had not resolved defendant's counterclaim for attorney fees. Defendant asserted the counterclaim was not based on a fee-shifting statute, but rather involved a "substantive issue that required briefing by both of the parties." *Id.*, ¶ 34. This Court observed that the record did not reflect whether the counterclaim "was based on, for example, an asserted contractual right or other theory of law which might take it outside the rule set forth in *Leske*." *Id.*, ¶ 35.[2] Accordingly, the Court applied the liberal construction mandated by its own precedents: "Under these circumstances, although the March 26 order arguably disposed of the entire matter in litigation between the parties, we cannot say on this record that it unambiguously did so." *Id.*, ¶ 36.

The May 24, 2023 Order in this case had no "case dismissed" or similar language. Rather, it expressly stated at paragraph 18: "As to Karen's request for contribution to attorney fees for overtrial, the Court presently has insufficient information to address that issue and Karen will file a separate Motion on this issue." (Appx. 14). As in *Admiral Ins. Co.*, the overtrial issue is not one that involves a fee-shifting statute and thus falls outside of the Court of Appeals' decisions in *Leske* and *Campbell*. Rather, overtrial is a substantive issue requiring briefing by both parties,

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[2] In *Leske v. Leske,* 185 Wis. 2d 628, 633, 517 N.W.2d 317 (Ct. App. 1994) (per curiam), the court held "the pendency of a claim under a specific fee-shifting statute does not render a judgment or order nonfinal, *provided that the judgment or order disposes of all of the substantive causes of action between the parties.*" (emphasis supplied).

consideration of relevant evidence, and a substantive decision by the circuit court of whether overtrial occurred in the proceedings before it.

Given the shared view of the parties and the circuit court that the May 24, 2023 Order did not "dispose[] of the entire matter in litigation" because of the unresolved overtrial claim, and the absence of any decision extending the attorney fee exception to an overtrial motion, the Court of Appeals erred by refusing to liberally construe the May 24, 2023 Order as a non-final order.

IV. The Attorney Fee Exception to Finality Does Not Extend to Substantive Issues Such as Overtrial, Where the Fees are Awarded as Damages.

The Court of Appeals held the May 24, 2023 Order was final "even though the post-judgment attorney's fees motions were not resolved by the order," citing *Campbell,* 259 Wis. 2d 676, for the proposition that an "order resolving issue of postdivorce child support and arrearages is final, even if order leaves open request for attorney fees." (Appx. 6).

Campbell was a statutory fee-shift case. It involved a motion for contempt based on arrearages resulting from appellant's failure to notify respondent of a change in his ability to pay support. Three orders were issued: an order setting child support but leaving the amount of arrearages open pending an audit; a subsequent order setting the arrearages after the audit; and a third order awarding attorney fees under Wis. Stat. § 767.262 (2000).[3] *Campbell*, 259 Wis. 2d 676, ¶ 4. The Court held that because the fee issue arose under a "fee-shifting statute," it was analogous to the statutory fee shifts at issue in *Leske* and *Laub v. City of Owen*, 209 Wis. 2d 12, 561 N.W.2d 785 (Ct. App. 1997). *Campbell*, 259 Wis. 2d. 676, ¶¶ 8-11. *Cambell* does not and should

[3] Wis. Stat. § 767.262 (2000) has since been amended and renumbered as Wis. Stat. § 767.241. It grants the circuit court authority to award attorney fees to one party in a divorce action based upon consideration of the parties' respective financial resources.

not extend beyond fee-shifting statutes to motions involving substantive overtrial determinations, where attorney fees are treated as damages.

Rather, *Campbell* is part of a line of cases holding that an order resolving claims may be a final order even if statutory fee-shift, contractual fee-shift, or statutory cost issues remain unresolved. *See Leske,* 185 Wis. 2d at 633 (fee-shifting statute); *McConley v. T.C. Visions, Inc.,* 2016 WI App 74, ¶¶ 9, 11, 371 Wis. 2d 658, 665, 668, 885 N.W.2d 816 (contract fee shift); *Harder,* 274 Wis. 2d at 344-346, ¶ 17 (statutory costs). Such fee-shift provisions have been held not to require substantive inquiry or resolution, as the underlying dispute or contract issue has already been disposed of, and the only issue remaining is the amount of fees or costs. *See ACLU,* 155 Wis. 2d at 447 (pending claim for fees under 42 U.S.C. § 1988 does not render order non-final because "the merits of the underlying action have been completely adjudicated").

Another rationale for these authorities has been that such fees are akin to statutory costs under Wis. Stat. § 814.04, where only the amount of fees, not their underlying authorization, remains. *See McConley*, 371 Wis. 2d 658, ¶ 8 ("When the recovery of attorney fees is authorized by a statute or a contract, the attorney fees are litigation 'disbursements and fees allowed by law' as set forth in § 814.04(2).").

A third rationale has been that the assessment of statutory fees is "comparable to execution on a judgment and confirmation of a foreclosure sale," both occurring after all substantive issues have been adjudicated. *ACLU,* 155 Wis. 2d at 447. That court added that such attorney fees "are not compensation for the injury giving rise to an action," and as such "[t]heir award is uniquely separable from the cause of action to be proved at trial." *Id.* (quoting *White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445, 452 (1982)).

Overtrial does not fall into any of these categories. It is not based on statute or contract. Rather, it is a substantive legal doctrine. A motion alleging overtrial requires the circuit court to make a substantive, factual determination of whether a party engaged in "unreasonably excessive litigation" or an "abuse of judicial resources through the unnecessary overutilization of those resources." *In re Attorney Fees in Zhang v. Yu*, 2001 WI App 267, ¶¶ 11, 13, 248 Wis. 2d 913, 923-24, 637 N.W.2d 754. Where, as here, the circuit court must make a judicial determination of this unresolved substantive issue, it cannot be said as a matter of fact or law that the circuit court has "disposed of the entire matter in litigation," as required by Wis. Stat. § 808.03(1), until it has made the required determination.

If a court determines overtrial has occurred, it proceeds to assess damages, which include attorney fees. *See Johnson v. Johnson,* 199 Wis. 2d 367, 377, 549 N.W.2d 239 (Ct. App. 1996) ("The policy underpinning an overtrial attorney's fees award is to *compensate* the overtrial victim for fees unnecessarily incurred because of the other party's litigious actions.") (emphasis supplied); *Zhang*, 248 Wis. 2d at 924, ¶ 13 ("A sanction furthers two objectives, providing *compensation* to the overtrial victim for fees unnecessarily incurred . . . and deterring unnecessary use of judicial resources.") (emphasis supplied).

McConley recognized that where attorney fees are sought as damages, the matter is not final until that substantive claim is adjudicated:

> ***We clarify, however, that there is no final and appealable order or judgment if there is a need for further litigation on attorney fees when the fees are damages.*** Attorney fees incurred in the pending litigation taxable as costs are distinct from attorney fees that may be claimed as an element of damages. *See e.g. Roehl Transp., Inc. v. Liberty Mut. Ins. Co.,* 2010 WI 49, ¶ 184, 325 Wis. 2d 56, 784 N.W.2d 542 (in a bad faith case attorney fees are awarded as part of

> compensatory damages); *City of Cedarburg Light & Water Comm'n v. Glens Falls Ins. Co.,* 42 Wis. 2d 120, 125, 166 N.W.2d 165 (1969) (recognizing that if a breach of contract is the cause of litigation between the plaintiff and third parties that the defendant had reason to foresee when the contract was made, the plaintiff's reasonable expenditures in such litigation are part of his damages for the breach).

371 Wis. 2d 658, ¶ 9 n.5 (emphasis added; underlining in original). Likewise, this Court recognized in *Admiral Ins. Co.* that claims seeking attorney fees based upon a "substantive" theory outside of the statutory fee shift context may "fall outside the rule set forth in *Leske*." 339 Wis. 2d 291, ¶¶ 34-35.

In sum, the attorney fee exception to finality in *Campbell* and *Leske* does not extend to claims alleging overtrial. Where an overtrial claim remains unresolved, as it was here, the entire matter in litigation between the parties is also unresolved. On a policy level, such a rule advances judicial economy, as any circuit court decision determining that overtrial did or did not occur should be part of the same appeal as the underlying litigation in which the overtrial allegedly occurred.

V. The Court Should Expand *Wambolt* and *Tyler* and Require Circuit Courts to State Whether an Order Is or Is Not Final. Such a Rule Will Protect the Fundamental Right to Appeal and Ensure Efficient Appeals.

The appeal process created by Wis. Stat. § 808.03(1) limits an appeal as of right to a single "final judgment or final order" that "disposes of the entire matter in litigation." This is designed to avoid unnecessary interlocutory or multiple appeals. *Alles*, 106 Wis. 2d at 394. The rich list of citations in the annotated statutes demonstrates that parties and courts alike had difficulties determining exactly what was or was not a final order. In *Wambolt* and *Tyler*, this Court attempted to level the finality playing field

by mandating to bench and bar that final orders must explicitly state they are final orders, and that the failure to so state will uniformly be construed in favor of the right to appeal.

This case demonstrates that uncertainties remain. The Court of Appeals seemingly went out of its way to find the May 24, 2023 Order was final, despite the lack of any finality language and despite the language which expressly contemplated continuing substantive litigation in the case. The Court, in a footnote, commented that the motion for overtrial, "though contemplated, had not yet been filed when the May 24, 2023 order was issued." (Appx. 6). This footnote suggests the Court's analysis would have been different if the motion for overtrial had been filed before the May 24, 2023 Order was entered. That makes little sense, as the Order's statement that Karen "will file a separate Motion on this issue" confirmed that the "entire matter in litigation" was not concluded and that a subsequent order was in fact contemplated. This checks both of *Wambolt's* non-final boxes. 299 Wis. 2d 723, ¶ 27.

If the Court of Appeals was correct that the *timing* of the filing of a substantive motion such as overtrial was the key to determining finality, future parties could game the appellate process by waiting to file an overtrial motion until after an order was entered on the matter in which overtrial allegedly occurred. This could lead to multiple and duplicative appeals within the same dispute. In this case, for example, it would mean David was required to file a notice of appeal from the May 24, 2023 Order, and then file a second notice of appeal from the order on the overtrial motion. (R. 444). Two separate appeals, not one.

Why? What purpose or policy does this requirement serve? All it does is create a likelihood of multiple appellate proceedings, overlapping statements on transcript, overlapping appellate records, disjointed briefing schedules, and multiple motions to consolidate under Wis. Stat. § 809.10(3). All for "matters" that

were litigated between the same parties, in the same underlying dispute, and on the same record.

At a minimum, such a result utterly defeats the purpose stated by this Court when it created *Wambolt's* finality rule:

> With the requirement that a final document state that it is final for purposes of appeal, litigants will need look only to the face of the document.

299 Wis. 2d 723, ¶ 48.

The solution to this problem is to expand the *Wambolt* rule to require the circuit court to state whether an order is final or is not final. Make the implicit, explicit.

Wambolt already requires the circuit court to undertake this analysis. By requiring a circuit court to expressly state that an order is final for purposes of appeal, the circuit court is required to make a deliberative decision, when entering an order that resolves a dispositive motion or occurs at the end of case, whether the order is ***or is not*** final. When the circuit court, as here, chooses not to include any finality language, it means the court has in fact determined that its order is non-final. The court should be required to say so.

Expanding *Wambolt* in this fashion is a proper exercise of the Court's superintending authority under Article VII, Section 3 of the Wisconsin Constitution ("The supreme court shall have superintending and administrative authority over all courts."). Such authority "is as broad and flexible as necessary to insure the due administration of justice in the courts of this state." *In re Kading*, 70 Wis. 2d 508, 520, 235 N.W.2d 409 (1975). It authorizes the Court to "control the course of ordinary litigation in the lower courts of Wisconsin." *Arneson v. Jezwinski*, 206 Wis. 2d 217, 226, 556 N.W.2d 721 (1996). *Arneson* held the Court's superintending authority is properly exercised in the context of Wis. Stat. § 808.03, as the statute "falls within an area of power shared between the legislative and judicial branches." *Id.*

Requiring courts to state whether an order is final or is not final imposes a negligible burden them, while protecting the right to appeal and avoiding unnecessary appeals. The rule has no discernable downside. After all, the circuit court is in the best position to determine whether its own orders are final or not final, and, under *Wambolt*, it is already required to undertake this analysis.

The expanded rule will compel the circuit court and the parties to focus on the finality issue and address it explicitly in the context of potentially dispositive orders. If a party believes the circuit court got it wrong by stating that an order is not final, it can take any necessary action to ensure finality. If a party believes the court got it wrong in stating an order is final, it can file a motion stating what litigation remains and why the order is not a final order. The rule would avoid the specter of a party reviewing an order that has no finality language, and later having a different court find the party waived the right to appeal from that order.

In either case, a party will truly be able to "look only to the face of the document" to determine whether it is final.

In addition, the Court can eliminate the "should liberally construe" limitation of the *Wambolt* safety net and hold that where an order contemplates further litigation on any issue and fails to include the finality language mandated by *Wambolt*, an appeal from a subsequent order is timely and brings the prior order with it on appeal as a matter of law. See Wis. Stat. § 809.10(4) ("An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon.").

CONCLUSION

For the foregoing reasons, David Morway respectfully requests that the Court: (1) reverse the Court of Appeals November 17, 2023 Order finding that David's appeal from the May 24, 2023

Order was untimely; (2) remand the case to the Court of Appeals to consider a full appeal of all matters decided by the May 24, 2023 Order and the subsequent orders; and (3) extend *Wambolt* to require that circuit courts state, in any dispositive or post-trial order, whether the order is, or is not, a final order for purposes of appeal.

Dated this 16th day of May, 2024.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of the brief is 6,338 words.

Dated at Milwaukee, Wisconsin this 16th day of May, 2024.

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CERTIFICATION OF APPENDIX

I hereby certify that filed with the brief is an appendix that complies with s. 809.19(2) and that contains: (1) a table of contents; (2) the decision of the court of appeals; (3) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court necessary for an understanding of the petition; (4) portions of the record necessary for an understanding of the petition; and (5) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b).

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of 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 at Milwaukee, Wisconsin this 16th day of May, 2024.

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