STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP000076 & 2022AP000077

In re the termination of parental rights to A.F. and L.F., persons under the age of 18:
DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

Petitioner-Respondent,

v.

A.D.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUE PRESENTED

> Between October 2019 and September 2021, the circuit court ordered A.D., the father of A.F. and L.F., to appear at eight pre-trial hearings in this termination of parental rights case. A.D. appeared at all eight hearings. During the last pre-trial hearing at which A.D. appeared, the circuit court excused A.D. and dispelled his concern that his early departure would be held against him, explaining: "This is a civil case, and it's not unusual that in civil cases we have the attorneys handling the pretrials. ... So whenever you feel you need to leave to get ready to go to work, just go ahead and then you can excuse yourself and you can leave the meeting, okay?"

A.D. failed to appear for the next scheduled pre-trial hearing and the court summarily granted the county's motion for a default judgment as to grounds to terminate A.D.'s parental rights to A.F. and L.F. In doing so, the court concluded that A.D.'s conduct was "egregious" because of the number of times the court had ordered A.D. to appear.

The court of appeals affirmed the circuit court's finding of "egregiousness," similarly concluding that A.D.'s single missed appearance was "egregious."

In *Dane County DHS v. Mable K.*, 2013 WI 28, ¶70, 346 Wis. 2d 396, 828 N.W.2d 198, this Court explained that a circuit court may enter a default judgment as a sanction in a TPR case when a parent's failure to follow court orders is "so extreme, substantial and persistent that the conduct may be considered egregious."

Has the Wisconsin Court of Appeals, in this case and a string of post-*Mabel K.* cases, effectively and unlawfully overruled *Dane County DHS v. Mable K.*, by redefining "egregious" to mean "a parent's failure to appear at one pre-trial TPR hearing?"

This Court should grant review and reverse.

CRITERIA FOR REVIEW

The issue presented satisfies three distinct but connected criteria for review. First, the court of appeals' unpublished but citable one-judge decision is in clear conflict with this Court's decision in *Dane County DHS v. Mable K.*, 2013 WI 28, 346 Wis. 2d 396, 828 N.W.2d 198. *See* Wis. Stat. § (Rule) 809.62(1r)(d).

Second, a decision by the supreme court will clarify the law with regards to the legal standard for "egregiousness" in the context of default judgments against parents in termination of parental rights cases. While the specific facts and circumstances in A.D.'s case may be somewhat unique, a clarifying decision by this Court will have statewide impact. In

fact, since this Court decided *Mabel K.* in 2013, the court of appeals has affirmed at least 'a baker's dozen' one-judge TPR cases involving default judgments based on a parent's failure to comply with court orders. *See* Wis. Stat. § (Rule) 809.62(1r)(c)2.

Third, A.D.'s case presents a worthy candidate for this Court's review because the issue presented ultimately concerns a question of law "of the type that is likely to recur unless resolved by the supreme court." *See* Wis. Stat. § (Rule) 809.62(1r)(c)3.

As will be argued below, this issue has reached a tipping point. This Court's holding in *Mabel K.* is clear:

> ...Wis. Stat. § 805.03 limits the sanctions that a circuit court may impose for failure to comply with court orders to those that are just. In order for a sanction dismissing a civil case to be just, the non-complying party must act egregiously or in bad faith. The *Shirley E.* court applied that requirement to default judgments at fact-finding hearings in termination of parental rights proceedings.
>
> Where a circuit court concludes that a party's failure to follow court orders, though unintentional, is *so extreme, substantial and persistent that the conduct may be considered egregious*, the circuit court may make a finding of egregiousness.

Mabel K., 346 Wis. 2d 396, ¶¶69-70 (emphasis added, but cleaned up). In short, a circuit court may enter a default judgment against a parent at the grounds

stage of a termination of parental rights proceeding if the parent's failure to follow court orders is "*so extreme, substantial and persistent that the conduct may be considered egregious.*" *Id.*, ¶70 (emphasis added).

Now, less than a decade later, the court of appeals has repeatedly affirmed default judgment's against parents for missing one hearing. If missing one hearing, at which the circuit court previously ordered the parent to appear, is "egregious," than this Court's decision in *Mabel K.* has been silently but effectively overruled by the court of appeals.

This Court should accept review, reverse, and reaffirm *Mabel K.'s* clear, simple, and straightforward egregiousness standard. To do otherwise would redefine "egregious" to mean "fail to appear at one hearing."

STATEMENT OF THE CASE AND FACTS

On October 24, 2019, Dane County filed petitions to terminate A.D.'s parental rights to A.F. (Case No. 2019TP68) and L.F. (Case No. 2019TP69). (2022AP76: 3:1-6; 2022AP77: 3:-6).[1] The petitions alleged a single ground to terminate A.D.'s parental rights: failure to assume parental responsibility under Wis. Stat. § 48.415(6). (3:1, 3-6; 2022AP77: 3:1, 3-6).

[1] All subsequent citations to the record in these consolidated cases are to the record in Case No. 2022AP000076, unless otherwise indicated.

A.D. was summoned to appear in court on November 12, 2019, for a hearing on the county's petitions. (6; 2022AP77: 9). The summons and the corresponding notice of motion in each case included written notice that "[i]f you fail to appear at this hearing, or any subsequent hearing, the court may proceed to hear testimony and enter an order terminating your parental rights." (6:5; 2022AP77: 9:5).

On November 12, 2019, A.D. appeared in person and without counsel. (180:1-2). A.D. opposed the county's petition to terminate his parental rights: "I don't want my rights terminated." (180:33). The court found good cause to set the cases over to give A.D. an opportunity to obtain counsel. (180:33).

The court then scheduled a hearing for December 10, 2019, and, at the county's request, warned A.D. that "if you do not appear for that court hearing coming up on December 10th at 1:15, the court could make a finding of default and that would mean that you are forfeiting your right to contest the grounds for termination of parental rights. So, it is important for you to personally attend that hearing and all subsequent hearings on the petition." (180:37-39).

A.D. appeared in person on December 10, 2019, without counsel. (181:1-2). A.D. expressed a desire to be represented and the court instructed A.D. to contact the public defender's office "as soon as possible."

(181:3-4). The court again found good cause to continue the cases. (181:5-6).

On January 24, 2020, A.D. appeared in person and with Attorney Charles Ver Hoeve, who had been appointed on January 23, 2020. (55:1-2; 45). A.D. denied the allegations in the petitions and preserved his right to a jury trial. (55:5). The court set further hearing dates of March 26, 2020, (motions in limine) April 10, 2020, (final pre-trial), and April 21, 2020, (trial). (55:22-24).

Thereafter, and again at the county's request, the court informed A.D. that he was "required to be personally present at these hearings we just scheduled ... So you have to be personally present. If you're not personally present, you could lose the rights that we just talked about today and you could end up with a default judgment." (55:26-27). The court also informed A.D. that he was required to "personally participate" in depositions related to the petitions. (55:27).

On March 26, 2020, all parties and counsel, including A.D., appeared by telephone. (188:1-2). Upon A.D.'s request, the court allowed Attorney Ver Hoeve to withdraw as appointed counsel for A.D. (188:4-10). As a result of the developing COVID-19 pandemic and the related Wisconsin Supreme Court orders concerning jury trials, the court cancelled the scheduled April 21, 2020, trial but allowed the April 10, 2020, final pre-trial hearing to remain on the calendar. (188:3, 15-16, 24). The court also informed A.D. that upon his release from jail, "[i]t's going to be

very important then for you to mail us your address immediately when you're released. Okay?" (188:19-20). A.D. agreed. (188:20). The court continued, "If we don't have a current address and we send out a notice and you don't get it and so you miss a court date, I'm going to consider that a default if you haven't given us the new address that you can receive mail at." (188:20).

On April 10, 2020, A.D. appeared by video, as did his newly appointed counsel, Attorney Matthew W. Giesfeldt. (215:1; 69). The court rescheduled A.D.'s trial for September 13, 2020, and set a final pre-trial hearing for September 3, 2020. (215:9, 13).

On August 14, 2020, the court held a status hearing where all parties and counsel appeared remotely, including A.D., who appeared by telephone. (186:1-2). A.D. reasserted his right to a jury trial, but agreed that the ongoing COVID-19 pandemic constituted cause to delay the trial. (186:5). The court then rescheduled the jury trial for January 11, 2021, and the final pre-trial hearing for January 4, 2021. (186:20,23; 92).

On January 4, 2021, all parties and counsel, including A.D., appeared by video. (185:1). A.D. again reasserted his right to a jury trial. (185:5). The court rescheduled the trial for June 1, 2021, and the final pre-trial for May 13, 2021. (185:10-11).

On May 13, 2021, A.D. appeared remotely, and by counsel, who appeared in person. (184:1-4, 12-13; App. 3). The initial issue addressed at this hearing was

whether to sever the trials of A.D., who had repeatedly preserved his right to a jury trial, and J.F., the mother of A.F. and L.F., who waived her right to a jury trial. (184:8-33). After the court began discussing possible October 2021 dates for the rescheduled trial, the guardian ad litem asked for time to consult with counsel. (184:34; Pet. App. 18).

The court then granted a brief recess, at which time A.D. asked how much longer the hearing would take, because he was concerned about maintaining his employment. (184:34; Pet. App. 18). A.D. informed the court that he had to be at work at "10:15." (184:34; Pet. App. 18). The court indicated that it would be "comfortable excusing you from the rest of the pre-trial if Mr. Giesfeldt is okay with that and if you're okay with that." (184:34-35; Pet. App. 18-19). Attorney Giesfeldt, informed the court that he was fine with A.D. being excused. (184:35; Pet. App. 19). Nevertheless, A.D. expressed concern: "It's not going to -- it's not going to knock me off, no points off, is it or includ me, is it?" (184:35; Pet. App. 19). The court responded, "No, no." (184:35; Pet. App. 19). The court continued: "This is a civil case, and it's not unusual that in civil cases we have the attorneys handling the pretrials. No, no points. It's up to you." (184:35; Pet. App. 19).

The court then informed A.D.: "So whenever you feel you need to leave to get ready to go to work, just go ahead and then you can just excuse yourself and you can leave the meeting, okay?" (184:35; Pet. App. 19). A.D. thanked the court and subsequently "excused

himself for the remainder of the pre-trial." (184:36; Pet. App. 20).

After the recess, the guardian ad litem informed the court that counsel had reached an agreement to sever the trials for the A.D. and J.F. (184:36-37). Specifically, the parties reached an agreement to maintain the June 1, 2021, trial date for J.F. and to reschedule A.D.'s jury trial for October 2021. (184:36-38).

With regards to A.D.'s trial, the court scheduled jury selection to begin on October 7, 2021, and the trial to begin on October 11, 2021. (184:49). The court also rescheduled A.D.'s final pre-trial hearing for September 21, 2021. (184:50). At that point, the court excused A.D.'s counsel from the remainder of the hearing. (184:51). Before excusing himself, however, A.D.'s counsel confirmed that A.D. would be excused from J.F.'s trial, now set for a bench trial, but that counsel for A.D. would be permitted to observe J.F.'s trial. (184:51-52).

Then, the guardian ad litem requested that A.D.'s personal appearance be "required for the pre-trial as well as jury selection." (184:53). The court stated: "It is." (184:53). The court further stated: "And in September, on the -- for the final pre-trial, I'll require his in-person appearance, and -- as well as in person appearances of counsel." The court then cautioned, "that a failure to appear without good cause could result in a default judgment terminating his parental rights." (184:53).

J.F.'s trial proceeded on June 1, 2021, through June 4, 2021, and June 14, 2021. A.D.'s counsel attended J.F.'s trial on behalf of A.D. on June 1, 2021, June 2, 2021, June 3, 2021, and June 14, 2021. (189; 190; 191; 183). On June 14, 2021, the court found grounds to terminate J.F.'s parental rights. (183). On July 27, 2021, the court held a disposition hearing at which time the court terminated J.F.'s parental rights. (182; 173).

Roughly two months later, on September 21, 2021, the court held the previously scheduled final pre-trial hearing related to A.D.'s jury trial, which was set to begin on October 7, 2021. (232). A.D. appeared by counsel, but A.D. did not personally appear. (232:1-3; Pet. App. 21-23). Asked whether he was expecting A.D. to appear, Attorney Giesfeldt informed the court, "I don't have any reason to believe that he shouldn't -- or wasn't coming." (232:3; Pet. App. 23).

The court then took notice that the court did not have a current address on file for A.D. (232:3; Pet. App. 23). The court stated that "[i]t shows it's still the Dane County Jail, but the Dane sheriff's inmate list doesn't show the jail as his address." (232:3; Pet. App. 23). Attorney Giesfeldt agreed and explained that A.D., since his release from jail a couple months ago, had not secured a permanent residence. (232:3; Pet. App. 23).

The county then moved the court for a default judgment, arguing that A.D.'s single failure to appear "supports an egregiousness finding." (232:6; Pet. App.

26). To support its argument, the county mistakenly asserted that A.D. was "personally present at that last final pre-trial" and that "before [A.D.] left, the court was very clear he was ordered to be personally present for today's final pre-trial, jury selection, and trial, and I believe he was present when this date was scheduled." (232:6; Pet. App. 26). As set forth above, A.D. appeared remotely on May 13, 2021, and excused himself from the hearing, with permission from the court, before his next pre-trial hearing date was scheduled and before the court ordered A.D. to personally appear. (184:34-36; Pet. App. 18-20).

The guardian ad litem supported the county's request for a default judgment, but also mistakenly asserted that A.D. was "present the last time we were in court and when this court date was scheduled." (232:8; Pet. App. 28).

On behalf of A.D., Attorney Giesfeldt objected and opposed the county's motion for a default judgment. (232:8-9; Pet. App. 28-29).

Prior to ruling, the court reviewed the court reporter's notes from the May 13, 2021, hearing. (232:9; Pet. App. 29). The court confirmed that at the final pre-trial hearing on May 13, 2021, A.D. was excused by the court "before today's final pre-trial date was set and before the oral order for personal appearance or reminder of his requirement to appear personally today was made." (232:10; Pet. App. 30).

At this point, the court asked Attorney Giesfeldt if he had a "phone number at which we can try to reach [A.D.]?" (232:10; Pet. App. 30). Attorney Giesfeldt explained that he had been communicating with A.D. by using "phone numbers of friends because he doesn't have his own phone right now." (232:10-11; Pet. App. 30-31). Attorney Giesfeldt further offered that he emailed A.D. that morning, but had "not yet received a response." (232:11; Pet. App. 31). Attorney Giesfeldt stated that he had been in communication with A.D. over the summer, and that A.D. did appear at a deposition after the May 13, 2021, final pre-trial hearing: "So he did participate in that deposition. I talked to him prior to the deposition and after the deposition prior to that day, and after that day also, communicated with him that day about the case." (232:11-12; Pet. App. 31-32). Attorney Giesfeldt continued: "[A.D.]'s continued to stay engaged in the case." (232:12; Pet. App. 32).

The court then questioned Hannah Graber, a social worker with Dane County Human Services, about her contact with A.D. (232:12, 16; Pet. App. 32, 36). Ms. Graber explained that her contact with A.D. was limited, that she never had an accurate phone number for him, and that "[s]ometimes if he calls me it's on a different number." (232:12; Pet. App. 32). Ms. Graber admitted that she "occasionally communicate[d]" with A.D. by email. (232:12; Pet. App. 32). Ms. Graber specifically admitted that she communicated with A.D. by email "last Friday," "I asked him to meet with me and he -- he got back to me about that." (232:13; Pet. App. 33). Ms. Graber also

informed the court that "over the past four months [A.D.]'s had maybe three visits, maybe four" with his daughters. (232:13-14; Pet. App. 33-34).

The court then confirmed with the county that the deposition A.D. participated in took place on July 26, 2021. (232:14; Pet. App. 34). After a brief follow-up argument from the county, the court ruled on the county's motion for a default judgment. (232:14; Pet. App. 34). The court's oral decision is set forth below:

> Okay. Well, the -- I'll find that the history of orders, both oral and written, as described by the county in its argument is correct and it's not disputed. There have been repeated orders for personal appearance in this case and repeated orders to keep the court informed of his address. He participated in the last final pre-trial. During the course of the final pre-trial on May 13th, I think when it had become clear that there were going to be two separate trials, he asked if he could be excused because he was employed and needed to maintain employment. His attorney had no objection to him being excused, and I authorized him to be excused and so then he left the hearing. Up to that point, it did not appear there had been any problem with him hearing anything. After he was excused, we set today's date for the final pre-trial and I did enter another oral order for personal appearance with his attorney present here. We presume that that was conveyed to him to the extent that his attorney has been able to have communication with him.

> He has not notified the court of any new address after the -- his release from jail. He has not notified the county of a new address. And it doesn't appear that he's notified anyone of a phone number at which he can be reliably reached, which is why I've tried to call him at this hearing. He does have an e-mail and communicates by email. So, essentially, his whereabouts are unknown and he's chosen not to keep the department or the court informed of where he's living. And he's failed to appear for today's hearing.
>
> I will find that he is in default and in violation of the orders for personal appearance and that it is egregious given the number of times that personal appearance has been ordered in this case, even though he was not personally present when this date was set. In addition, the court attempted to send notices to him. Not all of them for this -- today's hearing, but to both the jail which was his last known address and to Aberg Avenue which he had provided as an address at which he could receive mail. He left no forwarding address with the jail that they were aware of, and the Aberg Avenue address mail that was sent there in June and July was not picked up. So I'll find him in default and I'll allow the county to put on its testimony.

(232:14-16; Pet. App. 34-36).

The county then called Ms. Graber, who testified about A.D.'s case. (232:16; Pet. App. 36). After brief arguments from Attorney Giesfeldt and the guardian ad litem about whether sufficient evidence was presented to support a finding that grounds

existed to terminate A.D.'s parental rights, the court made a finding that Ms. Graber's testimony was "sufficient grounds for termination of parental rights under 48.415(6)." (232:40-43).

The court then scheduled A.D.'s disposition hearing for September 30, 2021. (232:43).

A.D. appeared in person and with counsel for his disposition hearing. (233:1; Pet. App. 37). Attorney Giesfeldt immediately made a motion to adjourn the disposition hearing under "48.315" or alternatively "to vacate the default judgment." (233:3-4; Pet. App. 39-40). Attorney Giesfeldt argued that A.D. "has not had a working telephone," a "stable place of employment," "or a place of residency since he left the jail, and those two things inhibited both his receipt of notices," and "him not updating his address, he didn't have a permanent address to update the court." (233:4; Pet. App. 40). Attorney Giesfeldt further argued that "[A.D]'s presence here today demonstrates that if that communication can happen, he clearly has the motivation and ability to participate in the case." (233:4; Pet. App. 40).

The county opposed A.D.'s motion. (233:5-6; Pet. App. 41-42). After a preliminary discussion concerning attorney-client privilege, (232:6-12; Pet. App. 42-48), the court allowed A.D. to testify in support of his motion to vacate the default judgment. (233:13-15; Pet. App. 49-51). Attorney Giesfeldt's questioning of A.D. proceeded as follows:

Question: [A.D.], you were residing in the Dane County Jail at some point in 2021; is that correct?

Answer: I don't know.

Question: Where -- do you have a current permanent address? Like an apartment or a home or something like that, right now?

Answer: I don't know.

Question: Do you have a -- your own telephone number that is specifically assigned just to you?

Answer: With fraud going on, shit, I don't know. Shit, I don't have one possession -- in my possession in person, no.

Question: Do you have like a subscription or a plan with a phone provider to give you a cellphone or a landline?

Answer: No.

Question: And do you have a personal computer?

Answer: No.

Question: Do you have your own car?

Answer: No.

> Question: Tell us how easy is it for you to get around town. How do you provide yourself with transportation?
>
> Answer: This is a joke to y'all, ain't it? Y'all just humiliate black people, man. Y'all just do it wrong, man. Excuse me. Excuse me. Okay, take me, come on.

(233:13-14; Pet. App. 49-50).

At this point, the court stated for the record that "[A.D.] left the witness stand and started to walk out the courtroom, was stopped by bailiffs [who] informed him that he had a warrant out for him, and he said go ahead, take me. And the bailiffs are removing him from the courtroom." (233:14-15; Pet. App. 50-51). The court then stated that A.D. "has waived his motion for relief from the default judgment...I think he's abandoned his claim to vacate the default judgment." (233:15; Pet. App. 51). Asked to add any further clarification to the record regarding A.D.'s "departure" from the courtroom, Attorney Giesfeldt noted that "[A.D.] demonstrated frustration or some negative emotion. I won't venture the specific proper adjective but a negative emotion regarding the types of questions I was asking. Saying something to the effect that -- that he -- that -- about black people being embarrassed." (233:16-17; Pet. App. 52-53).

Thereafter, the county called Ms. Graber to testify regarding disposition. (233:22-37). After brief arguments from the parties, the court terminated

A.D.'s parental rights to A.F. and L.F. (233:40-48; 214; 2022AP77: 221; Pet. App. 54-59).

A.D. filed a timely notice of intent to pursue postdisposition relief on October 5, 2021. (216; 2022AP77: 222). Appellate counsel was appointed on October 28, 2021, and A.D. filed a notice of appeal on January 14, 2022. (235; 2022AP77: 240).

On appeal, A.D. argued that his failure to appear for the September 21, 2021, final pre-trial hearing did not constitute an egregious failure to comply with the circuit court's order. A.D. offered three reasons why the circuit court erred in this case.

First, A.D. argued that the circuit court's and the county's focus on the number of prior orders to appear and warnings about the potential consequences of failing to appear, ignored completely the undisputed fact that A.D. complied with the court's orders to appear at eight prior hearings over roughly two years. A.D. argued that using the number of prior *orders to appear*, with which A.D. complied, as evidence of the egregiousness of his single failure to appear was unreasonable and not supported by the record.

Second, because "egregious" is defined as an "extreme, substantial and *persistent*" failure to comply with court orders, A.D. argued that his single failure to appear at a pre-trial hearing, after close to two years of compliance, could not be considered egregious.

Third, A.D. argued that the unique circumstances of his case, including the final direct interaction he had with the circuit court on May 13, 2021, further weighed against any finding of egregiousness. Specifically, even if, under some unique and compelling circumstances, a single failure to comply with a court order could be considered egregious, the facts in this case do not.

The court of appeals affirmed and, like the circuit court, agreed that A.D.'s failure to appear on September 21, 2021, was egregious based on the number of prior orders to appear given by the circuit court, regardless of A.D.'s "persistent and substantial compliance with the court's orders." *Dane County DHS v. A.D.* unpublished slip op., No. 2022AP76, 77, ¶18, (Mar. 31, 2022). (Pet. App. 14). The court of appeals, like the circuit court also cited A.D.'s failure to provide an updated mailing address upon his release from custody. *See id.*, ¶¶14-16. (Pet. App. 11-12).

ARGUMENT

Review is Necessary and Appropriate to Clarify and Reaffirm *Mabel K.'s* Egregiousness Standard.

A. Egregiousness under *Dane County DHS v. Mabel K.*

In *Mable K.*, this Court held that the circuit court erroneously exercised its discretion, in

granting a default judgment against a parent in a TPR proceeding, in two ways. 346 Wis. 2d 396, ¶¶51, 57. First, the court erred when it entered a default judgment against Mable K. after depriving her of her statutory right to an attorney under Wis. Stat. § 48.23(2). *Id.*, ¶51. Second, the court erred when it entered a default judgment before establishing the grounds alleged in the petitions by clear and convincing evidence. *Id.*, ¶57.

In deciding upon the appropriate remedy for these errors, the court considered a circuit court's authority to impose "sanctions." The court explained:

> Even if the circuit court determined that Mable K. forfeited her right to a jury and granted a default judgment as a sanction, Wis. Stat. § 805.03 limits the sanctions that a circuit court may impose for failure to comply with court orders to those that are just. In order for a sanction dismissing a civil case to be just, the non-complying party must act egregiously or in bad faith. The *Shirley E.* court applied that requirement to default judgments at fact-finding hearings in termination of parental rights proceedings.
>
> Where a circuit court concludes that a party's failure to follow court orders, though unintentional, is *so extreme, substantial and persistent that the conduct may be considered egregious, the circuit court may make a finding of egregiousness.*

Id., ¶¶69-70 (cleaned up, but emphasis added).

The *Mable K.* court cited *Hudson Diesel, Inc. v. Kenall*, 194 Wis. 2d 531, 543-44, 194 N.W.2d 531 (Ct. App. 1995), for its definition of egregiousness. *Id.*, ¶70.

In *Hudson Diesel, Inc.*, a commercial case, the court of appeals reversed a default judgment where there was no evidence the company "persistently violated discovery procedure." 194 Wis. 2d at 543. Further, while the court agreed that the company's discovery response was "inappropriate," the court concluded that "based on the circumstances present in this particular case, we conclude that the company's conduct was not so extreme or persistent that it could be characterized as egregious." *Id.* at 544-45.

B. The court of appeals' redefinition of "egregious" in TPR appeals.

As mentioned above, since this Court decided *Mable K.*, the court of appeals has issued at least 13, one-judge opinions concerning default judgments in TPR appeals. While the court of appeals appears to have applied *Mable K.* faithfully in some cases, multiple decisions demonstrate a clear departure from this Court's definition of egregiousness within the context of default judgments in TPR cases. A.D.'s case represents a clear end of the line, from "extreme, substantial and persistent," to "a parent's failure to appear for one pre-trial hearing."

Each of these 13 cases is listed and summarized below.[2]

1. In *State v. Samantha J.*, unpublished slip op., Nos. 2014AP988, 989, 1017, ¶5, (Sept. 16, 2014), the court of appeals affirmed a default judgment based on a mother's failure to appear at "three hearings and a deposition without stating a reason, and [noting that she] did not appear to have an interest in her case." (Pet. App. 63). The court of appeals' decision failed to cite to or rely on *Mable K.'s* definition of egregiousness related to failure to comply with court orders. (Pet. App. 60-74).

2. In *State v. T.N.*, unpublished slip op., Nos. 2014AP2407, 2408, ¶5, (Sept. 10, 2015), the court of appeals affirmed a default judgment based on T.N.'s failure to appear at the first hearing after his initial appearance. (Pet. App. 78). At the hearing T.N. missed, his attorney appeared and explained that she had sent T.N. a letter

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[2] The first 12 unpublished one-judge court of appeals' decisions summarized below are cited pursuant to Wis. Stat. § (Rule) 809.23(3)(b) and (3)(c). (Pet. App. 60-244). The decision by the court of appeals in A.D.'s appeal is cited and included in the Appendix to Petition for Review pursuant to Wis. Stat. § (Rule) 809.62(2)(f). (Pet. App. 4-16). In sum, these cases demonstrate the need for review by this Court in A.D.'s case based on the court of appeals' failure to faithfully apply *Mable K.*

and left a voicemail, neither of which had been returned. *Id.*, ¶5. (Pet. App. 78). The circuit court then denied the T.N.'s attorney's request for additional time to locate T.N. and explained that "T.N.'s conduct was "egregious," "glaring," and "flagrant." *Id.*, ¶6. (Pet. App. 78-79). T.N. further failed to appear at any subsequent hearings until five months later when after it was discovered that T.N. had absconded from probation and was subsequently taken into custody. *Id.*, ¶8. (Pet. App. 79-80). Again, the court of appeals failed to cite *Mable K.* (Pet. App. 75-89).

3. In *Barron County DHHS v. M.B.-T.*, unpublished slip op. Nos. 2016AP1381, 1382, 1383, ¶4, (Mar. 31, 2017), the court of appeals affirmed a default judgment entered after neither M.B.-T., nor his attorney, appeared for the hearing held after the initial appearance, at which he had been present and warned about the consequences of failing to appear. (Pet. App. 93). The court explained why M.B.-T.'s single missed appearance was sufficient to justify the default judgment: "M.B.-T. did not answer the petition within the thirty-day period…nor did he request another continuance…[and] M.B.-T. never offered any express position on the petition until three months later."

Id., ¶18. (Pet. App. 99). Again, the court appeals did not cite *Mable K.* (Pet. App. 91-108).

4. In *State. V. K.C.*, unpublished slip op., No. 2017AP32, ¶2, (April 25, 2017), the court of appeals affirmed a default judgment based on egregious conduct. (Pet. App. 110). The court explained that K.C. appeared with counsel at three hearings prior to her scheduled jury trial. *Id.*, ¶¶8-9. (Pet. App. 112-113). K.C. also appeared and sat for a deposition pre-trial. *Id.*, ¶10. (Pet. App. 113). K.C. appeared in court for the scheduled start of her jury trial, but failed to appear the following day. *Id.*, ¶¶12-13. (Pet. App. 113-114). After a subsequent evidentiary hearing, the circuit court granted the state's motion for a default judgment. *Id.*, ¶¶14-15. (Pet. App. 144-115). While the court of appeals cited some commercial cases for the circuit court's authority to sanction a party for egregious conduct, the court again failed to cite *Mable K. Id.*, ¶18. (Pet. App. 116-117).

5. In *State v. K.P.*, unpublished slip op., Nos. 2017AP612, 613, ¶1, (July 11, 2017), the court of appeals affirmed a default judgment entered against K.P. for his failure to appear for his jury trial. (Pet. App. 130). K.P. was in custody and

appeared for the first two TPR hearings. *Id.*, ¶8. (Pet. App. 133). However, K.P. was then released from custody and failed to appear at the next hearing and the county moved for a default judgment. *Id.*, ¶9. (Pet. App. 133). When K.P. appeared at the next hearing, the circuit court warned him about the risk of default if he failed to appear again. *Id.*, ¶10. (Pet. App. 133). K.P. subsequently failed to appear for his jury trial and his attorney informed the court that he had spoken with K.P. at "9:20 a.m." and that K.P. was on his way, but that he had been unable to reach him. *Id.*, ¶12. (Pet. App. 134). The circuit court then granted the county's motion and found K.P. in default based on K.P.'s "egregious" failure to appear. *Id.*, ¶13. (Pet. App. 134). Here, the court of appeals cited *Hudson Diesel Inc.*: "Conduct may be 'so extreme, substantial and persistent that it can be characterized as egregious' even if it is unintentional." *Id.*, ¶15. (Pet. App. 135).

6. In *Kenosha County DHS v. V.J.G.*, unpublished slip op., Nos. 2017AP1150, 1151, ¶1, (Dec. 27, 2017), the court of appeals affirmed a default judgment after V.J.G. failed to appear at multiple hearings, including his trial. *Id.*, ¶¶2-7. (Pet. App. 140-143).

7. In *Barron County DHHS v. S.R.T.*, unpublished slip op., Nos. 2018AP1574, 1575, ¶¶4-7, (May 22, 2019), the court of appeals affirmed a default judgment based on S.R.T.'s failure to appear after the initial appearance. (Pet. App. 158-160). S.R.T. was in custody at the time of his initial appearance, but was subsequently released and failed to appear at the next four scheduled hearings. *Id.*, ¶¶4-6. (Pet. App. 158-160). The circuit court found that S.R.T.'s failures to comply with court orders, including failing to maintain contact with his trial attorney, was egregious. *Id.*, ¶6. (Pet. App. 160). Here, the court of appeals cited and relied on *Mable K.* as it relates to the circuit court's authority to enter a default judgment at the grounds stage of a TPR proceeding. *Id.*, ¶14. (Pet. App. 163).

8. In *State v. C.M.*, unpublished slip op., No. 2019AP1483, ¶¶8-9, (Nov. 5, 2019), the court of appeals affirmed a default judgment based on C.M.'s failure to appear at two hearings. (Pet. App. 176-177). Specifically, C.M. failed to appear at her initial appearance, but told her counsel that she "had forgotten and was not coming." *Id.*, ¶8. (Pet. App. 176-177). The court then called C.M. directly and ordered her to contact the public defender's office to obtain

representation and warned C.M. about the risk of default if she failed to appear again. *Id.* (Pet. App. 176-177). C.M. failed to appear at the next hearing and instead called the court to explain that she had "mistaken the time of the hearing and asked to appear by phone." *Id.*, ¶9. (Pet. App. 177). The court then called the public defender's office and discovered that C.M. had failed to contact them to obtain counsel for the TPR proceeding. *Id.* (Pet. App. 177). The court then found her to be in default. The court of appeals again cited *Mable K.*; and defined "egregious" to mean "extraordinary in some bad way; glaring, flagrant." *Id.*, ¶¶16-17. (Pet. App. 179-180).

9. In *State v. Z.J.*, unpublished slip op., Nos. 2019AP1623-1626, ¶¶32-33, (Nov. 19, 2019), the court of appeals affirmed a default judgment based on Z.J.'s "egregious" failure to appear at a deposition and multiple hearings. (Pet. App. 196Z.J. also failed to appear at the subsequent disposition hearing. *Id.*, ¶39. (Pet. App. 198-199).

10. In *State v. L.C.*, unpublished slip op., No. 2019AP796, ¶¶2-12, (July 28, 2020), the court of appeals affirmed a default judgment based on L.C.'s "egregious" conduct, including failing to appear at

five court ordered depositions. (Pet. App. 201-206).

11. In *State v. A.M.-C.*, unpublished slip op., No. 2021AP94, 95, ¶34, (Mar. 30, 2021), the court of appeals affirmed a default judgment based on A.M.-C.'s failure to appear for her court trial. (Pet. App. 232). While A.M.-C. requested to appear by telephone for her trial, she admitted that she voluntarily moved from Milwaukee to New York and could not afford to return for the trial. *Id.*, ¶6. (Pet. App. 222). A.M.-C. had also missed multiple court appearances in the past. *Id.*, ¶7. (Pet. App. 222). Again, the court of appeals cited *Mable K.*, but defined egregious in this context to mean conduct that "impairs justice in this action and justice in the operation of our judicial system." *Id.*, ¶¶27-28. (Pet. App. 229-230).

12. In *State v. M.R.K.*, unpublished slip op., No. 2021AP141, ¶¶7-8, (June 22, 2021), the court of appeals affirmed a default judgment based on M.R.K.'s failure to appear at one TPR hearing. (Pet. App. 238-239). M.R.K. appeared at the initial appearance and was ordered to appear at the next hearing and told he should contact the State Public Defender to secure counsel for the proceeding. *Id.*, ¶7. (Pet. App. 242). At the next hearing,

neither M.R.K. nor any attorney appeared. *Id.*, ¶8. (Pet. App. 243). Because the circuit court had ordered him to appear and warned him about the risk of a default judgment, the circuit court concluded that M.R.K.'s failure was "egregious." *Id.*, ¶9. (Pet. App. 238-239). Here, the court of appeals again cited *Mable K.* and defined egregious to mean "extraordinary in some bad way; glaring, flagrant." *Id.*, ¶19. (Pet. App. 242-243).

13. Finally, in this case, *Dane County DHS v. A.D.* unpublished slip op., Nos. 2022AP76, 77, ¶¶1, 14, (Mar. 31, 2022), the court of appeals again affirmed a default judgment based on A.D.'s failure to appear for the ninth pre-trial hearing, concluding that the circuit court did not err in finding that A.D.'s failure was "egregious" because the circuit court had "personally warned [A.D.] at least five times" of the risk of default judgment. (Pet. App. 4-16).

To be clear, some of the cases summarize above consist of persistent failures to comply with court orders related to a parent's obligations in a TPR proceeding. However, what is equally clear is that, at least in the court of appeals, there is now no meaningful difference between a parent's failure to appear at a single TPR hearing and "*extreme, substantial and persistent*" conduct sufficient for a

circuit court to enter a default judgment and for the court of appeals to affirm.

C. Unless this Court grants review, egregious now means: "a parent that fails to appear at one pre-trial hearing."

The need and basis for review by this Court is clear. While claiming to faithfully apply this Court's precedent, the Wisconsin Court of Appeals has silently but effectively overturned *Mable K.'s* definition of "egregious" to mean a TPR parent's single failure to comply with a circuit court order. If the circuit court's default judgment in this case against A.D. is allowed to stand, there would be no circumstance under which a parent's single failure to comply with a court order would not be legally "egregious." Respectfully, this redefinition is in flagrant conflict with our courts' loftly language describing the TPR process and the rights at issue in these cases:

- "Parental rights termination adjudications are among the most consequential of judicial acts, involving as they do 'the awesome authority of the State to destroy permanently all legal recognition of the parental relationship.'" *Steven v. Kelley H.*, 2004 WI 47, ¶21, 271 Wis. 2d 1, 678 N.W.2d 856; *see also Walworth County Department of Health & Human Services v. Roberta J.W.*, 2013 WI App 102, ¶1, 349 Wis. 2d 691, 836 N.W.2d 860.

- These cases "affect some of parents' most fundamental human rights." *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶20, 246 Wis. 2d 1, 629 N.W.2d 768.

- During the grounds phase of the termination of parental rights proceeding "the parent's rights are paramount" and parents are provided "heightened legal safeguards to prevent erroneous decisions." *Roberta J.W.*, 349 Wis. 2d 691, ¶1.

- A parent's interest in the parent-child relationship is a fundamental liberty interest under the due process clause of the Fourteenth Amendment. *Brown County v. Shannon R.,* 2005 WI 160, ¶59, 286 Wis. 2d 278, 706 N.W.2d 269.

- "When the State seeks to terminate familial bonds, it must provide a fair procedure to the parents, even when the parents have been derelict in their parental duties." *Id.*, ¶¶18-19.

- As such, "[a]lthough they are civil proceedings, termination of parental rights proceedings deserve heightened protections because they implicate a parent's fundamental liberty interest." *Id.*, ¶59.

- "The protection of a parent's interests in termination of parental rights proceedings is particularly important in light of the 'vast disparity in an involuntary termination case between the ability of the state to prosecute and the ability of the parent to defend.'" *Id.* ¶62.

At the same time, A.D.'s petition for review and request to this Court is simple: reaffirm *Mable K.'s* definition of "egregious" conduct sufficient to support a default judgment against a parent at the grounds stage of a TPR proceeding. Because "egregious" indisputably means conduct that is "so extreme, substantial and persistent," this Court must reverse the court of appeals decision in this case and remand this case to the circuit court so that A.D. can have the day in court, for which he has now waited close to three years.[3]

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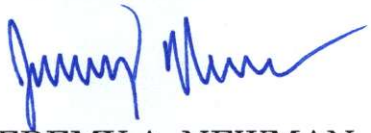
[3] A.D. recognizes that as a result the default judgment entered against him, and his subsequent appeal, the lives of A.F. and L.F. have also remained in legal limbo. This was not A.D.'s intent. A.D.'s clear and consistent goal has been to preserve his parental rights to A.F. and L.F. and to contest the county's allegations upon which the petitions to terminate his parental rights are based. He is entitled to and maintains his right to a jury trial in these cases.

CONCLUSION

For all of the reasons set forth above, A.D. most respectfully requests that this Court grant this petition for review.

Dated this 28th day of April, 2022.

Respectfully submitted,



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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 7,078 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

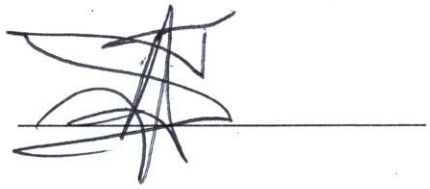
Dated this 28th day of April, 2022.

Signed:

JEREMY A. NEWMAN
Assistant State Public Defender

SIGNATURE OF PETITIONER

IN SUPPORT OF PETITION FOR REVIEW[1]



[1] The parent's signature has been redacted in order to comply with the confidentiality requirements of cases involving children.