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Session 2

Next Level Appellate Briefs: Persuasive Use of Forms & Visuals

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About the Presenters...

Joseph (Joe) S. Diedrich has briefed appeals in the U.S. Supreme Court; the U.S. Courts of Appeals for the D.C., Federal, Seventh, Eighth, Ninth, and Tenth Circuits; the supreme courts of Wisconsin and Georgia; and the appellate courts of Wisconsin, Illinois, and Missouri. He has orally argued appeals in the Seventh Circuit (including en banc), the Eighth Circuit, the Federal Circuit, and the Wisconsin Court of Appeals. Joe also litigates administrative appeals and high-stakes disputes in trial courts across the country. No matter the forum, Joe draws on a unique background in music composition to bring unmatched creativity to analyzing and writing about complex legal issues. Joe specializes in challenges to government action, including judicial review of decisions issued by federal agencies, state agencies, and local governments. He also has significant experience defending class actions and litigating cases involving issues of constitutional and administrative law; land use, zoning, and permitting; and international trade law. He serves clients in various industries, including telecommunications, traditional and renewable energy, food and agribusiness, real estate, and healthcare, among others. In addition to writing as an advocate for his clients, Joe has published several scholarly and popular articles on constitutional law and appellate practice. His work has appeared in the SMU Law Review, the Villanova Law Review, the University of Cincinnati Law Review, the Fordham Urban Law Journal, the Yale Journal on Regulation Notice & Comment, Law360, Wisconsin Lawyer (where he serves on the editorial board), and elsewhere. Joe's articles have been cited in state and federal judicial opinions.

Hon. Sarah Geenen was elected to the Wisconsin Court of Appeals District 1 in April 2023 and took office on August 1, 2023. Prior to taking the bench, she was an attorney and shareholder with The Previant Law Firm S.C. where she specialized in labor and employment law, representing primarily workers and labor unions.

Professor Lisa A. Mazzie has been a faculty member at Marquette University Law School since 2004. She teaches Legal Analysis, Writing & Research 1 and 2 and Appellate Writing and Advocacy. She's also co-director of Marquette's Moot Court Program, and faculty advisor/coach for the several national moot court teams. Before joining the faculty, Professor Mazzie was Justice Roggensack's first law clerk at the Wisconsin Supreme Court. Before that, she worked as an attorney in private practice in Madison. Professor Mazzie received her BA, with honors, from the University of Wisconsin - La Crosse and her JD, cum laude, Order of the Coif, from the University of Wisconsin - Madison. Professor Mazzie is currently working on a textbook titled Writing for Law Practice: What They Didn't Teach You First Year.

Hon. Nathan Petrashek was appointed to Wisconsin Court of Appeals District 1 in 2026. He was district staff attorney for District II of the Wisconsin Court of Appeals for 16 years. Prior to that time, he clerked for several state appeals court judges, including the Hon. Edward Brunner, the Hon. Mark Mangerson, and the Hon. Thomas Hruz. Nathan is a board member for the State Bar's Appellate Practice Section and frequently presents at judicial education conferences. Together with Judge Hruz, he authors the standards of review appendix for the State Bar's treatise on Wisconsin appellate procedure. Nathan earned his law degree in 2009 from Marquette University, where he was a member of law review and teaches Appellate Writing and Advocacy. He earned his B.S. in political science and public administration at the University of Wisconsin-Green Bay.

Matt Woleske is a career law clerk for Justice Rebecca Frank Dallet on the Wisconsin Supreme Court. Before joining Justice Dallet's chambers in 2021, Matt spent three years in private practice and served as a law clerk for Justice Shirley S. Abrahamson of the Wisconsin Supreme Court and for federal district judges in New York and California.

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Gain the Upper Hand with Good Typography

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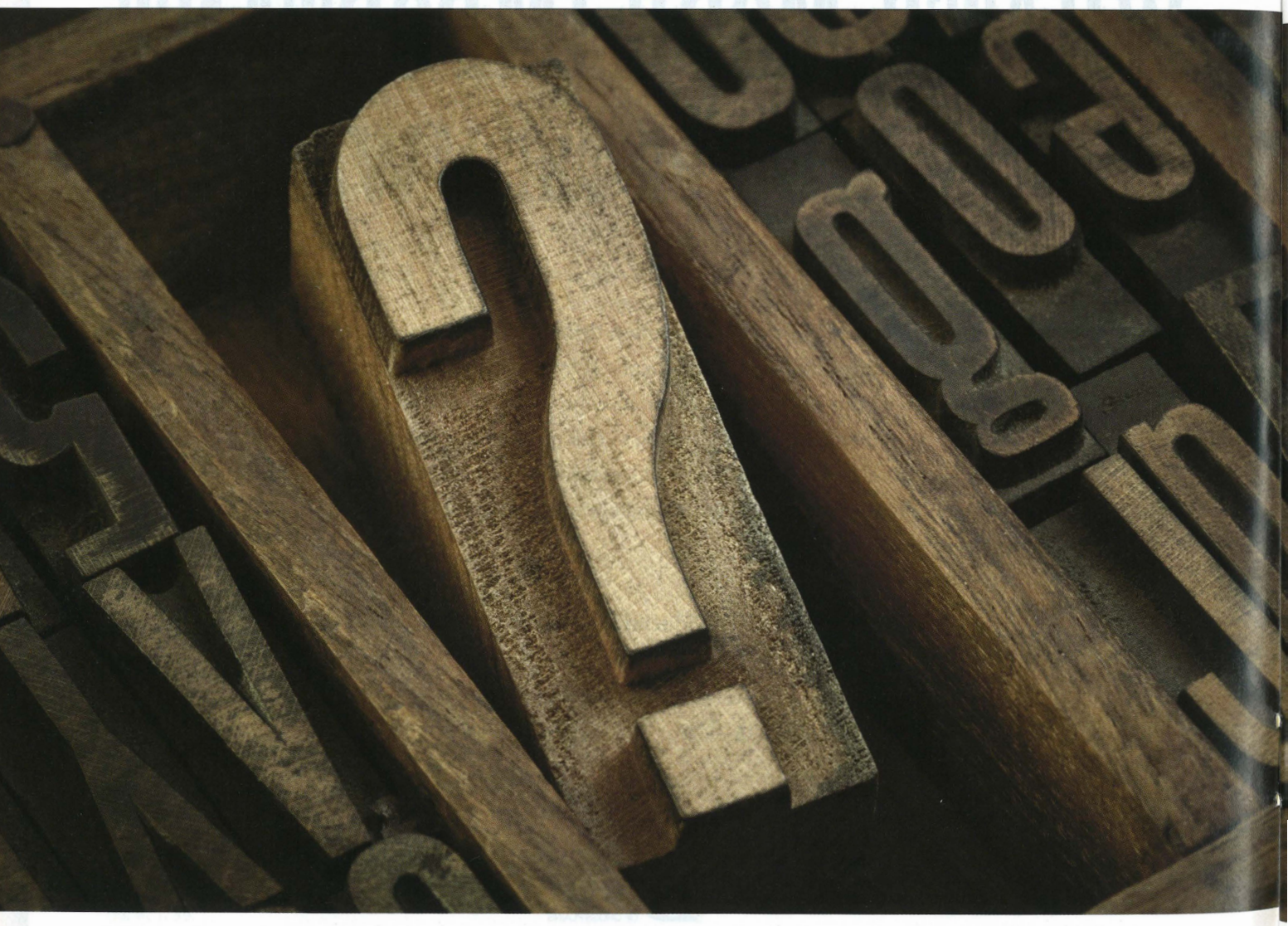
Gain the Upper Hand with Good Typography

You can improve your chances of persuasion by making your briefs typographically superior. It won't make your arguments better, but it will ensure that judges grasp and retain your points with less struggle. That's a valuable advantage.



BY JOSEPH S. DIEDRICH & MELISSA E. LOVE KOENIG

SUMMARY

Briefs are the legal profession's novels – and judges are its bibliophiles. Lay readers, lawyers, and judges all notice when something is difficult to read, and all get distracted from the text by poor visual presentation. But all also are pleasantly drawn into text that uses good typography, which aids reader comprehension.

What makes a brief both visually pleasing and intellectually persuasive? Here are some practical tips.

The authors organize their discussion of best practices around Wisconsin Rule of Appellate Procedure section 809.19(8)(b), which sets forth basic typography standards for briefs filed in the Wisconsin Supreme Court and Wisconsin Court of Appeals.

Let's say you go to the bookstore to buy your next book club selection. You find a hardbound edition of the novel and thumb through it. As you walk to the checkout, you spy a paperback in the discount bin. You have to squint to read the small font, and the words seem to bleed together. So you drop it back in the bin, opting to spend the extra money on the hardbound copy. The font is easier to read and the visual design draws you in. You read the first chapter in the checkout line.

Despite the identical content of the two editions, you picked one over the other because it was easier to read. After comparing the editions, you noticed how the hardbound edition's typography – the visual presentation of the words on the page – was easier to *comprehend*. And comprehension is something you value. After all, you want to sound smart leading the book club discussion.

Briefs are the legal profession's novels – and judges are its bibliophiles. Lay readers, lawyers, and judges all notice when something is difficult to read, and all get distracted from the text by poor visual presentation. But all also are pleasantly drawn into text that uses good typography, which aids reader comprehension. "[A]n effectively designed document," says law professor James Dimitri, "make[s] the arguments in the document more memorable to the reader" and "make[s] a strong statement to the reader about the authoring attorney's credibility."[1]

To that end, brief writers should aim to make their visual presentation as pleasing as possible. Those who do will gain an upper hand over their opponent. The Seventh Circuit agrees: "You can improve your chances by making your briefs typographically superior. It won't make your arguments better, but it will ensure that judges grasp and retain your points with less struggle. That's a valuable advantage, which you should seize."[2] If two briefs contain the same content but one is easier to read, that one will be more *persuasive*.

To design a visually superior brief, you must comply with court rules and orders about formatting and typography. You might also have to follow conventions set by your employer. But these rules and conventions merely establish a floor: you should go beyond compliance. In this article, we share best practices and recommendations for doing so.

Rules of Appellate Procedure

We organize our discussion of best practices around Wis. Stat. section 809.19(8)(b), part of the Wisconsin Rules of Appellate Procedure, which sets forth basic typography standards for briefs filed in the Wisconsin Supreme Court and Wisconsin Court of Appeals.

At the same time, the rule grants brief writers substantial discretion to make typography choices. We explain what each rule requires and then offer additional recommendations for crafting a visually superior brief.

Later, we explain how our recommendations translate to filings in Wisconsin circuit courts and other tribunals. While our recommendations apply to brief writing generally, particular

Paper Versus Screen

The Rules of Appellate Procedure were written with *paper* in mind. Although many judges still read briefs on paper, more and more are reading briefs electronically. Should you design your brief differently if it will be read electronically?

To be sure, paper and electronic screens lend themselves to different typographical best practices. With older technology, these differences were quite pronounced. For example, it is accepted wisdom that serif fonts look better on paper, but sans serif fonts look better on a screen.[30]

As screen technology continues to improve, however, many differences between paper and screens have evaporated. "[W]ith screens becoming more paper-like than ever, there's decreasing need to make special accommodations for screen reading."[31] What's more, judges who read on a screen typically view briefs in paginated PDF form, meaning what they see on a monitor, laptop, or tablet resembles paper.

All this means that you needn't fret over the difference between paper and screens. That said, we have tailored our recommendations to work well *both* on paper and electronically. **WL**

jurisdictions, courts, and judges may have their own preferences. The U.S. Court of Appeals for the Seventh Circuit, for example, maintains detailed typography standards.[3]

Font Choice

A visually appealing brief starts with a visually appealing font. In Wisconsin appellate courts, "[b]riefs shall be produced by using either a monospaced font or a proportional serif font" in size 13 for body text and size 11 for footnotes and block quotes.[4]

A monospaced font's characters all occupy the same width on the page; a proportional font's characters vary in width. Monospaced fonts, such as Courier, are a vestige of early typewriters and are rarely used today. When writing a brief, you should always use a proportional font.

Under the rule, a proportional font must also include serifs. A "serif" is the small curl-like feature added to the ends of characters in certain fonts. For instance, Times New Roman and the font used in the *Wisconsin Lawyer* printed articles are serif fonts. Arial and Verdana are sans-serif fonts.

Brief writers have considerable discretion when choosing which proportional serif font to use. Yet the inertia of blind tradition has made Times New Roman the default and has led "[m]any lawyers [to] erroneously assume that courts demand" it.[5]

Times New Roman was invented in the early 20th century for the *Times* of London and quickly gained traction among newspaper publishers. The *Times* commissioned it as an intentionally narrow font to fit more text per line and to enable quick reading.[6] Even from the beginning, it was criticized as unappealing to the eye.

For all its ubiquity in self-published documents, when was the last time you saw Times New Roman in a book? Maybe never. Fonts used in professionally published books are comparably easier to read. This visual appeal, in turn, fosters comprehension and retention.[7]

Because "[b]riefs are like books rather than newspapers," we (along with courts and typographers) recommend using a book font to write briefs. Among the best proportional serif fonts are Century, Century Schoolbook, and Book Antiqua.[8] These fonts are used by professional printers and the country's best legal writers. The U.S. Supreme Court, for example, uses Century to publish its slip opinions.

Book fonts tend to take up more space on the page than Times New Roman does. The rule enforces a word count, however, not a page count. At least in Wisconsin appellate courts, you can't gain an advantage by using a font that fits more words onto a page.

Spacing Choices

The space you leave on the page creates a sense of breathing room; a reader should not feel overwhelmed in approaching the print on the page. Creating the right spacing is a matter of both mathematics and art. The rule specifies that if you use a proportional serif font (see above), you must also use a "leading of minimum 2 points."[9]

Leading (pronounced with a soft "e" like the metal "lead") refers to "the vertical space from the same point on one line to the same point on the next, within the same paragraph."[10] The term originated with the small lead pieces used in hand typesetting to space vertical lines.[11]

Leading and "line spacing" are sometimes used interchangeably, but they are slightly different concepts.[12] Line spacing is the "vertical distance between lines of text."[13]

Single spacing is generally too cramped for the eye. Double spacing, historically used in term papers to

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allow for handwritten comments, slows down the eye and is therefore no longer recommended. It creates too much white space (or "negative space") on the page, especially when paired with wider margins (see below).

Legal typography expert Matthew Butterick recommends using line spacing that is between 120 percent and 145 percent of the font size.[14] When using Microsoft Word, this translates to 1.03-1.24 line spacing (not 1.2-1.45).[15] That said, allowing some room for tradition and flexibility, selecting between 1.15 and 1.5 line spacing in the Word paragraph dialog box will promote optimal readability in a Wisconsin appellate brief.

If you use less than 1.25 line spacing, consider adding additional space between paragraphs. To comply with the rule and as a best practice, we recommend either 1.4 line spacing or 1.15 line spacing with extra spacing between paragraphs to give the reader's eyes a break. Note that your choice of margin width may warrant a small adjustment to these figures (see below).

As to spacing between *sentences* on the same line, one space is sufficient for proportional fonts.[16] This departs from past practice with typewriters and monospaced fonts, when two spaces were recommended to create a visual break.

The Future of the Rules of Appellate Procedure

All of Wis. Stat. chapter 809 is currently under review by the Appellate eFiling Committee, appointed by the Clerk of the Supreme Court and Court of Appeals to recommend rule changes for appellate electronic filing. The committee is considering changes to Wis. Stat. section 809.19(8) that may affect the recommendations in this article to some extent. Although their exact contours are not known with certainty, any changes will likely more closely reflect the best practices and recommendations discussed in this article.

A petition to recommend mandatory eFiling for attorneys filing in the Court of Appeals and Supreme Court is expected to be filed in autumn 2020. **WL**

Margins and Alignment

Typography entails not only the text itself, but also the text's relationship to the page. To that end, decisions about margins and alignment significantly affect the visual appeal of a brief. The rule regulates a brief's margins by mandating a "maximum of 60 characters per full line of body text."[17] The number of characters per line depends on the font. If you use

size 13 Century Schoolbook, 60 characters amounts to roughly 1.5-inch margins.

By capping the number of characters, the rule sets a minimum margin width, which you can exceed. We recommend setting your margins between 1.5 and 2 inches. This range complies with what's required and provides adequate white space. Like silent rests between the musical notes of a symphony, white space is crucial for a visually appealing and easy-to-read document.[18]

In general, the *wider* you set your margins (the more white space at the edges), the *less* white space you need between lines within the same paragraph. If you use 1.5-inch margins, for example, then 1.25 to 1.4 line spacing looks quite comfortable; if you use 2-inch margins, you can reduce your line spacing to as low as 1.15. (See also Spacing Choices, above.)

Closely related to margins is alignment. Microsoft Word allows you to left align or justify your text. Whereas the former lines up only the left edge of the text, the latter aligns "both the left and the right margins by adding additional space between words as needed."[19] The text of this article is left aligned.

Which alignment fosters easier reading?[20] Left-aligned text leaves jagged right edges (called "rags"), which many view as unappealing. It has the advantage, however, of keeping uniform space between all words on the page.

Justified text, with its flush-right edge, "gives text a cleaner, more formal look."[21] But the reader's eyes must contend with different-sized spaces between the words in each consecutive line. Sometimes the spaces become quite wide, causing "rivers"— "vertical flow[s] of white spaces that appear near each other on consecutive lines of text."[22] Inconsistent spacing and rivers make text more difficult to read, which reduces comprehension and retention.

Unless you're engaging a professional typesetter (who has sophisticated technology for combatting rivers), we recommend sticking with left-aligned text. If you do justify, you should also hyphenate. In this context, hyphenation refers to splitting long words across lines at syllabic breaks.

Microsoft Word has a rudimentary automatic hyphenation function that controls for some of the inconsistent spacing endemic to justified text. You can select this option under the Layout -> Page Setup tab. (You may also have to adjust your Paragraph settings to undo the check box "Don't Hyphenate.")

Headings, Emphasis & Graphics

Good document design governs the use of headings and other visual aids to facilitate comprehension. The rule provides for the use of headings and adds that "[i]talics may not be used for normal body text but may be used for citations, headings, emphasis and foreign words."[23]

Like silent rests between the musical notes of a symphony, white space is crucial for a visually appealing and easy-to-read document.

Headings draw attention to important points, helping a reader comprehend and retain information through a process called "chunking."[24] Although the rule allows you to italicize headings, italics and underlining impair readability in single-spaced headings.

To make the most of your headings, create contrast without being flashy. For briefs, we recommend using the same font and same size as the body text, though bolded for contrast. Capitalizing every word in a heading or using all caps or small caps is distracting. To enhance readability, capitalize only the first word and proper nouns. (Many *non-brief* publications use various different typography settings, all of which can look very good. For example, the *Wisconsin Lawyer* uses a non-serif font for subheads, bolded, initial capped, and left justified (as is all text), and uses a serif font for body text.)

Be sure to use consistent numbering and spacing in headings. Align your headings with the left margin of your paragraphs. Indent your subheadings (from the left) using the same amount of space as you use to indent each new paragraph. Exacting placement of headings in a document creates a professional look that conveys credibility. Also, consider using an introductory paragraph between a main heading and a subheading; headings should be followed by content.[25]

Italics are appropriate for citations, limited emphasis in text, and some foreign words. Avoid using underlining, all caps, or small caps in briefs; italics are the only acceptable way to add emphasis. Underlining is a product, again, of the bygone typewriter era.[26]

Like long headings, block quotations provide a visual wall of text that many readers skip over. When you do use them, sparingly, include only the most relevant language in the quote and use ellipses for internally omitted language and citations. Two shorter block quotes are preferable to one long block quote. We also recommend introducing the quote with language more meaningful than "the court said as follows." Then go on to explain the quote in your own words.[27]

Finally, graphics and pictures can help a reader quickly draw inferences. Charts and bullet points synthesize material. Don't hesitate to copy photos from exhibits into a brief. A picture provides a ready reference for your written content and helps a reader visualize what you're describing.

Wisconsin Circuit Courts

Whereas all appellate courts and judges in Wisconsin adhere to the same basic typography requirements (the rule), circuit courts lack the same uniformity. No statewide typography criteria are baked into the Wisconsin Rules of Civil Procedure. Individual counties and judges sometimes set their own standards and sometimes don't.

In Dane County Circuit Court, for

example, local rules regulate margin size (1 inch on all sides), line spacing (double), and font (size 12, proportional).[28] These parameters obviously differ from the appellate rules.

Yet after accounting for the different requirements, brief writers retain significant discretion – and hence have room to apply the recommendations from above. You can choose which font to use, for instance, and we still recommend the book fonts. So, too, do our recommendations about emphasis and headings apply with equal force.

Conclusion

Whether it's Dane County Circuit Court, another court, an administrative forum, or any other legal body, the age-old advice to "check the local rules" only begins the document design process. Applicable rules answer some questions but leave many more up to individual writers.

Because "the look of words themselves affects visual perception," brief writers "can create a picture using typography as paint on the canvas of the page."[29] Using best practices and good judgment, guided by your eyes and trial and error, you will enhance the appearance, the readability, and ultimately the persuasiveness of your briefs. Even if both sides' legal arguments are equally strong, a more visually appealing document might just give you the edge in credibility and persuasion you need to win. **WL**

ENDNOTES

[1]James D. Dimitri, *Word Wise: Best Practices in Document Design*, Res Gestae: J. Ind. State Bar Ass'n, Vol. 57, No. 10, at 2 (June 2014).

[2]U.S. Court of Appeals for the Seventh Circuit, *Requirements and Suggestions for Typography in Briefs and Other Papers,* https://bit.ly/2Ba89hU; *see also* Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents,* 2 J. Ass'n of Legal Writing Dirs. 108, 111 (2004) ("Persuasion includes looking good on paper.").

[3]U.S. Court of Appeals for the Seventh Circuit, *supra* note 2.

[4]Wis. Stat. § 809.19(8)(b)1., 3.c.

[5]Matthew Butterick, A brief history of Times New Roman, *Typography for Lawyers* (2d ed.), https://bit.ly/2ZI1Ewl.

[6]*See id.*; Robbins, *supra* note 2, at 131-32.

[7]For an extended discussion of font design, see generally Derek H. Kiernan-Johnson, *Telling Through Type: Typography and Narrative in Legal Briefs*, 10 J. Ass'n of Legal Writing Dirs. 87, 91-106 (2010).

[8]U.S. Court of Appeals for the Seventh Circuit, *supra* note 2, at 3-4, https://bit.ly/32ttuyh; Butterick, *supra* note 5; *id.* at System Fonts, https://bit.ly/3eH6Zlz.

[9]Wis. Stat. § 809.19(8)(b)3.c.

[10]Allen Wyatt, *Understanding Leading* (Dec. 23, 2019), https://bit.ly/31HjO2d.

[11]Robbins, *supra* note 2, at 123.

[12]Wyatt, *supra* note 10.

[13]Matthew Butterick, Line spacing, *Typography for Lawyers* (2d ed.), https://bit.ly/3grSNnO.

[14]*Id.*

[15]*See id.* You can specify the line spacing in Word by choosing either "at least" (minimum point value) or "exactly" (exact point value) or "multiple" (based on ratio). *See id.* "Multiple" spacing can be used to set single and double spacing, as well as any more specific number you choose, such as 1.15, 1.25, 1.4, 1.5, etc. (See the Paragraph dialog box in Word.)

[16]*See, e.g.*, Mignon Fogarty, *How Many Spaces after a Period?* (July 31, 2009), https://bit.ly/2YLlw0L.

[17]Wis. Stat. § 809.19(8)(b)3.c.

[18]*See, e.g.*, Bryan A. Garner, *Legal Writing in Plain English* 146-47 (2d ed. 2013); *see also* Dimitri, *supra* note 1, at 9-11; Kiernan-Johnson, *supra* note 7, at 110-12; Robbins, *supra* note 2, at 122-23; Mads Soegaard, The power of white space, *Interaction Design Foundation*, https://bit.ly/3hk2LZf.

[19]Bryan A. Garner, *The Redbook: A Manual on Legal Style* 82 (2006).

[20]*See* Robbins, *supra* note 2, at 130-31.

[21]Matthew Butterick, Justified text, *Typography for Lawyers* (2d ed.), https://bit.ly/39lgVqh.

[22]Garner, *supra* note 19, at 82; *see also* Dimitri, *supra* note 1, at 9-10.

[23]Wis. Stat. § 809.19(8)(b)3.c.

[24]Robbins, *supra* note 2, at 125.

[25]*See id.* at 124-25 (discussing introductory paragraphs summarizing information as a "learning base" for more detailed content later in the document).

[26]Matthew Butterick, Underlining, *Typography for Lawyers* (2d ed.), https://bit.ly/2EGQikw.

[27]Mary Beth Beazley, *A Practical Guide to Appellate Writing and Advocacy* 141-42 (5th ed. 2018).

[28]Dane Cnty. Cir. Ct. Local Rule 115.

[29]*See* Robbins, *supra* note 2, at 110.

[30]*See, e.g.*, Dimitri, *supra* note 1, at 5-6.

[31]Matthew Butterick, Screen-reading considerations, *Typography for Lawyers* (2d ed.), https://bit.ly/2OBO2fL. **WL**

Formatting Requirements – A Quick Reference

I. Wisconsin Court of Appeals/Supreme Court – Wis. Stat. § 809.19(8)

a. Black image on a white background, with a white cover page

b. Formatted for 8.5 x 11" paper

c. Font and spacing:

i. For a `monospaced font` like `Courier New`: ten characters per inch, double-spaced

ii. For a proportional serif font like Times New Roman, Century, Century Schoolbook, or Book Antiqua:

1. Minimum 13-point body text

2. 11-point for block quotes and footnotes

3. Italics only for citations, headings, emphasis, and foreign words

4. Bold only for citations, headings, and emphasis

5. Line spacing must be between 1.15 and 1.5 lines; more space between paragraphs is permitted but not required.

6. Block quotes and footnotes must be single spaced.

d. Margins: minimum 1.25-inch on the left and right, minimum 1 inch on the top and bottom.

e. Page numbers centered in the bottom margin, sequential numbering, starting with 1 on the cover.

II. Seventh Circuit Court of Appeals (Federal Rule of Appellate Procedure 32; Circuit Rule 32)

a. Black image on light paper, 8.5 x 11", one-sided printing only. Cover page color depends on the party's role in the case.

b. Photographs, illustrations, and graphs "may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy."

c. Font:

i. For proportionally-spaced fonts:

1. The **Federal Rules** provide that a proportionally-spaced font like Times New Roman, Century, Century Schoolbook, or Book Antiqua must be 14-point or larger.

2. **Circuit Rule 32** provides that a brief is acceptable if proportionally-spaced type is at least 12-point in-text, and 11-point for footnotes.

3. Proportionally-spaced font must include serifs, though sans-serif type may be used in headings and captions.

ii. A `monospaced font` may not contain more than 10 ½ characters per inch.

d. Text must be double-spaced; quotations more than two lines long may be indented and single-spaced, and headings, and footnotes may be single-spaced.

e. Margins must be at least one inch on all four sides.

f. Italics and bold may be used for emphasis. Case names may be underlined or italicized.

III. Additional Resources

a. The **Seventh Circuit's Practitioners Handbook for Appeals** (https://www.ca7.uscourts.gov/rules-procedures/Handbook.pdf) includes both requirements and detailed suggestions for typography and formatting at pages 169 to 176.

b. The **Guide to Wisconsin Appellate Procedure for the Self-Represented Litigant** (https://www.wicourts.gov/publications/guides/docs/proseappealsguide.pdf) includes a helpful rundown of formatting (as well as other requirements) at pages 34 to 35, the Checklist for Briefs.

REQUIREMENTS AND SUGGESTIONS FOR TYPOGRAPHY IN BRIEFS AND OTHER PAPERS

Federal Rule of Appellate Procedure 32 contains detailed requirements for the production of briefs, motions, appendices, and other papers that will be presented to the judges. Rule 32 is designed not only to make documents more readable but also to ensure that different methods of reproduction (and different levels of technological sophistication among lawyers) do not affect the length of a brief. The following information may help you better understand Rule 32 and associated local rules. The Committee Note to Rule 32 provides additional helpful information.

This section of the handbook also includes some suggestions to help you make your submissions more legible—and thus more likely to be grasped and retained. In days gone past lawyers would send their work to printers, who knew the tricks of that trade. Now composition is in-house, done by people with no education in printing. Some of the printer's toolkit is simple to use, however. Subsection 5, below, contains these hints.

1. Rule 32(a)(1)(B) requires text to be reproduced with "a clarity that equals or exceeds the output of a laser printer." The resolution of a laser printer is expressed in dots per inch. First generation laser printers broke each inch into 300 dots vertically and horizontally, creating characters from this 90,000-dot matrix. Second generation laser printers use 600 or 1200 dots per inch in each direction and thus produce a sharper, more easily readable output; commercial typesetters use 2400 dots per inch.

Any means of producing text that yields 300 dots per inch or more is acceptable. Daisy-wheel, typewriter, commercial printing, and many ink-jet printers meet this standard, as do photocopies of originals produced by these methods. Dot matrix printers and fax machines use lower resolution, and their output is unacceptable. Although Rule 32(a) applies only to briefs and motions, we urge counsel to maintain this standard of clarity in appendices. A faxed copy of the district court's opinion, or text from Lexis or Westlaw printed by a dot-matrix printer, is needlessly hard to read. Use photocopies of the district court's original opinion and other documents in the record.

2. Rule 32(a)(5) distinguishes between proportional and monospaced fonts, and between serif and sans-serif type. It also requires knowledge of points and pitch.

Proportionally spaced type uses different widths for different characters. Most of this handbook is in proportionally spaced type. A monospaced face, by contrast, uses the same width for each character. Most typewriters produce monospaced type, and most computers also can do so using fonts with names such as "Courier," "Courier New," or "Andale Mono." The rule leaves to each lawyer the choice between proportional and monospaced type.

> This sentence is in a proportionally spaced font; as you can see, the m and i have different widths.
>
> `This sentence is in a monospaced font; as you can see, the m and i have the same width.`

Serifs are small horizontal or vertical strokes at the ends of the lines that make up the letters and numbers. The next line shows two characters enlarged for detail. The first has serifs, the second does not.

Studies have shown that long passages of serif type are easier to read and comprehend than long passages of sans-serif type. The rule accordingly limits the principal sections of submissions to serif type, although sans-serif type may be used in headings and captions. This is the same approach magazines, newspapers, and commercial printers take. Look at a professionally printed brief; you will find sans-serif type confined to captions, if it is used at all.

> This sentence is in New Century Schoolbook, a proportionally spaced font with serifs. Baskerville, Bookman, Caslon, Garamond, Georgia, and Times are other common serif faces.
>
> This sentence is in Helvetica, a proportionally spaced sans-serif font. Arial, Eurostile, Trebuchet, Univers, and Verdana are other common sans-serif faces.

Variations of these names imply similar type designs.

Type must be large enough to read comfortably. For a monospaced face, this means type approximating the old "pica" standard used by typewriters, 10 characters per horizontal inch, rather than the old "elite" standard of 12 characters per inch. Because some computer versions of monospaced type do not come to exactly 10 characters per inch, Rule 32(a)(5)(B) allows up to 10½ per inch, or 72 characters (including punctuation and spaces) per line of type.

Proportionally spaced characters vary in width, so a limit of characters per line is not practical. Instead the rules require a minimum of 12-point type. Circuit Rule 32 permits the use of 12-point type in text and 11-point type in footnotes; Fed. R. App. P. 32(a)(5)(A) standing alone would have required you to use 14-point type throughout.

"Point" is a printing term for the height of a character. There are 72 points to the inch, so capital letters of 12-point type are a sixth of an inch tall. This advice is in 12-point type. Your type may be larger than 12 points, but it cannot be smaller. See Circuit Rule 32(b). Word processing and page layout programs can expand or condense the type using tracking controls, or you may have access to a condensed version of the face (such as Garamond Narrow). Do not use these. Condensed type is prohibited by Rule 32(a)(6). It offers no benefit to counsel under an approach that measures the length of briefs in

words rather than pages, and it is to your advantage to make the brief as legible as possible.

This is 9-point type.

This is 10-point type.

This is 11-point type.

This is 12-point type.

This is 12-point type, condensed. Condensed type is not acceptable.

This is 13-point type.

This is 14-point type.

3. Rule 32(a)(6) provides that the principal type must be a plain, roman style. In other words, the main body of the document cannot be bold, italic, capitalized, underlined, narrow, or condensed. This helps to keep the brief or motion legible. Italics or underlining may be used only for case names or occasional emphasis. Boldface and all-caps text should be used sparingly.

4. Rule 32(a)(7) determines the maximum length of a brief. It permits you to present as much argument as a 50-page printed brief. The variability of proportionally spaced type makes it necessary to express this length in words rather than pages. Other rules extend this approach to other documents. For example, Fed. R. App. P. 29(d) provides that an *amicus* brief may be no more than half the length allowed by Rule 32(a)(7).

Lawyers who choose monospaced type may avoid word counts by counting lines of type. Unless the brief employs a lot of block quotes or footnotes it will be enough to count pages and multiply by the number of lines per page. (Fifty pages at 26 lines per page is 1,300 lines.) The line-count option is not available when the brief uses proportional type.

Principal briefs of 30 pages or less, and reply briefs of 15 pages or less, need not be accompanied by a word or line count. Think of Rule 32(a)(7)(A) as a safe harbor. Lawyers who need more should use Rule 32(a)(7)(B). A brief that meets the type volume limitations of Rule 32(a)(7)(B) is acceptable without regard to the number of pages it contains.

5. What has gone before has been a description of requirements in Fed. R. App. P. 32 and Circuit Rule 32. Now we turn to advice, offered for mutual benefit of counsel seeking to make persuasive presentations and judges who want the most legible briefs so that they can absorb what counsel have to offer. Nothing in what follows is mandatory.

Typographic decisions should be made for a purpose. *The Times of London* chose the typeface Times New Roman to serve an audience looking for a quick read. Lawyers don't want their audience to read fast and throw the document away; they want to maximize retention. Achieving that goal requires a different approach—different typefaces, different column widths, different writing conventions. Briefs are like books rather than newspapers. The most important piece of advice we can offer is this: read some good books and try to make your briefs more like them.

This requires planning and care. A business consultant seeking to persuade a client prepares a detailed, full-color presentation using the best available tools. An architect presenting a design idea to a client comes with physical models, presentations in software, and other tools of persuasion. Law is no different. Choosing the best type won't guarantee success, but it is worth while to invest some time in improving the quality of the brief's appearance and legibility.

Judges of this court hear six cases on most argument days and nine cases on others. The briefs, opinions of the district courts, essential parts of the appendices, and other required reading add up to about 1,000 pages per argument session. Reading that much is a chore; remembering it is even harder. You can improve your chances by making your briefs typographically superior. It won't make your arguments better, but it will ensure that judges grasp and retain your points with less struggle. That's a valuable advantage, which you should seize.

Two short books by Robin Williams can help lawyers and their staffs produce more attractive briefs. *The PC is not a Typewriter* (1990), and *Beyond the PC is not a Typewriter* (1996), contain almost all any law firm needs to know about type. These books have counterparts for the Mac OS: *The Mac is not a Typewriter* and *Beyond the Mac is not a Typewriter*. Larger law firms may want to designate someone to learn even more about type. For this purpose, Robert Bringhurst, *The Elements of Typographic Style,* offers the same value for a brief's layout and type as Strunk & White's *The Elements of Style* and Bryan A. Garner's *The Elements of Legal Style* do for its content. Ruth Anne Robbins, *Painting with print: Incorporating concepts of typographic and layout design into the text of legal writing documents*, 2 J. Ass'n Legal Writing Directors 108 (2004), sums up much of this learning with special reference to legal documents. For the convenience of counsel (and with the permission of Professor Robbins) a copy of this article is posted on the court's web site.

Another way to improve the attractiveness and readability of your brief or motion is to emulate high-quality legal typography. The opinions of the Supreme Court, and the briefs of the Solicitor General, are excellent models of type usage. The United States Reports are available online in Acrobat versions that retain all of their original typography. You can find them at <http://www.supremecourtus.gov/opinions/boundvolumes.html>. Briefs of the Solicitor General also are available online in Acrobat versions. Go to <http://www.usdoj.gov/osg/briefs/search.html>. The Supreme Court's opinions and the SG's briefs follow all of the conventions mentioned below, as do the printed opinions of the Seventh Circuit.

Herewith some suggestions for making your briefs more readable.

• Use proportionally spaced type. Monospaced type was created for typewriters to cope with mechanical limitations that do not affect type set by computers. With electronic type it is no longer necessary to accept the reduction in comprehension that goes with monospaced letters. When every character is the same width, the eye loses valuable cues that help it distinguish one letter from another. For this reason, no book or magazine is set in monospaced

type. If you admire the typewriter look, choose a slab-serif face with proportional widths. Caecilia, Clarendon, Lucida, Officina Serif, Rockwell, and Serifa are in this category.

• Use typefaces that were designed for books. Both the Supreme Court and the Solicitor General use Century. Professional typographers set books in New Baskerville, Book Antiqua, Calisto, Century, Century Schoolbook, Bookman Old Style and many other proportionally spaced serif faces. Any face with the word "book" in its name is likely to be good for legal work. Baskerville, Bembo, Caslon, Deepdene, Galliard, Jenson, Minion, Palatino, Pontifex, Stone Serif, Trump Mediäval, and Utopia are among other faces designed for use in books and thus suitable for brief-length presentations.

Use the most legible face available to you. Experiment with several, then choose the one you find easiest to read. Type with a larger "x-height" (that is, in which the letter x is taller in relation to a capital letter) tends to be more legible. For this reason faces in the Bookman and Century families are preferable to faces in the Garamond and Times families. You also should shun type designed for display. Bodoni and other faces with exaggerated stroke widths are effective in headlines but hard to read in long passages

Professional typographers avoid using Times New Roman for book-length (or brief-length) documents. This face was designed for newspapers, which are printed in narrow columns, and has a small x-height in order to squeeze extra characters into the narrow space. Type with a small x-height functions well in columns that contain just a few words, but not when columns are wide (as in briefs and other legal papers). In the days before Rule 32, when briefs had page limits rather than word limits, a typeface such as Times New Roman enabled lawyers to shoehorn more argument into a brief. Now that only words count, however, everyone gains from a more legible typeface, even if that means extra pages. Experiment with your own briefs to see the difference between Times and one of the other faces we have mentioned.

• Use italics, *not* underlining, for case names and emphasis. Case names are not underlined in the United States Reports, the Solicitor General's briefs, or law reviews, for good reason. Underlining masks the descenders (the bottom parts of g, j, p, q, and y). This interferes with reading, because we recognize characters by shape. An underscore makes characters look more alike, which not only slows reading but also impairs comprehension.

• Use real typographic quotes (" and ") and real apostrophes ('), not foot and inch marks. Reserve straight ticks for feet, inches, and minutes of arc.

• Put only one space after punctuation. The typewriter convention of two spaces is for monospaced type only. When used with proportionally spaced type, extra spaces lead to what typographers call "rivers"—wide, meandering areas of white space up and down a page. Rivers interfere with the eyes' movement from one word to the next.

• Do not justify your text unless you hyphenate it too. If you fully justify unhyphenated text, rivers result as the word processing or page layout program adds white space between words so that the margins line up.

• Do not justify monospaced type. Justification is incompatible with equal character widths, the defining feature of a monospaced face. If you want variable spacing, choose a proportionally spaced face to start with. Your computer *can* justify a monospaced face, but it does so by inserting spaces that make for big gaps between (and sometimes within) words. The effects of these spaces can be worse than rivers in proportionally spaced type.

• Indent the first line of each paragraph ¼ inch or less. Big indents disrupt the flow of text. The half-inch indent comes from the tab key on a typewriter. It is never used in professionally set type, where the normal indent is one em (the width of the letter "m").

• Cut down on long footnotes and long block quotes. Because block quotes and footnotes count toward the type volume limit, these devices do not affect the length of the allowable presentation. A brief with 10% text and 90% footnotes complies with Rule 32, but it will not be as persuasive as a brief with the opposite ratio.

• Avoid bold type. It is hard to read and almost never necessary. Use italics instead. Bold italic type looks like you are screaming at the reader.

• Avoid setting text in all caps. The convention in some state courts of setting the parties' names in capitals is counterproductive. All-caps text attracts the eye (so does boldface) and makes it harder to read what is in between—yet what lies between the parties' names is exactly what you want the judge to read. All-caps text in outlines and section captions also is hard to read, even worse than underlining. Capitals all are rectangular, so the reader can't use shapes (including ascenders and descenders) as cues. Underlined, all-caps, boldface text is almost illegible.

One common use of all-caps text in briefs in argument headings. Please be judicious. Headings can span multiple lines, and when they are set in all-caps text are very hard to follow. It is possible to make headings attractive without using capitals. Try this form:

ARGUMENT

I. The Suit is Barred by the Statute of Limitations

A. Perkins had actual knowledge of the contamination more than six years before filing suit

This form is harder to read:

ARGUMENT

I. THE SUIT IS BARRED BY THE STATUTE OF LIMITATIONS

A. *Perkins had actual knowledge of the contamination more than six years before filing suit*

If you believe that italics and underscores are important to getting your idea across, try something like this (replacing underlining with a rule line beneath the text):

ARGUMENT

I. The Suit is Barred by the Statute of Limitations

A. Perkins had actual knowledge of the contamination more than six years before filing suit

Next-Level Appellate Briefs: Persuasive Use of Form and Visuals
Matt Woleske
Additional Resource

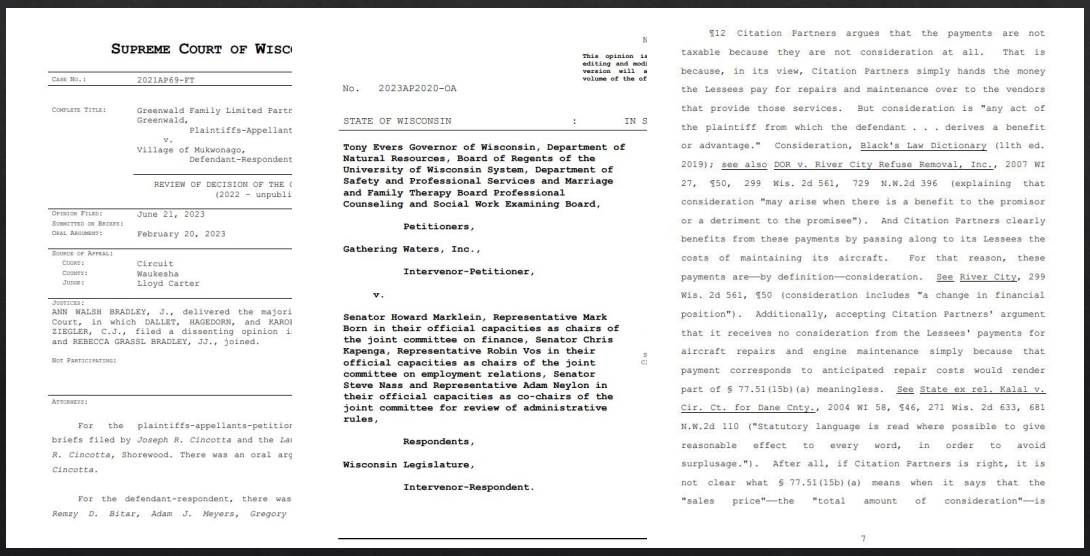
- https://typographyforlawyers.com/court-opinions.html

Lessons from the Wisconsin Supreme Court's 2024 template revision

Matt Woleske, Law Clerk, Wisconsin Supreme Court

1

The Bad Old Days



SUPREME COURT OF WISC

CASE NO.: 2021AP69-FT

COMPLETE TITLE: Greenwald Family Limited Partr
Greenwald,
Plaintiffs-Appellant
v.
Village of Mukwonago,
Defendant-Respondent

REVIEW OF DECISION OF THE (
(2022 - unpubli

OPINION FILED: June 21, 2023
SUBMITTED ON BRIEFS:
ORAL ARGUMENT: February 20, 2023

SOURCE OF APPEAL:
COURT: Circuit
COUNTY: Waukesha
JUDGE: Lloyd Carter

JUSTICES:
ANN WALSH BRADLEY, J., delivered the majori
Court, in which DALLET, HAGEDORN, and KAROI
ZIEGLER, C.J., filed a dissenting opinion i
and REBECCA GRASSL BRADLEY, JJ., joined.

NOT PARTICIPATING:

ATTORNEYS:

For the plaintiffs-appellants-petitior
briefs filed by *Joseph R. Cincotta* and the La
R. Cincotta, Shorewood. There was an oral arg
Cincotta.

For the defendant-respondent, there was
Remzy D. Bitar, Adam J. Meyers, Gregory

N

This opinion is
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version will a
volume of the of

No. 2023AP2020-OA

STATE OF WISCONSIN : IN S

Tony Evers Governor of Wisconsin, Department of Natural Resources, Board of Regents of the University of Wisconsin System, Department of Safety and Professional Services and Marriage and Family Therapy Board Professional Counseling and Social Work Examining Board,

Petitioners,

Gathering Waters, Inc.,

Intervenor-Petitioner,

v.

Senator Howard Marklein, Representative Mark Born in their official capacities as chairs of the joint committee on finance, Senator Chris Kapenga, Representative Robin Vos in their official capacities as chairs of the joint committee on employment relations, Senator Steve Nass and Representative Adam Neylon in their official capacities as co-chairs of the joint committee for review of administrative rules,

Respondents,

Wisconsin Legislature,

Intervenor-Respondent.

¶12 Citation Partners argues that the payments are not taxable because they are not consideration at all. That is because, in its view, Citation Partners simply hands the money the Lessees pay for repairs and maintenance over to the vendors that provide those services. But consideration is "any act of the plaintiff from which the defendant . . . derives a benefit or advantage." Consideration, Black's Law Dictionary (11th ed. 2019); see also DOR v. River City Refuse Removal, Inc., 2007 WI 27, ¶50, 299 Wis. 2d 561, 729 N.W.2d 396 (explaining that consideration "may arise when there is a benefit to the promisor or a detriment to the promisee"). And Citation Partners clearly benefits from these payments by passing along to its Lessees the costs of maintaining its aircraft. For that reason, these payments are——by definition——consideration. See River City, 299 Wis. 2d 561, ¶50 (consideration includes "a change in financial position"). Additionally, accepting Citation Partners' argument that it receives no consideration from the Lessees' payments for aircraft repairs and engine maintenance simply because that payment corresponds to anticipated repair costs would render part of § 77.51(15b)(a) meaningless. See State ex rel. Kalal v. Cir. Ct. for Dane Cnty., 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage."). After all, if Citation Partners is right, it is not clear what § 77.51(15b)(a) means when it says that the "sales price"——the "total amount of consideration"——is

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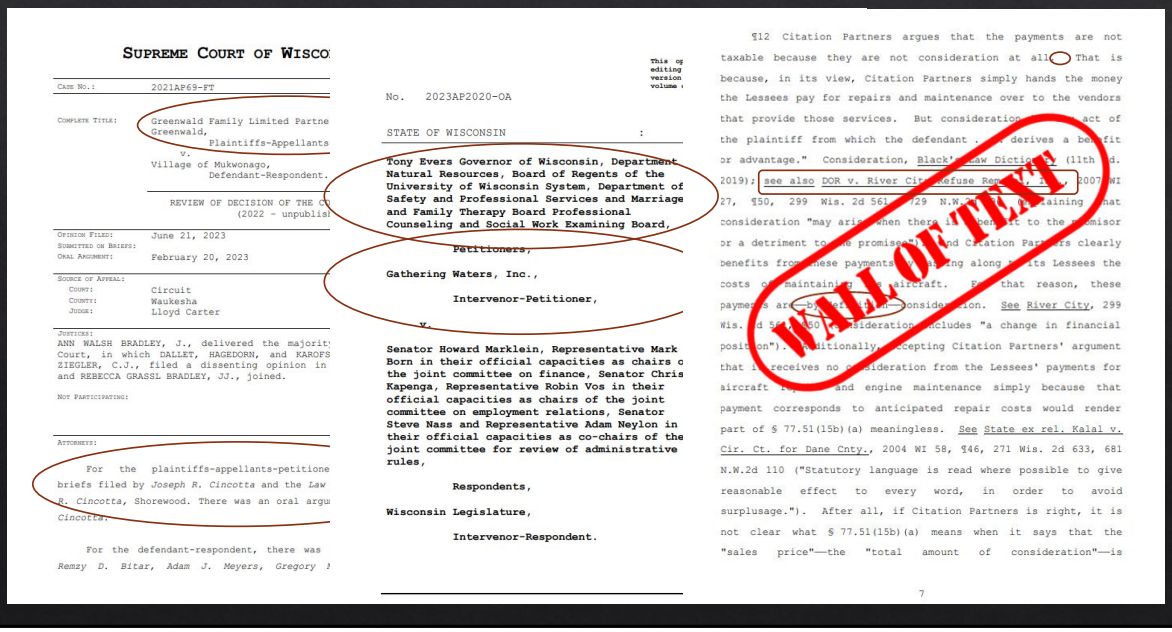
2

The Problems



SUPREME COURT OF WISCO

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COMPLETE TITLE: Greenwald Family Limited Partne
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and REBECCA GRASSL BRADLEY, JJ., joined.

NOT PARTICIPATING:

ATTORNEYS:
For the plaintiffs-appellants-petitione
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Cincotta.

For the defendant-respondent, there was
Remzy D. Bitar, Adam J. Meyers, Gregory

This op
editing
version
volume

No. 2023AP2020-OA

STATE OF WISCONSIN :

Tony Evers Governor of Wisconsin, Department of Natural Resources, Board of Regents of the University of Wisconsin System, Department of Safety and Professional Services and Marriage and Family Therapy Board Professional Counseling and Social Work Examining Board,

Petitioners,

Gathering Waters, Inc.,

Intervenor-Petitioner,

v.

Senator Howard Marklein, Representative Mark Born in their official capacities as chairs o the joint committee on finance, Senator Chris Kapenga, Representative Robin Vos in their official capacities as chairs of the joint committee on employment relations, Senator Steve Nass and Representative Adam Neylon in their official capacities as co-chairs of the joint committee for review of administrative rules,

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Wisconsin Legislature,

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¶12 Citation Partners argues that the payments are not taxable because they are not consideration at all. That is because, in its view, Citation Partners simply hands the money the Lessees pay for repairs and maintenance over to the vendors that provide those services. But consideration [illegible] act of the plaintiff from which the defendant [illegible] derives a benefit or advantage." Consideration, Black's Law Dictionary (11th ed. 2019); see also DOR v. River City Refuse Removal, Inc., 2007 WI 27, ¶50, 299 Wis. 2d 561, 729 N.W.2d [illegible] explaining that consideration "may arise when there is a benefit to the promisor or a detriment to the promisee"). And Citation Partners clearly benefits from these payments [illegible]ing along [illegible] its Lessees the costs of maintaining [illegible] aircraft. For that reason, these payments are [illegible]—consideration. See River City, 299 Wis. 2d 561, ¶50 ("consideration includes "a change in financial position"). Additionally, accepting Citation Partners' argument that it receives no consideration from the Lessees' payments for aircraft [illegible] and engine maintenance simply because that payment corresponds to anticipated repair costs would render part of § 77.51(15b)(a) meaningless. See State ex rel. Kalal v. Cir. Ct. for Dane Cnty., 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage."). After all, if Citation Partners is right, it is not clear what § 77.51(15b)(a) means when it says that the "sales price"—the "total amount of consideration"—is

WILL OUTLAW!

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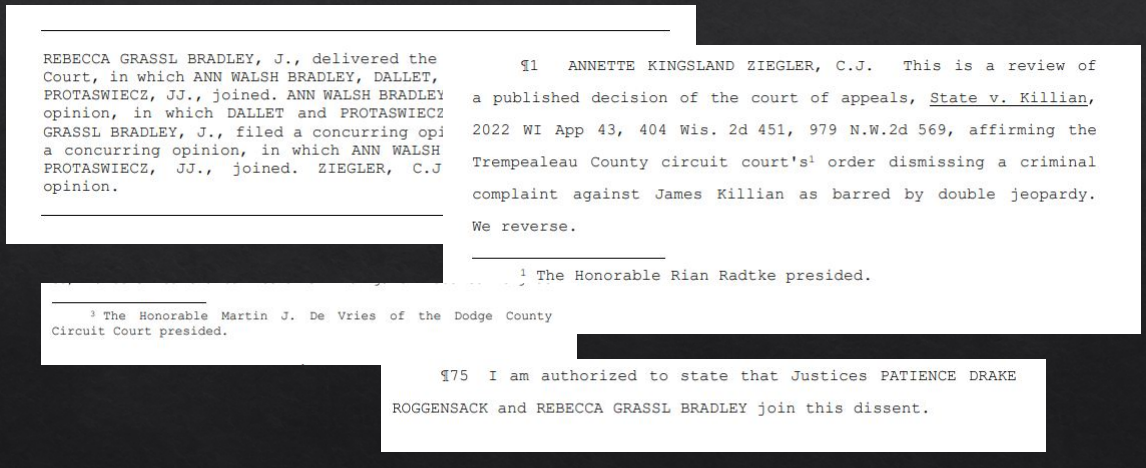
3

The Problems



REBECCA GRASSL BRADLEY, J., delivered the
Court, in which ANN WALSH BRADLEY, DALLET,
PROTASWIECZ, JJ., joined. ANN WALSH BRADLEY
opinion, in which DALLET and PROTASWIECZ
GRASSL BRADLEY, J., filed a concurring opi
a concurring opinion, in which ANN WALSH
PROTASWIECZ, JJ., joined. ZIEGLER, C.J
opinion.

¶1 ANNETTE KINGSLAND ZIEGLER, C.J. This is a review of a published decision of the court of appeals, State v. Killian, 2022 WI App 43, 404 Wis. 2d 451, 979 N.W.2d 569, affirming the Trempealeau County circuit court's[1] order dismissing a criminal complaint against James Killian as barred by double jeopardy. We reverse.

[1] The Honorable Rian Radtke presided.

[3] The Honorable Martin J. De Vries of the Dodge County Circuit Court presided.

¶75 I am authorized to state that Justices PATIENCE DRAKE ROGGENSACK and REBECCA GRASSL BRADLEY join this dissent.

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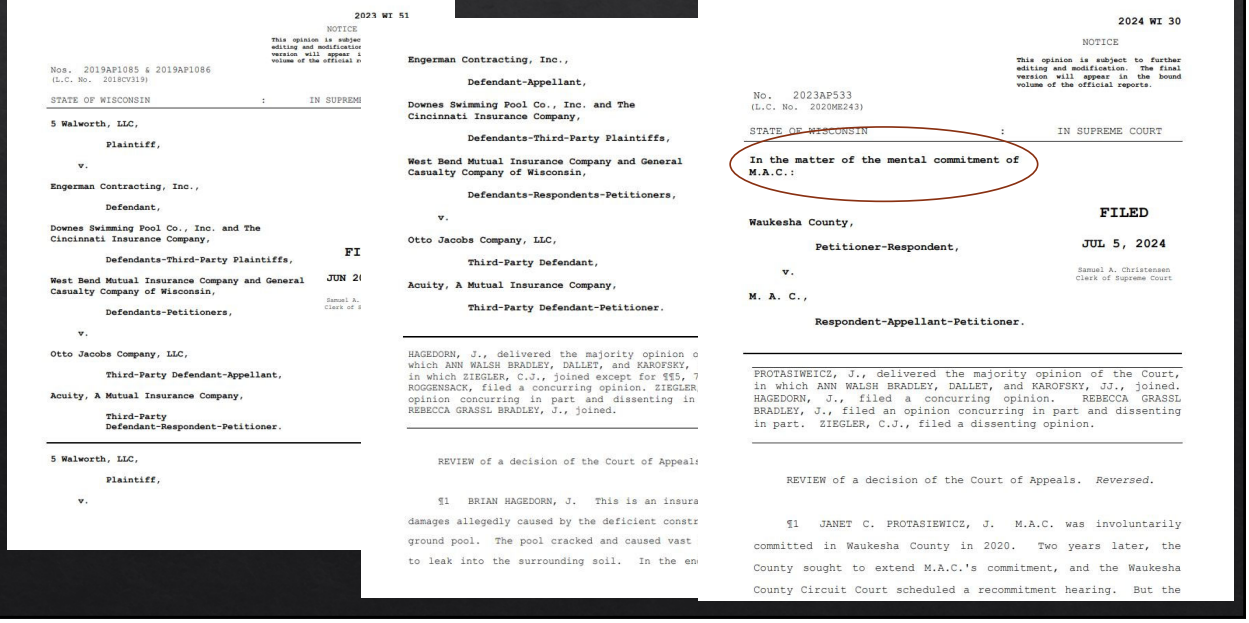
The Problems



2023 WI 51

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

Nos. 2019AP1085 & 2019AP1086
(L.C. No. 2018CV319)

STATE OF WISCONSIN : IN SUPREME COURT

5 Walworth, LLC,

Plaintiff,

v.

Engerman Contracting, Inc.,

Defendant,

Downes Swimming Pool Co., Inc. and The Cincinnati Insurance Company,

Defendants-Third-Party Plaintiffs,

West Bend Mutual Insurance Company and General Casualty Company of Wisconsin,

Defendants-Petitioners,

v.

Otto Jacobs Company, LLC,

Third-Party Defendant-Appellant,

Acuity, A Mutual Insurance Company,

Third-Party Defendant-Respondent-Petitioner.

FILED

JUN 2

Samuel A.
Clerk of S

5 Walworth, LLC,

Plaintiff,

v.

Engerman Contracting, Inc.,

Defendant-Appellant,

Downes Swimming Pool Co., Inc. and The Cincinnati Insurance Company,

Defendants-Third-Party Plaintiffs,

West Bend Mutual Insurance Company and General Casualty Company of Wisconsin,

Defendants-Respondents-Petitioners,

v.

Otto Jacobs Company, LLC,

Third-Party Defendant,

Acuity, A Mutual Insurance Company,

Third-Party Defendant-Petitioner.

HAGEDORN, J., delivered the majority opinion o which ANN WALSH BRADLEY, DALLET, and KAROFSKY, in which ZIEGLER, C.J., joined except for ¶¶5, 7 ROGGENSACK, filed a concurring opinion. ZIEGLER opinion concurring in part and dissenting in REBECCA GRASSL BRADLEY, J., joined.

REVIEW of a decision of the Court of Appeals

¶1 BRIAN HAGEDORN, J. This is an insura damages allegedly caused by the deficient constr ground pool. The pool cracked and caused vast to leak into the surrounding soil. In the en

2024 WI 30

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2023AP533
(L.C. No. 2020ME243)

STATE OF WISCONSIN : IN SUPREME COURT

In the matter of the mental commitment of M.A.C.:

Waukesha County,

Petitioner-Respondent,

v.

M. A. C.,

Respondent-Appellant-Petitioner.

FILED

JUL 5, 2024

Samuel A. Christensen
Clerk of Supreme Court

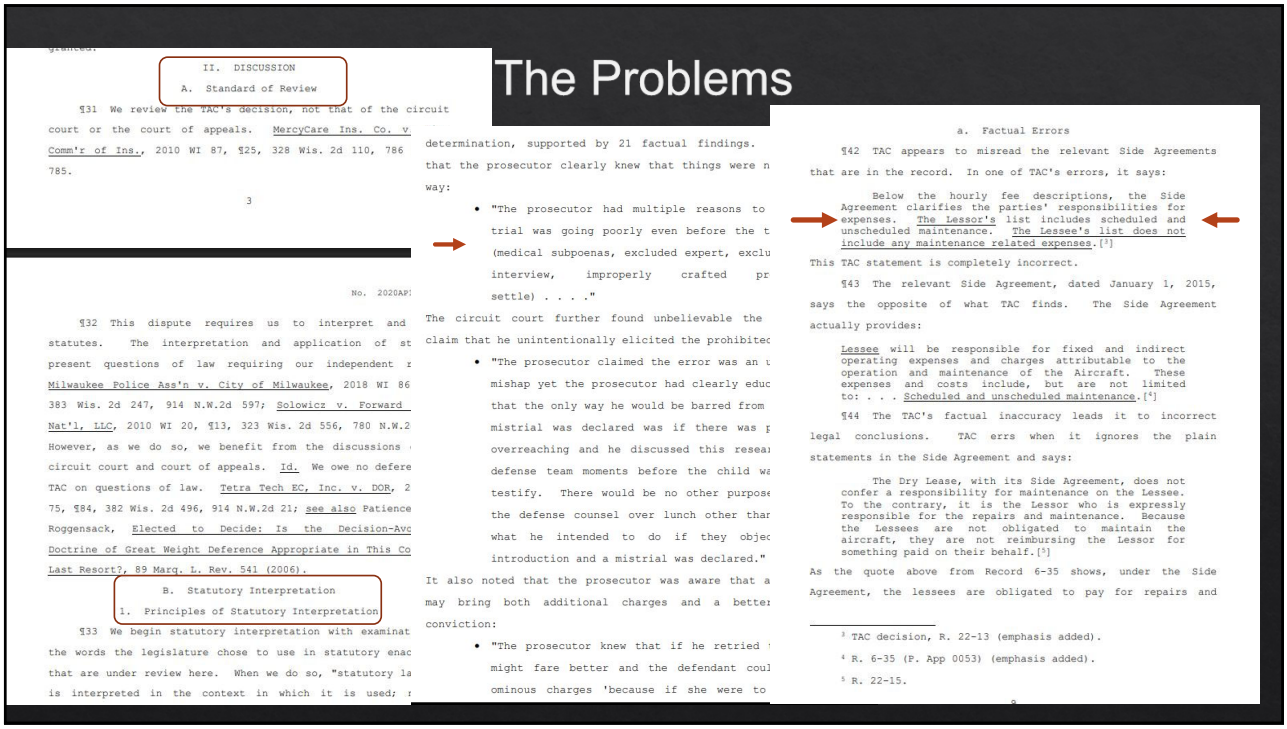
PROTASIEWICZ, J., delivered the majority opinion of the Court, in which ANN WALSH BRADLEY, DALLET, and KAROFSKY, JJ., joined. HAGEDORN, J., filed a concurring opinion. REBECCA GRASSL BRADLEY, J., filed an opinion concurring in part and dissenting in part. ZIEGLER, C.J., filed a dissenting opinion.

REVIEW of a decision of the Court of Appeals. *Reversed.*

¶1 JANET C. PROTASIEWICZ, J. M.A.C. was involuntarily committed in Waukesha County in 2020. Two years later, the County sought to extend M.A.C.'s commitment, and the Waukesha County Circuit Court scheduled a recommitment hearing. But the

5

The Problems



II. DISCUSSION

A. Standard of Review

¶31 We review the TAC's decision, not that of the circuit court or the court of appeals. MercyCare Ins. Co. v. Comm'r of Ins., 2010 WI 87, ¶25, 328 Wis. 2d 110, 786 785.

3

No. 2020AP

¶32 This dispute requires us to interpret and statutes. The interpretation and application of st present questions of law requiring our independent r Milwaukee Police Ass'n v. City of Milwaukee, 2018 WI 86 383 Wis. 2d 247, 914 N.W.2d 597; Solowicz v. Forward Nat'l, LLC, 2010 WI 20, ¶13, 323 Wis. 2d 556, 780 N.W.2 However, as we do so, we benefit from the discussions circuit court and court of appeals. Id. We owe no defere TAC on questions of law. Tetra Tech EC, Inc. v. DOR, 2 75, ¶84, 382 Wis. 2d 496, 914 N.W.2d 21; see also Patience Roggensack, Elected to Decide: Is the Decision-Avo Doctrine of Great Weight Deference Appropriate in This Co Last Resort?, 89 Marq. L. Rev. 541 (2006).

B. Statutory Interpretation

1. Principles of Statutory Interpretation

¶33 We begin statutory interpretation with examinat the words the legislature chose to use in statutory enac that are under review here. When we do so, "statutory la is interpreted in the context in which it is used;

determination, supported by 21 factual findings. that the prosecutor clearly knew that things were n way:

- "The prosecutor had multiple reasons to trial was going poorly even before the t (medical subpoenas, excluded expert, exclu interview, improperly crafted pr settle) . . . ."

The circuit court further found unbelievable the claim that he unintentionally elicited the prohibitec

- "The prosecutor claimed the error was an u mishap yet the prosecutor had clearly educ that the only way he would be barred from mistrial was declared was if there was p overreaching and he discussed this resea defense team moments before the child wa testify. There would be no other purpose the defense counsel over lunch other thar what he intended to do if they objec introduction and a mistrial was declared."

It also noted that the prosecutor was aware that a may bring both additional charges and a better conviction:

- "The prosecutor knew that if he retried might fare better and the defendant coul ominous charges 'because if she were to

a. Factual Errors

¶42 TAC appears to misread the relevant Side Agreements that are in the record. In one of TAC's errors, it says:

> Below the hourly fee descriptions, the Side Agreement clarifies the parties' responsibilities for expenses. The Lessor's list includes scheduled and unscheduled maintenance. The Lessee's list does not include any maintenance related expenses.[3]

This TAC statement is completely incorrect.

¶43 The relevant Side Agreement, dated January 1, 2015, says the opposite of what TAC finds. The Side Agreement actually provides:

> Lessee will be responsible for fixed and indirect operating expenses and charges attributable to the operation and maintenance of the Aircraft. These expenses and costs include, but are not limited to: . . . Scheduled and unscheduled maintenance.[4]

¶44 The TAC's factual inaccuracy leads it to incorrect legal conclusions. TAC errs when it ignores the plain statements in the Side Agreement and says:

> The Dry Lease, with its Side Agreement, does not confer a responsibility for maintenance on the Lessee. To the contrary, it is the Lessor who is expressly responsible for the repairs and maintenance. Because the Lessees are not obligated to maintain the aircraft, they are not reimbursing the Lessor for something paid on their behalf.[5]

As the quote above from Record 6-35 shows, under the Side Agreement, the lessees are obligated to pay for repairs and

[3] TAC decision, R. 22-13 (emphasis added).

[4] R. 6-35 (P. App 0053) (emphasis added).

[5] R. 22-15.

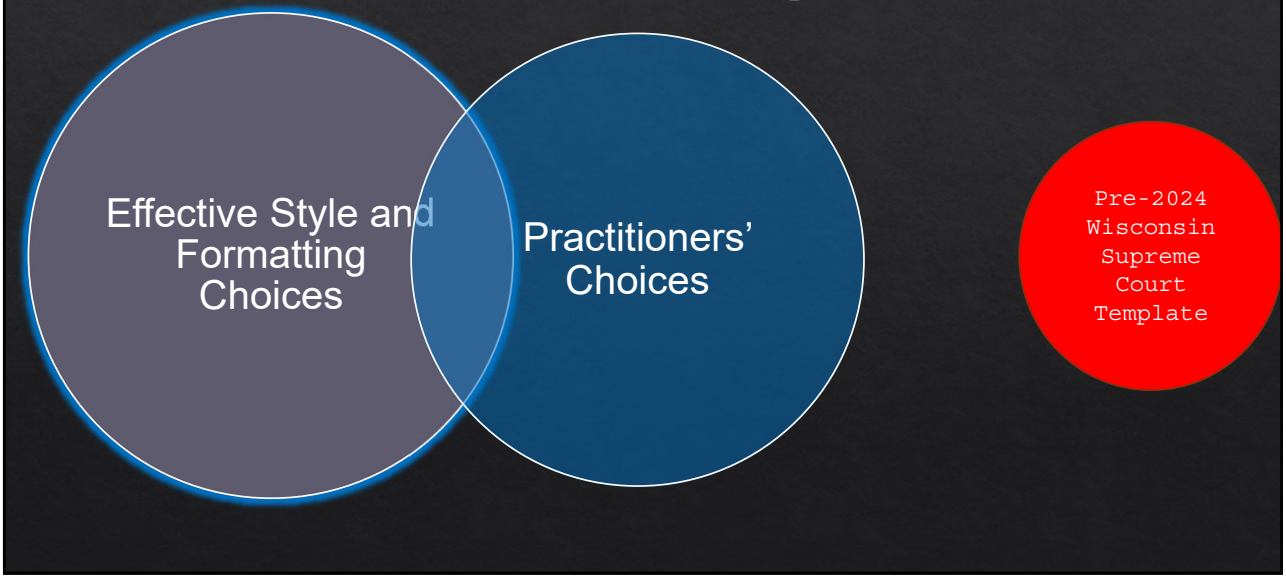
6

The Problems

- Outdated Font
- Outdated style and conventions
- Narrow margins
- Insufficient formatting options, which created inconsistencies
- Unnecessary details, presented haphazardly

7

Helpful Venn Diagram



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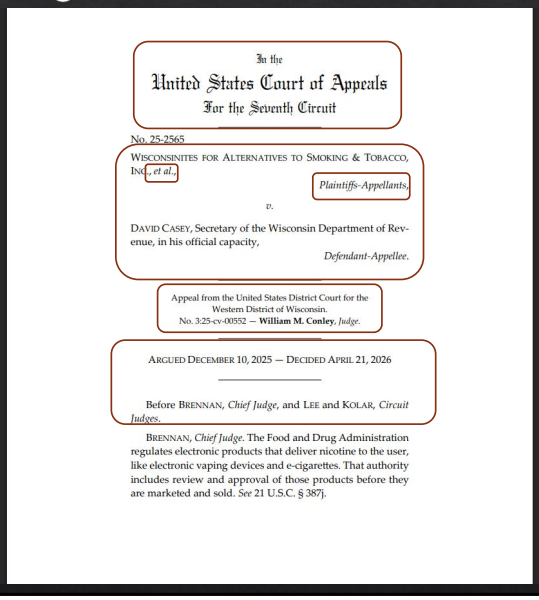
Evaluating Alternatives: Seventh Circuit



In the
United States Court of Appeals
For the Seventh Circuit

No. 25-2565

WISCONSINITES FOR ALTERNATIVES TO SMOKING & TOBACCO, INC., *et al.*,
Plaintiffs-Appellants,

v.

DAVID CASEY, Secretary of the Wisconsin Department of Revenue, in his official capacity,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 3:25-cv-00552 — **William M. Conley**, *Judge*.

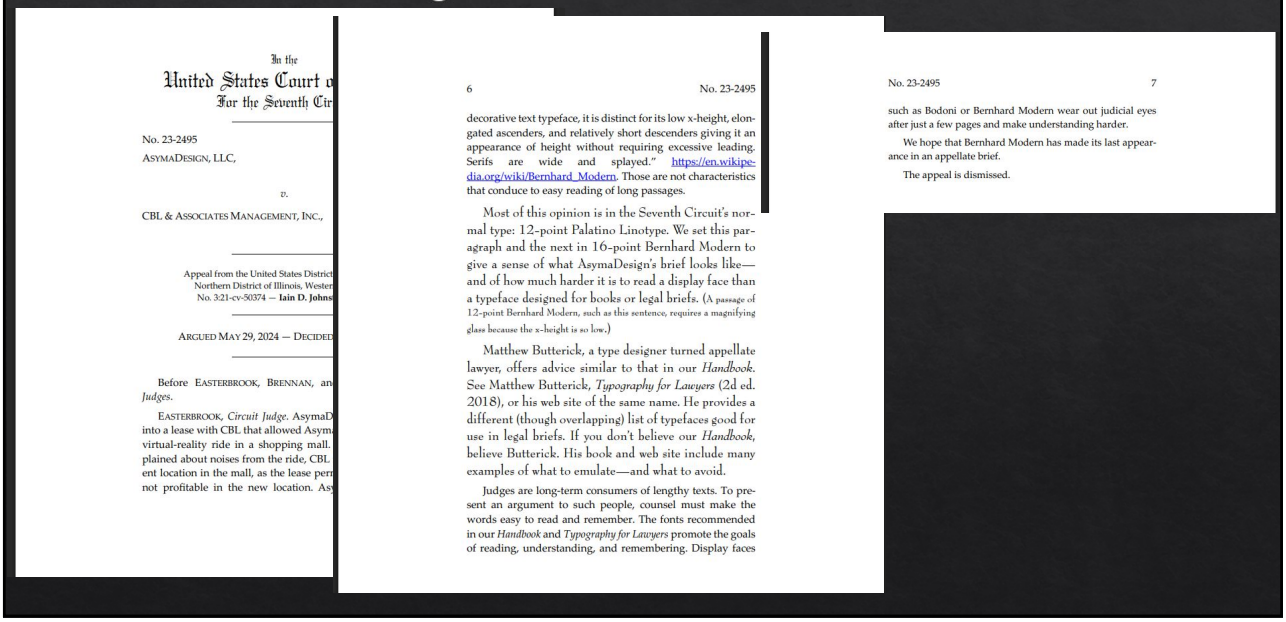
ARGUED DECEMBER 10, 2025 — DECIDED APRIL 21, 2026

Before BRENNAN, *Chief Judge*, and LEE and KOLAR, *Circuit Judges*.

BRENNAN, *Chief Judge*. The Food and Drug Administration regulates electronic products that deliver nicotine to the user, like electronic vaping devices and e-cigarettes. That authority includes review and approval of those products before they are marketed and sold. *See* 21 U.S.C. § 387j.

9

Evaluating Alternatives: Seventh Circuit



In the
United States Court o
For the Seventh Cir

No. 23-2495

ASYMADESIGN, LLC,

v.

CBL & ASSOCIATES MANAGEMENT, INC.,

Appeal from the United States District
Northern District of Illinois, Wester
No. 3:21-cv-50374 — **Iain D. Johns**

ARGUED MAY 29, 2024 — DECIDED

Before EASTERBROOK, BRENNAN, an
Judges.

EASTERBROOK, *Circuit Judge*. AsymaD
into a lease with CBL that allowed Asym
virtual-reality ride in a shopping mall.
plained about noises from the ride, CBL
ent location in the mall, as the lease per
not profitable in the new location. As

6 No. 23-2495

decorative text typeface, it is distinct for its low x-height, elongated ascenders, and relatively short descenders giving it an appearance of height without requiring excessive leading. Serifs are wide and splayed." https://en.wikipedia.org/wiki/Bernhard_Modern. Those are not characteristics that conduce to easy reading of long passages.

Most of this opinion is in the Seventh Circuit's normal type: 12-point Palatino Linotype. We set this paragraph and the next in 16-point Bernhard Modern to give a sense of what AsymaDesign's brief looks like—and of how much harder it is to read a display face than a typeface designed for books or legal briefs. (A passage of 12-point Bernhard Modern, such as this sentence, requires a magnifying glass because the x-height is so low.)

Matthew Butterick, a type designer turned appellate lawyer, offers advice similar to that in our *Handbook*. See Matthew Butterick, *Typography for Lawyers* (2d ed. 2018), or his web site of the same name. He provides a different (though overlapping) list of typefaces good for use in legal briefs. If you don't believe our *Handbook*, believe Butterick. His book and web site include many examples of what to emulate—and what to avoid.

Judges are long-term consumers of lengthy texts. To present an argument to such people, counsel must make the words easy to read and remember. The fonts recommended in our *Handbook* and *Typography for Lawyers* promote the goals of reading, understanding, and remembering. Display faces

No. 23-2495 7

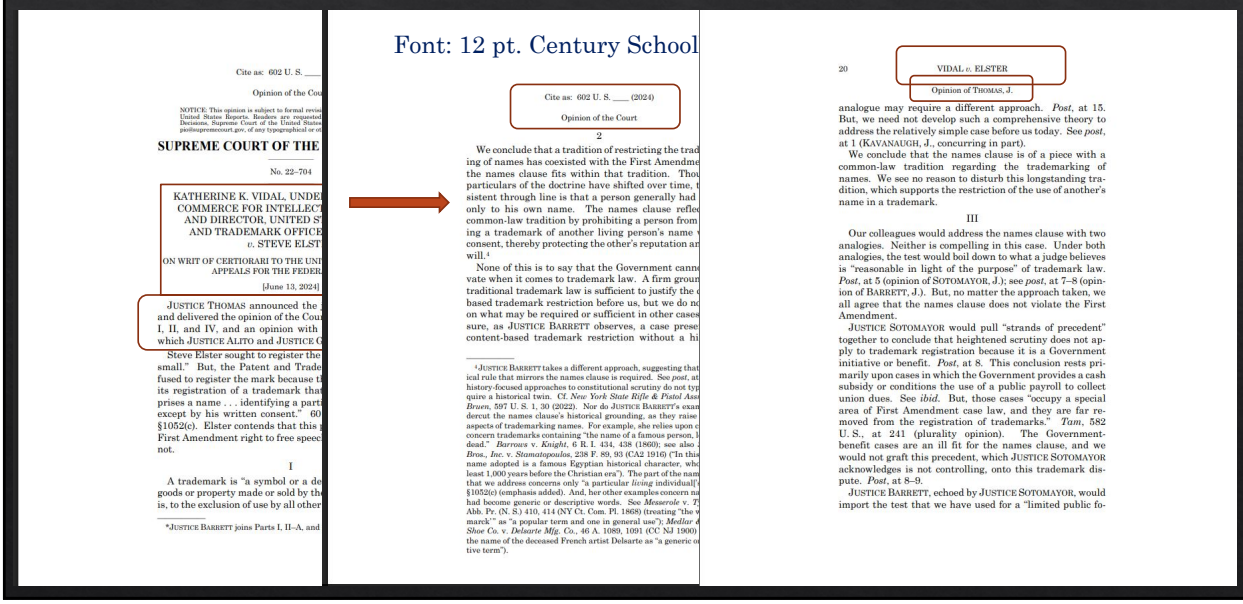
such as Bodoni or Bernhard Modern wear out judicial eyes after just a few pages and make understanding harder.

We hope that Bernhard Modern has made its last appearance in an appellate brief.

The appeal is dismissed.

10

Evaluating Alternatives: U.S. Supreme Court



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Cite as: 602 U. S. ____ (2024)

Opinion of the Court

2

We conclude that a tradition of restricting the trad
ing of names has coexisted with the First Amendme
the names clause fits within that tradition. Thou
particulars of the doctrine have shifted over time, t
sistent through line is that a person generally had
only to his own name. The names clause reflec
common-law tradition by prohibiting a person from
ing a trademark of another living person's name
consent, thereby protecting the other's reputation ar
will.[4]

None of this is to say that the Government cann
vate when it comes to trademark law. A firm groun
traditional trademark law is sufficient to justify the
based trademark restriction before us, but we do n
on what may be required or sufficient in other cases
sure, as JUSTICE BARRETT observes, a case prese
content-based trademark restriction without a hi

[4] JUSTICE BARRETT takes a different approach, suggesting that
ical rule that mirrors the names clause is required. See *post*, at
history-focused approaches to constitutional scrutiny do not typ
quire a historical twin. Cf. *New York State Rifle & Pistol Ass*
Bruen, 597 U. S. 1, 30 (2022). Nor do JUSTICE BARRETT's exam
dercut the names clause's historical grounding, as they raise
aspects of trademarking names. For example, she relies upon
concern trademarks containing "the name of a famous person,
dead." *Barrows* v. *Knight*, 6 R. I. 434, 438 (1860); see also
Bros., Inc. v. *Stamatopoulos*, 238 F. 89, 93 (CA2 1916) ("In this
name adopted is a famous Egyptian historical character, wh
least 1,000 years before the Christian era"). The part of the nam
that we address concerns only "a particular *living* individual[
§1052(c) (emphasis added). And, her other examples concern na
had become generic or descriptive words. See *Messerole* v. T
Abb. Pr. (N. S.) 410, 414 (NY Ct. Com. Pl. 1868) (treating "the w
mark'" as "a popular term and one in general use"); *Meillor A*
Shoe Co. v. *Delsarte Mfg. Co.*, 46 A. 1089, 1091 (CC NJ 1900)
the name of the deceased French artist Delsarte as "a generic o
tive term").

Cite as: 602 U. S. ____ (2024)

Opinion of the Court

SUPREME COURT OF THE

No. 22–704

KATHERINE K. VIDAL, UNDE
COMMERCE FOR INTELLECT
AND DIRECTOR, UNITED S
AND TRADEMARK OFFICE
v. STEVE ELST

ON WRIT OF CERTIORARI TO THE UNI
APPEALS FOR THE FEDER

[June 13, 2024]

JUSTICE THOMAS announced the
and delivered the opinion of the Cou
I, II, and IV, and an opinion with
which JUSTICE ALITO and JUSTICE

Steve Elster sought to register the
small." But, the Patent and Trade
fused to register the mark because U
its registration of a trademark that
prises a name . . . identifying a part
except by his written consent." 60
§1052(c). Elster contends that this
First Amendment right to free speec
not.

I

A trademark is "a symbol or a de
goods or property made or sold by th
is, to the exclusion of use by all other

*JUSTICE BARRETT joins Parts I, II–A, and

20 VIDAL *v.* ELSTER

Opinion of THOMAS, J.

analogue may require a different approach. *Post*, at 15. But, we need not develop such a comprehensive theory to address the relatively simple case before us today. See *post*, at 1 (KAVANAUGH, J., concurring in part).

We conclude that the names clause is of a piece with a common-law tradition regarding the trademarking of names. We see no reason to disturb this longstanding tradition, which supports the restriction of the use of another's name in a trademark.

III

Our colleagues would address the names clause with two analogies. Neither is compelling in this case. Under both analogies, the test would boil down to what a judge believes is "reasonable in light of the purpose" of trademark law. *Post*, at 5 (opinion of SOTOMAYOR, J.); see *post*, at 7–8 (opinion of BARRETT, J.). But, no matter the approach taken, we all agree that the names clause does not violate the First Amendment.

JUSTICE SOTOMAYOR would pull "strands of precedent" together to conclude that heightened scrutiny does not apply to trademark registration because it is a Government initiative or benefit. *Post*, at 8. This conclusion rests primarily upon cases in which the Government provides a cash subsidy or conditions the use of a public payroll to collect union dues. See *ibid.* But, those cases "occupy a special area of First Amendment case law, and they are far removed from the registration of trademarks." *Tam*, 582 U. S., at 241 (plurality opinion). The Government-benefit cases are an ill fit for the names clause, and we would not graft this precedent, which JUSTICE SOTOMAYOR acknowledges is not controlling, onto this trademark dispute. *Post*, at 8–9.

JUSTICE BARRETT, echoed by JUSTICE SOTOMAYOR, would import the test that we have used for a "limited public fo-

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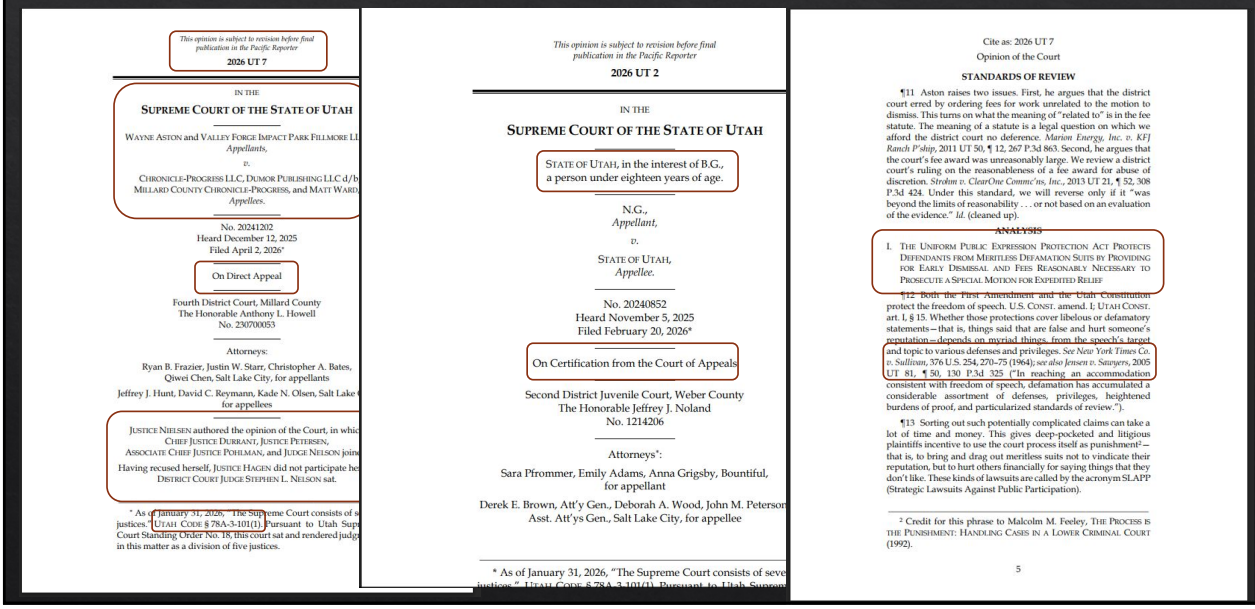
Evaluating Alternatives: Utah Supreme Court



This opinion is subject to revision before final publication in the Pacific Reporter

2026 UT 7

IN THE

SUPREME COURT OF THE STATE OF UTAH

WAYNE ASTON and VALLEY FORGE IMPACT PARK FILLMORE LL
Appellants,

v.

CHRONICLE-PROGRESS LLC, DUMOR PUBLISHING LLC d/b
MILLARD COUNTY CHRONICLE-PROGRESS, and MATT WARD,
Appellees.

No. 20241202
Heard December 12, 2025
Filed April 2, 2026*

On Direct Appeal

Fourth District Court, Millard County
The Honorable Anthony L. Howell
No. 230700053

Attorneys:

Ryan B. Frazier, Justin W. Starr, Christopher A. Bates,
Qiwei Chen, Salt Lake City, for appellants

Jeffrey J. Hunt, David C. Reymann, Kade N. Olsen, Salt Lake
for appellees

JUSTICE NIELSEN authored the opinion of the Court, in whic
CHIEF JUSTICE DURRANT, JUSTICE PETERSEN,
ASSOCIATE CHIEF JUSTICE POHLMAN, and JUDGE NELSON joine

Having recused herself, JUSTICE HAGEN did not participate he
DISTRICT COURT JUDGE STEPHEN L. NELSON sat.

* As of January 31, 2026, "The Supreme Court consists of s
justices." UTAH CODE § 78A-3-101(1). Pursuant to Utah Sup
Court Standing Order No. 18, this court sat and rendered judg
in this matter as a division of five justices.

This opinion is subject to revision before final publication in the Pacific Reporter

2026 UT 2

IN THE

SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, in the interest of B.G.,
a person under eighteen years of age.

N.G.,
Appellant,

v.

STATE OF UTAH,
Appellee.

No. 20240852
Heard November 5, 2025
Filed February 20, 2026*

On Certification from the Court of Appeals

Second District Juvenile Court, Weber County
The Honorable Jeffrey J. Noland
No. 1214206

Attorneys*:

Sara Pfrommer, Emily Adams, Anna Grigsby, Bountiful,
for appellant

Derek E. Brown, Att'y Gen., Deborah A. Wood, John M. Peterson
Asst. Att'ys Gen., Salt Lake City, for appellee

* As of January 31, 2026, "The Supreme Court consists of seve
justices." UTAH CODE § 78A-3-101(1). Pursuant to Utah Supre

Cite as: 2026 UT 7

Opinion of the Court

STANDARDS OF REVIEW

¶11 Aston raises two issues. First, he argues that the district court erred by ordering fees for work unrelated to the motion to dismiss. This turns on what the meaning of "related to" is in the fee statute. The meaning of a statute is a legal question on which we afford the district court no deference. *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 12, 267 P.3d 863. Second, he argues that the court's fee award was unreasonably large. We review a district court's ruling on the reasonableness of a fee award for abuse of discretion. *Strohm v. ClearOne Commc'ns, Inc.*, 2013 UT 21, ¶ 52, 308 P.3d 424. Under this standard, we will reverse only if it "was beyond the limits of reasonability . . . or not based on an evaluation of the evidence." *Id.* (cleaned up).

ANALYSIS

I. THE UNIFORM PUBLIC EXPRESSION PROTECTION ACT PROTECTS DEFENDANTS FROM MERITLESS DEFAMATION SUITS BY PROVIDING FOR EARLY DISMISSAL AND FEES REASONABLY NECESSARY TO PROSECUTE A SPECIAL MOTION FOR EXPEDITED RELIEF

¶12 Both the First Amendment and the Utah Constitution protect the freedom of speech. U.S. CONST. amend. I; UTAH CONST. art. I, § 15. Whether those protections cover libelous or defamatory statements—that is, things said that are false and hurt someone's reputation—depends on myriad things, from the speech's target and topic to various defenses and privileges. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270–75 (1964); *see also Jensen v. Sawyers*, 2005 UT 81, ¶ 50, 130 P.3d 325 ("In reaching an accommodation consistent with freedom of speech, defamation has accumulated a considerable assortment of defenses, privileges, heightened burdens of proof, and particularized standards of review.").

¶13 Sorting out such potentially complicated claims can take a lot of time and money. This gives deep-pocketed and litigious plaintiffs incentive to use the court process itself as punishment[2]—that is, to bring and drag out meritless suits not to vindicate their reputation, but to hurt others financially for saying things that they don't like. These kinds of lawsuits are called by the acronym SLAPP (Strategic Lawsuits Against Public Participation).

[2] Credit for this phrase to Malcolm M. Feeley, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1992).

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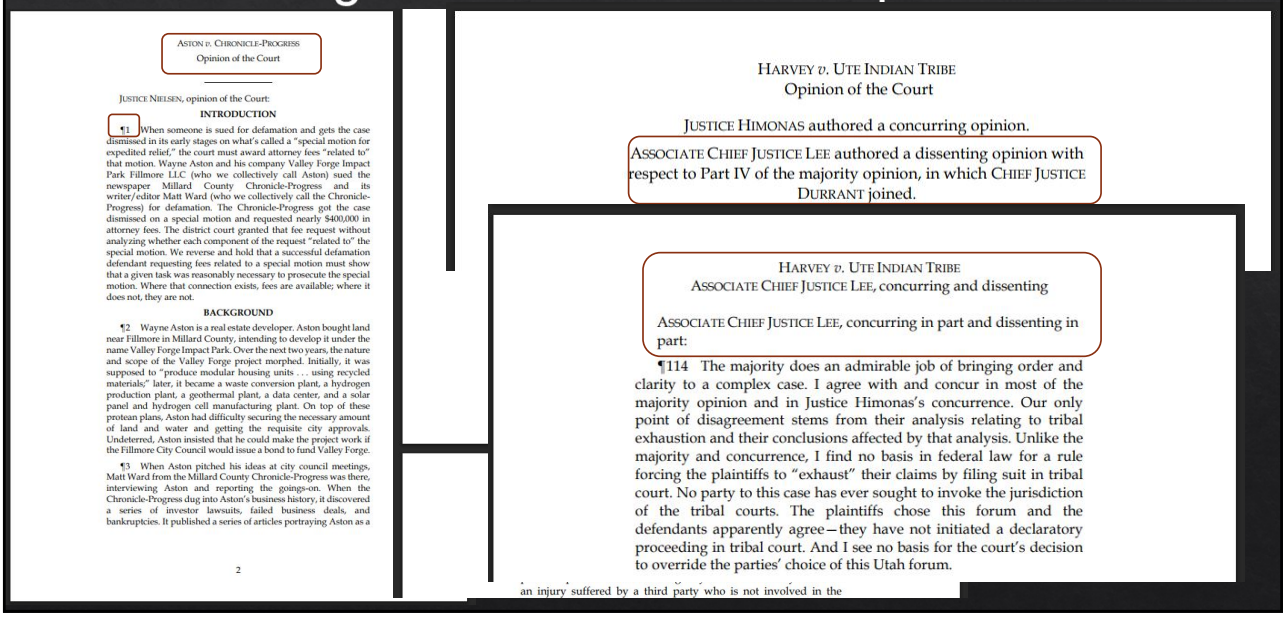
Evaluating Alternatives: Utah Supreme Court



ASTON *v.* CHRONICLE-PROGRESS
Opinion of the Court

JUSTICE NIELSEN, opinion of the Court:

INTRODUCTION

¶1 When someone is sued for defamation and gets the case dismissed in its early stages on what's called a "special motion for expedited relief," the court must award attorney fees "related to" that motion. Wayne Aston and his company Valley Forge Impact Park Fillmore LLC (who we collectively call Aston) sued the newspaper Millard County Chronicle-Progress and its writer/editor Matt Ward (who we collectively call the Chronicle-Progress) for defamation. The Chronicle-Progress got the case dismissed on a special motion and requested nearly $400,000 in attorney fees. The district court granted that fee request without analyzing whether each component of the request "related to" the special motion. We reverse and hold that a successful defamation defendant requesting fees related to a special motion must show that a given task was reasonably necessary to prosecute the special motion. Where that connection exists, fees are available; where it does not, they are not.

BACKGROUND

¶2 Wayne Aston is a real estate developer. Aston bought land near Fillmore in Millard County, intending to develop it under the name Valley Forge Impact Park. Over the next two years, the nature and scope of the Valley Forge project morphed. Initially, it was supposed to "produce modular housing units . . . using recycled materials;" later, it became a waste conversion plant, a hydrogen production plant, a geothermal plant, a data center, and a solar panel and hydrogen cell manufacturing plant. On top of these protean plans, Aston had difficulty securing the necessary amount of land and water and getting the requisite city approvals. Undeterred, Aston insisted that he could make the project work if the Fillmore City Council would issue a bond to fund Valley Forge.

¶3 When Aston pitched his ideas at city council meetings, Matt Ward from the Millard County Chronicle-Progress was there, interviewing Aston and reporting the goings-on. When the Chronicle-Progress dug into Aston's business history, it discovered a series of investor lawsuits, failed business deals, and bankruptcies. It published a series of articles portraying Aston as a

2

HARVEY *v.* UTE INDIAN TRIBE
Opinion of the Court

JUSTICE HIMONAS authored a concurring opinion.

ASSOCIATE CHIEF JUSTICE LEE authored a dissenting opinion with respect to Part IV of the majority opinion, in which CHIEF JUSTICE DURRANT joined.

HARVEY *v.* UTE INDIAN TRIBE
ASSOCIATE CHIEF JUSTICE LEE, concurring and dissenting

ASSOCIATE CHIEF JUSTICE LEE, concurring in part and dissenting in part:

¶114 The majority does an admirable job of bringing order and clarity to a complex case. I agree with and concur in most of the majority opinion and in Justice Himonas's concurrence. Our only point of disagreement stems from their analysis relating to tribal exhaustion and their conclusions affected by that analysis. Unlike the majority and concurrence, I find no basis in federal law for a rule forcing the plaintiffs to "exhaust" their claims by filing suit in tribal court. No party to this case has ever sought to invoke the jurisdiction of the tribal courts. The plaintiffs chose this forum and the defendants apparently agree—they have not initiated a declaratory proceeding in tribal court. And I see no basis for the court's decision to override the parties' choice of this Utah forum.

an injury suffered by a third party who is not involved in the

13

Lessons from other courts

- Use a proportionally spaced, serif typeface like Palatino Linotype, Century Schoolbook, or Georgia
  - Studies show serif typefaces are easier to read, particularly in longer documents;
  - Proportionally spaced fonts make outdated conventions like double-spacing after the period unnecessary;
  - Hyphens, em dashes, and en dashes are all distinct in proportionally spaced fonts; and
  - They make large-and-small caps and italicized text readable and usable for citations, headings, and emphasis

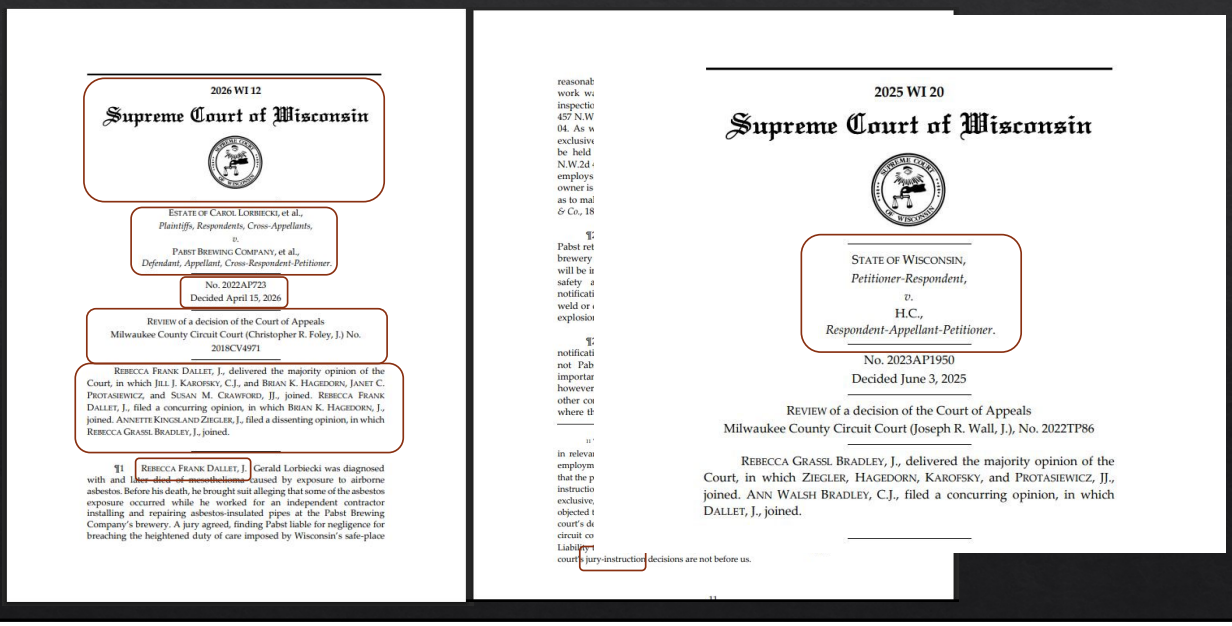
14

Lessons from other courts

- Use an official-looking front page and caption that communicates only the most important information, set off using dividing lines
- Use wide margins
  - Wider margins make the header useable to communicate opinion information, case name, or citation information
- Improve opinion designation to communicate joinders

15

The Solution



2026 WI 12

Supreme Court of Wisconsin

ESTATE OF CAROL LORBIECKI, et al.,
Plaintiffs, Respondents, Cross-Appellants,
v.
PABST BREWING COMPANY, et al.,
Defendant, Appellant, Cross-Respondent-Petitioner.

No. 2022AP723
Decided April 15, 2026

REVIEW of a decision of the Court of Appeals
Milwaukee County Circuit Court (Christopher R. Foley, J.) No. 2018CV4971

REBECCA FRANK DALLET, J., delivered the majority opinion of the Court, in which JILL J. KAROFSKY, C.J., and BRIAN K. HAGEDORN, JANET C. PROTASIEWICZ, and SUSAN M. CRAWFORD, JJ., joined. REBECCA FRANK DALLET, J., filed a concurring opinion, in which BRIAN K. HAGEDORN, J., joined. ANNETTE KINGSLAND ZIEGLER, J., filed a dissenting opinion, in which REBECCA GRASSL BRADLEY, J., joined.

¶1 REBECCA FRANK DALLET, J. Gerald Lorbiecki was diagnosed with and ~~later died of~~ mesothelioma caused by exposure to airborne asbestos. Before his death, he brought suit alleging that some of the asbestos exposure occurred while he worked for an independent contractor installing and repairing asbestos-insulated pipes at the Pabst Brewing Company's brewery. A jury agreed, finding Pabst liable for negligence for breaching the heightened duty of care imposed by Wisconsin's safe-place

court's jury-instruction decisions are not before us.

2025 WI 20

Supreme Court of Wisconsin

STATE OF WISCONSIN,
Petitioner-Respondent,
v.
H.C.,
Respondent-Appellant-Petitioner.

No. 2023AP1950
Decided June 3, 2025

REVIEW of a decision of the Court of Appeals
Milwaukee County Circuit Court (Joseph R. Wall, J.), No. 2022TP86

REBECCA GRASSL BRADLEY, J., delivered the majority opinion of the Court, in which ZIEGLER, HAGEDORN, KAROFSKY, and PROTASIEWICZ, JJ., joined. ANN WALSH BRADLEY, C.J., filed a concurring opinion, in which DALLET, J., joined.

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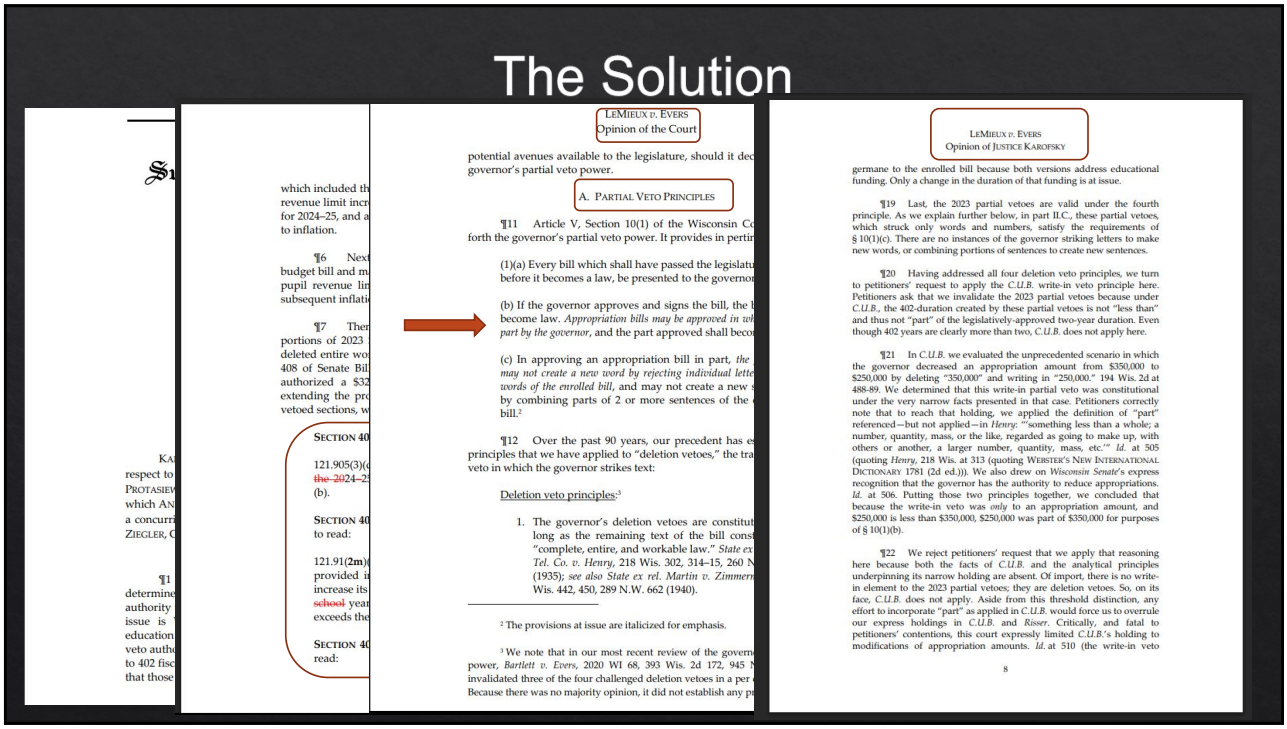
The Solution



LEMIEUX *v.* EVERS
Opinion of the Court

potential avenues available to the legislature, should it dec
governor's partial veto power.

A. PARTIAL VETO PRINCIPLES

¶11 Article V, Section 10(1) of the Wisconsin Co
forth the governor's partial veto power. It provides in pertir

(1)(a) Every bill which shall have passed the legislatu
before it becomes a law, be presented to the governo

(b) If the governor approves and signs the bill, the
become law. *Appropriation bills may be approved in wh*
part by the governor, and the part approved shall beco

(c) In approving an appropriation bill in part, *the*
may not create a new word by rejecting individual lette
words of the enrolled bill, and may not create a new
by combining parts of 2 or more sentences of the
bill.[2]

¶12 Over the past 90 years, our precedent has e
principles that we have applied to "deletion vetoes," the tra
veto in which the governor strikes text:

Deletion veto principles:[3]

1. The governor's deletion vetoes are constitut
long as the remaining text of the bill const
"complete, entire, and workable law." *State ex*
Tel. Co. v. Henry, 218 Wis. 302, 314–15, 260 N
(1935); *see also State ex rel. Martin v. Zimmern*
Wis. 442, 450, 289 N.W. 662 (1940).

[2] The provisions at issue are italicized for emphasis.

[3] We note that in our most recent review of the governo
power, *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945
invalidated three of the four challenged deletion vetoes in a per
Because there was no majority opinion, it did not establish any p

LEMIEUX *v.* EVERS
Opinion of JUSTICE KAROFSKY

germane to the enrolled bill because both versions address educational funding. Only a change in the duration of that funding is at issue.

¶19 Last, the 2023 partial vetoes are valid under the fourth principle. As we explain further below, in part II.C., these partial vetoes, which struck only words and numbers, satisfy the requirements of § 10(1)(c). There are no instances of the governor striking letters to make new words, or combining portions of sentences to create new sentences.

¶20 Having addressed all four deletion veto principles, we turn to petitioners' request to apply the *C.U.B.* write-in veto principle here. Petitioners ask that we invalidate the 2023 partial vetoes because under *C.U.B.*, the 402-duration created by these partial vetoes is not "less than" and thus not "part" of the legislatively-approved two-year duration. Even though 402 years are clearly more than two, *C.U.B.* does not apply here.

¶21 In *C.U.B.* we evaluated the unprecedented scenario in which the governor decreased an appropriation amount from $350,000 to $250,000 by deleting "350,000" and writing in "250,000." 194 Wis. 2d at 488-89. We determined that this write-in partial veto was constitutional under the very narrow facts presented in that case. Petitioners correctly note that to reach that holding, we applied the definition of "part" referenced—but not applied—in *Henry*: "'something less than a whole; a number, quantity, mass, or the like, regarded as going to make up, with others or another, a larger number, quantity, mass, etc.'" *Id.* at 505 (quoting *Henry*, 218 Wis. at 313 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1781 (2d ed.))). We also drew on *Wisconsin Senate*'s express recognition that the governor has the authority to reduce appropriations. *Id.* at 506. Putting those two principles together, we concluded that because the write-in veto was *only* to an appropriation amount, and $250,000 is less than $350,000, $250,000 was part of $350,000 for purposes of § 10(1)(b).

¶22 We reject petitioners' request that we apply that reasoning here because both the facts of *C.U.B.* and the analytical principles underpinning its narrow holding are absent. Of import, there is no write-in element to the 2023 partial vetoes; they are deletion vetoes. So, on its face, *C.U.B.* does not apply. Aside from this threshold distinction, any effort to incorporate "part" as applied in *C.U.B.* would force us to overrule our express holdings in *C.U.B.* and *Risser*. Critically, and fatal to petitioners' contentions, this court expressly limited *C.U.B.*'s holding to modifications of appropriation amounts. *Id.* at 510 (the write-in veto

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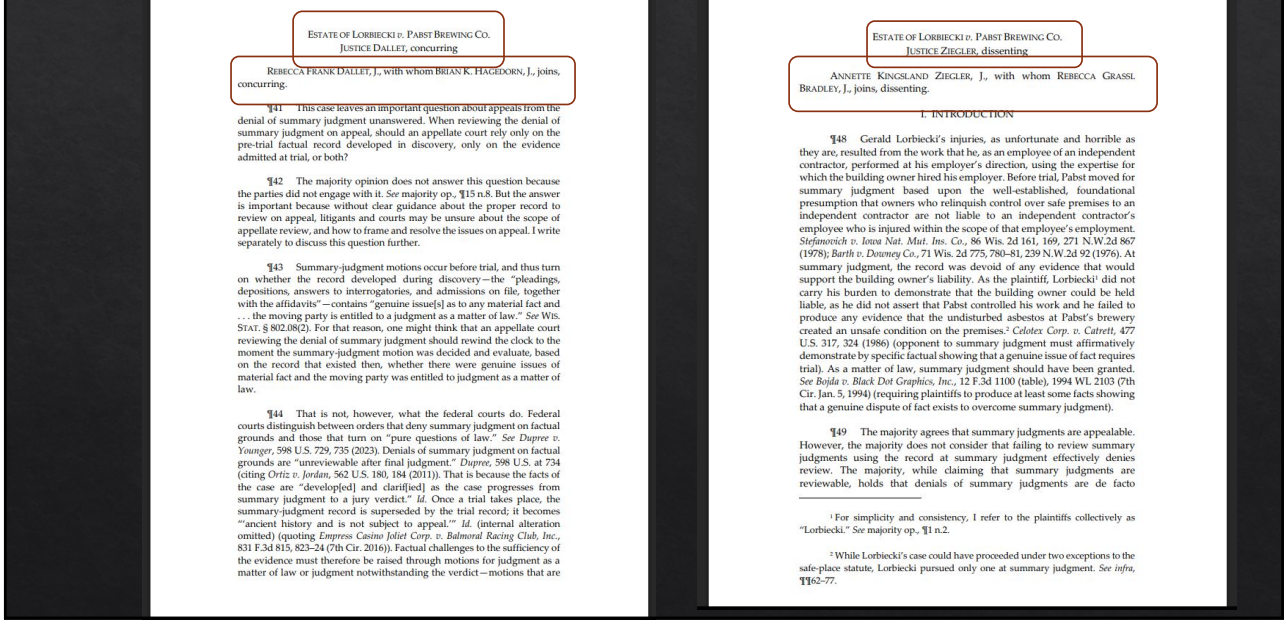
The Solution



ESTATE OF LORBIECKI *v.* PABST BREWING CO.
JUSTICE DALLET, concurring

REBECCA FRANK DALLET, J., with whom BRIAN K. HAGEDORN, J., joins, concurring.

¶41 This case leaves an important question about appeals from the denial of summary judgment unanswered. When reviewing the denial of summary judgment on appeal, should an appellate court rely only on the pre-trial factual record developed in discovery, only on the evidence admitted at trial, or both?

¶42 The majority opinion does not answer this question because the parties did not engage with it. *See* majority op., ¶15 n.8. But the answer is important because without clear guidance about the proper record to review on appeal, litigants and courts may be unsure about the scope of appellate review, and how to frame and resolve the issues on appeal. I write separately to discuss this question further.

¶43 Summary-judgment motions occur before trial, and thus turn on whether the record developed during discovery—the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits"—contains "genuine issue[s] as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *See* WIS. STAT. § 802.08(2). For that reason, one might think that an appellate court reviewing the denial of summary judgment should rewind the clock to the moment the summary-judgment motion was decided and evaluate, based on the record that existed then, whether there were genuine issues of material fact and the moving party was entitled to judgment as a matter of law.

¶44 That is not, however, what the federal courts do. Federal courts distinguish between orders that deny summary judgment on factual grounds and those that turn on "pure questions of law." *See Dupree v. Younger*, 598 U.S. 729, 735 (2023). Denials of summary judgment on factual grounds are "unreviewable after final judgment." *Dupree*, 598 U.S. at 734 (citing *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011)). That is because the facts of the case are "develop[ed] and clarif[ied] as the case progresses from summary judgment to a jury verdict." *Id.* Once a trial takes place, the summary-judgment record is superseded by the trial record; it becomes "'ancient history and is not subject to appeal.'" *Id.* (internal alteration omitted) (quoting *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 823–24 (7th Cir. 2016)). Factual challenges to the sufficiency of the evidence must therefore be raised through motions for judgment as a matter of law or judgment notwithstanding the verdict—motions that are

ESTATE OF LORBIECKI *v.* PABST BREWING CO.
JUSTICE ZIEGLER, dissenting

ANNETTE KINGSLAND ZIEGLER, J., with whom REBECCA GRASSL BRADLEY, J., joins, dissenting.

I. INTRODUCTION

¶48 Gerald Lorbiecki's injuries, as unfortunate and horrible as they are, resulted from the work that he, as an employee of an independent contractor, performed at his employer's direction, using the expertise for which the building owner hired his employer. Before trial, Pabst moved for summary judgment based upon the well-established, foundational presumption that owners who relinquish control over safe premises to an independent contractor are not liable to an independent contractor's employee who is injured within the scope of that employee's employment. *Stefanovich v. Iowa Nat. Mut. Ins. Co.*, 86 Wis. 2d 161, 169, 271 N.W.2d 867 (1978); *Barth v. Downey Co.*, 71 Wis. 2d 775, 780–81, 239 N.W.2d 92 (1976). At summary judgment, the record was devoid of any evidence that would support the building owner's liability. As the plaintiff, Lorbiecki[1] did not carry his burden to demonstrate that the building owner could be held liable, as he did not assert that Pabst controlled his work and he failed to produce any evidence that the undisturbed asbestos at Pabst's brewery created an unsafe condition on the premises.[2] *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (opponent to summary judgment must affirmatively demonstrate by specific factual showing that a genuine issue of fact requires trial). As a matter of law, summary judgment should have been granted. *See Bojda v. Black Dot Graphics, Inc.*, 12 F.3d 1100 (table), 1994 WL 2103 (7th Cir. Jan. 5, 1994) (requiring plaintiffs to produce at least some facts showing that a genuine dispute of fact exists to overcome summary judgment).

¶49 The majority agrees that summary judgments are appealable. However, the majority does not consider that failing to review summary judgments using the record at summary judgment effectively denies review. The majority, while claiming that summary judgments are reviewable, holds that denials of summary judgments are de facto

[1] For simplicity and consistency, I refer to the plaintiffs collectively as "Lorbiecki." *See* majority op., ¶1 n.2.

[2] While Lorbiecki's case could have proceeded under two exceptions to the safe-place statute, Lorbiecki pursued only one at summary judgment. *See infra*, ¶¶62–77.

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Lessons for Appellate Lawyers: What to do

- If the court can make changes, you can too
- Look at other lawyers' briefs. What works? What doesn't?
- Consider court rules and other guidance
- Think about your audience
  - Always ask "does the court need this?" and "is there a better way?"

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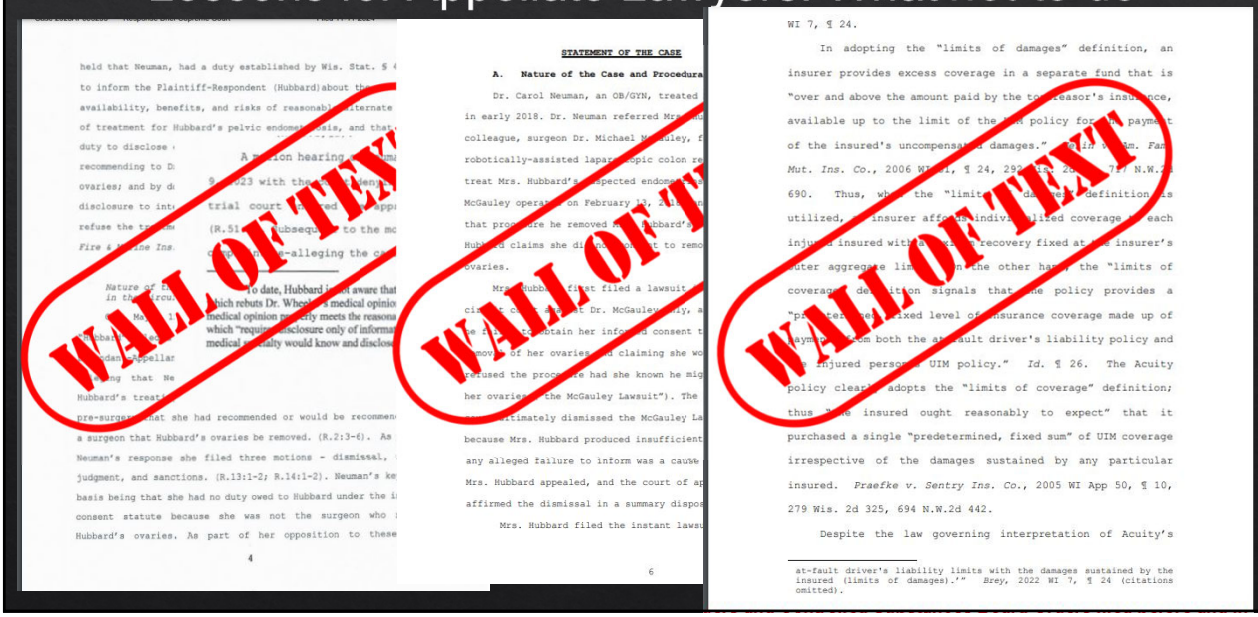
Lessons for Appellate Lawyers: What *not* to do



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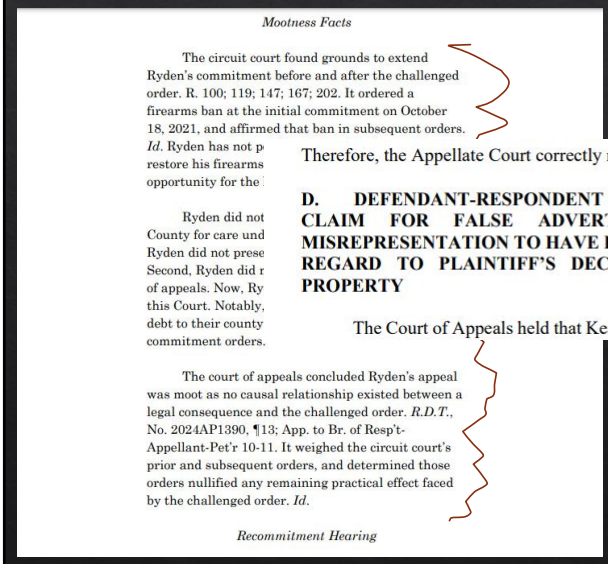
Lessons for Appellate Lawyers: What *not* to do



Mootness Facts

The circuit court found grounds to extend Ryden's commitment before and after the challenged order. R. 100; 119; 147; 167; 202. It ordered a firearms ban at the initial commitment on October 18, 2021, and affirmed that ban in subsequent orders. *Id.* Ryden has not p restore his firearms opportunity for the

Ryden did not County for care und Ryden did not prese Second, Ryden did r of appeals. Now, Ry this Court. Notably, debt to their county commitment orders.

The court of appeals concluded Ryden's appeal was moot as no causal relationship existed between a legal consequence and the challenged order. *R.D.T.*, No. 2024AP1390, ¶13; App. to Br. of Resp't-Appellant-Pet'r 10-11. It weighed the circuit court's prior and subsequent orders, and determined those orders nullified any remaining practical effect faced by the challenged order. *Id.*

Recommitment Hearing

Therefore, the Appellate Court correctly reve

D. DEFENDANT-RESPONDENT PET CLAIM FOR FALSE ADVERTISI MISREPRESENTATION TO HAVE BEE REGARD TO PLAINTIFF'S DECISIC PROPERTY

The Court of Appeals held that Kearns

FILED
12-09-2024
CLERK OF WISCON
SUPREME COURT

In the Supreme Court of Wisconsin

Scot Van Oudenhoven,

Petitioner-Appellant-Petitioner,

v.

Wisconsin Department of Justice,

Respondent-Respondent

Appeal No. 2023AP000070

Appeal from the Judgment of the Winnebago County Circuit Court, The Hon. Teresa S. Basiliere

Brief of Petitioner

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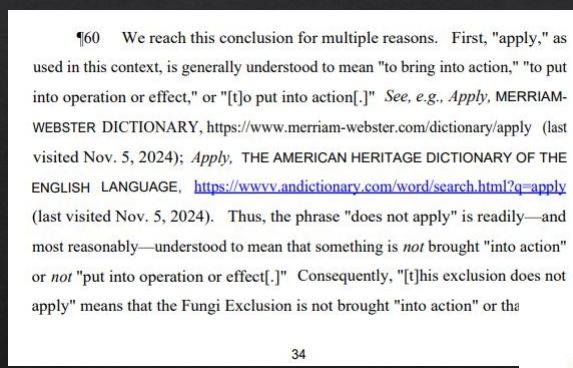
Lessons for Appellate Lawyers: What *not* to do



¶60 We reach this conclusion for multiple reasons. First, "apply," as used in this context, is generally understood to mean "to bring into action," "to put into operation or effect," or "[t]o put into action[.]" *See, e.g., Apply,* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/apply (last visited Nov. 5, 2024); *Apply,* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, https://wwvv.andictionary.com/word/search.html?q=apply (last visited Nov. 5, 2024). Thus, the phrase "does not apply" is readily—and most reasonably—understood to mean that something is *not* brought "into action" or *not* "put into operation or effect[.]" Consequently, "[t]his exclusion does not apply" means that the Fungi Exclusion is not brought "into action" or tha

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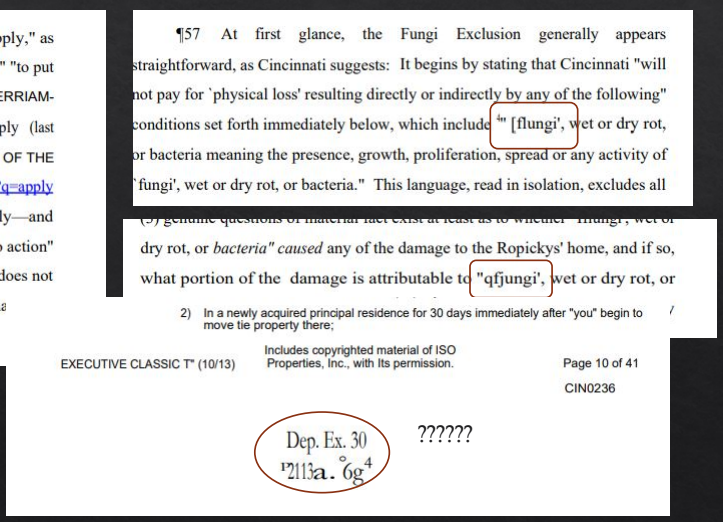

¶57 At first glance, the Fungi Exclusion generally appears straightforward, as Cincinnati suggests: It begins by stating that Cincinnati "will not pay for `physical loss' resulting directly or indirectly by any of the following" conditions set forth immediately below, which include "[flungi', wet or dry rot, or bacteria meaning the presence, growth, proliferation, spread or any activity of `fungi', wet or dry rot, or bacteria." This language, read in isolation, excludes all

dry rot, or *bacteria" caused* any of the damage to the Ropickys' home, and if so, what portion of the damage is attributable to "qfjungi', wet or dry rot, or

2) In a newly acquired principal residence for 30 days immediately after "you" begin to move tie property there;

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Other Resources

- Seventh Circuit Requirements and Suggestions for Typography in Briefs and Other Papers
- Typography for Lawyers by Matthew Butterick (both the book and website, typographyforlawyers.com)

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