

COMMENT

ABUSE VICTIMS ARE NOT SLEEPING AWAY THEIR DAY IN COURT: CLAIM PRECLUSION AND WISCONSIN ABUSE INJUNCTIONS

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A quirk of the Wisconsin rules of civil procedure currently deprives victims of domestic abuse access to protective injunctions in certain circumstances. The issue arises because of a confluence of doctrines, statutory definitions, and common practices. Abuse victims who petition for a domestic abuse or harassment injunction—colloquially known as a restraining order—but do not appear for their hearings routinely have their petitions dismissed for “failure to prosecute.” This dismissal is defined by statute as a judgment on the merits. A judgment on the merits in turn bars the victim from refile for the injunction under the doctrine of claim preclusion, also known as *res judicata*.

The preclusive effect of such a prior dismissal deprives abuse victims of the legal protections that the legislature intended to provide by creating the injunction statutes. This erodes Wisconsin public policy, which clearly favors the protection of crime victims and recognizes their unique concerns. The mechanical application of claim preclusion in this context does not account for the distinct legal position of injunction petitioners and is unnecessary to fulfill the traditional purposes of claim preclusion, as injunction petitions are rarely “vexatious” or “needless.”

To remedy this problem, the legislature should amend the law to presumptively except protective injunctions from the operation of claim preclusion. Alternatively, and without a change in the law, judges hearing injunction petitions should exercise their discretion to dismiss injunctions without prejudice when the petitioner fails to appear for an injunction hearing, and attorneys and advocates working with clients should ensure petitioners are aware of the effect of a missed hearing. These solutions would allow victims of domestic abuse to, at the very least, have their petitions for injunctions heard on the merits.

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INTRODUCTION

A woman walks into a courtroom.¹ She is there to get a protective injunction against her abusive husband. Just being in court represents overcoming multiple legal, emotional, and psychological obstacles. She had to hear his threats to take her children from her and remove them from the country. She had to decide that her safety and her children's safety were worth the risk of further upsetting him. It has taken multiple attempts, but she is there now. She is ready. She is going to explain to the judge—sitting up there in his black robes—exactly what has happened to her and why she deserves, why she *needs*, the law's protection. She sits, anxiously, in the gallery as other cases are called.

Finally, she hears her name called. It is her turn. She approaches the petitioner's counsel table and takes a seat. While she is not alone today, she does not have an attorney by her side. Across the aisle sits her

1. This narrative is fictional, but has been adapted from *Santander v. Monserrat*, No. 2024CV003115 (Wis. Cir. Ct. dismissed Oct. 23, 2024), <https://wcca.wicourts.gov/caseDetail.html?caseNo=2024CV003115&countyNo=13&index=0&mode=details>.

husband. He has his attorney with him. She knows from the other hearings that she will be asked to speak first. She practices what she will say in her head. But before she can be sworn in, her husband's attorney stands. He and the judge discuss something. She does not really understand what they are talking about. Something about the previous petition? The courtroom is silent, the clock ticking away.

Finally, the judge asks her why she failed to appear the last time she filed an injunction. She explains her husband threatened the children. The judge asks if she can prove that. She tries to show the judge the text messages her husband sent her, offering to hand the judge her phone. Her husband's attorney objects. The judge tells her that because she was not present at the last hearing, there is nothing he can do. She cannot get the injunction.

Cases like this occur because of a disconnect between the reality of domestic abuse and the ideals of civil procedure. A victim² of abuse fails to appear for an injunction hearing, and the case is dismissed under the label "failure to prosecute." This label, paired with a civil procedure rule defining it as a judgment on the merits,³ prevents domestic abuse victims from bringing their case again without some new incident of abuse under the doctrine of claim preclusion. This denies abuse victims the protection they need and demonstrates a misunderstanding of the complex nature of abuse. Barring an injunction petition under a theory of claim preclusion denies the petitioner protection to which they ought to have ready access. This undermines public policy, which is clearly in favor of granting protection to victims of crime and abuse. To ensure that these cases are heard, there must be a change in the law or the practices of judges and advocates.

I. CURRENT WISCONSIN LAW OF CLAIM PRECLUSION AND INJUNCTION PETITIONS

As an expression of public concern for the safety of victims of domestic abuse and harassment, Wisconsin has established a statutory scheme for the granting of injunctions against domestic abuse and harassment perpetrators.⁴ These injunctions, often colloquially called "restraining orders" or "no-contact orders," court-order the respondent to avoid engaging in specific actions against a successful petitioner.⁵

2. Although some prefer the term "survivor," I use the term "victim" throughout this Comment, as it is the term used by Wisconsin law and carries certain legal privileges. *See, e.g.*, WIS. CONST. art. I, § 9m.

3. WIS. STAT. § 805.03 (2023–24).

4. WIS. STAT. §§ 813.12, 813.125 (2023–24).

5. *Id.*; *Self-Help Law Center: Restraining Orders*, WIS. CT. SYS., <https://www.wicourts.gov/services/public/selfhelp/restord.htm> [<https://perma.cc/9X9M-LBK8>] (last visited Oct. 25, 2025).

Injunctions can order the respondent not to abuse, harass, or contact the petitioner.⁶ They may additionally require the surrender of any firearms in the respondent's possession.⁷ Violating the terms of the injunction can lead to criminal charges.⁸

To obtain a domestic abuse temporary restraining order (TRO) and injunction, a petitioner must file a petition alleging the elements required by statute.⁹ A judge or court commissioner must issue a temporary restraining order if the petition alleges the requisite elements and the court believes the facts show that the respondent has abused, or is likely to abuse, the petitioner.¹⁰ The TRO is intended to prevent contact with the petitioner by the respondent prior to the injunction hearing.¹¹ That injunction hearing is required to be held within fourteen days of the filing of the petition.¹² The petition and notice of the hearing must be served on the respondent prior to the hearing.¹³ If, at the hearing, the petitioner shows that the respondent "has engaged in, or based upon prior conduct . . . may engage in, domestic abuse of the petitioner," the court may grant the requested injunction.¹⁴ If the court grants a domestic abuse injunction, the respondent must surrender any firearms they own or possess.¹⁵

Harassment injunctions are an alternative to domestic abuse injunctions. Harassment injunctions have different requirements but are obtained through a similar procedure to domestic abuse injunctions.¹⁶ Most people who would qualify for a domestic abuse injunction would also qualify for a harassment injunction, although the facts that must be proven differ.¹⁷ Unlike a domestic abuse injunction, a harassment

6. §§ 813.12(4), 813.125(4).

7. §§ 813.12(4m), 813.125(4m); WIS. STAT. § 941.29(1m)(f)–(g) (2023–24).

8. § 813.12(8)(a).

9. § 813.12(3)(a)(1), (4)(a)(1).

10. § 813.12(3).

11. *Id.*

12. § 813.12(3)(c).

13. § 813.12(4)(a)(2).

14. § 813.12(4)(a)(3). Domestic abuse is narrowly defined by the statute as "[i]ntentional infliction of physical pain, physical injury or illness"; "[i]ntentional impairment of physical condition"; first-, second-, or third-degree sexual assault, stalking, or damage to property belonging to the individual; or a "threat to engage" in any of the described conduct. § 813.12(1)(am). It is also statutorily limited to abuse occurring between adult family members, household members, caregivers, former spouses, adults with shared children, and adults who have or have had a dating relationship. *Id.*

15. § 813.12(4m). There is an exception to the mandatory surrender provision if the respondent is a peace officer. *Id.*

16. *See* § 813.125.

17. *Compare* § 813.12 (defining requirements for a domestic abuse injunction), *with* § 813.125 (defining requirements for a harassment injunction).

injunction does not automatically carry a firearms assessment.¹⁸ Therefore, enjoined respondents may be allowed to retain their firearms.¹⁹ Victims of domestic abuse may choose to file petitions for a harassment injunction rather than a domestic abuse injunction because their facts better fit the elements of a harassment injunction or because a firearms assessment is not necessary or desirable.

There are several reasons an injunction might not be granted. These include a petitioner and respondent not meeting the statutory requirements, the petitioner falling short of their burden of persuasion at the injunction hearing, the petitioner moving to have the petition dismissed, the parties entering into a stipulated agreement, the petitioner being unable to properly serve the respondent with the petition and notice, or the petitioner failing to appear at the injunction hearing.²⁰ Some of these reasons are judgments on the merits, including a failure to meet the burden of proof or not meeting the statutory requirements. Others, including lack of proper service, are procedural problems and unrelated to the merits of the petition.

Once a petition has been dismissed or denied on the merits, it cannot be brought again. This is claim preclusion, also known as *res judicata*.²¹ The concept is straightforward: Once a lawsuit has been decided, the parties are barred from “litigating a second lawsuit on the same claim, or any other claim arising from the same transaction . . . that could have been . . . raised in the first suit.”²² An earlier proceeding acts as a bar to a later claim when there is “(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction.”²³ When a case meets these requirements, the earlier judgment is conclusive “as to all matters which were litigated or which might have been litigated in the former proceedings.”²⁴

18. See § 813.125(4m) (allowing a judge to prohibit the respondent from possessing a firearm if “the judge or circuit court commissioner determines, based on clear and convincing evidence presented at the hearing on the issuance of the injunction, that the respondent may use a firearm to cause physical harm to another or to endanger public safety”).

19. See *id.*

20. See *Form No. CV-409: Order Dismissing/Denying Petition for TRO/Injunction*, Wis. Ct. Sys. (Sep. 12, 2024) [hereinafter *Form No. CV-409*], <https://www.wicourts.gov/forms/cv-409.pdf>.

21. *N. States Power Co. v. Bugher*, 525 N.W.2d 723, 727 (Wis. 1995). I use the term “claim preclusion” in this Comment, as it is preferred by Wisconsin courts. *Id.* Some authorities may refer to it as *res judicata*, but the terms are synonymous. *Id.*

22. *Res Judicata*, BLACK’S LAW DICTIONARY (12th ed. 2024).

23. *Bugher*, 525 N.W.2d at 728.

24. *Id.* at 727 (quoting *Lindas v. Cady*, 515 N.W.2d 458, 463 (Wis. 1994)).

The policy behind claim preclusion is clear: “[T]here should be an end to the litigation.”²⁵ Allowing subsequent claims renders a final judgment almost meaningless. Claim preclusion seeks to prevent “vexatious, repetitious and needless claim[s].”²⁶ When a final judgment on the merits has been entered, the parties’ available relief narrows to direct appeal or collateral attack, meaning that they cannot start the litigation process over in hopes of a different outcome.²⁷ This sort of Monday-morning quarterbacking would hinder judicial efficiency, increase litigation costs, and undermine trust in the judicial system. In contrast, claim preclusion, “relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and . . . encourage[s] reliance on adjudication.”²⁸

Claim preclusion is not always a complete bar to raising issues that have been raised in previous litigation. When there is no “identity of the causes of action” between two suits, the first does not bar the second.²⁹ An identity of causes of action requires that the two claims have a “shared set of operative facts.”³⁰ If the second claim is based, at least in part, on new facts that could not have been raised in the original action, claim preclusion is not implicated.³¹ Wisconsin appellate courts have found that facts that would ordinarily be barred by claim preclusion may be raised to demonstrate a pattern of abusive conduct as long as there are some additional facts that could not have been raised in the first instance.³²

Claim preclusion can help sort out meritorious claims from vexatious and repetitive claims—but only so far as the earlier judgment was on the merits.³³ For example, if a claim is dismissed for a procedural reason—such as improper service or lack of subject matter jurisdiction—the petitioner is generally entitled to bring the suit again and attempt to cure these defects. There is one type of dismissal, however, that is considered a judgment on the merits even though it may seem procedural: dismissal for failure to prosecute. In the injunction context, dismissals for failure to prosecute are routinely entered when a petitioner does not

25. *Liddell v. Smith*, 345 F.2d 491, 493 (7th Cir. 1965).

26. *Bugher*, 525 N.W.2d at 727 (quoting *Purter v. Heckler*, 771 F.2d 682, 690 (3d Cir. 1985)).

27. *See id.*

28. *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

29. *Clarke v. Wis. Elections Comm’n*, 2023 WI 79, ¶ 46, 998 N.W.2d 370, 393.

30. *Id.* ¶ 47.

31. *See id.*

32. *See, e.g., Wittig v. Hoffart*, 2005 WI App 198, ¶¶ 9–15, 704 N.W.2d 415, 418–20.

33. *See Clarke*, 2023 WI 79, ¶ 46.

appear for the injunction hearing.³⁴ Wisconsin law defines a dismissal for failure to prosecute as a judgment on the merits.³⁵

Generally, courts may dismiss a civil action for failure to prosecute any time that a party fails to move their case forward, comply with the statutes governing civil procedure, or obey the orders of the court.³⁶ A dismissal for failure to prosecute “operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order.”³⁷ Dismissals on the merits, including dismissals for failure to prosecute, may be set aside for good cause, including for “mistake, inadvertence, surprise, or excusable neglect” or for “[f]raud, misrepresentation, or other misconduct of an adverse party.”³⁸ Motions to set aside a judgment must be made “within a reasonable time.”³⁹

Dismissal for failure to prosecute has been deemed a “drastic” sanction by courts.⁴⁰ The sanction of dismissal is meant to “punish the suitor who sleeps away his day in court, and give trial courts a certain and speedy means of clearing the records of mere deadwood.”⁴¹ Dismissals for failure to prosecute have been upheld as judgments on the merits and preclusive of later claims.⁴² There is a seeming contradiction in a sanction for a procedural failure being treated as a judgment on the merits. This apparent contradiction can be resolved by considering the purposes of the doctrine of claim preclusion and the circumstances in which the sanction is typically used. The purpose of claim preclusion is to promote an end to litigation and prevent vexatious and repetitive claims.⁴³ A claim that is brought but never prosecuted is a vexatious claim with no end to litigation. A dismissal for failure to prosecute is meant to serve as a sanction for “egregious conduct,”⁴⁴ and it is good policy that a litigant who has behaved egregiously should then be barred from refiling a dismissed claim.

34. See *infra* note 42 and accompanying text.

35. WIS. STAT. § 805.03 (2023–24).

36. *Id.*

37. *Id.*

38. WIS. STAT. § 806.07(1) (2023–24).

39. § 806.07(2).

40. See, e.g., *Theis v. Short (In re Est. of Short)*, 2010 WI App 108, ¶ 23, 789 N.W.2d 585, 594 (quoting *Rupert v. Home Mut. Ins. Co.*, 405 N.W.2d 661, 665 (Wis. Ct. App. 1987)).

41. *Hine v. Grant*, 96 N.W. 796, 797 (Wis. 1903) (discussing the purpose of a predecessor statute).

42. See *Pautsch v. Clark Oil Co.*, 58 N.W.2d 638, 640 (Wis. 1953).

43. *N. States Power Co. v. Bugher*, 525 N.W.2d 723, 727 (Wis. 1995).

44. See *Indus. Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶ 63, 726 N.W.2d 898, 911.

Although the sanction of dismissal for failure to prosecute is meant only for cases where there is egregious procedural misconduct by a plaintiff, it is used frequently to dismiss injunction petitions. For example, of the 926 harassment and domestic abuse injunction petitions filed in Dane County in 2024, ninety (10 percent) were dismissed for failure to prosecute.⁴⁵ Another eighty-three petitions (9 percent) were dismissed when the petitioner failed to appear for the injunction hearing, but no reason for the dismissal was noted on the docket.⁴⁶ These 173 dismissals—almost one in five of those filed—occurred when the petitioners failed to appear for a singular hearing. Having a petition dismissed for failure to prosecute can then bar the petitioner from refile and having the later petition heard on the merits.⁴⁷ This prohibition is unjust and contrary to public policy in the context of domestic abuse and harassment injunction petitions.

II. IDENTIFYING AND REMEDYING THE PROBLEM OF CLAIM- PRECLUDED INJUNCTION PETITIONS

Claim preclusion should not bar abuse victims from seeking protective injunctions. Wisconsin law and public policy have recognized the specific interests and needs of crime and abuse victims.⁴⁸ Abuse victimization is a unique experience that can make participation in legal proceedings against a perpetrator especially difficult.⁴⁹ Moreover, the policy purposes of both applying claim preclusion and defining a

45. I manually compiled data on injunction petitions from the Wisconsin Circuit Court Access database (CCAP). I conducted a general search for all civil cases in Dane County and disregarded cases that were not injunction petitions. CCAP limits searches to thirty calendar day periods per search, so I conducted successive searches for each thirty day period in 2024. This data is on file with the Wisconsin Law Review. Nine hundred and twenty-six petitions were filed in Dane County in 2024, including 355 domestic abuse injunction petitions and 571 harassment injunction petitions. Overall, 333 of these petitions were granted, 523 were denied or dismissed, and the remaining seventy were resolved by stipulation. *Id.* In some cases, the docket notes available for CCAP specify “dismissed for failure to prosecute.” *See, e.g., Petitioner v. Rios Noriega*, No. 2024CV000017 (Wis. Cir. Ct. dismissed Jan. 24, 2024), <https://wcca.wicourts.gov/caseDetail.html?caseNo=2024CV000017&countyNo=13&mode=details>. In others, the docket just notes the petitioner’s absence and states that the injunction is denied or dismissed without giving a reason. *See, e.g., Petitioner v. Williams*, No. 2024CV000681 (Wis. Cir. Ct. dismissed Mar. 15, 2024), <https://wcca.wicourts.gov/caseDetail.html?caseNo=2024CV000681&countyNo=13&mode=details>.

46. This data was compiled using the same collection methods described *supra* note 45.

47. *See Santander v. Monserrat*, No. 2024CV003115 (Wis. Cir. Ct. dismissed Oct. 23, 2024), <https://wcca.wicourts.gov/caseDetail.html?caseNo=2024CV003115&countyNo=13&index=0&mode=details>.

48. *See infra* Section II.A.

49. *See infra* Section II.A.1.

dismissal for failure to prosecute as a judgment on the merits are not implicated in injunction proceedings, which are intentionally quick and therefore unlikely to create bloat on a docket.⁵⁰

Existing forms of relief from a prior dismissal for failure to prosecute are insufficient to provide the necessary protection to abuse victims. Therefore, a change in law, judicial policy, or both is needed. The tension between the rules of civil procedure and the needs of abuse victims could be resolved through legislative action, or it can be mitigated through the exercise of judicial discretion and the education of petitioners.

A. Wisconsin Law and Public Policy Regarding Abuse Victims

Studies have clearly shown the profound impact domestic abuse has on victims.⁵¹ These effects, including trauma and a reasonable fear of retribution, limit victims' ability to seek help or participate in the legal process.⁵² Wisconsin has recognized the special status of victims in a number of ways, including through the adoption of statutory and constitutional victims' rights schemes,⁵³ policies for prosecuting abuse cases without victim cooperation,⁵⁴ and theories of defense based on the accused's past victimization.⁵⁵ These policies demonstrate that the law can and should be sensitive to the need for special consideration when working with victims of crime and abuse.

1. Abuse Victims Face Unique Barriers in Accessing the Legal System

People who have never been victims of abuse often find it difficult to understand why an abuse victim does not simply "leave." For decades, extensive research has been conducted and literature published to explain why it is difficult and/or outright dangerous for victims of domestic abuse to separate from their abuser.⁵⁶ Legal actors and systems should be

50. See *infra* Section II.B.1.

51. See *infra* Section II.A.1.

52. See *infra* Section II.A.1.

53. WIS. STAT. § 950 (2023–24); WIS. CONST. art. I, § 9m.

54. WIS. DIST. ATTY'S ASS'N, WISCONSIN PROSECUTOR'S DOMESTIC ABUSE REFERENCE BOOK 25-1 to 25-16 (2d ed. 2012) [hereinafter PROSECUTOR'S DOMESTIC ABUSE REFERENCE BOOK].

55. *State v. Head*, 2022 WI 99, ¶¶ 130–38, 648 N.W.2d 413, 442–43.

56. See, e.g., Megan McPherson Halket, Katelyn Gormley, Nicole Mello, Lori Rosenthal & Marsha Pravder Mirkin, *Stay with or Leave the Abuser? The Effects of Domestic Violence Victim's Decision on Attributions Made by Young Adults*, 29 J. FAM. VIOLENCE 35, 36 (2014); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 58 (1991); Michael Dowd, *Battered Women: A Perspective on Injustice*, 1 CARDOZO WOMEN'S L.J. 1, 3 (1993);

sensitive to the specific obstacles faced by victims rather than blaming victims for a situation they cannot control and punishing them for failing to follow through with their cases. Behavior that might not be seen as “reasonable” in the typical, non-victimized litigant is understood better in light of what domestic abuse victims experience.⁵⁷

There are certain interrelated effects that are especially pertinent when an abuse victim petitions for a domestic abuse injunction but fails to appear for their hearing. First, abuse victims regularly perceive, often correctly, that they are at the most risk when trying to leave their abuser.⁵⁸ Second, it often takes abuse victims multiple attempts to leave before they successfully disengage from their abuser.⁵⁹ Third, abuse victims often find facing their abuser in court re-traumatizing and as carrying its own risks.⁶⁰ Together, these findings make clear that an abuse victim might need more than one attempt to complete the process of seeking a protective injunction. If anything, a previous failure to appear could be considered evidence of the seriousness of the abuse they are facing.

Leaving an abusive partner and seeking the protection of the law through an injunction or other means may seem like a straightforward route to safety for victims. However, the reality is more complicated. Violence often escalates following a separation or attempted separation. By one estimate, a battered woman is 75 percent more likely to be murdered by her abusive partner after she has tried to leave than during the relationship.⁶¹ Another study found that 73 percent of women seeking medical treatment for injuries caused by an abusive male partner had already left their abuser’s household.⁶² According to the U.S. Department of Justice, a woman who has left an abusive spouse is fourteen times more likely to be the victim of a violent crime at the hands of her abuser compared with a woman remaining in an abusive marriage.⁶³

The increased risk of violence makes it unsurprising that it takes victims, on average, seven attempts to successfully leave their abuser.⁶⁴

Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 COLO. LAW. 19, 24 (1999).

57. See, e.g., *State v. Bednarz*, 507 N.W.2d 168, 170–72 (Wis. Ct. App. 1993) (recognizing the value of expert testimony to explain behavior typical of abuse victims).

58. Buel, *supra* note 56, at 19.

59. Halket, Gormley, Mello, Rosenthal & Mirkin, *supra* note 56, at 36.

60. See, e.g., Claye Epperson, *Restoring Balance to Domestic Violence Prosecution After Crawford*, 9 VA. J. CRIM. L. 163, 174–76 (2021) (discussing challenges for domestic abuse victims testifying against their abuser in criminal court).

61. Buel, *supra* note 56, at 19.

62. Dowd, *supra* note 56, at 26.

63. *Id.* (citing CAROLINE W. HARLOW, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ-126826, FEMALE VICTIMS OF CRIME 5 (1991)).

64. Halket, Gormley, Mello, Rosenthal & Mirkin, *supra* note 56, at 36.

In addition to the risk to their physical safety, abuse victims often face economic, social, and religious pressures to stay.⁶⁵ Their abuser might also threaten to take their children. In the case of immigrant victims, their immigration status might be within the control of their abuser and used to keep them with the abuser and under their control.⁶⁶ Understanding these and other factors make the difficulties victims face in leaving their abuser more understandable.⁶⁷ Given these findings, denying abuse victims relief on the basis of missing a single hearing is unjust.

Additionally, in the context of injunction petitioners who are abuse victims, it is crucial to understand the re-traumatization they experience when facing their abuser in court.⁶⁸ A victim seeking an injunction against their abuser must face them in court and subject themselves to cross-examination by their abuser or their abuser's attorney. If the abuse has taken the form of "gaslighting," in which the victim's perception of events is challenged or trivialized,⁶⁹ this cross-examination could feel like reliving the abuse they are trying to escape. Together, these effects show that when an abuse victim seeks the protection of the state through an injunction, they are overcoming significant obstacles and putting themselves at risk. Given these facts, it should not come as a surprise that many abuse victims are unable to follow through with the process.

2. Wisconsin Recognizes the Unique Concerns of Crime Victims

Wisconsin law and public policy recognize the particular challenges crime victims experience in a number of ways. The needs of crime victims, and abuse victims more specifically, have been recognized by the Wisconsin State Legislature, people, and courts. The state legislature has adopted laws meant to protect the victims of crime and domestic abuse.⁷⁰ The people of Wisconsin also voted to give protection to crime victims through the adoption of a constitutional amendment.⁷¹ State courts have recognized the value of understanding the perspective of

65. Dowd, *supra* note 56, at 4.

66. Veronica Tobar Thronson, *Affidavits Are Forever: Public Charge, Domestic Violence, and the Enforceability of Immigration Law's Affidavit of Support*, 41 YALE L. & POL'Y REV. 69, 75–76 (2022).

67. See Buel, *supra* note 56, at 19–26.

68. Epperson, *supra* note 60, at 174–76.

69. *What is Gaslighting?*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/resources/what-is-gaslighting/> [<https://perma.cc/U9ME-E3X4>] (last visited Oct. 25, 2025).

70. WIS. STAT. § 950 (2023–24); WIS. STAT. § 813.12 (2023–24).

71. See WIS. CONST. art. I, § 9m; Associated Press, *Wisconsin Voters Approve Crime Victims Amendment*, FOX47 (Apr. 13, 2020, at 18:03 CT), <https://fox47.com/news/local/wisconsin-voters-approve-crime-victims-amendment-04-13-2020>.

victims in abuse cases.⁷² District Attorney's offices around the state have also adopted policies to prosecute abuse cases when the victim does not wish to cooperate with the case.⁷³ Each of these laws, doctrines, and policies represent the ways Wisconsin recognizes the particular needs of crime and abuse victims.

Wisconsin's legislative interest in the protection of crime and abuse victims is represented in several statutes. The Wisconsin State Legislature has granted rights to crime victims within the criminal justice system. These include the right to be treated with "fairness, dignity, and respect for his or her privacy," to be notified of certain proceedings, and to be accompanied by a service representative.⁷⁴ The legislature has also adopted a crime victim compensation scheme in recognition of the state's "moral responsibility to aid innocent victims of violent crime" and provide "adequate protection" to crime victims.⁷⁵ Lastly, the state legislature recognized the seriousness of domestic abuse when it created the statutory scheme for obtaining domestic abuse restraining orders and injunctions.⁷⁶

Wisconsin voters expanded on and strengthened the victim's rights provided by statute by adopting a new constitutional provision, commonly called "Marsy's Law," in 2020.⁷⁷ Marsy's Law is a package of rights for crime victims championed by the family of Marsy Nichols, who was stalked and murdered by her ex-boyfriend in 1983.⁷⁸ According to the initiative's website, one week later the victim's ex-boyfriend accosted the victim's mother, who had not been notified of his release on bail.⁷⁹ Based on this experience, Marsy's family "[sought] to give crime victims meaningful and enforceable constitutional rights equal to the

72. See, e.g., *State v. Head*, 2002 WI 99, ¶¶ 6–9, 648 N.W.2d 413, 420 (holding that a defendant on trial for homicide may use prior acts of domestic abuse by her victim as evidence of actual belief of imminent danger of death or great bodily harm); *State v. Bednarz*, 507 N.W.2d 168, 171–72 (Wis. Ct. App. 1993) (allowing the State to use expert testimony regarding battered woman syndrome to provide a possible explanation for a victim's recantation of a battery allegation).

73. See PROSECUTOR'S DOMESTIC ABUSE REFERENCE BOOK, *supra* note 54, at 25-1 to 25-16 (providing guidance for continuing prosecution when a victim recants their testimony or is reluctant to participate at trial).

74. § 950.04.

75. WIS. STAT. § 949.001 (2023–24).

76. WIS. STAT. § 813.12 (2023–24).

77. Laura Schulte & Molly Beck, *Marsy's Law Constitutional Amendment Passes Overwhelmingly in Wisconsin, Giving More Rights to Victims of Crime*, MILWAUKEE J. SENTINEL (Apr. 13, 2020, at 20:00 CT), <https://www.jsonline.com/story/news/politics/elections/2020/04/13/marsys-law-additional-rights-for-crime-victims-amendment-article-1-constitution/5132745002/> [https://perma.cc/69QE-8U7Q].

78. *About Marsy's Law*, MARSY'S L., <https://www.marsyslaw.us/about-marsys-law> [https://perma.cc/9GLS-LDGF] (last visited Oct. 25, 2025).

79. *Id.*

rights of the accused.”⁸⁰ Since 2008, several states have adopted Marsy’s Law, although it has drawn harsh criticism from civil liberties groups accusing the amendment of degrading criminal defendants’ rights.⁸¹ Despite these criticisms, Wisconsin voters demonstrated a clear interest in protecting crime victims when they voted overwhelmingly in favor of the constitutional amendment.⁸²

Wisconsin courts have also recognized the effects of abuse on victims. This includes allowing evidence of past abuse of a defendant in a self-defense case⁸³ and judicial acceptance of expert testimony on “battered woman syndrome” to explain why a victim might recant their testimony.⁸⁴ Women who have killed their abusive husbands have been allowed to introduce evidence of the abuse they suffered to explain why they feared for their own safety as part of a self-defense claim.⁸⁵ Past abuse is also relevant to Wisconsin’s “adequate provocation” defense to homicide; whether an abused spouse’s response to provocation is in line with an ordinarily constituted person’s response must be considered in light of abuse they had experienced.⁸⁶ A defendant’s personal history as a victim of domestic abuse is also relevant in the context of a coercion defense, as it relates to the reasonableness of their perception that their criminal action is “the only means of preventing imminent death or great bodily harm,” which “must be determined from the standpoint of the defendant.”⁸⁷ For these defenses, the law is willing to consider the “cumulative effect” of past abuse on a criminal defendant.⁸⁸

The use of expert witnesses to provide an explanation as to why an abuse victim might return to their abuser or recant their story is common in cases involving violence between romantic partners.⁸⁹ A reference book produced by the Wisconsin District Attorney’s Association argues for the continued prosecution of domestic abuse cases where the victim

80. *FAQs: What is Marsy’s Law?*, MARSY’S L., [https://www.marsyslaw.us/\[https://perma.cc/F25F-UMHK\]](https://www.marsyslaw.us/[https://perma.cc/F25F-UMHK]) (last visited Oct. 25, 2025).

81. *See State Efforts*, MARSY’S L., [https://www.marsyslaw.us/states/\[https://perma.cc/YV8Y-94JJ\]](https://www.marsyslaw.us/states/[https://perma.cc/YV8Y-94JJ]) (last visited Oct. 25, 2025); *see, e.g.*, Jeanne Hruska, ‘Victims’ Rights’ Proposals Like Marsy’s Law Undermine Due Process, ACLU (May 3, 2018), <https://www.aclu.org/news/criminal-law-reform/victims-rights-proposals-marsys-law-undermine-due-process>.

82. *See* Shulte & Beck, *supra* note 77.

83. *State v. Head*, 2002 WI 99, ¶ 6, 648 N.W.2d 413, 420.

84. *See, e.g., State v. Bednarz*, 507 N.W.2d 168, 171–72 (Wis. Ct. App. 1993).

85. *See, e.g., Head*, 2002 WI 99, ¶¶ 131–38.

86. *See State v. Hoyt*, 128 N.W.2d 645, 648–49 (Wis. 1964).

87. *State v. Stetzer*, 2025 WI 34, ¶ 28, 22 N.W.3d 893, 902 (quoting Wis. STAT. § 939.46(1) (2023–24)).

88. *Hoyt*, 128 N.W.2d at 649.

89. *See, e.g., Bednarz*, 507 N.W.2d at 171; *State v. Mayer*, 583 N.W.2d 430, 433–34 (Wis. Ct. App. 1998).

recants or testifies on behalf of the defense.⁹⁰ It points out the prosecutorial interest in “curbing future manipulative and criminal behavior.”⁹¹ It additionally provides tools for prosecuting domestic abuse cases, including how to use prior inconsistent statements and expert witnesses.⁹² It also provides thematic advice for framing the recantation for the jury as the product of the cyclic nature of abuse.⁹³

The rules of civil procedure should not erode Wisconsin’s clear public policy in favor of protecting abuse victims. The will of the people, as represented by the adoption of Marsy’s Law, and the intent of the legislature, as represented by the creation of the injunction procedures, should not be undermined without a compelling competing interest. Claim preclusion’s purposes—judicial efficiency and having an end to litigation—are not sufficiently compelling, especially in the context of injunction petitions and hearings where the burden on courts is minimal.⁹⁴

B. The Public Policy Rationale of the Injunction Statutes Is Unnecessarily Undermined by Claim Preclusion

The sanction of dismissal for failure to prosecute is intended as a tool for courts to manage their dockets, prevent unwarranted delay, and clear their “records of mere deadwood.”⁹⁵ Courts have the inherent authority to issue appropriate sanctions to achieve these goals, which is supported by statutory authorization to dismiss a case for failure to prosecute or for failure to comply with required procedure statutes.⁹⁶ To justify a dismissal for failure to prosecute or comply with procedural rules, a court must find that the litigant has behaved “egregiously or in bad faith.”⁹⁷ When this requirement has been met, it follows that it would be poor policy to allow such a litigant to bring an identical or near-identical claim in a later case.

90. PROSECUTOR’S DOMESTIC ABUSE REFERENCE BOOK, *supra* note 54, at 25-2.

91. *Id.*

92. *Id.* at 25-5 to 25-15.

93. *Id.*

94. *See infra* Section II.B.

95. *Neuhaus v. Clark County*, 111 N.W.2d 180, 182 (Wis. 1961) (quoting *Hine v. Grant*, 96 N.W. 796, 797 (Wis. 1903)); *see also Neylan v. Vorwald*, 368 N.W.2d 648, 653 (Wis. 1985) (reaffirming “the inherent power of trial courts to dismiss actions” in the interest of judicial economy); *Hlavinka v. Blunt, Ellis & Loewi, Inc.*, 497 N.W.2d 756, 760–61 (Wis. Ct. App. 1993) (acknowledging that “the trial court does, of course, have the power, both inherent and statutory, to prevent unwarranted delay and the proliferation of stale lawsuits”).

96. *Hlavinka*, 497 N.W.2d at 761.

97. *Indus. Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶ 43, 726 N.W.2d 898, 908.

However, the typical domestic abuse or harassment petition that is dismissed for failure to prosecute does not fit the description presumed by the rule. Domestic abuse has unique characteristics that the legislature, people, and courts of Wisconsin recognize.⁹⁸ In creating the mechanism for domestic abuse victims to obtain an injunction, the legislature demonstrated particular concern for domestic abuse victims. Treating these litigants as those whose behavior has been egregious or in bad faith prevents these victims from getting the protection intended by the legislature. Furthermore, because protective injunction petitions are not ongoing cases under the regular rules of civil procedure,⁹⁹ they do not become stale cases clogging dockets when a petitioner fails to appear at the single hearing.

1. The General Purpose of Dismissal for Failure to Prosecute

The statute permitting courts to sanction a litigant who fails to prosecute their case or comply with the procedural rules has existed in one form or another for over a hundred years.¹⁰⁰ It is intended to penalize litigants “who sleep[] away [their] day in court”—showing no care for their own case, wasting judicial resources, and cluttering dockets.¹⁰¹ Basic principles of fairness require that such a drastic sanction as dismissal with prejudice only be made when it is “just.”¹⁰² Justice requires that the party being sanctioned has acted egregiously or in bad faith and that they have been placed on adequate notice that their behavior might result in case dismissal.¹⁰³

In civil cases, the burden to move the case forward is placed on the party bringing the action.¹⁰⁴ A petitioner who brings a claim but then makes no genuine attempt to move the case towards a resolution may be in danger of having their case dismissed with prejudice.¹⁰⁵ An earlier version of the failure-to-prosecute dismissal statute applied specifically to cases that had been ongoing for longer than five years without moving

98. See *supra* Section II.A.2.

99. The procedure for obtaining a protective injunction is established by the injunction statutes, and injunction petitions are usually resolved within two weeks of filing. See WIS. STAT. §§ 813.12(3)–(4), 813.125(3)–(4) (2023–24). For more information on the statutory procedure under the injunction statutes, see *infra* text accompanying notes 119–127.

100. See *Hine*, 96 N.W. at 797.

101. See *id.*

102. See *Lister v. Sure-Dry Basement Sys., Inc.*, 2008 WI App 124, ¶ 11, 758 N.W.2d 126, 130 (quoting *Marquardt*, 2007 WI 19, ¶ 43).

103. *Rupert v. Home Mut. Ins. Co.*, 405 N.W.2d 661, 663–66 (Wis. Ct. App. 1987).

104. *Theis v. Short (In re Est. of Short)*, 2010 WI App 108, ¶ 12, 789 N.W.2d 585, 591.

105. See *id.*

to trial.¹⁰⁶ While this requirement no longer exists, and cases may now be dismissed for failure to prosecute in less time, this legislative history provides some context about the degree of delay a dismissal for failure to prosecute typically envisions.

Despite there no longer being a specific amount of time after filing at which a party becomes in danger of having their suit dismissed for failure to prosecute, the sanction is still considered “drastic.”¹⁰⁷ The law is clear that it should only be used when litigants behave “egregiously or in bad faith,”¹⁰⁸ and the sanction is “appropriate only in limited circumstances.”¹⁰⁹

There is no set standard of behavior that may be considered sufficiently egregious to justify dismissal with prejudice. Courts have dismissed cases that dragged on for years without significant progress,¹¹⁰ while others have dismissed cases after the plaintiff was out of compliance for only a few weeks or months.¹¹¹ Dismissal may be an appropriate sanction for failure to comply with discovery orders when the failure is “extreme, substantial, and persistent.”¹¹² Regardless of the specific facts preceding a dismissal, courts have maintained that it is only appropriate in extreme cases.¹¹³

In addition to finding that a plaintiff’s behavior is egregious, a court must provide the misbehaving party adequate notice to satisfy constitutional due process requirements before dismissing a case for failure to prosecute.¹¹⁴ To satisfy due process, a petitioner must be on notice that their behavior may be seen as egregious and may result in a dismissal with prejudice.¹¹⁵ The existence of the statutory rule permitting dismissal for failure to prosecute is not considered sufficient constructive notice to satisfy this requirement.¹¹⁶ A hearing prior to dismissal is not

106. *Neylan v. Vorwald*, 368 N.W.2d 648, 652 (Wis. 1985).

107. *In re Est. of Short*, 2010 WI App 108, ¶ 23.

108. *Indus. Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶ 43, 726 N.W.2d 898, 906.

109. *Id.* ¶ 42.

110. *See, e.g., In re Est. of Short*, 2010 WI App 108, ¶¶ 11–13.

111. *See, e.g., Marquardt*, 2007 WI 19, ¶¶ 44–56.

112. *Lister v. Sure-Dry Basement Sys., Inc.*, 2008 WI App 124, ¶ 11, 758 N.W.2d 126, 130 (quoting *Marquardt*, 2007 WI 19, ¶ 43).

113. *See supra* notes 102–109.

114. *Rupert v. Home Mut. Ins. Co.*, 405 N.W.2d 661, 665 (Wis. Ct. App. 1987).

115. *See id.* at 664.

116. *Neylan v. Vorwald*, 368 N.W.2d 648, 653 (Wis. 1985) (finding that the absence of a time limit in the statute, as compared to previous versions of the statute, which required a case to proceed to trial within a set number of years, meant the statute did “not import any constructive knowledge to litigants or their counsel of the outside time limits a court will consider as being a ‘failure to prosecute’” (citing WIS. STAT. § 805.03 (1983–84)).

sufficient to ensure the grant of due process.¹¹⁷ The notice must grant a party the opportunity to correct their behavior; it is not enough to require a plaintiff to “excuse [their] violation of an unknown standard of conduct.”¹¹⁸ A party must have actual or constructive notice that their conduct could result in dismissal and also be given an opportunity to bring their behavior in line with the expected standard.¹¹⁹ Injunction petitioners, often proceeding pro se,¹²⁰ generally do not receive notice, actual or constructive, that their failure to appear will result in dismissal for failure to prosecute and are given no opportunity to cure their behavior.

In sum, failure to prosecute is a drastic sanction that is appropriate only in limited circumstances. It is appropriate when a litigant’s behavior is egregious or in bad faith. It also requires the party to be placed on adequate notice that their behavior could be seen as egregious, thereby making any further violation of the court’s expected standard of conduct at least knowing, if not willful. This traditional use of the dismissal for failure to prosecute sanction stands in stark contrast with an abuse victim who misses an injunction hearing. Injunction petitions are resolved in a single hearing, and it is hard to say that a domestic abuse victim missing this single hearing has acted egregiously or in bad faith. Therefore, the purpose of dismissal for failure to prosecute and the subsequent bar on re-litigation it carries is not served by its use in the injunction petition context.

2. The Legislative Intent of the Injunction Statutes Is Undermined by Applying Claim Preclusion

By creating the statutory schemes for the issuance of protective injunctions, the legislature expressed a clear policy in favor of protecting victims of abuse and harassment. An abuse or harassment victim seeking the remedy of a protective injunction is placed in a distinct legal position when they file an injunction petition. Therefore, it does not make sense to hold injunction petitioners to the same standards and rules as the typical civil litigant.

The legislature indicated its intention that injunctions, and the protection they offer to victims, be readily available by creating expedited procedures that differ from the standard rules of civil

117. *Rupert*, 405 N.W.2d at 664.

118. *See id.* at 663–64.

119. *Theis v. Short (In re Est. of Short)*, 2010 WI App 108, ¶ 24, 789 N.W.2d 585, 594–95.

120. KIANNA HANSON ET AL., DOMESTIC ABUSE INTERVENTION SERVS., COURT WATCH REPORT 2023 - 2024, at 11 (2024), <https://abuseintervention.org/wp-content/uploads/2024/12/2023-2024-Court-Watch-Report-Final.pdf>.

procedure. If a domestic abuse temporary restraining order and injunction petition is filed alleging the required elements and a “judge or circuit court commissioner finds reasonable grounds to believe that the respondent has engaged in, or . . . may engage in, domestic abuse,” the court shall issue a TRO.¹²¹ This ex parte order, if entered, provides almost immediate protection for the petitioner. TROs typically order the respondent not to engage in specified behaviors listed in the petition; this can include prohibitions on committing domestic abuse against the petitioner, visiting the petitioner’s residence, and contacting the petitioner.¹²² There is no requirement to notify the respondent before the TRO is entered.¹²³ A TRO is in effect until an injunction hearing is held.¹²⁴ An injunction hearing is scheduled to take place within fourteen days of the filing of a petition, and the petitioner must serve the respondent with a copy of the TRO and a notice of the hearing.¹²⁵ After the injunction hearing, if the court “finds reasonable grounds to believe that the respondent has engaged in, or . . . may engage in, domestic abuse of the petitioner” it may issue a domestic abuse injunction for a period of up to four years.¹²⁶

This procedure is very quick compared to more traditional civil litigation, with most cases resolved within two weeks of filing.¹²⁷ The swiftness of these proceedings demonstrates that the legislature determined it was necessary, given the nature of domestic abuse, for victims to “be able to obtain relief promptly.”¹²⁸ The adoption of the injunction petition schemes under these sections illustrates a legislative acknowledgement of domestic abuse as a serious societal concern and a recognition that victims of abuse may need specialized assistance.¹²⁹

121. WIS. STAT. § 813.12(3)(a) (2023–24). If the petitioner instead files a harassment injunction petition, a TRO may be issued if the petition alleges the requisite facts and “[t]he judge or circuit court commissioner finds reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner.” § 813.125(3)(a).

122. §§ 813.12(3)(a), 813.125(3)(a).

123. §§ 813.12(3)(b), 813.125(3)(b).

124. §§ 813.12(3)(c), 813.125(3)(c).

125. § 813.12(3)(c), (4)(a)(2); § 813.125(3)(c), (4)(a)(2).

126. § 813.12(4)(a)(3), (c)(2). If the petitioner instead files a harassment injunction petition, an injunction may be issued if the petition alleges the requisite facts and “the judge or circuit court commissioner finds reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner.” § 813.125(4)(a)(3).

127. A TRO may be extended for an additional fourteen days if service has not been completed on the respondent despite the petitioner exercising due diligence in attempting to serve the respondent. §§ 813.12(3)(c), 813.125(3)(c). This extension may occur only once. §§ 813.12(3)(c), 813.125(3)(c). This brings the outer limit of how long these actions may take to twenty-eight days.

128. *Hayen v. Hayen*, 2000 WI App 29, ¶ 16, 606 N.W.2d 606, 611.

129. *Schramek v. Bohren*, 429 N.W.2d 501, 503–04 (Wis. Ct. App. 1988).

The legislative intent of making protective injunctions readily available is undermined when a domestic abuse victim is prevented from having their injunction petition heard on the merits. Meanwhile, the policies underlying claim preclusion and the sanction of dismissal for failure to prosecute do not seem to demand these petitioners be prevented from having their cases heard. Specifically, these injunctions are unlikely to clog dockets or overly burden judicial resources because of their short timeline and simple process compared to standard civil procedures. The two weeks it takes for a typical protective injunction proceeding is far less than the months or years seen in most other cases that are dismissed for failure to prosecute.¹³⁰ Furthermore, the typical victim petitioner's behavior is unlikely to be egregious, as would be required to dismiss a typical civil case.¹³¹ Therefore, there simply is insufficient time for their behavior to be accurately described as "extreme, substantial, and persistent."¹³²

C. The Relief Currently Available Falls Short

Under current law, a petitioner who misses an injunction hearing is not without options. Even after their petition is dismissed for failure to prosecute, they retain several potential channels for relief. First, they may be able to refile a petition if they can allege additional instances of abuse or harassment that occurred after the date of the missed hearing. Second, they can challenge the dismissal on direct appeal. Finally, they can move the issuing court to set aside the judgment for good cause. As this Section demonstrates, each of these remedies is insufficient because they create additional barriers that undermine the petitioner's ability to get the relief the legislature intended to be available to them.

1. Abuse Victims Should Not Have to Experience Further Harm Before Refiling

Claim preclusion applies only to those claims that were or could have been raised during the previous action. An action based on events that occurred after the entry of the previous judgment is not barred. In the typical civil case, incidents that preceded the previous judgment would not typically be litigable, as they would either be precluded by

130. Compare § 813.12(3)(c) (setting two-week timeline for the occurrence of the injunction hearing after issuance of the TRO), with *Theis v. Short (In re Est. of Short)*, 2010 WI App 108, ¶ 23, 789 N.W.2d 585, 594 (dismissal for failure to prosecute three and a half years after remand to trial court).

131. See *supra* Section II.B.1.

132. *Lister v. Sure-Dry Basement Sys., Inc.*, 2008 WI App 124, ¶ 11, 758 N.W.2d 126, 130 (quoting *Indus. Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶ 43, N.W.2d 898, 907).

issue preclusion or simply irrelevant to the later arising case.¹³³ However, in the case of domestic abuse or harassment, prior acts of abusive or harassing behavior are relevant to establishing a pattern of behavior.

Wisconsin courts have found that a domestic abuse injunction petitioner may raise facts previously litigated if they demonstrate a pattern of abusive conduct that is relevant to the issue of intent.¹³⁴ In *Wittig v. Hoffart*,¹³⁵ Lana Wittig obtained a domestic abuse injunction against her husband, Brian Hoffart.¹³⁶ The injunction was based on Lana's description of repeated instances of verbal and physical abuse that spanned over a year.¹³⁷ Several months after the original injunction was granted, Lana moved to vacate the order to facilitate counseling sessions with her estranged husband.¹³⁸ By the time she moved to vacate the injunction, she had relocated and believed her husband did not know where she lived.¹³⁹ The vacatur was granted.¹⁴⁰ Lana later learned that Brian had found out where she lived, obtained keys to her apartment, and had even visited her apartment when she was not home.¹⁴¹ She also testified that he had threatened to kill her and that she believed that the threats were genuine.¹⁴² Lana admitted that Brian had not physically hurt her after the entry of the original injunction order against him.¹⁴³ In addition to this testimony, the trial court considered "two earlier injunction orders that had been entered against" Brian.¹⁴⁴ The court granted Lana the new injunction, stating that despite Brian not hitting Lana since the vacatur of the first injunction, he had made multiple "true threats" in that time.¹⁴⁵

On appeal, Brian argued that the facts underlying the initial injunction were precluded from consideration at the later injunction hearing and should not have been admitted.¹⁴⁶ The court of appeals disagreed.¹⁴⁷ The court held that the facts underlying the initial injunction were admissible to show that Brian was likely to commit domestic abuse

133. See *supra* Part I.

134. *Wittig v. Hoffart*, 2005 WI App 198, ¶¶ 11, 13–15, 704 N.W.2d 415, 419–20.

135. 2005 WI App 198, 704 N.W.2d 415.

136. *Id.* ¶ 3.

137. See *id.* ¶ 2.

138. *Id.* ¶ 3.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* ¶ 6.

145. *Id.* ¶ 7.

146. *Id.* ¶ 10.

147. *Id.*

against Lana in the future if the injunction was not granted and that the threats Brian made were “true threats.”¹⁴⁸ Courts are also commanded to consider the respondent’s “pattern of abusive conduct” when determining whether a domestic abuse injunction is appropriate.¹⁴⁹ The court found it “significant[]” that Lana alleged additional threats and stalking that occurred after the initial injunction was vacated.¹⁵⁰ Thus, the later petition was not merely asking the court to reinstate the earlier petition, but was based on new facts.¹⁵¹ The court of appeals affirmed the entry of the later injunction.¹⁵²

As *Wittig* shows, a victim-petitioner who fails to obtain an injunction can try again if the respondent has engaged in additional abusive or harassing behavior. This “hook” of facts that are not precluded would likely then be sufficient to allow the rest of the respondent’s pattern of behavior to be brought in under the reasoning in *Wittig*. However, this requires a petitioner who backed out of pursuing a petition in one instance to wait until additional abuse has occurred before they are once again eligible to seek the law’s protection. This requirement flies directly in the face of the purpose of the injunction statutes.¹⁵³ An injunction seeks to prevent further abuse; a petitioner—who is already a victim of abuse—should not be expected to subject themselves to further abuse before they can obtain relief.

2. Challenges Associated with Direct Appeal

Like any final judgment, a dismissal of an injunction petition may be appealed.¹⁵⁴ A petitioner who has had their injunction petition dismissed for failure to prosecute simply because they failed to appear for the injunction hearing has a few potentially meritorious arguments on appeal. First, they could argue that they were not on sufficient notice. Second, they could argue that the court did not find that their behavior was egregious, and therefore the dismissal with prejudice was not just. Finally, they can argue that a finding that their behavior was egregious was erroneous.

As discussed previously, to satisfy due process, a party must be on sufficient notice that their behavior could result in dismissal and have an opportunity to cure their behavior prior to dismissal. Because the injunction hearing is the first and only hearing after the petition is filed

148. *Id.*

149. *Id.* ¶ 13 (citing and quoting WIS. STAT. § 813.12(4)(aj) (2023–24)).

150. *Id.* ¶¶ 3, 11.

151. *Id.* ¶ 11.

152. *Id.* ¶ 20.

153. *See supra* text accompanying notes 70–76.

154. *See Form No. CV-409, supra* note 20.

and the TRO is granted or denied,¹⁵⁵ and the paperwork the petitioner is given makes no mention of potential sanctions for failing to appear at that hearing, it is not clear that a petitioner is on actual notice of the potential for their petition to be dismissed with prejudice.¹⁵⁶ The existence of the rule is also insufficient constructive notice.¹⁵⁷ Many injunction petitioners were likely not on sufficient notice prior to the dismissal and could successfully argue on appeal that their due process right was violated by the judgment. This issue does not appear to have been previously litigated at the appellate level, but a petitioner whose petition was dismissed for failure to prosecute could appeal the dismissal and raise it as an issue of first impression.

Next, a petitioner could argue that, without a finding that their behavior was egregious, the trial court's dismissal of their petition was an erroneous exercise of discretion. Injunction petitions are dismissed using a form order that does not require—or even have a place for—a finding that the petitioner's behavior was egregious before the box for “failure to diligently prosecute” is checked by the court.¹⁵⁸ Without a finding that a litigant's conduct is egregious, the sanction of dismissal with prejudice is not justified.¹⁵⁹ If a court merely checks the box next to “failure to diligently prosecute,” it is unclear that this satisfies the requirement that the court first find that the petitioner's behavior was egregious. Therefore, a petitioner could possibly succeed on an appeal on this theory, although this has not yet been tried.

Finally, a petitioner whose petition is dismissed for failure to prosecute could argue on appeal that their behavior was, regardless of the court's finding, not egregious. They could distinguish their single missed hearing, which occurred within two weeks of filing, from the multi-year delays seen in most failure to prosecute cases. They could argue that they did not “sleep[] away [their] day in court”¹⁶⁰ in the manner of the litigants the rule was designed to punish. Furthermore, they could

155. See WIS. STAT. §§ 813.12(2m), 813.125(2m) (2023–24).

156. See *Form No. CV-402: Petition for Temporary Restraining Order and/or Petition and Motion for Injunction Hearing (Domestic Abuse – 30709)*, WIS. CT. SYS. (Sep. 12, 2024), <https://www.wicourts.gov/forms/cv-402.pdf>; *Form No. CV-403: Temporary Restraining Order and Notice of Injunction Hearing (Domestic Abuse – 30709)*, WIS. CT. SYS. (May 19, 2016), <https://www.wicourts.gov/forms/cv-403.pdf>; *Form No. CV-405: Petition for Temporary Restraining Order and/or Petition and Motion for Injunction Hearing (Harassment – 30711)*, WIS. CT. SYS. (Sep. 12, 2024), <https://www.wicourts.gov/forms/cv-405.pdf>; *Form No. CV-406: Temporary Restraining Order (Temporary Order of Protection) and Notice of Injunction Hearing (Harassment – 30711)*, WIS. CT. SYS. (Sep. 12, 2024), <https://www.wicourts.gov/forms/cv-406.pdf>.

157. See *Neylan v. Vorwald*, 368 N.W.2d 648, 653 (Wis. 1985).

158. See *Form No. CV-409*, *supra* note 20.

159. See, e.g., *Buchholz v. Schmidt*, 2024 WI App. 47, ¶ 62, 11 N.W.3d 212, 232.

160. *Hine v. Grant*, 96 N.W. 796, 797 (Wis. 1903).

argue that the two weeks their case existed did not make it “deadwood”¹⁶¹ in need of pruning.

While each of these arguments may have merit, they still do not cure the issue of providing the petitioner the prompt relief the legislature intended to be available to them. Direct appeal is an additional, complicated, and expensive step of litigation that might prove daunting to a pro se petitioner attempting to escape a dangerous domestic abuse situation. The petitioner also faces the challenging erroneous exercise of discretion standard on appeal, under which it is entirely possible that a dismissal for failure to prosecute could be upheld.

3. Challenges of Setting Aside the Prior Judgment

Many victims of abuse and harassment who missed an injunction hearing and had their petition dismissed for failure to prosecute would likely prevail on a motion to have that judgment set aside for cause under Wisconsin Statutes section 806.07.¹⁶² This statute grants relief from a judgment, order, or stipulation under specific circumstances.¹⁶³ A judgment may be set aside: for “[m]istake, inadvertence, surprise, or excusable neglect” by the party wishing to set aside the judgment; for “[f]raud, misrepresentation, or other misconduct of an adverse party”; if the application of the judgment “is no longer equitable”; or for “[a]ny other reasons justifying relief.”¹⁶⁴ Each of these could apply to a victim-petitioner in different circumstances.

“Excusable neglect” is defined as “neglect which might have been the act of a reasonably prudent person under the same circumstances.”¹⁶⁵ A victim-petitioner who misses their injunction hearing could argue that their conduct was what a reasonably prudent person might have done in their circumstances. This would rely on successfully arguing that the specific experience of ongoing domestic abuse would make a reasonably prudent person back out of attending an injunction hearing that might be retraumatizing. They could also raise the perception, common among domestic abuse victims and supported by research, that leaving an abuser places a victim in increased danger compared with staying.¹⁶⁶ Given these facts, a judge might find that the failure to prosecute was reasonable under the circumstances.

161. *Neuhaus v. Clark County*, 111 N.W.2d 180, 182 (Wis. 1961) (quoting *Hine*, 96 N.W. at 797).

162. WIS. STAT. § 806.07 (2023–24).

163. *Id.*

164. § 806.07(1)(a), (c), (g)–(h).

165. *Giese v. Giese*, 168 N.W.2d 832, 834 (Wis. 1969).

166. *See, e.g.*, Mahoney, *supra* note 56, at 65 (defining “separation assault” as “the attack on the woman’s body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return”).

Second, a victim's failure to prosecute is often based on the abuser's implied or actual threat to cause further harm to the victim or others if they continue to prosecute their injunction petition. In these cases, the petitioner would have a valid claim that the dismissal should be set aside as being the product of misconduct of an adverse party.¹⁶⁷ They would have to present evidence of the alleged misconduct of the respondent, as the burden is on the party seeking to have the judgment set aside to show that a statutory reason exists.¹⁶⁸

Finally, the victim-petitioner could request relief because the judgment is "no longer equitable" or for "[a]ny other reason[] justifying relief from the operation of the judgment."¹⁶⁹ These catch-all clauses allow the court to exercise its discretion to set aside a judgment even when the petitioner's situation does not fit neatly into the other categories. For example, in one case, a petitioner's previous dismissal for failure to prosecute was set aside because it had been the product of a miscommunication with the prosecutor's office.¹⁷⁰ In that case, the victim-petitioner had been mistakenly informed by the prosecutor of a criminal case pending against the respondent that her presence was not required for the hearing.¹⁷¹ The prosecutor believed she was asking if she needed to be at a hearing for the criminal case, and did not realize she was thinking of the injunction hearing.¹⁷² Based on this misunderstanding, the court granted relief from the prior judgment, allowing the refiled petition to be heard on the merits.¹⁷³ Relief under this section requires the party requesting relief to demonstrate that there are "extraordinary circumstances" justifying relief, because the interests of

167. § 806.07(1)(c).

168. *See Padek v. Thornton*, 88 N.W.2d 316, 318 (Wis. 1958).

169. § 806.07(1)(g)–(h).

170. The details of this case are taken from my personal observations attending the hearing where claim preclusion was raised in person. *See Petitioner v. Wellner*, No. 2024CV003095 (Wis. Cir. Ct. filed Oct. 9, 2024), <https://wcca.wicourts.gov/caseDetail.html?caseNo=2024CV003095&countyNo=13&index=0&mode=details> (subsequent injunction petition allowed to be heard on the merits). For further information on this case, see *Petitioner v. Wellner*, No. 2024CV002974 (Wis. Cir. Ct. dismissed Oct. 9, 2024), <https://wcca.wicourts.gov/caseDetail.html?caseNo=2024CV002974&countyNo=13&index=0&mode=details> (initial injunction petition dismissed for petitioner's failure to attend hearing); *State v. Wellner*, No. 2024CF002380 (Wis. Cir. Ct. filed Oct. 2, 2024), <https://wcca.wicourts.gov/caseDetail.html?caseNo=2024CF002380&countyNo=13&index=0&mode=details> (respondent's criminal case in which petitioner was mistakenly informed by the prosecutor that they did not need to attend the injunction hearing).

171. *See supra* note 170.

172. *See supra* note 170.

173. *See supra* note 170.

justice must be balanced with the competing policy favoring the finality of judgments.¹⁷⁴

It is certainly possible that an abuse victim could get a prior dismissal for failure to prosecute set aside. However, this is an insufficient cure for the issue of claim preclusion in the context of domestic abuse and harassment petitions. Granting a motion for relief under this section is a discretionary form of relief, and different courts might be more or less open to arguments under this section.¹⁷⁵ Even if petitioners could reliably gain relief under this section, they are nonetheless burdened by this added step of litigation that they must navigate before having their case heard on the merits. This added litigation once again undermines the legislative intent of providing prompt relief to victims of domestic abuse and harassment.¹⁷⁶

D. Proposed Solutions

There are several ways this problem can be addressed, both with and without changes to the law. The most robust solution would be a statutory amendment to exclude injunction petitions from the action of claim preclusion. This would clearly require legislative action on the issue. Under current law, however, judges can exercise their discretion to dismiss injunction petitions without prejudice, allowing the petitioner to refile. Finally, attorneys and advocates working with abuse victims can make sure their clients are fully aware of the ramifications of not appearing for their hearing. They can also help clients navigate getting a previous judgment of dismissal for failure to prosecute set aside so that a new petition may be brought.

1. A Statutory Amendment

Wisconsin Statutes section 805.03, the statute defining dismissal for failure to prosecute as a judgment on the merits, creates a rebuttable presumption that such a judgment is preclusive of later claims.¹⁷⁷ Judges retain the discretion to “otherwise specif[y]” in the order for good cause.¹⁷⁸ Eliminating or reversing this presumption for domestic abuse

174. *Werner v. Hendree*, 2011 WI 10, ¶ 71, 795 N.W.2d 423, 438 (quoting *State ex rel. M.L.B. v. D.G.H.*, 363 N.W.2d 419, 427 (Wis. 1985)).

175. WIS. STAT. § 806.07(1) (2023–24) (the statute reads that “the court . . . may relieve a party”—this use of the permissive “may” means granting the relief is discretionary (emphasis added)).

176. *Hayen v. Hayen*, 2000 WI App 29, ¶ 16, 606 N.W.2d 606, 611 (1999).

177. WIS. STAT. § 805.03 (2023–24).

178. *Id.* (“Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order.”).

and harassment injunctions would allow victims who file a petition in good faith, but miss the hearing for whatever reason, to try their petition again without penalty.

This statutory change would reverse the presumption for a dismissal for failure to prosecute in the case of injunction petitions. Like the presumption under section 805.03, this presumption would be rebuttable. A court would retain the discretion to specify in the order that the judgment was on the merits or with prejudice, and a later petition would be barred. This would allow the court to properly penalize a petitioner who routinely files nuisance petitions or otherwise files petitions in bad faith.

Under this proposed statutory scheme, a petitioner who files for an injunction but then fails to appear would, in the ordinary course, be able to refile without any showing of additional abuse. They would not be subject to additional litigation to have the previous judgment vacated or set aside.¹⁷⁹ Likewise, they would not have to prove that their previous failure to appear was for good cause or otherwise justified. An abuse victim could then get the protection the legislature intended to make available to them without added barriers.

This remedy is preferable to those that follow. This remedy, unlike others suggested, would not be dependent on actions of individual judges, representatives, or petitioners. It would therefore apply uniformly to all petitioners. It would allow the public policy of protecting the victims of crime and abuse to be fulfilled equally in every courtroom in Wisconsin.

2. Judicial Discretion

Under current law, courts have the discretion to deny petitions without prejudice when the petitioner fails to appear at the injunction hearing. This is not unheard of.¹⁸⁰ Judges should routinely exercise their discretion in this way when dealing with injunction petitioners who fail to appear for their injunction hearing.

Judges who oversee injunction hearings are required to consider “pattern[s] of abusive conduct” when deciding whether to grant an injunction.¹⁸¹ While there is no mandate in the statute governing

179. *Contra* § 806.07 (granting relief from a judgment for specific purposes on party motion).

180. *See, e.g., Petitioner v. Vaughn*, No. 2024CV001297 (Wis. Cir. Ct. dismissed May 8, 2024), <https://wcca.wicourts.gov/caseDetail.html?caseNo=2024CV001297&countyNo=13&mode=details> (“Petitioner does not appear in court. . . . [T]he Court DISMISSES petition for injunction. Petitioner may refile.”); *Petitioner v. Jarboh*, No. 2024CV001172 (Wis. Cir. Ct. dismissed Apr. 26, 2024), <https://wcca.wicourts.gov/caseDetail.html?caseNo=2024CV001172&countyNo=13&mode=details> (“Court dismisses matter for failure to prosecute with out prejudice.”).

181. WIS. STAT. § 813.12(4)(aj) (2023–24).

injunction petitions about how a judge should handle a petitioner's failure to appear, there is no reason that similar considerations should not come into play. If judges can understand patterns of abuse when a hearing does occur, they should also understand them when the hearing does not occur.

A judge is well positioned to consider the ways in which ongoing domestic abuse could prevent a petitioner from attending an injunction hearing.¹⁸² Judges can recognize that in most cases, a failure to appear is most likely not the product of bad faith on the part of the abuse victim, but rather a rational response to the risks they face and patterns of abuse they have experienced. Based on this understanding, a judge can and should exercise their discretion to dismiss the petition without prejudice.¹⁸³ This preserves the remedy of a protective injunction for the abuse victim to take advantage of in the future, supporting the public policy of providing this relief and protection.¹⁸⁴

3. Petitioner Advocacy and Education

Victim-petitioners are often acting pro se but have some contact with victim advocates and other services.¹⁸⁵ These advocates should impress upon the petitioner that not appearing at a hearing could prevent them from having an injunction granted later on. In cases where a victim has already had a petition denied for failure to prosecute, they should be educated on the possibility of getting that prior judgment set aside for good cause so that they may have their new petition heard.

Unless and until there is a change in the law, attorneys and advocates with clients seeking a protective injunction should make sure petitioners understand the potential consequences of a missed injunction hearing. The consequences should be explained as clearly and simply as possible and avoid complicated legal explanations.¹⁸⁶ It should generally suffice

182. See *supra* Section II.A.I.

183. On the form dismissing the petition, the judge should check box 6 for "Other" findings and write in dismissal without prejudice or something similar. See *Form No. CV-409*, *supra* note 20.

184. See *supra* Section II.B.2.

185. See, e.g., *Legal Help*, DOMESTIC ABUSE INTERVENTION SERVS., <https://abuseintervention.org/legal-help/> [<https://perma.cc/UU8Z-AH7L>] (last visited Oct. 26, 2025) (providing "support, information, advocacy and court accompaniment" to victims of abuse in Dane County).

186. A document produced by End Domestic Abuse Wisconsin explains the doctrines of issue and claim preclusion in a highly technical legal manner that might be difficult for a pro se petitioner to understand. It states that "[c]laim preclusion does *not* prevent petitioner from applying for 2nd injunction based on same facts from 1st injunction." END DOMESTIC ABUSE WIS.: WIS. COAL. AGAINST DOMESTIC VIOLENCE, RESTRAINING ORDERS IN WISCONSIN 39 (2018) (emphasis added), https://s3-us-east-2.amazonaws.com/edaw-webinars/wp-content/uploads/2019/01/07165425/II-C_1

to say that if they miss a hearing, they might not be allowed to try again. This information should be shared directly with clients and included in information packets shared with petitioners.¹⁸⁷

When a victim seeks help with an injunction, the attorney or advocate they are working with should try to identify whether claim preclusion will be an issue. They should ask if the petitioner has filed for an injunction before, and whether it had been granted. If they have filed, and it was not granted, they should be asked why. If they did not attend the hearing, the attorney or advocate should explain the possibility that a new petition could be claim precluded. They should then work to identify ways the victim could overcome this hurdle. Options include identifying instances of abuse that happened after the date of the missed hearing, ways of explaining to the court why the hearing was missed, and giving them information on moving to set aside the previous judgment.¹⁸⁸ If they failed to appear at the previous injunction hearing because the respondent threatened them, that could be grounds for the previous judgment to be set aside.¹⁸⁹

While these education efforts unfairly place the burden of avoiding the pitfall of claim preclusion on abuse victims, they should not be ignored. An educated petitioner can make a more carefully calculated decision if and when they file for a petition. While applying claim preclusion to protective injunction petitions undermines the public policy aims of the injunction statutes, the current law is what it is. As long as this reality remains, abuse victims should be fully armed with the knowledge they need to avoid losing out on the protection the legal system provides.

CONCLUSION

The doctrine of claim preclusion, as applied to petitions for protective injunctions, undermines the ability of abuse victims to obtain the legal protection the legislature intended them to have. This erosion of the public policy of protecting the victims of crime and abuse is not necessary to maintain the general policy purpose of claim preclusion—that litigation should be limited. Therefore, the legislature should adopt a statutory amendment to make dismissals of protective injunctions

Restraining_Order_Grid-June2016aynXEV.pdf [https://perma.cc/GR4D-WSML]. This seems to refer to obtaining a later injunction after successfully obtaining the first, and could mislead a petitioner who has their first injunction petition dismissed. The resource does not explain what could happen if the petitioner misses their hearing.

187. See generally *id.* for one such information packet produced by End Domestic Abuse Wisconsin.

188. See WIS. STAT. § 806.07 (2023–24).

189. § 806.07(1)(c) (allowing for relief from a judgment due to misconduct of an adverse party).

petitions for failure to prosecute presumptively non-preclusive. In the absence of a change in the law, judges should exercise their discretion to dismiss petitions without prejudice, and advocates should educate victims seeking petitions about the potential pitfalls of missed hearings and about claim preclusion.

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