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WISCONSIN COURT OF APPEALS
DISTRICT 2

VILLAGE OF CHENEQUA

Plaintiff-Appellant,

vs.

Circuit Court Case No.: 2014-CV-001389
Appeal No. 2015-AP-000094 FT

CHAD C. SCHMALZ

Defendant-Respondent.

PLAINTIFF-APPELLANT VILLAGE OF CHENEQUA'S REPLY BRIEF

Appeal from Circuit Court of Waukesha County
Honorable Michael O. Bohren

Kershek Law Offices
Greenfield Professional Center
10777 West Beloit Road
Greenfield, WI 53228

By: Kimberly M. Kershek
State Bar No.: 1078878
Attorney for Plaintiff-Appellant,
Village of Chenequa

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STATEMENT OF FACTS

The Plaintiff-Appellant Village of Chenequa ("Village") relies on its Statement of Facts as set forth in its brief in chief. In addition, the following facts are pertinent to addressing Defendant-Respondent Schmalz's ("Schmalz") claim that the Village has waived its right to raise the community caretaker doctrine on appeal.

Schmalz filed a Motion to Suppress in the Circuit Court on August 13, 2014 on the grounds that the Village police officer lacked a reasonable suspicion to stop Schmalz and that the officer's stop was not justified by the community caretaker doctrine (R 9; R-Ap. p. 1-11). In fact, the majority of Schmalz's Motion to Suppress is devoted to addressing the application of the community

caretaker doctrine to the facts of the present matter. Id. Therefore, the issue of the application of the community caretaker doctrine to the facts of this case was before the Circuit Court at the time of the October 13, 2014 hearing on Schmalz's motion.

During his testimony at the motion hearing, Village Officer Johns testified that he observed Schmalz's vehicle traveling southbound on Highway C in the Village at an unusually low speed and very near to the fog line in an area with little to no shoulder. (R 15 6:8-7:7, 7:15-21, 8:13-16, 25:8-10; R-Ap. p. 6:8-7:7, 7:15-21, 8:13-16, 25:8-10). Officer Johns testified that once behind Schmalz's vehicle, he observed a deer coming from the right side of his field of vision toward the roadway. (R 15 9:3-7, R-Ap. p. 9:3-7). Officer Johns stated that he had no trouble seeing the deer as it approached the roadway or reacting to its presence and approach. (R 15 9:15-17, 10:16-18; R-Ap. p. 9:15-17, 10:16-18).

Officer Johns also testified that he observed the deer travel in front of Schmalz's vehicle, which then struck the deer causing the deer to "spin helicopter into the roadway into the northbound lane." (R 15 9:7-10, 11:2-4; R-Ap. p. 9:7-10, 11:2-4). Officer Johns stated that he saw that Schmalz did not stop upon striking the deer but only tapped

his brakes lightly just before impact. (R 15 9:10, 11:5-10; R-Ap. p. 9:10, 11:5-10). Officer Johns testified that he did not think this was "normal driving behavior to strike an animal that's as large as a deer and not at least stop and check on your vehicle to make sure your vehicle is safe to continue on." (R 15 11:23-12:2; R-Ap. p. 11:23-12:2). In Officer Johns's experience, people report deer-car collisions approximately 90% of the time. (R 15 19:19-20:6). In this instance, the impact was such that the deer was deceased in the northbound lane where it created a traffic hazard. (R 15 26:24-27:3, R-Ap. p. 26:24-27:3).

Officer Johns testified that having observed Schmalz fail to stop after striking the deer, he was unsure if something was wrong with Schmalz. (R 15 24:5-14; R-Ap. p. 24:5-14). Officer Johns testified that at the time he didn't know if Schmalz was impaired or having a medical condition like diabetic shock that may have contributed to his lack of reaction to the deer. *Id.* Officer Johns stated that he wondered if Schmalz even knew he struck a deer. (R 15 24:12-14; R-Ap. p. 24:12-14). Officer Johns said knew that he would not be able confirm if Schmalz was having some kind of problem without making contact with him. *Id.* Officer Johns also testified that he stopped the vehicle to determine whether the operator was hurt or if

there was any damage to the vehicle. (R 15 24:19-23; R-Ap. p. 24:19-23).

During his closing argument at the motion hearing, the Village prosecutor argued that, despite the fact that Officer Johns had the time and ability to see and react to the approaching deer, Schmalz only tapped his brakes "at the last minute, struck the deer and continued on." (R 15 30:3-12; R-Ap. p. 30:3-12). The Village prosecutor further argued that this was clearly not a collision that would have escaped a driver's notice. (R 15 30:15-17; R-Ap. p. 30:15-17). The Village prosecutor reiterated to the court that Schmalz did not "stop to investigate either his vehicle or the deer or the traffic hazard created by the deer...." (R 15 30:17-19; R-Ap. p. 30:17-19). In rendering its decision, the Circuit Court did not mention or rule on any aspect of the application of the community caretaker doctrine to the facts of this matter.

ARGUMENT

The Village has not waived its right to raise the issue of the community caretaker doctrine on appeal. The rule in Wisconsin is that in order to avoid waiver, an issue must be sufficiently flagged for the trial court to be made aware that a ruling is required on the issue. Beacon Bowl, Inc. v. Wis. Elec. Power Co., 176 Wis.2d 740,

790, 501 N.W.2d 788 (1993) (citation omitted). Issues that are raised and briefed or argued are not deemed abandoned. See McGivern v. AMASA Lumber Co., 77 Wis.2d 241, 245, 252 N.W.2d 371, 373 (1977); State v. Ledger, 175 Wis.2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993) (citation omitted). Furthermore, this Court has the power to address issues even if they are not preserved in circuit court. See Northern States P. Co. v. Hunter Bd. Of Supv., 57 Wis.2d 118, 133, 203 N.W.2d 878 (1973); Stumpner v. Cutting, 2010 WI App 65, ¶11, 324 Wis.2d 820, 783 N.W.2d 874.

Schmalz's motion to suppress in this case was based largely on the community caretaker doctrine. In addition, as described herein, Officer Johns made several references during his testimony to his concern that Schmalz may be in need of assistance, medical or otherwise, particularly after striking the deer and failing to react to the collision. Officer Johns testified that he stopped Schmalz's vehicle to determine whether the operator was hurt or if there was any damage to the vehicle. The Village prosecutor also made reference during his closing argument to Officer Johns's concern that Schmalz may be in need of assistance.

It is true, as Schmalz points out, that at the time of the motion hearing before the Circuit Court, the Village

prosecutor stated that "the motion is just a stop motion."
(R. 27:20-22; R-Ap. p. 27:20-22). There can exist,
however, more than one justification for a stop in any
particular case. The Village prosecutor's statement does
not foreclose the Village from raising the community
caretaker doctrine on appeal.

CONCLUSION

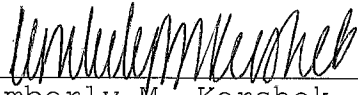
Because the issue of the application of the community
caretaker doctrine to the facts of this case was before the
circuit court by virtue of Schmalz' Motion to Suppress and
the Village's presentation of its case, including the
testimony of Officer Johns, the Village did not waive its
right to raise the issue of the community caretaker
doctrine on appeal. Therefore, because Officer Johns's
stop of Schmalz was justified by the community caretaker
doctrine, the Village of Chenequa respectfully requests
that this Court reverse the Circuit Court's decision to
grant Schmalz's motion to suppress and remand the case back
to the Circuit Court.

Alternatively, because Officer Johns possessed the
requisite reasonable suspicion to stop Schmalz, the Village
of Chenequa respectfully requests that this Court reverse
the Circuit Court's clearly erroneous decision to grant

Schmalz's motion to suppress for lack of reasonable suspicion and remand the case back to the Circuit Court.

Respectfully submitted this 24th day of March, 2015.

KERSHEK LAW OFFICES

A handwritten signature in black ink, appearing to read 'Kimberly M. Kershek', written over a horizontal line.

Kimberly M. Kershek
Attorney for Plaintiff-Appellant
State Bar No. 1078878


Kershek Law Offices
10777 West Beloit Rd.
Greenfield, Wisconsin 53228
Telephone: (414) 321-6530
Fax: (414) 321-6535
kkershek@kersheklaw.com

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and Wis. Stat. § 809.19(8)(c) as modified by the Court's Order for a brief produced with a monospaced font. The length of this brief is seven (7) pages.

Dated this 24th day of March, 2015.

KERSHEK LAW OFFICES



Kimberly M. Kershek
Attorney for Plaintiff-Appellant
State Bar No. 1078878

Kershek Law Offices
10777 West Beloit Rd.
Greenfield, Wisconsin 53228
Telephone: (414) 321-6530
Fax: (414) 321-6535
kkershek@kersheklaw.com

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12).

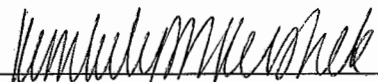
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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 24th day of March, 2015.

KERSHEK LAW OFFICES



Kimberly M. Kershek
Attorney for Plaintiff-Appellant
State Bar No. 1078878

Kershek Law Offices
10777 West Beloit Rd.
Greenfield, Wisconsin 53228
Telephone: (414) 321-6530
Fax: (414) 321-6535
kkershek@kersheklaw.com

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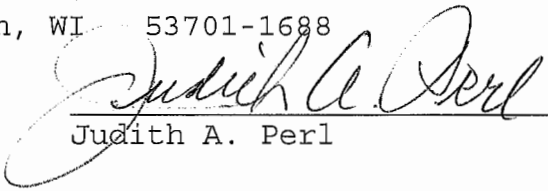
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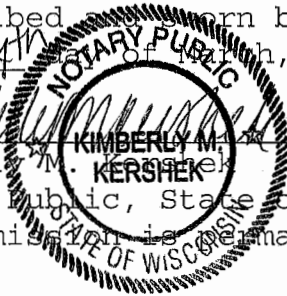
STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

Judith A. Perl of Kershek Law Offices located at the Greenfield Professional Center, 10777 West Beloit Road, Greenfield, Wisconsin, 53228, being first duly sworn on oath, states that on the 24 day of March, 2014, she mailed properly enclosed in a postage paid envelope, an original and five (5) copies of Plaintiff-Appellant Village of Chenequa's Reply Brief and all accompanying certifications in the above matter to:

Wisconsin Court of Appeals
Office of the Clerk
110 E. Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688


Judith A. Perl

Subscribed and sworn before me
this 24th day of March, 2015.



Kimberly M. Kershek
Notary Public, State of Wisconsin
My commission is permanent

Kimberly M. Kershek
Notary Public, State of Wisconsin
My commission expires permanent


CERTIFICATE OF MAILING

I hereby certify that this brief and all accompanying certifications were deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on March 24, 2015.

I further certify that the brief and all accompanying certifications were correctly addressed and postage was pre-paid.

Dated this 24th day of March, 2015.

KERSHEK LAW OFFICES



Kimberly M. Kershek
Attorney for Plaintiff-Appellant
State Bar No. 1078878

Kershek Law Offices
10777 West Beloit Rd.
Greenfield, Wisconsin 53228
Telephone: (414) 321-6530
Fax: (414) 321-6535
kkershek@kersheklaw.com