

RECEIVED

10-12-2015

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2015AP1501-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL W. BRYZEK,

Defendant-Respondent.

ON APPEAL FROM ORDERS GRANTING
POSTCONVICTION RELIEF ENTERED IN THE
WALWORTH COUNTY CIRCUIT COURT, THE
HONORABLE DAVID M. REDDY, PRESIDING

BRIEF AND APPENDIX OF
PLAINTIFF-APPELLANT

BRAD D. SCHIMEL
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar #1009170

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

TABLE OF CONTENTS

	Page
STATEMENT OF THE ISSUE	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	2
STATEMENT OF THE CASE.....	2
ARGUMENT	11
I. STANDARD OF REVIEW.....	12
II. THE JURY INSTRUCTION CORRECTLY DEFINED THE COMMON LAW DUTIES AND AUTHORITY OF AN AGENT UNDER A POWER OF ATTORNEY AT THE TIME OF BRYZEK’S OFFENSE.	13
CONCLUSION.....	22

CASES CITED

Alexopoulos v. Dakouras, 48 Wis. 2d 32, 179 N.W.2d 836 (1970).....	14, 15, 20
First Nat'l Bank of Omro v. Bean, 141 Wis. 476, 124 N.W. 656 (1910)	21
Losee v. Marine Bank, 2005 WI App 184, 286 Wis. 2d 438, 703 N.W.2d 751.....	14, 15

Praefke v. American Enterprise Life Ins. Co.,
 2002 WI App 235, 257 Wis. 2d 637,
 655 N.W.2d 456.....14, 15, 21

Russ v. Russ,
 2007 WI 83, 302 Wis. 2d 264,
 734 N.W.2d 874..... 13, passim

State v. Ferguson,
 2009 WI 50, 317 Wis. 2d 586,
 767 N.W.2d 187.....13

State v. Lettice,
 205 Wis. 2d 347, 556 N.W.2d 376
 (Ct. App. 1996).....12

State v. Thiel,
 188 Wis. 2d 695,
 524 N.W.2d 641 (1994).....12

Tina B. v. Richard H.,
 2014 WI App 123, 359 Wis. 2d 204,
 857 N.W.2d 432.....13

Zastrow v. Journal Communications, Inc.,
 2005 WI App 178, 286 Wis. 2d 416,
 703 N.W.2d 673, *aff'd*, 2006 WI 72,
 291 Wis. 2d 426, 718 N.W.2d 5120

STATUTES CITED

2009 Wis. Act 319, § 1413

2009 Wis. Act 319, § 1613, 16

2009 Wis. Act 319, § 1813

	Page
Wis. Stat. § 243.37	13
Wis. Stat. § 244.02(6)	8
Wis. Stat. § 244.14	2, 9, 13
Wis. Stat. § 244.14(1)	1, passim
Wis. Stat. § 244.14(1)(a)	7
Wis. Stat. § 974.05(1)(b)	2, 11

ADDITIONAL AUTHORITY

Uniform Power of Attorney Act (1984), 8B U.L.A. (2014)	17, 18, 20
Wis JI-Criminal 1444 (2006)	6

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2015AP1501-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL W. BRYZEK,

Defendant-Respondent.

ON APPEAL FROM ORDERS GRANTING
POSTCONVICTION RELIEF ENTERED IN THE
WALWORTH COUNTY CIRCUIT COURT, THE
HONORABLE DAVID M. REDDY, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

STATEMENT OF THE ISSUE

At defendant-respondent Michael W. Bryzek's trial for theft from his mother as her agent under a durable power of attorney, the court gave the jury an instruction defining an agent's authority based on Wis. Stat. § 244.14(1). That statute was enacted after the charging period for the offense. The issue on appeal is whether the statute codified common law principles that were established at the time of Bryzek's conduct.

The circuit court held that the statute represented "new law" and ordered a new trial.

This court should hold that the statute codified existing common law standards and that the circuit court erred when it granted Bryzek's motion for a new trial.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of the court's opinion is warranted because there are no Wisconsin decisions that address the relationship between the common-law duties of an agent acting under a durable power of attorney and the statutory duties of such an agent under Wis. Stat. § 244.14.

STATEMENT OF THE CASE

This is an appeal by the State of Wisconsin pursuant to Wis. Stat. § 974.05(1)(b) from orders granting a motion for postconviction relief filed by defendant-respondent Michael W. Bryzek and ordering a new trial (82:1-2; 83:1; A-Ap. 101-102, 103).

Bryzek was charged in Walworth County Circuit Court with theft by a bailee of more than \$10,000 (2:1). The complaint alleged that between May 2007 and November 2010, Bryzek, acting as an agent under a durable power of attorney signed by his mother, E.B., used more than \$38,000 of her money for his own purposes (*id.*).

The Durable Power of Attorney. In 1996, E.B. executed a General Durable Power of Attorney document that named Bryzek as her agent (97A:59,

198; 36:Exhibit S-16; A-Ap. 123-26). The Power of Attorney granted E.B.'s agent a number of specific powers to manage her financial affairs (36:Exhibit S-16, pp. 1-3; A-Ap. 123-25). Additionally, as relevant to this case, the Power of Attorney provided that the agent could:

22. Make gifts of any kind, including gifts to my agent.

* * *

24. In general, do anything and everything in respect to all of my affairs that I myself might or could do if personally present, and manage and conduct my property, business and affairs in such manner as may be approved by my said agent; hereby intending to give my said agent the fullest power and authority, not intending in any way to limit such full, wide and general powers, but giving and granting unto my said agent full power and authority to do and perform all and every act and thing whatsoever requisite, necessary or desirable to be done, and in my name and behalf, and under seal or otherwise; to make, execute and deliver any and all such instruments in writing as my said agent may approve, all as full and to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all that my said agent shall lawfully do or cause to be done by virtue hereof.

(36:Exhibit S-16, pp. 2-3; A-Ap. 124-25.)

Trial evidence. The State's primary witness at trial was Jon Erickson, who is a Trust Officer at the New Citizen's State Bank in Whitewater (95:46).¹

¹The State also called several witnesses to authenticate court, bank, and other business records (94:116-39; 95:3-45).

Erickson was appointed guardian of E.B.'s estate in May 2011 (95:48). (One of E.B.'s other sons was appointed guardian of her person (95:60).) At the time of Erickson's appointment, E.B. was living in a nursing home (95:61-62).

After he was appointed E.B.'s guardian, Erickson reviewed her bank records (95:70-71). Based on that review, he created a report listing account activity that he considered "abnormal" for someone in E.B.'s position (95:72-73).

Erickson's report identified 242 transactions between May 23, 2007, and November 19, 2010, mostly checks, totaling just under \$37,000, that appeared to be "out of the norm for someone in her position" (36:Exhibit S-13:1-9; 95:73-74; 97A:21; A-Ap. 127-35). The report also identified fees of over \$1,700 assessed by the bank for returned checks or insufficient funds (36:Exhibit S-13:9; 95:74; 97A:21-22; A-Ap. 135).

Erickson testified about each of the items he identified in his report (95:76-157; 97A:4-20). Those items included checks payable to Bryzek himself (95:79, 93, 94, 97, 100, 108, 127, 151-52; 97A:18), as well as checks payable to a hardware store (95:79, 125, 150, 152, 156; 97A:12), home improvement stores (95:83-84, 98, 102, 131, 134), a tavern (95:86, 89), an electronics firm (95:87), pharmacies (95:80-82),² AT&T (95:88, 106, 118, 121, 122, 130), auto parts

²The pharmacy payments were for Bryzek's own medications (95:80-82). Because E.B. was in a nursing home, her medications were purchased from an institutional supplier (95:80).

stores (95:92-93, 152; 97A:4-5, 12, 15, 17), insurance companies (95:105-106, 108, 115, 118, 138), a sporting goods store (95:110, 129, 131, 133; 97A:11), a septic company (95:123), WE Energies (95:142-43), a dentist who practices in Montana (95:143-44, 146), and a Montana property management company (97A:20). Erickson testified that, in his two and a half years as E.B.'s guardian, he had no need to write checks to any of those entities on her behalf (95:79-80, 84, 86, 87, 88, 98, 106, 107, 123, 134, 138, 143; 97A:24).

While Bryzek was using his mother's money for his own purposes, her bills went unpaid. Erickson testified that E.B. was in arrears at her nursing home when he became her guardian (97A:35). There were judgments against her for more than \$78,000 for money owed to two nursing homes in which she previously resided (95:11-14, 62) and a judgment against her for more than \$21,000 for unpaid pharmacy bills (95:7-8, 65-66). Erickson testified that while E.B. owned assets totaling \$492,654, she lacked the liquidity to pay bills such as property taxes (97A:33, 46).³

The only witness called by the defense was Bryzek's brother, Steven Bryzek. He testified that their mother became incapacitated in 1999 after suffering a brain aneurysm and that he and Bryzek took care of her at the family farm between 1999 and 2006 (97A:196-200). Steven testified that his mother gave Bryzek the power of attorney in 1996 after

³E.B.'s largest asset was a twenty percent interest in the LLC that owns the family farm (97A:50).

Steven spoke with her about the need to have something in place if something were to happen to her (97A:198). He described Bryzek as E.B.'s "favorite son" and said that "he took good care of her" (97A:201).

Steven testified that Bryzek moved to Montana in 2006 (97A:209). He further testified that his mother's income came primarily from Social Security and that it was insufficient to pay her nursing home costs (97A:204, 213). Steven also testified that while Bryzek was acting as their mother's agent she was forced to move from two successive nursing homes for failure to pay her bills (97A:255).

The jury instruction. The State asked the trial court to modify the standard jury instruction for theft by a bailee, Wis JI-Criminal 1444, to add language to the second element of the offense that defined the authority of an agent under a Power of Attorney (26:2-3). The proposed additional language stated:

The "authority" of a Power of Attorney means that despite any provisions to the contrary in the power of attorney, an agent who has accepted appointment shall act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, if those expectations are not known, in the principal's best interest; act in good faith; and act only within the scope of

authority granted in the power of attorney.

(26:3.) This language was derived from Wis. Stat. § 244.14(1)(a) (2013-14).⁴

Bryzek objected to the inclusion of this language (27:1-4; 29:2; 94:16-20; A-Ap. 112-16). He argued that the statute applied only to civil proceedings and that “the State cannot, in effect, create a brand new crime of Theft by a Power of Attorney with New Elements” (27:2; 29:2). He further argued that the instruction would violate the prohibition against ex post facto laws by criminalizing conduct that was innocent when committed (27:3).

At the outset of trial, the court ruled that it would give the State’s proposed language defining the agent’s authority (94:20; A-Ap. 116). At the final

⁴Wis. Stat. § 244.14(1)(a) (2013-14) provides:

(1) Notwithstanding any provisions to the contrary in the power of attorney, an agent who has accepted appointment shall do all of the following:

(a) Act in accordance with the principal’s reasonable expectations to the extent actually known by the agent and, if those expectations are not known, in the principal’s best interest.

(b) Act in good faith.

(c) Act only within the scope of authority granted in the power of attorney.

jury instruction conference, Bryzek reiterated his objection to giving the additional language but argued that if the court were to give that instruction, it also should give the jury an instruction based on the definition of “good faith” in Wis. Stat. § 244.02(6) (9A:51, 55-56; A-Ap. 118-19). The court granted that request (99A:56-57; A-Ap. 119-20).

Based on those rulings, the court instructed the jury as follows on the second element of the offense:

Two, the defendant intentionally used the money without the owner’s consent and contrary to the defendant’s authority.

The term “intentionally” means that the defendant must have had the mental purpose to use the money without the owner’s consent and contrary to the defendant’s authority.

The authority of a Power of Attorney means that despite any provision to the contrary in the Power of Attorney, an agent who has accepted appointment shall act in accordance with the principal’s reasonable expectations to the extent actually known by the agent and, if those expectations are not known, in the principal’s best interest; act in good faith; and act only within the scope of authority granted in the Power of Attorney. Good faith means honesty in fact.

(99A:62-63; A-Ap. 121-22.)

Verdict and sentencing. The jury found Bryzek guilty of theft of more than \$10,000 (99A:151). The court sentenced him to eighteen months of initial confinement and eighteen months of extended supervision (101:44).

When it sentenced Bryzek, the court remarked that “his behavior took place over several years and resulted in substantial financial hardship and loss to the victim” (101:45). The court described Bryzek as “an opportunist who took advantage of his ill and elderly mother causing her losses totaling well over \$30,000 in damages. The defendant abused his Power of Attorney to the extreme and . . . routinely took funds out of her account to benefit and use for himself” (*id.*).

Postconviction proceedings. Bryzek filed a postconviction motion that asserted several claims for relief (69:1-11). One of those claims, which Bryzek previously had asserted in a motion for a directed verdict (35:1-3), was that the gifting provision in the power of attorney “preclude[s] any conviction” for theft (69:2; upercasing omitted) because “[t]he power to gift means that Michael Bryzek had the ‘authority’ to spend money the way he did” and “the Durable Power of Attorney, in its explicit and unambiguous grant of power by [E.B.], granted Michael Bryzek consent of the owner, namely [E.B.], to do exactly what he did” (69:3).

The postconviction claim on which the circuit court granted relief was Bryzek’s argument that he was entitled to a new trial because the statute on which the jury instruction was based, Wis. Stat. § 244.14, was enacted on September 1, 2010, while most of the charging period for his offense preceded that date (69:4-11).⁵ Bryzek argued that the statute “made a substantial change in the law with respect

⁵The charging period in the complaint was “between May of 2007 and November of 2010” (2:1).

to the definition of the duties and responsibilities of an agent under a durable power of attorney” (69:5). Applying the new statutory standards to him, he claimed, created an ex post facto law (69:6-9). The State argued in response that there was no ex post facto violation because the statute codified existing common law principles (78:19-24).

After hearing oral arguments from the parties, the court permitted additional briefing on the issue of whether the statute was “a codification of existing law or whether it’s new law” (104:39). Both parties then filed supplemental briefs addressing that issue (79:1-5; 81:1-7).

The circuit court determined that Bryzek was entitled to a new trial because the jury instruction was based on “new law” (105:2; A-Ap. 105). The court explained in its oral ruling:

I based that upon a lot of the information that the court had but also the new information that was provided by [defense counsel]; that is the Legislative Reference Bureau’s analysis, including a statement that the bill includes definitions and general rules that are not in the current law; and it includes those dealing with the agent’s duties . . .; the Wisconsin Legislative Council Act Memo that the Act updates existing statutes including those dealing with the agent’s duties; the article in Wisconsin Lawyer by Beerman & Johnson entitled *Procedural Gray Areas: New POA for Finances*, including a statement that the new Act is a welcome change, containing improvements such as better protections for both the principal and the person asked to . . . rely on the POAF; and then the Wisconsin Guardian Support Center, including one excellent default rule of

Chapter 244 is that the agent is not allowed to make gifts or self-deal.

My reading of *Russ* [*v. Russ*, 2007 WI 83, 302 Wis. 2d 264, 734 N.W.2d 874] is that this information about the “notwithstanding” language and the good faith language, including that honesty in fact was not the law previously, the timing is coincidental -- too coincidental when looking at the language of the concurring opinion by then Chief Justice Abrahamson who pointed out the very defects that I think were . . . in large part remedied by the amendment to the statutes.

(105:2-3; A-Ap. 105-106.)

The circuit court entered written orders vacating the judgment of conviction and the amended judgment of conviction⁶ and granting a new trial (82:1-2; 83:1; A-Ap. 101-103). The State filed a notice of appeal from those orders pursuant to Wis. Stat. § 974.05(1)(b) (84:1).

ARGUMENT

The circuit court did not expressly state, in either its oral decision or its written orders, that the jury instruction’s incorporation of standards contained in Wis. Stat. § 244.14(1) constituted an ex post facto violation (82:1-2; 83:1; 105:2-3; A-Ap. 105-106). But the court’s determination that Bryzek is entitled to a new trial because the statute represented “new law” (105:2; A-Ap. 105) strongly

⁶The amended judgment of conviction modified the amount of restitution (65:2).

suggests that that was the basis for the court's decision.

An ex post facto violation occurs when a law “punishes as a crime an act previously committed, which was innocent when done; . . . makes more burdensome the punishment for a crime, after its commission, or . . . deprives one charged with crime of any defense available according to law at the time when the act was committed.” *State v. Thiel*, 188 Wis. 2d 695, 703, 524 N.W.2d 641 (1994). Bryzek argued in his postconviction motion that applying the standards codified in Wis. Stat. § 244.14(1) was an ex post facto violation because it “fundamentally changed the law with respect to durable powers of attorney in Wisconsin and created new duties for the agent that simply did not exist before” (69:7).

The issue before this court is whether Wis. Stat. § 244.14(1) codified legal standards that were in effect when Bryzek used his mother's money for his own purposes or whether the statute and the jury instruction that incorporated it imposed new duties on agents acting under a power of attorney. For the reasons that follow, this court should conclude that the statute codified existing common law principles regarding an agent's duties and authority and that the jury instruction correctly informed the jury of those principles.

I. STANDARD OF REVIEW.

An appellate court reviews a trial court's decision to grant a new trial under an erroneous exercise of discretion standard. *State v. Lettice*, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996). A

trial court erroneously exercises its discretion when it has exercised discretion on the basis of an error of law. *See Tina B. v. Richard H.*, 2014 WI App 123, ¶45, 359 Wis. 2d 204, 857 N.W.2d 432. Whether a jury instruction fully and fairly informs the jury of the law applicable to the charges being tried is a question of law that an appellate court reviews independently. *State v. Ferguson*, 2009 WI 50, ¶9, 317 Wis. 2d 586, 767 N.W.2d 187.

II. THE JURY INSTRUCTION
CORRECTLY DEFINED THE
COMMON LAW DUTIES AND
AUTHORITY OF AN AGENT
UNDER A POWER OF
ATTORNEY AT THE TIME OF
BRYZEK'S OFFENSE.

When E.B. signed the Durable Power of Attorney in 1996, the Uniform Durable Power of Attorney Act, Wis. Stat. § 243.37 (1995-96), governed those instruments. (A durable power of attorney, unlike the common law power of attorney, survives the principal's disability or incapacity. *See Russ v. Russ*, 2007 WI 83, ¶44, 302 Wis. 2d 264, 734 N.W.2d 874 (Abrahamson, C.J., concurring).) That statute did not contain a provision comparable to the current Wis. Stat. § 244.14.

The legislature repealed Wis. Stat. § 243.37 in 2010 when chapter 244 was enacted. *See* 2009 Wis. Act 319, §§ 14, 16. The Act was published on May 26, 2010, and became effective on "the first day of the 4th month beginning after publication." *Id.*, § 18.

The trial court's ruling that the jury instruction was based on "new law" is correct with respect to an agent's *statutorily* imposed duties. The court cited several sources that indicate that the new statute created duties not contained in the prior version of the statute. For example, an analysis by the Legislative Reference Bureau of the bill creating chapter 244 notes that, among other changes, "[t]he bill contains a default rule prohibiting an agent, other than the principal's spouse or domestic partner, from making a gift to the agent or certain other persons. Current statutory language is silent on these issues" (79:14; A-App. 138).

But the common law was not silent on that default rule. There were several Wisconsin cases decided prior to the enactment of the new statute that held that, in the absence of a provision expressly allowing the agent under a power of attorney to self-deal or make gifts, the agent has a fiduciary duty to act solely for the benefit of the principal. See *Alexopoulos v. Dakouras*, 48 Wis. 2d 32, 40-41, 179 N.W.2d 836 (1970); *Losee v. Marine Bank*, 2005 WI App 184, ¶16, 286 Wis. 2d 438, 703 N.W.2d 751; *Praefke v. American Enterprise Life Ins. Co.*, 2002 WI App 235, ¶16, 257 Wis. 2d 637, 655 N.W.2d 456. As this court explained, "A fiduciary will not be allowed to feather his or her own nest unless the power of attorney specifically allows such conduct." *Praefke*, 257 Wis. 2d 637, ¶12.

But what if the power of attorney specifically allows such conduct? *Alexopoulos*, *Losee*, and *Praefke* did not address that issue because the powers of attorney in those cases did not allow the agent to

engage in self-dealing or make gifts to himself. *See Alexopoulos*, 48 Wis. 2d at 35, 39-42; *Losee*, 286 Wis. 2d 438, ¶20; *Praefke*, 257 Wis. 2d 637, ¶20.

The Wisconsin case that addresses the duties of an agent under a power of attorney who is authorized to engage in self-dealing is *Russ*. In *Russ*, the defendant and his mother opened a joint bank account funded by his mother's income in 1985. *See Russ*, 302 Wis. 2d 264, ¶4. In 1999, the mother executed a durable power of attorney that named the defendant as her agent; that instrument did not allow the defendant to make gifts. *See id.*, ¶5. The mother was declared incompetent in 2002 and, shortly thereafter, her guardian sued the defendant for money he withdrew from the joint account for his personal use while he was his mother's agent under the power of attorney. *See id.*, ¶¶6-7.

The supreme court said the case involved "conflicting and inconsistent presumptions." *Id.*, ¶31. On the one hand, there was a presumption of donative intent by the mother resulting from her son's co-ownership with her of the joint account. *Id.* "On the other hand," the court said, "a fiduciary, such as a POA agent, has an obligation not to engage in self-dealing." *Id.*, ¶32. "When a POA agent, for the agent's own use, transfers funds deposited by the principal, without written authority in the POA document to do so, a presumption of fraud is created, regardless of whether the funds were deposited before or after the execution of the POA." *Id.*

The court held that “[w]hen these two conflicting and inconsistent presumptions coexist, the circuit court is then free to make a determination based upon the facts and the credibility of the witnesses.” *Id.*, ¶36. “Under such circumstances, as well as in cases where a power of attorney agent actively uses his or her authority to create a joint account with the principal, thereby triggering a presumption of fraud, extrinsic evidence may be admissible to determine the intent of the parties.” *Id.* The supreme court affirmed the circuit court’s dismissal of the case based on the circuit court’s factual findings that before signing the POA, the mother gave the defendant broad discretion to use the money in the joint checking account and that the parties’ understanding before and after she signed the POA was that the defendant could do as he pleased with her money. *Id.*, ¶¶38-39.

Russ establishes that the factfinder should weigh the competing rights and duties of an agent under a power of attorney. The court expressed the standard for making that determination as “the intent of the parties.” *Id.*, ¶36. As then-Chief Justice Abrahamson explained in her concurring opinion, the *Russ* court “adopt[ed] the ‘intention of the principal’ as the standard for testing the agent’s decision-making in the present case,” under which “[a]n agent is to act according to the principal’s wishes.” *Id.*, ¶53 (Abrahamson, C.J., concurring).

Three years after the *Russ* decision, the legislature enacted chapter 244. *See* 2009 Wis. Act 319, § 16. According to the Legislative Reference Bureau’s analysis of the bill, Chapter 244 “adopts the

Uniform Power of Attorney Act” (79:12; A-Ap. 136). The comments to the Uniform Act state that it “contains rules that govern all powers of attorney subject to the Act. Examples of these include imposition of certain minimum fiduciary duties on an agent who has accepted appointment (Section 114(a)).” Uniform Power of Attorney Act (1984), 8B U.L.A. 183-84 (2014) (A-Ap. 139-48).

When drafting Wis. Stat. § 244.14(1), the legislature adopted language substantively identical to Section 114(a) of the Uniform Act. Section 114(a) provides:

(a) Notwithstanding provisions in the power of attorney, an agent who has accepted appointment shall:

(1) act in accordance with the principal’s reasonable expectations to the extent actually known by the agent and, otherwise, in the principal’s best interest.

(2) act in good faith; and

(3) act only within the scope of authority granted in the power of attorney.

Uniform Power of Attorney Act (1984), § 114(a), 8B U.L.A. 203-04 (2014) (A-Ap. 144-45).

The comment to § 114 describes the nature of the agent’s duties under that provision:

Although well settled that an agent under a power of attorney is a fiduciary, there is little clarity in state power of attorney

statutes about what that means. Among states that address agent duties, the standard of care varies widely and ranges from a due care standard to a trustee-type standard. Section 114 clarifies agent duties by articulating minimum mandatory duties (subsection (a)) as well as default duties that can be modified or omitted by the principal (subsection (b)).

The mandatory duties – acting in accordance with the principal’s reasonable expectations, if known, and otherwise in the principal’s best interest; acting in good faith; and acting only within the scope of authority granted – may not be altered in the power of attorney. Establishing the principal’s reasonable expectations as the primary guideline for agent conduct is consistent with a policy preference for “substituted judgment” over “best interest” as the surrogate decision-making standard that better protects an incapacitated person’s self-determination interests.

Id. at 205 (citations omitted); A-Ap. 146.

Under section 104(a) of the Uniform Act, from which Wis. Stat. § 244.14(1) is derived, “the principal’s reasonable expectations” provide “the primary guideline for agent conduct.” *Id.* Similarly, under *Russ*, the standard for determining the authority of an agent under a power of attorney who is authorized to engage in self-dealing is “the intent of the parties,” *Russ*, 302 Wis. 2d 264, ¶36. More specifically, under that standard, “[a]n agent is to act according to the principal’s wishes.” *Id.*, ¶53 (Abrahamson, C.J., concurring). The new statutory standard (the principal’s reasonable expectations) thus is the same as the existing common law standard (the principal’s wishes).

Against that backdrop, the State returns to the language of the jury instruction:

The authority of a Power of Attorney means that despite any provision to the contrary in the Power of Attorney, an agent who has accepted appointment shall act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, if those expectations are not known, in the principal's best interest; act in good faith; and act only within the scope of authority granted in the Power of Attorney. Good faith means honesty in fact.

(99A:62-63; A-Ap. 121-22.)

Every portion of that instruction is consistent with the common law principles that were in effect at the time of Bryzek's offense.

"The authority of a Power of Attorney means that despite any provision to the contrary in the Power of Attorney. . . ." That language instructed the jury that the gifting provision in the Power of Attorney did not trump Bryzek's other duties to his principal – that the gifting provision did not give Bryzek *carte blanche* to make gifts to himself. That principle was established in *Russ*, where the court held that the agent's power to use for his own purposes money held in a joint account with his principal, pursuant to which he owed no duty to the principal, *see Russ*, 302 Wis. 2d 264, ¶31, had to be balanced against the agent's fiduciary duties to the principal under the power of attorney in a manner that effectuated the principal's intent, *see id.* at ¶¶32-40.

“[A]n agent who has accepted appointment shall act in accordance with the principal’s reasonable expectations to the extent actually known by the agent and, if those expectations are not known, in the principal’s best interest. . . .” As discussed above, Russ established that when an agent under a power of attorney is authorized to engage in self-dealing, the agent must act according to the principal’s intent and wishes. And, as the Comment to the Uniform Act quoted above explains, the requirement that an agent “act[] in accordance with the principal’s reasonable expectations, if known, and otherwise in the principal’s best interest; act[] in good faith; and act[] only within the scope of authority granted” ensures that the agent fulfills his or her duty to act consistent the principal’s reasonable expectations. See Uniform Act, Comment at 205; A-App. 146.

The agent “shall . . . act in good faith”; “Good faith means honesty in fact.” An agent under a power of attorney has a fiduciary relationship with the principal. See *Alexopoulos*, 48 Wis. 2d at 40-41. “The specific duties of a fiduciary vary depending on the specific type of relationship but, in general, fiduciaries have duties of honesty, fidelity, and good faith. . . .” *Zastrow v. Journal Communications, Inc.*, 2005 WI App 178, ¶24, 286 Wis. 2d 416, 703 N.W.2d 673, *aff’d*, 2006 WI 72, 291 Wis. 2d 426, 718 N.W.2d 51.

The agent “shall . . . act only within the scope of authority granted in the Power of Attorney.” It is the long-established law of this state that “the powers of

the attorney-in-fact⁷ are strictly construed and are interpreted to grant only those powers that are clearly delineated or specified." *Praefke*, 257 Wis. 2d 637, ¶9 (citing *First Nat'l Bank of Omro v. Bean*, 141 Wis. 476, 480, 124 N.W. 656 (1910)).

Bryzek has taken the position that because the Power of Attorney granted him the power to make gifts to himself, he had unlimited authority to use his mother's money for his own purposes regardless of the deleterious effects on his mother (35:2-3; 69:2-3; 104:10). Just as that is not the law under Wis. Stat. § 244.14(1) (2013-14), it was not the law when Bryzek committed this offense.

Wisconsin Stat. § 244.14(1) and the jury instruction based on that statute did not impose any duties on Bryzek or restrict his authority as his mother's agent beyond what was required of agents under the common law when Bryzek spent E.B.'s money on himself while ignoring her financial obligations. Because the jury instruction correctly stated the law that applied at the time of the offense, the circuit court erred when it granted a new trial based on its conclusion that the jury instruction reflected "new law."

⁷An agent under a power of attorney is alternatively referred to as an attorney-in-fact. See *Russ*, 302 Wis. 2d 264, ¶15.

CONCLUSION

For the reasons stated above, the court should reverse the circuit court's orders granting postconviction relief.

Dated this 12th day of October, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar #1009170

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,745 words.

Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12). I further certify that 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 12th day of October, 2015.

Jeffrey J. Kassel
Assistant Attorney General

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2015AP1501-CR

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

MICHAEL W. BRYZEK,
Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING
POSTCONVICTION RELIEF ENTERED IN THE
WALWORTH COUNTY CIRCUIT COURT, THE
HONORABLE DAVID M. REDDY, PRESIDING

APPENDIX OF PLAINTIFF-APPELLANT

BRAD D. SCHIMEL
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar #1009170

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

INDEX TO APPENDIX

	Page
Order vacating judgment of conviction and granting a new trial (82:1-2).....	101
Amended order vacating judgment of conviction and granting a new trial (83:1)	103
Transcript of ruling on postconviction motion (105:1-4).....	104
Transcript of pretrial ruling on jury instruction (94:1, 13-20)	108
Transcript of final jury instruction conference (99A:1, 55-57).....	117
Transcript of jury instruction reading (99A:62-63).....	121
General Durable Power of Attorney (36:Exhibit S-16).....	123
Erickson report (36:Exhibit S-13)	127
Legislative Reference Bureau analysis of 2009 A.B. 704 (79:12-14)	136
Uniform Power of Attorney Act (1984) (excerpt).....	139

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix that complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 12th day of October, 2015.

Jeffrey J. Kassel
Assistant Attorney General