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 AND APPENDIX OF DEFENDANT-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant does not request oral argument. Publication of the court's opinion is warranted because there are no Wisconsin cases that address the relationship of the duties of an agent under Wis. Stat. § 244.14 (1) compared to the duties of a common-law agent acting under a durable power of attorney, or an agent acting under a durable power of attorney created under Wis. Stat. Ch. 244. As a result, a decision in this case would meet the publication standards under Wis. Stat. § 809.23 (1), (4), and (5).

STATEMENT OF THE CASE

This case arises out of the State's prosecution of a son, chosen by his mother, to function as her durable power of attorney, without a single piece of evidence that the son in any way violated his mother's intent when functioning in the role of attorney-in-fact. In 1996, E.B. executed a General Durable Power of Attorney that named Michael Bryzek as her agent and attorney-in-fact. R. 97A, p. 59; R. 36, Exhibit S-16.[1] In making her selection of Bryzek as her attorney-in-fact, E.B. chose Bryzek, her favorite son, to receive the powers under the Power of Attorney instead of one of her other five children.

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[1] R. ___, p. ___ refers to documents and pages in the record.

The Power of Attorney specifically and unequivocally provided that Bryzek could:

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

R. 36, Exhibit S-16, p. 2.

Prior to any evidence being presented in this case, the State requested that the jury be instructed as to the duties of an agent under a Power of Attorney based upon the provisions of Wis. Stat. § 244.14 (1). R. 93, p. 9-10. The State asked that the provisions of Wis. Stat. § 244.14 (1) be read to the jury in its entirety, the only change being replacing with the word "notwithstanding" to despite. R. 93, p. 10. In the process of the discussion between the court and counsel, the court asked the State to look at the statute books in the courtroom and refer him directly to the statute in question. R. 93, p. 9-10. Without telling the court that Wis. Stat. § 244.14 (1) did not become effective until September 10, 2010[2], the State successfully argued:

> So the issue is going to be how would she have done it if she was the one writing the checks, would she have authorized

[2] The charging period in the complaint was May 2007 through November 2010. R. 2, p. 1. However, after September 1, 2010, only $4,321.59 worth of allegedly improper transactions occurred after September 1, 2010, R. 33, Exhibit S-13, pp. 8-9 – far less than what is required to support a conviction for theft in an amount greater than $10,000 – and of that $4,321.59, the court commissioner in his restitution, which was adopted by the trial court, held that only for checks numbered 1247, 1273, 1325, 1327, 1328, 1329 which had a total value of $1,927.78 had the minimum test of a preponderance of the evidence been met to prove these items were indeed theft. R. 64, pp. 2-3. An amount, if proven beyond a reasonable doubt at trial would have only constituted a Class A misdemeanor under Wis. Stat. § 943.20 (3) (a).

> the gifts, the money that Mr. Bryzek spent that was not for [E.B.'s] benefit. To what extent does a Power of Attorney grant him authority to spend that money in the way Michael Bryzek wishes. What the law tells us in 244.14(1) is despite any provisions to the contrary in the Power of Attorney, an agent shall. And we look at Sub. (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, act in the principal's best interest. And (b), act in good faith. And (c), act only within the scope of the authority granted in the Power of Attorney.

R. 93, pp. 11-12. The State succeeded with that argument. And the jury, over the objection of Bryzek's counsel, R. 99A, p. 51, the jury was instructed that the "authority" element, element number 2 in the crime of theft by a bailee, was defined by the precise words found in Wis. Stat. § 244.14 (1) with the word "nothwithstanding" changed to "despite." R. 99A, p. 62-63.

The State faced a proof problem with respect to what E.B's reasonable expectations known by the agent were. The problem was Bryzek could not be compelled to testify about what he knew and E.B. was incompetent to testify. R. 94, p. 11-12. In an attempt to satisfy the State's proof problem with respect to the "authority" element of the crime of theft by a bailee, the State offered, over the objection of

Bryzek's counsel, R. 97, p. 37, lines 8 through 14, "expert" testimony from the lawyer and trust officer appointed guardian of E.B.'s estate.[3]

That witness, Jon Erickson, a lawyer and trust officer at New Citizen's Bank of Whitewater, was appointed guardian of E.B.'s estate in 2011. R. 95, p. 46, 48. After Erickson was appointed E.B.'s guardian, Erikson inventoried the E.B. assets. R. 95, p. 47. Erickson determined that E.B. owned assets totaling $492,654, but that she lacked liquidity to pay bills, including property taxes. R. 97A, p. 33, 46. Indeed, while Erickson was guardian of E.B.'s estate, Citizen's Bank advanced a $7,000 loan to E.B. to pay property taxes on property she owned in Michigan. R. 95, p. 33.

Mr. Erickson testified that he had been appointed approximately 125 to 150 times as guardian of estates. R. 95, p. 51. He testified that his authority as guardian of E.B.'s estate was governed by statute. *Id.* He further testified that in his role:

> Q. Do you have a fiduciary duty to [E.B.]?
> A. Yes.

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[3] Bryzek's Post-Conviction Motion included a challenge to Erickson's testimony based upon the arguments that (1) Erickson's testimony could not be offered to explain the Power of Attorney, See *Praefke v. American Enterprise Life Ins. Co.*, 2002 WI App 235, ¶¶ 7, 20, 257 Wis.2d 637; (2) Erickson's testimony was based upon the analyzed the wrong issue; and (3) Erickson's testimony violated the holding of *See State v. Hazeltine*, 120 Wis.2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). The trial court did not reach the issues raised in that part of Bryzek's motion because the court found that the application of the standards created in Wis. Stat. § 244.14(1) meant that the prosecution was based upon an *ex post facto* statute. R. 105, pp. 2-4.

> Q. What does it mean to have a fiduciary duty?
>
> A. It means I act in her best interest first and foremost, do what's right.

R. 95, p. 52. Mr. Erickson also testified, over the objection of counsel, that in his capacity gifting is only done under a Power of Attorney when there is a pattern of gifting has been established or when an estate is of a size that the estate is reduced for estate tax purposes. R. 95, p. 54-55. He testified that he never, as a trust officer, unilaterally gave a gift. R. 95, p. 58.

His testimony with respect to the transactions that he found "out of the norm for someone in [E.B.'s] position," R. 95, pp. 73-74; R. 97A, p. 21; R. 36, Exhibit S-13, was identical in each instance. He testified with respect to some of the items he found to be "out of the norm" that the item was "out of the norm" because in his opinion E.B. did not have a "need" for the transactions. *See* R. 95, pp. 76, 80, 84, 93, 107, 110. In a second set of instances, Erickson testified that the expenditure were "not in the best interest of [E.B.]" or "for the benefit of [E.B.]" *See* R. 95, p. 82, 94-95, 101, 106, 113, 129, 136, 138, 144. In a third set of instances Erickson testified that he had never had to write checks to certain payees. *See* R. 95, p. 86, 87, 88, 98, 99, 100, 114, 127, 128, 134, 142.

The problem with all of that testimony is precisely what the court found in the restitution hearing:

> THE COURT FINDS that [Mr. Erickson's testimony] misses the issue at hand. The issue at hand is not whether the expenses were necessary for [E.B.] or whether a different Power of Attorney or Guardian would have managed her available resources differently or whether that management could have been done better. The issue at hand is also not even necessarily whether those expenditures or allocations were improper but rather did the management or mismanagement of the funds constitute a theft by the defendant. In other words did he convert those funds for his own personal use or the use of another.

R. 64, p.2.

The jury found Bryzek guilty of theft of more than $10,000 based upon the testimony of Erickson. R. 99A, p. 151.

In postconviction proceedings, Bryzek challenged the jury instruction which incorporated the language of Wis. Stat. § 244.14 (1) as applied to Bryzek created an *ex post facto* law. R. 69, p. 6-9. The State argued that there was no *ex post facto* violation because the statute merely codified existing common law principles. R. 78, pp. 19-24.

The court asked for additional briefing on the issue of whether the statute was a "codification of existing law" or whether the statute was something "new." R. 104, p. 39. After that briefing, the court reached its conclusion. The provisions of Wis. Stat. § 244.14 (1) were

"new" and as a result, the court granted Bryzek a new trial. R. 82, R. 83.

The State appealed from that ruling. R. 84.

ARGUMENT

I. THE TRIAL COURT'S CONCLSUION THAT THE APPLICATION OF WIS. STAT. § 244.14(1) TO THE ENTIRE CHARGING PERIOD IN THIS CASE CREATED AN *EX POST FACTO* LAW IS CORRECT.

The trial court broke down the arguments advanced on postconviction motions into three separate issues. First, whether the Power of Attorney itself precludes a conviction under Wis. Stat. § 943.20 (1) (b). The trial court denied post-conviction relief based upon that argument. R. 104, p. 10. Second, whether Wis. Stat. § 244.14 (1) is an *ex post facto* law as applied in this case. R. 104, p.11. The trial court granted a new trial based upon that argument. R. 105, pp. 2-3; R. 82; R. 83. Third, whether the testimony of Mr. Erickson was improperly admitted. R. 104, p. 37. The trial court never reached that issue as it had already granted a new trial based upon the *ex post facto* law argument. R. 105, p. 4.

There can be little doubt based upon the record that the trial court concluded that Wis. Stat. § 244.12(1) as applied in this case was an *ex post facto* law. The determination of whether a law is *ex post*

facto as applied is a question of law which is reviewed *de novo. State v. McMaster,* 206 Wis.2d 30, 36, 556 N.W.2d 673 (1996).

> It is settled by the decisions of the Court so well known that their citations may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed is *ex post facto.*

State v. Thiel, 188 Wis. 2d 695, 700, 524 N.W.2d 641(1994) [adopting the definition of *ex post facto* set forth by the United States Supreme Court in *Collins v. Youngblood,* 497 U.S. 37, 42, 110 S.Ct. 2715 (1990)].[4] While the defendant claiming that a statute as applied has a heavy burden because of the strong presumption of constitutionality given to statutes, each case of which considers whether a statute is constitutionally infirm because it violates the *ex post facto* clauses, turns on the particularized facts of each case. *Id.,* at 704-705.

In this case, the particularized facts overcome any presumption of constitutionality and demonstrate conclusively that the jury instructions as to criminality of the conduct of an agent under a power of attorney for conduct which predated the provisions of Wis. Stat. §§ 244.14(1) and 244.02(6) because the instruction and use of statutes criminalized conduct which prior to the effective date of the statute was innocent and because the

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[4] The *Ex Post Facto* prohibition in the Wisconsin Constitution is found in Article I § 12. The *Ex Post Facto* prohibitions of the United States Constitution are found in Article I §§ 9, and 10.

use of the statute as an instruction outlining the duty of the agent deprived the defendant of a defense available at the time when the act was committed.

The charging dates in this case are May 23, 2007 to November 19, 2010. R. 2, p. 1. Wis. Stat. §§ 244.02 (6) and 244.14 (1) were enacted by the legislature as 2009 Act 319, § 16 with an effective date of September 1, 2010. Prior to that date, Durable Powers of Attorney were governed by Wis. Stat. §§ 243.07 and 243.10. Neither § 243.07 nor § 243.10 contained the "notwithstanding any provisions to the contrary in the power of attorney" language or the duties delineated in Wis. Stat. §244.14(1) nor did either statute contain a definition of "good faith."

The 2010 change in the law with respect to durable powers of attorney made a substantial change in the law with respect to the definition of the duties and responsibilities of an agent under a durable power of attorney. Prior to the 2010 change, the only real definition of the duties of an agent were those developed in the case law interpreting then existing Wis. Stat. §§ 243.07 and 243.10. Prior to the passage of Wis. Stat. Chapter 244, case law concluded that a durable power of attorney created fiduciary duties on the part of the agent, *See Russ ex rel. Schwartz v. Russ,* 2007 WI 83, ¶¶ 14, 15, 302 Wis.2d 264, 734 N.W.2d 874 (2007); *Praefke v. American Enterprise Life Ins. Co.,* 2002 WI App 237, ¶¶ 14, 16, 257 Wis.2d 637; *Alexopoulos v. Dakouras,* 48 Wis.2d 32, 41, 179 N.W.2d 836 (1970). Each of those cases reached the same salient conclusion with respect to what an agent could or

could not do under a power of attorney. They concluded two things (1) an agent under a power of attorney "may not engage in self-dealing unless the power to self-deal is written in the power of attorney document;" and (2) there is a "bright-line rule that an attorney-in-fact may not make a gift to himself or herself unless there is an explicit intent in writing from the principal allowing the gift." *Id.*

The State's argument that common law was not silent on a default rule with respect to gifting under powers of attorney is misleading. It is true that at common law and in the cases developed under prior the prior durable power of attorney statutes, Wis. Stat. §§ 243.07 and 242.10, did contain default rules which precluded gifting or self-dealing with respect to the principal's assets unless the power of attorney specifically allowed such conduct. Where, as here, the Power of Attorney granted the right to gift and self-deal, there was no default rule. Rather, the Power of Attorney's grant of authority controlled.

The State asserts that the *Russ* case sets the default "duties of an agent under a power of attorney who is authorized to engage in self-dealing." *See* State's Brief at 15. The State's assertion is flatly wrong. The power of attorney in *Russ* did not allow for gifts or self-dealing. *Russ, at* ¶¶ 27-30, and ¶59 ("In completing the durable power form, the mother did not explicitly allow her son to make gifts or engage in self-dealing.") The only reason an issue of fact was presented in the *Russ* case was the existence of a joint

account between the mother and the son prior to the date of the power of attorney.

As a result, the State has not offered one case that creates a default rule related to gifting or self-dealing when the power to gift and self-deal is specifically granted in the Power of Attorney. There were none in Wisconsin prior to the enactment of Wis. Stat. § 244.14(1). That's where the problem arises in this case.

The power of attorney in this case explicitly and unambiguously provides that Michael Bryzek, as agent and attorney-in-fact, the unlimited right to "make gifts of any kind, including gifts to my agent." R. 36, Exhibit S-16, p. 2. The power of attorney also explicitly and unambiguous "ratified" and "confirmed" all actions of the agent in advance of the actions. R. 36, Exhibit S-16, p. 2-3. Under the law as it existed prior to the adoption of the language of Wis. Stat. §244.14 (1), which imposed duties "notwithstanding any provision to the contrary in the power of attorney," that language, contained in E.B.'s Durable Power of Attorney meant Bryzek had the right to do just what he did as E.B.'s agent and attorney-in-fact. Thus, every one Bryzek's actions, which occurred prior to September 1, 2010 that the State advances as support for the judgment of conviction, were actions that were "innocent" under the law as it existed at that time. He had the power to gift, including gifts to himself. That power had no limitation. The fact that he exercised those rights was neither a violation of the power of attorney nor

was it a crime. The power of attorney granted him an absolute defense to any criminal charge like the one advanced in this case.

Indeed, the breadth of the powers granted by the statutes governing Powers of Attorney, namely Wis. Stat. §§ 243.07 and 243.10, and the lack of guideposts to govern the fiduciary responsibilities of agents under such powers of attorney led to a concurring decision in the *Russ* case which specifically urged

> The legislature should consider formulating guideposts to govern the fiduciary responsibilities of an agent so that agents can operate efficiently on behalf of the principal under a durable power, while the principal is protected from abuse of the power and unnecessary court interventions and government intrusions are prevented. Any reform of the durable power of attorney must preserve and foster the instrument's usefulness.

Russ, 2007 WI 83 ¶64. The legislature created those guideposts effective September 1, 2010. Prior to that date, actions like that of Bryzek simply could not have been considered a crime under the law and the Power of Attorney that existed in this case.

In the legislation effective September 1, 2010, the legislature repealed of the provisions of Wis. Stat. §§ 243.07 and 243.10, and the creating of the new framework for durable powers of attorney under Chapter 244. That enactment 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.

The legislative history of the statute confirms that conclusion. The Legislative Reference Bureau's analysis of 2009 Assembly Bill 704, which became 2009 Wisconsin Act 319 and ultimately Chapter 244, states "[t]his bill includes definitions and general rules that are not in current law." App. . As the Legislative Reference Bureau specifically states "[t]he bill provides guidance where there is none in current law regarding default rules for . . . agents' reimbursement and compensation, . . . [and] the agent's duties . . . . The bill is given a specific context with respect to common law principles: "The bill clarifies that the power of attorney is supplemented by the principles of common law to the extent those principles are not displaced by specific provisions and . . . remedies under the bill are not exclusive and do not abrogate any other cause of action or remedy that may be available under current law."

The Wisconsin Legislative Council Act Memo echoes the original bill. "The Act updates existing statutes addressing uniform power of attorney and supercedes both prior uniform acts in the following ways:

- *Agent Conduct* – Guidance regarding default rules for . . . the agent's duties . . ."

App. (Emphasis Added). The Legislative Council memo also concludes that "2009 Wisconsin Act 319 clarifies that unless displaced by specific statutory provisions, the principles of common law **supplement** the statutory language." *Id.* (Emphasis Added).

Commentators have reached the same conclusion.

> The Act provides default fiduciary duties that the agent owes the principal. [Wis. Stat. § 244.14] The minimum, mandatory duties require the agent to 1) follow the principal's reasonable expectations (or if unknown, to act in the principal's best interest); 2) act in good faith; and 3) act only within the scope of the POAF. Additional default fiduciary duties – for example, the duty of loyalty and the duty of care – are expected, unless the principal expressly provides otherwise. The statutory form provides an addendum describing the agent's fiduciary duties.

Beerman & Johnson, "Procedural Gray Areas: New POA for Finances," *Wisconsin Lawyer*, Volume 84, Number 10, October 2011. The article concludes "[t]he new Act is a welcome change, containing improvements such as better protections for both the principal and persons asked to rely on the POAF." *Id.*

Similarly, the Wisconsin Guardian Support Center provides identical analysis:

> Key Changes to the New POA-F to Approach with Caution
>
> - The new POA-F automatically entitles the agent to reasonable compensation for performing his or her duties as agent under the document. . . .
>
> - One excellent default rule of Chapter 244 is that the agent is not allowed to make gifts or self-deal. However, any language permitting an agent to make gifts must be approached with serious caution, despite the fact that gifting authority is already subject to several restrictions under the new statute. If gifting authority is granted, the agent is not allowed to make gifts of more than the annual federal gift-tax exclusion amount unless the gifting provision is expressly modified. The agent many only make gifts that are consistent with the principal's expressed wishes if known by the agent; if unknown, the

> agent may only make gifts that would be in the principal's best interests based on all relevant considerations. . . .

"Wisconsin's New Uniform Power of Attorney for Finances and Property;" *The Guardian*, Coalition of Wisconsin Aging Groups Elder Law Center, Second Quarter 2010.

In short, the legislature did enact "new" law rather than codifying existing law when it created the provisions of Wis. Stat. § 244.14 (1). The language directing that *"[n]otwithstanding provisions to the contrary in the power of attorney*, an agent who has accepted appointment shall: (1) act in accordance with the principal's reasonable expectations[5] to the extent actually known by the agent, otherwise, in the agent's best interest . . ." are restrictive provisions on an explicit grant of a specific authority to gift to the agent (Emphasis Applied). As such, the application of those new restrictions in this case makes Wis. Stat. § 244.14 (1) *ex post facto* as applied in this case.

B. The Trial Court's Grant of A New Trial was not an Erroneous Exercise of Discretion.

If the State is correct in its assertion that the trial court was not actually ruling that the statute as applied was *ex post facto* but rather "new"

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[5] The State argues that this provision is the same as a common law principal that the agent is to act according to the principal's wishes. That is once again simply wrong. If the principal wished, as is set forth in the specific language of the Power of Attorney in this case, that the agent could gift without restriction to the agent or others, that should have been enforced prior to the enactment of Wis. Stat. § 244.14. However, after the enactment of the statute, the agent can only act in accordance with the principal's wishes if those wishes are "reasonable." That is the unambiguous language of the statute. The statute places a restriction upon the agent in spite of the wishes of the principal as expressed in explicit language in the power of attorney to those that are "reasonable."

law that did not exist during a portion of the charging period, then the trial court's grant of a new trial is not an erroneous exercise of discretion. Appellate courts review 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 346 (Ct. App. 1996).

The trial court may have granted the new trial in this case not because of a constitutional finding regarding the statute as applied an *ex post facto* law, but rather, finding that the jury instruction that incorporated the provisions of the "new" law did not fully and fairly inform the jury of the law applicable to the charges being tried. In that instance, a new trial is appropriate even though questions related to jury instructions in a criminal case are questions of law reviewed independently by an appellate court. *State v. Ferguson*, 2009 WI 50, ¶9, 317 Wis.2d 586, 767 N.W.2d 187.

The jury instruction's elevation of the duty of an agent under a Durable Power of Attorney to something more than following the provisions of the durable power when the durable power was granted or governed a period before the effective date of Wis. Stat. §244.14 is an example of a jury instruction that does not fully and fairly inform the jury of the law applicable to the charges. The reason for that conclusion is that the instruction did not strike the appropriate balance between the authority granted in the Power of Attorney and whatever common law duty arguably applied to at the time. There is certainly no case that imposes duties notwithstanding the provisions

contained in a Power of Attorney. Thus, if the instruction had been written to define the authority of an agent as not including gifts to the agent absent a specific provision in the power of attorney -- that would have been the appropriate instruction. The State did not want that instruction because the State feared the jury would be convinced that the power granted by E.B. to Bryzek in this case would preclude any conviction. R. 94, pp.14-16.

If the State believes that it can convict Bryzek based upon two separate cases, one under the new law and one under the law as it existed prior to September 1, 2010, the grant of a new trial provides precisely that opportunity to argue that and see what happens in the pre-trial and trial phases of the case. At the same time, the grant of a new trial is likely to result in an acquittal because, absent the statutory language, the power of attorney will likely function to preclude a conviction for at least those activities which occurred before the new statute and "new" law existed.

In light of the fact that some of the alleged criminal activity occurred before the change in the statutory duties and some occurred after the change in statutory duties, the trial court struck the appropriate balancing of interests, those of the state, and those of the defendant in granting a new trial. That is not an erroneous exercise of discretion. Rather, the actions of the trial court in granting a new trial are entirely an appropriate exercise of discretion.

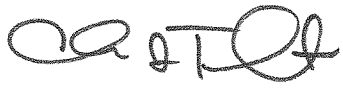
CONCLUSION

Based upon the foregoing argument and authority, the postconviction order of the trial court, granting a new trial should be affirmed.

Dated this 12th day of November, 2015.

Respectfully Submitted,

LAW OFFICES OF
CHRIS J TREBATOSKI, LLC



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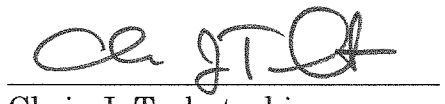
CERTIFICATION

I do hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief prepared with a proportional serif font. The length of the brief is 4,682 words.



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CERTIFICATE OF COMPLIANCE WITH WIS STAT. § (RULE) 809.19(12)

I do 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 form to the printed for of the brief filed as of this date.

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

Dated this 12th day of October, 2015.

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