STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

CITY OF EAU CLAIRE,
Plaintiff-Appellant,

v.

Appeal No. 2016AP248

DAVID EUGENE PHELPS,
Defendant-Respondent

BRIEF OF PLAINTIFF-APPELLANT CITY OF EAU CLAIRE

ON APPEAL FROM THE EAU CLAIRE CIRCUIT COURT
CASE NOs. 2015TR7555; 2015TR8099
THE HONORABLE WILLIAM M GABLER, PRESIDING

Douglas Hoffer
Eau Claire Assistant City Attorney
State Bar No. 1079432
Jenessa Stromberger
Eau Claire Assistant City Attorney
State Bar No. 1090100
203 S. Farwell Street
Eau Claire, WI 54701
(715) 839-6006
douglas.hoffer@eauclairewi.gov

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INTRODUCTION

Eau Claire police officer Michael McClain had specific articulable facts that gave him a reasonable basis to stop David Phelps' motor vehicle. Officer McClain, while on duty on a Sunday morning at approximately 2:30 a.m., observed Phelps illegally impede traffic by driving approximately 12 miles per hour the entire time Officer McClain was travelling behind Phelps, observed Phelps execute an illegal turn, and observed Phelps twice leave his turn signal on for unusually long periods of time. It was thus reasonable for Officer McClain to initiate a short investigatory stop.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The material facts of this case are not in dispute. On Sunday, August 9, 2015 at approximately 2:30 a.m., around the time bars close in Eau Claire on a weekend, Officer Michael McClain ("Officer McClain") of the City of Eau Claire Police Department was on regular patrol duty in a marked police squad car on Farwell Street in downtown Eau Claire. (R. 11: 4-5) Officer McClain observed Phelps driving southbound on South Farwell Street. (R. 11: 5) Officer McClain observed Phelps traveling approximately 12-15

miles per hour in a 35 mile per hour zone for a period of several blocks. (R. 11: 5) Phelps' turn signal was on for approximately a block to a block and a half. (R. 11: 5) Phelps' exceptionally slow speed impeded Officer McClain. (R. 11: 8-9, 25) Despite Phelps' exceptionally slow speed at bar time and Phelps' use of a turn signal for over a block and a half, Officer McClain did not initiate a traffic stop, but continued to monitor Phelps' driving. (R. 11: 5)

Phelps next executed an illegal right turn by turning into the left-hand lane of travel instead of the closest right-hand lane on Lake Street in violation of Wis. Stat. § 346.31(2). (R. 11: 5-6) Officer McClain did not notice anything unusual or out of the ordinary about the road condition as he turned onto Lake Street behind Phelps. (R. 11: 6) Officer McClain noted that Phelps continued to drive 12-13 miles per hour over several more blocks, now in a 30 mile per hour zone. (R. 11: 6) Officer McClain was impeded by the vehicle's slow speed. (R. 11: 8-9, 25) Officer McClain then observed that the vehicle again activated its turn signal, this time for approximately three-quarters of the lengthy Lake Street bridge, which crosses the Chippewa River, before executing a left turn. (R. 11: 7) As the

vehicle was executing its next turn onto First Avenue, Officer McClain initiated a traffic stop. (R. 11: 7) Phelps was eventually arrested for operating a motor vehicle while under the influence of an intoxicant, and Phelps filed a motion challenging the legal basis for the initial traffic stop. (R. 7: 1-2; 11: 1-28).

Phelps conceded his extremely slow speed and illegal turn. (R. 11: 17-18) Phelps testified his slow speed and illegal turn were due to a fear that potholes would damage his small vehicle. (R. 11: 17-18)

Phelps' Suppression Motion challenging the reasonable basis for the stop was granted and the citations dismissed by the circuit court on December 30, 2015. (R. 11: 27) The circuit court determined that the stop was not based on specific articulable facts, but rather was based on a hunch. (R. 11: 26) The circuit court did not address, nor did it make any findings of fact regarding the disagreement between Officer McClain and Phelps regarding road conditions. (R. 11) The City of Eau Claire appealed.

ISSUES PRESENTED FOR REVIEW

Did Officer McClain have reasonable suspicion to conduct a traffic stop of Phelps?

Trial Court Answered: No. Officer McClain's decision to stop Phelps was merely based on a hunch and the case is therefore dismissed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Appellant does not recommend oral argument or publication. The issues raised in this appeal are largely matters of settled law.

STANDARD OF REVIEW

The application of constitutional principles to undisputed facts is a question of law that is reviewed de novo without deference to the circuit court's decision. *State v. VanLaarhoven*, 2001 WI App 275, ¶ 5, 248 Wis. 2d 881, 885, 637 N.W.2d 411, 414; *State v. Foust*, 214 Wis. 2d 568, 571-72, 570 N.W.2d 905, 907 (Ct. App. 1997).

ARGUMENT

I. Officer McClain had reasonable suspicion to stop Phelps.

Officer McClain's conduct on the morning in question was good police work that complied with constitutional principles. Officer McClain's traffic stop was more than just a "hunch;" it was based on specific, articulable facts, as required by law. Phelps' operation of a motor vehicle that early Sunday morning around bar time consisted of illegal, unusual and concerning driving behavior that provided Officer McClain with a reasonable suspicion to conduct a short investigatory stop. Phelps made an illegal turn and impeded traffic, either of which, taken by itself, is a statutory violation and is enough to create reasonable suspicion for an investigatory traffic stop. Phelps' defense, that the street was riddled with potholes, may be a defense to a ticket for the illegal turn; however, that defense does not negate the legitimate basis for an investigatory traffic stop. Additionally, Officer McClain did not rely solely on the illegal turn, but also observed other specific articulable facts that justified an investigatory traffic stop.

An investigatory or *Terry* stop requires a police officer to have reasonable suspicion that a legal violation has been committed. "An investigatory stop is constitutional if the police have reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." *State v. Young*, 2006 WI 98, ¶ 20, 294 Wis. 2d 1, 717 N.W.2d 729; *see also* Wis. Stat. § 968.24. Whether the police have reasonable suspicion is determined by viewing the facts "from the standpoint of an objectively reasonable police officer." *Young*, 2006 WI 98 at ¶ 58. An investigatory stop allows police officers to briefly detain a person for purposes of investigating possible illegal behavior. *Id.* at ¶ 20, citing *State v. Waldner*, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996).

Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that illegal activity is afoot. *Id.* at ¶ 21. Although police officers need more than a hunch, "police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." *Id.*, citing *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990); *see also State v. Conaway*, 2010 WI App 7, ¶ 5, 323 Wis. 2d

250, 779 N.W.2d 182. In fact, an investigatory stop is designed to help rule out the possibility of innocent behavior.

The Wisconsin Supreme Court concisely articulated the framework through which courts should analyze the validity of an investigatory stop – by determining whether any reasonable inference of wrongful conduct can be objectively discerned:

> [S]uspicious conduct by its very nature is ambiguous, and the [principal] function of the investigative stop is to quickly resolve that ambiguity. **Therefore if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry**.

Anderson, 155 Wis. 2d at 84; *Young*, 2006 Wis. 98 at ¶ 21 (emphasis added).

It was reasonable to believe that wrongful conduct occurred. Officer McClain testified to the following specific, articulable facts – which were not disputed – that warranted a reasonable belief that wrongful conduct occurred prior to the investigatory stop:[1]

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1 Officer McClain also testified that there were no unusual road conditions. The defendant disputed this fact, but the circuit court properly chose not address this area of disagreement. The issue is whether Officer McClain had a reasonable

1. A car drove down South Farwell Street at 12-15 miles per hour, in a 35 mile per hour zone.
2. The car impeded Officer McClain's travel.
3. It was approximately 2:30 a.m., or "bar time" on a Sunday morning
4. The car had its turn signal on for a block to a block and a half before making a turn.
5. The car passed opportunities to turn while the turn signal was on.
6. The car made an illegal turn onto Lake Street.
7. Now in a 30 mile per hour zone, the car continued to drive at 12-15 miles per hour for an extended period of time.
8. The car had its turn signal on for approximately three-quarters of the Lake Street bridge.
9. Observations of poor and unusual driving were made within a short span of time.

Officer McClain's decision to stop Phelps was good police work and a reasonable attempt to clarify whether Phelps was intoxicated. The standard for a valid investigatory stop – whether **any** reasonable inference of wrongful conduct can be objectively discerned – is met in this case. Once Officer McClain observed Phelps execute an illegal turn – notwithstanding Phelps' alleged affirmative defense – there was a legal basis for the traffic stop. Once Officer McClain observed Phelps impede traffic by driving 12 m.p.h. – notwithstanding Phelps' alleged affirmative defense - there

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suspicion to detain Phelps, not whether Phelps had an affirmative defense to the observed traffic violations.

was a legal basis for the traffic stop. However, although either the illegal turn or impeding traffic alone would provide a basis for a traffic stop, those were not the only facts that contributed towards the totality of circumstances Officer McClain observed prior to initiating a traffic stop.

Reasonable suspicion is also supported by the time of day and day of the week Phelps' illegal driving occurred. Wisconsin courts have consistently held that both time of day and day of the week are factors in creating reasonable suspicion to justify an investigatory stop, particularly in the drunk driving context. *See, e.g., State v. Post*, 2007 WI 60, ¶ 36, 301 Wis. 2d 1, 733 N.W.2d 634 (poor driving that takes place at or around "bar time" lends credence to suspicion that driver was intoxicated); *State v. Waldner*, 206 Wis. 2d 51, 60-61, 556 N.W.2d 681 (1996) (nothing illegal in itself about driving at late hour; however, other factors in combination with late-hour driving may "coalesce to add up to a reasonable suspicion"); *In re Wheaton*, 2012 WI App 132, ¶ 25-26, 345 Wis. 2d 61, 823 N.W.2d 839 (Ct. App. 2012) (driving noticeably slower than the speed limit at 3 a.m. are relevant factors contributing to reasonable

suspicion of impaired driving) (unpublished and cited for persuasive authority only); *State v. Lange*, 2009 WI 49, ¶ 32, 317 Wis. 2d 383, 766 N.W.2d 551 (time of night is relevant in OWI investigatory stop analysis, and it "is a matter of common knowledge that people tend to drink during the weekend when they do not have to go to work the following morning"); *State v. Rogers*, 2011 WI App 19, 331 Wis. 2d 489, 795 N.W.2d 64 (Ct. App. 2010) (vehicle weaving around bar time was adequate basis for investigatory stop) (unpublished and cited as persuasive authority only). It is common knowledge that bar close time in Wisconsin is 2:30 a.m. on weekends, which was approximately the time Officer McClain observed Phelps on Sunday, August 9, 2015. (R. 11: 5); *see* Wis. Stat. § 125.32(3).

The most plausible explanation for Phelps' behavior was that he was under the influence of alcohol or another intoxicant. Wisconsin courts have repeatedly recognized the importance of police officers closely scrutinizing motor vehicle infractions at bar time, especially on weekends, which is when Phelps' driving occurred. It was reasonable for Officer McClain to believe that a driver under the influence of alcohol would lack the motor skills

necessary to properly complete a right turn into the right-hand lane which, even at 12 miles per hour, is a tighter and more difficult turn to complete than a right-hand turn into the left-hand lane.

Whether or not Phelps' "pothole defense" is valid has no bearing on whether Officer McClain had reasonable suspicion to conduct an investigatory stop. The possibility that acts may be legally defensible or conducted innocently does not preclude Officer McClain from making the traffic stop. In fact, that is exactly the point made in *Anderson* and *Young*: that an officer is not required to rule out the possibility of innocent acts before initiating an investigatory stop. Furthermore, the illegal turn was not the only suspicious, or even illegal, behavior Phelps exhibited.

It is reasonable to believe a driver who drives approximately 12 miles per hour, a speed remarkably slower than the posted speed limits of 35 and 30 miles per hour, for an extended period of time, at bar time, is driving at such a remarkably slow speed to compensate for impaired coordination or concentration caused by alcohol impairment. It is also reasonable to believe that a driver who activates his turn signal a block and a half prior to making a turn

while passing an opportunity to turn may not simply be inattentive but rather might be under the influence of alcohol or another intoxicant. Under the totality of circumstances it was reasonable for Officer McClain to conduct a short investigative traffic stop to clarify the reason for Phelps' illegal and poor driving.

II. The specific, articulable facts gathered by Officer McClain exceed the standard required by existing case law.

Existing case law demonstrates Wisconsin's strong public policy encouraging police officers to vigilantly enforce poor driving that occurs around bar time on weekends. The specific, articulable facts gathered by Officer McClain exceed the standard required by existing case law. The Court should apply *State v. Waldner*, 206 Wis. 2d 51, 556 N.W.2d 681 (1996), *In re Wheaton*, 2012 WI App 132, ¶ 25-26, 345 Wis. 2d 61, 823 N.W.2d 839 (unpublished and cited as persuasive authority only), and *Village of Bayside v. Olszewski*, 2016 WI App 18, 2016 WL 121398 (unpublished and cited as persuasive authority only), to the facts of this case.

Unlike Phelps, Waldner committed no illegal acts, but the officer gathered enough specific, articulable facts to give rise to

reasonable suspicion. *Waldner*, 206 Wis. 2d at 53. At 12:30 a.m., Waldner traveled at a slow rate of speed down a main street in Richland Center. *Id*. Waldner stopped at an intersection where there was no stop sign or stop light, then turned and accelerated, but did not exceed the speed limit. *Id.* Waldner then legally parked and poured some liquid out of a plastic glass onto the street. *Id.* The Supreme Court determined these constituted specific, articulable facts requisite for reasonable suspicion. *Id*. at 57.

Though the circumstances of the stop in each case are similar, the specific, articulable facts in this case exceed those in *Waldner* because Officer McClain observed Phelps violate two separate traffic statutes. Both cases took place in the very early hours of the morning, on a main street through town, with a driver traveling at a very slow rate of speed. Waldner committed no legal violation, but Phelps committed legal violations when he made an illegal turn in violation of Wis. Stat. § 346.31(2) and when he impeded traffic in violation of Wis. Stat. § 346.59 by traveling at approximately 12 miles per hour in front of Officer McClain. The Wisconsin Supreme Court found sufficient specific, articulable facts in *Waldner* for a

valid traffic stop, and consequently the specific articulable facts in the present case are sufficient.

In *Wheaton*, the Court of Appeals examined whether a police officer had a valid legal basis for initiating a traffic stop when the officer observed the following factors: 1) the defendant was driving around 3:05 a.m., approximately one hour after weekday "bar time"; 2) the defendant was driving noticeably below the speed limit when the police officer first saw the defendant's vehicle; 3) the officer's reasonable belief that the defendant failed to signal a turn; 4) the defendant failed to immediately respond to the officer's emergency lights;[2] and 5) the observations of unusual driving were made within a short span of time. *Wheaton*, 345 Wis. 2d 61 at ¶ 23 (unpublished and cited for persuasive authority only).

Wheaton concluded that the officer had a reasonable suspicion to stop the defendant's vehicle. *Wheaton* concluded that 3 a.m. was sufficiently close to "bar time" to be considered a relevant factor and that driving noticeably slower than the speed limit is

2 Because individuals are generally considered "seized" for 4th Amendment purposes once a police officer activates his or her emergency lights it is unclear whether this fact was considered for purposes of determining the legitimacy of a traffic stop.

another indicator of impairment that adds to the totality of the circumstances suggesting impairment. Furthermore, the failure to signal along with the fact that the officer's observations occurred in a relatively short time frame supported the basis for the stop.

Wheaton supports Officer McClain's stop. Phelps was seen driving closer to "bar time" than Wheaton. Phelps drove 12 miles per hour over the course of many blocks, a speed that appears to be much slower than the speed Wheaton was traveling. Phelps engaged in two separate violations of Wisconsin's traffic laws: initiating an illegal turn and impeding traffic. Moreover, Phelps also engaged his turn signal for prolonged periods. If the totality of circumstances permitted Wheaton's stop then Phelps' stop was also permissible.

In *Olszewski*, the defendant drove at approximately 1:00 a.m. on a road partially covered with snow. *Olszewski*, 2016 WI App 18 at ¶ 2. Upon arriving at a red traffic light, the defendant stopped beyond the stop line and three-quarters of a car length past the crosswalk. *Id.* at ¶ 3. The defendant remained stopped at the intersection until the light turned green, at which time the officer conducted a traffic stop. *Id.*

Olszewski determined that this was sufficient specific, articulable evidence to create reasonable suspicion of a traffic violation. *Id.* at ¶ 17. In reaching this determination, the court discussed that "[r]easonable suspicion exists *even where no traffic violation occurred* as long as the officer can point to facts that led him to reasonably believe that a traffic violation had occurred." *Id*. at ¶ 14, citing *Conaway*, 2010 WI App 7, ¶ 5, *State v. Griffen*, 183 Wis. 2d 327, 33, 515 N.W.2d 535 (Ct. App. 1994) (emphasis added).

The specific, articulable facts in the case at hand exceed those in *Olszewski*. In *Olszewski*, due to the partially snow-covered street, the officer was unclear as to whether or not the stop line and crosswalk in the defendant's lane of travel were visible. *Id.* at ¶ 13. Officer McClain observed actual, definable, illegal traffic violations when Phelps made an illegal right turn onto Lake Street and when he impeded traffic by traveling at such a slow speed, thereby exceeding the standard required by *Conaway* and *Griffen*. It is undisputed that Phelps turned into an improper lane and that Phelps drove his vehicle at approximately 12 miles per hour in 35 and 30 miles per hour zones.

Furthermore, Officer McClain observed other unusual and concerning driving behaviors that only added to Officer McClain's basis for the traffic stop. In *Olszewski*, the officer based the stop entirely on the uncertain violation of the vehicle's location relative to a snow-covered stop line and crosswalk. *Id.* at ¶ 3. Officer McClain met the reasonable suspicion standard set forth in *Olszewski*.

III. The Court should not apply the exclusionary rule to this case because the officer's conduct was reasonable.

The exclusionary rule does not apply in this case because the seizure constituted a valid investigatory stop, because Officer McClain's conduct was reasonable, because Officer McClain's conduct was not intentional conduct that was patently unconstitutional, and because Officer McClain's conduct was not sufficiently deliberate that deterrence is worth the price paid by the justice system. Consequently, the circuit court's decision to suppress all evidence obtained after the traffic stop and to dismiss the case should be reversed.

The traffic stop was justified under current Fourth Amendment jurisprudence. Nevertheless, even a determination that

Officer McClain lacked a reasonable suspicion for stopping Phelps does not require suppressing all evidence discovered after the initial stop. The fact that a seizure is unconstitutional does not necessarily mean that the exclusionary rule applies. *Herring v. United States*, 555 U.S. 135, 140 (2009). Exclusion is a last resort reserved for extraordinary cases. *Id.*

The exclusionary rule is not an individual right and applies only where it results in appreciable deterrence. *Id.* at 141. The United States Supreme Court has repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. *Id.* Additionally, the benefits of deterrence must outweigh the costs. *Id.* An assessment of the flagrancy of the police misconduct constitutes an important step in the calculus of applying the exclusionary rule. *Id.* Evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. *Id.* at 143.

First, Officer McClain's conduct was reasonable. Officer McClain balanced protecting public safety by vigilantly

investigating a possible drunk driver at bar time with respecting the constitutional rights of citizens not to be stopped in their motor vehicles without a reasonable suspicion. Officer McClain did not pull Phelps over at the first hint of a problem, but rather waited until after he observed a number of specific articulable facts, as previously discussed in this brief.

Second, Officer McClain's conduct was not flagrant conduct that was patently unconstitutional. To the contrary, Officer McClain's decision to initiate a short investigatory traffic stop was informed by specific articulable facts that warranted a reasonable belief that illegal activity occurred. Consequently, Officer McClain's conduct cannot reasonably be described as intentional, flagrant or patently unconstitutional. Because Officer McClain's conduct was reasonable there is no deterrence benefit to excluding the evidence in this case and the circuit court order should be reversed.

IV. Observing a statutory traffic law violation creates a legal basis for a traffic stop.

Observing a statutory traffic law violation creates a legal basis for a stop. *State v. Popke*, 2009 WI 37, ¶ 13, 317 Wis. 2d 118, 127, 765 N.W.2d 569, 574 ("An officer may conduct a traffic stop

when he or she has probable cause to believe a traffic violation has occurred."); *citing* 4 Wayne R. LaFave, *Search and Seizure* § 9.3(a) (4th ed. 2004) (concluding that probable cause for even the slightest traffic violation is legally sufficient to justify a traffic stop). After testimony was received and the parties concluded their arguments the circuit court announced its decision. The circuit court's reasons for disregarding the two separate statutory violations in this case are inconsistent with Wisconsin law.

First, the circuit court acknowledged Phelps' illegal turn constituted a "technical traffic violation." (R. 11: 25) Under Wisconsin law a police officer observing a "technical traffic violation" has a legal basis to initiate a traffic stop. In announcing its decision, the circuit court sua sponte relied on a vague belief that the City of Eau Claire Police Department and Eau Claire County Sheriff's Department have a policy not to issue citations for improper turns such as the illegal turn made in this case. (R. 11: 25) No facts were entered into the record to support this belief other than the court claiming a "general aware[ness]" of this fact. (R. 11: 25) The circuit court determined that because of the existence of this

alleged policy, the illegal turn was in fact "indicative of nothing." (R. 11: 25-26)

The City disputes such a policy exists, but the existence of such a policy does not impact the legal analysis in this case. Officer McClain observed an illegal turn and was thus legally entitled to stop Phelps. If nothing else, such a policy does not preclude officers from stopping violators and providing warnings regarding the illegal conduct. Furthermore, the illegal turn was one factor among many that demonstrate under the totality of circumstances that Officer McClain had reasonable suspicion to stop Phelps. The circuit court should not have completely disregarded the illegal turn as part of the totality of circumstances justifying the traffic stop.

Second, the circuit court acknowledged that Phelps was driving approximately 12 to 13 miles per hour and impeded Officer McClain's vehicle, but concluded this did not constitute a legal violation. (R. 11: 25-26) ("There was no impeding of any cars, other than the law enforcement officer's."). The circuit court apparently believes Wisconsin law treats impeding a police vehicle differently than impeding a citizen vehicle. The circuit court is mistaken. Wis.

Stat. § 346.59, which prohibits persons from driving motor vehicles at a speed so slow as to impede the normal and reasonable movement of traffic, does not include an exemption which permits impeding police vehicles. Consequently, impeding Officer McClain's vehicle constituted a traffic violation and thus provided legal justification for the traffic stop. Furthermore, Phelps' remarkably slow speed (which impeded Officer McClain) was one factor among many that demonstrate under the totality of circumstances that Officer McClain had reasonable suspicion to stop Phelps.

CONCLUSION

For all the foregoing reasons the court should reverse the decision of the circuit court.

Dated this 3rd day of May, 2016.

Attorneys for the City of Eau Claire,

BY: __/s Douglas J. Hoffer_____

Douglas J. Hoffer
State Bar No. 107943
Jenessa Stromberger
State Bar No. 1090100
203 S. Farwell Street
Phone: (715) 839-6006 Fax: (715) 839-6177
douglas.hoffer@eauclairewi.gov

CERTIFICATION OF FORM AND LENGTH

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 20 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 4,571 words.

Dated this 3rd day of May, 2016.

BY: /s Jenessa Stromberger
Jenessa Stromberger
State Bar No. 1090100

Jenessa Stromberger
Eau Claire Assistant City Attorney
State Bar No. 1090100
203 S. Farwell Street
Phone: (715) 839-6006
Fax: (715) 839-6177
jenessa.stromberger@eauclairewi.gov

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This electronic brief is identical in content and format to the printed form of the brief mailed on May 3, 2016.

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Dated this 3rd day of May, 2016.

BY: /s Jenessa Stromberger
Jenessa Stromberger
State Bar No. 1090100

Jenessa Stromberger
Eau Claire Assistant City Attorney
State Bar No. 1090100
203 S. Farwell Street
Phone: (715) 839-6006
Fax: (715) 839-6177
jenessa.stromberger@eauclairewi.gov

CERTIFICATION OF MAILING

I certify that this brief or appendix was 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 May 3rd, 2016.

BY: /s Jenessa Stromberger
Jenessa Stromberger
State Bar No. 1090100

Jenessa Stromberger
Eau Claire Assistant City Attorney
State Bar No. 1090100
203 S. Farwell Street
Phone: (715) 839-6006
Fax: (715) 839-6177
jenessa.stromberger@eauclairewi.gov