STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2016 AP 000248

**CITY OF EAU CLAIRE**,

**Plaintiff-Appellant,**

v.

**DAVID EUGENE PHELPS**,

**Defendant-Respondent**.

# BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT

**ON APPEAL FROM A DECEMBER 30, 2015, ORDER IN THE EAU CLAIRE COUNTY CIRCUIT COURT**
**The Honorable William A. Gabler, Presiding**
**Trial Court Case Nos. 2015 TR 7555 & 2015 TR 8099**

ANDEREGG & ASSOCIATES
Post Office Box 170258
Milwaukee, WI 53217-8021
(414) 963-4590
By: Rex R. Anderegg
State Bar No. 1016560

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Wisconsin Cases Cited:**

**Federal Cases Cited:**



**Wisconsin Statutes Cited:**

**Other Authorities:**

## ISSUE PRESENTED

**I. WHETHER THE CITY MET ITS BURDEN OF PROOF TO ESTABLISH THAT THE POLICE OFFICER HAD REASONABLE SUSPICION TO STOP AND DETAIN DAVID PHELPS.**

**The circuit court answered:** No.

## STATEMENT ON PUBLICATION

The respondent does not believe the Court's opinion will meet the criteria for publication as the it does not present any novel issue of law, but instead, can be resolved by merely applying the legal standards to the facts to affirm the lower court's judgment.

## STATEMENT ON ORAL ARGUMENT

The respondent does not request oral argument in this case as he believes the briefs will sufficiently explicate the facts and law necessary for the Court to decide the issue presented in this case.

## STATEMENT OF THE CASE

On August 9, 2015, City of Eau Claire Police Officer Michael McClain stopped David Phelps and ended up charging him with Operating While Intoxicated-First Offense. (R1). Phelps entered a plea of Not Guilty. (R3).

On October 23, 2015, Phelps filed a Motion to Suppress, challenging the legality of the stop and the seizure of his vehicle and person. (R7). On December 30, 2015, the circuit court held an evidentiary hearing on Phelps' motion. (R11). At the conclusion of that hearing, the circuit court ruled in Phelps' favor finding the stop of his vehicle was unlawful. (R11-27). The charges were dismissed and the City then commenced this appeal. (R10).

## STATEMENT OF THE FACTS

On August 9, 2015, at approximately 2:30 a.m., City of Eau Claire Police Officer Michael McClain was patrolling downtown when he observed a vehicle southbound on South Farwell Street, traveling slower than the posted speed limit. (R11-4-5). The vehicle – an electric Honda Insight – was being driven by David Phelps. (R11-11). It was not disputed that Phelps was traveling slower than the speed limit. (R11-17). Likewise, the record also establishes Phelps was not, in any way, obstructing or impeding any traffic. (R11-8-9). In either event, Officer McClain began following the vehicle.[1] (R11-5).

[1] The City argues Phelps was driving roughly 15 miles per hour where the posted limit was 35 miles per hour, and later 30 miles per hour. (City's brief, p. 2). Given that all driving occurred within "the corporate limits of a city," it is likely the posted limit was actually 25 miles per hour. Section 346.57(4)(e), Stats.

The record also reveals the reason Phelps was driving slowly and cautiously. Phelps presented evidence, unrefuted by the City, that the area in question on South Farwell Street, was pock ridden with potholes. (R11-11). As Phelps explained:

> I turned onto South Farwell just . . . south of Galloway, and I immediately started seeing potholes that have actually been backfilled with gravel and dirt. My car is a two-door Honda Insight. It's electric, with only four inches of clearance underneath. I get 70 miles a gallon. I like my car. I was looking at potholes all the way along on South Farwell, first lane, of at least six inches.

(R11-11). Phelps went on to explain that his vehicle is expensive, made of aluminum, and that given the four-inch clearance, it would be susceptible to undercarriage damage, which he sought to avoid. (R11-17). Phelps further explained that while he had earlier been in the right hand lane of Farwell southbound, he had moved to the left hand lane because of the number of potholes in the right lane. (R11-12).

At the corner of Farwell and Lake Avenue, Phelps signaled and made a right-hand turn westbound onto Lake Avenue. (R11-5, 14). Officer McClain averred that when Phelps turned right onto Lake Avenue, he made a wider than normal turn that took him into the left hand lane. (R11-5). Evidence in the record, however, revealed Phelps did so to avoid the aforementioned potholes, as well as broken glass at the

corner in the right-hand lanes of Farwell and Lake. (R11-14). In short, Phelps admittedly took a wide turn, but it was to avoid glass and other hazards in the road. (*Id*.).

Officer McClain also turned right onto Lake Avenue and continued to follow Phelps. (R11-6-7). Officer McClain testified that when Phelps was crossing the Lake Street Bridge, Phelps engaged his left-hand turn signal for approximately three-quarters of the length of the bridge. (R11-7). Phelps, of course, did so because he intended to make the first left hand turn at the end of the bridge, onto First Avenue. (R11-7, 15-16). Indeed, Phelps *did* turn left onto First Avenue, just as he had signaled. (*Id.*). When Phelps did so, however, Officer McClain engaged his emergency lights and stopped and detained Phelps. (R11-7). The length of the bridge is unknown and not a part of the record.[2]

Officer McClain conceded that Phelps never created any traffic difficulties. (R11-9). He also conceded the speed at which Phelps was driving did not constitute any traffic infraction. (*Id*.). It never impeded traffic. (R11-8-9). Phelps' vehicle never swerved and his car presented no equipment violations. (*Id*.). And when Officer McClain engaged his emergency lights, Phelps immediately signaled and properly pulled over in a safe and normal fashion. (*Id*.).

[2] The City takes certain liberties with the facts of this case, for example, characterizing the bridge as "lengthy," (*see, e.g.,* City's Brief, p. 2) when the record is silent as to its length.

Finally, the City makes a material factual assertion that is patently incorrect. The City claims there was an instance when the turn signal for Phelps' vehicle was engaged and Phelps passed up an opportunity to turn onto a street that ostensibly would have been in accordance with what he was signaling. The City does not include any record cite for this assertion because it did not happen, and there is no support for the claim in the record.

## ARGUMENT

### I. THE CIRCUIT COURT PROPERLY CONCLUDED THAT OFFICER MCCLAIN LACKED REASONABLE SUSPICION TO STOP AND DETAIN PHELPS.

The Fourth Amendment to the United States Constitution provides for "the right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . ." Article I, § 11 of the Wisconsin Constitution also prohibits "unreasonable searches and seizures."

All investigative traffic stops, no matter how short the duration, must be objectively reasonable under the circumstances existing at the time of the stop. *Whren v. United States*, 517 U.S. 806, 809-10 (1996); *State v. Waldner*, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996). Before initiating a stop, the officer must be able to point to specific and articulable facts which, taken together with rational inferences, objectively warrant a reasonable person with the knowledge

and experience of the officer to believe criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

Whether there was or reasonable suspicion to conduct a traffic stop is a question of constitutional fact, which is a mixed question of law and fact to which this Court will apply a two-step standard of review. *State v. Post,* 2007 WI 60, ¶ 8, 301 Wis.2d 1, 733 N.W.2d 634. First, this Court will review the circuit court's findings of historical fact under the clearly erroneous standard. *Id.* Second, this Court will review the application of those historical facts to the constitutional principles independent of the determinations rendered by the circuit court. *Id.*

A police officer may detain an individual to investigate possible criminal behavior when the officer has reasonable suspicion the individual has committed or is about to commit a crime. Section 968.24, Stats.; *State v. Post,* 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. The detention is a seizure within the meaning of the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution and triggers their protections. *See State v. Harris,* 206 Wis.2d 243, 253, 256, 557 N.W.2d 245 (1996). For an investigatory stop to be constitutionally valid, the officer's suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion" on the citizen's liberty. *Terry v. Ohio,* 392 U.S. 1, 21, (1968). What constitutes reasonable suspicion in a given situation depends on the totality of the circumstances. *Post,* 2007 WI 60 at ¶¶37–38. A central concern of the Supreme Court is to assure that an individual's reasonable expectation of privacy is not subject to

arbitrary invasion at the unfettered discretion of officers in the field. *Brown v. Texas,* 443 U.S. 47 (1979).

The circuit court began its decision properly, citing the law that would dictate its decision. It cited this Court's decision in *State v. Fields*, 2000 WI App. 218, 239 Wis. 2d 38, 619 N.W.2d 279, that sets forth the legal standard at play: that to execute a valid traffic stop consistent with the fourth amendment prohibition against unreasonable searches and seizures, the law enforcement officer must reasonably suspect that some kind of illegal activity has taken place or is taking place. (R11-21). The circuit court also took note of section 968.24, Stats., and quoted the Wisconsin Supreme Court as follows:

> We reiterate that the fundamental focus of the fourth amendment, and sec. 968.24, Stats, is on reasonableness. The question is whether the actions of the law enforcement officer were reasonable under the circumstances It is a common sense question, which strikes a balance between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibility.

(R11-22), *citing State v. Anderson*, 155 Wis. 2d 77, 87, 454 N.W.2d. 673 (1990) (citations omitted).

### A. The Circuit Court Correctly Concluded That Officer McClain's Stop Of Phelps Was Based On A Hunch, And Not Reasonable Suspicion.

The circuit court correctly concluded that Officer McClain's traffic stop of Phelps was based on "a hunch." (R11-26). The Wisconsin Supreme Court and other courts have long held that an inchoate and unparticularized suspicion or hunch will not suffice to establish the requisite reasonable suspicion. *See State v. Waldner*, 206 Wis.2d 51, 56, 556 N.W.2d 681 (1996). Contrary to the City's arguments, the fourth amendment has not eroded to the point where particularly cautious and careful driving has actually become the basis for a valid traffic stop. Phelps was driving slowly and carefully. He was not varying his speed. He signaled his intentions to turn ahead of time, not at the last minute. On these facts, the City argues that there was reasonable suspicion to believe that Phelps was operating under the influence.

Taken to its logical conclusion, the City's position seeks to attack the fourth amendment from the both ends, leaving motorists with an ever-diminishing margin of acceptable driving behavior. Drivers should not exceed the speed limit and if they do, they are subject to a traffic stop. Now drivers apparently should not drive too far *under* the speed limit because even when it does not violate the law, it too will form the basis for a traffic stop. Drivers can also be stopped and ticketed if they do not signal their intention to turn at least 100 feet before making the intended turn. Section 346.34((1)(b), Stats. Now drivers must now be careful not to signal their intention to turn too far in advance or that too will form the basis for a traffic stop. At its core, the City's argument here,

which the circuit court properly rejected, is that when Officer McClain deemed Phelps' driving to be so careful it required further investigation, that thinking somehow constituted something more than a hunch.

Conveniently missing from the City's argument on appeal is the fact this *it* bore the burden of proof to justify the traffic stop. Where a violation of the Fourth Amendment right against an unreasonable search and seizure is asserted, the burden of proof upon the motion to suppress is upon the government. *State v. Taylor*, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973); *Vale v. Louisiana* 399 U.S. 30, 34 (1970); *United States v. Burhannon*, 388 F.2d 961 (7th Cir. 1968). With this in mind, the facts the City did not introduce into the record are as important to the analysis as the facts that were introduced into the record.

For example, the City failed to put into the record at what time the bars closed on the particular night in question. The City attempts to rectify this shortcoming by citing section 125.32(3), Stats. (City's Brief, p. 10). That section does nothing, however, to assist the City in meeting its burden of proof. Not only does that statute not establish the closing time for bars in Eau Claire, it merely establishes a range of closing times that adds very little to the requisite analysis. Indeed, on weekends, according to section 125.32(3), a premises with a Class B license can close between 2:30 a.m. and 6:00 a.m.

Nor did the City put into the record the length of the bridge upon which Phelps engaged his left turn signal (roughly one-quarter of the way across). Absent any evidence of the length of the bridge, the City's reliance on Phelps engaging his

turn signal is completely meaningless. It is even more meaningless given that immediately upon crossing the bridge, Phelps turned left, in full accordance with what he signaled his intentions to be. It was then that Officer McClain stopped Phelps.

Nor, despite its repeated claim that Phelps drove slowly for "an extended period of time," (*see e.g.,* City's Brief, p. 8), did the City ever establish over what distance that actually occurred. The record speaks only to a block to a block and one-half and then a bridge of some unspecified length. And as previously noted, it never put into the record its claim, on appeal, that Phelps had his turn signal engaged while passing by a street onto which he ostensibly could have turned. That simply is not in the record and that the City turns to facts not of record to challenge the circuit court's decision speaks to the weakness of its arguments.

Finally, the record contains facts that explain what was, at the end of the day, innocuous driving by Phelps. Phelps testified that his cautious driving (as well as his right hand turn, more fully discussed below) was prompted by road conditions. The uniqueness of Phelps' vehicle was not contradicted on the record. Phelps explained that he was driving cautiously and avoiding back-filled potholes (and broken glass) to protect undue damage to his expensive vehicle. A cautious approach does not equate to reasonable suspicion. Citing *State v. Fields*, 2000 WI App. 218, 239 Wis. 2d 38, 619 N.W.2d 279, the circuit court noted that a longer than normal stop at a stop sign does not provide reasonable suspicion to stop and detain a motorist. (R11-22-23).

The City will counter the fact that Phelps was merely driving cautiously by reiterating that an officer need not rule out an innocent explanation for the behavior, and this is true. (City's Brief, p. 6), *citing State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). This observation, however, is a bit of legerdemain because all fourth amendment issues must be decided on the "totality of the circumstances." *Post,* 2007 WI 60 at ¶¶37–38. By definition, the totality of the circumstances includes what facts are missing, as well as what facts are present.

The City argues that the facts of this case provide a more compelling basis for a traffic stop than those in *Waldner, supra*. Phelps disagrees. The only similarity between the cases is that there was driving under the speed limit. In *Waldner*, however, the vehicle stopped at an intersection where there was no stop sign or light. *Waldner*, 206 Wis. 2d at 53. The vehicle then accelerated rapidly at a high rate of speed for a few seconds. *Id.* Shortly thereafter, the vehicle pulled to the side of the road and the driver dumped a liquid containing ice from a plastic cup onto the roadway. *Id. Waldner* made a point of noting that the dumping of a liquid and ice mixture outside of the vehicle after such strange driving behavior was absolutely unusual and certainly suspicious. *Id.* at 60.

Here, by contrast, there was no unusual driving, only an abundance of caution. There was no unprovoked or unexplained stop. There was no rapid acceleration. And most importantly, there was no strange depositing of a suspicious beverage on the road after stopping. It should also be noted that

despite the slow driving reported in *Waldner*, no effort was ever made to transmogrify that fact into an allegation of impeding traffic.

Curiously, the City asks this Court to "apply" unpublished cases to the facts of this case. (City's Brief, p. 12), *citing In re Wheaton,* 2012 WI App 132, ¶ 25-26, 345 Wis. 2d 61, 823 N.W.2d *and Village of Bayside v. Olszewski,* 2016 WI App 18, 2016 WL 121398. Phelps posits that while these cases may have persuasive value, it is not proper for the Court to "apply" them, strictly speaking, to this or any case. In either event, *Wheaton* involved a failure to use a turn signal and then driving which suggested an attempt to evade the police, or a complete unawareness that an officer was trying to stop the suspect. Phelps, by contrast, immediately noticed Officer McClain's emergency lights and stopped, properly. *Olszewski* has even less value in this context because the stop was based on a violation of section 346.37(1)(c), Stats. – failure to stop before entering a crosswalk. The claimed traffic violations in this case are addressed below.

### B. Officer McClain Did Not Have Reasonable Suspicion To Stop Phelps For Impeding Traffic.

The City argues that an independent basis upon which it was proper for Officer McClain to stop Phelps was for "impeding traffic" contrary to section 346.59, Stats. That section states:

> (1) No person shall drive a motor vehicle at a speed so slow as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or is necessary to comply with the law.
>
> (2) The operator of a vehicle moving at a speed so slow as to impede the normal and reasonable movement of traffic shall, if practicable, yield the roadway to an overtaking vehicle and shall move at a reasonably increased speed or yield the roadway to overtaking vehicles when directed to do so by a traffic officer.

The record does not, contrary to the City's arguments, establish a basis to stop Phelps under this statute. Instead, it supports the circuit court's finding that Phelps impeded no traffic. (R11-25). That finding was not clearly erroneous given the facts of record. Section 805.17(2), Stats.

On the contrary, by the officer's own admission Phelps was not creating any traffic difficulties. (R11-9). There were no other vehicles in the area. *See, e.g., State v. Baudhuin,* 141 Wis. 2d 642, 650, 416 N.W.2d 60 (1987)(impeding traffic where eight to ten vehicles behind squad car and none in front of defendant's vehicle); *Slattery v. Lofy*, 45 Wis. 155, 159-160, 172 N.W.2d 341 (1969)(no violation of section 346.59 where motorist could have simply passed vehicle without danger or incident). The City, however, attempts to fabricate a violation of section 346.59, Stats., by conflating the single squad car with "traffic." The officer, who had complete authority to go

around Phelps with impunity, was not impeded. A squad car is not the type of "traffic" to which the statute speaks. Moreover, the record reveals that the roads upon which Phelps was traveling consisted of two lanes of travel in the direction he was heading. Accordingly, Officer McClain, even if his single squad could be equated to "traffic," could have simply passed Phelps in the other lane.

### C. Officer McClain Did Not Have Reasonable Suspicion To Stop Phelps For An Improper Turn.

The City also argues that Officer McClain could stop Phelps for a violation of section 346.31(2), Stats., which states:

> Both the approach for a right turn and the right turn shall be made as closely as practicable to the right-hand edge or curb of the roadway. If, because of the size of the vehicle **or the nature of the intersecting roadway**, the turn cannot be made from the traffic lane next to the right-hand edge of the roadway, the turn shall be made with due regard for all other traffic.

(Emphasis added). Here, we can see where "the totality of the circumstances" finds expression in the very statutory language upon which the City wishes to rely. There is no evidence in the record to suggest that Phelps made his right hand turn without due regard for all other traffic. On the contrary, the record suggests that turn was made, in accordance with the statute, with due regard for all other traffic.

As Phelps testified, the "nature of the intersecting roadway" governed the manner in which he made his turn. The potholes and the broken glass at the corner were part of the circumstances that compelled him to avoid the right hand edge of the curb or roadway. In other words, it was not "practicable for him to turn in that fashion and the very statutory language at issue recognizes, and allows for, the type of turn that Phelps made.

The City, however, takes this important circumstance – the actual road conditions – and deprecatingly rebrands it as Phelps "pothole defense" or Phelps' "affirmative defense." (City's Brief, pp. 8, 11). Presenting this important fact in this fashion is a bit disingenuous. The bad road conditions, at this stage of the proceeding, were not a "defense" at all, but rather, part of the totality of the circumstances that were proper to consider when deciding the fourth amendment issue. Indeed, it seems implicit in the circuit court's decision that there were, indeed, potholes and broken glass as Phelps described them.

The City, however, takes this a step further and argues, in a footnote, that:

> Officer McClain also testified that there were no unusual road conditions. The defendant disputed this fact, but **the circuit court properly chose not to address this area of disagreement**. The issue is whether Officer McClain had a reasonable suspicion to detain Phelps, not whether Phelps had an affirmative defense to the observed traffic violations.

(City's Brief, pp. 7-8, fn 1)(emphasis added). Phelps posits that since the road conditions were, both statutorily and constitutionally, an important circumstance, it would *not* be proper for the circuit court to choose *not* to address this area of disagreement. While the circuit court's decision on this issue can stand alone based on its use of judicial notice (as discussed below), it would not, contrary to the City's argument, be appropriate for the circuit court to ignore this factual dispute if it was necessary for a decision on the reasonable suspicion issue.

The circuit court took judicial notice of the fact that there has been a longstanding policy in the Eau Claire area not to conduct traffic stops for an arguably improper turn of the precise kind attributed to Phelps, even if the "nature of the roadway" had not compelled him to turn as he did:

> It has long been the policy of law enforcement . . . both the Eau Claire Police Department and the Sheriff's Department, not to issue tickets for people turning into wrong lanes when they turn left or right. I remember that that was a policy that was started years and years ago when Judge Karl Peplau and Judge Thomas Barland were county court judges. And I've never seen any prosecution for that technical violation in my 16 years on the bench. And I just kind of been generally aware of the fact that those kind of improper left turns or right turns, which we see every day, are ignored. So at least in Eau Claire County, those kinds of technical violations are indicative of nothing.

(R11-25-26). The circuit court's analysis of this fact could not have been more correct. If there is a decades-long policy of allowing the public to make turns in this fashion, that a citizen made such a turn is truly "indicative of nothing."

Nevertheless, calling the circuit court's observation "a vague belief," the City argues that it was improper for the circuit court to make and rely on this observation because "[n]o facts were entered into the record to support this belief other than the court claiming a 'general aware[ness]' of this fact." (City's Brief, p. 20). The City, however, fails to recognize that this is precisely the type of fact for which a circuit court may take judicial notice. Section 902.01(2)(a), Stats., allows a circuit court to take judicial notice of a "fact generally known within the territorial jurisdiction of the trial court." Section 902.01(3) grants the court the discretionary authority to take judicial notice of the fact whether such is requested by a party or not. Section 902.01(6) allows judicial notice to be taken at any stage of the proceeding. In other words, the circuit court was well within its authority to take judicial notice that residents of Eau Claire drive in that jurisdiction with knowledge that such turns, even if the road conditions do not compel it, are never viewed as a traffic infraction.

Moreover, the City has forfeited its right to challenge that aspect of the circuit court's ruling on appeal. If the City truly believed the court was wrong to rely on this fact or that its reasoning in this regard was otherwise flawed, section 902.01(5), Stats., establishes a procedure for such a challenge:

> A party is entitled upon timely request to an opportunity to be heard as to the propriety of

> taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

In other words, if the City believed the circuit court's reliance on judicial notice of this fact was inappropriate, it had a statutory remedy. It could have requested a hearing to determine whether the court's judicial notice was proper. The record reveals it never did so. By failing to raise and address the issue in the lower court, it has waived it, and should not be permitted to make this argument for the first time on appeal. *State v. Jones*, 2002 WI App 196, ¶ 24, 257 Wis. 2d 319 651 N.W.2d 305 (challenge waived because raised for first time on appeal) *See also Schwittay v. Sheboygan Falls Mut. Ins. Co.,* 2001 WI App 140, ¶ 16 n. 3, 246 Wis. 2d 385, 630 N.W.2d 772 ("party must raise an issue with sufficient prominence such that the trial court understands that it is called upon to make a ruling").

### D. The City Did Not Ask The Circuit Court To Deem This Case One Where The Exclusionary Rule Should Not Be Applied, Likely Because This Case Does Not Fit That Mold, And Should Not Be Permitted To Raise This Argument For The First Time On Appeal.

The City, for the first time, now argues that this case constitutes the type of case where the exclusionary rule should not be applied even if there was a fourth amendment violation. To support this argument, the City cites *Herring v. U.S.,* 555 U.S. 135 (2009). The City never raised this issue at the circuit court level. As a general rule, this Court will not entertain arguments that a party fails to raise, and therefore waives, at the circuit court level. *See Jones, supra*.

Indeed, the City does not even raise the one issue that may be dispositive of this entire appeal: whether the circuit court had the authority to dismiss this case in the first place. The motion Phelps filed was a motion to suppress, not a motion to dismiss. The proper remedy, following the circuit court's ruling, would have been to suppress the evidence obtained after the traffic stop and then allow the City to determine how it wished to proceed under those circumstances. Instead, the circuit court, *sua sponte* and without objection from the City, simply dismissed the case.

In either event, the City fails to identify any underlying basis for a "good faith" exception to the exclusionary rule in this case (e.g., attenuation). This is not a case, like *Herring v. U.S.,* 555 U.S. 135 (2009), where police acted in objectively reasonable reliance on a subsequently invalidated search

warrant. *Herring* was just another in a line of cases specifically addressing circumstances where police mistakes are the result of negligence, rather than systemic error or reckless disregard of constitutional requirements. To hold the exclusionary rule not applicable to this run-of-the-mill case would be to effectively abrogate the exclusionary rule in this state.

## Conclusion and Relief Requested

For all the foregoing reasons, the respondent respectfully requests that this Court affirm the judgment of the lower court. In the event this Court does not accept the circuit court's reliance on judicial notice, it should, at a minimum, remand so the circuit court can make explicit, rather than implicit, factual findings on the road conditions, which were an important part of the totality of the circumstances underlying the stop.

Dated this 15th day of June, 2016.

/s/ Rex Anderegg
REX R. ANDEREGG
Attorney for the Defendant-Respondent

## CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 4,714 words.

Dated this 1st day of May, 2016.

/s/ Rex Anderegg
REX R. ANDEREGG

**CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)**

I hereby certify that I have submitted an electronic copy of the brief-in-chief and appendix in *City of Eau Claire v. Phelps,* Appeal No. 2016 AP 248, which complies with the requirements of s. 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 15th day of June, 2016.

/s/ Rex Anderegg
Rex Anderegg