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COURT OF APPEALS – DISTRICT IV**

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OF WISCONSIN**

**Appeal No. 2017AP001284
Circuit Court Case No. 2016TR001028**

In the Matter of the Refusal of Damian A. Bethke

**DANE COUNTY,
Plaintiff-Respondent,**

v.

**DAMIAN A. BETHKE,
Defendant-Appellant.**

**ON APPEAL FROM THE JUDGMENT OF CONVICTION
OF REFUSAL AND ORDER DENYING MOTION TO
SUPPRESS ENTERED BY THE CIRCUIT COURT FOR
DANE COUNTY, THE HONORABLE CLAYTON KAWSKI
AND THE HONORABLE JILL KAROFKY PRESIDING**

**BRIEF AND APPENDIX
OF DEFENDANT-APPELLANT
DAMIAN A. BETHKE**

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STATEMENT OF ISSUES

1. May a person be seized and arrested for allegedly abandoning a vehicle?

The trial court answered: Yes.

2. Is the mere presence of a vehicle stuck on the side of the road, known by officers to have been unattended only for a few hours, vehicle “abandonment” which could justify the warrantless seizure of an individual?

The trial court answered: Yes.

3. Is a trooper’s belief that an individual left his stuck truck on the side of the road and walked away a sufficient fact to support probable cause for a warrantless arrest?

The trial court implicitly answered: Yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Appellant does not believe that oral argument is necessary as the parties’ briefs will fully present the issues on appeal.

Publication is not warranted under Section 809.23, Stats., as the decision in this case is largely fact driven and can be decided on the basis of controlling precedent and well-settled principles of law.

STATEMENT OF THE CASE

January 3, 2016	Damian A. Bethke was nearly home, driving along rural County Highway MN in the Town of Pleasant Springs, Dane County, Wisconsin, in the middle of winter when his car became stuck along the side of the country road. He began to walk the rest of the way home. On that walk, he flagged down a Wisconsin State Trooper who was driving by. The trooper seized and arrested Bethke and took him into custody. (R.45:16, 42, 47; App. 19, 21, 26)
April 18, 2016	Bethke filed a Motion to Suppress for an order suppressing evidence, statements or observations obtained by law enforcement officers during and following the trooper's seizure, detention and arrest of Bethke, asserting an unlawful stop and detention in violation of the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. (R.6; R.45:4-5; App. 12-13)
August 18, 2016	An evidentiary hearing was conducted before Dane County Circuit Judge Clayton P. Kawski.
September 26, 2016	Judge Kawski entered an order denying Bethke's Motion to Suppress. (R.9; App. 31-36)
December 21, 2016	Following a jury trial on the companion Operating While Intoxicated (1 st) charge, a jury returned a not guilty verdict in approximately 30 minutes. (R.25:5)

June 27, 2017	Notice of Appeal was timely filed by Damian A. Bethke. (R.35)
July 7, 2017	Judgment of Conviction of Refusal was entered by Judge Kawski. (R.37)
September 5, 2017	Amended Judgment of Conviction of Refusal was entered by Dane County Circuit Judge Jill J. Karofsky (successor to Judge Kawski). (R.43; App. 39-40)
September 5, 2017	Amended Notice of Appeal was timely filed by Damian A. Bethke. (R.47)

STANDARD OF REVIEW

This Court applies a de novo standard to its review of whether a seizure of a person passes statutory and constitutional muster. State v. Jackson, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989); State v. Young, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997); State v. Arias, 2008 WI 84, ¶11, 311 Wis. 2d 358, 752 N.W.2d 748 (citing State v. Griffith, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72) (whether police conduct constitutes a violation of the Fourth Amendment of the U.S. Constitution and article I, Section 11 of the Wisconsin Constitution is a question of constitutional fact that this Court reviews independently).

STATEMENT OF FACTS

After midnight on January 3, 2016, Damian Bethke was driving home with two other people when his truck became stuck on the side of the road. (R.45:42; App. 21) He “tried to put it in four-

wheel drive” but “couldn’t get it out.” (R.45:42; App. 21) Knowing that he “wasn’t very far from [his] house”, Bethke plugged his address into the GPS on his phone to walk “a direct line” towards his house. He told the two other people in the vehicle to wait there and said: “I will go home, grab another car, I will pick you guys back up.” (R.45:42; App. 21) He “took the shortest route to [his] house, which [he] saw through the GPS” was to head straight across the farm field he was facing. (R.45:42; App. 21)

Unfortunately, it was middle-of-the-night dark, the field was “very snow covered” and at one point the corn stalks were no longer popping up through the snow and Bethke unknowingly stepped onto an ice-covered pond “in the middle of [the] farmer’s field.” (R.45:43; App. 22) The ice broke and he fell in. The “ice continued to break” as he tried to escape the water so Bethke “sprawled out across the ice” and “eventually got out of the pond and started continuing” in the direction toward his house. (R.45:43-44; App. 22-23) His phone was now dead because it had been submerged in water, so Bethke identified an “orange light in the distance” and decided to “continue to follow that orange light so [he] would make a direct path” – he figured the light would either “be somebody’s home” or may be “a road where [he could] seek help.” (R.45:43-44; App. 22-23) He “had extremely heavy clothes on” and “was completely exhausted,

drenched, shaking uncontrollably.” (R.45:45; App. 24) He could only walk a short distance “before [he] would collapse again of exhaustion from sludging and sludging through the snow.” (R.45:45; App. 24)

Bethke “eventually came to a residence after a significant time” walking through snow and woods – a “duplex type place that had a little waiting area.” (R.45:44, 46; App. 23, 25) Bethke “knocked on everybody’s doors”; no one answered, but he was relieved that “at least [he] was inside.” (R.45:46; App. 25) He “stayed in that area waiting for a vehicle to come across or some way to get help. [He] then saw a police officer’s vehicle with the lights.” (R.45:46; App. 25)

Bethke “took all of the energy that [he] had and . . . hoofed it out there and started flagging [his] arms down along the side of the road”, waving his arms over his forehead to flag down the Wisconsin State Trooper squad vehicle from the side of the roadway. (R.45:47; App. 26) The trooper saw Bethke waving his arms to get the trooper’s attention and “got on his loudspeaker, turned on his lights . . . and asked [Bethke] if [he] was the owner of the black F1150 (sic).” (R.45:47; App. 26) Bethke nodded his head “yes and said yes verbally.” (R.45:47; App. 26)

The trooper immediately ordered Bethke to lie on the ground, and Bethke “got down on the ground . . . on all fours, and then [he] laid directly flat out and sprayed (sic) [his] arms sprayed (sic) eagle

style.” (R.45:48; App. 27) At that point, Bethke did not feel free to leave. (R.45:48; App. 27)

The trooper then approached Bethke, “[p]ut his knee onto [Bethke’s] back and then handcuffed [him].” (R.45:48; App. 27)

Meanwhile, the Dane County Sheriff’s Office was following up on “a call for report of a missing adult.” (R.45:9; App. 17) One officer conducted “an area check” and found “a large black pickup truck” on County Highway MN in the Town of Pleasant Springs. (R.45:9-10; App. 17-18) The officer noted footprints “from the resting position of the pickup truck into the field” going in “a south easterly direction.” (R.45:10; App. 18) The officer followed the footprints into the field, in a direction that led toward Bethke’s house. (R.45:16; App. 19) While searching the area, the officers “received a radio transmission from one of the other officers on the scene” who indicated that “that the trooper had taken [a] subject into custody.” (R.45:16; App. 19)

Further facts will be set forth as necessary below.

ARGUMENT

I. A PERSON CANNOT BE ARRESTED FOR AN IN REM VIOLATION

Summary of Argument

Damian Bethke was arrested by a Wisconsin State Trooper for allegedly “abandoning” a vehicle; however, there is no authority for an officer to arrest a person for a violation of Wis. Stat. § 342.40(1m), an in rem violation.

Merits

The trial court relied exclusively on Wis. Stat. § 342.40(1m) for support of the state trooper’s seizure of Damian Bethke. The Court declared that:

“Key here, Mr. Bethke testified at the suppression hearing that he confirmed to a Wisconsin State Patrol officer, upon an inquiry over a patrol vehicle’s loud speaker, that he was the owner of a black Ford F-150 pickup truck. That truck had been abandoned on the side of the road. The trooper told Mr. Bethke to get down on the ground after hearing that the truck was his.

In Wisconsin, abandoning a vehicle on a public highway is prohibited by Wis. Stat. § 342.40(1m). By confirming that the abandoned Ford was his, Mr. Bethke provided a law enforcement officer information that allowed the officer to conclude that it was likely that Mr. Bethke committed a violation of Wis. Stat. § 342.40(1m). This provided a reasonable, articulable suspicion to detain him. See Renz, 231 Wis. 2d at 310.”

(R.9:4; App. 34) The trial court was incorrect in applying this section to the case at hand and was also incorrect in its reading of the statute

in terms of what remedies are available for a violation of such. Wis.

Stat. § 342.40(1m) reads in relevant part:

“No person shall leave unattended any motor vehicle, trailer, semitrailer or mobile home on any public highway or private or public property, for such time and under such circumstances as to cause the vehicle to reasonably appear to have been abandoned. Except as otherwise provided in this section, **whenever any vehicle has been left unattended without the permission of the property owner for more than 48 hours** in cities of the 1st class and, in other cities, villages and towns, a period set by the governing body thereof, the vehicle is deemed abandoned and constitutes a public nuisance.” (emphasis added)

The trial court’s reliance on Renz was misplaced because Renz deal with an offense for which an arrest of a person is allowed; namely, operating a motor vehicle while intoxicated.

A. There Was No Evidence That a Truck Owned by Bethke Had Been Abandoned.

The County offered no evidence that any trooper or officer or any other person ever believed Bethke’s truck had been “abandoned.” The County offered zero evidence that Bethke’s truck even appeared “abandoned” as the statute requires. The Wisconsin Attorney General approvingly cited Black’s Law Dictionary to define that term:

“The word ‘abandoned’ is a term of legal art that refers to property of which the owner has relinquished possession and control with the intention of never again reclaiming it.”

Opinion of the Attorney General, 2000 Wisc. AG LEXIS 2, 12-13, June 7, 2000 (citing Black’s Law Dictionary 1, 1233 (7th Ed. 1999)).

By specifying a time period (48 hours in first class cities and indicating other cities, villages or towns should set their own period), the legislature knew this statute would not apply to *any and all* vehicles stopped or parked off the side of a road. The window provided by the statute considers that people may have car problems where they need to leave their car to seek help. It considers that people may want to park their car for a short time. It considers that people cannot *always* stay with their vehicle. But it does direct that whatever problem or issue or circumstance caused a person to leave a car unattended, be resolved within a certain time period. It is noteworthy that the County did not offer any evidence as to what period was set by the governing body of the Town of Pleasant Springs, Wisconsin.¹ There is no evidence that the detaining trooper believed or could have believed Bethke's truck was abandoned per Wis. Stat. § 342.40(1m); the only evidence before the court was that Bethke's truck was unattended some time after midnight for a maximum of a few hours. (R.45:9; App. 17) At the hearing on Bethke's Motion to Suppress, the County offered no testimony from the arresting trooper and no

¹ It can be inferred that more rural areas of the state are more likely to enact *longer* windows due to the nature of the lifestyle of rural citizens and the less disruptive nature of unattended vehicles in less congested areas.

evidence to support any lawful reason the trooper may have even thought he had for seizing and handcuffing Bethke.

B. Wis. Stat. § 342.40(1m) Defines a Violation In Rem.

In Rem is a Latin term meaning “against or about a thing”. See USLegal, *In Rem Law and Legal Definition* (<https://definitions.uslegal.com/i/in-rem/>) An in rem proceeding refers to a legal action directed toward property, rather than toward a particular person.

“A technical term used to designate proceedings or actions instituted against the thing, in contradistinction to personal actions, which are said to be in personam . . . It is true that, in a strict sense, a proceeding in rem is one taken directly against property . . . for its object the disposition of property, without reference to the title of individual claimants.”

Black’s Law Dictionary, IN REM, (<http://thelawdictionary.org/in-rem/>)

Wis. Stat. § 342.40(1m) is a violation in rem; it addresses unattended abandoned cars and violations of the statute affect the vehicle only, not the registered owner or person driving the vehicle. It does not provide for any sanctions against the operator of the vehicle. It does not allow any fine or forfeiture to be assessed against the person. The heft of this statute and available sanctions against the owner or operator are *less* than your everyday parking ticket. For example, the owner of a vehicle that receives a parking ticket in

Wisconsin incurs a penalty most commonly in the form of a forfeiture. On the other hand, an owner whose car is found to be in violation of Wis. Stat. § 342.40(1m) does not face any forfeiture because, again, it is merely a violation in rem and carries no penalty against a person.

“Any **vehicle** in violation of this section **shall be impounded** until lawfully claimed or disposed of under sub. (3) except that if an authorized municipal or county representative determines that the cost of towing and storage charges for the impoundment would exceed the value of the vehicle, the vehicle may be junked, donated to a nonprofit organization, or sold by the municipality or county prior to expiration of the impoundment period upon determination by the chief of police or sheriff having jurisdiction that the vehicle is not stolen or otherwise wanted for evidence or other reason...”

See Wis. Stat. § 342.40(2) (emphasis added). The only remedy available to law enforcement is impoundment of the vehicle “until lawfully claimed” or disposal under specific circumstances. The remedy is addressed to the vehicle, not to a person.

Because the violation is in rem, a registered vehicle’s owner cannot be arrested for the simple fact that his or her car was deemed to be in violation of the statute. Rather, the only remedy available is in rem – against the vehicle. The trial court erroneously relied upon Wis. Stat. § 342.40(1m) in denying Bethke’s Motion to Suppress.

The only fact that the arresting trooper had when he held Bethke to the ground, handcuffed him, arrested him and took him into

custody was a hunch that Bethke's car was unattended. That arrest was therefore unlawful.

C. All Evidence Obtained as a Result of the Unlawful Arrest of Damian Bethke Must be Suppressed.

The exclusionary rule provides for the suppression of all evidence that "is in some sense the product of the illegal governmental activity." State v. Knapp, 2005 WI 127, ¶22, 285 Wis. 2d 86, 700 N.W.2d 899 (quoting Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)). The rule extends to both tangible and intangible evidence that is the fruit of the poisonous tree. Id. at ¶ 24 (citing Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

"The purposes of the exclusionary rule are to deter police misconduct and ensure judicial integrity by refusing to rely on evidence obtained through police misconduct . . . but the primary purpose is deterrence."

State v. Felix, 2012 WI 36, ¶39, 339 Wis. 2d 670, 811 N.W.2d 775

(internal citations omitted).

"In its broadest sense, the [fruit of the poisonous tree doctrine] can be regarded . . . as a device to prohibit the use of any secondary evidence which is the product of or which owes its discovery to illegal government activity."

State v. Knapp, supra, at ¶ 24 (quoting State v. Schlise, 86 Wis. 2d 26, 45, 271 N.W.2d 619 (1978)).

The trooper's seizure and arrest of Damian Bethke on the side of the road was unsupported by probable cause to establish that any offense permitting an arrest had been committed; the arrest was unlawful. Therefore, the Court must suppress all evidence and statements obtained following that unlawful arrest.

II. THE TROOPER LACKED AN OBJECTIVELY REASONABLE SUSPICION OF A VIOLATION OF LAW TO JUSTIFY THE SEIZURE OF DAMIAN BETHKE

Summary of Argument

Leaving one's vehicle off to the side of a roadway is not a violation of Wisconsin law that permits the seizure of the vehicle's owner.

Merits

Both the Fourth Amendment to the United States Constitution and article I, Section 11 of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches and seizures. Detaining an individual who is proactively flagging down a trooper from the side of a roadway is a form of seizure triggering Fourth Amendment protections. Terry v. Ohio, 392 U.S. 1, 16-17, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Such a detention is unreasonable and in violation of the Fourth Amendment unless the officer has a reasonable, articulable and particularized suspicion that the individual

seized has violated a law which would subject a person to arrest. Id. at 21.

The protections of the Fourth Amendment extend not only to houses and curtilage, but to ‘persons.’ “[T]he Fourth Amendment protects people, not places.” Katz v. U.S. 389 U.S. 347, 351 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Terry v. Ohio, 392 U.S. at 16, recognized that where a police officer restrains a person’s freedom to walk away, he has seized that person. U.S. v. Mendenhall, 446 U.S. 544, 554-55, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), detailed circumstances that would indicate a seizure, including the physical touching of the person, and the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.

The burden of establishing that a detention is lawful falls on the prosecution. State v. Pickens, 2010 WI App 5, ¶ 14, 323 Wis. 2d 226, 779 N.W.2d 1. The prosecution did not meet its burden in this case.

A. The State Trooper Had No Facts to Justify a Seizure of Damian Bethke.

After Damian Bethke’s truck slid off of the country road in the dead of winter in January and became stuck in the snow and ice, he left the truck there and instructed his two passengers to wait while he

went to retrieve a second vehicle to pick them up. (R.45:42; App. 21) Unknown to anyone he had been with, Bethke suffered a very unfortunate accident on the walk to his house to get a second car. As he walked across the farm field, he fell through ice into a pond and began to go into a state of hypothermia. He struggled to get out of the pond, but the ice kept breaking and he became exhausted. (R.45:43-45; App. 22-24) During that time, the other two occupants of the truck became worried, leaving the truck and calling in a missing person's report to the sheriff. (R.45:9; App. 17) They were not at the truck when the responding officers came upon it.

When Bethke finally freed himself from the semi-frozen pond, he managed to trudge through the snow to a road where he saw and flagged down a passing state trooper for help. (R.45:47; App. 26) The County did not present evidence from the state trooper that he even believed that the truck on the side of the roadway belonged to Bethke or that he believed Bethke was the driver who left it there. The County did not even call the arresting trooper to testify. There is no evidence that the trooper conducted any investigation other than asking over his loudspeaker "do you own a black Ford." (R.45:47; App. 26) He did not ask Bethke his name. He did not assess Bethke's medical condition or even approach him to look at him before Bethke was

made to get onto the ground, face down, so that the trooper could seize and handcuff him.

III. THE TROOPER DID NOT HAVE PROBABLE CAUSE TO MAKE A WARRANTLESS ARREST OF DAMIAN BETHKE

Summary of Argument

Damian Bethke was ordered to the ground, handcuffed, arrested and taken into custody after he attempted to flag a Wisconsin State Trooper down for help; the officer did not have probable cause to make that arrest.

Merits

A person is in “custody” when he has been “deprived of his freedom of action in any significant way.” Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). “[T]he ultimate inquiry,” the Court later said, was whether there was “a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.” Thompson v. Keohane, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) (internal citation omitted).

Among “the factors a court may consider are ‘the defendant’s freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint.’”

State v. Kilgore, 2016 WI App 47, ¶¶ 18-19, 370 Wis. 2d 198, 882 N.W.2d 493 (internal citations omitted).

A. Damian Bethke Was Under Arrest When He Was on the Ground, Handcuffed, With a Trooper's Knee in his Back.

When the state trooper had Bethke on the ground, face down in the snow, with his knee pressing down on Bethke's back, it cannot be disputed that the restraint on Bethke's freedom of movement was that which any person would believe consistent with a formal arrest. With the trooper on top of him, pressing him down and holding him to the ground, Bethke was not free to leave. (R.45:48; App. 27) The degree of restraint was high – Bethke could not move. His freedom of movement was completely restrained. Then, to further solidify the restraint and arrest, the trooper placed handcuffs on Bethke and called in to dispatch that he had placed Bethke “in custody.” (R:45, 16; App. 19) Any reasonable person, face down, knee in their back, handcuffs on, would have understood themselves to be under arrest, not free to leave, and in custody at that point.

B. The Trooper's Arrest of Bethke Was Unlawful.

The trooper did not have an arrest warrant. “A warrantless arrest is not lawful except when supported by probable cause.” State v. Lange, 2009 WI 49, ¶19, 317 Wis. 2d 383, 766 N.W.2d 551.

The trooper did not have probable cause. Probable cause to arrest would only have existed if the facts and circumstances known to the trooper would warrant a reasonable officer to conclude that

Bethke had committed or was in the process of committing an offense for which an arrest is permitted. State v. Richardson, 156 Wis. 2d 128, 148, 456 N.W.2d 830 (1990).

The County offered no evidence as to the circumstances the arresting trooper considered prior to unlawfully arresting Bethke. The evidence showed the trooper knew other officers at *another* location had come upon a black truck stuck off the side of the road. (R.45:47; App. 26) There was no evidence that the arresting trooper even had any knowledge of who had left that truck where it was or any other circumstances that could allow him to conclude that Bethke had committed any crime. The record is void of any facts known to the trooper to support probable cause to arrest. The County did not come close to meeting its burden to show probable cause existed prior to Bethke's arrest. Lange, supra, at ¶ 19 ("The burden is on the County to show that the officer had probable cause to arrest.")

Absent a warrant or any facts to support probable cause to arrest, the arrest of Damian Bethke was unlawful and this Court must suppress all evidence derived from that illegal arrest. See Section I (C), above, and State v. Knapp, 2005 WI 127, ¶22, 285 Wis. 2d 86, 700 N.W.2d 899.

CONCLUSION

Based upon the record herein and the foregoing authorities and arguments, Damian A. Bethke respectfully requests that this Court enter an order reversing the order of the trial court denying Damian Bethke's Motion to Suppress and vacating Damian Bethke's conviction.

Dated this 16th day of October, 2017.

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CERTIFICATION ON FORM

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c), Stats., for a brief and appendix produced with a proportional serif font. The length of this brief is 3,963 words.

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**CERTIFICATION OF COMPLIANCE
WITH RULE 809.19(12), STATS.**

I hereby certify that I have submitted an electronic copy of this brief, excluding the Appendix, which complies with the requirements of Section 809.19(12), Stats.

I further certify that the 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.

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CERTIFICATION REGARDING APPENDIX

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 Section 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.

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**CERTIFICATION OF COMPLIANCE
WITH RULE 809.19(13), STATS.**

I hereby certify that I have submitted an electronic copy of this Appendix, which complies with the requirements of Section 809.19(13), Stats.

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.

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