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STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT I

Case No. 2017AP2519-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MICHAEL A. RAKEL,
Defendant-Appellant.

ON APPEAL FROM AN AMENDED JUDGMENT OF
CONVICTION AND ORDER FOR RESTITUTION
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE MARK A. SANDERS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

1. May a circuit court order the Defendant-Appellant Michael A. Rakel to pay an amount equal to the victim's child support payments as part of Rakel's restitution obligations under Wis. Stat. § 973.20(1r) because such payments are special damages under Wis. Stat. § 973.20(5)(a)?

The circuit court answered: Yes.

This Court should answer: Yes.

2. If a circuit court may order Rakel to pay the victim's child support as part of his restitution obligations, did the circuit court err in ordering Rakel to pay child support to the biological mother of Rakel's child?

The circuit court did not address this question.

This Court should answer: No. Wisconsin Stat. §§ 767.501(2), 895.03, 895.04(1), and 973.20(5)(a), read and harmonized together, support the circuit court's decision that Rakel pay the victim's child support obligations as restitution to the biological mother of the victim's minor child until the minor child reaches 18. Because the child support payments are to paid to the mother by court order, and the mother may and did pursue child support enforcement actions under Wis. Stat. § 767.501(2) against the victim to satisfy that order, the circuit court properly directed that the payments go to the mother for the minor child's benefit.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent State of Wisconsin does not request oral argument or publication. The parties' briefs adequately develop the law and facts necessary for disposition of the appeal. Publication is unwarranted because the case may be decided by applying well-established legal principles to the facts.

INTRODUCTION

Rakel appeals from the circuit court's amended judgment of conviction and order for restitution.

On appeal, Rakel contends that the circuit court did not have statutory authority to require Rakel to pay an amount equal to the victim's child support obligations as restitution. Further, he contends that, even if the circuit court had authority to order these payments, the court improperly directed that they be made to the biological mother of the victim's child rather than the child herself.

This Court should reject Rakel's arguments. Read together, the restitution, wrongful death, and child support enforcement action statutes support the circuit court's restitution order. They also support the court's decision to direct those payments to the biological mother of the victim's child under the specific facts of this case.

This Court should affirm his amended judgment of conviction and order for restitution.

STATEMENT OF THE CASE

The State charged Rakel and co-defendant Roxanne Gray with several crimes relating to the death and robbery of the victim, Andre Taylor. (R. 1:1–2.)

Rakel and Gray concocted a plan to “get some ‘stuff’” off of their drug dealer Taylor. (R. 1:4.) Rakel and Gray asked Amber Pries, Gray's ex-girlfriend, to go with them. (R. 1:4.) According to Pries, Rakel and Gray wanted to take 2 grams of crack and 3 grams of heroin from Taylor. (R. 1:4.)

Rakel, Gray and Pries drove to where Taylor was waiting in his truck. (R. 1:4.) Once there, Gray got into Taylor's passenger seat while Rakel came from behind the truck and “snatched” Taylor from the driver's seat. (R. 1:4.) Rakel and Gray then chased Taylor down. (R. 1:4.)

When Rakel and Gray returned to Taylor's truck, Taylor was nowhere to be found while Rakel had a "shish-kebob stick" in his hands and blood on "all over" his pants. (R. 1:5.) Gray's face was also spattered in blood. (R. 1:5.) Pries asked Gray if she had just stabbed Taylor, and Gray said she had. (R. 1:5.)

For his involvement in Taylor's death, the State charged Rakel with first-degree reckless homicide as party to a crime, use of a dangerous weapon, and attempted robbery, as party to a crime and as a repeater. (R. 1:1–2.)

Rakel's guilty plea/sentencing. Rakel chose to plead guilty to a single charge of first-degree reckless homicide as party to a crime. (R. 16; 56:5.)

After accepting his guilty plea, the circuit court sentenced Rakel. (R. 57:1.) The parties began the sentencing hearing by discussing Taylor's family's restitution worksheet. (R. 57:6–11.) The parties discussed obligating Rakel to pay child support to Taylor's "children and grandchild." (R. 57:11; *see also* 36:2 (restitution worksheet).) Rakel's attorney objected because there was "no documentation . . . that would indicate that Mr. Taylor was in fact the father of these children." (R. 57:11.) Moreover, counsel contended that the \$9,000 requested by the family was "arbitrary" and that even if paternity were proven, Taylor's children "would be entitled to Social Security death benefits." (R. 57:11.) The State agreed to provide further analysis to the court before the restitution hearing. (R. 57:12.)

The court then sentenced Rakel to a term of 40 years of incarceration that consisted of 30 years of initial confinement followed by 10 years of extended supervision. (R. 57:83.) As relevant here, it ordered Rakel to pay any restitution but explained that the "exact amount" had not yet been set. (R. 57:80.) It made clear that Rakel's restitution payments would "be paid first. First the restitution, then the costs and

surcharges will be paid out of a percentage of your prison assets, income and wages.” (R. 57:80.)

After setting the issue of restitution over once more to allow the parties to gather more documentation, the circuit court held a restitution hearing for Rakel, Gray, and Pries, who had since been charged as a co-defendant for her role in Taylor’s death. (R. 58:3; 59:1.)

The circuit court conceived of five categories of restitution to be decided, one of which was “child support. . . . where we have the most objections.” (R. 59:5.) The circuit court noted the requested amount was \$52,500, but the State amended that request to a total of \$21,000, or \$300 per month, until Taylor’s child reached 18. (R. 59:5–7.)

The State reasoned that “the way to look at [the child support request] is that this would have been child support that would have been paid and was being paid by the victim, Mr. Taylor, to the biological mother of one of his children.” (R. 59:6.) Thus, Taylor’s family “request[ed] it . . . because of the fact that had the victim lived he would have been paying this amount of money towards the child of the victim and so in many ways I think [this] is analogous to loss of income.” (R. 59:6.)

The State argued that the restitution request for child support was appropriately viewed “within the category of I think special damages, but not general damages, which is an area in which the Court, if I’m not mistaken by the [restitution] statute, [Wis. Stat. § 973.20(5)(a),] may [be] include[d] in the restitution order.” (R. 59:6.) And it concluded that the court could order the child support payments as special damages “if they are the sort of damages that someone could get in a civil suit for the same action.” (R. 59:7.) Thus, it “appear[ed] to be that this would be potentially something along the lines that the child could attempt to seek as a result

of a wrongful death, which is what happened in this case.” (R. 59:7.)

Rakel’s attorney objected. (R. 59:7.) Counsel argued that the court did not “ha[ve] any authority to order” Rakel to pay Taylor’s child support obligations. (R. 59:7.) He contended the amount being requested was also incorrect because the child support obligation was \$265 not \$300 as the State initially argued and noted that the child’s family was receiving \$100 a month from Social Security as a result of Taylor’s death. (R. 59:7.) Thus, counsel contended that the award should be \$165 per month for 70 months, for a total of \$11,550. (R. 59:7.)

The State agreed with counsel that the correct amount of restitution request should be \$11,550. (R. 59:8.) The State also produced a Walworth County circuit court paternity action judgment that documented Taylor’s paternity of the child, including her birthdate of August 24, 2004. (R. 59:8–9.) The court questioned how “concrete” the information provided by the State was, explaining that it was unsure “how to factor” whether the financial circumstances that warranted the award now would remain. (R. 59:10.)

The court then looked to Wis. Stat. § 973.20(13)(a) which provides factors a circuit court is obligated to consider when it determines “whether to order restitution and the amount thereof.” The court noted that the statute included the “amount of loss suffered by any victim as a result of a crime considered at sentencing.” Wis. Stat. § 973.20(13)(a)(1). It reasoned that “the amount of loss suffered by the victim as a result of the crime [here]. . . . would have been *suffered by the child* is the \$11,550.” (R. 59:10–11) (emphasis added).) It also considered the potential income Rakel could earn in a prison setting, again noting that “[t]hat income” was “appropriate [to] be paid by restitution. In fact, by statute it’s required that restitution be paid first, which means that at least the dollar amount that would be used for costs and

surcharges would be available to pay restitution first.” (R. 59:11.)

The court imposed a joint and several restitution order as to Rakel, Gray and Pries, concluding that “with respect for [sic] child support, is sufficient [sic] as lost income.” (R. 59:16.) It concluded that there was “sufficient earning capacity so that that order could be fulfilled, particularly in the joint and several liability.” (R. 59:16.) The court imposed an order for restitution that in part obligated Rakel to pay \$11,550 to the mother to account for the future absence of Taylor’s child support payments. (R. 59:18.)

Rakel appeals that part of the restitution order. (R. 37:1.)

STANDARDS OF REVIEW

“Whether an item included within a restitution order comes within statutory limitations on what a court may order is a question of law that [an appellate court reviews] de novo.” *State v. Longmire*, 2004 WI App 90, ¶ 12, 272 Wis. 2d 759, 681 N.W.2d 534.

An appellate court reviews a circuit court’s decision to award restitution under an erroneous exercise of discretion standard. *State v. Hoseman*, 2011 WI App 88, ¶ 13, 334 Wis. 2d 415, 799 N.W.2d 479.

ARGUMENT

The circuit court properly ordered Rakel to pay restitution to account for lost child support payments to Taylor’s minor child under its statutory authority in Wis. Stat. §§ 767.501(2), 973.20(1r), 973.20(5)(a), 895.03 and 895.04(1).

A. Legal principles demonstrating that the biological mother of Taylor’s minor child is entitled to restitution from Rakel.

Under Wis. Stat. § 973.20(1r), the restitution statute, the circuit court “shall” order restitution for “any” crime, other than crimes involving domestic abuse, considered at sentencing “unless the court finds substantial reason not to do so and states the reason on the record.” Wisconsin Stat. § 950.02(4)(a)4.a. specifies that a family member of a deceased victim qualifies as a victim. Wisconsin Stat. § 950.02(3) defines “[f]amily member” to mean “spouse, minor child, adult child, sibling, parent, or legal guardian.”

In ordering restitution, “a court may require a defendant to pay only special damages the victim sustains which evidence in the record substantiates.” *State v. Holmgren*, 229 Wis. 2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999). Special damages “represent the victim’s actual pecuniary losses.” *Id.*

However, before a circuit court may order a defendant to pay special damages, there must be a showing that, 1) “the defendant’s *criminal activity* was a substantial factor in causing’ pecuniary injury to the victim,” and, that 2) the restitution award “is limited to ‘*special damages* . . . which could be recovered in a civil action against the defendant for his . . . conduct in the commission of a crime.” *Longmire*, 272 Wis. 2d 759, ¶¶ 13–14 (alterations in original) (citations omitted). The second limitation “restrains a sentencing court from ordering the payment of ‘general damages,’ that is,

amounts intended to generally compensate the victim for damages such as pain and suffering, anguish, or humiliation.” *Id.* ¶ 14. Special damages are therefore “[a]ny readily ascertainable pecuniary expenditure paid out because of the crime.” *Holmgren*, 229 Wis. 2d at 365.

Wisconsin law authorizing civil recovery for wrongful death. Wisconsin Stat. § 895.04(1) allows family members of the deceased to bring an action for wrongful death by declaring that “[a]n action for wrongful death may be brought by the personal representative of the deceased person or by the person to whom the amount recovered belongs.”

“Wisconsin Stat. § 895.03 states the conditions under which a wrongdoer is liable for wrongful death.” *Force ex rel. Welcenbach v. Am. Family Mut. Ins. Co.*, 2014 WI 82, ¶ 36, 356 Wis. 2d 582, 850 N.W.2d 866. In short, under that statute, “the legislature has proclaimed that a wrongdoer should be liable for a wrongful death when the injured party could have maintained an action and recovered damages from the defendant, had the injured party survived.” *Force*, 356 Wis. 2d 582, ¶ 37.

A wrongful death action “compensates the deceased’s relatives for the damages they suffer as a result of the deceased’s death.” *Force*, 356 Wis. 2d 582, ¶ 45. Thus, Wis. Stat. § “895.04(2) provides that minor children get a set-aside from the surviving spouse’s recovery *and recover as lineal heirs if no surviving spouse exists.*” *Id.* ¶ 54 (emphasis added). In addition, Wis. Stat. § 895.04(4) permits a plaintiff in a wrongful death action to recover “damages for pecuniary injury from wrongful death.”

Relevant family law provisions. Wisconsin Stat. § 767.511 defines the parameters and requirements before a circuit court may order a person to pay child support payments to another. As relevant here, a circuit court may order a person to pay child support following entry of “an

order or a judgment in a paternity action.” Wis. Stat. § 767.511(1). Child support is defined as “the amount . . . that the person should reasonably contribute to the support . . . of the . . . child.” Wis. Stat. § 767.501(2)(b).

Wisconsin Stat. § 767.501, “Actions to compel support,” declares that four classes of individuals may bring an action to compel child support payments if the person fails to pay: the person’s spouse, the minor child, the person with legal custody of the child, and a “nonlegally responsible relative.” Wis. Stat. § 767.501(2). Wisconsin Stat. § 767.501(1)(a) further defines a “[n]onlegally responsible relative” to mean “a relative who assumes responsibility for the care of a child without legal custody, but [who] is not in violation of a court order.”

A court reviewing a question of statutory interpretation is to avoid examining a statute in isolation. “While it is true that statutory interpretation begins with the language of the statute,” *Alberte v. Anew Health Care Servs., Inc.*, 2000 WI 7, ¶ 10, 232 Wis. 2d 587, 605 N.W.2d 515, a reviewing court’s statutory interpretation does not end there. Rather, “[i]n examining the statutory text . . . [a reviewing court] do[es] more than focus on a dictionary definition of each word. Words are given meaning to avoid absurd, unreasonable, or implausible results and results that are clearly at odds with the legislature’s purpose.” *Force*, 356 Wis. 2d 582, ¶ 30. Thus, a court should “scrutinize the words in view of the purpose of the statute. . . . [and] consider the meaning of words in the context in which they appear. *Id.*”

This Court has held that for the purposes of the wrongful death statute, the term “pecuniary injury” is interpreted “broadly.” *Estate of Holt by Holt v. State Farm Fire & Cas. Co.*, 151 Wis. 2d 455, 460, 444 N.W.2d 453 (Ct. App. 1989). It includes any “pecuniary loss actual or expected” caused by the defendant’s tortious conduct. *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 313, 294 N.W.2d 437 (1980)

(citation omitted). Indeed, this Court has held that “pecuniary injury” is synonymous with “financial loss.” *Estate of Holt*, 151 Wis. 2d at 460.

B. Wisconsin’s child support enforcement, wrongful death and restitution statutes authorize a circuit court to award restitution equal to a victim’s child support obligations.

Rakel argues that the circuit court did not have the statutory authority to order Rakel to pay restitution in an amount equal to Taylor’s child support obligations. (Rakel’s Br. 11–16.) Rakel is wrong because the circuit court’s treatment of the victim’s family’s claim for restitution for child support easily satisfies both prongs of *Longmire* to support the imposition of special damages on Rakel under Wis. Stat. § 973.20(5)(a), and comports with the purpose of that statute, the wrongful death statutes, and the child support statutes outlined above.

First, there is no debate that Rakel’s criminal activity in causing Taylor’s death was a substantial factor in causing Taylor’s family pecuniary loss. *Longmire*, 272 Wis. 2d 759, ¶ 13. Because Rakel, Gray and Pries killed Taylor, they deprived Taylor’s family of the continued payment of Taylor’s child support obligations. The absence of those payments going forward is obviously a “financial loss” which this Court has stated is synonymous with “pecuniary injury” in the wrongful death context. *Estate of Holt*, 151 Wis. 2d at 460.

Second, the circuit court’s restitution order is properly limited to “*special damages* . . . which could be recovered in a civil action against [Rakel] for his . . . conduct in the commission of the crime.” *Longmire*, 272 Wis. 2d 759, ¶ 14 (alterations in original) (quoting Wis. Stat. § 973.20(5)(a)).

Wis. Stat. § 895.04(1) declares that an “action for wrongful death may be brought by the personal

representative of the deceased person or by the person to whom the amount recovered belongs.” Wisconsin Stat. § 950.02(4)(a)4.a. defines a victim for the purpose of restitution as a family member of the deceased. Finally, Wis. Stat. § 767.501(2) would allow Taylor’s minor child to bring a “court action to compel the person to provide support.” Thus, Taylor’s minor child could bring a wrongful death action against Rakel because she is a victim, who could have brought a child support enforcement action against Taylor were he alive, and she is therefore a “person to whom the amount recovered belongs.” Wis. Stat. § 895.04(1).

Instead of obligating Rakel to pay the mother for some general, non-specific amount for pain and suffering because of Taylor’s death, the circuit court’s order here is specific and based on a demonstrable calculation provided by the circuit court. (R. 59:10–11.) Thus, the circuit court’s restitution order satisfied the second *Longmire* factor because the animating principle of that factor is that a defendant should have not have to pay restitution for a victim’s “general damages,” . . . intended to generally compensate the victim for damages such as pain and suffering, anguish, or humiliation.” *Longmire*, 272 Wis. 2d 759, ¶ 14 (citation omitted).

Indeed, the circuit court’s explanation of Rakel’s restitution order shows that it is expressly not meant to compensate the biological mother of Taylor’s child for general damages such as pain and anguish, but for “the amount of loss suffered by the victim as a result of the crime” that the parties were able to discuss and decide concretely based on demonstrable facts in the record. (R. 59:10.)

Indeed, the term “special damages” in Wis. Stat. § 973.20(5)(a) is to be interpreted broadly and means “[a]ny readily ascertainable pecuniary expenditure paid out because of the crime.” *Holmgren*, 229 Wis. 2d at 365. And as the Wisconsin Supreme Court has opined, the “dual legislative purposes of the wrongful death statutes [are]: (1) to impose

liability on the wrongdoer; and (2) to protect relational interests, especially the interests of the deceased's minor dependent children." *Force*, 356 Wis. 2d 582, ¶ 9. Thus, there is a clear recognition in the caselaw surrounding the wrongful death and restitution statutes that supports the circuit court's restitution award here.

Additionally, Rakel notes that the special damages statute "does not allow speculation," arguing that the circuit court's restitution award was not concretely or properly determined. (Rakel's Br. 15.)

But the circuit court's award of \$11,500 was not based on speculation. Rather, the court's order methodically evaluated Taylor's family's restitution request and explained the specific basis for the amount ordered. (R. 59:5–11.) It first determined the length of the financial obligation (until the child turned 18), began its calculations with a monthly sum that matched Taylor's child support obligations exactly, and then deducted (or offset) the monthly amount the child would receive from social security as a result of Taylor's death. (R. 59:5–11.)

Moreover, consistent with the factors in Wis. Stat. § 973.20(13)(a), the court also factored in Rakel's limited earning capacity while incarcerated, and his brain injury that would limit the type of work he could do. (R. 59:10–16.) Thus, the amount that the court ordered Rakel is not based on "speculation." (Rakel's Br. 15.) Far from it.

C. The statutes also support the circuit court's decision to require that Rakel pay the victim's child support obligations to the biological mother of Taylor's child.

Still, Rakel argues that, even if the circuit court could obligate Rakel to pay child support as a special damage under Wis. Stat. § 973.20(5)(a), it erred in directing that payment be made to the child's biological mother. (Rakel's Br. 16–18.)

Rakel is wrong because his argument ignores the realities of how child support enforcement actions are brought, and the policies behind the wrongful death and restitution statutes.

Although Wis. Stat. § 973.20(5)(a) does not specifically speak to the fact pattern in Rakel's case, this Court has already "emphasize[d] that it is not the nature of the potential civil cause of action that distinguishes between amounts awardable as restitution and those that are not. WISCONSIN STAT. § 973.20(5)(a) permits restitution for 'all special damages' that could be recovered in any type of 'civil action.'" *Longmire*, 272 Wis. 2d 759, ¶ 26.

As already addressed above, the biological mother of Taylor's child is the person to whom the Walworth County circuit court determined Taylor owed child support to, presumably as a "[n]onlegally responsible relative" under Wis. Stat. § 767.501(1)(a)."¹

Instead of obligating Rakel to pay the mother for some general, non-specific amount for pain and suffering because of Taylor's death, the circuit court's order here is specific and based on a demonstrable calculation provided by the circuit court. (R. 59:10–11.) Thus, the circuit court's restitution order satisfied the second *Longmire* factor because the animating principle of that factor is that a defendant should have not have to pay restitution for a victim's "general damages,' . . . intended to generally compensate the victim for damages such

¹ CCAP records in the paternity action do not make clear that the biological mother of Taylor's child is the child's legal guardian. See *Walworth County Case Number 2007PA000145PJ In Re the Paternity of M.D.T.*, Wisconsin Circuit Court Access, <https://wcca.wicourts.gov/caseDetail.html?caseNo=2007PA000145PJ&countyNo=64&index=0> (last visited June 11, 2020). Thus, the only other qualifying category to describe the mother is as a "[n]onlegally responsible relative" under Wis. Stat. § 767.501(1)(a).

as pain and suffering, anguish, or humiliation.” *Longmire*, 272 Wis. 2d 759, ¶ 14 (citation omitted).

Indeed, the circuit court’s explanation of Rakel’s restitution order shows that it is expressly not meant to compensate the biological mother of Taylor’s child for general damages such as pain and anguish, but for “the amount of loss suffered by the victim as a result of the crime” that the parties were able to discuss and decide concretely based on demonstrable facts in the record. (R. 59:10.)

However, Wis. Stat. § 767.501(1)–(2) also make clear that the child’s biological mother may also bring an enforcement action as a “nonlegally responsible relative.” Indeed, according to CCAP records, as part of the Walworth County paternity action, the child’s biological mother brought several actions to compel Taylor to pay his child support payments. Thus, although the child support payments are described by statute as “the amount . . . that the person should reasonably contribute to the support . . . of the . . . child,” Wis. Stat. § 767.501(2)(b), the actual litigation brought pursuant to the Walworth County’s paternity determination was brought by the minor child’s mother, presumably for the child’s benefit. Thus, while the minor child is properly considered a victim under the restitution statutes and the person “to whom the amount recovered belongs” under the wrongful death statute in Wis. Stat. § 895.04(1), as a practical matter, the child’s mother has undertaken all of the actions to compel Taylor’s child support payments. She is therefore the one who has suffered a pecuniary injury.

As the State argued at the restitution hearing, Taylor’s family “request[ed] [the child support payments] . . . because of the fact that had the victim lived he would have been paying this amount of money towards the child of the victim.” (R. 59:6.) Thus, the circuit court’s order does not obligate Rakel to compensate the family for general damages but for a specific, demonstrable sum that Taylor would have been

obligated to pay to the biological mother of his child had Rakel not killed him. This is entirely consistent with this Court's declaration that special damages are "[a]ny readily ascertainable pecuniary expenditure paid out because of the crime." *Holmgren*, 229 Wis. 2d at 365. The circuit court's determination that Rakel pay special damages to the biological mother of Taylor's child was therefore proper.

However, if this Court disagrees that the restitution amount is payable to the child's mother, it should remand with instructions so that the circuit court may name a Guardian Ad Litem ("GAL") for the child and direct Rakel's payments to him or her. *See* Wis. Stat. § 767.407(1)(a)1. (allowing a court to appoint a GAL for a minor child if "the court has reason for special concern as to the welfare of a minor child.").

CONCLUSION

This Court should affirm Rakel's amended judgment of conviction.

Dated this 18th day of June 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,044 words.

Dated this 18th day of June 2020.

ROBERT G. PROBST
Assistant Attorney General

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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 18th day of June 2020.

ROBERT G. PROBST
Assistant Attorney General