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Appeal No. 2018 AP 001382  
Green County Circuit Court Cases 2017 TR 001733, 2017 TR  
001914

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COUNTY OF GREEN,

Plaintiff-Appellant,

vs.

JOEY JAY BARNES,

Defendant-Respondent

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ON APPEAL FROM THE ORDER FOR DISMISSAL ENTERED IN THE  
CIRCUIT COURT OF GREEN COUNTY, THE HONORABLE THOMAS J.  
VALE, PRESIDING.

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**BRIEF OF DEFENDANT-RESPONDENT**

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### **STATEMENT OF THE ISSUES**

- I. Whether Green County Sheriff Deputy Nimitz performed an impermissible *Terry* stop that carried out for an unreasonable period of time, such that Mr. Barnes' Fourth Amendment rights were violated.
- II. Whether Mr. Barnes had a reasonable expectation of privacy to his private examination room at Monroe Hospital Emergency Room that was violated when Deputy Nimitz and Deputy King repeatedly entered it, while the curtain and door were closed, without permission from Mr. Barnes.

**STATEMENT ON PUBLICATION AND ORAL ARGUMENT**

The Defendant does not request oral argument. Oral argument is not necessary because "the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost." Wis. Stat. § 809.22(2)(b). Publication is not necessary.

## **STATEMENT OF THE CASE**

After an unreasonably lengthy investigation, Joey J. Barnes received a citation on July 13, 2017 for Operating While Intoxicated (OWI) 1<sup>st</sup> Offense (Green County Case No. 17-TR-1733) and Operating with Prohibited Alcohol Concentration (PAC) as a 1<sup>st</sup> Offense (Green County Case No. 17-TR-1914). R. 1. On December 13, 2017, Mr. Barnes filed a "Motion to Dismiss" with the Circuit Court. R. 7. An evidentiary hearing was held on Mr. Barnes' motion on February 1, 2018. R. 21. Both the County and Mr. Barnes filed a "Post-Hearing Brief" with the Court in follow-up to the evidentiary hearing held on February 1, 2018. R. 11, 12, 13, 14. The Court then held a status conference on April 27, 2018, at which point it granted suppression of evidence on the basis that law enforcement officers lacked probable cause to request a blood test. R. 22. A Status Conference was held on June 1, 2018 to further discuss the Court's oral ruling. R. 23. At this Status Conference, the Court orally dismissed both Green County Case Nos. 17-TR-1733 and 17-TR-1914. *Id.* A written "Motion and Order for Dismissal" was then submitted to and signed by the Court on June 6, 2018. R. 15. The County then filed a "Notice of Appeal" on July 20, 2018. R. 16.

### **STATEMENT OF THE FACTS**

On July 13, 2017, at approximately 9:00 p.m., Mr. Barnes was involved in a single car accident on a patch of State Highway 69, near Gutzmer Road just outside of Monticello, Wisconsin. *R. 21*. The specific area of road where Mr. Barnes crashed is known to be commonly associated with accidents, as there is an S-shaped curve in the road. *Id.* Law enforcement officers responded to the scene of the accident where they conducted a routine investigation of the stop, including questioning Mr. Barnes about the cause of the accident and his activities immediately prior to the accident. *R. 21 at 6-9*. Law enforcement was aware that, prior to the accident, Mr. Barnes was at Ten Pin Bowling Alley where he had consumed a few drinks. *Id. at 13*. However, neither Deputy Kanable, nor Deputy Nimtz, questioned him regarding when he began drinking or when he stopped drinking. *Id. at 14 and 60*. The first officer on scene, Deputy Kanable, did not observe any odor of alcohol on Mr. Barnes, he did not observe slurred speech, he did not observe glassy, bloodshot eyes, or any other sign of intoxication. *Id. at 15*. Deputy Nimtz arrived at the accident scene at approximately 9:05 p.m. *R. 25 at 21:05:07*. Deputy Nimtz provided conflicting testimony as to whether he observed any signs of intoxication at the scene of the accident. *Id. at 45, 69*. Mr. Barnes was questioned at

the scene of the accident, after which, he was free to leave. *Id.* at 20. Mr. Barnes was not placed into custody of law enforcement at this time. *Id.* Law enforcement made no further contact with Mr. Barnes until arriving at the hospital later that evening. *Id.* at 21:16-19.

Prior to arriving at Monroe Hospital Emergency Room, Deputy Nimitz was fully aware that he was investigating a civil forfeiture. *Id.* at 45:14-19. At the evidentiary hearing on February 1, 2018, Deputy Nimitz testified that he was aware of the following prior to entering Mr. Barnes' private examination room at Monroe Hospital:

1. Mr. Barnes had no prior OWI's (this was confirmed with a check of Mr. Barnes' driving record and dispatch);
2. Mr. Barnes had no outstanding warrants;
3. Mr. Barnes was not under arrest;
4. He Deputy Nimitz was not conducting a traffic stop;
5. Deputy Nimitz was not in hot pursuit;
6. There were no exigent circumstances;
7. Deputy Nimitz was not engaged in a community care-taking function;
8. Deputy Nimitz did not observe that Mr. Barnes engaging in any suspicious activity;
9. Deputy Nimitz did not believe that Mr. Barnes had or was committing a crime; and

10. Deputy Nimitz did not observe Mr. Barnes engaging in criminal conduct.

*R. 11 at 3.*

Monroe Hospital Emergency Room consists of a large reception area, which is surrounded by approximately 16 private examination rooms each of which is enclosed by walls, curtains, and doors. *R. 21 at 107:4-10.* Each private examination room is limited to one patient per room and are designed to protect patient privacy. *Id. at 53:15-23; 107:23-25; 58:2-5; 108:1-2.* Deputy Nimitz testified that he believed the general public is not readily admitted to these private examination rooms. *Id. at 55:18-21.* Deputy Nimitz acknowledged that these rooms were likely designed to provide patients with privacy because "patients could be dressing, undressing, or in some state or undress, or receiving [medical] treatment." *Id. at 55:22-25.* However, Deputy Nimitz then testified that law enforcement officers are not bound by rules applying to the general public and that he, as a law enforcement officer, could enter a private examination room regardless of this design and expectation of privacy. *Id. at 56:8-14.*

Upon entering Monroe Hospital Emergency Room, Deputy Nimitz observed that Mr. Barnes' curtain was closed. *Id. at 58:6-9.* Deputy Nimitz testified that he believed that Mr.

Barnes' had an expectation of privacy when the curtain or door was closed to his private examination room. *Id.* Regardless of this perceived expectation of privacy, Deputy Nimitz did not ask permission to enter Mr. Barnes' private examination room. *Id. at 58:12-16.* Deputy Nimitz did not speak with medical staff about Mr. Barnes' injuries or what treatments he was undergoing prior to entering Mr. Barnes' examination room. *Id. at 59:6-16.* Deputy Nimitz also testified that the general public is not allowed past the initial nurse's station that sits at the immediate entrance of Monroe Hospital Emergency Room. *Id. at 76:4-7.*

When Deputy Nimitz entered the examination room, Mr. Barnes was being treated by medical staff, lying in a bed with a neck brace on, and was undressed except for a hospital gown. *Id. at 58:17-19; 59:4-5.* Shortly after Deputy Nimitz entered Mr. Barnes' room without permission, Deputy King also entered Mr. Barnes' room without permission. *Id. at 107:11-16.* When Deputy King entered Mr. Barnes' room, the curtain was closed. *Id. at 107:17-19.* Deputy King also testified at the February 1, 2018 that he believed the curtain and door of the private examination rooms at Monroe Hospital Emergency Room are designed to provide patients, such as Mr. Barnes, with privacy. *Id. at 107:25; 108:1-3.*

After entering Mr. Barnes' private examination room, Deputy Nimitz proceeded to interrogate Mr. Barnes. *Id.* 60:1-16; R. 25. During this interrogation, Deputy Nimitz simply stated, "I'm going to check your eyes," and proceeded to perform a horizontal gaze nystagmus test. R. 25 at 21:50:20. Deputy Nimitz did not ask Mr. Barnes if he would be willing to consent to a field sobriety test. *Id.* The trial court held that Deputy Nimitz seized Mr. Barnes at the time he began performing the HGN test. R. 22 at 32. Deputy Nimitz did not perform either the "walk and turn" or "one-leg stand" field sobriety tests. See R. 21 at 61:6-12. Moreover, neither Deputy Nimitz, Deputy Kanable, nor Deputy King established an alcohol curve. *Id.* at 14:1-11; 67:13-15; 106:4-6. After interrogating Mr. Barnes, Deputy Nimitz (1) did not observe any nystagmus prior to 45 in either eye, (2) did not observe the odor of alcohol on Mr. Barnes while in the hospital bed, (3) did not observe blood shot eyes, and (4) did not observe any slurred speech. *Id.* at 65:5-7; 17-25; 66:1-3. Deputy King also did not observe that Mr. Barnes exhibited any signs of impairment. *Id.* at 106:10-18. After a brief discussion, neither Deputy King, nor Deputy Nimitz placed Mr. Barnes under arrest; instead, they simply walked out of Mr. Barnes' room and out of the hospital entirely. *Id.* at 59:24-25; R. 25 at 21:52:18.

Upon exiting the emergency room, Deputy King instructed Deputy Nimitz to turn off his body camera. *R. 21 at 67:20-25.* Deputy King also turned his body camera off, and the in-squad camera was also turned off. *Id. at 68:1-6.* Deputy King and Deputy Nimitz proceeded to have a conversation for approximately twenty-five (25) minutes before turning all in-squad and body cameras back on. *Id. at 70:22-24.* The Green County Sheriff has never instructed Deputy Nimitz or Deputy King to turn their body cameras off in the midst of an investigation. *Id. at 68:9-14.* Deputy Nimitz stated the purpose behind turning all the cameras off was for him and Deputy King to discuss Deputy Nimitz's confidence and decision-making abilities. *Id. at 79:12-15.* Deputy Nimitz further stated that Deputy King, his superior, training officer, was not happy with Deputy Nimitz's confidence at this point in the investigation. *Id. at 79:19-21.* After turning their cameras back on, Deputy King and Deputy Nimitz re-entered the emergency room. *Id. at 71:1-3.*

Deputy Nimitz and Deputy King re-entered Monroe Hospital at approximately 10:21 p.m. *Id. at 71:1-3.* Deputy Nimitz proceeded straight to Mr. Barnes' private examination room. *Id. at 71:4-8.* Upon reaching Mr. Barnes' room, Deputy Nimitz observed that the door to Mr. Barnes' room was closed and the privacy curtain was drawn. *Id. at 72:9-12.* Deputy Nimitz

proceeded to open Mr. Barnes' door, pull back the privacy curtain, and enter his room. *Id. at 72:13-15.* Deputy Nimitz did not ask Mr. Barnes for permission to enter his private examination room. *Id. at 72:17-21.* Deputy Nimitz did not ask Mr. Barnes' family members for permission to enter Mr. Barnes' room. *Id.* Deputy Nimitz did not ask hospital staff for permission to enter Mr. Barnes' room. *Id.* Neither Mr. Barnes, his family members, nor hospital staff gave Deputy Nimitz consent to enter Mr. Barnes' private examination room. *Id.*

Immediately upon re-entering Mr. Barnes' private examination room, Deputy Nimitz placed Mr. Barnes under arrest for a civil forfeiture of an OWI 1<sup>st</sup>. *Id. at 73:9-11.*

Deputy Nimitz testified that he used his body camera footage to draft his report of the incident. *Id. at 83:23-25, 84:1-25.* Nonetheless, Deputy Nimitz testified that he still made "a bunch of mistakes" in his official report. *Id. at 81:15-16.* Deputy Nimitz also testified that he could have made several mistakes in his testimony before the Court on February 1, 2018. *Id. at 85:1-3.* The Circuit Court also correctly reasoned that Deputy Nimitz lacked credibility due to his own uncertainty and multiple mistakes made in his investigation, report, and testimony. *R. 22 at 29:14-30:12.* Shortly after this incident, Deputy Nimitz's three-month long

employment with the Green County Sheriff's department terminated. *Id.* at 41:11-13.

## ARGUMENT

### **I. DEPUTY NIMTZ CONDUCTED AN ILLEGAL *TERRY* STOP BY INTERROGATING MR. BARNES OVER THE COURSE OF SEVERAL HOURS; THEREFORE, THE CIRCUIT COURT CORRECTLY SUPPRESSED EVIDENCE COLLECTED BY DEPUTY NIMTZ.**

The United States Supreme Court has routinely held that “‘No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.’” *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 1873 (1968) (quoting *Union Pac. R. Co. V. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001 (1891)). However, Wisconsin Statute § 968.24 permits a law enforcement officer, after first identifying him/herself as such, to question an individual “*for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime,*” without violating that individual’s Fourth Amendment rights. Wisconsin Statutes 2015-16 (emphasis added). The Wisconsin Court of Appeals held that § 968.24, Wis. Stats., was a codification of a *Terry* stop, which was founded in the United States Supreme Court case, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). *State v. Patton*, 297 Wis. 2d 415, 422 PP 9, 724

N.W.2d 347, 350 PP 9 (Ct. App. 2006). While an arrest requires a determination of probable cause, a *Terry* stop requires the lesser standard of "reasonable suspicion." *Id.* Thus, when a law enforcement officer lacks a *reasonable* suspicion that an individual has engaged in suspicious activity, such that the officer *reasonably* believes that the individual has, did, or is committing a crime, that officer violates an individual's Fourth Amendment rights. *See id.*

To remain within the confines of the § 968.24, Wis. Stats., such that an officer does not violate an individual's Fourth Amendment rights, an investigative stop must occur *only* when an officer suspects an individual has, is, or will engage in a criminal act and may only be carried out for a reasonable period of time. Wisconsin Statutes (2015-16). The United States Supreme Court has held that it is an "officer's reasonable suspicion that a person may be involved in a criminal activity [which] permits the officer to stop the person for a brief time[.]" *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 185, 124 S.Ct. 2451, 2458 (2004). Additionally, the Court held that the seizure "cannot continue for an excessive period of time." *Id.* at 185-186. The United States Supreme Court has further held

that, while it does not adopt a set time limit for a *Terry* stop, it has never held that a seizure of the person for approximately 90 minutes is reasonable. *U.S. v. Place*, 426 U.S. 696, 709-10, 103 S.Ct. 2637, 2646 (1983). When law enforcement is not justified in performing a *Terry* stop, because they knowingly are not investigating a possible criminal act, or they conduct the *Terry* stop for an unreasonable period of time, it amounts to a violation of an individual's Fourth Amendment rights and the evidence obtained in the subsequent search is thereby inadmissible. *Id.*

In the case at hand, Deputy Nimitz knowingly violated Mr. Barnes' Fourth Amendment rights when he engaged him in an impermissible *Terry* stop for the purpose of investigating a civil forfeiture. Prior to arriving at the emergency room, where Mr. Barnes had been transported after the accident, Deputy Nimitz contacted dispatch regarding Mr. Barnes' driving record. Deputy Nimitz was informed by dispatch that Mr. Barnes did not have any prior OWI offenses. Deputy Nimitz's check of Mr. Barnes' driving record confirmed that Mr. Barnes has never been charged with or convicted of an OWI. Deputy Nimitz knew that he was not investigating a criminal act; thus, Deputy Nimitz cannot claim that his actions fall within the purview of

§ 968.24, Wis. Stats. Knowing that he would be investigating only an OWI 1st, a civil forfeiture, Deputy Nimitz should have been aware that he was in violation of § 968.24, and therefore Mr. Barnes' Fourth Amendment rights, and was required to apply for and be granted a warrant to continue his investigation, as is prescribed in the Fourth Amendment. While the County may attempt to assert that Deputy Nimitz was not fully knowledgeable about the law and had no legal training, other than his training as a law enforcement officer, it does not excuse Deputy Nimitz's obligation to follow the law. As has been a long-standing principle in legal history, to claim Deputy Nimitz was ignorant of the law is no excuse for his violating it. See *State v. Collova*, 79 Wis. 2d 473, 488, 255 N.W.2d 581, 588 (1977).

Even if the Court were to find that Deputy Nimitz was justified in approaching Mr. Barnes for an investigative stop, the stop carried on for an unreasonable period of time, such that it violated Mr. Barnes' Fourth Amendment right to be secure in his person. Deputy Nimitz first arrived at the accident scene at approximately 9:05 p.m. Mr. Barnes was placed under arrest at approximately 10:22 p.m. In the time span of nearly an hour and a half, Deputy Nimitz, as well as two other law enforcement officers,

questioned Mr. Barnes repeatedly. During this hour and a half, Deputy Nimitz and Deputy King re-engaged Mr. Barnes on two separate occasions. The *Terry* stop began when officers questioned Mr. Barnes at the accident scene. Deputy Nimitz first re-ganged Mr. Barnes in the same *Terry* stop as the accident scene when he arrived at the hospital the first time to conduct another interrogation of Mr. Barnes. After completing this interrogation, Deputy Nimitz then left the hospital; however, he returned nearly a half hour later. After returning to the hospital, Deputy Nimitz again re-engaged Mr. Barnes in the same *Terry* stop. Only after re-engaging Mr. Barnes in the same *Terry* stop for the second time, nearly an hour and a half after it began, did Deputy Nimitz place Mr. Barnes under arrest. This prolonged *Terry* stop ultimately constitutes an illegal seizure of Mr. Barnes' person, thereby violating Mr. Barnes' Fourth Amendment rights. See *Place*, 426 U.S. at 709-10 (1983).

The County's argument that Mr. Barnes was not illegally seized prior to the actual moment of arrest lacks merit. First, the County argues that Mr. Barnes failed to demonstrate that he was seized because "[h]e did not testify that he felt he was not free to choose whether or not to speak with the deputies." *Appellant Br.*, 26. The

pertinent question to answer in this case is whether a reasonable person, in the same situation, would feel free to disregard police questioning and walk away. *State v. Williams*, 255 Wis. 2d 1, 12, 646 N.W.2d 834, 839 (2002).

In the case at hand, Mr. Barnes was unable to walk away. While Deputy Nimtzt interrogated him at the hospital, Mr. Barnes was in a neck brace, laying on a hospital bed, almost fully undressed, save for a hospital gown, and undergoing treatment for any possible injuries. Mr. Barnes was unable to get up and walk away from Deputy Nimtzt to end his interrogation. Deputy Nimtzt never asked Mr. Barnes for permission to ask him some questions. He never asked Mr. Barnes if he was willing to consent to a field sobriety test. In fact, Deputy Nimtzt never informed Mr. Barnes that he was conducting a field sobriety test. All Deputy Nimtzt stated was, "I'm gonna look at your eyes." The County correctly asserts that just because a law enforcement officer does not inform an individual that they are free to not respond does not eliminate the consensual nature of the questioning, per se; however, as the Circuit Court correctly found, the totality of the circumstances necessitates a finding that this may have affected the voluntariness of Mr. Barnes' responses. Based upon this, the prolonged and improper *Terry* stop constituted a seizure

of Mr. Barnes' person, such that his Fourth Amendment protections were violated.

Suppression of evidence is an appropriate remedy when evidence is gathered in violation of an individual's Fourth Amendment rights. *State v. Thompson*, 222 Wis. 2d 179, 189, 585 N.W.2d 905, 910 (Ct. App. 1998) (citing *State v. Mieritz*, 193 Wis. 2d 571, 574, 534 N.W.2d 632, 633 (Ct. App. 1995)). After determining that Mr. Barnes' Fourth Amendment rights were violated by Deputy Nimtz and Deputy King, the Circuit Court correctly suppressed the evidence seized by Deputies Nimtz and King.

The Circuit Court also correctly called into question Deputy Nimtz's credibility. The Circuit Court reasoned that Deputy Nimtz was unclear as to whether his observations during the investigation provided him probable cause to request a search warrant. R. 22 at 29:17-18. In the instant case, as there was no jury, the Circuit Court itself was the factfinder, and issues of credibility are left to the factfinder to determine. *State v. Hansen*, 149 Wis. 2d 474, 476, 439 N.W.2d 133 (1989). This determination of credibility contributed to the Circuit Court's holding that the evidence collected by Deputy Nimtz was to be suppressed. Once evidence was suppressed, the Circuit Court correctly dismissed the

County's case against Mr. Barnes. The Circuit Court's holding on this matter should be upheld.

**II. MR. BARNES HAD A REASONABLE EXPECTATION OF PRIVACY TO THE MONROE HOSPITAL EMERGENCY PRIVATE EXAMINATION ROOM WHICH WAS VIOLATED WHEN GREEN COUNTY SHERIFF'S DEPUTIES ENTERED HIS ROOM WITHOUT PERMISSION.**

It has been a long-standing notion in U.S. legal history that an individual is able to claim Fourth Amendment protections if s/he is able to demonstrate a "justifiable, reasonable, or legitimate expectation of privacy." *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580 (1979). In order to determine that an individual has a reasonable expectation of privacy, a court must ask two questions: (1) whether the individual has exhibited, through his/her actions, a subjective expectation of privacy; and (2) whether society is willing to recognize it as reasonable. *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 351-52, 88 S. Ct. 507, 511 (1967)). As the Fourth Amendment protects people and not places, any place has the potential to be considered protected by the Fourth Amendment. *Katz*, 389 U.S. at 351-52. Thus, even areas accessible, to some extent, to the public may be found to be protected so long as an individual expressed an intent for the area to be private. *Id.*

The County argues that *State v. Thompson*, 222 Wis. 2d 179, 585 N.W.2d 905 (Ct. App. 2015), prevented the Circuit Court from concluding that Mr. Barnes had an expectation of privacy to the private examination room at Monroe Hospital Emergency Room; however, the County fails to acknowledge the vast differences between *Thompson* and the case at hand. *Appellant Br.* at 12. In *Thompson*, police and emergency medical personnel responded to a call reporting that the defendant, Thompson, was seizing from an overdose. *Thompson*, 222 Wis. 2d at 182. Thompson was also involved in a traffic stop only an hour prior to this overdose. *Id.* at 181-82. Emergency personnel were notified by a witness that "Thompson had swallowed several bags of cocaine" when he was in the car involved in the traffic stop. *Id.* It was reported to the police officer that Thompson would need emergency surgery to remove the cocaine, otherwise he would likely die. *Id.* Presumably, in order to preserve chain of custody, a police officer was permitted to be in the room during Thompson's surgery in order to take custody of the bags of cocaine, as evidence, upon its removal from Thompson's stomach. *Id.* at 182-83. Thompson was not placed under arrest at the time of the traffic stop, nor after surgery. *Id.* 181-83. Thompson appealed his conviction on the basis that he

believed the officer violated his expectation of privacy to the operating room and emergency room. *Id.* at 184. The Court ultimately held that Thompson did not have an expectation of privacy to either. *Id.* at 187.

The following demonstrate the substantial differences between *Thompson* and that case at hand:

- (1) Both the emergency room and operating room where Thompson received treatment rooms were non-private areas where patients had no right to exclude others from entering; in the instant case, Mr. Barnes was placed in a private examination room, enclosed by walls, a curtain and a door. This room is more analogous to a hotel room than an operating or public emergency room. Mr. Barnes also had the right to exclude people from the room who he did not want there.
- (2) The police were investigating Thompson for suspected criminal conduct; The police were investigating Mr. Barnes for a simple, civil forfeiture.
- (3) Medical staff gave law enforcement specific permission to enter Thompson's operating room; no such permission was given to Deputy Nimitz in this case.

(4) Thompson's surgical doctor seized the cocaine from Thompson's intestines, and he was not an actor of the state; Deputy Nimitz was an actor of the state when he seized Mr. Barnes' person to perform an HGN test.

(5) Thompson was unconscious at the time police entered his emergency treatment and at the time police entered his operating room; Mr. Barnes was fully conscious.

Based upon these significant variances, and the totality of the circumstances of the *Dixon* factors, Mr. Barnes did have a reasonable expectation of privacy to his private examination room at the Monroe Hospital Emergency Room.

In order to demonstrate a reasonable expectation of privacy a party must demonstrate (1) that he has exhibited a subjective expectation of privacy in the area where the person was seized, and (2) that society is willing to recognize that expectation as reasonable. *State v. Thompson*, 222 Wis. 2d at 186. To determine whether society is willing to accept an expectation of privacy as reasonable a court may look to guidance by the *Dixon* factors: "(1) whether one has a property interest in the premises; (2) whether one was

legitimately on the premises; (3) whether one has complete dominion and control and the right to exclude others; (4) whether one took precautions those seeking privacy take; (5) whether one put the property to some private use; and (6) whether the privacy claim is consistent with historical notions of privacy.” *Id.* (quoting *State v. Dixon*, 177 Wis. 2d 461, 469, 501 N.W.2d 442, 446 (1993)). These factors are considered based on the totality of the circumstances. *Id.* at 187 (internal citations omitted). When applied to the case at hand, the Circuit Court correctly found that Mr. Barnes had a reasonable expectation of privacy to his private examination room at Monroe Hospital Emergency Room.

In the case at hand, the first prong of the *Thompson* case is, like *Thompson*, not dispositive of an expectation of privacy. The County argues that Mr. Barnes did not express a clear disinterest in Deputies Nimtz and King being in his private examination room. *Appellant Br.* at 14. However, this argument fails to acknowledge that the curtain was closed the first time Deputies Nimtz and King entered Mr. Barnes’ room, and both the curtain and door were closed the second time the deputies entered the room. Deputies Nimtz and King had no knowledge of whether Mr. Barnes was the one who

closed the curtain or door, or, more likely (due to the neck brace), asked someone to close the curtain and door for him. The County cannot claim that Mr. Barnes failed in any way to exhibit an expectation of privacy, as it is impossible to tell based on the testimony presented at the evidentiary hearing held February 1, 2018. Thus, since it impossible to know whether Mr. Barnes himself closed the curtain or doors, or instructed someone to do so, that analysis moves to the second *Thompson* prong.

Based upon the totality of the circumstances, it is likely that society would be willing to accept Mr. Barnes' expectation of privacy to his private examination room at Monroe Hospital Emergency room as reasonable. The six *Dixon* factors are the non-exclusive factors used to determine whether society is willing to accept his expectation as reasonable.

(1) Mr. Barnes concedes that he does not have a property interest in the Monroe Hospital Emergency Room.

(2) Mr. Barnes was legitimately on the premises of Monroe Hospital because he was there to receive medical treatment for injuries sustained in his motor vehicle accident.

(3) Due to his inability to move, as he was stuck in a neck brace, Mr. Barnes could not exercise physical

control over the hospital room; however, Mr. Barnes did have the ability to verbally control the hospital room. Failure to explicitly tell the officers to leave does not constitute and does not act as a waiver of permission to be there. As stated previously, Deputies Nimtz and King had no knowledge of whether Mr. Barnes closed the curtain or door to his room. Rather, the deputies proceeded to enter Mr. Barnes' room without first requesting permission from him, or medical staff.

(4) In the case at hand, at both times the deputies entered Mr. Barnes' private examination room the curtain was drawn, and on one occasion the door was closed. The deputies had no knowledge of whether Mr. Barnes had closed the curtain and door or instructed someone to close them. The deputies had no knowledge of whether Mr. Barnes was, at the moment, due to the closed curtain and door, undergoing medical treatment. However, both Deputy Nimtz and Deputy King testified that they believed that if the curtain or door were closed, then Mr. Barnes, like any other patient, was likely expecting privacy. Thus, it is more reasonable that the deputies should have operated under that guise that Mr. Barnes had exercised a subjective expectation of privacy and

requested permission from Mr. Barnes prior to entering the room.

(5) Mr. Barnes' private examination room was certainly put to private use. Unlike other emergency rooms that separate their patients by a simple curtain, Mr. Barnes was separated from other patients by being placed in a single-patient room, with walls, a curtain, and a door. Mr. Barnes was receiving private, individual medical treatment. At each time the deputies entered his room, the curtain was closed. The door was also closed the second time the officers entered Mr. Barnes' room. The deputies were unaware of whether Mr. Barnes was receiving medical treatment. In fact, neither deputy stopped to ask hospital staff whether Mr. Barnes was currently receiving medical treatment prior to barging into Mr. Barnes' private examination room. Both deputies believed that the curtain and door being closed was intended to provide Mr. Barnes with privacy; however, neither Deputy Nimtz nor Deputy King asked Mr. Barnes permission to enter. Nor did either deputy ask any member of hospital staff for permission to enter.

(6) The *Thompson* Court's holding that historical notions of privacy were not disturbed by police entrance into Thompson's treatment rooms does not apply and is

not analogous to the case at hand. The *Thompson* Court correctly found that "historical notions of privacy generally accord patients a significant measure of privacy in their medical treatment." *Thompson*, 222 Wis. 2d at 192. However, the *Thompson* Court reasoned that this notion was not disturbed in Thompson's case because the police were investigating a criminal act and were given express permission from hospital staff to be in Thompson's emergency and operating rooms. *Id.* The County argues that this scenario is identical to the case at hand' however, this claim, yet again, fails to acknowledge the vast differences between *Thompson* and the case before the Court.

In the instant case, Mr. Barnes was receiving treatment for possible injuries at Monroe Hospital Emergency Room after a car accident. Mr. Barnes was placed in a private examination room encased by walls, a curtain, and a door. Unlike Thompson, who was unconscious, Mr. Barnes was conscious throughout the entire police interaction. Police observed that the curtain was closed to Mr. Barnes' room the first time they entered, and that the curtain and door were both closed the second time they entered. Both Deputy Nimitz and King stated the closed curtain and door were intended

to provide Mr. Barnes privacy to receive medical treatment. Both deputies stated that they did not request permission of Mr. Barnes to enter his private examination room. Both deputies stated that they did not ask hospital staff for permission to enter Mr. Barnes' hospital room. Both deputies testified that they were not given express permission to enter Mr. Barnes' room at any point by anyone.

Based upon the significant differences between *Thompson* and the instant case, as well as the totality of the circumstances when considering the *Dixon* factors, this Court should find that Mr. Barnes had a reasonable expectation of privacy to his private examination room at Monroe Hospital Emergency Room. Additionally, this Court should find that society is willing to accept Mr. Barnes' expectation of privacy as reasonable under the circumstances.

#### **CONCLUSION**

Mr. Barnes was involved in a single car accident approximately 9:00 p.m. on an area of road that is commonly associated with accidents. At the scene of the accident, Mr. Barnes was questioned by Deputies Kanable, Nimtz, and King regarding the cause of the accident, therefore beginning a *Terry* stop. All deputies were aware that Mr. Barnes had had

a few beers earlier in the night, yet not a single one asked Mr. Barnes when he began drinking, when he stopped drinking, or anything else to establish an alcohol curve. Mr. Barnes was then transported to Monroe Hospital Emergency Room.

Deputy Nimitz then decided to then continue the *Terry* stop by following up with Mr. Barnes at the emergency room, in violation of § 968.24, Wis. Stats. Prior to arriving at the hospital, Deputy Nimitz was aware that Mr. Barnes had no prior convictions of operating while intoxicated; thus, Deputy Nimitz was fully aware that he was investigating a civil matter only. Even if the Court determines that Deputy Nimitz was not in violation of § 968.24, Wis. Stats., Deputy Nimitz's *Terry* stop carried on for approximately 90 minutes. This prolonged period of time over which Deputy Nimitz interrogated Mr. Barnes repeatedly amounts to an unreasonable length of time for a *Terry* stop. Moreover, Deputy Nimitz repeatedly entered Mr. Barnes' private examination room without permission from Mr. Barnes, his family, or hospital staff.

A simple directive by hospital staff does not amount to permission to enter Mr. Barnes' private examination room. Moreover, as Mr. Barnes was conscious, the hospital staff did not have the ability to waive Mr. Barnes' expectation of privacy. Deputy Nimitz and Deputy King observed that Mr. Barnes' curtain was closed the first time they entered the

hospital to interrogate Mr. Barnes. They also observed that the curtain and door was closed the second time they entered Mr. Barnes' private room. At no point throughout the prolonged *Terry* stop did Deputy Nimitz or King receive or request permission to enter Mr. Barnes' private room. Instead, both deputies repeatedly barged into Mr. Barnes' private room, irrespective of his right and expectation to privacy, which they believed he had.

This Court should uphold the Circuit Court on the following basis: (1) Deputy Nimitz conducted an impermissible *Terry* stop in violation of Mr. Barnes' Fourth Amendment rights; (2) Deputy Nimitz carried out an impermissible *Terry* stop for an unreasonable period of time of 90 minutes, thereby violating Mr. Barnes' Fourth Amendment rights; and (3) Mr. Barnes had a reasonable expectation of privacy to his private examination room at Monroe Hospital Emergency Room which Deputy Nimitz and Deputy King did not obtain permission to enter at any point during the night, thereby violating Mr. Barnes' Fourth Amendment rights. All of these holdings warrant a suppression of evidence, which the Circuit Court correctly ordered.

Based on the above analysis, this Court should uphold the Circuit Court's dismissal of both charges against Mr. Barnes.

**CERTIFICATION**

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

Monospaced font: 10 characters per inch; double spaced; 1.5 margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 28 pages.

Signed,

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Attorney Corinne L. Frutiger  
State Bar Number 1113703

**CERTIFICATION OF MAILING**

I certify that on this 10<sup>th</sup> day of December, 2018, pursuant to § 809.80(3)(b) and (4), the original and nine copies of the Brief of Respondent-Appellee were served upon the Wisconsin Court of Appeals via United States first-class mail in properly addressed, postage paid envelopes. Three copies of the same were served upon counsel of record for Plaintiff-Appellant via United States first-class mail in properly addressed, postage paid envelopes.

Signed,

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Attorney Corinne L. Frutiger  
State Bar Number 1113703

**CERTIFICATION OF ELECTRONIC FILING**

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of § 809.19(12), Wis. Stats. I further certify that this brief conforms to the rules contained in §§ 809.19(12)(f) and 809.19(13)(f), Wis. Stats., that the content of the electronic copy of the Respondent-Appellee's brief is identical to the content of the paper copy of the Respondent-Appellee's brief.

Dated this 10<sup>th</sup> day of December, 2018.

Signed,

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