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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT

In re the marriage of:

KATHY SCHWAB (N/K/A SIECH),

Petitioner-Respondent-Petitioner,

Appeal No. 2019-AP-001200

Circuit Court Case No. 1991-FA-915107

and

PAUL SCHWAB,

Respondent-Appellant.

On Appeal from the Wisconsin Court of Appeals, District 1

REPLY BRIEF OF RESPONDENT-APPELLANT

SUBMITTED BY:

Andrew J. Laufers
State Bar No. 1055072
Cordell Law, LLP
7701 France Ave South
Suite 375
Edina, MN 55435
Tel. (612) 397-9342
alaufers@cordelllaw.com

Laura Stack
State Bar No. 1084740
Cordell Law, LLP
111 East Kilbourn Avenue
Suite 1650
Milwaukee, WI 53202
Tel. (414) 982-3770
lstack@cordelllaw.com

Counsel for Respondent-Appellant

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UNITED STATES CODE:

10 U.S.C. 1408	6, 7, 8
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STATEMENT OF THE ISSUE

Does a contempt action under Wis. Stat. §785 nullify the twenty-year timeline for action upon a Judgment and Decree enumerated in Wis. Stat. §893.40?

The circuit court: Yes

The court of appeals: No

STATEMENT OF THE CASE

On February 25, 1992 Petitioner-Respondent-Petitioner (hereinafter “Kathy”) and Respondent-Appellant (hereinafter “Paul”) divorced. As part of the divorce settlement Kathy was awarded a 50% interest in Paul’s National Guard pension. App. 23. In December 2017 Kathy filed a contempt motion asking that Paul transfer to Kathy one-half of the interest in the National Guard pension. Paul countered that Wis. Stat. §893.40 barred Kathy’s motion as it was untimely.

The trial court granted Kathy’s motion and Paul appealed. The court of appeals reversed indicating that Wis. Stat. §893.40 barred Kathy’s motion. The court of appeals amended the decision in response to a motion for reconsideration but retained the underlying decision. The Supreme Court granted review and this appeal follows.

ARGUMENT

In this case, Kathy failed to secure a military retired pay order as permitted by federal law within twenty years of her divorce from Paul in 1992. She claims that the contempt statute nullifies her inaction to secure her interest in Paul's military retired pay order and allows her contempt motion filed twenty-five years after the divorce. This brief argues that the statute of repose sets a reasonable limit for final property settlements to be completed that must not be altered by the discretionary use of the court's contempt power.

I. Standard of Review

The interpretation of statutes and their application to undisputed facts are questions of law for the court's independent review. *McNeil v. Hansen*, 2007 WI 56, ¶7, 300 Wis. 2d 358, 731 N.W.2d 273. The court reviews questions of law using a de novo standard. *State v. Balliette*, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334.

II. Wis. Stat. §893.40 works in concert with Wis. Stat. §785 in setting boundaries for litigants.

Kathy argues that Wis. Stat. §893.40 conflicts with the court's contempt power in that it limits the ability of the court to enforce judgments. Wis. Stat. §893.40 requires that an action be brought within twenty years of an underlying action. Wis. Stat. §893.40 is what is termed a statute of repose. Wis. Stat. §893.40 states:

“Except as provided in ss. 846.04 (2) and (3) and 893.415, action upon a judgment or decree of a court of record of any state or of the United States shall be commenced within 20 years after the judgment or decree is entered or be barred.” Wis. Stat. §893.40

Wis. Stat. §785 statutorily outlines the court’s contempt power. In Wis. Stat. §785, contempt is defined as:

In this chapter: (1) “Contempt of court” means intentional: (a) Misconduct in the presence of the court which interferes with a court proceeding or with the administration of justice, or which impairs the respect due the court; (b) Disobedience, resistance or obstruction of the authority, process or order of a court; (bm) Violation of any provision of s. 767.117 (1); (br) Violation of an order under s. 813.1285 (4) (b) 2.; (c) Refusal as a witness to appear, be sworn or answer a question; or (d) Refusal to produce a record, document or other object. (2) “Punitive sanction” means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court. (3) “Remedial sanction” means a sanction imposed for the purpose of terminating a continuing contempt of court. Wis. Stat. §785.01

The court’s ability to use contempt stems from the inherent authority of the court. *Frisch v. Henrichs*, 2007 WI 102, ¶32, 304 Wis. 2d 1, 20, 736 N.W.2d 85, 94 (quoting *Griffin v. Reeve*, 141 Wis. 2d 699, 706, 416 N.W. .2d 612 (1987)). The legislature, as they did in Wis. Stat §785, may regulate the contempt power,

provided the contempt power does not limit the inherent authority of the court. *Frisch*, 2007 WI 102, at ¶32.

In this case, Kathy sought a remedial sanction to require the completion of the military retired pay order. She argues that any timelines for the completion of the military retired pay order should not apply because she was not eligible to receive money until Paul retired, which had not yet occurred at the time of the parties' divorce in 1992.

The purpose of a statute of repose is to provide finality to litigation. See *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 201, 293 A.2d 662, 667 (1972). The purpose of the contempt power is to ensure that parties follow court orders and judgments. The requirement that the parties' complete litigation within a reasonable period of time and that they follow court orders are not competing objectives. In fact, the objective that litigation be completed in a reasonable period of time **and** people follow court orders are necessary if court processes are to produce fair and reasonable results. (Emphasis added)

For instance, if the 1992 divorce decree hypothetically ordered that Kathy should receive a blue 1990 Toyota from Paul and she waited until 2017 to pick the car up from Paul, her argument that Paul sold the car and thus is in contempt would be at best ridiculous. In our example, Kathy needed to take steps to secure her right- she needed to pick the car up from Paul. The timeline that the statute of repose provides encourages Kathy to complete a task in a timely manner. The timeline elucidated

in the statute of repose actually breathes life into the contempt power in that the statute of repose requires tasks to be done in a timely manner, so as to avoid disputes later when circumstances may have changed.

III. It is not absurd that Kathy should be denied the right to Paul's military retired pay when she failed to obtain a military retired pay order within twenty years of the divorce.

In her brief, Kathy continually argues without legal justification that it was not possible for her to secure her right in Paul's military retired pay until Paul retired from the military. Kathy argues that because the parties' Marital Settlement Agreement indicated that she received military retired pay from Paul only "when and if it was available"¹ to Paul that she could not take steps prior to Paul's retirement to secure her right in the military retired pay and by necessity needed to wait until Paul retired to secure a military retired pay order. The court of appeals indicated the "when and if" qualification was included not to allow "(Kathy to) demand half the pension² at any time in the future regardless of the statute of repose, but because at the time of their divorce (Paul) was only thirty-nine years old and had not yet retired from the Air National Guard." Petitioner-Respondent-Petitioner's Appendix A-8, ¶17.

¹ Petitioner-Respondent-Petitioner's Appendix A-23, Section 20A.

² Paul's retirement is a military retired pay order which is a creature of federal statute. It would not be subject to traditional ERISA rules for a private sector pension.

Additionally, her assertion that she could have done nothing to secure her right in the pension prior to 2017 is not consistent with federal law. In order to divide a military-members retired pay, a military retired pay order must be sought pursuant to 10 U.S.C. §1408³. This law was enacted February 1, 1983⁴, prior to the parties' divorce in 1992.

In order to secure her interest in Paul's military retired pay, Kathy needed to serve a copy of her final divorce decree on the appropriate agent for the Secretary of Defense concerned with court orders. 10 U.S.C. §1408 (b) (1)(A). The court order needed to be a final decree which the Act defines as:

“A decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.” 10 U.S.C. §1408 (a)(3)”

The Act defines a court order as:

“A final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal

³ The title of the section of federal code is Payment of retired or retainer pay in compliance with court orders. References to the code within the text will refer to the act as the Act.

⁴ Legislative history of 10 U.S. C. §1408.

separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), or a support order, as defined in section 453(p) of the Social Security Act (42 U.S.C. 653(p)), which—

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for—

(i) payment of child support (as defined in section 459(i)(2) of the Social Security Act (42 U.S.C. 659(i)(2)));

(ii) payment of alimony (as defined in section 459(i)(3) of the Social Security Act (42 U.S.C. 659(i)(3))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member. 10 U.S.C. §1408 (a)(2).

The court order served upon the appropriate agent of the Secretary of Defense also could have been served prior to Paul's retirement as the Act provides for a procedure to calculate retired pay for a member who is not yet retired. 10 U.S.C. §1408 (a)(4)(B). The Act requires that the court order be effectively served on the

Secretary which means that the final decree needs to be in an appropriate form and either mailed, faxed, or personally served on the Secretary's agent. 10 U.S. C. 1408

(b). Furthermore, the Act provides a procedure with no further action required by Kathy for how the retirement should be paid once Paul retired. It provides:

“In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired pay.” 10 U.S.C. 1408 (d)(1)

Indeed, if Kathy truly wished to protect and secure her interest in Paul's military retirement a copy of the divorce decree should have been effectively served at the time of the divorce. This is because the Act provides a procedure to deal with one or more retired pay orders. It provides:

“In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired pay which remains after the satisfaction of all court orders which have been previously served.” 10 U.S.C. 1408 (e)(2).

In other words, Paul could have remarried and divorced and his second ex-wife could have effectively served her divorce decree granting her an interest in Paul's military retired pay and federal law would have limited Kathy's interest independently of Wisconsin law.

All Kathy needed to do in this case to preserve her right to Paul's military retired pay was to wait for the appeal period to expire and mail a certified copy of the Findings and Fact, Conclusion of Law and Judgment of Divorce to the appropriate agent. In other words she needed to wait 45 days after the final divorce hearing and at that point she could have taken steps to secure her right in the pension. She would have received 50% of the current pretax value of the National Guard pension within 90 days of Paul receiving his military retired pay.⁵ It is not absurd and unreasonable to expect that Kathy complete the simple act of mailing a certified copy of the decree to the appropriate agent of the Secretary of Defense within twenty years of the completion of her divorce.

In fact, the statute of repose served to protect Kathy- it provided a boundary for when work needed to be completed. This boundary exists in other property transfers. For instance, many checks provide a time limit for when they must be

⁵ Kathy tries to make it sound that further litigation would be required regarding Paul's retirement because of the when and if language in the decree. Kathy received one-half of what Paul had at the time of the divorce, no more or no less. Because the military retired pay was not yet vested as Paul had not retired, the amount of her half was undetermined. At the time of Paul's retirement, the military would do the appropriate calculation as enshrined in the federal statute. The when and if was presumably included as the Court of Appeals noted below to memorialize that the one-half amount was from the time of the divorce and not some unknown time in the future. It is not language that requires further litigation as jurisdiction is not reserved over the property settlement.

cash, or they are not valid. The check issuer does not provide this boundary because they want to cheat the recipient out of money, rather the check issuer provides this boundary to ensure that the money is available, and the transaction is completed within a reasonable period of time.

Here, the twenty-year time period exists to ensure that the parties complete their divorce settlement within a reasonable period of time and can separate their financial lives. In her inaction Kathy risked the very real possibility of Paul remarrying and divorcing again and another ex-spouse jumping in line in front of her to receive a portion of Paul's military retired pay. The statute of repose is not a trap for unwary litigants- rather it is a boundary to ensure legal acts are completed within a reasonable period of time.

What Kathy is really asking this court to do is to have the contempt statute cover up the sins of her divorce counsel by nullifying the reasonable boundary of the statute of repose. Her divorce counsel should have taken steps at the time of the entry of the decree to secure Kathy's right. Judge Dwyer recognized this when he stated during the oral ruling:

"To the parties, I will tell you that this, you have lived this. But this case is a legal nightmare. It is a legal nightmare because all the things that happened in this case that we are now trying to decide happened in 1992. And for what it's worth, although I do not think it is clear who is responsible when an order like this is made, to ensure that it is effectuated at the time it is made, I will tell you that I personally

have a practice of not putting a file away, I will say it that way, that is not literally true, until that document is prepared... Lawyers who represent parties shouldn't let them happen and parties shouldn't let them happen." Petitioner-Respondent-Petitioner's Appendix A-36, lines 17-25, A-37, lines 11-15.

The contempt statute is not meant to erase the negligence of Kathy's divorce counsel and judicially extend a legislative boundary. Indeed, it is an absurd result to find that statute of repose should not apply because Kathy and her divorce counsel failed to perform an act that could have been done at or near the time of the decree. Kathy may have remedies against her divorce counsel. The court, here, must follow the clear mandate of the legislature: Any actions upon a judgment and decree must be completed within twenty years of the judgment. It is not a job of the court to fix Kathy's problems with an arbitrary use of the contempt power.

IV. Property obligations in a divorce are final and are not continuing or ongoing.

In this case, Kathy argues that the division of the military retired pay is a continuing obligation. Kathy reasons that if the military retired pay is a continuing obligation then the court's decisions in *Griffin*⁶ and *Hamilton*⁷ would then indicate that the statute of repose does not apply. This ignores that the obligation in this case is a final obligation.

⁶ *Griffin v. Reeve*, 141 Wis. 2d 699, 416 N.W. 2d 612 (1987).

⁷ *Hamilton v. Hamilton*, 2003 WI 50, 261 Wis. 2d 458, 661 N.W. 2d 832.

Here, the parties specifically agreed in their Marital Settlement Agreement that the property division was final. To wit, their Marital Settlement Agreement reads:

“Both parties understand that the provisions of a judgment of divorce respecting property division are final and non-modifiable, **and, as such are different from provisions regarding support and maintenance.**”⁸

Petitioner-Respondent-Petitioner’s Appendix A-23, Section 20. (Emphasis Added).

The parties by their very agreement agreed that the division of Paul’s military retired pay is not like child support and spousal maintenance which are continuing obligations. The cases upon which Kathy relies to suggest that the statute of repose does not apply, i.e., *Griffin* and *Hamilton*, are inapposite as they deal with child support and this case deals with a property settlement.

Furthermore, the parties understood that further work was necessary to complete the property settlement. In the Final Stipulation for divorce, Section 25,⁹ the parties agreed:

“Each party recognizes that the terms of this stipulation will require each to cooperate in signing further documents to **make the terms a reality** and each party agrees to cooperate in signing such documents.”

⁸ It is interesting to note that this section is quoted in Kathy’s brief on page 3 and the impact of this language is then wholly ignored throughout their argument.

⁹ Petitioner-Respondent-Petitioner’s Appendix A-26, Section 25. (Emphasis added)

The further work or documents required to effectuate the terms of the stipulation does not transform the obligation into a continuing obligation. Further work to effectuate a right as the Court of Appeals noted in footnote 4¹⁰ is required by some judgments. Indeed, that is the case with most property judgments, for example a wife may need to pick up a car from a husband or a check may need to be cashed or a bank account closed and the money divided. Just because the parties need to close and divide the money in a bank account does not mean the obligation is continuing; it is a step necessary to effectuate the division of the bank account. Here there is no continuing obligation to pay one-half of Paul's military retired pay; an order needs to be given to the appropriate agent of the Secretary of Defense for Paul's military retired pay to be divided.

A continuing obligation, on the other hand, would be something like child support or maintenance. Obligations of child support and spousal maintenance would be paid over years and could change depending on the parties' circumstances. As a result, those obligations could be modified. The property settlement, here, on the other hand is non-modifiable, no matter what occurs Kathy will receive fifty percent of Paul's Air National Guard pension available to him when he retires as long as Kathy takes steps to effectuate the division of property, i.e., files the order in a timely manner.

¹⁰ Petitioner-Respondent-Petitioner's Appendix A-4, footnote 4.

Kathy uses this continuing obligation argument to suggest that the court should make a blanket rule that the statute of repose does not apply to continuing or ongoing obligations. However, this case does not deal with a continuing or ongoing obligation so this case is not the appropriate vehicle to rule on that issue.¹¹ This case involves a final order where Kathy failed to take steps to secure her right and thus was barred by the statute of repose.

V. Equitable Estoppel does not apply to this case.

Kathy argues that the statute of repose can be circumvented by equitable estoppel. Equitable estoppel argues that a person should not be able to be relieved from an obligation of a judgment that he or she agreed upon. *Rintelman v. Rintelman*, 118 Wis. 2d 587, 596, 348 N.W.2d 498 (1984).

The problem here is that Kathy also agreed that certain things needed to be done in order to make the terms of the Stipulation a reality. While Paul agreed that Kathy should receive one half of his National Guard Pension, Kathy also agreed to do the work to make that a reality. She cannot now complain that it is Paul who is estopped from applying the statute of repose when she did not do her necessary work to receive her share of his military retired pay.

¹¹ Even if the Court would determine that this case involved an ongoing obligation, Paul would submit that this court is not in a position to make a rule that ongoing or continuing obligations are not subject to the statute of repose. For example, in response to the court's ruling in *Hamilton* the Wisconsin State Legislature enacted Wis. Stat. §893.415. Paul's position is if such a rule is necessary it is the Legislature's job to make such a rule as it is their statute.

Additionally, if the court ruled Paul is equitably estopped from using the statute of repose, the statute of repose would be rendered meaningless. The statute of repose exists to block untimely actions on a Judgment. One could assume that many of those actions involve agreements reached by the parties. If the party whose action on a Judgment was blocked by the statute of repose could claim that the other party was equitably estopped from asserting the statute of repose, the statute of repose would be judicially eliminated without legislative action as a valid statute. All aggrieved parties would claim that the other party would need to do what they agreed upon, despite their inaction, because of equitable estoppel. The law exists to limit the time for action on a judgment and the common law must not upset the will of the legislature.

VI. This case is not similar to *Johnson*.¹²

Johnson was the most recent case dealing with the statute of repose before the Supreme Court. In *Johnson*, Ms. Johnson brought a motion in 2010 to enforce the division of Mr. Master's pension. *Id.* at 43. Mr. Masters countered that since the parties divorced in 1989 the statute of repose time barred Ms. Johnson's motion. *Id.* Ms. Johnson contended the retirement could not be divided until 1998 because the law at the time of the divorce provided no mechanism to divide the pension thus the statute of repose should not apply. *Id.* The Supreme Court agreed reasoning that barring the division of the pension when Ms. Johnson could not divide the pension

¹² *Johnson v. Masters*, 2013 WI 43, 347 WI 2d 238, 830 N.W. 2d 647.

by law until eleven years after the divorce would be absurd and unreasonable. *Id.* at 46.

In this case, no legal bar existed to Kathy securing her right in Paul's military retired pay. Thus, Kathy had a full twenty years in which to secure her rights to Paul's military retired pay. In this case Kathy is asking the court to judicially eliminate the statute of repose because of her failure to act. Unlike *Johnson*, she had the ability for the entire twenty years following her divorce (after the initial 45-day appeal period) to divide Paul's military retired pay. It is not unreasonable or absurd that she complete dividing the military retired pay order within twenty years. In this case the court must apply the statute of repose.

A. *Johnson* should not stand for the proposition that courts can ignore the statute of repose based upon equitable powers.

In her concurrence to *Johnson*, Justice Ziegler, joined by former Justice Gableman and Chief Justice Roggensack, noted that "the majority opinion does not answer whether Wis. Stat. §893.40 bars certain family court judgments that extend beyond 20 years and it does not conclude that the (trial)court has the equitable power to ignore a statute of repose." *Johnson* at 39.

The problem with *Johnson* is it injects uncertainty into litigation and family law practice. The court in *Johnson* took a very specific fact scenario and crafted a solution that allowed Ms. Johnson to retain her interest in a pension by indicating

that Ms. Johnson did not have a full twenty years to complete the division of the pension.

Here, Kathy asks the court to ignore the statute of repose. She argues that a contempt motion should be allowed because the division of retired pay is continuing, and that she could not secure her right to the pension at the time of the divorce.

This all results in a slippery slope for litigants as to exactly when the statute of repose applies. Litigants will begin to look for creative ways to evade the statute of repose and this will put circuit court judges in the position of fashioning an equitable solution to problems.

However, the legislature enacted a statute that provides a bright line rule, from which they did not exempt family law judgments. In response to *Hamilton*, the legislature did enact a change regarding child support. It is not the job of this court to enact a rule or rules limiting the statute of repose. Presumably, if the legislature feels that there should be rules limiting the application of the statute of repose in family law cases they can do so as they did in response to *Hamilton*.

In the meantime, the court should clearly define that the actions upon Judgments and Decree must be completed within twenty years. Such an affirmation of Wis. Stat. §893.40 will allow future litigants to be aware that they must complete the work required within twenty years. Perhaps such an affirmation will help realize

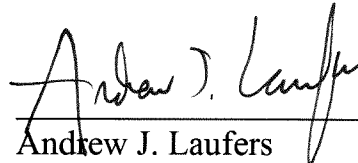
the hope of Circuit Court Judge Michael Dwyer that cases such as Paul and Kathy's case should never happen.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals must be affirmed. Kathy failed to secure her right to Paul's military retired pay within twenty years. She had the opportunity to do so within the entire time and a motion for contempt or equitable estoppel are not tools to extend the time to complete actions upon a Judgment as laid out in Wis. Stat. §893.40.

Respectfully submitted this 5th day of January, 2021.

CORDELL LAW LLP



Andrew J. Laufers

State Bar No. 1055072

Laura Stack

State Bar No. 1084740

111 East Kilbourn Avenue, Ste. 1650

Milwaukee, WI 53202

(414) 982-3770

Counsel for Respondent-Appellant

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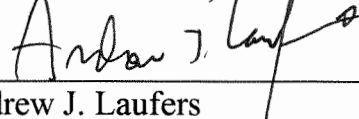
Respondent-Appellant.

FORM AND LENGTH 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: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 4,485 words.

Dated this 5th day of January, 2021.

CORDELL LAW, LLP



Andrew J. Laufers

State Bar No. 1055072

7701 France Ave South, Suite 375

Edina, MN 55435

Tel. (612) 397-9342

alaufers@cordelllaw.com

Counsel for Respondent-Appellant

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

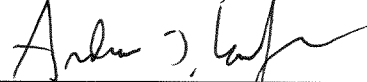
I hereby certify that I have submitted an electronic copy of this Brief, which complies with the requirements of Wis. Stat. §809.19(12).

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 5th day of January, 2021.

CORDELL LAW, LLP



Andrew J. Laufers

State Bar No. 1055072

7701 France Ave South, Suite 375

Edina, MN 55435

Tel. (612) 397-9342

alaufers@cordelllaw.com

Counsel for Respondent-Appellant

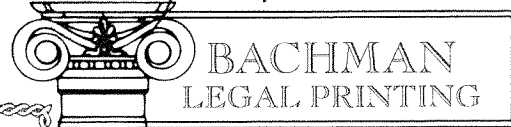
State of Minnesota)) SS.SS. County of Hennepin)	<h1 style="font-family: serif; font-size: 2em; margin: 0;">Affidavit</h1>
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Kristi Motch, being first duly sworn, states that she is an employee of Bachman Legal Printing, located at 733 Marquette Avenue, Suite 109, Minneapolis, MN 55402. That on **January 5, 2021**, she prepared the **Reply Brief of Respondent-Appellant**, case number **2019-AP-001200**, and filed **22** copies of same upon the following attorney(s) or responsible person(s) by **FedEx Standard Overnight delivery**.

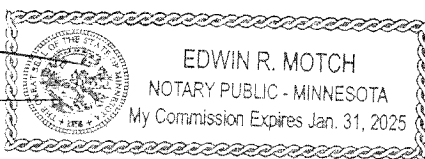
Clerk of Courts
 Wisconsin Supreme Court
 110 East Main, Suite 215
 Madison, WI 53703

Subscribed and sworn to before me on
January 5, 2021

Signed 



Notary Public 



Phone (612) 339-9518 ■ (800) 715-3582
 Fax (612) 337-8053 ■ www.bachmanprint.com
 733 Marquette Avenue
 Suite 109
 Minneapolis, MN 55402


State of Minnesota)	<h1>Affidavit</h1>
) SS.SS.	
County of Hennepin)	

Kristi Motch, being first duly sworn, states that she is an employee of Bachman Legal Printing, located at 733 Marquette Avenue, Suite 109, Minneapolis, MN 55402. That on **January 5, 2021**, she prepared the **Reply Brief of Respondent-Appellant**, case number **2019-AP-001200**, and served **3** copies of same upon the following attorney(s) or responsible person(s) by **First Class Mail postage prepaid**.

Carlton Stansbury
 10850 West Park Pl
 Suite 530
 Milwaukee, WI 53224

Subscribed and sworn to before me on
January 5, 2021

Signed 

Notary Public 



EDWIN R. MOTCH
 NOTARY PUBLIC - MINNESOTA
 My Commission Expires Jan. 31, 2025



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