STATE OF WISCONSIN

IN THE SUPREME COURT

Case No. 2019AP002174-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Respondent,

v.

CHRISTOPHER J. VAALER,

Defendant-Appellant-Petitioner.

DEFENDANT-APPELLANT-PETITIONER'S PETITION FOR REVIEW AND APPENDIX

JEREMIAH WOLFGANG MEYER-O'DAY
Attorney at Law
State Bar No. 1091114

COLE DANIEL RUBY
Attorney at Law
State Bar #1064819

Martinez & Ruby, LLP
620 8th Avenue
Baraboo, WI 53913
(608) 355-2000
jeremiah@martinezandruby.com
coleruby@martinezandruby.com
Attorneys for Defendant-Appellant-Petitioner

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ISSUES PRESENTED

1. When analyzing the issue of whether, under the totality of the circumstances, the facts known to the officer at the time that a traffic stop is extended by the officer for the purpose of conducting an impaired driving investigation provided that officer with a reasonable suspicion of impaired driving, should the court hold the officer to his conclusions regarding the existence of a particular fact in light of the fact that an officer's conclusions in light of that officer's particular training and experience are considered part of the totality of the circumstances?

The circuit court and the court of appeals both answered no; the circuit court implicitly and the court of appeals explicitly, stating simply that an officer's subjective beliefs are irrelevant to the analysis without further elaboration.

2. When evaluating the totality of the circumstances to determine whether an extension of a traffic stop for the purpose of conducting an impaired driving investigation, should due weight be given to the absence of facts which would tend to support an inference of impaired driving?

Both the circuit court and the court of appeals implicitly answered no, and gave no weight to the absence of facts which would ordinarily be present when a vehicle operator is impaired when analyzing the issue of whether there were sufficient facts to give rise to a reasonable suspicion of impaired driving under the totality of the circumstances.

CRITERIA FOR REVIEW

This petition asks whether, in light of the fact that an individual officer's particular training and experience is often relied upon as a relevant fact in assessing whether reasonable suspicion existed to justify the extension of a traffic stop for the purpose of conducting an impaired driving investigation, the officer's conclusions regarding a particular fact should also be taken into account under the totality of the circumstances, and further, whether, under when engaging in an analysis of the totality of the circumstances, due weight should be given to the lack of the usual indicia of impairment on the part of the operator of the vehicle stopped.

As to the first issue, both the State and the Court of appeals relied upon principles derived from their reading of ***State v. Waldner***, 206 Wis. 2d 51, 58, 556 N.W.2d 691 (1996) and ***State v. Colstad***, 2003 WI App 25, ¶21, 260 Wis. 2d 406, 659 N.W.2d 394 for the proposition that an officer may utilize a "fact" which that officer expressly did not believe to be true in assessing whether there were sufficient articulable and particularized facts to support a reasonable suspicion that Vaaler was impaired so as to justify expanding the scope and duration of the stop to conduct an impaired driving investigation, implicitly arguing and holding that an officer may reasonably disregard his own conclusions as to what the facts he or she is confronted with are. (State's Br. at 6-7; ***State v. Vaaler***, slip op. at 7; App. 107).

As to the second issue, both the State and the Court of appeals, relied upon the same principle, that an officer is not required to rule out innocent explanations, in arguing and implicitly holding that the absence of the usual indicia of impairment did not, under the circumstances of this case, render the expansion of the scope and duration of the stop to

conduct an impaired driving investigation unreasonable. (State's Br. at 7-8; ***State v. Vaaler***, slip op. at 6-7; App. 106-07).

An opinion on the issues presented here would help develop and clarify an area of law in which the circuit courts and the court of appeals regularly issue decisions, such as the decision at issue here, in tension with this court's as well as the Supreme Court of the United States's binding precedent and it would have tremendous statewide impact. *See* Wis. Stat. Rule 809.62(1r)(c)2. & (d). Further, a decision in this area would provide needed guidance in an area of law in which it is difficult for the bench and bar to predict outcomes and in which cases are frequently, as here, fairly described as "close." *See* Wis. Stat. Rule 809.62(1r)(a) & (c)2.

STATEMENT OF THE CASE & FACTS

Background – Proceedings in the Circuit Court

On January 7, 2017 at approximately 2:43 a.m., Deputy Joseph Anderson of the La Crosse County Sheriff's office executed a traffic stop of a vehicle being operated by Vaaler. (8). As a result of events taking place subsequently, Vaaler was arrested and charged with operating a motor vehicle while under the influence of an intoxicant (OMVWI) as a fourth offense.[1] (R3: 1-4). Vaaler filed a motion to suppress any evidence obtained after Deputy Anderson ordered him out of the vehicle to ask him to perform field sobriety tests on the basis that the deputy lacked reasonable suspicion that he was impaired or otherwise in violation of

[1] Vaaler successfully collaterally attacked a previous OWI-related conviction, resulting in the filing of an amended complaint reducing the charge to third offense OMVWI. (R14: 1-7; R15: 1-3); these events are not at issue in this appeal.

Wis. Stat. § 346.63 sufficient to justify expanding the scope of the stop and extending its duration to conduct an OMVWI investigation. (R21: 1-4).

At the suppression hearing, Deputy Anderson testified that the reason for the initial stop was that Vaaler's vehicle was being operated in the dark without its headlights on, although the vehicle's fog lamps were lit. (R59: 9). When Deputy Anderson made contact with Vaaler, he explained the reason for the stop to him, and in response Vaaler was able to turn his vehicle's headlights on without difficulty. (R59: 9) When asked, Vaaler indicated that he was coming from Brice's Prairie, and the stop took place in the Town of Holmen, approximately five minutes from Brice's Prairie, according to Deputy Anderson. (R59: 9-10).

When Anderson made contact with Vaaler, he detected a strong odor of intoxicants emanating from the vehicle, and also saw an open can of Miller Lite in the center console of the vehicle. (R59: 10). Deputy Anderson testified that he asked Vaaler a number of questions, and further, that some but not all of Vaaler's responses were delayed in some unspecified fashion. (R59: 10). Vaaler denied that he had been drinking. (R59: 10). Deputy Anderson also testified that he suspected that Vaaler was operating while impaired based upon the odor of intoxicants and the delayed answer Vaaler gave to the question Anderson asked regarding where Vaaler was coming from that evening, which delay the deputy testified was, in his experience, indicative of a person pausing to formulate a lie. (R59: 10-11). Anderson stated that he secured the can of Miller Lite that was in the center console of the vehicle, and that it was approximately half full of beer at the time. (R59: 11). When Anderson asked whose beer it was, Vaaler's female passenger stated that it belonged to her.

(R59: 11). At this point, a portion of the squad video was played, starting at timestamp 2:42:59, paused at 2:43:38, after which playback was resumed with the in-squad audio turned off and the overall volume increased. The video was stopped at timestamp 2:46:20. (R59: 12-13).

On cross, Attorney Schroeder played the squad video starting at 2:41:42. (R59: 15). Deputy Anderson agreed that the previously unplayed minute between 2:41:42 and 2:42:59 depicted him following the vehicle that turned out to be Vaaler's vehicle, and further, that there were lights on Vaaler's vehicle which appeared to be illuminating the road to some extent. (R59: 15). In addition, the area where the stop took place had streetlights which provided "ample" illumination. (R59: 16). Anderson did not observe any weaving or other indicia of impairment in Vaaler's operation of the vehicle, and agreed that Vaaler used his turn signal properly to signal a turn. (R59: 15). Anderson also agreed that nothing in the way that Vaaler pulled over after Anderson activated his emergency lights and siren to initiate the traffic stop indicated that Vaaler was in any way impaired. (R59: 15-16). Similarly, Vaaler did not appear to Anderson to have bloodshot or glassy eyes, nor was Vaaler's speech slurred, even slightly. (R59: 16). As was noted earlier, Vaaler denied that he had been drinking. (R59: 16-17).

As to Vaaler's female passenger, Anderson testified that it was obvious that she was intoxicated, that she was slurring her speech, and that she appeared to be impaired. (R59: 17). Anderson then confirmed that when asked, the passenger claimed that the beer in the center console belonged to her. (R59: 17). Importantly, prior to asking Vaaler to step out of the vehicle to perform standardized field sobriety tests (SFSTs), Deputy Anderson did not check

Vaaler's criminal history and so was unaware of whether Vaaler had ever been convicted of operating while impaired in the past. (R59: 18).

According to Anderson, the decision to ask Vaaler to exit the vehicle to perform SFSTs was based on the following factors: (1) the odor of intoxicants emanating from the vehicle; (2) the time of day; (3) the fact that Vaaler was operating the vehicle with only fog lamps on; and (4) the open can of beer in the center console of the vehicle. (R59: 18). Deputy Anderson testified that he believed the passenger when she stated that the beer can belonged to her, and further, admitted that he could not tell whether the odor of intoxicants was coming from Vaaler or the clearly intoxicated female passenger. (R59: 18). Anderson then testified that while the area in which the stop took place was well-lit by streetlights, the area Vaaler was coming from was not, as the area Vaaler stated he was coming from was rural. (R59: 19).

The court found that the initial stop was permissible based upon the headlight violation, and denied the motion to suppress based on the court's belief that the other facts adduced at the hearing were sufficient to allow the deputy to form the level of suspicion necessary to request that Vaaler perform standardized field sobriety tests. (R59: 19-20). In particular, the circuit court relied on the following facts in support of its determination that reasonable suspicion sufficient to support a request for field sobriety tests existed: (1) there was an odor of intoxicants emanating from the vehicle, the source of which the officer could not determine; and (2) there was an open container of beer in the center console of the vehicle, a container which the passenger claimed as hers, which claim the officer admitted he believed to be truthful. (R59: 18, 19-20). In addition to these factors,

the fact that Vaaler was driving late at night with only his fog lights on could also be taken to support reasonable suspicion. (R59: 18). Nonetheless, the court rested its ruling on the two factors identified above. (R59: 19-20).

The matter then proceeded to trial, after which Vaaler was convicted of operating a motor vehicle while impaired as a third offense. (R48: 1-2). This appeal follows; additional facts shall be stated as necessary below.

Appellate Proceedings

Vaaler filed a timely notice of appeal challenging the circuit court's denial of his suppression motion and subsequent conviction. (R. 67: 1). Vaaler argued that there under the totality of the circumstances, Deputy Anderson did not have sufficient facts to support a reasonable suspicion that Vaaler was operating while impaired, in particular, that Deputy Anderson could not reasonably rely upon the beer can in the center console in light of the fact that he believed Vaaler's passenger when she claimed the beer as hers, and that the absence of the usual indicia of impairment coupled was not outweighed by the few suspicious facts available to Deputy Anderson at the time that he expanded the scope and duration of the stop so as to launch an impaired driving investigation. (App. Op. Br. at 9-17).

In a decision dated August 6, 2020, the court of appeals affirmed the circuit court. *See* ***State v. Vaaler***, slip op. at 7-8; App. 107-08. That court stated that the following facts, taken together, sufficed to provide Deputy Anderson with a reasonable suspicion that Vaaler was operating while impaired: the odor of intoxicants emanating from the vehicle, but not from Vaaler's person as well as three additional factors: "(1) Vaaler was driving without the vehicle's headlights on at 2:40 a.m., which is commonly known as "bar

time"; (2) there was an open can of beer in the vehicle within Vaaler's reach; and (3) Vaaler hesitated when answering the deputy's questions, which Anderson's training and experience caused Anderson to believe that Vaaler was lying." ***Vaaler***, slip op. at 6; App. 106.

The court of appeals further rejected Vaaler's argument that the fact that Deputy Anderson believed Vaaler's clearly impaired passenger when she stated that the beer can in the center console was hers rendered it impermissible for Anderson to rely upon that can as a fact supporting reasonable suspicion for two reasons: (1) the Court of appeals held that Anderson's beliefs are not controlling in light of the objective nature of the inquiry; and (2) officers are not required to rule out innocent explanations for ambiguous conduct. ***Id.*** at 7. Finally, the court of appeals implicitly discounted Vaaler's arguments regarding the effect of the absence of the usual indicia of impairment by finding that there was reasonable suspicion without mentioning the absence of such facts. ***Id.*** Vaaler petitions this court for review of the decisions of the circuit court and the court of appeals.

ARGUMENT

I. This court should accept review to provide the bench and bar with needed guidance as to whether an officer may rely upon a fact about which the officer has explicitly accepted an innocent explanation in forming the requisite reasonable suspicion of impaired driving to expand the scope and duration of a traffic stop to conduct an impaired driving investigation.

It has long been the case that reasonable suspicion of criminal activity can be predicated upon observations of completely lawful activity which, when viewed as a totality and in light of a police officer's training and experience, allow for a reasonable inference that potentially criminal activity is afoot. *See generally* ***Terry v. Ohio***, 392 U.S. 1 (1968). It has further long been true that officers are not required to rule out innocent explanations for ambiguous conduct, *see* ***State v. Waldner***, 206 Wis. 2d 51, 58, 556 N.W.2d 691 (1996), and that an officer's subjective beliefs are in general "not controlling." *See* ***State v. Kelsey C.R.***, 2001 WI 54, ¶49 n.11, 243 Wis. 2d 422, 626 N.W.2d 777.

That said, it is also true that courts very frequently account for an individual officer's training and experience in determining whether the officer reasonably suspected criminal activity, a factor which is subjective in the sense that officers do not as a group have identical "training and experience." *See* ***State v. Allen***, 226 Wis. 2d 66, 74, 593 N.W.2d 504 (Ct. App. 1999) (stating that the training and experience of an officer is a factor to be considered in the totality of the circumstances analysis); *see also* ***State v. Conaway***, 2010 WI App 7, ¶¶8-13 (holding that while an officer's training and experience is often relevant to the reasonable suspicion inquiry, it fails to support reasonable suspicion where there is nothing to suggest that the officer's suspicions regarding a particular ambiguous fact had ever been bourne out).

Here, both the circuit court and the Court of appeals completely discounted the fact that Deputy Anderson did in fact accept that the beer in the center console of Vaaler's vehicle belonged to his clearly impaired passenger, not Vaaler, albeit only implicitly by finding that the presence of the beer can in the center console was a factor supporting

reasonable suspicion. This holding conflicts with both holdings of this Court and a recent holding of the Court of appeals.

In that case, the Court of appeals found significant the fact that the officer there could not localize the source of the odor of intoxicants to the driver, and held that this inability to determine whether the odor emanated from the driver or from elsewhere in the vehicle significantly lowered the probability that the driver there was committing a crime. *See* ***State v. Quitko***, No. 2019AP200-CR, ¶21, unpublished slip op. (May 12, 2020) (citing and quoting ***State v. Secrist***, 224 Wis. 2d 201, 218, 589 N.W.2d 387 (1999) (referring to probative value of odor of marijuana emanating from a vehicle and stating that "[t]he probability diminishes if the odor is not strong or recent, *if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor.*")) (brackets and emphasis added).

Here, as in ***Quitko***, the deputy was faced with significant ambiguity as to the source and probative value of the odor of intoxicants he detected emanating from the vehicle; in fact, "the source of the odor [was] not near [Vaaler]," "there [were] several people in the vehicle," and "[Vaaler's passenger's intoxicated state and admission to the open intoxicant being hers] offer[ed] a reasonable explanation for the odor[,]" thereby significantly diminishing the weight Deputy Anderson could reasonably have given to the said odor of intoxicants in determining whether he could reasonably suspect that Vaaler was operating while impaired. ***Secrist***, 224 Wis.2d at 218 (brackets added). Both the circuit court and the Court of appeals ignored the import of ***Secrist*** in finding that, in spite of the fact that Deputy Anderson had in fact localized the source of the odor to someone other than

Vaaler, Anderson was nonetheless allowed to factor in the odor of intoxicants and the presence of the beer can in Vaaler's center console as suspicious factors supporting reasonable suspicion.

Allowing an officer to count as suspicious a fact which that officer has expressly determined to have an innocent explanation also flies in the face of several other decisions of both this Court and the Court of appeals. *See*, *e.g.*, ***State v. Hogan***, 2015 WI 76, ¶50, 364 Wis.2d 167, 868 N.W.2d 124 ("The possibility that innocent explanations may exist for observed behavior does not preclude a finding of reasonable suspicion, but as a practical matter, police cannot expect to conduct field sobriety tests on every motorist who is shaking and nervous when stopped by an officer."); *see also* ***State v. Meye***, No. 2010AP336-CR, ¶2, unpublished slip op. (July 14, 2010) (ambiguity as to source of odor of alcohol undermines reasonableness of suspicion) *and* ***State v. Gonzalez***, No. 2013AP2585-CR, ¶17, unpublished slip op. (May 8, 2014) (same).

Here, there was no longer ambiguity as to the significance of the beer can in the center console once Deputy Anderson believed the impaired passenger to be telling the truth when she claimed it as hers, and it can reasonably be inferred that Anderson reached that conclusion in light of his training and experience. ***Colstad***, 260 Wis. 2d 406, ¶8 (officer's training and experience relevant to reasonable suspicion analysis). Further, notwithstanding the fact that police *may* ignore innocent explanations for ambiguous conduct, where they do in fact accept such innocent explanations, they should be bound by that acceptance in order to serve the main purpose of the exclusionary rule: deterrence of police lawlessness. *See* ***State v. Dearborn***, 2010 WI 84, ¶35, 327 Wis.2d 252, 786 N.W.2d 97 ("The

application of the exclusionary rule should focus on its efficacy in deterring future Fourth Amendment violations."). As a matter of logic, it cannot be true that anyone can reasonably rely on a state of affairs which one has expressly determined not to obtain. This Court should take review to clarify that it is unreasonable for an officer to rely on a suspicious explanation for a particular fact when the officer has determined that an innocent explanation is in fact true.

II. This court should accept review to clarify that when evaluating whether reasonable suspicion existed under the totality of the circumstances, a reviewing court is required to balance all of the facts, including facts tending to negate the existence of reasonable suspicion.

Here, the Court of appeals relied on the facts recited above in holding that Deputy Anderson had a reasonable suspicion that Vaaler was operating while impaired, including the beer can which Anderson did not believe belonged to Vaaler, but did not balance those facts against the absence of many other facts commonly associated with impairment which would tend to negate an inference that Vaaler was impaired. First, and other than the fact that Vaaler was driving at night with only his fog lamps on, Deputy Anderson admitted that he did not observe any indicia of impairment in Vaaler's driving conduct prior to or during the stop. (R59: 15-16).

Second, Vaaler did not exhibit any of the traditional indicia of impairment such as bloodshot or glassy eyes and slurred speech, and he also denied drinking alcohol that evening. (R59: 16-17). In contrast, his front seat passenger was, according to Deputy Anderson, visibly impaired. (R59: 17). Third, while the area Vaaler was coming from was rural,

Deputy Anderson did see that the road ahead of Vaaler was illuminated to some extent by the fog lamps, and in addition, the area where the stop took place had "ample" illumination. (R59: 15-16). Fourth and finally, Deputy Anderson did not check whether Vaaler had a criminal history prior to requesting that he perform field sobriety tests, and as such did not have knowledge at that time of any prior OMVWI convictions (or any other criminal convictions, for that matter) which Vaaler may have had. (R59: 18).

This absence of the ordinary indicia of impairment balanced against the ambiguous source of the odor of intoxicants, the fact that Deputy Anderson accepted that the beer can in the console belonged to Vaaler's clearly impaired passenger, and the time of night involved, this case is much more like cases in which courts have found that reasonable suspicion of impairment did not exist than those finding that it did, as was argued below in Vaaler's appellate briefs.

In ***State v. Gonzalez***, for example, the Court of appeals held that the following factors taken together did not add up to reasonable suspicion sufficient to justify requesting field sobriety testing: "(1) an odor of alcohol of an unspecified intensity "coming from [the] vehicle," 2) Gonzalez's explanation that the odor was the result of friends she was transporting, not her, and 3) the time of the stop, just after 10:00 p.m." ***Gonzalez***, No. 2013AP2585-CR, ¶17, unpublished slip op. (May 8, 2014). Notably in the context of the present case, although the officer there had stopped Gonzalez did so because one of her headlights was nonfunctional, the officer did not observe any other bad driving behaviors, nor did the officer observe any indicia of intoxication from Gonzalez herself other than the odor of alcohol mentioned above. ***Id.***, ¶¶3-4. What must also be kept in mind, as the ***Gonzalez*** court concluded, is the principle that

it is not illegal to drink alcohol and then drive in Wisconsin; rather, it is only illegal to operate a motor vehicle after having consumed enough alcohol to be "under the influence of an intoxicant . . . to a degree which renders [one] incapable of safely driving." ***Id.***, ¶13 (citing Wis. JI-CRIMINAL 2663 and Wis. Stat. §§ 346.63(1)(a) and 346.01(1)).

In contrast, the unpublished opinion cited by the State in the Court of appeals for the proposition that the absence of certain indicia of impairment does not defeat reasonable suspicion involved substantially more suspicious facts, despite being superficially similar to this case in that the officer there did not observe any of the usual indicia of impairment from the driver.

In that case, the driver was alone in his vehicle, and while the officer did not observe glassy or bloodshot eyes or slurred speech, the Court of appeals upheld the stop, stating that "the speeding, which showed Fellinger's nonconformance with the law, combined with the odor of intoxicants, the admission of drinking, and the time of night, 1:50 a.m., around "bar time," amounts to reasonable suspicion that Fellinger was operating his vehicle while intoxicated." ***Town of Freedom v. Fellinger***, No. 2013AP614, ¶24 (Aug. 6, 2013) (unpublished slip op.). Here, there was no admission of drinking, the source of the odor of intoxicants was ambiguous, and the traffic violation which led to the stop was less indicative of reckless conduct than the speeding involved in ***Fellinger***.

Here, neither the circuit court nor the Court of appeals weighed the scanty suspicious factors against the larger body of factors tending to negate suspicion. This ignores the requirement that courts review the question whether reasonable suspicion existed should examine the totality of

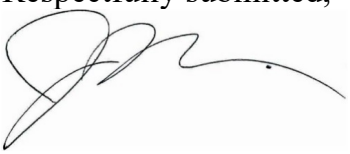
the circumstances. *See* ***State v. Williams***, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106 ("In determining whether the police have lawfully conducted a Terry stop, we consider the totality of the circumstances."). This Court should accept review to clarify that an analysis accounting for the totality of the circumstances must by definition involve weighing the suspicious factors against the innocent factors, rather than simply tallying up a few suspicious factors, noting that officers are not required to accept innocent explanations for ambiguous facts, and ignoring the absence of personal indicia of impairment, including the inability of Deputy Anderson to tie the odor of intoxicants to Vaaler as opposed to his passengers. *See* ***Secrist***, 224 Wis.2d at 218 (finding significant the questions whether the officer could localize the odor to the defendant and whether the defendant was able to give a reasonable explanation for the odor).

CONCLUSION

Vaaler asks this court to accept review of his appeal in order to: (1) provide the bench and bar with guidance as to the effect on the reasonable suspicion analysis of an officer's express resolution of an ambiguous fact in favor of innocence; (2) clarify that when conducting the reasonable suspicion analysis, the totality of the circumstances must be analyzed, and that the arguably suspicious factors must be balanced against factors tending to negate reasonable suspicion.

Dated this 6th day of September, 2020.

Respectfully submitted,



JEREMIAH WOLFGANG MEYER-O'DAY
Attorney at Law
State Bar No. 1091114

COLE DANIEL RUBY
State Bar No. 1064819

Attorneys for Christopher J. Vaaler
Martinez & Ruby, LLP
620 8th Avenue
Baraboo, WI 53913
(608) 355-2000

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (d) as well as Rule 806.62(4)(a) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 4,332 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 Rule 809.19(12) and Rule 809.62(2)(f). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 6th day of September, 2020.

Signed:

JEREMIAH WOLFGANG MEYER-O'DAY
Attorney at Law
State Bar No. 1091114

COLE DANIEL RUBY

State Bar No. 1064819

Attorneys for Christopher J. Vaaler
Martinez & Ruby, LLP
620 8th Avenue
Baraboo, WI 53913
(608) 355-2000

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