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STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT II

No. 2020AP791

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CINCINNATI INSURANCE COMPANY,

Plaintiff-Respondent,

v.

JAMES ROPICKY AND REBECCA LEICHTFUSS,

Defendants-Third-Party Plaintiffs-Appellants,

v.

INFRATEK ENGINEERING INVESTIGATIONS, LLC and DONALD L. KRIZAN,

Third-Party Defendants-Respondents.

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Appeal from the March 12, 2020 Order and March 24, 2020 Final Order of the Waukesha County Circuit Court
Case No. 2019CV371—Honorable Ralph M. Ramirez, Judge

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# BRIEF AND APPENDIX OF DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS JAMES ROPICKY AND REBECCA LEICHTFUSS

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*Counsel for the Defendants-Third-Party Plaintiffs-Appellants, James Ropicky and Rebecca Leichtfuss:*

Scott R. Halloin
Wis. State Bar No. 1024669
HALLOIN LAW GROUP, S.C.
839 North Jefferson Street
Suite 503
Milwaukee, Wisconsin 53202
p 414-732-2424
f 414-732-2422
shalloin@halloinlawgroup.com

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## ISSUES PRESENTED FOR REVIEW

Defendants-Third-Party Plaintiffs-Appellants James Ropicky's and Rebecca Leichtfuss' home in Wales, Wisconsin experienced water damage during a May 2018 storm. As a result, Ropicky and Leichtfuss made a claim against the Cincinnati Insurance Company ("Cincinnati") policy which insured the home. Third-Party Defendants-Respondents Infratek Engineering Investigations, LLC and its owner, Donald Krizan, (collectively, "Infratek") conducted an engineering evaluation of the home and the damage caused by the May 2018 storm.

On March 24, 2020, the Waukesha County Circuit Court, the Honorable Ralph M. Ramirez presiding, entered an order which summarily dismissed Ropicky's and Leichtfuss' claims against Infratek for negligence, the negligent performance of an undertaking, and the negligent supply of information for the guidance of others based exclusively on Wisconsin Statutes section 895.475. (R92 (A-App. 196–97); R6, pp.27–32.)

On March 12, 2020, before dismissing the third-party claims, the Circuit Court also denied Ropicky's and Leichtfuss'

motion to compel discovery from Infratek which was necessary to respond to Infratek's pending summary judgment motion, including discovery related to the scope of Infratek's oral contract and pattern and practice in its prior work for Cincinnati. (R88, p.2 (A-App. 146).) Ropicky and Leichtfuss appeal from the Circuit Court's March 12, 2020 and March 24, 2020 Orders. (R88 (A-App. 145–47); R92 (A-App. 196–97).)

In general, this appeal presents four issues for review:

I. **Whether the Circuit Court Erred by Finding That Infratek's Post-Loss Engineering Evaluation Was a "Safety Inspection or Advisory Services Intended to Reduce the Likelihood of Injury, Death or Loss" Exempt From Liability Pursuant to Wisconsin Statutes Section 895.475.**

**Answered by the Circuit Court:** Infratek provided advisory services intended to reduce the likelihood of injury or loss.

**Submitted by Ropicky and Leichtfuss:** Wisconsin Statutes section 895.475 does not apply to an engineer's post-loss investigation of an insurance claim. Ropicky and Leichtfuss ask that this Court reverse the Circuit Court's March 24, 2020 Order on this issue in its entirety (R92 (A-App. 196–97)), and remand this case for further proceedings.

II. **Whether the Circuit Court Erred by Finding on Summary Judgment That Infratek Was Acting as an Insurer's Agent and Therefore Exempt From Liability Pursuant to Wisconsin Statutes Section 895.475.**

**Answered by the Circuit Court:** Infratek was acting as an insurer's agent and therefore exempt from liability under Wisconsin Statutes section 895.475.

**Submitted by Ropicky and Leichtfuss:** Infratek failed to establish, and the record does not support, that Infratek was Cincinnati's agent. Ropicky and Leichtfuss respectfully ask that this Court reverse the Circuit Court's March 24, 2020 Order on this issue in its entirety (R92 (A-App. 196–97)), and remand this case for further proceedings.

III. **Whether the Circuit Court Erred by Finding That Infratek Could Not Be Liable for Its Negligent Guidance to Ropicky's and Leichtfuss' Contractor Pursuant to Wisconsin Statutes Section 895.475.**

**Answered by the Circuit Court:** Infratek was exempt from liability pursuant to Wisconsin Statutes section 895.475. The Circuit Court did not specifically address Infratek's guidance to Ropicky's and Leichtfuss' contractor.

**Submitted by Ropicky and Leichtfuss:** Section 895.475 does not provide a liability exemption for Infratek's negligent guidance to Ropicky's and Leichtfuss' contractor. Ropicky and

Leichtfuss ask this Court to reverse the Circuit Court's March 24, 2020 Order on this issue (R92 (A-App. 196–97)), and remand this case for further proceedings.

**IV. Whether the Circuit Court Erred by Denying Ropicky's and Leichtfuss' Motion to Compel Discovery Regarding the Scope of Infratek's Contract and Relationship with Cincinnati.**

**Answered by the Circuit Court:** The Circuit Court denied Ropicky's and Leichtfuss' motion to compel discovery regarding the terms of Infratek's oral contract and information regarding Infratek's pattern and practice in its prior work for Cincinnati.

**Submitted by Ropicky and Leichtfuss:** The Circuit Court's denial of the motion to compel was an abuse of discretion. Ropicky and Leichtfuss respectfully submit that this Court should reverse the Circuit Court's March 12, 2020 Order on this issue (R88 (A-App. 145–147), and remand this case for further proceedings.

## STATEMENT ON ORAL ARGUMENT

Ropicky and Leichtfuss respectfully request oral argument. This appeal presents issues of first impression regarding the proper interpretation of Wisconsin Statutes section 895.475. Oral argument may assist this Court by allowing it to explore any questions regarding the governing record and relevant authorities.

## STATEMENT ON PUBLICATION

Ropicky and Leichtfuss submit that publication is warranted in this case as it involves issues of first impression. The issues presented in this case are also likely to recur without additional clarification from this Court.

## STATEMENT OF THE CASE

This case is about $900,000 in damage to Ropicky's and Leichtfuss' home in Wales, Wisconsin that was discovered after a severe storm in May 2018. Ropicky's and Leichtfuss' claims against Infratek stemmed from Infratek's provision of its errant evaluation of the loss and damage to the property insurer, Cincinnati, and Infratek's provision of inaccurate information and engineering advice to Ropicky's and

Leichtfuss' repair contractor. Ropicky and Leichtfuss appeal the Circuit Court's dismissal of their claims against Infratek.

## I. An Insurance Claim Is Made and Infratek Errantly Evaluates Causation and Damages.

After a May 2018 storm, Dr. Ropicky tendered a property damage claim to his homeowner's carrier, Cincinnati. (R58, pp.1–2 (A-App. 230–31).) Cincinnati's adjuster, Julie Didier, came to see the home after repairs were underway. (R58, p.2 (A-App. 231).) In her conversations with Dr. Leichtfuss, Ms. Didier expressed concern about hidden water damage. (*Id.*) Ms. Didier advised that the insurance policy provided coverage for both visible and hidden damages. (*Id.*)

Ms. Didier suggested that Ropicky and Leichtfuss contact an engineer, specifically Infratek, and obtain an assessment of the water damage. (*Id.*) Based on this recommendation, Dr. Leichtfuss called Infratek. (*Id.*) Neither Cincinnati nor Infratek disclosed the existence of any relationship between Cincinnati and Infratek. (R58, p.3 (A-App. 232).)

Ropicky and Leichtfuss believed Infratek was unrelated to Cincinnati and that Infratek was providing an "honest and independent analysis of the damage and would not be influenced by Cincinnati." (*Id.*) Ropicky and Leichtfuss thought Infratek was hired for two purposes: (1) "to provide guidance to [their] contractor . . . to assist [them] in making repairs that were already in progress"; and (2) "to provide information to Cincinnati to help it adjust [their] claim." (*Id.*) Ropicky and Leichtfuss instructed their contractor to stop work until Infratek's analysis was complete. (*Id.*)

Infratek's analysis was errant in two respects. First, Infratek advised Cincinnati that substantially all damage to the insured property was mold related (R24, p.20 (A-App. 217)) even though Infratek did not conduct any mold testing and admits that it had no training in that area (R81, pp.8, 21–22 (A-App. 168, 181–82)). Infratek's conclusion that all damage was mold related was incorrect. (*See* R6, pp.18–21.) Second, Infratek provided errant advice to Ropicky's and Leichtfuss' repair contractor, underestimating the size of the hidden damage area and the cost of repair by nearly $900,000. (R58, pp.5–6 (A-App. 234–35).)

When Ropicky and Leichtfuss discovered Infratek's errors, they submitted additional expert analysis to Cincinnati and requested a re-appraisal under the policy. (R6, p.23.) Cincinnati declined and filed a declaratory judgment action on February 28, 2019. (*Id.*)

## II. Litigation Commences and Infratek Files an Early Summary Judgment Motion.

Cincinnati's complaint against Ropicky and Leichtfuss seeks a declaration that it has no further coverage obligations. (*See generally* R1.) Ropicky's and Leichtfuss' counterclaims against Cincinnati dispute that coverage on their $900,000 claim is capped at $10,000 by a "Fungi, Wet or Dry Rot, or Bacteria, Limit of Insurance Schedule" endorsement. (*See* R6, pp.11–27.) Neither Cincinnati's claims nor Ropicky's and Leichtfuss' counterclaims are at issue in this appeal.

On May 2, 2019, Ropicky and Leichtfuss filed a third-party complaint against Infratek for negligence (Count I), the negligent performance of an undertaking (Count II), and the negligent supply of information for the guidance of others (Count III). (R6, pp.27–32.) Infratek answered on June 14, 2019. (R13.)

On October 25, 2019, Infratek amended its answer and asserted a new eleventh affirmative defense based on the exemption from liability contained in Wisconsin Statutes section 895.475. (R20, p.22.) No additional facts were pled with this amendment.

On November 8, 2019, fourteen days after filing the Amended Answer and Affirmative Defenses, Infratek moved for summary judgment on the new affirmative defense. (R22.) Infratek's motion also came just days after Cincinnati cancelled the depositions of Mr. Krizan and Cincinnati's adjuster, Julie Didier. (R27, p.2.) As of the date of Infratek's motion, no depositions had been taken and no written discovery had been issued specific to the new affirmative defense.

At the time of Infratek's motion for summary judgment, Infratek and Cincinnati had objected to a number of Ropicky's and Leichtfuss' discovery requests, including requests for information regarding the contract between Infratek and Cincinnati as well as pattern and practice discovery regarding Cincinnati and Infratek's historical relationship. As such, when Infratek filed the motion for summary judgment (R22),

Ropicky and Leichtfuss responded in part with a motion to compel certain documents from Infratek and Cincinnati (R30).

### III. The Circuit Court Denies Discovery Necessary to Respond to Infratek's Motion and Only Permits a Limited Deposition of Mr. Krizan.

There were two primary discovery disputes raised by Ropicky's and Leichtfuss' motion to compel. (*Id.*) The first dispute related to whether Infratek was Cincinnati's agent. The motion to compel sought discovery of Infratek's contract with Cincinnati, and if it was oral, the terms of the oral agreement in order to address Infratek's argument that it was an agent of Cincinnati. The motion also sought prior contracts between Infratek and Cincinnati and prior reports prepared by Infratek for Cincinnati as pattern and practice evidence as to whether Infratek had previously served as Cincinnati's agent or safety inspector. (*See* R30, p.4 ("The withheld documents include[ ]: . . . 3. Documents regarding [Infratek's] other work for Cincinnati Insurance. . . . [Infratek] have indicated that approximately one dozen items exist that are responsive to item 3.").)

The second dispute raised in the motion to compel related to discussions and communications between Cincinnati

and Infratek related to Infratek's causation evaluation and Cincinnati's coverage decision. (R30, p.4 (items 1 and 2).) This second dispute is not relevant to whether Infratek was an agent of Cincinnati and the Circuit Court's Order on this discovery is not at issue in this appeal.

Ropicky's and Leichtfuss' response to Infratek's motion for summary judgment reiterated the need for the requested discovery. (R27, pp.15–16.) Specifically, Ropicky's and Leichtfuss' counsel outlined the discovery needed to respond to the summary judgment motion. (R28, pp.2–5.)

Cincinnati responded to the motion to compel by filing a motion for protective order. (R34; R35.) Cincinnati's motion asked the Circuit Court to protect Cincinnati's communications with Infratek, Infratek's draft reports regarding the loss, and other insureds' claims files. (R35; R34.) Infratek's limited response to the motion to compel joined one part of Cincinnati's motion—the portion related to whether Infratek's previous work for Cincinnati should be protected—and argued that Infratek's prior contracts and reports should not be compelled because it would result in "mini trials" of Infratek's past work. (R53, pp.1–2.) As stated above, this

appeal only involves whether it was appropriate for the Circuit Court to prohibit discovery regarding Infratek's prior work for Cincinnati and Infratek's oral contract with Cincinnati—not Infratek's communications and draft reports related to Ropicky's and Leichtfuss' loss.

A hearing on Ropicky's and Leichtfuss' motion to compel and the related motion for protective order was held on January 28, 2020. (R105 (A-App. 102–44).) The Circuit Court allowed Mr. Krizan to be deposed on the limited topic of agency prior to the upcoming summary judgment hearing. (R105, p.40:1–11) (A-App 141).) The Circuit Court appeared to grant the relevant part of Ropicky's and Leichtfuss' motion to compel:

> I am going to allow limited discovery in regards to the relationship that Mr. Krizan had with Cincinnati and how he came to be retained and the related issues.
>
> I have heard Mr. Halloin say, not these exact words but he was hired or brought on by Ms. Leich[t]fuss or Mr. Ropicky. I need to know about that at this juncture to resolve the summary judgment issue.
>
> So, can that be accomplished in the time frame that we can still have the matter heard on February 25th? I hope so.

(*Id.*) The Circuit Court did impose a significant limitation on discovery: Cincinnati's communications with Infratek were privileged as of June 1, 2018. (*See* R105, pp.31:3–32:6 (A-App. 132–33).) The Circuit Court picked June 1, 2018 as the cut-off date because the Circuit Court found that June 1, 2018 was the date that Cincinnati anticipated litigation. (*Id.*) June 1, 2018 was also the first day Cincinnati met with Dr. Leichtfuss to see the loss. (R105, p.34:3–17 (A-App. 135).)

The parties submitted various filings to obtain clarification from the Circuit Court regarding what discovery was permissible. (R71–R74; R76; R77; R82.) The Circuit Court did not initially sign either party's proposed order. The order proposed by Cincinnati stated:

> 3. The motion to compel is denied.
>
> 4. The Motion for Protective order is granted in part and denied in part. Plaintiff Cincinnati Insurance Company ("Cincinnati") is required to produce drafts of reports that Infratek Engineering Solutions, LLC ("Infratek") and/or Donald L. Krizan ("Krizan") provided to Cincinnati prior to June 1, [2018[1]], and to produce communications between Cincinnati and Infratek/Krizan prior to June 1, [2018].

[1] The proposed orders from the January 28, 2020 hearing, and the order signed by the Court on March 12, 2020, contain scrivener's errors. (R71; R73; R88, p.2 (A-App. 147).) The orders state that communications after June 1, 2019 were protected; however, the Circuit Court's ruling identified the date as June 1, 2018. (R105, p.34:3–17 (A-App. 135).)

> Cincinnati is not required to produce drafts of Infratek/Krizan reports and communications with Infratek after June 1, [2018].

(R71, p.2.) Ropicky's and Leichtfuss' proposed order contained an identical paragraph 4. Paragraph 3 of Ropicky's and Leichtfuss' proposed order was different:

> 3. The Motion to Compel is denied in part and granted in part. Infratek, Krizan and Cincinnati are required to produce documents relating to the relationship between Mr. Krizan, Infratek, Cincinnati and its counsel, as identified in the Drs. Leichtfuss and Ropicky's response to Infratek and Krizan's motion for summary judgment.

(R73, pp.3–4.)

Despite the language of paragraph 4, Cincinnati and Infratek limited oral discovery on Infratek's reports and contracts for other matters. Instead of producing the requested documents, Cincinnati created a spreadsheet summarizing "prior Krizan retentions by Cincinnati going back to 2015." (*See* R81, pp.24–25 (A-App. 284–85).) The spreadsheet "did not reveal the identity of the insureds or any substantive information about the respective claims." (R77, p.6.) Cincinnati believed this spreadsheet resolved the discovery issues associated with Infratek's prior reports for and contracts with Cincinnati. (*Id.*)

To comply with the Circuit Court's deadline, Mr. Krizan's "limited topic" deposition went forward on February 17, 2020. (R81, pp.5–22 (A-App. 265–82).) During the deposition, Cincinnati's and Infratek's counsel made multiple objections and instructed Mr. Krizan not to answer various questions.

Mr. Krizan was allowed to testify that he negotiated an oral contract with Cincinnati. (R81, p.15 (A-App. 273).) He also affirmed that his role was to "investigate a post loss event; . . . a loss that had already occurred." (R81, p.14 (A-App. 274).) Besides this testimony, the Circuit Court's discovery ruling prevented further discussion of the terms Infratek's retention by Cincinnati because the negotiation of the oral contract occurred after June 1, 2018.

Under the Circuit Court's ruling that all communications between Infratek and Cincinnati were privileged starting June 1, 2018, and Infratek's and Cincinnati's refusal to produce any documents other than the spreadsheet, Ropicky and Leichtfuss could not obtain testimony from Mr. Krizan regarding the terms of Infratek's oral contract with Cincinnati or pattern and practice evidence.

Instead, Ropicky and Leichtfuss had to rely on the competing affidavits of Cincinnati's adjuster and Dr. Leichtfuss for context.

Cincinnati's adjuster, Ms. Didier, averred that she first saw the loss on June 1, 2018. (R36, p.2 (A-App. 227).) Dr. Leichtfuss stated that she called Infratek, at Ms. Didier's suggestion, the same day Ms. Didier came to the view the home. (R58, p.2 (A-App. 231).) Cincinnati then allegedly retained Infratek on June 6, 2018. (R36, p.3 (A-App. 228).)[2] Infratek then came to Ropicky's and Leichtfuss' home on June 7, 2018, but never disclosed its relationship with Cincinnati to Ropicky and Leichtfuss. (R58, pp.3–4 (A-App. 233–34).)

As for pattern and practice discovery, Infratek refused to produce any documents related to Infratek's prior work for Cincinnati. Mr. Krizan's deposition testimony on this topic was also limited by the Circuit Court's order and by Cincinnati's spreadsheet. Ropicky and Leichtfuss attempted to use Cincinnati's spreadsheet during Mr. Krizan's deposition

[2] Because Infratek's first involvement in this matter occurred after June 1, 2018, the Circuit Court's ruling on the motion to compel prevented any further inquiry into the details of Infratek's retention by Cincinnati. (R88, p.2 (A-App. 146).)

but the spreadsheet proved deficient. Mr. Krizan testified that he had not seen the spreadsheet before the deposition. (R81, p.10 (A-App. 270).) Mr. Krizan testified that he had worked on approximately forty matters for Cincinnati but the spreadsheet only identified thirteen prior matters. (*Id.*) Mr. Krizan could only identify two of the thirteen matters listed on the spreadsheet because of the minimal information provided by Cincinnati. (R81, pp.11–13 (A-App. 271–73).)

Infratek's counsel instructed Mr. Krizan not to answer questions regarding the general scope of services that Infratek previously provided to Cincinnati. (R81, pp.13–14 (A-App. 273–74).) Infratek's counsel stated that questions regarding the nature of Infratek's retentions were "outside the scope of the deposition. . . . I think that was clear[ly] what the judge ordered." (R81, p.13 (A-App. 273).) Objections were also raised to a series of general questions regarding whether any of Mr. Krizan's forty evaluations for Cincinnati related to various federal and state safety statutes or standards of care. (R81, pp.13–14 (A-App. 273–74).)

Infratek's and Cincinnati's counsel only allowed two questions on this topic to be answered. First, when asked

whether "any of the 40 investigations conducted for Cincinnati [were] safety inspections that involved preloss conditions," Mr. Krizan responded "no." (R81, p.14 (A-App. 274).) Second, Mr. Krizan was allowed to confirm that he had never provided a pre-loss investigation for any entity. (*Id.*)

Ropicky and Leichtfuss advised the Circuit Court of Mr. Krizan's problematic deposition, and the corresponding impact on Infratek's pending summary judgment motion. (R82, pp.4–5; R84, pp.3–11.) Ropicky and Leichtfuss also submitted the entire transcript from Mr. Krizan's deposition to the Circuit Court. (R81, pp.5–22 (A-App. 264–82).)

## IV. The Circuit Court Finds That Infratek Was Acting as Cincinnati's Agent and Is Exempt from Liability.

On March 12, 2020, the Circuit Court held a hearing on Infratek's summary judgment motion. (R106 (A-App. 148–95).) At the hearing, the Circuit Court also signed Cincinnati's proposed order on the competing discovery motions. (R88 (A-App. 145–47).)

After the discovery order was signed, the hearing proceeded to the summary judgment motion. Ropicky and Leichtfuss re-asserted that Wisconsin Statutes section 895.475

did not apply. As to the service provided by Infratek, Ropicky and Leichtfuss argued the statute did not apply because Infratek provided a post-loss evaluation of an insurance claim—not a "safety inspection or advisory services intended to reduce the likelihood of injury, death or loss." Among other evidence, Ropicky and Leichtfuss cited to Mr. Krizan's clear admission during his deposition:

> Q. Was your report intended to be a preloss safety inspection?
>
> A. No.

(R81, p.15 (A-App. 275).)

The summary judgment hearing also focused on whether Infratek was Cincinnati's agent. Ropicky and Leichtfuss argued that Infratek had failed to establish any of the elements of agency. Specifically, Ropicky and Leichtfuss pointed to Mr. Krizan's undisputed testimony regarding the most important element of agency—control. In response to the question of whether "any aspect of [his] decision making process [was] not independent, and by that I mean controlled by someone else," Mr. Krizan responded no. (R81, p.15 (A-App. 275).) Because Mr. Krizan confirmed that he controlled the details of his report, and the manner, means, and methods of

his work (*id.*), Ropicky and Leichtfuss asserted that Infratek could not be Cincinnati's agent.

The Circuit Court rendered its oral ruling on the motion for summary judgment after hearing the parties' arguments. (R106, pp.42:3–45:20 (A-App. 189–92).) Without much explanation, the Circuit Court found that Infratek did not provide a "general safety inspection," but did provide "advisory services specifically as it pertains to the cause of reported water damage." (R106, pp.44:1–7 (A-App. 191).) The Circuit Court found that:

> . . . [T]he duty that he was tasked with was to determine the cause of reported water damages to the home of Ropicky and Leich[t]fuss. And so, it was pretty narrow. Here is what you are doing. Here is your task. Go and determine the cause of water damage.

(R106, p.43:12–25 (A-App. 190).) Near the end of the short ruling, the Circuit Court added: "the purpose of that was to reduce the likelihood of loss on the part of the insurance company." (R106, p.44:21–23 (A-App. 191).)

The Circuit Court also found that Infratek was Cincinnati's agent. (R106, p.45:5 (A-App. 192).) In doing so,

the Circuit Court only evaluated the control element of agency. The Circuit Court stated:

> I understand that the method he was going to use – the methods, I'm going to use plural, to make a determination whether it be by some instrument that measured the amount of damage or by looking at something with a camera or pulling away wood or siding. Those things Cincinnati did not control.
>
> But they did control the details of the work. That is, check on the water damage, the cause of water damage. I think that there isn't anything otherwise that is being established clearly in the record.

(R106, p.44:9–18 (A-App. 191).)

After the Circuit Court finished its ruling, Ropicky and Leichtfuss asked the Circuit Court to address Infratek's errant advice and guidance to Ropicky's and Leichtfuss' contractor. (R106, p.46:2–10 (A-App. 193).) Ropicky and Leichtfuss asserted that such acts would not qualify for protection under the section 895.475. (*Id.*) The Circuit Court responded: "I have made my decision. I have considered all the facts I need to consider at this juncture." (R106, p.46:11–13 (A-App. 193).)

The Circuit Court entered an order memorializing its March 12, 2020 oral ruling on March 24, 2020. (R92 (A-App. 196–97).) The March 24, 2020 Order is a final order as to

Defendants Infratek Engineering Investigations, LLC and Donald Krizan. (*Id.*)

## ARGUMENT

Mr. Krizan is a licensed professional engineer and his company, Infratek Engineering Investigations, LLC, is a professional engineering firm. Ropicky and Leichtfuss asserted third-party claims against Infratek for negligence (Count I), the negligent performance of an undertaking (Count II), and the negligent supply of information for the guidance of others (Count III). (*See generally* R6.) Wisconsin Statutes section 895.475 does not exempt Infratek from liability for any of these claims and the Circuit Court's Order to the contrary should be reversed.

Sections I, II, and III of this brief address the Circuit Court's errant summary judgment decision. Specifically, Section I addresses the Circuit Court's finding that Infratek provided "advisory services intended to reduce the likelihood of injury, death or loss . . . as an incident to insurance" despite the clear language of Wisconsin Statutes section 895.475 and undisputed nature of Infratek's services. Section II addresses the Circuit Court's finding that Infratek was Cincinnati's

agent despite a lack of evidentiary facts to establish the required elements of agency. Section III addresses the Circuit Court's failure to even consider whether Infratek's guidance to Ropicky's and Leichtfuss' contractor falls within the exemption from liability contained in Wisconsin Statutes section 895.475.

Section IV of this brief addresses the Circuit Court's abuse of discretion and improper handling of the discovery issues related to Infratek's alleged agency.

## I. The Circuit Court's Application of Section 895.475 Was Errant Because Infratek Performed a Post-Loss Evaluation—Not Pre-Loss Services Intended to Reduce the Likelihood of Injury, Death, Or Loss.

Relevant to this section, and sections II and III *infra,* Infratek moved to summarily dismiss all three of Ropicky's and Leichtfuss' claims based on Wisconsin Statute section 895.475. Section 895.475 provides:

> Exemption from civil liability for furnishing safety inspection or advisory services. The furnishing of, or failure to furnish, safety inspection or advisory services intended to reduce the likelihood of injury, death or loss shall not subject . . . an insurer, the insurer's agent or employee undertaking to perform such services as an incident to insurance, to liability for damages from injury, death or loss occurring as a result of any act or omission in the course of the safety inspection or advisory services. This section shall not apply if the active negligence . . . of the insurer, the insurer's agent or employee created the condition that was the proximate

> cause of injury, death or loss. This section shall not apply to an insurer, the insurer's agent or employee performing the safety inspection or advisory services when required to do so under the provisions of a written service contract.

Under the language of the statute, two questions are relevant to this Court's review of the Circuit Court's summary judgment decision: (I) whether an engineer's post-loss evaluation of an insurance claim is a "safety inspection or advisory services intended to reduce the likelihood of injury, death or loss"; and (II) whether Infratek was acting as the "insurer's agent."

This Court reviews summary judgment decisions *de novo* and applies the same methodology as the Circuit Court. *See Wright v. Allstate Cas. Co.*, 2011 WI App 37, ¶ 11, 331 Wis. 2d 754, 761, 797 N.W.2d 531, 535. Summary judgment is only appropriate where the pleadings, depositions, affidavits, and other evidentiary facts show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). "A factual issue is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Baxter v. Wis. Dep't of Nat. Res.*, 165 Wis. 2d 298, 312, 477 N.W.2d 648,

654 (Ct. App. 1991) (citation omitted). The statute does not afford wide latitude to decide summary judgment motions. *See Wright v. Hasley,* 86 Wis. 2d 572, 273 N.W.2d 319 (1979). On appeal, a circuit court's decision to grant or deny summary judgment is given exacting scrutiny. *Id.*

For the reasons stated below, Infratek is not exempt from liability under Wisconsin Statutes section 895.475 because Infratek did not conduct a "safety inspection or advisory services intended to reduce the likelihood of injury, death or loss." The Circuit Court's reasoning that section 895.475 exempts Infratek from liability because its post-loss causation evaluation of Ropicky's and Leichtfuss' loss was intended to reduce the likelihood of loss "on the part of the insurance company" has no basis in the language of the statute or published case law. (*See* R106, p.44:21–23 (A-App. 191).) The Circuit Court's decision on this issue should be reversed.

### A. Section 895.475 Applies to Pre-Loss Services—Not Post-Loss Services.

By its plain language, Wisconsin Statutes section 895.475 applies to "the furnishing of, or failure to furnish, safety inspection or advisory services" but the services must be "intended to reduce the likelihood of injury, death or loss."

"The purpose of statutory interpretation is to determine what the statute means so that it may be properly applied." *Westmas v. Creekside Tree Serv., Inc.*, 2018 WI 12, ¶ 18, 379 Wis. 2d 471, 907 N.W.2d 68 (citing *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110). When interpreting a statute, the Court first looks to the language of the statute. *Id.* "If the words chosen for the statute exhibit a 'plain, clear statutory meaning,' without ambiguity, the statute is applied according to the plain meaning of the statutory terms." *Id.* (external citation omitted). In determining the plain meaning of a statute, the courts should consider the context of the language. *Id.*, ¶ 19. Legislative history may "confirm or verify a plain-meaning interpretation." *Kalal*, 2004 WI 58, ¶ 51.

The language of section 895.475 is unambiguously forward looking—the safety inspection or advisory service must be intended to mitigate or avoid a future injury. The case before this Court involves an engineer's post-loss evaluation of an insurance claim. As admitted by Mr. Krizan, Infratek did not provide any services that were pre-loss, or intended to reduce the likelihood of injury, death, or loss. (*See* R24, p.1 (A-App. 198).) At his deposition, Mr. Krizan testified unequivocally:

> Q. Was your report intended to be a preloss safety inspection?
>
> A. No.

(R81, p.15 (A-App. 275).) None of the approximately forty investigations that Mr. Krizan did for Cincinnati, and none of the other investigations he has performed during his career, involved pre-loss conditions. (R81, p.14 (A-App. 274).)

The case law interpreting Wisconsin Statutes section 895.475 also supports the conclusion that the statute only applies to pre-loss services, not post-loss evaluations. In fact, the parties agree that section 895.475 has only been the subject of three published cases. None of the published cases involved similar facts, and most importantly, none required

the reviewing court to analyze whether the advisory services performed by an insurer's alleged agent were protected by section 895.475.

The first case, *American Mutual Liability Insurance Co. v. St. Paul Fire & Marine Insurance Co.*, 48 Wis. 2d 305, 179 N.W.2d 864 (1970), involved a claim by a worker's compensation insurer against a boiler insurer. The alleged negligent inspections were performed before an employee was fatally injured by steam escaping from a ruptured boiler fitting. *Id.* at 307. The services being furnished were meant to avoid the type of harm which later occurred. The worker's compensation insurer alleged that the boiler insurer could have prevented the employee's death by properly performing its pre-loss safety inspections. *Id.* The case clearly involved the type of pre-loss safety inspection contemplated by Wisconsin Statutes section 895.475.[3]

The second case, *Samuels Recycling Co. v. CNA Insurance Cos.*, 223 Wis. 2d 233, 588 N.W.2d 385 (Ct. App. 1998), involved allegations by a company that its insurer

[3] In *American Mutual Liability Insurance Co.*, the Supreme Court noted that section 895.44 (1965–66)—now section 895.475—became effective after the accident alleged in the complaint. *Id.* at 870 n.2.

failed to provide, or negligently provided, loss control services related to pollution inspections. *Id.* at 250–51. The relevant inspections occurred before the ultimate harm—government-ordered environmental cleanup—and were meant to reduce the likelihood of harm to the insured. *Id.* at 239, 250–51. Once again, the case involved the pre-loss advisory services contemplated by Wisconsin Statutes section 895.475.

The third case, *A.O. Smith Corporation v. Viking Corporation*, 79 F.R.D. 91 (E.D. Wis. 1978), arose from a fire in the plaintiff's plant. The plaintiff alleged that its insurer negligently inspected the automatic sprinkler system before the fire. *Id.* at 92–93. The plaintiff argued that a proper inspection could have prevented the loss suffered by the insured. *Id.* The Eastern District of Wisconsin, applying Wisconsin Statutes section 895.475, found that the insurer was exempt from liability.

Although other states have enacted statutes similar to section 895.475, Infratek did not present any case from any state that involved an engineer's post-loss inspection. For example, Massachusetts has adopted a similar statute and its courts have only applied the statute to pre-loss inspections.

*See Hamel v. Factory Mut. Eng'g Ass'n*, 409 Mass. 33, 34–36, 564 N.E.2d 395, 396 (1990) (discussing the insurer's alleged negligent inspections in the months preceding an accident); *Swift v. Am. Mut. Ins. Co. of Boston*, 399 Mass. 373, 504 N.E.2d 621 (1987) (discussing the insurer's alleged negligent inspections while the injured employee, whose family sued for failure to warn, was being exposed to silica dust).

Wisconsin Statutes section 895.475, formally section 895.44, was first enacted in 1965. Legal articles published around the time of Wisconsin's adoption of the statute confirm that the statute is meant to protect pre-loss services. Published four years after Wisconsin's statute was enacted, and after several other states had enacted similar statutes, Professor Arthur Larson's article titled *Worker's Compensation Insurer As Suable Third-Party*, explained the context behind the statute's adoption. 1969 DUKE L. J. 1117 (Dec. 1969); *see also* R85.

The article explains that statutes like section 895.475—at the time of publication section 895.44—were enacted after several state courts found that worker's compensation and liability carriers for employers could be sued for worker's

injuries where errors were made in pre-loss safety inspections. *Id.* at 1118. Professor Larson notes that by 1969, twenty-one states had enacted legislation to "reverse or confirm" these judicial holdings, including Wisconsin. *Id.* at 1124 n.32 (noting Wisconsin's reversal and explicit exemption through Wis. Stat. § 102.29(1) (1957–58) and Wis. Stat. § 895.44 (1965–66).)

Based on the language of section 895.475, and reinforced by foreign jurisdictions' interpretation of similar statutes and legal articles like Professor Larson's, Wisconsin Statutes section 895.475 was intended to apply to worker's compensation and other safety related pre-loss safety inspections—not an engineer's post-loss evaluation of an insurance claim.

### B. Infratek Did Not Provide a Safety Inspection or Advisory Services Intended to Reduce the Likelihood of Injury, Death, or Loss.

This appeal involves a summary judgment decision in favor of Infratek on an issue where Infratek had the burden of proof. *See Kaufman v. State St. Ltd. P'ship*, 187 Wis. 2d 54, 552 N.W.2d 249 (Ct. App. 1994) (party who has burden of proof at trial has burden on summary judgment). Yet the evidentiary facts submitted by Infratek did not establish that

Infratek provided any sort of safety inspection or advisory services intended to reduce the likelihood of injury, death or loss as is required to be exempt from liability pursuant to Wisconsin Statutes section 895.475. (R24 (A-App. 198–225).) Based on the evidence presented to the Circuit Court,[4] there was no dispute that Infratek provided a post-loss engineering evaluation, not the services described in section 895.475.

Infratek's own summary of its evaluation, its report (R24, pp.4–14 (A-App. 201–10)), highlights the Circuit Court's error on this issue. The report states that Infratek conducted an investigation "regarding storm water damage." (R24, p.5 (A-App. 202).) Although the report contains conclusions as to the alleged causes of the water infiltration, it provides no recommendations regarding what repairs were needed to reduce the likelihood of harm, and expresses no conclusions regarding safety concerns. (R24, pp.8–9 9A-App. 205–06).) Infratek's own summary judgment brief stated that "Infratek strenuously denies that it was retained by Cincinnati to

[4] During Mr. Krizan's deposition, he was asked about each type of safety inspection and advisory service identified by the cases cited in Professor Larson's article. (R81, p.8 (A-App. 268).) For each type of inspection, Mr. Krizan confirmed he had no training in those types of inspections and had never done such an inspection. (*Id.*)

reduce further loss to the Residence . . . but rather, for the sole purpose of determining the cause of the reported water damage." (R23, p.3 n.1.)

While Infratek has been unable to present any Wisconsin authority applying section 895.475—or any statute like it—to an engineer's evaluation of an insurance claim, Wisconsin law does permit professional negligence claims against engineers who conduct errant inspections of structures, even in the absence of privity. *See generally Milwaukee Partners v. Collins Eng'rs, Inc.,* 169 Wis. 2d 355, 485 N.W.2d 274 (Ct. App. 1992).

Ropicky's and Leichtfuss' third-party complaint against Infratek Engineering Investigations, LLC and Donald Krizan, an engineering firm and engineer, is based on Infratek's errant post-loss evaluation and errant instructions to Ropicky's and Leichtfuss' contractor. As such, section 895.475 does not apply to the services provided by Infratek. The Circuit Court's March 24, 2020 Order should be reversed in its entirety because it extended section 895.475 beyond its textual limit.

## II. The Circuit Court Erred by Finding That Infratek Was Acting as Cincinnati's Agent and Therefore Exempt From Liability Under Section 895.475.

In order to be exempt from liability for its negligent acts, Infratek must also establish that it was acting as Cincinnati's agent. This is because section 895.475 only protects a limited class of individuals:

> The furnishing of, or failure to furnish, safety inspection or advisory services intended to reduce the likelihood of injury, death or loss shall not subject a state officer, employee or agent, or an insurer, the insurer's agent or employee undertaking to perform such services . . . .

Wis. Stat. § 895.475 (emphasis added). There is no dispute that Infratek was not a state officer, employee or agent, or an insurer or insurer's employee when it conducted its evaluation. (R81, p.14 (A-App. 274).) Therefore, the remaining question on summary judgment was whether the record undisputedly established that Infratek was acting as an agent of the insurer, Cincinnati.

The evidence did not undisputedly establish that Infratek was acting as Cincinnati's agent. As such, the Circuit Court's March 24, 2020 Order should be reversed and remanded.

### A. To Prevail on Summary Judgment, Infratek Needed To Prove All Three Elements of Agency.

As noted above, the three published cases interpreting section 895.475—*American Mutual Liability Insurance Co.,* 48 Wis. 2d 506, *A.O Smith Corporation*, 79 F.R.D. 91, and *Samuels Recycling Co.*, 225 Wis. 2d 255—did not involve alleged agents of an insurance company conducting a post-loss investigation. However, there is substantial well-defined Wisconsin case law addressing who has the burden on summary judgment to establish the elements of an affirmative defense, including agency.

"'Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.'" *James W. Thomas Constr. Co., Inc. v. City of Madison,* 79 Wis. 2d 345, 352, 255 N.W.2d 551, 554 (1977) (quoting Restatement (2d) Agency § 1(1)). "A consistent facet of a fiduciary duty is the constraint on the fiduciary's discretion to act in his own self-interest because by accepting the obligation of a fiduciary he consciously sets another's interests before his own." *Zastrow v. Journal*

*Commc'ns*, *Inc.*, 2006 WI 72, ¶ 28, 291 Wis. 2d 426, 718 N.W.2d 51 (emphasis added).

For agency to exist, the following elements must be proven by the proponent of the agency:

> (1) the express or implied manifestation of one party that the other party shall act for him; (2) who has retained the right to control the details of the work and (3) whether the party agreeing to perform the service is engaged in a distinct occupation or business apart from that of the person who engages the services.

*Kohl v. F. J. A. Christiansen Roofing Co.*, 95 Wis. 2d 27, 34, 289 N.W.2d 329, 332–33 (Ct. App. 1980) (external citation and quotation marks omitted). The "most compelling factor in determining if a party is an agent or independent contractor is the determination of who has retained the right to control the details of the work." *Id.*

In 2018, the Wisconsin Supreme Court issued a detailed opinion on whether a party was an agent entitled to immunity from a negligence claim under a different immunity statute. *Westmas*, 2018 WI 12. The statute at issue in *Westmas* used the words "no owner and no officer, employee or agent of an owner." *Id.,* ¶ 21. The Wisconsin Supreme Court addressed the Circuit Court's grant of summary judgment on the agency

issue, which had been reversed by the Court of Appeals. The Court of Appeals had found that summary judgment was inappropriate because agency was a fact-specific inquiry. *Id.,* ¶ 15.

In affirming the Court of Appeals, the Wisconsin Supreme Court discussed the meaning of the term "agent" and found that agency exists only where the proponent establishes the right to control, and actual control over, the alleged agent's work, including the "means or methods" of that work. *Id.,* ¶¶ 26–43. For that reason, when "an independent contractor has no fiduciary obligations to and is not subject to control by the principal, no agency relationship has formed." *Id.,* ¶ 31. A principal who merely provides "vision and concept" for a project has not formed an agency relationship—the principal must have control "over the details of the work." *Id.*, ¶ 41–42. The *Westmas* court added, "to summarize, an agent is one who acts on behalf of and is subject to reasonably precise control by the principal for the tasks the person performs within the scope of the agency. Whether an independent contractor is an agent is a fact-specific inquiry." *Id.*, ¶ 36 (emphasis added).

The Wisconsin Supreme Court's recent opinion in *Lang v. Lions Club of Cudahy Wisconsin, Inc.*, 2020 WI 25, 390 Wis. 2d 627, 939 N.W.2d 582, also supports a reversal of the Circuit Court's March 24, 2020 Order.[5] *Lang* involved the review of a split Court of Appeals' decision due to "a difference of opinion regarding the proper reading of *Westmas*" and what level of specifications and control were needed over the work the agent was performing. *Id.*, ¶¶ 33–34. Ultimately, the Wisconsin Supreme Court agreed with the reasoning of Judge Brash's dissent in *Lang*, 2018 WI App 69, ¶ 41, 384 Wis. 2d 520, 920 N.W.2d 329, and clarified that the principal must have "the right to control the process . . . that caused the injury at issue." *Lang*, 2020 WI 25, ¶ 35.

The *Lang* opinion re-affirmed that an agency analysis is fact-specific. *Id.*, ¶ 34. The Wisconsin Supreme Court also clarified that when a principal "merely had a right to expect a result as opposed to the right to control the injury causing conduct, i.e., the means," as in *Westmas*, there would be no

[5] The Circuit Court was not presented with nor did it consider the Wisconsin Supreme Court's March 5, 2020 opinion in *Lang*, 2020 WI 25, prior to its March 24, 2020 Order. Although the *Lang* opinion was filed on March 5, 2020, a motion for reconsideration of the Supreme Court's decision was filed on March 25, 2020.

agency relationship even if a contract existed between the principal and the alleged agent. *Id.*, ¶ 32.

Both *Westmas* and *Lang* involved an agency analysis in the context of an immunity statute. Judge Brash's dissent in *Lang,* 2018 WI App 69, appears to follow this Court's earlier rationale in *Envirologix Corp. v. City of Waukesha*, 192 Wis. 2d 277, 531 N.W.2d 357 (Ct. App. 1995). *Envirologix* involved an immunity statute in the specific context of an alleged agent that was an engineer. *Id.* at 285. The Court of Appeals noted that the most that could be gleaned from the record was that the City of Waukesha had retained an engineer "to prepare the specifications for the project and perform the engineering duties called for" in the contract, and that the City of Waukesha "had the final say" as to whether to accept or reject the engineer's work. *Id.* at 294–95.

The Court of Appeals held that "[t]he mere fact that one is entitled to reject professional advice does not, per se, make for a principal-agent relationship." *Id.* at 295. Due to the fact that "[s]ummary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy," the Court of

Appeals concluded that summary judgment on the agency issue was improper. *Id.* at 297.

The Court of Appeals also noted the irony of the City's agency argument, stating that "it would logically seem that the City would want [the engineer] to exercise the full range of its experience and knowledge, rather than dictating to [the engineer] how it should exercise its professional engineering judgments." *Id.* at 296. The same logic can be applied to Infratek's work for Cincinnati in this case. While Infratek may qualify as an independent contractor, it was not Cincinnati's agent at the time of its evaluation.

### B. The Record Does Not Support a Summary Finding of Agency Because Infratek Did Not Establish Any of the Required Elements of Agency.

Under *Westmas*, 2018 WI 12, the Circuit Court's finding that Cincinnati exercised the requisite control over Infratek by defining the general task—"to check on the cause of the water damage" (R106, p.44:20–21 (A-App. 191))—is in error. At most, the record before the Circuit Court demonstrated that Cincinnati merely expressed a "vision" instead of actual control over the means, methods, and details of Infratek's work. As provided in *Lang*, 2020 WI 69, it was Infratek's

burden to show that Cincinnati exerted or had the right to exert control over the injury-causing conduct of the proposed agent. Here, there are two injury causing acts—Infratek's evaluation for Cincinnati and Infratek's repair evaluation. Nothing in the record shows that Cincinnati had the right to exert or did exert control over either act.

The only evidence provided by Infratek in support of its motion was Mr. Krizan's six paragraph affidavit which attached Infratek's July 9, 2018 and February 4, 2019 reports. (R24, pp.1–28 (A-App. 198–225).) Notably, Mr. Krizan did not aver that he was an agent of Cincinnati. (R24, pp.1–2 (A-App. 198–99).) Instead, Mr. Krizan stated that he was "retained" by Cincinnati to determine the cause of the reported water damage at Ropicky's and Leichtfuss' home. (*Id.*) Mr. Krizan did not state that he provided advisory services on behalf of Cincinnati, nor does he indicate that he provided any services that were intended to reduce the likelihood of injury, death, or loss. (*Id.*)

Infratek's July 9, 2018 report (R24, pp.4–13 (A-App. 201–10)) does not state that Infratek was Cincinnati's agent, and simply states:

> On June 7, 2018, I conducted an investigation regarding storm water damage to the common easterly exterior wall of the great room and exercise room of the residence at the above-referenced location. As a result of my analysis of the data I obtained, I offer the following report.

(R24, p.5 (A-App. 202).) The report's signature block also contains Mr. Krizan's engineering stamp:

Respectfully submitted,

**INFRATEK ENGINEERING INVESTIGATIONS, LLC**

Donald L. Krizan, P.E.

Attachments: Front Elevation View
Rear Elevation View
Photos 1-12


(R24, p.9 (A-App. 206).)

Mr. Krizan's deposition testimony (R81, pp.5–22 (A-App. 265–82)), Ms. Didier's affidavit (R36 (A-App. 226–29)), and Dr. Leichtfuss' affidavit (R58 (A-App. 230–60)) contradict the Circuit Court's finding that Infratek was acting as Cincinnati's agent. Even though Mr. Krizan's deposition was limited due to the Circuit Court's January 28, 2020 oral ruling and corresponding March 12, 2020 Order, Mr. Krizan's own testimony negates Infratek's argument that it was Cincinnati's agent. (R81, pp.5–22 (A-App. 265–82).)

Under the Circuit Court's March 12, 2020 Order, no depositions or discovery could be obtained from Cincinnati or its adjusters on the agency issue. (*See* R88 (A-App. 145–47); R105, p.40:1–4 (A-App. 141).) The only evidentiary facts from Cincinnati came from a short affidavit and related exhibits from the Cincinnati adjuster who handled the claim, Ms. Didier. (R36 (A-App. 226–29); R37–R47.) The adjuster's affidavit established that Infratek provided causation information to Cincinnati, that Infratek did not participate in the actual coverage decision, and that Cincinnati was not bound by Infratek's findings. (R36, p.3 (A-App. 228).) Based on these facts, Infratek was not Cincinnati's agent.

Dr. Leichtfuss' affidavit presented evidence which contradicted Infratek's conclusion that it was—at all times—acting as Cincinnati's agent. (R58 (A-App. 230–36).) Her affidavit pointed out that she was the one who actually called Infratek, on Cincinnati's recommendation, and that neither Cincinnati nor Infratek disclosed any alleged agency relationship. (R58, pp.2–3 (A-App. 231–32).) According to Dr. Leichtfuss, Infratek was to provide an independent assessment. (R58, p.3 (A-App. 232).) Dr. Leichtfuss' affidavit

also established that Infratek provided errant advice to Ropicky's and Leichtfuss' contractor regarding the location of hidden water damage. (R58, pp.4–6 (A-App. 233–35).)

Infratek failed to bring forward any evidence—let alone undisputedly establish—that it satisfied the required elements of agency. To summarize, the record contains:

- No evidence that Infratek was acting as Cincinnati's agent;
- No evidence that Infratek and Cincinnati had a fiduciary relationship;
- No evidence of any constraint on Infratek's discretion to act in its own self-interest;
- No evidence that Cincinnati had the right to control, or actually controlled, Infratek's work;
- No evidence that Cincinnati's control reached the "means or methods" and "details" of that work, including the right to manage the daily activities; and
- No evidence that Cincinnati was dictating how Infratek should exercise its professional engineering judgment.

Nevertheless, based on this limited record, the Circuit Court accepted Infratek's argument that it was Cincinnati's agent and entitled to a complete exemption from liability pursuant

to Wisconsin Statutes section 895.475. (R23, p.11; R106, p.45 (A-App. 192).)

Because the evidentiary record does not undisputedly establish any of the three required elements of agency,[6] Ropicky and Leichtfuss ask that the Circuit Court's March 24, 2020 Order on Infratek's motion for summary judgment be reversed in its entirety.

#### 1. There Is No Evidence That Infratek Was a Fiduciary of, Constrained by, or Engaged to Act on Behalf of Cincinnati.

As summarized above, Mr. Krizan's affidavit does not contain any statement that he believed he was acting as a "fiduciary" or "agent" of Cincinnati. Without this evidence, Infratek cannot satisfy the first element of agency. *See Westmas*, 2018 WI 12, ¶ 31 (stating that "when an independent contractor has no fiduciary obligation to and is not subject to control" of the principal, he is not an agent.); *Zastrow*, 2006 WI 72, ¶ 28 ("A consistent facet of a fiduciary duty is the constraint on the fiduciary's discretion to act in his own self-interest.")

[6] Infratek did not plead agency as part of its eleventh affirmative defense—the section 895.475 defense—and Infratek's only substantive reference to the concept of agency is made by counsel in its summary judgment reply brief.

Infratek's summary judgment materials do not identify any constraint on Infratek's discretion to act in its own self-interest. Mr. Krizan denied that Cincinnati could constrain his work and admitted that he used his engineer's stamp to certify that he was exercising his independent judgment with respect to the findings in Infratek's report. (R81, pp.11–12 (A-App. 271–72).)

Mr. Krizan's affidavit also contains no statement that Infratek was engaged to act for Cincinnati. There is no dispute that Infratek was retained to do an engineering evaluation after Dr. Leichtfuss reported the loss to Cincinnati. Agency requires more than just retention; if only retention was required, then all independent contractors would be agents. *See Westmas*, 2018 WI 12, ¶ 31 (An independent contractor is "one who contracts with another to do something for him . . . An independent contractor may or may not be an agent.")

An agent has to be hired to "act on behalf" of the principal. Restatement (2d) Agency § 1(1). Cincinnati's adjuster unequivocally admitted that Infratek was hired "to provide Cincinnati with scientific information and expert opinions about the nature of the loss that Cincinnati could use

to make coverage decisions on the claim. . . . Decisions concerning coverage were being made exclusively by Cincinnati without any participation by [Infratek]." (R36, p.3 (A-App. 228).) This evidence does not establish that Infratek was engaged to act on behalf of Cincinnati.

### 2. There Is No Evidence That Infratek Was Controlled by Cincinnati.

Mr. Krizan's undisputed testimony regarding the second element of agency—control—also supports the conclusion that Infratek was not Cincinnati's agent. *See Kohl*, 95 Wis. 2d at 34 (explaining that "who has retained the right to control the details of the work" is the most compelling factor of an agency analysis). When asked whether "any aspect of your decision making process [was] not independent, and by that I mean controlled by someone else," Mr. Krizan answered unequivocally, "No." (R81, p.15 (A-App. 275).)

Mr. Krizan admitted that he exercised exclusive and complete control over his decision making process and had the exclusive ability to control the means or methods of his work. (*Id.*) By applying his seal to Infratek's report, Mr. Krizan certified that the report was his independent opinion. (*Id.*)

Mr. Krizan's application of his engineer's stamp to Infratek's report is significant. The application of this stamp by an engineer is a certification that the report was done by the engineer "under his or her direction and control." Wis. Admin. Code A-E § 8.10. At his deposition, Mr. Krizan affirmed that the report "was done exclusively under [his] personal direction and control." (R81, p.16 (A-App. 276).)

The fact that Infratek did not disclose its purported agency is also relevant. (*See* R58, p.3 (A-App. 232)) The engineer's code of ethics requires conflicts of interest to be disclosed. *See* Wis. Admin. Code A-E § 8.05(1)(a). If Infratek truly believed it was Cincinnati's agent, it would have disclosed the conflict of interest.

### 3. The Evidence on "Distinct Occupation" Does Not Support the Circuit Court's Finding That Infratek Was Cincinnati's Agent.

Mr. Krizan's undisputed testimony regarding the third element of agency—whether the party providing the services had a distinct occupation from the party engaging services—also supports the conclusion that Infratek was not an agent. *See James W. Thomas Constr. Co., Inc.*, 79 Wis. 2d at 352. Mr. Krizan admitted that he was a professional engineer

providing opinions to non-engineers at Cincinnati. (R81, p.15 (A-App. 275).)

## III. The Circuit Court Errantly Dismissed All of Ropicky's and Leichtfuss' Claims Against Infratek Even Though the Claims Are Also Based on Infratek's Guidance to Their Contractor.

Ropicky's and Leichtfuss' claims against Infratek for negligence, the negligent performance of an undertaking, and the negligent supply of information are based on two sets of negligent acts performed by Infratek: (1) errors made in Infratek's guidance to Ropicky's and Leichtfuss' contractor; and (2) errors made in Infratek's causation evaluation for Cincinnati. Each separate set of negligent acts is sufficient to give rise to Ropicky's and Leichtfuss' claims.[7]

Therefore, in order for the Court to completely dismiss Ropicky's and Leichtfuss' claims pursuant to Wisconsin Statutes section 895.475, the Court must find that each set of

[7] For example, Counts II and III of Ropicky's and Leichtfuss' third-party complaint alleged that Infratek negligently performed an undertaking and negligently supplied information for the guidance of others. (R6, pp.28–32.) Infratek's errant advice to Ropicky's and Leichtfuss' contractor provides a standalone basis for these claims. *See Butler v. Advanced Drainage Sys., Inc.*, 2005 WI App 108, 282 Wis. 2d 776, 698 N.W.2d 117; Restatement (2d) of Torts § 324A (proscribing elements of negligent performance of an undertaking claim); *See Hatleberg v. Norwest Bank Wis.*, 2005 WI 109, ¶ 38, 283 Wis. 2d 234, 700 N.W.2d 15; Restatement (2d) of Torts § 552 (proscribing elements of negligent supply of information claim).

negligent acts qualifies as an insurer's agent's furnishing of safety inspection or advisory services intended to reduce the likelihood of injury, death, or loss.

Unfortunately, the Circuit Court's oral ruling did not address this specific issue. Sections I and II above address the Circuit Court's errant finding that Infratek's water damage causation evaluation qualified for protection under Wisconsin Statutes section 895.475. The Circuit Court failed to address whether Infratek's guidance to Ropicky's and Leichtfuss' contractor fell within the scope of Infratek's agency and constituted an advisory service intended to "reduce the likelihood of loss on the part of the insurance company." (R106, pp.44:21–23, 46:2–14 (A-App. 191, 193).) By failing to distinguish between the two sets of negligent acts giving rise to Ropicky's and Leichtfuss' claims, the Circuit Court improperly expanded the liability exemption provided by section 895.475.

Cincinnati and Ropicky and Leichtfuss appeared to agree that Mr. Krizan could be an agent for some purposes but not others. (R77, pp.14–15; R82, pp.6–7.) Unfortunately, the Circuit Court ignored the evidence that Dr. Leichtfuss called

Infratek in part to "to provide guidance to our contractor who had already been retained so as to assist us in making repairs that were already in progress" and "provide engineering assistance to define the scope of the damage for" Ropicky's and Leichtfuss' contractor. (R58, pp.3, 5 (A-App. 232, 234).) It was Dr. Leichtfuss—not Cincinnati—who requested these services from Infratek. (*Id.*) The Circuit Court also ignored that Infratek's "engineering assistance" proved woefully inadequate and underestimated the necessary work by almost $900,000. (R58, pp.5–6 (A-App. 234–35).)

Infratek's engineering assistance to Ropicky's and Leichtfuss' contractor does not fall within the scope of advisory services protected by Wisconsin Statutes section 895.475. First, Infratek's assistance to Ropicky's and Leichtfuss' contractor was not an advisory service intended to reduce the likelihood of injury, death or loss. The assistance was meant to define damage which had already occurred. (R58, pp.3–5 (A-App. 232–34).) Second, there is no evidence that Infratek's engineering assistance was directed or controlled by Cincinnati.

These evidentiary facts show that there was, at minimum, a genuine dispute of material fact regarding whether all of Infratek's actions were advisory services performed on behalf of Cincinnati and intended to reduce the likelihood of harm. As such, even if this Court believes that Infratek's causal analysis for Cincinnati is protected by Wisconsin Statutes section 895.475, the Circuit Court's March 24, 2020 Order should be reversed and remanded for further proceedings related Infratek's guidance to Ropicky's and Leichtfuss' contractor.

## IV. The Circuit Court Abused Its Discretion by Improperly Denying Ropicky and Leichtfuss Necessary Discovery.

The Circuit Court's March 12, 2020 Order barred Ropicky and Leichtfuss from obtaining discovery which was relevant and necessary to respond to Infratek's motion for summary judgment. A Circuit Court's discovery rulings are discretionary and are reviewed for an abuse of discretion. *See Franzen v. Children's Hosp. of Wis., Inc.,* 169 Wis. 2d 366, 376, 485 N.W.2d 603, 606 (Ct. App. 1992). The Circuit Court's March 12, 2020 Order limiting discovery on Infratek's oral

contract with Cincinnati and prior work for Cincinnati constitutes an abuse of discretion and should be reversed.

Under Wisconsin Statutes section 804.01(2)(a), Ropicky and Leichtfuss were entitled to "obtain discovery regarding any non-privileged matter that is relevant to any party's . . . defense and proportional to the needs of the case." Even materials obtained by another party in anticipation of litigation, normally protected by the work-product privilege, may be obtained "upon a showing that the party seeking discovery has substantial need of the materials . . . and that the party seeking discovery is unable" to obtain the materials from another source. Wis. Stat. § 804.01(2)(c)1. In the summary judgment context, "should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present . . . facts essential to justify the party's opposition, the court may refuse the motion for judgment or" order additional discovery "as is just." Wis. Stat. § 802.08(4).

The Circuit Court's March 12, 2020 Order failed to properly apply the above statutes. Infratek's assertion of agency on summary judgment was unusual because the

question of whether someone is an agent is a fact-intensive question. The standard is so stringent that even a written contract stating that a person was an agent of the owner has been found to be insufficient evidence of agency so as to permit summary judgment. *Kohl*, 95 Wis. 2d at 34 ("We cannot say that a simple signature by Mr. Taubman indicating that he was the owner's agent is the only proof necessary to find an agreement to act as an agent and manifestation that one party act for the other.").

*Westmas,* 2018 WI 12, *Lang*, 2020 WI 25, and *Envirologix*, 192 Wis. 2d 277, confirm that any assessment of agency in the context of an immunity statute is a fact-intensive and fact-specific inquiry. Under the circumstances, the Circuit Court should have ordered the necessary discovery on this issue in order to develop the detailed record required by these three cases.

In *Westmas,* the plaintiff was killed by a falling tree branch at Conference Point Center. 2018 WI 12, ¶ 1. Conference Point Center had hired an independent contractor to trim trees at its property. *Id.* The contractor claimed recreational immunity under Wisconsin Statutes section

895.52 under an agency theory. *Id.* The *Westmas* opinion memorialized the detailed record on the topic of agency. *Id.*, ¶¶ 5–15. The Court had the benefit of a written bid, and detailed discovery regarding the discussions that led up to the contract, the terms of the agreement between the owner and contractor, and what steps were taken by both parties regarding the means and methods to be used by the contractor. *Id.* The Court also reviewed the training of employees and the meetings conducted to discuss specifics of the anticipated scope of work. *Id.* In the end, the key facts were that the contractor chose the specific means and methods to bring down the branch, placed the spotters, and maintained control over the details of the work. *Id.*, ¶ 41. Those facts were essential to the Court's finding that the contractor was not an agent. *Id.*, ¶¶ 39–40.

In *Lang*, the alleged principal was the Lions Club, while the alleged agent was a contractor that provided audio services for the Lions Club's outdoor festival. 2020 WI 25, ¶ 1. The plaintiff was injured while tripping over an electrical cord laid by the contractor. *Id.* The contractor claimed immunity under Wisconsin Statutes section 895.52 under an agency

theory. *Id.*, ¶ 2. The trial court granted immunity to the contractor but the Court of Appeals reversed in a split decision regarding the nature and level of control needed to establish agency. *Id.*, ¶¶ 17, 33–34.

The Wisconsin Supreme Court reversed the Court of Appeals and agreed with Judge Brash's dissenting opinion. *Id.*, ¶¶ 33–34 (citing *Lang*, 2018 WI App 69, ¶¶ 33–46 (Brash, J., dissenting)). Judge Brash's dissent[8] and the Wisconsin Supreme Court's opinion explained requirements for agency under *Westmas* and made specific findings regarding the principal's desire to establish "reasonably precise control" of the agent's conduct "as evidenced by 'reasonably precise

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[8] Judge Brash's dissent in *Lang,* 2018 WI App 69, ¶¶ 33–46, explained that the following facts supported his opinion that the contractor was an agent:

> In sum, although the Lions Club did not tell Fryed precisely how to connect the cord that Lang tripped over, the Club set up the stage and the power sources required by the band's sound system. This effectively provided reasonably precise specifications as to where the cords could be located. Furthermore, the Club was responsible for determining the safety of the cords, and had the obligation to cover any cords deemed to be a safety hazard. These facts demonstrate that the Club had the right to exert, and did in fact exert, reasonably precise control over the placement of, and the safety surrounding, the cord on which Lang tripped.

*Id.*, ¶ 45.

specifications' provided by the principal." *Lang,* 2020 WI 25, ¶ 32. The Wisconsin Supreme Court held that the contractor was an agent because the record demonstrated that the Lions Club was responsible for determining the safety of the cords, had the obligation to cover any cords deemed to be a safety hazard, and to conduct a safety inspection. *Id.*, ¶¶ 45–58.

In *Envirologix,* the Court of Appeals evaluated whether a consulting engineer hired by the City of Waukesha could assert immunity under Wisconsin Statutes section 893.80(4) under an agency theory. 192 Wis. 2d 277, 296. The Court of Appeals reversed the lower court's finding of agency on summary judgment, and noted the absence of a detailed record and "minimal evidence on this point." *Id.* The Court of Appeals specifically noted that its review would have benefited from the contract—or if the contract was oral, the terms of that contract—being part of the record. *Id.* at 294–95.

Here, Ropicky and Leichtfuss were unable to conduct even basic discovery on the terms of the oral agreement between Infratek and Cincinnati because the contract negotiation occurred after June 1, 2018—the date the Circuit Court found that Cincinnati anticipated litigation. Ropicky

and Leichtfuss were also prevented from discovering any type of pattern and practice evidence related to Infratek's prior work for Cincinnati.

Because evidence regarding Infratek's oral contract with Cincinnati and prior work with Cincinnati was essential to Ropicky's and Leichtfuss' opposition to Infratek's summary judgment motion and could not be obtained from any other source, Ropicky and Leichtfuss submit that the Circuit Court's denial of this discovery was an abuse of discretion. The March 12, 2020 Order on this topic should be reversed and the matter remanded for discovery on Infratek's contract with Cincinnati and Infratek's patterns and practices in its prior work for Cincinnati.

## CONCLUSION

Ropicky and Leichtfuss respectfully submit that the Circuit Court's March 24, 2020 and March 12, 2020 Orders were in error. As such, Ropicky and Leichtfuss ask this Court to reverse the March 24, 2020 Order of the Circuit Court and remand this case for further proceedings, including the discovery denied by the Circuit Court's March 12, 2020 Order.

Dated July 17, 2020.

HALLOIN LAW GROUP, S.C.
Attorneys for *Defendants-Third-Party Plaintiffs-Appellants James Ropicky and Rebecca Leichtfuss*

Scott R. Halloin
Wis. State Bar No. 1024669

HALLOIN LAW GROUP, S.C.
839 North Jefferson Street
Suite 503
Milwaukee, Wisconsin 53202
p 414-732-2424
f 414-732-2422
shalloin@halloinlawgroup.com

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I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font that is 13 points in size for regular text, and 11 points for quotes and footnotes.

I additionally certify that the length of the portions of the brief specified in Wisconsin Statutes section 809.19(1)(d)–(f) is 10,134 words, less than the 11,000 specified in Wisconsin Statutes section 809.19(8)(c).

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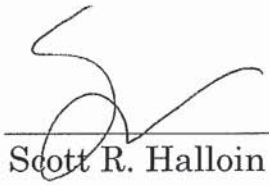

Scott R. Halloin

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Dated July 17, 2020.

Scott R. Halloin

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*Clerk of Court of Appeals:*
Sheila Reiff
Wisconsin Court of Appeals
110 East Main Street
Suite 215
P.O. Box 1688
Madison, WI 53701
**(10 Copies)**

*Counsel for Infratek Engineering Investigations, LLC and Donald Krizan*
Brian C. Tokarz, Esq.
James M. Sosnoski, Esq.
Meissner, Tierney, Fisher & Nichols
111 East Kilbourn Avenue
19th Floor
Milwaukee, WI 53202
bct@mtfn.com
sjm@mtfn.com
**(3 Copies)**

*Counsel for Cincinnati Insurance Company*
Mark W. Rattan, Esq.
Litchfield Cavo, LLP
250 East Wisconsin Avenue
Suite 800
Milwaukee, WI 53202
rattan@litchfieldcavo.com
**(3 Copies)**

I further certify that the brief was correctly addressed.

Dated July 17, 2020.

Scott R. Halloin