WISCONSIN COURT OF APPEALS
DISTRICT IV
Appeal No. 2021AP000002-AC

AARON P. CORDY and
BRENDA R. CORDY,
Plaintiff-Respondents,

v.

TWIN CITY FIRE INSURANCE COMPANY and
VENATICS, INC.,
Defendants,

and

RAVIN CROSSBOWS, LLC
Defendant-Appellant,

and

COMPCARE HEALTH SERVICES
INSURANCE CORPORATION,
Subrogated Defendant.

Appeal from the Non-Final Order of the Portage County Circuit Court, the Honorable Robert J. Shannon Presiding, Circuit Court Case No. 2018CV000183

DEFENDANT-APPELLANT'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES

1. Whether confidential communications to Ravin's legal counsel by Ravin's employees, made at the direction of counsel for the purpose of facilitating legal advice, are subject to the attorney-client privilege under WIS. STAT. § 905.03?

The circuit court answered "no," without conducting an analysis of the elements of attorney-client privilege, reasoning that even though the written communications were solely the statements, recollections, impressions and word choice of Ravin employees and did not contain any direct quotes from consumers or third parties, the communications were not protected by the attorney-client privilege because they contained factual information and were contained in "routine reports."

2. Whether such communications are subject to full or partial disclosure under *State ex rel. Dudek v. Circuit Court for Milwaukee Cnty.*, 34 Wis. 2d 559, 150 N.W.2d 387 (1967), simply because the communications contained "facts" relating to other incidents or claims?

The circuit court answered "yes," concluding that plaintiffs are always entitled to discover facts at any cost, but in doing so, misapplied and confused the attorney-client privilege with the work product doctrine and applied the incorrect legal standard.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested for the purpose of allowing this Court to ask questions of counsel on the facts and issues presented herein. Publication of the court's decision is warranted. No appellate decision has squarely addressed the question of whether and to what extent a party may discover confidential communications regarding facts of other claims in a product liability case and whether it is proper to pierce the veil of the attorney-client privilege to do so. The result in this case will have a statewide impact and will shape the law in this area.

STATEMENT OF THE CASE

This is a product liability case arising from Aaron Cordy's injury while using a Ravin crossbow. Ravin appeals from an order in the circuit court for Portage County, the Honorable Thomas T. Flugaur then presiding,[1] which compelled Ravin to produce communications between its employees and general counsel which are protected by the attorney-client privilege. (R.303; A-App. 118.) These communications were prepared on a form report developed by Ravin's general counsel to gather factual data to provide legal advice to Ravin in response to both a deluge of claims and a recall in conjunction with the Consumers Product Safety Commission ("CPSC"). The communications were marked "privileged" and

[1] Judge Flugaur issued his oral ruling on December 4, 2020, and retired from his judicial career the same day. An order consistent with Judge Flugaur's ruling was entered on December 16, 2020, signed by the Honorable Jill N. Falstad. The Honorable Robert J. Shannon now presides over the case. In the interest of brevity, Plaintiffs Aaron Cordy and Brenda Cordy (a derivative Plaintiff) will be referred herein as Mr. Cordy.

understood by all concerned to be protected. (R.152; R.243; A-App. 120-26.)

These documents are quintessential attorney-client privileged communications, protected from disclosure under Wisconsin law. These same documents were found to be privileged by a Federal Court construing the same principles of law. The circuit court's decision conflicts with that ruling and is a misapplication of Wisconsin law. The circuit court's order should be reversed.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

I. THE SUBJECT PRODUCT AND MR. CORDY'S LAWSUIT

Mr. Cordy was injured using a Ravin Model R15 Crossbow when, contrary to express warnings, he reached his hand into the firing path of the arrow while in the process of re-nocking it. (R.90 at 37-39.) The R15 Crossbow has a unique design that incorporates an internal cocking mechanism while keeping the limbs narrow, providing a compact but

highly accurate crossbow. (R.84.) The crossbow uses unique Ravin-brand arrows are specifically designed to be used with Ravin products. (*Id*. at 8.) The arrows are supplied with a u-shaped nock at the end of the arrow, which clips over the bowstring:

To load the crossbow, the user slides the nock back to the bowstring in order to properly "seat" the nock. (*Id*. at 11-12.) The user will hear an audible click and receive tactile feedback along the arrow shaft when the nock engages with the bowstring and is fully seated. (R.85 at 11.) The crossbow has both a mechanical blocking safety and an anti-dry fire mechanism to prevent the crossbow from discharging under certain circumstances. (*Id*. at 12-13.) In order to operate the crossbow, the nock must be properly seated on the bowstring, the safety must be disengaged and in the FIRE position, and then the user pulls the trigger. (R.84 at 9-15.)

II. THE RECALL AND THE ATTORNEY-CLIENT COMMUNICATIONS

In 2017, Ravin began receiving multiple reports from users claiming they were injured as a result of a delayed firing event. (R.89 at 29-30; R.93 at 11.) Ravin investigated and ultimately instituted a voluntary recall of the white nocks in conjunction with the CPSC. (R.88.) In addition to investigating and implementing the recall, Ravin also had to respond to claims prompting the investigation, as well as a greater number of claims that arose after announcing the recall. (R.243 at 1-3; A-App. 123-26.) To accomplish these tasks, Ravin's general counsel, Karl Schwappach, began gathering information to guide the company through these legal issues, including responding to legal claims and preparing the recall. (*Id*. at 2; A-App. 124.)[2]

[2] As discussed in further detail below, in response to Mr. Cordy's motion to compel, Ravin's opposition brief attached an affidavit from Mr. Schwappach used in connection with another case, *Miles v. Ravin*. (R.152; A-App. 120-22.) This was the same affidavit reviewed by the Court in *Miles* when it found the documents at issue in this case protected by the attorney-client and work product privileges. Ravin also submitted an additional

As part of obtaining factual data necessary for these tasks, Mr. Schwappach instructed the customer service department to collect and report certain information directly to him to assist his ability to perform legal duties on behalf of Ravin. (*Id.*) Mr. Schwappach told the team to communicate directly to him pursuant to the attorney-client privilege. (*Id*. at 2-3; A-App. 124-25.) These communications were made ***in addition to***, and separate from, routine customer service reports. (*Id.*) Ravin continued to maintain and complete these routine customer service reports. (R.152 at 3-4; A-App. 121-22.)

To capture the full scope of the data necessary to aid in his legal duties, Mr. Schwappach prepared a form that sought certain information regarding any warranty or injury claim in order to facilitate legal advice. (R.89 at 8-9; R.243 at 2-3; A-App. 124-25.) In the event of a warranty or injury claim, Ravin

affidavit from Mr. Schwappach with its supplemental brief. (R.243; A-App. 123-26.)

customer service employees would take down ordinary customer information and fill out the ordinary customer service report. (R.155 at 40; 57; R.152; A-App. 120-22.) Thereafter, as a separate effort, they would also gather certain information requested by Mr. Schwappach, and provide a direct report to him. (*Id*.) The purpose of the latter was to communicate to Mr. Schwappach the facts requested openly and directly and with the express understanding that the communications contained therein were for the purpose of facilitating legal advice and were privileged. (R.243 at 3; A-App. 125.)

The form expressly stated that it was a "Privileged" communication to counsel. (*Id*.) These communications were necessary to help gather information to defend the company and to coordinate Ravin's recall with the CPSC. (*Id*.) The communications included factual information gathered by employees expressed in their own words and did not include direct quotes from the claimants.

(*Id*. at 3; R.322 at 17; A-App. at 117.) They were *not* filled out by third parties. (*Id*.) At all times, Ravin maintained that these communications are attorney-client privileged. (R.243 at 3; A-App. 125.) Mr. Schwappach explained at his corporate deposition:

> Those facts were collected at my request on a form that I created for the customer service people. And [that] would be privileged material.

(R.155 at 16; A-App. 167.)

III. THE DISCOVERY DISPUTE

In the course of discovery, Mr. Cordy served 7 sets of discovery, including over 200 different discovery requests to the respective Defendants. (R.221 at 1-2.) Mr. Cordy also deposed 11 witnesses—10 of whom were Ravin/Defense witnesses and one individual claimant identified by Ravin in its discovery responses. (*Id*.) In response to this discovery, Ravin produced over 8000 pages of documents, including pleadings, depositions, and discovery responses from other pending cases, as well as factual summaries of other claims.

The present dispute arises over Plaintiff's

Fourth Set of Discovery Requests, which requested, *inter alia*: any and all warranty claims, names, addresses, phone numbers of persons who asserted warranty claims, business records documenting warranty claims, all customer service reports, any and all emails from users who made complaints about a R9 or R15 model crossbow, and any and all emails from Ravin's customer service department to Mr. Schwappach or Mr. Engstrom[3] regarding customer complaints. (R.116 at 10-12; 14; R.133 at 18-19.) Over objection, Ravin produced responsive information and documents, as specified below, but withheld the forms that are the subject of this appeal on the basis of the attorney-client privilege and the work product doctrine. (*Id*.) Ravin also produced a privilege log identifying all of the forms. (R.116 at 18-31.)

In its written responses to discovery, Ravin identified each and every claimant by name, and

[3] Mr. Engstrom is Ravin's Chief of Operations. (R.155 at 29.)

provided their (and/or their attorney's) contact information, along with a factual description of the claims.[4] (R.116 at 63-66; R.150 at 6-8; A-App. 132-34; R.153 at 20-28.) Ravin also produced screenshots of all of the routine customer service reports kept in the ordinary course of business, as well as pleadings, depositions and discovery responses from other cases against the Defendants on R9 or R15 cases (which also provided additional factual details). (R.116 at 72-126; R.150 at 6-8; A-App. 132-34; R.153.) These responses provided Mr. Cordy's attorney with facts relating to the claims, as well as the necessary information to directly contact the other claimants and/or their counsel. (*Id*.) In fact, Mr. Cordy's attorney used this

[4] Mr. Cordy's attorney took issue with Ravin's description of the facts in the non-privileged routine reports which Ravin produced, which included a conclusion (where applicable) that the safety was likely off at the time of the incident. (R.116 at 63-66; R.133 at 23; R.322 at 8; A-App. at 108.) This is not a controversial point. First, Mr. Schwappach provided a detailed explanation of how Ravin reached this conclusion during deposition. (R.89 at 23-26.) Second, Mr. Cordy's own expert has admitted that the crossbow cannot fire if the safety is in the "SAFE" position, meaning that, for the crossbow to release the bowstring, the crossbow cannot be in the full "SAFE" position. (R.96 at 22.)

information to depose claimant Vicki Reed and obtained affidavits from other claimants regarding the alleged facts of their incidents. (R.79 at 34-35; 42; R.150 at 10; A-App. 136; R.242; A-App. 156-65.) Additionally, Mr. Cordy's attorney now represents a number of other claimants. Ravin continues to supplement its responses in accordance with Wisconsin Rules of Civil Procedure.

Despite the extensive materials produced, Mr. Cordy's counsel objected to Ravin's position that the communications between the customer service representatives and general counsel were privileged, and claimed he was entitled to them because they contained "facts." (R.133 at 23.) In an effort to confer and avoid motion practice, Ravin advised Mr. Cordy's counsel that just one month prior, Ravin litigated this exact issue over the same documents before the Honorable Chad F. Kenney, in *Miles v. Ravin et al.*, No. 19-cv-1551, in Federal Court for the Eastern District of Pennsylvania. (R.156; A-App. 155.) In that

case, the Federal Court denied the plaintiff's motion to compel and ruled that the communications were protected by both the attorney-client privilege and work product doctrine. (*Id.*; R.150 at 11; A-App. 137.) The court noted that plaintiffs had the opportunity to contact and/or depose the other individuals, and could not claim "substantial need" (under the work product privilege) when they had the contact information for the claimants. (R.150 at 11; A-App. 137.) Mr. Cordy's motion to compel followed anyway.[5]

In his motion, Mr. Cordy never disputed that the documents at issue embodied communications with counsel. Instead, Mr. Cordy chiefly argued the need to discover facts about "other similar claims," and argued that he was entitled to the communications merely because they contained facts, which he claimed were not protected by the attorney-client privilege. (R.133.) In support, Mr. Cordy cited a quote from *State*

[5] Mr. Cordy initially filed his motion on February 26, 2020 (R.115) but filed a revised motion thereafter to conform to the circuit court's page length requirement. (R.133.)

ex rel. Dudek v. Circuit Court for Milwaukee Cnty., 34 Wis. 2d 559, 592, 150 N.W.2d 387, 405 (1967), which related to the work product privilege, not the attorney-client privilege, taking it out of context: "It is almost universally held that a party's routine report to his employer or insurer which report happens to find its way into the files of the employer's or insurer's attorney is not work product." (R.133; *citing Dudek,* 34 Wis. 2d at 592.) Considering this quote in isolation, Mr. Cordy argued that because the communications were "routine reports" and contained "facts" therefore they are always discoverable, regardless of whether they were communications between attorney and client. (*Id*. at 11-12.)

Ravin opposed the motion, attaching an uncontroverted affidavit from Mr. Schwappach setting forth the background and detail on the communications. *See supra*, Sec. II; (R.150; A-App. 156-65; R.152; A-App. 120-22.) This same affidavit was relied on by the *Miles* Court when it found the

documents privileged and protected. As argued to the circuit court, Mr. Schwappach's affidavit established that the documents were not routine reports, but instead were communications made in response to the specific situation faced by Ravin. (*Id*.) The affidavit further established that these were communications between the employees and Ravin's general counsel for the purposes of obtaining legal advice made with the understanding that they were privileged. (*Id*.)

Ravin's opposition brief also set forth the law of attorney-client privilege and the work product doctrine, and cited the differences between communications containing facts, and discovery of the facts themselves. (R.150 at 12-27; A-App. 138-153.) Ravin noted that the law pertaining to attorney-client privilege was expressly developed to allow for open communications of fact, and that these communications met the four corners of that privilege because they were made for the purposes of providing legal advice (in response to claims and performance of

a recall) and were clearly marked "Privileged." (*Id.*; R.152; R.243; A-App 120-26.) Ravin further highlighted that the *Miles* Court, construing the same affidavit presented to the circuit court, already held that the forms were protected by both the attorney-client privilege and work product doctrine.[6] (R.150 at 11-12; A-App. 137-38; R.152; A-App. 120-22.)

Mr. Cordy filed a reply brief claiming Mr. Schwappach's Affidavit was a "sham," because in deposition, he testified he was primarily concerned with obtaining data, and this somehow meant that the communications were not privileged. (R.161 at 3-5.) The brief cited portions of Mr. Schwappach's deposition where he explained the general process of obtaining facts (which Mr. Schwappach called "data") to determine the appropriate corporate legal response. (*Id.*; R.89 at 7-11.) None of Mr. Schwappach's testimony implied or suggested that the forms were

[6] Although this appeal concerns the attorney-client privilege, Ravin maintains that the documents are also protected by the work product doctrine.

not privileged communications. In fact, the cited testimony did not relate to the forms at issue. Mr. Cordy provided no explanation as to why Mr. Schwappach's testimony about his general efforts to obtain "data" somehow undermined his affidavit. Moreover, Mr. Schwappach testified in his corporate deposition that these forms were privileged. (R.155 at 16; A-App. 167)[7]

On August 14, 2020, the circuit court denied Mr. Cordy's motion, but ordered, *inter alia*, an *in camera* inspection of the documents. (R.238.) On September 10, 2020, Ravin produced the forms for the court to review. (R.241.) Ravin also filed a supplemental brief pointing out Mr. Cordy's ability to obtain the facts through other avenues without violating the privilege, and again noting that these communications were covered by the attorney-client privilege and were protected under Wisconsin law. (R.242; A-App. 156-

[7] Mr. Cordy also tried to claim that simply because Mr. Schwappach gave testimony that he handled a variety of roles while at Ravin, this somehow transformed these communications from being privileged. (R.161 at 3-5.)

65.) Mr. Cordy again responded by arguing that communications about facts are discoverable and reiterated that counsel was unsatisfied with Ravin's fact descriptions. (R.246.)

IV. THE CIRCUIT COURT'S RULING GRANTING MR. CORDY'S MOTION TO COMPEL

On December 4, 2020, the last day before Judge Flugaur's retirement, the court held a video conference and granted Mr. Cordy's motion, ordering Ravin to produce "parts" of the forms which included contact information for the customers and a description of the incident. (R.303; R.322; A-App. 101-118.) During the hearing, the circuit court explicitly acknowledged that the forms were filled out at the request of legal counsel and read the purpose directly from the forms: "legal counsel for Ravin has requested that customer service collect certain data for products returned for evaluation[;] Please collect the following information." (R.322 at 12; A-App. 112.)

Nevertheless, the court held that the communications between the employees and Mr.

Schwappach were not protected by the attorney-client privilege because they contained "facts" gained from the customers themselves. Suggesting that the presence of "facts" destroyed the privilege, the Court stated:

> …facts communicated to Ravin by its customers, and whether or not they are filled out on one of these forms or not, that that is not privileged. It is not work product. And it is not attorney-client privilege. It's information coming from the customer, complaining about the product. And the best I can tell in reading through these, the words that are being used are the words of the customers calling in and their words are being taken down and they are in those reports.
>
> * * *
>
> I use the analogy of an excited utterance, describing an event very close to the time that it happened when they were reporting it to Ravin and how those – what those words were, how they described it to one of the Ravin employees. And presumably, would be a customer service representative.

(R.322 at 9-11; A-App. 109-111.)

In issuing this decision, the court did not conduct an analysis on the elements of attorney-client privilege nor did it address the purpose for the communications. Though the court agreed that the forms did not contain direct quotes or statements from third parties, the court held that because the

communications were completed after discussion with claimants, they somehow were the words of the customer and not subject to the attorney-client privilege. The following exchange occurred:

> THE COURT: …I don't think the case law makes this – do you think it's attorney-client privilege?
> **MR. SUTTON: Yes, Your Honor. The customers –**
> THE COURT: You think the customers are the client of Ravin? Is that how it works?
> **MR. SUTTON: No, Your Honor. And what we already know what was said, is that these are actually the words of the customer service personnel. Sometimes even in discussions with the counsel. They are not quotes from the [customers].**
> THE COURT: I disagree. I understand it's not a quote. But it's pretty clear that the customer service is putting down the words of the customer. It's not phrased – it, well, that's just my opinion and the Court of Appeals may disagree.

(R.322 at 16-17; A-App. 116-117) (emphasis added).

In reaching its conclusion, the court's rationale appeared to confuse the differences between the attorney-client and work product privileges. Although the court acknowledged that the forms were communications between employees and general counsel, the court declined to address the attorney-client privilege as explained in Mr. Schwappach's

affidavit.[8] Instead, as the sole legal basis for the ruling, the court cited *Dudek* for the proposition that these communications were somehow the type of "routine document" created in the ordinary course of business that only incidentally finds its way to counsel and is therefore not work product. The court paraphrased *Dudek* (bolded below) and ruled:

> The Court previously held that Wisconsin laws recognize that **facts obtained from customers by a corporate Defendant in the usual course of investigating warranty or product defect claims and preparing routine reports to documents, the same are not subject to any privilege.** And that's the *Dudek versus Circuit Court from Milwaukee County*. And that it doesn't just transmute it, because they're filling out a form that was drafted by legal counsel for the Defendant, that everything in there is therefore attorney-client privilege and everything in there is work product. The court disagrees with that.

(R.322 at 9-10; 14; A-App. 109-110; 114) (emphasis added).

In its ruling, the court appeared fixated on Mr. Cordy's claimed "need" for information related to other purportedly similar claims. (R.322 at 6-8; 10; 13; A-

[8] The court did not address Mr. Cordy's position that the affidavit was not credible.

App. 106-108; 110; 113.) The court failed to consider the purpose of the communications and appeared to apply a necessity exception taken from work product principles, without expressly addressing the law of attorney-client privilege nor finding that Mr. Cordy met his burden to establish a substantial need of the materials or undue hardship. To the contrary, the court acknowledged that Mr. Cordy had the names of every individual who made a warranty claim, along with their contact information and addresses. (R.322 at 8; A-App. 108.) Yet, the court ordered Ravin to produce "parts" of the forms, specifically: "the name, address, phone number, e-mail address of the person involved in the incident, and the description of the incident and how it occurred." (R.322 at 13-14; A-App. 113-114.) Thereafter, Judge Flugaur retired.

On December 29, 2020, Ravin petitioned this Court for leave to appeal the circuit court's order. Ravin's request was granted on February 2, 2020. It is Ravin's position that the circuit court erroneously

exercised its discretion because it wrongly interpreted the facts, failed to apply the law of attorney-client privilege and applied an incorrect legal standard relating to the work product doctrine. The communications in question are unequivocally protected under attorney-client privilege, and there is no applicable exception to allow their discovery in this case. The circuit court's ruling should be reversed.

ARGUMENT

This appeal involves the vital importance of recognizing and preserving the attorney-client privilege in product liability cases. The circuit court erred when it refused to apply the attorney-client privilege to communications between employees and counsel made with the distinct understanding that their exchange of information occurred in confidence, and for one purpose alone: to facilitate legal advice in the face of the recall and incoming claims. The documents were not "routine reports that make their way to legal counsel's file incidentally," but instead

were prepared expressly for and sent directly to legal counsel and marked "privileged." The court failed to consider the purpose of the communications, substituted its own view for the uncontroverted evidence before it, found that these were somehow "routine documents" and were subject to discovery because they contained "facts." In making these rulings, the court expressly held that the attorney-client privilege did not apply, ignored crucial distinguishing facts and parted from over one hundred years of established precedent. The circuit court's ruling should be reversed for two reasons: (i) the court failed to recognize that the communications were attorney-client privileged; and (ii) failed to correctly interpret and apply the teachings of *Dudek*. As such, the circuit court committed reversible error when it failed to rationally apply the law to the facts and this Court should reverse the ruling.

The reasons for reversal are straightforward. First, the court ignored the purpose of the

communications. The undisputed evidence before it demonstrated that the documents at issue were communications between employees and counsel to facilitate legal advice. Precedent in this state holds such communications privileged and protected from discovery. This privilege applies—and indeed is based upon—the unfettered discussion and communications of *facts* (i.e., data). The court ignored the law on this issue and somehow found that simply because the communications contained facts, they were discoverable. Conversely, a Federal Court has already found that these same documents are privileged and protected from discovery under the attorney-client privilege and work product doctrine. The circuit court's ruling is contrary to law, provides two irreconcilable opinions over the same documents, and should be reversed.

Second, the ruling should be reversed because the court applied the wrong legal standard to justify disclosure. Specifically, the circuit court held that

under *Dudek*, the communications were required to be produced because they were either "routine" or factual. 34 Wis. 2d at 592. In making this ruling, the court referred to a portion of the *Dudek* opinion that construed the work product doctrine, not the attorney-client privilege. In fact, a full and fair reading of the *Dudek* opinion shows that *communications* between client and counsel are governed by the attorney-client privilege and protected from disclosure. In failing to recognize this, the court unraveled the attorney-client privilege, conflated the work product doctrine and its necessity exception with that privilege, and misapplied the law to the facts altogether. The circuit court's ruling should not stand.

I. STANDARD OF REVIEW

A circuit court's decision on a discovery motion should be overruled when the court failed to properly exercise its discretion through a reasoned application of the appropriate legal standard to the relevant facts of the case. *Earl v. Gulf & Western Manufacturing Co.*,

123 Wis. 2d 200, 204-05, 366 N.W.2d 160, 163 (Ct. App. 1995). Though a circuit court's discovery order is reviewed for erroneous exercise of discretion, if the court failed to utilize the proper legal standard, the question on appeal is an issue of law, which this Court reviews *de novo*. *State v. Hydrite Chemical Co.*, 220 Wis. 2d 51, 59, 582 N.W.2d 411, 414-15 (Ct. App. 1997). This is true for appellate issues requiring an interpretation of Wis. Stats. § 905.03 (attorney-client privilege) and § 804.01(2)(c) (work product doctrine). *Id*. Thus, as a question of statutory interpretation, this Court owes no deference to the circuit court's decision. *Franzen v. Children's Hosp. Wis., Inc.*, 169 Wis. 2d 366, 376, 485 N.W.2d 603, 606 (Ct. App. 1992). Given this Court's liberty to draw its own independent conclusions on the law, it is clear that the circuit court erroneously exercised its discretion when it construed the communications as discoverable and applied the incorrect legal standard. When the law is properly applied to the facts, the information at issue should be

protected and the circuit court's ruling should be reversed.

II. THE COURT ERRED WHEN IT FAILED TO APPLY THE ATTORNEY-CLIENT PRIVILEGE

The circuit court first erred by ruling that communications between employees and general counsel for the purposes of obtaining legal advice were not subject to the attorney-client privilege because they were "routine reports" containing "facts." The undisputed evidence before the Court was included in the affidavits of Karl Schwappach, Ravin's general counsel. In those affidavits, Mr. Schwappach explained that the forms at issue were confidential communications between client and attorney *only*, made for the purpose of facilitating legal advice. They were developed to allow him to provide and formulate a defense to aid the company in a crisis situation that included both defending a large number of claims and a recall. In order to defend against incoming claims and determine the proper action for any recall, counsel needed to drill down on legally relevant facts to

facilitate legal advice and prepare a defense. The forms were specifically developed to create a means of communication for this very purpose. They are clearly marked "Privileged," and were developed for the distinct function to relay key information to counsel so that he could provide sound legal advice, with the understanding that these discussions were privileged. (R.152; R.243; A-App. 120-26.) The circuit court failed to conduct a reasoned analysis of this undisputed evidence and erred when it failed to find that the communications were privileged.

A. *The Purpose and Scope of the Attorney-Client Privilege*

The attorney-client privilege is the oldest privilege existing at common law. *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). The privilege plays an essential role in promoting observance of law and the effective administration of justice. *Id.* Deeply rooted in public policy, the attorney-client privilege acknowledges that the right to evidence shall not overcome the sanctity of the private exchange of

communications between attorney and client. *Digital Equip. Corp. v. Desktop Direct., Inc.*, 511 U.S. 863, 884 (1994).

The purpose of the privilege is to encourage full and frank communication of facts between clients and their attorneys; this includes word choice and phrasing about any and all facts. The privilege ensures a safe space for communications between client and lawyer to guarantee confidence in the lawyer's ability to render sound legal advice and fully advocate for their client. *Upjohn*, 449 U.S at 389. The very nature of the privilege is to allow unfettered communications of ***facts*** between the attorney and client, without fear that the communications could later be revealed.

The attorney-client privilege has long been recognized in Wisconsin to promote these exact purposes. Over one hundred years ago, the Wisconsin Supreme Court summarized the very nature of the privilege, noting the essential purpose of fostering the

exchange of facts and the importance of keeping these exchanges "secret." The Court explained:

> It is essential to the ends of justice that clients should be safe in confiding to their counsel ***the most secret facts***, and to receive advice and advocacy in the light thereof without peril of publicity. Disclosures made to this end should be as secret and inviolable as if the facts had remained in the knowledge of the client alone.

Koeber v. Somers, 108 Wis. 497, 505, 84 N.W. 991, 993 (1901) (emphasis added); *see also Jacobi v. Podevels*, 23 Wis. 2d 152, 156-57, 127 N.W.2d 73, 76 (1964) (secrecy of communication between person and his attorney is based upon recognition of value of legal advice and assistance based upon full information of facts and corollary that full disclosure to counsel will often be unlikely if there is fear that others will be able to compel breach of confidence). The attorney-client privilege takes priority over a party's right to discovery based on the policy that "the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence

relevant to the administration of justice." *McCormick on Evidence 171* (3d ed. 1984).

The privilege applies in the corporate setting to communications between employees and general counsel. *Upjohn*, 449 U.S. at 389. In *Upjohn,* the United States Supreme Court clarified that the protection of the attorney-client privilege extends to all employees who give information to general counsel in the course of providing legal advice. *Upjohn*, 449 U.S. at 392; *see also Hertzog, Calamari & Gleason v. Prudential Ins. Co. of America*, 850 F. Supp. 255, 255 (S.D. N.Y. 1994) ("It is well settled that the attorney-client privilege applies to communications between the corporation and its attorneys, whether corporate staff counsel or outside counsel."). The basis for this rule is that, like individuals, corporations need continuing assistance from counsel fully informed of all relevant aspects of the corporation's conduct. Corporate employees who have relevant knowledge of matters must be able to speak candidly to the attorney without

fear that these discussions may subsequently be disclosed. Thus, when a corporate defendant requires its employees to give information to its attorney in the course of providing legal advice, those communications are privileged under the attorney-client privilege. *Upjohn*, 449 U.S. at 396. This facilitates a corporate defendant's ability to comply with the law and facilitate the administration of justice. *Id*. at 389.

B. *The Communications Were Made for the Purpose of Facilitating Legal Advice*

Under well-established precedent and the record before this Court, the communications at issue are confidential and protected by the attorney-client privilege under Wisconsin law. Under WIS. STAT. § 905.03, the privilege applies to "confidential communications" made for the purpose of facilitating legal services and as such, those communications cannot be disclosed. Sec. 905.03(2) (noting that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating

the rendition of professional legal services to the client . . .”). This is true if the communication is made between the client or client’s representative and the attorney. *Id.* The “client” is defined to include a “corporation.” Sec. 905.03(1)(a). A communication is “confidential,” “if not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” WIS. STAT. § 905.03(2).

The purpose of the communication is central to the analysis. When the client discloses information they reasonably believe is related to obtaining legal advice, they are communicating for the purpose of facilitating legal services, and the attorney-client privilege applies to protect that communication. *Jax v. Jax*, 73 Wis. 2d 572, 581, 243 N.W.2d 831, 836 (1976) (citation omitted). As such, when the attorney-client privilege is raised, the circuit court must inquire into

the existence of the relationship upon which the privilege is based *and* the nature of the information sought. *Franzen*, 169 Wis. 2d at 386-87. If the circuit court fails to consider that purpose or the nature of the communications, the ruling is an erroneous exercise of discretion and should be reversed. *Lane v. Sharp Packaging Systems*, 2002 WI 28, ¶¶39-41, 251 Wis. 2d 68, 103-04, 640 N.W.2d 788, 804-05 (finding that the circuit court erred where it failed to examine the nature of the communications where attorney billing records revealed the nature of the legal services provided and the substance of lawyer-client communications).

In the present case, the circuit court failed to conduct a reasoned analysis of the attorney-client privilege as applied to the facts before it. The sole evidence before the Court relating to the communications at issue was Mr. Schwappach's affidavits (both submitted in connection with the *Miles* case and in the circuit court), and the forms

themselves. (R.152; R.243; A-App. 120-26; R.241.) Mr. Schwappach's sworn statements clarified that these communications were made for the purpose of gathering factual information in order to render legal advice to the company in a time of crisis. (R.152; R.243; A-App. 120-26.) As the circuit court noted, the documents themselves even stated as much: "And I reviewed them in camera. And each one of these, these forms are developed by Karl Schwappach…and it indicates…legal counsel for Ravin has requested that customer service collect certain data for products returned for evaluation. Please collect the following information…". (R.322 at 12; A-App. 112.) The forms were created by Mr. Schwappach and Ravin employees were directed to fill them out and return them. (R.152; R.243; A-App. 120-26.) The documents were marked privileged and made with the understanding that Ravin employees were communicating in confidence and disclosing information reasonably necessary to defend against claims. (*Id*.) The documents meet every

portion of the test to determine if they were subject to the attorney-client privilege.[9] The federal court in *Miles v. Ravin* considered the same affidavit and found the same documents subject to protection. (R.152; R.156; A-App 120-22; 155.)

The circuit court failed to consider that the documents were actual communications to counsel. Instead, it simply stated that these documents were discoverable because they contained "facts" which the court interpreted as "the customer's words" even though the court acknowledged the communications did not contain quotes from the customers themselves. (R.322 at 9-11; A-App. 109-11.) This ruling ignored the record facts and fundamentally misunderstood the law and requires reversal. Contrary to the circuit court's ruling, the very purpose of the privilege is to allow

[9] It is immaterial that Mr. Engstrom was privy to these forms. In the case of a corporate client, privileged communications may even be shared by non-attorney employees in order to relay information requested by attorneys. *Eutectic Corp. v. Metco. Inc.*, 61 F.R.D. 35, 38 (E.D.N.Y. 1973). Further a communication remans confidential when it furthers rendition of legal advice. Wis. Stat. § 905.03(2). In such circumstances, the privilege remains.

protected communication of facts, meaning that inclusion of facts cannot be a reason to set aside the protection afforded by over one hundred years of precedent.

Communications do not lose their attorney-client privilege status simply because they contain facts. Contrary to the court's ruling, ***the most basic principle of the attorney-client privilege is that it protects confidential communications that include facts***. *Upjohn*, 449 U.S. at 395 ("[A] fact is one thing and a communication concerning that fact is an entirely different thing."). As such, the essential purpose of the attorney-client privilege is "that clients should be safe in confiding to their counsel ***the most secret facts***, and to receive advice and advocacy in the light thereof without peril of publicity." *Koeber*, 105 Wis. at 505 (emphasis added). Far from being discoverable because they contain facts, "[d]isclosures made to this end should be as secret and inviolable as if the facts had remained in the knowledge of the client

alone." *Id.*; *see also Jacobi*, 23 Wis. 2d 152, 156-57. Thus, just because the communications contain facts does not strip them of their status of attorney-client privileged communications.

Any argument to the contrary is nonsensical as this elementary principle is well-settled under Wisconsin law. The attorney-client privilege protects the fact that the information was communicated. *Borgwardt v. Redlin*, 196 Wis. 2d 342, 352-53, 538 N.W.2d 581 (Ct. App. 1995) (citing *Journal/Sentinel, Inc. v. School Bd.*, 186 Wis. 2d 443, 460, 521 N.W.2d 165, 173 (Ct. App. 1994)).

The attorney-client privilege extends to "communications," regardless of the inclusion of facts. *Dudek*, 34 Wis. 2d at 578. If this basic tenet were not in place, "parties would not reveal all of the facts because of a fear of detriment or embarrassment." *Id.* at 579. The circuit court's determination that communications are not attorney-client privileged because they contain factual information is contrary to

the very basis of the privilege and the law, and merits reversal.

The circuit court's refusal to find the communication of facts between employees and counsel to be privileged is not only contrary to this well settled law, but represents a fundamental misunderstanding of the distinction between the importance of safeguarding the communications with the discoverability of facts themselves. Though *Dudek* does include the proposition that underlying facts are not shielded from discovery, the *Dudek* Court did not rule that communications that contained facts themselves were discoverable. It ruled just the opposite, noting that such communications were privileged and not subject to disclosure. *Id*. at 582-83. The *Dudek* opinion stands for this general principle: a person who has factual knowledge of something cannot refuse to provide those facts because they were previously contained in a communication to an attorney. *Id*. at 580. In such a case, discovery of the

facts may be warranted, but not the discovery of the communication itself. For example, a defendant in a civil action may be compelled to testify to his own actions or facts of which he has personal knowledge, but "neither he nor his attorney may be compelled to testify how the defendant described the same events to his attorney." *See State ex rel. Reynolds v. Circuit Court Waukesha Cnty.*, 15 Wis. 2d 311, 317-18, 112 N.W.2d 686, 689 (1961). There is a distinction between compelling a witness to disclose his knowledge of relevant facts and compelling him to disclose the fact of past communication of his knowledge to his attorney. *Id*. The circuit court ignored this distinction and found that the communications of facts to Mr. Schwappach (i.e., how the Ravin employees described the events) were discoverable. This is contrary to the law and merits reversal.

Further, there was no support for any claim that the communications somehow were actually the statements of the customers themselves. The sole

evidence before the court established that these communications were the words of Ravin employees, not the consumer. As the court itself acknowledged the forms contained no direct quotes or third-party statements. (R.243 at 3; A-App. 125.) Instead, the communications are the interpretations and recollections of the employee. The unfettered word choice of the employee, who reasonably believed their words (and word choice) were both necessary to facilitate legal services *and* subject to protection at the time, is protected under Wisconsin law. What the court seemed to imply is that the summaries provided by the employees could not be protected because they were based upon information gained from another source. But that is not the rule of attorney-client privilege, where clients and attorneys frequently communicate by summarizing the facts as they see them—even when obtained from another source. In such cases, clients are free to use their own words to summarize this information without fear that it will

later be disclosed. This is the law of attorney-client privilege. The court misunderstood this and should be reversed.

Similarly, the trial court erred when it imputed the concept of "routine reports," (a consideration under the work product doctrine) to an analysis of attorney-client privilege. Whether reports are "routine" is not part of the legal analysis to determine attorney-client privilege for obvious reasons. Clients make reports to attorneys routinely throughout an attorney-client relationship and vice versa. The question under the existing law is whether these were communications for the purposes of obtaining legal advice and whether they were made with the understanding they were privileged. The sole evidence before the court established these elements, and the communications were protected.

Moreover, there is no factual support for the court's conclusion that these were "routine reports" made in the ordinary course of business and the court

ignored the basic purpose of the communications by finding such. The communications at issue were specifically requested by counsel in response to a crisis of responding to a large number of claims and a recall in conjunction with the CPSC. (R.243 at 1-3; A-App. 123-26.) The situation was not routine, nor was the method of communication. The communications were developed for this specific purpose. The communications are entirely separate and apart from the normal warranty or product claim process (each of which have already been produced in discovery). (R.116 at 72-126; 152 at 3-4; A-App. 121-22.) As explained by Mr. Schwappach, these efforts were entirely separate and unique from routine customer service efforts: "the forms were prepared *after*, and separately from, the initial report from the consumer." (R.243 at 3; A-App. 125.) Further, as the court itself conceded the communications contained the word choices of Ravin employees made with the understanding that they were communicating in

confidence. (R.322 at 16-17; A-App. 116-117.) Under *Upjohn* and its progeny, they therefore qualify as attorney-client privileged communications. The trial court's rejection of this evidence was wholly unsupported by the record and should be reversed.

Mr. Cordy's selective citations to parts of Mr. Schwappach's deposition testimony do not change this conclusion. In briefing, Mr. Cordy claimed Mr. Schwappach's testimony was inconsistent with his affidavits simply because he testified about a need to collect facts, which he called "data." (R.161 at 3-5.) None of the testimony cited by Mr. Cordy contained any questions specifically asking Mr. Schwappach to describe the process of these specific communications or whether the communications were privileged at all. (R.161 at 3-5.) The questions did not even relate to the forms at issue. In fact, Mr. Schwappach directly testified that these particular forms were privileged communications:

> Those facts were collected at my request on a form that I created for the customer service people. And

> [that] would be privileged material.

(R.155 at 16; A-App. 167.)[10]

It is also immaterial that Mr. Schwappach was concerned with obtaining what he called "data." Mr. Cordy's argument that because Mr. Schwappach was primarily concerned with obtaining "data," this somehow meant that the communications were not privileged, is also a fundamental misunderstanding of the attorney-client privilege. As noted at length above, obtaining facts ("data") is the essential part of the attorney-client relationship. Without facts, an attorney cannot provide legal advice. The words "data" and "facts" are synonyms, meaning that any claim by Mr. Cordy that testimony about gathering data somehow does not allow these to be attorney-client privileged is simply the result of a fundamental misunderstanding of the attorney-client privilege.

[10] The mere fact that Mr. Schwappach held other roles in the company does not change the fact that in this process he was acting as counsel to provide legal advice.

The circuit court's error also upsets consistency of the privilege, which is vital to its application, because the ruling is directly contrary with another court's order on these same documents. In *Miles v. Ravin et al.*, No. 19-cv-1551, a federal court reviewed the same affidavit from Mr. Schwappach that was presented to the circuit court (R.156; A-App. 155.) and considered the same arguments raised here. (R.150 at 11; A-App. 137.) The *Miles* Court found that these were not routine reports (because, as here, the routine customer service documents were produced), and ordered the communications protected under the attorney-client privilege. (R.156; A-App. 155.) The *Miles* Court was correct when it determined that the communications at issue are subject to the attorney-client privilege. The circuit court's ruling is at odds with the essential need for uniformity and predicable application of the privilege. Given the universal application of the law attorney-client privilege throughout the United States, there is no basis for the

same documents to be protected by privilege on jurisdiction, but not in another. For these reasons, the communications subject to this appeal are protected under the attorney-client privilege and the circuit court's ruling should be reversed.

III. THE COURT ERRED WHEN IT FAILED TO CORRECTLY APPLY *DUDEK V. CIRCUIT COURT FOR MILWAUKEE CNTY.*

The circuit court's ruling should also be reversed because it misapplied *Dudek*. The circuit court erred when it applied work product doctrine principles to conclude that the communications were "routine reports" subject to discovery. In so doing, the court cited a paraphrased quote from *Dudek* which does not apply to the attorney-client privilege. The difference lies in the details—the communications in question were made directly to Mr. Schwappach in his capacity as an attorney; they were not prepared for some other purpose and just happened to end up on his desk or in his file. Thus, under *Dudek*, when communications are made for the purpose of facilitating legal advice, they

are not "routine reports" and are therefore not discoverable. The court erroneously exercised its discretion when it ignored this elementary principle. The circuit court should be reversed.

In *Dudek*, the plaintiff brought an insurance indemnity action against Continental Casualty, represented by defense counsel, Attorney Dudek. 34 Wis. 2d at 568. He was subpoenaed to testify and produce, *inter alia*, a copy of all investigative reports relating to plaintiff's claims *Id.* at 568-69. During deposition, Attorney Dudek refused to answer questions regarding any investigations about plaintiff's case, whether conducted by himself or others, and what his knowledge was of the factual basis for allegations raised in Defendant's answer. *Id.* at 569-71. He objected on the basis of attorney-client privilege and the work product doctrine. *Id.*

The *Dudek* court reviewed the documents and items at issue. Construing the attorney-client privilege, the court held that the communications

between the attorney and the client were privileged and protected against disclosure. The Court explained:

> The law is well settled that once the professional relationship is established, all communications, oral and written, between attorney and client are privileged from production excluding those exceptions outlined in the statute.

Id. at 580.

The *Dudek* Court then explained that the attorney-client privilege prevented counsel from producing any correspondence between himself and his client or his client's agents. *Id.* at 581-82. This was true even if those communications contained facts. *Id.* This was because the entire purpose of the privilege was to encourage the disclosure of relevant facts. The Court explained:

> [T]he privilege prevents Mr. Dudek from revealing any facts or strategies germane to the controversy, knowledge of which he received from his client in his professional capacity. If Mr. Dudek could be forced to reveal any of these materials the purpose of the privilege would be frustrated because Mr. Dudek's client (and all clients in all future cases) would be discouraged from fully disclosing relevant facts to the attorney.

Id. Based upon these rulings, the Court held that the privilege attached to communications relevant to those issues and must be withheld. *Id*. at 583.

The *Dudek* Court further discussed items that were not communications between attorneys and clients under the attorney-client privilege. For example, the court considered reports that were routinely created *by the company* for an entirely separate purpose, which happened to find their way to a lawyer. *Id*. at 592. This is an entirely different situation than the present case. Moreover, *Dudek* discussed this principle *in its analysis of the work product doctrine*, not the attorney-client privilege. Differentiating between the two, the court held that a party could not claim work product over routine reports that were not communications between client and attorney. In doing so, the court expressly noted that, while routine reports were discoverable, communications were not. The *Dudek* Court ruled:

> **A statement by a party to his own attorney concerning anticipated or pending litigation**

> **need not concern us here. It is protected by the attorney-client privilege.** It is almost universally held that a party's routine report to his employer or insurer which report happens to find its way into the files of the employer's or insurer's attorney is not protected work product.

Id. at 592 (emphasis added).

Here, the circuit court misunderstood this critical distinction when it held: "Wisconsin laws recognize that facts obtained from customers by a corporate Defendant in the usual course of investigating warranty or product defect claims and preparing routine reports to documents, the same are not subject to any privilege." (R.322 at 9-10; 14; A-App. 109-110; 114.) This reference actually derives from the *Dudek*'s discussion of principles under the work product doctrine, not the attorney-client privilege. Though ignored by the circuit court, the very two preceding sentences (as bolded above) make this point clear: the notion that a "routine report" may be discoverable is only applicable when construing whether something is subject to the work product

doctrine. Whether a communication a client to an attorney is "routine" is entirely irrelevant.

This makes sense. Investigating a claim the same way every time does not make those efforts "routine" and thus discoverable under *Dudek*. There is an explicit difference between the routine reports that Ravin maintains in the ordinary course of business which might "end up on counsel's desk," and the forms subject to this appeal. The routine customer service database reports (which Ravin already produced because they are "routine" and thus not work product) are entirely separate from Ravin's efforts to investigate the legally relevant facts when litigation is either imminent or impending. Just because Ravin may investigate the claims the same way every time does not cause those efforts to become "routine reports in the ordinary course and subject to discovery." Any argument to the contrary is misplaced. The purpose of these communications was quite literally to aid in an

investigation effort, not to collect information in the normal course of business.

The attorney-client privilege and work product doctrine are fundamentally different. The work product privilege is based upon the mental impressions of the attorney, not the mere act of communicating. *See* WIS. STAT. § 804.01(2)(c). The attorney-client privilege applies to confidential communications made for the purpose of facilitating legal services. If communications were made under such a circumstance, the communications are protected from disclosure, regardless of whether they contain facts, and regardless of whether the parties communicate "routinely." *Dudek*, 34 Wis. 2d at 578. As such, the law of attorney-client privilege applies to the forms in question, even if the work product doctrine does not.

The circuit court failed to recognize these differences, and failed to apply the proper legal standard as it relates to the attorney-client privilege

to the communications at issue. The circuit court ignored the attorney-client privilege discussion in *Dudek*, as well as over one hundred years of Wisconsin precedent. Instead of applying the law of attorney-client privilege to the communications at issue, as recognized by the *Dudek* Court, the circuit court held that they were somehow "routine reports. . . not subject to any privilege." (R.322 at 9-10; 14; A-App. 109-110; 114.) In reaching this conclusion, the court misapplied the distinction made in *Dudek* about communications made to counsel that are privileged, and routine reports which only incidentally make their way to counsel; specifically: (i) documents created for the purpose of communicating to counsel and obtaining legal advice; versus (ii) documents created in the ordinary course of business which inadvertently or incidentally find their way to counsel's files and were created for an entirely different purpose other than communicating from client to counsel or obtaining legal advice. The former is a scenario where

a client engages in confidential communications with his attorney about facts and legal issues in the case to facilitate representation, and the latter is a game of hide the ball. *Id*. at 580 ("[A] party cannot conceal a fact merely by revealing it to his lawyer nor may he secrete a pre-existing document merely by giving it to his attorney."). The circuit misunderstood this distinction and thereby missed a guiding part of the *Dudek* analysis.

The circuit court was so concerned with Mr. Cordy's claimed purported "need" for the "facts" that it was quick to label the communications as (i) facts not subject to the attorney-client privilege, and (ii) "routine reports" not subject to the work product privilege. In its distraction, the court failed to properly analyze the law in light of the facts. The desire to discover facts does not uproot the age-old notion that communications containing those facts are absolutely attorney-client privileged. This purported exception has never been recognized by this Court. Though the

facts are appropriate for discovery by other means, such discovery cannot be in the manner of disclosing communications between client and attorney. Mr. Cordy and his counsel have the ability to discover those facts without violating the privilege.

Faced with the arguments and the documents before it, the circuit failed to apply the correct legal standard. The court was required to apply the law of attorney-client privilege. Although the issue of attorney-client privilege was briefed, the court disregarded it, holding it was inapplicable. This was clear error and this Court should reverse the circuit court's ruling.

CONCLUSION

The heart of this case asks this Court whether a party may discover descriptions of facts contained in communications from a client to his attorney. If Ravin is forced to divulge such confidential communications, then the circuit court has effectively created a necessity exception to the attorney-client privilege

requiring disclosure of "facts" contained in communications from client to counsel. Wisconsin courts have never applied this rule. Nor is the element of necessity present here, as the information is available through other means that do not involve invasion of the attorney-client privilege. By misinterpreting the facts, and failing to appreciate the purpose of the communications, the court erroneously exercised its discretion. For these reasons, Defendant-Appellant Ravin Crossbows, LLC, respectfully requests that this Court reverse the December 16, 2020 Decision and Order on Plaintiff-Respondent's Motion to Compel, and hold that the contested documents are protected under the attorney-client privilege.

Dated: February 26, 2021

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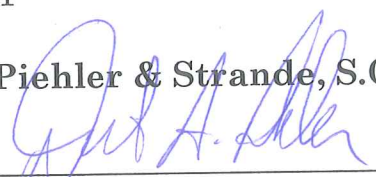
FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief confirms to the rules contained in WIS. STAT. § 809.19(8)(b) and (c) for a Brief and Appendix produced with proportional serif font. The length of this Brief is 8998 words.

Dated: February 26, 2021

Piehler & Strande, S.C.



David A. Piehler

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

I hereby certify that I have submitted an electronic copy of this Brief, including the Appendix, which complies with the requirements of WIS. STAT. § 809.19(12). I further certify that this electronic Brief is identical in content and format to the printed form of the Brief filed as of this date. A copy of this certificate has been served with the paper copies of this Brief filed with the court and served on all parties on February 26, 2021.

Dated: February 26, 2021

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(2) (A)

I hereby certify that filed with this Brief, either as a separate document or as part of this brief, is an Appendix that complies with WIS. STAT. § 809.19(2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of

persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: February 26, 2021

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