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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2021AP2105-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL GENE WISKOWSKI,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE SHEBOYGAN COUNTY CIRCUIT COURT, THE HONORABLE KENT R. HOFFMANN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

This case concerns a traffic stop conducted after a report that a driver was asleep in his truck in a McDonalds drive-through lane. The officer arrived about a minute after the dispatch and saw the truck pull out of the parking lot and onto a road. The officer pulled the truck over and had the driver—Michael Gene Wiskowski—get out of the truck to make sure that he did not need assistance and was in condition to drive safely. The circuit court concluded that the officer's actions in pulling the truck over and having Wiskowski get out of the truck were justified under the police community caretaker function, so it denied Wiskowski's motion to suppress evidence gathered after the traffic stop. Because the circuit court was correct, this Court should affirm the judgment convicting Wiskowski of operating a motor vehicle while under the influence of an intoxicant (OWI) as a fourth offense.

ISSUES PRESENTED

1. Was a police officer justified in stopping a truck shortly after a citizen reported that the truck's driver was sleeping at the wheel in a restaurant's drive-through lane?

The circuit court answered "yes." It concluded that the officer was justified in stopping the truck in his role as community caretaker.

This Court should answer "yes," and affirm.

2. Was the officer justified in having Wiskowski get out of his truck?

The circuit court answered "yes." It concluded that the officer was also justified in having Wiskowski get out of his truck in his role as community caretaker.

This Court should answer "yes," and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the arguments are fully developed in the parties' briefs, and the issues presented involve only the application of well-established principles to the facts presented.

STATEMENT OF THE CASE AND FACTS

A citizen called the police at about 1:00 p.m. to report that a driver was asleep in a truck in a McDonalds' drive-through lane. (R. 32:7.) City of Plymouth Officer Devin Simon arrived within about a minute of the call. (R. 32:7.) Before the officer arrived, the person who called the police knocked on the truck's window and the driver—Wiskowski—woke up. (R. 69:10.)[1] When the officer arrived, he saw that the truck was about to drive out of the parking lot onto the road. (R. 32:8.) The officer followed Wiskowski a short distance, activated his car's emergency lights, and pulled the truck over. (R. 32:8.)

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[1] In his affidavit in support of a search warrant, Officer Smith indicted that the person who called the police and then woke Wiskowski up was a McDonald's employee. (R. 24:4.)

The officer asked for identification, and Wiskowski gave him his driver's license and the wrong insurance card. (R. 32:8–9.) About 20 seconds later, Wiskowski gave the officer another insurance card. (R. 32:9.) The officer returned to his squad car and spoke to another officer who had arrived. (R. 69:12–13.) The officers ran Witkowski's information and learned that he had prior convictions for operating while under the influence of an intoxicant (OWI). (R. 69:13–14.) Officer Simon returned to Wiskowski and asked him to step out of his truck. (R. 32:9.) When Wiskowski got out and walked towards his truck's bumper, Officer Simon observed what he termed a "stumbling walk." (R. 32:9.) When Wiskowski spoke, Officer Simon smelled the odor of intoxicants on Wiskowski's breath. (R. 32:9.) Wiskowski admitted that he had consumed a couple beers. (R. 32:9–10.) Officer Simon conducted field sobriety tests, and then administered a preliminary breath test which gave a result of .187. (R. 32:10–11; 3:3.) Officer Simon arrested Wiskowski for OWI. (R. 32:11.) Officers obtained a search warrant for a blood test, which revealed an alcohol concentration of .167. (R. 21:2; 102:14.)

The State charged Wiskowski with OWI and operating with a prohibited alcohol concentration (PAC), both as fourth offenses. (R. 21; 22.) Wiskowski moved to suppress evidence gathered after he was pulled over. (R. 23.) The circuit court, the Honorable Kent Hoffman, presiding, denied the motion after a hearing. (R. 46.) At the hearing, Wiskowski's counsel clarified that Wiskowski challenged only the stop of his truck. (R. 32:4.) The circuit court concluded the stop was justified under the community caretaker doctrine, so it denied Wiskowski's motion. (R. 46:16.) Wiskowski moved for reconsideration, asserting that the officer unlawfully had him get out of his truck. (R. 62.) The circuit court denied the motion after another evidentiary hearing, concluding that

having Wiskowski get out of his truck was justified under the community caretaker doctrine. (R. 69:36.)

Wiskowski pleaded no contest to OWI as a fourth offense, and the PAC and improper refusal charges were dismissed. (R. 102:5, 13.) Wiskowski now appeals the judgment of conviction, challenging only the circuit court's decisions denying his motion to suppress evidence. (R. 103.)

STANDARD OF REVIEW

Whether evidence should be suppressed is a question of constitutional fact, where the circuit court's factual findings are evaluated under the clearly erroneous standard, but the circuit court's application of the historical facts to constitutional principles is reviewed de novo. *State v. Floyd*, 2016 WI App 64, ¶ 11, 371 Wis. 2d 404, 885 N.W.2d 156.

ARGUMENT

The circuit court properly denied Wiskowski's motion to suppress evidence because the officers were justified in stopping Wiskowski's truck and having him get out of the truck under their community caretaker function.

A. Police are justified in seizing a person when they have an objectively reasonable basis for believing the person may need assistance, and the public need or interest outweighs the intrusion on the person's privacy.

The Fourth Amendment to the U.S. Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches. *State v. Rome*, 2000 WI App 243, ¶ 10, 239 Wis. 2d 491, 620 N.W.2d 225. A warrantless search is unreasonable unless an exception to the

warrant requirement applies. *Id.* One exception is the community caretaker doctrine. *Id.* ¶ 11.[2]

"[A] police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and seizures." *State v. Pinkard*, 2010 WI 81, ¶ 14, 327 Wis. 2d 346, 785 N.W.2d 592. An officer's community caretaker function is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *State v. Kramer*, 2009 WI 14, ¶¶ 19, 23, 315 Wis. 2d 414, 759 N.W.2d 598 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). If "the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, he has met the standard of acting as a bona fide community caretaker, whose community caretaker function is totally divorced from law enforcement functions." *Id.* ¶ 36.

"A community caretaker action is not an investigative *Terry* stop and thus does not have to be based on a reasonable suspicion of criminal activity." *State v. Ellenbecker*, 159 Wis. 2d 91, 96, 464 N.W.2d 427 (Ct. App. 1990). A court determines whether an officer who performed a search or seizure in his community caretaker role did so reasonably, by balancing the public need and interest furthered by the police conduct against the degree of and nature of the intrusion upon the privacy of the citizen. *Kramer*, 315 Wis. 2d 414, ¶ 40.

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[2] Wiskowski argues that the traffic stop was not justified by reasonable suspicion on criminal activity. (Wiskowski's Br. 11–12.) The circuit court concluded that the stop was justified under the officer's community caretaker function, not reasonable suspicion, so the State address only the community caretaker function in this brief.

A court considering whether a seizure is justified by the community caretaker functions must therefore determine: "(1) that a seizure within the meaning of the fourth amendment has occurred; (2) if so, whether the police conduct was bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual." *Id.* ¶ 21 (quoting *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987)).

B. The police officer reasonably seized Wiskowski under the police community caretaker function.

The circuit court concluded that Officer Simon seized Wiskowski when he activated his squad car's emergency lights and stopped his truck. (R. 46:9.) There is no dispute that the circuit court was correct. (Wiskowski's Br. 14–15.) What remains is whether the officers were engaged in bona fide community caretaker activity when they stopped Wiskowski's truck, and if so, whether the public need and interest outweighed the intrusion on Wiskowski's privacy. As the circuit court recognized, the seizure was justified because the officer acted reasonably in his community caretaker function. (R. 46:16.)

1. The officer was engaged in bona fide community caretaker activity when he stopped Wiskowski's truck.

To be engaged in a bona fide community caretaker activity, police conduct must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441. The Wisconsin Supreme Court has explained that "'totally divorced' . . . does not mean that if the police officer has any subjective law enforcement concerns, he cannot be engaging in a valid community caretaker function." *Kramer*, 315

Wis. 2d 414, ¶ 30. Instead, "in a community caretaker context, when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns." *Id.* ¶ 30 "[I]f the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, he has met the standard of acting as a bona fide community caretaker, whose community caretaker function is totally divorced from law enforcement functions." *Id.* ¶ 36.

Here, as the circuit court recognized, there was an objectively reasonable basis for stopping Wiskowski's truck. The court found that Officer Simon responded to a call reporting that a driver was sleeping in his truck in a McDonald's drive-through and encountered Wiskowski shortly after he had been awakened and started driving. (R. 46:13–14.) The court found that Officer Simon stopped the truck for "a welfare check." (R. 46:13.) The court credited Officer Simon's testimony that he "wanted to rule out any medical concerns, and he also wanted to make sure that the person was okay." (R. 46:13.) The court recognized that Wiskowski being awake and driving normally when the officer first observed him "does not mean the defendant won't fall back asleep as this vehicle is moving." (R. 46:13.) The court recognized that the chance the driver could fall asleep again was "certainly a huge risk." (R. 46:13.) The court noted that doing so "would endanger both the driver as well as other people who are on the roadways or pedestrians." (R. 46:14.) The court concluded that stopping Wiskowski's truck was therefore "bona fide [community] caretaker activity." (R. 46:14.)

Wiskowski argues that the circuit court was wrong and that Officer Simon was not acting as a community caretaker when he stopped Wiskowski's truck. (Wiskowski's Br. 14–16.) He argues that the officer was not engaged in bona fide community caretaker conduct when he stopped the truck because the police "were unable to verify that Mr. Wiskowski ever needed assistance." (Wiskowski's Br. 14.) But the only way that the officers could reasonably have verified whether Wiskowski needed assistance was to stop his truck and ask him.

Witkowski argues that had the deputies found a person asleep at the wheel in the drive-through lane, "it would have been reasonable to believe the person may need assistance and the community caretaker function arguably would be in play," but since he was driving when the officers arrived, the initial safety concern had dissipated. (Wiskowski's Br. 14.) He compares his case to *State v. Ultsch*, 2011 WI App 17, 331 Wis. 2d 242, 793 N.W.2d 505. (Wiskowski's Br. 14–15.) But the situation here is nothing like the one in *Ultsch*.

In *Ultsch*, a car hit a building, causing damage to the building, but only minor damage to the car's front fender. *Ultsch*, 331 Wis. 2d 242, *Id.* ¶¶ 2, 19. The driver—Ultsch—then drove to a house two to three miles away, left the car in deep snow, and went into the house. *Id.* ¶¶ 2–3. When officers arrived at the house, the driver's boyfriend, who owned the house, was leaving. *Id.* ¶ 3. The boyfriend said the driver was inside and maybe asleep. *Id.* He did not indicate that she was injured or in need of assistance. *Id.* ¶ 20. The officers knocked and then entered the house uninvited. *Id.* ¶ 4. This Court concluded that the officers were not acting in their community caretaker role when they entered the house because "there was not an 'objectively reasonable basis' to believe that Ultsch was in need of assistance." *Id.* ¶ 22 (citation omitted). This Court noted that "no person had given officers information that would indicate that Ultsch was in a vulnerable situation,

nor did they observe anything that would indicate she was injured." *Id.* ¶ 20. This Court concluded that the officers "had no indication whatsoever that Ultsch might need assistance." *Id.* ¶ 21.

In contrast, in this case, a citizen gave police information indicating that Wiskowski was in a vulnerable situation—asleep at the wheel. (R. 46:13.) And while Wiskowski had awoken and driven away a short distance, there was still reason to believe that he might need assistance. Unlike in *Ultsch* where the driver had stopped driving and had gone home, here Wiskowski was driving. If he had been in medical distress, or simply overtired, he and the public were imperiled.

This case is much like another case in which this Court rejected an argument similar to the one Wiskowski makes here. In *State v. Promer*, 2020AP1715-CR, 2021 WL 6015858 (Ct. App. Dec. 21, 2021) (unpublished)[3], an officer responded to a call reporting that a driver was asleep in his vehicle which was in a bar's parking lot. *Id.* ¶ 3. When the officer arrived, the driver was awake and driving. *Id.* ¶ 4. This Court concluded that the police were justified in stopping the vehicle in their function as community caretakers. *Id.* ¶ 25–26. This Court recognized that a citizen's "report that a person sleeping or passed out in a vehicle in the bar's parking lot gave rise to a an objectively reasonable belief that the person was experiencing some type of medical difficulty or was too tired to drive safely." *Id.* 30. The same is true here. The police were justified in investigating the citizen report that Wiskowski was asleep at the wheel even though he had awoken and was driving a few minutes later.

[3] The State cites this Court's opinion in *Promer*, which is appended to this brief, only for persuasive value. Wis. Stat. § 809.23(3)(b).

Wiskowski argues that Officer Simon's conduct was not "totally divorced from the detection, investigation, or acquisition of evidence relating to violation of a criminal statute," as required for a bona fide community caretaker stop. (Wiskowski's Br. 14 (quoting *Cady*, 413 U.S. at 441.).) He claims that once the deputies saw him driving, "this case pivoted from a community caretaker action into a criminal investigation." (Wiskowski's Br. 15.)

In *Promer*, this Court rejected the identical argument. This Court recognized that "in a community caretaker context, when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns." *Promer*, 2021 WL 6015858, ¶ 32 (quoting *Kramer*, 315 Wis. 2d 414, ¶ 30). Therefore, "if the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, [the officer] has met the standard of acting as a bona fide community caretaker, whose community caretaker function is totally divorced from law enforcement functions." *Id.* (quoting *Kramer*, 315 Wis. 2d 414, ¶ 36).

Here, as the circuit court recognized, Officer Simon articulated an objectively reasonable basis to stop Wiskowski's truck for the community caretaker function. (R. 46:14–16.) The officer was therefore engaged in bona fide community caretaker activity.

2. The public interest outweighed the intrusion upon Wiskowski's privacy.

The final step in determining whether the traffic stop was justified as a bona fide community caretaker function is whether the exercise of that function was reasonable. *Kramer*, 315 Wis. 2d 414, ¶ 40. In making this determination, a reviewing court considers "(1) the degree of the public interest

and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished." *Id.* ¶ 41 (quoting *State v. Kelsey C.R.*, 2001 WI 54, ¶ 36, 243 Wis. 2d 422, 626 N.W.2d 777).

Here, the public interest in stopping the truck and checking on Wiskowski easily outweighed the intrusion on his privacy. As the circuit court recognized, "there was a high degree of public interest to ensure that the defendant was safe in operating the motor vehicle, and obviously the officer had to react quickly and didn't have much time to make his decision." (R. 46:15.) The court was correct. There was a strong public interest in checking on Wiskowski's well-being, to protect both Wiskowski and the public. And the officer had reason to believe that Wiskowski might be an unsafe driver. After all, he was reported to be asleep at the wheel only a few minutes before the officer stopped his truck. As the circuit court said, "it's clear to this court that the officer would be justified in stopping the vehicle to just confirm that the person is okay to drive the vehicle. It's unknown whether the person could fall back asleep and that is certainly a huge risk." (R. 46:13.) The court recognized that "if they fell asleep in the parking lot as reported and then are driving a short time later, there is a risk that they could fall back asleep while driving, which would endanger both the driver as well as other people who are on the roadways or pedestrians." (R. 46:13–14.) The court further recognized that the public nee outweighed the intrusion on Wiskowski, noting that "it would have been a brief stop, a brief encounter with the defendant just to make sure that he's okay to drive and that he's alert enough to drive." (R. 46:16.)

Wiskowski asserts that, contrary to the circuit court's conclusion, "[t]he public need was minimal" because there was no evidence that his truck "impeded the line" in the drive -through lane. (Wiskowski's Br. 16.) But the public need was not due to traffic control or the wait time for fast food. It was, as the circuit court recognized, the risk that Wiskowski could fall asleep again and imperil himself and the public.

Wiskowski asserts that "this situation did not present exigencies." (Wiskowski's Br. 13.) But, again, while Witkowski sleeping in the drive-through lane may not have presented exigencies, the potential of him falling back asleep while driving obviously was an exigent circumstance. As the circuit court recognized, "people can be injured or killed by a motor vehicle" operated by a driver who falls asleep. (R. 46:14–15.)

The second factor is the attendant circumstances of the stop. Wiskowski argues that "the attendant circumstances surrounding the search were instructive." (Wiskowski's Br. 16.) But he points out only that his truck was stopped a little after 1:00 p.m., and an officer approached his car and questioned him. (Wiskowski's Br. 16–17.) He claims that "A reasonable person, who by his own admission had worked the last 24-hours, would be alarmed by the squad and officer. (Wiskowski's Br. 17.)

However, it is hard to imagine a more benign traffic stop. The stop was conducted in the daytime, a single squad car stopped the truck, a single officer approached, and there was absolutely no use or threat of force. A reasonable person would not have been alarmed even if he had worked the prior 24 hours. And while Wiskowski told the police he had been working as a welder for the prior 24 hours (R. 32:24), a reasonable person who has been asleep at the wheel only a few minutes before would hardly be surprised when an officer pulls him over and approaches his vehicle.

The third factor is whether the seizure took place in an automobile. As the Supreme Court has stated, "What is reasonable for vehicles is different from what is reasonable for homes." *Caniglia v. Strom*, 141 S Ct. 1596, 1600 (2021). Here, the seizure took place in an automobile.

The fourth factor is what alternatives the officers had. As the circuit court recognized, there "weren't any available alternatives to what the officer did." (R. 46:15.) The officer could either stop Wiskowski's truck to check on him, or do nothing and hope he could drive safely, notwithstanding that he had reportedly been asleep at the wheel a few minutes before.

Wiskowski claims that there were "obvious alternatives to this aggressive approach" of stopping his truck. (Wiskowski's Br. 17.) He suggests that "the most obvious alternative was for [the deputies] to simply move on." (Wiskowski's Br. 17.) But there is no case that says simply ignoring the issue that gave rise to community caretaker function is a type of viable "alternative." One would be hard pressed to consider a community caretaker function case where ignoring the issue wouldn't be an alternative to actually checking on the individual. In *Promer*, where police responded to a report of a person passed out or asleep in his car, but saw the person driving when they arrived, this Court concluded that "It would not have been reasonable for the deputies to simply do nothing and hope Promer could drive safely." *Promer*, 2021 WL 6015858, ¶ 44. The same is true here. After receiving the report of Wiskowski asleep at the wheel, doing nothing was not a reasonable option.

As explained above, it would have been unreasonable for the officers not to even ask Wiskowski if he was okay. After all, they had a report that he was asleep in his car in a drive-through lane. The officers could not reasonably have gone into the McDonald's and asked for verification that Wiskowski had been asleep because Wiskowski was driving

away. Stopping Wiskowski's truck to check to see if he was in a condition to drive safely was the only reasonable alternative. If Wiskowski had fallen asleep again, either due to a health issue or to being over tired, "it may have been too late for effective assistance at some later time." *Kramer*, 315 Wis. 2d 414, ¶ 45. And as the circuit court concluded, it would be "risky" to follow the truck to see how Wiskowski was driving because if Wiskowski was "inclined to fall back asleep" he would "put everyone at risk." (R. 46:15.) The officer had no other viable options. There was no one else they could contact and no method of assessing whether Wiskowski was in distress or unable to operate his vehicle safely other than stopping his vehicle and interacting with him.

In total, the seizure occurred in an automobile, and the other three factors demonstrate that the officer stopped the truck while acting reasonably under his community caretaker function.

C. The police were justified in having Wiskowski get out of his truck.

After stopping Wiskowski's truck, the officers had him step out of the truck. The circuit court concluded that the officers were justified in doing so in their community caretaker role. (R. 69:35–36.) As the circuit court recognized, the officers asked Wiskowski to get out of his car to make sure they were not missing anything, and that he was okay to drive. (R. 69:35.) The court noted that Wiskowski might not be able to drive safely "due to alcohol but it also could be sleepiness." (R. 69:35.) The court noted that since Witkowski had been asleep at the wheel only a few minutes before, his then driving did not mean "that the defendant is not going to fall asleep as he's driving." (R. 69:35.) The court concluded that "under a totality of the circumstances here the officer is justified in not only stopping the vehicle" but in "exploring. . .

to investigate the community caretaker function" by asking Wiskowski to get out of his truck." (R. 69:36.)

Wiskowski claims that even if the stop was justified, "the community caretaker exception terminated" once the officer spoke with him. (Wiskowski's Br. 15.) He argues that "During that conversation it became clear that he did not require assistance." (Wiskowski's Br. 15.) He claims that he "did not provide a mumbled, nonsensical response to [the deputies'] questions," but "explained that he had been awake for approximately 24-hours working." (Wiskowski's Br. 15.)

However, viewed objectively, nothing that Wiskowski told the officer dispelled the belief that he needed assistance. Wiskowski told the officer that he had fallen asleep at the wheel only a few minutes before because he had worked prior 24 hours. Putting aside that Wiskowski's statement was seemingly untruthful (unless he was welding while drinking and intoxicated), Wiskowski's explanation even if true would not have meant that he did not need assistance. Instead, with information that Wiskowski had fallen asleep at the wheel only a few minutes before, and that he had been awake for 24 hours, the officers had even more reason to ask him to get out of the car so they could make sure that he was now not so tired that he would be unable to drive safely.[4] As the circuit court

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[4] At the hearing on his motion for reconsideration, Wiskowski argued that the traffic stop moved from a community caretaker function to a criminal investigation once police learned that he had prior OWI convictions. (R. 69:27–28.) The circuit court rejected Wiskoswki's argument (R. 69:35–36), and Wiskowski doe raise that argument on appeal.

recognized, the officers were therefore justified in having Wiskowski step out of his truck.[5]

CONCLUSION

This Court should affirm the judgment convicting Wiskowski of OWI as a fourth offense.

Dated: July 15, 2022.

Respectfully submitted,

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[5] Wiskowski does not dispute that once he was out of his truck, the officers were justified in having him perform field sobriety tests, requesting a preliminary breath test, arresting him, requesting a blood sample, and obtaining a search warrant for a blood sample.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 4297 words.

Electronically signed by:

Michael C. Sanders
MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 15th day of July 2022.

Electronically signed by:

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MICHAEL C. SANDERS
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