STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2022AP788

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

v.

ALFRED TALYANSKY, SW TRANSMISSIONS MANAGER, LLC, REMANNS, LLC, REMANNS MANAGER, LLC, QUALITY USED ENGINES, LLC, ENGINE RECYCLER MANAGER, LLC, QUALITY USED TRANSMISSIONS, LLC, QUALITY USED TRANSMISSIONS MANAGER, LLC, QUALITY USED ENGINES MANAGER, LLC, MIDWEST AUTO RECYCLING, LLC, ENGINE SHOPPER, LLC, ENGINE SHOPPER MANAGER, LLC, ENGINE & TRANSMISSION WORLD, LLC, BELDEN MFG, LLC, APLS ACQUISITION, LLC AND ENGINE RECYCLER, LLC, SW ENGINES MANAGER, LLC, SW ENGINES, LLC, SW TRANSMISSIONS, LLC, U NEED ENGINES MANAGER, LLC, U NEED ENGINES, LLC,

Defendants-Respondents-Cross-Appellants.

APPEAL FROM A FINAL JUDGMENT OF THE MILWAUKEE COUNTY CIRCUIT COURT, HONORABLE WILLIAM SOSNAY, PRESIDING

BRIEF OF APPELLANT STATE OF WISCONSIN

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INTRODUCTION

This is a consumer protection action brought by the State under Wis. Stat. § 100.18, the Deceptive Trade Practices Act, against several related corporate defendants and the individual who controls those entities. The State's complaint alleged that the defendants misrepresented facts about the used engines and other auto parts they sold, such as the mileage of the engines, whether they had been tested, and the locations of the businesses selling them. The State brought claims under Wis. Stat. § 100.18(1), which prohibits making any false or deceptive statement in advertising a product for sale, and Wis. Stat. § 100.18(10r), which prohibits misrepresenting that a business is located in a particular community or region when it is not.

The circuit court committed two errors of law that prevented the State from trying its full case.

First, the court held that Wis. Stat. § 100.18(1) does not apply to misrepresentations made in Wisconsin by an in-state business that are received by someone outside the state. The plain language of the statute, however, applies to the actions of the advertiser, not the consumer. Thus, the statute applies to representations made or caused to be made in Wisconsin regardless of whether the person who heard the advertisement is in Wisconsin or resides here.

Second, the circuit court held that the State must prove someone suffered a pecuniary loss in order to prove a violation of Wis. Stat. § 100.18. Thus, the court added an element to both of the State's legal claims that is not in the statute and contrary to supreme court precedent. In contrast to the private cause of action for an injured consumer, which does require pecuniary loss, the elements for a state enforcement action include no such component.

This Court should reverse the circuit court and remand for a new trial.

ISSUES PRESENTED

1. Wisconsin Stat. § 100.18(1) provides that no one "shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in" various forms, "an advertisement, announcement, statement or representation of any kind to the public" that "contains any assertion, representation or statement of fact which is untrue, deceptive or misleading." The statute focuses on the actions a person or entity is prohibited from making and does not mention the recipient's location or state of residence. Does section 100.18(1) cover statements made in Wisconsin by Wisconsin-based businesses when they are received by people outside the state?

The circuit court initially answered yes, but then answered no on a motion for reconsideration.

This Court should answer yes.

2. Subsection 11 of the Deceptive Trade Practices Act, Wis. Stat. § 100.18, provides several ways for the statute to be enforced, including both state enforcement actions and a private cause of action. The private cause of action may be brought by "[a]ny person suffering pecuniary loss because of a violation of this section." Wis. Stat. § 100.18(11)(b)2. In contrast, subsections (11)(a) and (11)(d) governing state enforcement actions contain no requirement of a pecuniary loss, and the Wisconsin Supreme Court has not treated pecuniary loss as an element of an enforcement claim. The two causes of action have different remedies, with the State able to seek injunctive relief, forfeitures, and restitution. Must the State show that someone suffered a pecuniary loss in order to prove a statutory violation in an enforcement action under § 100.18?

The circuit court answered yes.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State welcomes oral argument if it is helpful to the Court. This Court's opinion should be published because there is no state decision interpreting the application of Wis. Stat. § 100.18 to those who are outside Wisconsin when they hear or see the representation, that question is likely to recur in other cases, and there are conflicting federal district court decisions on this issue. Further, this Court should reaffirm that the State need not prove pecuniary loss in a section 100.18 enforcement action when the model jury instruction, Wis. JI–Civil 2418, applies to private causes of action but does not specifically address State claims. *See* Wis. Stat. § (Rule) 809.23(1)(a)1., 3.

STATEMENT OF THE CASE

I. General background.

Defendants operate a business that sells used and remanufactured auto parts to consumers throughout the United States, primarily via the internet. (R. 80:6–7.)

Beginning in May 2015, the State received hundreds of complaints about Defendants' business practices. (R. 62:7–56.) The complaints ranged from misrepresentations about the mileage of parts being offered for sale and the quality of the parts, including whether they had been tested and guaranteed. (R. 62:17–56.) They also complained about the defendants' assertions about the size of their inventory and locations where they operated. (R. 62:17–56.)

The defendants' business operates exclusively out of Wisconsin. Midwest Auto Recycling, LLC ("Midwest"), is the defendants' primary corporate entity; it does business in Cudahy, Wisconsin. (R. 80:6–8.) Defendant Alfred Talyansky, a Wisconsin resident, owns the websites that Defendants operate, while the corporate Defendants own the content

on those websites. (R. 80:10–11.) He is the principal of Midwest and its top manager. (R. 337:103, 113.) Midwest's predecessor, Mid City Auto Recycling, was a salvage yard in Milwaukee, which sold used car parts. (R. 337:103–05.) Mid City Auto Recycling closed in 2006, and then Midwest was created. (R. 337:106.) The business moved its location to Cudahy and focused on online sales of used engines, transmissions, and other parts. (R. 337:107.) Midwest sells auto parts in the United States to auto shops and individuals. (R. 337:114.)

All the other defendants are corporate entities related to Midwest and all also have their primary place of business in Cudahy, Wisconsin. (R. 80:6–8.)[1] Some of the other corporate entities use mailing addresses outside Wisconsin, but those are not physical addresses and contain no business operations—they simply receive mail. (R. 80:7–8.) According to the defendants, Talyansky established various corporate entities, "using different company names and websites to increase internet traffic." (Dkt. 80:7.)

Midwest has "a lot of different websites" that are "made strictly for - - to driv[e] traffic to our sites so customers find us, because there's so much competition out there." (R. 337:115.) Midwest owns numerous auto parts sales websites, including Engine & Transmission World, Belden Manufacturing, Engine Shopper, Engine Shopper Manager, SW Transmissions, SW Transmissions Manager, SW Engines, SW Engines Manager, Quality Used

[1] At the relevant times, the corporate entities were owned by Talyansky or some combination of the other entities (R. 80:6–7). For example, Alfred and Edward Talyansky were the members of Midwest, Midwest was the member of Belden, Mfg, LLC, and Belden was the member of Engine & Transmission World, LLC. (R. 80:6–7.)

Transmissions, Quality Used Transmissions Manager, Quality Used Engines, Remanns, Remanns Manager, APLS Acquisitions, Engine Recycler, Engine Recycler Manger, U Need Engines, and U Need Engines Manager. (R. 337:115–17; 338:26–29; 298, 300–01.)

A third-party contractor creates the defendants' website content, but Talyansky approves that content. (R. 81:3–4.) Those websites are the "primary source of information to potential customers," but information is also given to customers by phone or email. (R. 80:16.)[2] All of the defendants' telephone and email communications with customers are conducted from their Cudahy location in Wisconsin. (R. 80:16.) Likewise, all contacts with customers—whether via the defendants' websites or email and phone communications—drive sales transactions that are finalized at the defendants' location in Cudahy. (R. 80:15–16.)

II. Procedural history of the case.

A. The complaint and pretrial proceedings.

After receiving hundreds of complaints and investigating the matter, the State filed its initial complaint in June 2017 and the operative amended complaint in February 2018. (R. 344; 32.) The State brought the action "pursuant to Wis. Stat. §§ 100.18(11)(d) . . . to enforce" Wis. Stat. § 100.18 "and to recover pecuniary losses suffered by

[2] The defendants operate multiple websites over which they do business, including www.swengines.com, www.swtransmissions.com, www.qualityusedengines.com, www.engineandtransmissionworld.com, www.remanns.com, and gotengines.com, among many others. (R. 80:10–11.)

consumers." (R. 32:7 ¶ 1.)[3] The State's amended complaint alleges that Defendants have engaged in deceptive practices under Wis. Stat. § 100.18 by misleading consumers about their auto parts, services, and their physical location, by communications through internet advertising, websites, email, and telephone. (R. 32:23–24 ¶¶ 90–104).) The State alleged that the defendants committed violations under two subsections of the Act: (1) fraudulent misrepresentations under Wis. Stat. § 100.18(1) in marketing and selling auto parts; and (2) fraudulent misrepresentations under section 100.18(10r) regarding where their business was located. (R. 32:23–24 ¶¶ 90–104.)

The State sought judgment (1) finding that the defendants violated Wis. Stat. § 100.18; (2) finding that each violation was a separate offense; (3) enjoining the defendants and their agents from making further misrepresentations; (4) ordering the defendants to make restitution to consumers who suffered losses; (5) imposing civil forfeitures; (6) temporarily enjoining the defendants from billing customers for auto parts that were not the parts represented during the sale; (7) for costs and attorney fees; and (8) for other equitable relief. (R. 32:24–26 ¶¶ A.–I.)

In June 2018, the State initially disclosed to the court and defendants 427 consumer witnesses, with six in Wisconsin. (R. 62:7–14.)

The defendants moved for summary judgment, seeking a ruling that the State could not proceed with claims relating to anyone outside the state. (R. 72–76.) Section 100.18(1) requires the misrepresentation to be "made in Wisconsin." The defendants argued that to be a violation of

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[3] The complaints alleged violations of Wis. Stat. § 100.195, but that claim was later dropped.

Wis. Stat. § 100.18(1), the statement must have also been "received" by someone in Wisconsin (R. 73:11–13) and that their website representations were not "made in Wisconsin" because they used out-of-state website consultants and servers (R. 73:14–15).

The circuit court denied the defendants' motion in an oral ruling (R. 102), then entered a written order (R. 101). The court held that "there is no language that indicates the conduct, statements, or consumers must be in Wisconsin, just that the false information must come before the public in Wisconsin." (R. 102:41–42.) "In short, the text of [Wis. Stat. § 100.18] contains no strict territorial boundary on its enforcement." (R. 102:45.) The court also concluded that the location of the servers and consultants was not relevant and that relied on federal authority stating that "the citizenship of the individual receiving the deceptive or misleading statement is of no consequence." (R. 102:43.)

The defendants petitioned this Court for leave to appeal the nonfinal order. *See State v. Engine & Transmission World, LLC*, No. 2018AP1960-LV. This Court denied the petition on April 9, 2019.

In November 2018, the State filed an amended witness disclosure narrowing the initial list of 427 potential witnesses down to 42 consumer witnesses, with two from Wisconsin. (R. 115:1–13.) The State then filed a pretrial report in April 2019 which included a list of 36 consumer witnesses, further narrowing list, and explaining that it "intend[ed] to present the testimony of 20 consumer witnesses to the jury," depending on which witnesses were available on the trial date. (R. 158:4, 5–19.) Two of the witnesses lived in Wisconsin. (R. 158:5–19.)

Almost two years later and after the trial had been delayed due to the pandemic, on March 1, 2021, the defendants filed a motion for reconsideration. (R. 230–32.)

The motion was largely based on a September 2020 decision from the Eastern District of Wisconsin, *T&M Farms v. CNH Industrial America, LLC*, 488 F. Supp. 3d 756 (E.D. Wis. 2020), which held, contrary to other district courts, that Wis. Stat. § 100.18 did not apply to those who are not Wisconsin residents. (R. 231:4–8.)

The circuit court granted the motion at an oral ruling on April 19, 2021, (R. 247, App. 101–19), which was memorialized in a written order (R. 246, App. 120). The court held that there had been no manifest error of fact or law, but it was allowed to consider *T&M Farms* as "the most recent authority" interpreting Wis. Stat. § 100.18(1). (R. 247:5, App. 105 (citing *Seebach v. Beetling Design Corp.*, 46 F. Supp. 3d 876 (E.D. Wis. 2014)).) The court relied on *T&M Farms* and held that that section 100.18(1) "does not apply unless a person makes a deceptive representation that is likely to reach an[d] induce an action by a purchaser in Wisconsin." (R. 247:10, App. 110.) In sum, "the State cannot pursue claims based on customers that received and acted on the advertisements outside of Wisconsin." (R. 247:11, App. 111.)

The order was non-final, and so trial preparations continued. Trial was set to begin November 29, 2021. (R. 337.) On October 6, 2021, the defendants filed a memorandum asserting that the testimony of witnesses living outside Wisconsin was not relevant given the reconsideration order. (R. 259:2–3.) In response, the State filed a written offer of proof. (R. 264:1, App. 121.)

The State's offer of proof involved three types of evidence: (1) documents and testimony summarizing the defendants' practice of quoting mileages that systematically underreported the mileage on the engines actually sold; (2) testimony of out-of-state consumers about their experiences with the defendants; and (3) evidence of the defendants' internet advertising. (R. 264, App. 121–37.)

On the first point, the evidence would include testimony of Jocelyn Henning, a Department of Justice employee, who would summarize the data in Defendants' and their supplier's business records to compare the mileage numbers provided in quotes with the mileage of parts delivered, and the testimony of two witnesses from the defendants' supplier to authenticate their records. (R. 264:3–9, App. 129.) Ms. Henning's testimony would have shown that the defendants systematically deceived prospective customers about the mileage of the parts they sold, promising low-mileage parts and instead delivering high-mileage parts. (R. 264:5–6, App. 125–26.) Her testimony would have established that roughly 92% of the parts orders she matched from 2015 sales records had mileage numbers more than 50,000 miles higher than the numbers the defendants advertised for the same part, and approximately 44% had mileage numbers more than 100,000 miles higher than the numbers the defendants advertised. (R. 264:5, App. 125; 168 (summary chart).)

On the second point, the State would offer testimony from three out-of-state consumers about how the engines they received did not match up with the representations that had been made about mileage and compression testing. (R. 264:9–16, App. 129–36.) Steve Malcolm from Ohio would have testified about an engine he purchased from Engine and Transmission World's website that he believed, based upon the quote he received, had about 68,000 miles on it but, upon investigation, had over 200,000 miles. (R. 264:12–14, App. 132–34.) Steve Dentici from California would have testified that he bought an allegedly low-mileage engine from the "SWEngines.com" website, it failed, and he replaced it after finding another engine on the "Remann's" website, not knowing that it was another of the defendants' sites. (R. 264:14–15, App. 134–35.) Davidson Le'Teng from Missouri is a highly experienced amateur mechanic who

would have testified about an allegedly low-mileage engine he purchased from SWEngines.com, which he inspected and tested, concluding that it was in poor condition and likely had more than the quoted 68,000 miles on it. (R. 264:15–16, App. 135–36.)[4]

Lastly, the State would offer testimony from the defendants' provider of internet advertising, who would testify about, among other things, why the defendants had multiple websites with different names and how Defendant Alfred Talyansky controlled the content of the defendants' websites. (R. 264:16–17, App. 136–37.)

In an oral ruling, the circuit court[5] excluded all evidence relating to out-of-state sales because, due to the ruling on the reconsideration motion, "matters involving incidents that occurred outside Wisconsin, meaning dealing with residents of other states, is not admissible." (R. 309:10, App. 141.) The court ruled that under Wis. Stat. § 904.03, such evidence "would be unduly prejudicial in view of what I believe the law is and what the statute says." (R. 309:10, App. 141.) This was memorialized in a written order issued after the trial, (R. 324:1, App. 188), after the court had rejected several orders jointly proposed orders by the parties in the weeks leading up to trial (R. 276–77, 294–95). Thus, the State was precluded from putting on the three non-

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[4] The circuit court had previously denied the defendants' motion in limine to exclude Mr. Le'Teng's lay and expert testimony. (R. 198.)

[5] This case was presided over by multiple circuit court judges. Regarding the rulings at issue in this appeal, the Honorable Williams S. Pocan ruled on the two motions regarding the proper interpretation of Wis. Stat. § 100.18(1) while the Honorable William Sosnay issued the pretrial and trial rulings on evidence, jury instructions, the special verdict form, and the State's post-trial motion for judgment.

Wisconsin witnesses and the vast majority of Ms. Henning's evidence was also inadmissible.

Regarding the pecuniary loss element, before trial, the parties reached an agreement regarding the jury instructions and submitted them to the court. (R. 309:17.) The joint proposed instructions included the first two elements in Wis. JI–Civil 2418 for a Wis. Stat. § 100.18(1) claim and omitted any element of monetary loss. (R. 273:2–3, App. 145–46.) The joint proposed instructions also included an instruction for the State's Wis. Stat. § 100.18(10r) misrepresentation-of-business-location claim that was based upon the statutory text and included no element of pecuniary loss. (R. 273:3, App. 146.)

B. Trial proceedings

At trial, limited by the circuit court's ruling on the scope of Wis. Stat. § 100.18(1), the State presented the testimony of one Wisconsin witness and no out-of-state witnesses.

Joseph Koehler of Westfield testified about used transmissions he purchased from Defendant Quality Used Transmissions. (R. 338:161–210.) He searched Google for "used transmissions" and focused on those that did not have a lot of miles and included a warranty. (R. 338:166–67.) His search led him to the Quality Used Transmissions website, which he used to get a quote for a transmission with a supposed mileage of 78,176. (R. 338:170–72.) Koehler believed that the transmission was in Quality Used Transmissions' inventory. (R. 338:173–74.) The information stated that the transmission was tested, visually inspected, and cleaned. (R. 338:174.) He purchased a used transmission, and it was shipped directly to his local mechanic, who installed it in the Koehler family's minivan. (R. 338:174–75, 177.)

Shortly thereafter, the family learned from a dealership that the van should not be driven, and the transmission needed to be replaced. (R. 338:182–85.) While Quality Used Transmissions delivered a second used transmission under the parts warranty (R. 338:184–85, 207–10), it refused to cover the $1,100 labor cost for installing the second replacement transmission, rejecting Koehler's proof regarding the odometer reading. (R. 338:185–90.) Now lacking confidence in the reliability of the part, the Koehlers "got rid of the van as quick as [they] could." (R. 338:191.)

In addition to Al Talyansky, the State called two other witnesses who were employed by Talyansky and Midwest, Chris Flood and Dale Heinzel. (R. 338:70, 212.) Flood was the manager of Midwest's ordering department and managed the Engine & Transmission World website. (R. 338:19–20.) He acknowledged using multiple aliases, not his own name, when interacting with customers. (R. 338:152–53.) Heinzel—who uses the name "Dale Jones" when dealing with customers on the phone—was the manager of the shipping department at Midwest. (R. 338:212–13.)

After both parties had presented their witnesses, the court addressed jury instructions with counsel outside the jurors' presence. (R. 339:74–77, App. 156–59.) Despite the parties' agreement not to include a pecuniary loss element, the court said it would give "the standard jury instruction [Wis. JI–Civil] 2418 on unfair trade practices, which deals with the statute 100.18(1), provides that there are three elements." (R. 339:75, App. 157.) After a break, the court explained its view that it is "fundamental that the plaintiff would have to show that there has been some loss as a result of what they claim was false advertising," or "the statute itself would really stand for nothing." (R. 339:82–83, App. 164–65.) The court held that "to leave out the third element and the law to apply here would be a mistake" and noted that "[w]hether or not another body sees that differently I

guess remains to be seen, and certainly the court would abide by it." (R. 339:83, App. 165.)

The court stated that "if either side wants to object or make a record on that, now is the time to do it." (R. 339:83, App. 165.) The State then objected to including the monetary loss element in the instructions. (R. 339:83–84, App. 165–66.) Citing *State v. American TV & Appliance of Madison, Inc.*, 146 Wis. 2d 292, 430 N.W.2d 709 (1988) and the statutory language, specifically section 100.18(11)(d), the State argued that "only the first two elements were required to be proved to establish a violation of the statute." (R. 339:83–84, App. 165–66.)

The court rejected the State's arguments. (R. 339:85, App. 167.) The circuit court and counsel next addressed the special verdict, specifically, adding a question (Question 5) that asked the jury to find the monetary-loss element of the court's instructions. (R. 339:86–90, App. 168–72; 292:2.)

The circuit court then instructed the jury and included the monetary-loss element for claims under Wis. Stat. § 100.18, both under subsection (1) and subsection (10r), and the related question on the special verdict. (R. 339:105, 107–08, App. 177, 179–80.) The court read to the jurors one instruction on the claims under both subsections. (R. 339:100–10, App. 174–84.)

After the trial, the jury entered a verdict. (R. 292, App. 185–87.) The jury found that the defendants' "advertisements to Wisconsin consumers" on their websites were not untrue, deceptive, or misleading by a vote of 10 to 2. (R. 292:1, App. 185 (Question 1).) The jury found that four of the defendants' websites published a misrepresentation that the business behind the website was located in a certain community or region when it was not. (R. 292:2, App. 186 (Question 2).) It found that the representations in sales quotes to Wisconsin consumers were not untrue, deceptive or

misleading. (R. 292:2, App. 186 (Question 3).) The jury found that Defendant Alfred Talyansky had knowledge of, and the ability to control, the representations on which they were asked to rule. (R. 292:2, App. 186 (Question 4).) Lastly, they found that the State failed to prove a Wisconsin consumer had suffered a pecuniary loss due to a misrepresentation. (R. 292:2, App. 186 (Question 5).)

Given that the State had proven a violation of Wis. Stat. § 100.18(10r) for misrepresentation of business location, it asked for the circuit court to impose an injunction against such practices under section 100.18(11)(d) and a civil forfeiture for each violation and costs under section 100.26(4m). (R. 317.) The court denied the State's request because there was no showing of pecuniary loss, which it thought was an element of this claim. (R. 336:7–10, App. 195–98.)

The defendants sought costs against the State (R. 310–13), which the circuit court denied because the statutes did not expressly authorize costs against the State (R. 336:11–12).

The circuit court did not enter an order of dismissal until April 4, 2022. (R. 333, App. 203.) The State then filed this appeal. (R. 341.) The defendants cross-appealed the denial of their motion for costs. (R. 352.)

STANDARDS OF REVIEW

The interpretation of Wis. Stat. § 100.18(1) is an issue of statutory interpretation, which is reviewed de novo. *Brown County v. Brown Cnty. Taxpayers Ass'n*, 2022 WI 13, ¶ 19, 400 Wis. 2d 781, 971 N.W.2d 491. The issue of the elements the State needs to prove for claims under Wis. Stat. § 100.18 is also an issue of statutory interpretation reviewed de novo. *Id.*

"Whether a jury instruction correctly states the law is a question of law" reviewed de novo. *State v. Langlois*, 2018 WI 73, ¶ 34, 382 Wis. 2d 414, 913 N.W.2d 812. While "the content of the special verdict remains within the discretion of the circuit court," *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 22, ¶ 12, 308 Wis. 2d 103, 746 N.W.2d 762, this Court, "review[s] de novo '[w]hether a special verdict reflects an accurate statement of the law applicable to the issues of fact in a given case.'" *City of Milwaukee v. NL Indus.*, 2008 WI App 181, ¶ 83, 315 Wis. 2d 443, 762 N.W.2d 757 (alteration in original) (citation omitted).

This appeal involves evidentiary rulings by the circuit court that were based on its interpretations of statutes, which are reviewed de novo. *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶ 14, 324 Wis. 2d 180, 781 N.W.2d 503.

ARGUMENT

The circuit court committed two crucial errors of law that prevented the State from trying its full case. Those errors require a new trial.

First, the court mistakenly held that Wis. Stat. § 100.18(1) does not apply to misrepresentations made in Wisconsin by an in-state business if they are received by a consumer who is outside the State or not a Wisconsin resident. The plain language of the text applies to the

actions of the entity making the representation, not the consumer. The court erroneously relied on a federal district court decision that misunderstood Wisconsin law.

Second, the circuit court erroneously added an element to what the State needs to prove in a civil enforcement action claim, holding that it needed to prove pecuniary loss. The court erroneously injected a requirement unique to the private cause of action, which has a separate statutory subsection and different remedies, onto the State.

The circuit court relied on those legal errors in two ways. Based on its first error, it excluded the majority of the evidence the State sought to introduce, preventing the State from trying its case. Based on its second error, it denied the State the injunctive relief it sought to stop the illegal conduct.

This Court should reverse the circuit court and remand for a new trial.

I. Wisconsin Stat. § 100.18(1) applies to representations made or caused to be made in Wisconsin by in-state businesses that are received by out-of-state consumers.

Under the plain language of Wis. Stat. § 100.18(1), the State can enforce the law against in-state businesses that make misrepresentations in Wisconsin that reach consumers located outside the state. Other courts have agreed with the State's reading, and the federal district court decision relied on by the circuit court was an outlier. The circuit court's ruling conflicts with the statute, violates commonsense, and would be poor public policy.

A. The plain language of Wis. Stat. § 100.18(1) applies to misrepresentations made by in-state businesses.

The question is straightforward: whether an in-state business that makes representations in Wisconsin has made or caused those representations to be made "in this state" within the meaning of the statute. Wisconsin Stat. § 100.18(1) provides that

> No person . . . shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, . . . an advertisement, announcement, statement or representation of any kind to the public . . . which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading."

The statute thus prohibits anyone from (1) "mak[ing]" or "caus[ing] . . . to be made" "in this state" (2) an "advertisement" or other representation that contains an "untrue, deceptive or misleading" statement. Wis. Stat. § 100.18(1). This Court has described this provision as "extremely broad." *MBS-Certified Pub. Accts., LLC v. Wis. Bell Inc.*, 2013 WI App 14, ¶ 16, 346 Wis. 2d 173, 828 N.W.2d 575.

The defendants' alleged misconduct meets both elements. They "made" statements on their website and via email and telephone communications, they made those statements from their principal place of business in Wisconsin, and those statements were allegedly misleading.

The circuit court erroneously added a third element that does not appear in the statute: that the misrepresentation must be received by a Wisconsin resident. That addition violates core principles of statutory interpretation.

The analysis "begins with the language of the statute. If the meaning of the statute is plain, [courts] ordinarily stop the inquiry." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). "Statutory language is given its common, ordinary, and accepted meaning." *Id.* Moreover, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Id.* (citation omitted).

Here, the relevant language is "make . . . in this state . . . an advertisement." Wis. Stat. § 100.18(1). The most natural reading of the word "make" refers to the creation of the misrepresentation, not to its receipt by a consumer. Black's Law Dictionary defines "make" as "1. To cause (something) to exist." *Make*, Black's Law Dictionary (11th ed. 2019). Under this definition, the advertisement is made in Wisconsin when the business creates it and then sends it out into the public. The statute uses verbs, like "make," that focus on the actions of the person making the representation, not on the recipient of that communication.

This is reinforced by the many synonyms for "make" used in the provision. *See State v. Pinder*, 2018 WI 106, ¶ 38, 384 Wis. 2d 416, 919 N.W.2d 568 (noting that words should be interpreted in the same sense as surrounding terms). Wisconsin Stat. § 100.18(1) uses the terms "publish, disseminate, circulate, or place before the public," which all focus on the advertiser's conduct. An advertisement is "published" when it goes into the world, not when someone hears it. Black's Law Dictionary defines "publish" as "1. To *distribute* copies (of a work) to the public." *Publish*, Black's

Law Dictionary (emphasis added), focusing on the advertiser, not on the recipient. Similarly, the word "disseminate" focuses on the actions of the advertiser and even contemplates that the advertiser's statement will spread from the advertiser out to others in the world: "disseminate" is defined as "to spread abroad as though sowing seed." *Disseminate*, Merriam-Webster, https://www.merriam-webster.com/dictionary/disseminate (last visited Sept. 19, 2022). Similarly, the word "circulate" focuses on the actions of the advertiser.

A Wisconsin business takes all these actions in Wisconsin, where it is located. The defendants here issued their internet advertisements from their corporate home in Cudahy, and thus made and disseminated those advertisements in Wisconsin.

The defendants may argue that the phrase "in this state" modifies "public," so that the consumer must be in the state when they receive the communication or even be a Wisconsin resident. There are at least three problems with that reading.

First, "to the public" and "before the public" appear four times in Wis. Stat. § 100.18(1), and "in the state" appears only once. If the statute applied only to people in the state, one would expect it to appear each time.

Second, even in that one occurrence, there is a comma between "before the public" and "in this state." If "in this state" modified "public," there would be no need for that comma. Statutory interpretation "should also look to the grammatical construction of the statute." *See Student Ass'n of the Univ. of Wis.-Milwaukee v. Baum*, 74 Wis. 2d 283, 296, 246 N.W.2d 622 (1976). When a comma separates a word or phrase from another phrase, this supports a reading that the latter phrase does not modify the prior phrase. *See State ex*

rel. Ahlgrimm v. State Elections Bd., 82 Wis. 2d 585, 590, 263 N.W.2d 152 (1978).

Section 100.18(1) is a very old law, comprised of a long sentence, but it is not ambiguous. The phrase "[i]n this state" modifies the statute's verbs, which describe the actions a person or entity may not take—either "make, publish, disseminate, circulate, or place before the public, or cause to be made . . . disseminated, circulated, or placed before the public." Then, after a comma, the statute provides that those actions may not take place "in this state." "[I]n this state" modifies where the actions take place, not where the consumer must be (or reside) when he receives the statement.

Third, the circuit court's interpretation requires adding language to the statute. Courts may not add words to a statute that are not there. *See, e.g., Novell v. Migliaccio*, 2008 WI 44, ¶ 28, 309 Wis. 2d 132, 749 N.W.2d 544 (holding that Wis. Stat. § 100.18(1) does not have a reasonable reliance requirement because "[t]he words 'rely,' 'relied,' and 'reliance' appear nowhere in the text of either § 100.18(1) or § 100.18(11)(b)2."). But here, with not a shred of statutory support, the circuit court adds a requirement that the representation be received by a Wisconsin resident.

The Legislature could easily have added language that limited Wis. Stat. § 100.18 depending on the residence of the consumer or where the representation was "received." Indeed, in a different section of Wis. Stat. chapter 100 regulating mail-order sales, the Legislature limited claims in both ways: it defined a "buyer" as someone who both (1) "[i]s a resident of this state" and (2) "[w]hile located in this state, receives a solicitation . . . ." Wis. Stat. § 100.174(1)(a)1.–2. For that cause of action, the Legislature identified both that the consumer must be a Wisconsin resident and actually in Wisconsin at the time of the solicitation.

When it came to Wis. Stat. § 100.18(1), the Legislature required neither of those things. It did not use any defined term like "recipient" or "consumer" at all, much less limit the statute based on whether someone is a resident of Wisconsin or where he happens to be located when he hears or sees the misrepresentation. Instead, the statute uses terms that focus solely on the individual's or entity's *actions* of making or causing to be made the representation.

Beyond ignoring the terms the Legislature wrote, the circuit court's interpretive path leads to particularly absurd results. As one example, under the circuit court's reasoning, a misleading phone call or voicemail made by a Wisconsin salesman would violate section 100.18(1) if the consumer happened to speak to the salesman or listen to the voicemail in Wisconsin, but not if she were on her cellphone in some other State. Similarly, a website advertisement would violate section 100.18(1) depending on the fortuity of where the consumer was located at the moment he viewed the ad. The circuit court appeared to implicitly recognize that absurdity by limiting the statute's reach to consumers who are Wisconsin "residents," but there is not even a whisper of such a residency requirement in the statute. And that reading creates its own absurdity: a Wisconsin company would be responsible for its misrepresentations only for Wisconsin residents (however those are defined) but not for Illinois residents visiting Wisconsin.

In not so limiting Wis. Stat. § 100.18(1), the Legislature chose wisely. A Wisconsin entity's misrepresentations are equally injurious whether they are received in Wisconsin or elsewhere, and the State's civil enforcement powers are the best mechanism to address Wisconsin companies' violations of law, including seeking injunctions and ensuring that they are complied with in Wisconsin courts. If a person or entity can limit the reach of its responsibility to misrepresentations that happen not to

cross state lines, the true scope of the illegal activity and harms caused by it cannot effectively be remedied.

The circuit court's interpretation would also create regulatory confusion for Wisconsin businesses that advertise or do business with consumers who happen not to be in Wisconsin. Presumably, the circuit court would say that a Wisconsin person or entity making a representation heard in Minnesota is governed by Minnesota's laws, even though the representations were disseminated in Wisconsin and even if the consumer made the eventual purchase in Wisconsin. So the company must comply with one set of laws for consumers it reaches in Wisconsin, and a different set of laws for consumers who hear or see the advertisements in Minnesota. That, too, makes no sense.

By its plain language, Wis. Stat. § 100.18(1) applies to misrepresentations made in Wisconsin by in-state businesses regardless of where the misrepresentation is received or whether the consumer is a Wisconsin resident. The circuit court erred in holding otherwise.

B. Federal case law supports interpreting Wis. Stat. § 100.18(1) to include representations that are received by consumers in other states, and the case relied on by the circuit court was an outlier.

In deciding the defendants' motion to reconsider, the circuit court relied almost entirely on one federal district court decision. The more persuasive federal cases, however, interpret the statute as applying to representations made or caused to be made in Wisconsin even if the communication is received by a consumer in another state.

In *T&M Farms*, the court misinterpreted the statute, and its holding was contrary to other federal district court decisions. *T&M* involved claims brought by cotton farms that purchased cotton pickers manufactured by Wisconsin

defendant CNH. *T&M Farms*, 488 F. Supp. 3d at 759. The court said that it could not say that CNH made deceptive representations about the pickers "in this state" because pickers were used exclusively by cotton farms, and there were no cotton farms in Wisconsin. *Id.* at 761.

The court's interpretation skipped a plain language reading altogether and jumped to relying on one of the purposes of the statute, "to protect Wisconsin residents from deceptive advertising." *Id.* The court believed that the only way to protect Wisconsin residents from out-of-state violators of Wis. Stat. § 100.18(1) was to have the statute apply depending on where the misrepresentation was received, not where it was made. *T&M Farms*, 488 F. Supp. 3d at 762.

As an initial matter, Wisconsin law requires courts to look first to text and turn to statements of legislative purpose only if the language is not plain. *Kalal*, 271 Wis. 2d 633, ¶ 49. Here, the language is plain.

But more relevant to the decision, the court misapplied even its purpose-oriented analysis.

First, section 100.18 does not have a single purpose. While *one* purpose of the statute is to protect Wisconsin consumers, the Wisconsin Supreme Court *also* recognizes that the statute is "intended 'to deter sellers from making false and misleading representations in order to protect the public.'" *Hinrichs v. DOW Chem. Co.*, 2020 WI 2, ¶ 49, 389 Wis. 2d 669, 937 N.W.2d 37 (quoting *Novell*, 309 Wis. 2d 132, ¶ 30). That is, the statute does not simply seek to protect Wisconsin consumers; it also seeks to prevent Wisconsin sellers from breaking the law and misleading or lying to potential purchasers. This purpose supports applying the law to in-state entities regardless of where the consumer is located when he receives the communication.

Second, the district court was mistaken in assuming it had to choose between protecting Wisconsin consumers from a violator wherever that violator is located or protecting consumers only from violators located in Wisconsin. But the statute covers both types of violations. The statute prohibits a company both from "mak[ing]" *and* "caus[ing] to make" a false representation.[6] A Wisconsin company like the defendants here makes its representations in Wisconsin; an Illinois company that places an ad in the Milwaukee State Journal "causes to make" a representation in Wisconsin to consumers located here.

Other federal district courts have disagreed with the analysis in *T&M*.

In *Le v. Kohl's Department Stores, Inc.*, 160 F. Supp. 3d 1096, 1114 (E.D. Wis. 2016) the court held that Wis. Stat. § 100.18(1) applies to a Wisconsin business, like Kohl's, even in cases where the advertising is seen by consumers in other states. A person in California saw misstatements made by Kohl's Department Stores, Inc., a Wisconsin business. *Id.* at 1115. Kohl's argued, just like the defendants here, that its misstatements were not "made" in Wisconsin because the consumer "saw" them in California. *Id.* The court began by analyzing the language of the statute as required by *Kalal*, holding that "the statute's language requires that actionable statements under the WDTPA [Wis. Stat. § 100.18] be 'made' in Wisconsin." *Id.* It then looked to the definition of "make," noting that "the ordinary meaning of the verb 'to make' is

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[6] The court also relied on an Attorney General opinion from 1928. *T&M Farms v. CNH Indus. Am., LLC*, 488 F. Supp. 3d 756, 762 (E.D. Wis. 2020), (citing 17 Op. Atty. Gen 194 (1928)). This one-page opinion, however, did not even interpret the relevant statutory language (at that time, Wis. Stat. § 343.413), but instead advised that a plaintiff would have to be able to obtain service on an agent in Wisconsin to bring such a suit.

'[t]o cause (something) to exist.'" *Id.* (quoting *Make*, Black's Law Dictionary (10th ed. 2014)). Thus, "even if [the plaintiff] 'saw' Kohls' allegedly deceptive statements in California, the advertisements that comprise the basis of [the plaintiff's] claims indeed were 'made,' and then 'disseminated,' by Kohls from its Wisconsin headquarters." *Id.*

The Northern District of Illinois analyzed the statute in a similar way in *Demitropoulos v. Bank One Milwaukee, N.A.*, 915 F. Supp. 1399 (N.D. Ill. 1996). That court held that Wis. Stat. § 100.18 "may be violated so long as the allegedly deceptive or misleading representation was 'ma[de], publish[ed], disseminate[d], circulate[d], or placed before the public, in [Wisconsin]' and the citizenship of the individual receiving the deceptive or misleading statement is of no consequence." *Id.* at 1415 (alteration in original).

The same is true here. The defendants are based in Cudahy, Wisconsin. As the jury found, Defendant Al Talyansky had knowledge of, and the ability to control, the representations at issue. (R. 292:2.) Thus, the advertisements were made and disseminated in Wisconsin, which is all that is required under Wis. Stat. § 100.18(1).

In sum, the courts in *Kohl's* and *Demitropoulos* correctly interpreted the text of Wis. Stat. § 100.18(1), while *T&M Farms*, the case relied on by the circuit court, erred. The circuit court here erred by relying on that decision.

C. Other states' authority supports applying Wis. Stat. § 100.18(1) to in-state businesses.

Other states have interpreted their deceptive-advertising laws to apply to in-state businesses even if they advertise in other states.

New York has a statute with similar language to Wisconsin's. Its law prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the

furnishing of any service *in this state*." N.Y. Gen. Bus. Law § 349(a). And as in Wisconsin, New York grants its attorney general the authority to seek an injunction for violations of this provision. N.Y. Gen. Bus. Law § 349(b). Similarly, New York law prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service *in this state*." N.Y. Gen. Bus. Law § 350. The attorney general likewise has the authority to enforce this deceptive-advertising law by seeking civil penalties. N.Y. Gen. Bus. Law § 350-d.

The New York courts interpret these provisions as applying to in-state businesses whose advertisements are seen in other states. In *People by Vacco v. Lipsitz*, 663 N.Y.S.2d 468, 470 (Sup. Ct. 1997), the New York attorney general sought to enforce its consumer laws against a business physically located in New York, alleging "that the business engaged in fraudulent and deceptive consumer sales practices targeting the world-wide Internet audience by methods involving the use, misuse and abuse of e-mail." The defendant argued that the laws did not apply to its advertising to other states, but the court held "there is no reason to exclude consideration of out-of-state complaints." *Id.* at 474. The court held that the statutes granted the attorney general the "clear authority to seek to restrain illegal business practice by a local business in relation to both in-state and out-of-state residents, notwithstanding that these practices occur on the Internet" and "no geographical restrictions upon the consumer complaints which properly serve as a basis for an enforcement action by the Attorney General." *Id.* The *Vacco* court relied on a prior decision that noted that "[a] state is damaged if its citizens are permitted to engage in fraudulent practices even though those parties damaged are non-residents of the state." *State by Abrams v. Camera Warehouse, Inc.*, 496 N.Y.S.2d 659, 660 (Sup. Ct. 1985).

Similarly, the Pennsylvania Supreme Court held that its unfair-trade-practices act allowed a non-resident consumer to bring a claim against an in-state business because there was no territorial limitation in the statutory language. *Danganan v. Guardian Prot. Servs.*, 179 A.3d 9, 16 (Pa. 2018). Similar to Wisconsin, its statute allowed claims to be brought by any "person," which was not limited to Pennsylvania residents. *Id.* This also "harmonize[d] with the statute's broad underlying foundation of fraud prevention." *Id.*

Other courts have similarly interpreted unfair-trade-practices acts or false-advertising acts to apply to in-state businesses' representations to out-of-state consumers. *See Thornell v. Seattle Serv. Bureau, Inc.*, 363 P.3d 587, 592 (Pa. 2015) (Washington consumer protection law "allow[s] claims for an out-of-state plaintiff against all persons who engage in unfair or deceptive acts that directly or indirectly affect the people of Washington"); *Kugler v. Haitian Tours, Inc.*, 293 A.2d 706, 711 (N.J. Super. Ct. App. Div. 1972) (holding that New Jersey's Consumer Fraud Act was "not confined by its terms [or] spirit to activities involving residents of this State" and instead "prohibits unlawful practices in New Jersey without limitation as to the place of residence of the persons imposed upon"); *Garner v. Healy*, 184 F.R.D. 598, 604 (N.D. Ill. 1999) ("under the [Illinois Consumer Fraud Act], any Illinois consumers, or any non-resident consumers, who purchased the allegedly misrepresented products that were marketed in Illinois within the relevant time period have standing to sue"); *In re Arby's Rest. Grp. Inc. Litig.*, No. 17-CV-0514, 2018 WL 2128441, at *18 (N.D. Ga. Mar. 5, 2018) (holding that Georgia's consumer-protection law provided a cause of action to out-of-state consumers against a Georgia defendant).

The same is true here. The State of Wisconsin has the power to stop in-state businesses from making misrepresentations in Wisconsin even if those misrepresentations go to consumers outside the state. The statute contains no residency or locational limitation on the recipients of the misrepresentation. As other courts have recognized, the State of Wisconsin would be damaged if its businesses are allowed to engage in misrepresentations even if the damaged parties are not located here.

D. The circuit court's legal error prevented the State from trying its full case, which requires a remand for a new trial.

The circuit court's legal errors necessitate a new trial. The circuit court prevented the State from offering testimony from consumers from outside the state about their experiences with the defendants; testimony regarding the parts supplied to the defendants that were then sold to consumers not in Wisconsin; testimony from suppliers involving sales that involved sales to customers in other states; and summary evidence showing overwhelming patterns of how the defendants undercounted the mileage on the parts the defendants sold. The State was left with a single witness whose experience, standing alone, was not enough to persuade a jury that the defendants' unusable product was the result of a misrepresentation about its age, condition, and testing rather than an error.

Because this exclusion was based on the circuit court's erroneous interpretation of section 100.18(1), it is legal error reviewed de novo and not a discretionary ruling. *See Palisades Collection LLC*, 324 Wis. 2d 180, ¶ 14 ("if an evidentiary issue requires construction or application of a statute to a set of facts, a question of law is presented and our review is de novo"). This Court should reverse the circuit court and remand for a new trial at which the State can

advance its claims under a correct understanding of section 100.18(1).

II. The State does not have to prove pecuniary loss in state enforcement actions, and the circuit court erred in adding that element to the jury instructions.

A. Pecuniary loss is not an element of a state enforcement action.

In addition to its incorrect rulings regarding the application of the statute to consumers located outside the State, the circuit court also erred in applying a model jury instruction intended for private causes of action to a civil enforcement action brought by the State. Wisconsin Stat. § 100.18(1) and (10r) include no reference to monetary or pecuniary loss, and the Wisconsin Supreme Court has held that the State need not prove pecuniary loss as one of the elements of the claim.

In *State v. American TV & Appliance of Madison, Inc.*, 146 Wis. 2d 292, 430 N.W.2d 709 (1988), in addressing the legal sufficiency of the claim under section 100.18(1), the court stated that "[t]here are two elements to this offense: There must be an advertisement or announcement, and that advertisement must contain a statement which is 'untrue, deceptive or misleading.'" *Id.* at 300. Under *American TV*, the State here was required to prove only two elements, and not pecuniary loss.

The circuit court relied on law applicable to the statute's private right to action. Courts have held that individual consumers asserting a violation of section 100.18(1) must show pecuniary loss caused by their reliance on the misrepresentation. That additional requirement was recognized in *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶ 38, 270 Wis. 2d 146, 677 N.W.2d 233, where the supreme court explained that Wis. Stat. § 100.18(1)

"provides a private cause of action for persons suffering a pecuniary loss as a result of a violation of the statute." The court held that this requirement for a "private cause of action" came from the language in Wis. Stat. § 100.18(11)(b)2., which states: "Any person *suffering pecuniary loss* because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including reasonable attorney fees." *Tietsworth*, 270 Wis. 2d 146, ¶ 38 (emphasis added) (quoting Wis. Stat. § 100.18(11)(b)2.). The court then explained that under the terms of that subsection, a private plaintiff must allege three things: (1) that the defendant "made an 'advertisement, announcement, statement or representation . . . to the public,' [2] which contains an 'assertion, representation or statement of fact' that is 'untrue, deceptive or misleading,' and [3] that the plaintiff has sustained a pecuniary loss as a result of the 'assertion, representation or statement of fact.'" *Id.* ¶ 39 (quoting Wis. Stat. § 100.18(1) and citing Wis. JI–Civil 2418).

In contrast to that private cause of action, the State does not need to show a pecuniary or monetary loss in an enforcement action because it does not proceed under subsection (11)(b)2. It proceeds under subsections (11)(a) or (d). Subsection (11)(a) provides that "[t]he department of agriculture, trade and consumer protection shall enforce this section. Actions to enjoin violation of this section or any regulations thereunder may be commenced and prosecuted by the department in the name of the state in any court having equity jurisdiction." Wis. Stat. § 100.18(11)(a). Subsection (11)(d) provides that the State "may commence an action in circuit court . . . to restrain by temporary or permanent injunction any violation of this section." Wis. Stat. § 100.18(11)(d). These subsections do not require the State to show a pecuniary or monetary loss.

Correspondingly, the two types of actions offer different remedies. In a civil enforcement action, the State may seek a variety of remedies, depending on the need to stop the conduct, punish the wrongdoing, and correct the harms already done. It may seek an injunction. Wis. Stat. § 100.18(11)(a), (d). It may seek forfeitures to punish the wrongdoing. Wis. Stat. § 100.26(4), (4m). It may also seek "the reasonable and necessary costs of investigation and an amount reasonably necessary to remedy the harmful effects of the violation" as well as attorneys' fees. Wis. Stat. § 100.263. And it also may seek restitution "to restore to any person any pecuniary loss suffered because of the acts or practices involved in the action, provided proof thereof is submitted to the satisfaction of the court." Wis. Stat. § 100.18(11)(d). The private cause of action, in contrast, allows the plaintiff to "recover such pecuniary loss" along with costs and attorneys' fees, with double damages in certain instances. Wis. Stat. § 100.18(11)(b)2.

Thus, in State enforcement actions, proving pecuniary loss is not an element of the claim. It is necessary only to establish an entitlement to restitution, to be proven "to the satisfaction of the court"—not a jury—when restitution is claimed as "to any person" for "any pecuniary loss suffered because of the acts or practices" alleged. *Id.* This makes sense because the State can seek relief that is not based on pecuniary loss, such as an injunction to stop violations and civil forfeitures. The whole point of an injunction is to allow the State to prevent harm from occurring before consumers suffer a pecuniary loss.

In summary, when the State enforces the statute pursuant to Wis. Stat. § 100.18(11)(a) or (d), whether its claims are under section 100.18(1), (10r), or any other subsection, it does not need to prove pecuniary or monetary loss as an element of its claims.

B. The circuit court denied the State any form of relief based on its incorrect interpretation of Wis. Stat. § 100.18.

The circuit court erred when it instructed the jury that the State had to prove that it "sustained a monetary loss as a result of the assertion, representation or statement" (R. 339:108) and submitted question 5 of the special verdict to the jury asking whether "any Wisconsin consumer sustain[ed] a monetary loss." (R. 339:105; 292:2.) Instructing the jury this way misinterpreted § 100.18 and failed to follow *American TV*.

The circuit court appears to have gone astray based on Wis. JI–Civil 2418. That jury instruction comes from Wis. Stat. § 100.18(11)(b)2., which states that "[a]ny person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including reasonable attorney fees." But *Tietsworth* made clear that this requirement is for a "private cause of action" under section 100.18(11)(b)2.—not one brought by the State under subsection (11)(d). 270 Wis. 2d 146, ¶¶ 38–39.

The circuit court attempted to distinguish *American TV* because of the procedural posture of the case, noting it was about "whether the trial court was correct in dismissing the Complaint in a case for the plaintiff having failed to state a claim upon which relief [can] be granted." (R. 339:85, App. 167.) Regardless of the procedural posture, the elements of a claim are the elements of a claim. *American TV* unequivocally stated the elements of a section 100.18(1) enforcement claim in which the State was the only plaintiff, and they did not include pecuniary loss. 146 Wis. 2d at 300. The court should have omitted the third element of Wis. JI–Civil 2418, as the parties had jointly agreed in their proposed jury instructions. (R. 273:2–3, App. 146–47.)

The circuit court's decision to include the monetary-loss element in its instructions prejudiced the State. The circuit court denied all relief for the Wis. Stat. § 100.18(10r) violations based on its erroneous view that the State needed to prove pecuniary loss. (R. 336:7–10, App. 195–98.) Thus, the State was denied relief—even an injunction forbidding any future misrepresentations of the type. The court never explained why pecuniary loss would be needed to enjoin future misrepresentations. The injunction's purpose is to prevent potential future pecuniary losses, and the State should not have to wait for a consumer to be harmed financially before seeking injunctive relief. And the timing of the court's decision was particularly prejudicial: it came after the close of the State's evidence. (R. 339:84–85, App. 166–67.)

The circuit court committed a reversible error of law when it instructed the jury that the State had to prove a monetary loss for its Wis. Stat. § 100.18(1) and (10r) claims. This Court should reverse and remand for a new trial.

CONCLUSION

The circuit court made fundamental legal errors interpreting Wis. Stat. § 100.18 that prejudiced the State and prevented it from trying its full case. This Court should reverse the circuit court's judgment and remand for a new trial.

Dated this 20th day of September 2022.

Respectfully submitted,

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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 9502 words.

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

Dated this 20th day of September 2022.

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