STATE OF WISCONSIN
COURT OF APPEALS
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.

On Appeal from the Circuit Court of Milwaukee County
Circuit Court Case No. 17-CX-04
The Honorable William Sosnay, Presiding

COMBINED BRIEF OF RESPONDENTS AND CROSS-APPELLANTS

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INTRODUCTION

The impact of the issues presented here go far beyond the confines of this case and are likely to impact any Wisconsin business. Whether the State of Wisconsin has the authority to regulate a company's activities beyond the boundaries of Wisconsin is a significant issue, and one of first impression in Wisconsin.

Here, the State alleges two errors of law:

(1) The circuit court held that Wis. Stat. §100.18 does not apply to misrepresentations made by a Wisconsin company but received and acted upon by consumers outside the state; and
(2) The circuit court required the State to demonstrate that someone suffered pecuniary loss as part of its claims under §100.18.

Neither of these determinations were in error and a new trial is not justified.

This case and its trial are remarkable for two reasons. First, the State's arguments in favor of this relief require a tortured reading of §100.18 by seeking extraordinary expansion of Wisconsin law requesting the statute be applied beyond the borders of Wisconsin, and regulating injuries occurring in other states. Second, the State is attempting to obtain a new trial where it presented only one Wisconsin consumer witness and the jury largely found no misrepresentations occurred in the first place.

With respect to the first issue, the State is seeking to improperly use its authority to dictate how companies in Wisconsin operate on a national level. The State was not prohibited from soliciting testimony of Wisconsin consumers or seeking relief on behalf of Wisconsin consumers, but rather, was prohibited from introducing testimony of out-of-state consumers who viewed and acted upon the representations outside Wisconsin. In disputing the circuit court's determination, the State is attempting to regulate how a Wisconsin company advertises anywhere in the country solely by virtue of the fact that the company has an office in Wisconsin from which advertising campaigns may emanate.

The State's interpretation of §100.18 is a clear overreach of State authority posing serious Constitutional and policy questions. Courts have routinely held that state laws do not have national application, that such application is an unconstitutional violation of the Commerce Clause, and that each state has an equal interest in establishing its own consumer protection laws which cannot be usurped by its neighbors.

To avoid these issues, the legislature expressly included a territorial limitation in the language of §100.18 requiring that the misrepresentation be placed before the public "in this state." Under this language it is clear that the State's attempt to pursue violations for supposed misrepresentations placed before the public in other states is not actionable.

Midwest[1] is not alone in its interpretation of §100.18, but its position has also been adopted by the Eastern District of Wisconsin and by the two circuit court judges in this case. Conversely, the State finds no support for its position in Wisconsin, and the very same arguments made in the State's briefing has been rejected throughout the Eastern District of Wisconsin. As a result, the circuit court properly limited application of §100.18 to advertising received by consumers in Wisconsin.

The State also seeks relief based on the circuit court's determination that pecuniary loss is a required element of §100.18. However, the circuit court was correct in determining that pecuniary harm is required. This result is supported by multiple Wisconsin Supreme Court opinions conclusively indicating that pecuniary loss is an element of §100.18.

Assuming an error existed, the State is not entitled to relief on these grounds because any error was harmless. The jury found Defendants' advertisements and sales quotes to Wisconsin consumers were not untrue, deceptive or misleading. (292:1, 2, App. 185-186 (Q.1. and Q.3)) Thus, the issue of pecuniary harm was largely never reached and did not impact the jury's verdict.

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[1] There are 21 Defendants, including one individual Alfred Talyansky, named in this case, which will collectively be referred to "Midwest" unless otherwise identified.

Further, claims under §100.18 are only actionable with respect to misrepresentations received in Wisconsin. Although one Wisconsin consumer testified at trial, there is no evidence in the record regarding their receipt of any misrepresentation. As a result, regardless of whether pecuniary loss is an element of this claim, the State has not established a violation.

Based on the foregoing, the circuit court appropriately limited the State's case to exclude transactions that occurred outside of Wisconsin and did not commit a material error in requiring pecuniary loss. Based on the jury verdict, this Court should deny the State's appeal.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Midwest is prepared to present oral argument if requested. Midwest respectfully requests that this opinion be published since there is no state decision interpreting the application of Wis. Stat. § 100.18 with respect to representations received outside of Wisconsin.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

Midwest collectively refers to the 20 limited liability companies named as defendants, and one individual, Alfred Talyansky. (R. 32.) Mr. Talyansky is currently a manager of Midwest Auto Recycling, LLC. (R. 337:103.) The predecessor company, Mid-City Auto Salvage, operated a salvage yard located in the City of Milwaukee. (*Id*.) In 1997, Mr. Talyansky's father started Mid-City, and in 1998, Mr. Talyansky began working at the salvage yard. (R. 337:104.) Mid-City procured most of its inventory of used auto parts through vehicle auctions. (*Id*.) The vehicles would be disassembled, and parts would be sold out of the Milwaukee location. (R. 337:105.)

Then came the Internet boom, and Mr. Talyansky and his father decided to change the business model of the company from selling used parts of an entire vehicle at one physical location to only selling a few types of used auto parts online. (R. 337:107.) In 2006, Mid-City was dissolved, and Midwest opened at a new location at 2100A East College Avenue, Cudahy, Wisconsin. (R. 337:102, 106-107.) Midwest focused entirely on online sales; specifically, remanufactured or used/salvaged engines and transmissions. (R. 74:1; 337:107.)

To expand the business, Midwest used various websites to advertise and sell these auto parts to people and businesses throughout the United States. (*Id*.) In 2018, Midwest, collectively, averaged 16,000-19,000 combined sales. (*Id*.) Most of these sales occurred outside Wisconsin, with only 1,400 sales in Wisconsin between June 23, 2014, through September 21, 2021. (R. 337:168; 299.)

On June 23, 2017, the State filed its Complaint. (R. 344.) On February 12, 2018, the State filed an Amended Summons and Complaint. (R. 32.) The State alleged Midwest made false, misleading, or deceptive statements to customers through website and other internet advertising. (*Id*.) The State sought civil forfeitures and pecuniary losses relating to these alleged violations. (R. 32:25.) On June 30, 2018, the State filed a Witness Disclosure, which contained the names of 427 customers alleged to have purchased a used engine or transmission from Midwest, 6 of which were in Wisconsin when receiving the advertising at issue. (R. 62.) On November 5, 2018, the State filed an Amended Witness List Disclosure that significantly reduced the number of witnesses, but still included mostly out-of-state customers. (R. 115.)

On July 24, 2018, the State filed a Motion for Temporary Injunction, which relied upon the testimony of out-of-state customers. (R. 68; 70.) On July 27, 2018, Midwest filed a Motion for Partial Summary Judgment as to Defendants' Extraterritorial Conduct, or Alternatively a Motion to Define Scope of State's Claims. (R. 72; 73.) The focus of the motion was to determine whether the State was able to enforce the Wisconsin Deceptive Trade Practices Act ("WDTPA" or "§100.18") outside of Wisconsin. (R. 73.)

On September 13, 2018, the circuit court denied Midwest's motion determining that there was no territorial limitation on claims under §100.18. (R. 102.) On September 24, 2018, the circuit court denied the State's Motion for Temporary Injunction. (R. 99.) On October 18, 2018, Midwest attempted an interlocutory appeal, which was denied on April 11, 2019. (R. 109; 148.)

On March 1, 2021, Midwest filed a Motion for Reconsideration of the Motion for Partial Summary Judgment as to Defendants' Extraterritorial Conduct arguing that since the 2018 summary judgment decision, new

authority within the Eastern District of Wisconsin had conclusively determined that Wis. Stat. § 100.18(1) does not apply to advertising received outside of Wisconsin. (R. 230-31; 231:2, Midwest App. 101-10.); *T&M Farms v. CNH Indus. Am., LLC*, 488 F. Supp. 3d 756, 761-62 (E.D. Wis. 2020). On April 19, 2021, the circuit court heard the Motion for Reconsideration, and relying upon *T&M Farms*, granted Midwest's Motion. (R. 246; 247.)

On October 6, 2021, Midwest filed a Memorandum of Remaining Trial Issues, since a judicial rotation resulted in Judge Sosnay being assigned to the case. (R. 259., Midwest App. 111-15.) In this Memorandum, Midwest argued that since the State could not (1) rely on representations encountered or acted upon outside of Wisconsin or (2) pursue forfeitures and restitution for these claims, that the State should also not be permitted to present a case based on testimony and evidence relating to Midwest's out-of-state transactions. (R. 259:2.) The State filed its own Memorandum, along with an Offer of Proof Regarding Seven of its Trial Witnesses. (R. 262; 264.) The State argued, in part, that it should be permitted to introduce evidence showing how "defendants' business practices operate on a large scale. . . ." (R. 262:5.) The State's Offer of Proof involved three different types of evidence. (R. 264.)

First, the State sought to introduce Jocelyn Henning whose testimony Midwest previously objected to, and two employees of one of Midwest's suppliers, who Ms. Henning relied upon in her "expert" report ("Henning Report").[2] (R. 159; 264; 267.) While the State argued Ms. Henning was a necessary trial witness, it was never a given that Ms. Henning would be permitted to testify since Judge Pocan had previously stated that the Henning Report may help the jury under Wis. Stat. § 910.06, but the State still had to figure out how this information would get before the jury. (R. 185:18-19.) Following the circuit court granting the Motion for Reconsideration,

[2] The "Henning Report" refers to a report prepared by Joceyln Henning, employee of Wisconsin Department of Justice, which included a spreadsheet summary compiled from a technologically complex process comparing over 10 million rows of data from documents produced in the litigation and use of formulas to obtain results.

Midwest challenged the relevancy of the Henning Report, since the State's claims were limited to representations made "in the state," and, the report would be unfairly prejudicial. (R. 267:5-6., Midwest App. 121-25.) The only objection to the two employees was they should not be permitted to discuss non-Wisconsin sales. (R. 267:9.)

The second piece of evidence the State sought to introduce was testimony of three out-of-state consumers. (R. 269:9-16.) The crux of the State's argument on why these three consumers should be allowed to testify was that the State prepared for trial relying on the circuit court's 2018 ruling on the unlimited "territorial" reach of Wis. Stat. § 100.18. (R. 264:10.) Midwest responded these three out-of-state witnesses were no longer relevant considering the circuit court's 2021 decision indicating that no claims could be brought based on out-of-state conduct. Thus, transactions that occurred in Ohio had no bearing on any actionable claims and this testimony would only appeal to the jury's "sympathies." (R. 264:13-16.)

The third type of evidence the State attempted to introduce was testimony from Midwest's website creator, Tony Mooneyham. (R. 264:16-17.) Midwest did not object to Mr. Mooneyham testifying, but requested that any costs associated be borne by the State. (R. 267:17.)

On November 8, 2021, the circuit court held a status conference to discuss the impact the Motion for Reconsideration had on the trial. Part of the discussion included whether the State was allowed to introduce evidence of out-of-state consumers, and the Henning Report. (R. 309:3-4.) The circuit court ultimately denied the State's request to introduce testimony of out-of-state witnesses, relying on Judge Adelman's decision in *T&M Farms*, 488 F. Supp. 3d at 761-62; (R. 309:9.) The court also stated it did not yet have the benefit of hearing from Ms. Henning, but surmised there could be hearsay or authentication issues. (R. 309:9.) Although the court did not expressly state that it would bar the Henning Report, the court indicated that the State could only present evidence relating to Wisconsin transactions. (R. 309:12.) Judge Sosnay further stated he believed the *T&M Farms*' decision "is still valid and I am going to apply it here." (R. 309:10.)

The jury trial commenced on November 29, 2021. The State called Mr. Talyansky as its first witness. (R. 337:101.) The State proceeded to call several other witnesses, including Engine & Transmission World employees, and only one Wisconsin witness, Joseph Koehler. (R. 338:70, 161, 212.)

At the conclusion of the trial, the jury entered a verdict. (R. 292.) The jury found Midwest's advertisements to Wisconsin consumers were not untrue, deceptive or misleading. (R. 292:1, App. 185 (Q.1.).) That the representations in sales quotes, during the period from June 24, 2014, to the present, to prospective Wisconsin customers were not untrue, deceptive, or misleading. (R. 292:2, App. 186 (Q.3.).) The jury concluded that four of Midwest's websites published a misrepresentation that the business behind the website was in a certain community or region when it was not. (R. 292:2, App. 186 (Q.2.).) However, the jury did not find that any Wisconsin consumer sustained a monetary loss caused by a representation for which jury answered "Yes" to in Questions No. 1, 2 or 3. (R. 292:2, App. 186 (Q.5.).) The jury also found that Alfred Talyansky had knowledge of, and the ability to control representations in Questions No. 1, 2 or 3. (R. 292:2, App. 186 (Q.4.).)

Both parties filed motions after verdict seeking costs, and both motions were denied. (R. 336:7-12.) The State also sought an injunction and forfeitures related to proving the violation of Midwest misrepresenting their business location in violation of Wis. Stat. §100.18(10r). (R. 317.) The circuit court denied this request. (R. 336:7-10.)

STANDARD OF REVIEW

The issues presented by the State, whether Wis. Stat. § 100.18 applies to representations made to out-of-state consumers and whether pecuniary harm is required, are matters of statutory interpretation which this Court reviews *de novo*. *State v. Gramza*, 2020 WI App 81, ¶ 15, 395 Wis. 2d 215, 952 N.W.2d 836. Whether evidence is properly excluded is ordinarily subject to an erroneous discretion review. *In re Commitment of Pletz*, 2000 WI App 221, ¶ 17, 239 Wis. 2d 49, 619 N.W.2d 97. However, where statutory interpretation is the basis for exclusion, *de novo* review applies. *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶ 13, 324 Wis. 2d 180, 781 N.W.2d 503.

Courts exercise "broad discretion in crafting jury instructions based on the facts and circumstances of the case." *Dakter v. Cavallino*, 2015 WI 67, ¶ 31, 363 Wis. 2d 738, 866 N.W.2d 656. Whether the circuit court erred "by stating the law incorrectly or in a misleading manner constitutes a question of law . . . but benefiting from, the analysis of the circuit court[.]" *Id*. ¶ 32. Finally, erroneous jury instructions only warrant reversal or a new trial when the error is prejudicial. *Id*. ¶ 33. Whether an alleged error is prejudicial is a question of law reviewed independently. *Id*.

ARGUMENT

I. The Plain Language of Wis. Stat. § 100.18 Provides a Cause of Action Only for Advertising Received Within Wisconsin

A. A Territorial Limitation Exists Under Wis. Stat. § 100.18

The State argues that it should be allowed to enforce Wis. Stat. § 100.18 ("§100.18" or "WDTPA") for actions occurring outside this State. However, the plain language of the statute does not grant the State this authority.

i. Statutory interpretation framework

When engaging in statutory interpretation, courts are to give effect to the legislature's intent as expressed by the plain language of the statute. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. In its interpretation, a court must defer to policy choices enacted by the legislature and presume that the legislative intent is expressed in the words of the statute. *Id*. The primary object of statutory interpretation is to give the statute its "full, proper and intended effect." *Id.* Courts must give each term its "common, ordinary, and accepted meaning" and should not render any term superfluous. *Id*. ¶ 45.

However, statutory language is not interpreted in isolation, but must also consider context. A contextual interpretation considers both the structure of the statute, and the surrounding legislation. Statutes must be given a reasonable construction to avoid absurd or unreasonable results. *Id.* ¶ 46; *In re Commitment of Gilbert*, 2012 WI 72, ¶ 56, 342 Wis. 2d 82, 816 N.W.2d 215. Finally, "courts must interpret statutes to avoid unconstitutional results." *In re A. P.*, 2019 WI App 18, ¶ 26, 386 Wis. 2d 557, 927 N.W.2d

560; *State v. S & S Meats, Inc.*, 92 Wis. 2d 64, 71, 284 N.W.2d 712 (Ct. App. 1979).

ii. The Relevant Text of Wis. Stat. § 100.18

In relevant part, Wis. Stat. § 100.18 provides: "No person, firm . . . shall make, publish, disseminate, circulate, or place before the public, [the deceptive advertisement] or cause, directly or indirectly, to be made, published, disseminated, circulated, or *placed before the public, in this state* . . . ." Wis. Stat. §100.18 (emphasis added). The plain language of §100.18 requires that a representation be "made, published, disseminated, circulated, or placed before the public" in Wisconsin before a violation exists. *Gilson v. Rainin Instrument, LLC*, No. 04-C-852-S, 2005 WL 955251, at *12 (W.D. Wis. Apr. 25, 2015).

The statute contains two clauses. The first clause lists the methods by which the prohibited conduct may occur stating, "make, publish, circulate, disseminate" etc. The second clause modifies the first and provides a territorial limitation applicable to each of the foregoing methods restricting application of the statute to those advertisements placed before the public in the State of Wisconsin. The phrase "in this state" is not ambiguous, and obviously refers to the state of Wisconsin. Further, this language modifies the phrase "place before the public" meaning that the offending representation must be placed before the public in Wisconsin. Therefore, the plain language of §100.18 does not focus on the advertiser's location, but on the location in which the advertising is received by the public. Consequently, §100.18 does not regulate advertisements placed before the public outside of Wisconsin.

The State argues that §100.18 only contains two elements, prohibiting anyone from (1) "making" or "causing" to be "made" "in this state" (2) an "advertisement" or other representation that contains "untrue, deceptive or misleading" statement. The State maintains that there is no requirement that the representation must be received by a Wisconsin resident or that the representation be received in Wisconsin.

Stated differently, the State's proposed definition of the word "make" involves only the creation of the representation and not the receiving of that

representation. (Appellant's Br. 24.) The State claims that the "advertisement is made in Wisconsin when the business creates it and then sends it out into the public." (*Id*.) The public being anybody that sees it, the location being irrelevant.

This interpretation runs contrary to the language of the statute and fails to give proper meaning to the requirement that the misrepresentation be placed before the public "in this state."

iii. Wis. Stat. § 100.18 Cannot be Applied Extraterritorially

Even if the State's interpretation of §100.18 were plausible, it would require Wisconsin courts to apply state law to conduct occurring outside of Wisconsin. Extraterritorial application of statutes is extraordinary and is presumptively impermissible. When tasked with determining the extraterritorial effect of a statute, the Wisconsin Supreme Court held that courts are to presume that a statute may not be extraterritorially applied absent clear statutory language authorizing such application. *Wis. Indus. Energy Grp., Inc. v. Pub. Serv. Comm'n*, 2012 WI 89, ¶ 46, 342 Wis. 2d 576, 819 N.W.2d 240 ("[t]he general rule, unquestionably, is that laws of a state have no extraterritorial effect."); *see also K-S Pharmacies, Inc. v. Am. Home Prods. Corp*., 962 F.2d 728, 730 (7th Cir. 1992) (discussing the "presumption of exclusive domestic application" based on states' lack of "any . . . power to reach outside their borders").

The State has pointed to no "clear statutory language" which expressly authorizes it to apply §100.18 to advertisements received by consumers outside Wisconsin. Instead, the State turns the presumption on its head and makes a lengthy argument essentially stating that the legislature could have inserted additional language into the statute indicating its intent for exclusive Wisconsin application. However, the legislature did evince a purely intrastate application when it inserted the phrase "in this state" into the statute. Further, no language is required to construe Wisconsin statutes as applying only to conduct within the State. Where, no clear statutory language indicates that extraterritorial application of §100.18 was intended, the State's interpretation should be rejected.

iv. The State's Interpretation Produces Unconstitutional Results

In addition to the above textual problems with the State's argument, allowing §100.18 to apply to any advertising emanating from Wisconsin violates the dormant commerce clause and must be avoided. *See In re A. P.*, 2019 WI App 18, ¶ 26. ("courts must interpret statutes to avoid unconstitutional results.").

In *Morley-Murphy Co. v. Zenith Elecs. Corp.*, 142 F.3d 373, 380 (7th Cir. 1998), the Seventh Circuit was tasked with determining whether the Wisconsin Fair Dealership Act ("WFDL") applied extraterritorially. While there were no territorial limitations in the statute (unlike §100.18) the Seventh Circuit still found that the WFDL did not apply to conduct occurring outside Wisconsin. *Id*. The *Morely-Murphy* Court concluded:

> We think, in light of both the presumption against extraterritoriality and the troublesome nature of the constitutional questions that would be raised if the WFDL reached beyond Wisconsin's borders, that the Wisconsin Supreme Court would construe the WFDL as not applying to Morley-Murphy's sales of Zenith products in Minnesota and Iowa.

Id. Specifically, the *Morley* court was concerned that applying the WFDL outside of Wisconsin "may adversely affect interstate commerce by subjecting activities to inconsistent regulations[.]" *Id*. at 379. Further, the court expressed concern with extraterritorial regulation generally stating, "[i]t is much more difficult to see why Wisconsin is entitled to insist that other states adhere to the same economic policy it has chosen . . . the state that has chosen more regulation could always trump its deregulated neighbor." *Id*. Thus, even though the plaintiff was a Wisconsin company, the court refused to apply Wisconsin law to the company's dealings in other states.

As in *Morley-Murphy*, this Court should determine that there is no legislative intent to apply §100.18 to a Wisconsin company's dealings outside of the state. If the State is permitted to seek recovery under §100.18 for conduct occurring outside Wisconsin, a complex web of overlapping regulation would be created. Each state has its own consumer protection laws offering

a wide and diverse range of protections.[3] The State itself admitted that "any recovery in Wisconsin for civil forfeitures does not preclude any other state from recovery for any supposed violations by the defendants under those state laws." (R. 78:9.) Under the State's interpretation, Wisconsin businesses would be placed in an impossible compliance scenario where any state could seek to impose forfeitures, restitution, injunctions, and other penalties for the same conduct. This is precisely the result the Seventh Circuit in *Morley-Murphy* sought to avoid and is the type of policy which would create unreasonable conditions for any Wisconsin business. Therefore, this Court should preclude the State from attempting to set national policy and refuse to apply §100.18 to advertisements received outside Wisconsin.

v. The State Does Not Have Standing to Assert Claims Under Wis. Stat. § 100.18 for Conduct Occurring Outside the State of Wisconsin

Regardless of whether §100.18 textually could be construed to apply extraterritorially, the State's power to enforce such laws begins and ends at the border of Wisconsin. No Wisconsin case law exists where the State has attempted to bring suit seeking recovery based on conduct and injuries occurring outside Wisconsin; this is because the State plainly lacks standing to represent non-residents injured outside its borders.

The Wisconsin Supreme Court outlines a three-part inquiry to the issue of standing:

> (1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a 'personal stake' in the controversy); (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and (3) whether judicial policy calls for protecting the interest of the party whose standing has been challenged.

Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n. Inc., 2011 WI 36, ¶ 5, 333 Wis. 2d 402, 797 N.W.2d 789.

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[3] *See Consumer Protection in the States*, Nat'l Consumer L. Ctr. (2018), https://www.nclc.org/wp-content/uploads/2022/08/udap-appC.pdf. (Midwest App. 354-456.)

Further, where a statute is at issue, "a court determines these three aspects of standing by examining the facts to determine whether an injured interest exists that falls within the ambit of the statute." *Id*. Additionally, "standing depends not only on the allegation of a sufficiently personal stake or interest . . . but also on a showing of a 'logical nexus between the status asserted and the claim sought to be adjudicated.'" *State ex rel. First Nat. Bank of Wis. Rapids v. M & I Peoples Bank of Coloma,* 95 Wis. 2d 303, 309, 290 N.W.2d 321 (1980) (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1968)).

In this case, the State is authorized to bring suit "in the name of the state" for any violation of §100.18. Wis. Stat. §100.18(11)(d). The State may not bring suit in any other capacity than its official sovereign status as the State of Wisconsin. To assert standing in a state enforcement action, the State must "articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party, [and] [t]he State must express a quasi-sovereign interest." *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). Although a state has a sovereign interest in the health and well-being of its residents, the state has no sovereign interest in the health and well-being of those outside its borders. *Id.*; *In re Fluidmaster, Inc., Water Connector Components Prods. Liab. Litig.*, No. 14-CV-5696, 2017 U.S. Dist. LEXIS 48792, at *116 (N.D. Ill. Mar. 31, 2017) (quoting *Darisse v. Nest Labs, Inc.*, No. 5:14-CV-01363-BLF, 2016 U.S. Dist. LEXIS 107938, at *15 (N.D. Cal. Aug. 15, 2016)) ("Each consumer's home state 'ha[s] a compelling interest in protecting their consumers from in-state injuries caused by an out-of-state company doing business within their borders, and in setting the scope of recovery for consumers under their own laws.'").

To hold otherwise would empower the State to use its jurisdiction over Wisconsin companies operating in any other state to shape policy and enforcement on a national level. It is well-settled that such powers and policy decisions are necessarily left to the federal government and the respective states in which the conduct occurred. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 559 (1996) ("Principles of state sovereignty and comity forbid a State to enact policies for the entire Nation, or to impose its own policy choice on neighboring States.").

This conclusion is confirmed by the notable absence of any precedent in which the State of Wisconsin has brought suit on behalf of non-residents injured out of state. *See State v. Amoco Oil Co.*, 97 Wis. 2d 226, 231-33, 293 N.W.2d 487 (1980) (in this case, the State sought to enforce §100.18 only with respect to advertisements viewed in Wisconsin even though Amoco operated nationwide); *State v. Going Places Travel Corp.*, 2015 WI App 42, ¶¶ 10-13, 362 Wis. 2d 414, 864 N.W.2d 885 (again, the State only represented Wisconsin residents). Based on the foregoing, even if §100.18 could reach outside Wisconsin, the State lacks standing to bring suit on behalf of out-of-state consumers and is not entitled to relief.

vi. The State Is Not Permitted to Seek Forfeitures and Restitution for Acts that Occurred Out of State

The State argues it is entitled to a new trial, because it believes that it should have been permitted to introduce testimony of out-of-state consumers and that it can recover forfeitures and restitution on behalf of out-of-state consumers. Allowing the State to recover penalties on behalf of non-residents for conduct occurring out-of-state effectively prevents injured states from protecting their own consumers and collecting funds that should go to their state's initiatives aimed at protecting victims of the alleged conduct. Thus, the State of Wisconsin is not the proper party to redress alleged harms to consumers in other jurisdictions.

This is particularly problematic where courts have employed claim preclusion to bar private claims following public enforcement actions. As scholars note, "[a]lthough the case law on the preclusive effect of public aggregate litigation is surprisingly sparse, the prevailing view is that the judgment in a state case is binding 'on every person whom the state represents as parens patriae.'" *See* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 500 (2012) (quoting Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 Fordham L. Rev. 361, 384 (1999)).[4]

[4] *See also Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993) ("When a state litigates common public rights, the citizens of that state are represented in such litigation by the state and are bound by the judgment."); *Brown & Williamson Tobacco*

Where the State seeks to use its power to represent aggregate claims that would otherwise require the involvement of other state's Attorney Generals (or other relevant offices), serious deficiencies are present and the State of Wisconsin is not an appropriate representative of out-of-state consumer interests.

Even if these issues did not exist, a state may not punish conduct occurring outside its borders. *State Farm Mut. Auto Ins. Co. v. Campbell*, 583 U.S. 408, 421-22 (2003).[5] As the United States Supreme Court stated,"[n]or, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside the State's jurisdiction." *Id*. (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985)); *see also BMW of N. Am., Inc*., 517 U.S. at 572 ("[T]he economic penalties that a State inflicts on those who transgress its laws, whether the penalties are legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and economy, rather than those of other States or the entire Nation."). As a result, this Court should find that the State cannot seek forfeitures or damages to punish conduct occurring in other states.

B. Recent Federal Cases Soundly Reject the State's Interpretation of Wis. Stat. § 100.18

Corp. v. Gault, 627 S.E.2d 549, 554 (Ga. 2006) (barring claims following settlement between the tobacco companies and the states acting as parens patriae); *Bonovich v. Convenient Food Mart, Inc.*, 310 N.E.2d 710, 711 (Ill. App. Ct. 1974) (ruling that defeat of an antitrust action brought by the attorney general under state law barred a similar action by a private party); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769 (9th Cir. 1994) (precluding private claims following public enforcement settlement).

[5] Other courts have also interpreted *State Farm* to require in state conduct before awarding punitive damages. *See Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1370 (Fed. Cir. 2003) ("Thus, the Supreme Court focused on where the conduct being punished occurred, not the conduct itself."); *Spaulding v. Tate*, Civil Action No. 3: 11-18-DCR, 2012 U.S. Dist. LEXIS 125669, at *17 (E.D. Ky. Sept. 5, 2012); *Ray v. Ford Motor Co.*, No. 3:07cv175-WHA-TFM (WO), 2011 U.S. Dist. LEXIS 143121, at *14 (M.D. Ala. Dec. 13, 2011) ("United States Supreme Court precedent limits punitive damage awards against defendants to the extent that defendant's conduct affected the victim's home state.").

Both parties acknowledge that there is no Wisconsin decision determining the proper scope of §100.18 as it relates to the issues in this case. However, federal courts within the Eastern District of Wisconsin have examined the exact issues presented in this case and have determined that §100.18 does not apply to representations received outside of Wisconsin. These courts have also examined the exact arguments raised by the State and have concluded that advertising emanating from Wisconsin is insufficient to state a claim under §100.18.

i. T&M Farms *Considered and Rejected the State's Arguments*

In *T&M Farms*, the Eastern District held that advertisements technically created in Wisconsin but received by consumers in other states could not be pursued under §100.18. *T&M Farms v. CNH Indus. Am., LLC*, 488 F. Supp. 3d 756 (E.D. Wis. 2020).

The Plaintiffs, T&M Farms and P&J Farms, were cotton farms located in Arkansas and Alabama, respectively. *Id*. at 759. Defendant, CNH, headquartered in Racine, Wisconsin, built cotton harvesting equipment purchased by plaintiffs. *Id.* Each farm purchased cotton harvesters through CNH's independent dealers located across the country. *Id*. A dispute arose as to whether the cotton pickers performed as expected resulting in the plaintiffs filing suit alleging violation of the WDTPA. *Id*. Specifically, the plaintiffs alleged that CNH's representations that its cotton harvester was reliable and would yield cost savings were false and amounted to violations of the WDTPA. *Id.* at 760.

As in this case, the defendants in *T&M Farms* sought dismissal arguing that, "the statements at issue are not subject to the Wisconsin DTPA because plaintiffs encountered the statements and acted on them outside of Wisconsin." *Id*. Plaintiffs refuted this argument noting that the advertisements were created at CNH's headquarters in Wisconsin, thus visible in Wisconsin. *Id*. Judge Adelman began his analysis by considering whether the WDTPA applied to defendant's marketing of the cotton pickers. *Id*. at 762-63.

Judge Adelman, like the circuit court here, focused his analysis on the same basic structure and meaning of §100.18. *Id*. at 759-63. Judge Adelman found that the deceptive representations were not made "in this state" since the representations at issue were made to consumers outside the state. *Id.* at 762. Much like the State has argued in this case, plaintiffs in *T&M Farms* argued that because defendant's corporate headquarters was located in Racine, Wisconsin, that the WDTPA was applicable. *Id*. at 761. Specifically, plaintiffs argued that the statute "turns on the physical location of the person who makes the allegedly deceptive statements or causes them to be made, rather than on the geographic area in which the statements are encountered by the public." *Id*.

Judge Adelman rejected plaintiffs' argument concluding that plaintiffs' interpretation "fails to place the relevant language in context and to read it in the light of the statute's overall purpose." *Id.* He determined, "[n]othing in §100.18(1) suggests that its purpose is to regulate advertisers who are physically located in Wisconsin but who advertise elsewhere. To the contrary, its purpose is to protect Wisconsin residents from deceptive advertising." *Id*. (citing *K&S Tool & Die Corp. v*. *Perfection Mach*. *Sales, Inc*., 2007 WI 70, ¶ 35, 301 Wis.2d 109, 732 N.W.2d 792 ("the purpose of the DTPA includes protecting Wisconsin residents from untrue, deceptive, or misleading representation made to induce action")).

Judge Adelman determined the statutory purpose and language of the WDTPA precluded its application to advertisements made outside the state reasoning:

> An advertiser who is physically located outside of Wisconsin can make deceptive representations to Wisconsin residents or cause such representations to be made to residents here. Thus, to achieve the DTPA's statutory purpose of protecting Wisconsin residents from deceptive advertising, the phrase "in this state" must be understood as referring to the location of the *advertising* rather than the *advertiser*.

Id. at 762 (citing 17 *Op. Wis. Atty. Gen*. 194 (1928)) (emphasis in original). Judge Adelman went on to determine that, "[a] person who disseminates deceptive advertising to Wisconsin residents is a person who violates §100.18(1), no matter where that person is physically located at the time the advertising is disseminated." *Id*. Ultimately, "because 'in this state' refers to

the location of the advertising rather than the advertiser, advertising in other states is not actionable under the DTPA, even if the advertiser is physically located here." *Id.*

Judge Adelman distinguished *Le v. Kohls Dep't Stores, Inc*., and did not agree with the *Le* Court's definition of the term "make." *Id.* (citing 160 F. Supp. 3d 1096 (E.D. Wis. 2016)). He rejected the *Le* analysis because it failed to consider "how the word 'make' and the phrase 'in this state' interact with § 100.18(1)." *Id.* In rejecting *Le*, Judge Adelman once again focused on the location of the advertisement, not the location of the advertiser. He found that the only reasonable interpretation of the statutory terms "in this state" combined with the word "make" requires that "a person 'makes' a marketing statement 'in this state' when the person causes the advertising to exist in this state, not when a person in this state causes the advertising to exist somewhere else in the world." *Id.*

Plaintiffs attempted to escape this conclusion based upon the fact that CNH "marketed the [cotton harvester] on its website and in agricultural magazines" which were available to Wisconsin consumers. *Id.* Although Judge Adelman conceded that "anyone in Wisconsin could have viewed CNH's website or obtained the agricultural publications through the mail[,]" he nonetheless concluded that the WDTPA did not apply to online advertisements viewed by consumers outside the State of Wisconsin. *Id*. As he explained, the plaintiffs' broad interpretation would create "absurd results, in that it would subject every person who advertises on the Internet or in publications to the Wisconsin DTPA, even if the advertising is unlikely to reach Wisconsin residents." *Id.*

There is no material distinction between the reasoning in *T&M Farms* and the present case. Therefore, this Court should apply *T&M Farms* and preclude application of §100.18 to advertising received outside of Wisconsin.

ii. Recent Federal Case Law Supports T&M Farms*' Decision*

To avoid the rationale of the persuasive *T&M* Farms decision, the State has attempted to characterize the case as an "outlier." However, Judge Adelman is not alone in his opinion. Rather, multiple cases have now been decided in

the Eastern District of Wisconsin confirming that §100.18 does not apply to representations received outside Wisconsin. For example, another case issued on September 15, 2022, *Hydraulics Int'l, Inc. v. Amalga Composites, Inc*., No. 20-CV-371, 2022 WL 4273475 (E.D. Wis. Sept. 15, 2022), analyzed whether plaintiff, a Utah company, could assert a claim against defendant, a Wisconsin company under § 100.18. *Id*. at *6.

In August 2017, plaintiff purchased numerous fiberglass wound spools that were cracked, and any portion that could be reused resulted in issues with the components. *Id*., at *1. Plaintiff filed suit alleging various causes of action including §100.18. *Id*. Defendant's file a motion on whether §100.18 applied to statements that plaintiff only heard or read in Wisconsin. *Id*. The Court determined that the "only portion of the statute that suggests its geographical scope is the phrase 'in this state." *Id*. at *7. Finding the "verbs that precede it 'make, publish, disseminate, circulate, or place before the public'—specify what must occur 'in this state' for someone to run afoul of the statute." *Id.*

The Court referenced all relevant cases that have analyzed §100.18.[6] The analysis included *T&M Farms* decision that held that the primary purpose of §100.18 is to "protect Wisconsin residents from deceptive advertising" not regulate advertisers "physically located in Wisconsin but who advertise elsewhere." *Id*. at *7 (citing *T&M Farms*, 488 F. Supp. 3d at 761). However, the Court was critical of *T&M Farms* for potentially leaving the door open for an exception to application of §100.18 by potentially allowing claims where a Wisconsin consumer could have been misled by the advertising. *Id*. While Midwest does not interpret *T&M Farms* as creating this exception, the Court's decision unequivocally stated any application of §100.18 to consumers receiving the advertising in other states was not permissible. The Court indicating that allowing such claims would expand the scope of the statute far beyond what the legislative intent was—to protect Wisconsin consumers—and that the statute does not "protect consumers located

[6] *Hydraulic*'s decision cites to *Le v. Kohls Department Stores, Inc*., 160 F. Supp. 3d 1096 (E.D. Wis. 2016), *Demitropolous v. Bank One Milwaukee, N.A.*, 915 F. Supp. 1399 (N.D. Ill. 1996), *T&M Farms v. CNH Indus. Am*., *LLC*, 488 F. Supp. 3d 756 (E.D. Wis. 2020), *Jou v. Kimberly-Clark Corp*., No. C-13-03075 JSC, 2013 U.S. Dist. LEXIS 173216 (N.D. Cal. Dec. 10, 2013).

anywhere from deception by a Wisconsinite or a Wisconsin business." *Id.* at *8.

C. Other States' Authority Relating to Application of Consumer Protection Laws

The State has cited to several cases from other jurisdictions that have interpreted whether false advertising statutes apply to out-of-state consumers. The inherent problem with these cases is that, unlike the Eastern District opinions, the State's citations do not interpret Wisconsin law, but interpret the statutes of other states. These statutes often contain no territorial limitations, contain materially different language, and do not involve the same arguments that are at issue in this case.

i. Other States Interpreting Wis. Stat. § 100.18 Have Rejected the State's Arguments

In the rare cases where other states have interpreted §100.18, those courts have also rejected the State's interpretation.

For example, in *Jou v. Kimberly-Clark Corp.*, No. C-13-03075 JSC, 2013 U.S. Dist. LEXIS 173216, at *45 (N.D. Cal. Dec. 10, 2013), the district court held that the WDTPA only applies to advertisements received in Wisconsin. In that case, the court was tasked with determining whether California plaintiffs who purchased products in California could pursue a claim under the WDTPA since those products and associated advertising were created in and were emanated from a Wisconsin corporation. *Id*. at *42, *44. Plaintiffs argued "that Wisconsin's consumer protection law applies in this action because the WDTPA "focuses on where the deceptive label is made and enters the stream of commerce." *Id*.

The *Jou* Court disagreed stating that:

> The plain language of the WDTPA forecloses plaintiffs' argument . . . the WDTPA does not 'focus' on where the deceptive label is made and enters the stream of commerce; rather, the statute forbids the making, publishing, disseminating, circulations, or placing before the public an untrue or misleading advertisement . . . *in Wisconsin*."

Id. at *46 (emphasis in original) (citing *Calnin v. Hilliard*, No. 05-C-1092, 2008 WL 336892, at *13 (E.D. Wis. Feb. 5, 2008) and *Force v. ITT Hartford Life & Annuity Ins. Co.*, 4 F. Supp. 2d 843, 857-58 (D. Minn. 1998)). Specifically, the district court held that "a Wisconsin corporation does not violate the statute if it creates a deceptive label in Wisconsin and then places the label in a publication outside of Wisconsin; the deceptive label must be placed before the public in Wisconsin." *Id*.

ii. Other States Interpreting Consumer Protection Laws Have Rejected the State's Interpretation

A litany of other cases interpreting state statutes have also refused to apply those laws to out-of-state conduct and advertising.

While not examining §100.18, recent federal court case analyzed whether New York's false advertising statute, General Business Law ("GBL") could be applied extraterritorially. *Chung v. Igloo Prods. Corp*., No. 20-CV-4926 (MKB), 2022 WL 2657350 (E.D.N.Y. July 8, 2022). Notably, the State spends a substantial portion of its briefing analogizing the GBL to §100.18 and attempting to demonstrate that the GBL is applied extraterritorially. Regardless of the similarities between the GBL and §100.18, recent New York authority defeats the State's argument.

In *Igloo*, plaintiffs commenced a class action against Igloo alleging that the portable ice coolers did not perform as advertised. *Id*. at *1. Plaintiffs alleged various claims, including violation of GBL. *Id*. at *3. The GBL prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service *in this state*." *Id*. at *7 (emphasis added). The *Igloo* Court dismissed plaintiffs' GBL claim finding that there is "a 'territorial' element to claims under sections 349 and 350." The *Igloo* Court found that New York Court of Appeals has interpreted the limiting phrase 'in this state' to require that 'the transaction in which the consumer is deceived must occur in New York.*" Id.* at *8 (citing *Goshen v. Mut. Life Ins. Co. of N.Y*., 98 N.Y.2d 314, 324 (2002)). The *Igloo* Court also clarified that GBL's purpose is not to "protect New York residents solely based on their residency; they are intended to police consumer transactions that 'take place in New York State, regardless of residency." *Id*. (quoting

Goshen, 98 N.Y.2d at 325). This reasoning was also adopted by *4 K&D Corp. v. Concierge Auctions, LLC*, 2 F. Supp.3d 525, 547 (S.D.N.Y. 2014).

The court determined the territorial requirement is not where the allegedly deceptive statements emanated, but where the consumer viewed and acted upon it. *Igloo,* 2022 WL 2657350 at *9 (citing *Sharpe v. Puritan's Pride, Inc.*, No. 16-CV-6717-JD, 2019 WL 188658, at *3-4 (N.D. Cal. Jan. 14, 2019)).

In *Sharpe*, defendants supplied vitamins and health supplements to consumers across the United States. *Sharpe*, 2019 WL 188658, at *1. Plaintiffs pled violations of California consumer statutes, and New York's GBL. *Id*. at *1-2. Relying on New York decisions, the *Sharpe* Court found the language "in this state" applies to transactions in which the consumer is deceived must occur in New York and cannot just originate from there.[7] *Id*. Therefore, the *Sharpe* Court dismissed the GBL claim. *Id*. at *4.

In another recent New York case, *Jenkins v. Trustco Bank*, No. 1:21-cv-238 (GLS/ATB), 2022 WL 3371131 (N.D.N.Y. Aug. 16, 2022), the court dismissed plaintiff's GBL claim even though plaintiff asserted defendant's headquarters was in New York. The plaintiff attempted to rely on *Cruz v. FXDirectDealer, LLC*., 720 F.3d 115, 123-24 (2d Cir. 2013), which allowed a Virginia plaintiff to pursue a GBL claim, because the governing law and forum selection clause in the contract required all suits be adjudicated in New York state or federal court. The *Jenkins* Court distinguished the *Cruz* decision, because the *Cruz* Court found the plaintiff satisfied the territorial limitation since the agreement was governed by New York law. *Jenkins,* 2022 WL 3371131 at *3. The *Jenkins* court found the plaintiffs did not satisfy the territorial requirement of GBL, because other than the defendant creating a deceptive scheme and maintaining a principal place of business in New York, no additional facts were pled. *Id*.

[7] *Sharpe* Court relied upon *Goshen v. Mutual Life Ins. Co. of N.Y.,* 98 N.Y.2d 314, 324 (2002) and *Cruz v. FXDirectDealer,LLC*, 720 F.3d 115 (2d Cir.2013).

Based on the foregoing, to the extent this Court considers cases outside Wisconsin state and federal courts, there is no support for the State's interpretation.

iii. The Foreign Cases Relied Upon by the State Are Distinguishable and Unhelpful

Although this Court need not consider cases outside Wisconsin state and federal courts, the plethora of foreign cases cited by the State are distinguishable.

As an initial matter, the only foreign case cited by the State addressing §100.18 is *Demitropoulos v. Bank One Milwaukee, N.A.*, 915 F. Supp. 1399, 1405 (N.D. Ill. 1996). Like the New York *Cruz* case, *Demitropoulos* involved a forum selection clause selecting Wisconsin law. In *Demitropoulos*, plaintiff had entered into a lease at a local car dealership in Illinois. *Demitropoulos*, *Id*. at 1405. The leasing bank, Bank One, was located in Wisconsin. *Id*. The lease form contained a choice of law clause that required disputes to be governed by Wisconsin law. *Id*. at 1413.

After determining that Wisconsin law would apply, the court addressed defendant's argument that §100.18 "does not protect nonresidents of Wisconsin." *Id.* at 1414. The Court analyzed several cases discussing the statutory objectives of §100.18 and concluded that no case law held that the statute only afforded protection to state residents. *Id*. at 1414-15. The parties never raised the issue of whether a territorial limitation is imposed by the language "in this state," and the court did not address it. Further, because the parties expressly agreed to apply Wisconsin law to the dispute, defendant likely had waived or was estopped from making any argument that Wisconsin law could not be enforced regardless of where the conduct occurred. Therefore, the *Demitropoulos* decision does not support the State's interpretation of §100.18 having extraterritorial application.

The State also relies upon a variety of cases interpreting the consumer protections of other states. However, each case is distinguishable and falsely equates §100.18 with materially different statutory language of other jurisdictions.

The State's citation to *State by Abrams v. Camera Warehouse, Inc*., 496 N.Y.S.2d 659 (Sup. Ct. 1985), is unhelpful. The *Camera Warehouse* case involved interpretation of New York General Business Law § 518, which prohibited surcharges for credit card transactions and had no territorial limitation language. *Id.* at 660.[8] Ultimately, the court never addressed any language similar to § 100.18 in its decision, and the statute at issue was later found to be unconstitutional in *People v. Fulvio*, 517 N.Y.S.2d 1008 (Crim. Ct. 1987).

The State also cites to, *People by Vacco v. Lipsitz*, 663 N.Y.S.2d 468 (Sup. Ct. 1997). In *Vacco*, the New York Attorney General alleged there were numerous complaints concerning a New York magazine supplier, who amongst other allegations, including "spamming," failing to deliver magazines after a subscription was purchased. *Id*. at 470-71. The alleged acts occurred over the internet; however, the location of the sender was in New York. As a result, the court determined that New York had jurisdiction to include out-of-state complaints. *Id*. at 472-74. However, the *Vacco* Court relied upon the *Camera* case, which had found "the plain meaning of the language indicates the Legislature intended that all consumers be protected from illegal practices regardless of their residency. . . ." *Id*. at 474. (citing *Camera Warehouse*, 496 N.Y.S.2d at 660). Subsequently, the statute at issue in *Camera*, was found unconstitutional. *Id*. at 475. The *Vacco* Court also acknowledged the case was one of "nationwide first impression." *Vacco*, 663 N.Y.S.2d at 470.

Since *Vacco* was decided, multiple courts have issued contrary decisions interpreting New York law including *Goshen*, 98 N.Y.2d at 326.[9] The *Goshen* Court held that GBL limiting language of "in this state" required the misrepresentation to occur in the relevant state. *Id.* (holding "the intent is

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[8] N.Y. Gen. Bus. Law § 518 provides,

> No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means. Any seller who violates the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or a term of imprisonment up to one year, or both.

[9] *See also Igloo*, 2022 WL 2657350; *Jenkins*, 2022 WL 3371131.

to protect consumers in their transactions that take place in New York State"). The Court went on to indicate the GBL "was not intended to police the out-of-state transactions of New York companies . . . any deception took place in Florida, not New York." *Id*. Thus, the New York precedent cited by the State is outdated and at best, establishes New York Courts do not agree as to how the GBL should apply.

The State then cites to *Danganan v. Guardian Prot. Servs.*, 179 A.3d 9, 16 (Pa. 2018). This case involved an out-of-state consumer filing suit against an in-state security company alleging violation of Pennsylvania's Unfair Trade Practices law. *Id*. at 10. Additionally, this case involved a contractual choice of law clause. *Id*. The Court ultimately applied Pennsylvania law to out-of-state conduct and determined the statute had no territorial limitation. *Id*. at 11-12. The statute's language expressly states it applies to conduct "wherever situate, and includes any trade of commerce directly or indirectly affecting the people of this Commonwealth." *Id*. at 10.[10] In other words, there was no geographic limitation in the Pennsylvania statute, and it contemplates regulation of conduct which indirectly affects the Commonwealth. This case is distinguishable from § 100.18, which does contain an express territorial limitation and does not contemplate regulation indirectly affecting Wisconsin.

The State next cites to *Thornell v. Seattle Serv. Bureau, Inc.*, 363 P.3d 587 (Wash. 2015). This case involved a plaintiff who was a Texas resident alleging defendant sent debt collection letters in violations of Washington Consumer Act. *Id.* ¶ 2. Although the court permitted regulation of out-of-state conduct, this case is again clearly distinguishable as Washington's statute and Wisconsin's §100.18 are very different. The Washington statute permits regulation of "any commerce directly or indirectly affecting . . ." the

[10] The Pennsylvania UTPCPL applies to "trade" and commerce" which are defined to include "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth." 73 Pa. Stat. and Cons. Ann. § 201-2 (West 2020). ‼

Commonwealth. *Id*. ¶ 10.[11] Further, the Washington courts relied upon existing Washington case law that had applied the statute to out-of-state commerce, which does not exist in this case.

The State relies upon *Kugler v. Haitian Tours, Inc.*, 293 A.2d 706 (1972). In this case the Defendant was a New Jersey Company that offered divorce packages in Haiti which would allegedly be recognized in the United States. *Id.* at 707. However, complications arose when the divorces were not recognized. The New Jersey Attorney General sued defendant under the New Jersey consumer fraud statute. *Id*.[12] However, New Jersey law is not analogous to § 100.18, and contains no territorial limitation.

The State also relies upon *Garner v. Healy*, 184 F.R.D. 598 (N.D. Ill. 1999). The facts are completely inapposite. *Garner* is a class action certification case, where plaintiff alleged defendant sold non-wax products as wax. *Id.* at 599. Defendants argued the named plaintiffs could not sue under state consumer laws in Illinois, Ohio or Connecticut because they did not purchase products in those states. *Id*. at 603. The Court recognized that, "This disagreement is not subject to a simple legal resolution." *Id*. at 604. With respect to whether out-of-state consumers can sue under Illinois consumer protection laws, the court stated, "conflicting interpretations of the ICFA have caused a split of authority within this district over application of the ICFA to consumers who are not citizens of Illinois." *Id*. With little

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[11] The relevant statutory language examined by the court allows regulation of trade and commerce defines as, "(2) "Trade" and "commerce" shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." Wash. Rev. Code Ann. § 19.86.010 (West 2022).

[12] The New Jersey Statutes at issue prohibits:

> The act, use or employment by any person of any commercial practice that is unconscionable or abusive, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise . . . whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

N.J. Stat. Ann. § 56:8-2. The term "merchandise" shall include any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale. N.J. Stat. Ann. § 56:8-1.

discussion, the Court concluded it would allow the claims at this stage of the case, but there was no certainty on whether the other state's laws would apply. *Id*. However, "Defendants have not provided this Court with any case law that would prohibit the application of the Ohio or Connecticut consumer fraud statutes to non-resident consumers[.]" *Id*. The Court allowed the claims to go forward "at this stage in the proceedings" and granted the motion for class certification. The Court did not state out-of-state consumers were categorically permitted to recover, but indicated only that the class could be certified. *Id*. at 604-05. The court did not make a definitive ruling on whether a cause of action existed, and there was no analysis of §100.18. As a result, *Garner* is unhelpful.

Finally, the State relies upon *In re Arby's Rest. Grp. Inc. Litig.*, No. 17-CV-0514-AT, 2018 WL 2128441, at *18 (N.D. Ga. Mar. 5, 2018). Arby's point of sale machines was hacked by a third-party resulting in the theft of consumer credit card information. Lawsuits were brought by consumers and financial institutions alleging violation of various state's consumer protection laws. The court determined out-of-state consumers could bring a claim under Georgia consumer law. However, in doing so, the court stated, "Arby's has not cited any authority to support its assertion that a non-Georgia resident lacks standing to sue for violations of the Georgia Fair Business Practices Act by a Georgia corporation." *Id*. at *17. The court also acknowledged "no Georgia court has directly addressed this question." *Id.* at *18. Consequently, the GFBPA analyzed by the court is not analogous to Wisconsin's §100.18.

D. The State is Not Entitled to a New Trial

Following the decision on Midwest's Motion for Reconsideration, the State was put on notice the State's strategy had to change. The circuit court was willing to adjust deadlines or even remove the trial date. (R. 247:13-14., App. 113-14.) The State requested the court take "no further action" at that time, or at any other time. (*Id*.) The State had ample time to identify Wisconsin witnesses, or seek an adjournment.

After the April 19, 2021, decision, any out-of-state witness testimony was not relevant. *See* Wis. Stat. §§ 904.01 & 904.02. Evidence there were "similar" complaints by out-of-state consumers (and the State's claim these

complaints are similar is not true, since each transaction is unique) was irrelevant at the time of trial, and potentially prejudicial under Wis. Stat. § 904.03. It would have been unfairly prejudicial to Midwest to permit the State to attempt to influence the jury's decision by introducing the testimony of out-of-state consumers, because it did not have Wisconsin witnesses. The State cannot complain it only had a single witness at trial, since the State made a strategic decision on how to prepare after the Motion for Reconsideration was granted.

II. The State Was Required Prove Pecuniary Loss

The State argues the circuit court erred in determining that pecuniary loss is an element of Wis. Stat. §§ 100.18 and 100.18(10r). Specifically, the circuit court required pecuniary loss and declined to award costs or forfeitures for technical violations absent damages for two reasons. First, the circuit court determined that pecuniary loss was a required element under §§100.18(1) & (10r), and therefore, the jury's determination that no injury had occurred was dispositive. Second, the court indicated that it could not award forfeitures for conduct occurring outside Wisconsin. At trial, the State provided no testimony or other evidence that a Wisconsin consumer had even seen the location-based misrepresentations at issue. Although the State argued that online advertisements are presumably available to Wisconsin residents, the court determined this type of inferential violation was inconsistent with the *T&M Farms* decision. As stated below, the circuit court's determinations were correct.

A. Pecuniary Loss Is an Element of the State's §100.18 Claims

In support of its position, the State cites to one case—*State v. Am. TV & Appliance of Madison, Inc.*, 146 Wis. 2d 292, 430 N.W.2d 709 (1988). The circuit court distinguished *American TV*, because that case involved an appeal relating to the trial court's decision to dismiss the State's complaint for failure to state a claim. (R. 339:84-85.) Thus, the court was not required to evaluate pecuniary loss since the existence of such loss was not at issue.

Further, Judge Sosnay correctly found that subsequent Wisconsin authority has consistently required pecuniary harm for any claim under §100.18. Specifically, the Wisconsin Supreme Court has identified three elements to a §100.18 claim: (1) the defendant made a representation to the public with

the intent to induce an obligation, (2) "that the representation was untrue, deceptive or misleading," and (3) "that the representation caused the plaintiff a pecuniary loss." (R. 336:8); *Novell v. Migliaccio*, 2008 WI 44, 309 Wis. 2d 132, 749 N.W.2d 544; *K & S Tool & Die Corp.*, 2007 WI 70, 301 Wis. 2d 109, 732 N.W.2d 792. This precedent is clear and requires pecuniary loss be demonstrated. *Fox v. lowa Health Sys.*, 399 F. Supp. 3d 780, 798 (W.D. Wis. 2019) (holding that claimants "under the Wisconsin Deceptive Trade Practices Act, Wis. Stat. §100.18, . . . must prove the representation materially induced (caused) a pecuniary loss to the plaintiffs.") Contrary to the State's argument, these cases do not condition the elements of a claim on whether the State or a private individual is the plaintiff.

Although there is no binding case law which expressly addresses the elements required to prove a violation of Wis. Stat. § 100.18(10r), a location-based misrepresentation under Wis. Stat. § 100.18(10r) is undeniably part of the WDTPA and should be treated similarly to other forms of misrepresentation contained in the WDTPA.

Where courts have clearly indicated *all* deceptive trade practice claims require a showing of pecuniary loss, the circuit court's determination that the State had not proven a violation of any portion of the WDTPA was correct.

B. Even if pecuniary loss is not an element of State's §100.18 Claims, the Error is Harmless

Even if the circuit court did err by requiring the State demonstrate pecuniary loss, that error was harmless. As an initial matter, the jury verdict separately asked whether a misrepresentation had occurred and whether pecuniary loss resulted from that misrepresentation. The jury had to answer Special Verdict Question No. 1, "Were the representations in the Defendants' advertisements to Wisconsin consumers untrue, deceptive, or misleading?" (R. 292:1.) The jury answered "No." (*Id*.) Thus, regardless of whether damages were required or not, the State could not possibly prevail on its claims under Wis Stat. § 100.18(1). Further, this verdict question mirrored the elements set forth in *Am. TV & Appliance of Madison*.

The *Rashke* case is illustrative of harmless error in separated jury verdict questions. *Rashke v. Koberstein, et al*., 220 Wis. 75, 264 N.W. 643 (1936).

In that case, the court found, "no harm resulted to appellants for including in the verdict a question as to comparative negligence which the jury did not answer unless they found the plaintiff guilty of contributory negligence." *Id.* at 643. Much like in *Rashke*, pecuniary loss is only relevant if the jury had answered "yes" to question one. Because the jury found Midwest did not make any misrepresentations, asking about pecuniary loss in a separate question did not prejudice the State.

C. The State was not Entitled to any Form of Relief Under Wis. Stat. § 100.18(10r)

Even if the State established a technical violation of Wis. Stat. § 100.18(10r),[13] the State is not entitled to regulate conduct or obtain relief for violations occurring outside of Wisconsin. Simply put, even if the content of an advertisement may amount to a misrepresentation, if that representation was not received in Wisconsin, then there is no claim under §100.18 regardless of whether damages exist.

Here, the State made no effort to introduce Wisconsin consumer witness testimony concerning whether any violation occurred in Wisconsin. The only Wisconsin consumer that testified was Joseph Koehler. (R. 338:161-211.) Mr. Koehler provided no testimony that related to location-based representations. Instead, the State argued the websites were theoretically available to Wisconsin consumers based on the accessible nature of the internet. As the circuit court correctly determined, theoretical access to online misrepresentations is not sufficient to pursue a claim of WDTPA or to regulate interstate commerce under Wisconsin law. *T&M Farms*, 488 F. Supp. 3d at 762. As a result, the State cannot obtain any relief with respect to these violations and is not entitled to a new trial based on this alleged error.

i. A Permanent Injunction is Not Warranted

The State also sought a permanent injunction, pursuant to Wis. Stat. § 100.18(11)(d). The State argued a permanent injunction was necessary to bar Midwest from misrepresenting the location of their business. While Midwest

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[13] The State established no violation of any other section of the WDTPA because the jury found no other conduct to be a misrepresentation.

challenges the State proved a violation of Wis. Stat. § 100.18(10r), even assuming *arguendo* the State had established a violation, a permanent injunction is unwarranted.

The State sought an injunction against all 21 Defendants, even though the jury only found 4 websites contained location-based misrepresentations because Midwest used virtual addresses. (R. 292:2.) When Midwest realized their conduct might be in violation of Wisconsin law, in the summer of 2018, it voluntarily removed all virtual addresses from the websites. (R. 337:121-22; 338:63; 339:50.) Yet the State sought an injunction over three years later for all Defendants. While the State argues it was entitled to an injunction, injunctive relief is discretionary even when a statutory violation is established. *Forest Cnty. v. Goode*, 219 Wis.2d 654, 684, 579 N.W.2d 715 (1998) (holding that "[o]nce a violation is established," the court has discretion to issue a permanent injunction). Finally, despite the circuit court restricting State's enforcement of §100.18 to Wisconsin, the State still sought to impose a blanket regulation on how Midwest conducts business across the country. This remedy is clearly unwarranted, and the circuit court properly exercised its discretion in denying the injunction.

CONCLUSION

Based on the foregoing, the circuit court did not err, and any error that might have occurred is harmless. Therefore, this Court should affirm the circuit court's judgment and decline to remand this case for a new trial.

Dated this 20th day of October 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. § 809.19(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 10,927 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 October 2022

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STATE OF WISCONSIN
COURT OF APPEALS
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.

On Appeal from the Circuit Court of Milwaukee County
Circuit Court Case No. 17-CX-04
The Honorable William Sosnay, Presiding

CROSS-APPELLANTS' BRIEF

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INTRODUCTION

Since this case was initiated in 2017, Midwest has maintained that the State was not permitted to pursue claims on behalf of consumers outside the State of Wisconsin. Although it was not until April 19, 2021, that Circuit Court Judge Pocan ruled that the State could not pursue out-of-state violations, the State nonetheless had ample opportunity to prepare its case and to present adequate factual testimony from Wisconsin consumers.

The State was well aware that it would not be permitted to try this case with out-of-state consumer testimony. However, the State nonetheless chose to go to trial with the testimony of a single Wisconsin consumer. With scant evidence in support of its claims, after four days of trial, the jury returned an unsurprising and nearly unanimous verdict in favor of Midwest. Simply put, Midwest was forced to expend substantial resources to defend a case, which lacked factual support, and never should have gone to trial in the first place.

Although Midwest incurred considerable costs defending this case and was unquestionably the prevailing party with respect to nearly each allegation, the circuit court declined to award any costs to Midwest. The circuit court's decision resulted from its determinations that this litigation was initiated by the Wisconsin Department of Justice, and that the State is immune from the general taxation of costs statute. However, the State is not unconditionally immune from taxation of costs under Chapter 814, and costs should have been awarded to Midwest for at least two reasons. First, the State does not enjoy immunity from the effects of Chapter 814, and any immunity that might exist is waived when the State not only voluntarily commences a lawsuit, but also attempts to step into the shoes of consumers from across the nation. For the reasons more fully set forth below, the circuit court erred in failing to award costs to Midwest.

ISSUES PRESENTED

ISSUE ONE: Whether costs should have been awarded to Midwest in this action under Wis. Stat. §§ 814.03 & 814.04?

COURT DISPOSITION: The circuit court determined that costs could not be awarded against the State.

This Court should answer yes.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

The full factual background is set forth in more detail in Midwest's contemporaneously filed Response Brief. For the sake of judicial economy, and pursuant to Wis. Stat. § 809.19(6)(b)(2), the factual background is not recited in its entirety here. Instead, Midwest incorporates its Response Brief into this Cross-Appeal by reference.

Relevant to this Cross-Appeal, on December 21, 2021, Midwest filed a Motion After Verdict seeking an award of costs as the prevailing party pursuant to Wis. Stat. §§ 814.03 & 814.04. (R. 311:2.) Specifically, Midwest sought $18,327.78 in costs for physical copies, deposition transcripts, faxes, postage, and other allowable statutory costs.[1] (*See* R. 310:1.)

The State opposed Midwest's motion arguing that the State was immune from the taxation of costs under Wis. Stat. §§ 814.03 & 814.04 and no other statute authorized the taxation of costs against the State. (R. 328:1.) On March 24, 2022, the circuit court held a hearing to address the parties' respective motions after verdict. (R. 336:1, Midwest App. 136-147.) At that hearing, the circuit court determined that "the Defendants are not entitled to costs against the State because statutes 814.03 and 814.04 do not expressly authorize the Court to award such costs against the State." (R. 336:12, Midwest App. 136, 147.) As a result, Midwest was not awarded costs and their motion after verdict was denied to the extent it sought recovery of costs. Midwest now appeals the circuit court's cost determination.

STANDARD OF REVIEW

Whether the State is subject to the taxation of costs statutes is a question of law and receives *de novo* review. *Cmty. Credit Plan, Inc. v. Johnson*, 221

[1] Midwest also sought costs related to e-discovery in the amount of $40,707.82. (*See* R. 310:1.) These costs were denied by the circuit court. (R. 336:12, Midwest App. 136, 147.) Midwest is not appealing the denial of e-discovery costs, but appeal only the denial of statutory costs relating to the making of physical copies, deposition transcripts, postage, and other costs expressly enumerated in Wis. Stat. §§ 814.03 & 814.04.

Wis. 2d 766, 772, 586 N.W.2d 77 (Ct. App. 1998) ("The interpretation of a statute presents a question of law which we decide independently of the trial court."), *aff'd*, 228 Wis. 2d 30, 596 N.W.2d 799 (1999); *Stewart v. Farmers Ins. Grp.*, 2009 WI App 130, ¶ 10, 321 Wis. 2d 391, 773 N.W.2d 513 ("[I]ssues related to the recovery of actual attorney fees and other expenses, relying on Wis. Stat. § 814.04(2). . . . Resolution of these issues presents questions of statutory interpretation application, which are questions of law that this court reviews *de novo*.")

ARGUMENT

I. Midwest Was the Prevailing Party and is Entitled to an Award of Costs

Pursuant to Wis. Stat. § 814.03, "If the plaintiff is not entitled to costs under s. 814.01(1) or (3), the defendant shall be allowed costs[.]" Wis. Stat. § 814.03. Here, the State as the plaintiff in this action, was not entitled to costs under either Wis. Stat. §§ 814.01 (1) or (3) as the plaintiff did not obtain recovery on any of its claims. Stated differently, Wis. Stat. § 814.03 "contemplates the awarding of costs only to successful parties" which also encompasses successful defense of claims. *Gorman v. Wausau Ins. Cos.*, 175 Wis. 2d 320, 327, 499 N.W.2d 245 (Ct. App. 1993); *Sampson v. Logue*, 184 Wis. 2d 20, 25, 515 N.W.2d 917 (Ct. App. 1994) (awarding costs to a successful defendant where the jury "returned a verdict against the plaintiff.") Further, the award of costs under this section to a prevailing defendant is not discretionary, but mandatory. *Strong v. Brushafer*, 185 Wis. 2d 812, 818, 519 N.W.2d 668 (Ct. App. 1994).

In this case, the State was not successful on its claims. As reflected in the Special Verdict, the jury determined that only one claimed misrepresentation occurred. (R. 292:1-3.) Specifically, the jury determined Midwest misrepresented its location on four websites in Special Verdict question four. (*Id.*) However, the jury determined that no other misrepresentations existed and determined that no damages flowed from the location-based misrepresentation. (*Id.*) Consequently, the State did not prevail on any claim, and instead Midwest was the successful party with respect to each cause of action.

II. The Fact that This Case Was Brought on Behalf of the State of Wisconsin Does Not Alter the Award of Costs

Despite being the successful party in this case, the circuit court declined to award any costs to Midwest pursuant to Wis. Stat. §§ 814.03 & 814.04 based only on the fact that the Department of Justice rather than a private individual had initiated litigation. Specifically, the State argued that, unlike private litigants, the State is immune from taxation of costs under Wis. Stats. §§ 814.03 and 814.04 because those statutes do not expressly provide for taxation of costs against the State. However, the State also indicated that if it had prevailed it would be entitled to costs under Wis. Stat. §§ 814.03 & 814.04. (*See* R. 32.) This logic is flawed and impermissibly permits the State to recover costs while simultaneously denying recovery to successful defendants should the State bring an unmeritorious claim.

In the underlying case, the State argued, and the circuit court agreed, that the State is immune from costs unless a specific statute authorizes the taxation of such costs. (*See* R. 336:11, Midwest App. 136-147.) In support of this position, the State and circuit court primarily relied upon *Martineau v. State Conservation Comm'n*, 54 Wis. 2d 76, 194 N.W.2d 664 (1972). (*Id.*). However, this authority is distinguishable from the present case.

In *Martineau*, the plaintiff sought recovery of costs under Wis. Stat. § 32.06(9)(a), and not under Chapter 814. *Id*. at 81. Under the applicable statute, the issue before the Wisconsin Supreme Court was "whether sec 32.06(9)(a), Stats., contemplates awarding attorney's fees in the event of involuntary abandonment of condemnation proceedings. . . ." *Id*. Although attorney's fees are allowed under Wis. Stat. § 32.06(9)(a) for *voluntary* abandonment of a condemnation action, the court determined that, in the case on *involuntary abandonment* (e.g., dismissal), fees could not be awarded. *Id*. at 84-85. Thus, the *Martineau* authority speaks to condemnation actions and the award of attorney's fees in the case of involuntary dismissal, not the taxation of costs against the State after trial under Chapter 814.

Further, subsequent authority has applied other portions of Chapter 814 against the State. In *Zaragoza*, the Wisconsin Court of Appeals assessed a $250 jury fee against the State for belated cancellation of a criminal case less than two days before the trial was to commence. *In re Sanctions in State v.*

Zaragoza, 2007 WI App 36, ¶ 1, 300 Wis. 2d 447, 730 N.W.2d 421. The State argued that it was not subject to any costs under Chapter 814 because the statute did not authorize the award of costs against the State. *Id*. ¶ 7. Specifically, the section under which jury fees may be awarded, Wis. Stat. § 814.51, applies only to the "plaintiff" or "defendant" in an action and does not expressly include the term "State" or any other analogous language. *Id*. As a result, the State argued that the *Martineau* precedent precluded an award. *Id*. The Court of Appeals disagreed holding that Chapter 814's use of the general term "plaintiff" clearly embraced the State. *Id*. ¶¶ 8-11. Specifically, since the case was criminal in nature, the court determined that the State would always be a "plaintiff." *Id*. The court also determined that the State did not cite to any other authority requiring the legislature expressly use the word "State" when creating statutes applicable to the State. *Id*. As a result, the court assessed a $250 jury fee against the State under Chapter 814. *Id*.

This case is virtually indistinguishable from the reasoning applied by the *Zaragoza* Court. As the Wisconsin Court of Appeals in *Zaragoza* determined, a statute need not expressly identify the State of Wisconsin before taxation of costs is appropriate. 2007 WI App 36, ¶ 10. Instead, the statute must only indicate generally that the State is subject to such costs. Here, Wis. Stat. §§ 814.03 and 814.04 apply to all "parties" in litigation, including "plaintiffs." Undeniably, both the State and Midwest are parties to this case, and thus are equally subject to statutory taxation of costs. There is no material difference in the type of language used in these statutes and that of § 814.51 (which has been applied to the State). Further, much like the court's determination that the State is always a plaintiff in criminal matters, the State is also always a plaintiff in enforcement actions like those at issue here. As a result, the State should be considered a "party" or "plaintiff" within the meaning of Wis. Stat. §§ 814.03 & 814.04 and is subject to the taxation of costs.

III. Alternatively, the State Has Waived Any Immunity from Taxation of Costs That it Might Have Had

Even if the State could establish that it is textually not subject to taxation of costs under Chapter 814, the State has not brought this action solely on behalf of the State of Wisconsin but has requested relief on behalf of consumers

across the nation. As a result, the State has assumed the position of a private litigant and has waived any immunity it might have asserted.

In this case, the State is not simply seeking recovery on behalf of the State of Wisconsin, or even on behalf of Wisconsin consumers, but instead sought recovery on behalf of private consumers from across the nation. (*See* R. 259.) The State has argued that it is entitled to obtain restitution on behalf of virtually any injured consumer to restore all alleged pecuniary losses resulting from Midwest's purported conduct. (*Id*.) Unlike any other case cited by the State, these claims not only go beyond the authority of any action which can be properly brought by the State, but also require the state to step into the shoes of consumers anywhere in the country to seek restitution on their behalf.

Although no Wisconsin court has directly addressed this issue, the Wisconsin Court of Appeals has noted that any immunity enjoyed by States, including any immunity from costs, is derived from the concept of sovereign immunity. *Zargoza*, 2007 WI App 36, n.4 ("We do not address sovereign immunity as an issue separate from the *Martineau* rule because the rule is unquestionably linked to sovereign immunity.") In turn, the Wisconsin Supreme Court has acknowledged that sovereign immunity is not unconditional and can be waived by conduct of the State. *State ex rel. Reynolds v. Smith*, 19 Wis. 2d 577, 120 N.W.2d 664 (1963); *City of Kenosha v. State*, 35 Wis. 2d 317, 326, 151 N.W.2d 36 (1967) (attorney general's decision to bring suit "was sufficient to waive the state's sovereign immunity from being taxed for costs"). Although, no Wisconsin court appears to have addressed these issues outside of circumstances involving litigation in federal forums or between states, other courts have held that:

> Where a state voluntarily becomes a litigant—either in its own courts or in the courts of another jurisdiction—the result . . . is that it waives its sovereign immunity from suit and may be subjected to costs in the same manner as a private litigant[.]

Barr v. Game, Fish & Parks Comm'n, 497 P.2d 340, 344 (Colo. App. 1972) (citations omitted).

Not only has the State voluntarily assumed the role of a private litigant in this case, but the State has also exceeded any authority it had to pursue violations

in its sovereign capacity resulting in a waiver of any immunity that might have existed. The State is only authorized to bring suit to enforce its consumer protection laws "in the name of the state[.]" Wis. Stat. § 100.18(11)(d). The State has no power to bring suit in any capacity other than its official sovereign status, and therefore must have a sovereign interest in the controversy. *See Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 5, 333 Wis. 2d 402, 797 N.W.2d 789; s*ee also AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 394-95 (4th Cir. 2012) (noting that codifications expressly permitting the state to bring suit "in the name of the state" require a sovereign interest). The State of Wisconsin has no sovereign interest in regulating conduct outside its borders or in the health and well-being of citizens in other states. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982) (stating that "a State has a quasi-sovereign interest in the health and well-being . . . of its residents" and that this interest must be asserted with respect to "a sufficiently substantial segment of its population"); *In re Fluidmaster, Inc., Water Connector Components Prods. Liab. Litig*, No. 14-CV-5696, 2017 U.S. Dist. LEXIS 48792, at *116 (N.D. Ill. Mar. 31, 2017) (quoting *Darisse v. Nest Labs, Inc.*, No. 5:14-CV-01363-BLF, 2016 U.S. Dist. LEXIS 107938, at *15 (N.D. Cal. Aug. 15, 2016)) ("Each consumer's home state 'ha[s] a compelling interest in protecting their consumers from in-state injuries caused by an out-of-state company doing business within their borders, and in setting the scope of recovery for consumers under their own laws.'"). Thus, the State of Wisconsin has no sovereign interest in brining suit primarily to regulate conduct outside its borders.

Where the State acted outside any appropriate sovereign interest throughout this litigation, it cannot now claim that principles of sovereign immunity bar recovery of costs. Based on the foregoing, the State has waived any immunity which might have existed either by voluntarily pursuing this case and stepping into the shoes of private litigants or by exceeding any appropriate sovereign interest by seeking recovery primarily for out of state conduct and consumers.

CONCLUSION

Based on the foregoing, Midwest respectfully appeals the circuit court's determination that costs are unavailable to Midwest in this case.

Dated this 20th day of October 2022.

Respectfully submitted,

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