STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

Appeal No. 23 AP 241

COLUMBIA COUNTY,

Plaintiff-Respondent,

vs.

CARTER SMITS,

Defendant-Appellant

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON JANUARY 27, 2023, IN THE CIRCUIT COURT FOR COLUMBIA COUNTY, BRANCH 3, THE HONORABLE TROY D. CROSS PRESIDING

Respectfully submitted,

CARTER SMITS, Defendant-Appellant

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I. Even If A Result Of .08 Is Slightly More Likely To Reflect Guilt Rather Than Innocence, Such A Result Is Not "Clear, Satisfactory, and Convincing" Evidence That Could Support The Jury's Verdict.

The Respondent argues that the "right on the money/right on the line" dichotomy in the Appellant's brief misunderstands the principles of math involved. One side definitely misunderstands the math, and while each side could split decimals and probabilities *ad nauseum*, the bigger misunderstanding here is on the burden of proof. No matter whether Appellant's math or the Respondent's is correct, what is really at issue is whether a blood test result that is only 54.55% likely, at most even by the County's argument, to reflect guilt could constitute clear and convincing evidence. It can't, no matter how the probabilities are calculated.

Again, as already mentioned in the Appellant's initial brief, the County had to prove this violation by "clear, satisfactory, and convincing" evidence. Wis. Stats. § 345.45. To carry this burden, they had to produce a greater quantity and quality of evidence than they would under a preponderance of the evidence standard. *Kuehn v. Kuehn*, 11 Wis. 2d 15, 29–30, 104 N.W.2d 138, 147 (1960); *Kruse v. Horlamus Indus., Inc.*, 130 Wis. 2d 357, 363, 387 N.W.2d 64, 67 (1986). This is the highest civil burden of proof and is the standard

that must be met to take away a person's rights to their children (*State v. Bobby G.*, 2007 WI 77, 301 Wis. 2d 531, 734 N.W.2d 81) or to direct their own affairs (Wis. Stats. § 54.44 (2)). And while the Respondent correctly points out that the one test result they presented was entitled to a presumption of accuracy, they do not argue that that presumption survived rebuttal by the analyst's statements on cross examination that there was a real chance the actual BAC was below the legal limit. Arguments not rebutted on appeal are deemed conceded. *Shadley v. Lloyds of London*, 2009 WI App 165, ¶ 26, 322 Wis. 2d 189, 204–05, 776 N.W.2d 838, 845. Similarly, the Respondent also does not argue with the Appellant's premise that a result reflecting a 50/50 chance of guilt or innocence would not be clear and convincing- they simply argue that the actual chance of guilt is higher than that.

A 5% increase in probability is simply not enough to turn a test result that doesn't meet a mere preponderance standard into one that is clear, satisfactory, and convincing. The Appellant and the Respondent each accept the premise that a result reflecting a 50/50 chance of guilt or innocence would not be clear and convincing. And certainly, a 55% chance of guilt would meet a preponderance of the evidence standard, which only requires guilt or liability be "more likely than not." But that slight increase in probability is not enough

to render the test result clear and convincing because it does not represent a fundamental change in either the quantity or quality of that evidence. The "clear and convincing" standard is mean to embody a higher degree of certainty and a greater protection for those in proceedings where it applies, be it a termination of parental rights, a guardianship proceeding, or a trial for driving with a prohibited BAC. That additional protection is meaningless if it only requires 4% more certainty than the preponderance of the evidence standard.

II. Expert testimony in this case said the result is just as likely to be below .08 as above .08.

The County's expert witness testified at trial as to the uncertainty of measurement on both direct and cross examination. R. 36 at 113, lines 24-25; at 114, lines 1-11; at 121, lines 21-25; at 122, lines 1-22. That testimony was that for a test result of less than .100 the variability is plus or minus 0.005. R. 36 at 114, lines 7-8. That means that with a reported result, here 0.08, there is "actually a window around that value where the true result lies." R. 36 at 114, lines 9-11. The expert further testified that the actual result lies somewhere between .075 and .085. R. 36 at 122, lines 1-3. The expert stated that the lab is confident to 95-99% that the true result is between .075 and .085. R. 36 at 122, lines 13-15. And finally, the expert

answered yes that there is an equal chance that the true result is below .08 as there is that is above .08. R. 36 at 122, lines 20-22.

The County's own expert testimony does not support their incorrect mathematical argument – statistically, the true result of the blood test to a 95-99% confidence level is that it is somewhere between .075 and .085 and it is equally likely to be below .08 as it is to be above .08. Within that band .075-.085 each number is as likely to be correct as any other number, meaning that .075 is equally likely as .076, as .08, and as .085. The County's expert testimony, which is undisputed, shows that the County cannot meet its burden to prove the alcohol concentration was a .08 or above in this matter by clear, convincing and satisfactory evidence.

CONCLUSION

Because the blood test result did not present clear and convincing evidence that Mr. Smit's BAC was above the statutory prohibition, the Defendant respectfully asks this Court to reverse the trial court's denials of the motions for directed verdict and for judgment notwithstanding the verdict.

Dated at Madison, Wisconsin, November 15, 2023.

Respectfully submitted,

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Defendant-Appellant

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8) (b), (bm), and (c) for a brief. The length of the brief is 1517 words.

Dated: November 15, 2023.

Signed,

BY: Electronically signed by Sarah M. Schmeiser
SARAH M. SCHMEISER