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WISCONSIN COURT OF APPEALS
DISTRICT 2

COUNTY OF WAUKESHA,

Appeal No. 2023-AP-000919

Plaintiff-Respondent,

Circuit Court Case No. 2021-TR-004801

Circuit Court of Waukesha County

-v-

Hon. Dennis Moroney, Presiding

JACOB A. VECITIS,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

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OVERVIEW

This case requires the Court of Appeals to address the legal import of un rebutted expert testimony of the nullifying effect of alcohol based hand sanitizer and oral cavity bleeding on the scientific reliability of breath alcohol testing device requirements of *Wis. Adm. Code Ch. Trans 311* and *Wis. Stat. §343.305(6)(b)*.

In this first offense OWI case, the prosecution relied upon a breath test administered not in conformity with *Wis. Adm. Code Ch. Trans 311* due to: (a) the test administrator using alcohol based hand sanitizer while administering the test which resulted in the subject inhaling alcohol vapors during the process of providing the breath samples; and (b) contemporaneous capillary bleeding in the subject's oral cavity and throat during the process of providing the breath samples. Moreover, Certified Medical Records corroborated the defendant's diagnosed pre-existing medical condition of cardiac syncope as having caused the loss of vehicle control.

The prosecution's evidence of intoxication consisted of: (a) the defendant's loss of control of his motor vehicle; (b) the "mild" odor of intoxicants on the defendant's breath; and (c) a scientifically unreliable breath testing device result. Given the un rebutted evidence of the defendant's pre-existing cardiac syncope condition and the scientific unreliability of the breath alcohol test results, the prosecution's evidence was insufficient to meet the middle burden of proof of intoxication by "clear and convincing evidence to a reasonable certainty." Accordingly, the trial court's finding the defendant guilty of operating a motor vehicle while under the influence of an intoxicant in violation of *Wis. Stat. §346.63(1)(a)* was against the great weight and clear preponderance of the evidence.

The extraordinarily harsh consequences flowing from an erroneous conviction for operating a motor vehicle while intoxicated is illustrated by this case where the defendant's future career opportunities in law enforcement are virtually foreclosed based upon a scientifically unreliable breath alcohol test result.

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STATEMENT OF ISSUES

- I. WHETHER THE TRIAL COURT'S ADJUDICATION OF THE DEFENDANT AS GUILTY FOR VIOLATING WIS. STAT. §346.63(1)(a) UNDER THE "CLEAR AND CONVINCING" MIDDLE BURDEN OF PROOF WAS AGAINST THE GREAT WEIGHT AND CLEAR PREPONDERANCE OF THE EVIDENCE.**

Answered In The Negative By The Trial Court.

The trial court rejected the defendant's legal position that the prosecution failed the "clear and convincing" burden of proof based upon un rebutted evidence that: (a) contemporaneous inhalation of hand sanitizer vapor voids the scientific reliability of the breath test; (b) contemporaneous blood in the test subject's mouth voids scientific reliability of the breath test; and (c) an episode manifesting defendant's cardiac syncope condition caused the loss of control of his vehicle.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

A. Oral Argument.

The Defendant-Appellant, Jacob A. Vecitis, does not believe that oral argument would aid in addressing the issues presented in this case.

B. Publication.

Resolution of the case by the Court of Appeals does warrant publication because it will expand the published body of case law explaining the scientific underpinnings and importance of the requirements of *Wis. Adm. Code Ch. Trans 311.06(1)(2) and (3)(a)* relating to breath alcohol testing devices and the scientific limitations of the testing componentry of such devices. The use of alcohol breath testing in law enforcement, insurance liability cases and employment law cases often has extremely serious consequences for the general citizenry of the State of Wisconsin. What these machines can and cannot do in terms of their design limitations and the scientific reliability of their resulting data analyses, warrants careful explication to the bench and bar to avoid potential miscarriages of justice.

STATEMENT OF THE CASE

A. Nature Of The Case.

This is a non-criminal case brought by Waukesha County against the defendant, Jacob A. Vecitis, for first offense operating a motor vehicle while under the influence of an intoxicant in violation of *Wis. Stat. §346.63(1)(a)*.

B. Procedural Status Of The Case.

This appeal seeks appellate review of a bench decision issued by the Circuit Court of Waukesha County following a trial to the court, which adjudicated the defendant, Jacob A. Vecitis, guilty of a 1st offense violation of *Wis. Stat. §346.63(1)(a)*, “operating a motor vehicle while under the influence of an intoxicant.”

C. Disposition In The Trial Court.

On January 30, 2023 the trial court adjudicated the defendant, Jacob A. Vecitis, guilty of operating a motor vehicle while under the influence of an intoxicant per *Wis. Stat. §346.63(1)(a)* followed by dismissal of the companion “prohibited alcohol content” (PAC) charge under *Wis. Stat. §346.63(1)(b)*, and dismissal of the companion charge of “failure to maintain control vehicle” under *Wis. Stat. §346.57(2)*. The trial court, on May 22, 2023, subsequently denied the defendant’s Motion for Reconsideration.

D. Statement Of Facts.

1. The Defendant’s Medical Condition.

On August 31, 2021, at approximately 4:55 p.m., Jacob Vecitis was operating his motor vehicle Eastbound on I-94 in Waukesha County approaching the Moorland Road exit when he experienced sudden loss of consciousness due to a transient cardiac anomaly medical event diagnosed as cardiac syncope. [R-53; A-App. p. 152-153.] This medical event resulted in a single vehicle rollover accident

in which the defendant, Jacob Vecitis, sustained head injuries. [R-53; A-App. p. 153-155.]

Mr. Vecitis' certified medical records, filed with the court as Trial Exhibit 3, [R-40; A-App. pp. 215-329] reflect a prior similar event 8 years previously in October of 2013, when he was 16 years old. At that time he was driving to school in the morning when, without warning, he lost consciousness but was able to avoid crashing the vehicle he was operating. [R-53;A-App. p. 142-144.] Medical testing at the time of the 2013 accident reflected an abnormal electrocardiogram with other cardiac function anomalies. [R-40; A-App. p. 295-309.]

The condition did not surface again until after Jacob Vecitis had obtained his Bachelor's Degree in Police Science, when a medical examination required as part of the hiring process of him as a police officer in Salt Lake City, Utah, revealed the continued existence of this same abnormal cardiac anomaly. [R-40; A-App. p.284-285.] An electrocardiogram done in Salt Lake City on January 22, 2021 continued to exhibit the same "abnormal" electrocardiogram anomaly as in 2013. As a result, he was rejected from being hired as a police officer in the Salt Lake City Police Department and advised to undertake a medical treatment evaluation program to fully explore this cardiac anomaly condition.[R-53; A-App. p. 145-147.]

Within one week, upon returning to the Milwaukee area, he initially placed himself under the care of Dr. Kristin Dement and the Ascension Medical Group in Franklin, Wisconsin, with his first office visit on January 28, 2021. [R-40; A-App. p. 322.]

He continued in this evaluative process with medical visits on February 10, 2021, [R-40; A-App. p. 309-321.] February 16, 2021, [R-40; A-App. p. 300-308.] February 19, 2021, [R-40; A-App. p. 290-299.] and February 22, 2021. [R-40; A-App. p. 279-289.] After a normal echocardiogram result on February 22, 2021, Mr. Vecitis proceeded with his daily living regimen without restrictions per Michael

Curley, M.D. [R-40; A-App. p. 312.] until the event giving rise to this case occurred on August 31, 2021. On that date, without warning, he lost consciousness while driving home in the afternoon from a golf outing. Approximately 9 months later Mr. Vecitis' 2013 diagnosis of cardiac "syncope" was reconfirmed and a course of treatment undertaken, including surgical implantation of an electronic monitoring device in his sternum in December of 2022 which continues to this day. [R-40; A-App. p. 215-266; R-53; A-App. p. 161-162.]

2. The Defendant's Arrest.

At the scene of the August 31, 2021 accident, Waukesha County Sheriff Deputy Keith McDonald, detected a "mild odor of intoxicants" on Mr. Vecitis' breath. [R-53, A-App. p. 12.] Deputy McDonald did not conduct field sobriety testing based upon the defendant declining to do so due to his head injuries. [R-53; A-App. p. 154-155.] Mr. Vecitis was transported to the Waukesha County Sheriff's Department where a breath/alcohol test was conducted with Mr. Vecitis' full cooperation. [R-53; A-App. p. 151; R-53; A-App. p. 19.] The breath test device utilized was an Intoximeter EC/IR II. [R-53; A-App. p.28-29.]

It is uncontroverted that the breath test operator applied an alcohol based hand sanitizing substance to her hands shortly before opening the plastic packaging containing the mouthpiece for the subject test. [R-53; A-App. p.39.] The odor of the alcohol in the hand sanitizing agent was unmistakable and concerning to the test operator.[R-53; A-App. p.44-45; R-53; A-App. p.156-160.] The mouthpiece was handed by the test operator for insertion into the subject's mouth just before the breath sample was collected from Mr. Vecitis. [R-53; A-App. p.24; pp. 40-43.] Mr. Vecitis remembers inhaling alcohol vapors at the time of giving the breath sample. [R-53; A-App. p. 160.] Notably, the head injuries sustained by Mr. Vecitis included internal injuries to his tongue and oral cavity in the accident, resulting in the metallic

taste of blood and the sensation of excess liquid within his mouth up to and during the subject breath test. [R-53; A-App. p.157.]

The Intoxilyzer EC/IR II test results reported a breath alcohol value of 0.12g/210L. [R-53; A-App. p.333.]

3. The Trial Testimony.

The case went to trial without a jury on January 30, 2023 at which five witnesses testified.

First, Deputy Keith McDonald testified of the events leading to the arrest. He testified that his report noted Mr. Vecitis told Deputy McDonald that he had lost consciousness while operating his vehicle just prior to the crash.[R-53; A-App. p.16-17.] Deputy McDonald's material testimony ended with his description of having completed the 20 minute observation period required by *Wis. Adm. Code Ch. Trans 311.06(3)(a)*. He does not describe doing a mouth check of the defendant. He testified, however, that his report noted that Mr. Vecitis had sustained head injuries in the accident.[R-53; A-App. p.16.]

Second, Deputy Shannon Fettig testified that immediately after Deputy McDonald ended his 20-minute observation protocol, she conducted the breath alcohol test of Mr. Vecitis using an Intoximeter EC/IR II, with a reported result of "0.12 g/210L." [R-53; A-App. p.30-31.] She testified recalling that at the time of conducting the test she remarked to Deputy McDonald that she was "worried" whether alcohol vapors of the hand sanitizer she used at the time of the test might contaminate the test result.[R-53; A-App. pp. 43-45.] Deputy Fettig testified that *Wis. Adm. Code Ch. Trans 311* requires and she knew that, during the 20- minutes observation period prior to drawing a breath sample the test subject cannot "ingest" any form of alcohol. [R-53; A-App. p.48.] Deputy Fettig was then shown the *Webster Dictionary* definition of the word "ingest," which employs the phraseology: "to take in (air)." [Trial Exhibit 4, R-31; A-App. p. 332.] She then tacitly agreed

that this definition confirmed her concern about the effect use of hand sanitizer could have on the accuracy of alcohol breath test results using the Intoximeter EC/IR II device.

The third witness to testify was Ms. Therese Sanders, an employee of the Wisconsin Department of Transportation, Division of State Patrol Chemical Test Section. Ms. Sanders testified that she possessed a bachelor's degree in clinical laboratory science, had familiarity with maintenance of the Intoximeter EC/IR II machine, and was involved in training law enforcement officers in the operation and use of that device for evidentiary purposes.[R-53; A-App. p.55.] She described the 20 minute observation period as a "safeguard" for the reliability of the test result. [R-53; A-App. p.52.] Ms. Sanders expanded on the importance of the required 20 minute "safeguard" observation period for a valid breath alcohol test in her testimony as follows [R-53; A-App. p. 57]:

11 Q And can you explain to the Court that I just the
12 sequence of a normal test routine?

13 A Sure, sure. So from, I guess, I would - -did you
14 want me to start from the point in time when the officer - - or
15 the law enforcement official has the subject, and we start
16 with the 20-minute observation?

17 Q Yes, please.

18 A Sure. Okay. So with any investigation, OWI
19 investigation, an officer would be required to do a mouth
20 check to ensure that there's no foreign objects in the mouth
21 that could possibly contaminate our breath sample.

22 From there, then they would do a 20 -minutes
23 observation close and scrutinous to ensure nothing in,
24 nothing. [R-53; A-App. p.57.] (emphasis added.)

Further in her testimony, Ms. Sanders explained that the prevention of residual alcohol molecules in the subject's mouth is critical to the integrity of the breath test results. [R-53; A-App. pp.63,66.] Ms. Sanders also agreed that the accuracy of the Intoximeter EC/IR II requires that the *Wis. Adm. Code Ch. Trans 311.06 (3)(a)* requirements be met so that no alcohol be "ingested" by inhalation during the 20 - minute observation period prior to or during introduction of the breath sample into the machine.[R-53; A-App. pp.65-69.]

Ms. Sanders then testified that the check for alcohol molecules in the ambient air only occurs as a "snapshot" during the "blank check" test . . . : "[t]o ensure that there is no alcohol within the instrument and around the instrument." [R-53; A-App. p.71.] She did **not** testify that the machine tests the ambient air around the test subject, only the machine. Also, she testified that if the deputy administering the test first ran the "blank check" test, and then put on hand sanitizer, the blank test would not detect the hand sanitizer molecules in the air being inhaled by the test subject. [R-53; A-App. p.73.]

With regard to capillary blood in the mouth at the same time of drawing the breath sample Ms. Sanders concluded that alcohol readings of capillary blood traditionally run 10 to 12 percent higher than alveolar sac breath readings. [R-53; A-App. p.78.]

Ms. Sanders testified that she had not read Dr. Henson's report filed in this case as Trial Exhibit #1. Nor had she done any independent research or reviewing professional literature on the effect of hand sanitizer on the scientific reliability of breath alcohol testing, but she conceded that hand sanitizer would have an effect on breath alcohol devices. [R-53; A-App. p.81.] These articles included a 2013 article entitled, Common Hand Sanitizer May Distort Readings of Breathalyzer Tests in the Absence of Acute Intoxication, published by the Society for Academic Emergency Medicine, and a 2017 article entitled, The Effect of Alcohol-Based

Hand Sanitizer Vapors on Evidential Breath Alcohol Test Results, published in the *Journal of Forensic Sciences* [Trial Exhibit #10; R-37; A-App. pp. 334-340.] Nor was she aware of the Memorandum published in 1985 by Dr. Safwat W. Bishara referenced in Dr. Henson's report, [Trial Exhibit #1; R-37; A-App. pp. 190-192.] that there can be no bleeding in or around the mouth or from the nose of the breath test subject.

At the conclusion of Ms. Sanders' testimony the prosecution rested. The defense motion to dismiss was denied by the court, finding that the prosecution had presented a *prima facie* case. [R-54; A-App. pp. 93-94.]

The fourth witness to testify was Ronald E. Henson, Ph.D., retired dean and chaired professor of criminal justice at Aspen University, Aspen, Colorado, and a nationally recognized expert in the field of alcohol physiology and pharmacology with particular expertise in the Intoximeter EC/IR II breath alcohol testing device. [R-38; Trial Exhibit #2; A-App. pp. 193-214.] Dr. Henson testified that he reviewed all the police reports and the on-site field video of the accident scene. He conducted a full review of the professional literature on the subject of hand sanitizer effect in breath alcohol testing devices and the effect of blood in the oral cavity. He also was physically present in court for all testimony and evidence presented by the prosecution in its case-in-chief. [R-54; A-App. pp. 97-104.]

Dr. Henson explained that alcohol is a volatile substance in all hand sanitizers and its presence is recognizable by its odor. He also explained that it would vaporize into the atmosphere for the test subject to inhale irrespective of the test operator physical touching the mouthpiece. [R-54; A-App. pp. 104-105.]

Referencing a 2017 study published in the *Journal of Forensic Science*, Dr. Henson explained the basis for his expert opinion that inhalation of hand sanitizer of a breath test subject results in transitory mouth alcohol sufficient to render the test results scientifically unreliable. [R-37; Trial Exhibit #10; A-App. pp. 334-34

and R-54; A-App. pp.107-114.] This study also supported his opinion that the 18-20 second air sample test of ambient air within and around the EC/IR II machine during the “blank” test does not reliably detect alcohol molecules emanating from the hand sanitizer vapors being breathed in by the test subject several feet away from the machine. Specifically, page 3 of this study in the *Journal of Forensic Science* reports that 2 out of 20 tests of the Intoximeter EC/IR II reported highly significant positive breath alcohol concentrations of .041 and .023g/210L in subjects inhaling ambient air in controlled circumstances of operator application of hand sanitizer similar to that described by Detective Shannon Fettig. [R-37; A-App. p. 335, *see* report sections “Materials and Methods”; and A-App. p. 336 “Results,” . . . “Intox EC/IR II”].

Dr. Henson then testified based on cited professional literature and live subject studies conducted by him of the additive effect of blood in a test subject’s mouth, if a test subject such as Jacob Vecitis had consumed alcohol within 3 hours of the breath test. [R-54; A-App. pp. 125-129.] Dr. Henson also explained how the EC/IR II device does not reliably shut down in the instance of additional alcohol molecules in the oral cavity because its design cannot distinguish between residual mouth alcohol molecules resulting from regurgitation, vomit, a belch, or active bleeding in the oral cavity or vapor airways of a test subject who has ingested alcohol within 3 hours of the breath test. [R-547; A-App. pp. 129-130.]

As an additional illustration of the design limitations of such alcohol breath test devices, Dr. Henson related the instance of false positive breath test results in the case of a public school teacher who was terminated based on her failing breath alcohol testing. Dr. Henson’s investigation and analysis determined that she used a dry-erase whiteboard frequently throughout her teaching day which resulted in false positive breath tests for alcohol due to extended periods of inhalation by her of

alcohol fumes emanating from isopropyl alcohol based whiteboard erasers. [R-54; A-App. pp. 132-133.]

Dr. Henson's testimony concluded with his unequivocal opinion that use of hand sanitizer by the operator of an EC/IR II Intoximeter at the time of and within 20 minutes of conducting a breath alcohol test is not in conformity with the Wisconsin Administrative Code requirements, and is not scientifically reliable.

On cross-examination, Dr. Henson testified that he observed blood on Mr. Vecitis' person in the site video.

On redirect examination, Dr. Henson testified that based on live subject research conducted by him at the University of Illinois, Institute of Aviation and Police Training Institute, that Mr. Vecitis' loss of consciousness while operating his motor vehicle could not be attributed to intoxication - even if the reported blood alcohol test level of .12g/210L had been accurate based upon a valid breath alcohol test. [R-54; A App. pp. 138-139.]

The fifth witness to testify was the defendant, Jacob Vecitis. Mr. Vecitis gave background testimony about receiving his 2020 Bachelor's Degree in Criminal Justice from Arizona State University and his plan and career in law enforcement. He then described an episode of sudden loss of consciousness when he was 16 years old while operating a motor vehicle on his way to school 8 years prior to the August 31, 2021 incident which is the subject of this case. He related the medical testing done at that time in 2013 diagnosed his loss of consciousness due to a heart condition known as "syncope", which is described more particularly in the certified medical records admitted into evidence in this matter as Trial Exhibit 3 (R-40; A-App. pp. 215-329) and the excerpts from those certified medical records admitted into evidence as Exhibit A at the Motion to Reconsider hearing of May 22, 2023. [R-56; A-App. pp. 384-405.]

Mr. Vecitis testified that this heart condition manifested itself again at the time of his sudden loss of consciousness on August 31, 2023, but had been the subject of a 2020 medical examination he had undergone as part of interviewing to be hired by the Salt Lake City Police Department. [R-53; A-App. pp. 144-145.] After the 2020 abnormal EKG, he returned to the Milwaukee area and participated in an extended medical diagnostic program that ultimately resulted in the surgical implantation of a cardiac monitoring device in his sternum in December of 2022. [R-53; A-App. pp. 146-148; R-53; A-App. pp. 161-162; and R-40; A-App. p. 227.]

Mr. Vecitis then testified as to the events of August 31, 2021 prior to the accident. He testified that after participating in a business golf event until mid-afternoon, he and a business vendor had 2 “Old Fashioned” alcoholic beverages, the last of which he consumed approximately 30-45 minutes before the subject accident. [R-53; A-App. pp. 150-152.] He testified that he had taken no medications or any other drugs that day and felt no negative physical symptoms of any sort. [R-53; A-App. pp. 152-153.] He testified that his last memory prior to regaining consciousness after the crash was operating his vehicle to change lanes intending to exit I-94 at Moorland Road in Brookfield, Wisconsin. [R-53; A-App. pp. 152-153.] After the crash, he recalled bleeding in his mouth and pain in his right jaw from a head injury, being dizzy, being physically disoriented and “seeing stars.” [R-53; A-App. p. 154.] Based on his injured status, Mr. Vecitis declined Deputy McDonald’s invitation to undergo field sobriety physical tests. [R-53; A-App. p. 155.] Mr. Vecitis then agreed to submit to a breath alcohol test when requested by Deputy McDonald. [R-53; A-App. p. 155.]

Mr. Vecitis’ testimony described the circumstances of the breath test done, including the 20 minute observation period by Deputy McDonald and the test administered by Deputy Shannon Fettig. [R-53; A-App. p. 157.] Mr. Vecitis also described that Deputy Shannon Fettig applied hand sanitizer after preparing the test

machine for the test and after opening the plastic packaging containing the mouthpiece. He also recalled her remarking about her concern about hand sanitizer interfering with the test, and that she did not have any latex gloves to use. [R-53; A-App. pp. 158, 160.] Mr. Vecitis also testified to detecting and inhaling the very strong odor of alcohol vapors prior to and during the test administration. [R-53; A-App. p. 160.]

After Mr. Vecitis testified, the court, counsel and the clerk discussed admission of the certified medical records into the record. [R-53; A-App. pp. 164-165.] The court clerk explained that under a newly implemented exhibit e-filing computer protocol, the judge could not see them until after they were received. [R-53; A-App. pp. 165-167.] Defense counsel then provided the court with a hard copy of excerpts from the certified medical records to highlight the diagnostic specific records within the 113 pages of Trial Exhibit 3 which consisted of the entire packet of certified medical records. [R-53; A-App. p. 168.] However, the medical record excerpt was not formally placed in the record by the clerk until the May 22, 2023 Motion to Reconsider hearing. [R-62; A-App. pp. 382-405.]

The parties thereupon rested and moved to closing arguments. [R-53; A-App. pp. 169-181.] During closing argument defense counsel reviewed the burden of proof, citing *City of New Berlin v. Wertz*, 105 Wis.2d 670, 314 N.W.2d 911 (Wis. App. 1981) and the un rebutted expert testimony of Dr. Henson explaining the lack of scientific reliability of breath alcohol testing by the Intoximeter EC/IR II under the facts of this case (i.e. hand sanitizer and active bleeding in the oral cavity). The test protocol requirements of *Wis. Adm. Code Ch. Trans 311.06* were referenced and the medical record entries of defendant's diagnosis of cardiac syncope were identified.

The court then recited its rationale for finding the defendant guilty. [R-53; A-App. pp. 183-185.] In doing so, the court stated:

My conclusion of law would be that the intoximeter testing involved was relevant and conducted to the requirements of the Wisconsin Administrative Code. (emphasis added.)

[R-53; A-App. p. 184.]

The court then found that the “blank check” procedure of the Intoximeter EC/IR II was programmed to detect contaminants in or in the area of the intoximeter, which if found to exist would have shut the machine down. [R-53; A-App. pp. 184-185.] This finding rejected the unopposed expert testimony of Dr. Henson about the machine’s design capability, the published study of the 2017 *Journal of Forensic Science* testing of that function of the Intoxilyzer EC/IR II; and the timing of the 18-20 second “blank check” occurred prior to the machine operator applying hand sanitizer.

A Motion to Reconsider was subsequently brought by the defendant on March 20, 2023.

4. The Motion To Reconsider.

On May 22, 2023, the trial court conducted a hearing on the defendant’s Motion to Reconsider [R-45]. At the hearing the trial court did not recall the certified medical records having been placed in the record at the January 30, 2023 trial, or the excerpt of those certified records which were given to the court and clerk during closing arguments which showed Mr. Vecitis’ diagnosed medical history and treatment protocol, which apparently were not placed in the record by the clerk. [R-62; A-App. pp. 353-358.] The medical record excerpt was thereupon discussed and marked as Exhibit A and placed in the record at the end of the May 22, 2023 hearing. [R-62; A-App. p. 382.]

During this hearing the court rejected the un rebutted expert testimony of Dr. Henson that members of the general population do not lose consciousness due to a blood alcohol reading of 0.12g/210L. [R-62; A-App. pp. 359-360.]

The court then stated that it did not recall any testimony of the blood breath test being unreliable or the hand sanitizer contamination issue. [R-62; A-App. pp. 360-362.]

The court and counsel then went through an extended discussion which demonstrated the court's misconceptions relating to the effect of hand sanitizer on the EC/IR II machine accuracy and the design limitations of the machine, including the prosecution conceding the machine's lack of ability to correct for ambient air contamination released by the application of hand sanitizer if applied after the 18-20 second blank check ambient air sampling, as was the evidence in this cases. [R-62; A-App. pp. 362-374.]

The court then moved to addressing the cardiac syncope issue. [R-62; A-App. pp. 374-382.] Upon inquiring whether the defendant had been advised by his doctor not to drive, the court was informed that there was nothing in the medical records advising of any concern with drinking alcohol and cardiac syncope. [R-62; A-App. pp. 377-381.]

The court thereupon veered into speculation into how many drinks the defendant had consumed, engaging in reverse logic stating: "One or two drinks are not going to get you to a 1.2". This statement ignored the converse truism that people don't pass out with a breath test result of that level. [R-62; A-App. p. 380.] This statement also ignored Deputy Fettig's concern that the hand sanitizer had skewed the test result, and all of the unrebutted expert testimony. In effect, the court's comment bypassed all the evidence explaining how the test device design resulted in a false positive test read-out in the event of operator use of alcohol based hand sanitizer and active capillary bleeding in a test subject's mouth who had consumed any alcohol within 35-40 minutes before the test. [R-62; A-App. pp. 380-382.]

At the conclusion of the hearing, the trial court denied the Motion to Reconsider and cordially invited appellate review. [R-62; A-App. pp. 379-380.]

ARGUMENT

A. The Standard Of Review.

This case presents review of a key decision by the trial court characterized by it as a “conclusion of law.” This key conclusion of law was the court’s finding that the alcohol breath result from the Intoximeter EC/IR II test conducted of Jacob Vecitis’ breath on August 31, 2021 met the requirements of *Wis. Adm. Code Ch. Trans 311.06*.

My conclusion of law would be that the intoximeter testing involved was relevant and conducted to the requirements of the Wisconsin Administrative Code. (emphasis added.)

[R-53; A-App. p. 184.]

It is fundamental that trial court conclusions of law are decided *de novo* by an appellate court without deference. *City of Muskego v. Godec*, 167 Wis.2d 536, 545, 482 N.W.2d 179 (1992).

In making this decision as a “conclusion of law” the trial court had to weigh a number of facts affecting whether the breath alcohol test conducted of the defendant utilizing an Intoximeter EC/IR II device was or was not operated in conformity with the “approved techniques and methods” of the Wisconsin Department of Transportation set forth in *Wis. Adm. Code Ch. Trans 311.06*. This was a decision which was made by conceptually applying a codified rule of law to a set of facts. The Supreme Court described this result as a “conclusion of law” in *Kress Packing Co. v. Kottwitz*, 61 Wis.2d 175, 212 N.W.2d 97 (1993) as follows:

A finding of fact, ultimate or evidentiary, must still in its essential nature be a fact. A conclusion of law goes farther and accepts the facts, ultimate and evidentiary, and by judicial reasoning results from the application of rules or concepts of law to those facts, whether the facts are undisputed or not. (emphasis added.)

Kress Packing Co. v. Kottwitz, supra, 61 Wis.2d at 179.

B. The Statutory Framework Governing Breath Alcohol Testing.

The law in Wisconsin governing the validity of chemical analysis of breath alcohol testing is found in several sections.

First, *Wis. Stat. §343.305(5)(d)* provides in pertinent part:

(5) ADMINISTERING THE TEST; ADDITIONAL TESTS.

* * * * *

(d) At the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while under the influence of an intoxicant, . . .

* * * * *

. . . the results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant, . . .

Second, *Wis. Stat. §343.305(6)(b)* then provides in pertinent part:

(6) REQUIREMENTS for tests.

(a) * * * * *

(b) The department of transportation shall approve **techniques or methods of performing chemical analysis of the breath** and shall:

1. Approve training manuals and courses throughout the state for the training of law enforcement officers in the chemical analysis of a person’s breath;
2. Certify the qualifications and competence of individuals to conduct the analysis;

3. Have trained technicians, approved by the secretary, test and certify the accuracy of the equipment to be used by law enforcement officers for chemical analysis of a person's breath under sub. (3) (a), (am), or (ar) before regular use of the equipment and periodically thereafter at intervals of not more than 120 days; and

4. Issue permits to individuals according to their qualifications.

Third, *Wis. Adm. Code Ch. Trans 311.01* recites that its purpose is to fulfill the legislative directive to the Department of Transportation in *Wis. Stat. §343.305(6)(b)* and *311.06* provides the approved “techniques or methods” referenced therein:

Trans 311.06 Approved techniques and methods of performing chemical analysis of the breath. (1) Only methods approved by the department may be used to perform quantitative breath alcohol analysis.

(2) Techniques used in performing quantitative breath alcohol analysis shall be those which are designed to assure accuracy, detect malfunctions and to safeguard personnel and equipment.

(3) Procedures for quantitative breath alcohol analysis shall include the following controls in conjunction with the testing of each subject:

(a) Observation by a law enforcement person or combination of law enforcement persons, of the test subject **for a minimum of 20 minutes prior to the collection of a breath specimen, during which time the test subject did not ingest alcohol, regurgitate, vomit or smoke.**

Fourth, if a breath test is administered under the approved “techniques and methods” specified by the Department of Transportation in *Wis. Adm. Code Ch. Trans 311.06*, then *Wis. Stat. §885.235(1g)(c)* provides in pertinent part:

(c) The fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more.

Fifth, when a breath test is administered in conformity with the “techniques and methods” specified by the Department of Transportation in *Wis. Adm. Code Ch. Trans 311.06*, it results in *prima facie* admissibility of the test result but is subject to *Wis. Stat. §885.235(4)*, which provides in pertinent part:

(4) The provisions of this section relating to the admissibility of chemical tests for alcohol concentration or intoxication . . . shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant, . . . or his or her blood had a specified alcohol concentration, . . .

The EC/IR II is an extremely complex and sensitive machine designed to extrapolate a person’s blood alcohol reading from an air sample extracted only from the alveolar sacs deep within the subject’s lungs. That is why the subject being tested cannot *ingest* anything for 20 minutes before the breath sample is collected per *Wis. Adm. Code Ch. Trans 311.06(3)(a)*. Both Deputy Shannon Fettig and Ms. Therese Sanders of the Wisconsin DOT agreed that it was appropriate to include inhalation of hand sanitizer alcohol vapor within the term “ingest” as used in the *Wis. Adm. Code Ch. 311.06(3)(a)* per the standard *Webster Dictionary* definition of that term marked as Trial Exhibit 4 [R-31; A-App. p. 330-332].

C. Alcohol Molecules When “Ingested” 20 Minutes Prior To And During The Breath Alcohol Test Render It Scientifically Unreliable.

In this case it is uncontroverted that both alcohol vapors and capillary blood were introduced into the subject’s mouth during the process of the August 31, 2021 Intoximeter EC/IR II breath testing of Mr. Vecitis. Mr. Vecitis had to inhale the alcohol vapors from the hand sanitizer applied by Deputy Fettig after she ran the initial blank test when she opened the plastic packaging for the mouth piece. In addition, neither law enforcement officer conducted the standard required open mouth inspection of Mr. Vecitis, and it is uncontroverted that Mr. Vecitis sustained

head injuries depicted in the video of the crash site and his testimony that he tasted blood in his mouth during the testing process. These facts combine to present an unintentional but fundamental violation of the statutory testing protocol of *Wis. Adm. Code Ch. Trans 311.06(3)(a)*.

These violations are not merely technical breaches of the standard testing protocol of *Wis. Adm. Code Ch. Trans 311.06(3)(a)*. They are both relevant and material because, as Dr. Henson explained by referencing the 2017 *Journal of Forensic Sciences* study, inhalation of hand sanitizer vapors during the breath testing process resulted in a false positive reading by as much as .041 in one of 20 subjects testing the Intoximeter EC/IR II. Such a false positive reading in Mr. Vecitis' case from hand sanitizer vapor contamination alone would result in a reduction of his reported test from 0.12g/120L to below the legal limit of 0.08g/120L. This deviation, along with other significant deviations reported in that article illustrate and support Dr. Henson's opinion that the contemporaneous inhalation of hand sanitizer alcohol vapors by a test subject renders the test results of an Intoximeter EC/IR II device scientifically unreliable under such circumstances.

In addition, the capillary blood in Mr. Vecitis' oral cavity from his head injuries also inflated the reading of the EC/IR II breath testing device print-out because even minimal residual alcohol remaining in his circulatory system from earlier in the afternoon would further skew the EC/IR II test readings sufficiently to increase the false positive test result above that caused by the inhaled hand sanitizer alcohol vapor. This second scientific principle, is explained in Dr. Henson's testimony and report, and whose testimony on this subject was expressly adopted by the Illinois Court of Appeals in *People v. Ernsting*, 94 N.E.3d 1278, 2018 IL App. (5th) 160330 in rendering such test results to be scientifically unreliable.

The scientific expert testimony in this case and the current statutory provisions governing validity of breath alcohol test protocols cited herein require a trial court to fully consider the state of scientific knowledge and not confuse *prima facie* admissibility into evidence under case law construing prior statutory provisions dating back 40 years to the 1980s, with the current statutory framework and current scientific studies identifying the forensic scientific limitations on the reliability of the test results of such testing devices. As set forth in the seminal Court of Appeals decision in *City of New Berlin v. Wertz*, 105 Wis.2d 670, 314 N.W.2d 911 (Wis. App. 1981), trial courts continue to be required to exercise control over the receipt into evidence and then rationally the weight to be given to the test results of blood/breath alcohol testing devices.

CONCLUSION

In this 1st offense OWI case, under Wis. Stat. §346.63(1)(a), the prosecution has the middle burden of proof to “a reasonable certainty” by evidence that is “clear, satisfying and convincing” that Jacob Vecitis was under the influence of an intoxicant at the time he lost control of his motor vehicle on August 31, 2021. The prosecution’s evidence consists of a single vehicle crash, the mild odor of intoxicants on the defendant’s breath at the accident scene, and breath test result which was scientifically unreliable because the sample tested was not tested in circumstances that meet the requirements of Wis. Admin. Code Trans Ch. 311.06. Furthermore, expert testimony explained the materiality of this failure to comply with DOT “techniques and methods” completely invalidated the Intoximeter EC/IR II test results.

Although Jacob Vecitis has no burden of proof as to the exact cause of his loss of consciousness, he provided empirical evidence in the form of certified medical records of his diagnosed pre-existing cardiac “syncope” medical condition

for which he continues to have a medical device recently implanted in his chest. This evidence provides the medical diagnosis for his unanticipated loss of consciousness which led to the single vehicle crash of August 31, 2021.

Under these facts, the trial court's decision that the prosecution met its burden of proof principally based upon an erroneous decision made "as a matter of law" must be reversed and remanded so that the controversy may be properly tried.

Respectfully submitted this 25th day of September, 2023.

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**CERTIFICATION AS TO FORM AND LENGTH OF APPELLATE
BRIEFS**

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. Section 809.19(8)(b) (bm), and (c) for a Brief. The length of this brief is 6,461 words.

Dated at New Berlin, Wisconsin on September 25, 2023.

Electronically Signed By

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APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this Brief is an appendix that complies with Wis. Stat. §809.19(2)(a) and that contains, at a minimum:

- (1) A table of contents;
- (2) The findings or opinion of the circuit court;
- (3) A copy of any unpublished opinion cited under Wis. Stat. §809.23(3)(a) or (b); and
- (4) Portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at New Berlin, Wisconsin on September 25, 2023.

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