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INTRODUCTION TO CASE

A brief introduction to this case is included to help bring to light the facts and the merits before the Court of Appeals.

The Appellant, Max Kane, brings this appeal in the face of the State of Wisconsin's disingenuous and unconstitutional two-step, where the State has identified **only** Mr. Kane as a target of its investigation, but nonetheless claims that his compelled testimony is necessary. There is no Constitutionally permissible basis for the State to depose Mr. Kane. Either the State intends to improperly use Mr. Kane's testimony to obtain evidence against him (thereby infringing on his Fifth Amendment Rights) or it seeks to obtain testimony that has no relevance to its investigation. The trial court inexplicably granted summary judgment in the State's favor while admitting on the record that the case was not ripe because "...the deposition never took place", and without the State

offering any basis for its investigation other than to target Mr. Kane. This Court should reverse the trial court and put an end to this farce.

STATEMENT OF ISSUES

This case carries four main issues being brought forth to be heard before Wisconsin's Honorable Fourth District Court of Appeals.

1 - Whether the circuit court erred by ruling over a controversy that was not ripe for adjudication.

2 - Whether the record shows that immunity was conferred to Mr. Kane.

3 - Whether DATCP's conduct has exceeded the intended use of its authority granted by statute.

4 - Whether the circuit court erred by issuing a Summary Judgment while material facts are still in dispute.

**STATEMENT OF ORAL ARGUMENTS AND
PUBLISHED OPINION**

Oral arguments are necessary to demonstrate Mr. Kane's Constitutional position in this important case. This case is deserving of the Court's additional attention, by and through oral arguments, because of the Constitutional challenges and high bar which has been brought forth. Additionally, the application standard pertaining to the necessary evidence required to invoke the State's broad investigatory powers under Wisconsin Statute 93.15 has never been established by the courts of Wisconsin and thus is a case of first impression. Mr. Kane contends that this merits the hearing of oral arguments.

In continuing, the outcome of this case is important to the People of Wisconsin. The popularity of the issues at bar have been demonstrated to be of a concerning interest to the People. On December 21, 2009 at the circuit court hearing of this very case, over 150 attendees filled the court room to capacity. Also, legal sales of farm fresh

milk have made regular media coverage on Wisconsin radio and TV stations. In early 2010, a bill to legalize routine fresh milk sales was introduced to the Wisconsin Legislature. At the bill's public hearing in Eau Claire approximately 800 people occupied one main hearing room and three overflow rooms where the hearing was being streamed via a live video feed. A fourth overflow room was soon opened to accommodate the increased person traffic. The bill passed the Wisconsin Senate 28 to 8, and the Assembly 60 to 35. However the bill was vetoed by Governor Doyle in April of 2010.

The overwhelming interest expressed by the People of Wisconsin demonstrates a means for a published opinion and additional reasoning for oral arguments. However, in the event the circuit court's ruling is overturned by the Court of Appeals due to a lack of ripeness, then oral arguments are mute because, in effect, there would be no argument to be brought forth.

STATEMENT OF CASE

Mr. Kane founded a private, owners only, club called Belle's Lunchbox. The club obtained legal ownership over dairy producing animals through a lease contract. As an advantage to its owners, the club created boarding agents by contracting individuals whom lived in, and owned land in the country, to board, milk and care for the leased animals. As a courtesy to its owners, the club created a website to which the owners, who resided in the several states, could use to place boarding and service orders to the club's boarding agents, as the boarding agents cared for the leased animals. The website clearly displayed on every page that it was a private owners only website. Only club owners were permitted secured access to areas of the website which permitted owners to place boarding and service orders to the boarding agents. The public was not.

The Wisconsin Department of Agriculture Trade and Consumer Protection (DATCP) started investigating

the club after receiving information that the club may have been linked to a raw milk-related illness in the Chicago area where a 16 year old boy became ill. A Chicago area resident stated to Illinois authorities that she had served the boy a milkshake made from raw milk. She stated that the milk used to make the milkshake *may* have derived from the club, but that she was not sure of that fact as she had obtained raw milk from multiple sources.

In the midst of an incomplete investigation conducted by the State of Illinois and the FDA, the boy was suspected of having contracted Brucellosis (an incurable chronic disease), which Illinois and FDA believed to be caused by the boy drinking the milkshake.

Out of concern for the boy, Mr. Kane immediately ordered that the club's boarding agents have a licensed veterinarian test the leased cows for Brucellosis. The independent tests were promptly performed and showed a negative for Brucellosis. A massive, expensive Federal investigation was triggered, which ultimately came up empty after multiple Federal medical tests performed in Illinois continued to show a negative reading for

Brucellosis in the boy's blood. At that point the alleged Brucellosis and milkshake were ruled out by the medical authorities.

Mr. Kane consulted seasoned dairy attorney Peter Kennedy, who specializes in defending government enforcement against people who choose to consume raw milk. Mr. Kennedy explained that in his years of experience the FDA has a long flagrant history of using the States to do the federal “dirty work”. Mr. Kennedy strongly advise that Mr. Kane immediately file a public records request to obtain the e-mail communications between the FDA and DATCP. Mr. Kane did so, and the State responded, mailing Mr. Kane an eleven page document consisting of nine pages of e-mails.

In the e-mails, high ranking DATCP Administrator Robert Ehlendeldt expressed discontent about the boy's disease tests results coming up negative. Mr. Ehlendeldt suggested that the boy's suffering would have simplified the government's problems and could have been used as a good lever to push the agenda against raw milk.

In spite of the negative test results for Brucellosis on both the cows and the boy, and in spite of the fact that no individual ever came forward to sign a complaint against Mr. Kane, DATCP agents went on to engage in monthly conference calls with the FDA and other State agencies from Michigan, Indiana, and Illinois. In DATCP's email transmissions, the conference calls were entitled "FDA Raw Milk Conference Call". The conference calls were orchestrated and facilitated by agents of the FDA, where eliminating raw milk was discussed as a paramount issue. The FDA expressed their position against raw milk, and gave rundowns of their efforts against raw milk cross the U.S. (*See App.*, p. 14.)

The e-mails revealed that DATCP continued having monthly conference calls and email exchanges with FDA and other State agencies from around the country. FDA's raw milk agenda was discussed from as far west as California and emails were being exchanged by DATCP and other State agents from as far east as Maryland. The message of these communications was clearly to stop raw milk in the United States.

The e-mails empirically show DATCP agent Jackie Owens turning information over to William Weissinger of FDA with the understanding that the FDA wanted to pursue Max Kane. In this email exchange Jackie Owens assured William and the FDA that DATCP would help the FDA's investigation of Mr. Kane in any way they could. (*See App., p. 18.*)

Upon another open records request, Mr. Kane entered the DATCP building with an attorney to examine some of the department's files on raw milk. Upon examination of the department's files, Mr. Kane uncovered six pages of hand written notes. The notes were dated, written somewhat sloppy, and by the wording contained therein, would permit any reasonable person to believe, without a shred of doubt, that the notes were taken by a DATCP agent during one of the monthly FDA conference calls. The conference call notes revealed that Mr. Kane's home was under surveillance and that the FDA would ultimately visit him. The notes went on to describe and strategize different prosecution options against Mr. Kane. Three of the options discussed were: (1) civil action; (2)

criminal action; and/or (3) FDA infiltrate the club through undercover means. In the notes it was also discussed as whether to use the Vernon county district attorney or the WI Department of Justice. It was noted that an investigated demand was jurisdictionally difficult because neither Mr. Kane, nor the club, nor the club's boarding agents had any kind of a license with the State. (*See App.*, p. 22.)

Before long, Mr. Kane was sent a demand and ultimately subpoenaed by the State to attend a deposition where he was to be posed questions by the State's attorney Phillip Ferris.

On June 18, 2009 at 1pm Mr. Kane appeared to attend the scheduled deposition where he was to give testimony. Mr. Kane was both prompt and on time. Before the deposition actually began, Mr. Ferris asked Mr. Kane if Mr. Kane would be willing to assert his fifth amendment right and then agree to file a civil action and go before a judge. Kane responded “no” to the suggestion made by Mr. Ferris.

Kane then asked questions of Phillip Ferris, who was facilitating. Mr. Ferris refused to answer any of Mr. Kane's questions and maintained that Mr. Kane was not entitled to ask questions and be responded to. Surprisingly, Mr. Ferris chose not to put Mr. Kane under oath and chose not to pose any questions to Mr. Kane. Instead, Mr. Ferris voluntarily adjourned the deposition, and filed a civil complaint against Mr. Kane with the Vernon county circuit court. (*See App.*, p. 27.)

Mr. Kane answered the complaint pro se, but then ended up hiring counsel before the scheduling conference. The briefs went back and forth between counsel and the State. A few days prior to the hearing Mr. Kane and his attorney, under mutual agreement, decided to have counsel withdrawal. Mr. Kane, then pro se, attended the hearing on December 21, 2009 a bit unprepared.

At the beginning of the hearing, the Court spoke about its concerns that the dispute was not ripe to be brought before the court. The Court's reasoning was because Mr. Ferris never attempted to put Mr. Kane under oath and or posed any questions to Mr. Kane. The Court

asked Mr. Ferris why Mr. Ferris never had Mr. Kane sworn in or questioned at the June 18th deposition. Mr. Ferris responded by stating that he did not pose questions because he did not think Mr. Kane would answer them. The Court then stated that the deposition never actually took place and Mr. Ferris agreed. (*See App.*, p. 42.)

Along with ripeness, the Court went on to only partly discuss the immunity that Mr. Kane *might* receive from his testimony. Mr. Ferris argued to the Court that Mr. Kane's immunity would arise as a result of Mr. Kane assertion of his fifth amendment right.

The Court heard multiple constitutional challenges made by Mr. Kane. Some were *facial* challenges, some were *as applied*. Mr. Ferris *facial* argued that the State did in fact have the power to investigate the violations of WI Statutes and stated to the Court that Mr. Kane, under a constitutional challenge, carried the heavy burden of proving the WI Statutes unconstitutional beyond a reasonable doubt.

In continued arguments, Mr. Ferris made statements by alleging facts to the Court. Mr. Kane

rebutted in disagreement claiming that Mr. Ferris did not have his facts correct.

At the end of the hearing the Court, gave its decision and reasoning, analyzed the ripeness issue, and stated that in the name of judicial economy the Court would overlook the ripeness issue. The Court then went on to partially address the issue of immunity and stated that it believed that a proper grant of immunity would bind the Federal government and State of Illinois. However, in its reasoning the Court never addressed the fact that immunity had never been conferred to Mr. Kane, nor did the Court address Mr. Kane's risk of prosecution in any other State besides Illinois.

The Court went on to address the Constitutional challenges made by Mr. Kane. The Court noted that Mr. Kane's oral arguments were very primitive, under developed.

The Court addressed the facial constitutional challenge and agreed with Mr. Ferris. The Court said that the State did have the power granted by WI Statute 93.15 to investigate violations of dairy Statutes and reasoned that

Mr. Kane carried the heavy burden of proving the Statute unconstitutional beyond a reasonable doubt, and that Mr. Kane did not meet his burden. The Court only made a facial ruling and never made a ruling on the constitutional challenges as they applied to Mr. Kane in this case.

In its decision and order for Summary Judgment, the Court made no mention of the continued disputed facts, nor did it address the infancy dynamic of this case. The Court granted a Summary Judgment and later signed an order for Mr. Kane to comply with the subpoena. (*See App.*, pages 1 - 6)

In response, Mr. Kane filed a notice of appeal with the Wisconsin Court of Appeals and a motion for relief pending appeal with the same Circuit Court. At the resulting motion hearing on April 19, 2010, the Circuit Court suspended its own order so that judgment could be made by the Wisconsin 4th District Court of Appeals.

STATEMENT OF RELEVANT FACTS

The following enumeration of valid facts are relevant to this case before the Honorable 4th District Court of Appeals.

1 - Mr. Kane founded a private owners only club which was a closed community of owners and not open to the public. The club was called Belle's Lunchbox. (*See App.*, p. 33 and 39.)

2 - The State of Illinois and the Federal government started to investigate Mr. Kane and the club. Wisconsin soon after started to participate in the investigation. (*See App.*, p. 33.)

3 - The Wisconsin Department of Agriculture Trade and Consumer Protection (DATCP) agents participated on monthly conference calls orchestrated by the FDA officially known as FDA Raw Milk Conference Calls. (*See App.*, p. 14 and 17.)

4 - Under the suggestion of attorney Pete Kennedy, Mr. Kane filed an open records requests to uncover communications between the Federal government and the State of Wisconsin. (*See App.*, p. 12 and 28.)

5 - On the FDA conference calls participated 18 government agents from the several States and the Federal government and discussed how their internet search identified about 20 milk clubs serving Illinois. They contended that they want to "address" one club at a time. (*See App.*, p. 14.)

6 - On the monthly conference calls the FDA gave a rundown of their efforts against raw milk across the U.S. (*See App.*, p. 14.)

7 - In conjunction with the monthly conference calls DATCP exchanged emails with the FDA and multiple other States of the Union as far east as Maryland. (*See App.*, pages 13 thru 18.)

8 - Government agents of the several states and FDA circulated an email that revealed about how the FDA helped kill a bill that would legalize raw milk in Maryland. (*See App.*, p. 15.)

9 - The FDA communicated to DATCP that FDA was interested in pursuing Mr. Kane. (*See App.*, p. 16 and 17.)

10 - DATCP communicated to FDA that DATCP would help the FDA pursue Mr. Kane "...in any way they could." (*See App.*, p. 18.)

11 - DATCP agents inscribed hand written notes while strategizing cooperative surveillance and prosecution efforts between DATCP and FDA, against Mr. Kane. (*See App.*, p. 19 thru 24.)

12 - DATCP has an invested interest to aid and abet a federal investigation against Mr. Kane because DATCP is directly, regularly, and financially funded by the federal government. Funding for 2009 was \$13,647,809.24. (*See App.*, p. 25 and 26.)

13 - In written testimony FDA's director John Sheehan stated that "no one should consume raw milk at any time for any reason". (*See App.*, p. 31.)

14 - The State of Wisconsin, through their attorney Mr. Ferris, subpoenaed Mr. Kane to attend what was

supposed to be a deposition scheduled for June 18, 2009, to which Mr. Kane appeared promptly and on time without counsel.

15 - At no time during the scheduled meeting did Mr. Ferris chose to, or even attempt to, have Mr. Kane sworn in or put under oath. (*See App.*, p. 42.)

16 - At no time during the scheduled meeting did Mr. Ferris pose questions to Mr. Kane to where Mr. Kane asserted his 5th Amendment Right. (*See App.*, p. 42.)

17 - Mr. Ferris filed a civil action against Mr. Kane at the Vernon county circuit court. (*See App.*, p. 27.)

18 - The Court noted that as a result of Mr. Ferris not choosing to pose questions to Mr. Kane that the deposition never actually took place, and Mr. Ferris agreed with the Court's analysis. (*See App.*, p. 42.)

19 - In court Mr. Ferris contended that Mr. Kane's immunity would automatically arise as a result of Mr. Kane's asserting his 5th Amendment Right. (*See App.*, p. 46.)

20 - Mr. Kane never asserted his 5th Amendment Right. (*See App.*, p. 42 and 45 and 46.)

21 - Immunity was never conferred to Mr. Kane in writing or otherwise.

22 - The trial Court made its ruling based on a hypothetical situation supported by the reasoning standard of *judicial economy*. (See App., p. 56.)

23 - The Court never address Mr. Kane's risk of prosecution in any other State besides Illinois.

24 - The Court used "reason to believe" as the application standard to invoke the over broad investigative powers granted to DATCP by WI Statute 93.15 (See App., p. 58.)

25 - The Court only address the facial constitutional challenge and never address the constitutionality of Statue 93.15 as is applied to Mr. Kane in this case. (See App., pages 54 thru 60.)

26 - The Court granted a Summary Judgment ordering Mr. Kane to comply with DATCP's subpoena all while contending that Mr. Kane never refused questioning. (See App., p. 42.)

27 - Facts in this case are still in dispute. (See App., p. 37.)

28 - Mr. Kane was never brought before or indicted
by a grand jury.

ARGUMENTS

I. THIS CONTROVERSY IS NOT RIPE FOR ADJUDICATION AND AS A RESULT THE CIRCUIT COURT HAD NO JURISDICTION

As established by the Wisconsin Supreme Court in the *Olson* case, ripeness is one of four standards which the controversy must satisfy before one may seek declaratory relief pursuant to the Uniform Declaratory Judgments Act. See WI Statute 806.04. (See *Olson v. Town of Cottage Grove*);

"Before one may seek declaratory relief pursuant to the Uniform Declaratory Judgments Act, he must demonstrate that his cause of action is properly before the court, namely, that it is justiciable."

"Ripeness, as a component of justiciability, is a threshold jurisdictional question in a declaratory judgment action."

The WI Court of Appeals also recognized these standards in *Braun v. City of Wauwatosa*;

Before a plaintiff may maintain a declaratory judgment action under WI Statute 806.04, there must first exist a justiciable controversy.

In *EE, LLP v. Manitowoc County* the WI Court of Appeals affirmed the circuit court's dismissal, because EE did not go through the permit process and get denied;

The circuit court denied EE's motion and dismissed the case, finding that EE's complaint was "not ripe for judicial determination." The court held that the provisions of WI Statute 66.0401 (1) were to be applied on a case-by-case basis and EE could not mount a "facial" challenge to the statute. Rather it had to go through the permit process and, if a CUP was denied, it would have to seek judicial review.

Just the same Mr. Ferris would have had to try to depose Mr. Kane and get denied, which Mr. Ferris never did. Nor did Mr. Ferris meet his burden to demonstrate that this controversy was properly before the court.

This controversy is not ripe for adjudication by the circuit court because: (1) the deposition which was scheduled for June 18, 2009 never took place; (2) the deposition not taking place was at the result of Mr. Ferris' actions and not Mr. Kane's actions; and (3) Mr. Kane never asserted his Fifth Amendment Right against self incrimination. The circuit court itself took notice and stated affirmatively to these facts at multiple areas on the

record. Please see the appendix for the following four statements made by the court on the record.

Court: "Because what concerns me there is I wonder if this issue is, as we sometimes say, "ripe" because you never put him under oath or attempted to put him under oath." (*See App.*, p. 42.)

Court: "...but the deposition never took place." (*See App.*, p. 42.)

Court: "But the fact remains you never posed any questions to him; never put him under oath, never posed any questions to him." (*See App.*, p. 42.)

Court: "Let's assume that you had been put under oath. And you then in response to a question, asserted your 5th Amendment privilege to a question...." (*See App.*, p. 54.)

It is a true fact, supported by the statements on the record, that the circuit court had reached the legal conclusion that the case was *not* ripe for adjudication based on the facts. After the circuit court reach this undeniable conclusion, the court reasoned a hypothetical situation, supported by the reasoning standard of judicial economy,

to overlook the facts of this case and make a discretionary ruling.

Court: I've decided that the court should rule on the merits of what it sees before it rather than sending this back for another go-round, if you will. And I do that as much as anything in the interest of judicial economy. (*See App.*, p. 56.)

This ruling and reasoning were errors for five additional reasons. First and foremost, ripeness is jurisdictional. Mr. Kane agrees that courts have powers to make discretionary rulings in certain situations as long as the court examines the relevant facts and then applies the proper standard of law. However, since ripeness determines the jurisdiction of the court, normal moderate discretion should become tightened until it ultimately takes a back seat to the facts pertaining to the ripeness. In the *Olson* case the Wisconsin Supreme Court recognized this logic and set a narrow holding standard for ripeness to be reviewed as a standard of law.

A ripeness determination, on the other hand, is a legal conclusion and therefore reviewed as a question of law. The Town argues that the question we must ask regarding ripeness should be: "How

ripe is ripe enough?" This question implies circuit court discretion to determine whether a case is timely based upon a continuum to ripe outcomes. We disagree that this is the question courts must ask because ripeness should not be conceptualized as a sliding scale of possibilities. The proper question is simply: "Is the action ripe?" This question requires the circuit court to make a legal conclusion -"ripe" or "not ripe"-based upon the facts at hand and the standards set forth by the Act and our precedents.

Secondly, the reasoning and standard set forth by the circuit court of *judicial economy* poses an error because it infringes upon Mr. Kane's Rights of Due Process. According to due process, the correct series of actions to ripen the controversy would have had to play out before jurisdiction could be invoked and judgment could be made: Namely, (1) attempt to put Mr. Kane under oath and then let Mr. Kane refuse to be put under oath; or (2) put Mr. Kane under oath and then let Mr. Kane assert his Fifth Amendment Right; or (3) both.

Thirdly, a proper standard of law was not applied. The standard of *judicial economy* implies that in the name of money Mr. Kane's individual's rights may be overlooked. The board game makers, Parker Bros., might

restate this by saying "do not pass *due process*, go directly to *judgment*".

Fourthly, the ruling and reasoning of the circuit court were both irrational because they were supported by a hypothetical and overlooked the facts. This conclusion is outlined by the court's first two words of its statement below..."Let's assume...."

Court: "Let's assume that you had been put under oath. And you then in response to a question, asserted your 5th Amendment privilege to a question...." (*See App.*, p. 54.)

It is impossible for the record to show that Mr. Kane refused to be put under oath. This statement is supported by the fact that Mr. Ferris never attempted to have Mr. Kane sworn in. It is also impossible for the record to show that Mr. Kane refused questions at the deposition. This statement is supported by the fact that no questions were posed to Mr. Kane at the deposition. (*See App.*, p. 42.)

Court: "But the fact remains you never posed any questions to him; never put him under oath, never posed any questions to him."

Mr. Ferris: "That's -- you're -- that's absolutely correct, Your Honor."

The record as cited above empirically proves, and Mr. Ferris does not deny, the fact that Mr. Ferris never attempted to put Mr. Kane under oath or pose any questions to Mr. Kane.

Fifthly, since Mr. Ferris was the one who subpoenaed Mr. Kane to attend the deposition, the burden to ripen the controversy by following through with the scheduled deposition rested upon Mr. Ferris, the movant, and *not* Mr. Kane. The record clearly shows that Mr. Ferris did not meet his burden to ripen the controversy, and that by his own free will, did not attempt to follow through with the deposition essential to do so. The record clearly shows that Mr. Ferris did not believe that Mr. Kane would answer questions and that is the sole reason why Mr. Ferris did not attempt to ask any or did not attempt to put Mr. Kane under oath. (*See App.*, p. 42.)

Mr. Ferris: ...the reason being, if you read the transcript, it was crystal clear he was not going to answer my questions.

It is *not* a proven fact that Mr. Kane was not going to answer questions. It is merely an assumption made by Mr. Ferris. With all due respect to Mr. Ferris and his beliefs and assumptions about future events, the burden still rested upon Mr. Ferris to attempt to conduct the deposition, which he did not.

In conclusion of this argument there are no facts on the record that show that Mr. Kane refused to be put under oath, or that Mr. Kane asserted his Fifth Amendment Right. Nor does the record show that Mr. Ferris met his obligation to show that his cause of action is properly before the court pursuant to the Uniform Declaratory Judgments Act Wisconsin Statute 806.04. Nor does the records show that Mr. Ferris met his burden to follow through with the scheduled deposition, nor does the record show that the court examined relevant facts and applied a proper standard of law, nor does the record show that the circuit court had jurisdiction. In closing of this argument I will site Article I Section 22, a fitting passage, from the Wisconsin Constitution:

The blessings of a free government can only be maintained by a *firm adherence to justice,*

moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

II. IMMUNITY IS NOT AUTOMATIC, IT MUST BE CONFERRED BY THE AUTHORITY, AND NO IMMUNITY HAS BEEN CONFERRED TO MR. KANE

It is well established by the United States Supreme Court that immunity must be conferred prior to the compelling of testimony. This legal prerequisite is explicitly noted by the Court in *Balsys*;

Of course, the judicial exclusion of compelled testimony functions as a fail-safe to ensure that compelled testimony is not admitted in a criminal proceeding. The general rule requires a grant of immunity prior to the compelling of any testimony. We have said that the prediction that a court in a future criminal prosecution would be obligated to protect against the evidentiary use of compelled testimony is not enough to satisfy the privilege against compelled self-incrimination. *Pillsbury Co. v. Conboy*, 459 U.S. 248, 261, 74 L. Ed. 2d 430, 130 S. Ct 608 (1983). The suggestion that a witness should rely on a subsequent motion to suppress rather than a prior grant of immunity would (not) afford adequate protection. Without something more, (the witness) would be compelled to surrender the very protection which the privilege is designed to guarantee. *Maness v. Meyers*, 419 U.S. 449, 462, 42 L. Ed. 2d 574, 95 S. Ct 584 (1975)(footnote and internal quotation marks

omitted). This general rule ensures that we do not 'let the cat out with no assurance whatsoever of putting it back,' *id.* at 463, and leaves the decision whether to grant immunity to the Executive in accord with congressional policy, see *Pillsbury, supra*, at 262.

The record clearly shows that Mr. Ferris disagrees with the opinion of *Balsys* as he contends that Mr. Kane's immunity would automatically arise as a result of Mr. Kane's assertion of his Fifth Amendment Right, and that no formal grant of immunity is necessary to satisfy Mr. Kane's Right against self-incrimination. (*See App.*, p. 46.)

Mr. Ferris: "...and the immunity arises as a result of his assertion and the compelling of his testimony under 93.17...."

But before we disagree with this rational any further, let us first give Mr. Ferris the benefit of the doubt, and agree that Mr. Kane's immunity *will* automatically arise as a result of Mr. Kane's assertion. Mr. Ferris' argument still does not hold water because the record shows that Mr. Kane never asserted his Fifth Amendment Right. (*See App.*, p. 42.)

Court: "But the fact remains you never posed any questions to him; never put him

under oath, never posed any questions to him."

Mr. Ferris: "That's -- you're -- that's absolutely correct, Your Honor."

In oral arguments Mr. Ferris attempted to finesse his immunity argument by claiming that Mr. Kane's immunity will automatically arise. The record does not show any authority that supports Mr. Ferris' *automatic* immunity claim, and quite to the contrary, the record, by and through the *Balsys* case, shows quite the opposite. Immunity was *not* conferred to Mr. Kane then, and immunity has *not* been conferred to Mr. Kane now. Immunity is *not* automatic, it *must* be conferred by the authority, and it wasn't, and it hasn't.

The record shows that the circuit court *never* addressed this *automatic* immunity issue in its ruling, and has *now* signed an order for Mr. Kane to comply with the subpoena. If Mr. Ferris' claims about *immunity automatically arising* as a result of Mr. Kane "taking the fifth" are true, then an affirming appellate court will sentence Mr. Kane to death. Being that Mr. Kane's immunity is a result, dependent upon Mr. Kane's assertion

of "the Fifth", under Mr. Ferris' logic, Mr. Kane would *not currently* have immunity since Mr. Kane never actually "took the Fifth", and *now* if Mr. Kane attempts to invoke his immunity by "taking the fifth" once the questions are finally posed to him, he will be held in contempt of the Court's order. Continuing, if Mr. Kane does not "take the fifth" once questions are finally posed to him and he complies with the Court's order, he will *not* have immunity because he never "took the fifth", and therefore any of his answers can be used against him. In other words, Mr. Kane would just be giving out free information. For this reason alone, the circuit court erred and must be overturned.

- LOGICAL NOTES FOR THE LEGAL MIND -

The way to demonstrate the *immunity is legitimate* argument is to show a case where a person's immunity was upheld under fire. Example: If you want to argue that seat belts will protect you in a car crash, one should site example of people who have been in car crashes where the seat belt served its purpose.....as opposed to arguing that seat belts will protect you in a crash because other people

choose to wear them and those people have not experience a car crash. A more proper argument would be to show an example where someone's immunity was actually upheld while under fire and how that case played out in the court.

III. BY GIVING TESTIMONY MR. KANE STANDS AT A POSSIBLE RISK OF FUTURE PROSECUTION IN OTHER STATES

The record shows that the alleged violations involved conduct occurring in other states, and the State does not allege, nor does the record show, that immunity has been conferred to Mr. Kane by any other state. Pursuant to the *Balsys* case, as cited in the immunity arguments, since immunity has not been conferred to Mr. Kane, Mr. Kane does not have adequate protection from prosecution in other states jurisdiction, and under the Doctrine of Dual Sovereignty any other state could do just that, possibly even under a formal grant of immunity from Wisconsin. See *Heath v. Alabama*, (See App., p. 34.)

IV. WI STATUE 93.15 IS UNCONSTITUTIONAL AS APPLIED TO MR. KANE IN THIS CASE, AND DATCP IS EXCEEDING ITS INTENDED AUTHORITY UNDER THE STATUTE

Essentially, what is going on is that the Federal Government, the State of Wisconsin, and other States in the Union, have decided that they want to put an end to legal access to raw milk under the pretext that they are investigation criminal violations, all while the Federal Government is using State Agencies to do their bidding and collect information. The record proves this fact. (*See App.*, pages 16 thru 18, and 19 thru 24.)

The State of Wisconsin has subpoenaed Mr. Kane while simultaneously making him the center target of their investigation. The records shows that the State has *never* identified anyone else that they are investigating with regards to the Belle's Lunchbox investigation. In spite of the undeniable fact that immunity was never conferred to Mr. Kane, the State claims to have granted Mr. Kane derivative use immunity that extends to only one other State. This all makes no sense unless there is some nefarious purpose at work. If Mr. Kane is the center of the

investigation, then what value is his testimony that the State cannot use against him? Why is the State offering the target of its investigation derivative use immunity? The concern which arises is that either the State is planning to mis-state facts at a later Kastigar hearing, and claim that they did not obtain information from the interview or that another jurisdiction plans to prosecute Mr. Kane.

DATCP's track record, agenda against raw milk, and disingenuous actions speak for them self. In the Spring of 2010 DATCP had multiple WI County Sheriffs serve several small farmers around the state, who were suspected of selling raw milk off the farm, with extremely invasive demands for interrogatories. The demands had pages upon pages of questions demanding that the farmers turn over everything from bank account statements to receipts and credit card information dating from over five years back. It is paramount to note that no citizen ever came forward to sign a complaint against these farmers. DATCP took this enforcement action on their own accord. The only problem with the demands for interrogatories is that they were issued "out of the blue" without any prior

legal action pending. Once legal counsel got involved on behalf of the farmers, DATCP surprisingly let the demands dissolve and backed off. DATCP's bully tactics set a poor standard for government excellence. After gaining light of DATCP's maneuver, one of the county sheriffs deemed the demands unjust and went as far as apologizing to the local farmer to whom he previously served the demand to.

Similarly DATCP issued Mr. Kane an invasive demand comprised of twenty five different questions primarily about Mr. Kane. The State's claims of seeking to prosecute someone other than Mr. Kane and give Mr. Kane immunity are not genuine. No such person has been identified, and the State's preferred questions do *not* support, nor do they reflect, such a paper-thin claim. Instead the questions are all about Mr. Kane as opposed to some other person. (*See App.*, pages 7 thru 9.)

The record empirically demonstrates that the demand sent to Mr. Kane never even mentioned anything about immunity, and quite to the contrary, the demand told Mr. Kane in **bold print** that if he did not comply he could face huge fines and go to jail. Does that sound like a way

to grant someone immunity? A more believable truth is that DATCP tried to bully answers out of Mr. Kane without having mention immunity, and planned to let Mr. Kane try to figure the immunity part out himself. (*See App., p. 11.*)

When DATCP was questioned, by both Mr. Kane and the media, about why DATCP is launching all the actions against raw milk around the state, DATCP's legal counsel Cheryl Daniels maintained the position that DATCP has no invested interest *for* or *against* raw milk, and that DATCP is just enforcing the laws as created by the Wisconsin Legislature. If that is true, then why did DATCP officials, on behalf of the agency, appeared in Eau Claire, WI on March 16, 2010 to speak against a bill that would legalize the sale of raw milk in Wisconsin?, and why in their e-mails did DATCP want to use a boy's illness as a lever to push an agenda which DATCP claims not to exist?

As this very case progressed through the circuit court Mr. Kane made an unscheduled appearance to the office of DATCP legal counsel Cheryl Daniels. Mr. Kane

and Cheryl Daniels spent about thirty minutes speaking together. The appearance was provoked by DATCP's threats to have a local District Attorney file criminal charges against a small farmer who was suspected of selling raw milk in Rubicon, WI. Mr. Kane wanted to know what were DATCP's issues against raw milk. Legal counsel Cheryl Daniels went on to tell Mr. Kane that she liked mandatory pasteurization of dairy products because it "...made her job easier." She said that with mandatory pasteurization she would not have to be faced with the burden of giving an explanation to an angry parent, whose child was believed to be sickened by raw milk. This was far different from the usual reason of "I'm just enforcing the laws of the legislature."

In the Spring of 2010 channel 27 WKOK Madison featured a thirty minute special report about the thousands upon thousands of yearly formal complaints which are submitted to DACTP by elderly Wisconsin consumers, and that continue to go unanswered by the agency. In the special report the Secretary Rod Nilsustuen simply said that DACTP was not given enough funding to keep up

with all the complaints. Why is the agency investing its financial resources against raw milk, an area where the agency receives few if any consumer complaints, instead of helping the elderly of Wisconsin who are calling upon their government for help? The answer is because DATCP has an emotional involvement, invested interest, bias, personal views, and an agenda against raw milk.

Given the facts, the events, the documents, the e-mail communications, the hand written notes, and the actions and statements of DATCP, the record proves beyond a reasonable doubt that DATCP and the Federal government have a bias against raw milk. The executive branch of government should enforce the laws with logical discretion, not with prejudice. DATCP's previous claims of "just enforcing the laws that are on the books" is a total falsehood and simply not true.

The investigative powers conferred upon DATCP by WI Statue 93.14 and 93.15 are broad indeed. For example, pursuant to 93.15(1), DATCP can require any person "engaged in business" to provide answers to

DATCP's questions. According to WI Statute 93.01(1m), the definition of "business" is surprisingly far-sweeping:

"Business" included any business, except that of banks, credit unions, savings and loan associations, and insurance companies. "Business" includes public utilities and telecommunications carriers to the extent that their activities, beyond registration, notice and report activities, are not regulated by the public service commission and includes public utility and telecommunications carrier methods of competition or trade and advertising practices that are exempt from regulation by the public service commission...

When the executive branch of government is entrusted with such broad powers, it must use them judiciously, and not without the benefit of checks and balances in the form of oversight by the judiciary. (*See App.*, p. 36.)

The State's attempt to exploit the over broad powers established by WI Statute 93.15 are not genuine. The Wisconsin Legislature created the overly broad investigative powers of Statue 93.15 to investigate registered Grade A dairy farms which the State has the authority to license. It is not reasonable to believe that the Wisconsin Legislature created such over broad investigative powers to be used to invade the privacy of those who choose to consume raw milk, as a part of their

pursuit of happiness, and that are not bothering anyone else in the world.

The record shows that in its ruling, the Court only addressed the *facial* challenge to the statute and never addressed the *as applied* challenge to the statute. The Court contended that the State had the power to investigate possible violations of dairy statutes, and Mr. Kane agrees. However, Mr. Kane disagrees with how DATCP is abusing its power and overstepping the intended use of its power. Namely their intentions to help the federal investigation ".....in any way they can." (*See App.*, p. 18.)

Statute 93.14 is misleadingly worded and somewhat undefined. It states that the department may investigate **any matter within its power**, but it does not define how far its powers extends, or where the line is drawn. So the question arises, what is to determine whether a situation falls under the power or jurisdiction of DATCP?

WI Statute 93.14 (1) The department or any of its authorized agents may, **in relation to any matter within the departments power**, conduct hearings, administer oaths, issue subpoenas and take testimony.

Saying that an agency has the power to investigate any matter within its power is like saying that a detective has the power to question any witness which they have the power to question.

The legislature conferred very broad authority upon DATCP with all of Chapter 93, and DATCP in this instance is exceeding its authority under the statute. DATCP has targeted Mr. Kane in their e-mails with the Federal government and statute 93.15 is unconstitutional as DATCP is applying it to Mr. Kane.

DATCP's powers are enumerated in WI Stat. 93.08, none of which include regulation of out-of-state activities, or providing assistance to authorities in other states or federal jurisdictions. Mr. Kane does not contend that cooperation with other enforcement authorities is at all inappropriate, however, he does object to the use of DATCP's resources and statutory authority to conduct a fishing expedition for the benefit of out-of-state enforcement authorities whose investigative powers are less extensive. DATCP is clearly crossing the line. The Court erred by failing to address the unconstitutional *as*

applied issue, which was clearly before the court. (*See* App., p. 36.)

**V. MATERIAL FACTS ARE STILL IN DISPUTE
AND THEREFORE A SUMMARY
JUDGEMENT WAS NOT WARRANTED**

The rigorous standard applies to a movant for summary judgment as set forth in *Kraemer Bros., Inc. v. United States Fire Ins.*, 89 Wis. 2d 555, 278 N.W.2d 857 (1979):

A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy. Some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt.

Adickes v. Kress & Co., 398 U.S. 144, 157-158 (1970)

The inferences to be drawn from the underlying facts contained in the moving party's material must be viewed in the light most favorable to the party opposing the motion.

The records shows that a summary judgment is premature at this juncture. Even if the Court concludes, as a matter of

law, that the immunity available to Mr. Kane is co-extensive with the applicable privilege against self-incrimination, the inquiry does not end there. Mr. Kane has raised the following additional issues which the court must address at an evidentiary hearing including (1) whether Belle's Lunchbox is a private club not subject to DATCP jurisdiction and (2) whether DATCP intends to use the Subpoena and other information gathered, using DATCP's investigative powers, to feed information to out-of-state enforcement personnel for out-of-state enforcement purposes rather than enforcement of Wisconsin law and regulations. (*See App.*, p. 38.)

If courts of law strive toward any one thing, it should be that their summary judgments are based on *facts* as opposed to *hypothetical* situations. *See* Wisconsin Statute 802.08(2):

The judgment sought should be rendered if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Overlooking facts and issuing a summary judgment based on a hypothetical is not justice, nor does it satisfy the

requirements for summary judgment pursuant to
Wisconsin Statute 802.08(2).

CONCLUSION

Mr. Kane respectfully requests the following from the Wisconsin Fourth District Court of Appeals:

1 - That the Court of Appeals find that the engagements between Mr. Kane and the State were not yet ripe to be brought before the Vernon county circuit court, and that the circuit court erred as a matter of law.

2 - That the Court of Appeals find that the State, by choosing not to depose Mr. Kane, did not meet their burden to ripen the controversy.

3 - That the Court of Appeals find that *Judicial Economy* is not the correct standard of law to merit a summary judgment.

4 - That the Court of Appeals find that the circuit court erred by not applying the correct standard of law.

5 - That the Court of Appeals find that immunity was not conferred to Mr. Kane, and that the circuit court erred by ordering Mr. Kane to comply with the subpoena.

6 - That the Court of Appeals find that by giving testimony Mr. Kane would be putting himself at a possible risk where his testimony could inflict damage against him in some possible future case.

7 - That the Court of Appeals find that *reason to believe* is too lenient a standard to invoke the over broad investigative powers created by WI Statue 93.15 and that perhaps *substantial evidence* is a most suitable application.

8 - That the Court of Appeals find that the Wisconsin Legislature's intention behind the broad investigation powers created by WI Statue 93.15 were for investigating Grade A dairy farms, that are registered and licensed by the State of Wisconsin, and that the broad investigative powers were not created for circumstances such as the ones surrounding this controversy.

9 - That the Court of Appeals find that relevant facts are still in dispute, and that as a result, the Summary Judgment granted to the State, under Wisconsin Statute 802.08, was done so in error.

10 - That the Court of Appeals rule in favor of Mr. Kane, and overturn or quash the Summary Judgment

granted to the State of Wisconsin by the Vernon county
circuit court.

Dated this 1st day of August 2010.

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WORD CERTIFICATION

I hereby certify that this brief conforms to the rules contained in 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of the brief is 8,346 words.

Dated this 1st day of August 2010.

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