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DISTRICT I

May 31, 2023

To:

Hon. Kevin E. Martens
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Michael L. Chernin
Electronic Notice

Lanarius T. Hodges 506895
Redgranite Correctional Inst.
P.O. Box 925
Redgranite, WI 54970-0925

You are hereby notified that the Court has entered the following opinion and order:

2021AP1881 Lanarius T. Hodges v. Michael L. Chernin (L.C. # 2017CV5927)

Before Brash, C.J., Donald, P.J., and Dugan, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Lanarius T. Hodges, *pro se*, appeals an order of the circuit court granting summary judgment in favor of Michael L. Chernin. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We further conclude that the circuit court's decision entered on November 24, 2021, which granted Chernin's summary judgment motion at issue in this appeal, identified and applied the proper legal standards to the relevant facts to reach the correct conclusion. We, therefore,

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

incorporate into this order the circuit court's decision, which we are attaching, and summarily affirm on that basis. *See* WIS. CT. APP. IOP VI (5)(a) (court of appeals may adopt circuit court opinion).

Hodges filed the action underlying the appeal against Chernin, alleging that while Chernin was his attorney, Chernin improperly convinced him to sign a release of potential personal injury claims against another Chernin client, Hussein Govani. Hodges alleged that on November 17, 2013, he was shot five times inside of a tavern owned by Govani. Hodges alleged that Chernin visited him at the hospital and told him that "the [tavern] owners sent Chernin to become [Hodges's] attorney." Hodges further alleged that later, while he was being held in the Milwaukee County Jail for charges in an unrelated criminal matter, Chernin came to the jail and convinced Hodges to execute a release of all potential claims against Govani arising from the tavern shooting. Hodges also alleged that Chernin was acting on behalf of Govani when Chernin convinced Hodges to sign the release and that Govani paid Chernin $10,000 for getting Hodges to sign the release. Hodges's complaint alleged claims of legal malpractice, fraud, and breach of fiduciary duty.

In March of 2018, Chernin moved for summary judgment, arguing that Hodges knew that by signing the release, he would be giving up any potential claims resulting from the tavern shooting. Chernin further argued that, because Hodges understood the effect of the release, Chernin could not have been the proximate cause of any injuries that Hodges claimed as a result of Hodges signing the release. Chernin provided an affidavit in support of his motion, as well as a disc containing recorded jail calls made by Hodges, which Chernin claimed demonstrated Hodges's understanding of the effect of the release. The circuit court granted summary judgment. On appeal, however, this court remanded the matter back to the circuit court because

we concluded that Chernin's affidavit was insufficient to render the disc containing the recorded calls admissible. *See* ***Hodges v. Chernin***, No. 2019AP129, unpublished slip op. (WI App June 16, 2020).

On remand, Chernin renewed his summary judgment motion, this time providing affidavits from Corrections Officer Gary A. Kohl and Assistant District Attorney Chad E. Wozniak, addressing the process by which jail phone recordings are obtained. Hodges responded that the doctrine of issue preclusion barred the circuit court from considering the additional affidavits. The circuit court granted Chernin's motion, finding: (1) issue preclusion did not apply; (2) the additional affidavits cured any evidentiary defects from the first summary judgment motion; and (3) the recordings established that Hodges was aware of the effects of signing the release. This appeal follows.

On appeal, Hodges contends that the circuit court erred in finding that issue preclusion was inapplicable to this matter; that the circuit court failed to consider certain material facts; that the circuit court failed to address certain motions filed by Hodges; and that the circuit court failed to lift a stay on discovery, thereby precluding Hodges from obtaining all of the facts essential to his case.

As stated, the circuit court's November 24, 2021 decision states the relevant legal standards and provides a proper legal analysis as to the issues on appeal, particularly as to issue preclusion. We do note, however, that contrary to Hodges's contention, that the circuit court actually did address additional facts as well as at least one of the motions Hodges complains of, but still found that Hodges could not "establish that the actions of Chernin caused him harm because he understood the release form when he signed it. Because of this, Hodges cannot prove

causation[.]" Moreover, none of the additional facts Hodges cites in his brief contradict the circuit court's finding that Hodgins was fully aware of the effect of the release. As to Hodges's claim that additional discovery would have proven the fraud, breach of fiduciary duty, and legal malpractice claims, we note that the circuit court's decision correctly assumes that the evidence shows that Hodges did not rely on any of that conduct, and thus, that conduct did not cause him any injury.

For the foregoing reasons, we affirm the circuit court and adopt its November 24, 2021 decision.

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

BY THE COURT:

DATE SIGNED: November 24, 2021

Electronically signed by Kevin E. Martens-27

Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT

BRANCH 27

MILWAUKEE COUNTY

LANARIUS T. HODGES,

Plaintiff,

v. Case No. 17-CV-5927

MICHAEL L. CHERNIN,

Defendant.

AMENDED DECISION AND ORDER

INTRODUCTION

Lanarius T. Hodges ("Hodges") filed this action against Michael Chernin ("Chernin") alleging that, while serving as his attorney, Chernin improperly convinced Hodges to sign a release of potential personal injuries claims against another Chernin client, Hussein Govani ("Govani"). Hodges' complaint includes claims of Legal Malpractice, Fraud, and Breach of Fiduciary Duty. After Judge Brostrom[1] granted Chernin's Motion for Summary Judgment, the Court of Appeals determined that relied-upon evidence – a disc of Hodges' recorded jail phone calls – lacked proper foundation for admissibility. On remand, Chernin has submitted additional affidavits seeking to provide that foundation. Because he has successfully done so and Judge Brostrom's findings remain the law of this case, the Court **GRANTS** summary judgment in favor of Chernin.

BACKGROUND FACTS

I. General Background

Hodges alleges that, on November 17, 2013, he was shot five times inside of a tavern owned by Govani. The following includes the substantive and procedural facts of this case relevant to summary judgment as set forth by the Court of Appeals in its remand order, with footnotes omitted:

Hodges' criminal case

> On November 6, 2013, in Milwaukee County Circuit Court case No. 2013CF5055, prior to the tavern shooting, the State charged Hodges with firstdegree recklessly endangering safety with use of a dangerous weapon, two counts of possession of a firearm by a person adjudged delinquent, and

[1] The Honorable Ellen Brostrom presided over this case when Chernin's Motion for Summary Judgment was decided.

endangering safety with reckless use of a firearm, and a warrant was issued for Hodges' arrest.

The warrant was executed on November 19, 2013, and Hodges was taken into custody. On November 23, 2013, Chernin represented Hodges at his initial appearance in case No. 2013CF5055. He withdrew as Hodges' trial counsel on January 23, 2015, before the matter proceeded to a jury trial on April 27, 2015.

Hodges' complaint against Chernin in this action

In his complaint in this case, filed on July 17, 2017, Hodges alleged that on November 17, 2013, he was shot five times inside a tavern owned by Govani and that, as a result of the shooting, he had personal injury claims against Govani. He also alleged that, at the time of the shooting, Chernin was representing Govani on an unrelated civil case. Hodges further alleged that Chernin came to the hospital where he was being treated for his injuries from the tavern shooting, that Chernin told Hodges that he would be representing him in the criminal case, and that Chernin told him that "the [tavern] owners sent Chernin to become [Hodges'] attorney."

Hodges further alleged that, later while he was being held in the Milwaukee County Jail for the charges in the criminal case, Chernin came to the jail and, on December 30, 2013, Chernin convinced Hodges to execute a release of all potential claims against Govani arising from the tavern shooting. Hodges also alleged that Govani sought to have Hodges sign a release of all potential claims arising, from the shooting incident at Govani's tavern, that Chernin was acting on behalf of Govani when Chernin convinced Hodges to sign the release, and that Govani paid Chernin $10,000 for getting Hodges to sign the release.

Procedural history in this case

The summons and complaint in this case were filed on July 17, 2017, and a copy was personally served on Chernin by the Milwaukee County Sheriffs Office on August 5, 2017. [ ]

Chernin filed a single document entitled "Motion, Affirmative Defenses & Answer" on September 13, 2017. [ ]

Chernin's motion for summary judgment

In March 2018, Chernin filed a motion for summary judgment and a brief, an affidavit, and a disc in support of his motion for summary judgment. In his affidavit, Chernin averred that he had represented Hodges in the criminal case, that as a part of the discovery materials in the criminal case, the prosecutor

> produced a disc that contained telephone calls placed by Hodges while he was in the jail, and that the accompanying disc contained actual recorded telephone calls that Hodges made between November 24, 2013, and January 3, 2014, while he was in custody in the jail.
>
> Chernin argued that Hodges' statements in the recorded phone calls clearly showed that Hodges knew that, by signing the release, he would be giving up any potential claims that he had resulting from the tavern shooting. Chernin further argued that, because Hodges understood the effect of his signing the release, Chernin could not have been the proximate cause of any injuries that Hodges claimed as a result of Hodges signing the release and, therefore, he was entitled to summary judgment.
>
> In rendering its decision granting Chernin's motion for summary judgment, the trial court relied exclusively upon Hodges' alleged statements contained in the jail calls. It stated that "Chernin has submitted this disc with the jail calls. He has sworn under oath that it's an accurate, unaltered copy of that disc. I can accept a copy." It went on to state that Hodges's statements contained in the disc show that he understood what the release meant. It then concluded that as a result of his knowledge of the effect of the release the "causation chain" of each claim "is broken."

Hodges v. Chernin, 393 Wis. 2d 595, ¶¶ 6-20. **II.**

The Court of Appeals Decision

The Court of Appeals did not consider whether summary judgment was appropriate based on the content of the recorded calls, but rather "whether Chernin's affidavit was sufficient to render the disc admissible in evidence." *See id.* at ¶ 27. It concluded that Chernin's affidavit was insufficient because it "was not 'made on personal knowledge' and did not 'set forth such evidentiary facts as would be admissible in evidence.'" *Id.* at ¶ 28 (*citing* Wis. Stat. § 802.08(3)). The Court of Appeals explained that

> . . . [a]ll that Chernin could say about the disc was that the prosecutor in the criminal case gave him the disc as part of the discovery materials in that case. Chernin has no personal knowledge of how the calls in the jail were recorded nor how they were preserved. He has no personal knowledge of how the original or the copy of the disc was made nor how the prosecutor came into possession of the disc.

Id. The Court of Appeals recognized that affidavits not made with personal knowledge must be disregarded for summary judgment purposes. *Id.* at ¶ 29 (*citing Leszczynski v. Surges*, 30 Wis. 2d 534, 538 (1966)). It concluded that Chernin was not qualified to testify about the disc because he "does not have the requisite personal knowledge of how the jail phone calls were recorded and preserved, nor how the original disc and the copy were made, nor how the prosecutor came into possession of the disc." *Id.* at ¶ 30.

III. Chernin's Newly Filed Affidavits

After the Court of Appeals remanded the case, Chernin renewed his motion for summary judgment and filed additional affidavits from Corrections Officer Gary A. Kohl ("Officer Kohl") and Assistant District Attorney Chad E. Wozniak ("ADA Wozniak").[2]

Officer Kohl signed two affidavits (filed on December 21, 2020 and May 7, 2021, respectively). He works for the Milwaukee County Sheriff's Department and handles jail records kept in the ordinary course of business by the Sheriff. (12/21/20 Kohl Aff. ¶¶ 1-2.) Those records include logs of calls made by inmates. (*Id.* at ¶ 3.) Officer Kohl attested that inmates' calls are occasionally recorded and downloaded without alteration when an inmate makes statements that might violate the law. (*Id.* at ¶¶ 3-5.) Those recording are then provided to law enforcement for possible investigation. (*Id.* at ¶ 5.) Officer Kohl reviewed records and found that Hodges was an inmate from Dec. 1, 2013, through January 3, 2014. (*Id.* at ¶ 7.) Officer Kohl further compared "the index of the recorded jail calls with the business records of the Sheriff's [Office] still available

[2] The petitioner had filed a Motion to Lift Stay on Interrogatories on January 5, 2018. That motion was denied by the Court on February 17, 2021.

within the ordinary course of business." (*Id.* at ¶ 6.) Officer Kohl concluded that

> (b) Each call on the index compares to the Inmate PIN, Password, Inmate Identification assigned to Lanarius Hodges and the CSN found in the Sheriff's Department records;
> (c) The duration for each call on the index is identical to the Sheriff Department records to which it was compared for Lanarius Hodges. If the duration of the call is the same on the index and the record then the call has not been altered or modified by the recording process;
> (d) Each of the calls comparing the index with the Sheriff's Department records show the calls were made with the codes assigned to Hodges.

(*Id.* at ¶ 10(b)-(d).) Attached to his affidavits are a log of jail phone calls made by Hodges, an index of his jail calls that were recorded, a listing of where Hodges was housed at the time the calls were made, and a source document containing his unique telephone identifiers (including his master ID number, telephone pin and telephone password).

ADA Wozniak works for the Milwaukee County District Attorney's Office and holds the position formerly occupied by ADA Dennis Stingl. (Wozniak Aff. ¶¶ 1-2.) ADA Wozniak has access to the records kept in the ordinary course of his office. (*Id.* at ¶ 3.) ADA Wozniak attested that ADA Stingl prosecuted Hodges in "*State of Wisconsin v. Lanarius T. Hodges*, Milwaukee County Case Number 14CF3587, for a charge of solicitation to commit perjury based on Hodges' recorded telephone calls while in the Milwaukee County Jail. (*Id.* at ¶¶ 4, 6-7.) ADA Wozniak stated that, based on his review of records, "Hodges' recorded conversations were stored on an audio compact disc" that had been provided by the Milwaukee County Sheriff's Department and that a "complete and unadulterated copy of the compact disc containing Hodges' jail conversations was provided by ADA Stingl as discovery in Hodges' criminal prosecution to his then lawyer Michael Chernin." (*Id.* at ¶¶ 8-10.)

As previously indicated, Chernin provided an affidavit with his original motion along with the disc he received during discovery in Hodges's criminal case. (Chernin Aff. ¶¶ 3-5.) Chernin swore that the disc was an "accurate, complete, and unadulterated" copy of the disc he received in discovery. (*Id.* at ¶ 6.) According to Chernin, the disc contains several phone calls of Hodges discussing the release of liability agreement with others.[3] As noted by the Court of Appeals, the

[3] Chernin summarizes the following exchanges in his brief by referencing excerpts from the disc:

On December 19, 2013 (call #13826241):

Hodges's mother: "What was the paper for?"

Hodges: "It's basically saying, like, like, uh, any, any claims, like, basically I can't do, I can't make any claims against them. Pretty much."

On December 26, 2013 (call #13980786):

Hodges: "Yeah, I want to sue them."

Other person: "So you just going to sit in there, right?"

Hodges: "I'm going to try to stay in 'til the tenth, the tenth, when my next court date is. If they lower my bail to like 8 G's then I'll bail off of that, uh, with nobody's help. Instead of just taking they $2,000 and then not being able to sue them, I'd rather just wait to see if I can."

On December 28, 2013 (call #14023432):

Hodges: ". . . (unintelligible audio) . . . working with them. He working with them, and he the one that sent dude that tried to make me sign that paper."

On December 29, 2013 (call # 14040516):

Hodges's Mother: "Yeah. So Yamira can meet with me to, um, give me the money if you want me to do that."

Hodges: "Yeah, uh, man though, I know they, man, I can get a lot of money that's why they trying to do this, mom."

Hodges: "That's why I need ya'll to just do it because I don't want to just take the $4,000 from them and bail out and miss out on, like, a hundred thousand.
I could get a hundred thousand or better."

Hodges: "I can take that as a loss. I really don't want to. I swear I don't want to. I want to wait 'til the 10th, but it is what it is."

In a later call on December 29th (call #14066203):

Hodges's Mother: "Okay. Tell Yamira to come get you, right?"
Hodges: "Yeah, both of you all now."
Hodges's Mother: "Okay, but then you sign the paper with her?"

previous trial court judge stated that her clerk listened to the disc and prepared a transcript of the disc that the trial court read. Based on this review, the trial court concluded that Hodges knew that, if he signed the release, he would be precluded from asserting a personal injury claim against

Govani:

> The trial court then found that the statements on the disc "unequivocally show that there's no disputed material facts that [Hodges] understood what the release meant. [Hodges] understood it would preclude [Hodges] from getting any other money beyond this bail money out of the civil case ... [Hodges] thought maybe [he] could get it not to stick[.]" The trial court then found that, because Hodges knew and understood what he was doing when he signed the release "the causation chain [was] broken" for each of his claims:—legal malpractice, fraud, and breach of fiduciary duty.

Hodges v. Chernin, 393 Wis. 2d 595, ¶¶ 26-27. The trial court further found that Hodges had not provided evidence that the contents of the disc were not accurate:

> The trial court then told Hodges that "you have sworn under oath that [the disc] is not accurate but you haven't given me any facts, any evidence, any factual evidence, to support that claim. Your sort of just bald assertion that it's not accurate does not raise a triable issue of material fact."

Id. at ¶ 25.

In his response to Chernin's renewed Motion for Summary Judgment, Hodges argues that the doctrine of issue preclusion bars the Court from considering the Kohl and Wozniak affidavits. Hodges further argues that, even on their merits, the affidavits do not provide foundation for admissibility because the proponents (1) lack personal knowledge of the circumstances involving this particular disc and (2) failed to attach documents referenced in the affidavits. Without these

Hodges: "Yes, ma. I will, I will do it but it's not going to hold up because, uh, I'm in here and that's bribery. That's blackmail."

Hodges: "but I just talked to man and he talking about 100 to 300 thousand dollars. That's bribery. They trying to bribe me so I can sue them for that too he said. I know. Dude said that was bribery. They trying to bribe me because they know they in the wrong."
Hodges's Mother: "He said you sign the papers Nai, and you won't get nothing."
Hodges: "Okay. That's a risk I'm willing to take. I'm trying to get out of here."

affidavits, Hodges indicates that Chernin has not addressed the remaining elements of each cause of action and argues that Chernin is not entitled to summary judgment.

LEGAL STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers 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." Wis. Stat. § 802.08(2). Summary judgment "is designed to eliminate unnecessary trials" because "there is no triable issue of fact" to present to a jury. *Maynard v. Port Publ'ns., Inc.*, 98 Wis. 2d 555, 562-63, 297 N.W.2d 500 (1980). The court takes "evidentiary facts in the record as true if not contradicted by opposing proof." *Lambrecht v. Estate of Kaczmarczyk,* 2001 WI 25, ¶ 23, 241 Wis. 2d 804, 623 N.W.2d 751. However, "inferences to be drawn from the underlying facts," "should be viewed in the light most favorable to the party opposing the motion, and doubts as to the existence of a genuine issue of material fact are resolved against the moving party." Id.

The moving party has the burden of showing the absence of genuine issues of material fact. *Cent. Corp. v. Research Prods. Corp.*, 2004 WI 76, ¶ 19, 272 Wis. 2d 561, 681 N.W.2d 178. "A

'material fact' is one that is of consequence to the merits of the litigation." *Schmidt v. N. States Power Co.*, 2007 WI 136, ¶ 24, 305 Wis. 2d 538, 742 N.W.2d 294. A factual issue is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Baxter v. Wis. Dep't of Natural Res.*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991). Once the moving party has satisfied the initial burden, the nonmoving party "may not rest upon the mere allegations or denials of the pleadings but . . . must set forth specific facts showing that there is a genuine issue for trial." Wis. Stat. § 802.08(3). If the court is satisfied that there is no genuine issue of material fact, the court shall enter judgment as a matter of law. Wis. Stat. § 802.08(2); *Jackson v. Benson*, 218 Wis. 2d 835, ¶ 18, 578 N.W.2d 602 (1998).

DISCUSSION

Chernin is entitled to summary judgment because (1) the doctrine of issue preclusion does not apply to Chernin's renewed motion for summary judgment with additional supporting affidavits; (2) those affidavits provide adequate foundation for admissibility of the disc containing the recorded jail phone calls; and (3) this Court is bound by Judge Brostrom's previous determination that those calls establish that Hodges cannot prove a necessary element of each of his legal claims – causation – because he knew the consequences of signing the release form.

I. Issue Preclusion Does Not Apply Because the New Affidavits Were Not Considered When Determining Admissibility of the Disc in the Previous Motion for Summary Judgment.

Issue preclusion does not apply to Chernin's renewed motion for summary judgment because neither the trial court nor the Court of Appeals have considered whether the disc was admissible in light of the new affidavits. "The doctrine of issue preclusion forecloses relitigation of an issue

that was previously litigated between the same parties or their privies." *Reuter v. Murphy*, 2000 WI App 276, ¶ 7, 240 Wis. 2d 110, 622 N.W.2d 464. A court must perform a twostep analysis when analyzing issue preclusion: (1) determining whether issue preclusion can, as a matter of law, be applied and, if so, (2) whether the application of issue preclusion would be fundamentally fair. *Flooring Brokers, Inc. v. Florstar Sales, Inc*., 2010 WI App 40, ¶ 6, 324 Wis. 2d 196, 781 N.W.2d 248. For the first step, a court must determine whether "the issue or fact was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment." *Id.* ¶ 7. For the second step, which is only required if the court determines that the first step was met, the court must then decide "whether applying issue preclusion comports with principles of fundamental fairness." *Id*. ¶ 8.

Hodges claims that issue preclusion applies because there was a previous Motion for Summary Judgment concerning the disc. This is a misunderstanding of this legal doctrine. It is true that the Court of Appeals determined that the disc was not admissible; however, that was based solely on the sufficiency of Chernin's affidavit alone. The appellate court did not consider whether the disc was admissible based on the Kohl and Wozniak affidavits. Because admissibility in light of the new affidavits was not addressed by the Court of Appeals or Judge Brostrom, this issue has not been "litigated and determined in the prior proceeding" – a prerequisite for issue preclusion. *Id*. ¶ 7. As a result, the doctrine of issue preclusion does not applicable here.

II. The New Affidavits Cure the Evidentiary Defects of the Previous Motion for Summary Judgment Because the Affiants Have Sufficient Personal Knowledge to Establish Chain of Custody.

In its remand order, the Court of Appeals did not address the merits of Judge Brostrom's conclusion that Hodges could not meet the causation element of each of his claims because the contents of the disc itself established that he knew the legal effect of signing the release. *Hodges v. Chernin*, 393 Wis. 2d 595, ¶27. Instead, the Court of Appeals only determined that Chernin's affidavit, standing alone, did not render the disc admissible into evidence. *Id. ¶27.* In doing so, the appellate court found that Chernin lacked personal knowledge of how the calls were recorded or preserved, how the disc was made, and how the prosecutor came into possession of it. *Id. ¶28.*

The Kohl and Wozniak affidavits cure these defects and, along with Chernin's original affidavit, provide a sufficient foundation to admit the disc containing the jail calls. Affidavits in summary judgment motions "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶ 10, 324 Wis. 2d 180, 781 N.W.2d 503 (quoting Wis. Stat. § 802.08(3)). Although

"the party submitting the affidavit need not submit sufficient evidence to **conclusively** demonstrate the admissibility of the evidence it relies on in the affidavit," the party must "make a prima facie showing that the evidence would be admissible at trial." *Id.* (emphasis added). "If admissibility is challenged, the court must then determine whether the evidence would be admissible at trial." *Id.*

Wis. Stat. § 908.03(6) provides an exception to the hearsay rule for records of regularly conducted activity. This exception is not limited to business records, and applies to all records of regularly conducted activity. *Bank of America NA v. Neis*, 2013 WI App 89, N.6, 349 Wis. 2d 461, 835 N.W.2d 527. Importantly, the custodian or qualified witness is not required to be the original owner of the record. *Palisades*, 2010 WI App ¶ 20. In *Palisades*, an affidavit by an

employee of Palisades addressed account statements. *Id*. ¶ 4. However, the account statements themselves were prepared by a different company, Chase Bank. *Id*. The Court of Appeals held that the affiant was not qualified to testify as to the account records at issue because the account records submitted were records of Chase Bank, not Palisades. *Id*. ¶ 1. According to the court, the employee did not have personal knowledge of how the Chase Bank records were prepared in the ordinary course of business. *Id*. ¶¶ 22-23. Therefore, the account records were not admissible. *Id*. Palisades has since been recognized by the Court of Appeals to stand for "the extremely narrow proposition that the hearsay exception for business records is not established when the only affiant concerning the records in question lacks personal knowledge of how the records were made." *Central Prairie Finance LLC v. Doa Yang*, 2013 WI App 82, ¶ 9, 348 Wis. 2d 583, 833 N.W.2d 866.

When an affidavit is provided by an employee who regularly works with the records referenced, however, the records are admissible. *Deutsche Bank Nat. Trust Co. v. Olson* is instructive. 2016 WI App 14, 366 Wis. 2d 720, 875 N.W.2d 649. In *Deutsche Bank*, the Court of Appeals evaluated a case where the affidavit provided by the party "went further" than the party in *Palisades*. *Id*. ¶ 26. The affiant was an employee of SPS, the company whose records were produced. *Id*. ¶¶ 28-29. However, a portion of the information contained in the records was originally from Bank of America and had been later transferred to SPS. *Id*. The court held that the employee had sufficient personal knowledge to establish foundation for the admissibility of all of the SPS records, including those that originated with Bank of America. *Id*. ¶ 47. Despite the presence of third party information, the employee was able to testify about how all of the records were sourced and maintained within the SPS files. *Id*. ¶¶ 45-45

The Kohl affidavits support admissibility of the disc containing the jail calls because Kohl has the requisite personal knowledge necessary to establish its foundation as a business record.

Based on his experience as a corrections officer at the jail, Kohl affirms that he is familiar with Milwaukee County Sheriff's Department records and understands how inmate phone calls are recorded and produced. He states that inmate calls are monitored and downloaded without alteration for the purpose of providing a recording to law enforcement when they may contain evidence of a crime. (ADA Wozniak confirms this in his affidavit.) Kohl indicates that this occurred with Hodges and that he compared the index of recorded calls with department records to establish that the recorded calls (contained on the disc) match Hodges' unique telephone identifiers. He then concludes that, because the call durations on the index of recorded calls match those reflected in the business record (the call logs), the disc containing those calls is unaltered. This is sufficient to establish foundation for the disc as a business record made and kept in the ordinary course of business. *Id*. ¶¶ 1-2. Under *Palisades*, Kohl is not required to be the initial custodian of the disc or the individual who created it. It is sufficient that, based on his personal knowledge of the creation and maintenance of these records, he could cross reference the call durations of the disc with the business records of the Milwaukee Sheriff's office. And unlike the employee in *Deutsche Bank*, the records in this case are entirely the product of Kohl's employer. Kohl has provided all of the necessary source documents with his two affidavits to support his statements. Kohl has therefore provided adequate foundation for the disc to constitute an admissible business record.

ADA Wozniak's affidavit, in turn, establishes a chain of custody for the disc. As Kohl indicated, remarks by Hodges during his jail calls were, in accordance with department policy,

recorded – and not altered -- in order to be given to law enforcement. Based on his review of the records of the Milwaukee County District Attorney's Office, ADA Wozniak confirms that – consistent with this practice – the recording was given to ADA Stingl, the prosecutor in Hodges' solicitation to commit perjury case. Based on his familiarity with the records, ADA Wozniak is able to swear that the disc was kept in the files of the ADA's office until tendered to Chernin in discovery, who was at that time defending Hodges. As previously indicated, it is not required that ADA Wozniak be the individual who prosecuted Hodges to establish admissibility. As noted by the Court of Appeals, Chernin previously swore that the disc provided to the original trial judge in this case was an "accurate, complete, and unadulterated" copy of the disc he received from ADA Stingl in discovery. This provides the final link for chain of custody and admissibility. The chain of custody for physical evidence is not required to be perfect or complete. *State v. McCoy*, 2007 WI App 15, ¶ 9, 298 Wis. 2d 523, 728 N.W.2d 54. In this case, it is clearly sufficient for the disc containing the jail calls to be admitted into evidence and considered in Chernin's renewed motion

for summary judgment.

III. Chernin's Motion for Summary Judgment Is Granted Because Hodges' Statements Contained on the Disc Establish That He Understood the Consequences of Signing the Release Form.

As previously indicated, the Court of Appeals did not address Judge Brostrom's conclusion that, based on the content of the recorded calls on the disc, Chernin was entitled to summary judgment. Because this finding was undisturbed by the Court of Appeals, it remains the law of this case. *See State v. Klinker*, 2010 WI App 19, 323 Wis. 2d 276, 779 N.W.2d 723 ("the trial court will not again decide an issue it has already decided") (citing *State v. Witkowski*, 163

Wis.2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991)); *Aldrich v. LIRC*, 2012 WI 53, ¶ 88, 341 Wis. 2d 36, 814

N.W.2d 433 (noting that the goals of issue preclusion are "to avoid repetitive litigation, conserve judicial resources, and foster reliance on judicial action by promoting finality of judgments and avoiding inconsistent decisions). As the successor judge in this case, it would be improper for this Court to consider for a second time an issue already decided by Judge Brostrom – namely, that the disc (now properly in evidence) establishes that Hodges understood the consequences of signing the release form.

In his response to Chernin's renewed motion, Hodges provided a letter from his civil attorney, Randall Reinhardt, which states that Hodges's civil case against Govani settled for less than full value because of the signed release of liability form. For purposes of summary judgment, the Court will assume this to be true. Nevertheless, the law of this case (as determined by Judge Brostrom) is that Hodges cannot establish that the actions of Chernin caused him harm because he understood the release form when he signed it. Because of this, Hodges cannot prove causation, which is a necessary element of each of his three causes of action. To establish legal malpractice, a plaintiff must prove: (1) the existence of an attorney client privilege, (2) an act or omission which constitutes negligence, (3) **causation**, and (4) damages. *Cook v. Continental Cas. Co.*, 180 Wis. 2d 237, 245 n.2, 509 N.W.2d 100 (Ct. App. 1993) (emphasis added). To establish

misrepresentation, in turn, a plaintiff must show (1) the defendant made a representation of fact to the plaintiff; (2) the representation was false; and (3) the plaintiff **believed and relied on the misrepresentation to his detriment** or damage. See *Tietsworth v. Harley-Davidson, Inc.*, 2004

WI 32, ¶12, 270 Wis. 2d 146, 677 N.W.2d 233 (emphasis added). The elements for a breach of fiduciary duty are: (1) the defendant owed the plaintiff a fiduciary duty, (2) the defendant breached that fiduciary duty, and (3) the breach of duty **caused** the plaintiff's damages. *Berner Cheese Corp.*

v. Krug, 2008 WI 95, ¶ 40, 312 Wis. 2d 251, 752 N.W.2d 800 (emphasis added).

Judge Brostrom found that, based on the jail calls, Hodges understood the consequences of signing the release form. Hodges told his mother that he understood that a potential consequence of signing the release form was that he could not pursue a claim against Govani. The recordings also establish that Hodges was willing to sign the release because he believed that it would not hold up in court. There is no evidence that he signed it because he relied on a misrepresentation by Chernin, and Judge Brostrom further rejected his assertion that the recordings were altered as baseless and self-serving. Again, this Court is bound by those findings and Chernin is therefore entitled to summary judgment in this civil action as a matter of law because Hodges cannot prevail on any of his claims.[3]

CONCLUSION

For the foregoing reasons, Chernin's Renewed Motion for Summary Judgment is **GRANTED**.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL

[3] The Court takes no position on whether any actions taken by Chernin, as alleged by Hodges, constitute any other type of professional or ethical violation.