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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

VILLAGE OF ELM GROVE,

Plaintiff-Respondent,

Court of Appeals case no.:
2011AP002888

v.

RICHARD K. BREFKA,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM AN ORDER OF THE CIRCUIT COURT
FOR WAUKESHA COUNTY, BRANCH II,
THE HONORABLE MARK GUNDRUM, PRESIDING

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The facts are not in dispute. Richard G. Brefka was arrested by police officers of the Village of Elm Grove. He was, thereafter, issued a Notice of Intent to Revoke, pursuant to Wis. Stat. §343.305. His attorney at the time filed a request for a hearing, but did not do so within the ten-day statutory time limit. By new counsel, Brefka moved the municipal court for the Village of Elm Grove to extend the time limit for the filing of the request for a hearing. The municipal court denied that motion, holding that it lacked competence to proceed under *Village of Butler v. Fricano*, 2010 WI App 84, 326 Wis. 2d 267,787 N.W.2d 60. Brefka appealed this matter to the Waukesha County Circuit Court. The Village moved to dismiss the appeal, arguing that under *Fricano*, the court lacked competence over the case to proceed. Brefka argues that the court had jurisdiction and discretion to extend the ten-day time limit to request a hearing, under Wis. Stat. §800.115(1) and Wis. Stat. §806.07. A motion hearing was held on October 31, 2011. The circuit court granted the Village's motion to dismiss and remanded the matter back to municipal court for disposition. (R.11, throughout). The circuit held that it lacked competence to hear the case, and did not reach the merits of Brefka's motion. (R:7). Brefka appeals this Order.

STATEMENT OF THE ISSUE PRESENTED

Does a court have authority under Wis. Stat. §806.07 or Wis. Stat. §800.115(1) to grant relief from judgment in a refusal case and to extend the time limit under Wis. Stat. §343.305(9)(a)?

The trial court answered, no.

ARGUMENT

A Refusal Proceeding is Subject to the Rules of Civil Procedure; Hence Wis. Stat. §806.07 and Wis. Stat. §800.115(1) Apply.

A refusal proceeding under Wis. Stat. §343.305 is a special proceeding. In the absence of a specific contrary statutory provision, the rules of civil procedure apply to all special proceedings, including refusal proceedings. *State v. Schoepp*, 204 Wis.2d 266, 554 N.W.2d 236 (1996).

Wis. Stat. §343.305(9)(a) establishes a ten-day time limit or a subject to request a refusal hearing. The statute, however, is silent as to whether there may be a provision for extension of the time limit, curing of a default, re-opening a case, etc. Under *Schoepp*, therefore, the rules of civil procedure apply.

Wis. Stat. §800.115(1) allows a defendant to seek relief from judgment from a municipal court on the grounds of excusable neglect. Wis. Stat. §806.07, similarly, allows any party to seek relief from a judgment from a municipal court or a circuit court.

Nothing in Wis. Stat. §343.305(9) contradicts or limits the competence of a court to extend a time limit or provide relief from an order, on the grounds of excusable neglect. Therefore, the municipal court erred when it held that it lacked competence to extend the time limit for filing of a request for a hearing on the refusal.

Wis. Stats. §800.14(1) and (4) provide that a party may seek relief from the order of a municipal court, and may demand a new trial on the merits before the circuit court for that county. Thus, the circuit court was competent to hear Brefka's appeal of the denial of his motion to extend the time limit for the filing of a request for a refusal hearing.

The *Fricano* Case Should Not Be Followed

The circuit court relied on *Fricano, supra*. *Fricano* held that a municipal court lacked competence to "reopen" a judgment on a refusal case, when the defendant missed the ten day time limit. *Fricano* should not be followed for three reasons: first, it is procedurally distinguishable; second, it is a non-binding, unpublished decision; and third, it is wrongly decided.

Fricano held that the trial court lacked competence to hear the defendant's motion to reopen the judgment, as strictly speaking there was no judgment to reopen. That analysis may be correct, as the trial court does not enter a default judgment in a refusal case. Rather, in the absence of a request for a hearing, the Department of Transportation revokes the defendant's driver's license. The

penalty to the defendant is imposed by the Department of Transportation without the requirement of a court judgment. In this case, however, Brefka did not ask the trial court to vacate the judgment. Rather, Brefka asked the court to extend the time limit to request a hearing. Even if the court could not act on a non-existent judgment, it was still competent to order a hearing on the revocation.

Fricano was an unpublished decision. Under Wis. Stat. § Rule 809.23(a), unpublished decisions may not be cited to the court as binding authority. They may be referenced for their persuasive value, if any exists. Unpublished decisions, however, are of no precedential value. Nor is a party against whom an unpublished decision is referenced required to respond to, refute or distinguish that decision. The court may or may not consider the unpublished decision in its discretion.

Fricano fails to consider, or even address, the very simple contradictory authority of *Schoepp*, a published, binding precedent. Under *Schoepp*, the municipal court and this court are empowered, under the regular rules of civil procedure, to entertain motions to extend time or motions from relief from judgments or orders. Thus, *Fricano* was wrongly decided.

CONCLUSION

Fricano should not control this issue. Rather, this court should hold that the trial court must consider the merits of Brefka's motion and exercise its discretion as to whether or not to vacate the judgment on the refusal case and to extend the ten-day time limit.

Therefore, Brefka respectfully prays that this court reverse the decision of the trial court and remand the matter to the trial court for a hearing on the merits of Brefka's motion.

Signed and dated at Glendale, Wisconsin this 10th day of April 2012.

Respectfully submitted,
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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 744 words.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stats. §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 first names and last initials 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.

Additionally, I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Signed and dated at Glendale, Wisconsin this 10th day of April 2012.

Respectfully submitted,
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BY: Andrew Mishlove, #01015053
Attorney for the Defendant

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stats. §809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 first names and last initials 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.

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