STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2013AP752

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANICA C.C. BAUSCH,

Defendant-Appellant.

APPEAL FROM DECISION OF THE DANE COUNTY CIRCUIT COURT, CASE NO. 12-FO-3248, THE HONORABLE WILLIAM E. HANRAHAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

J.B. VAN HOLLEN
Attorney General

CHRISTOPHER J. BLYTHE
Assistant Attorney General
State Bar #1026147

Attorneys for
Plaintiff-Respondent
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0180

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-respondent State of Wisconsin ("the State") does not request oral argument. The State anticipates that the parties' briefs will adequately address the legal issues presented.

The State requests publication of this Court's decision to provide guidance to courts and parties

regarding the availability of discovery in a forfeiture case brought under Wis. Stat. ch. 778.

STATEMENT OF THE ISSUES

The State does not object to the characterization of issue as stated in the brief of defendant-appellant Anica C.C. Bausch ("Ms. Bausch").

STATEMENT OF THE FACTS

The facts relevant to this matter are not in dispute. Ms. Bausch received a forfeiture citation regarding an alleged violation of Wis. Admin. Code § Adm 2.14(2)(v) on October 29, 2012. (R. 1). In pursuing her defense, Ms. Bausch sought discovery from the State by serving requests for admissions, interrogatories, and requests for production of documents on the State. (R. 10). The State then filed a motion to deny the use of discovery in the forfeiture proceeding (R. 11), which was granted by the trial court on March 19, 2013. (R. 13).

ARGUMENT

I. STANDARD OF REVIEW.

The issue before this Court involves the interpretation of certain statutory provisions, which is a question of law the court reviews *de novo*. *State v. Campbell*, 2002 WI App 20, ¶ 4, 250 Wis. 2d 238, 642 N.W.2d 230. Despite its *de novo* review, however, this Court can benefit from the analysis of the trial court. *State v. Isaac J.R.*, 220 Wis. 2d 251, 255, 582 N.W.2d 476 (Ct. App. 1998).

II. DISCOVERY IS LIMITED IN CRIMINAL PROCEEDINGS AND A FORFEITURE PROCEEDING IS A QUASI-CRIMINAL PROCEEDING.

The proceeding before the circuit court in this matter is a forfeiture action, which the Wisconsin Supreme Court has described as "a quasi-criminal proceeding where the defendant is required as in criminal cases to enter a plea of guilty, not guilty or nolo contendere." *City of Milwaukee v. Cohen*, 57 Wis. 2d 38, 46, 203 N.W.2d 633 (1973). The circuit court also characterized this matter as "quasi-criminal" in nature ("The citation that has been issued is quasi-criminal in nature. It is not a conventional civil case"). (R. 13, ¶ 4). As a quasi-criminal proceeding, the same rules and rationales for limiting discovery in a criminal proceeding should be applied.

Standard elements of civil procedure have been deemed inappropriate for purposes of quasi-criminal forfeiture proceedings. For example, the application of a statute that provided for awarding costs and attorney fees for frivolous claims (Wis. Stat. § 814.025)[1] was deemed inapplicable to a quasi-criminal proceeding. *City of Janesville v. Wiskia*, 97 Wis. 2d 473, 483, 293 N.W.2d 522 (1980). In *State v. Hyndman*, 170 Wis. 2d 198, 488 N.W.2d 111 (Ct. App. 1992), the court reasoned that the required timelines and the inherent dispute of fact in a criminal case preclude the use of summary judgment procedures. *Id.* at 206. And in *State v. Schneck*, 2002 WI App 239, 257 Wis. 2d 704, 652 N.W.2d 434, the court held that a forfeiture prosecution could not be reconciled with the civil summary judgment procedures laid out in the statutes. *Id.*, ¶ 7. The *Schneck* court reasoned that "mere silence regarding a rule of civil procedure does not automatically mean that the procedure is permitted." *Id.*, ¶ 14. The

[1]Wisconsin Stat. § 814.025 was repealed by Supreme Court Order 03-06, § 1, effective July 1, 2005.

circuit court in this matter applied that principle, holding in paragraph 3 of its Decision and Order that:

> Wis. Stat. §778.25(1)(a)(6) expressly provides that this type of forfeiture action is to be litigated through civil procedures identified in §778.25(2). Under this section, no allowance has been made by the legislature for use of the discovery methods sought by the defendant.

(R. 13, ¶ 3).

Discovery rights have historically been limited in criminal proceedings in Wisconsin. Prior to the enactment of Wis. Stat. § 971.23 in 1973, "Wisconsin [did] not recognize a right in [a] defendant to a pretrial discovery of the prosecution's evidence." *State v. Miller*, 35 Wis. 2d 454, 478 & n.4, 151 N.W.2d 157 (1967) (citing multiple cases). That statutory provision specifies what information and evidence a prosecutor must disclose to a defendant prior to trial. Under the canon of construction *expressio unius est exclusio alterius* "the expression of one thing in a statute excludes another that is not stated." *Northwest Airlines, Inc. v. Wisconsin Dept. of Revenue*, 2006 WI 88, ¶ 50, 293 Wis. 2d 202, 717 N.W.2d 280, citing *Motola v. LIRC*, 219 Wis. 2d 588, 605, 580 N.W.2d 297 (1998). Given the narrow and specific nature of the items enumerated in Wis. Stat. § 971.23(1), the use of civil discovery devices such as interrogatories and requests for admissions inherently conflicts with the rules of criminal procedure and is not allowed. Thus, defendants in a criminal proceeding are not entitled to the free-ranging discovery that they would have in a civil proceeding.

For example, in *State v. Schaefer*, 2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457, the Supreme Court held that a criminal defendant cannot use the civil *subpoena duces tecum* power under Wis. Stat. § 805.07(2) to obtain police files. And in *State ex rel. Lynch v. County Court*, 82 Wis. 2d 454, 262 N.W.2d 773 (1978), the court prohibited a lower court from ordering the prosecutor to allow the defendant to inspect his entire case file.

Had the Legislature wanted to provide for civil discovery in a forfeiture proceeding, it could have done so. It did not, and the civil discovery procedures should not be applied to a quasi-criminal proceeding.

III. AS A QUASI-CRIMINAL PROCEEDING, A FORFEITURE ACTION IS NOT COMPATIBLE WITH THE USE OF DISCOVERY FOR DISPOSITIVE PURPOSES.

The fundamental purpose of discovery in a civil matter is to resolve legal issues prior to trial (*i.e.*, via the use of summary judgment proceedings). But a quasi-criminal proceeding such as a forfeiture action does not lend itself to such an approach. As the prosecutor in a quasi-criminal forfeiture action, the State is required to prove all the elements of any violation, similar to a criminal proceeding, and as such there are no legal issues to resolve prior to trial via the use of summary judgment. Thus, the purpose of pre-trial discovery is essentially negated by this requirement. Because a quasi-criminal proceeding cannot be resolved via summary judgment (*see Schneck*, supra and *Hyndman*, supra), the purpose of pre-trial discovery is, in essence, eliminated.[2]

A defendant who is given a forfeiture citation such as the one in this case simply enters a plea of "guilty," "not guilty," or "no contest." There is no responsive pleading that specifically admits or denies each individual fact and allegation in a complaint, as is the case in an ordinary civil matter commenced by the filing of a summons and complaint and responded to by an answer. Thus, the quasi-criminal nature of a forfeiture proceeding does not lend itself to the use of the summary judgment

[2]*See also State v. Ryan*, 2012 WI 16, ¶¶ 49-69, 338 Wis. 2d 695, 809 N.W.2d 37 (holding that summary judgment procedure could not be reconciled with a forfeiture action under Wis. Stat. ch. 30).

process and the related pre-trial use of discovery to resolve legal questions based on undisputed facts.

In addition, as observed by the *Schneck* court, "[t]he supreme court has noted many of the similarities in procedure between a forfeiture action and a criminal action, and the court has cautioned that 'it is an oversimplification to treat forfeiture actions as purely civil in nature.'" *Schneck*, 257 Wis. 2d 704, ¶ 15 (footnote omitted), citing *City of Milwaukee v. Wuky*, 26 Wis. 2d 555, 562, 133 N.W.2d 356 (1965).

It should also be noted that the application of criminal procedure statutes to forfeiture actions provides certain rights to Ms. Bausch that she otherwise might not enjoy. For example, she has the right to a jury trial[3] in which the prosecution has a higher burden of proof (clear and convincing evidence) than in an ordinary civil proceeding. She also is entitled to all disclosures that the prosecutor is mandated to provide under the statutes. *See* Wis. Stat. § 971.23(1).

IV. THE RELEVANT STATUTORY PROVISION DOES NOT ALLOW THE USE OF THE DISCOVERY METHODS SOUGHT BY MS. BAUSCH.

Ms. Bausch argues that the general civil procedure statutes, including the use of discovery under Wis. Stat. ch. 804, should apply to her case. Specifically, she asserts that because the provisions of Wis. Stat. ch. 778 are silent regarding the use of discovery, small claims procedures under Wis. Stat. ch. 799 are invoked, which she notes incorporate "'the *general* rules of [civil] practice and procedure,'" (Bausch brief at 4, quoting Wis. Stat. § 799.04(1)), including Wis. Stat. ch. 804, which provides

[3]Under *State v. Ryan, supra*, summary judgment does not apply and a defendant is entitled to his/her day in court.

for discovery in the form of requests for admission, interrogatories, and requests for production of documents.

First, Ms. Bausch incorrectly assumes that the small claims procedures under Wis. Stat. ch. 799 are applicable. She correctly notes that Wis. Stat. § 799.01(1)(b) specifies that small claims procedure is the exclusive procedure to be used in forfeiture actions except where "a different procedure is described in . . . [ch.] 778, or elsewhere." *Id.* In this instance, however, a different procedure *is* set out under Wis. Stat. § 778.25. That statute lays out a specific process that much more resembles a criminal proceeding than a standard civil one. Thus, the *general* provision of the small claims statute is not applicable to this type of forfeiture proceeding, which has its own statutory process and rules. As a principle of statutory interpretation, a specific statute generally prevails over a general statute. *Heritage Farms, Inc. v. Markel Insurance*, 2009 WI 27, ¶ 20, 316 Wis. 2d 47, 762 N.W.2d 652, citing *State v. Anthony D.B.*, 2000 WI 94, ¶ 11, 237 Wis. 2d 1, 614 N.W.2d 435.

Second, as noted above, the circuit court observed that the use of standard civil procedures cannot be reconciled with the quasi-criminal nature of this particular type of forfeiture proceeding:

> Wis. Stat. §778.25(1)(a)(6) expressly provides this type of forfeiture action is to be litigated through civil procedures identified in §778.25(2). Under this section, *no allowance has been made by the legislature for the use of the discovery methods sought by the defendant*.

(R. 13, ¶ 3; emphasis added). The circuit court went on to note several differences between this type of forfeiture action and a standard civil case, including the fact that the action is not commenced via a summons and complaint, the requirement that the defendant's response be entered by a plea rather than by a written answer, the unavailability of summary judgment, and the fact that counterclaims are not available. (R. 13, ¶ 4).

In support of her argument, Ms. Bausch also cites to a twenty-five-year-old Attorney General opinion[4] that endorses the use of interrogatories and depositions in a forfeiture proceeding. That opinion and its reasoning, however, pre-dates many of the court decisions referred to herein, in which the courts have rejected numerous arguments that standard civil procedures should be applied to forfeiture proceedings that the courts have found to be quasi-criminal in nature.

The court should also be mindful of the fact that the impact of allowing discovery in this type of forfeiture proceeding would extend far beyond the specific circumstances of this matter. The statute that governs this type of forfeiture proceeding (Wis. Stat. § 778.25) is also applicable to forfeiture proceedings for a variety of statutory sections regarding a wide-ranging number of subjects, including: § 125.07(4)(a) and (b) (underage drinking); § 125.085(3)(b) (using a fake ID); § 125.09(2) (drinking on school grounds); §§ 961.573(2), 961.574(2), and 961.575(2) (possession, manufacture or delivery of drug paraphernalia, or delivery of such to a minor); § 947.013(1m) (harassment); § 167.32 (body passing or alcohol consumption at sporting events); § 254.92 (underage purchase of cigarettes); § 36.11(1)(c) (management and operation of property by the UW System); § 101.122(7)(d) (compliance with energy efficiency standards for rental units); and § 173.41(15)(b) (regulation of dog breeders and animal shelters). The application of the general rules of civil discovery to forfeiture actions such as Ms. Bausch's would open the floodgates to such discovery in all these other types of forfeiture proceedings, as well.

Given the substantial differences between how these types of forfeiture are commenced and prosecuted under the statutes when compared to other standard civil matters, Ms. Bausch's argument that the standard rules of

[4]77 Op. Att'y Gen. 270 (1988).

civil procedure (including discovery) should apply cannot be sustained.

V. MS. BAUSCH HAS OTHER OPTIONS FOR OBTAINING CERTAIN TYPES OF INFORMATION RELEVANT TO HER CASE.

To the degree Ms. Bausch asserts that she is entitled to certain information for presenting her defense, she has other avenues by which she can seek information that she believes is relevant to her case. First, the statutes provide her with a mechanism for filing motions before trial (*see* Wis. Stat. § 971.31). The use of pretrial evidentiary hearings in criminal and quasi-criminal cases is standard practice. And while such motions shouldn't be used for discovery purposes, it is a common practice to supplement motions with evidentiary hearings. This process is regularly used to address important constitutional questions, such as whether an officer had probable cause to arrest. As part of the pretrial motion process, for example, Ms. Bausch could subpoena the State's officers to elicit any information that is relevant to her motion.

Ms. Bausch can also use public records requests for the purpose of trying to obtain information that she deems relevant to her case. She is free to invoke the provisions of Wis. Stat. ch. 19 to seek the production and release of any such documents, though any such request would, of course, still be subject to the balancing tests under the statute and the relevant case law that have been applied to such requests.

CONCLUSION

For the reasons discussed above, the State respectfully requests that this Court AFFIRM the decision of the circuit court.

Dated this _____ day of August 2013.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

CHRISTOPHER J. BLYTHE
Assistant Attorney General
State Bar #1026147

Attorneys for
Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0180
(608) 267-2223 (Fax)
blythecj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,354 words.

Dated this _____ day of August, 2013.

_____
CHRISTOPHER J. BLYTHE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of August, 2013.

_____
CHRISTOPHER J. BLYTHE
Assistant Attorney General