COURT OF APPEALS OF WISCONSIN
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

-v-

ANICA C.C. BAUSCH,

Defendant-Appellant.

Appeal No. 13 AP 752

Circuit Court Case No. 12 FO 3248

DEFENDANT-APPELLANT'S REPLY BRIEF

Appeal from the Circuit Court for Dane County, Hon. William E. Hanrahan, Judge.

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A. THE LABEL "QUASI-CRIMINAL" DOES NOT HELP DECIDE THIS CASE

In its brief, the State first argues that the civil forfeiture violation at issue in this case is "quasi-criminal" and therefore the criminal discovery rules of Wis. Stat. sec. 971.23(1) should apply. Brief for Respondent at 3. The State relies on dicta in a 1973 case addressing a search and seizure issue arising in a municipal forfeiture action in "county court." City of Milwaukee v. Cohen, 57 Wis. 2d 38, 46 (1973). The State tries to turn a "description" of a forfeiture case in which a defendant must enter a plea as being "quasi-criminal" into a definition of what is a "quasi-criminal" case. The nature of the particular forfeiture action in Cohen is not apparent from that decision. Id. Addressing the search and seizure provisions of Fourth Amendment and the Wisconsin Constitution art. I, sec. 11, the Cohen court held that "[t]hese constitutional provisions do not limit their effect to criminal cases." Id. It is constitutional law, and not the use of the label "quasi-criminal" that decides the Cohen case. The Cohen court was not asked to address whether civil procedure in general or civil discovery in particular was available in forfeiture actions.

Nevertheless, the State tries to apply the label "quasi-criminal" to *some* forfeiture cases in which *some*

aspects of civil procedure were held not to apply, in order to suggest that all civil procedure (and therefore Chapter 804 discovery) should not apply in the instant forfeiture case. Brief for State at 3-6. In Wiskia the former frivolous claims statute (Wis. Stat. 814.025) was held not to apply to the prosecution of an ordinance violation for serving liquor to an already intoxicated person, because the supreme court did not want to interfere with the excercise of "broad prosecutorial discretion." City of Janesville v. Wiskia, 97 Wis. 2d 473, 483 (1980). The supreme court's concern about prosecutorial discretion decided the Wiskia case, not the "quasi-criminal" label. The Wiskia court was not asked to address whether civil procedure in general or civil discovery in particular was available in forfeiture actions.

Similarly, the State argues that the denial of the use of summary judgment in a forfeiture case under Chapter 345 suggests that "standard elements of civil procedure" are inappropriate in all forfeiture cases. State v. Schneck, 2002 WI App 239. In Schneck, the court of appeals noted that a defendant in a Chapter 345 forfeiture action was expected "to plead guilty, no contest or not guilty" in response to a traffic citation. Schneck at para. 10. This Court concluded that "there is nothing in ch. 345 that requires or contemplates the kind of responsive pleading that would enable a trial court to determine if a material

issue of fact or law has been joined" and therefore concluded that "summary judgment procedure is inconsistent with, and unworkable in, a Wis. Stat. Ch. 345 forfeiture proceeding." Schneck at paras. 10 and 16. It was this practical problem with summary judgment, and not the label "quasi-criminal" that led to this conclusion. The Schneck decision never uses the phrase "quasi-criminal" and it held that "forfeiture actions are civil actions." Schneck at para. 5. The Schneck court was not asked to address whether civil procedure in general or civil discovery in particular was available in forfeiture actions.

The State wants to throw the label "quasi-criminal" on the instant case in the hope that this label will somehow automatically make the criminal discovery rules of Wis. Stat. sec. 971.23(1) apply to this case, even though nothing in that statute suggests that this would be the case. It is telling that the State cannot cite a single civil forfeiture case in which the prosecution was required to provide criminal discovery to a defendant under Wis. Stat. sec. 971.23(1). Not surprisingly, the four cases in the State's brief that actually address issues of discovery are plain-old criminal cases and not a forfeiture cases ("quasi-criminal" or otherwise). The legislature has established a clear set of rules for discovery in criminal cases so the denial of the use of civil discovery in the actual criminal

cases cited in the State's brief are neither surprising nor instructive to the case at bar.

The State's entire brief studiously ignores this Court's decision in State v. Schoepp, 204 Wis. 2d 266 (Ct. App. 1996)(discussed in Appellant's principal brief at 4-5). In footnote 6 of Schoepp, this Court found significance in the fact that the legislature had not chosen to forbid the use of civil discovery in Wis. Stat. sec. 343.305 refusal matters at that time, in contrast to discovery restrictions that expressly existed elsewhere in the statutes:

> Section 345.421, STATS., provides that defendants to civil and criminal traffic proceedings may not obtain discovery except in limited circumstances. *The legislature could have provided that discovery is also not available in refusal hearings, but it did not do so.*

Id. at fn. 6 (emphasis added). The State's brief avoids Schoepp because it takes the position that "[h]ad the Legislature wanted to provide for civil discovery in a forfeiture proceeding, it could have done so."

The State's position is at odds with both common sense and this Court's precedent. The State's position is also flawed because the legislature *has* already provided for civil discovery in Chapter 778 forfeitures. See Appellant's principal brief at 3-4 (discussing the interplay of Chs. 778, 799 and 804), see also 77 Op. Att'y Gen. 270 (1988)(appendix to Appellant's principal brief pp. 103-105).

B. SUMMARY JUDGMENT IS NOT THE "FUNDAMENTAL PURPOSE" OF CIVIL DISCOVERY

The State's brief next claims that the "fundamental purpose" of civil discovery is to dispose of cases through summary judgment. Brief for State at 5. It is very telling that the State cites absolutely no authority for this proposition. In the context of "trial practice," Black's Law Dictionary defines "discovery" as "[t]he pre-trial devices that can be used by one party to obtain facts and information about the case from the other party *in order to assist the party's preparation for trial.*" Black's Law Dictionary 466 (6th ed. 1990)(emphasis added). Discovery helps litigants prepare for trial; it is not limited to assisting in cases that involve summary judgment.

Discovery helps litigants prepare for more efficient trials and avoid trial by ambush. This can save time for judges and juries. Most importantly, discovery helps ascertain the truth:

> The right to discovery is an essential element of our adversary system. In order for our adversary system to effectively ensure the ability of litigants to uncover the truth, and to seek and be accorded justice, it is our responsibility to render decisions that do no harm to the fundamental and important right of litigants to access our courts.

Sands v. Whitnall School Dist., 2008 WI 89 at para. 18.

The State's repeated focus on summary judgment is a red herring.

C. CHAPTER 778 DOES NOT FORBID DISCOVERY

In Part IV of its brief, the State begins by repeating its argument that the legislature's failure to place a discovery provision in Chapter 778 means that they meant to deny discovery to litigants. Brief for State at 7. The State concedes that Wis. Stat. sec. 799.01(1)(b) provides that small claims procedure must be followed in Chapter 778 forfeiture cases except "where a different procedure is described" in Chapter 778. Id. The State then turns plain language on its head by suggesting that the *absence* of a discovery procedure in Chapter 778 *describes* a different procedure. Id.

If Chapter 778 were to provide for discovery different from Chapter 804 civil discovery or expressly deny discovery, then it would describe a different procedure. However Chapter 778's actual silence on the issue of discovery describes nothing. As was discussed in Part III A above, the legislature's choice not to limit or deny discovery in Chapter 778 is dispositive of this issue. See State v. Schoepp, 204 Wis. 2d 266 n.6 (Ct. App. 1996).

Next, the State's brief, citing the trial court, repeats its claim that the "nature" of this case is "quasi-criminal" and therefore cannot be reconciled with "standard civil procedures." As has been discussed above, the label

"quasi-criminal" is not helpful and focuses on labels over substance. See Part III C above.

One assertion that is unique to this part of the State's brief is the assertion that this type of forfeiture "is not commenced via a summons and complaint." Brief for State at 7. Although it is true that the instant case was commenced by a citation, it is also true that the Attorney General's office has commenced several cases by summons and complaint charging the same violation alleged in the instant case, Wis. Admin. Code ADM sec. 2.14(2)(v). See, e.g., State v. Brian Standing, 13 FO 872 (Dane County) and State v. David Wolfe, 13 FO 2170 (Dane County)(undersigned counsel is counsel of record in both these cases).

Next, the State's brief tries to dismiss without any meaningful discussion, a Wisconsin Attorney General's Opinion that is on all fours with the issue at bar, and concludes that civil discovery is available. Brief for State at 8. The State cannot and does not argue that any of the relevant statutes have changed. Nevertheless, the State tries to vaguely dismiss that opinion on account of its age. It is interesting to note that 5 of the 15 cases cited in the State's brief are older than 1988, but nevertheless made the cut. The opinion in question is clear and correct and as relevant today as it was 25 years ago. 77 Op. Att'y Gen. 270 (1988).

Finally, the State argues that permitting civil discovery in Chapter 778 forfeiture cases will "open the floodgates" to civil discovery in several types of cases, such as "body passing," underage smoking, and dog breeding violations. Brief for State at 8. Undersigned counsel does not agree because the gate is already open and there is no flood. For at least 25 years, our statutes and (until very recently) the Wisconsin Attorney General have clearly stated that civil discovery is available in Chapter 778 forfeiture cases. The flood of civil discovery in underage smoking cases and the like would have been here by now if it were to come. However, if litigants someday become overwhelmed by civil discovery in "body passing" cases then the legslature surely can and will expressly address the issue of discovery under Chapter 778 as they have done before in other chapters of the Wisconsin Statutes.

D. Open Records Requests Are No Substitute for Civil Discovery

The State's final argument is that because Ms. Bausch might be able to get some materials under Wis. Stat. Chapter 19 (the "Open Records" law) she does not need civil discovery. Brief for State at 9. The implication is that this possibility makes it okay to deny her statutory rights to civil discovery. The State provides no authority for the proposition that the possiblity makign Open Records requests

is somehow grounds for denying the right of a litigant to discovery provided by statute or otherwise.

Even assuming, *arguendo*, that Open Records requests might be filled in a particular case, such requests are clearly not equivalent to depositions, interrogatories or requests to admit or deny. At best, those requests might be similar to a request for production of documents. However, given the broad grounds for denying Open Records requests, even that is doubtful. For example, Wis. Stat. sec. 19.36 (1)(am) is an exception that would surely swallow the rule of disclosure in most forfeiture cases, since the government may refuse to disclose:

> Any record containing personally identifiable information that is collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding.

VII. CONCLUSION

For the foregoing reasons, as well as those contained in the Appellant's principal brief, the decision of the trial court should be reversed and Ms. Bausch should be permitted to use civil discovery in this matter.

Respectfully submitted this ____ day of September, 2013.

_____

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CERTIFICATION

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Dated: September 9, 2013

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I hereby certify that:

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Signed

Signature