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COURT OF APPEALS OF WISCONSIN
DISTRICT IV

07-16-2013

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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 BRIEF

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

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III. STATEMENT OF ISSUES

A. Is Civil Discovery Under Wis. Stat. Chapter 804 Available in a Forfeiture Case Brought Pursuant to Chapter Wis. Stat. 778?

Trial Court Answer: No.

IV. STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant believes that a published appellate decision on this issue will clarify an issue of general importance in the administration of justice and will have implications beyond the instant case. As she indicated in her Petition for Leave to Appeal Nonfinal Judgment or Order pp. 6-7, the instant case represents only one of more than a hundred forfeiture citations issued by the Capitol Police in the final months of 2012, most or all of which are being prosecuted by the Wisconsin Attorney General's office.

There is now confusion in the circuit courts where until very recently there had been settled law. Several Dane County trial judges issued discovery deadlines in these forfeiture cases, only to subsequently deny the use of discovery in these cases. Several other Dane County judges have motions to deny civil discovery pending before them that are nearly identical to the motion that is the subject of the instant appeal. A published decision will provide guidance to many trial judges in both pending and future forfeiture cases.

The Defendant-Appellant believes that the controlling statutes are clear and that oral argument will not be necessary.

V. STATEMENT OF THE CASE

This is an appeal from a nonfinal order in Case No. 12 FO 3248, entered on March 19, 2013, in the circuit court for Dane County, Judge William E. Hanrahan presiding, in which the court denied Defendant-Appellant her the use of any civil discovery in this case. R. 13.

On or about October 29, 2012 Defendant-Appellant Anica Bausch was mailed a forfeiture citation by the Wisconsin State Capitol Police accusing her of violating Wis. Admin. Code ADM sec. 2.14(2) (v) by "OBSTRUCT ACCESS PASSAGE ETC (NO PERMIT)" on that day at 12:30 p.m. R. 1. At the time of the alleged offense, Defendant-Appellant Anica Bausch was in the Wisconsin State Capitol Rotunda participating in an assembly known as the "Solidarity Sing Along," where people gather every weekday to petition the government through song.

On March 12, 2013, the counsel for Defendant-Appellant served a request for admissions, interrogatories, and request for production of documents on the Wisconsin Attorney General's office, which caused the State to file a "Motion in Opposition to Application of Civil Discovery" on March 14, 2013. R. 10 & 11. The trial court granted the State's Motion in a Decision and Order entered March 19, 2013, denying the parties all use of Chapter 804 discovery. R. 13.

Defendant-Appellant filed a timely Petition for Leave to Appeal Nonfinal Judgment or Order on April 2, 2013 which was granted on or about May 3, 2013. R. 16. On or about April 4, 2013 Defendant-Appellant filed a Notice and Motion for Stay of Deadlines Pending Possible Appeal which was granted by the trial court on April 16, 2013. R. 15. There has been no further trial court activity in the instant case.

VI. Argument

A. Standard of Review

The issue in the instant appeal involves statutory construction which is a question of law. Honhathers Restaurants, Inc. v. LIRC, 2000 WI App 273. An appellate court must decide questions of law without deference to the decision of the circuit court. State v. Vanmanivong, 2003 WI 41, para 17.

B. Facts

On February 25, 2013, the trial court established a a deadline of 45 days to complete discovery in the instant case. R. 4. On March 12, 2013, counsel for Defendant-Appellant served her first request for admissions, interrogatories, and request for production of documents on the Wisconsin Attorney General's office, which is prosecuting this matter at the trial level. R. 10. However, on March 14, 2013, the State filed a "Motion in Opposition to Application of Civil Discovery" seeking to

deny the use of civil discovery in this case. R. 11. On March 19, 2013 Defendant-Appellant file a Response arguing that the State's motion should be denied. R. 12. The trial court nevertheless granted the State's motion, denying the parties all use of Chapter 804 discovery, in a Decision and Order entered March 19, 2013. R. 13

C. The Wisconsin Statutes Clearly Provide for Civil Discovery In a Chapter 778 Forfeiture Action

Defendant-Appellant was issued a forfeiture citation for an alleged violation of Wis. Admin. Code ADM sec. 2.14(2)(v). This administrative rule was promulgated by the Department of Administration pursuant to Wis. Stat. sec. 16.846 ("Rules relating to use, care and preservation of property under department control"), which authorizes rules providing for "a forfeiture of not more than \$500." See Wis. Stat. sec. 16.846(1)(b)(2) and Wis. Admin. Code ADM sec. 2.14(2)(attached). A civil action to recover a forfeiture pursuant to such a rule is controlled by Chapter 778 ("Collection of Forfeitures"). See Wis. Stat. sec. 778.25(1)(a)(6)(attached).

Small claims procedure "is the exclusive procedure to be used in circuit court" in "actions to recover forfeitures" except as a different procedure is prescribed in Chapter 778 or elsewhere. See Wis. Stat. sec. 799.01(1)(b)(attached). Chapter 778 neither prescribes the denial of discovery nor places any restrictions on its use; it is silent on the issue

of discovery. Small claims procedure expressly incorporates "the general rules of practice and procedure in chs. 750 to 758 and 801 to 847." See Wis. Stat. sec. 799.04(1) (attached). Chapters 801 to 847, of course, include Chapter 804 which provides for civil discovery, including requests for admission, interrogatories and requests for production of documents.

The instant case is similar to State v. Schoepp, 204 Wis. 2d 266 (Ct. App. 1996), where this Court granted leave to appeal where civil discovery was denied to a motorist prior to a refusal hearing under the 1995 version of Wis. Stat. Sec. 343.305. The Schoepp court found the correct answer in the plain language of the statutes in effect at that time:

The plain language of § 801.01(2), STATS., provides that Chapter 804, STATS., governs practice in circuit courts in all special proceedings "except where different procedure is prescribed by statute or rule." Section 343.305, STATS., does not provide a different means for a defendant in a refusal hearing to obtain depositions, interrogatories and other discovery, nor does it provide that discovery is not available prior to refusal hearings. FN6 Because the statutes do not provide different discovery procedures for refusal hearings, we conclude that the discovery procedures of Chapter 804 apply.

Schoepp, 204 Wis. 2d at 238-39. In footnote 6, the Schoepp court noted the significance of the fact that the legislature had not limited discovery in refusal matters at that time, in

contrast to limitations it had placed on discovery in other matters:

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.

In the instant case, the trial court used an analysis that is at odds with what this Court did in Schoepp. Our trial court took Chapter 778's silence on the issue of discovery to mean that discovery is not permitted. R. 13 para. 3. The trial court focused on Wis. Stat. sec. 778.25(2), the section that sets out what information a forfeiture citation must contain, and noted the absence of a discovery provision in that section. Id. This led the trial court to an erroneous conclusion.

D. No Appellate Court has Previously Addressed this Precise Issue, But The Wisconsin Attorney General Has Opined That Civil Discovery Is Available in a Forfeiture Action Under Chapter 778

No appellate court has previous addressed the precise issue of the availability of civil discovery in a Chapter 778 forfeiture action. However, the Wisconsin Attorney General has issued an opinion on this precise issue that is in complete agreement with the analysis of the Defendant-Appellant:

These statutes tell us that in actions to recover forfeitures for violations of statutes, the procedures set forth in chapters 23, 66, 345 and 778 have priority. Where those chapters are not applicable, chapter 799 is accorded the next level of priority in establishing the procedure to be used. Finally, where chapter 799 is not applicable, the rules of practice and procedure in chapters 750 to 758 and 801 to 847 are.

77 Op. Att'y Gen. 270, 271 (1988) (attached). As to a specific question about the availability of interrogatories and depositions, the Attorney General reached the same conclusion as Defendant-Appellant:

Finally, because neither chapter 778 nor chapter 799 have any provision for interrogatories or depositions, the practice and procedure in chapters 801 to 847 apply; and interrogatories and depositions are available in the forfeiture action to the extent they are permitted by chapters 801 to 847.

Id.

VII. CONCLUSION

This Court's analysis in Schoepp, the Opinion of the Attorney General, and the plain language of the statutes, all support the Defendant-Appellant's position on the availability of discovery. For these reasons the trial court's order denying her the use of discovery should be reversed.

Respectfully submitted this ____ day of July, 2013.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

 x Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 7 pages.

 Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is _____ words.

Dated: July 16 , 2013

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CERTIFICATE OF COMPLIANCE WITH WIS STAT. § 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. § 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.

Signed ...

Signature

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

-v-

Appeal No. 13 AP 752

ANICA C.C. BAUSCH,

Circuit Court Case No. 12

FO 3248

Defendant-Appellant.

DEFENDANT-APPELLANT'S APPENDIX

Appeal from the Circuit Court for Dane County, Hon.
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APPELLANT'S BRIEF 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. Stat. § 809.19(2)(a) and that contains, at a minimum:

- (1) a table of contents;
- (2) the findings or opinion of the circuit court;
- (3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b); and
- (4) 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.

Dated:

Signed: