

**RECEIVED**

**STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT 4**

**05-26-2015**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

---

**In the matter of the refusal of Kirk L. Griesse:**

**STATE OF WISCONSIN,**

**District 4**

**Plaintiff-Respondent,**

**vs.**

**Appeal No. 2015AP000180**

**KIRK L. GRIESE,**

**Circuit Court Case No.  
2014TR7899**

**Defendant-Appellant,**

---

**DEFENDANT-APPELLANT'S REPLY BRIEF**

---

**ON APPEAL FROM THE CIRCUIT COURT OF DODGE  
COUNTY, WISCONSIN, THE HONORABLE  
JOHN R. STORCK PRESIDING, CASE NO. 2014TR7899**

---

**Respectfully submitted,**

**Gergen, Gergen & Pretto, S.C.  
Attorneys for Defendant-Appellant,  
Kirk L. Griesse**

**William H. Gergen  
State Bar # 1003061**

**Post Office Address:  
105 Front Street  
P.O. Box 453  
Beaver Dam, Wisconsin 53916  
Telephone: (920) 887-0371  
Fax: (920) 887-2398**

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF AUTHORITIES .....	ii
The Officer Did Not Have Probable Cause To Believe That Griese Was Operating While Intoxicated .....	1
CONCLUSION .....	3
CERTIFICATION	
CERTIFICATION REGARDING ELECTRONIC BRIEF PURSUANT TO SECTION 809.18(12)(f), STATS	

## **TABLE OF AUTHORITIES**

### **CASES**

### **PAGE**

*State v. Babbitt*, 188 Wis. 2d 349, 525  
N.W.2d 102 (Ct. App. 1994) ..... 1

*Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*,  
90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) ..... 3

### **The Officer Did Not Have Probable Cause To Believe That Griese Was Operating While Intoxicated**

The State, while recognizing that proof of the actual time of driving was problematic at the refusal hearing, fails to recognize or even address the “while” factor (operating **while** intoxicated) which is utterly missing from the evidentiary record, because it was missing from the officer’s investigation. (R.14;20:3-17;30:1) The State also fails to address the additional knowledge that the officer had regarding Griese drinking at the bar after driving. (R.14;22:15-17;27:18-24) Finally, the State assumes that the tipping incident qualifies as bad driving indicative of intoxication, in the face of an evidentiary record which indicates that the defendant tipping his motorcycle is not uncommon during a riding season. (R.14;11:10-14) While the officer, and the State, may be entitled to every reasonable inference, they are not entitled to every inference. The above are included in the totality of the circumstances which must be taken into account.

The State chooses to focus its analysis on *State v. Babbitt*, 188 Wis. 2d 349, 525 N.W.2d 102 (Ct. App. 1994). However, in relating the factors present in this evidentiary record that are similar to those in *Babbitt*, the State fails to analyze the most crucial factors, which are missing.

First, in *Babbitt*, the officer received a citizen’s report that Babbitt was “driving erratically”. *Id* at 357. The only incident reported to the officer in this case was that of a motorcycle tipping. (R.14;5:10-12)

Second, in *Babbitt* the officer observed bad driving indicative of intoxication. *Id.* In this case, the officer not only did not observe bad driving indicative of intoxication, but the tipping incident was, according to the officer's investigation, something that was not uncommon for Griesse to do during the riding season. (R.14;11:10-14) Using words like "downplayed" and "claiming" in the State's brief does not change the evidentiary record. The officer, and hence the State, have no basis upon which to claim that the evidence is other than it is, i.e., that Griesse tipping his motorcycle is not an uncommon occurrence during the riding season. Additionally, Griesse told Deputy Weinfurter that traffic was coming up quickly and he felt he had to make the turn quick. (R.14;23:13-15)

Third, the police officer in *Babbitt* pulled the driver over and executed a normal traffic stop. *Id.* at 355. Thus, the state of intoxication in which that officer found Babbitt was the same at the time of the officer's observations as they were when Babbitt was driving her car just moments before the stop. In this case, under any view of the evidence, there is a significant passage of time between Griesse's driving and the officer's observations, and Griesse spent that time in The Hill Tavern drinking. Thus, Griesse's state of intoxication was not the same at the time of the officer's observations as it was (if any there was) at the time of driving. The evidentiary record in this case lacks the temporal connection between the driving and the driver's state of intoxication that appear in *Babbitt* and the other reported cases in this area on this issue. This problem is compounded by the fact that Griesse spent the "gap time" in a bar drinking.

The absence of this temporal connection required, at the very least, more investigation by Deputy Weinfurter before he could **reasonably** draw an inference that his observations of Griese's condition at the time he observed them were reasonably connected to his driving. That is, faced with the fact that Griese had been drinking since driving, combined with the fact that the officer had not observed any bad driving indicative of intoxication, the officer needed to investigate further in order to determine if what he was observing was in fact evidence of operating **while** intoxicated, as opposed to evidence of being intoxicated after driving and having tipped his motorcycle.

Due to the brevity of the State's brief, the defendant has very little other argument to reply to. It should be noted that any argument not addressed by the State should be deemed conceded on appeal. *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979)

### **Conclusion**

The defendant's conclusion is the same, in light of the State's brief, that it was at the conclusion of his initial brief. There is a gap in time in this case, and events occurring during that gap in time, which preclude a reasonable inference being drawn by the police officer that Griese was operating **while** intoxicated. This lack of evidence, and this gap in time, could have been further investigated by the police officer to determine the extent of Griese's drinking, the exact time of the driving, and even whether or not the citizen who called in the tipping incident observed any other driving that might have been indicative of intoxication.

Instead, the officer rushed to judgment, arresting Griese after he refused the field tests and the PBT. In doing this throughout, Griese questioned why the officer's were bothering him over a minor tipping incident. Griese obviously felt the officers did not have a good reason, what the law calls probable cause, to be asking him to perform these various tests. Thus, his refusal to take the tests would not, in this case, carry the same inference of knowledge of guilt as it would in a case where the defendant had been pulled over by the police so that the defendant's state of intoxication at the time of observation by the police would have necessarily been the same as when he was driving.

Griese asks this Court to find that the evidentiary record in this case does not support a reasonable inference that, with the information that the officer had at the time of arrest, Griese was intoxicated **while** driving. Such a finding would not preclude officers from arresting people who drink after driving, it would merely cause the police officers to do what is reasonable under the circumstances, that is, investigate further to determine whether there was a reasonable inference to be drawn that the intoxication observed by the officer was supported by facts sufficient to draw a reasonable inference that the defendant was intoxicated **while** driving. In this case, the evidence does not support such a conclusion.

Dated this \_\_\_\_\_ day of May, 2015

Respectfully submitted,

GERGEN, GERGEN & PRETTO, S.C.  
Attorneys for Kirk L. Giese,  
Defendant-Appellant

By: \_\_\_\_\_  
William H. Gergen, SBN #1003061

## **CERTIFICATION**

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of this brief is 1,072 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 § 809.12(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 or 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: May \_\_\_\_, 2015.

Signed,

**Gergen, Gergen & Pretto, S.C.**  
Attorneys for Defendant-Appellant,  
Kirk L. Griesse

By \_\_\_\_\_  
William H. Gergen #1003061

**Post Office Address:**

105 Front Street  
P.O. Box 453  
Beaver Dam, Wisconsin 53916  
Telephone: (920) 887-0371  
Fax: (920) 887-2398

**CERTIFICATION REGARDING ELECTRONIC BRIEF  
PURSUANT TO SECTION 809.19(12)(f), STATS.**

I hereby certify that I have submitted an electronic copy of this Brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats.

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: May \_\_\_\_, 2015.

Signed,

**Gergen, Gergen & Pretto, S.C.**  
Attorneys for Defendant-Appellant,  
Kirk L. Giese

By \_\_\_\_\_  
William H. Gergen #1003061

**Post Office Address:**  
105 Front Street  
P.O. Box 453  
Beaver Dam, Wisconsin 53916  
Telephone: (920) 887-0371  
Fax: (920) 887-2398