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OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT III

No. 2015AP001415

OCONTO COUNTY,

Plaintiff-Respondent,

v.

JONATHAN E. VAN ARK,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION OF
THE CIRCUIT COURT OF OCONTO COUNTY, THE
HONORABLE MICHAEL T. JUDGE PRESIDING,
FINDING THE DEFENDANT GUILTY OF OPERATING
A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL
CONCENTRATION

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE TRIAL COURT IMPROPERLY ADMITTED THE ORAL TESTIMONY OF THE MEDICAL TECHNOLOGIST AND THE BLOOD ANALYST BECAUSE NEITHER WITNESS HAD ANY PRESENT RECOLLECTION OF THE DEFENDANT OR HIS BLOOD SAMPLE.

In its initial brief, the defendant pointed out that the medical technologist testified that he could not remember having any contact with the defendant, nor drawing his blood. (Trans. 126:10-22; Defendant's Appendix 187). The County, in its brief, states that "[t]he medical technologist...refreshed his memory from reviewing the appellant's blood test result and was able to testify as to the date, time and manner in which the blood sample was drawn." (Plaintiff-Respondent's brief, page 2). The County failed to provide any citation to the record for such an assertion. Similarly, the County asserted in its brief that "the testimony of the blood analyst establishes that she had personal knowledge of the matter she testified to" (Plaintiff-Respondent's brief, page 2). However, the County fails to address the fact that the blood analyst was asked by the court "whether... she has any present recollection of receiving, testing, or doing anything with any blood sample relating to Mr. Van Ark" (Trans. 133-134, Defendant's Appendix 194-195), to which the blood analyst testified: "I do not have any personal recollection of this specific sample...." (Trans. 134:5-7, Defendant's Appendix 195). The County simply equates the fact that, because the court permitted the medical technologist and the blood analyst to testify *as though they had a present recollection of the matter*, the witnesses in fact had a present recollection when they testified that they did not. The County's reply is simply not supported by the record. As explained by the defendant in its initial brief, the trial court erroneously permitted the medical technologist and the blood analyst to orally testify about matters to which they had no present recollection.

II. A REASONABLE JURY COULD HAVE CONCLUDED THAT THE COUNTY HAD FAILED TO MEET ITS BURDEN OF PROVING THAT THE DEFENDANT HAD A PROHIBITED ALCOHOL CONCENTRATION AT THE TIME OF DRIVING, AND THUS, THE TRIAL COURT ERRED IN GRANTING A DIRECTED VERDICT.

The defendant argued in its initial brief that although the County presented evidence from which the jury could infer that the defendant's blood alcohol concentration exceeded the legal limit, the jury was not required to reach that conclusion. (Brief of Defendant-Appellant at 15). The defendant explained in its initial brief that the County failed to present any evidence of how the result of a test of the defendant's blood taken more than an hour after driving may have related to the defendant's alcohol level at the time of driving. The defendant further explained that due to that fact, and the fact that neither of the County's blood test witnesses had any recollection of doing anything with the defendant's blood sample, a reasonable jury could have concluded that the County had not met its burden of proving that the defendant had a prohibited alcohol concentration at the time of driving. The County failed to refute the defendant's argument, and did not even address it. Arguments not refuted are deemed conceded. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct.App.1979).

The County simply argues that because the trial court was satisfied that the County met its burden of proof, the court's taking the case from the jury and directing a verdict was proper. However, as explained in the Defendant-Appellant's initial brief and as noted above, there were sufficient reasons that the jury may have determined that the County had not met its burden of proof. "Even if the evidence adduced is undisputed, if that evidence permits different or conflicting inferences, a verdict should not be directed...." *Millonig v. Bakken*, 112 Wis. 2d 445, 334 N.W.2d 80 (1983).


CONCLUSION

For the reasons explained above, the court of appeals should determine that the trial court erred in allowing the medical technologist and the blood analyst to provide oral testimony about the blood sample taken from the defendant, and the manner in which it may have been analyzed, when neither witness had any present recollection of the matter. The lack of any present recollection by either of the blood test witnesses, combined with the lack of any evidence of how a blood test taken an hour after driving might relate to a person's alcohol level at the time of driving, would have permitted a reasonable jury to conclude that the County had not met its burden to prove by evidence that is clear, satisfactory and convincing, that the defendant had a prohibited alcohol concentration at the time he drove a motor vehicle. That determination was properly in the province of the jury and the court of appeals should reverse the conviction and remand the matter for a new trial.

Dated this 19th day of January, 2016.

Respectfully Submitted,

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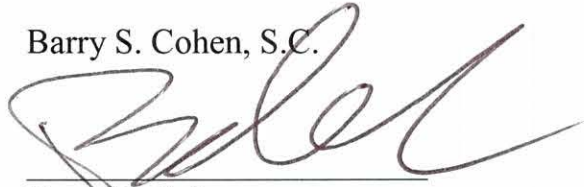
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Dated this 19th day of January, 2016.

Barry S. Cohen, S.C.



Barry S. Cohen

Attorney for Defendant-Appellant

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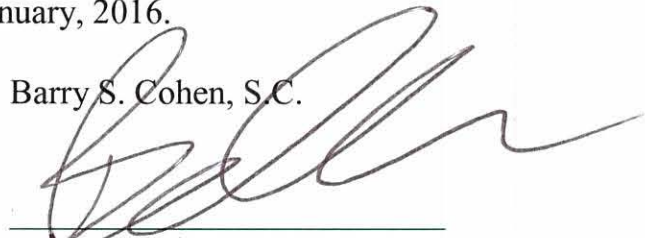
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Dated this 19th day of January, 2016.

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