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**STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III**

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**Appellate Case No. 2017AP1079**

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**COUNTY OF DOOR,**

Plaintiff-Respondent,

-vs-

**DONALD LEE McPHAIL,**

Defendant-Appellant.

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**APPEAL FROM A FINAL ORDER ENTERED IN THE  
CIRCUIT COURT FOR DOOR COUNTY, BRANCH I,  
THE HONORABLE D. TODD EHLERS PRESIDING,  
CIRCUIT COURT CASE NO. 17-TR-406**

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**REPLY BRIEF OF DEFENDANT-APPELLANT**

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## ARGUMENT

### I. RESOLUTION OF MR. McPHAIL'S APPEAL SHOULD NOT BE BASED UPON SPECULATION.

Just as the circuit court did, in an effort to rebut Mr. McPhail's argument on appeal, the County proffers that "had the sent the [Notice of Intent to Revoke Operating Privilege form in] 'it would have been received downstairs and it would have been shipped upstairs,' . . . ." <sup>1</sup> County's Brief at 3. This argument is utterly speculative.

The entire point of this case is that the Notice form had the wrong address. To hope, pray, speculate, gamble, risk, hypothesize, conject, or suppose that an employee of the Sheriff's Office would know or understand that the Notice form must be "sent upstairs" reduces Mr. McPhail's due process right to a hearing to a game of "best guess." There is no guarantee that the receiving clerk—likely a person who is unfamiliar with the procedural ministrations of Wisconsin's Implied Consent Statute—would have any idea or notion of what to do with the form. More importantly, there is nothing, other than mere speculation, to suggest that he or she would even "send it upstairs" within the proper time limit. What would happen if the notice had been received on the tenth, or final, day? If this hypothetical individual did not know that he or she had to "send it upstairs" and therefore had to take the time to inquire of another individual within the department, there is no guarantee that this person would do so the same day. Would the request be deemed untimely then if it was not delivered until the eleventh day?

The only way to avoid such conjecture is to ensure that the form is correctly addressed. In this fashion, one need not worry whether the person who mistakenly receives the form knows what to do with it. It should be noted that the County presented not one

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<sup>1</sup> The "downstairs/upstairs" dichotomy to which the County refers is that the Notice form contained the erroneous address for the Sheriff's Office, which is downstairs from the circuit court. It proposes that if the Notice had been received, it would have been sent from the lower floor of the building to the upper floor where the circuit court is located.

shred of evidence regarding who received the notice, whether he or she knew what to do with the notice, and whether he or she would have been able to timely deliver the same to the circuit court. The record is completely devoid of any evidence in this regard.

The County also presupposes in its argument, as did the circuit court, that no Notice form requesting a hearing was sent in by Mr. McPhail. Like the foregoing argument, this is purely speculative as well. The attorney who appeared on Mr. McPhail's behalf at the hearing in this matter *never* conceded that Mr. McPhail failed to mail the Notice form requesting a hearing. In fact, the County's assertion in this regard is a complete mischaracterization of the record. In open court, Attorney Singh, an officer of the court, averred "from what I understand, . . . Mr. McPhail had actually filed a request for the refusal hearing as far as I know. That's the information that was provided to me." R18 at 3:4-7. While he admitted that he was not the defendant's primary attorney and therefore did not present that day in court with "proof of that," he nevertheless indicated that a request *was made*. R18 at 3:7-8. In fact, he again emphasized that "the request *was made* . . . ." R18 at 3:8-9 (emphasis added).

Given the foregoing solemn judicial admission by an officer of the court in open court on the record, this Court should disregard all of the County's assertions and arguments to the contrary without apology.

### **CONCLUSION**

Because every one of the County's arguments rests upon or is based upon mere speculation unsupported by the record, Mr. McPhail requests that this Court reverse the revocation order of the court below.

Dated this \_\_\_\_\_ day of October, 2017.

Respectfully submitted:

**MELOWSKI & ASSOCIATES, LLC**

By: \_\_\_\_\_

**Dennis M. Melowski**

State Bar No. 1021187

Attorneys for Defendant-Appellant

## **CERTIFICATION**

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(c)2. in that it is proportional serif font; the text is 13 point type; and the length of the brief is 666 words.

Finally, I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on October 26, 2017. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this \_\_\_\_\_ day of October, 2017.

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