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WISCONSIN COURT OF APPEALS
DISTRICT 2

COUNTY OF WAUKESHA,

Appeal No. 2023-AP-000919

Plaintiff-Respondent,

Circuit Court Case No. 2021-TR-004801

Circuit Court of Waukesha County

Hon. Dennis Moroney, Presiding

-v-

JACOB A. VECITIS,

Defendant-Appellant.

DEFENDANT-APPELLANT’S REPLY BRIEF

Attorneys for Defendant-Appellant:

Law Offices of Joseph F. Owens, LLC

2665 S. Moorland Road, Suite 200

New Berlin, WI 53151

(262) 785-0320

aolaw@bizwi.rr.com

Electronically signed by:

Joseph F. Owens

JOSEPH F. OWENS

State Bar No. 1016240

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INTRODUCTORY STATEMENT

As a preliminary matter, the Plaintiff-Respondent's Brief erroneously identifies the presiding circuit court judge in this appeal as the Honorable Jennifer Dorow. In fact, the presiding circuit court judge in the bench trial from which this appeal was taken was reserve judge, Honorable Dennis Moroney.

The Plaintiff-Respondent's Brief adopts the factual and procedural sections of Defendant-Appellant's Brief found on pages 6 through 19 as "undisputed." Therefore, it is undisputed for purposes of this appeal that Jacob Vecitis experienced sudden loss of consciousness due to a cardiac medical event, diagnosed as cardiac syncope, which resulted in the single vehicle rollover accident on August 31, 2021 involved in this case. [See: Def. Appellant Brief pp. 6-7.]

In addition, it is undisputed that the Intoximeter EC/IR II test operator applied an alcohol based hand sanitizing substance to her hands after the "blank test" had already been run, and before opening the packaging of the mouth piece being used for the subject test; and that Jacob Vecitis testified that he was inhaling alcohol vapors at the time of providing the breath sample into the EC/IR II testing device.

It is further undisputed that Jacob Vecitis was experiencing bleeding in his mouth at the time of providing the breath sample into the Intoximeter EC/IR II testing device.

In addition, all of the admissions by the prosecution's designated expert, Therese Sanders, as to the negative affect on the scientific accuracy of the Intoximeter EC/IR II test results due to a test subject "ingesting" alcohol vapors by inhaling same within 20 minutes of providing the breath sample are conceded as "undisputed" facts. [See: Def. Appellant Brief pp. 10-11.]

ARGUMENT

Waukesha County's entire brief is predicated on the proposition that the circuit court made a "finding of fact" that the subject Intoximeter test was conducted in conformity with the requirements of the Wisconsin Administrative Code, despite the circuit court correctly characterizing its own decision making process as a "conclusion of law."

Whether an issue is one of fact or one of law is itself a question of law. *State v. Byrge*, 237 Wis.2d 197, 614 N.W.2d 477, 486, 2000 WI 101, ¶32; *Crowley v. Knapp*, 94 Wis.2d 421, 429-30, 288 N.W.2d 815, 819-820 (1980). When, as conceded here in the County's Brief, there are no disputed factual issues as to what occurred in the events giving rise to the case in controversy, the circuit court's ruling applying statutory requirements to these facts, result in a conclusion of law, which is reviewed *de novo* on appeal. Judicial construing of the requirements of an ordinance restricting the use of property, when there is no dispute in the evidence of use of the subject property, is a question of law. *Browndale International Ltd. v. Board of Adjustments*, 60 Wis.2d 182, 199-200; 208 N.W.2d 121 (1973).

"The distinction between propositions of fact and conclusions of law is this: Propositions of fact are descriptive; conclusions of law are dispositive. Propositions of fact state history; conclusions of law assign legal significance to that history." Clarence Morris, *Law and Fact*, 55 Harv. L. Rev. 1303, 1329 (1942).

"A conclusion of law results when legal effects are assigned to events. A conclusion of law stands for more than the happening of events; it is at least a step in the legal disposal of events. If a rule of law must be applied before a conclusion is reached, that conclusion is one of law." *Id.* at 1328-29.

"When there is but one account of what happened, and the application of acceptable rules of law to that account is problematic, a question of law results."

Morris, *supra* § V.B. 1., at 1314-15 (citing Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443 (1899)).

“Whether the facts ... fulfill a particular legal standard is a question of law which we review *de novo*.” *Ide v. LIRC*, 224 Wis.2d 159, 166, 589 N.W.2d 363 (1999).

This case does not involve any assertion of malfunction or defect in the Intoximeter EC/IR II. The machine will function properly and will provide accurate breath alcohol test results within its design capabilities. As detailed in the Defendant-Appellant’s Brief on pp. 20-22, under Wis. Stat. §343.305(5)(d) and §343.305(6)(b), the machine’s test results are (a) admissible into evidence and (b) constitute *prima facie* of intoxication under Wis. Stat. §885.235(1g)(c) **if** the test is administered in conformity with “... department of transportation” approved “techniques and methods,” which are set out specifically in Wis. Adm. Code Ch. Trans 311.06.

A machine such as the Intoximeter EC/IR II will analyze and assess all alcohol in the breath sample introduced into it. Both experts explained that is why the critical 20 minute observation period in Wis. Adm. Code Ch. Trans 311.06(3)(a) exists prohibiting the subject from “ingesting” any “alcohol” within 20 minutes prior to collection of the subject breath sample. The machine can only do what it is designed to do - measure alcohol in a given breath sample. It cannot distinguish the source of the alcohol if other than from the alveolar sacs in the subject’s lungs, (i.e., inhaled hand sanitizer vapor or capillary blood in the oral cavity through which the breath sample passes when exhaled into the machine).

The County’s citation to *State v. Bailey*, 321 Wis.2d 350, 773 N.W.2d 488, 2009 WI App. 140, has no application here. In *Bailey*, the circuit court weighed the credibility of testimony describing various acts by police officers in making a *Terry* vehicle search.

The County's citation of *State v. Disch*, 119 Wis.2d 461, 476-77, 351 N.W.2d 492 (1984) is equally inapposite. In *Disch*, the Supreme Court addressed the "due process" inquiry required by a hypothetical finder of fact, in the context of a pre-trial motion to suppress, when analyzing the materiality of a blood test result derived from a "properly authenticated sample by legislative fiat" (i.e., then Wis. Stat. §885.235(1)). In the present case, the gist of this entire appeal centers on the uncontroverted fact that the "legislative fiat" of Wis. Adm. Code Ch. Trans 311.06(3)(a) was not followed. The trial court simply refused to consider the "legislative fiat" prohibiting the ingestion of any form of alcohol by the test subject within 20 minutes of providing the breath test sample. That was not a fact determination as to which the circuit court would have to assess credibility. The facts of non-compliance with the Wis. Adm. Code Ch. 311.06(3)(a) are uncontroverted. Jacob Vecitis ingested alcohol vapors during the subject *BAC* test and had capillary blood in his mouth at the time the breath sample was passing through his oral cavity.

The trial court simply refused to recognize the significance of these uncontroverted facts in relation to the "legislative fiat" governing their admissibility into evidence or the entitlement of the breath test results to *prima facie* proof status. In addition, the trial court failed to perceive the materiality of both expert's testimony that the inhalation of alcohol based hand sanitizer vapors by the test subject at the time of administering the test would negatively affect the accuracy of the test machine's reported results. [R-53; A.App. p. 81; R-54; A.App. pp. 104-105, 107-114.] There simply was no conflicting opinion testimony on this fundamental scientific issue between the experts as to which the trial court would have any reason to assess credibility.

The County's citation to *City of New Berlin v. Wertz*, 105 Wis.2d 670, 674, 314 N.W.2d 911, 913 (Ct. App. 1981) relies on a Court of Appeals decision

predicated on technically dissecting and interpreting a 40 year old statutory provision, the language of which is markedly changed from the current statutory framework which is meticulously laid out in the Defendant-Appellant's Brief; and which the County, the circuit court and this Court are bound to apply.

The County is correct in its assertion that the current statutory framework relieves the prosecution in an OWI case of having to produce an expert to testify as to the accuracy of a properly conducted test by a trained operator of a certified breath test device in order to obtain *prima facie* admissibility of that device test result. The problem presented by the County's argument is that it ignores the requirement that the trial court must nevertheless determine whether the test was conducted in conformity with the Department of Transportation "approved techniques and methods." No matter how hard the County strives to divert the focus from this fundamental issue, the uncontroverted facts in this case remain that the subject test did not conform to those "approved techniques and methods"; and that failure was "material" in terms of providing a skewed result showing an inflated blood alcohol reading due to the inhalation of hand sanitizer alcohol vapors and the presence of capillary blood in the subject's mouth.

CONCLUSION

This case is docketed for appeal purposes as if it were a routine traffic regulation case. It is not. The scientific facts of how the Intoximeter EC/IR II is designed and works are not unique to it as a blood alcohol testing device. However, this case serves to illustrate and demonstrate the essential necessity of scrupulous adherence to the "approved techniques and methods" required by the Wisconsin Department of Transportation in Wis. Adm. Code Ch. Trans 311.06 in order to confer scientific reliability upon the results of a breath alcohol test administered to a subject using the Intoximeter EC/IR II, or any other breath testing device similarly approved for use by the Wisconsin Department of Transportation.

Whether through laxity over time or ignorance, departure from adherence to the “approved techniques and methods” in Wis. Adm. Code Ch. Trans 311.06 is not simply a harmless departure from a bothersome tangential bureaucratic rule. It completely destroys the probative value of the scientific test process itself for which the Intoximeter EC/IR II was designed. Deputy Shannon Fettig, when she administered the subject test using alcohol based sanitizer on her hands, knew enough to vocalize her suspicion that the inhalation of its vapors could have a negative affect on the test results. [See: R-53; A.App. pp. 39, 44-45; 156-160.] However, she did not have enough knowledge as to how the Intoximeter EC/IR II was designed to do anything other than to proceed with the test and vocalize her concern. The full significance of the concern she vocalized has now been fully explored and explained in a trial to a court that was not sufficiently cognizant of the fundamental scientific principles placed on the record by expert testimony, professional literature and peer reviewed scientific studies in the fields of emergency medicine and forensic science.

Accordingly, it is of the utmost importance to members of law enforcement, and the trial bench and bar of the State of Wisconsin that the forensic scientific facts extant in this case receive the fullest exposure in order to prevent the miscarriage of justice in the many case of all sorts in which breath alcohol tests are administered in which test administrators unknowingly use hand sanitizer rather than latex gloves as a matter of hygiene protocol. Therefore, this case deserves review by a full panel of appellate judges and publication.

The trial court’s decision should be reversed on *de novo* review and remanded to the circuit court with instructions to dismiss the case on the grounds that on this record the prosecution cannot meet the required middle burden of proof that Jacob Vecitis was intoxicated or had a prohibited alcohol level in his blood stream at the time of operating his motor vehicle on August 31, 2021.

Respectfully submitted this 9th day of November, 2023.

Attorneys for Defendant-Appellant:

Law Offices of Joseph F. Owens, LLC
Electronically Signed By

Joseph F. Owens

Joseph F. Owens
State Bar No. 1016240

**CERTIFICATION AS TO FORM AND LENGTH OF APPELLATE
BRIEFS**

I hereby certify that this Reply Brief conforms to the rules contained in Wis. Stat. Section 809.19(8)(b) (bm), and (c) for a Reply Brief. The length of this brief is 1,913 words.

Dated at New Berlin, Wisconsin on November 9, 2023.

Electronically Signed By

Joseph F. Owens

Attorney Joseph F. Owens
State Bar No: 1016240