STATE OF WISCONSIN
IN SUPREME COURT

Appeal No.: 2011AP002888

VILLAGE OF ELM GROVE,

Plaintiff-Respondent,

v.

RICHARD K. BREFKA,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming an Oder of the Circuit Court for Waukesha County, Branch 11, the Honorable Mark Gundrum, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

ISSUE PRESENTED

Does a court have authority under Wis. Stat. §806.07 or Wis. Stat. §800.115(1) to grant relief from judgment in a refusal case and to extend the time limit under Wis. Stat. §343.305(9)(a)?

The trial court and Court of Appeals answered, no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Consistent with this Court's practice, oral argument and publication are warranted.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The facts are not in dispute. Richard G. Brefka was arrested by police officers of the Village of Elm Grove. He was, thereafter, issued a Notice of Intent to Revoke, pursuant to Wis. Stat. §343.305. His attorney at the time filed a request for a hearing, but did not do so within the ten-day statutory time limit. By new counsel, Brefka moved the municipal court for the Village of Elm Grove to extend the time limit for the filing of the request for a hearing. The municipal court refused to entertain the motion, holding that it lacked competence to proceed under *Village of Butler v. Fricano*, 2010 WI App. 84, 326 Wis. 2d 267,787 N.W.2d 60 (Ct. App. 2010), (unpublished decision).

Brefka appealed this matter to the Waukesha County Circuit Court. The Village moved to dismiss the appeal, arguing that under *Fricano*, the court lacked competence to proceed. Brefka argued that the court had jurisdiction, competence and discretion to extend the ten-day time limit to request a hearing, under Wis. Stat. §800.115(1) and Wis. Stat. §806.07. A motion hearing was held on

October 31, 2011. The circuit court granted the Village's motion to dismiss and remanded the matter back to municipal court for disposition, holding that it lacked competence to hear the case. Brefka appealed the circuit court's order to the Court of Appeals, who affirmed the ruling.

Brefka petitioned the Wisconsin Supreme Court to review the decision of the Court of Appeals. The Supreme Court granted review.

ARGUMENT

1. The Lower Courts' Rulings Inappropriately Deprive the Judiciary of its Inherent Discretionary Power to Grant Relief from Judgment.

A. Wis. Stat. §800.115 Allows a Municipal Court Judge to Grant a Defendant Relief From Judgment.

Wis. Stat. §343.305(9)(a) establishes a ten-day time limit for a person to request a refusal hearing. The statute, however, is silent as to whether a time limit may be extended, a default cured, or a case re-opened. Wis. Stat. §800.115 allows a defendant to seek relief from judgment from a municipal court on the grounds of excusable neglect. It states:

> 800.115 Relief from Judgment.
> (1) A defendant may within 6 months after the judgment is entered move for relief from the judgment because of mistake, inadvertence, surprise, or excusable neglect.
> (2) Any party, including the court on its own motion, may at any time move to reopen the judgment under s. 806.07 (1) (c), (d), (g), or (h).
> (3) Nothing in this section shall prevent the parties from stipulating and the court approving the reopening of a judgment for any other reason justifying relief from operation of the judgment.
> (4) The court may impose costs on the motion as allowed under s. 814.07.

> (5) Upon receiving or making a motion under this section, the court shall provide notice to all parties and schedule a hearing on the motion.

Wis. Stat. §800.115, therefore, provides municipal courts with direct authority to relieve an individual from municipal court judgments. Nothing in this section prohibits relief in situations where a deadline to file a request for a refusal hearing in the municipal court was not met.

B. The Rules of Civil Procedure Apply to Actions under Wis. Stat. §343.305 and Allow a Court to Grant Relief from Judgment pursuant to Wis. Stat. §806.07.

A refusal hearing is a special proceeding for purposes of Wis. Stat. §801.01. *State v. Schoepp,* 204 Wis. 2d 266, 270, 554 N.W.2d 236, 238 (1996) citing *State v. Jakubowski,* 61 Wis. 2d 220, 224, 212 N.W.2d 155, 157 (1973). Wisconsin law provides for the application of Chapters 801 to 847 of the Wisconsin Statutes to all special proceedings in the absence of a specific statutory provision. *Id* at 272, *Wis. Stat. §801.01(2).* Therefore, the sections in Chapter 806, the Wisconsin Rules of Civil Procedure governing Judgment, are applicable to implied consent violations that are handled in circuit courts, when Wis. Stat. §800.115 is not applicable.[1]

Wis. Stat. §806.07 allows any party to seek relief from a judgment from a municipal court or a circuit court. In pertinent part, Wis. Stat. §806.07 provides:

> 806.07 Relief from judgment or order.
> (1) On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

[1] In Wisconsin, first offense Refusal matters may originate in either a circuit court or a municipal court, subject to the jurisdiction of the particular law enforcement agency that makes the arrest. Although Wis. Stat. §800.115 specifically governs municipal court procedure, except for the existence of §800.115 exists, nothing in the statutes suggests that Wis. Stat. §806.07 is not also applicable to §343.305 violations that are litigated in municipal courts.

> (a) Mistake, inadvertence, surprise, or excusable neglect;
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);
> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
> (d) The judgment is void;
> (e) The judgment has been satisfied, released or discharged;
> (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
> (g) It is no longer equitable that the judgment should have prospective application; or
> (h) Any other reasons justifying relief from the operation of the judgment.
>
> (2) The motion shall be made within a reasonable time, and, if based on sub. (1) (a) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub. (1) (b) shall be made within the time provided in s. 805.16. A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

The Court's power to grant relief under Wis. Stat. §806.07 is a codification of the common-law, inherent power of a court to grant relief from its own judgments and orders. "The general control of the judicial business before it is essential to the court if it is to function." *Neylan v. Vorwald*, 124 Wis. 2d 85, 94, 368 N.W.2d 648 (1985). "Every court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket with economy of time and effort." *Latham v. Casey & King Corp.*, 23 Wis. 2d 311, 314, 127 N.W.2d 225 (1964). Under *Schoepp* and Wis. Stat. §801.01, the rules of civil procedure apply to Wis. Stat. §343.305 implied consent violations. Contrary to the Village's position, a court may relieve a party from judgment upon filing of a timely motion for relief pursuant to Wis. Stat. §806.07.

Therefore, in Brefka's case, the municipal court had authority to grant the requested relief under both Wis. Stat. §800.115 and Wis. Stat. §806.07. The Circuit Court had authority to entertain this same request for relief under Wis. Stat. §806.07.

C. Wis. Stat. §343.305(10)(a) Does Not Deprive the Court of the Power to Grant Relief Pursuant to Wis. Stat. §806.07.

Interpreting Wis. Stat. §343.305(10)(a), the Village asserts that the presence of the word "shall" in the statute prohibits courts from extending the time limit to file a request for refusal hearing, and thus restricts courts from exercising their power to grant relief from judgment under Wis. Stat. §806.07. Wis. Stat. §343.305(10)(a) provides:

> If the court determines under sub. (9)(d) that a person improperly refused to take a test or if the person does not request a hearing within 10 days after the person has been served with the notice of intent to revoke the person's operating privilege, the court shall proceed under this subsection. If no hearing was requested, the revocation period *shall* begin 30 days after the date of the refusal. If a hearing was requested, the revocation period shall commence 30 days after the date of refusal or immediately upon a final determination that the refusal was improper, whichever is later.
>
> (emphasis supplied).

The word "shall" may be interpreted as "directory" if such analysis is consistent with the intent of the legislature. *See State v. Moline,* 170 Wis. 2d 531, 538, 489 N.W.2d 667, 670 (1992) citing *In re S.A. II,* 165 Wis. 2d 530, 535, 478 N.W.2d 21, 23 (Ct. App. 1991). Although, the word "shall" is usually determined to be mandatory, it may be construed as directory in this instance, as it was in *Moline*. Neither the statutory language nor the legislative history suggest that the intent of the word "shall" in Wis. Stat. §343.305(10)(a) was to prohibit courts from extending time limits and granting relief under Wis. Stat. §806.07. Thus, it is a leap of faith to say that the language "shall revoke" excludes relief from a judgment under Wis. Stat. §806.07.

This situation is similar to the use of the term "shall" in Wis. Stat. §806.02(4), Default Judgment, which states as follows:

> In an action on express contract for recovery of a liquidated amount of money only, the plaintiff may file with the clerk proof of personal service of the summons on one or more of the defendants and an affidavit that the defendant is in default for failure to join issue. The clerk *shall* render and enter judgment against the defendants who are in default for the amount demanded in the complaint. Leaving the summons at the abode of a defendant is not personal service within the meaning of this subsection.
>
> (Emphasis supplied).

It has never been suggested, however, that Wis. Stat. §806.02(4) deprives a court of competence to reopen a default judgment and grant relief under Wis. Stat. §806.07. Neither is a court in a refusal proceeding deprived of such authority.

Further, even accepting the Village's argument that the word "shall" in Wis. Stat. §343.305(10)(a) is mandatory, it is addressed only to the entry and execution of the judgment; the statute has nothing to do with relief from that judgment.

Moreover, the Legislature revisited the issue of the applicability of *Schoepp* and it declined to do anything more than limit discovery. In *Schoepp*, this Court held that a refusal proceeding is a special proceeding, subject to the rules of civil procedure. *Schoepp,* 204 Wis. 2d at 273. In 2001, the Wisconsin legislature enacted Assembly Bill 216, which prohibited the use of discovery in refusal hearings. The legislature did not, however, limit or carve out an exception to Wis. Stat. §806.07, a court's power to grant relief, as it relates to refusal proceedings.

2. *Village of Butler v. Fricano* Should be Overturned.

A. *Fricano* Creates an Anomaly in the Law, Outside the Normal Framework of Civil and Traffic Procedure.

Fricano, supra, inappropriately carves out an anomalous exception to the rule that courts may grant relief from judgment. In doing so, *Fricano* wrongly interprets the refusal statute. In

determining the meaning of a statute, "absurd results or interpretations are to be avoided." *State v. Moline*, 170 Wis. 2d 531, 538, 489 N.W.2d 667, 670 (1992) quoting *State v. Gould*, 56 Wis. 2d 808, 812, 202 N.W.2d 903, 905 (1973). Law ought to be, as far as possible, uniform, simple, and equally applied. *Fricano* contradicts this elementary tenet.

B. *Fricano* Is Not Based on Firm Authority.

Fricano is based on a misapplication of the concept of the competency of a court to adjudicate a case. *Fricano* held that because the defendant failed to request a Refusal Hearing within the ten day time limit provided under Wis. Stat. §343.305(10)(a), the court lost competency to proceed with the hearing. Competency refers to a court's ability to exercise the subject matter jurisdiction vested in it by the state constitution. *See Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶¶8-9, 273 Wis. 2d 76, 681 N.W.2d 190. Article VII, section 8 of the Wisconsin Constitution provides that: "except as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state." *Id.* at ¶8. "A failure to comply with a statutory mandate pertaining to the exercise of subject matter jurisdiction may result in a loss of the circuit court's competency to adjudicate the particular case before the court." *Id.* at ¶9.

Mikrut goes on to state that, "many errors in statutory procedure have no effect on the circuit court's competency." *Id.*, Only when the failure to abide by a statutory mandate is central to the statutory scheme of which it is a part will the circuit court's competency to proceed be implicated. *Id.* citing *In re Bollig*, 222 Wis. 2d 558, 567-68, 587 N.W.2d 908 (Ct. App. 1998). The statutory mandate in refusal proceedings is for the application of the general rules of civil procedure, not for derogation of the court's authority. Thus, the competency of the court is not invoked by the ten day refusal time limit.

Also noteworthy is Chief Justice Abrahamson's concurring opinion in *Mikrut*. It cautions interpretation of the majority opinion

to the extent that it allows for reversion to "ancient common law where every error enabled a court to dismiss a case without looking at the merits of the case." *Id.* at ¶45. *Fricano*, therefore, attempts to engrave into the law exactly what the concurring opinion warned against.

Fricano stated that "courts have routinely held that the failure of a party to act within a statutorily mandated time limit results in the court's loss of competence to hear the specific case before it." *Fricano*, 2010 WI App at ¶9. The court of appeals relied on the holdings in *Green County DHS v. H.N.*, 162 Wis. 2d 635, 656, 469 N.W.2d 845 (1991) and *Miller Brewing Co. v. LIRC*, 173 Wis. 2d 700, 706, 495 N.W.2d 660 (1993).

The natures of the cases on which *Fricano* relies, however, are far different from *Fricano* and the case at hand. *Green County DHS v. H.N.* involved a Chapter 48 "Children in Need of Protection" (CHIPS) proceeding where the clear legislative intent of the relevant statute is to unambiguously set standards for the protection of a child and the protection of the constitutional parental right. *Miller Brewing Co. v. LIRC* involved a dispute concerning the Wisconsin Worker's Compensation judicial review statute requiring a party aggrieved by a decision of the Labor and Industry Review Commission to name all adverse parties as defendants when seeking judicial review. The legislative intent of the Worker's Compensation judicial review statute was to create limits upon which a circuit court can review decisions of the LIRC.

The issues in the above-referenced cases have nothing to do with civil procedure and the court's common law power to grant relief as it applies to Wisconsin implied consent violations. *Fricano* wrongly shoehorned competency as means to undermine a court's right to grant relief under the rules of the civil procedure. The decisions of these cases and *Fricano* do not and should not trump the court's power to grant relief under Wis. Stats. §806.07 and §800.115 in refusal proceedings.

CONCLUSION

Fair, equal and comprehensive rules of law and procedure should be relatively simple and understandable. In civil procedure, parties are entitled to ask for relief from judgment. Nothing in the statute suggests that the Wisconsin Legislature intended to deprive the judicial branch of government the power to grant relief from judgments. If the legislature intended to deprive courts of that power in refusal hearing situations, then it would have acted far more clearly than what is articulated in Wis. Stat. §343.305(10)(a). *Fricano* misinterprets the statute and caselaw. In doing so, *Fricano* creates an anomalous breach in the inherent and statutory authority of the courts. Thus, it should be overturned.

Therefore, Richard Brefka, by his attorneys, The Law Offices of Andrew Mishlove, by Attorney Andrew Mishlove and Attorney Lauren Stuckert, hereby respectfully pray that the Supreme Court reverse the decision of the Court of Appeals and remand this matter to the trial court for a hearing on the merits of Brefka's Motion to Extend the Time Limit to File a Request for a Hearing.

Dated this _13_ day of December 2012.

Respectfully submitted:

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 2,731 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 §809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 this _13_ day of December 2012.

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APPENDIX

CERTIFICATION AS TO APPENDIX

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 §809.09(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 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 this 13th day of December 2012.

Signed:

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INDEX TO APPENDIX