RECEIVED
01-03-2013
CLERK OF SUPREME COURT
OF WISCONSIN

SUPREME COURT
OF THE
STATE OF WISCONSIN

VILLAGE OF ELM GROVE,
Plaintiff-Respondent,

Appeal No. 2011AP002888

RICHARD BREFKA,
Defendant-Appellant-Petitioner

PLAINTIFF-RESPONDENT VILLAGE OF ELM GROVEÕS REPLY TO BRIEF OF DEFENDANT-APPELLANT-PETITIONER

ON REVIEW OF A DECISION OF
THE COURT OF APPEALS, DISTRICT II
AFFIRMING AN ORDER OF THE CIRCUIT COURT
CASE NO. 2011CV002837
THE HONORABLE MARK GUNDRUM, PRESIDING

Douglas Hoffer
de la Mora & de la Mora
State Bar No. 1079432
Counsel for Village of Elm Grove
15255 Watertown Plank Road
Elm Grove, WI 53122
(262) 784-5415
(262) 784-0975 (Fax)
dh@delamoralaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The material facts in this case are not in dispute.[1] The present action involves an appeal from a Waukesha Circuit Court refusal hearing dismissal stemming from a December, 2010 traffic stop. On December 12, 2010 police officers from the Village of Elm Grove arrested the defendant, Richard Brefka, and issued a ñNotice of Intent to Revoke Operating Privilege.ò The Notice of Intent to Revoke stated that Brefka had ten days to request a refusal hearing. Brefka requested a refusal hearing on December 28, 2010.

The municipal court scheduled a refusal hearing. The Village of Elm Grove filed a motion to strike the defendantôs untimely refusal request. Brefka conceded that his refusal hearing request was not timely submitted, and filed a motion asking the court to extend the time limit.

The municipal court, citing *Village of Butler v. Fricano*, 2010 WI App 84, 326 Wis. 2d 267, 787 N.W.2d 60, an unpublished case, determined that Brefkaôs failure to request a refusal hearing within

[1] (Def-Respôs Petition App. C-4) (Procedural facts of the case deemed admitted).

the ten day statutory deadline resulted in the municipal court losing competency to proceed. Consequently, the municipal court dismissed Brefkaôs request for a refusal hearing and Motion to extend the statutory time limit. Brefka immediately filed an appeal to the Waukesha Circuit Court.

The Village of Elm Grove filed a Motion to Dismiss the circuit court proceeding. On October 31, 2011, the circuit court held a motion hearing. The circuit court cited *Fricano* and Wis. Stat. § 343.305(9) and (10), concluded that the court lacked competence to hear the case and dismissed the action. Brefkaôs underlying drunk driving charge was tried separately from the refusal proceeding.

The Court of Appeals affirmed the Order of the circuit court in an unpublished decision, concluding that Wis. Stat. § 343.305 unambiguously requires refusal hearing requests to be timely filed to avoid revocation. (Def-Resp Petition App. C.)

Brefka petitioned the Supreme Court of Wisconsin for review of the Court of Appealsô decision. The Supreme Court granted review.

ISSUES PRESENTED FOR REVIEW

Does a court have competence to hold a refusal hearing if the defendant does not meet the condition contained in Wis. Stat. § 343.305 of requesting a hearing within ten days?

Trial Court and Court of Appeals Answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Consistent with this Courtôs practice, oral argument and publication are warranted.

BACKGROUND

Any person who operates a motor vehicle on Wisconsinôs public highways consents, by implication, to one or more chemical tests of his or her blood, breath or urine for the purpose of verifying the presence of alcohol. Wis. Stat. § 343.305; *See also State v. Neitzel*, 95 Wis. 2d 191, 193, 289 N.W.2d 828 (1980).

Refusing to submit to a chemical test subjects that person to revocation of his or her operating privileges and other penalties. Wis. Stat. § 343.305. The person may request a hearing on the revocation within ten days by mailing or delivering a written request to the court address specified in the Notice of Intent to Revoke given

to the defendant. *Id.* If the court does not receive the request within ten days, the court must order the personôs operating privileges revoked. *See* Wis. Stat. § 343.305(9) and (10).

Wis. Stat. § 343.305(9)(a)5 expressly limits the issues a court may consider during a refusal hearing. A refusal prosecution does not preclude an OWI prosecution, and an OWI prosecution does not preclude a refusal prosecution. *See In re Refusal of Anagnos*, 2012 WI 64, 341 Wis. 2d 576, 603-06, 815 N.W.2d 675 (Ziegler, J., concurring).

The prosecution may try a refusal separately from the underlying OWI prosecution, and the prosecutionôs burden of proof at a refusal hearing is ñsubstantially less than at a suppression hearing.ò *See In re Refusal of Anagnos*, 2012 WI 64, 341 Wis. 2d 576, 603-06, 815 N.W.2d 675 (Ziegler, J., concurring) citing *State v. Wille*, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994). The refusal prosecution must merely present evidence sufficient to demonstrate the plausibility of the officerôs account. *See In re Refusal of Anagnos*, 2012 WI 64, 341 Wis. 2d 576, 603-06, 815 N.W.2d 675 (Ziegler, J., concurring).

Refusal penalties are generally more severe than OWI first penalties. A refusal generally carries a one year driverôs license revocation, a thirty-day waiting period for an occupational license, and an order to install an ignition interlock device. *See* Wis. Stat. § 343.305(10). An OWI first offense generally carries a six to nine month driverôs license revocation, no waiting period for an occupational license, and an order to install an ignition interlock device only if the blood alcohol level exceeds 0.15. *See* Wis. Stat. § 346.65.

SUMMARY OF ARGUMENT

Untimely refusal hearing requests deprive courts of competency[2] to hold refusal hearings. The Villageôs position is best summarized by this Courtôs opinion in *Heritage Farms, Inc. v. Markel Ins. Co.*, which stated ñthe legislature says in a statute what it

[2] Wisconsin courts, statutes, and commentators have used the terms ñsubject matter jurisdictionò and ñcompetencyò to describe circuit courtsô power to hear cases. This Court has made it clear that ñthe critical focus is not, however, on the terminology used to describe the courtôs power to proceed in a particular case. The focus is on the effect of non-compliance with a statutory requirement on the circuit courtôs power to proceed.ò *Miller Brewing Company v. Labor and Industry Review Commission*, 173 Wis. 2d 700, 495 N.W.2d 660 (1993), citing *In the Interest of B.J.N. and H.M.N.,* 162 Wis. 2d 635, 656-57, 469 N.W.2d 845 (1991). The Village uses the term ñcompetencyò in this brief to describe the circuit courtôs power to proceed with a refusal hearing when a defendant misses the ten day deadline.

means and means in a statute what it says.ò *Heritage Farms, Inc. v. Markel Ins. Co.,* 2012 WI 26, ¶ 26, 339 Wis. 2d 125, 810 N.W.2d 465. This case involves the interpretation of a clear and unambiguous statutory provision.

Refusal hearings are a proceeding created by statute. Courts lack inherent authority to regulate motor vehicle operating privileges.[3] Wis. Stat. § 343.305 conditions the right to a refusal hearing on the appropriate court receiving a hearing request within ten days. Wis. Stat. § 343.305 unambiguously requires courts to impose revocation and other penalties for untimely refusal hearing requests.

The Court should apply *State v. Nordness*, 128 Wis. 2d 15, 381 N.W. 2d 300 (1986), and *In re Refusal of Anagnos,* 2012 WI 64, ¶ 33, 341 Wis. 2d 576, 591, 815 N.W.2d 675, in determining the statute does not authorize refusal hearings to consider the issue of whether to extend the ten day deadline. Wis. Stat. 343.305(9)(a)5 expressly limits authorized refusal hearing issues. In both *Nordness*

[3] *State v. Darling*, 143 Wis. 2d 839, 844, 422 N.W.2d 886 (Ct. App. 1988).

and *Anagnos*, this Court stated that refusal hearing issues are ñstrictly limitedò to the issues found in Wis. Stat. 343.305(9)(a)5.

Brefkaôs interpretation requires the Court to expand the ten day deadline found in Wis. Stat. § 343.305 and also requires the Court to overrule twenty-six years of Supreme Court precedent.[4]

State v. Schoepp, 204 Wis.2d 266, 554 N.W.2d 236 (Ct. App. 1996) is not as broad as Brefka asserts. *Schoepp's* holding, that the civil rules of discovery apply to refusal hearings, does not preclude statutory time limits to request refusal hearings. *Schoepp* is consistent with both *Fricano* and the Court of Appeals decision in the present case.

Because Brefka failed to timely submit a refusal hearing request, the Court of Appealsô decision should be affirmed. The Court of Appealsô decision is consistent with the statuteôs clear language, consistent with long standing Supreme Court precedent, and consistent with the purpose of Wisconsinôs implied consent law.

---

[4] *State v. Nordness*, 128 Wis. 2d 15, 381 N.W. 2d 300 (1986), and *In re Refusal of Anagnos,* 2012 WI 64, ¶ 33, 341 Wis. 2d 576, 591, 815 N.W.2d 675.

STANDARD OF REVIEW

Construction of a statute is a question of law. *Karow v. Milwaukee County Civil Service Commission*, 82 Wis. 2d 565, 263 N.W.2d 214 (1978). ñJudicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute.ò *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 662, 681 N.W.2d 110 (2004). ñThe purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.ò *Id.* If the meaning of a statute is plain, the Courtôs inquiry ends. *Id.* Statutory language is understood in relation to surrounding or closely related statutes. *Id.*

ARGUMENT

I. Brefka's failure to timely request a refusal hearing deprived the circuit court of competency to hold a refusal hearing because the ten day statutory deadline is mandatory.

Brefkaôs failure to timely request a refusal hearing deprived the circuit court of competency to hold a refusal hearing. Failure to act within statutorily mandated time limits results in the courtôs loss

of competence to hear the specific case before it. *Village of Butler v. Fricano*, 2010 WI App 84, 326 Wis. 2d 267, 787 N.W.2d 60,[5] citing *Green County DHS v. H.N.,* 162 Wis.2d 635, 656, 469 N.W.2d 845 (1991); *see also Miller Brewing Co. v. LIRC,* 173 Wis.2d 700, 706, 495 N.W.2d 660 (1993); *see also State v. Darling*, 143 Wis. 2d 839, 844, 422 N.W.2d 886 (Ct. App. 1988) (ñ[T]he regulation of motor vehicle operating privileges is a function of the legislature and not the courts. Because this area is controlled exclusively by the legislature, and not a court function, the court is confined to those powers vested by the statute.ò). This case involves the interpretation of a clear and unambiguous statutory provision. The language in Wis. Stat. § 343.305 regarding time limits to request a refusal hearing is clear and unambiguous.

Wis. Stat. § 343.305(9)(a)4 conditions the right to a refusal hearing on the appropriate court receiving a request within ten days. If the court does not receive a request for a refusal hearing within the

[5] Cited for persuasive authority only.

ten-day time limit, revocation commences thirty days after the date of the notice of intent to revoke:

> (The notice of intent to revoke the personôs operating privilege shall contain substantially all of the following information:) That the person may request a hearing on the revocation within 10 days by mailing or delivering a written request to the court whose address is specified in the notice. *If no request for a hearing is received within the 10-day period, the revocation period commences 30 days after the notice is issued.*

(Emphasis added). Additionally, Wis. Stat. § 343.305(10)(a) states the court ñshallò proceed with revocation and other penalties if the court does not receive a refusal hearing request within ten days:

> 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.*

(Emphasis added). ñShallò is presumed mandatory when it appears in a statute.ò *Karow,* at 570. ñShallò may be construed as directory, however, if necessary to carry out the legislatureôs clear intent. *Id.* at 571. Statutory time limits that provide a penalty for noncompliance lend support for construing time limit as mandatory. *See Karow*, at 571-72.

Because the ten day time limit is mandatory, Brefkaôs failure to timely request a hearing results in the circuit court losing

competence to hold a refusal hearing. Wis. Stat. § 343.305(9)(a)4 uses mandatory language in describing the consequences of failing to meet the statutory time limit. As noted above, § 343.305(10)(a) states the court ñshallò proceed with revocation and other penalties if the court does not receive a refusal hearing request within ten days. The statutory time limit is thus presumed mandatory. Furthermore, the statute provides a penalty for noncompliance with the time limit: revocation and other consequences. The penalty for noncompliance further demonstrates that the legislature intended the ten day time limit to be mandatory.

The clear language of Wis. Stat. § 343.305(9) and (10) demonstrates the ten day deadline to request a refusal hearing is mandatory. The above referenced statutory provisions are not the only provisions found in Wis. Stat. § 343.305 that demonstrate refusal hearings cannot consider motions to extend the ten day time limit.

II. Wis. Stat. § 343.305(9) does not authorize refusal hearings to consider motions to extend the ten day time limit.

Whether to extend the statutory ten day time limit is not a statutorily authorized refusal hearing issue. Contrary to Brefkaôs

assertion, Wis. Stat. § 343.305(9) is not silent on whether a refusal hearing may consider a motion to extend the ten day time limit. Wis. Stat. § 343.305(9)(a)5 expressly limits refusal hearing issues to: (1) Did the police officer have probable cause and did the officer lawfully arrest the defendant?; (2) Did the police officer properly read the ñinforming the Accusedò form to the defendant?; and (3) Did the defendant refuse the test, and, (4) if so, did the defendant have an affirmative defense?

This Court held ñthat the issues to be raised at a refusal hearing are *strictly limited* to the issues enumerated in the refusal hearing statute.ò *In re Refusal of Anagnos,* 2012 WI 64, ¶ 33, 341 Wis. 2d 576, 591, 815 N.W.2d 675, 682 (emphasis added); citing *State v. Nordness*, 128 Wis. 2d at 19, 381 N.W. 2d 300 (1986). The holdings of *Nordness* and *Anagnos* are consistent with the general rule of statutory construction, expressio unius est exclusio alterius, the express mention of one matter excludes other similar matters not mentioned. *See State v. Smith*, 103 Wis. 2d 361, 366, 309 N.W.2d 7, 9 (Ct. App. 1981). Because the statute expressly limits refusal

hearing issues, other issues not mentioned are excluded from consideration.

A. The Court should not overrule *Nordness* or *Anagnos.*

The Court should apply *Nordness* and *Anagnos* in determining that Wis. Stat. § 343.305 does not authorize refusal hearings to consider motions to extend the ten day time limit. In *Nordness*, the defendant argued that, in addition to the issues delineated in Wis. Stat. § 343.305, refusal hearings may also examine a threshold question of whether the defendant actually operated a motor vehicle. *Nordness,* at 18-28. The defendant argued that § 343.305ôs language stating ñany person who drives or operates a motor vehicleé shall be deemed to have given consent to one or more testsé ò demonstrated a legislative intent to create an ñactual driverò finding prior to inquiring into the statutorily limited issues of a refusal hearing. *Id.*

The *Nordness* Court found the § 343.305 language limiting refusal hearing issues clear and unambiguous, and determined that refusal hearing issues are *strictly limited* to the issues now found in

Wis. Stat. § 343.305(9)(a)5.[6] *Id.* (emphasis added). The *Anagnos* Court expressly agreed with the conclusion of *Nordness*, stating ñthat the issues that can be raised at a refusal hearing are *strictly limited* to the issues enumerated in the refusal hearing statute.ò *Anagnos* at ¶¶ 25, 33.

Like the defendant in *Nordness*, Brefka wants the court to broaden the scope of refusal hearings beyond the issues ñstrictly limitedò by statute. Brefka cites no support in the implied consent statute for the proposition that the circuit court may consider a motion to extend the ten day deadline. Instead, Brefka argues that the circuit court had inherent authority to broaden the statutorily limited scope of refusal hearings. Brefkaôs argument is weaker than the argument made by the *Nordness* defendant, because the *Nordness* defendant cited language found in the implied consent statute in support of his argument. Brefkaôs argument also ignores the ruling in *State v. Darling*, 143 Wis. 2d 839, 844, 422 N.W.2d

---

[6] At the time that the *Nordness* case was decided, Wis. Stat. § 343.305(3)(b)5 contained the relevant statutory language. The statute was subsequently amended and renumbered, but the *Anagnos* Court concluded that ñthe statute is substantially the same as it was when *Nordness* was decided.ò (*See Anagnos* at footnote 9).

886 (Ct. App. 1988), which concluded that trial courtsô power to regulate motor vehicle operating privileges is not inherent, but instead is confined to those powers vested by the legislature.

Additionally, unlike *Anagnos*, there is no conceptual nexus between Brefkaôs proposed refusal hearing issue and any of the refusal hearing issues authorized by Wis. Stat. § 343.305(9). In *Anagnos*, this Court concluded that a trial court may entertain argument at a refusal hearing that an arrest was unlawful because the traffic stop that preceded it was not justified by probable cause or reasonable suspicion. Although Wis. Stat. § 343.305(9) does not expressly mention ñreasonable suspicionò there is a conceptual nexus between ñlawful arrest,ò which is expressly mentioned in the statute, and reasonable suspicion. Consequently, allowing a refusal hearing to consider the issue of reasonable suspicion is merely allowing a refusal hearing to consider whether the defendant was ñlawfully arrested.ò Motions to extend the ten day statutory time limit, on the other hand, bear no relationship to any authorized refusal hearing issue.

Because Wis. Stat. § 343.305 strictly limits refusal hearing issues, circuit courts thus lack discretion to expand the scope of refusal hearings. Because no conceptual nexus exists between extending the ten day statutory time limit and the statutorily authorized refusal hearing issues, the Court of Appeals correctly affirmed the circuit courtôs determination that it lacked competency to proceed.

III. *Schoepp* is consistent with both *Fricano* and the Court of Appeals decision in this case.

Schoepp is not as broad as Brefka asserts. In applying Wis. Stat. § 801.01(2), *Schoepp* held that the civil rules of discovery applied to refusal cases because a different procedure was not prescribed by statute. *Schoepp* at 266-73. The present case is distinguishable from *Schoepp* because mandatory time limits are prescribed by a specific statute: Wis. Stat. § 343.305. Brefkaôs apparent position ï that *Schoepp*ôs holding precludes mandatory statutory time limits in refusal hearings ï is both illogical and inconsistent with Wisconsin law. *Schoepp* is consistent with both *Fricano* and the Court of Appeals decision in the present case.

The Wisconsin Court of Appeals previously considered the arguments now raised by Brefka in *Village of Butler v. Fricano*, 2010 WI App 84, 326 Wis. 2d 267, 787 N.W.2d 60, and concluded that the ten day deadline is mandatory.[7] Because the defendant missed the ten day deadline, *Fricano* concluded, the court lacked competency to hold a refusal hearing. *Id.*

Fricano and the present case share identical material facts. On September 3, 2008, the Village of Butler Police Department stopped and cited Bryan Fricano for OWI. *Id.* at ¶ 2. Fricano refused to submit to an evidentiary chemical blood test as required by Wisconsinôs implied consent law, Wis. Stat. § 343.305(2), and he was issued a notice of intent to revoke his operating privilege. *Id.* The notice informed Fricano that he had the right to request a hearing on the revocation within ten days. *Id.* Fricano engaged legal representation on September 9, 2008, but his attorney failed to request a refusal hearing. *Id.* at ¶ 4. Approximately one month later,

[7] *Fricano* is an unpublished case cited for persuasive authority only.

Fricano received a notice from the Wisconsin Department of Motor Vehicles informing him that his license was revoked. *Id.* at ¶ 3.

Fricano sought to reopen the refusal matter in the Village of Butler Municipal Court on the grounds that his attorney failed to request a refusal hearing within the ten day deadline. *Id.* at ¶ 3. The municipal court denied Fricanoôs Motion to Reopen, and Fricano appealed from the municipal court order to Circuit Court. *Id.* at ¶ 4.

At the circuit court hearing, Fricano testified that he provided his first attorney with a copy of the informing the accused form which indicated Fricano refused the blood test, and the notice of intent to revoke his operating privileges. *Id.* at ¶¶ 4-5. Fricano further testified that he informed his attorney that he refused to take the blood test. *Id.* at ¶ 5. The circuit court dismissed Fricanoôs appeal on the grounds that Fricanoôs failure to act within the prescribed time period deprived the court of subject matter jurisdiction. *Id.* at ¶ 6. Fricano appealed the circuit courtôs decision to the court of appeals. *Id.* at ¶ 6.

The court of appeals affirmed the circuit courtôs dismissal on the grounds that Fricanoôs failure to meet the statutory deadline

resulted in the circuit court losing competency to proceed. *Id.* at ¶¶ 9-10. Furthermore, the court of appeals, quoting the Wisconsin Supreme Court, stated that ñwe have consistently ruled that a courtôs loss of power due to the failure to act within statutory time periods cannot be stipulated to nor waived.ò *Id.* at ¶ 9.

A. The Court should apply *Fricano* as persuasive authority and conclude that the circuit court lacked competence to hold a refusal hearing.

The Court should apply *Fricano* as persuasive authority and conclude that the circuit court lacked competence to hold a refusal hearing once Brefka missed the mandatory statutory time limit. The facts in *Fricano* are on point with the facts of the present case. Like *Fricano*, all parties concede that Brefka missed the statutory deadline. Similar to *Fricano*, Brefkaôs failure to submit a request for a refusal hearing may have been due to the actions of the defendantôs first attorney. Both parties in *Fricano* cited *Schoepp,* and thus the *Fricano* court considered *Schoepp's* ruling in reaching its decision.

Moreover, Brefkaôs application of *Schoepp* is illogical. *Schoepp* concluded that the Wisconsin Rules of Civil Procedure apply to special proceedings when the statute does not prescribe a

different procedure, and refusal hearings are special proceedings. *Schoepp* at 270. From those premises Brefka concludes that refusal hearings cannot be subject to mandatory statutory time limits. Brefkaôs conclusion does not logically follow from his premises, and ignores the different procedure prescribed by Wis. Stat. § 343.305. Taken to its logical conclusion, Brefka argues that under Wis. Stat. §§ 800.115 or 806.07 no special proceeding can ever be subject to a mandatory statutory time limit. Such a conclusion defies existing case law which permits mandatory statutory time limits in a variety of special proceedings. *See Lueptow v. Schraeder*, 226 Wis. 437, 277 N.W. 124 (1938) (A juvenile delinquency proceeding was neither a criminal nor a civil action but was a special proceeding); *See also In Interest of C.A.K.*, 154 Wis. 2d 612, 453 N.W.2d 897 (1990) (Twenty-day time limit for filing delinquency petition is mandatory); *See also In Interest of R.H.*, 147 Wis. 2d 22, 433 N.W.2d 16 (Ct. App. 1988) (Thirty-day limit for holding dispositional hearing on delinquency petition is mandatory); *See also In re Termination of Parental Rights to Joshua S.,* 2005 WI 84, 282 Wis. 2d 150, 698 N.W.2d 631; *See also Fricano* at ¶ 10.

The Court of Appeals decision in the present case should be affirmed because it is consistent with *Schoepp's* ruling, consistent with the clear language of the statute, consistent with the Courtôs rulings in *Nordness* and *Anagnos,* and consistent with the Court of Appealsô ruling in *Fricano.*

IV. The *Karow* factors demonstrate the ten day deadline is mandatory.

The legislature did not ñclearly intendò to allow defendants to exceed ten day time limit to request refusal hearing. The word ñshallò may be construed as directory if necessary to carry out the legislatureôs clear intent. *Karow* at 571. The clear language of Wis. Stat. § 343.305, however, demonstrates that the ten day deadline is mandatory.

Courts may consider the following factors in determining whether a statutory time limit, like the time limit found in Wis. Stat. § 343.305, is mandatory or directory: whether the legislature stated the consequence of noncompliance; consequences resulting from one construction or another; the nature of the statute; the evil to be remedied, and the general object sought to be accomplished. *Karow*

at 572-73. All of these factors demonstrate the ten day deadline found in Wis. Stat. § 343.305 is mandatory.

First, Wis. Stat. § 343.305 states a consequence for noncompliance with the ten day deadline: the Court proceeds with revocation and other penalties. Because the statute expressly includes the consequence for failing to meet the ten day deadline, the deadline is mandatory.

Second, permitting courts to extend the ten day deadline would lead to chaos. Statutory time limits ensure prompt litigation. *Armes v Kenosha County*, 81 Wis. 2d 309, 260 N.W.2d 515 (1977). Under Brefkaôs preferred interpretation, defendants would routinely move to extend the ten day deadline or move to reopen refusals after their licenses were revoked, after ignition interlock devices were installed, and after fees associated with the revocation were paid. Defendants charged with additional OWI offenses less than six months after missing the ten day deadline would routinely attempt to reopen and challenge the refusal. The legislature created a mandatory time limit to reduce refusal litigation and lower the burden on local communities and the court system. Permitting

courts to extend the ten day deadline would increase OWI litigation and increase the costs of drunk driving enforcement.

Third, the implied consent lawôs purpose is to facilitate the taking of tests for intoxication and to enable the state to expeditiously remove dangerous drivers from the highway. *See Scales v. State*, 64 Wis. 2d 485, 219 N.W.2d 286 (1974); *See also Neitzel*, 95 Wis. 2d at 193 (ñ[T]he clear policy of the [implied consent] statute is to facilitate the identification of drunken drivers and their removal from the highways,ò); *See also State v. Brooks*, 113 Wis. 2d 347, 355, 335 N.W.2d 354 (1983) (noting purpose of refusal law is ñto penalize drunk drivers by finding them guiltyò); *See also Nordness*, at 34 (Through the implied consent law the state endeavors to quash the effects of drunk driving); *see also State v. Carlson*, 2002 WI App 44, 250 Wis. 2d 562, 580, 641 N.W.2d 451 (ñ[T]he general purpose behind laws relating to operating while under the influence of intoxicants is to get drunk drivers off the road as expeditiously as possible and with as little possible disruption of the courtôs calendar.ò). Brefkaôs interpretation would only hinder

dangerous driversô prompt removal from Wisconsin highways and increase the amount of refusal litigation.

Fourth, the evil to be remedied is drunk driving, which is a ñdeplorable, antisocial, dangerous behavior which the legislature can ï and should ï penalize severely.ò *State v. Caibaiosai,* 122 Wis. 2d 587, 601, 363 N.W.2d 574 (1985) (Abrahamson, J., dissenting). Drunk driving resulted in 238 deaths and nearly 4,000 injuries in Wisconsin in the year 2009.[8] Almost half of all fatal traffic crashes in Wisconsin in 2009 were alcohol related. *Id.*

A. Court should defer to the policy choices of the state legislature.

Creating a ten day mandatory deadline to request a refusal hearing, and strictly limiting the number of permissible refusal hearing issues were policy decisions. Reasonable arguments exist that the legislature should amend Wis. Stat. § 343.305(9) to allow additional time to request a refusal hearing, or to authorize additional

---

[8] Wisconsin Department of Transportation, *Drunken Driving*, http://www.dot.wisconsin.gov/safety/motorist/drunkdriving/index.htm (last visited December 26, 2012).

refusal hearing issues. Nevertheless, the Court should defer to the policy choices of the state legislature.

Crafting comprehensive drunk driving legislation that serves the many policy goals of the legislature is difficult. Wisconsinôs drunk driving laws have been described as ñlenient,ò and compared to an indulgent parent unwilling to discipline a spoiled child. *See* David Kesmodel, *Wisconsin Sours on Lenient Drunken-Driving Laws,* Wall St. J. (June 18, 2009); *Welsh v. Wisconsin,* 466 U.S. 740, 755-56, 104 S. Ct. 2091, 2100-01 (1984) (Blackmun, J., concurring).

One area of Wisconsinôs drunk driving legislative scheme, however, is not lenient: Wisconsinôs implied consent law. The legislature consistently passes strict implied consent laws and Wisconsin courts consistently construe Wisconsinôs implied consent laws liberally to effectuate the legislative purpose of the law. *See State v. Reitter*, 227 Wis. 2d 213, 224-25, 595 N.W.2d 646 (1999) (Wisconsin legislature enacted implied consent statute to combat drunk driving, not to enhance the rights of alleged drunk drivers, and given legislatureôs intent, courts should construe the implied consent law liberally); *See also State v. Bohling*, 173 Wis. 2d 529, 494

N.W.2d 399 (1993) (permitting warrantless blood draw); *see also* Andrew Mishlove & Lauren Stuckert, *Wisconsin's New OWI Law*, 83 JUNE Wis. Law 6 (2010) (Wisconsinôs new OWI law extends the application of IID orders to first offenders who refuse to submit to an evidentiary breath or blood test.).[9] Wis. Stat. § 343.305ôs mandatory ten day time limit reflects the legislatureôs attempt to balance Wisconsinôs lenient treatment of OWI first offenses.

In sum, the legislature did not ñclearly intendò to allow refusal hearings to consider the issue of whether to extend the ten day statutory time limit. To the contrary, the clear language of the statute demonstrates that the legislature intended to preclude the consideration of time limit extensions.

CONCLUSION

This Court should affirm the decision of the Court of Appeals, which is consistent with the clear language of the statute,

[9] Recent changes to Wisconsinôs OWI law require individuals convicted of an OWI first offense with a blood alcohol level above .15 or OWI first refusals to install ignition interlock devices in their vehicles. Consequently, communities should be cautious in dismissing refusal charges with a plea to the underlying OWI because ñsavvy persons who believe they are driving with a BAC of 0.15 or higher will be more inclined to refuse the test.ò *See* Andrew Mishlove & Lauren Stuckert, *Wisconsin's New OWI Law*, JUNE Wis. Law 6 (2010).

consistent with over twenty-six years of Supreme Court precedent, and consistent with the purpose of Wisconsinôs implied consent law. Brefka argues that the legislature did not act with sufficient clarity to demonstrate its intent to preclude consideration of motions to extend the statutory time limit at refusal hearings. It is unclear how the legislature could more plainly articulate its intent to make the ten day time limit mandatory and strictly limit refusal hearing issues.

Dated this 2nd day of January, 2013.

de la Mora & de la Mora
Attorneys for the Village of Elm Grove,

BY: /s/Douglas J. Hoffer
Douglas J. Hoffer
State Bar No. 1079432

Prepared By:
Douglas Hoffer
de la Mora & de la Mora
15255 Watertown Plank Road
Elm Grove, WI 53122
Phone: (262) 784-5410
Fax: (262) 784-0975
dh@delamoralaw.com
N:\Word-Central\Village of Elm Grove\Circuit Court\Brefka\Appeal\Supreme Court\01 02 13 Brefka Brief.doc

CERTIFICATION OF FORM AND LENGTH

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 20 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 5,370 words.

Dated this 2nd day of January, 2013.

BY: /s/Douglas Hoffer
Douglas Hoffer
State Bar No. 1079432

de la Mora & de la Mora
15255 Watertown Plank Road
Elm Grove, WI 53122
Phone: (262) 784-5410
Fax: (262) 784-0975
dh@delamoralaw.com

CERTIFICATION 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 s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of January 3, 2013.

A copy of this certificate is being filed with the court and served on all opposing parties as of this date.

Dated this 2nd day of January, 2013.

BY: /s/Douglas Hoffer
Douglas Hoffer
State Bar No. 1079432

de la Mora & de la Mora
15255 Watertown Plank Road
Elm Grove, WI 53122
Phone: (262) 784-5410
Fax: (262) 784-0975
dh@delamoralaw.com

PLAINTIFF-RESPONDENT APPENDIX TABLE OF CONTENTS