

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent

-v-

KEITH H. SHOEDER,

Defendant-Appellant.

APPEAL NO. 2018AP000997 CR

**APPEAL AND SUPPORTING ARGUMENT OF
DEFENDANT-APPELLANT
KEITH H. SHOEDER**

DIRECT APPEAL FROM JUDGMENT OF THE
CIRCUIT COURT FOR ONEIDA COUNTY
CASE NO. 2017-CF-118
HONORABLE MICHAEL H. BLOOM, PRESIDING

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STATEMENT OF ISSUE

Whether a riding lawn mower is a “motor vehicle” as used in Wis. Stat. § 346.63(1)(a) or an “all-terrain vehicle” as defined in Wis. Stat § 23.33(4)(c). The Trial Court found the riding lawn mower subject to Wis. Stat. §346.63(1)(a).

STATEMENT ON ORAL ARGUMENT

PURSUANT TO WIS. STATS. § 809.22(1), § 809.19(c)

The appellant is not requesting oral argument.

STATEMENT ON PUBLICATION

PURSUANT TO WIS. STATS. § 809.23(1), § 809.19(c)

The appellant is requesting the decision be published due to fact this case will establish precedent in the State of Wisconsin.

STATEMENT OF THE CASE

On or about May 9, 2017, law enforcement stopped Keith H. Shoeder while he was driving a Husqvarna riding lawn mower on the eastbound lane of County Highway W in the City of Rhinelander, County of Oneida, State of Wisconsin. Mr. Shoeder was cited for Operating a Motor Vehicle Under the Influence of an Intoxicant – 4th Offense pursuant to Wis. Stat. § 346.63(1)(a), which is a felony offense. On June 15, 2017 Shoeder filed a Motion to Dismiss with Supporting Affidavit in Branch II of Oneida County Circuit Court before the Honorable Michael H. Bloom, asserting the Court lacked jurisdiction over Shoeder in that Shoeder was charged for a violation of Wis. Stat. § 346.63(1)(a) alleging Shoeder

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operated a “motor vehicle” under the influence of an intoxicant. The Motion asserts that Shoeder was charged incorrectly and should have alternatively been charged under Wis. Stat § 23.33(4)(c). After submission of Briefs, a motion hearing was held on August 24, 2017 in which the Court denied Shoeder’s Motion to Dismiss.

ARGUMENT

Currently in the State of Wisconsin, there is no case law guiding the parties or the Court on the definition and classification of a riding lawn mower as a motor vehicle or an all-terrain vehicle subject to Wis. Stat. § 23.33(4)(c). Obviously, the Court’s interpretation relative to the identification and definition of a riding lawn mower as either a motor vehicle or an all-terrain vehicle is critical to the treatment of Shoeder as it relates to the current charges he is facing for operating under the influence of an intoxicant – 4th offense.

As has been stated by Shoeder in the previous submission to the Trial Court, Wis. Stat. § 23.33(1)(b) defines an all-terrain vehicle as a commercially designed and manufactured motor driven device that has the following characteristics:

- a. Weight of 900 lbs. or less
- b. A width of 50 inches or less
- c. Seat designed to be straddled by the operator
- d. Travels on three or more low-pressure tires or non-pneumatic tires

Wis. Stat. § 23.33(1)(b) adopting Wis. Stat. § 340.01(2g)

As argued previously by the defense, the category the riding lawn mower falls into is critical in whether or not Mr. Shoeder is treated under Wis. Stat. §

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346.63 dealing with operating a motor vehicle under the influence of an intoxicant as a criminal offense or under Wis. Stat. § 23.33(4)(c) as a forfeiture. Wis. Stat. § 346.02(11) specifically excludes “all-terrain vehicles” and “utility terrain vehicles” from the penalty provisions of Wis. Stat. § 346.63. Clearly, it was the legislative intent to exclude these motor vehicles from the afore-referenced statute even though both would qualify by definition of a motor vehicle as stated in the case of *State v. Smits*, 2001 WI App 45, 241 Wis.2d 374. However, the fact that a riding lawn mower fits that definition is not and cannot be the end of the discussion simply because an all-terrain vehicle or utility terrain vehicle also clearly fit the definition of a motor vehicle, yet are excluded by statute from the provisions of Wis. Stat. § 346.63(1)(a). In the submissions presented by the State previously, there is no explanation offered why that would have occurred or the legislature’s intent relative to that exclusion. However, a close reading of the legislative notes from the 1985-1986 legislature (Attached and marked as *Exhibit “g”*), the legislature at the time of the creation of the act did not intend that all-terrain vehicles or utility terrain vehicles would ever be operated on the roadway. In fact, it appears the legislative intent was to have those vehicles controlled through the Department of Natural Resources and not the Department of Transportation.

The State went on to indicate that the registration requirement for an ATV further indicates that they are motor vehicles and therefore different than the Husqvarna riding lawn mower. However, that argument does not answer the question since the registration requirement for all-terrain vehicles/utility terrain vehicles only has been in existence since 1986 and 2012, respectively. The reason that it is important is because when the legislation was created relative to the operation of all-terrain vehicles and utility terrain vehicles being governed by the Department of Natural Resources, there was no requirement for registration and

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therefore they were considered purely off road vehicles. Although they still met the current definition of a motor vehicle, the intended purpose at the time of the creation of the legislation governing their use was never intended to go on the roadways so there had to be an enforcement mechanism; the Department of Natural Resources. As I am sure the Court is well aware, all-terrain vehicle and utility terrain vehicle operation on the roadway now is common and that is one of the main reasons that the registration requirement currently exists. It is a revenue source for the State of Wisconsin. It is not the actual operation or configuration of the vehicle itself. The purpose of the vehicle should define its classification. A lawn mower's purpose does not include use on a roadway.

In Shoeder's brief to the Trial Court, the argument was made that the "straddle seat" requirement found in Wis. Stat. § 340.01(2g) defining an all-terrain vehicle was no longer commonsensical, simply due to the progression of ATV designs that have occurred since the statutes creation. To classify one of the new step through models as anything other than an all-terrain vehicle, would produce an absurd result. *State v. Zigler*, 342 Wis.2d 256, 816 N.W. 238 (2012) (Shoeder's Brief in Support of Motion to Dismiss). Attached see *Exhibits "E" and "F"* which depict current models of all-terrain vehicles designed and produced by the Bombardier Corporation and the John Deere Corporation that both have step through seating which no longer requires straddling. These vehicles are sold and labeled as all-terrain vehicles. If these models came before the Court in a matter that required their definition, common sense would indicate the Court would find them to be defined as all-terrain vehicles, even though the step through seating eliminated a single factor from the defining statute. As you can see from the previously stated exhibits and *Exhibit "B"* attached hereto which depicts the Husqvarna riding lawn mower, they are very similar in nature. Granted, the seat can now be sat in with a straight front edge verses straddling, but the operator

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must straddle the engine, steering wheel, and operate the foot pegs on each side of the straddled motor compartment in order to operate the lawn mower. Is that operation and seating position different than that envisioned by the legislature when creating this statutory section more than thirty years ago? I submit to you that it is not. Quite frankly, it is difficult to foresee any set of circumstances in which a legislature would have envisioned a riding lawn mower, designed to be operated for the single purpose of cutting grass to be considered a motor vehicle for the transportation of individuals on a public roadway. Wis. Stat. § 346.63(1)(a) was created to govern the operation of a motor vehicle by a person under the influence of an intoxicant on a public roadway. Wis. Stat. § 23.33(4)(c) uses the same definition but does not have the public roadway element as it applies to the off road vehicles. Common sense would seem to dictate that since a lawn mower's singular design is to cut grass, off road, the only logical statute to apply to its intoxicated use must be Wis. Stat. § 23.33(4)(c).

As mentioned previously, there is very little guidance, either statutorily or through case law as to what a riding lawn mower is actually classified as. The premise forwarded by Shoeder is similar to a discussion held in an unpublished decision entitled *State of Wisconsin v. Hill*, No.2013AP2549-CR, WL 1797661, 2014 WI App 71. *See Exhibit "D"*. In the Hill case, Mr. Hill was cited for operating a "utility-terrain vehicle" (UTV) under the influence of an intoxicant and was cited under Wis. Stat. § 346.63(1)(a). Mr. Hill moved to dismiss the charge stating that because he was operating a UTV he could not be violating Wis. Stat. § 346.63(1)(a) because that statute is excluded from applicability to "all-terrain vehicles" and "utility-terrain vehicles" pursuant to Wis. Stat. § 346.02(11). The Circuit Court denied Mr. Hill's motion. He subsequently appealed and the Judgment from the Circuit Court was reversed. The question in that case was essentially the same question before the Court, with that question being whether

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Mr. Hill violated Wis. Stat. § 346.63(1)(a) or Wis. Stat. § 23.33(4)(c) by operating the “utility-terrain vehicle” under the influence of an intoxicant on a public roadway. Although Shoeder is arguing that the riding lawn mower is more akin to an all-terrain vehicle or a utility terrain vehicle than a motor vehicle, the thought processes is similar. The purpose when interpreting a statute is to give effect to the Legislature’s intent. Ascertaining the meaning of the statute requires more than focusing on a single sentence or portion thereof. See *State v. Zigler*, 342 Wis.2d 256, 816 N.W. 238 (2012). Statutory language must be interpreted as part of a whole as to avoid absurd results or contravention of the statutes purpose. [Id.] The riding lawn mower utilized by Mr. Shoeder fit the definition of an all-terrain vehicle with the exception that it did not have a seat that had to be straddled. In the case of Hill, the State argued that the vehicle operated by Mr. Hill could not be considered a utility-terrain vehicle because the steering mechanism must be shaped like a wheel and Mr. Hill’s did not. The Court responded by indicating they did not give credence to absurd arguments thereby dismissing the one (1) singular fact as to the design of the utility-terrain vehicle as being definitive of its definition of a motor vehicle verses a utility-terrain vehicle. In the case before the Court, Shoeder submits to the Court that the fact that although the lawn mower that was operated by Shoeder may not have a seat that is straddled, in all other respects the lawn mower fits the definition of an all-terrain vehicle.

The reasons the definitions are important in this case are two-fold. First, Wis. Stat. § 346.02(11) specifically excludes “all-terrain vehicles” and “utility-terrain vehicles” from the penalty provisions of Wis. Stat. § 346.63. Clearly, it was the Legislatures intent to exclude an “all-terrain vehicle” and/or “utility-terrain vehicle” from the afore-reference statute even though both would qualify by definition of a “motor vehicle”, as stated in the case of *State v. Smits*, 2001 WI App 45, 241 Wis. 2d 374. Secondly, since a riding lawn mower is not defined

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anywhere in the Wisconsin Statutes, perhaps the time has come for it to be. Shoeder makes this statement based on several factors as well. First and foremost, at the time of the definition of an “all-terrain vehicle”, a requirement that an “all-terrain vehicle” have a seat that must be straddled was included as one of the criteria. As you can see from the attached exhibits, the Bombardier Corporation and the John Deere Corporation have both designed and manufactured “all-terrain vehicles” with step through seating that no longer require straddling. That is important only because that is the single factor that does not define a Husqvarna riding lawn mower as an “all-terrain vehicle”. *See Exhibits “E” and “F”*. Secondly, an “all-terrain vehicle” is not a commercial vehicle, is not licensed in the State of Wisconsin and is not even titled. A riding lawn mower does not have a certificate of title, cannot be licensed or registered in the State of Wisconsin. Again, both vehicles have very similar attributes. Quite frankly, it is difficult to foresee any set of circumstances in which the Legislature would have considered a riding lawn mower to be a “motor vehicle” for transport of individuals on a roadway, thereby logically removing it from the provisions of Wis. Stat. § 346.63. Clearly, Wis. Stat. § 346.63(1)(a) was created with the intent to govern the transport of individuals on a “motor vehicle” on a roadway, only.

Similarly, because the vehicle could not be registered, licensed, titled or in any way legally operated on a public roadway, it would be an absurd result to consider the lawn mower to be a motor vehicle as the intended by the Wisconsin Legislature when creating § 346.63 of the Wisconsin Statutes. It is the proposition of Shoeder that the Legislature never considered a riding lawn mower to be a motor vehicle to be operated on a public roadway and it is likely and probable that that thought process was never even considered. A riding lawn mower is just that, an implement to be used off road for the purposes of cutting grass, not to transport persons or people on a public roadway.

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CONCLUSION

The case before the Court presents an interesting fact scenario and one that has not been decided by the Courts up to this point in time. There are clearly arguments on both sides as to whether or not a riding lawn mower is a motor vehicle and subject to the motor vehicle laws or an all-terrain vehicle and subject to the regulations and enforcement found under the Department of Natural Resources. The best and most logical argument relative to the current statutes regulating the operation and definition of the riding lawn mower is one of the passage of time. What I mean by that, your Honors, is that when viewing the progression and transformation the ATV/UTV market has gone through in the last thirty years, one would think the need for the laws to change rapidly to keep pace with the progression of the industry would occur. They have not. When the original off-road recreational committees were formed, no one envisioned these vehicles being operated on a roadway and probably never envisioned them being anything more than a passing fancy. However, today the industry is growing by leaps and bounds and is an economic boom for many rural areas. The ability of persons to operate these motor vehicles on the roadway has opened an entirely new and broad recreational base for many towns and areas throughout Northern Wisconsin. The reason that is important is because even as we sit here today and the registration laws governing the use of ATVs and UTVs have changed, those motor vehicles are still not under the guidance and enforcement provisions of the Department of Transportation. They are not licensed vehicles, they are registered. If a person is found to be operating one of those vehicles under the influence of an intoxicant they are penalized pursuant to Wis. Stat. § 23.33(4)(c). By definition and pursuant to Wis. Stat. § 346.02(11), all-terrain vehicles and utility terrain vehicles are excluded from the penalty provisions of Wis. Stat. § 346.63. That has not changed over the course of time.

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Although a riding lawn mower can be defined as a motor vehicle, there is no factor about a riding lawn mower, either in its design or use, that one would look at and think that it is anything other than an off-road vehicle and far more akin to an all-terrain vehicle than anything else. The mere fact that Shoeder operated the lawn mower on the roadway does not change what it is but instead creates a scenario in which its use can be more precisely defined. At the end of the day, your Honors, the law must be guided by common sense to avoid absurd results. *State of Wisconsin v. Hill*, No.2013AP2549-CR, WL 1797661, 2014 WI App 71. A riding lawn mower is an all-terrain vehicle.

For the reasons stated herein, the defense hereby moves the Court for an order reversing the Trial Court's denial of Shoeder's Motion to Dismiss the Criminal Complaint.

Dated this 17 day of August, 2018.

Respectfully Submitted
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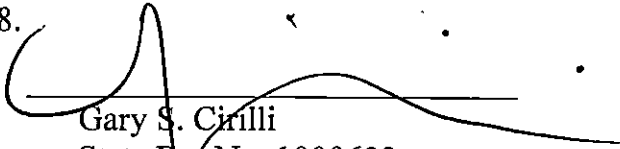
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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,118 words.

Dated this 21 day of August, 2018.



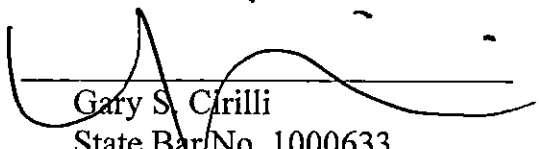
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CERTIFICATION IN COMPLIANCE WITH RULE

809.19(12) (f)

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

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