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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2020AP491

In the Matter of the Refusal of Kelly L. Springer:

WASHINGTON COUNTY,

Plaintiff-Respondent,

-vs-

KELLY L. SPRINGER,

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, BRANCH II, THE HONORABLE JAMES K. MUEHLBAUER PRESIDING, TRIAL COURT CASE NO. 20-TR-439

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . ii-iii

STATEMENT OF THE ISSUES 1

STATEMENT ON ORAL ARGUMENT 1

STATEMENT ON PUBLICATION 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

STATEMENT OF REVIEW ON APPEAL 4

ARGUMENT 4

I. DEPUTY BOISVERT FAILED TO PROVIDE MR. SPRINGER WITH AN ADEQUATE AMOUNT OF TIME TO MAKE A "PROMPT" DECISION ABOUT WHETHER TO SUBMIT TO AN IMPLIED CONSENT TEST. 4

A. Statement of the Law As It Relates to a Subject Responding to a Request for an Implied Consent Test.4

B. The Facts of the Instant Case Establish That Mr. Springer Was Not Given a Sufficient Amount of Time Within Which to Make an Election to Submit, or to Refuse to Submit, to Testing. 5

II. THE ARRESTING OFFICER IN THIS CASE SHOULD HAVE INFORMED MR. SPRINGER THAT THE PRELIMINARY BREATH TEST TO WHICH HE EARLIER SUBMITTED DID NOT COUNT AS AN IMPLIED CONSENT TEST. 7

CONCLUSION 11

TABLE OF AUTHORITIES

Wisconsin Statutes

Wisconsin Statute § 341.315(2) 6

Wisconsin Statute § 343.303 7

Wisconsin Statute § 343.305(2) 4

Wisconsin Statute § 343.305(3)(a) 4

Wisconsin Statute § 343.305(4) 5

Wisconsin Statute § 343.305(5)(d) 7

Wisconsin Statute § 343.305(9)(a) 2

Wisconsin Statute § 346.63(1)(a) 2, 3, 7

United States Supreme Court Cases

Arnett v. Kennedy, 416 U.S. 134 (1974) 8

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 9

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 8

Giaccio v. Pennsylvania, 382 U.S. 399 (1966) 8

Lanzetta v. New Jersey, 306 U.S. 451, 444 (1939) 8

Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981) 8-9

Matthews v. Eldridge, 424 U.S. 319 (1976) 9

Morrissey v. Brewer, 408 U.S. 471 (1972) 9

United States v. Williams, 553 U.S. 285 (2007) 8

Wisconsin Supreme Court Cases

County of Jefferson v. Renz, 231 Wis. 2d 293, 603 N.W.2d 541 (1999).....7

Village of Oregon v. Bryant, 188 Wis. 2d 680, 524 N.W.2d 635 (1994).....10

Wisconsin Court of Appeals Cases

Elkhart Lake v. Borzyskowski, 123 Wis. 2d 185, 366 N.W.2d 506 (Ct. App. 1985).....5

State v. Neitzel, 95 Wis. 2d 191, 289 N.W.2d 828 (1980).....5

State v. Rydeski, 214 Wis. 2d 101, 571 N.W.2d 417 (Ct. App. 1997) 5

State v. Wilke, 152 Wis. 2d 243, 448 N.W.2d 13 (Ct. App. 1989)..4

Extrajurisdictional Authority

Beck v. Cox, 597 P.2d 1335, 1338 (Utah 1979).....5

STATEMENT OF THE ISSUES

I. WHETHER MR. SPRINGER WAS ALLOWED SUFFICIENT TIME TO MAKE A "PROMPT" DECISION TO SUBMIT TO OR REFUSE AN IMPLIED CONSENT TEST?

Trial Court Answered: YES. A sufficient "pause" existed in between the arresting deputy's asking Mr. Springer to submit to an implied consent test and Mr. Springer's failure to respond in the affirmative. R23 at 29:1-12; D-App. at 106.

II. WHETHER MR. SPRINGER HAD THE RIGHT TO HAVE HIS SUBJECTIVE CONFUSION ABOUT WHETHER HE ALREADY HAD SUBMITTED TO AN EVIDENTIARY CHEMICAL TEST CURED BY THE ARRESTING OFFICER?

Trial Court Answered: NO. The arresting officer was under no obligation to explain to Mr. Springer that he was confused about whether the preliminary breath test counted as an implied consent evidentiary chemical test. R23 at 28:12-20; D-App. at 105.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents questions regarding the interpretation of already established law. The issues presented herein are of a nature that can be addressed by the application of long-standing legal principles the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

The Defendant-Appellant will NOT REQUEST publication of this Court's decision as the law at issue herein is fully developed, and therefore, publication would do little, if anything, to enhance the relevant body of law.

STATEMENT OF THE CASE

Mr. Springer was charged in Washington County with both Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a), and Unlawfully Refusing to Submit to an Implied Consent Test, contrary to Wis. Stat. § 343.305(9)(a), arising out of an incident which occurred on January 30, 2020. R23 at 4:5-7; 12:5-9; 15:5-25.

Mr. Springer subsequently filed a request for a refusal hearing. R4. A hearing on the lawfulness of Mr. Springer's refusal was held on March 2, 2020, before the Circuit Court for Washington County, the Honorable James K. Muehlbauer presiding. R23.

Deputy Thomas Boisvert, the arresting officer in the instant matter, was the single witness called to testify on behalf of the County. R23 at pp. 3-21. At the conclusion of the evidentiary portion of the hearing, counsel for Mr. Springer made several legal arguments, including, *inter alia*: (1) the arresting officer failed to provide an adequate opportunity for Mr. Springer to render his decision on whether to submit to an implied consent test; and (2) Mr. Springer should have been informed by the arresting officer that his belief that he had already submitted to an implied consent test by providing a breath sample at roadside during preliminary breath testing was erroneous. R23 at 23:1 to 26:8.

The circuit court rejected both of Mr. Springer's arguments, and by Conviction Status Report dated March 3, 2020, ordered Mr. Springer's operating privilege revoked for a period of one (1) year. R9; D-App. at 102.

STATEMENT OF FACTS

On January 30, 2020, the above-named Appellant, Kelly Springer, was operating his motor vehicle in Washington County, when Deputy Thomas Boisvert of the Washington County Sheriff's Office observed Mr. Springer make multiple lane deviations on US 45 without signaling. R23 at 4:10-25; 5:1-22. Deputy Boisvert caught up to Mr. Springer's vehicle and initiated a traffic stop. R23 at 5:18-22.

After making contact with Mr. Springer, Deputy Boisvert ostensibly observed that he had difficulty finding his proof of insurance, and when asked whether he had consumed any intoxicants, stated that he had "several beers or a couple beers." R23 at 7:23 to 8:6. Based upon this information, Deputy Boisvert asked Mr. Springer to perform field sobriety tests, to which request Mr. Springer consented. R23 at 8:20-24. Mr. Springer allegedly failed the standardized battery of field sobriety tests. R23 at 8:25 to 11:4.

Upon completing the field sobriety tests, Deputy Boisvert administered a preliminary breath test [hereinafter "PBT"] to Mr. Springer which yielded a result above the prohibited limit. R23 at 11:5-19. After the PBT, Deputy Boisvert placed Mr. Springer under arrest for Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a). R23 at 12:18-23.

Once seated in the rear of the deputy's squad, Deputy Boisvert read the Informing the Accused form [hereinafter "ITAF"] to Mr. Springer and asked him whether he would be willing to submit to an evidentiary chemical test of his breath. R23 at 13:5 to 14:4. Mr. Springer initially remained silent in response to the deputy's question, and the deputy reread the question "about six times." R23 at 14:5-17. After re-reading the question to Mr. Springer for the sixth time, Mr. Springer replied "I've already given you a test." R23 at 15:3-4; 18:16-22. Whereupon, Deputy Boisvert, immediately and without further comment, marked Mr. Springer as having refused to submit to an implied consent test. R23 at 15:5-7; 19:1-4.

At the refusal hearing, Deputy Boisvert testified that in between each reading of the question, he allowed anywhere from five to ten seconds to pass before he read the question to Mr. Springer again for a total of "five or six more times" after the initial reading. R23 at 18:7-22. Given this testimony, this would equate to a total time of twenty-five seconds on the lower end of the range to sixty seconds on the high end of the range of time given that there was no additional waiting after the last reading of the question, but rather an immediate marking of Mr. Springer as having refused testing.[1]

STANDARD OF REVIEW ON APPEAL

This appeal presents a question relating to the application of the implied consent law to an undisputed set of facts. As such, this Court reviews the matter as a question of law *de novo*. *State v. Wilke*, 152 Wis. 2d 243, 247, 448 N.W.2d 13 (Ct. App. 1989).

ARGUMENT

I. DEPUTY BOISVERT FAILED TO PROVIDE MR. SPRINGER WITH AN ADEQUATE AMOUNT OF TIME TO MAKE A "PROMPT" DECISION ABOUT WHETHER TO SUBMIT TO AN IMPLIED CONSENT TEST.

A. Statement of the Law As It Relates to a Subject Responding to a Request for an Implied Consent Test.

Pursuant to Wis. Stat. § 343.305(2), a law enforcement officer who suspects an individual of operating a motor vehicle while intoxicated may request that the individual submit to a chemical test of their blood, breath, or urine under § 343.305(3)(a). This goal is accomplished *vis a vis* the reading of the "Informing the Accused" form to the suspect. Wis. Stat. § 343.305(4); R7. At the end of the

[1]The lower end is given by the elapsing of 5 seconds for 5 times after the initial reading, for a total 25 seconds; and the high end is given by the elapsing of 10 seconds for 6 times after the initial reading, for a total of 60 seconds.

ITAF, a question is asked of the suspect, "Will you submit to an evidentiary chemical test of your [breath, blood, or urine]," with the law enforcement officer designating which test it is that the law enforcement agency is seeking. *Id*.

It is incumbent upon the accused to "promptly" elect to submit, or to refuse to submit, to the requested test. *State v. Neitzel*, 95 Wis. 2d 191, 205, 289 N.W.2d 828 (1980); *State v. Rydeski*, 214 Wis. 2d 101, 109, 571 N.W.2d 417 (Ct. App. 1997). The implied consent law, however, does not require a verbal refusal to submit to testing. *Rydeski*, 214 Wis. 2d at 106-07. While it remains true that "[i]t is the reality of the situation that must govern, and a refusal in fact, regardless of the words that accompany it, can be as convincing as an express verbal refusal,"[2] including a suspect's remaining silent when asked to submit to an implied consent test, it is also true that no decision of any court of supervisory jurisdiction has defined what constitutes a "prompt" reply to the officer's request.

B. The Facts of the Instant Case Establish That Mr. Springer Was Not Given a Sufficient Amount of Time Within Which to Make an Election to Submit, or to Refuse to Submit, to Testing.

Mr. Springer acknowledges from the start that a person's silence, when asked to submit to a chemical test for intoxication, can certainly be construed as a *de facto* refusal to submit to an implied consent test. That issue is not, however, the issue Mr. Springer raises before this Court. Mr. Springer proffers that it is unreasonable to conclude that a person who is given only twenty-five seconds to respond to the request for testing has refused such testing if he has not delivered a response within that time.[3] This is especially true in

[2]*Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 192, 366 N.W.2d 506 (Ct. App. 1985), quoting *Beck v. Cox*, 597 P.2d 1335, 1338 (Utah 1979).

[3]Given Deputy Boisvert's admission that it is possible he only asked Mr. Springer to submit to a test five times, and waited only five seconds in between each attempt, Mr. Springer will, throughout the remainder of his argument on this point, construe the facts in a light most favorable to him since there is a basis in the record to assume the same.

a circumstance in which the person who is being asked to submit to testing has more at stake than a "typical" suspect who, unlike Mr. Springer, is not a commercially licensed driver.[4] Commercially licensed drivers are subject to more severe penalties, such as disqualification from operating a commercial motor vehicle, which affect their livelihoods and ability to maintain employment more acutely than the average person. *See, e.g.*, Wis. Stat. § 341.315(2).

Mr. Springer acknowledges that establishing a "bright-line" rule of any period of time, *e.g.*, thirty seconds, one minute, two minutes, *etc*., is likely unworkable no matter how desirable. This is not to say, however, that there should not be a *minimum* period of time in which the person is permitted an opportunity to "think it over." This point is perhaps best made by hypothetical.

Assume, *arguendo*, that an officer reads the ITAF to a suspect, asks him to submit to a breath test, and when the individual does not respond within one second's time, considers him to have refused testing. It is highly unlikely that any fact finder acting reasonably would conclude that the failure to respond within one second constituted a refusal by silence. Extend this example to two seconds. Again, the conclusion would very likely be the same. Mr. Springer would even go as far as to postulate that three, four, five, on up to ten seconds would all remain unreasonable amounts of time within which a person facing a life-changing decision must answer whether he will submit to testing. Mr. Springer's hypothetical would similarly not change regardless of the number of times the officer could repeat the question in those periods. It is not the frequency of the "asking" that matters here. It is the period of time in which the intellect of the accused is afforded the opportunity to weigh the options regarding the consequences of submitting to an implied consent test versus those of refusing the same that matters.

It takes longer than one minute to carefully and fully read the ITAF to a suspect. *See* R7. It is Mr. Springer's position that asking a person to make a decision in less time than it takes to provide him

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[4]Deputy Boisvert testified that he was unaware that Mr. Springer was commercially licensed. R23 at 20:23 to 21:5.

with all of the information regarding that decision is patently unfair and unreasonable. Perhaps the standard which this Court should consider is one in which both sides are treated equally. That is, a person who is asked to submit to an implied consent test should be afforded as long a time to make his decision regarding testing as it takes to relay the information to him.

Should this Court not elect to consider the foregoing a reasonable alternative, at least in the instant case Mr. Springer believes twenty-five seconds was too little time in which he could make a decision *regardless* of how many times the deputy could reinsert the question into his silence. It should be emphasized that the decisions a person is asked to make relating to providing the government with either chemical test evidence or proof of consciousness of guilt evidence in the form of a refusal would likely not be easy to make "promptly" even for individuals who are trained in the law if "promptly" means in less than twenty-five seconds. Some consideration must be given to the fact that the typical accused drunk driver is a lay person.

II. THE ARRESTING OFFICER IN THIS CASE SHOULD HAVE INFORMED MR. SPRINGER THAT THE PRELIMINARY BREATH TEST TO WHICH HE EARLIER SUBMITTED DID NOT COUNT AS AN IMPLIED CONSENT TEST.

Wisconsin Statute § 343.303 permits a law enforcement officer who has "probable cause"[5] to believe that a person has committed a violation of § 346.63(1)(a) to request that the individual submit to a preliminary breath test [hereinafter "PBT"]. The result of this test is not admissible in court against the accused, unlike an implied consent test. *Cf.* Wis. Stat. § 343.303 *with* § 343.305(5)(d).

In the instant case, when Deputy Boisvert asked Mr. Springer to submit to an evidentiary chemical test of his breath, Mr. Springer

[5]This is not considered the traditional "probable cause" to arrest, but rather is a standard nestled above a reasonable suspicion and below probable cause to arrest. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999).

ultimately responded that he had already submitted to a test. R23 at 15:3-4; 18:19-22. Upon hearing this response, Deputy Boisvert immediately marked Mr. Springer as having refused the test without disabusing him of his erroneous notion that the roadside PBT counted as an implied consent test. R23 at 15:5-7; 19:1-4. It is Mr. Springer's contention that this failure on the part of Deputy Boisvert violates notions of fair play and fundamental fairness.

The concept of "fundamental fairness" is an outgrowth of the Due Process Clause of the Fifth Amendment. *United States v. Williams*, 553 U.S. 285, 304 (2007). It is a concept that is driven by notions of fair play. *See, e.g., Connally v. General Construction Company*, 269 U.S. 385, 391 (1926). The Supreme Court has held that the Fourteenth Amendment is implicated in constitutional fair play and fundamental fairness as well. *See generally, Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966).

Expounding upon these "notions of fair play," the United States Supreme Court has observed that "[a]ll are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 444 (1939). While it is true that the foregoing quote was made in a different factual context than that before this Court in the instant case—the *Lanzetta* Court was examining a penal statute—its underlying idea is no less applicable and should be carried forward into this case.

Being apprised of what the government commands ***is*** a function of due process. In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), the United States Supreme Court recognized that due process emanated from more than mere legislative enactments, rather, it grew out of constitutional fundament. The High Court described it thusly: "The right to due process 'is conferred not by legislative grace, but by constitutional guarantee.'" *Id*. at 541, quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974).

At its core, fundamental fairness is a constitutional doctrine which finds its purchase in the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 24 (1981). While the soil from which the concept of fundamental fairness grows is well tilled, the notion of

fundamental fairness itself is not given to a tight definition or rigid rule. The *Lassiter* Court has remarked upon the nebulous nature of fundamental fairness in this way:

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[Unlike] some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter, 452 U.S. at 24-25. As the Supreme Court noted in *Matthews v. Eldridge*, 424 U.S. 319 (1976), due process, in the context of fundamental fairness, "'is flexible and calls for such procedural protections as the particular situation demands.'" *Id*. at 334, quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Thus stated, Mr. Springer proffers that his case is precisely about what is fundamentally fair and what ensures constitutional "fair play" under the facts of his case. While he acknowledges that the foregoing authority is not directly on point with his case because all of the aforementioned decisions arose out of different factual scenarios than his, it is also true that there is no case directly on point with his circumstances. As such, all that can be done is to draw from the fundament of this authority and extend the ideas which gird it to his case.

In doing so, Mr. Springer believes that it is fundamentally unfair and violates notions of fair play for a law enforcement officer to fail to inform a person who is acting under the false belief that a roadside PBT was an "implied consent test" that such is not the case. This is not a particular onerous or burdensome requirement. It requires but a few words—a few words which, importantly, could bring a person's misapprehended belief into check. All a law enforcement officer would need to do is inform the suspect that: "The roadside test is not admissible in court. I'm asking you for a different

test." Frankly, officers throughout Wisconsin already engage in this practice, and Mr. Springer can think of no reason why Deputy Boisvert should not also have done so. To permit accused citizens to act under an erroneous, but not illogical or unreasonable belief given what happens during the detention and arrest of a suspected drunk driver, smacks of unfairness and all the more so when one considers that it would take very little effort to remedy this problem.

Put in another context, adopting Mr. Springer's approach would *better serve* the government's interest in ending the scourge of the drunk driving epidemic in that it would likely cause more citizens to submit to testing than to refuse it if they knew that the PBT was not an implied consent test. Simply explaining that the PBT was not admissible in court would cause many individuals to reconsider taking the evidentiary test because they would no longer be acting under the belief that they were not refusing testing by already having submitted at roadside. In this fashion, the public policy underlying Wisconsin's impaired driving law would be promoted rather than hindered.

It is likely that the County will argue in its brief that an accused drunk driver may not argue that he was "subjectively confused" by the information he received so long as the arresting officer complies with the implied consent law by reading the ITAF verbatim. *See, e.g.*, *Village of Oregon v. Bryant*, 188 Wis. 2d 680, 693-94, 524 N.W.2d 635 (1994). While it is true that a defendant may not make a "subjective confusion" argument when the ITAF is read verbatim and the arresting officer does not try to add information to that which appears on the form, this argument misses Mr. Springer's point in this case.

Mr. Springer is not alleging that he was subjectively confused about the information which appears on the ITAF. Rather, he is arguing that he was confused about what constituted a "breath test" when he had already submitted to a PBT. The PBT is an artifact of a different statute apart from the implied consent statute which allows for an officer to gather evidentiary breath samples. Mr. Springer's confusion was over the *two breath tests—i.e.*, the one he submitted to at roadside and the one the deputy sought—and not over the information which appeared on the ITAF. Thus, any foray by the

County into the body of common law which prohibits "subjective confusion" arguments must fail because it misses the point of contention herein.

CONCLUSION

Because Mr. Springer was neither afforded sufficient time within which to make his decision to submit to an implied consent test and was not properly disabused of the notion that the roadside preliminary breath test to which he submitted counted as an "implied consent test," Mr. Springer respectfully requests that this Court reverse the lower court's finding regarding the propriety of his alleged refusal to submit to an implied consent test under Wis. Stat. § 343.305 and reinstate his operating privilege.

Dated this 29th day of May, 2020.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By:_____

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CERTIFICATION

I hereby 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. The text is 13-point type and the length of the brief is 3.294 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) Table of Contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. I further certify that if the record is required by law to be confidential, the portions of 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. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, 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 and appendix 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 May 29, 2020. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 29th day of May, 2020.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2020AP491

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APPENDIX

Table of Contents

Order Finding Refusal Unreasonable 101

Conviction Status Report. 102

Decision of the Circuit Court 103-108