STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case Nos. 2021AP1350 & 2021AP1351

CITY OF WAUKESHA,

Plaintiff-Appellant,

-vs-

BRIAN J. ZIMMER,

Defendant-Respondent.

APPEAL FROM AN ORDER GRANTING DISMISSAL ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, BRANCH II, THE HONORABLE DENNIS P. MORONEY, RESERVE JUDGE, PRESIDING, TRIAL COURT CASE NOS. 20-TR-7032 & 20-TR-7035

BRIEF & APPENDIX OF DEFENDANT-RESPONDENT

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STATEMENT OF THE ISSUES

I. WHETHER THE ARRESTING OFFICER LACKED PROBABLE CAUSE TO ARREST MR. ZIMMER FOR AN OPERATING WHILE INTOXICATED OFFENSE?

Trial Court Answered: YES. The circuit court did not err in entering its judgment because it based the same upon its evaluation of the credibility of the arresting officer's testimony, which credibility the lower court seriously questioned and found to be untruthful. (R20 at 71:8-20; R-App. at 116).

II. WHETHER THE ARRESTING OFFICER FAILED TO COMPLY WITH WIS. STAT. § 343.303 AND THE FOURTH AMENDMENT WHEN HE FAILED TO "REQUEST" A PRELIMINARY BREATH TEST FROM MR. ZIMMER?

Trial Court Answered: YES. The lower court concluded that the arresting officer failed to "request" a preliminary breath test from Mr. Zimmer, which failure was inconsistent with the plain language of Wis. Stat. § 343.303 (2021-22). (R20: 14:6 to 18:1; R-App. at 101-05).

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal presents a question which, when examined under the appropriate standard of review, may be disposed of easily and in a manner consistent with well-established rules of appellate review. The issue presented is of a nature that can be addressed by the application of 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 issue before this Court is premised upon the unique facts of the case and is of such an esoteric nature that publishing this Court's decision would likely have little impact upon future cases.

STATEMENT OF THE FACTS AND CASE

The City has set forth in its brief an extended recitation of the facts and case, which insofar as it goes, adequately describes what transpired in the lower court. Mr. Zimmer does not dispute the accuracy of the portions of the record cited by the City nor included in its appendix, and therefore, will join the City in its "Statement of the Facts and the Case." *See* Brief and Appendix of Plaintiff-Appellant, at pp. 5-12.

There are portions of the City's statement of the facts which could be more complete contextually. Where appropriate, therefore, Mr. Zimmer will incorporate a more thorough recitation of the same in the body of his argument below.

As a final observation, Mr. Zimmer notes that when referring to portions of the transcript from the evidentiary hearing, the City refers to these as Record Item No. 23. The Index provided to counsel for Mr. Zimmer indicates that the transcript of the motion hearing is actually Record Item No. 20 and that Record Item No. 23 is the "Notice of Appeal transmittal." *See* Waukesha County Clerk of Courts Index. Based upon this discrepancy, Mr. Zimmer intends to refer to the transcript from the motion hearing as "R20" rather than the "R23" employed by the City.

STANDARD OF REVIEW ON APPEAL

Because the question presented to this Court involves the credibility of the arresting officer's testimony, "the reviewing court must accept the inference drawn by the trier of fact," which in this case is the circuit court. *Milbauer v. Transport Employes' Mut. Benefit Society*, 56 Wis. 2d 860, 864, 203 N.W.2d 135 (1973); *Hanz Trucking, Inc. v. Harris Brothers Co.*, 29 Wis. 2d 254, 138 N.W.2d 238 (1965). "When the trial court sits as the finder of fact, it is the ultimate arbiter of the credibility of witnesses and the weight to be given to their testimony." *Gehr v. City of Sheboygan*, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1970). It is well settled that the trial judge is the ultimate arbiter of the credibility of the witnesses. *Posnansky v. City of West Allis*, 61 Wis. 2d 461, 465, 213 N.W.2d 51 (1973).

Beyond the foregoing, this Court must apply the "clearly erroneous" standard of review to the findings of fact made by the court below. The court in *Wurtz v. Fleishman*, 97 Wis. 2d 100, 293 N.W.2d 155 (1980), observed that "[t]his grant of

jurisdiction [to review matters on appeal] does not confer the right to make findings of fact where the evidence is controverted." *Id.* at 107 n.3.

ARGUMENT

I. THE CITY'S CHARACTERIZATION OF THE APPROPRIATE STANDARD OF REVIEW IN THE INSTANT MATTER IS MISLEADING.

A. Framing the Issue: The Relevant Inquiry.

The City begins its brief by asserting that "[w]hen the facts are reviewed *de novo*, **independent of the Circuit Court's decision**, the facts show sufficient evidence of probable cause to arrest without considering the Preliminary Breath Test administered by the arresting officer." Brief of Plaintiff-Appellant, at p.4 (emphasis added). The City's characterization of the appropriate standard to be applied by this Court is short of an accurate mark.

Regrettably for the City, any review of the lower court's decision cannot be made "independently" of the circuit court's assessment of Officer Moss' credibility. As the courts in *Gehr* and *Posnansky* correctly observed, it is the trial court which remains the ultimate arbiter of the credibility of the witnesses. *Gehr*, 81 Wis. 2d at 122; *Posnansky*, 61 Wis. 2d at 465. The *Posnansky* court characterized the appropriate standard of review regarding the credibility of the witnesses thusly: "The trial judge, when acting as the fact finder, is the ultimate arbiter of the credibility of a witness. **His determination in that respect will not be questioned unless his finding is based upon caprice, an abuse of discretion, or an error of law.**" *Posnansky*, 61 Wis. 2d at 465-66 (emphasis added). Unless the circuit court's finding regarding Officer Moss' credibility is clearly erroneous, this Court may not disturb it. *Wurtz*, 97 Wis. 2d at 107 n.3.

Regarding the analysis of the issues presented by the City, it is important to further define what this standard implies. A decision of the United States Supreme Court, *Anderson v. Bessemer City*, 470 U.S. 564 (1985), provides the sharpest description of what the clearly erroneous standard entails. The *Anderson* Court observed:

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's

> power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized, is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). **This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty . . . if it undertakes to duplicate the role of the lower court.** "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). **If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous**. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); *see also*, *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 884 (1982).

Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985)(emphasis added).

For purposes of appellate review of the probable cause question presented by the City, it is also of significant import to recognize that:

> Determining probable cause for a warrantless arrest in the context of a suppression motion is another matter. **Plausibility is not enough**. The trial court takes evidence in support of suppression and against it, and chooses between conflicting versions of the facts. **It necessarily determines the credibility of the officers** and other witnesses. *State v. Pires*, 55 Wis. 2d 597, 602-03, 201 N.W.2d 153, 156 (1972). The court then finds the historical facts and determines whether probable cause exists on the basis of those facts.

State v. Wille, 185 Wis. 2d 673, 682, 518 N.W.2d 325 (Ct. App. 1994)(emphasis added). Clearly, the *Wille* court acknowledged that subsumed within any probable cause determination is the "credibility of the officer[]."

The extensive line of the foregoing authority unequivocally establishes that this Court is *not* permitted to simply review the facts of this case *de novo* as the City suggests. Instead, great deference must be given to the lower court's assessment of the credibility of Officer Moss because that is a factual question and not a question of law. Unless the circuit court's determination regarding the officer's credibility is clearly erroneous or is "based upon caprice, an abuse of discretion, or an error of law," it may not be upset on appeal.

B. Application of the Appropriate Standard of Review to the Facts of This Appeal.

Since the question of Officer Moss' credibility is thoroughly interwoven with the issue of whether probable cause existed to arrest Mr. Zimmer, this Court is not permitted to address the latter question without first giving great deference to the lower court's assessment of the officer's credibility. In so doing, an examination of the record reveals that Judge Moroney did not find Officer Moss' testimony to be credible. During his decision, Judge Moroney engaged in the following exchange with counsel for Mr. Zimmer:

> MR. MELOWSKI: Well, I am saying that without the PBT **there isn't probable cause to arrest, and since we are not considering the PBT** I would ask the Court to find that there isn't probable cause to arrest [Mr. Zimmer].
>
> THE COURT: Well, I have got to come to that conclusion, to be honest, Mr. Eastman [the prosecutor]. Why? Because even though I asked him the question I did purposefully, because he had testified about the PBT and then he found after, it was after the PBT came back that there was probable cause. I wanted to find out whether or not he had probable cause before the PBT was rendered in any fashion and whether or not, you know. And he said, yes. I said why didn't you arrest him them? **He couldn't answer that question truthfully**, and I give the officer all the credit for that. It is because he didn't rely on that, or he didn't rely enough on that. He relied on the PBT result.

(R20 at 71:4-20; R-App. at 116)(emphasis added).

The foregoing exchange plainly demonstrates that the lower court was being asked to determine whether probable cause existed to arrest Mr. Zimmer in the absence of any "consider[ation of] the PBT . . . ." (R20 at 71:4-5; R-App. 116). In response to this specific inquiry, the lower court concluded that Officer Moss—when the question was put to him regarding probable cause to arrest—"couldn't answer . . . truthfully." (R20 at 71:17; R-App. at 116). This is as plain and unambiguous as any assessment of credibility can be made. Judge Moroney unmistakably characterized Officer Moss as untruthful.

Moreover, the judge's follow-up comment—that he gave the officer "credit for"—further sheds light on the judge's opinion that Officer Moss' credibility was suspect because the "credit" the judge gave Officer Moss was for not "digging himself a deeper hole" (to use the common parlance). That is, when Judge Moroney

was pressing the officer to commit to a position during his examination from the bench, and he finally caught the officer in a circumstance where he could no longer continue to contrive inconsistent answers, the judge was commending him for not forging even more engineered responses which would further strain credulity. Put another way, Officer Moss knew that he "had been caught" and recognized that he should relent in the face of Judge Moroney's withering examination.

Since the basis for Judge Moroney's conclusions of law rested upon the necessary determination of Officer Moss' credibility (*see Wille*, 185 Wis. 2d at 682), this Court is not permitted to substitute its own judgment regarding the officer's credibility (*Anderson*, 470 U.S. at 573-74), but rather, must instead give great deference to the lower court's evaluation of the same (*Posnansky*, 61 Wis. 2d at 465-66).

In the end, there is nothing within the four corners of the City's brief which establishes that the lower court's finding regarding the credibility of Officer Moss' testimony was in any manner premised "upon caprice, an abuse of discretion, or an error of law." *Posnansky*, 61 Wis. 2d at 465-66. Failing to establish such a basis for upsetting the lower court's factual finding is fatal to the City's cause, and therefore, this Court should not reverse the decision of the court below.

Before moving on to the second question presented by the City in its appeal, it is worth taking note of the last portion of the *Posnansky* standard in anticipation of what the City may attempt to proffer in its reply brief to Mr. Zimmer's response brief.

The City might argue that the *Posnansky* standard was violated because the lower court's decision was predicated upon "an error of law" relating to whether the preliminary breath test has to be "requested" pursuant to Wis. Stat. § 343.303. This is simply *not* the case. When counsel for Mr. Zimmer put the question to the lower court regarding whether probable cause to arrest Mr. Zimmer existed, he did so in the context of *not* considering the preliminary breath test. (R20 at 71:4-5; R-App. at 116). In responding to this inquiry, Judge Moroney took pains to note that Officer Moss was not credible regarding his answer with respect to whether probable cause existed to arrest Mr. Zimmer. (R20 at 71:13-18; R-App. at 116). Based upon this response, Judge Moroney was assessing whether *probable cause to arrest* Mr. Zimmer existed and *not* whether the preliminary breath test must be "requested" under § 343.303. Thus, even if this Court determines that the circuit court

erroneously interpreted the plain language of § 343.303, that alleged "error of law" played no role in the lower court's decision.[1]

C. Other Considerations.

While Mr. Zimmer posits that this Court should not reverse the decision of the court below because Judge Moroney did not find Officer Moss credible, Mr. Zimmer believes that the City may attempt to transmogrify the appropriate standard of review into one which solely involves a *de novo* review of the facts. *See, e.g.*, Brief of Plaintiff-Appellant at p.4 ("When the facts are reviewed *de novo*, independent of the Circuit Court's decision, . . ."). To this end, the City's portrayal of the facts of this case is decidedly cherry-picked. Additional facts were adduced at the motion hearing which support Judge Moroney's conclusion regarding a lack of probable cause to arrest. For example:

> Officer Moss never observed Mr. Zimmer's vehicle swerving, crossing the centerline, or deviating within its lane of travel. (R20 at 42:15-21; R-App. at 106).
>
> Officer Moss conceded that the Zimmer vehicle maintained an appropriate speed throughout the entire time he followed the vehicle. (R20 at 42:22 to 43:4; R-App. at 106-07).
>
> Mr. Zimmer timely responded to Officer Moss' signal to stop his vehicle. (R20 at 43:5-7; R-App. at 107).
>
> Officer Moss admitted that he **never observed an odor of intoxicants about Mr. Zimmer's person, either before or after he exited his vehicle.** (R20 at 43:8-23; 45:20-22; R-App. at 107, 108).
>
> Mr. Zimmer denied consuming any intoxicants. (R20 at 43:24 to 44:2; 45:23-25; R-App. at 107-09).
>
> Officer Moss did not observe any vertical gaze nystagmus or lack of ocular convergence when he tested Mr. Zimmer for the same. (R20 at 47:10-14; 47:19-24; R-App. at 110).
>
> Mr. Zimmer performed the alphabet recitation test without exhibiting any signs of impairment. (R20 at 48:8-19; 50:2-5; R-App. at 111, 113).
>
> Mr. Zimmer correctly counted backward from 82 to 61, and even though he was instructed to stop at 68, none of the numbers between 82 and 61 were skipped, transposed, or repeated,

[1]Make no mistake, Mr. Zimmer is ***not*** conceding that it is "an error of law" to interpret § 343.303 as requiring that a law enforcement officer "request" that a person suspected of impaired driving submit to a preliminary breath test. Mr. Zimmer only makes this argument in *anticipation* of how the City may respond to his position regarding the appropriate standard of review in this case.

> nor did Mr. Zimmer have to pause during his recitation. (R20 at 48:20 to 50:1; R-App. at 111-13).
>
> Mr. Zimmer also successfully recited the months of the year from March to October as instructed without error. (R20 at 50:6-12; R-App. at 113).

Based upon the foregoing, Mr. Zimmer proffers that even if this Court did not defer to Judge Moroney's credibility determination regarding Officer Moss, there remains a reasonable factual basis upon which the lower court could have found that probable cause to arrest Mr. Zimmer did not exist. Neither Mr. Zimmer's driving nor his mentation were impaired based upon Officer Moss' admissions. Similarly, his eyes did not display evidence of any vertical nystagmus or lack of convergence, and he did not admit to consuming any intoxicants which explains why Officer Moss observed no odor of intoxicants emanating from his person *at any point in the process*. Thus, even if this Court was not to defer to Judge Moroney's credibility determination, there exist sufficient facts under the totality of the circumstances test[2] to conclude that probable cause to arrest Mr. Zimmer did not exist.

II. THE CITY DID NOT PRESERVE AN OBJECTION TO THE DISMISSAL OF THE CASE BELOW, AND THEREFORE, THIS COURT IS PRECLUDED FROM TAKING UP AN IMPROPERLY PRESERVED ISSUE.

The City's appeal is premised upon its conclusion that the lower court *erroneously dismissed the case* it brought against Mr. Zimmer. *See* Brief of Plaintiff-Appellant at p.4 (emphasis added). There is a significant problem for the City, however, in that it did not properly preserve its right to appeal by objecting to the entry of the judgment of dismissal in the lower court.

More specifically, when counsel for Mr. Zimmer moved to dismiss the charges pending against him, the following exchange took place between counsel for the parties:

> MR. MELOWSKI: Well I am making a motion to have the evidentiary chemical test result thrown out as fruit of the poisonous tree, and **I am making a motion to have the charges against Mr. Zimmer dismissed**.
>
> THE COURT: Mr. Eastman?

[2]The Court determines whether probable cause to arrest exists under the "totality of the circumstances." *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986)(citations omitted).

> MR. EASTMAN: I think it would, based upon the Court's decision it would be appropriate for it to suppress the test result, the blood test result.

(R20 at 69:18-25; R-App. at 114)(emphasis added). Notably absent from the City's concession is any objection to the expressed request for a dismissal of the charges pending against Mr. Zimmer. In fact, at a later point when the lower court states that it ruled suppression is an appropriate remedy as Mr. Zimmer requested, the City—even though it had an opportunity to expressly preserve its right to appeal by objecting to the entry of an order of dismissal—actually *expressly* proffers that dismissal is appropriate by stating: "And if the Court does all of those things, the officer had no probable cause at all to arrest, **then it would be appropriate to dismiss the charges**." (R20 at 70:21 to 71:3; R-App. at 115-16)(emphasis added). Thereafter, during the remaining portion of the lower court's oral ruling, the City never interposes an objection to the court's decision to dismiss. (R20 at 71:8 to 74:13; R-App. at 116-19).

In fact, there are at least two separate occasions during the circuit court's ruling when the City had an opportunity to interject an objection to dismissal but, for reasons unknown to Mr. Zimmer, chose not to. (R20 at 72:21-25; 73:23-25; R-App. at 117-18).

The City's suggestion that dismissal was an appropriate remedy, along with its failure to object to the same, is fatal to its appeal because it "actively contributed" to the circuit court's ruling without objection. The Wisconsin Supreme Court has long held that when a party "actively contributes" to a claim of error, it may not later claim error upon appeal. *State v. Gove*, 148 Wis. 2d 936, 938, 944, 437 N.W.2d 218 (1989)("Gove affirmatively contributed to what he now claims was trial court error"); *accord*, *Knight v. Heritage Mut. Ins. Co.*, 71 Wis. 2d 821, 828, 239 N.W.2d 348 (1976).

As a general rule, objections which are not properly made in the trial court will preclude a party from later raising them on appeal. *State v. Holland Plastics Co.*, 111 Wis. 2d 497, 504, 331 N.W.2d 320 (1983). This general rule exists because, as the Wisconsin Supreme Court explained in *State v. Erickson*, 227 Wis. 2d 758, 596 N.W.2d 749 (1999):

> The waiver rule exists to cultivate timely objections. Such objections promote both efficiency and fairness. By objecting, both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources. If the waiver rule did not exist, a party could decline to object for strategic reasons and raise the error only when that party

> needed an advantage at some point in the trial. Similarly, judicial resources, not to mention the resources of the parties, are not best used to correct errors on appeal that could have been addressed during the trial.

Id. at 766.

When the waiver rule is coupled with the supreme court's disdain for addressing issues to which a party has "actively contributed," it becomes apparent that the City's appeal in this case should be dismissed. After all, the City not only never objected to dismissal of the case below as an appropriate remedy, but actually "actively contributed" to the imposition of dismissal as a remedy by affirmatively stating on the record that "it would be appropriate to dismiss the charges." (R20 at 70:21 to 71:3; R-App. at 115-16). Mr. Zimmer's concern in this regard is, at a minimum, at least worth consideration by this Court.

III. THE SEIZURE OF A PERSON'S BREATH BY A PRELIMINARY BREATH TESTING DEVICE IS SUBJECT TO FOURTH AMENDMENT PROTECTION.

A. Preliminary Considerations.

The City erroneously asserts that if this Court concludes that probable cause existed to arrest Mr. Zimmer for an operating while intoxicated violation, "there will be no need to address whether Officer Moss administered the PBT correctly because the result is not admissible at trial." Brief of Plaintiff-Appellant at p.12. Not only is this an incorrect statement, but it utterly misses the point of Mr. Zimmer's argument. This Court will still need to address the merit of Mr. Zimmer's argument because, as he has averred all along, the seizure of a sample of a person's breath is a cognizable seizure for Fourth Amendment purposes and, because the PBT can be directly tied to a law enforcement officer's decision whether to seek a blood, breath, or urine test from a suspected impaired driver, if there is a Fourth Amendment violation, it should result in suppression of the blood test under the fruit of the poisonous tree doctrine—*regardless* of the City's assertion that no issue lies because the result of the PBT is not admissible at trial.

More specifically, in the seminal case of *Wong Sun v. United States*, 371 U.S. 471 (1963), the Supreme Court examined the extent to which the Fourth Amendment's exclusionary rule was to be applied. *Id.* at 487. Specifically, the Court addressed whether, in a prosecution for the possession of heroin, evidence obtained after the search of a person which was premised upon an informant's arrest without probable cause, could be suppressed as the "fruit" of the unconstitutional arrest of the informant. *Id.* at 486-88.

In concluding that the exclusionary rule required suppression of the subsequently obtained evidence because it was the "fruit" of an unconstitutional action by law enforcement in violation of the Fourth Amendment, the *Wong Sun* Court held that "[t]he exclusionary prohibition extends as well to the indirect as the direct products of such invasions." *Id.* at 484, citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

Upon concluding that the taint of illegally obtained evidence extends "to the indirect as [well as] the direct products" of the unconstitutional act, the *Wong Sun* Court held that the appropriate test in order to determine whether the ill-gotten evidence ought to be suppressed is to question "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488, quoting Maguire, *Evidence of Guilt*, 221 (1959).

The fruit of the poisonous tree doctrine has been adopted in the same form as that established by the *Wong Sun* Court. *See, e.g., State v. Anderson,* 165 Wis. 2d 441, 477 N.W.2d 277 (1991); *State v. Walker*, 154 Wis. 2d 158, 453 N.W.2d 127 (1990), *abrogated in part on other grounds*, *State v. Felix*, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775.

The direct nexus between a PBT and a blood test lies in a law enforcement officer's decision whether to request an evidentiary breath, blood, or urine test. For example, if a PBT tests positive for the presence of alcohol and reveals that the subject's ethanol concentration is well above the prohibited limit, an officer *is not* likely to seek a blood test because the PBT-revealed level of impairment is likely due to alcohol alone as opposed to an illegal drug. Similarly, if the PBT result is below the legal limit, but the subject is demonstrating significant signs of impairment, the officer *will almost certainly* order blood work because the officer suspects that the person may be under the influence of drugs beyond alcohol. Likewise, if the individual is found to have marijuana in their vehicle and the PBT result is returned at a value near the legal limit but not over, the officer might seek a blood specimen in order to direct a laboratory to test for both alcohol *and* THC. It is clear from the foregoing examples that the PBT result *plays a significant if not determinative role* in which type of test an officer will request.

This causal nexus is precisely the link about which the *Wong Sun* Court was concerned. There is no way to "sufficiently purge" the blood test from the taint of the PBT because the evidence obtained from administering field sobriety tests is not designed to distinguish between impairment by alcohol versus impairment by cocaine versus impairment by THC, *etc.*, thereby providing an officer with direction regarding whether to seek a blood test versus a breath test. That is, if a person fails

to pass the field sobriety tests, a law enforcement officer may reasonably suspect impairment by alcohol, *but it is not until such time that a PBT is administered* that the officer knows whether s/he should suspect another intoxicant (such as THC). It is the *seizure* of the breath sample—and *only* this seizure—which provides the distinguishing information between alcohol and other substances and thereby affects the officer's decision regarding how to proceed.

Because law enforcement officers simply do not know what form of testing to request until they have administered a PBT, the City cannot so baldly posit that this Court's decision on what it refers to as the "probable cause" issue will automatically dispose of Mr. Zimmer's PBT concerns.

B. The City Apparently Misinterprets the Record in This Case.

In a bizarre twist of logic, the City claims that "the [lower] court applied a subjective standard" in concluding that Officer Moss used the PBT to reach his finding of probable cause to arrest Mr. Zimmer. Brief of Plaintiff-Appellant at p.14. Apparently, the City believes that because Judge Moroney couched his decision in terms of the third-person singular pronoun "he" instead of using "Officer Moss" when describing the observations upon which Officer Moss based his decisions, the standard the judge employed *subjectively* examined the officer's state of mind rather than independently examining the facts to determine whether they rose to the level of establishing probable cause. There are two significant problems with the City's position.

First, the City utterly ignores the fact that the lower court did not find Officer Moss to be a credible witness. There is going to be some subjective examination of any officer's conduct when the trier of fact does not find the witness' testimony credible. How else is a judge supposed to express concerns about a witness' credibility without, at some level, assessing what an officer might be thinking? It does not automatically follow that a judge is applying a subjective standard—as the City claims—when evaluating the facts.

Second, in direct contravention of the notion that Judge Moroney was subjectively assessing probable cause, the judge unequivocally ***separated*** his "subjective" judgment from the requirement that he objectively evaluate the facts. As the City notes, Judge Moroney stated that he "***personally*** think[s Officer Moss] had more than enough probable cause before the PBT. ***But he didn't.***" Brief of Plaintiff-Appellant at p.14 (emphasis added). Clearly, the judge stated his "personal" belief about probable cause, but then implicitly found that *despite his personal belief*, Officer Moss did ***not*** have probable cause. Why would the judge proffer his personal belief about probable cause and then find that it did not exist under the facts of the case unless this latter decision was a function of his objective assessment of the record? It makes no sense whatsoever for the lower court to have gone on the record with its *personal* belief but then to have found that no probable

cause existed based upon the facts adduced at the hearing *unless* that decision was a function of something *other than* the judge's "personal belief." The foregoing was not an instance of the lower court speaking to what Officer Moss believed, but rather, was a function of the judge expressing what *he* thought about whether the objective standard had been met.

C. The Finding of the Court Below Is Tied Directly to Its Assessment of Officer Moss' Credibility.

After setting forth the foregoing argument, the City expends significant effort examining common law decisions relating to the consideration of an officer's subjective intent, concluding that Judge Moroney impermissibly brought these factors into his decision. As Mr. Zimmer described above, the lower court did not find Officer Moss to be "truthful." In so doing, it was not unreasonable for the lower court to address what it thought about the officer's intentions and beliefs. After all, it was the lower court's ***own questioning*** of Officer Moss which led it to believe that the officer was not being truthful, and these questions centered about the issue of whether the officer was going to claim he had probable cause to arrest before the administration of the PBT or whether he was relying on the PBT to establish the same. The judge was doing nothing more than carefully evaluating the witness' character for truthfulness by delving into this subject. Simply because the judge went on the record during his decision from the bench to describe the inconsistencies in the witness' testimony it does not follow that the judge was then adopting a subjective standard for the probable cause determination. Contextually speaking, the judge was proffering an exposition on the "how" and "why" underlying his determination that Officer Moss was not truthful. The City makes Mr. Zimmer's point for him on this issue by relying upon § 805.17(2) which provides that "**due regard shall be given** to the opportunity of the trial court to judge the credibility of the witnesses." Wis. Stat. § 805.17(2) (2021-22)(emphasis added). Since the judge's statements are nothing more than demonstrative of his effort to put his witness credibility finding in its proper context, they are no more revealing than that.

D. The Statutory Scheme for Requesting a Preliminary Breath Test.

The City impliedly claims that § 343.303 permits PBTs to be demanded from suspected impaired drivers rather than "requested." It premises its argument by taking exception to the lower court's use of the term "magic words" when characterizing that § 343.303 compels law enforcement officers to "request" that a person submit to a PBT. The City's argument elevates form over substance in that Judge Moroney was merely attempting to get his point across that PBTs may not be demanded, commanded, or required.

That § 343.303 does not permit a PBT to be demanded rather than requested can be gleaned by examining other preliminary breath test statutes which apply to

circumstances similar to those in the instant case, but which require that different action be taken. For example, statutes which speak to the administration of PBTs in intoxicated boating, intoxicated snowmobiling, and intoxicated all-terrain vehicle cases *all* state that the suspect "**shall provide** a sample of his or her breath for a preliminary breath screening test" when requested to do so. *See* Wis. Stat. §§ 30.682(1), 350.102(1), & 23.33(4g)(a) (2021-22)(emphasis added), respectively. If Mr. Zimmer's position that the "request" language employed by § 343.303 did not truly mean *request*, but rather meant that the seizure of a person's breath is something that can be commanded, then one must ask: Why would the Wisconsin Legislature elect to use *different* language across so many other statutes? The legislature could have enacted § 343.303 with the words "shall provide" as it did in every other instance, yet it chose to employ the words "may request." The legislature is presumed to know what the law is on any given topic, and therefore, under the prevailing canons of statutory construction, the legislature's election to use alternative language in § 343.303 *must* mean something. When the legislature elects to use different language on a similar topic, it must be concluded that a *different* intention is evidenced. *See State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. The language of each statute must be given full force and effect. *See generally*, *State v. Delaney*, 2003 WI 9, 259 Wis. 2d 77, 658 N.W.2d 416; *State v. Newman*, 157 Wis. 2d 438, 459 N.W.2d 882 (Ct. App. 1990).

Beyond the statutory comparison, courts of supervisory jurisdiction have characterized the PBT as a voluntary test. For example, while none of the following cases are directly on-point with the issue raised in this appeal, they are nevertheless instructive based upon the way in which each of the courts *describes* the nature of a preliminary breath test. In *State v. Goss*, 2011 WI 104, 338 Wis. 2d 72, 806 N.W.2d 918, and *State v. Fischer*, 2010 WI 6, 322 Wis. 2d 265, 778 N.W.2d 629, the courts characterized the PBT as a "voluntary" test. Recognizing, that these courts characterized the PBT as a voluntarily taken test demonstrates that Mr. Zimmer's analysis of § 343.303 is not off of the mark because, impliedly, if it was not a "voluntary" test neither the *Goss* nor *Fischer* courts would have characterized it as such.

Even more telling is the decision in *State v. Repenshek*, 2004 WI App 229, 277 Wis. 2d 780, 691 N.W.2d 369. In *Repenshek*, the court of appeals examined whether a person's refusal to submit to a PBT could be used as proof of consciousness of guilt when assessing whether there was probable cause to believe the suspect's blood contained evidence of a crime. *Id.* ¶ 2. In concluding that a refusal to submit to a PBT could be factored into a "reasonable suspicion" determination, the *Repenshek* court repeatedly referred to a suspect's decision regarding submission to a PBT as a part of a larger transaction in which "§ 343.303 authorizes police to ***request*** that a person submit to a PBT . . . ." *Repenshek*, 2004 WI App 229, ¶ 20 (emphasis added). The *Repenshek* court then continued its

analysis by examining whether a reasonable suspicion was a sufficient trigger "***to ask*** [a defendant] to submit to a PBT in the first place." *Id.* (emphasis added). In all of the paradigms examined by the *Repenshek* court, the context in which PBT testing was addressed involved the officer *asking* the suspect to submit to testing. In fact, the *Repenshek* court refers to the context in which a PBT is sought as one involving a "request" or an "asking" on no less than **twenty-five (25)** occasions.

It is readily apparent from the foregoing statutory and common law authority that a PBT is a *voluntary* test which must be *requested not commanded* by a law enforcement officer, which is precisely what Judge Moroney meant when he employed the shorthand terminology "magic words." The judge was not attempting to define what those words should be, but rather, was trying to get his point across that there should be a *request* for a PBT and not a *demand.*

The City's final attempt to discount Mr. Zimmer's argument is premised upon its assertion that "[i]f there is no Fourth Amendment right to refuse a request for a blood draw under threat of civil penalty by the implied consent statute, . . . there cannot be a Fourth Amendment right to refuse or request for a breath test to determine one's BAC . . . ." Brief of Plaintiff-Appellant at p.27. This argument overlooks one very significant fact, namely: the seizure of a person's breath during a detention for an operating while intoxicated offense is a "special circumstances" seizure delimited by the Wisconsin Legislature.

More specifically, in the limited circumstances described in § 343.303, the legislature has authorized law enforcement officers to "*request*" that persons suspected of operating while intoxicated offenses submit to a preliminary breath test. Clearly, it is already well-settled that the Fourth Amendment is, contrary to the City's assertions, implicated in the seizure of a person's breath. In *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602 (1989), the United States Supreme Court examined whether a federal regulation which permitted quasi-private railways to obtain breath samples from railroad personnel who were involved in accidents on the railroad implicated Fourth Amendment protections for the suspect workers. *Id.* at 614-15. In holding that the Fourth Amendment *was implicated in the seizure of breath samples* from railroad employees, the High Court stated:

> **We are unwilling to conclude, in the context of this facial challenge, that breath and urine tests required by private railroads in reliance on Subpart D will not implicate the Fourth Amendment.**
>
> . . .
>
> We have long recognized that a "compelled intrusio[n] into the body for blood to be analyzed for alcohol content" must be deemed a Fourth Amendment search. *See Schmerber v. California*, 384 U.S. 757, 767-768 (1966). *See also Winston v. Lee*, 470 U.S. 753, 760 (1985). In light of our society's concern for the security of one's person, see, *e. g., Terry v. Ohio*, 392 U.S. 1, 9 (1968), it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that

> society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests. *Cf. Arizona v. Hicks*, 480 U.S. 321, 324-325 (1987). Much the same is true of the breath-testing procedures required under Subpart D of the regulations. **Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or "deep lung" breath for chemical analysis, *see, e. g., California v. Trombetta*, 467 U.S. 479, 481 (1984), implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in *Schmerber*, should also be deemed a search**, *see* 1 W. LaFave, Search and Seizure § 2.6(a), p. 463 (1987). *See also Burnett v. Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986); *Shoemaker v. Handel*, 795 F.2d 1136, 1141 (3rd Cir. 1986), *cert. denied*, 479 U.S. 986 (1986).

Skinner, 489 U.S. at 615, 616-17 (emphasis added).

Similarly, in *County of Milwaukee v. Proegler*, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980), the Wisconsin Court of Appeals recognized that "the taking of a breath sample is a search and seizure within the meanings of the United States and Wisconsin Constitutions, ..." *Id.* at 623, citing *Waukesha Mem'l Hosp., Inc. v. Baird*, 45 Wis. 2d 629, 173 N.W.2d 700 (1970), and *State v. Bentley*, 92 Wis. 2d 860, 286 N.W.2d 153 (Ct. App. 1979).

Based upon the foregoing, and the fact that the legislature is presumed to know the law when it enacts a statute, the legislature in creating the "request" language was giving deference to the Fourth Amendment's proscription against coerced searches. The legislature created the "special circumstances" search described in § 343.303, and in so doing, used the plain and unambiguous language that breath tests thereunder must be *requested*, just as Judge Moroney recognized when he stated that "magic words" needed to be employed such as "will you submit" or "are you willing to submit" or "would you take this test," *etc.* Granted, Judge Moroney was perhaps "inarticulate" or "ill-defined" when he chose the term "magic words." Nevertheless, the notion he was trying to get across is one which is wholly consistent with the plain language employed by the legislature in drafting § 343.303.

CONCLUSION

Because the lower court assessed Officer Moss' testimony to be lacking in truthfulness, this Court should grant great deference and due regard to the judge's evaluation of the officer's credibility, and in so doing, find that the City has failed to meet its burden to overturn the decision of the lower court because it is not clearly erroneous.

Furthermore, because the City failed to properly preserve its objection to the entry of an order of dismissal in the circuit court, and moreover, actively participated

in the imposition of this remedy as a sanction, this Court should not entertain the City's appeal.

Finally, Mr. Zimmer asserts that when the totality of the facts of this case are examined in light of the lower court's concern regarding Officer Moss' truthfulness, the circuit court's finding that probable cause to arrest Mr. Zimmer did not exist should not be upset.

Dated this 13th day of January, 2022.

Respectfully submitted:
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CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 7,045 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 January 13, 2022. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 13th day of January, 2022.

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