STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2025AP392

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JEFFREY LEE BUSS,

Defendant-Appellant.

APPEAL FROM AN ORDER OF JUDGMENT ENTERED IN THE CIRCUIT COURT FOR DODGE COUNTY, BRANCH III, THE HONORABLE JOSEPH G. SCIASCIA PRESIDING, TRIAL COURT CASE NO. 2022-TR-292

BRIEF OF DEFENDANT-APPELLANT

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[1] For purposes of judicial economy, because none of the statutes implicated in the instant appeal have been modified substantively in the interstitial period between the date of Mr. Buss' violation and his appeal, Mr. Buss will refer to the statutes as they exist in their current incarnation.

STATEMENT OF THE ISSUE

WHETHER MR. BUSS' SILENCE IN RESPONSE TO BEING ASKED TO SUBMIT TO AN IMPLIED CONSENT TEST AFTER HE ALREADY REQUESTED THAT THE ARRESTING OFFICER TAKE HIM TO THE HOSPITAL FOR A BLOOD DRAW CONSTITUTED AN UNLAWFUL REFUSAL TO SUBMIT TO AN IMPLIED CONSENT TEST?

> Trial Court Answered: YES. Relying in part upon *State v. Rydeski*, 214 Wis. 2d 101, 571 N.W.2d 417 (Ct. App. 1997), the trial court concluded that Mr. Buss' silence after being asked to submit to an implied consent test, even in light of his earlier statements indicating his desire to have his blood drawn, was ambiguous in contravention to the *Rydeski* court's ruling. R49 at 15:4-5, 18:19-21; D-App. at 117, 120. The court found that Mr. Buss did "not giv[e] the officer a black and white answer as to whether he's doing [the test] with consent or not." R49 at 14:11-13; D-App. at 116.

STATEMENT ON ORAL ARGUMENT

Mr. Buss does NOT REQUEST oral argument as this appeal presents a question of law based upon an undisputed set of facts which is neither unduly complicated nor complex. The issue presented is 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

Mr. Buss does NOT REQUEST publication of this Court's decision. The common law authority at issue is well developed and would neither be enhanced nor clarified by publication of this Court's decision.

STATEMENT OF THE CASE

Mr. Buss was charged in Dodge County with Operating a Motor Vehicle While Under the Influence of an Intoxicant—Third Offense, contrary to Wis. Stat. § 346.63(1)(a), Operating a Motor Vehicle With a Prohibited Alcohol Concentration—Third Offense, contrary to Wis. Stat. § 346.63(1)(b), 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 14, 2022. R14 at pp. 1-5; R45 at p.1.

After retaining counsel, Mr. Buss filed several pretrial motions including, *inter alia*, a motion to dismiss the refusal charge pending against him on the ground that he did not, both as a matter of fact and of law, refuse to submit to an implied consent test. R8. In response to Mr. Buss' motion, the State filed a letter brief in opposition to the same on April 14, 2023. R23. By reply brief submitted on May 1, 2023, Mr. Buss filed his answer to the State's letter brief. R24.

A hearing was held on Mr. Buss' motion on February 25, 2025, prior to which the court reviewed the video capture of the encounter between Mr. Buss and the arresting officer, Sgt. Jeremy Wolfe of the Dodge County Sheriff's Office. R49 at 3:7-9; R36; D-App. at 105. Because the video recording provided a factual basis for Mr. Buss' motion, no testimony was taken at the hearing. R49; D-App. at 103-21. Instead, the court entertained the legal arguments of the parties, whereafter it denied Mr. Buss' motion by finding that his statements to the arresting officer in response to being asked to submit to an implied consent test were ambiguous. R49 at 14:11-13; D-App. at 116.

Based upon the court's ruling, an order of judgment revoking Mr. Buss' operating privilege for unlawfully refusing an implied consent test was entered on the same day. R41; D-App. at 101-02.

It is from the adverse decision of the circuit court that Mr. Buss appeals to this Court by Notice of Appeal filed on February 27, 2025. R42.

STATEMENT OF FACTS

On January 14, 2022, Jeffrey Buss was stopped and detained in the City of Juneau by Sgt. Jeremy Wolfe of the Dodge County Sheriff's Office for deviating from his designated lane of travel. R14 at pp. 1, 3.

After approaching Mr. Buss, Sgt. Wolfe observed that he had an odor of intoxicants emanating from his person, bloodshot eyes, and slurred speech. R14 at p.3. Based upon these observations, Sgt. Wolfe asked Mr. Buss to submit to a battery of field sobriety tests. Mr. Buss submitted to a horizontal gaze nystagmus test, however, he ultimately declined to perform the remaining field sobriety tests. R14 at p.3.

Prior to declining the walk-and-turn test, when Sgt. Wolfe asked Mr. Buss "How come you can't do the test," Mr. Buss replied, "It's cold, whatever. I told you I don't have to risk [it]. **You give me a blood test."** R36 at Time Stamp 23:46:49 (emphasis added). Mr. Buss was then arrested for Operating a Motor Vehicle While Under the Influence of an Intoxicant.

After his arrest, Sgt. Wolfe read the Informing the Accused form [hereinafter "ITAF"] to Mr. Buss. R36 at 00:01:44, *et seq*. After the recitation of the form, Sgt. Wolfe asked Mr. Buss whether he would be willing to submit to an evidentiary chemical test of his blood. *Id*. Mr. Buss remained silent when asked this question. *Id*. Sgt. Wolfe informed Mr. Buss that he needed "a 'yes' or 'no,'" but Mr. Buss continued to remain silent. *Id*. As Sgt. Wolfe pressed him for a "yes or no" answer, Mr. Buss stated, "I don't give a fuck what you do," to which he also added "whatever, like I have a choice. Seriously I don't do this by choice." *Id*.; R49 at 14:21-22; D-App. at 116. In response to Mr. Buss' statement, Sgt. Buss asked whether that was a "yes," but again, Mr. Buss remained silent. R36 at 00:04:00, *et seq*.

At this point, Sgt. Wolfe construed Mr. Buss' silence as a refusal to submit to an implied consent test, and he cited Mr. Buss with Unlawfully Refusing to Submit to an Implied Consent Test, contrary to Wis. Stat. § 343.305(9)(a). R1.

STANDARD OF REVIEW

The issue presented in this appeal centers on whether Mr. Buss' consent to a blood test conformed with the rigors of Wis. Stat. § 343.305. The question of whether consent was given is a question of historical fact, and as such, this Court will uphold the determination of the lower court if the finding of consent—or lack thereof—is not contrary to the great weight and clear preponderance of the evidence. *State v. Phillips*, 218 Wis. 2d 180, 196-97, 577 N.W.2d 794 (1998).

ARGUMENT

I. HAVING ALREADY BEEN DEEMED TO HAVE GIVEN HIS IMPLIED CONSENT TO AN EVIDENTIARY CHEMICAL TEST OF HIS BLOOD, MR. BUSS' CONDUCT WAS CONSISTENT, BOTH EXPRESSLY AND IMPLIEDLY, WITH WIS. STAT. § 343.305, AND IT WAS ERROR FOR THE COURT BELOW TO CONCLUDE OTHERWISE.

A. Introduction.

An issue at the heart of Mr. Buss' appeal centers on whether a person's *conduct*—as opposed to his verbal statements—may be deemed sufficient "consent" to a blood draw under the auspices of the implied consent statute. Fortunately, this Court need not search for an answer to the question of whether it is permissible to construe *conduct* as consent to a search because the Wisconsin Supreme Court has already provided an answer in *State v. Artic*, 2010 WI 83, 327 Wis. 2d 392, 768 N.W.2d 430. In *Artic*, the court held that determining whether constitutionally sufficient consent to a search has been given, a trial court should consider the defendant's **words, gestures, or conduct**. *Id.* ¶ 30. Thus, no requirement exists that only a *verbal* response is acceptable to establish consent to search. Since the *Artic* court recognized that *gestures* and/or *conduct* can also establish consent, verbal expression is not the *sine qua non* of giving valid "consent in fact."

Beyond the question of whether conduct may establish consent to a search, there is a deeper and more fundamental problem which this Court should address and which the trial court recognized in its decision. More particularly, the trial court astutely observed:

> To me, when the law says you have deemed to have consented, and then the officer asks you under less than ideal circumstances, "Do you consent?" I mean that just—why would you ask him that? If he's already consented. To me, it would make more sense to say you've already consented when you got your license; you have the opportunity now to revoke that consent if you really want to, but if you do, here are some consequences. To me, that makes more sense, but you know I—I ran for judge, not legislature, so I'll let them do their job; I've got to do mine.

R49 at 19:6-15; D-App. at 121. As Mr. Buss discusses below, the court's insightful commentary on the tension inherent in asking a person for consent they are already deemed to have given makes the enforcement of the implied consent statute fraught

with irregularities and inconsistencies. *See* Section I.B.1., *infra*. For this reason, among others, Mr. Buss contends that under the circumstances of his case, the trial court erred when it concluded that his conduct was ambiguous since he was already deemed to have given consent to a blood test at the time he applied for and received his operating privilege. Wis. Stat. § 343.305(2) (2025-26). The only question which should have been addressed is *not* whether his consent was given, but rather, whether he ***revoked*** that consent.

B. The Law Relating to Implied Consent Testing Under Wis. Stat. § 343.305.

Under Wisconsin's Implied Consent Law, every person who operates a motor vehicle on a public highway within this state is presumed to have given their implied consent to providing a blood, breath, or urine sample for the purpose of determining the presence of alcohol and/or controlled substances when requested to do so by a law enforcement officer who has probable cause to believe the individual is operating a motor vehicle while impaired. Wis. Stat. § 343.305(2) (2025-26). Section 343.305(2) unequivocally provides that "[a]ny person who . . . drives or operates a motor vehicle upon the public highways of this state, . . . is **deemed to have given consent** to one or more tests of his or her breath, blood or urine, ..." *Id*. (emphasis added). Since consent has already been "deemed given," the real question is whether the individual who is the subject of the search has revoked that consent.

1. The Contractual Nature of the Bargain Between the Driver and the State.

The statutory "deeming of consent" is akin to a contract between the State of Wisconsin and those individuals who operate motor vehicles on state roads. The Wisconsin Supreme Court acknowledged the implied contractual relationship between the State and a driver when it observed in *State v. Crandall*, 133 Wis. 2d 251, 394 N.W.2d 905 (1986), that:

> [T]he accused intoxicated driver has no choice in respect to granting his consent. He has, by his application for a license, waived whatever right he may otherwise have had to refuse to submit to chemical testing. **It is assumed that, at the time a driver made application for his license, he was fully cognizant of his rights and was deemed to know that, in the event he was later arrested for drunken**

> **driving, he had consented, by his operator's application, to chemical testing under the circumstances envisaged by the statute**.

Crandall, 133 Wis. 2d at 257 (emphasis added), quoting *State v. Neitzel*, 95 Wis. 2d 191, 201, 289 N.W.2d 828 (1980); *see also*, *Scales v. State*, 64 Wis. 2d 485, 494, 219 N.W.2d 286 (1974); *County of Milwaukee v. Proegler*, 95 Wis. 2d 614, 623, 291 N.W.2d 608 (Ct. App. 1980). The *Crandall* court's characterization of the relationship between a driver and the state describes all of the elements of contract, namely promise, acceptance, and consideration. *See Runzheimer Int'l, Ltd. v. Friedlen*, 2015 WI 45, ¶ 20, 362 Wis. 2d 100, 862 N.W.2d 879; *Rosecky v. Schissel*, 2013 WI 66, ¶ 57, 349 Wis. 2d 84, 833 N.W.2d 634; *Goossen v. Estate of Standaert*, 189 Wis. 2d 237, 247, 525 N.W.2d 314 (Ct. App. 1994). The "promise" is the state's concession to the prospective vehicle operator that he or she may drive a motor vehicle on state roadways. The "acceptance" is the prospective driver's application for an operator's license while being "fully cognizant of his rights." Finally, the "consideration" is the driver's consent to an implied consent test. All the elements of contract are, *quod erat demonstrandum*, thus present.

In the same vein, the Wisconsin Supreme Court observed in *Scales* that the purpose of the implied consent statute "was to impose a condition on the right to obtain a license to drive on a Wisconsin highway. The condition requires that a licensed driver, by applying for and receiving a license, **consent** to submit to chemical tests for intoxication under statutorily determined circumstances"—again, all of the elements of contract are present. *Id*. at 494 (emphasis added). Clearly, since Mr. Buss received an operating privilege in the State of Wisconsin, his "consent to submit to chemical tests for intoxication" was already given as the consideration for that privilege under both the Law of Contract and in accordance with *Crandall* and *Scales*. *See also*, *State v. Reitter*, 227 Wis. 2d 213, 224, 595 N.W.2d 646 (1999) ("Wisconsin drivers are deemed to have given implied consent to chemical testing *as a condition of receiving the operating privilege*").

The implied-consent contract is so engrained within the statutory schema that there is even a subsection of the implied consent statute which provides that "[a] person who is unconscious or otherwise not capable of withdrawing consent is **presumed not to have withdrawn consent** under this subsection, ..." Wis. Stat. § 343.305(3)(b) (2025-26). While the aforementioned subsection was recently declared unconstitutional in *State v. Prado*, 2021 WI 64, 397 Wis. 2d 719, 960 N.W.2d 869, the *Prado* case is nevertheless instructive in the instant matter.

2. The Impact of *Prado* on the Facts of the Instant Case.

In *Prado*, the Wisconsin Supreme Court addressed whether the incapacitated driver provision set forth in § 343.305(3)(b) was constitutional. *Prado*, 2021 WI 64, ¶ 2. The court ultimately concluded that "[t]he provision's 'deemed' consent authorizes warrantless searches that do not fulfill any recognized exception to the warrant requirement and this the provision violates the Fourth Amendment's proscription of unreasonable searches." *Id*. ¶ 3.

From a factual perspective, the *Prado* court's holding was premised upon a circumstance in which a law enforcement officer sought to obtain a blood sample from an injured driver who had been involved in a motor vehicle accident. *Id*. ¶¶ 6-8. The driver of the vehicle, identified as the defendant Prado, had been transported to the hospital due to the severity of her injuries. When a law enforcement officer arrived at the hospital to obtain a blood sample from Prado, he found her intubated and unconscious. *Id*. ¶ 9. Despite Prado being unconscious, the officer read the ITAF to her and asked her to submit to a blood test. *Id*. ¶ 10. Obviously, Prado did not respond. *Id*. Based upon Prado's condition, the law enforcement officer instructed one of the attending nurses to obtain an evidentiary sample of Prado's blood under the incapacitated driver provision of the implied consent law. *Id*. A blood specimen was withdrawn from Prado, and subsequent testing revealed that Prado had a prohibited alcohol concentration. *Id*.

Prado moved the circuit court to suppress the blood test result, and the court agreed with Prado that "the incapacitated driver provision sets forth an unconstitutional *per se* exception to the warrant requirement in cases where a driver is unconscious." *Id*. ¶ 11. The circuit court also declined to apply the good faith exception to the warrant requirement as the State requested. *Id*.

The State thereafter appealed the circuit court's ruling. The court of appeals concurred with the circuit court that the incapacitated driver provision did not fit within any exception to the Fourth Amendment, but it reversed the circuit court's decision regarding the application of the good faith exception to the facts before it. *Id*. ¶ 13-15. Based upon this decision, both the State and Prado petitioned the supreme court for review. *Id*. ¶ 16.

The *Prado* court reached the same conclusions as the court of appeals, namely the incapacitated driver provision of the implied consent statute was unconstitutional and the good faith exception to the warrant requirement saved Prado's blood test result from suppression. *Id*. ¶¶ 70-71.

Several things are notable in the *Prado* decision which have relevance to the issue raised by Mr. Buss. First, the "deemed consent" problem the *Prado* court had with the language of the implied consent statute was limited solely to the facts before it, *i.e.*, when a subject is otherwise incapacitated or unconscious. *Id*. ¶¶ 44, 53-54. The *Prado* court observed that the inquiry before it was "fundamentally at odds with the concept of 'deemed' consent in the case of an incapacitated driver because **an unconscious person can exhibit no words, gestures, or conduct to manifest consent**." *Id*. ¶ 44 (emphasis added). This is a reflection of precisely how the circuit court, in issuing the ruling which instigated the *Prado* litigation, characterized and circumscribed its opinion: "[T]he incapacitated driver provision sets forth an unconstitutional *per se* exception to the warrant requirement **in cases where a driver is unconscious**." *Prado*, 2021 WI 64, ¶ 11 (emphasis added). Notably, the *Prado* court never swept a broader brush across the "deemed consent" canvass as it related to drivers *who were not unconscious*.

Prado did *not* hold that the contractual notion of consent, upon which the decisions in *Crandall*, *Neitzel*, *Scales*, *Proegler*, and *Reitter*, *et al*., are premised, is unconstitutional as it relates to circumstances involving *conscious* drivers. The notion that the implied consent statute creates a contract between the State and motor vehicle operators remains, in common parlance, "good law." The *Prado* court's finding that the seizure of a sample of an incapacitated person's blood is unconstitutional extends only to the "deemed consent" portion of § 343.305(3)(b) and does *not* abrogate the "deemed consent" policy expressed in § 343.305(2).

The foregoing point ties directly into the second reason the *Prado* decision is instructive in this case because the *Prado* court put its imprimatur of approval on the notion that consent to a blood draw is something which can be given "by words, gestures, or conduct" just as Mr. Buss described in his introduction. *Id*. ¶ 44, citing *Artic*, 2010 WI 83, ¶ 30. As Mr. Buss more fully contends below, he demonstrated his consent through all three vehicles by which consent may be established: words, gestures, and conduct. *See* Section I.C., *infra*.

C. Application of the Law to the Facts.

Adopting the *Artic* approach of examining a defendant's "words, gestures, or conduct" to the circumstances of Mr. Buss' case reveals that he gave Sgt. Wolfe constitutional consent to a blood test. Breaking the *Artic* test into its component parts, the following is revealed:

> **Words**: What words did Mr. Buss choose to express during his encounter with Sgt. Wolfe? Mr. Buss told the sergeant, "You give me a blood test." This statement, at face value, irrefutably demonstrates Mr. Buss' willingness to submit to a blood test. If Mr. Buss was unwilling to submit to a test, his statement to the deputy would have been markedly different. To further bolster evidence that he was consenting to the test, Mr. Buss also informed Sgt. Wolfe that he was not "do[ing] **this** by choice." What, then, is the "this" to which Mr. Buss was referring? Contextually speaking, the "this" to which Mr. Buss referred was his *agreement* (or consent) to submit to a blood test as requested.
>
> **Gestures**: With respect to this element of the *Artic* paradigm, it is the *absence* of certain gestures that is revelatory of Mr. Buss' consent to a test. In other words, Mr. Buss did *not* physically resist or otherwise obstruct Sgt. Wolfe from performing his duties. Mr. Buss did *not* physically refuse to go to the hospital. Mr. Buss *never* pulled away from the phlebotomist when his blood was being drawn. Every physical action taken by Mr. Buss demonstrated his willingness, consent, and compliance with his obligation to submit to testing under § 343.305.
>
> **Conduct**: Similar to both the words and gestures described above, the overall conduct of Mr. Buss demonstrated his willingness to provide a blood specimen for evidentiary testing under § 343.305. This "conduct" category is a catchall which overlaps with those categories examined above, encompassing both the words he spoke and his compliance with the deputy's (and phlebotomist's) directions. The only thing Mr. Buss would add to this calculus under the notion of "conduct" is that it was Mr. Buss himself who *initiated the request for a blood test*, rather than Sgt. Wolfe, thereby further demonstrating through his conduct that he wanted to provide a blood specimen for testing. Moreover, Mr. Buss never engaged in any dilatory conduct, such as making repeated requests to use the bathroom; requesting the advice of an attorney; requesting that the form be reread multiple times, asking "to make a phone call first," asking for time to "think about it," etc.

Mr. Buss maintains that the *Artic-Prado* paradigm of demonstrating consent is satisfied in this case on all three accounts, and it was error for the court below to conclude that there was any ambiguity inherent in his actions on the night of his arrest.

When examining the record in this case, there is one question which should act as a framework within which this Court should conduct its review, namely: Where are there any demonstrable words, gestures, or conduct which betray that Mr. Buss was unwilling to submit to the implied consent test to which he *already consented* at the time he obtained his operating privilege. Mr. Buss wants to emphasize this last point, that he *already gave his consent to a blood test* when he was granted a driver's license. The *Crandall* court acknowledged as much when it noted that "at the time [Mr. Buss] made [an] application for his license, he was fully cognizant of his rights and was deemed to know that, in the event he was later arrested for drunken driving, he had consented . . . to chemical testing under the circumstances envisaged by the statute." *Crandall*, 133 Wis. 2d at 257. With this point in mind, Mr. Buss' question regarding where the record reveals that he revoked that consent becomes acute, and frankly, it is cut from the same fabric that the circuit court found troubling when it queried "why would you ask [Mr. Buss to consent]? If he's already consented. To me, it would make more sense to say you've already consented when you got your license; you have the opportunity now to revoke that consent if you really want to, but if you do, here are some consequences. To me, that makes more sense." R49 at 19:6-15; D-App. at 121.

As the circuit court impliedly recognized, a conundrum arises from the holding in *Rydeski* because the *Rydeski* court held that a driver's conduct may be construed as a refusal to submit to an implied consent test, but if this is true, then so too must the reverse also be true. That is, the old saw about "what is sauce for the goose is sauce for the gander" ought to apply as equally to conduct which is demonstrative of an act of refusal as it does to conduct which is demonstrative of an act of consent. In other words, if the State in a particular case is going to argue that a subject's dilatory behavior in repeatedly asking to use the bathroom[2] prior to testing can be deemed a refusal to submit to a test, then why should not a person's stating "you give me a blood test" be deemed consent because it represents the "flip side" of the same coin? If this Court imposes the same arbitrary, non-statutorily sanctioned, non-common law approved, requirement on a suspect as Sgt. Wolfe did in this matter—*i.e.*, by only accepting a verbal "yes or no" answer—then it will be creating an artificial construct around a process for which no such construct exists in the law. If this Court is only going to accept a verbal "yes or a no" response as Sgt. Wolfe did, will an accused's response of "sure" constitute a refusal to submit to testing because it is not of the "yes" ilk? What if the accused replies "no problem?"

[2] *Rydeski*, 214 Wis. 2d at 104-05.

Alternatively, what if the subject indicates that a blood test is "okay" with him? It is Mr. Buss' position that examples such as these should be examined on a case-by-case basis with an eye toward the notion that if the State is permitted to argue that a person's words, gestures, and actions can be assessed to determine whether the person has *refused* a test, then an accused ought to be able to argue that his words, gestures, and actions demonstrated his *consent* to testing. Thus, it was error for the court below to find that any ambiguity existed in Mr. Buss' actions because (1) he already gave his consent when he obtained a license and (2) he did nothing to expressly revoke that consent.

If the implied consent statute truly represents a contract between the State and those who operate motor vehicles on its highways, then the law requires that the rescission of that contract be *unequivocal*. *Potter v. Taggart*, 54 Wis. 395, 11 N.W. 678 (1882). As the *Potter* court noted, if a person is going to rescind a contract into which they have previously entered, the person "must determine his election to rescind by **express words to that effect, or by some *unequivocal* act**, ..." *Id*. at 400 (internal quotation marks omitted; emphasis added). Employing *Potter* as a yardstick by which to measure Mr. Buss' conduct, one may ask: Did Mr. Buss "expressly" rescind his deemed consent? No, Mr. Buss did the opposite by requesting a blood test himself. Did Mr. Buss engage in "some unequivocal act" to revoke his consent? No, Mr. Buss accompanied the deputy to the hospital without any physical resistance and similarly submitted to the blood draw without attempting to pull away or otherwise interfere with it or delay it. Applying the Law of Contract to the circumstances of this case yields the same answer as the analysis described above, to wit: Mr. Buss did not rescind or revoke the consent he gave to testing at the time he applied for his operating privilege.

Village of Elkhart Lake v. Borzyskowski, 123 Wis. 2d 185, 366 N.W.2d 506 (Ct. App. 1985), is also instructive on the issue of whether Mr. Buss (1) withdrew the implied consent he was already deemed to have given to a chemical test of his blood and (2) whether his expressed verbal consent to such a test was sufficient to establish that he was being compliant with § 343.305.

Borzyskowski is edifying precisely because it provides a stellar example of conduct which is *not* compliant with the "deemed consent" a driver has already given under the rubric of § 343.305. If a side-by-side comparison of the facts of

Borzyskowski is undertaken against Mr. Buss' conduct, it is no great leap to conclude that Mr. Buss was being compliant with the law.

Borzyskowski involved a situation in which the defendant *actively engaged* in behavior which demonstrated an unwillingness to submit to testing. More specifically, Borzyskowski *physically failed to comply* with the procedures necessary to obtain a valid breath sample and did so *repeatedly*. *Borzyskowski*, 123 Wis. 2d at 190-91. This was a *deliberate* and *intended* interference with the law enforcement agency's attempt to obtain a breath sample. In Mr. Buss' case, the undisputed facts reveal that he engaged in *no* such deliberate interference with the deputy's effort to obtain a blood specimen from him as did Borzyskowski. The following questions—and their answers—are enlightening on this point:

> Prior to being asked to submit to an implied consent test, did Mr. Buss inform the deputy: "Hey, I'm *not* taking any blood test." **NO**.
>
> Did Mr. Buss engage in any physically resistive behavior? **NO**.
>
> Did Mr. Buss refuse to be taken to the hospital? **NO**.
>
> Did Mr. Buss later expressly revoke his consent prior to the blood draw? **NO**.
>
> Did Mr. Buss attempt to pull his arm away from the phlebotomist when the blood draw was attempted? **NO**.
>
> Was there any other conduct on Mr. Buss' part which contradicted the verbal consent to testing he gave at roadside? **NO**.

Quite to the contrary of Borzyskowski's resistive behavior, Mr. Buss engaged in the polar opposite of deliberate interference because he expressly informed Sgt. Wolfe, "You give me a blood test." Clearly, this expressed willingness to submit to a blood test is a far cry from Borzyskowski's deliberate physical effort to avoid providing a breath sample because—again unlike Borzyskowski who had to be *asked* to submit to an implied consent test—the genesis of Mr. Buss' consent originated with *himself*, *i.e.*, Mr. Buss was the first person in the encounter with Sgt. Wolfe to suggest that he provide a blood sample for testing. There was no need to "wait around" until Sgt. Wolfe finally had to ask for consent, rather, the consent was verbally initiated and voluntarily offered by Mr. Buss from the first instance. Given

this uncontested fact, it was error for the court below to conclude that Mr. Buss was being ambiguous, and this Court should therefore reverse the circuit court's decision.

CONCLUSION

The court below erred when it found that Mr. Buss' conduct was ambiguous. Mr. Buss was already deemed to have given his consent to a blood test under *Crandall* and he did nothing—as did Rydeski and Borzyskowski—to demonstrate that he was revoking that consent. This Court should reverse the decision below and remand Mr. Buss' case with direction to enter an order finding that his conduct was not tantamount to a refusal of an implied consent test.

Dated this 2nd day of June, 2025.

Respectfully submitted,

MELOWSKI & SINGH, LLC

Electronically signed by:
Dennis M. Melowski
State Bar No. 1021187
Attorneys for Jeffrey Lee Buss

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 5,758 words.

I also certify that filed as a separate document is an appendix that complies with Wis. Stat. § 809.19(2)(a).

Finally, I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 2nd day of June, 2025.

Respectfully submitted,

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