**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

December 3, 1997

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**


## NOTICE

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**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.**


**No. 97-0615**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SCOTT L. ZIMMERMANN,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed.*

BROWN, J. Scott L. Zimmermann appeals an adverse result of a refusal hearing pursuant to § 343.305(9)(a)5, STATS. He argues that before the trial court may find a refusal to take a chemical test to have been unreasonable, it must be satisfied that the refusal was a "knowing" withdrawal of his implied consent. We conclude that this issue has previously been addressed and answered by the supreme court in ***Village of Oregon v. Bryant***, 188 Wis.2d 680, 524

N.W.2d 635 (1994), and this court in ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 542 N.W.2d 196 (Ct. App. 1995). Pursuant to the holdings in those cases, we affirm the trial court's order.

Zimmermann was stopped under suspicion of intoxicated driving. The officer conducted field sobriety tests and asked Zimmermann to submit to a preliminary breath test. *See* § 343.303, STATS. Zimmermann agreed and tested above the statutory limit at 0.21%. Zimmermann was then arrested. At the station, Zimmermann was read the Informing the Accused form; when asked to submit to a breath test, he refused. He told the officer that because he had already given a breath test, he did not understand why he had to give another. Ultimately, the officer processed Zimmermann as a refusal.

Zimmermann claims that the statutes and case law make clear that a refusal must be a knowing and conscious decision. Zimmermann apparently contends that such a decision cannot be made until the accused is clear enough about the law that he or she can make a decisive statement about whether to submit to the test. He contends that because the legislature acknowledged in § 343.305(3)(b), STATS., that there may be circumstances where an accused is incapable of withdrawing consent, this supports his view that the consent must be an assertive, confident choice. He further cites ***State v. Hagaman***, 133 Wis.2d 381, 395 N.W.2d 617 (Ct. App. 1986), holding that a severe mental disorder may prevent a person from having the capacity to consent, as support for his contention.

But what he is really arguing is that if an accused is subjectively confused about implied consent, the confusion is a valid ground for refusal. That is not the law. ***Bryant*** provides that all the information the accused needs is

adequately provided by the Informing the Accused form which is read by the officer. *See* ***Bryant***, 188 Wis.2d at 693-94, 524 N.W.2d at 640. Any confusion arising from the reading of the form is of the accused's own making. ***Quelle*** elaborated on ***Bryant*** and held that subjective confusion is not grounds for refusal. In fact, as pointed out by the State, the accused in ***Quelle*** contended, just as Zimmermann does, that she was confused by the fact that she had already taken a preliminary breath test, and if the law is that the accused submit to one test, she could not understand why she had to take a test in addition to the preliminary breath test she took beforehand. We held that the subjective confusion was her own doing. We said:

> As we have repeatedly explained, law enforcement's duty under the implied consent law is to accurately deliver information to the accused.… Her state of confusion stems from an inability to digest and interpret the words and phrases of the form. Under *Bryant*, however, this combination of words and phrases is not confusing. The officer's correct explanation of the law, therefore, cannot be grounds for suppressing the test results.
>
> ….
>
> Quelle's argument fails because her confusion arose out of an inability to interpret the form, not improper conduct by [the] officer.

***Quelle,*** 198 Wis.2d at 283-84, 542 N.W.2d at 201 (citation omitted).

What we said in ***Quelle*** applies equally to Zimmermann's argument. For the same reasons that we rejected Quelle's assertion, we reject Zimmermann's. Zimmermann was read the form. The form has been held to be an adequate and unconfusing explanation of the law by our supreme court. Based on a proper reading of the form, consent was implied. Zimmermann's duty was to take the test. His choice not to do so was unreasonable under the law. Any remaining confusion on Zimmermann's part is no excuse.

Zimmermann's reliance on § 343.305(3)(b), STATS., and ***Hagaman*** in an attempt to have us reach a different result than in ***Quelle*** is misplaced. The legislature made a political choice to except from the strictures of the statute those people who, by reason of mental disability, are incapable of giving or refusing consent. ***Hagaman*** merely reflects this choice. There is nothing in the record showing that Zimmermann had a mental disability on the date he was stopped by the officer. Zimmermann tries to escape the obvious intent of the legislature by arguing that it was not the lack of "capacity" that intrigued the legislature, but the lack of being able to make a knowing and conscious decision that the legislature was concerned about. We disagree. The statute speaks to those who are "not capable" of consenting. *See* § 343.305(3)(b). The ***Hagaman*** court spoke to that as well. Zimmermann's attempt to circumvent our holding in ***Quelle*** fails.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.