COURT OF APPEALS
DECISION
DATED AND RELEASED

March 6, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3207

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROGER F. LEWIS,

Defendant-Appellant.

APPEAL from an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed*.

SNYDER, J. Roger F. Lewis appeals from an order of revocation for refusing to submit to a chemical test of his breath. Lewis contends that § 343.305(4)(c), STATS., requires that he be specifically informed at the time the test is requested that he was "driving or operating a motor vehicle." Because he was not so informed, he complains that his statutory rights were violated and the revocation must be vacated. We disagree and affirm the revocation order.

The facts are not disputed. On July 21, 1995, Lewis was arrested for drunk driving in the Village of Kohler. He was transported to the Sheboygan County Sheriff's Department where the Informing the Accused form was read to him. The Informing the Accused form did not include a specific statement that Lewis was "driving or operating a motor vehicle." He refused to submit to a chemical test of his breath and requested a hearing on the reasonableness of his refusal. The trial court found his refusal unreasonable and ordered his license revoked. Lewis appeals from that order.

Whether Lewis was properly advised of his rights under § 343.305(4), STATS., concerns the construction and application of a statute. The application of a statute to undisputed facts is a question of law that we review de novo. ***Gonzalez v. Teskey***, 160 Wis.2d 1, 7-8, 465 N.W.2d 525, 528 (Ct. App. 1990). In construing § 343.305(4), we are to give effect to the intent of the legislature. ***State v. Wilke***, 152 Wis.2d 243, 247, 448 N.W.2d 13, 14 (Ct. App. 1989). We ascertain legislative intent by first looking to the language of the statute itself and giving the language its ordinary and accepted meaning. ***Id.*** at 247-48, 448 N.W.2d at 14. A person who is requested to submit to a chemical test under the implied consent law must be informed of the information contained in § 343.305(4). ***Wilke***, 152 Wis.2d at 251, 448 N.W.2d at 16.

Lewis contends that he was wrongly denied specific information required by the implied consent law under § 343.305(4)(c), STATS., which reads:

> **(4)** INFORMATION. At the time a chemical test specimen is requested under sub.(3)(a) or (am), the person shall be orally informed by the law enforcement officer that:

....

> (c) If one or more tests are taken and the results of any test indicate that the person has a prohibited alcohol concentration *and was driving or operating a motor vehicle*, the person will be subject to penalties, the person's operating privilege will be suspended under this section and a motor vehicle owned by the person may be immobilized, seized and forfeited or equipped with an ignition interlock device if the person has 2 or more prior convictions, suspensions or revocations within a 10-year period that would be counted under s. 343.307(1) .... [Emphasis added.]

Because the Informing the Accused form read to Lewis failed to include the phrase "driving or operating a motor vehicle," he contends that the form and procedure are fatally defective. He argues that ***Village of Elm Grove v. Landowski,*** 181 Wis.2d 137, 143, 510 N.W.2d 752, 754-55 (Ct. App. 1993), mandates the inclusion of this language. In that case we said, "[T]he safest and surest method [of compliance with the requirements of § 343.305(4), STATS.,] is for law enforcement officers to advise OWI suspects of *all* warnings, whether or not they apply to the particular suspect, and to do so in the very words of the implied consent law. This suggestion is nothing more than what the statute requires on its face."[1] ***Landowski***, 181 Wis.2d at 143, 510 N.W.2d at 754-55. Lewis' argument is that because the words "driving or operating a motor

[1] This ***Landowski*** language was "suggested in dicta" in the earlier case of ***State v. Geraldson,*** 176 Wis.2d 487, 496-97, 500 N.W.2d 415, 419 (Ct. App. 1993), where we held that the officer's failure to advise a commercial operator of the commercial warnings was fatal even where the operator was not operating a commercial vehicle at the time of the arrest. ***Id.*** at 494-95, 500 N.W.2d at 418.

vehicle" are present in § 343.305(4)(c), the words must be included in the Informing the Accused form.

The State submits that the ***Landowski*** language is dicta and that ***State v. Piskula,*** 168 Wis.2d 135, 140-41, 483 N.W.2d 250, 252 (Ct. App. 1992), holding that warnings not in full compliance with the statute may still constitute substantial compliance, is the controlling law. Lewis responds that the ***Landowski*** language is not dicta and requires that the language in § 343.305(4)(c), STATS., should be interpreted as mandatory.[2]

We do not see the issue presented as one that turns upon whether the subject language is mandated by ***Landowski*** or is a substantial compliance question under ***Piskula***. We are not bound by the issues as framed by the parties. *See* ***Saenz v. Murphy,*** 162 Wis.2d 54, 57 n.2, 469 N.W.2d 611, 612 (1991), *overruled on other grounds*, 167 Wis.2d 1, 481 N.W.2d 476 (1992).

Our reading of § 343.305(4), STATS., satisfies us that the language in subsec. (c), "driving or operating a motor vehicle," relates to a statutory prerequisite to requesting a chemical test, rather than to advice concerning the consequences of taking or refusing the test. Lewis' analysis focuses on just one of the subsections of § 343.305(4). We are satisfied that subsection (a) is relevant to a proper analysis of this question and must be read in conjunction with subsection (c).

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[2] In ***Landowski***, we held that the officer's giving of the commercial license warnings to a person who is not commercially licensed is not fatal to the revocation order. ***Village of Elm Grove v. Landowski***, 181 Wis.2d 137, 144, 510 N.W.2d 752, 755 (Ct. App. 1993).

Section 343.305(4)(a), STATS., requires that a test subject be informed that "[h]e or she is deemed to have consented to tests under sub. (2)." Section 343.305(2) provides in relevant part:

> Any 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,* for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol .... [Emphasis added.]

Both subsections (2) and (4)(a) of § 343.305, STATS., are subsumed in paragraph one of the Informing the Accused form read to Lewis:

> You are deemed under Wisconsin's Implied Consent Law to have consented to chemical testing of your breath, blood or urine at this Law Enforcement Agency's expense. The purpose of testing is to determine the presence or quantity of alcohol or other drugs in your blood or breath.

Applying the implied consent law logically, we conclude that the specific language Lewis seeks to have included in the Informing the Accused form is not necessary, and further, that even if we were to conclude that it was mandatory, the substance of the language is covered in paragraph one of the form. Repeating the words "driving or operating a motor vehicle" later in the Informing the Accused form is redundant, meaningless and unnecessary.

We are mindful of Lewis' contention that because the legislature includes the "driving or operating a motor vehicle" language in § 343.305(4)(c), STATS., it must have intended that those words be read to the test subject. However, a review of recent changes to this ever-evolving law undermines this argument and supports our analysis.

Prior to 1993, § 343.305(4)(c), STATS., included the chemical test information for both (1) driving or operating *motor vehicles* and (2) driving or operating *commercial motor vehicles*. The penalties differed and the phrase "driving or operating" merely preceded the classification of whether the motor vehicle was commercial so that the correct advice would be provided to the test subject.

In 1993, § 343.305, STATS., subsec. (4)(c) was amended to apply only to driving or operating a motor vehicle, and subsec. (4m) was created to apply to driving or operating a commercial motor vehicle.[3] We are satisfied that the descriptive words "driving or operating" had been used to differentiate between the two types of motor vehicle licenses at issue under subsec. (4)(c). However, after the 1993 change, the language was superfluous to the purpose of that subsection.

In sum, the implied consent law is predicated on the individual's driving or operating a motor vehicle. Lewis was informed by paragraph one of the Informing the Accused form that he was deemed to have consented to the

[3] See 1993 WIS. ACT 315.

chemical tests under the implied consent law. That statement incorporates and satisfies the statutory prerequisite of § 343.305(4)(c), STATS., that Lewis was "driving or operating a motor vehicle." Because the Informing the Accused form read to Lewis complied with the implied consent law requirements in this case, we affirm.

By the Court.—Order affirmed.

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