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REPORT CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT AND COURT OF APPEALS

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2016 Court Opinions Report Summary -

Minnesota Statutes, section 3C.04, subdivision 3, requires the Office of the Revisor of Statutes to biennially report to the Legislature "any statutory changes recommended or discussed or statutory deficiencies noted in any opinion of the Supreme Court or the Court of Appeals of Minnesota." This report highlights the Minnesota Supreme Court and Minnesota Court of Appeals opinions identifying ambiguous, vague, preempted, constitutionally suspect, or otherwise deficient statutes.

The 2016 court opinions report includes 18 cases — 6 from the Minnesota Supreme Court and 12 from the Minnesota Court of Appeals.

The report provides a case comment related to each deficiency noted by the Minnesota Supreme Court or the Minnesota Court of Appeals. Each case comment includes the text of the applicable deficient statutory provision, a statement of the deficiency, a brief summary of the facts of the case, and a brief discussion of the court's analysis of the deficiency. Where possible, the words or phrase identified as deficient have been underlined.

Statute Citation	Issue	Court Opinion
13.43, subdivision 1	What qualifies as personnel data?	*KSTP-TV v. Metropolitan Council*, 884 N.W.2d 342 (Minn. 2016) (A14-1957)
13.43; 13.46	If data can be classified as both personnel data and welfare data, is that data public or private?	*S.F. v. Clay County*, 2014 WL 6863230 (Minn. App. 2014) (A14-0494)
65A.12, subdivision 1	Which party to an insurance policy is required to appoint a qualified appraiser?	*Bjorklund Companies, LLC, v. Auto-Owners Insurance*, 2015 WL 303717 (Minn. App. 2015) (A14-1175)
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65B.49, subdivision 3a, clause (5)	What does coverage available mean in reference to excess insurance protection?	*Sleiter v. American Family Mutual Insurance Company,* 868 N.W.2d 21 (Minn. 2015) (A13-1596)
97A.015, subdivision 36; 97A.401, subdivision 3	What does it mean to possess a wild animal?	*In the Matter of Minnesota Department of Natural Resources Special Permit No. 16868*, 867 N.W.2d 522 (Minn. App. 2015) (A14-1741)
168.10, subdivision 1e	What does it mean to screen a vehicle from public view?	*In re Krenik*, 884 N.W.2d 913 (Minn. App. 2016) (A15-1566)
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169A.20, subdivision 2	Constitutionality of warrantless chemical tests for purposes of DWI law	*State v. Thompson*, A15-0076 (Minn. 2016), *State v. Trahan*, A13-0931 (Minn. 2016)
245C.15, subdivision 3, paragraph (a); 245C.15, subdivision 3, paragraph (e)	When does a relator's ten-year disqualification period begin?	*Gustafson v. Commissioner of Human Services*, 2016 WL 3961945 (Minn. App. 2016) (A15-1943)
268.085, subdivision 1, clause (7)	Meaning of good cause	*Fay v. Dep't of Emp't & Econ. Dev.*, 860 N.W.2d 385 (Minn. App. 2015) (A14-1487)
290.01, subdivision 7, paragraph (b)	In determining taxpayer residency, can the commissioner of revenue aggregate all the days the taxpayer spent in Minnesota during the tax year?	*Marks v. Commissioner of Revenue,* 875 N.W.2d 321 (Minn. 2015) (A15-1145)
513.33	Is a promise to forgive a debt a "credit agreement?"	*NJK Holding Corp. v. Araz Grp., Inc.*, 878 N.W.2d 515 (Minn. App. 2016), *review denied* (July 19, 2016) (A15-1628)
515B.4-113, paragraph (b), clause (2) and 515B.4-116, paragraph (b)	Meaning of engineering standards Meaning of costs of litigation	*650 North Main Association v. Frauenshuh, Inc.*, 885 N.W.2d 478 (Minn. App. 2016) (A15-1547)
588.20, subdivision 2; 609.02, subdivision 15	Whether a violation of a term of probation is a violation of a "mandate of a court"?	*State v. Jones*, 869 N.W.2d 24 (Minn. 2015) (A14-1399)
609.106, subdivision 2; 244.05, subdivisions 4 and 5	Retroactive applicability of case law regarding constitutionality of juvenile sentence of life imprisonment without the possibility of release	*Jackson v. State*, 883 N.W.2d 272 (Minn. 2016) (A14-2060)
609.352, subdivision 2; 609.352, subdivision 3, paragraph (a)	Constitutionality of prohibition on mistake of age defense	*State v. Moser*, 884 N.W.2d 890 (Minn. App. 2016) (A15-2017)
617.247, subdivision 9	Meaning of "has previously been convicted."	*State v. Noggle,* 2015 WL 5825102 (Minn. App. 2015) (A15-0104)

Minnesota Statutes, section 13.43, subdivision 1.

Subject: Data practices; personnel data

Court Opinion: *KSTP-TV v. Metropolitan Council*, 884 N.W.2d 342 (Minn. 2016) (A14-1957).

Applicable text of section 13.43, subdivision 1:

"[P]ersonnel data" means government data on individuals maintained because the individual is or was an employee of or an applicant for employment by, performs services on a voluntary basis for, or acts as an independent contractor with a government entity.

Statutory Issue:

The interpretation of what qualifies as personnel data is at issue.

Facts:

The data at issue in this court opinion were video recordings of two separate incidents on Metro Transit buses. In both incidents, each Metro Transit bus digitally recorded the events that occurred in and around the buses. The recordings were stored on hard drives located on the two buses. The hard drives are equipped to hold 330 hours of video, at which point the digital recording system begins to record over the oldest data first. Metro Transit transferred the video recordings of the incidents to DVDs. If Metro Transit had not transferred the data, the data would have been deleted automatically.

KSTP requested copies of the video recordings depicting the events. The requests were made after the 330-hour recording cycle had expired. Metro Transit denied the requests. KSTP filed a data practices complaint with the Office of Administrative Hearings. The administrative law judge held that the data were public. The court of appeals affirmed and an appeal followed.

Discussion:

The court first analyzed the issue as to what data qualifies as personnel data under Minnesota Statutes, section 13.43, subdivision 1. Specifically, the court addressed the question as to whether the personnel data exception applies when the data is used for multiple purposes, one of which is personnel purposes. If the data at issue qualified as personnel data, then the data would be private data and could only be released pursuant to a court order. See Minnesota Statutes, section 13.43, subdivision 4. If the data did not qualify for the personnel data exception, then the data would be available to KSTP.

KSTP argued that "if there are multiple reasons for a government entity to 'maintain the data,' some of which are unrelated to personnel matters, the data is not 'maintained because' the individual is an employee of the government entity" and would therefore not qualify as personnel data. The Metropolitan Council argued that it does not matter if the video recordings were used for multiple reasons, as long as they were maintained to evaluate employee conduct thereby qualifying the data as personnel data. The court noted that in the context of determining what constitutes personnel data, "it is unclear… whether the government entity must maintain the data solely for a personnel purpose or whether the personnel purpose can be just one justification among many."

The court favored KSTP's position, as the Metropolitan Council's position would allow government entities to shield data from public view simply by establishing that one of the reasons for preserving the data is that "the individual is or was an employee of .... a government entity."

In order to further resolve the dispute, the court went on to analyze at what point in time data receives its data classification. Is the data classified at the time of its creation or at the time of the request to access the data? The court concluded that, since the word "maintained" was used in the personnel data definition, the exception for personnel data "focuse[d] on the existing state of the data – that is, the form of the data at the time a request to access it is made." In addition, the court cited Minnesota Statutes, section 13.03, subdivision 9, which states that "unless otherwise expressly provided by a particular statute, the classification of data is determined by the law applicable to the data at the time a request for access to the data is made, regardless of the data's classification at the time it was collected, created, or received." Therefore, the court concluded that KSTP was not entitled to access the data since it was classified as private data at the time of the request.

The court did not suggest a practical remedy to the deficiency noted in the court opinion. The court clarified that when a government entity maintains data for multiple reasons, the data can only be classified as either public or private, but not both. The court further clarified that the classification of data is determined at the time the request for the data is made. The legislature may want to consider clarifying further what constitutes personnel data under Minnesota Statutes, section 13.43, subdivision 1.

Minnesota Statutes, sections 13.43 and 13.46.

Subject: Data practices; personnel data and welfare data

Court opinion: *S.F. v. Clay Co.*, 2014 WL 6863230 (Minn. App. 2014) (A14-0494).

Applicable text of sections 13.43, subdivision 2:

[T]he following personnel data on current and former employees, volunteers, and independent contractors of a government entity is public...

(4) the existence and status of any complaints or charges against the employee, regardless of whether the complaint or charge resulted in a disciplinary action;
(5) the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify confidential sources who are employees of the public body..."

Applicable text of section 13.46, subdivision 2:

Data on individuals collected, maintained, used, or disseminated by the welfare system are private data on individuals, and shall not be disclosed ..."

Statutory issue:

If data can be classified as both personnel data and welfare data, is that data public or private?

Facts:

S.F. was working for respondent Clay County Social Services when she learned that she was pregnant. During an obstetrics appointment in North Dakota, S.F. disclosed to a nurse that she "had used marijuana daily but she ceased using it once she learned that she was pregnant." The nurse was required by North Dakota law to disclose maternal prenatal drug use and filed a report with Cass County, North Dakota. Cass County forwarded the report to Clay County, Minnesota, where S.F. lived.

The Clay County receptionist recognized the S.F.'s name on the report and sent the report to the child-protection unit supervisor, who discussed the report with the director of social services. Because Clay County had a conflict of interest, the supervisor and director sent the report to Otter Tail County for investigation. Otter Tail County determined that no investigation was required, but recommended that Clay County do a child-welfare assessment. The supervisor sent the report to Becker County to complete the assessment.

The director of social services in Clay County also discussed the report and its consequences for S.F.'s continued employment with S.F.'s immediate supervisor, as well as several other county employees in human resources and the county attorney's office.

A few months later, S.F. was terminated from her position after she failed to complete a required check-in. During a deposition, the director stated that the fact that S.F. had "[engaged] in a criminal activity on

a daily basis" by using marijuana was "absolutely the main factor in her termination." The director had learned this information from the initial report.

S.F. filed a grievance with her union, "alleging that she was terminated because of her pregnancy." The county again noted that although she was an at-will employee and no cause was required, S.F.'s dismissal was due to the report of her marijuana use.

S.F. sued the county, alleging violations of the Minnesota Government Data Practices Act (MGDPA) and the Minnesota Health Records Act (MHRA). Both parties moved for summary judgment, and the district court granted summary judgment to the county, reasoning that because the data was classified as both "welfare data" and "private personnel data" under the MGDPA, reliance on the data in terminating S.F.'s employment was permissible. The court also noted that although the report "was a medical record for purposes of the MHRA," the release of the report to the county was permitted because of the mandated reporting requirement. S.F. appealed the grant of summary judgment.

Discussion:

The court first addressed S.F's arguments related to the MGDPA, noting that "the purpose of the MGDPA is to balance the rights of individuals (data subjects) to protect personal information from indiscriminate disclosure with the right of the public to know what the government is doing." Certain data on individuals are classified differently depending on the type of data, and this case involves the interaction between "personnel data" and "welfare data."

Personnel data is defined in section 13.43 as "government data on individuals maintained because the individual is or was an employee of... a government entity." Certain types of personnel data are public, including salary, benefits, and disciplinary actions. Welfare data is governed by section 13.46, which states that "[d]ata on individuals collected, maintained, used, or disseminated by the welfare system are private data on individuals, and shall not be disclosed" to the public, with limited exceptions. One exception is that welfare data can be exchanged between "personnel of the welfare system working in the same program."

The court noted that the ambiguity in this case arose from the fact that although the report on S.F's marijuana use was welfare data and would ordinarily not have been available to S.F.'s employer, in this case S.F's employer was the county, which gained access to the report through the normal course of its business. And, although the report did not concern S.F.'s employment, "the county collected, maintained, and used the report because S.F. was a government employee," therefore making the report personnel data in addition to welfare data.

The court addressed the problematic implications of the county's argument – namely, that under the county's theory, "any information generated anywhere about anything concerning a government employee, so long as it comes to the attention of the government, would be personnel data" and potentially subject to public release.

Because the statutes were not clear which concern should take precedence – S.F's right to privacy in her obstetric data or the public's right to know what the government is doing – the court found that the statutes were ambiguous.

In order to resolve this ambiguity, the court turned to other sections of the MGDPA, "which emphasize the private nature of certain data." For example, section 13.05 restricts the use and dissemination of private data on individuals, only allowing such use and dissemination when necessary to administer and manage legislatively mandated programs. The court also looked to the Minnesota law on mandated reporters, and noted that the purpose of the report "is to ensure that an unborn child is not harmed and that a parent is assessed and counseled to protect the child" – not to "assist an employer in making employment decisions." Therefore, the court reversed the district court and remanded for further proceedings.

The court also briefly addressed S.F's arguments related to the MHRA. The parties agreed that the report was a health record subject to the MHRA. The court referenced a 1997 Supreme Court case, *Bol v. Cole*, for the principle that "the release of health records are governed by strict and narrow principles." Because the MHRA does not indicate that an individual's health record may be released to an employer without the individual's consent, the court also reversed the district court on this issue and remanded for further proceedings.

The court did not suggest a remedy for this ambiguity, but the court opinion strongly indicated that health records are considered private and should not be used by an employer to make employment decisions. However, the court did not provide specific guidance for an employer that happens to acquire an employee's health record through the regular course of its business, and it is unclear what practical steps an employer in this situation should take. The legislature may want to consider clarifying this ambiguity in statute.

Minnesota Statutes, section 65A.12, subdivision 1.

Subject: Insurance; waiver of right to appraisal

Court Opinion: *Bjorklund Companies, LLC v. Auto-Owners Insurance*, 2015 WL 303717 (Minn. App. 2015), (A14-1175); *review denied* (April 14, 2015).

Applicable text of section 65A.12, subdivision 1:

Any person who shall not, within 20 days after written request, appoint a qualified appraiser, as provided in the policy, shall at the election of the other party be deemed to have waived the right to appraisal, and, if it be the insurer, shall be liable to suit.

Statutory Issue:

The statute does not indicate which party to an insurance policy is required to appoint the qualified appraiser.

Facts:

Bjorklund Companies, LLC contracted with Auto-Owners Insurance Company for an insurance policy to cover Bjorklund's two commercial buildings. Wind storms damaged Bjorklund's buildings. Bjorklund's contractor inspected the property and estimated that the storms caused $636,289.92 in damage to the two buildings. Engineers for Auto-Owners subsequently inspected Bjorklund's property and concluded that a majority of the damage predated the storms. Auto-Owners sent Bjorklund a coverage position letter, confirming the second inspection evaluation and agreed to reimburse Bjorklund $15,328.78 for damages.

Bjorklund then sent a letter to Auto-Owners indicating Bjorklund wanted an appraisal. Auto-Owners responded indicating, among other issues, that to proceed with appraisal Bjorklund must send Auto-Owners the contact information for Bjorklund's appraiser. Neither party moved forward with the appraisal process at that time.

Auto-Owners issued Bjorklund a check for the lesser amount. Bjorklund sued claiming that Auto-Owners breached the terms of the policy in part by declining to enter into the appraisal process. Bjorklund moved to compel Auto-Owners to participate in the appraisal, or to determine unpaid damages. Auto-Owners also moved to compel an appraisal and stay the action pending appraisal, or dismiss the action altogether. The court granted Auto-Owners request to compel an appraisal. An appraisal panel awarded Bjorklund an additional $10,016.50. Ultimately, the district court confirmed the appraisal award, granted Auto-Owners' motion for summary judgment and a protective order, and denied all of Bjorklund's motions. Bjorklund appealed the decision.

Discussion:

The court noted at the outset that a party can waive its right to an appraisal under Minnesota Statutes, section 65A.12, subdivision 1. However, the first issue before the court was whether Auto-Owners waived its right to an appraisal. The court confirmed that section 65A.12, subdivision 1, is silent as to which party must appoint the qualified appraiser – the party *receiving* the written request or the party *sending* the written request. The court concluded that either interpretation was reasonable and that section 65A.12, subdivision 1, is ambiguous.

The court did not suggest a practical remedy to the deficiency noted in the court opinion. Rather, the court decided not to resolve the ambiguity because there was no indication, even assuming Auto-Owners was the party required to appoint the qualified appraiser, that Bjorklund elected to waive Auto-Owners' right to appraisal. Section 65A.12, subdivision 1, provides that the right to an appraisal is waived "at the election of the other party," and that an election for waiver requires an affirmative act. Bjorklund did nothing to elect waiver, and in fact pursued an appraisal after sending the letter indicating it wanted an appraisal. The court held that, regardless of which party must appoint the qualified appraiser, under the plain meaning of section 65A.12, subdivision 1, Bjorklund did not elect to waive Auto-Owners' right to an appraisal. The court also rejected Bjorklund's arguments that the appraisal award should be vacated.

The legislature may want to consider clarifying which party is responsible for appointing a qualified appraiser under section 65A.12, subdivision 1.

Minnesota Statutes, section 65B.43, subdivisions 19.

***Subject**:* No-Fault Automobile Insurance Act; underinsured motorist coverage

Court Opinion: *Hanbury v. American Family Mutual Insurance Company*, 865 N.W.2d 83 (Minn. App. 2015), (A14-1746); *review denied* (Aug. 25, 2015).

Applicable text of section 65B.43, subdivision 19:

"Underinsured motorist coverage" means coverage for the protection of persons insured under that coverage who are legally entitled to recover damages for bodily injury from owners or operators of underinsured motor vehicles.

***Statutory Issue**:*

Whether the No-Fault Automobile Insurance Act only provides underinsured motorist coverage for an individual physically injured in a car accident.

Facts:

Hanbury's mother, Mary Ellen, was killed in a car accident caused by Mary Ellen's husband's negligence. Appellant was not in the car at the time of the accident. Appellant was appointed trustee of his mother's estate.

Hanbury filed a wrongful death action against Mary Ellen's husband (the husband) for the maximum liability limit of the husband's insurance policy.

When his mother died, Hanbury was insured under a car insurance policy that included underinsured motorist (UIM) coverage. If Mary Ellen had survived the car accident, she would not have been able to recover UIM benefits from Hanbury's insurance policy.

Hanbury submitted a claim to his own insurer for UIM benefits, "contending that his recovery from the wrongful-death settlement did not adequately compensate him for the losses that he sustained from . . . [his mother's] death." American Family Insurance notified Hanbury that he was ineligible for UIM benefits because he was not injured in the car accident.

Hanbury filed suit. The district court granted summary judgment for American Family Insurance. An appeal followed.

Discussion:

Although a contract between the insurer and the insured, the Minnesota No-Fault Automobile Insurance Act ("No-Fault Act") required an insurance policy to provide certain coverage. In general, underinsured motorist (UIM) coverage was required "for the protection of persons insured under that coverage who are legally entitled to recover damages for bodily injury from owners or operators of underinsured motor vehicles." Minnesota Statutes, section 65B.43, subd. 19. Hanbury argued that he was eligible to receive UIM benefits from his own insurance policy resulting from his mother's death. Whereas, American Family Insurance asserted that the No-Fault Act did not require UIM benefits to be paid to an

individual not physically injured in the car accident. The court rejected Hanbury's three arguments for recovery of UIM benefits.

Hanbury argued that he was entitled to UIM benefits because the damages from his mother's wrongful death action did not adequately compensate him and because UIM benefit recovery was appropriate for any insured individual with physical injury coverage, regardless of whether the individual sustained the physical injury in the car accident. American Family Insurance, on the other hand, argued that UIM benefit recovery was only appropriate for physical injury of the insured person. The court determined that Minnesota Statutes, section 65B.43, subdivision 19, which defined UIM coverage as the "protection of persons insured under that coverage who are legally entitled to recover damages for bodily injury," was ambiguous because both party's interpretations were reasonable. The issue of whether the No-Fault Act only required UIM coverage for an individual physically injured in a car accident was an issue of first impression for the court.

In its analysis, the court found that the legislature intended UIM benefits to be reserved for those physically injured in a car accident. Minnesota Statutes, section 65B.42 states that the purpose of the No-Fault Act was partially "to relieve the severe economic distress of uncompensated victims of automobile accidents . . ."

The statute does not define the term "victim" and thus, the court reviewed the common meaning of the term and found that victim was a person "who is harmed or killed by another." The court determined that the text of the statute supported limiting benefits to an individual physically injured in a car accident.

In 1985, the legislature amended the No-Fault Act to limit an individual's ability to recover benefits to "stem rising insurance costs." Consequently, the court observed, the legislature's 1985 amendments demonstrated a policy decision to connect UIM benefits to the specific car involved in the car accident. The court reviewed related provisions' references to "injured person" to support its conclusion that coverage only applied to an individual injured in the car accident. *See* Minnesota Statutes, section 65B.49, subdivisions 3a and 4a.

The court also considered the policy implications of the parties' positions. The court found Hanbury's position added a very high cost for an insurance company which was in opposition with the legislature's intent behind the statute. Under Hanbury's theory, an insurer would be required to pay UIM benefits for car-related deaths for each person for whom the insured was the next of kin.

Ultimately, the court concluded that the No-Fault Act did not require UIM coverage for an individual that was not physically injured in a car accident. The court also rejected Hanbury's claim under the wrongful death statute and Hanbury's attempt to recover UIM benefits for loss-of-consortium from his own insurance policy and not that of his mother's policy, the injured person.

The court did not offer a practical remedy to the issue at hand. The court determined that the No-Fault Act did not require UIM coverage for an individual that was not physically injured in a car accident under section 65B.43. If the legislature disagrees with the court's legislative history analysis and its conclusion, the legislature may consider further amending section 65B.43 to explicitly require UIM benefits for an individual not physically injured in a car accident.

Minnesota Statutes, section 65B.49, subdivision 3a, clause (5).

Subject: No Fault Automobile Insurance Act; underinsured motorist coverage benefits

Court Opinion: *Sleiter v. American Family Mutual Insurance Company*, 868 N.W.2d 21 (Minn. 2015) (A13-1596).

Applicable text of section 65B.49, subdivision 3a, clause (5):

If at the time of the accident the injured person is occupying a motor vehicle, the limit of liability for uninsured and underinsured motorist coverages available to the injured person is the limit specified for that motor vehicle. However, if the injured person is occupying a motor vehicle of which the injured person is not an insured, the injured person may be entitled to excess insurance protection afforded by a policy in which the injured party is otherwise insured. The excess insurance protection is limited to the extent of covered damages sustained, and further is available only to the extent by which the limit of liability for like coverage applicable to any one motor vehicle listed on the automobile insurance policy of which the injured person is an insured exceeds the limit of liability of the coverage available to the injured person from the occupied motor vehicle.

Statutory Issue:

The phrase "coverage available" is ambiguous.

Facts:

Cody Sleiter was on a school bus and suffered extensive damage to his right leg, hip, and lower back when the bus was struck by an at-fault vehicle. The policy for the at-fault vehicle had a liability limit of $60,000 per accident. The policy for the bus had $1,000,000 in underinsured motorist (UIM) coverage. The insurers paid these amounts to the district court, and the district court appointed a special master to assess damages and determine claim values. The total damages for all 19 victims totaled $5,302,800. Sleiter's damages totaled $140,000. The special master concluded that the insurance proceeds should be split on a percentage basis for each claimant. Sleiter was allocated $1,600.33 from the at-fault vehicle's policy, and $34,543.70 from the bus's policy. The district court approved the special master's findings and Sleiter received a total of $36,144.03.

Because Sleiter's damages exceeded the award, he sought excess UIM benefits from American Family, which insured Sleiter's family vehicle for up to $100,000 in UIM coverage. American Family denied coverage, claiming that Sleiter's excess UIM coverage ($100,000) did not exceed the UIM coverage provided by the bus's insurance ($1,000,000).

Sleiter sued for $65,456 – the difference between the recovery he received from the bus's UIM coverage and his UIM policy limits. Each party moved for summary judgment. The district court granted American Family's motion, and denied Sleiter's motion. Sleiter appealed, the court of appeals affirmed, and the Supreme Court granted review.

Discussion:

The court stated that the issue was the interpretation of the phrase "coverage available" in the last sentence of Minnesota Statutes, section 65B.49, subdivision 3a, clause (5), and whether the section allowed Sleiter to recover excess UIM benefits under his policy with American Family.

The court noted that it had previously considered the meaning of "coverage available" in the last sentence of section 65B.49, subdivision 3a, clause (5), in *Schons vs. State Farm Mut. Auto. Ins. Co*. There was no discussion of ambiguity in that case, and the court remarked that *Schons* did not address the current factual situation where multiple injured parties claimed access to the UIM limits of the host vehicle policy.

The term "coverage available," in section 65B.49, subd. 3a, clause (5), appears in both the first sentence and the third sentence and is undefined. The court acknowledged that "coverage available" in the third sentence could refer to the *policy limit* of the host vehicle's UIM coverage; in this case, $1,000,000. Or, it could mean the *amount recovered* by the insured person from the host vehicle's UIM policy; in this case $34,543.70.

The court determined that American Family's interpretation was reasonable for a single-injured insured accident, and is consistent with "the goal of connecting a passenger's recoverable UIM benefits to the host vehicle's policy" as the court held in *Schons*. Sleiter's interpretation was reasonable because it preserves a distinction between two different phrases in the third sentence, "limit of liability" and "coverage available," and is consistent with the legislative purpose of UIM coverage to "relieve the severe economic distress of uncompensated victims of automobile accidents." The court explained that the "coverage available" for a single victim is obvious – the policy limits; but, in accidents involving a large number of injured passengers, it is unknown until the claims are made against the policy.

Importantly, the court further clarified that for accidents involving a large number of injured passengers, Sleiter's reading of "coverage available" is likely the more natural reading because it accords with the legislative purpose of preventing injured passengers from being undercompensated. And, it limits claims to the amount of coverage selected by the insured to prevent overcompensation.

The court found that both interpretations were reasonable and therefore section 65B.49, subd. 3a, clause (5), was ambiguous. The court looked to the statutory canons of construction in Minnesota Statutes, section 645.16 to resolve the ambiguity. The court determined that the most relevant factors in this case were the purpose of the legislation and the consequences of each possible interpretation.

The purposes of no-fault insurance include relieving the economic stress caused by automobile accidents and preventing overcompensation and duplicate recovery. As the court noted, Sleiter's interpretation would allow compensation for accident victims but limit claims to the amounts of coverage selected by the insured. American Family's interpretation was appropriate in the context of a single-victim accident, but is insufficient to compensate multiple injured passengers for their injuries as they may be unable to access the coverage limits they purchased.

The court concluded that Sleiter's interpretation was the better interpretation, and that "coverage available" means the benefits actually paid to the insured under the coverage provided by the occupied vehicle's policy.

The court did not suggest a practical remedy to the deficiency noted in the court opinion. The dissenting opinion argued that the materially identical phrase in the first sentence and third sentences of section 65B.49, subdivision 3a, clause (5), "limit of liability," now has different meanings, and that the phrase "coverage available" now has different meanings for single-victim accidents and multiple-victim accidents. The legislature may want to consider clarifying the meaning of the phrase "coverage available" in section 65B.49, subdivision 3a, clause (5).

Minnesota Statutes, sections 97A.015, subdivision 36 and 97A.401, subdivision 3, paragraph (a).

Subject: Game and fish; wild animal possession

Court Opinion: *In the Matter of Minnesota Department of Natural Resources Special Permit No. 16868,* 867 N.W.2d 522 (Minn. App. 2015) (A14-1741)

Applicable text of section 97A.015, subdivision 36:

"Possession" means both actual and constructive possession and control of the things referred to.

Applicable text of section 97A.401, subdivision 3:

[S]pecial permits may be issued without a fee to take, possess, and transport wild animals as pets and for scientific, educational, rehabilitative, wildlife disease prevention and control, and exhibition purposes. The commissioner shall prescribe the conditions for taking, possessing, transporting, and disposing of the wild animals.

Statutory Issue:

The interpretation of the term possession is at issue.

Facts:

The relator ("Rogers"), an expert on the North American black bear, has been studying black bears in Northern Minnesota since at least 1998. One of the main purposes of Rogers' research is to habituate bears. As part of Rogers' studies, he placed radio-collars on black bears. The Minnesota Department of Natural Resources (DNR) notified Rogers' that a permit under Minnesota Statutes, section 97A.401, subdivision 3, is required to radio-collar a wild animal. The DNR maintained that the radio-collaring of a wild animal is a form of possession. Rogers applied for a permit in 1999 and the DNR granted him one. In 2012, the DNR's public safety concerns regarding Rogers' research increased, as collared bears were coming into contact with residents around the area where Rogers conducted his research, including contact with residents at homes, cabins, and state parks. In 2013, the DNR decided not to renew Rogers' permit. The relator and the DNR commenced a contested case proceeding in which Rogers argued that his collaring activities do not amount to possession. The administrative law judge determined that Rogers' collaring activities amount to possession within the meaning of section 97A.401, subdivision 3, and recommended that the commissioner of the DNR deny Rogers' permit. The commissioner adopted the ALJ's recommendations and an appeal followed.

Discussion:

The statutory deficiency noted by the court in this case is that the term "possession" is ambiguous – meaning that the term is susceptible to more than one reasonable interpretation. The court analyzed whether or not possession includes attaching a radio collar to a bear. A radio collar allows a person to track and locate a bear. The commissioner of the DNR argued that collaring a bear is sufficient to meet the definition of possession and the relator argues that it is not.

The definition of possession in Minnesota Statutes, section 97A.015, subdivision 36, includes "actual" and "constructive" possession, as well as "control" over the thing referred to. In the court opinion, the court did not acknowledge two competing interpretations of the definition of possession. Rather, the court stated broadly that possession is "susceptible to different reasonable interpretations" and is "dependent on the legal context."

The arguments of each party to the case are centered on where to place the boundaries around the term possession – i.e. what is the "amount of control" necessary to constitute possession. Rogers stated that possession of a bear should require "confinement, capture, or removal from nature." This reading of possession sets the boundaries very narrowly as to what it means to possess something. On the other hand, the commissioner argued that collaring a bear constitutes possession as the collar "provide[s] continued access to the [bear] that the general public does not have and the [bear is] unable to avoid…continued human intervention." This position sets the boundaries of possession much more broadly as it requires only a small amount of control to fulfill the possession requirement.

The arguments posed by each side regarding the term possession point to a difference of degree rather than a difference of kind, which indicates that the term possession is vague.[1] The court concluded that the commissioner's interpretation was reasonable since the statutory definition of possession includes constructive possession, and therefore the court gave the DNR deference in resolving the statutory deficiency. As a result of this opinion, the term possession found in chapter 97A now includes the radio-collaring of bears, and consequently, the radio-collaring of any wild animal.

The court did not suggest a practical remedy to the deficiency noted in the court opinion. The court provided that a radio-collar is within the boundaries of what it means to possess a wild animal. The legislature may want to consider further defining the term possession in order to more clearly set its parameters. The legislature could amend the definition of possession in chapter 97A to include "the radio-collaring of a wild animal." However, adding that specificity to a statutory definition may be considered "over-drafting."[2]

[1] "Vagueness exists when there is doubt about where a word's boundaries are." See Revisor's manual section 8.9, page 284.

[2] See Revisor's Manual section 8.27, "being specific does not mean naming every single thing being required or forbidden."

Minnesota Statutes, section 168.10, subdivision 1e.

Subject: Motor vehicles; outdoor storage

Court Opinion: *In re Krenik*, 884 N.W.2d 913 (Minn. App. 2016) (A15-1566).

Applicable text of section 168.10, subdivision 1e:

Pioneer, classic, collector vehicles, collector military vehicles, or street rods, licensed or unlicensed, operable or inoperable, may be stored in compliance with local government zoning and ordinances on their owners' property, provided that the vehicles and any outdoor storage areas they may require are maintained in such a manner that they do not constitute a health or environmental hazard and are screened from ordinary public view by means of a fence, shrubbery, rapidly growing trees or other appropriate means.

Statutory Issue:

Does "screened" mean that a vehicle needs to be hidden from public view or covered in a way so that the vehicle's condition cannot be seen?

Facts:

John Krenik stored several vehicles on his driveway at his home in St. Paul. The City of St. Paul Department of Safety and Inspections received complaints regarding the vehicles. Krenik attempted to address the issue by tarping the vehicles. The City of St. Paul ordered a vehicle abatement order stating that Krenik's tarped vehicles violated Minnesota Statutes, section 168.10, subdivision 1e (the "vehicle storage statute").

Krenik appealed the order and requested a hearing. Before the hearing, Krenik built a portable wooden fence to place in front of the vehicles. The roofs of the tarped vehicles were still visible above the top of the portable fence. The hearing officer held that the vehicles were not screened from ordinary public view. The city council affirmed the decision of the hearing officer and an appeal followed.

Discussion:

The City of St. Paul and Krenik had differing interpretations about what constitutes screening a vehicle. The City of St. Paul's position was that a vehicle needs to be hidden from ordinary public view in order to satisfy the requirements of the vehicle storage statute. Krenik, on the other hand, stated that the vehicle only needs to be covered so that its condition is unseen.

The court was persuaded by the City of St. Paul's interpretation. The court noted that the canon of *ejusdem generis* states that "general words are construed to be restricted in their meaning by preceding particular words." The vehicle storage statute provides that screening from public view can be accomplished by use of a "fence, shrubbery, rapidly growing trees or other appropriate means." The court, following the canon of *ejusdem generis*, interpreted these terms to mean concealment of the vehicle rather than a simple covering of the "aesthetic qualities" of a vehicle. Krenik argued that the purpose of the vehicle storage statute was aesthetic – meaning that its purpose is to hide "the appearance of an unsightly vehicle." The court rejected this claim as the vehicle storage statute also "encompasses vehicles that do not create an eyesore." Further, the court explained that the vehicle storage statute has a public safety purpose as the outdoor storage of a vehicle may lead to vandalism, injury, or public health concerns; be a distraction to drivers; or be an attractive nuisance for children.

Therefore, the court concluded that Krenik's use of tarps and a portable fence did not satisfy the requirements of the vehicle storage statute.

The court did not suggest a practical remedy to the deficiency noted in the court opinion. The court labeled the word "screened" as ambiguous. However, the court did not consider two competing meanings of the word screen. The only definition it considered was "to conceal from view." The arguments posed by each side center on where to place the boundaries of the word "screened" rather than two competing meanings of the word. Thus, the term "screened" may be vague[3] rather than ambiguous. The court analyzed, within the context of the vehicle storage statute, whether screening a vehicle requires complete concealment or only a simple covering. The difference is one of degree rather than a difference of kind. The court concluded that screening a vehicle requires complete concealment. Therefore, the legislature may want to consider amending the vehicle storage statute to further clarify what is required when screening a vehicle from ordinary public view.

[3] "Vagueness exists when there is doubt about where a word's boundaries are." See Revisor's manual section 8.9, page 284.

Minnesota Statutes, section 169.30, paragraph (b).

Subject: Traffic law; stopping at a stop sign

Court opinion: *State v. Marliem*, 2015 WL 2467421 (Minn. App. 2015) (A14-1208).

Applicable text of section 169.30, paragraph (b):

Every driver of a vehicle shall stop at a stop sign or at a clearly marked stop line before entering the intersection, except when directed to proceed by a police officer or traffic-control signal.

Statutory issue:

The word "at" is ambiguous.

Facts:

Defendant Johannes Marliem entered an intersection without stopping immediately adjacent to a stop sign, and was issued a citation by a police officer. The defendant testified at a court trial that he had stopped "about 30 feet before the stop sign" and then proceeded into the intersection. The district court found that the defendant was guilty of failure to stop at a stop sign, and this appeal followed.

Discussion:

The court of appeals determined that there are two reasonable interpretations of the text of section 169.30, paragraph (b). The state's interpretation was that "at a stop sign" could only mean "immediately next to or perpendicular to a stop sign," and the defendant's interpretation was that "at a stop sign" could also mean "at a reasonable distance before a stop sign." The court of appeals found that although the meaning of "at a stop sign" necessarily included the state's interpretation, it could also include the defendant's interpretation; therefore, the language was ambiguous.

Because it found the language to be ambiguous, the court turned to canons of statutory construction to determine the legislature's intent. First, the court examined "the object to be attained by the law" and found that the purpose of section 169.30 was to encourage "the safe flow of intersection traffic." The court reasoned that the closer an individual is to an object, the more easily that individual can see the object, and so the closer an individual is to a stop sign when he or she stops, the more easily other drivers can see the individual stopping. Therefore, stopping adjacent to a stop sign creates a safer flow of traffic through an intersection than stopping some distance before the stop sign.

Next, the court examined "the consequences of a particular interpretation of the law" and found that the defendant's interpretation could lead to adverse consequences for traffic flow. The court reasoned that if an individual stops "a reasonable distance" before a stop sign, other drivers may not see this stop and may assume that the individual will stop closer to the stop sign. If another driver assumes that the individual will stop adjacent to the stop sign, but the individual has already stopped and is proceeding through the intersection, a traffic accident may result. This canon of statutory construction also supported the district court's interpretation of the language.

The defendant argued that ambiguous statutes should be narrowly construed because of the principle of lenity, but the court stated that lenity does not apply in this case because "petty misdemeanor traffic regulations are not penal statutes." Rather, a petty misdemeanor traffic regulation is to be construed "liberally to effect its purpose."

The defendant also argued that a 1951 Minnesota Supreme Court case, *Bohnen v. Gorr*, supported his interpretation. However, the court found that the *Bohnen* case interpreted a different statute and was distinguishable from the facts of the current case.

Based on this analysis, the court concluded that the state's interpretation of section 169.30, paragraph (b), was correct, and "at a stop sign" means "immediately next to or perpendicular to a stop sign." The court did not suggest a practical remedy to the deficiency noted in the court opinion. The legislature may want to consider clarifying the meaning of "at a stop sign" in statute. The legislature could add the phrase "immediately next to or perpendicular to a stop sign" to the statutory language.

Minnesota Statutes, section 169A.20, subdivision 2.

Subject: Driving while impaired; refusal to submit to a chemical test

Court Opinions: *State v. Thompson*, A15-0076 (Minn. 2016), *State v. Trahan*, A13-0931 (Minn. 2016), See also *State v. Huffman*, A15-0917 (Minn. App. 2016) and *State v. Bresnahan*, A15-1263 (Minn. App. 2016).

Applicable text of section 169A.20, subdivision 2:

It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license).

Statutory Issue:

Does the Fourth Amendment to the U.S. Constitution permit the state to prosecute an individual under Minnesota Statutes, section 169A.20, subdivision 2, for refusing to submit to a warrantless blood or urine test absent exigent circumstances?

Facts:

This case comment combines two Minnesota Supreme Court opinions – both relating to the constitutionality of Minnesota Statutes, section 169A.20, subdivision 2 (the "test refusal statute"). The Minnesota Supreme Court addressed the constitutionality of warrantless blood and urine tests in *State v. Thompson* and *State v. Trahan*. In *Trahan,* the defendant refused to submit to a blood test. And in *Thompson*, the defendant refused to submit to both a blood and urine test. In two unpublished court of appeals cases (*State v. Huffman* and *State v. Bresnahan*), the court of appeals addressed the same issues relating to the constitutionality of the test refusal statute as it relates to blood and urine tests.

Discussion:

The Fourth Amendment to the United States Constitution provides "[t]he right of people to be secure in their persons…against unreasonable searches and seizures." Law enforcement may conduct searches of persons or places, but those searches must be reasonable. In order to be reasonable, it is generally required that law enforcement must obtain a warrant before conducting a search. The exception to this general requirement is a search-incident-to-arrest.

A warrantless search of a suspected drunk driver's blood or urine conducted after the suspect is in police custody is a search-incident-to-arrest. The United States Supreme Court recently analyzed warrantless blood and breath tests in the context of test refusal statutes in *Birchfield v. North Dakota*, __ U.S. __ (2016). The U.S. Supreme Court held that breath tests have only a "slight" impact on privacy, but blood tests are "significantly more intrusive" and may not be "administered as a search incident to a lawful arrest for drunk driving." *Id.* In *Thompson*, the Minnesota Supreme Court reiterated this point as applied to Minnesota's test refusal statute stating that "*Birchfield* is dispositive with respect to the blood test that Thompson refused," and therefore concluded that a "warrantless blood test may not be administered as a search incident to a lawful arrest of a suspected drunk driver." Likewise in *Trahan*, the Minnesota Supreme Court concluded that the Fourth Amendment "prohibits convicting Trahan for refusing the blood test requested of him absent the existence of a warrant or exigent circumstances."

The Minnesota Supreme Court utilized the framework provided in *Birchfield* to analyze the constitutionality of the test refusal statutes as it applies to warrantless urine tests. The court analyzed the "impact urine test have on privacy interests." Specifically, the court determined the "level of physical intrusion" resulting from a urine test, "the ability of the State to retain a sample containing other personal information," and "the enhanced embarrassment a urine test is likely to cause during an arrest." First, the court recognized that the level of physical intrusion resulting from a urine test is similar to that of a breath test – a minimal level of invasiveness. However, the urine test differs from the breath test in other regards. A breath test only detects blood-alcohol concentration and the breath sample cannot be maintained. A urine test, like a blood test, "can be used to detect and assess a wide range of disorders and can reveal whether an individual is pregnant, diabetic, or epileptic." In addition, the urine sample remains viable after the test is completed. Furthermore, the urine test may "cause considerably more embarrassment for arrestees than breath tests" since the arrestee is required to urinate in "full view" of the arresting officer.

The court concluded that a urine test is more like a blood test than a breath test, as the impact on an individual's privacy is high. Therefore, the court held "that a warrantless urine test does not qualify as a search incident to a valid arrest of a suspected drunk driver." As a result, the court held that Thompson could not be prosecuted under the test refusal statute for refusing to submit to a warrantless blood or urine test.

The court did not suggest a practical remedy to the constitutional deficiencies noted in the test refusal statute. In both *Thompson* and *Trahan*, the test refusal statutes were held unconstitutional as applied to both Thompson and Trahan. As with all successful as-applied constitutional challenges, the court's holding results in a narrowing of the circumstances for which a particular statute remains constitutional. In the context of the test refusal statute, it appears now that warrantless blood and urine tests may only be allowed when exigent circumstances require them.

Minnesota Statutes, section 245C.15, subdivision 3, paragraphs (a) and (e).

Subject: Human Services; disqualification period under the Background Studies Act

Court Opinion: *Gustafson v. Commissioner of Human Services*, 2016 WL 3961945 (Minn. App. 2016) (A15-1943).

Applicable text of section 245C.15, subdivision 3, paragraph (a):

(a) An individual is disqualified under section 245C.14 if: (1) less than ten years have passed since the discharge of the sentence imposed, if any, for the offense; and (2) the individual has committed a gross misdemeanor-level violation of any of the following offenses: . . . 609.2112, 609.2113, or 609.2114 (criminal vehicular homicide or injury)…

(e) When a disqualification is based on a judicial determination other than a conviction, the disqualification period begins from the date of the court order. When a disqualification is based on an admission, the disqualification period begins from the date of an admission in court. When a disqualification is based on an Alford Plea, the disqualification period begins from the date the Alford Plea is entered in court. When a disqualification is based on a preponderance of evidence of a disqualifying act, the disqualification date begins from the date of the dismissal, the date of discharge of the sentence imposed for a conviction for a disqualifying crime of similar elements, or the date of the incident, whichever occurs last.

Statutory Issue:

When does the ten-year disqualification period begin under the Minnesota Background Studies Act?

Facts:

Gustafson pled guilty to criminal vehicular operation on August 11, 2003 and was placed on three years of probation.

Gustafson's wife later applied for a license to operate a child-care program in their home, and Gustafson was subject to a background study. The Department of Human Services (DHS) completed a background study and disqualified Gustafson from having direct contact with or access to persons served by a child-care program because of his 2003 conviction. Gustafson requested reconsideration and a set-aside or variance. DHS denied Gustafson's set-aside request, but granted Gustafson a variance with a number of conditions. In its letter ruling on Gustafson's reconsideration request, DHS explained that Gustafson's prior conviction was a proper basis for disqualification and that Gustafson's 10-year disqualification period started on April 23, 2010 and expires on April 23, 2020. Gustafson appealed DHS's determination by writ of certiorari.

On appeal, Gustafson asserted that the statute authorizing his disqualification was unconstitutional and that DHS erred in concluding that Gustafson's 10-year disqualification period had not expired on August 11, 2013, ten years from the date of his guilty plea.

Discussion:

Gustafson challenged DHS's application of section 245C.15 to his case, the constitutionality of section 245C.15, and DHS's determination to deny his request for reconsideration.

The court analyzed whether DHS correctly determined the start and end date of Gustafson's 10-year disqualification. DHS argued that Gustafson's disqualification period began the date he was discharged from his sentence, April 23, 2010; whereas Relator argued that his disqualification began the date of his guilty plea, August 11, 2003. Gustafson's argument was based on the text from the Minnesota Background Studies Act, section 245C.15, subdivision 3, paragraph (e):

> When a disqualification is based on a judicial determination other than a conviction, the disqualification period begins from the date of the court order. When a disqualification is based on an admission, the disqualification period begins from the date of an admission in court. *When a disqualification is based on an Alford Plea, the disqualification period begins from the date the Alford Plea is entered in court.* When a disqualification is based on a preponderance of evidence of a disqualifying act, the disqualification date begins from the date of the dismissal, the date of discharge of the sentence imposed for a conviction for a disqualifying crime of similar elements, or the date of the incident, whichever occurs last.

The court held that the parties presented two reasonable interpretations of section 245C.15, subdivision 3 when the section was applied to "a person who was convicted of and sentenced for a crime after entering an *Alford* plea" and thus, the statute was ambiguous. In the court's analysis, it considered the legislative history of the statute and the doctrine of constitutional avoidance, and deferred to DHS's interpretation.

In reviewing the legislative history of the statute, the court found that in 2007 the legislature amended section 245C.14, subdivision 1, paragraph (a), to include the disqualification of a person who entered an *Alford* plea. Two years later, the legislature further amended section 245C.15 to clarify that a disqualification period based on an *Alford* plea began on the date the *Alford* plea was entered. The court held that the amendments adding the *Alford* plea language only applied to a person not convicted of a crime; otherwise one provision would be superfluous.

DHS argued that it "treat[ed] all convictions for disqualifying crimes equally, regardless of whether the conviction was based on a guilty plea, *Alford* plea or jury verdict." In other words, DHS only began the disqualification period on the date of an *Alford* plea when the *Alford* plea did not result in a criminal conviction. The court deferred to DHS's interpretation because DHS's interpretation was not in conflict with the purpose of the Minnesota Background Studies Act to protect vulnerable populations served by a licensed facility.

The court also relied on the doctrine of constitutional avoidance, which instructs courts to avoid ruling a statute unconstitutional when possible. In this case, DHS's interpretation avoided holding section 245C.15 unconstitutional because the disqualification of both a **"**person convicted after an *Alford* plea and a person convicted after a conventional guilty plea" would be based on the discharge date of the applicable sentences; and thus, each person would be treated in the same manner.

Ultimately, the court held that section 245C.15, subdivision 3, paragraph (a) only applied to a person who was disqualified because of a criminal conviction and paragraph (e) only applied to a person who was disqualified because of a determination other than a criminal conviction. DHS's determination was upheld. The court also denied all three of Gustafson's constitutional challenges and affirmed DHS's determination denying Gustafson's request for reconsideration.

The court did not offer a practical remedy to the issue at hand. The court indicated that section 245C.15, subdivision 3, paragraph (a) only applied to a person who was disqualified because of a criminal conviction and paragraph (e) only applied to a person who was disqualified because of a determination other than a criminal conviction. If the legislature agrees with the court's analysis, the legislature could amend the statute to explicitly reflect the court's holding.

Minnesota Statutes, section 268.085, subdivision 1, clause (7)

Subject: Reemployment services; good cause for failure to participate in meeting

Court opinion: *Fay v. Dep't of Emp't & Econ. Dev.*, 860 N.W.2d 385 (Minn. App. 2015) (A14-1487).

Applicable text of section 268.085, subdivision 1:

An applicant may be eligible to receive unemployment benefits for any week if:

(7) the applicant has been participating in reemployment assistance services, such as development of, and adherence to, a work search plan, if the applicant has been directed to participate by the commissioner. This clause does not apply if the applicant has good cause for failing to participate.

Statutory issue:

The phrase "good cause" is ambiguous.

Facts:

Relator Patrick Fay was eligible for unemployment benefits. He received a mailing from the Department of Employment and Economic Development (DEED) notifying him that he was required to attend a scheduled reemployment assistance services meeting, and that "[f]ailure to attend [would] result in a delay or denial of [relator's] unemployment benefits."

Fay did not attend the scheduled meeting, and later testified that although he lived very close to the meeting site, he had "simply missed" the meeting, and declined to provide any additional explanation. DEED determined that because Fay did not have good cause to miss the meeting, he was ineligible for unemployment benefits for the week of the missed meeting, pursuant to Minnesota Statutes, section 268.085, subdivision 1.

Fay filed an appeal and an unemployment law judge (ULJ) concluded, after an evidentiary hearing, that Fay did not have good cause for missing the meeting. Fay requested a rehearing, and during the rehearing, the ULJ affirmed the earlier decision. This appeal followed.

Discussion:

The court noted that this was a case of first impression because the definition of "good cause" in section 268.085, subdivision 1, had never been considered by the court of appeals. The court first determined that the phrase "good cause" was ambiguous "because it is susceptible to a spectrum of reasonable interpretations." Specifically, ambiguity arose because the statute did not indicate how important or severe an individual's justification for missing a meeting must be in order to be considered "good cause."

The court used the canon of *in peri materia* to determine the meaning of the phrase. This canon allows the court to look to other statutes with "common purposes and subject matter" to determine the meaning of ambiguous language. The court looked at another statute on the topic of unemployment insurance, section 268.105. That section applies to appeals of ULJ decisions, and states that if an

appellant fails to attend an appeal hearing, the ULJ must set aside the decision and order an additional hearing unless the appellant had good cause for his or her failure to attend. The section defines "good cause" as "a reason that would have prevented a reasonable person acting with due diligence from participating in the hearing." Because both section 268.105 and section 268.085 require an applicant to show good cause for failing to attend a required in-person event, the court determined that the sections have a common purpose, and the definition in section 268.105 also applied to section 268.085.

The court also noted that there are several other definitions of "good cause" in chapter 268, but those definitions "do not share a common purpose" with section 268.085 because they do not apply to failure to attend an event. Rather, they apply to situations where an individual refuses to accept employment or fails to file certain paperwork.

Based on this analysis, the court simply applied the definition of good cause in section 268.105 to the phrase in section 268.085. Therefore, "good cause" in section 268.085 means "a reason that would have prevented a reasonable person acting with due diligence from participating in the reemployment assistance services meeting."

In order to apply this definition to the facts of the case, the court looked to several other cases that have interpreted the definition in section 268.105. Generally, courts have held that good cause cannot be demonstrated without a showing that the individual explained the circumstances that led to his or her failure to attend a hearing, and attempted to reschedule the hearing. Because Fay's only explanation for his failure to attend the meeting was that he forgot, the court held that Fay did not have good cause and was ineligible for unemployment benefits for the week of the missed meeting. Although Fay presented to the court of appeals several new reasons for why he missed the meeting, those reasons had not been presented to the ULJ, and the court of appeals therefore could not consider them.

In order to resolve the ambiguity in section 268.085, the legislature may want to consider adding the court's adopted definition of good cause – "a reason that would have prevented a reasonable person acting with due diligence from participating in the reemployment assistance services meeting" – to the statute.

Minnesota Statutes, section 290.01, subdivision 7.

Subject: Individual income taxation; residency

Court Opinion: *Marks v. Commissioner of Revenue*, 875 N.W.2d 321 (Minn. 2015) (A15-1145).

Applicable text of section 290.01, subdivision 7:

(a) The term "resident" means any individual domiciled in Minnesota, ...

(b) "Resident" also means any individual domiciled outside the state who maintains a place of abode in the state and spends in the aggregate more than one-half of the tax year in Minnesota, ...

Statutory Issue:

The definition of "resident" is ambiguous when an individual is domiciled both in Minnesota and outside Minnesota during a given tax year.

Facts:

In 1999 Curtis and Stacy Marks moved from Minnesota to Florida and became Florida domiciliaries. They maintained a home in Minnesota and visited often. On August 1, 2007, the Markses moved back to Minnesota and reestablished Minnesota domicile. During 2007, Curtis Marks was physically present in Minnesota for 104 days before August 1, and was domiciled in Minnesota for 153 days (August 1 - December 31). In total Curtis Marks was physically present or domiciled in Minnesota for a total of 257 days during 2007, just over 70 percent of the year. The Markses filed a 2007 Minnesota income tax return as part-year residents.

The commissioner of revenue audited the Markses' 2007 tax return and determined that under section 290.01, subdivision 7, the Markses were full-year residents for that year. The commissioner assessed additional income tax, penalties, and interest. The Markses filed an administrative appeal. The commissioner upheld the ruling. The Markses appealed the commissioner's ruling to the Tax Court. The Tax Court granted the Markses summary judgment, holding that because the Markses spent fewer than 183 days in Minnesota prior to becoming domiciled in Minnesota, "the only days that may be aggregated for purposes of satisfying the [physical presence] requirements of subdivision 7(b) are those spent in Minnesota while 'domiciled outside the state.' " The commissioner appealed the decision.

Discussion:

The court began by explaining that Minnesota Statutes, section 290.17, provides for allocation of income for the purposes of individual income tax. Residents allocate all income to Minnesota. Non-residents and part-year residents allocate depending on the type of income. Section 290.17 does not define who is a non-resident or part-year resident. Section 290.01, subdivision 7, defines "resident" for the purposes of Minnesota Statutes, chapter 290. The definition includes a physical presence test in paragraph (b) of that section. The court observed that section 290.01, subdivision 7, does not fully explain how to determine the residency of individuals domiciled in Minnesota for only part of a year. However, the court pointed to Minnesota Rules, part 8001.0300, which provides an administrative interpretation of residency and domicile, and examples regarding the physical presence test.

Both the commissioner and the Markses argued that the plain language of section 290.01, subdivision 7, supported their position.

The Markses argued that the phrase "domiciled outside the state" in section 290.01, subdivision 7, paragraph (b), is limiting language, therefore an individual whose domicile changes during a tax year is only a full-year Minnesota resident if the individual both maintains an abode in the state and spends at least 183 days in Minnesota *while domiciled in another state*.

The Commissioner argued that the phrase "domiciled outside the state" is not limiting, but merely expresses the rule that individuals may be taxed as residents for portions of the year that they were not domiciled in Minnesota if during the year two things are true: (1) the individual maintained an abode in Minnesota; and (2) the individual spent at least 183 days in Minnesota. The court noted that statutory language defining what constitutes a calendar day for the physical presence test, and the absence of language regarding whether days spent in Minnesota must be spent as non-domiciliaries to be counted for the physical presence test, supported the commissioner's position.

The court concluded that section 290.01, subdivision 7, is ambiguous regarding whether an individual is a resident when that individual is domiciled *both* in Minnesota and outside of Minnesota during a given year. The two reasonable interpretations are: (1) the physical presence test only applies to the days the individual spends in Minnesota while domiciled outside of Minnesota; or (2) the physical presence test applies to all days the individual spends in Minnesota during that year, whether as a domiciliary or not.

To resolve the ambiguity, the court looked to the factors to consider and presumptions to apply provided by Minnesota States, sections 645.16 and 645.17. The court found that two were dispositive – the purpose of the law and the administrative interpretation.

First, the court described that the purpose of section 290.01, subdivision 7, paragraph (b), is to provide that individuals who take advantage of Minnesota's services, benefits, and protections by spending substantial time in the state should pay taxes on their entire income. The Markses spent 70 percent of their time in Minnesota, and enjoyed sufficient benefits that would warrant paying income tax as residents.

Second, the court ruled that the commissioner's interpretation under Minnesota Rules, part 8001.0300 was entitled to deference. Subpart 10, item B, of that rule provides an example that makes clear that if an individual maintains an abode in Minnesota while domiciled outside the state, all days the individual spends in Minnesota during that year – whether as a domiciliary or not – can be aggregated to determine whether the individual is a resident.

The court dismissed the Markses' arguments that the administrative rule conflicted with the statute and that the ambiguity must be resolved in favor of the taxpayer. The rule is longstanding and unaltered by the legislature, and the canons of construction provide sufficient guidance so that the court did not need to resort to simply finding for the taxpayer.

The court reversed the Tax Court decision and held that the Markses were residents in 2007 for the purposes of the individual income tax.

The court did not suggest a practical remedy to the deficiency noted in the court opinion. The dissenting opinion argued that section 290.01, subdivision 7, paragraphs (a) and (b), define domiciled residents,

and non-domiciled residents, respectively. The dissent further argued that all three requirements for non-domiciled residents – domicile outside Minnesota, abode, and physical presence – must be satisfied simultaneously. The legislature could clarify the definition of "resident" in section 290.01, subdivision 7, by providing that the physical presence test applies to all days spent in Minnesota regardless of domicile (this would confirm the court's opinion), or that the physical presence test applies only to days spent in Minnesota while domiciled in another state (this would confirm the dissenting opinion).

Minnesota Statutes section 513.33.

***Subject**:* Credit agreements; promises to forgive debts

***Court Opinion**: NJK Holding Corporation v. The Araz Group, Inc.*, 878 N.W.2d 515 (Minn. App. 2016), (A15-1628) *review denied* (July 19, 2016).

***Applicable text of section 513.33, subdivisions 1**:*

"[C]redit agreement" means an agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation;. . . .

***Statutory Issue**:*

Whether a promise to forgive a debt is a "credit agreement" under Minnesota Statutes, section 513.33 that requires the promise to be in writing to be enforceable.

***Facts**:*

In 1997, Araz Group, Inc. (debtor) executed a promissory note payable to NJK Holding Corporation (creditor). In 1998, the parties amended their lending agreement and NJK Holding Corporation gave Araz Group, Inc. a line of credit as a loan. Araz Group, Inc.'s staff testified that on several occasions, NJK Holding Corporation presented the money given to Araz Group, Inc. as "written off" and that NJK Holding Corporation made it clear Araz Group, Inc. was not required to pay back the money. Araz Group, Inc. made no loan payments to NJK Holding Corporation until 2003.

NJK Holding Corporation wrote off the loan to Araz Group, Inc. as "bad debt." Between 2003 and 2011, after NJK Holding Corporation's write-off, Araz Group, Inc. made "sporadic" loan payments to NJK Holding Corporation. NJK Holding Corporation reported loan payments it received to the IRS as income.

Although Araz Group, Inc. never received a form reporting cancellation of debt to the IRS from NJK Holding Corporation, Araz Group, Inc. believed the loan was forgiven, based on a variety of verbal statements by NJK Holding Corporation in May 2010. However, Araz Group, Inc. "did not report cancellation-of-debt income on its 2010, 2011, 2012, or 2013 federal tax returns." There were differing theories regarding why Araz Group, Inc. made 13 payments to NJK Holding Corporation after May 2010.

In 2012, NJK Holding Corporation sent a demand for payment of the loan to Araz Group, Inc. Araz Group, Inc. responded that "all matters between . . . [the parties] have been settled." Consequently, NJK Holding Corporation brought a breach of contract suit and moved for summary judgment in district court. The district court granted summary judgment for NJK Holding Corporation on the legal issue presented and held that NJK Holding Corporation did not forgive the loan because there was no writing of loan forgiveness. The jury determined the remaining issue of fact and found that the original loan was not a gift. An appeal followed.

***Discussion**:*

On appeal, the court reviewed whether the promise to forgive a debt was a "credit agreement" under Minnesota Statutes, section 513.33 that requires the promise to be in writing to be enforceable.

As a matter of law, "claims on agreements falling under section 513.33 fail" if not in writing. Araz Group, Inc. argued that NJK Holding Corporation's promise to forgive its debt did not fall under section 513.33 and therefore, NJK Holding Corporation's promise to forgive was enforceable. The court started its analysis with the relevant statutory text and observed that section 513.33 provided, in part:

> Subd. 1 . . . "credit agreement" means an agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation; . . .
>
> Subd. 2 . . . A debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor.
>
> Subd. 3 . . . The following actions do not give rise to a claim that a new credit agreement is created, unless the agreement satisfies the requirements of subdivision 2 . . . the agreement by a creditor to take certain actions, such as entering into a new credit agreement, forbearing from exercising remedies under prior credit agreements, or extending installments due under prior credit agreements. . . .

Because the terms "forbearance" and "financial accommodation" are not defined in section 513.33, the court considered the plain meaning of each term. The court determined that section 513.33 was ambiguous because it was reasonable to interpret a credit agreement as either including or excluding debt forgiveness in the context of forbearance or other financial accommodation.

Based on the text of the statute and prior case law from other jurisdictions, the court found that the legislature intended credit agreements to be interpreted broadly.[4]

The court was also "guided by the statutory presumption that the legislature does not intend to produce absurd, impossible, or unreasonable results." In this instance, the court concluded that requiring the modification of a credit agreement to be in writing, but not a promise to forgive debt under a credit agreement, would produce an absurd result. This interpretation would, in essence, mean that a "'temporary forbearance requires a writing, but a permanent one – or a cancellation of the debt – does not.'"

Ultimately, the court held a promise to forgive a debt was a credit agreement and was subject to the writing requirements of section 513.33. Because NJK Holding Corporation's promise to forgive Araz Group, Inc.'s debt was not in writing, Araz Group, Inc.'s claim failed as a matter of law.

The court did not suggest a practical remedy for the deficiency noted in the court opinion. The court determined that a promise to forgive a debt was a credit agreement that was subject to section 513.33, subdivision 2. The legislature may want to consider further defining the term "credit agreement" to clarify when a claim is subject to the writing requirements of section 513.33. However, adding that specificity to a statutory definition may be considered "over-drafting."[5]

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[4] "[Minnesota Statutes,] section 513.33 defines a 'credit agreement' to include 'an agreement to . . . forbear repayment of money . . . or to make *any other* financial accommodation . . .'"

[5] See Revisor Manual 8.27, "being specific does not mean naming every single thing being required or forbidden."

Minnesota Statutes, sections 515B.4-113, paragraph (b), clause (2), and 515B.4-116, paragraph (b).

Subject: Minnesota Common Interest Ownership Act; costs of litigation

Court Opinion: *650 North Main Association v. Frauenshuh, Inc.*, 885 N.W.2d 478 (Minn. App. 2016) (A15-1547).

Applicable text of section 515B.4-113, paragraph (b), clause (2):

(b) A declarant warrants to a purchaser that:

(2) any improvements subject to use rights by the purchaser, made or contracted for by the declarant, or made by any person in contemplation of the creation of the common interest community, will be (i) free from defective materials and (ii) constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.

Applicable text of section 515B.4-116, paragraph (b):

The court may award reasonable attorney's fees and costs of litigation to the prevailing party.

Statutory Issue:

Does the phrase "engineering standards" in Minnesota Statutes, section 515B.4-113 include "architectural standards?"

Are "costs of litigation" discretionary under Minnesota Statutes, section 515B.4-116, paragraph (b)?

Facts:

An association representing a group of persons owning a building brought suit against the developers of the building, Territorial Springs Riverview, LLC, and Frauenshuh Sweeney LLC, (collectively Frauenshuh) and the construction firm that built the building, Kraus-Anderson Construction Company (Kraus-Anderson). The suit against Frauenshuh and Kraus-Anderson, based on the association's claims that their building had major construction defects, asserted several claims of negligence and breach of statutory warranty. Specific to Frauenshuh, the suit asserted claims of breach of statutory warranty under the Minnesota Common Interest Ownership Act.

The case went to trial and the jury ultimately found that Frauenshuh "did not breach either the chapter 327A warranty or the chapter 515B warranties." But the jury found that the building had major construction defects. Among these findings, the jury found that the design of the building was defective and was the direct cause of the association's damages. The design was completed by the architect J. Buxell.

The association moved for judgment as a matter of law and the district court found, among other things, that "Frauenshuh was responsible for the architectural design defects and was liable to the association for the….damages attributed to J. Buxell." In addition, the court awarded the association an amount for "costs and disbursements."

Discussion:

There are two statutory deficiencies in the Minnesota Common Interest Ownership Act noted by the court in this opinion. The deficiencies are found in Minnesota Statutes, section 515B.4-113, paragraph (b), clause (2), and Minnesota Statutes, section 515B.4-116, paragraph (b).

The first deficiency relates to statutory warranties for building improvements. Pursuant to section 515B.4-113, paragraph (b), clause (2), a declarant must warrant that any improvements "will be constructed according to sound engineering and construction standards." The parties to the suit agreed that Frauenshuh, as the developer, is the declarant. Frauenshuh argued that the district court erred by holding Frauenshuh liable for the architectural defects attributable to J. Buxell, the architect of the building. Frauenshuh's position was that "sound engineering and construction standards" do not include architectural standards.

The court noted that engineering is defined as "the work performed by the engineer" or "the application of scientific and mathematical principles to practical ends such as design, manufacture, and operation of efficient and economical structures, machines, processes, and systems." The court explained that since "engineering can be interpreted narrowly to refer only to design work performed by an engineer or more broadly to encompass design work performed by other professionals, such as architects," the term "engineering" is ambiguous.

The court held that the term "engineering" should be construed broadly. First, the court noted that when "engineer" is used in chapter 515B, "it is used in connection with the term architect." In addition, section 515B.1-114, paragraph (a), states that chapter 515B should be "liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed." Therefore, the court concluded that "given these references to the work of engineers and architects throughout chapter 515B and given that the statutory warranties are to be liberally administered," the term "engineering standards" should be broadly construed to include "architectural standards."

The second deficiency found by the court relates to the "costs and disbursements" awarded by the district court to the association. Section 515B.4-116, paragraph (b), provides that "[t]he court may award reasonable attorney's fees and costs of litigation to the prevailing party" in an action brought under the Minnesota Common Interest Ownership Act. Frauenshuh contested the district court's award of expert witness fees, arguing that "costs" recoverable under section 515B.4-116, paragraph (b), refer to costs recoverable under section 549.02, which provides that "[u]pon judgment in the plaintiff's favor of $100 or more in an action for recovery of money only" $200 is allowed for costs. The court stated that since "it is unclear whether 'costs' under section 515B.4-116(b) refers to the costs provided by section 549.02 or more broadly refers to general litigation expenses, the statute is subject to more than one reasonable interpretation and is therefore ambiguous."

To resolve the statutory deficiency, the court noted that if the costs in section 515B.4-116, paragraph (b), are limited to the costs allowed under section 549.02, then that would make section 515B.4-116, paragraph (b), duplicative. In addition, the court explained that the word "reasonable" in section 515B.4-116, paragraph (b), modifies both attorney's fees and costs of litigation. Under this reading, the court construed section 515B.4-116, paragraph (b), to allow for a discretionary award of "reasonable" costs of litigation. Therefore, the $200 costs limitation under section 549.02 cannot apply to section

515B.4-116 as it would eliminate the discretionary nature of the award related to costs. The court held that the district court properly awarded expert witness fees as costs of litigation.

The court did not suggest a practical remedy to the deficiencies noted in the court opinion. For the deficiency noted in section 515B.1-114, paragraph (b), clause (2), the court held that the phrase "engineering standards" could be interpreted either narrowly or broadly. A broad interpretation would include "architectural standards" within the phrase's meaning. When a discussion refers to the boundaries of a term or phrase, as was the case with the phrase "engineering standards," the issue is vagueness.[6] The court concluded that the phrase "engineering standards" should be broadly construed. The legislature may want to consider amending section 515B.1-114, paragraph (b), clause (2), to further clarify the boundaries of the phrase "engineering standards."

For the deficiency noted in section 515B.4-116, paragraph (b), the court clarified that the costs of litigation are not limited by section 549.02. The legislature may want to consider clarifying this issue. However, the court's analysis clearly demonstrates that section 549.02 does not limit the court's discretion to award reasonable costs of litigation under section 515B.4-116, paragraph (b).

[6] "Vagueness exists when there is doubt about where a word's boundaries are." See Revisor's Manual section 8.9, page 284.

Minnesota Statutes, sections 588.20, subdivision 2, clause (4).

***Subject**:* Contempt of court; probation violation

***Court Opinion**: State v. Jones*, 869 N.W.2d 24 (Minn. 2015) (A14-1399).

Applicable text of section 588.20, subdivision 2, clause (4):

Every person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor: . . .

> (4) willful disobedience to the lawful process or other mandate of a court other than the conduct described in subdivision 1;

***Facts**:*

Jones was convicted of a controlled-substance crime in 2013. The district court stayed imposition of her sentence and placed her on supervised probation. Jones violated the terms of her probation by consuming alcohol as a minor and receiving a citation for disorderly conduct. The State moved to revoke Jone's probation and charged her with a misdemeanor contempt of court under Minnesota Statutes, section 588.20, subdivision 2, clause (4). Jones moved to dismiss the contempt charge arguing that a probation term was not a court mandate under section 588.20, subdivision 2, clause (4). The district court granted Jone's motion to dismiss, revoked her probation, and executed her sentence. The State appealed, and the court of appeals affirmed the dismissal. The State petitioned for review, which the Minnesota Supreme Court granted.

***Statutory Issue**:*

Whether a violation of an individual's term of probation is a violation of a mandate of a court that subjects an individual to criminal contempt under Minnesota Statutes, section 588.20, subdivision 2, clause (4).

***Discussion**:*

The court first looked to the meaning of "mandate," which was not defined in Minnesota Statutes. Without determining the scope of the word, the court assumed for the purpose of its analysis that mandate in section 588.20 includes "a court order commanding compliance with a direction of the court." The court's analysis focused on the narrower issue of "whether willful violation of a 'term' of probation itself constitutes willful disobedience of a court order commanding compliance . . . giving prosecutors the authority . . . to bring a new charge: criminal contempt."

The State argued that a term of probation was part of a court order and consequently, Jones' probation violation was a violation of a court order. Specifically, Jones' controlled substance conviction sentence was imposed by a Sentencing Order which described her probation terms. See Minn. R. Crim. P. 27.03, subdivision 4(A)7. Whereas, Jones argued that since the probation statute used the word "term" and not "mandate" or "court order," a probation violation was not a violation of a court order. The court found that the statutory text supported each party's interpretations, and thus determined the statute was ambiguous.

At the outset of its analysis, the court reviewed the text of Minnesota Statutes. The only references to a condition of probation as an "order" are in Minnesota Statutes, section 609.135, and are not relevant to this case.[7] The court found that the comprehensive probation statutes did not suggest that a violation of a probation term was contempt of court. Although the court observed the text supported either party's interpretation, the court found the probation statutes' failure to "even hint, that a willful violation of a 'term' of probation constitutes criminal contempt" persuasive.

In addition to its textual considerations, the court's holding was based on three points. First, the court sought to construe, if possible, the statutes to avoid a "conflict between the executive and the judiciary" or, in other words, to avoid an interpretation that would violate the separation of powers doctrine. The purpose of the contempt statutes "is to vindicate the authority of the court." Under the State's interpretation, the state could charge a person with criminal contempt even if the court determined no disrespect was directed at the court. The court determined the State's interpretation was contrary to the purpose of the contempt statutes and impinged on the court's authority to sentence.

Second, the court determined that the legislative history of the relevant statutes did not support a finding that a term of probation was a mandate. Specifically, clause (4) of the original misdemeanor contempt statute was passed in 1888; however, the probation system was not created until 11 years later (and only for juveniles). The court found it unlikely that the legislature intended a violation of a probation term to be included in the earlier enacted violation of a mandate of a court. Moreover, the language of the original adult probation system contemplated a flexible scheme that did not support the conclusion that a term of probation was a "mandate" of a court.

Third, because this was a question of first impression, the court reviewed other jurisdictions' holdings on the matter. The court observed that the majority of courts addressing the question held that a violation of probation was not a contempt of court.

Ultimately, the court concluded that a violation of a term of probation was not a violation of a "mandate of a court" under section 588.20, subdivision 2, clause (4).

The court did not suggest a practical remedy for the deficiency noted in the court opinion. The court determined that a violation of an individual's term of probation was not a violation of a mandate of a court that subjects an individual to criminal contempt under section 588.20, subdivision 2, clause (4). If the legislature disagrees with the court's legislative history analysis and its conclusion, the legislature may consider further clarifying section 588.20, subdivision 2, as including a violation of a term of probation or amending section 609.14 (Revocation of Stay) to clarify that a violation of a term of probation is also a contempt of court under section 588.20, subdivision 2.

[7] Minnesota Statutes, section 609.135 referred to a probation condition as an order regarding restitution and treatment.

Minnesota Statutes, sections 609.106, subdivision 2, and 244.05, subdivisions 4 and 5.

Subject: Mandatory juvenile sentences; life imprisonment without the possibility of release

Court opinion: *Jackson v. State*, 883 N.W.2d 272 (Minn. 2016) (A14-2060).

Applicable text of section 609.106, subdivision 2:

The court shall sentence a person to life imprisonment without possibility of release under the following circumstances:

(1) the person is convicted of first-degree murder under section 609.185, paragraph (a), clause (1), (2), (4), or (7);

Applicable text of section 244.05:

An inmate serving a mandatory life sentence under section 609.106 or 609.3455, subdivision 2, must not be given supervised release under this section.

Statutory issue:

Is it unconstitutional to impose a sentence of life imprisonment without the possibility of release on a juvenile whose sentence was final before the U.S. Supreme Court's 2012 *Miller* decision was announced?

Facts:

After a 2006 jury trial, the defendant, Prentis Cordell Jackson, was found guilty of first-degree premeditated murder. On the date of the murder, the defendant was 17 years old. The district court sentenced the defendant to life imprisonment without the possibility of release (LWOR) pursuant to Minnesota's mandatory minimum sentencing laws, and the Minnesota Supreme Court affirmed his conviction in 2008.

In 2012, the U.S. Supreme Court held in *Miller v. Alabama*, 132 S. Ct. 2455, that mandatory imposition of LWOR sentences on juveniles was unconstitutional under the Eighth Amendment prohibition against cruel and unusual punishment. However, an LWOR sentence could be imposed on a juvenile if the sentencing court considered the facts and circumstances of the case and found that the juvenile's crime reflected "irreparable corruption" or "permanent incorrigibility," and not mere "transient immaturity."

In 2013, the defendant filed a petition for postconviction relief, arguing that a key prosecution witness had recanted his testimony, and in the alternative, that the defendant's sentence was unconstitutional under the newly decided *Miller* case. The witness asserted his Fifth Amendment right against self-incrimination and refused to testify at the postconviction hearing. The postconviction court held that other evidence of the witness' recantation was inadmissible hearsay, and rejected this postconviction challenge to the defendant's sentence. The postconviction court also held that the defendant's *Miller* argument was not persuasive because the defendant's conviction was final before the *Miller* case was decided, and the Minnesota Supreme Court had held in *Chambers v. State*, 831 N.W.2d 311 (2013), that *Miller* did not apply retroactively to sentences finalized before the *Miller* rule was announced.

The defendant appealed the decision to the Minnesota Supreme Court, and before the court issued its decision, the U.S. Supreme Court held in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), that the *Miller* rule applied retroactively, effectively overruling *Chambers*. The court ordered supplemental briefs and heard a second round of oral arguments, and thereafter issued this decision.

Discussion:

First, the court considered the defendant's argument based on the alleged recantation of the key witness' statement. The court reviewed the postconviction court's analysis and affirmed the postconviction court's decision. Specifically, the court held that the postconviction court "properly applied the law to the facts..." and "did not abuse its discretion when it ruled that [the witness'] out-of-court statements were not admissible... ."

Next, the court considered the defendant's constitutional argument in light of the *Miller* and *Montgomery* holdings. The district court "was required to impose a sentence of LWOR under Minnesota's mandatory sentencing scheme," and the *Miller* court explicitly found this type of sentencing to be unconstitutional as applied to juveniles. Although the Minnesota Supreme Court previously held in *Chambers* that the *Miller* rule did not apply retroactively to sentences imposed before the *Miller* rule was announced, the U.S. Supreme Court overturned this rationale in *Montgomery*. Therefore, the court reasoned that *Miller* applied to the defendant's case, and the defendant's sentence violated the Eighth Amendment under the *Miller* rule.

The court then considered what the appropriate remedy would be for this constitutional violation. In a previous case, *State v. Ali*, 855 N.W.2d 235 (Minn. 2014), the court held that a juvenile LWOR sentence had violated the *Miller* rule, and had considered two potential remedies: "(1) remanding for a *Miller* resentencing hearing... or (2) severing the unconstitutional portion of the mandatory sentencing statutes and reviving the most recent constitutional versions... ."

In *Ali*, the court remanded the case for a *Miller* resentencing hearing, reasoning that "district courts had the authority to hold *Miller* hearings because the sentencing scheme violated a rule of criminal procedure," and criminal procedure rulings are within the court's jurisdiction. However, in this case, the defendant argued that the court should no longer allow district courts to hold *Miller* hearings. Because the U.S. Supreme Court held in *Montgomery* that "*Miller* announced a *substantive* rule of constitutional law," and was therefore not a matter of simple criminal procedure, it would be improper for the judiciary "to hold *Miller* hearings in the absence of legislative direction." The state argued that *Miller* "does not categorically prohibit LWOR sentences for all juveniles," but rather allows an LWOR sentence when the juvenile is found to be "irreparably corrupt," and not just "transiently immature." Therefore, the *Miller* rule has a procedural element, and a remand to the district court would be appropriate.

The court did not resolve the question of whether the *Miller* rule was substantive or procedural. Rather, the court held that a *Miller* resentencing hearing would not be fair in cases involving retroactive application of the *Miller* rule because "[a] fair and meaningful evaluation of a juvenile's youthful characteristics, including his or her 'transient immaturity' versus permanent 'corruption' and 'incorrigibility' at the time of the offense" would not be possible after a significant amount of time had passed. Specifically, a *Miller* resentencing hearing would be unfair because "[t]he sentencing court would be required to evaluate a juvenile's mindset and characteristics from many years ago."

Although this holding appears to apply to all cases retroactively applying *Miller*, the court's reasoning emphasizes the "many years" that had passed since the original sentencing hearing. It is unclear whether this holding would also apply to more recently sentenced cases where relevant evidence may be more readily available.

Having held that a *Miller* resentencing hearing would not be an appropriate remedy, the court turned to its other option – severing the unconstitutional portion of the mandatory sentencing statute. The court reasoned that because mandatory sentencing was still constitutional as applied to adults, severing the entire content of the mandatory sentencing statute would be unnecessarily broad. Rather, the court held that the most appropriate remedy was "as-applied severance and revival." In other words, the court held that "the relevant LWOR sentencing statutes [were] severed and the most recent constitutional statutes [were] revived, as applied to [the defendant] and any other juvenile offenders who received mandatory LWOR sentences that were final before the *Miller* rule was announced."

The court examined historical versions of the sentencing statutes and found that the most recent constitutional versions were from 2004. Therefore, the 2004 version of the sentencing statutes is the language that now applies to juveniles.

The court vacated the defendant's LWOR sentence and remanded the case to the district court with instructions to impose a sentence of life imprisonment with the possibility of release after 30 years, pursuant to the 2004 version of the sentencing statutes.

The legislature may want to consider amending the mandatory sentencing statutes to reflect the 2004 language that now applies to juveniles.

Minnesota Statutes, section 609.352, subdivision 2, and subdivision 3, paragraph (a).

Subject: Crimes; solicitation of children to engage in sexual conduct

Court Opinion: *State v. Moser*, 884 N.W.2d 890 (Minn. App. 2016) (A15-2017).

Applicable text of section 609.352, subdivision 2:

A person 18 years of age or older who solicits a child or someone the person reasonably believes is a child to engage in sexual conduct with intent to engage in sexual conduct is guilty of a felony and may be sentenced as provided in subdivision 4.

Applicable text of section 609.352, subdivision 3, paragraph (a):

Mistake as to age is not a defense to a prosecution under this section.

Statutory Issue:

Does the prohibition on using the mistake-of-age defense as applied to soliciting a minor over the internet to engage in sexual conduct violate substantive due process?

Facts:

An adult male, Mark Moser, used Facebook over a period of less than one week to solicit a 14 year old girl for sex. Moser and the girl never met in person. During one of the Facebook exchanges, the girl told Moser that she was 16, even though her real age was 14.

As a result of the Facebook exchange, Moser was charged with solicitation of a child "to engage in sexual conduct with the intent to engage in sexual conduct" under Minnesota Statutes, section 609.352, subdivision 2.

In district court, Moser argued that Minnesota Statutes, section 609.352 (the child-solicitation statute) was unconstitutional as subdivision 3, paragraph (a) specifically prohibits a defendant from raising the mistake-of-age defense. The child-solicitation statute imposes a strict liability crime – meaning that intent to engage in sexual conduct with a child does not have to be proven (i.e. the state does not have to prove that the defendant had knowledge of the child's age). Moser stated that in his situation, where the interaction between an adult and a child is done strictly over the internet, the defendant must be allowed to raise a mistake-of-age defense. In the absence of that defense, Moser claims that the child-solicitation statute violates substantive due process – his fundamental right to both a fair trial and to present a full defense.

Discussion:

In resolving the constitutional issues presented by the case, the court first analyzed the historical context of mens rea (the "guilty mind") in criminal jurisprudence. Recognizing that a criminal intent requirement is "embedded in our justice system," the court explained that "it is a rare case where the legislature explicitly excludes a mens rea requirement for a felony offense" as was done in the child-solicitation statute. However, there are certain areas of behavior where courts have upheld the constitutionality of strict liability crimes – most notably in the area of public welfare crimes. Public welfare crimes do not criminalize "aggression or action, but are based on 'neglect where the law requires care, or inaction where it imposes a duty.'" Some examples of public welfare crimes include the offense of failing to produce proof of insurance, possession of an open alcohol bottle in a vehicle, the sale of contaminated or adulterated food or drugs, or the possession of certain illegal weapons. In these

instances, courts have noted that "the lack of mens rea requirement is justified because the offenses regulate potentially harmful items, such as dangerous devices, products, or waste materials." Another class of crimes that have been excluded from the normal mens rea requirements are those that prohibit "sexual conduct with children who are below the age of consent." In these cases, the court explained that the defendant is "presumed to be able to ascertain the victim's age." In concluding the court's discussion on the historical context of mens rea, the court stated that the legislature can enact crimes with strict liability, but "its ability to do so is not without limits" as strict liability crimes have "only been accepted in two narrow areas."

The court next analyzed the child-solicitation statute under the due process clause of the Minnesota and U.S. Constitutions. The first step in any due process analysis is to determine whether a fundamental right has been infringed. The court concluded that "the rights to a fair trial and to present a complete defense…have long been at the core of due process protections" and therefore Moser's fundamental rights were infringed by the child-solicitation statute.

The second step in the due process analysis is to determine whether the law serves a compelling government interest. The court stated that "there can be no question…that protecting the safety of children from sexual predators is a compelling government interest."

Next, the court examined whether the law is narrowly tailored to serve the compelling interest of protecting children. The court concluded that the child-solicitation statute, as applied to Moser, does not survive strict scrutiny and therefore violates the due process clause of the Minnesota and United States Constitutions. The question the court considered was "whether excluding mens rea in this statute is the least burdensome way to protect the public interest."

The court first looked to *State v. Guminga*, 395 N.W.2d 344 (Minn. 1986), where the Minnesota Supreme Court held that "no one can be convicted of a crime punishable by imprisonment for an act he did not commit, did not have knowledge of, or give express or implied consent to the commission thereof." *Id.* at 349. In that case, the law at issue "imposed vicarious criminal liability on the owner of a bar whose employee sold alcohol to underage persons." The *Guminga* court noted that there were less burdensome options to protect the public interest, and held that a gross misdemeanor conviction violated the defendant's substantive due process and only civil penalties would have been constitutional for that offense.

In light of the *Guminga* approach to strict liability crimes, the court recalled its discussion on the long established importance of mens rea in criminal jurisprudence, especially in the context of a felony level offense like the child-solicitation statute. The court explained that the child-solicitation statute does not fall into the "generally accepted limited uses for strict liability crimes: public welfare offenses or situations where there is a reasonable duty and opportunity to ascertain relevant facts." The penalty for the child-solicitation statute is much harsher than those of public welfare crimes which "typically carry light penalties and do not subject a person's reputation to serious harm." And, the child-solicitation statute "imposes an unreasonable duty on defendants to ascertain relevant facts," as it would be extremely difficult to determine a person's age through communication over the internet.

Furthermore, given the inchoate nature of solicitation crimes – criminalizing, at the felony level, behavior that is anticipatory or preliminary without requiring criminal intent – the court stated that the child-solicitation statute crosses the constitutional boundaries of due process. And finally, without a

mistake-of-age defense, the child-solicitation statute is overinclusive since adults who "have no desire to have sexual contact with children" may be subject to criminal liability.

For these reasons, the court concluded that the child-solicitation statute, as applied to Moser, violates due process by imposing strict liability and eliminating the mistake-of-age defense. The court suggested a practical remedy to the statute's constitutional deficiency. The court specifically mentioned that a lower penalty may "bring the statute within constitutional bounds." However, the court did not take a position on precisely what that penalty would be. In addition, a second practical remedy is readily apparent from the court's holding. The statute could be amended to provide an exception to the mistake-of-age defense in those instances where the solicitation to engage in sexual conduct was solely conducted over the internet, making it unreasonable for the defendant to be able to ascertain the person's age.

Minnesota Statutes, section 617.247, subdivision 9.

Subject: Criminal sentencing; conditional release

Court Opinion: *State vs. Noggle,* 2015 WL 5825102 (Minn. App. 2015) (A15-0104).

Applicable text of section 617.247, subdivision 9:

If the person has previously been convicted of a violation of this section, section 609.342, 609.343, 609.344, 609.345, 609.3451, 609.3453, or 617.246, or any similar statute of the United States, this state, or any state, the commissioner shall place the person on conditional release for ten years.

Statutory Issue:

The phrase "has previously been convicted" is ambiguous.

Facts:

In August 2009, Forest Grant Noggle pleaded guilty to possession between May 10 and 14, 2007, of pornographic work involving minors. The plea agreement provided for a stay of adjudication and supervised probation for five years.

In August 2007, Noggle had pleaded guilty to attempted third-degree criminal sexual conduct for an incident occurring on May 10, 2007. Noggle had arranged on the Internet to meet a purported minor female for sex, but it was a sting operation. When he was arrested on this charge, he gave a statement to police that led to the charge of possession of pornographic work involving minors.

In the sting operation case, the district court initially placed Noggle on probation. There were three subsequent violation hearings, in December 2008, September 2011, and January 2015, respectively. The district court first adjudicated Noggle guilty but stayed imposition of sentence. Next the district court continued the stay of imposition again. At the final hearing, the district imposed and executed an 18-month prison sentence and also imposed a 10-year conditional-release term.

In the possession of pornographic work involving minors case, in December 2011, Noggle admitted to the following violations of his probation conditions: (1) being in a house with a minor child; (2) interruption of his sex-offender-treatment program because of a probation violation; and (3) possession of erotic stories that violated the spirit of the treatment program. The district court entered conviction for these violations, but stayed imposition of sentence. In October 2014, the district court held a contested probation-revocation hearing and determined that Noggle had committed multiple additional probation violations. The district court imposed an executed sentence of 27 months and a ten-year conditional-release term.

At issue here is the conviction and sentencing for the possession of pornographic work involving minors. Noggle appealed his 27-month executed sentence and the ten-year conditional-release term. Noggle also argued that the district court abused its discretion by revoking his probation.

Discussion:

The court affirmed Noggle's executed sentence of 27 months, and found that the district court did not abuse its discretion in revoking Noggle's probation, both on grounds unrelated to statutory ambiguity.

Noggle further argued that the ten-year conditional-release term under section 617.247, subdivision 9, was improper because: (1) there was insufficient evidence on the record of a previous conviction; and (2) the phrase "has previously been convicted" is ambiguous. The court explained that a conditional-release term was mandatory under section 617.247, subdivision 9.

The court dispensed with Noggle's first argument because, at the time of the conviction for possession of pornographic work involving minors, Noggle had a prior qualifying conviction of third-degree criminal sexual conduct, and the district court had the order in its file.

Regarding Noggle's second argument, the court remarked that section 617.247, subdivision 9, does not include a definition of the phrase "has previously been convicted." The court examined a similar statutory provision, section 609.3455, subdivision 1, which stipulates the rules of conditional release for criminal-sexual-conduct convictions. Paragraph (f) of that subdivision provides, "previous sex offense conviction" means that "the offender was convicted *and sentenced* for a sex offense before the commission of the present offense." Meanwhile, paragraph (g) of the same subdivision provides, "prior sex offense conviction" means the offender is "convicted of committing a sex offense before the offender has been convicted of the present offense, regardless of whether the offender was convicted for the first offense before the commission of the present offense, and the convictions involved separate behavioral incidents." However, the penalty is the same for either a previous or prior offense conviction under section 609.3455, subdivision 1.

Ultimately, the court found Noggle's argument compelling that section 617.247, subdivision 9, was ambiguous because it did not define the phrase "has previously been convicted."

The court applied the rule of lenity which asserts that ambiguity be resolved in favor of the criminal defendant. In this case, the court made clear that the more favorable reading for Noggle is that the phrase "has previously been convicted" means a conviction that occurred before commission of the present offense. Noggle's conviction for third-degree criminal sexual conduct occurred after the conviction for possession of pornographic work involving minors. The court held that Noggle's conditional-release term should be reduced to five years.

The court did not suggest a practical remedy to the deficiency noted in the opinion. The legislature may want to consider looking at the definitions in section 609.3455, subdivision 1, paragraphs (f) and (g) to help clarify the ambiguous phrase "has previously been convicted" in section 617.247, subdivision 9.

Actions Taken –

The Minnesota Legislature recently responded to two statutory deficiencies raised by Minnesota appellate courts.

1. *Engfer v. General Dynamics Advanced Information Systems, Inc.*, 869 N.W.2d 295 (Minn. 2015) (No. A13-0872).

   In *Engfer*, the Minnesota Supreme Court held that the Employee Retirement Income Security Act (ERISA) preempts the timing provision in Minnesota Statutes, section 268.035, subdivision 29, paragraph (a), clause (13). The timing provisions require that a supplemental unemployment benefit plan "provide supplemental payments only for those weeks the applicant has been paid regular, extended, or additional unemployment benefits" in order for the supplemental payments to be excluded from the definition of "wages." The legislature responded in Laws 2016, chapter 189, article 9, section 2, by repealing the language that was held to be preempted by ERISA.

2. *State v. Turner*, 864 N.W.2d 204 (Minn. App. 2015) (No. A14-1408).

   In *State v. Turner*, the Minnesota Court of appeals held that Minnesota Statutes, section 609.765, which criminalizes defamation, is unconstitutionally overbroad under the First Amendment. The legislature responded in Laws 2016, chapter 126, section 8, by narrowing the definition of defamation to only false statements.