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REPORT

OF

REVISOR OF STATUTES

****

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT AND COURT OF APPEALS

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Submitted to the Legislature of the State of Minnesota

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Pursuant to Mn Stat 3C.04, subd 3

Office of the Revisor of Statutes

700 State Office Building
100 Constitution Avenue
St. Paul, MN 55155-1297

Phone: 296-2868
Fax: 296-0569

November 15, 1992

The Honorable Roger D. Moe
President of the Senate

and

The Honorable Dee Long
Speaker of the House of Representatives

State Capitol
Saint Paul, Minnesota 55155

Minnesota Statutes, section 3C.04, subdivision 3, requires the Revisor of Statutes to biennially report to the Legislature on statutory changes recommended or statutory deficiencies noted in opinions of the Supreme Court of Minnesota.

I am, therefore, pleased to transmit to you our report on opinions issued by the Supreme Court between October 1, 1990, and September 30, 1992.

Respectfully submitted,

Harry M. Walsh
Revisor of Statutes
296-0949

HMW/ks
copies:

Chair and Members,
Senate Judiciary Committee

Chair and Members,
House Judiciary Committee

REPORT OF THE REVISOR OF STATUTES

TO THE

LEGISLATURE OF THE STATE OF MINNESOTA

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT

The Revisor of Statutes respectfully reports to the Legislature of the State of Minnesota, in accordance with Minnesota Statutes, section 3C.04, subdivision 3, which provides that the Revisor of Statutes shall:

> "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. The report must be made by November 15 of each even-numbered year. It must treat opinions filed during the two-year period immediately preceding September 30 of the year before the year in which the session is held. It must include any comment necessary to outline clearly the legislative problem reported."

The opinions of the Supreme Court and Court of Appeals of Minnesota concerning statutory changes recommended or discussed, or statutory deficiencies noted during the period beginning October 1, 1990, and ending September 30, 1992, together with a statement of the cases and the comment of the Court, are set forth on the following pages in numerical order, according to statutory section number. This is the first biennium during which reporting of Court of Appeals cases has been required, though this was done previously on an informal basis. Please note also that an additional finding of unconstitutionality of a Minnesota law (hiring of replacements for strikers) handed down by the U.S. District Court for Minnesota, was also included.

As was the case with our last biennial report, there was a

shortage of clear judicial discussion of statutory deficiencies and recommendations for change. Although four findings of unconstitutionality appeared during the biennium, the 1992 Legislature reacted quickly to remedy three of the defects. These three cases, and the legislative action they apparently precipitated are mentioned under ACTIONS TAKEN on the next page.

Three cases also appear which appeared to be of interest because of statements made in dissenting opinions in regard to construction of particular statutory provisions.

ACTIONS TAKEN

In recent times, the Legislature has been prompt in reacting to constitutional issues raised by the Court. Thus in the area of implied consent testing of vehicle operators, McDonnell v. Com'r of Public Safety, decided by the Court of Appeals (460 N.W.2d 363) on Oct. 2, 1990, and by the Supreme Court (473 N.W.2d 848) on June 7, 1991, which found serious defects in the implied consent law, the Legislature on April 17, 1992, enacted Laws 1992, chapter 570, article 1, of which makes a number of changes in our implied consent law, several of which appear designed to cure these constitutional defects.

Similarly, when State v. Russell (477 N.W.2d 886) was issued by the Supreme Court on Dec. 13, 1991, holding unconstitutional the statute which made possession of crack cocaine a more serious offense than possession of an equal amount of the more refined powder cocaine, the Legislature reacted almost immediately when it passed chapter 358 of Laws 1992 on January 16, 1992 - a promptness which is quite impressive - which equalized the penalty.

The application of a preference for families of the same racial or ethnic heritage in the adoption of minority racial or heritage children was declared unconstitutional by the Court of Appeals on Dec. 31, 1992, in Matter of Welfare of DL (479 N.W.2d 408). On April 17, 1992, the Legislature enacted chapter 557 of Laws 1992, which made the preference for adoption applicable to all children, regardless of race or heritage - as the Court had recommended.

Section 117.195, subdivision 1

STATE BY HUMPHREY v. BAILLON CO.

State By Humphrey v. Baillon Co., 480 N.W.2d 673 (Minn.App. 1992) (Feb. 4, 1992), was a highway right-of-way condemnation case in which the issue involved the computation of interest upon the judgment. The trial court computed interest under section 117.195, subdivision 1, which provides that:

> "* * * The rate of interest shall be determined according to section 549.09. * * *"

(Section 549.09 is a statute prescribing a method of computing interest on money judgments which is tied to the interest rate on United States treasury bills.)

Both the State Constitution (Art. 1, Sec. 13) and the United States Constitution prohibit the taking of private property for public use without "just compensation."

The Court of Appeals reversed the trial court on the manner of computing interest and remanded the case for re-computation, holding that:

> "A trial court in a condemnation proceeding is not bound by statutory interest rates but instead must determine what rate of interest will provide the landowner with just compensation." (emphasis added)

Section 179.12(9)

EMPLOYERS ASSOCIATION, INC. v.

UNITED STEELWORKERS OF AMERICA

Employers Association, Inc. v. United Steelworkers of America, ... FSupp. ... (USDC, Minn.) Oct. 1, 1992, was a declaratory judgment seeking a declaration that Minnesota's Strikebreaker Replacement Law (M.S. sec. 179.12(9) was unconstitutional.

Section 179.12(9) provides that:

> "It is an unfair labor practice for an employer: * * *
>
> (9) To grant or offer to grant the status of permanent replacement employee to a person for performing bargaining unit work for an employer during a lockout of employees in a labor organization or during a strike of employees in a labor organization authorized by a representative of employees; * * *."

Clause (10) makes a violation of clause (9) an unlawful act.

The instant case arose out of a statement of intent by a member of the Association (Northern Hydraulics) to do just what was prohibited by clause (9); namely to hire permanent replacement workers in the event of a strike. (The strike was averted, but this action ensued.)

The Court noted that the Ramsey County District Court had upheld the constitutionality of the law in a case that was currently on appeal before the Minnesota Court of Appeals but, in effect, refused to defer to the State Court because of the important question of federal law presented.

The Court found the State's blanket prohibition on hiring of permanent striker replacements directly interferes with an employer's federally protected right to do so, and that the

Striker Replacement Law is contrary to federal labor law and is preempted as unconstitutional under the Machinists preemption doctrine as stated in 427 U.S. at 147.

Section 216B.44

MATTER OF PEOPLE'S CO-OP POWER ASS'N

Matter of People's Co-op Power Ass'n, 470 N.W.2d 525 (Minn.App. 1991) (May 14, 1991), was a case in which the Court of Appeals was faced with a controversy between a municipal electric utility and an electric cooperative power association. At issue was a construction of Minnesota Statutes, section 216B.44, which provides in pertinent part that:

> "* * * whenever a municipality which owns and operates an electric utility (a) extends its corporate boundaries through annexation * * *, the municipality shall thereafter furnish electric service to these areas unless the area is already receiving electric service from an electric utility, in which event, the municipality may purchase the facilities of the electric utility serving the area. The municipality acquiring the facilities shall pay to the electric utility formerly serving the area the appropriate value of its properties within the area * * *." (emphasis added)

The Public Utilities Commission, relying on the above statute, ordered the city of Rochester to pay in excess of $130,000 to People's upon annexation of a 40 acre tract of undeveloped territory into the city, concluding that:

> " furnishing electric service in the area was synonymous with a utility assigned to the area having developed facilities making it 'capable' of providing service in the area."

and despite the fact that the annexed area was totally undeveloped and the co-op had no lines or property of any type within the area, the city must compensate People's.

A majority of the Court of Appeals affirmed the Commission's decision, holding that:

> "We must affirm the Public Utilities Commission on its calculation of an award that properly compensates a rural cooperative for impairment of investments establishing its

capability to serve an area acquired by a municipality. Loss of anticipated revenues is a consideration for measuring compensation due for either an investment in present services or other investments creating the capability to provide services in the area."

Of interest in this case is the well reasoned dissent of Judge Davies, who argued that:

"In this case the MPUC and the majority distort section 216B.44 by twice ignoring the phrase 'property(ies) within the annexed area.' The MPUC also twice ignores the phrase 'serving the area.'

The facts here are that People's had no facilities whatsoever within the annexed 40 acres; and it did not serve one customer within its bounds. Therefore, under the explicit compensation formula of the statute, People's should receive no compensation."

Sections 240.01 - 240.29

RICE v. CONNELLY

The Supreme Court in Rice v. Connelly, 488 N.W.2d 241, (July 31, 1992), held unconstitutional the Legislature's action in enacting Laws 1991, chapter 336, amending various provisions of chapter 240, a main purpose of which was to authorize off-track betting on horse races, and Minnesota Rules, part 7873.0400, which set forth the requirements for telephone account wagering.

On November 2, 1982, Minnesota voters approved an amendment to Article X of our Constitution stating:

> "Sec. 8. Parimutuel Betting. The Legislature may authorize on-track parimutuel betting on horse racing in a manner prescribed by law." (emphasis added)

Pursuant to this amendment the 1983 Legislature passed legislation establishing a Racing Commission to license and regulate parimutuel betting on horse racing. Under license from the Commission, Canterbury Downs racetrack was constructed and began operation. Since then a person wishing to bet on a horse race could only do so by attending a race at Canterbury Downs.

The Legislature enacted chapter 336 in an apparent attempt to increase the opportunity for betting on races at Canterbury Downs and thus to provide increased revenue for the track. In declaring this attempt invalid, the Supreme Court held:

> "By its terms, Minn. Const. art X § 8 explicitly limits legislative prerogative to the authorization of 'on-track parimutuel betting on horseracing' and therefore, to the extent that Minn.Stat. §§ 240.01-240.29 (Supp. 1991) and Minnesota R. 7873.0400 (1991) constitute legislative action in excess of that constitutionally permissible, they are declared unconstitutional. Accordingly, any actions of the Minnesota Racing Commission in reliance upon the

invalid legislation are held unauthorized and invalid."

Section 256D.065

MITCHELL v. STEFFEN

The 1991 Minnesota Legislature, in an attempt to reduce state expenditures, enacted Minnesota Statutes, section 256D.065, providing, in effect, that general assistance and work readiness payments to otherwise eligible applicants without minor children who have resided in the state less than six months shall equal 60 percent of the amount received by an identically situated applicant with more than six months residence.

Mitchell v. Steffen, 487 N.W.2d 896 (Minn. App. 1992) (June 9, 1992), was an action brought against the commissioner of human services by several public assistance applicants who had resided in the state less than six months. The District Court certified the matter as a class action and ruled in favor of the applicants on all points excepting retroactively of benefits, granting summary judgment to the applicants on their claim that the statute is unconstitutional under the equal protection clause of the United States Constitution (U.S.C.A. Const. Amend. 14).

Upon appeal, the Court of Appeals concluded:

> "Finally, we reiterate that a state may not constitutionally apportion its services or benefits based solely on the length of a citizen's residency. Acceptance of the appellant's position in this case 'would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection.' *Shapiro*, 394 U.S. at 632-33, 89 S.Ct. at 1330.

and held that:

> "The district court did not err in determining that the statute violates the Equal Protection Clause of the

United States Constitution, and in concluding that a claim is not raised under the Privileges and Immunities Clause of United States Constitution.

While not addressed by the district court, we conclude the statute also violates the equal protection clause of the Minnesota Constitution.

The district court's refusal to award retroactive benefits is reversed."

sending the case back to the District Court for recalculation of benefits.

Section 541.051, subdivision 1(a)

GRIEBLE v. ANDERSON CORPORATION

Griebel v. Anderson Corporation, 489 N.W.2d 521 (Sept. 18, 1992), was an action by lake homeowners against a window manufacturer seeking damages for the alleged negligent design and manufacture of patio doors which allowed cluster flies to enter the home, which they did in large numbers.

The District Court granted summary judgment for the Defendants, ruling that the claim was barred by Minnesota Statutes, section 541.051, subdivision 1(a), which provides that:

> "Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property * * * shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property * * * more than two years after discovery of the injury. * * *" (emphasis added)

The Court of Appeals had reversed the District Court, based on apparent agreement of the parties that the flies constituted no health hazard and that there was thus no "injury to property." The Supreme Court reversed again, holding that the two-year statute of limitations for claims of damages or injuries resulting from defective and unsafe improvements to real property did in fact apply to bar the action.

Of interest in this case is the dissent of Justice Tomljanovich, in which Justice Yetka joined, which stated:

> "The majority ignores the clear command of the statute that in order for the two-year limitations period to apply, the injury must arise out of condition which is *both* defective and unsafe. By defining 'unsafe' as 'insecure' instead of 'hazardous,' I believe the majority has

stretched the definition of 'unsafe' so it will include most merely defective improvements. I do not believe we should whittle away at the meaning of 'unsafe' in this fashion to avoid the fact that the legislature chose the word 'and,' not 'or.'

and went on to conclude:

"At least 30 jurisdictions have adopted comparable statutes, and many are strikingly similar to Minnesota's - with one notable exception. Half of the jurisdictions with statutes similar to Minn.Stat. § 541.051 have substituted the word 'or' for 'and.' The impact of that word change is significant, extending application of the two-year limitations period to those cases where the challenged improvement is defective but not unsafe.

Some legislatures have chosen to use 'defective or unsafe' language. Ours has not. Thus I believe our legislature's word choice was intentional. I would hold that under Minn.Stat. § 541.051, a complained of improvement must be both defective and hazardous before the two-year limitations period applies. Because the parties have stipulated that there is no health hazard, under this definition, the disputed improvements cannot be considered unsafe. As a result, I would hold the two-year limitations period does not apply."

Sections 609.205(1) and 609.378

STATE v. McKOWN

In State v. McKown, 475 N.W.2d 63 (Sept. 30, 1991), the Supreme Court, with two justices dissenting, affirmed a decision by the Court of Appeals (461 N.W.2d 720) affirming dismissal of an indictment in a case in which a mother and step-father had been charged with second degree manslaughter in the death of a minor daughter who died of petoacidosis diabetes after they failed to seek medical treatment for the illness.

Our manslaughter statute (section 609.205 (1)) provides that:

> "A person who causes the death of another by any of the following means is guilty of manslaughter in the second degree * * *:
>
> (1) by the person's culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another; * * *."

The defendants, who were practicing Christian Scientists, relied upon the "spiritual means or prayer" exemption in the child neglect statute (section 609.378) which provides that:

> "* * * (1) A parent, legal guardian, or caretaker who willfully deprives a child of necessary food, clothing, shelter, health care, or supervision appropriate to the child's age, * * * and the deprivation substantially harms or is likely to substantially harm the child's physical or emotional health is guilty of neglect of a child. If a parent, guardian, or caretaker responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, this treatment or care is 'health care,' for purposes of this clause." (emphasis added)

In upholding dismissal of the indictment, the Court stated that:

> "The spiritual treatment and prayer exception to the

child neglect statute expressly provided respondents the right to 'depend upon' Christian Science healing methods so long as they did so in good faith. Therefore the state may not now attempt to prosecute them for exercising that right."

The Court pointed out that the decision was neither intended to stand for the proposition that compliance with one statute necessarily complies with all others nor a conclusion that the state could never prosecute an individual when death of a child ensues from good faith reliance on spiritual methods of treatment, but stated:

> "* * * Rather, we hold that in this particular instance, where the state has clearly expressed its intention to permit good faith reliance on spiritual treatment and prayer as an alternative to conventional medical treatment, it cannot prosecute respondents for doing so without violating their rights to due process.
>
> We therefore conclude that the indictments issued against respondents, charging them with second degree manslaughter in the death of Ian Lundman, violate the constitutional guarantee of due process of law and must be dismissed."

Of possible interest in this case was a statement by the Court of Appeals on possible legislative action:

> The legislature could, of course, have built into the statute such a limitation, as has the legislature of Oklahoma. That body, in its child neglect statute, has authorized parents to treat illness with spiritual means or prayer, except in those instances in which 'permanent physical damage' could result to the child."

Sections 609.344, subdivision 1(k) and

609.345, subdivision 1(k)

STATE v. POOLE

In State v. Poole, 489 N.W.2d 537, (Minn. App. 1992) (Aug. 11, 1992), the Court of Appeals upheld the conviction of defendant, a licensed medical doctor, on 16 counts of third and fourth-degree criminal sexual conduct committed against 11 female patients.

The pertinent statutes for the two degrees of the offense each read:

> "A person who engages in sexual penetration [contact] with another person is guilty of criminal sexual conduct in the third [fourth] degree if any of the following circumstances exists: * * * (k) the actor accomplishes the sexual penetration [contact] by means of false representation that the contact is for a bona fide medical purpose by a health care professional. Consent by the complainant is not a defense." (emphasis added)

Defendant argued that these statutory provisions were vague and ambiguous and do not cover the conduct of a health care professional. The majority of the Appeals Court panel however held that the provisions were not unconstitutionality vague and do apply to health care professionals, thus affirming the conviction.

A dissent by Judge Schumacher presented an interesting argument that essentially contended that the statute was ambiguous in that:

> "The statute does not unambiguously define the 'false representation' which makes the penetration a criminal act. This representation could be either as to the medical justification alone, or as to both the medical justification and the health care status of the actor. (emphasis added) The ambiguity of the statute is demonstrated by the state's construction of it at trial,

where the state argued that *only* a health care professional could violate the statute."

and that therefore the legislative history could be consulted,

and:

> "That history shows indisputably that the statute was passed in response to an imposter performing gynecological examinations at a hospital in St. Paul, and was intended to apply only to impostors. The distinction becomes all the more critical in view of Dr. Poole's testimony that his medical practices were done in good faith and that these practices had helped patients and even saved lives.
>
> Thus, the conduct of a doctor such as Dr. Poole does not fall within the terms of the statute and his conviction must be reversed."