REPORT OF THE
REVISOR OF STATUTES

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT
AND COURT OF APPEALS

Submitted to the Legislature of the State of Minnesota
November 1998

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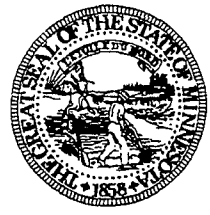

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November 16, 1998

The Honorable Allan Spear
President of the Senate
Room 120
Capitol Building

The Honorable Phil Carruthers
Speaker of the House of Representatives
Room 463
State Office Building

Dear Mr. Speaker and Mr. President:

Minnesota Statutes, section 3C.04, subdivision 3, requires the Office of 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, 1996 and September 30, 1998.

Sincerely,

Michele L. Timmons
Revisor

cc: The Honorable Jane Ranum
Chair, Senate Judiciary Committee
and Members

The Honorable Wes Skoglund
Chair, House Judiciary Committee
and Members

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ACTIONS TAKEN

The Minnesota Legislature, during the 1997-1998 biennium, responded to constitutional and other problems which were raised by the Court of Appeals or Supreme Court.

In U.S.West Communications v. Redwood Falls, 558 N.W.2d 512, the Court of Appeals held that a city lacked authority to require a telecommunications carrier to obtain a franchise from the city or to require the carrier to enclose fiber optic lines in concrete duct. In 1997, the legislature enacted legislation to address various issues concerning the use of public rights-of-way and the regulatory roles of local government and the state, found at Laws 1997, chapter 123.

In County of Morrison v. Litke, 558 N.W. 2d 16, the Court of Appeals ruled that while aiders and abettors of theft of public assistance could be held criminally liable, the wrongfully obtained assistance was not recoverable under Minnesota Statutes 1996, sec. 256.98, subd. 4, which limited recovery to the recipient and the recipient's estate. The legislature corrected this anomaly by amendment set forth in Laws 1997, chapter 85, article 5, sec. 9.

In State v. Machholz, 574 N.W. 2d 415, the Court of Appeals held Minnesota Statutes 1997 Supplement, sec. 609.749, subd. 2, paragraph (a), clause (7), as unconstitutionally overbroad. The statute made conduct a crime if the person engaged "in any other harassing conduct that interferes with another person or intruders on the person's privacy or liberty." The legislature amended the clause and corrected the constitutional defect. See Laws 1998, chapter 367, article 2, sec. 23.

In State v. Miner, 556, N.W. 2d 578, the Court of Appeals dealt with the free speech issues of Minnesota Statutes 1994, sec. 97A.037, which prohibited "harassing conduct" by persons trying to interfere with lawful hunters and trappers. One element of "harassing conduct" was the "intent to...dissuade," which the court ruled "restricted the freedom of expression guaranteed by the First Amendment and is invalid." The legislature amended the statute, shown at Laws 1998, chapter 401, sec. 33.

Minnesota Statutes, sec. 13.43, subd. 3

Data Privacy for Public Employment Interviewees

Mankato Free Press v. City of N. Mankato

Minnesota Court of Appeals

May 13, 1997

In *Mankato Free Press Co. v. City of North Mankato*, 563 N.W.2d 291 (Minn. Appp. 1997), a newspaper sued a city and its city council claiming it violated the Data Practices Act and the Open Meeting Law as follows:

I - the Data Practices Act, specifically Minnesota Statutes, section 13.43, subdivision 3, by refusing to identify applicants who were chosen for interviews for the job of city administrator. The subdivision reads in relevant part:

> ". . . [T]he following personnel data on current and former applicants for employment by a . . . political subdivision . . . is public: veteran status; relevant test scores; rank on eligible list; job history; education and training; and work availability. Names of applicants shall be private data except when . . . applicants are considered by the appointing authority to be finalists for a position in public employment. For purposes of this subdivision, "finalist" means an individual who is selected to be interviewed by the appointing authority prior to selection . . . ."

II - the Open Meeting Law, specifically Minnesota Statutes, section 471.705, subdivision 1, by conducting private, one-on-one serial interviews with job applicants before conducting public interviews. The subdivision reads, in relevant part:

> ". . . all meetings, including executive sessions of . . . the governing body of any . . . city . . . shall be open to the public . . . ."

III - the Open Meeting Law, specifically Minnesota Statutes, section 471.705, subdivision 1, when the city council members took, in private, a straw vote to narrow the list of job finalists before conducting the public interviews and only later recorded its votes in the minutes. The subdivision reads, in relevant part:

> "The votes of the members of . . . such governing body . . . on any action taken in a meeting herein required to be open to the public shall be recorded in a journal kept for that purpose, and the journal shall be open to the public during all normal business hours where such records are

kept."

The city council selected five applicants to be interviewed, but refused to disclose the names of the applicants to the newspaper until they had agreed to be interviewed, at which time their names were publicly announced. The council members conducted simultaneous, nonpublic, serial one-on-one interviews with each of the five finalists, at which different questions were asked than at the public interviews held later that day. Following the public interviews, the council members met together privately and took straw votes ranking the candidates until one favored candidate remained. Then the favored candidate was hired by unanimous roll call vote. The results of the straw votes were not make public at the time, but were later added to the minutes.

I

The city argued that it has discretion deciding at which point a candidate becomes a finalist and that some candidates, when applying for a position, don't want their present employer to learn they are seeking other employment. The court stated that section 13.43 was ambiguous, susceptible of "more than one reasonable interpretation." It held in favor of the newspaper by concluding that "selected to be" showed "an intent that the identities of finalists are to be made public when the appointing authority chooses them for interviews, not when the candidates agree to go forward with the interviews."

II

The city argued that the Open Meeting Law was not violated by the one-on-one interviews since a quorum of the members was never reached. The court noted that, although the law does not define "meeting," the Minnesota Supreme Court has previously held that meetings subject to the law are "gatherings of a quorum or more members of the governing body . . ." but that "serial meetings in groups of less than a quorum for the purposes of avoiding public hearings or fashioning agreement on an issue may also be found to be a violation of the statute depending upon the facts of the individual case." The appeals court remanded on this issue for the trial court to make a factual determination on whether the "interviewing procedure was done with the purpose of avoiding public hearings or fasioning agreement on who to hire as city administrator."

III

The court agreed with the newspaper that the city violated the Open Meeting Law by taking a nonpublic straw vote to narrow the list of finalists, stating (in a note) that the straw vote became an official vote when the council members took action as a result of the vote; that a "city council meeting is not really 'open' to the public if the council is conducting voting in

secret"; and that "[s]ecret voting denies the public an opportunity to observe the decision-making process, to know the council members' stance on issues, and to be fully informed about the council's actions."

Minnesota Statutes, section 65B.49, subdivision 3

Automobile Insurance Coverage Priority

Hertz Corp. v. State Farm Mut. Ins. Co.

Minnesota Supreme Court

January 28, 1998

Hertz Corporation v. State Farm Mutual Insurance Company sought declaration as to who should provide primary coverage for an accident involving a motor vehicle rented by Hertz, a self-insured rental agency, to a driver insured by State Farm. The driver renewed his policy of automobile insurance with State Farm on March 22, 1994, which provides in relevant part: "The liability coverage extends to the use, by an insured, of a . . . non-owned car" and "If a . . . non-owned car has other vehicle liability coverage on it, then this coverage is excess." The legislature added paragraph (d) to Minnesota Statutes, section 65B.49, subdivision 3, paragraph (3), effective August 1, 1994, which read:

> "(d) Except as provided in subdivision 5a, a residual liability insurance policy shall be excess of a nonowned vehicle policy whether the nonowned vehicle is borrowed or rented, or used for business or pleasure. A nonowned vehicle is one not used or provided on a regular basis."

The driver rented a motor vehicle from Hertz on August 2, 1994, and did not purchase a liability insurance supplement (LIS) from Hertz. The rental agreement provided that if a driver did not purchase the LIS, that the driver's insurance was primary, apparently intending to make Hertz's self-insurance effective only if the driver had no other automobile insurance.

The trial court held for Hertz and the court of appeal affirmed holding that the rental agreement fell within the purpose of the No-Fault Act because Hertz provided coverage if the renter had none and that the rental agreement was valid and enforceable.

The supreme court reversed, concluding that the rental agreement's limitation on Hertz' liability obligation to situations in which there was no other coverage, violated the No-Fault Act and was unenforceable." After interpreting statutory section 65B.49, subdivision 3, paragraph (3), paragraph (d), the court further concluded that Hertz' self-insurance was primary, the State Farm policy is excess to the Hertz coverage, and that Hertz must provide coverage for the damages resulting from the accident. (The court added in a footnote: "If our interpretation of the No-Fault Act is deemed incorrect by the legislature, and rental car agencies are to be treated differently than all other automobile owners, the

legislature is, of course, free to clarify the statute at any time.")

Justice Page dissented, arguing that the majority's decision allows the renter and the renter's insurer to avoid responsibility for the renter's involvement in an accident, that the purpose of the No-Fault Act is satisfied under the terms of the rental agreement because no renter is ever without liability coverage and thus no person injured as a result of an accident involving the operator would ever remain uncompensated, that increased costs incurred by rental companies will probably be passed on to their customers, and that it is not unreasonable for individual renters "to bear the cost of their own liability insurance."

Minnesota Statutes, sec. 160.09, subd. 3

Access to Land

Christopherson v. Fillmore Township

Minnesota Court of Appeals

September 8, 1998

In *Christopherson v. Fillmore Township*, 583 N.W.2d 307 (Minn.App. 1998), a landowner brought an action against a town after its town board vacated a road dividing his property and, in its place, granted him a 20-foot-wide permanent easement, which is the statutory minimum for roads approaching bridges or culverts. The landowner argued entitlement to a 33-foot easement, as required for a cartway under Minnesota Statutes, section 164.08, subdivision 2. The landowner's motion for summary judgment was granted by the district court which held that a 20-foot access was not "other access" required by Minnesota Statutes, section 160.09, subdivision 3, which reads:

> "When a county highway or town road is the only means of access to any property or properties containing an area or combined area of five acres or more, the highway or road shall not be vacated without the consent of the property owner unless other means of access are provided." (emphasis added)

The appeals court stated that since "access" was not defined for purposes of the town road vacation statute, it was ambiguous. The court concluded that what constitutes "access" under section 160.09, if not changed by the legislature, must be determined on a case-by-case basis. In this case, since Christopherson had not petitioned for a cartway, section 164.08 was not applicable and a 20-foot easement was sufficient to provide "other means of access" for the landowner.

Minnesota Statutes, sec. 169.685, subd. 5

Motor Vehicle Child Passenger Restraint

State v. Lucas

Minnesota Court of Appeals

May 12, 1998

In *State v. Lucas*, 578 N.W.2d 775 (Minn.App. 1998), defendant was stopped for a violation of the child passenger restraint system law, Minnesota Statutes, section 169.685. Subdivision 5 of that statute reads in pertinent part:

> "(a) Every motor vehicle operator, when transporting a child under the age of four . . . in a motor vehicle equipped with factory-installed seat belts, shall equip and install for use in the motor vehicle . . . a child passenger restraint system meeting federal motor vehicle safety standards.
>
> (b) No motor vehicle operator who is operating a motor vehicle . . . may transport a child under the age of four in a seat . . . equipped with a . . . seat belt, unless the child is properly fastened in the child passenger restraint system. Any . . . operator who violates this subdivision is guilty of a petty misdemeanor and may be sentenced to pay a fine . . . ."

The trial court ruled the stop unlawful and granted defendant's motion to suppress evidence of alcohol-related driving offenses, which was obtained as a result of the stop. The appeals court affirmed stating that the child passenger restraint law was *in pari materia* (relating to the same person or thing or having a common purpose) with the seat belt law. The seat belt law, Minnesota Statutes, section 169.686, requires that motor vehicle seat belts be worn by drivers, front seat passengers, and children older than three and younger than 11 years of age. In addition, the seat belt law contains a "conditional traffic offense" provision, not expressly contained in the child passenger restraint law, which reads:

> "A peace officer may not issue a citation for a violation of this section unless the officer lawfully stopped or detained the driver of the motor vehicle for a moving violation other than a violation involving motor vehicle equipment."

Although the same provision is not found in both laws, the appeals court found that the seat belt law and child passenger restraint law should be construed as having common subject matter and "constituting one systematic body of law" and that "each statute should be construed in light, with reference to,

and in connection with" each other. The majority further stated that the court need not adopt a literal interpretation if it is contrary to the "policy and object of the statute"; that "there is no sound reason . . . to depart in . . . 169.685 from its express policy and intent in . . . 169.686 of disallowing traffic stops solely for restraint violations"; that "a contrary holding would engender confusion . . . in the enforcement and application of the laws"; and that "we express no opinion as to the wisdom of such preclusion, a matter to be addressed by the legislature."

Judge Huspeni dissented, arguing that "the legislature could have written the . . . enforcement provision to apply to . . . section 169.685" but "did not"; that the legislative history indicates that section 169.685 should not be "read to limit an officer's discretion to stop a vehicle"; that *in pari materia* should not be invoked because the two statutes do not address the same persons, have the same purpose, or refer to each other; that the court should hesitate to "supply that which the legislature could have, but did not"; and that possible confusion should not outweigh child safety concerns.

Minnesota Statutes, sec. 171.3215, subd. 2

School Bus Driver's License Endorsement Cancellation

Thompson v. Commissioner of Public Safety

Minnesota Court of Appeals

August 5, 1997

In *Thompson v. Commissioner of Public Safety*, 567 N.W.2d 280 (Minn. App. 1997), Thompson appealed the denial of his petition for reinstatement of the school bus endorsement for his driver's license following his conviction for violating the Open Bottle Law, Minnesota Statutes, section 169.122. After 90 days, his driver's license was reinstated. Then, Johnson petitioned the district court for reinstatement of the school bus endorsement. The district court denied the petition, ruling that Thompson's driver's license was revoked under the implied consent statute and he was not entitled to reinstatement of his school bus endorsement for five years under Minnesota Statutes, section 171.3215, subdivision 2, which reads in relevant part:

> "Within ten days of receiving notice . . . that a school bus driver has been convicted of a . . . violation of section 169.121, 169.129, . . . and within ten days of revoking a school bus driver's license under section 169.123, the commissioner shall cancel the school bus driver's endorsement . . . to operate a school bus . . . for five years." (emphasis added)

Thompson argued that "and" should be read in its normal conjunctive sense and that the plain language of the statute deprives a person of the school bus endorsement only if the person has both been convicted of a listed offense and the commissioner cancels the endorsement under Minnesota Statutes, section 169.123.

The court found that "[t]he legislature used the word 'and' in this context, instead of the word 'or,' because it repeated the phrase 'within ten days' in each clause, but did not include any notice language in the revocation phrase. Grammatical errors such as this cannot eviscerate the law, and words and phrases may be added in aid of construction. Minn. Stat. . . . 645.18 (1996). In any event, the common usage canon of construction may not be observed if it would produce 'a construction inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute.' Minn. Stat. . . . 645.08 (1996)." The court quoted from a previous case by the Minnesota Supreme Court that said "'and' may be construed as a disjunctive where the sense of the statute plainly requires it, thereby changing 'and' to 'or'." The court concluded "a school bus endorsement must be cancelled under Minn. Stat. . . . 171.3215, subd 2, when the driver's license

has been revoked under the implied consent statute."

Minnesota Statutes, secs. 243.166, subd. 1, para. (a), clause (1); and 244.052, subd. 1, clause (3)

Sex Offender Community Notification

In the Matter of Risk Level Determination of C.M.

Minnesota Court of Appeals

June 2, 1998

In the Matter of the Risk Level Determination of C.M., 578 N.W.2d 391 (Minn.App. 1998) was an appeal from an Administrative Law Judge's determination to uphold the classification of C.M. (relator) as a level III sex offender, which requires widespread notification of the public in the community where the sex offender resides, is employed, or is regularly found.

In 1993, relator was charged with several counts of criminal sexual conduct and other offenses for contemporaneous incidents occurring at his ex-girl-friend's apartment. In exchange for dismissal of all other charges, relator pleaded guilty to burglary in the second degree, but did not admit to having sex with his ex-girl-friend. He was sentenced to 58 months in prison. Before release, a prison psychologist recommended, and the End of Confinement Review Committee determined, that relator be classified as a level III sex offender. The Office of Administrative Hearings upheld that classification.

Relator argued that he was not a sex offender under Minnesota Statutes, section 244.052, subdivision 1, clause (4) (which is now clause (3)), because he was not "convicted of an offense for which registration under section 243.166 . . . is required . . . ." Minnesota Statutes, section 243.166, subdivision 1, paragraph (a), clause (1), requires a person to register "if:

> (1) the person was charged with or petitioned for a felony violation of or attempt to violate any of the following, and convicted of or adjudicated delinquent for that offense or another offense arising out of the same set of circumstances . . . ." (emphasis added)

The provision then lists a series of specific crimes related to sexual conduct. Relator contended "notification applies only where the offender is convicted of an offense that automatically results in registration because the offense is specifically listed in section 243.166."

The state argued that the statute also applies to any

offender convicted of an offense not listed in section 243.166 if the offense arose from the same set of circumstances leading to a charge of a listed offense.

The court concluded that the "risk of erroneous, irrevocable attachment of stigma outweighs the state's interest in protecting the public" and that the state's interpretation of an ambiguous statute "would result in a violation of state and federal guarantees of due process." Community notification under a scheme in which a person "was charged with, but not convicted of, a sex offense would result in deprivation of a constitutionally protected liberty interest without due process of law." The court adopted relator's alternate construction that notification "applies only to individuals who have been convicted of an offense" specifically listed in section 243.166, subdivision 1. Relator was convicted only of burglary, was "outside the scope of the notification statute," and thus is not an offender for purposes of the notification statute.

Johnson v. Minn. Dept. of Human Services

Medical Assistance Authorization Pending Appeal

Minnesota Statutes, sec. 256.045, subd. 10

Minnesota Court of Appeals

June 10, 1997

Johnson v. Minnesota Department of Human Services, 565 N.W.2d 453 (Minn. App. 1997), was brought to challenge the decision by the department of human services to deny authorization for using medical assistance funds to purchase a HiRider stand-up wheelchair for Johnson. A department appeals referee affirmed the department's decision, but it was subsequently overturned by the district court. The district court also granted Johnson a writ of mandamus to make the department provide immediate authorization for Johnson to acquire the wheelchair under Minnesota Statutes, section 256.045, subdivision 10, which reads in relevant part:

> "If the commissioner of human services or district court orders monthly assistance or aid or services paid or provided in any proceeding under this section, it shall be paid or provided pending appeal to the commissioner of human services, district court, court of appeals, or supreme court." (emphasis added)

Johnson argued that "monthly" only modifies "assistance" and, since the wheelchair is a one-time expenditure for an "aid" or "service," the department was required to provide the special wheelchair pending appeal. The department argued that "monthly" modified all three of the nouns "assistance or aid or services" and the department "is obligated to pay for only assistance or aid or services provided on a monthly basis. Because a HiRider is provided on a one-time basis, rather than monthly, the department [concluded that] the HiRider need not be provided pending appeal." The court found: "Because both interpretations of the statute are reasonable, the statute is ambiguous" and "can be given more than one reasonable interpretation."

The court found "assistance," "aid," and "service" to be "essentially synonymous; the "sole effect of using 'monthly' in the statute is to distinguish between benefits that are received monthly and benefits that are not received monthly"; and, "accordingly the statute does not impose a duty on the department to provide authorization for Johnson to obtain a HiRider pending appeal . . . ." The court held that "[t]he district court erred in issuing a writ of mandamus compelling the department to provide Johnson authorization to obtain a HiRider pending appeal."

Minnesota Statutes, sec. 256B.431, subd. 15

Capital Cost Reimbursement to Nursing Home

Rate Appeals of Lyngblomsten Care Center

Minnesota Court of Appeals

June 17, 1998

In the Matter of the Rate Appeals of Lyngblomsten Care Center and Camilia Rose, 578 N.W.2d 1 (Minn.App. 1998), was a review of a decision of the commissioner of human services granting summary judgment for the department of human services to deny reimbursement to two nursing home facilities (relators) for capital repair or replacement costs. The costs were incurred within 12 months of a construction project qualifying for public financial assistance. Denial was based on Minnesota Statutes, section 256B.431, subdivision 15, paragraph (e), which reads in pertinent part:

> "(e) If costs otherwise allowable under this subdivision are incurred as the result of a project approved under the moratorium exception process . . . or in connection with an addition to or replacement of buildings, attached fixtures, or land improvements . . ., these costs must be claimed under subdivision 16 or 17, as appropriate." (emphasis added)

Relators argued that "as the result of" and "in connection with" should be interpreted to mean the costs are related to the qualifying construction project before being added to the cost of the project for approval under the moratorium process.

The department argued that statutory section 256B.431, subdivision 10, requires use of the definition found in statutory section 144A.071, subdivision 1a, clause (g), which reads in pertinent part:

> "(g) 'construction project' means:
>
> . . .
>
> (3) capital asset additions or replacements that are completed within 12 months before or after the completion date of the project . . . ."

In effect, the department's position, affirmed by the court, prevents reimbursement of the relators' repair or replacement costs.

The court found that statutory section 256B.431, subdivision 15, paragraph (3), is ambiguous and that the department's interpretation was entitled to "'great weight' due

to the ambiguous and technical nature of the statutes in question." It concluded that "'as a result of' and 'in connection with' can be read to mean that any repair or replacement cost incurred within 12 months of a major construction project should be considered a part of the major construction project" and that this interpretation is "consistent with the goals of the nursing home moratorium process."

Minnesota Statutes, sec. 299C.11, para. (b), clause (1)

Criminal Record Expungement

State v. Bragg

Minnesota Court of Appeals

May 12, 1998

State v. Bragg, 577 N.W.2d 516 (Minn.App. 1998), was an appeal from a district court order to seal appellant's court records and identification evidence resulting from 1993 and 1994 charges of fifth-degree assault and disorderly conduct. Appellant argued that the identification evidence must be returned to him because the charges were dismissed before a determination of probable cause was made pursuant to Minnesota Statutes, section 299C.11, paragraph (b), which provides in pertinent part:

> "(b) No petition under chapter 609A is required if the person has not been convicted of any felony or gross misdemeanor, either within or without the state, within the period of ten years immediately preceding the determination of all pending criminal actions or proceedings in favor of the arrested person, and either of the following occurred:
>
> (1) all charges were dismissed prior to a determination of probable cause; or . . . .
>
> Where these conditions are met, the bureau or agency shall, upon demand, return to the arrested person finger and thumb prints, photographs, distinctive physical mark identification data, and other identification data, and all copies and duplicates of them."

The appeals court concluded that the reference to "a determination of probable cause" was ambiguous since at least three probable cause determinations, under certain circumstances, may be made before trial. The court further concluded that "the 'determination of probable cause' . . . is a determination, based on the full record, of whether sufficient probable cause exists to proceed to trial." Because the charges against Bragg in 1993 and 1994 were dismissed before such a determination was made, the court held that Bragg was entitled to return of his identification evidence and arrest records related to those charges.

Minnesota Statutes, sec. 336.2-318

Scope of Liability for Breach of Warranty

Minnesota Mining and Mfg. v. Nishika Ltd.

Minnesota Supreme Court

June 12, 1997

In *Minnesota Mining and Manufacturing Company v. Nishika Ltd., LenTec Corporation, American 3D Ltd., and Nishika Manufacturing (H. K.) Ltd.*, 565 N.W.2d 16 (Minn. 1997), four companies (respondents) involved in the three-dimensional photography business brought an action in Texas against a seller (3M) of photographic emulsion, alleging breach of express and implied warranties. The respondents prevailed in the lower courts but the Texas Supreme Court certified two questions of Minnesota law to the Minnesota Supreme Court:

> 1. For breach of warranty under [Minn. Stat., sec. 336.2-318], is a seller liable to a person who never acquired any goods from the seller, directly or indirectly, for pure economic damages (e.g., lost profits), unaccompanied by any injury to the person or the person's property?
>
> 2. If the answer to Question 1 is 'yes,' may several such persons, who may or may not be related, and who may or may not include the buyer of the goods, recover damages jointly as a single economic unit?"

3M formulated an emulsion that it claimed "would work well with the respondents' film development process" and understood that the emulsion would be used with 3M-manufactured backcoat sauce. 3M sold the new emulsion to LenTec and sold backcoat sauce components to Nishika who bought the emulsion from LenTec. The other two respondents did not buy either product from 3M. However, with use the photographs faded over time and lost their three-dimensional look, resulting in declining sales and failure of respondents' business. Judgment was entered in Texas, before appeal to its supreme court, in the amount of $29,000,000, jointly for the respondents.

- First Question -

Minnesota Statutes, section 336.2-318, reads:

> "A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section."

The court interpreted the statute to "[e]ssentially . . . broaden the reach of warranties by narrowing the lack of privity defense" and that it "is not so clear and free from ambiguity that we may disregard legislative intent, the aims of section 336.2-318 at the time of enactment, or the consequences of a particular construction." Further, "The . . . term 'injured' is not defined in the U.C.C. . . . [and] is unclear." The court stated that "this court has never gone so far as to hold that section 336.2-318 reaches a plaintiff who is seeking lost profits unaccompanied by physical injury or property damage *and* who never used, purchased, or otherwise acquired the goods in question . . . [which] would expand warranty liability well beyond the limits contemplated by the legislature"; and, "the scope of a seller's liability for breach of warranty should recede as the relationship between a 'beneficiary' of the warranty and the seller's goods become more remote." The court answered the first question in the negative.

- Second Question -

The court found that the "respondents do not have a joint legal interest in the judgment that was entered, and each of the respondents is a legally independent entity." The court held: "In general, and absent a joint claim, each plaintiff has an obligation to prove the amount of damages that it individually suffered."

Minnesota Statutes, sec. 340A.801, subd. 1

Dramshop Law

Lefto v. Hoggsbreath Enterprises, Inc.

Minnesota Supreme Court

July 23, 1998

Lefto v. Hoggsbreath Enterprises, Inc., 581 N.W.2d 855, was an action seeking recovery under the Minnesota Civil Damage Act, commonly known as the Dram Shop Law, on behalf of the plaintiff and her daughter as a result of a motor vehicle accident in which the plaintiff's then fiance' (now husband) was severely injured. At the time of the accident, the plaintiff and her fiance' were unmarried but had been living together for five years, had been pooling their incomes, shared household and other expenses, and jointly owned recreational property. The standard of living for the plaintiff and her daughter, as well as her husband, was reduced due to the accident.

The parties stipulated that the defendant made an illegal sale of alcohol to the driver of the vehicle involved in the accident resulting in injury to the plaintiff's fiance', who was a passenger. However, the defendant contended that the plaintiff and her daughter were not within the class of people ("other person") who have a right of action under the act.

The contested part of the act read:

> "A spouse, child, parent, guardian, employer, or <u>other person</u> injured in person, property, or means of support, or who incurs other pecuniary loss by an intoxicated person or by the intoxication of another person, has a right of action...." Minnesota Statutes, section 340A.801, subdivision 1 (emphasis added)

The district court and the court of appeals found that the plaintiff and her daughter were within the class of people who have a right of action under the act. The supreme court majority affirmed, concluding that: "The term 'other person' as used in the Civil Damage Act refers to any other person injured by the intoxication of another if that injured person played no role in causing the intoxication." The court stated that the act is both penal and remedial; that in the past it had liberally interpreted the act to "suppress the mischief" (illegal furnishing of liquor causing a person's intoxication) and "advance the remedy" (protection of innocent third persons injured as a result of another's intoxication, by providing those persons a claim of civil damage); that previous cases had allowed recovery to innocent other persons for injury to person

or property and for pecuniary losses, and "that it makes no sense to [now] apply the rule of *ejusdem generis* to only one category of injury -- means of support".

Justice Stringer, joined by Justice Tomljanovich, dissented, arguing that the majority has expanded the scope of the act by interpreting "other person" to mean "any other person" or "every person"; that the majority did not follow the canon of construction that general words are construed to be restricted in their meaning by preceding particular words (rule of *ejusdem generis*) under Minnesota Statutes, section 645.08, subdivision 3; that the preceding, specific categories of people have in common "a legal relationship involving a level of dependence such that . . . a legal responsibility of the injured party to the claimant is impaired"; and, that for "other persons" to make a claim they must prove that the illegal sale "interfered with or prevented one having a legal obligation to the plaintiff from fulfilling that obligation."

Minnesota Statutes, secs. 363.01, subd. 41; 363.03, subd. 1

Male-on-Male Sexual Harassment

Cummings v. Koehnen

Minnesota Supreme Court

August 28, 1997

Cummings v. Koehnen, et al., 568 N.W.2d 418 (Minn. 1997), raised "the question of whether male-on-male sexual harassment is prohibited by the Minnesota Human Rights Act (MHRA) . . . and, if so, whether a plaintiff . . . must show that the harassment affected one gender differently than the other or that the harasser was homosexual." The trial court held that sexual harassment between two men in an all-male work force was not an actionable claim under the MHRA. The court of appeals reversed and the supreme court affirmed the court of appeals.

The plaintiff was apparently subjected to ongoing sexual harassment by the defendant but was unable to present evidence that the harassment was based on sex under Minnesota Statutes, section 363.03, subdivision 1, clause (2), which states in relevant part that "it is an unfair employment practice:

> . . .
>
> (2) For an employer, <u>because of</u> race, color, creed, religion, national origin, <u>sex</u>, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age,
>
> . . .
>
> (c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." (emphasis added)

Plaintiff was unable to prove differential treatment based on sex, since the company had no female employees, or to prove that the harasser had an actual sexual interest in men, but argued that "the 'because of sex' element is unnecessary because sexual harassment is specifically included in the meaning of "discrimination, based on sex'" and that the plaintiff is required only to prove the elements listed in the definition of sexual harassment found at Minnesota Statutes, section 363.01, subdivision 41; which reads:

> "Subd. 41. . . . "Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:

(1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment, public accommodations or public services, education, or housing;

(2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment, public accommodations or public services, education, or housing; or

(3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action."

The court held that the "because of sex" element is superfluous and that it was necessary for a sexual harassment plaintiff to prove only the elements set forth in section 363.01, subdivision 41.

Justice Page dissented, arguing that the legislature did not intend "to make actionable all 'rude and crude' conduct that takes place in the workplace between people of the same sex." He contended that "the law of sexual harassment . . . was designed to remove barriers to equality based on one's gender; that the legislature could have eliminated the "because of sex" requirement but did not; that the majority, by "reading the 'because of sex' requirement out of the statute," is reading "out of the MHRA that which the legislature did provide"; and that the result will likely be a flood of sexual harassment claims by persons "who have never faced barriers to gender equality in the workplace, with the ultimate result being less protection for those women and men who have faced such barriers and who the legislature clearly intended to protect."

Minnesota Statutes, secs. 473.675, subd 1; and 606.01

Review of Quasi-Judicial Action of State Agency

Heideman v. Metropolitan Airports Commission

Minnesota Court of Appeals

November 12, 1996

In *Heideman v. Metropolitan Airports Commission*, 555 N.W.2d 322 (Minn.App. 1996), the court of appeals was asked to determine whether the court of appeals or the district court had jurisdiction under a writ of certiorari to review the quasi-judicial action of the metropolitan airports commission (MAC) in dismissing Heideman (relator).

Minnesota Statutes, section 473.675, subdivision 1, states in pertinent part:

> "A review of any order of the commission may be had upon certiorari in the district court of Ramsey county upon petition of any party to the proceedings before the commission."

Minnesota Statutes, section 606.01, states:

> " No writ of certiorari shall be issued, to correct any proceeding, unless such writ shall be issued within 60 days after the party applying for such writ shall have received due notice of the proceeding sought to be reviewed thereby. The party shall apply to the court of appeals for the writ."

The court stated that the conflict between the two laws was irreconcilable and that even though section 473.675, subdivision 1, was specific to MAC, the later-amended general provision of section 606.01 was intended by the legislature to prevail. It concluded that only the court of appeals, and not the district court, is authorized to issue a writ of certiorari to review quasi-judicial decisions of the commission. It further held that the applicable portion of section 473.675 and all other "pre-existing special provisions allowing certiorari review in the district court" are repealed by implication. The court quoted a portion of Minnesota Statutes, section 645.39: "When a general law establishes a uniform and mandatory system covering a class of subjects, that law is construed to repeal pre-existing special laws on the same class of subjects."

The court added in a note that this decision does not affect decisions of agencies that are not quasi-judicial.

Minnesota Statutes, sec. 518.5511

Administrative Child Support Process

Holmberg v. Holmberg

Minnesota Court of Appeals

June 12, 1998

Holmberg v. Holmberg, Kalis-Fuller v. Fuller, and Carlson v. Carlson, 578 N.W.2d 817 (Minn.App. 1998), were consolidated for review by the appeals court to determine, among other issues, the constitutionality of Minnesota Statutes, section 518.5511, which sets forth an administrative process, conducted by an administrative law judge (ALJ) and only when the public authority for enforcing child support orders is a party, for an action following marital dissolution "to obtain, modify, and enforce" an order relating to child support, medical support, or spousal maintenance if combined with a child support proceeding. For purposes of these actions, the statute confers the powers of a district court judge on the presiding ALJ.

The court majority held section 518.5511 to be unconstitutional as violative of the separation of powers required by the Minnesota Constitution, article III, section 1. The majority stated:

- the state constitution gives original jurisdiction to district courts for civil cases, and dissolution proceedings are civil cases;

- the administrative process "constitutes an impermissible invasion of the original jurisdiction of the district court";

- members of the executive branch, who are not judges, are given broad discretion over matters traditionally the province of district courts;

- *Breimhorst v. Beckman*, 227 Minn. 409, 35 N.W.2d 719, (1949), is precedential in stating the constitutional test as requiring the agency's decisions to be "not only subject to review by certiorari, but lack judicial finality in not being enforceable by execution or other process in the absence of a binding judgment entered thereon by a . . . court";

- the statute allows enforcement "without any intervening ruling or binding judgment of a district court" and is therefore "outside [the] limits of allowable quasi-judicial power";

- the shift of the "initial burden of judicial review to

this court . . . encroaches upon the original jurisdiction of the district courts";

- in comparing other systems with original jurisdiction, the tax court serves a "peculiarly legislative function" and the workers' compensation court is "an integrated, comprehensive system," descriptions that do not pertain to this administrative process;

- "We must conclude . . . the administrative support system represents an improper attempt to transfer broad judicial power to the executive branch. This attempted transfer violates . . . the limits of our state constitution."

Judge Shumaker dissented on the issue of constitutionality, joined by Chief Judge Toussaint, contending the administrative process was not proved "beyond a reasonable doubt" to violate the separation of powers doctrine of the state constitution. The dissent argued:

- that the separation of powers mandate is not a rigid doctrine and the courts have recognized and allowed the exercise of "quasi-judicial" powers by executive agencies;

- that, like workers' compensation laws, this legislation "reflects the legislature's exercise of police power in response to a public welfare concern" and "is part of a system . . . entirely legislative in jurisdiction and power";

- that, in comparison with workers' compensation, both systems operate in a quasi-judicial capacity and, while section 518.5511 is a "comparatively minor delegation of judicial power over a limited class of family law proceedings," the workers' compensation system "reflects a total transfer of plenary judicial power over a firmly rooted, common law cause of action";

- that the first criterion of *Breimhorst*, requiring some type of district court oversight, is no longer valid, in light of the workers' compensation act and more recent judicial decisions; and

- that the "current, correct test for determining [the constitutionality of] quasi-judicial administrative functions" should be an examination of whether "(1) there is a vital public interest in the subject; (2) there is a reasonable need for statutory regulation; (3) the system of regulation is an adequate substitute for the procedures that formerly existed; and (4) there is a right of appellate review."

[**Note:** Minnesota Supreme Court granted petition to review and scheduled oral argument for 12/7/98.]

Minnesota Statutes, sec. 604.02, subd. 1

Third-Party Tortfeasor's Right to Contribution

Decker v. Brunkow

Minnesota Court of Appeals

December 31, 1996

Decker, et al., Respondents, v. Brunkow, Defendant and Third-Party Plaintiff, Appellant, v. Oak Ridge Homes, SLS, Inc., Third-Party Defendant, Respondent, 557 N.W.2d 360 (Minn. App. 1996), was an action in negligence brought against a building owner who, in turn, brought an action for indemnification or contribution against the employer. The district court found Brunkow (owner) five percent negligent and Oak Ridge Homes (employer) 95 percent negligent, awarded damages to Decker (employee), and allocated the entire verdict to the owner because the employer was held to be immune from direct liability under the Workers' Compensation Act. Owner appealed, arguing that her liability was limited to four times her percentage of fault under Minnesota Statutes, section 604.02, subdivision 1, which reads in relevant part:

> "Subdivision 1. When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. . . . [A] person whose fault is 15 percent or less is liable for a percentage of the whole award no greater than four times the percentage of fault . . . ."

This "15% X 4" rule was added by amendment to the subdivision by the legislature in 1988.

The court phrased the issue as: "Does the 1988 amendment . . ., which limits the liability of a tortfeasor who is 15% or less at fault to no more than four times the percentage of fault, modify the contribution rule of *Lambertson*?

In *Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679 (1977) (noted in the revisor's 1978 report on supreme court opinions), the supreme court discussed the problem of a less negligent party bearing the entire cost of liability while the more negligent party, who is an employer, is shielded by the limits of the workers' compensation law. The court fashioned a compromise contribution rule allowing a third-party tortfeasor "contribution against the employer 'in an amount proportional to its percentage of negligence, but not to exceed its total workers' compensation liability to plaintiff.'"

In this case, the court found that the 15% X 4 rule is "primarily intended to remedy unfairness in tort actions" and

"does not apply where the third-party tortfeasor seeks contribution from a negligent employer who is exclusively liable under workers' compensation law." The court noted that *Lambertson* recognized the unfairness of its contribution rule, but that any change to the workers' compensation third-party rule would have to be made by the legislature and stated: "No such changes have been made. We hold that until the legislature chooses to address the conflict, the contribution rule in *Lambertson* applies." Affirmed.

APPENDIX

STATE OF MINNESOTA
IN COURT OF APPEALS
C9-96-2277

Mankato Free Press Co., d/b/a The Free Press,
Appellant,

vs.

City of North Mankato, et al.,
Respondents.

Filed May 13, 1997
Reversed and remanded
Huspeni, Judge

Nicollet County District Court
File No. C196100036

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Carla J. Heyl, 145 University Avenue West, St. Paul, MN 55103-2044 (for Amicus Curiae League of Minnesota Cities)

Considered and decided by Huspeni, Presiding Judge, Toussaint, Chief Judge, and Parker, Judge.

S Y L L A B U S

1. The Government Data Practices Act, Minn. Stat. § 13.43, subd. 3 (1996), requires that the names of certain applicants for public employment be made public at the time they are selected to be interviewed.

2. Determining whether a city council's procedure of interviewing job applicants in groups of less than a quorum was adopted for the purpose of avoiding the public hearing required by the Open Meeting Law, Minn. Stat. § 471.705, subd. 1 (1996), presents a fact question that cannot be answered on summary judgment.

3. The Open Meeting Law, Minn. Stat. § 471.705, subd. 1, requires that the results of a written straw vote taken during an open meeting be made public during the meeting.

OPINION

HUSPENI, Judge

Appellant Mankato Free Press Co., d/b/a The Free Press, brought an action against respondents City of North Mankato and its council members, claiming that respondents violated portions of the Government Data Practices Act, Minn. Stat. § 13.43, subd. 3 (1996), and the Open Meeting Law, Minn. Stat. § 471.705, subd. 1 (1996). The district court granted respondents' motion for summary judgment. We reverse and remand.

FACTS

Respondents hired a consultant to help select a new North Mankato city administrator. After meeting with applicants, the consultant narrowed the pool of applicants to 11. Debra Flemming, editor of The Free Press, met with North Mankato mayor Nancy Knutson and the North Mankato city attorney and requested that the names of the applicants be disclosed as soon as the city council decided to interview them. She also requested that any interviews be conducted publicly. Knutson told Flemming that the council would conduct one-on-one interviews that would not be open to the public.

The council held a special meeting on January 10, 1996, during which it reviewed the applications of the 11 candidates and selected five of the applicants to interview. The meeting was open to the public, but the council did not reveal the names of the applicants. After the meeting, a reporter for The Free Press requested the names of the five finalists. The council refused, saying the finalists' identities would be disclosed only after they agreed to be interviewed. The next morning the five candidates were contacted, and they all agreed to interview for the position. Their names were publicly announced later that day.

On January 27, 1996, the council members conducted simultaneous, serial one-on-one interviews of each of the five finalists so that each candidate was interviewed separately by each council member. The one-on-one interviews were not open to the public or the media. After the interviews, the council members ate lunch together but did not discuss the interviews. Following lunch, the council conducted public interviews. Knutson stated that she asked different questions at the public interviews than at the private interviews.

After the public interviews, the council members took a straw vote by writing on a piece of paper the names of their top two candidate choices. The result of the straw vote was not made public at the time, but it was included in the council meeting minutes, which were available at a later date. From the straw vote, three candidates remained, and the council members ranked these three. A motion was then made to hire the favored candidate, and a unanimous roll call was taken in favor of hiring the top candidate.

Appellant commenced this action, claiming that respondents violated the Government Data Practices Act and the Open Meeting Law. Appellant sought a declaratory judgment. Both sides moved for summary judgment, which the district court granted in favor of respondents on the three issues pertinent to this appeal.

ISSUES

1. Did respondents violate the Government Data Practices Act by refusing to provide the names of the job finalists before the candidates had agreed to be interviewed?

2. Did respondents violate the Open Meeting Law by conducting serial one-on-one interviews with the job finalists?

3. Did respondents violate the Open Meeting Law by taking a written straw vote to narrow the field of candidates where the results of the straw vote were not made public until a later date?

ANALYSIS

On appeal from summary judgment, this court asks whether there are any genuine issues of material fact and whether the district court erred in applying the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). The construction of a statute is a question of law and thus fully reviewable by an appellate court. Hibbing Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527, 529 (Minn. 1985).

I.

Appellant claims that under the Government Data Practices Act, respondents were obligated to identify the names of applicants for the city administrator job when the city council decided to invite the applicants for interviews. The Government Data Practices Act attempts "to reconcile an individual's right of privacy with the public's right to be fully informed about government operations." Demers v. City of Minneapolis, 486 N.W.2d 828, 831 (Minn. App. 1992). With respect to information collected about applicants for public employment, the statute provides:

> [T]he following personnel data on current and former applicants for employment by a * * * political subdivision * * * is public: veteran status; relevant test scores; rank on eligible list; job history; education and training; and work availability. Names of applicants shall be private data except * * * **when applicants are considered by the appointing authority to be finalists for a position in public employment. For purposes of this subdivision, "finalist" means an individual who is selected to be interviewed by the appointing authority prior to selection.**

Minn. Stat. § 13.43, subd. 3 (1996) (emphasis added).

Respondents rely on the first sentence of the italicized language, which suggests that an appointing authority has discretion in deciding the time at which a candidate is a finalist. Appellant, on the other hand, highlights the next sentence, arguing that by defining "finalist" the legislature sought to limit a public body's discretion in deciding when a person becomes a finalist.

Both sides raise legitimate concerns in their arguments interpreting Minn. Stat. § 13.43, subd. 3. Respondents argue that many people, when applying for a position, do not want their present employer to know that they are considering seeking other employment. Respondents further

contend that a hiring process may be lengthy and an applicant has a right to privacy if the applicant decides he or she is no longer interested in the position. Appellant argues that if public bodies are given too much authority to decide when a candidate is a finalist, they could evade the purpose of the statute by inventing various conditions that must be met before an individual is considered a finalist.

Because the italicized language has more than one reasonable interpretation, the statute presents an ambiguity and is subject to the rules of statutory construction. See Tuma v. Commissioner of Econ. Sec., 386 N.W.2d 702, 706 (Minn. 1986) (statute is ambiguous if it has more than one reasonable interpretation and court must apply rules of construction); Waller v. Powers Dep't Store, 343 N.W.2d 655, 657 (Minn. 1984) (statutory construction appropriate only when statute is ambiguous). The inclusion of the definition of finalist is a key consideration; it indicates that the triggering event that makes a name public is the selection of a candidate to be interviewed, not the candidate's acquiescence to the interview. To hold otherwise would give the candidate control over when his or her name is made public. The statute does not contemplate such a result.

The statute's legislative history supports our decision. The italicized language was added to the statute during the 1981 legislative session. 1981 Minn. Laws ch. 311, § 12. As originally introduced in the Senate, the amendment did not include the definition of "finalist." See 1 1981 Minn. Senate Journal 966. When the definition was added, it was initially worded so that a "finalist" was "an individual **who is interviewed** * * * ." Id. (emphasis added). Before being passed by the House, the definition was altered so that a "finalist" was "an individual who is **selected to be** interviewed * * * ." See 2 Minn. House Journal 3404 (emphasis added). The legislature's addition of the definition of "finalist" as well as the "selected to be" clause indicates an intent that the identities of finalists are to be made public when the appointing authority chooses them for interviews, not when the candidates agree to go forward with the interviews.

We recognize that the privacy concerns of applicants for public employment are at stake, but the statute and its legislative history suggest that the public's right to be informed outweighs an individual's privacy right in this context. We believe that the concerns raised by respondents can be addressed if the appointing authority advises candidates before they apply (or early in the selection process) that if they are selected to be interviewed they will be considered to be finalists under the statute and their names may be made public during the selection process. Respondents' failure to disclose the candidates' names violated statutory requirements. Therefore, we reverse the district court's decision on this issue.

II.

Appellant next argues that respondents violated the Open Meeting Law by conducting serial one-on-one interviews. The law provides with few exceptions that

> all meetings, including executive sessions, of * * * the governing body of any * * * city * * * and of any committee, subcommittee, board, department or commissioner thereof, shall be open to the public * * *.

Minn. Stat. § 471.705, subd. 1 (1996). The purpose of the statute is to (1) prohibit secret meetings that make it impossible for the public to become fully informed, (2) assure the public's right to information, and (3) give the public an opportunity to express its views. Claude v. Collins, 518 N.W.2d 836, 841 (Minn. 1994). The Open Meeting Law was enacted to benefit the public and must be construed in the public's favor. See id.

Although the statute does not define "meeting," the supreme court has held that meetings subject to the requirements of the Open Meeting Law are

> gatherings of a quorum or more members of the governing body, or a quorum of a committee, subcommittee, board, department, or commission thereof, at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body.

Moberg v. Independent Sch. Dist. No. 281, 336 N.W.2d 510, 518 (Minn. 1983). Applying this rule, the district court reasoned that when the city council conducted the one-on-one interviews, there was never a "meeting" of a quorum of the council. The court concluded that the interview process "may have violated the spirit of the Open Meeting Law, but technically the procedure did not violate the written statute."

The district court also recognized that determining whether the Open Meeting Law was violated requires more than merely applying the "quorum rule," and cited the caution of the Moberg court that

> serial meetings in groups of less than a quorum for the purposes of avoiding public hearings or fashioning agreement on an issue may also be found to be a violation of the statute depending upon the facts of the individual case.

336 N.W.2d at 518. However, the district court, after finding that respondents' interview process may have violated the spirit of the Open Meeting Law, went on to find that the one-on-one interviewing procedure was not used "to avoid a public hearing or to fashion agreement on an issue." We conclude that in making this finding about the council members' reasons for using the one-on-one interviews, the district court decided a fact issue, which is appropriate only upon a trial on the merits. See Vacura v. Haar's Equip., Inc., 364 N.W.2d 387, 391 (Minn. 1985) (noting that summary judgment is not intended as substitute for trial when there are genuine fact issues to be determined).

Arguably the effect of the one-on-one interviews is at odds with the purpose of the Open Meeting Law. The Open Meeting Law is intended to give the public access to "meetings at which information is received which may influence later decisions" of a public body as well as "matters which could foreseeably require final action" by a public body. St. Cloud Newspapers, Inc. v. District 742 Community Schs., 332 N.W.2d 1, 6 (Minn. 1983). Here, the council members undoubtedly garnered information during the one-on-one interviews that affected their votes about who to hire. Knutson admitted that she asked questions during the private interviews that she did not ask during the public interviews.

While the effect of respondents' interview process may have frustrated the purpose of the Open Meeting Law, Moberg recognizes a violation of the law only if the process was designed to avoid public hearings. See 336 N.W.2d at 518. Therefore, on remand the district court should make a proper factual inquiry to determine whether respondents' interviewing procedure was done with the purpose of avoiding public hearings or fashioning agreement on who to hire as city administrator. [1]

III.

Appellant argues that respondents also violated the Open Meeting Law by taking a written straw vote to narrow the list of finalists during the January 27 meeting. [2] We agree. The results of the straw vote were not made public during the meeting, but were recorded in the meeting minutes, and were made available only at a later date.

The Open Meeting Law requires, with limited exceptions, that all city council meetings be open to the public. Minn. Stat. § 471.705, subd. 1. It further provides:

> The votes of the members of * * * such governing body * * * on any action taken in a meeting herein required to be open to the public shall be recorded in a journal kept for that purpose, and the journal shall be open to the public during all normal business hours where such records are kept.

Id. A city council meeting is not really "open" to the public if the council is conducting its voting in secret. See Op. Att'y Gen. 471e (Aug. 20, 1962) (interpreting Minn. Stat. § 471.705 as precluding secret ballots at city council meetings "[u]nless a secret ballot can be taken in such a manner as to enable the council to comply with" the Open Meeting Law). Secret voting denies the public an opportunity to observe the decision-making process, to know the council members' stance on issues, and to be fully informed about the council's actions. See Claude, 518 N.W.2d at 841 (noting that one purpose of Open Meeting Law is to prohibit secret meetings that make it impossible for public to become fully informed). We conclude that the straw vote here was a secret vote, and, as such, violated the Open Meeting Law.

DECISION

Under the Government Data Practices Act, respondents were obligated to disclose the names of job finalists at the time they decided to interview them, not when the candidates agreed to be interviewed. The Open Meeting Law prohibits the secret straw vote taken at the January 27 council meeting. We reverse the district court's entry of summary judgment on these two issues. We remand to the district court for a proper factual determination on the issue of whether respondents used the one-on-one interview process in order to avoid the requirements of the Open Meeting Law.

Reversed and remanded.

Footnotes

[1] Regarding the issue of the council members' purpose in using the one-on-one interviews, we recognize that they did consult with the city attorney before establishing the interview procedure. Respondents argue that the city attorney relied on an unpublished order opinion in which this court approved of a district court's determination that serial one-on-one interviews do not violate the Open Meeting Law even though the plan was adopted to eliminate the application of the Open Meeting Law. See Northwest Publications, Inc. v. City of Apple Valley, No. C7-91-332 (Minn. App. Feb. 27, 1991). We question the reasonableness of the city attorney's reliance here. This court did not affirm the district court on the merits of that case, but merely denied a petition for extraordinary relief on an emergency basis.

[2] The council termed the vote a "straw vote," which typically is not a formal binding official vote. In this case, however, the council acted upon the straw vote, giving it the same effect as an official vote.

STATE OF MINNESOTA

IN SUPREME COURT

C3-96-2050

Court of Appeals

Gardebring, J.
Concurring Specially, Blatz, J., Keith, C.J.
Dissenting, Page, J.

The Hertz Corporation,

Respondent,

vs.

State Farm Mutual Insurance Company,
petitioner,

Appellant.

Filed: January 28, 1998
Office of Appellate Courts

S Y L L A B U S

1. A car rental agreement that provides that the self-insured rental agency is liable only in the event that the renter or operator of the rented vehicle does not have other automobile liability insurance coverage violates the Minnesota No-Fault Act.

2. In determining priority of coverages, the self-insured rental agency's coverage is primary, while the renter's nonowned vehicle coverage arising from his or her own insurance policy is secondary pursuant to both Minn. Stat. § 65B.49, subd. 3(3)(d) (1996), and the common law "closest to the risk" doctrine.

Reversed.

Heard, considered, and decided by the court en banc.

OPINION

GARDEBRING, Justice.

This case involves the application of the Minnesota No-Fault Act in the context of rental cars. Specifically, we are asked to determine whether a self-insured rental car agency may meet its obligations under the Minnesota No-Fault Automobile Insurance Act, Minn. Stat. §§ 65B.41-.71(1996) ("No-Fault Act"), by providing liability coverage only in the event that the renter or operator of the rented vehicle does not have other liability coverage arising from his or her own automobile policy.

Jeffrey Powers rented an automobile from Hertz in August 1994. While driving the rental car, he was involved in an accident, which gave rise to negligence claims against him for property damage and personal injury. At the time of rental, Powers declined to purchase the Liability Insurance Supplement (LIS), which, for an additional fee, provided full liability coverage for automobile renters. The rental agreement provided that:

> If you do not purchase liability insurance supplement (LIS) * * * at the commencement of the rental and an accident results from the use of the car, your insurance and the insurance of the operator of the car will be primary. This means that Hertz will not grant any defense or indemnity protection under this paragraph if either you or the operator of the car are covered by any valid and collectible automobile liability insurance, whether primary, excess or contingent, with limits at least equal to the minimum required by the applicable state financial responsibility law. If neither you nor the operator of the car have such insurance, Hertz will grant you and any authorized operator of the car limited protection under the terms and conditions stated in subparagraphs 10(a) above and 10(c) below.

The intended import of this provision was apparently to make the Hertz self-insurance coverage effective only if the renter or operator of the rented vehicle had no automobile liability insurance. Powers had personal automobile liability insurance through State Farm for coverage on his 1985 Ford Bronco II. Powers renewed his State Farm policy on March 22, 1994, for a six-month term and the policy was in effect at the time of the accident. The State Farm policy, which has liability coverage with limits at $50,000 per person and $100,000 per occurrence, provided: "The liability coverage extends to the use, by an insured, of a * * * non-owned car." The policy further stated that "[i]f a * * * *non-owned* car has other vehicle liability coverage on it, then this coverage is excess."

Hertz brought a declaratory judgment action against State Farm, asserting that State Farm has the primary duty to defend and indemnify Powers against the claims arising from the accident involving the rented vehicle. In granting Hertz's motion for summary judgment, the trial court held that the Hertz rental agreement was a valid and enforceable contract that did not provide Powers with liability coverage at the time of the accident. It also held that the Hertz rental agreement did not violate the No-Fault Act because it guaranteed liability coverage if the renter or operator was not insured. It concluded that Minn. Stat. § 65B.49, subd. 3(3)(d), the statute dictating priority of coverage, did not apply because Hertz did not provide liability coverage at

all on these facts. The trial court further concluded that Minn. Stat. § 65B.49, subd. 3(3)(d) did not apply because it took effect on August 1, 1994, after the March 1994 renewal date of the Powers' State Farm policy. Finally, the trial court held that State Farm, and not Hertz, was responsible for defending and indemnifying Powers for the claims arising out of the accident.

The court of appeals affirmed the trial court, holding that the Hertz rental agreement satisfied the purpose of the No-Fault Act because Hertz provided liability coverage in the event that the renter or operator did not have other automobile liability insurance. Because the court of appeals held the Hertz rental agreement was valid and enforceable, it did not reach the issue of priority of coverage under the No-Fault Act. State Farm now appeals, arguing that the Hertz rental agreement violates the No-Fault Act, because Hertz, a self-insurer, was required to maintain liability coverage on the vehicles that it owns. We reverse.

In our review of the summary judgment, we must determine "whether there are any genuine issues of material fact and whether the trial court erred in its application of the law." Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co., 433 N.W.2d 82, 84 (Minn. 1988). Because the facts are undisputed, this case raises only issues of statutory and contract interpretation, which are questions of law subject to de novo review. Garrick v. Northland Ins. Co., 469 N.W.2d 709, 711 (Minn. 1991).

The No-Fault Act requires that every Minnesota automobile owner maintain a "plan of reparation security," with specific, statutorily set minimum benefits, including liability coverage. Minn. Stat. § 65B.48, subd. 1; see also Minn. Stat. § 65B.49, subd. 3(1) (stating the minimum benefits required). That obligation may, of course, be met either by the purchase of a commercial automobile liability insurance policy under Minn. Stat. § 65B.48, subd. 2, or by qualification as a self-insured entity, under Minn. Stat. § 65B.48, subd. 3. In this case, Hertz met its obligation by seeking and receiving the authorization of the commissioner of commerce to operate as a self-insured entity. In seeking that approval, Hertz agreed to "discharge fully and promptly all payments and obligations which are now due or shall become due under the provisions of the Minnesota No-Fault Automobile Insurance Act and amendments thereto." State Farm asserts that Hertz's rental agreement violates the No-Fault Act because it allows Hertz to provide "contingent" liability coverage on vehicles it owns, although Hertz is statutorily required, as a self-insured owner of the vehicles, to maintain liability coverage, regardless of whether the renter or operator of a rented vehicle is otherwise insured. In response, Hertz argues that there is no violation of the No-Fault Act because there are no circumstances under which a Hertz vehicle would be uninsured. We disagree. A self-insured car rental agency does not meet its obligations as an automobile owner under the No-Fault Act by thrusting upon the renter its responsibility to provide liability coverage -- that is, by providing liability coverage only in the event that the renter is without liability coverage.

The statutory provisions at issue -- Minn. Stat. §§ 65B.48, subd. 1 and 65B.49, subd. 3(2) -- do not on their face require that an automobile owner maintain coverage that is not contingent upon the presence of other coverage. Nevertheless, it is inconsistent with the general purpose of the No-Fault Act to read the statute in the manner advocated by Hertz. Hertz's interpretation of the Act would create a practical exemption to the broad statutory mandate that all automobile owners carry liability insurance, an exemption nowhere evident in the language of the statute.

Further, the distinction relied upon by Hertz and the court of appeals, that the statutory requirements on Hertz are different because it is self-insured, is contrary to our reading of the No- Fault Act in other cases. We have said that "[s]elf-insurance is the functional equivalent of a commercial insurance policy.

* * * The purpose of either form of insurance is to compensate victims appropriately. The certificate filed with the commissioner [of commerce] is the functional equivalent of an insurance policy." McClain v. Begley, 465 N.W.2d 680, 682 (Minn. 1991). Further, in his concurring opinion in McClain, Justice Simonett concluded that, in considering the application of the No-Fault Act to self-insureds, we should "treat the self-insurer as if it had purchased a policy of auto liability insurance for each of its vehicles with itself as the named insured. Such a policy, if purchased, would contain an omnibus clause extending coverage to permissive drivers as additional unnamed insureds." Id. at 684. Applying this conceptual approach here, one could identify Powers as a permissive driver of the rented vehicle, whose liability would be fully covered by virtue of the omnibus clause. [1]

Further, we find no merit in Hertz's argument that this construction of the No-Fault Act violates its freedom of contract. Legislation may impact contractual obligations, if certain conditions are met. Generally speaking, "[t]he federal constitutional prohibition against contract impairment, U.S. Const., art. I, § 10, cl. 1, has been construed to mean that the state reserves some power to modify contract terms when the public interest requires." Christensen v. Minneapolis Mun. Employees Retirement Bd., 331 N.W.2d 740, 750 (Minn. 1983). The legislature, therefore, can alter contract terms by enacting statutes as long as the legislation is "necessary to meet a broad and pressing social or economic need, if the legislation is reasonably adopted for the solution of the problem involved, and if it is not over broad or over harsh." Id. (quoting White Motor Corp. v. Malone, 599 F.2d 283, 287 (8th Cir. 1979)).

The purposes of the No-Fault Act are spelled out in Minn Stat. § 65B.42: to "relieve the severe economic distress of uncompensated victims"; to prevent overcompensation; to assure prompt payment; to "ease the burden of litigation"; and to correct imbalances and abuses in the automobile accident liability system. That these are legitimate public purposes is unquestionable, and a statutory scheme the linchpin of which is a requirement that each automobile owner carry liability coverage is not either harsh or overly broad.

This court has stated, in the context of a No-Fault Act case, that "contract provisions which conflict with statutory law will not be enforced." Roering v. Grinnell Mut. Reinsurance Co., 444 N.W.2d 829, 833 (Minn. 1989). We have also stated that "an insurer's liability is governed by the contract between the parties *only as long as coverage required by law is not omitted and policy provisions do not contravene applicable statutes.*" Streich v. American Family Mut. Ins. Co., 358 N.W.2d 396, 399 (Minn. 1984) (emphasis added). We conclude that the provision of the rental agreement purporting to limit Hertz' liability obligation to situations in which there is no other coverage, contravenes the No-Fault Act and is, therefore, unenforceable. [2]

Because we hold that Hertz's attempted limitation of coverage is unenforceable, we must determine which insurance coverage is primary in this case. We begin with the consideration of

Minn. Stat. § 65B.49, subd. 3(3)(d), a statutory amendment to the No-Fault Act which became effective on August 1, 1994. See Minn. Stat. § 645.02 (1996). Minn. Stat. § 65B.49, subd. 3(3)(d) (1996) states that:

> (3) Every plan of reparation security shall be subject to the following provisions which need not be contained therein:
>
> * * * *
>
> (d) Except as provided in subdivision 5a, [3] a residual liability insurance policy shall be excess of a nonowned vehicle policy whether the nonowned vehicle is borrowed or rented, or used for business or pleasure. A nonowned vehicle is one not used or provided on a regular basis.

Hertz argues that Minn. Stat. § 65B.49, subd. 3(3)(d) does not apply to the instant case because (1) Powers' State Farm policy, which was effective at the time of the accident, was renewed prior to the effective date of this statutory amendment and (2) the statutory amendment only applies to insurance "policies" and not to self-insurers. Hertz further argues that State Farm's "other insurance" provision is not applicable here, because, as a self-insurer, its reparation security is simply not "other insurance." For the second proposition, Hertz asserts that "a certificate of self-insurance is a contract with the state to protect the public, whereas an automobile liability insurance policy is a contract with the insured to provide indemnity."

State Farm argues that the statutory amendment does apply because, according to Hertz's application for self-insurance, Hertz obligated itself to "discharge fully and promptly all payments and obligations which are now due or shall become due under the provisions of the Minnesota No-Fault Automobile Insurance Act and amendments thereto." State Farm further argues that self-insurance is the equivalent of an insurance policy, and the statutory amendment cannot be found inapplicable simply because it uses the word "policy," rather than the broader term "plan of reparation security."

We have stated that "the general rule is that upon each renewal an entirely new and independent contract of insurance is created and is governed by the laws in effect on the date of renewal." Hauer v. Integrity Mut. Ins. Co., 352 N.W.2d 406, 408 (Minn. 1984). However, "[o]n each reinstatement or renewal of policies, any statutes or amendments pertaining to such policies and enacted after their issuance are incorporated into the new policies." Id. (quoting Taylor v. American Nat'l Ins. Co., 264 Minn. 21, 25, 117 N.W.2d 408, 411 (1962)). Therefore, Hertz is incorrect in its assertion that Minn. Stat. § 65B.49, subd. 3(3)(d) does not apply because it became effective after Powers renewed his State Farm policy.

State Farm is correct in its contention that Hertz's application for self-insurance required that Hertz comply with the No-Fault Act in its entirety and with any amendments enacted in the future. Also, as previously stated, neither this court nor the legislature has provided that self-insured entities should be treated any differently from other insurers, and for that reason Hertz's assertion that the statutory amendment only applies to third-party insurers is mistaken. Therefore,

we conclude that Minn. Stat. § 65B.49, subd. 3(3)(d) is applicable to determine which coverage should be deemed primary.

In applying Minn. Stat. § 65B.49, subd. 3(3)(d) to the instant case, we conclude that the the Hertz self-insurance is primary. The State Farm policy is secondary under the statute, in excess of the Hertz coverage.

Even if this court did not apply Minn. Stat. § 65B.49, subd. 3(3)(d) to this case, the Hertz coverage would still be deemed primary under the common-law "closest to the risk" doctrine. Under our previous cases, to determine which coverage is primary we applied the "closest to the risk" test, in which we ask:

> (1) Which policy specifically described the accident-causing instrumentality?
> (2) Which premium is reflective of the greater contemplated exposure?
> (3) Does one policy contemplate the risk and use of the accident-causing instrumentality with greater specificity than the other policy--that is, is the coverage of the risk primary in one policy and incidental to the other?

Interstate Fire & Cas. Co., 433 N.W.2d at 86.

Applying these factors to this case, the Hertz self-insurance policy specifically describes the rental vehicle involved in the accident because Hertz is the owner and its self-insurance is specifically available to cover the vehicle at issue, while Powers' State Farm policy only describes Powers' personal automobile. As to the second factor, because Hertz chose to self-insure, it avoided the payment of premiums to cover its liability. However, it is clear that Powers' State Farm policy did not contemplate primary coverage for more than damage to a rental vehicle, and its premiums are reflective of that fact. In addressing the third and final factor, the State Farm policy specifically states that its non-owned vehicle coverage is excess and incidental to any other policy covering the vehicle. While Hertz attempts to shift primacy to the State Farm policy through its rental agreement, Hertz's self insurance must provide liability coverage for damages caused by the use of vehicles it owns and offers for rent. Therefore, Hertz's self-insurance coverage is primary even under common law principles.

In summary, Hertz cannot contract away its primary obligations under the No-Fault Act by limiting its liability coverage to situations where no other coverage exists. Therefore, Hertz must provide primary liability coverage for the damages resulting from Powers' accident while driving the rental car owned by Hertz.

Reversed.

SPECIAL CONCURRENCE

BLATZ, Justice (concurring specially).

I concur in the result of the majority decision. The legislature clearly set forth in Minn. Stat. § 65B.49, subd. 3(3)(d) that "a residual liability insurance policy shall be excess of a nonowned

vehicle policy." This statutory amendment to the No-Fault Act was effective on August 1, 1994. The statute requires that Hertz's nonowned vehicle policy be deemed primary in providing Powers with liability coverage. This statutory amendment was effective the day before Powers rented the Hertz vehicle, and, therefore, Hertz is bound by its mandates. While I do not agree with all of the other legal analysis and conclusions reached by the majority, Minn. Stat. § 65B.49, subd. 3(3)(d) is dispositive of this matter. Therefore, I concur in the result.

KEITH, C. J. (concurring specially).

I join in the special concurrence of Justice Blatz.

DISSENT

PAGE, J. (dissenting).

I respectfully dissent. The court's decision, which allows the renter of a rental car, who has his or her own liability insurance coverage and who declines to purchase the rental car company's liability insurance supplement to escape responsibility for the renter's involvement in an accident with the rental car, is wrong, fundamentally unfair, and poor public policy. What purpose is served by allowing the renter and the renter's insurance company to avoid responsibility for the renter's action? I would suggest none. To the extent that it is asserted that this result is necessary in order to fulfill the purposes of Minnesota's No-Fault Automobile Insurance Act, that simply is not the case. The purpose of the No-Fault Act is "[t]o relieve the severe economic distress of uncompensated victims of automobile accidents." Minn. Stat. § 65B.42(1) (1996). On the facts before us, that purpose is met and will always be met. The terms of the rental agreement at issue make clear that under any circumstances "[i]f neither [the customer] nor the operator of the car have [liability] insurance," Hertz will provide coverage. Thus, no "victim," injured as a result of an accident with one of Hertz's rental cars, will remain "uncompensated."

Finally, the result reached today is poor public policy. If Hertz cannot rely on its customers to either provide their own liability insurance protection or, at the time of rental, purchase Hertz's liability insurance supplement, the cost of that protection is likely to be passed on by Hertz to all of its rental car customers. There is no sound reason why individual renters should not be required to bear the cost of their own liability insurance protection.

Therefore, I dissent.

Footnotes

[1]In McClain, the rental car agency attempted to shift all financial liability to the renter through a provision in the rental agreement that provided that the renter was responsible for insuring the rental car. 465 N.W.2d at 681. Here, Hertz has attempted a similar shift of responsibility, but has agreed to provide coverage if the renter does not have liability coverage through a policy on another automobile. The Hertz approach is different in scope than that of the rental car agency in

McClain, but its fundamental aim is the same -- to avoid the statutory obligations of the No Fault Act.

[2]If our interpretation of the No-Fault Act is deemed incorrect by the legislature, and rental car agencies are to be treated differently than all other automobile owners, the legislature is, of course, free to clarify the statute at any time.

[3]Subdivision 5a provides that every plan of reparation security insuring a natural person must cover damage to rented automobiles.

STATE OF MINNESOTA
IN COURT OF APPEALS
C7-98-452

Dennis Christopherson, petitioner,
Respondent,

vs.

Fillmore Township,
Appellant.

Filed September 8, 1998
Reversed
Forsberg, Judge*

Fillmore County District Court
File No. C0-97-304

Lee A. Bjorndal, Baudler, Baudler, Maus & Blahnik, 108 North Main Street, Austin, MN 55912 (for respondent)

Peter B. Tiede, Lisa A. Atty, Murnane, Conlin, White & Brandt, 1800 Piper Jaffray Plaza, 444 Cedar Street, St.
Paul, MN 55101 (for appellant)

Considered and decided by Lansing, Presiding Judge, Forsberg, Judge, and Norton, Judge.

SYLLABUS

Where a town board has discretion to vacate a road and the legislature and caselaw have not defined the minimum distance for "access" required under Minn. Stat. § 160.09, subd. 3, (1996), a 20-foot road provides access.

O P I N I O N

FORSBERG, Judge

Appellant Fillmore Township challenges the district court's grant of summary judgment in favor of respondent Dennis Christopherson and denial of its motion for partial summary judgment related to the vacation of a township road which divided Christopherson's property. Because the minimum width of an easement that would provide "access" under Minn. Stat. § 160.09, subd. 3, (1996), has not been set by statutes or caselaw, we conclude that it was error for the court to rule that twenty feet does not provide access and accordingly, we reverse.

FACTS

The facts are not in dispute. Dennis Christopherson is the owner of forty acres of unimproved real property in Fillmore Township. Township road 484, (T-484), a four-rod (66-foot wide) road, divides Christopherson's property and provides the only access to the property. Although Christopherson's property is unimproved, he intends eventually to put a house on the lot. The Fillmore zoning ordinance requires that there be a road at least 66 feet wide for access to the building site.

At its May 12,1997, meeting, the Fillmore Township Board discussed the vacation of T-484. Christopherson and his counsel appeared opposing the vacation and informed the board that if T-484 were vacated, he would pursue legal action. No one else present opposed the road's vacation. Because one of the three board members owned property that would be affected by the vacation of T-484, that board member did not participate in the discussion or vote. However, before the vote, the other two board members, along with the township's legal counsel, retired to another room and held a brief discussion. Upon returning, those members voted to vacate T-484. On May 29, 1997, the township board sent a copy of its vacation order to Christopherson's attorney.

On May 22, 1997, Christopherson was sent a Joint Easement Agreement. This agreement provided an easement of ten feet on either side of T-484's centerline, totaling a twenty-foot wide easement for Christopherson and the other landowners. The agreement also allowed the landowners to "construct, maintain, or repair * * * ," the easement. Finally, the agreement provided that signatories would forego their rights to pursue legal action related to the vacation of the road. Christopherson refused to sign the joint agreement.

The resolution signed by the township board provided that, in the event an affected landowner did not sign the Joint Easement Agreement, the board "shall have authority to convey said land to an adjoining land owner who shall insure passage and sign the easement * * * ."

Christopherson sued the township board and both parties moved for summary judgment.

On January 21, 1998, the trial court granted Christopherson's motion for summary judgment, ordered the township to maintain T-484, and simultaneously denied the township's motion for summary judgment. The township appeals from the district court's denial of its motions for reconsideration and a new trial.

ISSUE

Did the trial court err by concluding that the township's grant for Christopherson to use, construct, maintain, and repair a twenty-foot-wide permanent easement did not provide other means of access under Minn. Stat. 160.09, subd. 3?

ANALYSIS

"On appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law."

State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990) (citation omitted). On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted). Where the material facts are not in dispute, the only questions before the reviewing court are questions of law and no deference need be given to the decisions below. Hubred v. Control Data Corp., 442 N.W.2d 308, 310 (1989).

Minn. Stat. § 160.09, subd. 3 (1996), reads in relevant part:

> When a county highway or town road is the only means of access to any property or properties containing an area or combined area of five acres or more, the highway or road shall not be vacated without the consent of the property owner unless other means of access are provided.

The township claims that the twenty-foot wide easement granted to Christopherson in the Joint Easement Agreement is "other access" under the statute, and that the district court erred in concluding otherwise. The statute does not define access, although the township offered definitions from legal dictionaries, one of which defined "access" as "opportunity to come and go from premises. An easement of way, whether arising from express or implied reservation." Ballentine's Law Dictionary, 3rd Ed. (1969). There is no dispute that the township had the discretion to vacate T-484. Therefore, the sole issue is whether the twenty-foot wide easement granted to Christopherson meets the statute's requirement for "other means of access."

The township argues that twenty feet should constitute "access," because that width is stated in a statute for the inimum for most roads that approach bridges or culverts. Christopherson argues that he is entitled to an easement that is at least two rods or thirty-three feet wide, as prescribed by Minn. Stat. § 164.08, subd. 2, (1996). See Roemer v. Board of Supervisors of Elysian Twp., 283 Minn. 288, 292, 167 N.W.2d 497, 500 (Minn. 1969) (a thirty-foot easement satisfied the "access" requirement in Minn. Stat. § 164.08, subd. 2).

The statute does not define and the parties have not cited any Minnesota authority defining "access." The legislature has defined what constitutes "access" in other contexts. See, e.g., Minn. Stat. 164.08, subd. 2 (1996) (in cases involving cartway petitions, access to be two rods wide). Absent an applicable definition of "access," the term is ambiguous and must be construed. See Minn. Stat. § 645.16 (1996) (ambiguous language in statue may be interpreted). Because the legislature did not define "access" in a manner applicable to all cases involving Minn. Stat. § 160.09, subd. 3, and because we cannot provide a definition, what constitutes "access" in cases involving Minn. Stat. § 160.09, subd. 3, must be determined on a case-by-case basis. See Martinco v. Hastings, 265 Minn. 490, 497, 122 N.W.2d 631, 638 (1963) ("[i]f there is to be a change in the statute, it must come from the legislature, for the courts cannot supply that which the legislature purposely omits or inadvertently overlooks").

Here, the district court reasoned that, although the Joint Easement Agreement gave Christopherson the right to use, construct, maintain, or repair the twenty-foot easement, it failed to provide "other access" because Christopherson has no assurance that the easement would remain passable with a vehicle if its maintenance was left to Christopherson and the other

landowners. Because there is no statutory requirement that the township provide maintenance, the district court's reasoning is misplaced.

The township argues that access can be less than two rods (33 feet) in width, citing the same statute and subdivision that Roemer involved. The township also argues that, if a minimum was set that was wider than most rural driveways, townships will be faced with many claims arguing "no access." That statute, however, provides, and the township acknowledges, that, if a landowner's "access" is less than two rods, "the town board *shall establish* a cartway at least two rods wide * * * ." Minn. Stat. § 164.08, subd. 2 (1986) (emphasis added). Christopherson has not petitioned for a cartway, so that statute has no applicability here. Because there is no statutory or caselaw definition for "access" under Minn. Stat. § 160.09, we conclude that the trial court's determination that a twenty-foot wide easement fails to provide Christopherson with "other access" under Minn. Stat. § 160.09, subd. 3, was error.

D E C I S I O N

Because there is no Minnesota caselaw or statutory definition for what constitutes "access" specific to Minn. Stat. § 160.09, subd. 3, we reverse.

Reversed.

Footnotes

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. Art. VI, § 10.

STATE OF MINNESOTA

IN COURT OF APPEALS

CO-97-2145

State of Minnesota,
Appellant,

vs.

Brian Keith Lucas,
Respondent.

Filed May 12, 1998
Affirmed
Shumaker, Judge
Dissenting, Huspeni, Judge

Ramsey County District Court
File No. K3-97-3236

Hubert H. Humphrey, III, State Attorney General, 1400 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101 (for appellant)

Peg Birk, St. Paul City Attorney, Joel A. Franklin, Assistant City Attorney, 500 City Hall, 15 West Kellogg Blvd., St. Paul, MN 55102 (for appellant)

John M. Stuart, Minnesota State Public Defender, Mark D. Nyvold, Special Assistant State Public Defender, 46 East Fourth Street, Suite 1030, St. Paul, MN 55101 (for respondent)

Considered and decided by Schumacher, Presiding Judge, Huspeni, Judge, and Shumaker, Judge.

S Y L L A B U S

1. Minn. Stat. § 169.686 (1996), which prohibits traffic stops solely for seat belt violations, is in pari materia with Minn. Stat. § 169.685 (1996), which has no limitation on traffic stops solely for child passenger restraint system violations.

2. If statutes are in pari materia, one can supply a provision omitted from another so long as consistent with legislative intent.

3. Minn. Stat. § 169.686, consistently with legislative intent, supplies to Minn. Stat. § 169.685 a prohibition on traffic stops solely for violations of the child passenger restraint system requirement.

4. The trial court properly construed the statutes to be in pari materia and properly suppressed evidence obtained from a police officer's traffic stop based solely on a child passenger restraint system violation.

OPINION

SHUMAKER, Judge

Respondent Brian Keith Lucas was stopped in his motor vehicle by a police officer solely because of a violation of the child passenger restraint system law. The trial court ruled the stop unlawful and granted the respondent's motion to suppress evidence. Appellant appeals from the order suppressing the evidence. We affirm.

FACTS

On October 6, 1997, a St. Paul police officer saw respondent drive a motor vehicle with three children, who appeared to be age four or under, standing and jumping in the back seat. Concerned for the children's safety and noting that they were unrestrained in violation of the law, the officer stopped the vehicle. The officer observed no moving traffic violation prior to the stop.

As the officer spoke with respondent he smelled a strong odor of alcohol on respondent's breath. Respondent admitted drinking four beers before driving, and when he failed a field sobriety test the officer arrested him, citing respondent for six gross misdemeanor alcohol-related driving offenses.

At the Rasmussen hearing, respondent moved to suppress all evidence on the ground that the stop was unlawful. The trial court granted the motion, and the state appealed. There are no facts in dispute.

ISSUE

Are Minn. Stat. §§ 169.686 and 169.685 (1996) in pari materia so that the prohibition of a traffic stop solely for a seat belt violation must be applied also to a traffic stop solely for a child passenger restraint system violation?

ANALYSIS

The trial court ruled that a traffic stop based solely on a child passenger restraint system violation is unlawful because a companion statute prohibits traffic stops solely for seat belt violations. Without using the specific term, the trial court ruled Minn. Stat. §§ 169.685 and 169.686 in pari materia. "In reviewing a district court's pretrial suppression order on undisputed facts, we determine independently as a matter of law whether the evidence must be suppressed." State v. Fiebke, 554 N.W.2d 755, 756 (Minn. App. 1996).

Statutes are in pari materia if they relate to the same person or thing or have a common purpose. Apple Valley Red-E-Mix, Inc. v. State Dept. of Public Safety, 352 N.W.2d 402, 404 (Minn.

1984). Statutes in pari materia are to be construed together and read in harmony so as to effectuate legislative intent, purpose, and policy. State v. Bolsinger, 221 Minn. 154, 160-161, 21 N.W.2d 480, 486 (1946).

Minnesota law requires motor vehicle drivers, front seat passengers, and front and rear seat passengers between ages four and ten to wear seat belts. In addition, the statute provides that

> A peace officer may not issue a citation for a violation of this section unless the officer lawfully stopped or detained the driver of the motor vehicle for a moving violation other than a violation involving motor vehicle equipment. Minn. Stat. § 169.686, subd. 1(3) (1996).

This court held in Fiebke, 554 N.W.2d at 757, that Minn. Stat. § 169.686, subd. 1, creates a "conditional traffic offense" by "making a seatbelt violation unenforceable unless it accompanies another violation." The court further held that the legislature specifically intended to prohibit traffic stops solely for seat belt violations.

Minn. Stat. § 169.685 refers both to seat belts and child passenger restraint systems. As to the latter, the statute states:

> No motor vehicle operator who is operating a motor vehicle on the streets and highways of this state may transport a child under the age of four in a seat of a motor vehicle equipped with a factory-installed seat belt, unless the child is properly fastened in the child passenger restraint system. Minn. Stat. § 169.685, subd. 5(b) (1996).

This statute contains no limitation on a peace officer's authority to stop a vehicle solely for a violation of the child passenger restraint system requirement. Nor did Fiebke, 554 N.W.2d at 757, address this statute. There are two legal questions before us: (1) Are Minn. Stat. §§ 169.685 and 169.686 in pari materia? (2) If so, must the prohibition on traffic stops provided in section 169.686, subd. 1 (1996), be incorporated into section 169.685, subd. 5(b)?

The statutes clearly appear to be in pari materia. Statutes that have a common subject matter and that share various particulars respecting the common subject matter should be construed as constituting one systematic body of law. In re Estate of Eriksen, 337 N.W.2d 671, 673, n.1 (Minn. 1983). Each statute should be construed in light of, with reference to, and in connection with the others. Bolsinger, 221 Minn. at 154, 21 N.W.2d at 486. In this case, both statutes refer to devices or systems for restraining motor vehicle occupants; they obviously share a purpose of promoting traffic safety; both deal with the same general class of persons, namely, those who ride in motor vehicles as drivers or passengers; they mandate the use by such persons of prescribed restraints; and they provide comparable minimal sanctions ($25 and $50 fines).

It is not this court's function to supply limitations that the legislature purposely omits or inadvertently overlooks. Nevertheless, this court is not required to adopt "a literal construction * * * contrary to the general policy and object of the statute." In re Raynolds' Estate, 219 Minn. 449, 18 N.W.2d 238, 240-241 (1945). When statutes are in pari materia the rule as to omissions is:

> Where two acts in pari materia are construed together, and one contains provisions omitted from the other, the omitted provisions will be applied in the proceeding under the act not containing such provisions, where not inconsistent with the purposes of the act. State ex rel. Carlton v. Weed, 208 Minn. 342, 346, 294 N.W. 370, 372 (1940).

This same approach to omissions from in pari materia statutes was taken in Wold v. Forrestal, 133 Minn. 90, 92, 157 N.W. 998, 999 (1916), an action on a drainage contractor's bond. The issue concerned determining which of two types of bond was posted under a statute that omitted to classify the requisite bond. The supreme court acknowledged that a reading of the statute independently of any other statute would correctly support the defendant's position. But the court said that the statute should not be read without reference to its companion statutes because together they form a system of laws on the subject of drainage. The court held:

> [N]o sound reason can be assigned to sustain a holding that by the omission of a like classification in this statute there was an intention on the part of the Legislature to depart from its general policy * * *. Such a result would lead only to confusion in the law, a situation to be avoided in the construction of the statutes. Id.

Likewise, we believe that there is no sound reason to think the legislature intended to depart in Minn. Stat. § 169.685 from its express policy and intent in Minn. Stat. § 169.686 of disallowing traffic stops solely for restraint violations. [1]

Not only do the statutes satisfy the criteria for in pari materia construction, but a contrary holding would engender confusion rather than clarity in the enforcement and application of the laws. Police officers would not be allowed to stop vehicles carrying unrestrained four-year-olds but could stop vehicles containing unrestrained three-year-olds. That distinction creates an inconsistency devoid of reason. Adding to the confusion is the situation that existed in this case. The children were five, four and three years of age, respectively. Under the state's interpretation, the officer could make the stop as to the unrestrained three-year-old, but such a stop directly contravenes the prohibition as to the other two children. An in pari materia construction makes the laws clear with respect to the traffic stop preclusion. We express no opinion as to the wisdom of such preclusion, a matter to be addressed by the legislature. See Olson v. Ford Motor Co., 558 N.W.2d 491, 496 (Minn. 1997).

D E C I S I O N

The trial court properly granted respondent's motion to suppress evidence. Affirmed.

HUSPENI, Judge (dissenting)

I respectfully dissent and would reverse the trial court. While all persons riding in a vehicle are vulnerable, tiny children are especially so. The legislature has extended to them the special protection of a required child passenger restraint system. That requirement is included in Minn. Stat. § 169.685 (1996). Minn. Stat. §169.686 (1996), however, addresses seat belt requirements; it does not reference child passenger restraint systems. Most important, it seems to me, is the language of the restrictive enforcement provision of section 169.686:

> A peace officer may not issue a citation for a violation of this section unless the officer lawfully stopped or detained the driver of the motor vehicle for a moving violation other than a violation involving motor vehicle equipment. Id., subd. 1.

The legislature could have written the restraint enforcement provision to apply to "this section or section 169.685." It did not, and the legislative history of section 169.685 indicates that it was not to be read to limit an officer's discretion to stop a vehicle. [2] Six years later the legislative history does clearly reflect the intent to include a restraint enforcement provision in section 169.686. See State v. Fiebke, 554 N.W.2d 755, 758 (Minn. App. 1996) (analyzing legislative history of section 169.686). Fiebke, however, addresses only section 169.686.

Nor do I believe the doctrine of in pari materia should be invoked with regard to these two statutory provisions. They do not relate to the same persons. They do not have the same purpose. Section 169.685 protects children under four. Section 169.686 applies to all persons above that age. The two sections do not refer to one another; a circumstance, I submit, which should cause us to be cautious lest we supply that which the legislature could have, but did not.

Finally, even though a child restraint system is easily distinguishable from a seat belt, I agree with the majority that distinguishing between an unrestrained three-year-old and an unrestrained four-year-old may be challenging. Peace officers, however, make challenging judgment calls every day in discharging their duties. And abundant case law assures us that peace officers may rely on their training and experience to draw inferences and make deductions that might elude others. State v. Skoog, 351 N.W.2d 380, 381 (Minn. App. 1984). While it can be argued that determining age can as easily elude a peace officer as anyone else, if the legislature becomes convinced as a matter of public policy that possible confusion outweighs the concern for the safety of children, the legislature can amend the restrictive enforcement provision of Minn. Stat. § 169.686 to read: "A peace officer may not issue a citation for a violation of this section, or of section 169.685 unless * * *."

Footnotes

[1] We acknowledge that, in arguing legislative intent, the appellant cited comments made during hearings before the Senate Transportation Committee on March 3, 1981. We do not find those comments persuasive in view of the House Floor Debate on May 8, 1987, clearly expressing the intent noted in State v. Fiebke, 554 N.W.2d 755, 758 (Minn. App. 1996).

[2] In response to a question by Department of Public Safety Commissioner John Sopsic as to whether there might be problems in enforcing this legislation, Senator Lantry stated that this law (section 169.685) would provide officers with the ability to stop vehicles. Child Passenger Restraint Systems: Hearing on S.F. No. 263 Before the Senate Committee on Transportation, (Mar. 3, 1981).

STATE OF MINNESOTA
IN COURT OF APPEALS
C2-96-2346

Glen Edwin Thompson, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed August 5, 1997
Affirmed
Holtan, Judge*

Roseau County District Court
File No. C996643

Steven A. Nelson, 210 Fourth Avenue, International Falls, MN 56649 (for Appellant)

Hubert H. Humphrey III, Attorney General, Peter R. Marker, Assistant Attorney General, 525 Park Street, Suite 200,
St. Paul, MN 55103-2106 (for Respondent)

Considered and decided by Norton, Presiding Judge, Amundson, Judge, and Holtan, Judge.

S Y L L A B U S

Minn. Stat. § 171.3215, subd. 2 (Supp. 1995), requires cancellation of a school bus endorsement on a driver's license
when the driver's license has been revoked under the implied consent statute.

O P I N I O N

HOLTAN, Judge

On appeal from the denial of his petition for reinstatement of his school bus endorsement, Glen Thompson argues the
district court erred in interpreting Minn. Stat. § 171.3215, subd. 2 (Supp. 1995), to find that revocation of his license
under the implied consent statute required cancellation of his school bus endorsement. We affirm.

FACTS

Appellant Glen Thompson's driver's license was revoked for 90 days pursuant to Minn. Stat. § 169.123, subd. 4 (1994), after testing showed his alcohol concentration was over .10. Thompson pleaded guilty to a violation of Minn. Stat. § 169.122 (1994) (open bottle), but never was convicted of a violation of Minn. Stat. § 169.121 (1994 & Supp. 1995) (driving while under the influence); Minn. Stat. § 169.129 (1994) (aggravated driving while under the influence); or a similar driving statute. The Department of Public Safety notified Thompson that the revocation of his driver's license required cancellation of the school bus endorsement on his license and that his endorsement could not be reinstated for five years.

Thompson petitioned the district court for reinstatement of his school bus endorsement. The parties submitted the case for decision based on stipulated facts and written memoranda. By the date of submission, the 90-day revocation period had expired and Thompson's driver's license had been reinstated.

The district court denied Thompson's petition for reinstatement. The court determined that Minn. Stat. § 171.3215, subd. 2 (Supp. 1995), required cancellation of Thompson's school bus endorsement because his driver's license had been revoked under the implied consent statute and that Thompson was not entitled to reinstatement of his school bus endorsement for five years.

ISSUE

Did the district court err in determining Thompson was not entitled to reinstatement of his school bus endorsement?

ANALYSIS

The decision whether to cancel a driver's license endorsement rests with the Commissioner of Public Safety. Minn. Stat. § 171.25 (1994); Askildson v. Commissioner of Pub. Safety, 403 N.W.2d 674, 676 (Minn. App. 1987), review denied (Minn. May 28, 1987). A presumption of regularity and correctness attaches to this administrative act. Id. An appellate court generally will not reverse an administrative agency's decision unless the decision was fraudulent, arbitrary, unreasonable, or outside the agency's jurisdiction and power. Id.

A person whose driver's license endorsement has been cancelled may file a petition with the district court seeking reinstatement of the endorsement. See Minn. Stat. § 171.19 (1994) (driver's license cancellation). The district court's fact findings will not be reversed on appeal unless clearly erroneous. See Berge v. Commissioner of Pub. Safety, 374 N.W.2d 730, 732 (Minn. 1985) (implied consent case). The interpretation of a statute, however, is a question of law reviewed de novo by this court. Hibbing Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527, 529 (Minn. 1985).

The object of statutory interpretation is to determine and give effect to the intent of the legislature. Minn. Stat. § 645.16 (1996). When the language of a statute is unambiguous, we must give effect to the statute's plain meaning. Tuma v. Commissioner of Econ. Sec., 386 N.W.2d 702, 706 (Minn. 1986).

Minn. Stat. § 171.3215, subd. 2 (Supp. 1995), provides:

> Within ten days of receiving notice under section 631.40, subdivision 1a, or otherwise receiving notice for a nonresident driver, that a school bus driver has been convicted of a gross misdemeanor, or a violation of section 169.121, 169.129, or a similar statute or ordinance from another state, and within ten days of revoking a school bus driver's license under section 169.123, the commissioner shall cancel the school bus driver's endorsement on the offender's driver's license or the nonresident's privilege to operate a school bus in Minnesota for five years.

In the present case, Thompson argues that the word "and" in Minn. Stat. § 171.3215, subd. 2, must be given its ordinary, conjunctive meaning. See Minn. Stat. § 645.08(1) (1996) (words in statute are construed according to their common usage). Thompson then claims that the plain language of Minn. Stat. § 171.3215, subd. 2, shows his school bus endorsement cannot be cancelled unless he has been convicted (a criminal action) of driving while under the influence or a similar driving offense and has had his license revoked under the implied consent statute (an administrative action).

These are two dissimilar sets of occurrences. In this context, "and" is not a conjunctive. When the word "and" is read in the context of the entire sentence, the plain language of Minn. Stat. § 171.3215, subd. 2, shows the Commissioner is required to cancel the school bus endorsement of a person who has been convicted of a driving while under the influence offense and also of a person whose driver's license has been revoked under the implied consent statute. The legislature used the word "and" in this context, instead of the word "or," because it repeated the phrase "within ten days" in each clause, but did not include any notice language in the revocation phrase. Grammatical errors such as this cannot eviscerate the law, and words and phrases may be added in aid of construction. Minn. Stat. § 645.18 (1996).

In any event, the common usage canon of construction may not be observed if it would produce "a construction inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute." Minn. Stat. § 645.08 (1996); see also Kugling v. Williamson, 231 Minn. 135, 139, 42 N.W.2d 534, 538 (1950) (statutory words and phrases should be construed according to common and approved usage unless to do so would be inconsistent with the manifest intent of the legislature). It is well settled that

> laws relating to the revocation of driving privileges * * * are not "penal" in nature, but are remedial statutes intended for the protection of the public and are to be liberally construed towards that end.

Szczech v. Commissioner of Pub. Safety, 343 N.W.2d 305, 306 (Minn. App. 1984). Further, the legislature intends to favor the public interest as against private interest. Minn. Stat. § 645.17(5) (1996).

> Moreover, various provisions of the same statute must be interpreted in the light of each other, and the legislature must be presumed to have understood the effect of its words and intended the entire statute to be effective and certain.

Van Asperen v. Darling Olds, Inc., 254 Minn. 62, 74, 93 N.W.2d 690, 698 (1958).

Here, Minn. Stat. § 171.3215, subd. 2, goes on to provide that cancellation of a school bus endorsement "under section 169.121, 169.123, 169.129, *or* a similar statute" remains in effect for some drivers until they provide proof of completion of an alcohol treatment program. (Emphasis added.) In discussing the offenses that disqualify a driver from receiving a school bus endorsement, Minn. Stat. § 171.3215, subd. 3 (Supp. 1995), refers three times to a violation of the driving while under the influence statutes or a revocation of the driver's license under the implied consent statute. [1] The use of the word "or" in all subsequent provisions of Minn. Stat. § 171.3215 shows the legislature intended that a driver who has been convicted of a driving while under the influence offense or has had his driver's license revoked under the implied consent statute cannot hold a school bus endorsement.

All of the statutory provisions regarding cancellation of driver's licenses and school bus driver endorsements must be read together. See Foley v. Whelan, 219 Minn. 209, 211, 17 N.W.2d 367, 369 (1945) ("[n]o act, or part of any act, or any section should be singled out for consideration apart from all the legislation on the subject"). These provisions clearly reflect the legislature's intent to sanction motor vehicle alcohol-related occurrences, both civil and criminal. Construing the statute in pari materia, as we must, revocation of a driver's license under Minn. Stat. § 169.123 is to be treated in the same manner as a conviction under the requisite alcohol-related criminal statutes. That is, the nondisqualifying revocations under Minn. Stat. § 169.123 must be treated in the same manner as a disqualifying offense.

Adopting Thompson's construction of Minn. Stat. § 171.3215, subd. 2, would conflict with the legislature's manifest intent by allowing a driver who has had his license revoked under the implied consent statute, but who has not been convicted of a driving while under the influence offense, to hold a school bus endorsement. Thompson's construction of Minn. Stat. § 171.3215, subd. 2, also would create an inconsistency in the statute by interpreting the section's first reference to the disqualifying offenses in one manner and all subsequent references in another.

Subdivison 2 of this section was amended in May 1995 by the First Special Session of the 79th Legislature by adding "and other offenses" to the heading. 1995 Minn. Laws 1st Spec. Sess. ch. 3, art. 2, § 46. The heading now reads "Cancellation for disqualifying and other offenses." Prior to this amendment, the heading read "Cancellation for disqualifying offense." Minn. Stat. § 169.123 is not defined as a disqualifying offense under Minn. Stat. § 171.3215, subd. 1 (Supp. 1995). Headings of a section indicate that the legislature was aware that adjustments were necessary to cancel bus driver endorsements when a driver's license was revoked. See Minn. Stat. § 645.49 (1996) (headnotes are intended to indicate the contents of the section). This recent amendment clearly indicates that the legislature intended to consider revocation of a driver's license under Minn. Stat. § 169.123 as an independent offense, which does not require it to be found to be a disqualifying offense to authorize cancellation of a bus driver's endorsement. It also indicates the drafter's understanding of the bill. See Minnesota Express, Inc. v. Traveler's Ins. Co., 333 N.W.2d 871, 873 (Minn. 1983) ("headings are relevant to legislative intent where they were present in the bill during the legislative process").

Because observance of the common usage canon of construction in this case would produce a result inconsistent with the legislature's manifest intent and repugnant to the context of the statute, we cannot apply this canon here. See Maytag Co. v. Commissioner of Taxation, 218 Minn. 460, 463, 17 N.W.2d 37, 39 (1944) ("and" may be construed as a disjunctive where the sense of the statute plainly requires it, thereby changing "and" to "or"). Instead, we must broadly construe the disputed language and interpret it in light of the legislature's intent and the statute's other provisions. Using this analysis, we conclude that a school bus endorsement must be cancelled under Minn. Stat. § 171.3215, subd 2, when the driver's license has been revoked under the implied consent statute.

D E C I S I O N

The Commissioner properly cancelled the school bus endorsement to Thompson's driver's license within ten days of revoking Thompson's driver's license under the implied consent statute.

Affirmed.

Footnotes

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

[1] Minn. Stat. § 171.3215, subd. 3, provides that the Commissioner shall investigate to determine if the school bus endorsement applicant "has been convicted of * * * a violation of section 169.121, 169.129, or a similar statute * * * *or* if the applicant's driver's license has been revoked under section 169.123." (Emphasis added.) The Commissioner may not issue or renew a school bus endorsement for a person who "has been convicted of committing a violation of section 169.121, 169.129, or a similar statute * * * *or* if the applicant's driver's license has been revoked under section 169.123." Id. (emphasis added). The statute uses similar language to specify who must submit proof of completion of an alcohol treatment program to receive a school bus endorsement. Id.

STATE OF MINNESOTA

IN COURT OF APPEALS

C7-97-1722

In the Matter of the Risk Level Determination of C.M.

Filed June 2, 1998
Reversed; motion denied
Willis, Judge

Office of Administrative Hearings
File No. 12-1100-11143-2

John M. Stuart, State Public Defender, Jenneane Jansen, Assistant State Public Defender, Legal Advocacy Project, 2829 University Avenue, S.E., Suite 600, Minneapolis, MN 55414 (for relator C.M.)

Hubert H. Humphrey III, Attorney General, Alan Held, Assistant Attorney General, 1400 NCL Tower, 445 Minnesota Street, Suite 900, St. Paul, MN 55101 (for respondent)

Considered and decided by Willis, Presiding Judge, Klaphake, Judge, and Mulally, Judge.*

S Y L L A B U S

Minn. Stat. § 244.052, subd. 1(4) (1996), permits community notification of sex offender status only where an offender has been convicted of a crime specifically listed in Minn. Stat. § 243.166, subd. 1 (1996).

O P I N I O N

WILLIS, Judge

Relator C.M. [1] appeals from his classification as a level III sex offender. We conclude that the interpretation of Minn. Stat. § 244.052, subd. 1(4) (1996), under which relator was classified as a sex offender is an unconstitutional violation of due process and therefore reverse.

FACTS

In March 1993, relator C.M. stayed in Waseca for two days with C.B., his ex-girlfriend. On March 4, C.B. evicted relator. Late that evening, relator returned, intoxicated, to C.B.'s apartment. When C.B. refused to let him in, relator broke down the door. Using physical force, relator ordered C.B. to keep quiet and stay in the apartment. Relator stated that he intended to sleep on C.B.'s living room couch, but he instead entered her bedroom, where he had sex with

her. According to the presentence investigation report, relator told police that the sex was consensual, "to calm [C.B.] down." C.B. told police that she did not consent.

Relator was arrested the next morning and charged with first-degree burglary, criminal damage to property, two counts of criminal sexual conduct in the first degree, and one count of criminal sexual conduct in the second degree. In exchange for dismissal of the remaining charges, relator pleaded guilty to burglary in the second degree, admitting in court to breaking down C.B.'s door and restraining her against her will but not to having sex with her. The presentence investigation report gave an "official version" of events quoted verbatim from the complaint but also noted, under "comments/recommendations," the differing version relator had given to police. Relator was sentenced to 58 months in prison.

Relator's criminal record dates to 1979, when he was convicted in North Dakota of felony gross sexual imposition and aggravated assault, apparently arising from separate incidents. The record contains no official descriptions of the details of these offenses. Between 1980 and 1990, relator had 13 convictions of theft and burglary and one of simple robbery.

In March 1997, Jeffrey Brown, the psychologist who recommends post-incarceration placement for all sex offenders held in Minnesota prisons, recommended to the End of Confinement Review Committee (ECRC) that relator be classified as a level III sex offender, the level indicating the highest risk of reoffense. Brown based his recommendation on relator's long history of alcohol and drug addiction and failed attempts at treatment and on his score on the Sex Offender Screening Tool (SOST) developed by the Department of Corrections. Relator's SOST score treated the March 1993 offense involved here as a sex offense. Brown also spoke to a North Dakota prosecuting attorney about the details of relator's earliest offenses, which he testified affected his assessment of relator's risk level. Brown made no attempt to obtain official documents regarding these convictions. The ECRC, of which Brown is a member, concurred with Brown's recommendation.

Relator appealed the ECRC's classification to an administrative law judge (ALJ). Relator argued (1) that he did not qualify as a sex offender under the notification statute because he had not been convicted of a sex offense, (2) that he should not have been classified as level III, and (3) that several aspects of the procedure violated his due process rights. The ALJ concluded that he lacked jurisdiction to consider relator's due process claims but that relator had adequately preserved them for appeal. At the review hearing, Brown testified that in classifying the 1993 offense as a sex offense, he had assumed the truth of C.B.'s statement in the complaint that the sexual intercourse with relator had not been consensual.

The ALJ concluded that relator was a sex offender under the plain meaning of the notification statute. He also determined that the evidence Brown obtained from the North Dakota prosecutor "must be disregarded as unreliable and uncorroborated hearsay." But the ALJ decided that Brown could legitimately classify the 1993 incident as a sex offense because relator's claim that C.B. consented "is absurd and contrary to all the facts even as presented by [relator]." The ALJ upheld relator's level III classification, and relator appealed to this court.

In October 1997, relator fulfilled the conditions for release in mid-November from the halfway house in which he then resided. Both the ALJ and this court denied relator's motion for a stay of community notification pending appeal. The notice police prepared for distribution to residents of the Loring Park neighborhood in Minneapolis states that "the individual who appears on this notification has been convicted of a sex offense that requires registration" and, under "description of offense," states that "[o]ffender burglarized a female acquaintance's home and forced her against her will in sexual acts." We reverse.

ISSUES

1. Is this court required to strike respondent's appendix as outside the record?

2. Did the ALJ err in determining that relator is a sex offender within the meaning of the notification statute?

3. Did application of the statute to relator, who was charged with, but not convicted of, a sex offense, violate constitutional guarantees of due process?

ANALYSIS

I. Motion to Strike

The state has compiled an appendix comprising a number of scientific and popular articles on sex offender recidivism and the effects of sex offenses on victims, and including a model notification policy promulgated by the Minnesota Board of Peace Officer Standards and Training, in support of its argument on appeal that the notification statute is constitutional. Relator moves to strike the entire appendix on the ground that the contents are outside the record.

We have found no case law addressing whether new evidence may be introduced in an appeal from an administrative agency where the agency lacked jurisdiction to consider the question to which the evidence pertains. In general, new evidence may be introduced on appeal if it is documentary, essentially uncontroverted, and is not offered in support of a reversal. In re Objections and Defenses to Real Property Taxes, 335 N.W.2d 717, 718 n.3 (Minn. 1983). We have stated that statistical and social scientific evidence that otherwise meets this test may be introduced on appeal to illuminate, "in the manner of a Brandeis Brief," the social context for a decision, particularly where the appellate decision will have widespread social, economic, or legal consequences. Economy Fire & Cas. Co. v. Iverson, 426 N.W.2d 195, 202 (Minn. App. 1988), rev'd in part on other grounds, 445 N.W.2d 824 (Minn. 1989). The supreme court has accepted the belated introduction of a government-prepared statistical report because "we could refer to such a report in the course of our own research, if we were so inclined." In re Estate of Turner, 391 N.W.2d 767, 771 (Minn. 1986).

In support of his motion to strike, relator relies on decisions involving attempts to introduce evidence pertaining to the facts of the individual cases rather than to matters of public record relevant to broad policy issues. See, e.g., Richardson v. Employers Mut. Cas. Co., 424 N.W.2d 317, 319-20 (Minn. App. 1988), review denied (Minn. Aug. 24, 1988). The evidence offered

here, while not necessarily uncontroverted, is documentary, [2] and we conclude that it may properly be introduced in this court in support of a constitutional argument now raised for the first time because the agency below lacked jurisdiction to consider it. Relator's motion to strike is therefore denied. But we also note that we are entitled to take judicial notice of the problem of sex offender recidivism in any event and that the model notification policy is irrelevant to determination of this case.

II. Interpretation of Notification Statute

This case arises under the sex offender community notification act, which is codified at Minn. Stat. § 244.052 (1996 and Supp. 1997). The statute defines "sex offender" and "offender" as "a person who has been convicted of an offense for which registration under section 243.166 is required." Id. at subd. 1(4). It provides that at least 90 days before an offender's release from prison, an end-of-confinement review committee shall convene to determine the offender's risk level. Id. at subd. 3(d). The statute requires that the offender be notified of the time and place of the ECRC's meeting and grants the offender "a right to be present and be heard at the meeting." Id. "An offender assigned * * * to risk level II or III * * * has the right to seek administrative review of [the ECRC's] risk assessment determination" but on review has "the burden of proof to show, by a preponderance of the evidence, that the end-of-confinement review committee's risk assessment determination was erroneous." Id. at subd. 6(a), (b). On administrative review, the offender has the right to "a reasonable opportunity to prepare for the hearing," to appointment of counsel, to provide evidence and supporting witnesses, and to cross-examine adverse witnesses. Id. at subd. 6(b).

The notification statute empowers the law enforcement agency in "the area where the sex offender resides, expects to reside, is employed, or is regularly found," to disclose to the public any information that the agency deems "relevant and necessary to protect the public and to counteract the offender's dangerousness." Id. at subd. 4(a). The statute mandates that the agency "consider" the statute's "guidelines" that information on level I offenders be disclosed to other law enforcement agencies and victims of or witnesses to the offender's crime; that information on level II offenders also be disclosed to schools, day care centers, "establishments and organizations that primarily serve individuals likely to be victimized by the offender," and individuals who fit the offender's pattern of victim preference; and that in the case of a level III offender, "the agency also may disclose the information to other members of the community whom the offender is likely to encounter." Id. at subd. 4(b). Finally, the statute provides that law enforcement agencies and officials and their private designees are "not civilly or criminally liable for disclosing or failing to disclose information as permitted by this section." Id. at subd. 7.

Statutory interpretation presents a question of law, which this court decides de novo. Hibbing Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527, 529 (Minn. 1985). Relator argues that he does not qualify as a "sex offender" under section 244.052, subdivision 1(4), because he was not "convicted of an offense for which registration * * * is required" under Minn. Stat. § 243.166 (1996 and Supp. 1997). Subdivision 1(1) of that section provides that a person shall register if

the person was charged with or petitioned for a felony violation of or attempt to violate any of the following, and convicted of or adjudicated delinquent for that offense or another offense arising out of the same set of circumstances.

The statute requires registration for a conviction or charge of first-degree murder under Minn. Stat. § 609.185(2) (1996) (homicide while committing or attempting to commit criminal sexual conduct in the first or second degree with force or violence), kidnapping of a minor, all criminal sexual conduct, and possession or production of child pornography. [3] Id. Registered sex offenders must inform law enforcement officials five days prior to any change of address and must return a monthly address verification card for a period of ten years. Id. at subds. 3(b), 4(c), 6(a). This court upheld the constitutionality of the registration statute in State v. Manning, 532 N.W.2d 244, 248-49 (Minn. App. 1995), review denied (Minn. July 20, 1995); see also In re Welfare of C.D.N., 559 N.W.2d 431, 433 (Minn. App. 1997) (extending Manning ex post facto law analysis to due process challenge), review denied (Minn. May 20, 1997). Relator concedes that he is required to register under the statute.

Relator contends that the phrase "convicted of an offense for which registration * * * is required" in section 244.052, subdivision 1(4), means that notification applies only where the offender is convicted of an offense that automatically results in registration because the offense is specifically listed in section 243.166. The state argued below, and the ALJ concluded, that the notification statute applies to any offender required to register under section 243.166, including those convicted of an unlisted offense "arising out of the same set of circumstances" as a charged, listed offense. Relator argues that if the legislature intended that result, it would simply have defined a sex offender as "a person required to register under section 243.166." On appeal, the state argues that the legislature inserted the "convicted of an offense" language to avoid application of the notification statute to juveniles, who are required to register after being "adjudicated delinquent" rather than "convicted."

If a statute, construed according to ordinary rules of grammar, is unambiguous, this court engages in no further statutory construction and applies its plain meaning. State by Beaulieu v. RSJ, Inc., 552 N.W.2d 695, 701 (Minn. 1996). "A statute is ambiguous if it is reasonably susceptible to more than one interpretation." Id. On appeal, both relator and the state have provided constructions that give effect to the entire statute, including the "convicted of an offense" language. See Minn. Stat. § 645.16 (1996) (stating that every law shall be construed to give effect to all its provisions where possible). We conclude that both parties' interpretations are reasonable and that section 244.052, subdivision 1(4), is, therefore, ambiguous in its application to relator.

Where a statute is ambiguous, a court applies established canons of construction. We must presume that the legislature did not intend absurd and unreasonable results. Minn. Stat. § 645.17(1) (1996). The state concedes that under its interpretation, a person who had been criminally tried and acquitted of a sex offense, but was convicted of another offense arising out of the same set of circumstances, could still be subject to the notification law. Similarly, under the language of the statute, an offender could be subject to notification even if the charged sex offense was dismissed on motion of the prosecutor before a plea or dismissed by a court for lack of probable cause, although counsel for the state claimed at oral argument that the state would

not seek notification under those circumstances. The state argues that the notification statute is a "civil, remedial law," and therefore its application could be proper even in the case of an acquittal because "the offender may have engaged in the conduct pursuant to a lesser, civil burden of proof." But the state concedes that the statute articulates no standard for proof of the underlying offense.

The unreasonableness of the state's construction is closely related to the question of its constitutionality. A second canon of statutory construction provides that where a statute is ambiguous and one interpretation gives rise to a constitutional conflict, courts will adopt an interpretation "that stands in harmony with the Constitution, even if the alternative construction might otherwise seem a more accurate reflection of legislative intent." State v. Crims, 540 N.W.2d 860, 867 (Minn. App. 1995), review denied (Minn. Jan. 25, 1996). Because relator does not argue otherwise, we assume for purposes of this case, without deciding, that notification is constitutional as applied to an offender actually convicted of an offense listed in section 243.166, subdivision 1. Under this assumption, relator's construction of the statute raises no constitutional difficulties. We now turn to the constitutionality of the state's interpretation.

III. Due Process

Relator argues that the notification statute, as applied to an offender not convicted of a sex offense, is a deprivation of liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution and article I, section 7, of the Minnesota Constitution. The ALJ in this case lacked jurisdiction to consider the constitutionality of the notification statute, and in any event constitutionality is a question of law, which this court decides de novo. In re Blilie, 494 N.W.2d 877, 881 (Minn. 1993). The party challenging a statute bears the burden of proving its unconstitutionality beyond a reasonable doubt. In re Haggerty, 448 N.W.2d 363, 364 (Minn. 1989). In general, due process protections under the Minnesota Constitution are identical with those provided by the federal constitution. Humenansky v. Minnesota Bd. of Med. Exam'rs, 525 N.W.2d 559, 565 (Minn. App. 1994), review denied (Minn. Feb. 14, 1995).

A. Protected liberty or property interest

In a due process analysis, the first inquiry is whether a protected liberty or property interest is implicated. Board of Regents v. Roth, 408 U.S. 564, 569-71, 92 S. Ct. 2701, 2705-06 (1972). [4] In 1971, the United States Supreme Court invalidated a state statute that allowed police, without notice or opportunity for a hearing, to post notices in retail liquor outlets forbidding the sale of liquor to certain individuals alleged to be alcoholic, holding that

> certainly where the State attaches "a badge of infamy" to the citizen, due process comes into play. * * * Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.

Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S. Ct. 507, 510 (1971) (citations omitted). But five years later, a five-Justice majority voted to uphold a Kentucky law that allowed police

to post photographs of named "active shoplifters" in retail establishments, even when it was applied to an appellant whose shoplifting charges had been dismissed. Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155 (1976). After noting that the alleged shoplifter likely had a cause of action for common-law defamation and expressing fears about indiscriminate widening of the scope of 42 U.S.C. § 1983, Justice Rehnquist addressed Constantineau:

> We think that the * * * language in the last sentence quoted, "because of what the government is doing to him," referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry. "Posting," therefore, significantly altered her status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards. The "stigma" resulting from the defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau of any "liberty" protected by the procedural guarantees of the Fourteenth Amendment.

Id. at 708-09, 96 S. Ct. at 1164. The Court concluded that liberty or property interests receive constitutional protection only if they have been "initially recognized and protected by state law." Id. at 710, 96 S. Ct. at 1165.

While the respondent in Paul was unable to point to any deprivation of a previously held legal right, we conclude that relator has demonstrated such a deprivation. In noting that the respondent had alternatives to a constitutional action, the Court in Paul noted that "[i]mputing criminal behavior to an individual is generally considered defamatory *per se*." 424 U.S. at 697, 96 S. Ct. at 1159. The Remedies Clause of the Minnesota Constitution provides that "[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person * * * or character." Minn. Const. art. I, § 8. The Minnesota Supreme Court has interpreted this clause to "enjoin[] the legislature from eliminating those remedies that have vested at common law without a legitimate legislative purpose." Olson v. Ford Motor Co., 558 N.W.2d 491, 496-97 (Minn. 1997) (emphasis omitted). But the community notification statute grants state and local officials immunity from liability for "disclosing * * * information as permitted by this section." Minn. Stat. § 244.052, subd. 7.

Here, the police publicly distributed a notice that clearly suggested that relator had been convicted of sexually assaulting C.B., when in fact he had not been. Although there is no case law interpreting the immunity section of the notification statute, its language appears to grant immunity to state and local entities even for making false statements in the course of community notification. This would deprive relator of his right, recognized and protected under the state constitution, to pursue a common-law defamation action for the false statements of law enforcement officials. We express no view as to the outcome of any challenge to the immunity provision of the notification statute under the Remedies Clause, but we conclude that the change it produces in relator's legal status gives rise to a liberty interest protected under the due process clause as interpreted in Paul. [5] We therefore do not address relator's claims that notification deprives him of additional protected interests and fundamental rights. [6]

B. Sufficiency of process

Where a protected liberty or property interest that does not rise to the level of a fundamental right is at stake, a court will determine the adequacy of the process for deprivation of the right through a balancing test, which takes into account (1) the importance of the private interest at stake; (2) the importance of the state's interest; and (3) the risk of erroneous deprivation in view of the procedural safeguards provided. Mathews v. Eldridge, 424 U.S. 319, 334-35, 96 S. Ct. 893, 903 (1976).

Because reputation and the right to protect it through defamation actions are intangible interests, it is difficult to measure the effect of a deprivation. But we note that under the statute, notification "may" continue for ten years following an offender's release from confinement. See Minn. Stat. § 244.052, subd. 4(f) (incorporating duration clause of section 243.166). We recognize the strength of the state's interest in protecting the community from dangerous sex offenders, but the crucial question here is how an offender is determined to be a dangerous sex offender when his conviction is not for a sex offense.

We perceive a significant risk of arbitrary or erroneous deprivation of an offender's liberty interests under the state's interpretation of section 244.052. Brown conceded that in scoring the SOST he made a unilateral determination, based on the double hearsay of the presentence investigation report, that relator had in fact committed a sex offense. Brown in turn sits on the ECRC, and while the offender has the right to be present and be heard when the ECRC initially determines his risk level, he has no statutory right to call or cross-examine witnesses, even where a sex offense has not been proven beyond a reasonable doubt. The offender does have a right to call and cross-examine witnesses at the administrative review hearing, but there he bears the burden of proving by a preponderance of the evidence that the ECRC erred. This procedure appears unprecedented in that at no point does the state bear the burden of proving, even by a preponderance of the evidence, that the offender actually committed a sex offense. Cf. Caprice v. Gomez, 552 N.W.2d 753, 758 (Minn. App. 1996) (upholding statute placing on patient seeking release from civil commitment the burden of producing information establishing that he meets discharge standards because state continues to bear ultimate burden of persuasion), review denied (Minn. Oct. 29, 1996).

In determining that sex offender registration is not punitive, this court noted that "the fact that the registration information is confidential lessens the similarity between this statute and traditions in which `registration' amounted to public scorn." Manning, 532 N.W.2d at 248 (citing Nathaniel Hawthorne, The Scarlet Letter (1850)). Although the fact of relator's arrest and the charges that were filed against him are public information, under the state's interpretation, law enforcement officials are entitled to inform the public that relator actually committed a sex offense, based ultimately on the discretion of a state-employed psychologist interpreting double hearsay evidence. [7] This poses grave risks of erroneous deprivation of the "good name, reputation, honor and integrity" of individuals who are legally guilty only of crimes considered significantly less heinous than sex offenses and of the right to seek legal redress for that very deprivation.

On balance, we conclude that this risk of erroneous, irrevocable attachment of stigma outweighs the state's interest in protecting the public from individuals who have never been proven, even by a preponderance of the evidence, to be sex offenders. In such a case, notification appears more an abdication of the state's responsibility of public protection than an exercise of it. If the state is sufficiently convinced that a sex offense has occurred to conclude that the public requires protection, it should have sufficient evidence to prove the offense in court and thereby protect the public through incarceration of the offender for a period commensurate with the crime, rather than accepting a plea bargain with an accompanying shorter sentence and imposing on individual members of the public the responsibility of protecting themselves.

We therefore conclude that the state's interpretation of section 244.052 to permit community notification where an offender is charged with, but not convicted of, a sex offense, would result in a violation of state and federal guarantees of due process. Accordingly, we adopt relator's alternate construction, the constitutionality of which is not challenged before us, under which notification applies only to offenders convicted of an offense specifically listed in section 243.166, subdivision 1. Because relator was convicted only of burglary and therefore is outside the scope of the notification statute, we need not address his contention that the ALJ erred in upholding his level III designation.

D E C I S I O N

The statutory definition of "sex offender" for purposes of community notification is reasonably subject to two interpretations, and we conclude that an interpretation that allows notification under the existing procedural scheme where an offender was charged with, but not convicted of, a sex offense would result in deprivation of a constitutionally protected liberty interest without due process of law. We therefore construe the statute to provide that sex offender notification applies only to individuals who have been convicted of an offense for which sex offender registration is specifically required under Minn. Stat. § 243.166, subd. 1. Relator is not a sex offender under this definition, and we therefore reverse the ALJ's determination that he is a level III sex offender properly subject to community notification.

Reversed; motion denied.

Footnotes

*Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

[1] Data used in risk level determination proceedings are not subject to public disclosure. Minn. Stat. § 244.052, subd. 3(c) (Supp. 1997). Because this appeal is from a confidential proceeding, we maintain the anonymity of the relator although, because of our disposition of this case, we do not reach issues involving the use of private data.

[2] On an administrative appeal involving a constitutional issue, it may not be equitable to adhere to the rule that new evidence cannot be offered for purposes of reversal, as that would grant only the respondent the opportunity to prepare a Brandeis brief. We need not decide that issue here.

[3] The statute also requires registration for offenders convicted of predatory crimes as defined under Minn. Stat. § 609.1352, subd. 2 (1996), if the offender was sentenced as a patterned sex offender or the court made findings that the offense was part of a predatory pattern of behavior, and for offenders convicted of or adjudicated delinquent for federal crimes similar to the state offenses listed. Minn. Stat. § 243.166, subd. 1(3), (4).

[4] In rejecting a due process challenge to the registration statute, this court used United States Supreme Court analysis applicable to determining whether a law was an impermissible ex post facto punishment in concluding that requiring sex offenders to notify police of their addresses was "nonpunitive." C.D.N., 559 N.W.2d at 433. We construe this decision as stating essentially that registration by itself does not implicate a protected interest.

[5] We also express no view as to whether relator would have standing to assert his claim absent actual dissemination of false statements during the notification process. We note that the deprivation is less certain than in Constantineau because the immunity clause of section 244.052 may be susceptible of an alternative construction that would preserve the right of an offender to challenge the dissemination of false statements. But cf. Rehn v. Fischley, 557 N.W.2d 328, 332-33 (Minn. 1997) (noting that immunities are meant to immunize the government against suit rather than merely against liability). But we also note that the stigma attached to a designation as a level III sex offender is considerably greater than that imposed on the "active shoplifter" in Paul or the alleged alcoholic in Constantineau. Because the Court in Paul recognized that stigma remained an "important factor" in its newly promulgated "defamation-plus" test, we conclude that the great weight of the stigma in this case compensates for the relative uncertainty in establishing the other element. See Paul, 424 U.S. at 709, 96 S. Ct. at 1164.

[6] These alleged deprivations of the right to establish a home, the right to travel, and rights to employment are substantially imposed by third parties rather than by the state. Cf. In re Medworth, 562 N.W.2d 522, 523, 525 (Minn. App. 1997) (refusing to enforce conservatorship that would deprive conservatee of fundamental right to establish her own home). But we note that both the Minnesota Supreme Court and the United States Supreme Court have invalidated statutes that prevented, as a practical matter, the exercise of substantive due process rights through intervening causes such as an appellant's poverty. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322 (1969) (invalidating statute that penalized right to travel by denying welfare benefits to new state residents); Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995) (striking restriction on public funding of abortions). Because it substantially overlaps with our discussion of due process below, we need not separately address relator's claim that the statute deprives him of his right to have the state prove all elements of a charge against him.

[7] The state urges this court to consider studies demonstrating that certain types of sex offenders typically have committed other offenses for which they have never been arrested. This evidence, if valid, supports a conclusion that an offender convicted of only one sex offense may legitimately be classified as level III. But such evidence is of limited probative value in reference to an offender who has not been proven to have committed even one sex offense. Here, the record includes one 19-year-old conviction of a sex offense but no reliable information as to its

nature, and one alleged sex offense that has never been proven in accordance with due process protections.

STATE OF MINNESOTA

IN COURT OF APPEALS

C7-96-2066

C5-96-2468

Forrest Johnson,
Respondent,

vs.

Minnesota Department of Human Services,
Appellant.

Filed June 10, 1997
Affirmed in part and reversed in part
Peterson, Judge

Washington County District Court
File No. C6955803

Steven P. Elliot, Minnesota Disability Law Center, 430 First Avenue North, Suite 300, Minneapolis, MN
55401-1780 (for Respondent)

Hubert H. Humphrey, III, Attorney General, Jacqueline Moen, Assistant Attorney General, 445 Minnesota Street,
Suite 900, St. Paul, MN 55101-2127 (for Appellant)

Considered and decided by Peterson, Presiding Judge, Lansing, Judge, and Crippen, Judge.

S Y L L A B U S

1. In an administrative proceeding to determine a person's entitlement to medical assistance funds for a health service, when the party requesting medical assistance establishes a prima facie case of eligibility for the funds, the burden of going forward with the evidence shifts to the opposing party, and if the opposing party fails to present evidence sufficient to rebut the prima facie case, the party requesting medical assistance has met the burden of proof.

2. When the commissioner of human services or the district court orders assistance or aid or services to be paid in a proceeding under Minn. Stat. § 256.045, subd. 10. (1996), only assistance or aid or services that are provided on a monthly basis must be paid or provided pending appeal of the order.

O P I N I O N

PETERSON, Judge

The Minnesota Department of Human Services (Department) denied Forrest Johnson's request for prior authorization to use medical assistance funds to purchase a HiRider stand-up wheelchair. A chief appeals referee for the Commissioner of Human Services affirmed the Department's decision on grounds that Johnson failed to demonstrate that the HiRider was medically necessary and that it was the least expensive appropriate alternative health service available. On appeal to the district court, the district court concluded Johnson had established that the HiRider was medically necessary and the least expensive appropriate alternative. The Department now appeals from the district court order reversing the chief appeals referee's decision and from a second district court order directing the issuance of a writ of mandamus compelling the Department to immediately provide authorization for Johnson to obtain a HiRider. We affirm in part and reverse in part.

FACTS

Respondent Forrest Johnson, currently age 39, was diagnosed with multiple sclerosis (MS) in 1990. MS is a progressive disease that causes myelin, a fat that coats nerves, to degenerate, and an individual's symptoms depend on where the myelin loss occurs. In Johnson's case, MS has caused weakness and stiffness in his legs, making him unable to stand or walk without assistance. Johnson's treating physician, Dr. Shapiro, and Johnson's physical therapist, Sharon Ruhsam, testified that Johnson's symptoms were unusual in that despite the extreme weakness in Johnson's legs, he maintained a high level of cognitive functioning and the ability to use his arms, allowing him to continue living independently.

Dr. Shapiro testified that prolonged immobility of the human body causes many problems, including the nervous system and muscles atrophying, infections developing due to the breakdown of skin, loss of range of motion, and calcium leeching out of bones, making them more brittle and possibly causing urinary tract infections. Other evidence indicated that prolonged immobility may result in digestive problems. Dr. Shapiro testified that some of the complications resulting from prolonged immobilization require extensive and costly treatment. Passive standing can alleviate many of the problems caused by prolonged immobility, including bone calcium loss, urinary tract and bladder infections, muscle spasticity, muscle contractures, loss of range of motion, muscle atrophy, and decubitus ulcers. Passive standing also can improve bowel function, respiration, and circulation.

Johnson presented evidence that he has had urinary tract infections as a result of prolonged immobility and that his digestive system has been affected by prolonged immobility. Ruhsam and Johnson's occupational therapist, Ronna Linroth, stated that Johnson had an increased risk for bone demineralization because he used steroids to manage his MS and an increased risk for pressure ulcers because he had little padding over boney prominences and was unable to feel pain. Dr. Shapiro testified that both the likelihood of Johnson having complications from prolonged immobilization and the likelihood of passive standing lessening those complications were significant. Ruhsam and Linroth believed that passive standing would improve Johnson's respiration and significantly reduce his muscle spasticity. Ruhsam testified that passive standing would also improve Johnson's range of motion.

The HiRider is a combination power wheelchair and passive standing device that enables Johnson to move between sitting and standing positions by touching two buttons. Johnson testified that when he used the HiRider on a trial basis for about three months in 1995, his leg muscles became stronger, he did not have a bladder infection, and he noticed an improvement in his balance, muscle tone, digestion, and diaphragm function.

Linroth testified that the HiRider was the safest passive standing device for Johnson to use at home without another person assisting him:

> [J]ohnson can set himself up in [other passive standing devices] in order to be lifted up in them. Our standing frames that we have there are hydraulic manual pumps and so he would not be able to pump himself up into that independently. In the stander, when it has the power lift that [Johnson] was alluding to earlier, there's like a toggle switch where you lift yourself up and he could probably run that toggle but what happens is because of the bracing his arm gets cut down here and he has to loop up around them so there's danger for injury for one thing, but the other part of that is the gate that you close behind you. You have to be able to turn around to get that gate if you were doing it yourself. If he is, has his feet planted and he's got extensor tone locking him in, he's not going to be able to rotate around like that to get that. And if he gets it, and by hook or crook, [Johnson] might figure out a way to do that, what happens when you go to release it then, it slides back away from you so that you just have the belt to catch you and getting back down then becomes a real safety issue.

Linroth believed that the HiRider would be cost-effective given Johnson's age and the fact that intervention was occurring during an early stage in the development of Johnson's MS. Linroth testified that out of 300 people seen at the MS Achievement Center during the last ten years, Johnson was the only one for whom the Center had recommended a HiRider.

Dr. Shapiro explained that to benefit from passive standing, Johnson would need to get into a standing position several times daily and that the HiRider would enable him to do so. Dr. Shapiro testified that other passive standing devices would not be practical for Johnson:

> There are standing frames that you can get up and stand in just for yourself, but most of those are ... you need people around to put you into the frame and you need people to take you down off the frame and you can only be up in the standing frame for a period of fifteen to twenty minutes and then somebody has to put you down and you go off and do something and then somebody has to put you back up again to get that benefit. We have had [Johnson] up in the stand frame. In a group situation where you have a lot of people who are going to stand, standing frames are fine, but to do what we really want to do with him, that's not very practical.

Dr. Shapiro also testified that during the previous 18 years, he had followed over 2,500 MS patients and had written only two prescriptions for a standing type of wheelchair.

Ruhsam testified that the progression of Johnson's MS was making it increasingly difficult for him to transfer from a wheelchair to a standing device:

[E]ven though [Johnson's] talking about no problems with transfer, from my professional eye I am more and more concerned with that. Being able to have the HiRider, to me, would allow him an opportunity to decrease some of the transfers he has to do. Right now he's talking about five or six times a day he transfers. Every time he transfers and he's alone, he's at risk for falling as far as I can see.

Ruhsam testified that a HiRider would minimize the number of transfers Johnson would need to make daily. The evidence indicated that a passive standing device other than a HiRider would require Johnson to transfer between two devices. Ruhsam testified that a HiRider would not be cost-effective for someone with a home care aide because the aide could reposition the person. Ruhsam felt that a HiRider might enable Johnson to continue living independently without assistance from a personal care attendant for a longer period of time than would be possible otherwise.

The chief appeals referee found:

13. [Johnson's] physician and therapist argue that it is the community medical standard to prescribe a health service that reduces the effects of a medical condition--even though it may not eliminate them entirely. Dr. Shapiro prescribed the HiRider for [Johnson], and he did so as an expert in the treatment of multiple sclerosis. Dr. Shapiro has only written two prescriptions in the past eighteen years for stand-up wheelchairs, he asserts. Moreover, the HiRider was recommended by Ronna Linroth, occupational therapists, and Sharon Ruhsam, physical therapist, who treat [Johnson] at the MS Achievement Center.

[Johnson] is the only client out of three hundred, for whom these therapists have recommended a HiRider. They justify the departure in [Johnson's] case, as he is unique from other MS sufferers. He has superior cognitive skills and upper body strength and motor skills, whereas the majority of MS patients have weakened upper extremities and significant cognitive impairment. [Johnson] is young enough and his MS is recent enough, that he is likely to receive long-term benefits from the equipment, assert Ms. Ruhsam and Ms. Linroth.

[Johnson] understands his symptoms and is a safe and effective manager of them, asserts Dr. Shapiro. His therapists testified that if [Johnson] is not provided the HiRider, he will have more falls or slips during transfers and will require some home care services to assist in performing transfers. The provision of the HiRider would clearly avert his need for home care services in the foreseeable future. Passive standing, through the use of the HiRider, will keep [Johnson] in better shape, maximize the function of his bones and muscles and maximize his independence. [Johnson] possesses the arm strength, the cognitive ability and the motivation necessary to maximize the benefits from the HiRider and passive standing. Finally, he is capable of safely and effectively operating and maintaining the HiRider.

14. [Johnson's] treating professionals assert the HiRider is more effective, appropriate and efficient than home care services for [Johnson], as [Johnson] does not currently have

> home care services and home care services would not allow him to stand when and where he wanted. Most importantly, the HiRider is more appropriate, efficient and safe than mobile standing devices for [Johnson], as he cannot independently transfer into a mobile stander, cannot safely return to a seated position, if he becomes fatigued while using a mobile stander, and he cannot perform other activities while using a mobile stander.

The chief appeals referee concluded:

> The equipment [Johnson] seeks here is beneficial or useful in a general sense but not medically necessary. It is the most optimal approach to meeting his ambulation and related needs. However, the record suggests a less expensive combination of a standard wheelchair and standing device might adequately address these needs, and [Johnson] has not demonstrated otherwise. Put another way, he has not shown this device is the least expensive appropriate alternative.

ISSUES

I. Does substantial evidence support the chief appeals referee's determinations that the HiRider was not medically necessary and that Johnson failed to establish the HiRider was the least expensive appropriate alternative?

II. Did the district court err in ordering the issuance of a writ of mandamus requiring the Department to immediately provide authorization for Johnson to obtain a HiRider?

ANALYSIS

I.

The district court reviewed the chief appeals referee's decision pursuant to Minn. Stat. § 256.045, subds. 7-8 (Supp. 1995). Under that statute, "district courts engage in appellate review of MA eligibility decisions." In re Kindt, 542 N.W.2d 391, 398 (Minn. App. 1996). On appeal from the district court's appellate review of an administrative agency's decision, this court does not defer to the district court's review, but instead independently examines the agency's record and determines the propriety of the agency's decision. Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 824 (Minn. 1977).

"This court's review of a decision of the Commissioner of Human Services is governed by Minn. Stat. § 14.69." Kaplan v. Washington County Community Soc. Servs., 494 N.W.2d 487, 489 (Minn. App. 1993). Minn. Stat. § 14.69(e)-(f) (1996) provides that this court may reverse or modify an agency decision if the decision was "[u]nsupported by substantial evidence in view of the entire record as submitted" or "[a]rbitrary or capricious." The party challenging the agency decision has the burden of proving the existence of a statutory ground for reversal. Erickson v. Commissioner of the Dep't of Human Servs., 494 N.W.2d 58, 62 (Minn. App. 1992).

Prior authorization of a health service covered under the medical assistance program will not be approved unless the health service is "medically necessary as determined by prevailing medical

community standards or customary practice and usage" and is "the least expensive appropriate alternative health service available." Minn. R. 9505.5030.A, E (1995); see also Minn. R. 9505.0175, subp. 25 (1995) (defining medically necessary). Johnson argues that substantial evidence does not support the chief appeals referee's determinations that Johnson failed to establish that the HiRider is medically necessary and the least expensive appropriate alternative. Substantial evidence is defined as:

1. Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion;
2. More than a scintilla of evidence;
3. More than some evidence;
4. More than any evidence; and
5. Evidence considered in its entirety.

Cable Communications Bd. v. Nor-West Cable Communications Partnership, 356 N.W.2d 658, 668 (Minn. 1984).

Medically necessary.

The Department argues that substantial evidence supports the chief appeals referee's determination that the HiRider was not medically necessary because Johnson failed to prove the HiRider was "recognized as the prevailing standard or current practice by the provider's peer group." Minn. R. 9505.0175, subp. 25.A. The Department does not dispute that passive standing is recognized by the medical community as the prevailing standard or current practice for treating problems caused by prolonged immobility. The Department argues the evidence showed that other types of passive standing devices, such as independent hydraulic or electric standing frames, not combination mobility and standing devices, are recognized as the prevailing standard of practice.

But Johnson presented evidence that he could not safely and effectively use other types of passive standing devices without assistance. Dr. Shapiro testified that to benefit from passive standing, Johnson would need to get into a standing position several times daily. The evidence presented showed that a passive standing device other than a combination standing and mobility device would require Johnson to transfer between two devices. Ruhsam testified that Johnson was having increasing difficulty making transfers and that he was at risk for falling every time he transferred. Linroth testified that it was not safe for Johnson to use an independent standing frame by himself because he could fall if he became fatigued while standing. The HiRider enabled Johnson to move between sitting and standing positions by just touching two buttons. Johnson was still able to live independently, and Linroth believed that the HiRider would be cost-effective given Johnson's age and the fact that intervention was occurring during an early stage in the development of his MS.

The chief appeals referee's findings indicate that he found credible the testimony of Dr. Shapiro, Ruhsam, and Linroth. Their testimony established that passive standing was the prevailing standard or current practice for treating problems caused by prolonged immobility and that the HiRider was the only type of passive standing device Johnson could use safely and effectively

while living independently. This evidence established a prima facie case that the HiRider was medically necessary given Johnson's unusual situation in terms of the progression of his MS. Cf. Elk River Concrete Prod. Co. v. American Cas. Co., 268 Minn. 284, 292, 129 N.W.2d 309, 314-15 (1964) (when plaintiff proved that final voucher was not signed by commissioner and that ordinarily a job was not considered accepted until commissioner approved the final voucher, plaintiff established a prima facie case of nonacceptance).

The general rule in civil cases is that

> "[w]here a plaintiff proves a prima facie case and it is unrebutted by defendant, the plaintiff has met his burden of proof."

Kirsebom v. Connelly, 486 N.W.2d 172, 175 (Minn. App. 1992) (quoting Fidelity Bank & Trust Co. v. Fitzimons, 261 N.W.2d 586, 590 (Minn. 1977)). A prima facie case shifts the burden of going forward with the evidence to the opposing party. Fidelity Bank & Trust, 261 N.W.2d at 590 n.10. In determining Johnson's eligibility for medical assistance funds to purchase a HiRider, the chief appeals referee essentially was acting in the role of a trial judge. We therefore conclude that the general rule applicable to civil cases also applies to an administrative proceeding to determine a person's eligibility for medical assistance funds for a health service. See In re Northern States Power Co., 416 N.W.2d 719, 722 (Minn. 1987) ("[i]n evaluating the validity of a rate increase application, the Commission should apply the classic burden of proof analysis employed in civil cases in determining whether the utility has established the amount of a claimed cost as a judicial fact"); see also Meath v. Harmful Substance Compensation Bd., 550 N.W.2d 275, 280 (Minn. 1996) (Anderson, J., concurring specially) (when performing a quasi-judicial function, agency receives evidence to make factual findings and weighs that evidence as would a trial judge).

Citing Ruhsam's testimony that even standing for 15 minutes per day can help Johnson, the Department argues that the HiRider was not medically necessary for Johnson. But Ruhsam also testified that standing more often would be more beneficial, and Dr. Shapiro testified that to benefit from passive standing, Johnson would need to get into a standing position several times daily. The evidence that standing for 15 minutes can provide some benefit was insufficient to rebut the evidence that Johnson needed to stand more often to benefit from passive standing. The Department also cites evidence that at least one standing frame, the Easy Stand frame, makes it possible for persons to stand for longer periods of time. But the evidence involved a person who did not have MS. Here, evidence indicated that due to fatigue caused by MS, Johnson would not be able to stand for long periods at one time. The Department did not present sufficient evidence to rebut the prima facie case that a HiRider was medically necessary for Johnson.

The Department contends that In re Lakedale Tel. Co., 561 N.W.2d 550, (Minn. App. 1997), should control this case. We disagree. In Lakedale, this court rejected Lakedale Telephone's argument that the Minnesota Public Utilities Commission erred in rejecting Lakedale Telephones rate proposal because the only evidence in the record supported Lakedale Telephone's proposal. But in Lakedale, the Public Utilities Commission found the evidence presented by Lakedale unpersuasive. Here, in contrast, the chief appeals referee's findings indicate that he found credible the evidence presented by Johnson.

Least expensive appropriate alternative.

The evidence showed that other types of passive standing devices are less expensive than the HiRider. But the evidence showed that because of problems with fatigue and transferring himself, Johnson could not safely and effectively use the less expensive devices by himself. The testimony of Dr. Shapiro, Ruhsam, and Linroth showed that the HiRider was the only known appropriate passive standing device for Johnson. Because no other known device was appropriate, the evidence, which the chief appeals referee's findings indicate he found credible, established a prima facie case that the HiRider was the least expensive appropriate alternative. The Department argues that some other passive standing device might be appropriate for Johnson. But the Department did not present any evidence that identified another appropriate device. Absent evidence that another appropriate device actually exists, the Department did not rebut the prime facie case. The chief appeals referee therefore erred in determining that Johnson failed to establish the HiRider was the least expensive appropriate alternative.

Johnson also argues that the chief appeals referee's decision was arbitrary and capricious. "An agency's determination is arbitrary and capricious when it represents the agency's will and not its judgment." In re Minn. Power, 545 N.W.2d 49, 51 (Minn. App. 1996).

> If there is room for two opinions on a matter, the agency's action is not arbitrary or capricious even though the court may believe that an erroneous conclusion has been reached.

In re Rochester Ambulance Serv., 500 N.W.2d 495, 499 (Minn. App. 1993). Because the evidence does not support the chief appeals referee's conclusions that Johnson failed to establish that the HiRider was medically necessary and the least expensive appropriate alternative, the chief appeals referee's denial of Johnson's request for prior authorization for medical assistance funds to purchase a HiRider was arbitrary and capricious.

II.

Johnson filed a petition in district court seeking the issuance of a writ of mandamus compelling the Department to provide authorization for him to obtain a HiRider while the Department's appeal was pending.

> Mandamus is an extraordinary legal remedy awarded, not as a matter of right, but in the exercise of sound judicial discretion and upon equitable principles. A trial court's order on an application for mandamus relief will be reversed on appeal only when there is no evidence reasonably tending to sustain the trial court's findings.

Coyle v. City of Delano, 526 N.W.d 205, 207 (Minn. App. 1995).

> To obtain a writ of mandamus, a petitioner must meet standing requirements. Minn. Stat. § 586.01-.02 (1992). A petitioner must demonstrate: (1) the failure of an official duty clearly imposed by law; (2) a public wrong specifically injurious to

petitioner; and (3) no other adequate specific legal remedy. Minn. Stat. § 586.02, .04 (1992).

Id.

> Mandamus will issue only when the petitioner has shown the existence of a legal right to the act demanded which is so clear and complete as not to admit any reasonable controversy. Similarly, mandamus will lie only to compel performance of a duty which the law clearly and positively requires.

Day v. Wright County, 391 N.W.2d 32, 34 (Minn. App. 1986), review denied (Minn. Sept. 24, 1986).

Johnson argues that under Minn. Stat. § 256.045, subd. 10 (1996), the Department had a duty to provide authorization for him to obtain a HiRider pending the outcome of this appeal. Minn. Stat. § 256.045, subd. 10, provides:

> If the commissioner of human services or district court orders **monthly assistance or aid or services** paid or provided in any proceeding under this section, it shall be paid or provided pending appeal to the commissioner of human services, district court, court of appeals, or supreme court. (emphasis added).

Johnson argues that "monthly" modifies only "assistance" and not "aid or services," and concludes that the statute requires the HiRider to be provided pending appeal. The Department argues that "monthly" modifies "assistance or aid or services" and, therefore, while an appeal is pending, the Department is obligated to pay for only assistance or aid or services provided on a monthly basis. Because a HiRider is provided on a one-time basis, rather than monthly, the Department concludes the HiRider need not be provided pending appeal. Because both interpretations of the statute are reasonable, the statute is ambiguous. See Tuma v. Commissioner of Econ. Sec., 386 N.W.2d 702, 706 (Minn. 1986) (statute is ambiguous when it can be given more than one reasonable interpretation).

The Department argues that because the statute is ambiguous, it does not clearly impose a duty and mandamus is not available to enforce the statute. But, as Johnson argues, International Union of Operating Eng'rs v. City of Minneapolis, 305 Minn. 364, 368-371, 233 N.W.2d 748, 751-53 (1975), indicates that mandamus is available to enforce a duty even when the language of the statute creating the duty is ambiguous. In International Union, the supreme court construed statutes imposing a duty on public employers to meet and negotiate with exclusive representatives of public employees regarding employment terms and conditions as requiring the disclosure of particular information even though the statutes did not expressly address the disclosure of information. The court held that mandamus was available to compel disclosure of the information. Id. at 375, 233 N.W.2d at 755. Under the procedure followed in International Union, we must construe the statute to determine whether it imposes a duty to provide Johnson a HiRider pending appeal.

Statutory construction is a question of law subject to de novo review. Hibbing Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527, 529 (Minn. 1985). The object of statutory construction is to determine and give effect to the legislature's intent. Minn. Stat. § 645.16

(1996). A statute should be construed according to the plain and ordinary meaning of its language, and grammar rules apply when construing a statute. Heaslip v. Freman, 511 N.W.2d 21, 22 (Minn. App. 1994), review denied (Minn. Feb. 24, 1994). When a statute is ambiguous, the legislature's intent may be determined by considering the occasion and necessity for the law; the circumstances under which it was enacted; the mischief to be remedied; the object to be attained; the former law, if any, including other laws upon the same or similar subjects; the consequences of a particular interpretation; the contemporaneous legislative history; and legislative and administrative interpretations of the statute. Minn. Stat. § 645.16.

Under Johnson's construction of Minn. Stat. § 256.045, subd. 10., the Department would not be required to provide a HiRider pending appeal if a HiRider is assistance, rather than aid or services, because a HiRider is provided on a one-time basis, and, thus, cannot be monthly assistance. Therefore, to reach the result urged by Johnson, we would have to conclude that a HiRider is aid or services, rather than assistance. We see no basis for such a conclusion. We have found no statutory definition of assistance, aid, or services. Absent statutory definitions that indicate whether a particular benefit is assistance, aid, or services, there is no reason to conclude that the HiRider falls within any one of these categories rather than another.

Assistance is defined as aid, help, and the act of assisting. The American Heritage Dictionary of the English Language 112 (3d ed. 1992). Aid is defined as assistance and the act or result of helping. Id. at 37. Service is defined as an act of assistance or benefit to another. Id. at 1649. Using these plain and ordinary meanings, we find that the three terms are essentially synonymous. Because the three terms are synonymous, every benefit could be described as assistance, aid, or service, and Johnson's construction of Minn. Stat. § 256.045, subd. 10., would require payment of all benefits pending appeal. Any monthly benefit would be required to be paid pending appeal if the benefit were characterized as assistance, and any one-time benefit would be required to be paid pending appeal if the benefit were characterized as aid or services.

The sole effect of using "monthly" in the statute is to distinguish between benefits that are received monthly and benefits that are not received monthly. If the legislature had intended to require that all benefits be paid pending appeal, it would not have included the modifier "monthly" in the statute at all. We, therefore, conclude that "monthly" modifies "assistance or aid or services." Accordingly, the statute does not impose a duty on the Department to provide authorization for Johnson to obtain a HiRider pending appeal and mandamus does not lie to compel the Department to do so.

DECISION

The district court properly determined that the chief appeals referee erred in denying Johnson's request for prior authorization for medical assistance funds to purchase a HiRider. The district court erred in issuing a writ of mandamus compelling the Department to provide Johnson authorization to obtain a HiRider pending appeal.

Affirmed in part and reversed in part.

STATE OF MINNESOTA
IN COURT OF APPEALS
C1-97-1876

In the Matter of the Rate Appeals of
Lyngblomsten Care Center and Camilia Rose.

Filed April 28, 1998
Affirmed
Shumaker, Judge

Department of Human Services
Agency Nos. 11-1800-10191-2 & 11-1800-10527-2

Samuel D. Orbovbich and Thomas L. Skorczeski, Orbovich & Gartner, Chartered, 710 North Central Life Tower, 445 Minnesota Street, St. Paul, MN 55101 (for relators)

Hubert H. Humphrey, III, Minnesota Attorney General, and Robert V. Sauer, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, MN 55101-2127 (for respondents)

Considered and decided by Schumacher, Presiding Judge, Huspeni, Judge, and Shumaker, Judge.

S Y L L A B U S

A nursing home facility receiving reimbursement through Minnesota's Medical Assistance program that undertakes a capital repair or replacement within twelve months of a qualifying major construction project may not seek reimbursement of the capital repair or replacement costs through Minn. Stat. § 256B.431, subd. 15 (1996).

O P I N I O N

SHUMAKER, Judge

The Minnesota Department of Human Services (DHS) refused to reimburse relator nursing homes' capital repair and replacement costs under the repair and replacement provision of the Nursing Facility Rate statute. The Commissioner of Human Services granted DHS summary judgment. Relators seek review through writ of certiorari.

FACTS

Relators Lyngblomsten Care Center and Camilia Rose Care Center are nursing home facilities that participate in Minnesota's Medical Assistance (MA) program. In 1993, both facilities completed major construction projects that were approved under the nursing home moratorium process. Minn. Stat. § 144A.073 (1996). The legislature determined that a nursing home moratorium was necessary "to control nursing home expenditure growth." Minn. Stat. § 144A.071 (1996). A major construction project is one that "exceeds the lesser of $150,000 or ten

percent of [the facility's] most recent appraised value." Minn. Stat. § 256B.431, subd. 16 (1996). Lyngblomsten's major construction project included a three-story addition, two elevators, and the remodeling of a lounge and two nursing stations at a cost of $1,234,223. Camilia Rose's major construction project was a 3,700 square foot addition to its building at a cost of $477,144.

Within 12 months of the major construction projects, relators made additional capital repairs and replacements to their facilities. During the year before the termination of Lyngblomsten's major construction project, it incurred costs of approximately $34,000 for light fixtures, carpeting, a nurse call system, a compressor, windows, elevator equipment, a cooler, and a heating filter system. Similarly, approximately four months after Camilia Rose completed its major construction project, it replaced a heating and cooling unit for its main building at a cost of approximately $26,000. These later repair and replacement costs were unrelated to and not a functional part of the major construction projects that had been approved for reimbursement.

DHS reimburses nursing facilities differently for a major construction project or for a capital repair or replacement. Relators applied to DHS for reimbursement of their major construction projects under the specific statutory provision for major construction projects, Minn. Stat. § 256B.431, subds. 16, 17 (1996). Relators also sought reimbursement of their unrelated capital repairs and replacements under a separate statutory provision, Minn. Stat. § 256B.431, subd. 15 (1996). The effect of relators' separation of costs, if DHS would have accepted them, would have been to obtain a greater total amount of MA reimbursement for their total costs.

During a desk audit, however, DHS disallowed relators' separation of costs. It adjusted the reported costs by adding the repair and replacement costs together with the major construction project costs. DHS's adjustment was based on a statutory definition of construction project. Because of DHS's action, relators did not receive reimbursement for their repairs under Minn. Stat. § 256B.431, subd. 15(e) (1996).

After DHS's desk audit adjustment, relators sought a contested case hearing before an administrative law judge (ALJ). The ALJ, on competing motions for summary judgment, recommended that the commissioner grant DHS's motion. The Commissioner of Human Services granted summary judgment to DHS. Relators obtained a writ of certiorari to this court, and we now review the commissioner's decision.

ISSUE

Did DHS correctly combine relators' major construction project costs and their ordinary repair and replacement costs under Minn. Stat. §§ 144A.071 and 256B.431?

ANALYSIS

This court independently reviews an agency's decision on a question of law or statutory interpretation. Matter of Dougherty, 482 N.W.2d 485, 488 (Minn. App. 1992), review denied (Minn. June 10, 1992). However, "[w]hen the meaning of a statute is doubtful, courts should give great weight to a construction placed upon it by the department charged with its administration." Krumm v. R. A. Nadeau Co., 276 N.W.2d 641, 644 (Minn. 1979); see also

Estate of Atkinson v. Minnesota Dept. of Human Servs., 564 N.W.2d 209, 213 (Minn. 1997) (citing Krumm).

There are three statutory provisions at issue. The first defines nursing home capital repair and replacement cost
reporting:

> If costs otherwise allowable under this subdivision are incurred *as the result of* a project approved under the moratorium exception process in section 144A.073, or *in connection with* an addition to or replacement of buildings, attached fixtures, or land improvements for which the total historical cost of these assets exceeds the lesser of $150,000 or ten percent of the nursing facility's appraised value, these costs must be claimed under subdivision 16 or 17, as appropriate.

Minn. Stat. § 256B.431, subd. 15(e) (emphasis added).

The second provision instructs the department of health and human services to employ the definition of construction project found at Minn. Stat. § 144A.071, subd. 1a (g)(3) (1996). Minn. Stat. § 256B.431, subd. 10 (1996). [1]

The third provision defines the term "construction project" as "capital asset additions or replacements that are completed within 12 months before or after the completion date of the project described in clause (1)." Minn. Stat. § 144A.071, subd. 1a (g)(3) (1996).

There is no case law interpreting these provisions. Relators contend that the two phrases in section 256B.431, subdivision 15(e), "as a result of," and "in connection with," require DHS to find that the claimed capital repair and replacement costs are a function of or related to the major construction project before those costs could be added to the cost of a major construction project approved under the moratorium process. Relators' argument would be more compelling if subdivision 15(e) were read in isolation. The department, however, is charged with interpreting all relevant statutory provisions together. Because Minn. Stat. § 256B.431, subd. 15(e) has more than one reasonable interpretation, the statute presents an ambiguity and is subject to the rules of statutory construction. See Tuma v. Commissioner of Econ. Sec., 386 N.W.2d 702, 706 (Minn. 1986) (statute is ambiguous if it has more than one reasonable interpretation and court must apply rules of construction); Waller v. Powers Dep't. Store, 343 N.W.2d 655, 657 (Minn. 1984) (statutory construction appropriate only when statute is ambiguous). The object of statutory construction is to determine and give effect to the legislature's intent. Minn. Stat. § 645.16 (1996).

Beginning with the desk audit and continuing to its argument on appeal, DHS has asserted that when section 144A.071, subdivision 1a (g)(3) is read in conjunction with section 256B.431, subdivision 15(e), the result is that the phrases in subdivision 15(e), "as a result of" and "in connection with," can be read to mean that any repair or replacement cost incurred within 12 months of a major construction project should be considered a part of the major construction project. The practical effect of DHS's interpretation serves to control nursing home expenditures. It is therefore consistent with the goals of the nursing home moratorium process. Minn. Stat. §

144A.071, subd. 1. DHS's interpretation is further entitled to "great weight" due to the ambiguous and technical nature of the statutes in question. Krumm, 276 N.W.2d at 644.

In addition, after applying canons of statutory interpretation, we are persuaded that DHS's interpretation is correct. Statutes are to be read to make the entire statute effective and certain. Minn. Stat. § 645.17 (2) (1996). In this case, DHS's reading of sections 144A.071 and 256B.431 gives meaning to and makes effective all of the provisions brought into question by this case.

Canons of statutory interpretation also allow us to consider legislative history of ambiguous statutes to determine the legislature's intentions. See Minn. Stat. § 645.16 (1996) (legislative history can be considered in construing a statute); A/AL, Inc. v. City of Faribault, 569 N.W.2d 546, 547 (Minn. App. 1997). In 1993, a senate committee discussion addressed exactly the issue in this case. Hearing on S.F. 1146 Before the Senate Committee on Health Care (Apr. 8, 1993). Senator Berglin introduced what is now Minn. Stat. § 144A.071, subd. 1a (g). Compare Berglin's April 8, 1993 A-3 amendment to S.F. 1146 with Minn. Stat. § 144A.071, subd. 1a. Senator Finn unsuccessfully attempted to amend Senator Berglin's amendment to allow a nursing home that was undergoing a major construction project to also receive reimbursement for an unrelated capital repair and replacement. Hearing on S.F. 1146 Before the Senate Committee on Health Care (Apr. 8, 1993). Senator Finn argued that it would be more cost effective to make ordinary repairs at the same time a major construction project was occurring instead of waiting a year and a day as proposed by Senator Berglin's A-3 amendment. Id. Senator Berglin and a representative from the department of health, however, testified that to allow such an exception would be inconsistent with the legislature's intention to control capital expenditure costs. Id. Senator Finn's amendment was not approved. Senator Berglin's amendment was approved by the committee and ultimately became Minn. Stat. § 144A.071, subd. 1a (g). 1993 Minn. Laws, 1st Spec. Sess. ch. 1, art. 5 § 2. We note that neither relators (despite the ALJ's and commissioner's reliance on this legislative history) nor this court found any evidence that contradicts the conclusions drawn from the April 8, 1993, committee hearing. We conclude, therefore, that the above committee discussion reasonably evinces the legislature's intent and, along with the above-cited reasons, precludes relators' argument.

We affirm the commissioner's decision because DHS's interpretation of ambiguous statutes is entitled to deference and because canons of statutory interpretation support DHS's interpretation.

D E C I S I O N

Relator nursing homes that completed capital repairs and replacements within 12 months of major construction projects were not entitled to reimbursement of their capital repair and replacement costs under Minn. Stat. § 256B.431, subd. 15(e).

Affirmed.

Footnotes

[1] Minn. Stat. § 256B.431, subd. 10 refers to Minnesota Rules, part 4655.1110 (Emergency). The legislature enacted Rule 4655.1110 into statute in 1993. 1993 Minn. Laws 1st Spec. Sess. ch. 1, art. 5, § 2, 1993 (codified at Minn. Stat. § 144A.071, subd. 1a).

STATE OF MINNESOTA

IN COURT OF APPEALS

C1-97-2039

State of Minnesota,
Respondent,

vs.

Antonio Francis Bragg,
Appellant.

Filed May 12, 1998
Reversed
Willis, Judge

Hennepin County District Court
File No. 91013031

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Jay M. Heffern, Minneapolis City Attorney, John R. Manning, Assistant City Attorney, 300 Metropolitan Centre, 333 South Seventh Street, Minneapolis, MN 55402 (for respondent)

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Considered and decided by Klaphake, Presiding Judge, Willis, Judge, and Mulally, Judge.*

*Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

SYLLABUS

1. As used in Minn. Stat. § 299C.11(b) (1996), "determination of probable cause" means a determination, based on the complete record, of whether there is sufficient probable cause to proceed to trial.

2. A defendant may seek an order for recovery of identification evidence pursuant to section 299C.11(b) in the same proceeding as a petition for expungement under Minn. Stat. § 609A.02, subd. 3 (1996).

OPINION

WILLIS, Judge

Antonio Bragg appeals the district court's determination that he is not entitled to recovery of his fingerprints and other identification evidence under Minn. Stat. § 299C.11(b) where misdemeanor charges against him were dismissed after he pleaded not guilty and no finding of probable cause was made. We reverse.

FACTS

In February 1997, Antonio Bragg filed a pro se petition for expungement of his criminal record, which included a 1985 petty misdemeanor conviction for fifth-degree assault and incidents in 1991, 1993, and 1994, in each of which he was charged with misdemeanor counts of fifth-degree assault and disorderly conduct. In his petition, Bragg also requested the return of his fingerprints and other identification evidence pursuant to Minn. Stat. § 299C.11(b)(1) (1996), which allows the return of fingerprints when the accused has had no felony or gross misdemeanor convictions in the previous ten years and "all charges were dismissed prior to a determination of probable cause." The district court denied the petition in its entirety with respect to the 1985 conviction but ordered the return of Bragg's fingerprints with respect to the 1991 charges, which had been continued for one year and then dismissed when no similar incidents occurred.

In the 1993 case, Bragg pleaded not guilty of assault on the day he was charged. A month later, the disorderly conduct charge was added, and Bragg demanded a complaint at his preliminary hearing. The district court in that case ordered a complaint over the prosecutor's objection, but both charges were thereafter dismissed without any determination of probable cause. In the present proceeding, the district court determined that Bragg had waived a finding of probable cause in the 1993 case by pleading not guilty and that the charges therefore fell outside the scope of section 299C.11(b)(1). The court granted the petition to expunge the 1993 charges and ordered that the court records, including fingerprints and other identification evidence, be sealed pursuant to Minn. Stat. § 609A.01 (1996) rather than returned to Bragg.

The district court made the same determination with respect to the 1994 charges, although the record does not show that Bragg entered a plea in that case. The state concedes that the district court erred factually in finding that Bragg entered a plea in the 1994 case.

Bragg appeals the denial of his request for return of his fingerprints with respect to the 1993 and 1994 charges. At oral argument, Bragg's counsel represented that the Bureau of Criminal Apprehension would be willing to return the requested evidence to Bragg but for the district court's order that it be sealed. We reverse.

ISSUE

Did the district court err in concluding that Bragg was not entitled to return of his fingerprints and other identification evidence with respect to the 1993 and 1994 charges?

ANALYSIS

The issues here are questions of statutory interpretation, which this court reviews de novo. See State v. Murphy, 545 N.W.2d 909, 914 (Minn. 1996).

Before 1996, Minn. Stat. § 299C.11 (Supp. 1995) allowed any arrested person to request return of fingerprints and other identification evidence "[u]pon the determination of all pending criminal actions or proceedings in favor of the arrested person," unless the arrested person had been convicted of a felony in the previous ten years. The statute was amended in 1996 to narrow its reach and now provides that:

> (b) No petition under chapter 609A is required if the person has not been convicted of any felony or gross misdemeanor * * * within the period of ten years immediately preceding the determination of all pending criminal actions or proceedings in favor of the arrested person, and either of the following occurred:
>
> (1) all charges were dismissed prior to a determination of probable cause; or
>
> (2) the prosecuting authority declined to file any charges and a grand jury did not return an indictment.
>
> Where these conditions are met, the bureau or agency shall, upon demand, return to the arrested person finger and thumb prints * * * and other identification data, and all copies and duplicates of them.
>
> (c) Except as otherwise provided in paragraph (b), upon the determination of all pending criminal actions or proceedings in favor of the arrested person, and the granting of the petition of the arrested person under chapter 609A, the bureau shall seal finger and thumb prints * * * and other identification data, and all copies and duplicates of them if the arrested person has not been convicted of any felony or gross misdemeanor * * * within the period of ten years immediately preceding such determination.

Minn. Stat. § 299C.11 (1996).

The 1996 legislation also created chapter 609A, which establishes grounds and a procedure for granting expungement petitions. Minn. Stat. § 609A.01 (1996) provides:

> This chapter provides the grounds and procedures for expungement of criminal records under section * * * 299C.11, where a petition is authorized under section 609A.02, subdivision 3 * * * . The remedy available is limited to a court order sealing the records and prohibiting the disclosure of their existence or their opening except under court order or statutory authority. Nothing in this chapter authorizes the destruction of records or their return to the subject of the records.

Minn. Stat. § 609A.02, subd. 3 (1996), authorizes a petition "to seal all records relating to an arrest, indictment or information" where "the records are not subject to section 299C.11, paragraph (b), and if all pending actions or proceedings were resolved in favor of the petitioner." Under Minn. Stat. § 609A.03, subd. 7(b)(1) (1996), a sealed record may be opened for purposes of a criminal investigation, prosecution, or sentencing or "for purposes of evaluating a prospective employee in a criminal justice agency * * * ."

There is no case law interpreting the current statutes. But while section 299C.11(b) only mentions fingerprints and identification information, the supreme court, interpreting identical language in the previous version, held that the statute impliedly allowed return of arrest records. In re R.L.F., 256 N.W.2d 803, 805 (Minn. 1977). [1] This interpretation presumptively still applies. See Minn. Stat. § 645.17(4) (1996) (providing that when court of last resort has construed statutory language, legislature presumptively intends same construction to apply to subsequent laws on same subject matter).

I. Scope of Section 299C.11(b)(1)

If a statute, construed according to ordinary rules of grammar, is unambiguous, this court engages in no further statutory construction and applies its plain meaning. State by Beaulieu v. RSJ, Inc., 552 N.W.2d 695, 701 (Minn. 1996). "A statute is ambiguous if it is reasonably susceptible to more than one interpretation." Id.

We conclude that the reference to a "determination of probable cause" in section 299C.11(b)(1) is ambiguous because where a person is arrested without a warrant and is not indicted by a grand jury, the district court may make as many as three probable cause determinations before trial. First, if the suspect remains in custody, the court, within 48 hours of arrest, must determine whether the arrest was supported by sufficient probable cause to justify continuing confinement. Minn. R. Crim. P. 4.03, subd. 1. But we do not believe the legislature could reasonably have intended to place the determination of probable cause for purposes of section 299C.11(b) at this early stage because in many cases charges would not yet have been filed, much less dismissed. See Minn. Stat. § 645.17(1) (1996) (establishing presumption that legislature does not intend absurd, impossible, or unreasonable results).

Second, a suspect may demand a determination as to whether the complaint states sufficient probable cause to give the court jurisdiction. See Minn. R. Crim. P. 10.02 (providing time period for motion to dismiss for want of personal jurisdiction); see also Comment, Minn. R. Crim. P. 10 (explaining that in misdemeanor cases where complaint is filed, question of jurisdiction becomes question of sufficiency of complaint); Minn. R. Crim. P. 2.01 (stating that complaint shall include facts establishing probable cause). In a misdemeanor case, a prosecution may be commenced by a "tab charge," which is a brief reading of charges into the record by the clerk. Minn. R. Crim. P. 4.02, subd. 5(3). In such a case, on a defendant's first appearance, the court will inform him of his right either to enter a plea or to demand a written complaint for purposes of challenging probable cause. Minn. R. Crim. P. 5.01(e). Generally, "by entering a plea at arraignment one waives any objection to the jurisdiction of the court over his person or any objection to prearraignment irregularities." State v. Noland, 298 Minn. 528, 528, 214 N.W.2d 355, 356 (1973). This rule has been modified in misdemeanor cases to require a defendant to demand a complaint and subsequently to plead not guilty before raising a jurisdictional challenge. Minn. R. Crim. P. 10.02; see also Comment, Minn. R. Crim. P. 10 (explaining modification of prior law). But because the modification applies only where a complaint has been issued, a plea entered without a demand for a complaint may still waive the right to this finding of probable cause.

Finally, in a felony or gross misdemeanor case, a defendant may move to dismiss a charge for lack of probable cause, based on the entire record, at the omnibus hearing. Minn. R. Crim. P. 11.03. Faced with such a motion, the court determines whether the state has provided sufficient evidence to avoid a directed verdict for the defendant. State v. Rud, 359 N.W.2d 573, 579 (Minn. 1984). In misdemeanor cases, a pretrial conference replaces the omnibus hearing, and the rule of criminal procedure governing the pretrial conference does not specifically provide for a motion to dismiss a charge for lack of probable cause. See Minn. R. Crim. P. 12.02. But while the comment to the rule states that "[t]here is no necessity for a probable cause determination for misdemeanors," neither the rule nor the comment expressly prohibits such a determination. [2]

"Expungement means to erase all evidence of the event as if it never occurred." State v. M.B.M., 518 N.W.2d 880, 882 (Minn. App. 1994) (citation and internal quotation omitted). The combination of sections 299C.11(b) and 609A.02(3), providing for return of identification evidence where charges are dismissed or never filed and sealing in all other circumstances where the defendant prevails, appears designed to grant the most complete erasure of the record to those defendants whose guilt is most in doubt. This would favor an interpretation that "determination of probable cause" generally refers to the final determination at the omnibus hearing, in which the determination is based on the complete record and is not dependent on the ability of the state to draft a facially valid complaint.

In order to conclude that the "determination of probable cause" mentioned in section 299C.11(b)(1) could be waived by entry of a plea, the district court must have interpreted the language to refer to a determination of sufficiency of the complaint under Minn. R. Crim. P. 10.02. It apparently reasoned that because the rules of criminal procedure do not specifically provide in misdemeanor cases for a pretrial determination of probable cause based on the full record, the determination of the sufficiency of the complaint pursuant to Minn. R. Crim. P. 10.02 was the only "determination of probable cause" to which the statute could refer. But we have found no authority stating that a court is prohibited from making a probable cause determination based on the full record in misdemeanor cases, and we decline to decide this issue in a case where it is not squarely before us. A determination of sufficiency of the complaint under rule 10.02 differs from a final pretrial determination of probable cause in purpose, scope, and method, and we see no indication that the legislature intended to create a significant disparity in treatment favoring felony defendants over misdemeanor defendants. Moreover, the amended expungement statutes appear designed to further both a defendant's interest in erasure of his record and the state's interest in retaining identification information for use in future investigations or prosecutions. We see no reason why the legislature would have intended to make identification information resulting from misdemeanor arrests, but not identification information resulting from felony or gross misdemeanor arrests, available to law enforcement officials where a charge is dismissed after the filing of a complaint.

The state argues that if a plea does not waive a determination of probable cause for purposes of the statute, a misdemeanor defendant who does not request a written complaint could demand return of his fingerprints even after a jury acquittal. We agree that this result would be contrary to the legislature's intent in amending section 299C.11(b) to narrow the range of circumstances in which a defendant could seek return of identification evidence.

See Geldert v. American Nat'l Bank, 506 N.W.2d 22, 26 (Minn. App. 1993) (stating that this court presumes that amendments to statutes are intended to effect change in law), review denied (Minn. Nov. 16, 1993). But an acquittal is not a dismissal, and section 299C.11(b)(1) provides for return of fingerprints only if charges are dismissed. Moreover, we need not, and do not, decide whether a defendant's rights under section 299C.11(b)(1) might be waived or extinguished at some other point in the process before the jury's verdict.

We conclude that the "determination of probable cause" referred to in section 299C.11(b)(1) is a determination, based on the full record, of whether sufficient probable cause exists to proceed to trial. Because the charges against Bragg in both the 1993 and 1994 cases were dismissed before such a determination was made, Bragg qualifies for return of his fingerprints under the statute.

Procedure Under the Expungement Statutes

The state argues that even if Bragg is entitled to obtain his fingerprints under section 299C.11(b)(1), an expungement proceeding under chapter 609A does not provide a remedy; rather, Bragg should have sought the fingerprints directly from the appropriate law enforcement agency. Section 609A.02, subdivision 3, authorizes the filing of a petition for expungement in the form of sealing a defendant's records where "the records are not subject to section 299C.11, paragraph (b) * * * ." That section in turn provides that a petition under chapter 609A is "not required" where a charge is dismissed without a finding of probable cause. Minn. Stat. § 299C.11(b).

We note initially that the state did not object to, and has not sought review of, the district court's order for the return of Bragg's fingerprints in connection with the 1991 charge. In any event, we do not believe that either statute prohibits a defendant from seeking, in combination with a petition brought under chapter 609A, a court order for return of identification evidence pursuant to section 299C.11(b). Section 609A.02 lists the grounds on which an expungement order may be granted, while section 609A.03 establishes the procedural requirements for a petition. We interpret section 609A.02, subdivision 3, to provide only that the grounds for sealing of records under chapter 609A are distinct from the grounds for return of evidence under section 299C.11(b) and not to address procedural issues. Section 299C.11(b) provides only that a petition under section 609A.03 is not required; it does not prohibit such a petition. And it is foreseeable that other situations could arise in which it is unclear at first whether a petitioner is entitled to relief under section 299C.11(b) and it would be most convenient for the petitioner and the court to address the issue together with the alternative of a chapter 609A expungement claim.

Although Bragg captioned his case as an expungement proceeding under chapter 609A, he included a claim under section 299C.11(b) in his petition from the outset. We conclude that Bragg, under the applicable statutes, was entitled to seek return of his fingerprints in combination with his expungement claim in a combined petition and is entitled to the return of his fingerprints in connection with both the 1993 and 1994 charges.

DECISION

For the reasons stated, we reverse the decision of the district court and conclude that Bragg is entitled to return of his fingerprints, other identification evidence, and arrest records in connection with both the 1993 and 1994 offenses. Because Bragg's counsel indicated that the Bureau of Criminal Apprehension is willing to return the material, we need not remand for a district court order to that effect.

Reversed.

Footnotes

[1] Apparently following the letter of the statutes, the district court ordered the return of Bragg's identification information, but not the sealing of his file or the return of arrest records, with respect to the 1991 conviction. Bragg does not appeal this order.

[2] The advisory committee comments to the rules of criminal procedure are not binding law in any event. State v. Johnson, 514 N.W.2d 551, 555 n.8 (Minn. 1994).

STATE OF MINNESOTA

IN SUPREME COURT

C2-96-2542

Certified Question
Supreme Court of Texas

Keith, C.J.
Took no part: Page, J.

Minnesota Mining and Manufacturing Company,

Texas Petitioner,

vs.

Nishika Ltd.,
LenTec Corporation,
American 3D Ltd., and
Nishika Manufacturing (H.K.) Ltd.,

Texas Respondents.

Filed: June 12, 1997
Office of Appellate Courts

SYLLABUS

1. Noncontracting parties who never used, purchased, or otherwise acquired a seller's warranted goods may not seek lost profits, unaccompanied by physical injury or property damage, for breach of warranty as third-party beneficiaries under Minn. Stat. § 336.2-318 (1996).

2. On the facts of this case, the respondents were not entitled to a joint recovery of damages for lost profits.

First certified question answered in the negative, second certified question answered as above.

Heard, considered and decided by the court en banc.

OPINION

KEITH, Chief Justice.

Four companies involved in the three-dimensional photography business ("respondents") sued Minnesota Mining and Manufacturing Company ("3M") in Texas state court seeking lost profits. The jury found that 3M breached express and implied warranties, and the trial court allowed the four respondents to recover one lump-sum damages award. The Texas Court of Appeals affirmed in all relevant respects, see Minnesota Mining & Mfg. Co. v. Nishika Ltd., 885 S.W.2d 603, 636, 639 (Tex. Ct. App. 1994) ("3M"), but the Texas Supreme Court withheld judgment and certified two questions of Minnesota law to this court pursuant to Minn. Stat. § 480.061 (1996):

> 1. For breach of warranty under [Minn. Stat. § 336.2-318], is a seller liable to a person who never acquired any goods from the seller, directly or indirectly, for pure economic damages (e.g., lost profits), unaccompanied by any injury to the person or the person's property?
>
> 2. If the answer to Question 1 is "yes," may several such persons, who may or may not be related, and who may or may not include the buyer of the goods, recover damages jointly as a single economic unit?

3M, 40 Tex. Sup. Ct. J. 154, No. 94-1124, 1996 WL 714345, at *5 (Tex. Dec. 13, 1996). We answer the first certified question in the negative and the second certified question as below.

I.

In formulating the questions certified, the Texas Supreme Court relied upon the following facts, which the court set forth in a light most favorable to the verdict.

James Bainbridge and Daniel Fingarette established a plan for managing a three-dimensional photography business through four independent companies. When 3M sold the goods at issue, Fingarette was the sole owner of the camera manufacturer (Quantronics Manufacturing (H.K.) Limited, a Hong Kong company), while Bainbridge was the sole owner of the camera marketer (American 3D Limited, a Nevada limited partnership), the printer designer (LenTec Corporation, a Georgia corporation), and the printer (Nishika Limited, a Nevada limited partnership).

In January 1988, Bainbridge met with 3M officials to seek assistance with the three-dimensional film development process. Bainbridge testified that he told 3M about his need for quality emulsion and backcoat sauce to process the film, his printer development efforts, his camera manufacturer (Quantronics), his financial commitment, and his experience in and future plans to enter the three-dimensional photography business.

In mid-1989, 3M formulated a new emulsion that 3M claimed would work well with the respondents' film development process. 3M apparently understood that this emulsion would be used in combination with a backcoat sauce that 3M had also developed. In December 1989, 3M began selling the new emulsion to respondent LenTec. 3M also sold backcoat sauce components to respondent Nishika, which purchased 3M's new emulsion from LenTec for use in processing the photographs. The other two respondent companies--the camera marketer and manufacturer--did not purchase emulsion or backcoat sauce from 3M.

After the respondents began using 3M's new emulsion in December 1989, a problem emerged with the film development process. Specifically, the photographs faded, losing their three-dimensional effect. By early 1990, there was a significant decline in camera sales. 3M eventually solved the problem and the respondents began buying a new backcoat sauce from 3M in April 1990, but the respondents' business ultimately failed.

LenTec, Nishika, American 3D, and Nishika Manufacturing (H.K.) Limited [1] filed suit against 3M in Texas state court alleging, in part, breach of express and implied warranties. At trial the respondents argued that the photographic fading was caused by the incompatibility of 3M's new emulsion and its old backcoat sauce, which in turn undermined confidence in the respondents' business.

The jury concluded that 3M breached an express warranty for the emulsion and implied warranties for the emulsion and the backcoat sauce; that these breaches directly caused harm to each of the respondents; and that $50,000,000 would fairly and reasonably compensate the respondents as a group. Damages were reduced, however, because the jury found that the respondents were 49% at fault for failing to exercise reasonable care in evaluating and using the emulsion and backcoat sauce.

Applying Minnesota law, the Texas trial court allowed all four respondents to recover lost profits jointly and entered judgment in the amount of $29,873,599 on January 29, 1993. The Texas Court of Appeals reversed the trial court's award of pre- and post-judgment interest, but upheld the judgment in all other respects. 3M, 885 S.W.2d at 636, 639. The Texas Supreme Court agreed that Minnesota law applied, but withheld final judgment and certified two questions of law to this court.

II.

The first certified question asks this court to consider whether a seller may be held liable for breach of warranty to a plaintiff, who never used, purchased, or otherwise acquired goods from the seller, for lost profits unaccompanied by personal injury or property damage. Unlike the other two respondents, Nishika Manufacturing and American 3D did not deal directly with 3M nor did they use, purchase, or otherwise acquire the 3M goods at issue. In fact, Nishika Manufacturing did not exist at the time the goods were sold. Hence, Nishika Manufacturing and American 3D premise their recovery of lost profits on the statutory extension of warranty protection to certain noncontracting parties ("third-party beneficiaries").

The third-party beneficiaries provision of Minnesota's Uniform Commercial Code ("U.C.C.") addresses the reach of express and implied warranties to "injured" parties lacking privity of contract with the seller. Essentially, the provision broadens the reach of warranties by narrowing the lack of privity defense:

> A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section.

Minn. Stat. § 336.2-318. The term "person" includes corporations and other business organizations. Id. § 336.1-201(28), (30). [2]

The current version of section 336.2-318 was adopted in 1969, and is notably broader than its predecessor. See Act of May 23, 1969, ch. 621, § 6, 1969 Minn. Laws 1061, 1064-65. From 1965 to 1969, the section applied only to a "natural person who is in the family or household of [the] buyer or who is a guest in [the buyer's] home" and who is "injured in person" by the breach of warranty. See Minn. Stat. § 336.2-318 (1968). Minnesota's current version is also somewhat broader than the broadest of three options recommended by the drafters of the model U.C.C. in 1966: Alternative A is identical to Minnesota's pre-1969 version of the statute; Alternative B applies only to "natural persons" who are "injured in person"; and Alternative C is identical to current Minnesota law, but allows a seller to exclude or limit the operation of the provision if injury to the person is not involved. See U.C.C. § 2-318.

We agree with 3M that the statute is not so clear and free from ambiguity that we may disregard legislative intent, the aims of section 336.2-318 at the time of enactment, or the consequences of a particular construction. See Minn. Stat. § 645.16(1)-(4), (6) (1996). The unadorned term "injured" is not defined in the U.C.C., nor is it used elsewhere in the text of Article 2. As applied to Nishika Manufacturing and American 3D, the reach of section 336.2-318 is unclear. We must therefore interpret the statute consistent with legislative intent and in a sensible manner that avoids unreasonable, unjust, or absurd results. See id. § 645.17(1); Thoresen v. Schmahl, 222 Minn. 304, 311, 24 N.W.2d 273, 277 (1946).

Under section 336.2-318, this court has sanctioned the recovery of lost profits (one form of economic loss) by a third-party beneficiary whose damages arose from a remote seller's breach of warranty. See Hydra-Mac, Inc. v. Onan Corp., 450 N.W.2d 913, 916 (Minn. 1990) (allowing the plaintiff--a marketer of skid loaders and subpurchaser of defective engines--to recover for lost profits and unreimbursed repair and retrofit expenses, and noting that the district court properly applied section 336.2-318); see also Transport Corp. of Am. v. International Business Machines Corp., 30 F.3d 953, 956, 959 (8th Cir. 1994). We have also indicated that plaintiffs who never used, purchased, or otherwise acquired defective goods may qualify as third-party beneficiaries when they suffer property damage. See Lloyd F. Smith Co., Inc. v. Den-Tal-Ez, Inc., 491 N.W.2d 11, 13-14, 16 (Minn. 1992); see also Nacci v. Volkswagen of Am., Inc., 325 A.2d 617, 619-20 (Del. Super. Ct. 1974) (applying Delaware's version of the statute to a personal injury claim). [3]

But this court has never gone so far as to hold that section 336.2-318 reaches a plaintiff who is seeking lost profits unaccompanied by physical injury or property damage and who never used, purchased, or otherwise acquired the goods in question. To do so, we believe, would expand warranty liability well beyond the limits contemplated by the legislature.
When placed in historical context, it seems clear that the primary motivation for the current version of section 336.2-318 was concern for injured consumers. A prevalent legal conflict at the time of enactment was how best to protect consumers from dangerous products. One route was to expand the doctrine of "warranty" to reach subpurchasers and others injured in person by defective products. During the 1960s, however, the preferred course was to recognize that the concept of "warranty" had been outgrown and to legitimize recovery in tort. See William L.

Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, passim (1966) (recounting the legal battle to break down the barrier of "privity," which culminated in widespread adoption of strict products liability in tort). Despite the promulgation of Restatement of Torts (Second) § 402A in 1965--which we adopted in 1967, see McCormack v. Hankscraft Co., 278 Minn. 322, 337-40, 154 N.W.2d 488, 499-501 (1967); see also Milbank Mut. Ins. Co. v. Proksch, 309 Minn. 106, 115 n.4, 244 N.W.2d 105, 110 n.4 (1976)--the drafters of the model U.C.C. presented states with Alternative C of the third-party beneficiaries provision, which was intended to follow the trend of strict products liability and extend warranty protection "beyond injuries to the person." U.C.C. § 2-318 cmt. 3. But the expansion of warranty protection to certain classes of noncontracting parties in the U.C.C. cannot be completely detached from the concerns that motivated our legislature in 1969. See Minn. Stat. § 645.16(1)-(4).

Our understanding of the background and aims of section 336.2-318 leads us to conclude that the scope of a seller's liability for breach of warranty should recede as the relationship between a "beneficiary" of the warranty and the seller's goods becomes more remote. Consistent with Hydra-Mac--and assuming that section 336.2-318 is otherwise satisfied--those who purchase, use, or otherwise acquire warranted goods have standing to sue for purely economic losses. Those who lack any such connection to the warranted goods must demonstrate physical injury or property damage before economic losses are recoverable. This line comports with legislative intent, provides a clear rule of law, and identifies a sensible limit to liability without disrupting settled precedent.

Any other result implies almost unlimited liability for sellers of warranted goods. If section 336.2-318 were interpreted as the respondents advocate, it seems that the respondents' individual employees, or perhaps even their families, would have standing to sue 3M for causing the loss of their jobs or even a decline in their wages. The respondents' reading also appears to allow recovery on the facts of Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124 (Iowa 1984), in which plaintiffs connected with motel, restaurant, bar, and retail businesses invoked Iowa's third-party beneficiaries provision in an attempt to sue solely for economic losses arising from a bridge closing; the closing was allegedly caused by the defendant-seller's defective steel. Id. at 125. That attempt to expand the scope of the U.C.C. was rejected. Id. at 129. The respondents appear to advocate warranty recovery as a catch-all alternative for plaintiffs with no viable legal basis for suit. The risk, however, is that the fortuitous existence of a warranty--between some seller and some buyer, somewhere--would allow remote yet foreseeable parties to recover for their hampered expectations, while others in similar circumstances--but who could not identify a warranty--would not. Cf. Cunningham v. Kartridg Pak Co., 332 N.W.2d 881, 885 (Iowa 1983) ("Plaintiff is not an injured consumer; he was a shareholder of a corporation whose expectations did not materialize. To allow a shareholder to use products liability law as the vehicle to a direct cause of action otherwise denied by general corporate law would be an injustice to both areas of the law.").
Confronted with liability of this magnitude, sellers would be encouraged to attempt to disclaim warranties or exclude consequential damages remedies--affecting both the immediate buyer and third-party beneficiaries alike. See Minn. Stat. § 336.2-318 (prohibiting a seller from limiting the reach of the third-party beneficiaries provision); Hydra-Mac, 450 N.W.2d at 916 (noting, however, that a valid warranty disclaimer under Minn. Stat. § 336.2-316 made to an original purchaser extends to third-party beneficiaries); see also U.C.C. § 2-715 cmt. 3. [4]

We therefore reject the respondents' reading of the statute--an interpretation that would likely lead to a variety of unreasonable, unjust, and absurd results that we cannot imagine were intended by the legislature. See Minn. Stat. §§ 645.16(6), 645.17(1); Thoresen, 222 Minn. at 311, 24 N.W.2d at 277. In light of the statute's language and purpose, and consistent with the legislature's apparent intent, the best reading of section 336.2-318 is that noncontracting parties who never used, purchased, or otherwise acquired the seller's warranted goods may not seek lost profits, unaccompanied by physical injury or property damage, for breach of warranty under the statute. Nishika Manufacturing and American 3D are simply not within the class of warranty "beneficiaries" protected by section 336.2-318. The first certified question must be answered in the negative.

III.

Because our answer to the first certified question necessitates judicial alteration of the respondents' damages award or a new trial--matters to be addressed by the Texas courts--it is both helpful and proper to reach the merits of the second certified question.

The jury found that 3M's breach of express and implied warranties was a direct cause of harm to each of the four respondents and that $50,000,000 was a reasonably certain sum that would fairly compensate them collectively. But the special verdict form did not ask for the amount of damages that each respondent had proved individually. The second certified question asks whether the respondents may "recover damages jointly as a single economic unit."

> This issue is a product of modern liberal joinder rules adopted by many states. In Minnesota,
>
> All persons may join in one action as plaintiffs if they assert any right to relief, jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of fact or law common to all these persons will arise in the action.

Minn. R. Civ. P. 20.01; see also Tex. R. Civ. P. 40(a). Such rules allow certain plaintiffs to seek relief in a single action, whether their right to relief is "joint" or not. But such rules were not intended to alter the substantive proof burdens of plaintiffs seeking damages. See 2 Douglas D. McFarland & William J. Keppel, Minnesota Civil Practice § 1411, at 219 (2d ed. 1990).

The respondents argue that they "alleged and proved joint claims." There is certainly some authority for the proposition that a defendant has no reason to complain about a joint damages award when the cause of action or claim is itself joint in nature. E.g., Silver Unicorn, Inc. v. Matheson, 638 So. 2d 985, 986 (Fla. Dist. Ct. App. 1994); Ortiz v. Avante Villa at Corpus Christi, Inc., 926 S.W.2d 608, 612 (Tex. Ct. App. 1996); Lewis v. Hall, 271 S.W.2d 447, 451 (Tex. Ct. App. 1954); 49 C.J.S. Judgments § 33, at 87 & nn. 97-98 (1997). However, the respondents fail to identify any Minnesota precedent for characterizing their claims as "joint." In fact, the sole foundation for their argument is that their claims "were based on the same conduct by 3M that created the warranties, and the same conduct by 3M that breached them." Although this court has not had recent occasion to address the issue of when a legal claim posed by

multiple parties is "joint," the respondents' argument is clearly inconsistent with traditional notions of joint claims or joint causes of action. [5] The four respondents do not have a joint legal interest in the judgment that was entered, and each of the respondents is a legally independent entity.

The respondents also assert that no harm is done to a defendant if multiple plaintiffs with separate claims decide to ask for a joint damages award, as long as each plaintiff individually satisfies the other elements of their claims. The respondents concede that plaintiffs in breach of warranty cases must prove that there was a warranty, that it was breached, and that a loss was caused by the breach. E.g., Peterson v. Bendix Home Sys., Inc., 318 N.W.2d 50, 52-53 (Minn. 1982). They also recognize that a plaintiff suing for breach of warranty must prove the amount of any lost profits to a reasonable degree of certainty. E.g., Hydra-Mac, 450 N.W.2d at 920; Polaris Indus. v. Plastics, Inc., 299 N.W.2d 414, 419 (Minn. 1980); Cardinal Consulting Co. v. Circo Resorts, Inc., 297 N.W.2d 260, 267 (Minn. 1980); Faust v. Parrott, 270 N.W.2d 117, 120 (Minn. 1978). The respondents, however, believe that this burden can be carried by them as a group.

We disagree. In general, and absent a joint claim, each plaintiff has an obligation to prove the amount of damages that it individually suffered. See 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 10.02 (3d ed. 1992) (stating that proof of aggregate damages as a common issue is unique to class actions, and that, in traditional individual suits, a defendant's liability to joined plaintiffs is the total of the damages "as proved for each of the joined plaintiffs"). The lump-sum judgment in this case deprived 3M of a jury determination of the sufficiency of the evidence with respect to each individual respondent. As legally independent entities with factually distinct connections to 3M's alleged breach, the individual respondents' evidence might vary in strength. A joint recovery risks eliminating the legal significance of these differences. [6] There may be exceptional cases in which lump-sum damages are appropriate and fair. But on the facts of this case, the respondents were not entitled to a joint recovery of damages for lost profits.

First certified question answered in the negative, second certified question answered as above.

PAGE, J., took no part in the consideration or decision of this case.

Footnotes

[1] Nishika Manufacturing displaced Quantronics as the respondents' camera manufacturer after the sales of allegedly defective goods by 3M but before this lawsuit was filed. The Respondents were also joined in their lawsuit by three individual distributors, but the jury did not award them any damages and they are not parties to this appeal.

[2] Nine other states have adopted similar third-party beneficiaries provisions. See Colo. Rev. Stat. § 4-2-318 (1992); Del. Code. Ann. tit. 6, § 2-318 (1993) (limiting its reach to natural persons); Haw. Rev. Stat. § 490:2-318 (1993); Iowa Code Ann. § 554.2318 (West 1995); N.D. Cent. Code § 41-02-35 (1983); R.I. Gen. Laws § 6A-2-318 (1992); S.D. Codified Laws § 57A-2-318 (Michie 1988); Utah Code Ann. § 70A-2-318 (Michie 1996); Wyo. Stat. Ann. § 34.1-2-318 (Michie 1991). Three other states use similar language, but they refer to and allow suits for

"damages," rather than suits by "injured" parties. See Ark. Code Ann. § 4-86-101 (Michie 1987); N.H. Rev. Stat. Ann. § 382-A:2-318 (1994); Va. Code Ann. § 8.2-318 (Michie 1991); see also Me. Rev. Stat. Ann. tit. 11, § 2-318 (West 1995) (applying to "any action" against certain specified defendants); Mass. Ann. Laws ch. 106, § 2-318 (Law. Co-op. 1984) (same).

[3] 3M does not argue that Hydra-Mac should be overruled, nor does it dispute that physical injury or property damage is recoverable by those "outside the distributive chain" of a seller's goods.

[4] The respondents argue that their interpretation of section 336.2-318 is tempered by section 336.2-715(2)(a), which includes as consequential damages "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know." Assuming that section 336.2-715(2)(a) applies to third-party beneficiary cases, see Hydra-Mac, 450 N.W.2d at 920; Industrial Graphics, Inc. v. Asahi Corp., 485 F. Supp. 793, 807 (D. Minn. 1980), it is not the rigid, subjective, and antiquated test that the respondents put forth. See Hydra-Mac, 450 N.W.2d at 920; Bemidji Sales Barn, Inc. v. Chatfield, 312 Minn. 11, 15-16, 250 N.W.2d 185, 188 (1977); Despatch Oven Co. v. Rauenhorst, 229 Minn. 436, 445, 40 N.W.2d 73, 79 (1949); see also Minn. Stat. Ann. § 336.2-715 Minn. Code cmt. (explaining that the statute follows the rule in cases such as Despatch Oven); U.C.C. § 2-715 cmt. 2; 1 James J. White & Robert S. Summers, Uniform Commercial Code § 10-4, at 569-70 (4th ed. 1995).

[5] King v. Socony-Vacuum Oil Co., 207 Minn. 573, 574-76, 292 N.W. 198, 199 (1940); Thorn v. Geo. A. Hormel & Co., 206 Minn. 589, 594, 289 N.W. 516, 518 (1940); Nahate v. Hanson, 106 Minn. 365, 367, 119 N.W. 55, 55 (1908); Ermentrout v. American Fire Ins. Co., 60 Minn. 418, 420, 62 N.W. 543, 544 (1895); Cochrane v. Quackenbush, 29 Minn. 376, 378, 13 N.W. 154, 155-56 (1882). Of course, the regime of civil procedure was quite different when these cases were decided and the primary issue was "misjoinder" of parties and claims. Nevertheless, the cited cases are some indication of the extent of the "joint claims" concept. Whatever their persuasive authority, we see nothing in our case law to support the respondents' contentions.

[6] Cases from other jurisdictions that have faced the issue of joint recovery also cut against the respondents'position. See Home Ins. Co. v. Pugh, 51 Ala. App. 373, 376, 286 So. 2d 49, 51 (Ala. Civ. App. 1973); Nemer v. Anderson, 151 Colo. 411, 417-18, 378 P.2d 841, 845 (Colo. 1963); Silver Unicorn, 638 So. 2d at 986; Caton v. Flig, 98 N.E.2d 162, 163 (Ill. App. Ct. 1951); Tramonte v. Palermo, 640 So. 2d 661, 666 (La. Ct. App. 1994); Slusher v. Jack Roach Cadillac, Inc., 719 S.W.2d 880, 883 (Mo. Ct. App. 1986); Musto v. Mitchell, 105 N.J.L. 575, 576-77, 146 A. 212, 213 (N.J. 1929); Mullen v. Roberts, 423 S.W.2d 576, 578-79 (Tex. 1968).

STATE OF MINNESOTA

IN SUPREME COURT

C3-97-261

Court of Appeals

Page, J.
Dissenting, Stringer and Tomljanovich, JJ.

Desiree Lefto, individually and as
parent and guardian of Nicole Lefto,
a minor,

Respondent,

vs.

Hoggsbreath Enterprises, Inc.,
petitioner,

Appellant.

Filed: July 23, 1998
Office of Appellate Courts

S Y L L A B U S

The term "other person" as used in the Civil Damage Act refers to any other person injured by the intoxication of another if that injured person played no role in causing the intoxication.

Affirmed.

Heard, considered, and decided by the court en banc.

O P I N I O N

PAGE, Justice.

Desiree Lefto commenced this action against Hoggsbreath Enterprises, Inc. ("Hoggsbreath") under the Minnesota Civil Damage Act (the "Act"), [1] on behalf of her daughter Nicole and herself, as a result of an August 28, 1993, motor vehicle accident that seriously injured Michael

Lefto, her then fiancé and now husband. At the time of the accident, Desiree Lefto and Michael Lefto, while living together, were not married. After stipulating to the facts, which included an admission by Hoggsbreath that it had made an illegal sale of alcoholic beverages, the parties brought cross-motions for summary judgment. In responding to Desiree Lefto's summary judgment motion, Hoggsbreath argued that Desiree and Nicole Lefto were not within the class of people having a right of action under the Act. The district court, finding, among other things, that Desiree and Nicole Lefto were within the class of people who have a right of action under the Act, granted Desiree Lefto's summary judgment motion and denied Hoggsbreath's. The district court then, pursuant to Minn. R. Civ. App. P. 103.03(h), certified as important and doubtful the question of whether they fit within the class of people having a right of action under the Act. The court of appeals, agreeing with the district court, affirmed. We conclude that Desiree and Nicole Lefto are within the class of people having a right of action under the Act.

The stipulated facts indicate that Desiree Lefto and Michael Lefto were engaged to be married on August 28, 1993. That day, Michael Lefto was a passenger in a car involved in a rollover motor vehicle accident. Hoggsbreath illegally sold liquor to the driver of the vehicle as well as to Michael Lefto, and those illegal sales were a contributing cause to the accident and to Michael Lefto's injuries, which were severe and included a closed head injury with secondary cognitive impairment.

At the time of the accident, Desiree and Michael Lefto, though unmarried, had been living together for 5 years. Nicole Lefto, Desiree Lefto's daughter, also lived with them. For at least 2 years before the accident, Desiree Lefto and Michael Lefto had been pooling their incomes and shared joint checking and Visa accounts. In addition, they owned furniture together and, although the title to their house was in Michael Lefto's name, they shared household costs and expenses. Finally, they jointly owned recreational property in Jenkins, Minnesota. Desiree Lefto and Michael Lefto eventually married, as planned, and Michael Lefto adopted Nicole.

After the accident, the house the Leftos lived in and Michael Lefto's truck had to be sold due to the loss of Michael Lefto's income. They also had to sell their jointly owned recreational property and furniture. Further, Desiree and Nicole Lefto have incurred expenses on behalf of Michael Lefto; have received less support from Michael Lefto; and have not received the aid, advice, comfort, and protection that they would have received but for the accident. Finally, Desiree and Nicole Lefto's standard of living has been reduced because of the accident.

When the district court grants a summary judgment based on its application of statutory language to the undisputed facts of a case, as the district court did here, its conclusion is one of law and our review is de novo. [2]

Hoggsbreath contends that the term "other person," as found in the Act, is ambiguous and its interpretation requires resort to our rules of statutory construction. Specifically, Hoggsbreath argues that the principle of *ejusdem generis* controls the outcome of this case. *Ejusdem generis,* as codified in Minn. Stat. § 645.08, subd. 3 (1996), requires that "[g]eneral words are construed to be restricted in their meaning by preceding particular words." Thus, Hoggsbreath argues because the categories of people preceding "other person" in the Act—spouse, child, parent, guardian, employee—all have a legal relationship with the "intoxicated person," only people

with a legal relationship with the intoxicated person are entitled to recover as an other person. Hoggsbreath contends that Desiree and Nicole Lefto did not have such a legal relationship and therefore do not have a right of action under the Act. Hoggsbreath also argues that to allow Desiree and Nicole Lefto to sue under the Act would offend public policy because Minnesota does not recognize common law marriage and, at the time of his injuries, Michael Lefto and Desiree Lefto were not married.

Although we have previously construed the Act's term "other person," we have not addressed the specific question presented here. [3] In construing "other person" in those cases, we did not apply the principle of *ejusdem generis* even though we had ample opportunity to do so.

We have said that the Act is both remedial and penal. [4] In Herrly v. Muzik, we said, "when [the Act's] provisions have been clear as to intent and purpose, we have liberally construed the act `so as to suppress the mischief and advance the remedy.'" [5] At the same time, we noted that liberal construction is not without limitations and that the Act "`is to be strictly construed in the sense that it cannot be enlarged beyond its definite scope.'" [6] The intent and purpose of the Act's provisions are clear. The mischief to be suppressed is the illegal furnishing of liquor causing a person's intoxication and the remedy to be advanced is the protection of innocent third persons injured as a result by providing those persons a claim of civil damage. [7] We reinforced the remedy to be advanced by identifying the Act's definite scope in Herrly where we said, "Our repeated view [is] that the [Act] was intended solely to protect `innocent third persons' injured as a result of another's intoxication * * *." [8] The dissent would have the court either ignore or overrule this line of cases. Therefore, consistent with our previous construction of the term "other person," we conclude that the term "other person" refers to any other person injured by the intoxication of another and who played no role in causing the intoxication. [9]

Moreover, we note that it makes no sense to apply the rule of *ejusdem generis* to only one category of injury—means of support—and not the others, personal injury, property or pecuniary losses. Clearly, any innocent third person injured in person or property need not have a legal relationship with the intoxicated person in order to have a cause of action under the Act. [10] So why should an innocent third person who is injured in means of support?

On this record, Desiree Lefto, the fiancée of Michael Lefto at the time of his injuries, and Nicole Lefto, her daughter, are clearly "other" innocent third persons that played no role in causing the intoxication that contributed to the cause of the rollover accident and to Michael Lefto's injuries. Further, unlike the situation in Hannah v. Jensen, [11] and Empire Fire & Marine Ins. Co. v. Williams, [12] they are not otherwise barred by law from asserting a claim of civil damage. Therefore, they are entitled to exercise their right of action under the Act.

Affirmed.

DISSENT

STRINGER, J. (dissenting).

The Civil Damages Act, commonly referred to as the Dramshop law, was adopted by the legislature in 1911, and to characterize it charitably, it is not a model of clarity. Its frequent review by this court provides no more compelling proof of its obscurity, frequently raising issues as to whether a putative claimant fits within the generic category of "other person." See, e.g., Hannah v. Jensen, 298 N.W.2d 52 (Minn. 1980) (policeman is not "other person"); Empire Fire & Marine Ins. Co. v. Williams, 265 Minn. 333, 336, 121 N.W.2d 580, 582-83 (1963) (tortfeasors' insurance company is not "other person"); Randall v. Village of Excelsior, 258 Minn. 81, 83, 103 N.W.2d 131, 133 (1960) (voluntarily intoxicated minor is not "other person"). That it is ambiguous as to who was intended to be entitled to bring suit under the statute would seem to be beyond dispute--yet the majority finds no ambiguity and applies it in a manner I believe clearly violates legislative intent. Therefore I respectfully dissent.

Efforts to determine what the legislature intended are rewarded by looking to what the statute says, and equally importantly, what it does not say. It says:

> A spouse, child, parent, guardian, employer, *or other person* injured in person, property, or means of support, or who incurs other pecuniary loss * * * has a right of action * * *.

Minn. Stat. § 340A.801, subd. 1 (1992) (emphasis added). It does not say "any other person" as the majority holds, and to add the word "any" dramatically expands the scope of those intended by the legislature to have a claim for injury under the statute.

Inclusion of spouse, child, parent, guardian, or employer [13] leaves no doubt as to who is to have a cause of action under the act, but who is included in "other person" is not clear. We are assisted by legislative cannons [sic] of construction which provide: "General words are construed to be restricted in their meaning by preceding particular words." Minn. Stat. § 645.08, subd. 3 (1996). This cannon [sic] is commonly referred to as the rule of *ejusdem generis*. In the Civil Damages Act the preceding particular words have a common feature--a legal relationship involving a level of dependence such that as a result of the illegal sale, a legal responsibility of the injured party to the claimant is impaired.

Applying this rule of construction to the category of "other persons," we are lead to the conclusion that for someone other than a spouse, child, parent, guardian or employer to be entitled to make a claim under the Civil Damages Act, there must be proof that the illegal sale interfered with or prevented one having a legal obligation to the plaintiff from fulfilling that obligation. It can mean nothing else, unless the statute is to be chopped into separate parts, without any sense of the breadth of its intended protection. The element of dependence in the Act was recognized in Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886 (1955), where we considered whether a trustee bringing an action under the Wrongful Death Act, Minn. Stat. § 573.02 (1953), could at the same time, bring an action under the Civil Damages Act, Minn. Stat. § 340.95 (1953). We noted that while the statutes were remedial in nature, they provided separate rights and neither had a common law heritage. Beck, 245 Minn. at 33-34, 70 N.W.2d at 891-92. In citing a variety of distinctions between the two statutes, we noted that as to the Wrongful Death Act "[t]he element of *dependency* is not involved in this statute; the element of pecuniary loss is." Beck, 245 Minn. at 34, 70 N.W.2d at 892. (Emphasis added.) The requirement of dependency aligns our Civil Damages Act with other states where courts have construed

similarly worded civil damages statutes to limit "other persons" to those having a legal relationship of dependence with the injury party. See, e.g., Langle v. Kurkul, 510 A.2d 1301, 1303 (Vt. 1986) (applying the rule of ejusdem generis to conclude that within the meaning of Vt. Stat. Ann. tit. 7, § 501 (providing a cause of action for a "husband, wife, child, guardian, employer or other person"), the "other person" must have "some special relation to the intoxicated person").

Therefore, I would conclude that the plaintiff here is not one entitled to bring suit under the statute because she has no relationship of dependency with the party injured by the illegal sale. Certainly she and Michael Lefto had combined some assets and had a hope to legalize their relationship through their marriage on the day of the accident, but when the accident tragically occurred, there was no legal relationship. It was only a hope or expectation.

The majority's holding otherwise raises a number of concerns. First, by rejecting an *ejusdem generis* analysis, the majority in effect converts the wording of the statute from "other person" to *every person*, because there are no limits to who can recover under the statute so long as damages can be proven. The majority's analysis would permit recovery, for example, to a retail sales establishment that could prove that the injured party was a good customer and his loss of income due to his injury occurring because of an illegal sale of alcoholic beverages prevented him from making his customary purchases at the retail store; or a homeowner who had contracted for home improvement services from a contractor would have a claim based on an illegal sale of liquor to his contractor if the contractor was prevented from completing the job because of injuries sustained by the contractor as the result of an illegal sale. The examples are limited only by our imagination. But they are real under the majority's holding. If the legislature had intended the statute to apply to every person--or "any other person" as the majority holds--it would have so written the statute. Other states have done so, [14] but Minnesota has not, and it is not the purview of this court to take such a step on its own.

Finally, as there is no counterpart in the common law to the Civil damages action--at common law purveyors of liquor had no duty to those injured by a sale to a minor or obviously intoxicated person, Herrly v. Muzik, 374 N.W.2d 275, 276-77 (Minn. 1985)--rules of statutory construction require a narrow, cautious approach to applying a law that is purely a creature of the legislature. This is particularly so when it is penal in nature. Id. at 278. In the majority's haste to provide a cause of action, this principal, too, is sacrificed.

TOMLJANOVICH, J. (dissenting).

I join in the dissent of Justice Stringer.

Footnotes

[1] The Act, in relevant part, provides that:

> A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss by an intoxicated person or by the intoxication of another person, has a right of action in the person's own name for all damages sustained against a person who caused the intoxication of that person by illegally selling alcoholic beverages. All damages recovered by a minor under this section must be paid either to the minor or to the minor's parent, guardian, or next friend as the court directs.

Minn. Stat. § 340A.801, subd. 1 (1992).

[2] See Wallin v. Letourneau, 534 N.W.2d 712, 715 (1995).

[3] See Hannah v. Jensen, 298 N.W.2d 52, 54-55 (Minn. 1980) (on-duty police officer does not qualify as "other person" due to application of Fireman's rule); Turk v. Long Branch Saloon, Inc., 159 N.W.2d 903, 905-06 (Minn. 1968) (injured party who purchased alcohol for the tortfeasor minor is not "other person" under the Act); Empire Fire & Marine Ins. Co. v. Williams, 265 Minn. 333, 337, 121 N.W.2d 580, 583 (1963) (tortfeasor's insurance company does not qualify as "other person" due to application of subrogation principle); Randall v. Village of Excelsior, 258 Minn. 81, 83-84, 103 N.W.2d 131, 133 (1960) (voluntarily intoxicated minor is not "other person" under the Act).

[4] Herrly v. Muzik, 374 N.W.2d 275, 278 (Minn. 1985).

[5] Id.

[6] Id. (quoting Beck v. Groe, 245 Minn. 28, 34, 70 N.W.2d 886, 891 (1955)).

[7] See Ross v. Ross, 294 Minn. 115, 121-22, 200 N.W.2d 149, 153 (1972).

[8] Herrly, 374 N.W.2d at 278.

[9] The dissent lists a parade of horribles, which it contends would flow from our decision. We do not believe the legislature intended to include every conceivable remote injury. In order to recover under the Act, a party seeking recovery must establish that they are "injured * * * by an intoxicated person or by the intoxication of another person * * *." While the statute has no counterpart in the common law, presumably, in order to recover, the party seeking recovery will have to establish that his or her injury was reasonably foreseeable and proximately caused by the intoxicated person.

[10] See McGuire v. C & L Restaurant Inc., 346 N.W.2d 605 (Minn. 1984) (motorcyclist injured by drunk driver brought suit under the Civil Damage Act); Englund v. MN CA Partners/MN Joint Ventures, d/b/a Radisson Hotel South, 555 N.W.2d 328 (Minn. App. 1996), aff'd 565 N.W.2d 433 (Minn. 1997) (motorcyclist injured by drunk driver brought suit under Civil Damage Act).

[11] 298 N.W.2d at 54-55.

[12] 265 Minn. at 337, 121 N.W.2d at 583.

[13] The reference to "employer" would seem to be on a slightly different footing than "spouse, child, parent, [or] guardian" because employment is traditionally "at will" but until the "at will" right to terminate the employment is exercised by either the employer or employee, their relationship is based on a contract--basically, the employee's agreement to work in exchange for the employer's agreement to pay wages or salary. An employer could suffer pecuniary loss if a valued employee--perhaps a creative inventor--were incapacitated and unable to work as a result of injury from an illegal sale of alcoholic beverages, and the statute recognizes this loss as compensable.

[14] See, e.g., Utah Code Ann. § 32A-14-101 (1997) (providing "any third person" injured in specified ways has a cause of action); N.Y. Gen. Oblig. § 11-101 (1997) (providing "any person" injured in specified ways has a cause of action); Ala. Code § 6-5-71 (1997) (providing "[e]very wife, child, parent, or other person" injured in specified ways has a cause of action).

STATE OF MINNESOTA

IN SUPREME COURT

C6-96-1118

Court of Appeals

Gardebring, J.
Dissenting, Page, J.

Richard S. Cummings,

Respondent,

vs.

Charles E. Koehnen, et al., petitioners,

Appellants.

Filed: August 28, 1997
Office of Appellate Courts

SYLLABUS

Under the Minnesota Human Rights Act, Minn. Stat. ch. 363, a plaintiff alleging sexual harassment by a person who is of the same gender must prove that the conduct complained of meets the elements set forth in the definition of sexual harassment, Minn. Stat. § 363.01, subd. 41 (1996), but does not need to prove that the harassment affected one gender differently than the other, nor that the harasser was homosexual.

Affirmed.

Heard, considered and decided by the court en banc.

OPINION

GARDEBRING, Justice.

This case raises for the first time the question of whether male-on-male sexual harassment is prohibited by the Minnesota Human Rights Act (MHRA), Minn. Stat. ch. 363, and, if so,

whether a plaintiff in such a case must show that the harassment affected one gender differently than the other or that the harasser was homosexual. The trial court granted defendants' (here the appellants) motion for summary judgment on plaintiff's sexual harassment claim, holding that a claim of sexual harassment between two heterosexual men in an all-male workplace is not actionable under the MHRA. The court of appeals reversed. We affirm the judgment of the court of appeals.

S & K Trucking and Landscaping, L.L.C., hired the plaintiff Richard Cummings, in July 1992, as a seasonal truck driver, to haul snow, dirt, gravel, and blacktop. Cummings continued to work seasonally at S & K until he was notified on March 12, 1994, that he would not be recalled from a seasonal layoff. At all times during Cummings' employment with S & K, Charles Koehnen, who was co-owner of the business, acted as manager and was Cummings' direct supervisor.

On September 13, 1994, Cummings filed a charge against S & K with the Minnesota Department of Human Rights, alleging that throughout his employment at S & K, Koehnen had subjected Cummings to "ongoing sexual harassment." The Department of Human Rights made a finding of probable cause on July 14, 1995, and Cummings brought this suit against Koehnen and S & K on October 27, 1995.

In his complaint, Cummings asserted he was subjected to sexual harassment in violation of the MHRA. [1] Specifically, Cummings claimed that Koehnen repeatedly said to him, "How about sucking my little dick and make it a big dick before you go out to make me money"; routinely told Cummings to bend over so he could engage in anal sex with him; routinely placed his hands on Cummings' hips, simulating anal sex, while stating, "Here, let me show you how a real man takes it"; and routinely told Cummings, who had a pony tail, that he was going to use the pony tail as a handle while Cummings was on his knees to give Koehnen a blow job. Cummings also alleged that Koehnen would pinch him on the buttocks or on the inside of his legs and would place tools and a garden hose up against Cummings' crotch and genitals.

Further, he alleged that Koehnen would call him derogatory sexual names, including "fat faggot"; that he told Cummings to "bend over so I can do you in the ass"; and that on payday he threw Cummings' paycheck on the floor, made him bend over to pick it up, grabbed Cummings' hips, simulated anal sex, and said, "Once you had this you'll never go back to your wife." Cummings claimed these incidents, and other similar ones, occurred nearly every day, were unwelcome and substantially interfered with his employment by creating a hostile work environment.

The appellants moved for summary judgment, which the district court granted, concluding that because both men were heterosexual and because Cummings had failed to present any evidence that the alleged harassment was "based on sex," he had failed to state a claim upon which relief could be granted under MHRA. The court of appeals reversed, concluding that a plaintiff need not prove the harassment was "based on" or "because of" gender or sexual orientation in order to state a claim for relief under the MHRA. [2] Cummings v. Koehnen, 556 N.W.2d 586 (Minn. App. 1996).

On an appeal from summary judgment, we must examine two questions, whether there are any genuine issues of material fact and whether the lower courts erred in their application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). An appellate court must view the evidence in the light most favorable to the party against whom judgment was granted. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). The construction of a statute is a question of law and thus fully reviewable. Hibbing Educ. Ass'n. v. Public Employment Relations Bd., 369 N.W.2d 527, 529 (Minn. 1985).

Under the MHRA, it is an unfair employment practice for an employer "*because of* * * * *sex* * * * to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." Minn. Stat. § 363.03, subd. 1(2) (1996) (emphasis added). For purposes of sex discrimination, the term "discriminate" includes sexual harassment. Minn. Stat. § 363.01, subd. 14 (1996). Further, "sexual harassment," as defined in the MHRA,

> includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct of a sexual nature when:
> (1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment * * *;
> (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment * * *; or
> (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment * * *, or creating an intimidating, hostile, or offensive employment * * * environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

Minn. Stat. § 363.01, subd. 41.

Thus, we have before us a statutory scheme that specifically includes within the definition of sexual discrimination claims for sexual harassment, which, in turn, is broadly defined to include a variety of specific behaviors.

As a threshold issue we must consider whether the MHRA allows claims for same-gender sexual harassment at all. Both parties to this matter concede that it does and we agree. The statutory language is written in gender-neutral terms, referring to the actors as "individual" and "employer." Minn. Stat. § 363.01, subd. 41. Neither the definition of "discriminate" nor that of "sexual harassment" specifies that the gender of the victim and harasser must be different for the discrimination or harassment to be actionable. See Minn. Stat. § 363.01, subds. 14, 41. Thus, from the plain language of the statute, it is clear that the MHRA applies to same-gender sexual harassment. [3] At issue in this case is the nature of proof necessary to establish a claim of same-gender sexual harassment. Specifically, we are asked to consider whether a sexual harassment plaintiff must prove, in addition to the elements of sexual harassment set forth in section 363.01, subd. 41, that the harassment was "because of sex," an apparent requirement of section 363.03, subd. 1(2). Appellants argue that a plaintiff must prove that the harassment was "because of sex" and that the phrase must have one of two meanings: that the harassment

resulted in the disparate treatment of one gender or that the conduct was motivated by the harasser's actual sexual interest in the victim, that is, that the harasser was homosexual. Cummings cannot meet his burden of proof, appellants argue, because there were no female employees at S & K who were similarly situated to Cummings, and thus he could not show differential treatment; and because Koehnen, the harasser, is heterosexual and therefore could not have an actual sexual interest in another man.

Cummings, on the other hand, argues that separate proof of the "because of sex" element is unnecessary because sexual harassment is specifically included in the meaning of "discrimination, based on sex." Therefore, he asserts, a plaintiff need only offer proof of the elements set forth in the specific definition of sexual harassment.

Thus, we must determine whether the legislature intended that proof of the elements of Minn. Stat. § 363.01, subd. 41, is enough to establish a claim of same-gender sexual harassment or whether a plaintiff must offer additional evidence that the behavior was "based on sex," specifically that it affected one gender differently than the other or that the harasser was homosexual.

In analyzing questions of statutory interpretation, our object is to ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (1996). The legislature has indicated that the MHRA should be liberally construed for the accomplishment of its purposes. Minn. Stat. § 363.11 (1996). One of those purposes includes protecting Minnesota employees from sexual harassment. See Minn. Stat. § 363.03, subd. 1(2) and Minn. Stat. § 363.01, subds. 14, 41 (making sexual harassment an unfair employment practice).

We are persuaded that Cummings is correct in his argument that the "because of sex" requirement of section 363.03, subd. 1(2) is rendered superfluous in sexual harassment claims by the specific statutory definitions of discrimination and sexual harassment. [4] "The term `discriminate' includes segregate or separate and, *for purposes of discrimination based on sex, it includes sexual harassment.*" Minn. Stat. § 363.01, subd. 14 (emphasis added). This definition makes it clear that sexual harassment is "discrimination based on sex." The actionable language of section 363.03, subd. 1(2), that it is unlawful, "for an employer, because of * * * sex, * * * to discriminate," means, in a sexual harassment case, that it is unlawful "for an employer to sexually harass." Thus, it is not necessary for a sexual harassment plaintiff to prove that the harassment occurred "because of sex," in addition to proving the elements of sexual harassment as set forth in section 363.01, subd. 41.

Specifically, we reject the arguments by appellant that a plaintiff in a same-gender sexual harassment case must prove either that the harassment affects one gender differently than the other [5] or that the harasser is homosexual. Requiring a plaintiff to show that conduct not only met the elements of sexual harassment, but also resulted in the differential treatment of male and female employees would lead to absurd results. [6] Such a requirement would leave two classes of employees unprotected from sexual harassment in the workplace: employees who work in a single-gender workplace and employees who work with an "equal opportunity harasser," who harasses sexually both males and females. There is nothing in the MHRA to indicate the legislature intended to leave these classes of employees unprotected, and we cannot presume the

legislature intended such an absurd result. See Minn. Stat. § 645.17(1) (in interpreting statutes, courts must presume the "legislature does not intend a result that is absurd").

Secondly, holding as we do that proof of the "because of sex" element is provided by evidence on the specific statutory elements of sexual harassment, Minn. Stat. § 363.01, subd. 41, we must also reject appellants' argument that a plaintiff must affirmatively prove the same-gender harasser is homosexual to proceed on a same-gender sexual harassment claim. Appellants argue that harassment of a sexual nature could not be "because of sex" unless the harasser had an actual sexual interest in the victim, that is, unless the harasser was homosexual. However, that argument is simply not supported by the statutory language. The statute defines sexual harassment as including "unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature" that substantially interferes with the victim's employment or creates a hostile work environment. Minn. Stat. § 363.01, subd. 41. Appellants' argument that a plaintiff must also show that the conduct is always motivated by the sexual desires of the harasser would narrow the prohibition in a manner inconsistent with the statute. The statute simply does not require a plaintiff to always show the conduct was motivated by an actual interest in sexual activity with the plaintiff. Rather, sexual harassment can include any "verbal or physical conduct or communication of a sexual nature" that has the effect of substantially interfering with the plaintiff's employment or of creating a hostile work environment. Minn. Stat. § 363.01, subd. 41. Evidence that the harasser was actually interested in sexual contact with the plaintiff may help to show that the conduct was "of a sexual nature," but in a case such as this, where the alleged actions were overtly sexual, such proof is not mandated by the language of the statute.

Our holding in this matter is supported by the legislative history of the MHRA. Initially, the MHRA did not specifically prohibit sexual harassment, only sex discrimination. See Minn. Stat. ch. 363 (1978). The specific definition of sexual harassment, and its placement within the prohibition of "discrimination based on sex," was added by the legislature at a later date. Act of March 23, 1982, ch. 619, §§ 2 and 3, 1982 Minn. Laws 1508, 1511. The legislature placed the prohibition of sexual harassment within the prohibition of "discrimination based on sex" in order to fit that new provision within the existing structure of the MHRA. We believe that the apparent requirement that a plaintiff prove both that the complained-of behavior was "because of sex" and also that it met the requirements of Minn. Stat. § 363.41, subd. 41, is a drafting anomaly resulting from the later addition of the sexual harassment provisions.

In addition, our conclusion is consistent with the position taken by the Minnesota Department of Human Rights, in its probable cause finding in this case and its brief as Amicus Curiae, which is entitled to deference. [7] See Minnesota Mining and Manufacturing Co. v. State, 289 N.W.2d 396, 400 (Minn. 1979).

In summary then, we hold that under the MHRA, a plaintiff alleging sexual harassment by a person who is of the same gender must prove that the conduct complained of meets the elements set forth in the definition of sexual harassment, Minn. Stat. § 363.01, subd. 41, but does not need to prove that the harassment affected one gender differently than the other, nor that the harasser was homosexual.

Finally, we must emphasize that our decision in this matter does not mean that every sexual comment in the workplace becomes actionable sexual harassment. The plaintiff must still prove the elements of sexual harassment set forth in section 363.01, subd. 41. That is, the conduct must be unwelcome, it must consist of "sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature," and it must be sufficiently pervasive so as to substantially interfere with the plaintiff's employment or to create a hostile, intimidating or offensive work environment. Minn. Stat. § 363.01, subd. 41; see, e.g., Klink v. Ramsey County by Zacharias, 397 N.W.2d 894 (Minn. App. 1986) (foul language and vulgar behavior in workplace did not rise to level of actionable sexual harassment under MHRA). In addition, to hold the employer liable, a plaintiff must show that "the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action." Minn. Stat. § 363.01, subd. 41. This is a high threshold, and our holding here today does not change that fact. [8]

Affirmed.

DISSENT

PAGE, J. (dissenting).

I respectfully dissent. While I agree with the court's conclusion that the Minnesota Human Rights Act (MHRA) prohibits sexual harassment between individuals of the same sex, I do not believe that in amending the MHRA to specifically prohibit sexual harassment the legislature intended to make actionable all "rude and crude" conduct that takes place in the workplace between people of the same sex. In dissenting, I do not mean to suggest that Koehnen's conduct was not offensive and disgusting or that employers should either permit or be required to tolerate such conduct in the workplace. The conduct alleged is both rude and crude and employers have a right to prohibit it. However, that is not the same as saying that the conduct is prohibited by the MHRA.

Minnesota Statutes § 363.03, subdivision 1, provides that:

> Except when based on a bona fide occupational qualification, it is an unfair employment practice:
>
> * * * *
>
> (2) For an employer, *because of* * * * *sex*
>
> * * * *
>
> (c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

(Emphasis added.) Minnesota Statutes section 363.01, subdivision 14, in defining the term "discriminate," states that "for purposes of discrimination based on sex, it includes sexual

harassment." (Emphasis added.) Subdivision 41 of section 363.01 then defines "sexual harassment" as including "unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature * * *."

This statutory framework came about as a result of the legislature's codification of this court's holding in Continental Can Co., Inc. v. State, 297 N.W.2d 241 (Minn. 1980). [9] In 1980, before sexual harassment was explicitly prohibited by the MHRA, this court held that sexual harassment was actionable under the MHRA because it was a form of gender discrimination. Id. at 249. At that time, the MHRA only prohibited discrimination on the basis of sex. In Continental Can, we stated that one of the purposes of the MHRA was "to rid the workplace of disparate treatment of female employees merely because they are female." Id. at 248. We further stated that, "[w]hen sexual harassment is directed at female employees because of their womanhood, female employees are faced with a working environment different from the working environment faced by male employees." Id. Thus, the law of sexual harassment, as it was initially developed by the courts, was designed to remove barriers to equality based on one's gender. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66-67 (1986). Given the development of Minnesota's law of sexual harassment, it is clear that a necessary predicate to establishing a claim of sexual harassment is establishing that the conduct alleged to constitute the sexual harassment occurred "because of sex."

The court's interpretation of the MHRA reads the "because of sex" requirement out of the statute and extends the MHRA to cover claims of workplace harassment inconsistent with the statute's underlying purposes as articulated in Continental Can. Significantly, the legislature, without modification, adopted this court's interpretation of the MHRA in Continental Can. Had the legislature intended to eliminate the "because of sex" requirement for establishing claims of sexual harassment under the MHRA, it could easily have done so but did not. [10]

The court's opinion raises the concern that if "because of sex" is not read out of the statute, an absurd result would follow because two classes of employees would be left unprotected: "employees who work in a single-gender workplace and employees who work with an 'equal opportunity harasser,' who harasses sexually both males and females." Ante at 8. First, and most important, employees who fall into these two categories are not left unprotected. In order to establish an actionable claim, they need only show that the alleged harassment occurred "because of sex." This is the same test that women making claims of sexual harassment against men have had to meet since the law of sexual harassment was developed. Moreover, the legislature could reasonably decide that employees who do not face barriers to equality because of their sex do not need protection under the statute. Such a decision is not absurd.

Finally, in reading the "because of sex" requirement out of the statute, the court claims "that the apparent requirement that a plaintiff prove both that the complained-of behavior was 'because of sex' and also that it met the requirements of Minn. Stat. § 363.01, subd. 41" was a mere "drafting anomaly." Ante at 9. While, I suppose, theoretically that is a possibility, it is certainly not the only possibility, nor even the most likely. Our rules of statutory construction provide that, "[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursing the spirit." Minn. Stat. § 645.16 (1996). Here, the statutory provisions in question are clear and free from all

ambiguity. In order for conduct to constitute sexual harassment, it must first be "because of sex." It is not for this court to read into the MHRA that which the legislature did not provide, nor is it the court's role to read out of the MHRA that which the legislature did provide. I see the court's decision today as generating a flood of sexual harassment claims [11] from a class of people who have never faced barriers to gender equality in the workplace, with the ultimate result being less protection for those women and men who have faced such barriers and whom the legislature clearly intended to protect.

Therefore, I dissent.

Footnotes

[1]Cummings asserted a variety of claims in addition to his MHRA claim. He alleged sexual harassment under Title VII of the Federal Civil Rights Act of 1964, but later dismissed these claims on his own. In addition, Cummings raised claims of reprisals and retaliation on the basis of sex, whistleblower violations, wrongful discharge, negligent hiring, retention, supervision and discharge, intentional infliction of emotional distress, and assault and battery. The reprisal and retaliation claims and the intentional infliction of emotional distress claims and negligent hiring were dismissed on summary judgment and have not been appealed. Summary judgment was not granted on Cummings' whistleblower, wrongful discharge, negligent suspension and retention, and assault and battery claims and those claims are also not part of this appeal. Finally, Cummings asserted that S & K, as his employer, failed to investigate his complaints of sexual harassment, also in violation of the MHRA. This claim was dismissed on summary judgment, but because it is derivative of Cummings' sexual harassment claims, our holding on those claims revives the failure to investigate claim as well.

[2]The court of appeals, in an earlier case, had required a plaintiff in a sexual harassment case to show the harassment was "based on sex." Klink v. Ramsey County by Zacharias, 397 N.W.2d 894, 901 (Minn. App. 1986), pet. for rev. denied (Minn., Feb. 13, 1987). Klink is in error to the extent that it requires a plaintiff to prove that sexual harassment is "based on sex," separate and apart from the elements of Minn. Stat. § 363.01, subd. 14.

[3]Further, while the federal appellate courts are divided, the majority to confront this issue have held that same-gender sexual harassment is actionable under Title VII. Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1377-79 (8th Cir. 1996); Fredette v. BVP Management Associates, 1997 WL 228588, at *3-4 (11th Cir. 1997); Yeary v.
Goodwill Industries-Knoxville, Inc., 107 F.3d 443, 448 (6th Cir. 1997); Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138, 142 (4th Cir. 1996). Three other circuits have indicated in dicta that such claims are actionable. Baskerville v. Culligan International Co., 50 F.3d 428, 430 (7th Cir. 1995); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994); Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1980). Only the Fifth Circuit has held otherwise. Garcia v. Elf Atochem North America, 28 F.3d 446, 452 (5th Cir. 1994). The Supreme Court has agreed to consider this issue during its next term. Oncale v. Sundowner Offshore Sens., Inc., 95 F.3d 56 (5th Cir. 1996), cert. granted, 65 U.S.L.W. 3809 (U.S. June 9, 1997) (No. 96-568). Similarly, several other states have construed their antidiscrimination laws to include a prohibition of same-gender sexual harassment. Melnychenko v. 84 Lumber Co., 424 Mass. 285, 290, 676 N.E.2d 45, 48 (1997) ("[s]exual harassment as defined in [the statute] is not limited to

conduct of a supervisor aimed at a subordinate of the opposite sex, nor is it limited to same-sex conduct only where the harasser is a homosexual."); Mogilefsky v. Superior Court, 20 Cal. App. 4th 1409, 1416, 26 Cal. Rptr. 2d 116, 119 (1993) (same-gender sexual harassment actionable under California statute); Barbour v. Department of Social Services, 198 Mich. App. 183, 186, 497 N.W.2d 216, 218 (1993) (male plaintiff stated claim for sexual harassment based on homosexual advances by male supervisor); Doe v. Department of Transportation, 85 Wash. App. 143, 148-49, 931 P.2d 196, 199-200 (1997) (assuming without stating that same-gender harassment actionable); Yukoweic v. International Business Machines Inc., 643 N.Y.S.2d 747, 748 (N.Y. App. Div. 1996) (same-gender harassment actionable but plaintiff failed to allege facts sufficient to support claim).

[4]Another way of resolving this issue would be to read "because of sex" to mean, in sexual harassment claims, "relating to human sexuality." In this way, we could give meaning to all provisions of the statute, as required by Minn. Stat. § 645.17(2) (1996). This is essentially the view adopted by the court of appeals. However, the result is the same: the plaintiff in a same-gender sexual harassment claim is required to offer proof only on the elements of sexual harassment, as provided in Minn. Stat. § 363.01, subd. 14, because that evidence is of necessity "relating to human sexuality."

[5]We recognize that in so holding, we depart from the federal rule, where proof of a disparate effect on one gender is a necessary element of any sexual harassment claim. See Quick, 90 F.3d at 1378 (citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 25, 114 S. Ct. 367, 372 (1993) (Ginsberg, J., concurring)). While we have looked in the past to federal cases interpreting Title VII for guidance in interpreting the MHRA because the statutes are similar in many respects, Sigurdson v. Isanti County, 386 N.W.2d 715, 719 (Minn. 1986), we decline to follow the federal rule here because the MHRA is not similar to Title VII in its treatment of sexual harassment. Title VII prohibits only sex discrimination, 42 U.S.C. § 2000e-2(a)(1), while the MHRA specifically prohibits sexual harassment. Minn. Stat. §§ 363.01 and 363.03. Thus, Title VII's statutory prohibition turns on discrimination, while Minnesota's statutory language includes the specific definition of sexual harassment.

[6]Appellants cite Continental Can Co., Inc. v. State, 297 N.W.2d 241 (Minn. 1980) for the proposition that sexual harassment must have a disparate effect on one gender to be actionable under the MHRA. Continental Can interpreted an earlier version of the MHRA, and is therefore not dispositive of the issue before us. At the time Continental Can was decided, the MHRA did not prohibit sexual harassment specifically; it only prohibited discrimination based on sex. See Continental Can, 297 N.W.2d at 246. We held that sexual harassment was actionable under the MHRA because it is a form of gender discrimination. Id. at 248. While we were finally led to the conclusion that the harassment had a disparate impact on females, that was a necessary conclusion given the language of the MHRA at that time. See id. at 248-49. Moreover, our holding that the sexual harassment was actionable was not based on an affirmative showing that the harassment was aimed only at the female plaintiff and not at males, but on the nature of the harassment, which demonstrated that it was aimed at the female plaintiff because she was a woman. See id. In other words, it was the sexual nature of the conduct that made it discrimination based on sex--a requirement that is now set forth in the statutory language. See Minn. Stat. § 363.01, subds. 14, 41.

[7]We also note that the Department of Human Rights has taken a similar position in its findings of probable cause in two other similar cases. While these cases were brought to our attention in an affidavit by the department's attorney which is not technically a part of the record, we take judicial notice because the affidavit was submitted when the department first became involved in this case as an Amicus before the court of appeals.

[8]We express no opinion as to whether Cummings' allegations meet this requirement. That is for the factfinder, after hearing the evidence, to determine.

[9] In 1982, the MHRA was amended to specifically prohibit sexual harassment. Act of March 23, 1982, ch. 619, §§ 2 and 3, 1982 Minn. Laws 1508, 1511.

[10] While the court's decision may be politically correct, I find the court's analysis leading to the conclusion that "because of sex" should be read out of the statute legally flawed.

[11] To paraphrase Justice Tomljanovich from her concurring opinion in Bilal v. Northwest Airlines, Inc., 537 N.W.2d 614, 620 (Minn. 1995), the courts simply cannot be the arbiter of all "rude and crude" conduct.

STATE OF MINNESOTA

IN COURT OF APPEALS

C7-96-1662

Kathy Daniels Heideman,
Relator,

vs.

Metropolitan Airports Commission,
Respondent.

Filed November 12, 1996
Appeal to proceed
Toussaint, Chief Judge

Metropolitan Airports Commission

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Considered and decided by Toussaint, Chief Judge, Kalitowski, Judge, and Harten, Judge.

S Y L L A B U S

The court of appeals has exclusive jurisdiction over writs of certiorari.

SPECIAL TERM OPINION

TOUSSAINT, Chief Judge

FACTS

Relator Kathy D. Heideman was discharged from her employment with respondent Metropolitan Airports Commission (MAC). MAC affirmed Heideman's termination on July 15, 1996. Heideman filed this certiorari appeal on August 13, 1996.

Heideman moves for a determination of whether this court or the district court has jurisdiction, indicating that she has obtained writs of certiorari in both courts. MAC takes the position that this court has certiorari jurisdiction.

DECISION

"In the absence of an adequate method of review or legal remedy, judicial review of the quasi-judicial decisions of administrative bodies, if available, must be invoked by writ of certiorari." Dietz v. Dodge County, 487 N.W.2d 237, 239 (Minn. 1992). A writ of certiorari is the proper method for review of MAC's decision to terminate Heideman from her employment. See id. (citing Dokmo v. Independent School Dist. No. 11, 459 N.W.2d 671, 674 (Minn. 1990)) (when an administrative body exercises discretion in terminating an employee, the termination decision is quasi-judicial in nature and reviewable by certiorari).

The court of appeals has jurisdiction "to issue writs of certiorari to all agencies, public corporations and public officials." Minn. Stat. § 480A.06, subd. 3 (1994). But section 480A.06, subdivision 3, "does not purport to grant exclusive jurisdiction for writs of certiorari to the court of appeals." White Bear Rod & Gun Club v. City of Hugo, 388 N.W.2d 739, 742 (Minn. 1986) (statute providing for district court review of land use planning decisions makes clear that the district court has at least concurrent certiorari jurisdiction). Consistent with White Bear Rod & Gun Club, this court held that absent express statutory language vesting judicial review of an agency action in the district court, the court of appeals has exclusive jurisdiction over writs of certiorari. Township of Honner v. Redwood County, 518 N.W.2d 639, 641 (Minn. App. 1994), review denied (Minn. Sept. 16, 1994); see also Naegele v. Minneapolis Community Dev. Agency, 551 N.W.2d 235, 237 (Minn. App. 1996) (absent explicit authority for review of a local agency's quasi-judicial decision in district court, a party's sole remedy is appeal to court of appeals by writ of certiorari), review denied (Minn. Sept. 10, 1996).

The statute governing MAC does provide for certiorari review in the district court:

> A review of any order of the commission may be had upon certiorari in the district court of Ramsey County upon petition of any party to the proceedings before the commission.

Minn. Stat. § 473.675, subd. 1 (1994).

Certiorari in Minnesota is not a common law writ, but a statutory remedy, and the statutory provisions are strictly construed. State ex rel. Ryan v. Civil Serv. Comm'n, 278 Minn. 296, 301, 154 N.W.2d 192, 196 (1967). The administrative procedure act provides for certiorari review by the court of appeals of a final decision in a contested case made by an agency having statewide jurisdiction. See Minn. Stat. §§ 14.02, subds. 2, 3; 14.63 (1994). Because MAC is not a statewide agency, Heideman is required to apply for the writ under the general certiorari statute, Minn. Stat. §§ 606.01-.06 (1994). The statute mandates issuance of the writ within 60 days after the party applying for the writ has received due notice of the proceeding sought to be reviewed. Minn. Stat. § 606.01.

In 1996, the legislature amended section 606.01 by adding the following sentence: "The parties shall apply to the court of appeals for the writ." 1996 Minn. Laws ch. 307, § 2. The legislature did not repeal section 473.675, subdivision 1, which confers certiorari jurisdiction in the Ramsey County District Court. The conflict between section 473.675, subdivision 1, and the 1996 amendment to section 606.01, which requires issuance of the writ by the court of appeals, is irreconcilable.

When there is an irreconcilable conflict between a general provision in a law and a special provision in the same or another law, the special provision shall prevail, unless the general provision was enacted at a later session and it is the manifest intention of the legislature that the general provision shall prevail. Minn. Stat. § 645.26, subd. 1 (1994).

Although section 473.65, subdivision 1, authorizes certiorari review in the Ramsey County District Court, Heideman must obtain the writ in accordance with the requirements of Minn. Stat. § 606.01. The 1996 amendment to section 606.01, enacted after section 473.675, subdivision 1, requires the party seeking review to apply to this court for the writ. We conclude that the 1996 amendment to the general provision, section 606.01, prevails over the earlier special provision, section 473.65, subdivision 1.

Moreover, we hold that the 1996 amendment to section 606.01 has repealed by implication all pre-existing special provisions allowing certiorari review in the district court. When a general law establishes a uniform and mandatory system covering a class of subjects, that law is construed to repeal pre-existing special laws on the same class of subjects. Minn. Stat. § 645.39 (1994). While repeal of a statute by implication is not favored, where a later statute accomplishes the same purpose intended to be accomplished by a previously enacted statute but in an obviously different manner, the later statute repeals and supersedes the earlier one. State v. Elam, 250 Minn. 274, 281-82, 84 N.W.2d 227, 232 (1957).

Because section 606.01 now provides that the party seeking certiorari review "shall" apply to the court of appeals for the writ, the statute establishes a mandatory procedure for certiorari review in this court. See Minn. Stat. § 645.44, subd. 16 (1994) ("shall" means "mandatory"). The amended section 606.01 accomplishes the same purpose as the special provisions allowing certiorari review in the district court, but in an obviously different manner, i.e., issuance of the writ by the court of appeals rather than the district court. Therefore, under the doctrine of repeal by implication, the amendment to section 606.01 requiring application to this court for the writ repeals and supersedes pre-existing special provisions allowing certiorari review in the district court. [1]

Because the 1996 amendment to section 606.01 confers exclusive certiorari jurisdiction in the court of appeals, only this court, and not the district court, is authorized to issue the writ for review of MAC's decision to terminate Heideman's employment.

Appeal to proceed.

Footnotes

[1] Our holding does not affect the district court's jurisdiction over causes of action arising from decisions of administrative bodies that are not "quasi-judicial." See Clark v. Independent Sch. Dist. No. 835, ___ N.W.2d ___ (Minn. App. Sept. 17, 1996) (district court lacks subject matter jurisdiction to review teacher's challenge to school district's decision to suspend him, but has jurisdiction over teacher's tort claims that are unrelated to the suspension); In re Application of Merritt, 537 N.W.2d 289, 290 (Minn. App. 1995) (person may obtain review of county board's rezoning decision, which is legislative in nature, only by initiating declaratory judgment in district court).

STATE OF MINNESOTA

IN COURT OF APPEALS

C7-97-926
C8-97-1132
C7-97-1512
C8-98-33

In Re the Marriage of:
Sandra Lee Holmberg, petitioner,
Appellant,

vs. (C7-97-926)

Ronald Gerald Holmberg,
Respondent,

AND

Denise M. Kalis-Fuller, n/k/a
Denise M. Kalis, petitioner,
Respondent,

vs. (C8-97-1132 & C9-98-33)

Lee V. Fuller,
Appellant,

AND

In Re the Marriage of:
Kristi Sue Carlson, petitioner,
Respondent,

vs. (C7-97-1512)

Steven Alan Carlson,
Appellant,
Dakota County,
Respondent.

Filed June 12, 1998
Affirmed in part, reversed in part, and remanded
Klaphake, Judge
Concurring in part, dissenting in part
Shumaker, Judge
Toussaint, Chief Judge

Wright County District Court
File No. F0-92-2139

Ramsey County District Court
File No. FX-84-11785

Dakota County District Court
File No. F2-93-13809

(Holmberg v. Holmberg)

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(Kalis-Fuller v. Fuller)

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(Carlson v. Carlson)

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Considered and decided by Toussaint, Chief Judge, Huspeni, Judge, Randall, Judge, Klaphake, Judge, Willis, Judge, Shumaker, Judge, and Mansur, Judge.*

SYLLABUS

1. The administrative child support process governed by Minn. Stat. § 518.5511 (1996) is unconstitutional because it violates the separation of powers required by Minn. Const. art. III, § 1.

2. In determining whether a lien on a homestead created by an ambiguous provision in a dissolution judgment may be modified, the district court must determine whether the lien is part of the division of property or in the nature of child support. A lien in the nature of child support may be modified if changed circumstances render it unreasonable and unfair.

3. A disabled child support obligor is entitled to a credit for social security disability benefits paid on behalf of a child for whom the obligor has a duty of support. Haynes v. Haynes, 343 N.W.2d 679 (Minn. App. 1984), and other contrary cases are overruled.

OPINION

KLAPHAKE, Judge

These consolidated cases are considered by an expanded panel of judges from this court. Each appeal is from a post-judgment child support order issued by an administrative law judge (ALJ) and raises constitutional challenges to the administrative child support process governed by Minn. Stat. § 518.5511 (1996). We address the separation of powers issue and conclude that the administrative child support process constitutes an impermissible transfer of judicial power to the executive branch, in violation of the separation of powers required by Minn. Const. art. III, § 1. We therefore reverse each of the support orders and remand for consideration by the district court.

In Holmberg v. Holmberg (C7-97-926), appellant Sandra Holmberg challenges a district court's post-judgment order delaying her ability to collect on her homestead lien until the children are emancipated. Because the district court did not err in concluding the lien was in the nature of child support and can be modified, but failed to determine whether Ronald Holmberg made a good faith effort to pay the lien, we remand on this issue.

In Kalis-Fuller v. Fuller (C8-97-1132 & C9-98-33), appellant Lee Fuller requests that this court overrule Haynes v. Haynes, 343 N.W.2d 679 (Minn. App. 1984), and credit disabled child support obligors for social security benefits paid on behalf of children for whom they have a support obligation. We take the opportunity afforded by this expanded panel to overrule Haynes, and we remand for recalculation of Lee Fuller's support obligation.

In Carlson v. Carlson (C7-97-1512), appellant Steve Carlson challenges an ALJ's amended order denying his motion for reduced support. Because we conclude the administrative child support process is unconstitutional, we need not address Steve Carlson's non-constitutional claims, which he raises only in the alternative.

FACTS [1]

In 1987, the legislature established a pilot project in Dakota County to address child and medical support issues and certain maintenance obligations in an administrative process if the county represented a party or was a party to the proceedings. 1987 Minn. Laws ch. 403, art. 3, § 80 (codified at Minn. Stat. § 518.551, subd. 10 (Supp. 1987)). The legislature approved a restructured administrative child support process in 1994, and expanded the process to all counties designated by the commissioner of human services to use the new contested hearing process. 1994 Minn. Laws ch. 630, art. 10, §§ 1-4 (codified at Minn. Stat. § 518.5511 (1994)). In 1995, the process was again expanded to include parentage orders when custody and visitation are uncontested. 1995 Minn. Laws ch. 257, art. 5, § 1. These appeals involve the administrative child support process as it existed prior to 1997. [2]

ISSUES

I. Does the administrative child support process governed by Minn. Stat. § 518.5511 (1996) violate the separation of powers required by Minn. Const. art. III, § 1?

II. Did the district court err by modifying Sandra Holmberg's homestead lien?

III. Should a disabled child support obligor be credited for social security disability benefits paid on behalf of the child for whom the support obligation is owed?

ANALYSIS

I.

A. Propriety of Addressing Constitutional Claims

Appellants did not challenge the constitutionality of the administrative child support process during the administrative proceedings or in the district court. Generally, an appellate court will consider constitutional issues only if raised and litigated before the district court. Egeland v. State, 408 N.W.2d 848, 852 (Minn. 1987). However, an administrative agency lacks subject matter jurisdiction to decide constitutional issues because those questions are within the exclusive province of the judicial branch. See Neeland v. Clearwater Mem. Hosp., 257 N.W.2d

366, 368 (Minn. 1977). Although precluded from raising their constitutional claims in the administrative proceedings, appellants might have "commenc[ed] an action or [brought] a motion" [3] in district court to raise any "issues outside the jurisdiction of the administrative process." Minn. Stat. § 518.5511, subd. 1(b) (1996).

Dismissal of these constitutional claims would only delay the processing of child support cases and perpetuate uncertainty for parents and children throughout the state. Moreover, the separation of powers issue, in particular, would not necessarily benefit from development of a district court record or additional briefing. See Minn. R. Civ. App. P. 103.04 (appellate court may address any issue as justice requires); In re Jury Panel for Dakota County, 276 Minn. 503, 507, 150 N.W.2d 863, 866 (1967) (addressing issue not properly before court because "clear-cut[,]" "fully briefed and argued," presented on complete record, and "[n]o useful purpose would be served" by not addressing issue). Therefore, we will address the separation of powers issue.

B. Merits of Separation of Powers Claim

The powers of government are divided among the branches of the government, and no member of one branch is allowed the power of any other branch "except in the instances expressly provided" in the Minnesota Constitution. Minn. Const. art. III, § 1. The constitution gives district courts original jurisdiction in all "civil" cases, and dissolution proceedings are civil actions. Minn. Const. art. VI, § 3; see Christenson v. Christenson, 281 Minn. 507, 521-24, 162 N.W.2d 194, 203-04 (1968) (discovery rules and privilege against self-incrimination available in divorce action, as in any other civil action). The issue here is whether the statute governing the administrative child support process constitutes an impermissible invasion of the original jurisdiction of the district courts. Although a statute is presumed constitutional, we will declare it unconstitutional "when absolutely necessary." Estate of Jones by Blume v. Kvamme, 529 N.W.2d 335, 337 (Minn. 1995).

By adopting Minn. Stat. § 518.5511 in 1994, the Minnesota legislature responded to the large number of children receiving child support services and federal developments encouraging efficient establishments and collection of child support obligations. See 42 U.S.C. (Supp. V 1983) (addressing establishment and collection of child support); 45 C.F.R. § 303.101 (1993) (same). To address these concerns, the legislature delegated to non-judge members of the executive branch broad authority over matters traditionally determined by the judicial branch. [4]

Under this statute, when the public authority is a party or is providing services to a party, the administrative child support process is the forum for actions "to obtain, modify, and enforce" orders involving child and medical support, or modification of spousal maintenance if combined with a child support proceeding. Minn. Stat. § 518.5511, subd. 1(a), (b). A county may unilaterally expand the process to include contempt motions and actions to establish parentage. Id., subd. 1(b). Although the statute presumes that all counties will participate, if the commissioner of human services does not "designate" a county for the process, contested hearings "shall be conducted in district court." Id., subd. 4. Thus, individual counties and the commissioner of human services effectively determine which litigants will have access to the district courts and which must pursue administrative remedies.

Once the administrative child support process is triggered, broad judicial authority is granted to the ALJs determining these matters. In particular, the ALJs have "all powers, duties, and responsibilities conferred on judges of district court to obtain and enforce child and medical support and parentage and maintenance obligations," including the power to issue subpoenas, to conduct proceedings according to administrative rules (as well as applying the rules of family court and civil procedure), and to conduct administrative proceedings in available courtrooms. Id., subds. 1(e), 4(d), 4(e), 6. Perhaps most importantly, the ALJs make findings of fact, conclusions of law, and "final" decisions, which are appealable to this court "in the same manner as a decision of the district court." Id., subds. 4(f), (h). Because many support orders and all maintenance orders originate in district court, the administrative child support process thus places the ALJs in the constitutionally untenable position of reviewing and modifying judicial decisions. See In re Lord, 255 Minn. 370, 372, 97 N.W.2d 287, 289 (1959) ("the executive shall have no power to interfere with the courts in the performance of judicial functions").

Our supreme court has reviewed challenges to the constitutionality of other legislative initiatives involving the administrative exercise of quasi-judicial powers, and their opinions guide our analysis here. In Breimhorst v. Beckman, 227 Minn. 409, 432-33, 35 N.W.2d 719, 733-34 (1949), the court held that the workers' compensation system did not violate separation of powers. The court explained that the vesting of quasi-judicial powers in an agency was not unconstitutional

> as long as the [agency's decisions] are not only subject to review by certiorari, but lack judicial finality in not being enforceable by execution or other process in the absence of a binding judgment entered thereon by a duly established court.

Id. at 433, 35 N.W.2d at 734. The supreme court later characterized these requirements as marking "the outside limit of allowable quasi-judicial power in Minnesota." Wulff v. Tax Ct. of Appeals, 288 N.W.2d 221, 223 (Minn. 1979).

Decisions made in the administrative child support process are not subject to review by certiorari, but are appealable "in the same manner as a decision of the district court." Minn. Stat. § 518.5511, subd. 4(h). We therefore apply the same standards of review on appeal to these ALJ decisions that we apply to district court decisions. Lee v. Lee, 459 N.W.2d 365, 368-69 (Minn. App. 1990), review denied (Minn. Oct. 18, 1990). Further, these ALJ decisions are enforceable without any intervening ruling or binding judgment of a district court. Thus, the administrative child support process goes beyond the "outside limits of allowable quasi-judicial power" set forth in Breimhorst.

The finality and appealability aspects of decisions made in the administrative child support process distinguish them from decisions made by a typical ALJ, which are usually reviewed within the relevant agency before judicial review is sought. Thus, the deference traditionally afforded an agency decision due to its expertise and required by separation of powers is not afforded ALJ decisions in the administrative child support process. See Meath v. Harmful Substance Compensation Bd., 550 N.W.2d 275, 281 n.2 (Minn. 1996) (Anderson, J. concurring specially) (noting "limited and deferential review" provided by certiorari "ensures that the judiciary does not encroach" on powers of other branches of government).

These decisions are also unlike those of traditional family-court referees, whose recommended decisions are initially reviewed by the district court. [5] See Peterson v. Peterson, 308 Minn. 297, 304, 242 N.W.2d 88, 93 (1976) (district court has "full authority" to adopt referee's order "in whole or in part"). By shifting the initial burden of judicial review to this court, the administrative child support process encroaches upon the original jurisdiction of the district courts.

In Wulff, 288 N.W.2d at 225, which upheld as constitutional the creation of the tax court, the supreme court expressed reluctance "to approve * * * a legislative scheme" that allowed agency "decisions, upon filing, [to] automatically become orders of the court." Nevertheless, the court concluded that there were "additional factors" that gave it "more latitude" to approve the creation of the tax court, despite the apparent violation of the limits established in Breimhorst. Wulff, 288 N.W.2d at 224. Those "additional factors" included the peculiarly legislative nature of taxation, the discretionary nature of the district court's ability to refer cases to that court, the preservation of taxpayers' "option to file in district court," and the "ultimate check on administrative power in the form of review" by appeal to the supreme court. Id. at 224-25. The court warned, however, that its decision should not be read "to imply * * * that any and all legislative delegation of judicial power subject to judicial review is constitutionally permissible." Id. at 225.

By contrast, the area of family law requires a district court to exercise its inherent power to grant equitable relief. Johnston v. Johnston, 280 Minn. 81, 86, 158 N.W.2d 249, 254 (1968); see also In re Welfare of R.L.W., 309 Minn. 489, 491, 245 N.W.2d 204, 205 (1976) (contempt is part of court's inherent power, independent of statute). Because the administrative child support process limits certain parties' access to district court, the district court is deprived of its inherent power to do equity in those cases. The administrative child support process lacks the "judicial checks" and "additional factors" identified in Wulff, which characterized a taxpayer's ability to elect a judicial determination as "crucial" and "perhaps the saving feature" of the statute. Wulff, 228 N.W.2d at 225.

We also recognize that workers' compensation and taxation are unique and require extensive, constitutionally valid, legislative supervision, but for different reasons. "Taxation is primarily a legislative function" and court involvement is a matter of convenience. State ex rel. Cent. Hanover Bank & Trust Co. v. Erickson, 212 Minn. 218, 225, 3 N.W.2d 231, 235 (1942). Thus, the legislature could delegate this non-judicial function to an agency without encroaching upon the judicial branch's authority. The workers' compensation system, on the other hand, is an integrated, comprehensive system created in response to increased industrialization and rising disability rates. Breimhorst, 227 Minn. at 430-31, 35 N.W.2d at 733. With few exceptions, it covers "all employers and employees," and requires both employers and employees to give up certain rights "to assure the quick and efficient delivery" of benefits to injured employees "at a reasonable cost to the employers." Minn. Stat. §§ 176.001, .021, subd. 1 (1996); see Boedingheimer v. Lake Country Transp., 485 N.W.2d 917, 923 (Minn. 1992) (noting uniqueness of workers' compensation system, including legislative oversight). Thus, although workers' compensation does not involve a peculiarly legislative function like taxation, as an integrated system "mandated" to meet a series of "important social issues," the workers' compensation

system was, and is, unique in its own way, justifying the delegation of judicial power to an agency. Wulff, 288 N.W.2d at 223.

The administrative child support process does not serve a peculiarly legislative function and it is not unique. Instead, the administrative child support process selectively usurps the district court's inherent equitable powers. And while it can be argued that the process was intended to meet certain social needs, it is not an integrated, comprehensive approach for deciding all child support issues in all cases. Rather, the administrative child support process applies only to limited types of cases where public monies are involved and only to certain issues in those cases. Parties may be involved in concurrent proceedings in the district court on property or custody issues outside the scope of the administrative child support process--which is precisely what occurred in Holmberg--and child support proceedings before an ALJ. The introduction of additional decisionmakers, the concomitant risk that decisions may be inconsistent or not easily reconciled, and the inefficiency of requiring consideration of overlapping or identical evidence and multiple appeals stand in contrast to the integrated and comprehensive nature of the workers' compensation system. [6]

Other courts on both the state and federal level have similarly ruled that certain transfers of judicial authority to administrative agencies violated separation of powers under either state or federal constitutions. While each state's constitution and the federal constitution differ somewhat from the Minnesota constitution, these foreign decisions reinforce the importance of a careful examination of any delegation of judicial functions. See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858 (1982) (appointment of bankruptcy judges violated Constitution where only oversight was by way of appeal); A.L.W. v. J.H.W., 416 A.2d 708 (Del. 1980) (to avoid constitutional infirmity, statute creating family court masters construed to require judge approval of master decisions); State, ex rel. Smith v. Starke Cir. Ct., 417 N.E.2d 1115 (Ind. 1981) (invalidating legislatively created commission with jurisdiction over probate, civil, and criminal cases); Drennen v. Drennen, 426 N.W.2d 252 (Neb. 1988) (state statute drafted in response to same child support laws that prompted Minnesota statute, deprived district court of original jurisdiction, and violated state constitution).

Finally, we reject the dissent's claim that Mack v. City of Minneapolis, 333 N.W.2d 744, 752-53 (Minn. 1983), changed the outside limit of quasi-judicial power in Minnesota. While the dissent reads Mack as reducing the test for separation of powers to a simple question of whether appellate judicial review is provided, we reject that analysis. That view would permit the legislature to transfer any traditional judicial function, wholesale, to autonomous ALJs who are members of the executive branch, without requiring any agency or district court review, so long as the "final" ALJ decisions are appealable to this court. Moreover, Mack, which involved limitations on attorney fees in workers' compensation cases and allowed the agency to initially set the amount of attorney fees, [7] relied heavily on the "nearly uniform practice throughout the country of assigning responsibility for attorney fees to compensation commissions." Id. at 753. "Given this uniform approach, [the supreme court] decline[d] to invoke the separation of powers as a basis for invalidating the statute." Id.

We recognize that in the area of family law the volume of cases is large, many children receive child support services from a public authority, and the current administrative child support

process lessens the burden on limited district court resources. We must conclude, however, that the administrative support system represents an improper attempt to transfer broad judicial power to the executive branch. This attempted transfer violates the rule announced in Breimhorst and the limits of our state constitution, and it does not fit within the exceptions carved out in Wulff or Breimhorst. We therefore hold the administrative child support process governed by Minn. Stat. § 518.5511 unconstitutional because it violates the separation of powers required by the Minnesota Constitution.

Appellants also raise due process and equal protection claims, based on the selective nature of the administrative child support process. The process denies litigants access to the district court while limiting the use of the administrative process, all based on whether public monies are involved, counties make certain elections, or the commissioner of human services designates a county for the administrative process. Conditioning litigants' access to a constitutional court based on financial considerations and on independent decisions made in the executive branch or individual counties is troubling, both from the perspective of equal protection and fundamental fairness, and because of the precedent it sets. Because the factual and evidentiary record before this court is not fully developed on the due process and equal protection claims, we decline to rule on these issues.

Finally, our ruling that the administrative child support process is unconstitutional is prospective only, and does not affect the validity of existing support obligations, which remain in effect unless and until a court grants relief. See State v. Olsen, 258 N.W.2d 898, 907 n.15 (Minn. 1977) (criteria for determining retroactivity or prospectivity include "reliance" and "effect on the administration of justice"). Our decision will not be final until the period for a petition for review to the supreme court has passed or any proceedings therein have been resolved. See Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs., 418 N.W.2d 173, 176 (Minn. 1988) (this court's decision final when supreme court denied petition for further review); see also Minn. R. Civ. App. P. 117, subd. 1 (party has 30 days to seek review of this court's decision in supreme court); Minn. R. Civ. App. P. 136.02 (entry of judgment on this court's decision stayed pending petition for review). Thus, persons seeking relief from existing support orders are not discharged of their obligation to satisfy the statutory criteria for modification.

II.

Holmberg v. Holmberg

The amended judgment dissolving the marriage of Ronald and Sandra Holmberg awarded Ronald Holmberg the marital homestead and custody of the children. It awarded Sandra Holmberg a lien on the home, to be paid by Ronald Holmberg in 30 months. It also set Sandra Holmberg's support obligation and Ronald Holmberg's maintenance obligation. On appeal, we affirmed the judgment. Holmberg v. Holmberg, 529 N.W.2d 456 (Minn. App. 1995), review denied (Minn. May 31, 1995).

Later, Sandra Holmberg signed a confession of judgment in favor of her attorney. When Ronald Holmberg failed to pay the lien, Sandra Holmberg sought to compel sale of the home and a division of proceeds. Ronald Holmberg asked that payment of the lien be postponed until the

children were emancipated. In March 1997, the district court took those issues, as well as support issues, under advisement.

In April 1997, the district court ruled that the lien was in the nature of child support and could be modified to defer Ronald Holmberg's obligation to pay it until the children were emancipated. The accompanying memorandum noted that Sandra Holmberg was not currently paying support but stated that it was likely the court would require security for any support obligation because of her limited income and the outstanding judgment against her for attorney fees. A week later, the ALJ required Sandra Holmberg to pay prospective support and to reimburse the county for past support.

Sandra Holmberg argues that her homestead lien is not subject to modification because it is part of the parties' property division. [8] Contrary to Sandra Holmberg's claims, our prior opinion reviewing the judgment contains no such ruling. See Holmberg, 529 N.W.2d at 461. As the dissolution judgment did not indicate whether the lien was a property interest, neither law of the case nor res judicata [9] precluded the district court from addressing the nature of the lien. See In re Welfare of M.D.O., 462 N.W.2d 370, 375 (Minn. 1990) (law of the case applies to issues "decided in earlier stages of the same case"); Demers v. City of Minneapolis, 486 N.W.2d 828, 830 (Minn. App. 1992) (res judicata requires prior ruling on merits of an issue).

Sandra Holmberg claims the district court erred in treating her lien as child support rather than as property. The dissolution judgment is ambiguous on this point and could be read either way. See Head v. Metropolitan Life Ins. Co., 449 N.W.2d 449, 452 (Minn. App. 1989) (whether dissolution judgment ambiguous is legal question), review denied (Minn. Feb. 21, 1990). Because the judge interpreting the ambiguous judgment is the same judge who issued it, this court gives "great weight" to the judge's construction of the judgment. Mikoda v. Mikoda, 413 N.W.2d 238, 242 (Minn. App. 1987), review denied (Minn. Dec. 22, 1987). In this case, the district court did not err by ruling that the lien was in the nature of child support and subject it to modification. See Trondson v. Janikula, 458 N.W.2d 679, 682 (Minn. 1990) (district court's resolution of ambiguity in contract treated as finding of fact); Minn. R. Civ. P. 52.01 (findings of fact not set aside unless clearly erroneous); see also Plonske v. Plonske, 473 N.W.2d 911, 913 (Minn. App. 1991) (allowing modification of lien payment period where lien in nature of child support).

The district court extended the lien, stating that if Sandra Holmberg were paying support, she "would likely" be ordered to provide security for that obligation. The district court also sought to ensure that Sandra Holmberg's interest in the homestead would remain accessible to the children, rather than being subject to execution by her attorney. Although these considerations are proper, the court failed to recognize that (1) the dissolution judgment was based on an assumption that Ronald Holmberg would have "little trouble" refinancing the homestead to pay Sandra Holmberg's lien; (2) the September 1996 order stated that Ronald Holmberg "waited until the last possible moment to attempt to satisfy [the] lien"; and (3) the April 1997 order contained no findings on whether Ronald Holmberg made good faith attempts to pay off the lien. Absent a true inability to pay off Sandra Holmberg's lien or changed circumstances rendering Ronald Holmberg's duty to pay unreasonable and unfair, the duration of Sandra Holmberg's lien may not be altered, even though it is in the nature of child support. See Minn. Stat. § 518.64, subd. 2(a)

(support may be modified upon showing of substantially changed circumstances rendering existing award unreasonable and unfair); Gorz v. Gorz, 552 N.W.2d 566, 569 (Minn. App. 1996) (moving party has burden to show changed circumstances); cf. Hecker v. Hecker, 568 N.W.2d 705, 709 (Minn. 1997) (frustration of expectations on which judgment is based can constitute substantial change in circumstances justifying maintenance modification). We remand for the district court to determine whether Ronald Holmberg, in good faith, lacked the ability to repay the lien and to make any necessary adjustments to its order based on that determination.

III.

Kalis-Fuller v. Fuller

The judgment dissolving the marriage of Denise Kalis and Lee Fuller awarded Denise Kalis custody and ordered Lee Fuller to pay support. Later, Lee Fuller was injured and Denise Kalis applied for AFDC. Lee Fuller and the parties' child eventually received social security disability benefits.

In January 1997, Lee Fuller sought administrative review of his support obligation, arguing that requiring him to pay support from his disability benefits in addition to the amount the child was receiving in dependent benefits was unfair. Lee Fuller's request was denied and he formally moved to reduce child support. An ALJ treated Lee Fuller's disability benefits as income and set his prospective support obligation at the guidelines amount. The ALJ ordered Lee Fuller to pay an additional amount toward support arrearages.

Lee Fuller claims that social security disability payments paid on behalf of a child for whom the noncustodial parent has a duty of support should be credited against the noncustodial parent's support obligation. [10] The payment of social security benefits from the account of a support-obligor parent "does not constitute payments from that parent." Haynes v. Haynes, 343 N.W.2d 679, 682 (Minn. App. 1984). While Haynes involved retirement benefits, its rationale has been applied to social security disability benefits. E.g., Green v. Green, 402 N.W.2d 248, 250 n.2 (Minn. App. 1987). We take this opportunity to re-examine Haynes.

Haynes was a case of first impression when decided in 1984. In concluding that payment of social security benefits from a support obligor's account did not constitute payment from the obligor, this court stressed that a support obligor lacks a property interest in the funds paid to dependent minors. Haynes, 343 N.W.2d at 681-82. As support for our position, we cited a Missouri case that has since been overruled. See Craver v. Craver, 649 S.W.2d 440, 444 (Mo. 1983), overruled by Weaks v. Weaks, 821 S.W.2d 503, 506-07 (Mo. 1991) (because "the child receives the benefit payments, the issue of the [obligor's] property right is irrelevant").

Where an obligor such as Lee Fuller, whose sole income is from disability benefits, is denied a credit against his support obligation, he must pay support from those benefits. Because his child already receives similar benefits as a disability dependent, Fuller receives fewer benefits than were intended while his child receives more. See Henry v. Henry, 622 N.E.2d 803, 809 (Ill. 1993) ("the source and the purpose of social security dependent benefits are identical to the sources and purpose of child support"). A majority of jurisdictions now recognize that such a

result would be inequitable and allow a credit against a support obligation for benefits paid on behalf of a child. See Hawkins v. Peterson, 474 N.W.2d 90, 93 (S.D. 1991) ("[u]nder the majority rule, child support may be offset by social security dependent benefits during the period in which the benefits are received); see also Henry, 622 N.E.2d at 806-07 (same); Newman v. Newman, 451 N.W.2d 843, 844 (Iowa 1990) (same); Frens v. Frens, 478 N.W.2d 750, 751 (Mich. App. 1991) (same); Brewer v. Brewer, 509 N.W.2d 10, 12 (Neb. 1993) (same).

We overrule the relevant portions of Haynes and its progeny because (1) child support and social security benefits paid on behalf of a child due to a support obligor's disability have almost identical purposes; (2) Haynes is at odds with the majority rule that has now emerged; and (3) a case critical to our ruling in Haynes has been overruled. On remand, the district court shall give Lee Fuller an appropriate credit against his prospective support obligation and arrearages for benefits paid on behalf of the child. If the credit exceeds Fuller's support obligation, he is not entitled to recover the difference from the child or the custodial parent. See Newman, 451 N.W.2d at 844 ("[t]he receipt of excess government benefits over the monthly child support obligation is equitably deemed a gratuity to the children").

IV.

Carlson v. Carlson

The 1994 judgment dissolving the Carlson marriage awarded Kristi Carlson custody, support, and maintenance. In March 1996, the district court denied Steve Carlson's motion to reduce his obligations. In April 1997, an ALJ denied a second motion by Steve Carlson to reduce his obligations, finding Steve Carlson had not shown a substantial change in circumstances since the district court denied modification in March 1996. Steve Carlson sought amended findings, arguing the ALJ should evaluate the claim of changed circumstances by looking to the 1994 judgment setting support rather than the 1996 denial of modification. In an amended order denying modification, the ALJ did so, but altered other findings in an apparent attempt to reach the same conclusion she had originally reached regarding Steve Carlson's claim of changed circumstances. [11]

On appeal, Steve Carlson challenged the constitutionality of the administrative child support process and raised non-constitutional claims regarding the propriety of the ALJ's amended findings only in the alternative. Due to our ruling on the constitutional issue, we need not address his other claims.

DECISION

The administrative child support process created by Minn. Stat. § 518.5511 (1996) is unconstitutional because it violates the separation of powers required by Minn. Const. art. III, § 1. We reverse the support orders and remand for consideration by the district court of the child support issues in each of the consolidated cases. In Holmberg (C7-97-926), the district court shall also determine whether Ronald Holmberg, in good faith, lacked the ability to pay the homestead lien. In Fuller (C8-97-1132 & C9-98-33), the district court shall also calculate the amount to be credited to Lee Fuller's prospective

support obligation and arrearages as a result of the child's receipt of social security benefits.

Affirmed in part, reversed in part, and remanded.

SHUMAKER, Judge (concurring in part, dissenting in part).

I concur in the majority's decisions on all issues in these consolidated appeals except its determination that the administrative child support process established by Minn. Stat. § 518.5511, subd. 1 (1996), is unconstitutional. As to that holding, I respectfully dissent. In my view, the challengers have failed to prove beyond a reasonable doubt that the process is unconstitutional. Upon a review of the relevant cases after Breimhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719 (1949), and similar legislative transfers of powers to administrative entities such as the workers' compensation division, I conclude that section 518.5511 does not violate the separation of powers doctrine.

Any analysis must begin with an acknowledgment that Minn. Stat. § 518.5511 is presumed to be constitutional. In re Blilie, 494 N.W.2d 877, 881 (Minn. 1993). This presumption can be overcome only by proving beyond a reasonable doubt that the statute is unconstitutional. Id. This is the weightiest burden of proof in the Anglo-American system of law. Since we are dealing with a purely legal question, the challengers' burden is to prove beyond any reasonable doubt that there is no principled application of legal precedent that will sustain the statute. I believe that the challengers have failed to carry their burden and that when we subject the statute to the Breimhorst test, as that test is currently applied, the statute satisfies the separation of powers mandate.

Preliminarily, it will be helpful to explore the general concept of "separation of powers" and the legal principles inherent in the concept. The Minnesota Constitution mandates that the powers of the three branches of government be exercised separately. Minn. Const. art III, § 1. The purpose of the separation is to provide "checks and balances critical to our notion of democracy." Wulff v. Tax Court of Appeals, 288 N.W.2d 221, 223 (Minn. 1979). The unfettered concentration of a particular power in one branch of government to the exclusion of the other branches is abhorrent to our democratic system, for, according to Locke and Montesquieu, "tyranny would be the natural and probable result." Id. at 222-23.

Logically then, the powers of the three branches may be shared in some limited way, and one branch must have the ability to "check" the exercise of powers by the other branches. This "checking" requirement, formulated as the separation of powers doctrine, "has never been an absolute division of governmental functions in this country, nor was such even intended." Id. at 223 (footnote omitted). Moreover, there has never been an all-inclusive definition of "judicial power":

> "What is judicial power cannot be brought within the ring-fence of a definition. It is undoubtedly power o hear and determine, but this is not peculiar to the judicial office. Many of the acts of administrative and executive officers involve the exercise of the same power." * * * [M]any boards hear and determine questions affecting private as well as

> public rights, * * *. "The authority to ascertain facts and apply the law to the facts when ascertained pertains as well to other departments of government as to the judiciary."

Breimhorst, 227 Minn. at 432-33, 35 N.W.2d 719, 734 (1949), (quoting State ex rel. Yaple v. Creamer, 97 N.E. 602, 607 (Ohio 1912)). "Courts have often validated the exercise of power by administrative agencies by characterizing it as `quasi-judicial.'" Wulff, 288 N.W.2d at 223.

Courts do not interpret and apply the separation of powers doctrine strictly. Id. Rather, they employ the "checking" approach, always inquiring as to whether the power under scrutiny is so exclusively concentrated in one branch that tyranny, at least as to that power, is a genuine risk. Id. at 222-23. Thus, courts have permitted

> a delegation of powers to an agency so long as it was accompanied by adequate standards to act as a check on agency activity. By so limiting the powers of agencies, separation of powers is to some extent maintained.

Id. at 223. Wulff recognized that many administrative agencies exercise the powers of all three branches of government and acknowledged that "a strict interpretation of the separation of powers doctrine would make the existence and functioning of such agencies nearly impossible." Id.

The majority relies on Breimhorst and Wulff in declaring Minn. Stat. § 518.5511 violative of the separation of powers doctrine. Breimhorst held that the quasi-judicial functions of an administrative agency do not violate the separation of powers if (1) the agency's decisions lack judicial finality because no judgment can be entered thereon without intervention by a "duly established court;" and (2) judicial appellate review is available. 227 Minn. at 433, 35 N.W.2d at 734. Wulff provided no new rule but only said: "We believe that the criteria set out in Breimhorst mark the outside limit of allowable quasi-judicial power in Minnesota." Wulff, 288 N.W.2d at 223.

Although Breimhorst and Wulff are precedential authorities, I believe that the more recent decision in Mack v. City of Minneapolis, 333 N.W.2d 744, 753 (Minn. 1983), which incorporates only the second criterion and the reasoning of Breimhorst, provides the current, correct test for determining whether quasi-judicial administrative functions violate the separation of powers doctrine.

Breimhorst involved a constitutional challenge to the Workers' Compensation Act and system. A woman suffered a disfiguring injury on her job. Breimhorst, 227 Minn. at 414, 35 N.W.2d at 724. She received workers' compensation benefits but she brought a common law tort action against her employer for damages that were not compensable under the act. Id. The supreme court ruled that the tort action was not available because the Workers' Compensation Act was compulsory and provided the complete and exclusive remedy against the employer. Id. at 429, 35 N.W.2d at 732. Neither the compulsory nature of the act nor the abrogation of established common law rights to tort damages and jury trial constituted a violation of the separation of powers doctrine. Id. at 433-36, 35 N.W.2d at 734-36. In sum, the 1949 Breimhorst court held that the Workers' Compensation Act was a proper exercise of the state's police power, was an

adequate remedy for employee injuries, and was subject to both district and appellate court "checks" on the exercise of the power.

In reaching its decision, Breimhorst recognized that the fluctuating needs and demands of a governed society can be met only if courts give deference to the legislature in the exercise of police power:

> In the exercise of this power, which is as flexible and adaptable as the vital needs of our changing society, the state acts as the conservator of the public welfare. * * * A wide discretion is vested in the legislature in determining when a public welfare need exists and in the selection of an appropriate remedy.

Id. at 430, 35 N.W.2d at 732-33. The United States Supreme Court recognized that the public welfare interest underlying the workers' compensation system included the "concern with the continued life and earning power of the individual" so as to prevent "pauperism, with its concomitants of vice and crime." New York Cent. R.R. Co. v. White, 243 U.S. 188, 207 (1917).

Like the Workers' Compensation Act, the administrative child support process reflects the legislature's exercise of police power in response to a public welfare concern. The supreme court has recognized the important public policies that affect legislative and judicial child support decisions. Regarding the recoupment of past child support, the court noted that there is a "strong state policy of assuring that children have the adequate and timely economic support of their parents," while simultaneously limiting "the unnecessary drain of scarce social service and judicial resources." Schaefer v. Weber, 567 N.W.2d 29, 33 (Minn. 1997). Additionally, like the Workers' Compensation Act, which abrogated common law rights and remedies and preempted the judicial system of redress for employee injuries, Minn. Stat. § 518.5511 is part of a system that is entirely legislative in jurisdiction and power. See, e.g. Melamed v. Melamed, 286 N.W.2d 716, 717 (Minn. 1979) ("a trial court's authority in divorce proceedings is strictly limited to that provided by statute"); Kiesow v. Kiesow, 270 Minn. 374, 379, 133 N.W.2d 652, 657 (1956) ("[d]ivorce jurisdiction is statutory and the district court has no power not delegated to it by statute.")

For purposes of a separation of powers analysis, it is difficult to find legally meaningful differences between the workers' compensation process and the administrative child support process. Both are administrative systems under the executive branch of government and both operate predominantly in a quasi-judicial capacity. It might be noted in passing that the workers' compensation system reflects a total transfer of plenary judicial power over a firmly-rooted, common law cause of action, while the child support process in question represents a comparatively minor delegation of judicial power over a limited class of family law proceedings. See Minn. Stat. § 518.5511, subd. 1(b) (1996) (only when the public authority is involved is the use of the administrative process for child support and maintenance required); see also Minn. Stat. § 518.5511, subd. 4(b) (1996) (recognizing the limited power of the ALJ; "[a]ny stipulation that involves a finding of contempt and a jail sentence * * * shall require the review and signature of a district court judge.")

Ostensibly, the majority's principal constitutional concern with Minn. Stat. § 518.5511 is the absence of district court intervention, right of approval or disapproval, or other oversight of the administrative decision. The first criterion in the Breimhorst test requires such district court involvement; and, at the time of the Breimhorst decision in 1949, orders from the industrial commission were in the nature of referees' recommendations which could be reviewed and approved or disapproved by the district court. See Minn. Stat. § 176.43 (1949) (commission's findings and decision "may be approved or disapproved in the same manner as * * * the report of a referee"). The current workers' compensation laws require no district court intervention; rather, decisions are final, effective, and binding when rendered by the administrative workers' compensation judges. Minn. Stat. §§ 176.281, 176.371 (1996). Thus, the current Workers' Compensation Act, under the majority's view and under strict adherence to Breimhorst, does not satisfy Breimhorst's first criterion. If that criterion is still valid law, the Workers' Compensation Act violates the separation of powers doctrine and is unconstitutional.

In my view, Breimhorst's first criterion is no longer the law. Rather, Mack represents the contemporary refinement of Breimhorst. In Mack, the challenge was directed at the authority of the Workers' Compensation Court of Appeals to regulate attorney fees according to a statutory fee structure. 333 N.W.2d at 752. The challengers argued that the regulation of attorney fees was inherently a judicial function and that legislative limits on the fees violated the separation of powers doctrine. Id. The supreme court disagreed, noting that the issue of attorney fees was ultimately within the supreme court's "plenary and summary authority to control." Id. (quoting Hollister v. Ulvi, 199 Minn. 269, 277, 271 N.W.2d 493, 497 (1937)). Mack also held that the fee process did not violate the separation of powers because "[i]n our view, final authority over attorney fees is not given to a nonjudicial body, since ultimately we can review all attorney fees decisions." Id. The court then quoted the Breimhorst test and held: "*By the same reasoning*, power in the commission to set attorney fees is constitutionally permissible, because these awards are reviewable by this court." Id. at 753 (emphasis added).

It is significant that Mack did not include the first Breimhorst criterion (district court review) in providing the reason that the administrative fee process is constitutionally permissible. Mack did not include district court review because it could not do so under the version of workers' compensation it reviewed in 1983. By that time, the district court intervention contemplated by the 1949 Breimhorst decision no longer existed in the Workers' Compensation Act. The court could not, therefore, accurately include it as a precondition to a properly separate exercise of powers. Mack should be read as a modification of the Breimhorst criteria. Mack implicitly abandoned the necessity of district court intervention as a precondition to a proper delegation of authority under the separation of powers doctrine, at least where appellate review is available.

The majority states that I have interpreted Mack as reducing the test for separation of powers to the single criterion of the availability of appellate review, and that such a rule "would permit the legislature to make wholesale transfers to an administrative agency of what were traditionally judicial functions * * * ." Actually, I indicated that Mack also adopted the reasoning of Breimhorst. The Breimhorst reasoning encompasses more than the two stated mechanical criteria of district court approval and availability of appellate review. The threshold constitutional question was whether the creation of the workers' compensation system was a proper exercise of the legislature's police power. Breimhorst, 227 Minn. at 429-30, 35 N.W.2d at 732. Breimhorst

reasoned that the legislature properly exercised its police power because the subject was of vital public interest and there was a reasonable need for regulation. Id. at 430, 35 N.W.2d at 733. Breimhorst further reasoned that the workers' compensation system was an adequate substitute for the common law cause of action and the constitutional right of jury trial that were abolished by the enactment of the workers' compensation laws. Id. at 433-36, 35 N.W.2d at 734-36.

Reading Breimhorst and Mack together, which we must do, the separation of powers test has four components: (1) there is a vital public interest in the subject; (2) there is a reasonable need for statutory regulation; (3) the system of regulation is an adequate substitute for the procedures that formerly existed; and (4) there is a right of appellate review.

I believe that this synthesis of Breimhorst and Mack reflects the nature, purpose, and historical foundation of the doctrine of separation of powers and provides for the absolute retention of the most significant "check" on the exercise of governmental power, namely appellate review with authority to reverse and remand to ensure compliance with the law. Because judicial appellate review of administrative child support decisions is available, the "whole" power of the judicial branch is not exercised by the executive branch. The judicial branch fully retains the authority to scrutinize administrative child support decisions in the same manner and by the same standards as it may with respect to judicial child support decisions. The judicial branch fully retains the authority to correct errors to ensure compliance with the law. Breimhorst and Mack are satisfied in both the workers' compensation and the administrative child support and maintenance frameworks.

Finally, it is appropriate to briefly address a few of the majority's additional points. The majority expresses concern about the scope of the transfer of functions to ALJs under section 518.5511, suggesting that the statute allows ALJs to virtually usurp the authority of judges. Actually, the statute gives an ALJ the powers of a district judge only as to child support, maintenance and parentage issues and only when the public authority is involved. Minn. Stat. § 518.5511, subd. 1(b). ALJs are given no jurisdiction over domestic abuse, custody and visitation, or property issues
and cannot issue contempt orders with jail sentences unless the district court approves. Id., subds. 1(b), 4(b).
Furthermore, when such issues are combined with support issues, parties have a right to be heard in district court. Id., subd. 1(b).

The majority appears to suggest that the transfer of limited child support matters to the ALJs deprives parties of the opportunity to have the district court exercise its "inherent power to grant equitable relief." In reality, however, judges and ALJs are mandated to apply mechanical, statutory, child support guidelines and are subject to specific restrictive criteria for any deviation. Minn. Stat. § 518.551. There is very little room for even the exercise of discretion, let alone the exercise of broader "equitable" powers.

The majority states that:

> Because many support orders and all maintenance orders originate in district court, the administrative child support process thus places the ALJs in the constitutionally untenable position of reviewing and modifying judicial decisions.

This characterization is misleading because it suggests that ALJs have power to review district court awards and discretion as to the enforcement of those awards. There is no such power or discretion. Presumably, the majority is referring to the ALJs' ability to modify previous orders. Such authority is available only if there has been a substantial change of circumstances since the entry of the previous order. Minn. Stat. § 518.64, subd. 2 (1996). Thus, if an ALJ modifies a previous district court child support order, the ALJ will always be doing so on the basis of substantially different facts.

Lastly, the majority relies on several cases from foreign jurisdictions as persuasive. Of those cases, one involved a statute drafted in response to the same federal mandate that prompted the Minnesota statute. See Drennen v. Drennen, 426 N.W.2d 252 (Neb. 1988). The Drennen case is not persuasive because as early as 1920 the Nebraska Supreme Court held that under the Nebraska Constitution Nebraska district courts have equity jurisdiction that may be exercised without legislative enactment. Id. at 259 (citing Matteson v. Creighton University, 179 N.W. 1009 (1920)). In 1981, the Nebraska Supreme Court reaffirmed its 1920 holding in Matteson. Id. (citing Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc., 302 N.W.2d 379 (Neb. 1981)). Drennen also reconfirmed that since 1939, Nebraska specifically found jurisdiction over divorce and child support orders in the equity powers of its district courts. Id. (citing Wassung v. Wassung, 286 N.W. 340 (1939)). Based upon Nebraska's precedential construction of its state constitution, Drennen easily concluded that the Nebraska Referee Act was unconstitutional because it removed original jurisdiction from the district court. Id. Minnesota has no similar constitutional history.

I remain unpersuaded beyond a reasonable doubt that Minn. Stat. § 518.5511 violates the separation of powers mandate of the Minnesota Constitution. I would, therefore, deny the challenge and sustain the constitutional validity of the statute.

TOUSSAINT, Chief Judge (concurring in part, dissenting in part)

I join in the concurrence/dissent of Judge Shumaker.

Footnotes

*Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

[1] Any facts necessary to an understanding of the individual appeals are included later in this opinion in our analysis of those appeals.

[2] Although the 1997 legislature has further modified the administrative child support process, the rulings at issue here were made before August 1, 1997, the effective date for the 1997

amendments. See Minn. Stat. § 645.02 (1996) (if no effective date specified, statutes effective August 1 of year enacted); 1997 Minn. Laws ch. 245, art. 1, §§ 18-20 (no effective date specified for amendments to § 518.5511). Similarly, while the ruling in Carlson was made after other amendments became effective on July 1, 1997, these amendments did not substantively impact that decision. See 1997 Minn. Laws ch. 203, art. 6, § 93 (stating July 1, 1997, effective date for amendments contained in chapter 203). Thus, in this opinion, we focus on the administrative child support process as it existed before the 1997 amendments.

[3] However, the exact nature of the action or motion by which constitutional challenges might be raised is unclear.

[4] Federal regulations have since changed and restrictions on judge involvement in child support collection programs prompted by federal law no longer exist. Compare 45 C.F.R. § 303.101(a) (1993) (expedited process includes presiding officer who is not judge) and 45 C.F.R. § 303.101(a) (1995) (defining expedited process without precluding involvement of judges).

[5] Under a pilot project, some decisions made by referees in the Second Judicial District are not being reviewed by district court judges. We note, however, that this pilot project is confined to a single district, is of limited duration, and is a joint effort of all three branches of government (authorized by the legislature, approved by the governor, and implemented by the supreme court). See 1996 Minn. Laws ch. 365, § 2 (authorizing Second Judicial District pilot project and setting expiration date); In re Second Judicial Dist. Combined Jurisdiction Pilot Project, No. CX-89-1863 (Minn. Apr. 10, 1996) (implementing pilot project). The advisability of foregoing review in the district court remains to be seen. See Kahn v. Tronnier, 547 N.W.2d 425, 428 (Minn. App. 1996) (district court review of referee's order not prerequisite to appeal, but analogous to motion for amended findings or new trial and affects scope of review on appeal), review denied (Minn. July 10, 1996).

[6] We also note that the symbiotic relationship between current funding of ALJs and their duty to collect back child
support may create a conflict of interest which may be the type of tyranny that the separation of power doctrine is designed to check.

[7] The power to regulate the bar, and hence attorney fees, "was intended to be vested *exclusively in the supreme court.*" Sharood v. Hatfield, 296 Minn. 416, 425, 210 N.W.2d 275, 280 (1973) (emphasis added) (citation omitted). Because the supreme court retains the power to review attorney fee decisions, the statutory provision limiting attorney fees in workers' compensation proceedings does not divest the supreme court of its authority on the subject; it simply gives the supreme court the opportunity to defer to the Workers' Compensation Court of Appeals. Thus, Mack is consistent with Wulff because a statute that does not require a court to defer to an agency, but merely gives a court an opportunity to relinquish its authority to the agency, is not a violation of the separation of powers. See Wulff, 288 N.W.2d at 224-25 (statute allowing, but not requiring, district court to refer cases to tax court did not violate separation of powers because it "takes nothing from the district court that it does not voluntarily relinquish").

[8] Generally, divisions of real and personal property are final. Minn. Stat. § 518.64, subd. 2(d) (1996). But the court, after considering the custody and circumstances of the children, may award the right of occupancy of the homestead in a dissolution or modification proceeding. Minn. Stat. § 518.63 (1996).

[9] Sandra Holmberg also argued that "judicial preclusion" precluded any modification of the terms for payment of her lien. But she neither cites authority addressing "judicial preclusion" nor defines the term. Schoepke v. Alexander Smith & Sons Carpet Co., 290 Minn. 518, 519, 187 N.W.2d 133, 135 (1971) (assignment of error based on "mere assertion" and not supported by argument or authority in appellant's brief is waived unless error is obvious).

[10] "Child support" is "an award * * * for the care, support and education of any child of the marriage or of the parties to the proceeding." Minn. Stat. § 518.54, subd. 4(1) (1996). Social security benefits paid on behalf of the child of a disabled support obligor have a similar purpose. See Henry v. Henry, 622 N.E.2d 803, 809 (Ill. 1993) ("[s]ocial security dependent disability benefits replace support the child loses upon the disability of the wage earner responsible for the child's support"); Potts v. Potts, 240 N.W.2d 680, 682 (Iowa 1976) ("primary purpose" of disability benefits paid for children due to obligor's disability "is to meet the current needs of the dependents").

[11] In the March 20, 1997 order, the ALJ found Steve Carlson "verifi[ed]" his financial information and found it "reasonable" to make specific findings of his total monthly income, net monthly income, and reasonable monthly expenses. In a July 3, 1997 amended order, the same ALJ found it "difficult to ascertain" Steve Carlson's income and struck the findings of his total and net monthly income made in the March 20, 1997 order. This appears to be an exercise of the ALJ's will rather than her judgment and were we to reach this issue, we would reverse.

STATE OF MINNESOTA
IN COURT OF APPEALS
C3-96-1609

Alice Decker, et al.,
Respondents,

vs.

Marilyn Brunkow, defendant and third-party plaintiff,
Appellant,

vs.

Oak Ridge Homes, SLS, Inc., third-party defendant,
Respondent.

Filed December 31, 1996
Affirmed
Schumacher, Judge

Wadena County District Court
File No. C695129

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Considered and decided by Klaphake, Presiding Judge, Schumacher, Judge, and Foley, Judge.*

S Y L L A B U S

Where an employer is immune from direct liability in a negligence action because of the Workers' Compensation Act, the limitation of a third-party tortfeasor's liability to four times her percentage of fault under Minn. Stat. § 604.02, subd. 1 (1996), does not apply.

O P I N I O N

SCHUMACHER, Judge

Marilyn Brunkow appeals from a judgment, arguing the trial court erred in not limiting her liability to respondent Alice Decker to four times her percentage of fault pursuant to Minn. Stat. § 604.02, subd. 1 (1996). We affirm.

FACTS

The facts of this case are undisputed. Brunkow was the owner of a building that was leased to respondent Oak Ridge Homes, SLS, Inc. (Oak Ridge). Decker was an employee of Oak Ridge.

On April 17, 1993, Decker was injured when she tripped and fell on the property while working for Oak Ridge. Decker brought an action against Brunkow who then commenced a third-party action against Oak Ridge for indemnification or contribution.

After a 3-day trial, the jury found Brunkow 5% and Oak Ridge 95% negligent. The jury awarded Decker $125,020.93 in damages.

Decker moved to allocate liability for the entire verdict to Brunkow because Oak Ridge was immune from direct liability under the Workers' Compensation Act. Brunkow argued that her liability was limited to four times her percentage of fault under Minn. Stat. § 604.02, subd. 1.

The trial court granted Decker's motion, declining to modify the contribution rule of Lambertson v. Cincinnati Corp., 312 Minn. 114, 257 N.W.2d 679 (1977), and holding that section 604.02 does not limit Brunkow's liability. Brunkow appeals.

ISSUE

Does the 1988 amendment to Minn. Stat. § 604.02, subd. 1, which limits the liability of a tortfeasor who is 15% or less at fault to no more than four times the percentage of fault, modify the contribution rule of Lambertson?

ANALYSIS

The construction of a statute is a question of law and thus fully reviewable by an appellate court. Hibbing Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527, 529 (Minn. 1985). "The fundamental aim of an appellate court construing a statute is to ascertain and give effect to the legislative intent." In re Copeland, 455 N.W.2d 503, 506 (Minn. App. 1990), review denied (Minn. July 13, 1990).

Brunkow argues that her liability to Decker is limited to four times her percentage of fault because the 1988 amendment to Minn. Stat. § 604.02, subd. 1, modified the contribution rule of Lambertson v. Cincinnati Corp., 312 Minn. 114, 257 N.W.2d 679 (1977). This is an issue of first impression.

Prior to 1988, damages in multi-party negligence cases were statutorily apportioned:

> When two or more persons are jointly liable, contributions to awards shall be in proportion to

the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award.

Minn. Stat. § 604.02, subd. 1 (1986). In situations where an employer who paid workers' compensation benefits and a third-party tortfeasor were both negligent, however, the Workers' Compensation Act provided the exclusive allocation method for damages and cut off the third-party tortfeasor's right to contribution from the employer. Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 374-75, 104 N.W.2d 843, 849 (1960), overruled in part by Tolbert v. Gerber Indus., 255 N.W.2d 362, 368 n.11 (Minn. 1977).

In Lambertson, the supreme court recognized the conflict between the third-party tortfeasor's contribution claim and the exclusive remedy of the workers' compensation law:

> [The third-party tortfeasor] has been forced to bear the entire burden of plaintiff's recovery despite the fact that it was [less negligent] and has a [more negligent] employer joined in the action and available for contribution. In contrast, granting contribution would result in substantial employer participation in its employee's common-law recovery despite the exclusive-remedy clause.

Lambertson, 312 Minn. at 128-29, 257 N.W.2d at 688. As a compromise, Lambertson constructed a contribution rule whereby the third-party tortfeasor was entitled to contribution against the employer

> in an amount proportional to its percentage of negligence, but not to exceed its total workers' compensation liability to plaintiff.

Id. at 130, 257 N.W.2d at 689. Lambertson noted its approach

> allows the third party to obtain limited contribution, but substantially preserves the employer's interest in not paying more than workers' compensation liability. Id.

In 1988, the legislature amended Minn. Stat. § 604.02, subd. 1 as follows:

> When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. Except in cases where liability arises under [a number of unrelated chapters], **a person whose fault is 15 percent or less is liable for a percentage of the whole award no greater than four times the percentage of fault * * *.**

1988 Minn. Laws ch. 503, § 3 (emphasis added). This new language has become known as the "15% x 4" rule. See Michael K. Steenson, Joint and Several Liability Minnesota Style, 15 Wm. Mitchell L. Rev. 969, 985 (1989).

The essential question, therefore, is whether the "15% x 4" rule of amended section 604.02 modifies the contribution rule in Lambertson. We hold that it does not.

Brunkow argues the legislative intent behind the "15% x 4" rule was to remedy the unfairness of holding a low-percentage at-fault tortfeasor responsible under joint and several liability for 100% of the award. See id. The amendment was primarily intended to remedy unfairness in tort actions. See id. at 986. The court in Lambertson, however, noted:

> "Since workmen's compensation statutes provide that the obligations thereunder are the only liability of the employer to the employee, or his representatives, there is no common liability involving the employer and third party in such situations; and therefore, there is no ground for allowing contribution." While there is no common liability to the employee in tort, both the employer and the third party are nonetheless liable to the employee for his injuries; the employer through the fixed no-fault workers' compensation system and the third party through the variable recovery available in a common law tort action. Contribution is a flexible, equitable remedy designed to accomplish a fair allocation of loss among parties.

312 Minn. at 128, 257 N.W.2d at 688 (quoting Hendrickson, 258 Minn. at 374-75, 104 N.W.2d at 849). Moreover, the supreme court in Kempa v. E.W. Coons Co., 370 N.W.2d 414 (Minn. 1985), noted that "the statutory apportionment of damages, section 604.02, does not govern an employer's contribution" because a third-party tortfeasor and an employer "are neither jointly liable nor jointly and severally liable" to the employee. Id. at 420. According to Lambertson and Kempa, Brunkow and Oak Ridge are not jointly liable under traditional tort law concepts. Amended section 604.02, therefore, does not apply where the third-party tortfeasor seeks contribution from a negligent employer who is exclusively liable under workers' compensation law.

Neither party claims the legislative history of section 604.02 contemplated the conflict between the workers' compensation law and contribution actions as discussed in Lambertson. While Lambertson recognized the unfairness of its contribution rule, the court commented that any change should be made to the "workers'-compensation-third-party law." 312 Minn. at 130, 257 N.W.2d at 689. No such changes have been made.
We hold that until the legislature chooses to address the conflict, the contribution rule in Lambertson applies.

We find no merit in Brunkow's argument that application of the Lambertson rule violates her constitutional right to equal protection. Brunkow is not treated differently than other third party tortfeasors who seek contribution from employers. See In re Harhut, 385 N.W.2d 305, 310 (Minn. 1986) (equal protection clauses of federal and state constitutions require that all persons similary situated be treated alike under law).

DECISION

The trial court properly refused to limit Brunkow's liability to four times her percentage of fault pursuant to Minn. Stat. §604.02, subd. 1.

Affirmed.

Footnotes

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.