

CASE NO. A08-0536

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State of Minnesota  
In Court of Appeals

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CHARLOTTE M. HEINO,

*Respondent,*

vs.

ONE (1) 2003 CADILLAC,  
MN LIC. # KFR615,  
VIN # 1G6KS54Y83U131208,

*Appellant.*

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RESPONDENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF LEGAL ISSUES

- I. Does a contested and unreviewed administrative license revocation qualify as a prior impaired driving-related loss of license under Minn. Stat. § 169A.03, Subd. 21 such that it can be utilized as an aggravating factor to subject a vehicle to forfeiture pursuant to Minn. Stat. § 169A.63, Subd. 6?

The District Court held that it does not.

Most apposite authority: *State v. Wiltgen*, 737 N.W.2d 561 (Minn. 2007).

## BRIEF STATEMENT OF THE CASE

This matter was adjudicated in the Ninth Judicial District, Itasca County District Court. The Honorable Jon A. Maturi presided over the proceedings.

The underlying action was originally instituted by Respondent, Charlotte M. Heino against the Appellant motor vehicle pursuant to Minn. Stat. § 169A.63, Subd. 8(d), *et seq.* after the motor vehicle was seized on May 9, 2007. On that date, Respondent was arrested and served with a Notice of Seizure and Intent to Forfeit pursuant to Minn. Stat. § 169A.63. One of the two aggravating factors cited to justify forfeiture was an unreviewed administrative revocation of Respondent's driver's license pursuant to Minnesota's Implied Consent law premised on Respondent's arrest for 4<sup>th</sup> Degree DWI on March 7, 2007.

By an order dated February 3, 2008, the Honorable Jon A. Maturi ordered the return of the Appellant motor vehicle to Respondent, holding, in pertinent part, that where judicial review is not completed or has not been waived by failure to timely petition for review, the use of a prior administrative license revocation as an aggravating factor to support vehicle forfeiture is a denial of due process. Accordingly, the District Court held that on May 9, 2007, Respondent's motor vehicle was not subject to forfeiture. On February 13, 2008, Appellant filed a motion for amended conclusions of law, or alternatively for a new trial to resolve the forfeiture matter. By an order dated February 29, 2008, Appellant's motion was denied by the District Court. Appellant appeals from the two aforementioned orders of the District Court.

## STATEMENT OF FACTS

On March 7, 2007, in the County of Itasca, Respondent was arrested for a 4<sup>th</sup> degree driving while impaired offense.<sup>1</sup> On that date, Respondent provided a breath sample indicating a blood alcohol content of .16 percent blood to alcohol by volume, and was provided a Notice and Order of License Revocation.<sup>2</sup> Respondent was also charged by citation with the crime of 4<sup>th</sup> Degree DWI.<sup>3</sup> On March 22, 2007, and pursuant to Minn. Stat. § 169A.53, Subd. 2, Respondent petitioned the Itasca County District Court for a judicial review of the March 7, 2007 license revocation.<sup>4</sup> An Implied Consent hearing was originally scheduled for May 1, 2007, but Respondent's counsel waived the requirement that the judicial review hearing be held within 60 days of the filing of Respondent's petition.<sup>5</sup> Accordingly, on April 11, 2007, Respondent's Implied Consent hearing was continued until August 7, 2007 pending resolution of Respondent's criminal matter.<sup>6</sup>

On May 9, 2007, Respondent was arrested for a 2<sup>nd</sup> degree driving while impaired offense.<sup>7</sup> The arresting officer charged Respondent with 2<sup>nd</sup> Degree DWI and enumerated two (2) aggravating factors on the citation: a blood to alcohol ratio of 0.26 and the March 7, 2007 license revocation.<sup>8</sup> On May 9, 2007, in addition to receiving a Notice of License Revocation, the Appellant motor vehicle was seized and Respondent

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<sup>1</sup> District Court's *Findings of Fact, Conclusions or Law, Order and Memorandum*, p. 1, dated February 3, 2008, App. 1.

<sup>2</sup> *Notice and Order of Revocation*, dated March 7, 2007, App. 7.

<sup>3</sup> *Summons*, Court File No CR-07-941, dated March 7, 2007, App. 8.

<sup>4</sup> Respondent's *Petition for Judicial Review*, dated March 22, 2007, App. 9.

<sup>5</sup> Respondent's *Waiver of Implied Consent Hearing Within 60 Days*, dated April 6, 2007, App. 15.

<sup>6</sup> *Notice of Hearing*, dated March 27, 2007; *Notice of Hearing*, dated April 11, 2007, App. 16, 17.

<sup>7</sup> District Court's *Findings of Fact, Conclusions of Law, Order and Memorandum*, p. 1, App. 1.

<sup>8</sup> *Id.*

was issued a Notice of Seizure and Intent to Forfeit Vehicle – Impaired Operation.<sup>9</sup> Ultimately, on May 24, 2007, Respondent was charged by Complaint with 3<sup>rd</sup> Degree DWI for her arrest on May 9, 2007. The Cohasset City Attorney utilized only Respondent’s blood to alcohol concentration as an aggravating factor.<sup>10</sup>

Pursuant to Minn. Stat. § 169A.63, Subd. 8(d), Respondent filed a timely Complaint & Demand for Judicial Review of Forfeiture on June 6, 2007.<sup>11</sup> Respondent also filed, on June 8, 2007, a Petition for Judicial Review of her license revocation with respect to her May 9, 2007 arrest and incidental loss of her driving privileges.<sup>12</sup>

Subsequent to the foregoing, on July 30, 2007 at a scheduled omnibus hearing in the Itasca County District Court, Respondent entered pleas of guilty to both the 4<sup>th</sup> Degree DWI and 3<sup>rd</sup> Degree DWI charges arising out of the offenses committed on March 7, 2007 and May 9, 2007 respectively.<sup>13</sup> Respondent was eventually sentenced on September 10, 2007.<sup>14</sup> One week hence, the undersigned, via written correspondence, withdrew both of the petitions for judicial review (PJR) of Respondent’s license revocations.<sup>15</sup>

Following adjudication of the aforementioned criminal matters, on January 14, 2008, a trial was commenced on Respondent’s Complaint and Demand for Judicial

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<sup>9</sup> *Notice of Seizure and Intent to Forfeit Vehicle – Impaired Operation*, dated May 9, 2007, App. 18.

<sup>10</sup> District Court’s *Findings of Fact, Conclusions or Law, Order and Memorandum*, p. 2, dated February 3, 2008, App. 1.

<sup>11</sup> Respondent’s *Petition for Judicial Review of Implied Consent Revocation*, dated June 6, 2007, App. 19.

<sup>12</sup> District Court’s *Findings of Fact, Conclusions or Law, Order and Memorandum*, p. 2, dated February 3, 2008, App. 1.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

Determination of Forfeiture.<sup>16</sup> On that date, the parties to this appeal stipulated to the facts on file, and the matter was submitted to the District Court for judicial determination. After taking the matter under advisement, the District Court, by an Order dated February 3, 2008, denied forfeiture and ordered the Appellant motor vehicle be returned to Respondent.<sup>17</sup> In so holding, the District Court stated thus:

1. The right to due process requires that the use of prior administrative license revocations to enhance criminal charges be limited to situations where judicial review is completed or has been waived by the failure to timely petition for review.<sup>18</sup>
2. The above limitation upon the use of administrative license revocations for the enhancement of criminal charges *applies to the use of such revocations in civil forfeiture proceedings because of the substantial interests of the individual.*
3. Because Ms. Heino sought judicial review by filing a timely petition for review and the review had not been completed at the time of the May 9, 2007 incident and subsequent attempted forfeiture of her vehicle, *Ms. Heino's right to due process as to her license revocation had not been satisfied* and the revocation from the March 7, 2007 incident may not be used against her.<sup>19</sup>

Accordingly, forfeiture of the Appellant motor vehicle was denied.

In response to the District Court's Order, Appellant filed motions for amended conclusions of law, or alternatively, for a new trial.<sup>20</sup> Finding Appellant's motions unpersuasive, the District Court denied Appellant its requested relief by an Order dated

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<sup>16</sup> *Transcript of Hearing*, dated January 14, 2008.

<sup>17</sup> District Court's *Findings of Fact, Conclusions or Law, Order and Memorandum*, p. 3, dated February 3, 2008, App. 1.

<sup>18</sup> The District Court's holding is essentially a reiteration of *State v. Wiltgen*, 737 N.W.2d 561, 565 (Minn. 2007), discussed *supra*.

<sup>19</sup> *Id.* at 3 (emphases added).

<sup>20</sup> Appellant's *Notice of Motion and Motion to Stay Order, For Amended Conclusions of Law, Order, or Alternatively for a New Trial*, dated February 13, 2008, App. 25.

February 29, 2008.<sup>21</sup> From the denial of forfeiture on February 3, 2008 and denial of its post-trial motions, Appellant brings the present appeal.

### STANDARD OF REVIEW

The parties to this appeal can agree on little, including the grounds for establishing the standard of review applicable in this matter. Although it is well within the province of the Appellate Court to review *de novo* the construction of a statute – a question of law – Appellant dirties the reviewing waters by attempting to impute to Respondent a constitutional challenge to Minnesota legislation that Respondent has never posited, not at the District Court level, nor in the present appeal. The interpretation of a statute is at issue here, not a constitutional challenge thereto.

An appellate court may fully review the construction of a statute, which is a question of law. *Hibbing Educ. Ass'n v. Pub. Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn.1985). Contrary to Appellant's proffer, appellate review of the instant case is restricted by no additional standards respecting the "constitutionality of enactments by a co-equal branch of government."<sup>22</sup> Rather, this Court is to review *de novo* the District Court's construction of specific statutory language as applied to the facts of this case. The proposition that Respondent has made some form of constitutional challenge to any Minnesota statute has as much merit as Appellant's case on appeal: none.

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<sup>21</sup> District Court's *Order and Memorandum*, dated February 29, 2008, App. 33.

<sup>22</sup> Appellant's Brief, p.1.

## SUMMARY OF ARGUMENT

The project of this brief is to demonstrate how Appellant's argument, with so much gloss and after so many pages, is fundamentally a request for this Court to denigrate firmly-entrenched principles of individual property rights upon an unwarranted, and altogether unsupported, theory of due process bifurcation; how Appellant's argument – apart from its discord with this State's precedent – amounts in its totality to nothing more than arbitrarily normative line-drawing, placing due process respecting individual liberty and due process respecting individual property rights in two very distinct jurisprudential spheres; why the District Court was correct in denying forfeiture of the Appellant motor vehicle; and ultimately why a reversal of the District Court's ruling would be unsound, both as a matter of law and as a matter of public policy.

## ARGUMENT

### **I. RESPONDENT DID NOT COMMIT A SECOND-DEGREE DRIVING WHILE IMPAIRED OFFENSE ON MAY 9, 2007, AND THE DISTRICT COURT'S HOLDING WAS CORRECT AS A MATTER OF LAW**

That this case was appealed is singularly surprising to the undersigned, as both parties agreed on the record at the stipulated facts trial to be bound by the District Court's order regarding forfeiture.<sup>23</sup> Nevertheless, Appellant's argument must fail as it did at the District Court.

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<sup>23</sup> See Transcript of Proceedings: Stipulated Facts, dated January 14, 2008, App. \*. Specifically, the exchange occurred thus:

The Court: But as I understand, we can take it off the calendar in either event because I heard both of you say no matter which way I rule, you both have agreed to be bound by that. In other words, if I rule that the revocation from the March 7 incident can be used as a basis for the forfeiture that the forfeiture is not being contested; and that the County agrees to the opposite, that if it cannot be used there's no forfeiture.

Appellant begins by stating that “[t]he issue of procedural due process in this case must be addressed against the backdrop of the Minnesota Impaired Driving Code. Minn. Stat. [sic] 169A.01, Subd. 1.”<sup>24</sup> Quite the opposite is necessary: the issue of procedural due process is the very backdrop by which the Minnesota Impaired Driving Code has been, and must now be, construed. Prior to that analysis however, and in the interests of clarity, the pertinent constituent provisions of the Minnesota Impaired Driving Code deserve enumeration.

**A. Minnesota’s Impaired Driving Code – Pertinent Sections**

In this case, Respondent’s motor vehicle was seized and subjected to forfeiture pursuant to Minn. Stat. § 169A.63, Subd. 6. That section states:

**Vehicle subject to forfeiture.** (a) A motor vehicle is subject to forfeiture under this section if it was used in the commission of a designated offense or was used in conduct resulting in a designated license revocation.

Minn. Stat. § 169A.63, Subd. 1(d) defines the term “**designated license revocation**” as:

a license revocation under section 169A.52 (license revocation for test failure or refusal) or a license disqualification under section 171.165 (commercial driver's license disqualification) resulting from a violation of section 169A.52; within ten years of the first of two or more qualified prior impaired driving incidents.

Minn. Stat. § 169A.63, Subd. 1(e), in pertinent part, defines the term “**designated offense**” as:

a violation of section 169A.20 (driving while impaired) under the circumstances described in section 169A.24 (first-degree driving while impaired), or 169A.25 (second-degree driving while impaired)...

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Mr. Muhar: Steve [Meshbesh], are we okay [sic] the Judge can issue a dispositive order to the forfeiture – order the forfeiture or deny it?

Mr. Meshbesh: We are, yes.

Mr. Muhar: I’m on board for that.

<sup>24</sup> Appellant’s Brief, p. 2.

Appellant has made no claim that Respondent's motor vehicle is subject to forfeiture for its use in conduct resulting in a designated license revocation. Rather, Appellant contends that Respondent's motor vehicle is subject to forfeiture for its use in the commission of a designated offense, namely a violation of Minn. Stat. § 169A.25 (second-degree driving while impaired). A person "is guilty of second-degree driving while impaired if two or more aggravating factors were present *when the violation was committed.*" Minn. Stat. § 169A.25, Subd. 1(a) (emphasis added).

Forfeiture in this matter was premised on the alleged presence of two aggravating factors on the date of Respondent's arrest on May 9, 2007. Minn. Stat. § 169A.03, Subd. 3 includes, in pertinent part, the following as "**aggravating factors**":

- (1) a qualified prior impaired driving incident within the ten years immediately preceding the current offense;
- (2) having an alcohol concentration of 0.20 or more as measured at the time, or within two hours of the time, of the offense;

...  
A "**qualified prior impaired driving incident**" includes "prior impaired driving convictions and prior impaired driving-related losses of license." Minn. Stat. § 169A.03, Subd. 22. Still further, a "**prior impaired driving-related loss of license**" is defined by Minn. Stat. § 169A.03, Subd. 21. In pertinent part, that section states:

**Prior impaired driving-related loss of license.** (a) "Prior impaired driving-related loss of license" includes a driver's license suspension, revocation, cancellation, denial, or disqualification under:

- (1) section... 169A.50 to 169A.53 (implied consent law);...

It is under the foregoing statutory hierarchical scheme that Appellant claims the motor vehicle at issue in the underlying matter is subjected to forfeiture. Appellant's argument must fail.

**B. A contested and unreviewed administrative license revocation cannot be used as an "aggravating factor" in an administrative forfeiture matter pursuant to Minn. Stat. § 169A.63, Subd. 6**

In *State v. Wiltgen*, the defendant, Jessica Wiltgen, was arrested on August 13, 2005 on suspicion of driving while impaired, such arrest resulting in the administrative revocation of her driver's license and a criminal charge of 3<sup>rd</sup> Degree DWI. *State v. Wiltgen*, 737 N.W.2d 561, 565 (Minn. 2007). Ms. Wiltgen timely filed a petition for judicial review to challenge the revocation, although the Implied Consent Hearing could not be held until after the conclusion of the criminal proceedings per a Standing Order of the Hennepin County District Court. *Id.* On September 13, 2005, Ms. Wiltgen was again arrested for a new offense and was charged with 2<sup>nd</sup> Degree DWI. *Id.* At trial, Ms. Wiltgen moved the court to reduce the charge of 2<sup>nd</sup> Degree DWI to a 3<sup>rd</sup> Degree offense, arguing that the unreviewed license revocation could not be used as an aggravating factor to support the enhanced criminal charge (2<sup>nd</sup> Degree DWI). *Id.* The district court granted Ms. Wiltgen's motion, however the Court of Appeals reversed. *Id.* at 566.

After granting Ms. Wiltgen's petition for review, the Minnesota Supreme Court reversed the Court of Appeals' decision. In doing so, the Court addressed the due process concerns implicated by Ms. Wiltgen's appeal under the three-part test established in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Specifically, that three-part test consists of the following factors:

(1) “the private interest that will be affected by the official action” (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,” and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

*Wiltgen*, 737 N.W.2d at 568 (quoting *Mathews*, 424 U.S. at 335, 96 S.Ct. 893). After analyzing the facts of Ms. Wiltgen’s case under the *Mathews* inquiry, the Court held that the “potential prejudice suffered by Wiltgen from the use of an unreviewed administrative revocation to enhance a subsequent DWI rises to the level of a violation of her right to procedural due process.” *Id.* at 570 (emphasis in original). Specifically, the Court held as follows:

If convicted of second-degree DWI by using the August 2005 revocation as an aggravating factor, Wiltgen would face a minimum sentence of 90 days of incarceration. But if the revocation is not used as an aggravating factor, Wiltgen can only be convicted of third-degree DWI and could face a minimum of 30 days of incarceration. Therefore, the private interest affected – Wiltgen’s liberty interest – is substantial. ...

The second *Mathews* factor we must consider is the likelihood of an erroneous deprivation of the private interest involved. ... At the trial of a second degree DWI charge, qualified prior impaired driving incidents – including license revocations under the implied consent law – may be used to establish conclusively an element of the offense. *Using a license revocation as a conclusive element of a crime when judicial review has been requested but has not yet occurred greatly increases the risk of an erroneous deprivation.* ... In Wiltgen’s case, there remains an opportunity for meaningful review of the administrative license revocation in the implied consent proceeding, *but until that review has been provided, the same due process concerns arise from the use of the revocation* “to establish an element of a criminal offense.” From the standpoint of *Mathews*, the opportunity for erroneous deprivation is more significant where judicial review has not been provided or has not been waived.

With respect to the third *Mathews* factor, the government interest, ... [t]he state has a compelling interest in highway safety that justifies its efforts to

keep impaired drivers off the road, particularly those drivers who have shown a repeated willingness to drive while impaired. Although we appreciate the important nature of the government interest, we conclude that Wiltgen's interest in her liberty, combined with the risk of erroneous deprivation, outweighs the state's interest in providing enhanced penalties for repeat offenders, pending resolution of the implied consent proceeding. *We hold that the potential prejudice suffered by Wiltgen from the use of an unreviewed administrative revocation to enhance a subsequent DWI rises to the level of a violation of her right to procedural due process.*

*Id.* at 569-70, (citations omitted, emphasis added). Contrary to Appellant's intimation that the holding in *Wiltgen* is limited to cases where a standing order prevents resolution of an Implied Consent Hearing before resolution of the related criminal matter, nowhere did the Supreme Court indicate or hold as such. In fact, the Court clearly manifested in its conclusion that its holding was based "only on the ground that the administrative revocation has not been judicially reviewed." *Id.* at 571.

The effect of the Supreme Court's holding is clear: an unreviewed license revocation cannot be used to enhance criminal charges under any circumstances. An application of *Wiltgen* to the facts of Respondent's case renders but one legal – and altogether logical – conclusion, namely, that Respondent did not commit a 2<sup>nd</sup> Degree DWI offense as contemplated by the aforementioned statutory definitions on May 9, 2007. No legal basis existed *when the violation was committed* to warrant forfeiture of the Appellant motor vehicle.

**C. The doctrine espoused in *Wiltgen* applies equally to civil forfeiture proceedings as it does to criminal proceedings**

The Appellant, with so much ink, attempts to charge Respondent with a desire to have this Court "expand the procedural rule in Wiltgen by extending it from criminal to

civil proceedings.”<sup>25</sup> Nowhere in the *Wiltgen* decision is it indicated that that holding was even confined to criminal proceedings in the first place. In fact, the *Mathews* doctrine that occupied so much of the Court’s energy in *Wiltgen* applies with equal force to civil proceedings. See *Wiltgen*, 737 N.W.2d at 568 (“Since 1982, when prehearing revocation was first authorized, we have consistently employed the three-part test established in *Mathews v. Eldridge* to determine whether prehearing revocations violate due process.” (citation omitted)). Thus, it is Appellant who is requesting a change in the status quo by calling for a judicial limitation of procedural due process rights.

Appellant’s dichotomized civil/criminal line of reasoning is wholly without merit; it is the desperate breath of a tired wolf, weak at the knees under the heavy garments of sheep’s clothing.

The only meaningful distinction between the present case and *Wiltgen* is the fact that the former implicates due process concerns with respect to property rights while the latter was concerned with due process respecting individual liberty. Granting *arguendo* that this Court will regard individual property rights with the veneration those rights have traditionally been accorded in our jurisprudence, application of the *Mathews* test to the facts of the instant case must, for all analytical intents and purposes, render the same result as *Wiltgen*.

A license to drive is an important property interest. *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90 (1971). The Appellant motor vehicle, a 2003 Cadillac, is *a fortiori* an important property interest. The District Court duly recognized

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<sup>25</sup> Appellant’s Brief, p. 6.

this fact, and concluded by an application of the *Mathews* three-part inquiry that the *Wiltgen* limitation “upon the use of administrative license revocations for the enhancement of criminal charges applies to the use of such revocations in civil forfeiture proceedings because of the *substantial interests of the individual*.”<sup>26</sup> The District Court’s conclusions of law and its reasons supporting the same as presented in the Court’s accompanying memorandum were correct and commensurate with this state’s legal precedent.

Nevertheless, Appellant argues that because judicial review of Respondent’s PJR from the March 7, 2007 revocation was completed on September 17, 2007 prior to trial on the forfeiture on January 14, 2008, any claims to a violation of procedural due process were mitigated in this case. Furthermore, Appellant submits that because Respondent’s waiver of her May 1, 2007 Implied Consent Hearing was of her own choosing, she “cannot demonstrate a *deprivation* of property rights without due process of law under these circumstances.”<sup>27</sup> In support of its conclusion, Appellant relies on *State v. Polsfuss*, 720 N.W.2d 1, 4 (Minn. App. 2006) and the cases cited therein, and *Heddan v. Dirkswager*, 336 N.W.2d 54, 59 (Minn. 1983) for the proposition that due process guarantees in civil proceedings are protected by the opportunity to be heard at a meaningful time and in a meaningful manner. Appellant’s conceptualization of procedural due process guarantees is misguided, and its ultimate conclusion untenable.

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<sup>26</sup> District Court’s *Findings of Fact, Conclusions or Law, Order and Memorandum*, p. 2, dated February 3, 2008, App. \* (emphasis added).

<sup>27</sup> Appellant’s Brief, p. 14 (emphasis in original).

Procedural due process imposes constraints on governmental decisions “which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments of the United States Constitution and Article 1, Section 7, of the Minnesota Constitution.” *Heddan*, 336 N.W.2d at 58. Due process requires that notice and an opportunity for a hearing precede deprivation of property. *Humenansky v. Minnesota Bd. of Med. Examiners*, 525 N.W.2d 559, 565 (Minn. App. 1994), review denied (Minn. Feb. 14, 1995). Indeed, due process requirements in civil proceedings are “satisfied by the opportunity to be heard at a meaningful time and in a meaningful manner.” *Polsfuss*, 720 N.W.2d at 59.

Appellant’s apparent interpretation of “opportunity to be heard” is unsound. It is as though Appellant reads “opportunity to be heard” as requiring only that a person in Respondent’s shoes be given a chance to *request* a hearing, not that the hearing actually be had or waived entirely. The United States Supreme Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff v. McDonnell*, 418 U.S. 539, 557-558, 94 S.Ct. 2963, 2975-2976, 41 L.Ed.2d 935 (1974). Appellant’s interpretation is further undermined by the Minnesota Supreme Court’s express language in *Wiltgen* itself, to wit:

By including section 169A.53 [implied consent law] in its definition of a prior impaired driving-related loss of license, the legislature evidenced an intent to limit the use of a license revocation, as an aggravating factor, to a situation where judicial review has already occurred or been waived by the failure to file a timely petition.

*Wiltgen*, 737 N.W.2d at 571.<sup>28</sup> On May 9, 2007, judicial review of Respondent’s license revocation had not been completed, nor had it been waived by her failure to file a timely petition; on May 9, 2007, Respondent had *not* had an opportunity to be heard. Under Appellant’s purported interpretation, a petitioner who elects to waive the time requirements for a judicial hearing regarding license revocation is in effect conceding finality of judicial review, despite the fact that no hearing has taken place. This absurd interpretation – in direct contradiction of statutory mandates and case law interpretive thereof – the law cannot and should not stomach.

**II. “HOME-FREE” OR A DILEMMA FOR THEE: WHY APPELLANT’S “HOME-FREE” ARGUMENT IS UNPERSUASIVE AND SHOULD BE REJECTED**

Appellant argues that “[u]nder her [Respondent’s] reasoning, those who elect to re-offend while their PJR’s are pending will escape the consequences which, under the statutory law, are progressively more serious as the number of ‘aggravating factors’ increase.”<sup>29</sup> Respondent has accomplished no such escape; she has merely not satisfied the statutory requirements to support forfeiture of the Appellant motor vehicle. Appellant expresses that by affirming the District Court’s decision, this Court will be fashioning a loophole in the statutory framework such that certain offenders will be “home-free.” This is far from so.

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<sup>28</sup> The Minnesota Supreme Court read the legislative intent under the doctrine of *expressio unius est exclusio alterius*. Just as a reference in the Poor Relief Act of 1601 to “lands, houses, tithes and coal mines” was held to exclude mines other than coal mines, so too does the Minnesota Supreme Court’s interpretation of the Impaired Driving Code exclude an unreviewed license revocation as an “aggravating factor.”

<sup>29</sup> Appellant’s Brief, p. 14.

The statutory fabric that Appellant is apparently so concerned with preserving will not be harmed in the instance that this Court affirms the District Court. On the other hand, reversal in favor of Appellant would do great violence to the proverbial statutory fabric – the carefully sewn and especially cared-for quilt that it is. Minnesota law is clear in this area:

Had the legislature intended an unreviewed license revocation to qualify as a prior impaired driving-related loss of license it would have referenced only section 169A.52, which addresses the license revocation penalties for test failure or refusal under the implied consent law. Because the legislature included the reference to section 169A.53 in the definition of prior impaired driving-related loss of license, we read the plain language of section 169A.03, subdivision 21, to require that judicial review be completed before a license revocation under the implied consent law may be used as an aggravating factor in a subsequent DWI prosecution.

*Wiltgen*, 737 N.W.2d at 571. Legislative efforts to combat recidivism through enhanced consequences will not be undercut by affirmation of the District Court's ruling. To the contrary, relief for Appellant would affirmatively undercut the express language of this state's duly elected representatives.

For all of its concern with the Legislature's efforts to combat recidivism and the purported chilling effect this Court would impose on those efforts by affirming the District Court, Appellant overlooks the inexorable effect reversal would have on future impaired driving offenders. Under the hypothetical precedent a reversal of the District Court would establish, a person in Respondent's shoes would be required to choose between waiving the 60-day requirement for conducting an Implied Consent Hearing (and essentially conceding an additional "aggravating factor") or having the Implied Consent Hearing prior to resolution of the collateral criminal matter and running the risk

of having statements and findings from the Implied Consent Hearing used against her on the criminal side. This necessary outcome entails far graver due process concerns than any of those raised by Appellant in its brief. The Minnesota Impaired Driving Code as presently constituted does not impose the kind of dilemma on impaired driving offenders that Appellant inadvertently seeks.

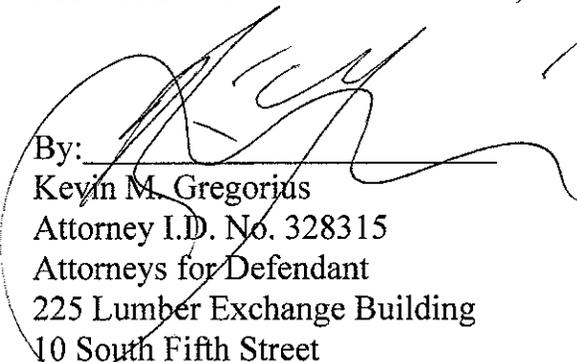
There is no doubt that the carnage caused by drunk drivers is well documented. It is important to remember however that the Legislature's role in combating drunk driving is preeminent. Too, it is important to understand that it is the Appellant who is asking this Court to attack the Legislature's clearly-expressed codifications in the Impaired Driving Code. It should not be the province of this Court to assume a legislative function and ignore the language of plainly written statutes as a reversal in favor of Appellant would necessarily entail.

**CONCLUSION**

The District Court was correct in denying the use of a contested and unreviewed administrative license revocation as an aggravating factor to support forfeiture of the Appellant motor vehicle. Respondent was not eligible for prosecution for the offense of second-degree driving while impaired on May 9, 2007. Thus, under the plain language of the Minnesota Impaired Driving Code, the Appellant motor vehicle was not subject to forfeiture on that date or anytime subsequent. The Appellant motor vehicle has been in the possession of the government for over a year. It must be returned to Respondent forthwith.

Respectfully Submitted,

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