

STATE OF MINNESOTA

IN SUPREME COURT

Alan and Keri Bearder, et al.,
Petitioners,

**RESPONSE IN OPPOSITION TO
PETITION FOR REVIEW OF
DECISION OF COURT OF APPEALS**

vs.

State of Minnesota, Minnesota Department of
Health, and Dr. Sanne Magnan, Commissioner of
the Minnesota Department of Health,

Appellate Court Case No.: A10-101

Date of Filing of Court of Appeals
Decision: August 24, 2010

Respondents.

TO: The Supreme Court of the State of Minnesota.

Respondents oppose Supreme Court review of the above-entitled decision of the Court of Appeals upon the following grounds:

I. LEGAL ISSUE AND ITS RESOLUTION BY THE COURT OF APPEALS.

Did Respondents violate the Genetic Information Statute, Minn. Stat. § 13.386 when, pursuant to the statutes and rules governing the Newborn Screening Program, they collected blood specimens from the 25 minor plaintiffs, analyzed the specimens for rare heritable and congenital disorders, and unless a parental destruction directive was received, retained the specimens and test results?

The court of appeals held: No, affirming dismissal of Petitioners' claim brought under section 13.08 of the Minnesota Government Data Practices Act ("Data Practices Act").

II. RULE CRITERIA RELIED UPON BY PETITIONERS.

Petitioners invoke the criteria of Minn. R. Civ. App. P. 117, subd. 2(a) and (d). Neither of these criteria supports granting review in this case. First, the court of appeals applied established precedent governing statutory interpretation to the particular facts of this case. The court of appeals also applied the standards for determining whether a non-moving party has shown that there is genuine issue of material so as to defeat a motion for summary judgment.

Second, the resolution of this case has a narrow impact and does not determine all Minnesotans' future rights concerning their newborns' genetic information.

III. STATEMENT OF THE CASE.

The Newborn Screening Program detects rare, hidden disorders in babies who seem healthy at birth, so that treatment can begin early to prevent serious permanent problems or even death. The 25 minor plaintiffs were screened at birth by the Minnesota Department of Health ("MDH"). Unless a child's parent directed destruction, the residual blood specimen left after testing and test results were retained and securely stored by MDH. Under Minn. Stat. § 144.128, the parent plaintiffs have the right at any time to direct MDH to destroy their children's blood specimens and test results. Nevertheless, Petitioners brought this action asserting a Data Practices Act claim, seeking relief for alleged violations of Minn. Stat. § 13.386 ("Section 13.386"), which governs the collection, storage, use and dissemination of "genetic information" unless "otherwise expressly provided by law."¹

The district court granted Respondents' motion to dismiss or, in the alternative, for summary judgment. With respect to the Data Practices Act claim, the court held that Section 13.386 did not apply to the 16 minor plaintiffs who were born before the August 1, 2006 effective date of the law. PFR App. 276. As to the remaining nine minor plaintiffs, the court held that Section 13.386 did not apply to the Newborn Screening Program because express provisions of law govern the Program. *Id.*

The court of appeals unanimously affirmed in a published opinion. With respect to the Data Practices Act claim, the court carefully evaluated the statutory language of Section 13.386

¹ Petitioners' amended complaint also asserted numerous tort claims, along with claims that Respondents' conduct violated their constitutional right to privacy and constituted a "taking" of their property. Contrary to Petitioners' statements in the Petition for Review ("PFR") herein, however, the amended complaint did not seek a declaratory judgment, nor did it allege that Respondents violated requirements of Minn. Stat. §§ 144.125 and 144.128 relating to advising parents of the right to refuse testing and destruction of specimens and test results upon request.

to determine whether it affects the newborn screening process as authorized by the newborn screening statutes and other public health statutes that grant the Commissioner of MDH broad authority to execute her duties. The court concluded that Respondents did not violate Section 13.386 because they were expressly authorized by law to collect, retain, use and disseminate blood specimens and test results for the newborn screening process. PFR App. 9-10, 12. The court further determined that Section 13.386 had no application to the 16 minor plaintiffs born prior to the effective date of the statute. *Id.* at 13. Finally, the court found that Petitioners had failed to present facts to counter Respondents' "specific evidence that the blood screening results of all 25 children involved in this action were not used in any public health studies or research." *Id.* The court concluded that, due to the lack of a genuine issue of material fact on that issue, summary judgment was appropriate on Petitioners' claim that the minor Plaintiffs' blood specimens were utilized for non-newborn-screening purposes that would trigger the informed consent provisions of Section 13.386. *Id.* at 13-14.

IV. ARGUMENT.

A. THE COURT APPLIED WELL-ESTABLISHED PRINCIPLES TO THE PARTICULAR FACTS OF THIS CASE.

There is no reason for further review because the court of appeals applied to the particular facts of this case established principles and precedents governing statutory interpretation and the standards for determining whether a non-moving party has shown that there is genuine issue of material so as to defeat a motion for summary judgment.

The court of appeals correctly identified and applied the established principles of statutory construction that apply in this case. The task before the court was to determine whether Section 13.386, which applies "unless otherwise expressly provided by law," restricts or overrides Respondents' broad authority with regard to the newborn screening process. The court applied several well-established principles of statutory construction: (1) that statutory language

must be construed according to its common and approved usage;² (2) that statutes should be construed, whenever possible, so as to give effect to all their provisions;³ and (3) statutes designed to protect public health should be liberally construed.⁴ Applying these principles, the court properly found that there was express statutory authority authorizing Respondents to collect, retain, and use blood specimens and test results and to conduct newborn-screening-related health studies and investigations. PFR App. at 9-10, 12. The court did not apply any new statutory construction principles or policies.

The court of appeals also correctly applied well-established principles when determining that summary judgment was proper as to claims that Petitioners had failed to support with a showing of specific evidence. It is well settled that creating a genuine issue of material fact requires more than presenting evidence which “merely creates metaphysical doubt as to a factual issue.” *Valspar Refinish, Inc. v. Gaylord’s Ind.*, 764 N.W.2d 359, 364 (Minn. 2009) (quotation omitted). Here, the court correctly noted that Petitioners presented *no* specific facts to counter Respondents’ evidence that the minor plaintiffs’ blood specimens were not used in health studies after initial screening. The court of appeals broke no new ground in affirming the district court’s grant of summary judgment.

B. THE RESOLUTION OF THIS CASE HAS A NARROW IMPACT.

There is no reason for further review because the resolution of this case has a narrow impact. Sixteen of the minor plaintiffs were born before the effective date of Section 13.386, leaving only nine minor plaintiffs to whom the statute could possibly have applied. As to those

² See Minn. Stat. § 645.08 (2) (2008).

³ See *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000); Minn. Stat. § 645.26, subd. 1 (2008).

⁴ See *Ly v. Nystrom*, 615 N.W.2d 302, 308 (Minn. 2000); see also Minn. Stat. § 645.17 (5) (2008) (presumption that “the legislature intends to favor the public interest over any private interest”).

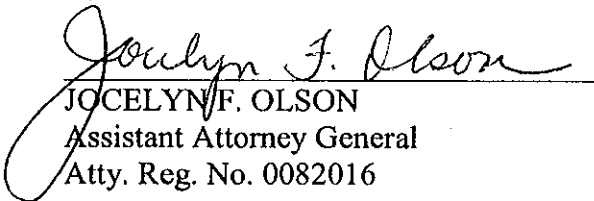
individuals, Respondents received the blood specimens, screened them, and then securely stored the specimens and results, as allowed by Minn. Stat. § 144.125. The facts underlying Petitioners' Data Practices claim do not raise a global issue of "genetic rights" or the future fate of all newborn blood specimens and test results retained by Respondents. Petitioners themselves can *prevent* Respondents from future storage, use or dissemination of the minor plaintiffs' blood samples and test results by supplying to MDH a parental directive under Minn. Stat. § 144.128 to destroy blood samples and test results. The issue of whether Respondents violated Section 13.386 with respect to the remaining nine minor plaintiffs is not an issue of statewide impact.

For these reasons, Respondents request an order denying review of the decision of the Court of Appeals.

Dated: October 8, 2010

Respectfully submitted,

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