STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

M[redacted] B[redacted] D[redacted],

Petitioner,

vs.

Commissioner of Public Safety,

Respondent.

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO RESCIND REVOCATION OF PETITIONER'S LICENSE

Court File No.: 27-CV-06-19902

TO: THE ABOVE-NAMED COURT; THE HONORABLE [redacted], JUDGE OF DISTRICT COURT; AND P[redacted] M[redacted], ASSISTANT ATTORNEY GENERAL.

INTRODUCTION AND PROCEDURAL HISTORY

Petitioner was charged with Gross Misdemeanor Refusal to Submit to Testing and Misdemeanor Driving While Under the Influence following a motorcycle accident on August 5, 2006. The criminal complaint, however, was not signed and filed by the Minneapolis City Attorney's Office until October 5, 2006. Petitioner did not receive the criminal complaint in the mail until October 25, 2006. On October 31, 2006, Petitioner contacted and retained Ryan Garry, attorney at Caplan Law Firm, for representation on the criminal case and implied consent case. Even though the Petitioner did not possess the *Notice and Order of Revocation* form, Mr. Garry immediately filed the implied consent petition on October 31, 2006. The court filed the Petitioner was not properly served with a Notice of Order for Revocation, and second that at the time of the implied consent reading, Petitioner was in a state rendering him incapable of refusal.

On January 12, 2007, Petitioner's counsel received a notice of motion and motion from J[redacted] W[redacted], Assistant Attorney General, requesting that this Court issue the following orders, (1) dismissing the Petition for Judicial Review on the grounds that Petitioner failed to comply with

the thirty day statutory requirement, (2) awarding the Commissioner attorney's fees, (3) awarding the police agency its expenses in sending the officer's to court, and (4) for any other relief the Court deems reasonable and proper under the circumstances.

Through this brief, Petitioner raises the issue of whether he was in a state rendering him incapable of refusal. In addition, Petitioner answers to the Commissioner's motions challenging the jurisdiction of the court, and requesting attorney fees. Finally, Petitioner requests attorney's fees from the Commissioner for having to prepare for and litigate an issue that never should have been raised in the first place.

FACTS

In the early morning hours of August 5, 2006, Petitioner was involved in a motorcycle traffic accident on the 4700 block of Humboldt Avenue South in Minneapolis. [Report of Officer R[redacted] M[redacted], Minneapolis Police Department (Aug 5, 2006).] Petitioner's motorcycle hit a parked car in front of 4730 Humbolt. [Accident Report of Officer R[redacted] H[redacted], Minneapolis Police Department (Aug 5, 2006).] Petitioner was ejected from the vehicle and landed in front of 4725 Humbolt, some 35 feet from the parked car. [*Id.*] Petitioner sustained serious injuries in the crash, including having the skin and flesh of his big toe ripped from the bone, which consequently exposed that toe's broken bone, a broken shoulder blade, a broken foot with all five toes broken, road rash skin burns over much of his body, and a missing piece of his scalp. [Supplemental Report of Officer R[redacted] M[redacted], Minneapolis Police Department (Aug. 5, 2006).] [Petitioner's testimony]. After hearing the crash, a nearby neighbor called 911, and reported that "the driver appears to be on fire as well," and "is rolling around on the ground attempting to put our the flames on self." [Id.] Police and paramedics responded, and Petitioner was taken to Hennepin County Medical Center for emergency care. [*Id.*]

At the hospital, Officer T[redacted] W[redacted] was determined to read the Implied Consent Advisory to Petitioner. [Supplemental Report of Officer T[redacted] W[redacted], Minneapolis Police Department (Aug. 5, 2006).] At the time of the reading, Petitioner was actively receiving treatment from various hospital personnel. [*Id.*; Transcript of "Audio Tape of Officer W[redacted] and Petitioner D[redacted]," p. 4 lines 12–25, p. 5 lines 18–23, p. 6 lines 12–13.] Due to the various doctors and nurses examining Petitioner in the operating room, it was necessary for Officer W[redacted] to read the Advisory in several disjointed segments. [*See Id.*] At one point, a hospital staff member was attempting to move Petitioner to another operating table, stating, "one, two, three….holler if I hurt you when I'm pushing. All right." Despite the obvious confusion and commotion in the emergency room, Officer W[redacted] continued her questioning, having to continually repeat most of the questions for Petitioner, despite Petitioner's answers being generally confused and unclear. [*Id. passim*.] As to Officer W[redacted]'s repeated question, "do you want to call an attorney," Petitioner responded with various answers such as, "I don't know," "what does it mean," "what for," "huh," "blood test" all while being poked and prodded by the doctors and nurses.[1]

Eventually Officer W[redacted] reached the end of the Advisory. [*Id.* p. 6.] The officer concluded, though Petitioner's intentions were far from clear, that Petitioner had refused testing. [*Id.* p. 6 line 17.] Because Petitioner was charged with Gross Misdemeanor Refusal to Submit to Testing, Petitioner's driver's license was revoked for one year. [Notice and Order of Revocation (Aug. 5, 2006).]

Petitioner testified credibly that he did not receive the *Notice and Order of Revocation* form from the police officer that night or any other night. Petitioner first saw this form when

[1] Enclosed with this brief, Petitioner has provided an audiotape of the implied consent reading at the hospital, and two transcripts. One transcript was provided to Petitioner's attorney by the prosecuting authority on the criminal case, the other transcript was provided to Petitioner's attorney by Johnson & Dziuk Court Reporters.

Petitioner's attorney sent him the discovery eventually received from the Minneapolis City Attorney's Office. Petitioner did not sign the *Notice and Order of Revocation* form, nor did Officer [redacted] check the box entitled, "Check if Driver Refused to Sign." The police officer testified that he was not contacted by the attorney general's office about whether or not he actually served Petitioner the *Notice and Order of Revocation* form.

LEGAL ISSUES

I. WHETHER PETITIONER WAS IN A CONDITION RENDERING HIM INCAPABLE OF REFUSAL.

ARGUMENT

I. BECAUSE PETITIONER WAS IN A CONDITION RENDERING HIM INCAPABLE OF REFUSAL, THE REVOCATION OF HIS DRIVING PRIVILEGES MUST BE RESCINDED.

A. A person who is incapable of refusal is deemed not to have withdrawn his consent to testing.

A person who is unconscious or otherwise incapable of refusal is deemed not to have withdrawn his or her consent to testing and a blood sample may be seized. See Minn. Stat. § 169A.51, Subd. 6 (2004); State, Dept of Public Safety v. Wiehle, 287 N.W.2d 416 (Minn. 1979); Stiles v. Commissioner of Public Safety, 369 N.W.2d 347 (Minn.Ct.App.1985). In a hospital context, the taking of blood samples is considered a minimally intrusive, reasonable method of blood–alcohol concentration testing. See Schmerber v. State of California, 384 U.S. 757, 771–772 (1966). A test of this nature may be less intrusive than the reading of the implied consent advisory to a patient receiving care at a hospital. Stiles, 369 N.W.2d at 354 (Minn. Ct. App. 1985).

B. A finding of incapacity depends upon the totality of the circumstances of the facts surrounding the alleged refusal.

A finding of incapacity is a question of fact and depends on the totality of the circumstances such that the reviewing court is left with a firm conviction that the driver was

incapable of making a reasonable refusal. See Thorton v. Commissioner of Public Safety, 384 N.W.2d 606 (Minn.Ct.App.1986); Stiles, 369 N.W.2d at 352. A person who is injured, somewhat disoriented, or receiving medical treatment may still be deemed to have refused testing *if* he or she is capable of responding to the officer. See Lindemann v. Commissioner of Public Safety, 404 N.W.2d 909 (Minn.Ct.App. 1987)(emphasis added). The criteria for incapacity is the extent of the apparent injuries, and where manifest injuries have been great, the driver has prevailed. See Villeneuve v. Commissioner of Public Safety, 417 N.W.2d 304, 307 (Minn.Ct.App.1988). See also Douglas v. Commissioner of Public Safety, 385 N.W.2d 850 (Minn.Ct.App. 1986).

In Stiles, the petitioner was taken to the emergency room after receiving injuries in a motorcycle accident. *Stiles*, 369 N.W.2d at 349. Though Stiles was confused and disoriented, the officer attempted to read the implied consent advisory to him. *Id.* at 349–350. Stiles' answers were short and confused. *See Id.* Eventually, after a circuitous attempt to figure out if Stiles wanted a lawyer or not, Stiles verbally refused the test. *Id.* at 350. In finding that Stiles was in a condition rendering him incapable of refusal, the court said:

> [h]ad the arresting officer here ordered a test after determining that Stiles was disoriented, the Commissioner could have offered that test result into evidence pursuant to the authority of Wiehle [287 N.W.2d 416 (Minn. 1979)] and Hauge [286 N.W.2d 727 (Minn. 1979)]. Such a test would almost certainly have been far less intrusive for Stiles than was the reading of the implied consent advisory at a time when his mind was disoriented and his body encumbered by various tubes, catheters, monitors, and oxygen equipment.

Stiles, 369 N.W.2d at 352 (footnote and citation omitted). The court then noted the officer's mistake:

> The officer chose instead to rely on the refusal of Stiles, whom the officer had unqualifiedly determined to be disoriented. Under circumstances such as these, such reliance raises the possibility that an injured driver, even though driving legally, could lose his or her license merely because of a test refusal uttered while in a disoriented state."

Stiles, 369 N.W.2d at 352 (footnote and citation omitted). Though the events in *Stiles* occurred before § 169A.51 subd. 6[2] became effective, the court noted that the statute "addresses the concerns now before this court." *Id.* at 353.

C. Given the totality of the circumstances in this case, Petitioner did not have the capacity to understand the implied consent advisory and was incapable of refusing the chemical test.

Here, in determining whether Petitioner was incapable of refusal, Thorton requires this Court to consider the totality of the circumstances. Here, Petitioner's injuries were very serious. Just prior to the reading of the implied consent advisory, Petitioner had just been in involved in a severe motorcycle accident where he was ejected from his motorcycle after hitting the rear of a parked car. The police reports indicate that Petitioner was literally on fire, rolling on the ground attempting to extinguish the flames. At the hospital, Petitioner was treated for a completely exposed broken bone in his right foot[3], a broken shoulder blade, a broken foot with all five toes broken, road rash skin burns over much of his body, and head injuries including a missing section of scalp. Moreover, just as in Stiles, Petitioner was disoriented and confused when he was questioned at the hospital. When Officer W[redacted] attempted to read him the implied consent advisory at the hospital, Petitioner was still actively receiving care from the medical staff. The officer had to continually repeat most of the questions, and at no time did Petitioner give a clear answer. The occasional responses from Petitioner that *were* discernable cannot truly be considered answers to the question asked; for example, when asked if he wanted to call an attorney, Petitioner's response was "What does it mean?" A reasonable officer could not have interpreted Petitioner's responses as indications of an understanding of the advisory, much less a competent refusal.

[2] Then Minn. Stat. § 169.123, subd. 2(c).
[3] Petitioner testified at the implied consent hearing that the skin and flesh of his big toe was hanging off to the side of his foot, while the exposed bone of the toe was sticking out.

Further, the reading of the advisory was interrupted several times while medical personnel attended to Petitioner. When read disjointedly and out of context, the complex advisory would be confusing for *anyone* facing the stress and embarrassment of police confrontation; here, an emergency room patient, in the middle of the night, in Petitioner's disoriented condition, could *certainly* not be expected to appreciate the import of the advisory when read in fits and starts.

Finally, ordering a blood test at a time when he was already undergoing medical procedures at a hospital, with trained staff on hand, would have been less intrusive than attempting to read the implied consent advisory at a time when Petitioner needed to focus on communication with the emergency room staff. The officer attending to Petitioner should have ordered the test despite Petitioner's apparent "refusal." Petitioner was not competent to refuse testing and his consent should have been deemed continuing.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court rescind the revocation of his driving privileges.

Respectfully submitted,

CAPLAN LAW FIRM, P.A.

Dated: February 27, 2007

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