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Daniel J. Hassing

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A MATTER OF INTERPRETATION

By Daniel J. Hassing*

Statutory interpretation is a matter that courts wrestle with on a daily basis. In some cases, it is easy and the text of the statute leads to a clear answer when applied to the facts of a case. In other cases, courts are left wondering what legislatures intended when they drafted the law. Over the years, appellate courts have developed rules to aid in their determination of legislative intent. Like other rules of law, these rules bind lower courts. But like the legislature, appellate courts are not always clear about the rules they are creating, and lower courts are sometimes left struggling with the application of the court's ruling.

Underhill v. Hobelman,[1] a recent decision from the Nebraska Supreme Court, is a decision that could frustrate lower courts. The decision in *Underhill* has muddled the rules of statutory interpretation. Namely, it makes unclear the situations in which courts can resort to a statute's legislative history to determine its meaning. While courts can resort to legislative history when the statute is ambiguous,[2] *Underhill* can be read to say that courts may examine legislative history any time it is interpreting a statute that the legislature amended after the court has already construed it. Unfortunately, the court implied this, rather than stating it explicitly, leaving lower courts to wonder what exactly the supreme court meant in the decision.

This brief commentary contains two parts. The first recounts the facts of *Underhill v. Hobelman* as well as the opinions handed down in the case. The second explores the court's recourse to the legislative history and its implications. Because the court was not clear as to what opened the door to legislative history, this paper will examine the possibility of ambiguity as well as the possibility that courts will always use legislative history to determine the effect of amendments. In the end, this commentary concludes that there is no clear answer as to what made legislative history available; the court simply did not say. Ultimately, this is a disservice to lower courts, as the decision arguably injects an element of uncertainty into what were fairly established rules.

* B.A., University of Nebraska-Omaha, 2006; B.S., University of Nebraska-Omaha, 2007; J.D. candidate, expected May 2010, University of Nebraska College of Law.

[1] 279 Neb. 30, 776 N.W.2d 786 (2009).

[2] Chase 3000, Inc. v. Public Service Com'n, 273 Neb. 133, 141, 728 N.W.2d 560, 568 (2007).

The Case

Anne Underhill and Shiloh Hobelman were friends. At the time of the accident, Underhill was on her way to visit Hobelman at his dorm room. Hobelman was disabled and used a dog named Brady to assist him with his day-to-day activities. When Underhill arrived, Hobelman's mother was walking Brady outside. Since Brady knew Underhill, Hobelman's mother let Brady off of the leash so that the dog could greet Underhill. Once Brady was free from the leash, he took off running towards Underhill. Underhill herself testified that Brady did not appear to be threatening nor did the animal appear to have any intent to harm Underhill. Nevertheless, Brady was apparently a little bit too aggressive in greeting Underhill as he ran into her leg, which caused her to fall down. As a result of the fall, Underhill sustained injuries that required surgery.[3]

Because Underhill was unable to pay her medical bills, she filed suit against Hobelman. She pleaded two causes of action: a negligence claim, which she later dropped, as well as a claim under section 54-601[4] of the Nebraska statutes. The district court granted summary judgment for Hobelman on the statutory claim.[5] In its ruling, the court relied on earlier cases that had interpreted section 54-601[6] to exclude injuries that resulted from a dog's conduct if the dog was acting playfully or mischievously; in other words, the dog had to be acting maliciously to invoke the strict liability of section 54-601.[7] Further, the district court held that a later amendment that added the word "injuring" to the statute expanded the range of injuries for which the dog owner could be liable but did not expand the strict liability of the statute. In order to determine the effect of the statutory amendment, the Nebraska Supreme Court agreed to review the case.

The *per curiam* opinion of the court upheld the lower court's decision; namely, that the later amendment to the statute did not extend strict liability to those situations in which the dog was acting playfully or mischievously.[8] The court reasoned that the amendment merely expanded the range of compensable injuries and did not extend the reach of the strict liability. This conclusion was based on the fact that the legislative history of the amendment made no

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[3] *Id.* at 31–32, 776 N.W.2d at 787.

[4] The relevant portion of the statute provides:

> the owner or owners of any dog shall be liable for any and all damages that may accrue (1) to any person . . . by reason of having been bitten by any such dog or dogs and (2) to any person . . . by reason of such dog or dogs killing, wounding, injuring, worrying, or chasing any person or persons.

NEB. REV. STAT. § 54-601 (Supp. 2009).

[5] *Underhill*, 279 Neb. at 31, 776 N.W.2d at 787.

[6] The earlier version of the statute did not include the word "injuring." *See id*. at 33, 776 N.W.2d at 788.

[7] Underhill admitted that the dog was not acting maliciously. *Id.* at 31, 776 N.W.2d at 787.

[8] *Id.* at 33–34, 776 N.W.2d at 789.

mention or reference to the earlier court decision[9] that had limited strict liability to those situations in which the dog was acting maliciously.[10] Because the legislature had not made clear otherwise, the court presumed that the legislature had acquiesced in its earlier reading of the statute.[11]

Justice McCormack dissented from the *per curiam* opinion. Justice Miller-Lerman joined his dissent. Under Justice McCormack's reading of the statute, the "plain and unambiguous language" required that strict liability be imposed "without regard to the intent of the dog at the moment of impact."[12] Justice McCormack began by noting that the statute was a break from the common law rule with regards to dog attacks. At common law, a dog owner could only be liable if he or she knew of the dangerous propensities of a dog. This, in effect, would give each dog a free bite as the dog owner would likely have no basis for knowing about the dangerous propensities if nothing had previously happened.[13] In *Donner v. Plymate*,[14] the court ruled that section 54-601 was designed to abrogate this common law rule and impose strict liability, but only with respect to acts mentioned in the statute.[15] Because all of the acts mentioned in the statute—killing, wounding, worrying, or chasing—are acts done by vicious dogs, acts in which the dog was only playful or mischievous were outside of the statute.[16] The amendment at issue in the case added the word "injuring" to the list of acts for which dog owners could be liable. Since one can be injured by a dog that is acting playfully or mischievously, Justice McCormack would have held that the statute expanded the breadth of strict liability under the statute.[17]

The Court's Use of Legislative History

Perhaps the most interesting legal question about *Underhill* relates to the court's use of the legislative history. Under the rules of statutory interpretation, the legislative history is to be used as an aid to interpretation only when the text of the statute is considered ambiguous.[18]

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[9] Donner v. Plymate, 193 Neb. 647, 228 N.W.2d 612 (1975).

[10] *Underhill*, 279 Neb. at 34, 776 N.W.2d at 789.

[11] *Id.*

[12] *Id.* at 35, 776 N.W.2d at 789 (McCormack, J., dissenting).

[13] *Id.*, 776 N.W.2d at 790.

[14] *Donner*, 193 Neb. at 647, 228 N.W.2d at 612.

[15] *Id.* at 649, 228 N.W.2d at 614.

[16] *Underhill*, 279 Neb. at 35–36, 776 N.W.2d at 789–90 (McCormack, J., dissenting).

[17] *Id.* at 37, 776 N.W.2d at 791.

[18] Chase 3000, Inc. v. Public Service Com'n, 273 Neb. 133, 141, 728 N.W.2d 560, 568 (2007).

However, the court seemed to open the door to a new situation in which legislative history can be used. It now appears that Nebraska courts can use legislative history anytime they are examining a statute that has been amended after an appellate court has construed it. While ambiguity certainly still is a possible explanation for the court's recourse to legislative history, the more plausible explanation is that legislative history, along with the text of the statute, can be used to rebut a presumption that the legislature has acquiesced to the court's prior determination of a statute's meaning.

The presence of ambiguity has traditionally been a necessity before a court can look to legislative history,[19] and certainly ambiguity is a possible explanation of why the court looked to legislative history in *Underhill*. "Ambiguity" is "[a]n uncertainty of meaning or intention, as in a contractual term or statutory provision."[20] Whether or not the statute is ambiguous appeared to be a point of disagreement between the court's opinion and the dissent. Indeed, Justice McCormack made no mention of the legislative history in his opinion and instead pointed to the "plain and unambiguous language" of the statute.[21] If ambiguity is what allowed the court to consider legislative history, the court must have found the statute to be ambiguous. However, the court really gave no analysis as to whether the amendment made the statute ambiguous. This begs the question: in what way was the statute ambiguous?

The amendment at issue in *Underhill* added the word "injuring" to the statute, thus making dog owners liable for damages caused by "dogs killing, wounding, injuring, worrying, or chasing any person or persons."[22] However, Underhill made her appeal against the backdrop of *Donner v. Plymate*,[23] which limited the breadth of strict liability under the statute to situations in which the dog was acting maliciously. Further, Underhill acquiesced in this reading of the statute because she did not argue that *Donner* was decided incorrectly.[24]

This created a tension in the statute: was the breadth of strict liability to be expanded by the addition of the word "injuring" or was it not? The court in *Donner* had determined that, when read together, "killing," "wounding," "worrying," and "chasing" implied that the dog was acting aggressively.[25] However, "to injure" someone does not necessarily require a malicious

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[19] *See, e.g.*, Pearson v. Lincoln Telephone Co., 2 Neb. App. 703, 710, 513 N.W.2d 361, 366 (1994) ("[W]hen the statutory language is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the lawmakers' intent").

[20] BLACK'S LAW DICTIONARY 93 (9th ed. 2009).

[21] *Underhill*, 279 Neb. at 35, 776 N.W.2d at 789 (McCormack, J., dissenting).

[22] NEB. REV. STAT. § 54-601 (Supp. 2009).

[23] 193 Neb. 647, 228 N.W.2d 612 (1975).

[24] *Underhill*, 279 Neb. at 33, 776 N.W.2d at 788.

[25] *Donner*, 193 Neb. at 650, 776 N.W.2d at 614.

intent.[26] While courts are to give statutory language its "plain, ordinary, and popular" meaning,[27] it has also been said that "words are known by the company they keep . . . [and] words grouped in a list should be given a related meaning."[28] These two principles of statutory interpretation seem to lead to opposite conclusions. If the former controls, it would seem that liability should be imposed for injuries regardless of the intent of the dog. But if the latter controls, and words are read in light of what surrounds them, it would appear that strict liability is still limited to situations in which the dog was acting maliciously. Since a reading of the text arguably does not give a clear picture of what the legislature intended, the statute is ambiguous, and recourse to the legislative history was proper.

It is also possible that an amended statute could be considered inherently ambiguous. This idea does not seem as far-fetched as one would initially suspect. As all lawyers know, statutes can be divided into elements. An amendment intended to change the meaning of one element could, at least in theory, have unintended, incidental effects on another element. These incidental effects could be the result of a change in punctuation in the statute or a sort of "spillover" effect from changed language.[29] In many cases, the exact contours of the legislature's amendatory intent will not be easily ascertainable;[30] in other words, it will be ambiguous. This is especially true in a case like *Underhill* when the addition of one word could implicate changes on two different aspects of a statute. In such cases, it is necessary that courts look to legislative history to determine the exact legislative intent so as not to disrupt statutory constructions of elements to which the legislature acquiesced.

There is another possible, yet related, explanation for the recourse to legislative history. In *Underhill*, the court said that it "presume[s] that when [it has] construed a statute and the same statute is substantially reenacted, the Legislature gave to the language the significance [the court] previously accorded to it."[31] The court then went on to note that neither the language of the statute nor the legislative history contained anything that would rebut that presumption. Thus, *Underhill* arguably creates a rebuttable presumption that legislatures acquiesce when they enact a similar statute. Further, both the text of the statute as well as the legislative history are available to help the parties rebut this presumption. One thing that makes this an attractive reading of

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[26] *See* BLACK'S LAW DICTIONARY 856 (9th ed. 2000) (defining injury as "[a]ny harm or damage).

[27] Vokal v. Neb. Accountability and Disclosure Comm'n, 276 Neb. 988, 992, 759 N.W.2d 75, 79 (2009).

[28] State v. Kipf, 234 Neb. 227, 234, 450 N.W.2d 397, 404 (1990).

[29] Remember that "words are known by the company they keep" and that a word's meaning could arguably change slightly depending on what words surround it.

[30] *Underhill* makes this point clear. The legislative history shows that the sole purpose was to expand the range of compensable injuries, not the scope of strict liability. *See Discussion of LB 1011 Before Committee on Agriculture*, 92nd Leg., 2nd Sess., 5–8 (Neb. 1991) (statements of Sen. Ed Schrock and Mr. Claude Berreckman). But this change by the legislature almost unintentionally altered another aspect of the statute.

[31] Underhill v. Hobelman, 279 Neb. 30 *Id.* at 31–32, 776 N.W.2d at 787.

Underhill is that it would explain why the court did not point out any ambiguities in the statute prior to examining the legislative history.

Thus, there are three possible explanations as to why the court looked to legislative history. The first limits its holding to the facts and statute before the court. The second would hold that many amended statutes are, in a sense, ambiguous because the exact intended scope of amendment may not be clear from the text. And the third would hold that courts can always look to legislative history of amended statutes even if viewed for the first time, the statute may not appear to be ambiguous.

While lawyers and judges may differ as to when, if ever, a court should look to legislative history in determining a statute's meaning, all would agree that the rules on the question should be clear. Surely, they would argue that all laws should be clear, whether they are judge-made rules of statutory interpretations or legislative enactments that deal with harm caused by dogs. Clarity in such areas leads to a more efficient judicial system that better serves the populace. Unfortunately, clarity eluded the Nebraska Supreme Court in *Underhill v. Hobelman*, leaving attorneys unsure of when they can resort to legislative history.

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