IN THE SUPREME COURT OF IOWA

S. Ct. No. 20-0997
Polk Co. No. CVCV060212

JENNIFER ANN ASKVIG,

Petitioner-Appellant,

vs.

SNAP-ON LOGISTICS CO., a/k/a,
SNAP-ON TOOLS CORPORATION,

Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
Hon. Jeffrey Farrell,
JUDGE

APPELLANT'S PAGE PROOF COPY OF BRIEF AND ARGUMENT

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CERTIFICATE OF COMPLIANCE

1. This Page Proof Copy of Appellant's Brief and Argument complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this Page Proof Copy of Appellant's Brief and Argument contains 8,033 words, excluding the parts of the petition exempted by Iowa R. App. P. 6.903 (1)(g)(1).

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_____ September 18th, 2020

Mark S. Soldat Date

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the district court err when it determined that the supreme court's supervisory order number 33 and its supplement did not apply to the statute of limitations for seeking judicial review of an agency's final decision in a contested case?

Webster County Board of Supervisors v. Flattery,
268 N.W.2d 869 (Iowa 1978).

Iowa Code section 17A.19.

II. Did the district court err by not considering whether there had been substantial compliance with Iowa Code section 17A.19(3)?

Iowa Code section 17A.19.

Iowa Public Service Company v. Iowa State Commerce Commission,
263 N.W.2d 766 (Iowa 1978).

Kerr v. Iowa Public Service Company,
274 N.W.2d 283 (Iowa 1979).

Ford Motor Company v. Iowa Department of Transportation Reg. Board,
282 N.W.2d 701 (Iowa 1979).

Black v. University of Iowa,
362 N.W.2d 459 (Iowa 1985).

Fort Dodge Security Police v. Iowa Department of Revenue,
414 N.W.2d 660 (Iowa 1987).

Sharp v. Iowa Department of Job Service,
492 N.W.2d 668 (Iowa 1992).

Iowa Code section 17A.23.

Webster's New World College Dictionary,
4th Edition (2010).

Carolan v. Hill,
553 N.W.2d 882 (Iowa 1996).

Larson Manufacturing Company Inc. v. Thorson,
763 N.W.2d 842 (Iowa 2009).

City of Des Moines v. Des Moines Police Bargaining Unit,
360 N.W.2d 729 (Iowa 1985).

ROUTING STATEMENT

This case should be retained by the supreme court. It should because it meets the criteria of Iowa R. App. P. Rule 6.1001(2)(c)(d). In the district court, issues were preserved concerning: (i) the supreme court's meaning and application of its 4/02/20 supervisory order number 33 and its 5/22/20 supplement to it; and (ii) the inconsistencies of statutory construction, interpretation, and applications of Iowa Code sections of 17A.19.

STATEMENT OF THE CASE

On **2/05/20**, the Iowa workers' compensation commissioner, ("commissioner"), filed an appeal decision in the contested case between Jennifer A. Askvig, ("Askvig"), and Snap-On Logistics Company, ("Snap-On"). (decision)

On **2/25/20**, Askvig filed a rehearing application with the commissioner. (application)

On **5/18/20**, Askvig filed a judicial review petition with the district court in Polk County, ("district court"), (petition.)

On **6/05/20**, Snap-On filed a pre-answer motion to dismiss Askvig's judicial review petition, (petition.)

On **6/22/20**, a commissioner's delegate certified the agency's contested case records to the district court. (certificate.)

On **7/03/20**, Askvig filed a resistance to Snap-On's pre-answer motion to dismiss judicial review petition, attached to which was an affidavit. (resistance.)

On **7/09/20**, the district court held an unrecorded hearing concerning the parties' motion and resistance. (ruling on motion to dismiss, p. 1.)

On **7/09/20**, the district court filed a ruling on motion to dismiss in which it granted the motion to dismiss and assessed the court costs to Askvig. (ruling.)

On **7/29/20**, Askvig filed a notice of appeal to the supreme court from the district court's ruling on motion to dismiss. (notice.)

STATEMENT OF THE FACTS

When Askvig's attorney filed a rehearing application with the commissioner on 2/25/20, he indicated that he had intended "to file a timely judicial review petition…. " (affidavit attached to 7/03/20 Askvig's resistance to motion to dismiss, p. 1 ["affidavit."]) He did because there were many indications that if the commissioner did not correct the legal errors made in his 2/05/20 decision, a judicial review case would have to be filed in the district court… " (affidavit.)

By **3/15/20**, the commissioner had not granted the [rehearing] application, so it was deemed denied pursuant to Iowa Code section 17A.16(2) and Rule 876-2.4, I.A.C…. " By **4/14/20**, no judicial review petition had been filed on behalf of… Askvig as required by Iowa Code section 17A.19(3)…. " (ex. C, p. 1, attached to Snap-On's 6/25/20 motion to dismiss, ["ex. C"].

"The months of February-April, 2020, were fairly busy months for… [Askvig's attorney]." (affidavit, p. 2.) For one thing, the following occurred:

> In the middle of February, 2020… [Askvig's attorney] started hearing about a virus which had started in China and which had spread to countries such as Italy and Iran. The virus was discussed and monitored within… [Askvig's attorney's] office throughout the rest of February and into mid-March. However, after the rapidity of its spread became more apparent, in part because… [Askvig's attorney] was so busy….
>
> Nevertheless, during the work week of 3/16/20-3/20/20, all four members of the law firm took action. They closed the office to the public that week…. [Askvig's attorney's] partner and his legal assistant agreed to shelter themselves and work from home… [Askvig's attorney] decided to continue working from the office. The whole process in… [the] office became altered, confusing, and inefficient.

> Making matters even worse… [Askvig's attorney's] partner's paralegal… caught something which was suspected by a doctor to be Covid-19. She… [was] out of the office ever since that date, ['3/22/20']. She did return, however, in early June for a few hours during a two day span, but she was unable to perform her job.
>
> This caused even more inefficiency and lack of organization in the firm. As just one of many possible examples, it left… [Askvig's attorney] alone in the office to answer phone calls which otherwise would have been screened if they were unwanted solicitations or taken a message if either partner was occupied at the time….
>
> This arrangement also had been difficult for… [Askvig's attorney], personally because he was not technologically savvy… [e]ven having to learn how to send attachments to his assistant to word process. He also did not have… [his legal assistant] in the office to remind him of upcoming due dates… (affidavit, pp. 4-5.)

For another thing, Askvig's attorney also was busy during the months of February-April, 2020 devoting 308.2 hours just on six cases. (affidavit pp. 2-3.) Additionally, he was busy as follows:

> During 2/05/20-5/01/20… [Askvig's attorney] recorded 38 hours on various files with lesser hours in each of them than those itemized above. During this same period… [he] worked 7 days a week, 60-70 hours each week, except on Sunday, 2/09/20, Saturday 2/23/20, and Saturday 3/14/20, all of which days he stayed home and except on 2/13/20-2/14/20 when he attended an IAJ workers' compensation seminar in West Des Moines. During this period, he did not record his hours for when he was doing activities on behalf of the law firm, reading new cases, and doing general research…. (affidavit, p. 3.)

For yet another thing, the following also occurred during the months of February-April, 2020, "the commissioner had implemented an electronic filing system and put it into place in [the] late summer, as well as adopted new hearing

rules which moved the last pre-hearing deadline from 30 days before hearing, to 7 days before hearing." (affidavit, p. 2.) This provided another challenge to any attorneys who was "not technologically savvy."

Accordingly, Askvig's attorney's expressed beliefs that:

> Because of the hearing workload prior to and after the office was closed to the public, the failure of the commissioner to respond to the 2/25/20 rehearing application, and the general stresses and confusion of self-sheltering in both the office and at home, both [Askvig's attorney's] legal assistant and he overlooked the fact that the "deemed denied" even had occurred on 3/16/20 and that the judicial review needed to be filed on or before 4/15/20.
>
> The most… [immediate] causes of this "overlooking" were the 54 hours consumed drafting the Berte brief during 4/09/20-4/10/20, 4/12/20, and 4/17/20-4/21/12 and the Covid-19 disruption of normal processes of monitoring deadlines. Resultantly, 4/15/20 came and went.
>
> Indeed, it was not until Snap-On's attorney sent… [Askvig's attorney] her 5/05/20 letter, (ex. B, attached to Snap-On's 6/05/20 pre-answer motion to dismiss judicial review petitioner), that he even realized there had been a statutory deadline, let alone one that already had gone by. (affidavit, p. 5.)

In that 5/05/20 letter, Snap-On conveyed that "[b]y my calculations, the deadline to file an application for judicial review has expired for this matter. Can you please confirm you have not filed an application for judicial review?" (ex. B, attached to Snap-On's motion to dismiss.)

On **5/18/20**, Askvig's attorney responded that based on the supreme court's supervisory orders on 4/14/20 and 5/08/20, "the time for filing a judicial review

has not expired… [and enclosed] a copy of the judicial review petition which is being filed today." (ex. C, attached to Snap-On's motion to dismiss.)

Furthermore, Askvig's attorney noted that:

> Be that as it may, it was not just [Askvig's attorney's] law firm who had to adjust to the quickly-spreading pandemic. As early as 3/16/20, Chief Justice Christenson issued a letter in which she acknowledged "**the profound impact COVID-19 has placed on our daily lives**… [and stating that she was] interested in hearing about concerns you have." This letter is attached to this affidavit as exhibit 2.
>
> On 3/17/20, the supreme court issued a release in which it informed everyone that it had "issued an order permitting new ways to access courts to prevent the spread of coronavirus." It did so "[f]ollowing [Iowa] Governor Reynolds' State of Public Health Emergency Declaration earlier today." In this release, it further was stated that "in this time of crisis, the form in which this public service [by the judiciary] is provided must be modified in a manner that allows services to continue…." (affidavit, p. 6, *emph. supp.*)

ARGUMENT

Division I

THE DISTRICT COURT ERRED WHEN IT DETERMINED THAT THE SUPREME COURT'S SUPERVISORY ORDER NUMBER 33 AND ITS SUPPLEMENT DID NOT APPLY TO THE STATUTE OF LIMITATIONS FOR SEEKING JUDICIAL REVIEW OF AN AGENCY'S FINAL DECISION IN A CONTESTED CASE.

Statements Addressing How The Issue Was Preserved for Appellate Review/Scope of Standard of Appellate Review.

The issue in this division was preserved for appellate review in: the 6/05/20 pre-answer motion to dismiss judicial review petition, plus its attachments; the

7/03/20 resistance to pre-answer motion to dismiss judicial review petition, plus its attachments; and the 6/09/20 ruling on motion to dismiss.

The scope and standard of appellate review is for corrections of errors at law.

Advocacy. In its 7/09/20 ruling, the district court held *inter alia* as follows:

> It logically follows that if the court cannot expand its judicial review jurisdiction by rule, it likewise cannot do so by supervisory order….
>
> The [supreme] court noted that Iowa Code chapter 17A does not include a savings clause, so the failure to file a petition within the timeframe provided in the statute meant that court lacked jurisdiction to consider the petition. *Id*. at 167-68. The court reiterated that "judicial review of administrative agency action is a special proceeding [and] is in all respects dependent upon the statutes [that] authorize its pursuit." *Id*. (quoting *Anderson v. W. Hodgeman & Sons, Inc*., 524 N.W.2d 418, 420 n. 1 (Iowa 1994)). Notably, the court rejected an argument that it could use its rules of appellate procedure to cure a litigant's failure to timely file. Id. This again shows that jurisdiction of judicial review is solely a province of the statutory scheme in chapter 17A.
>
> Historically, the courts have distinguished cases involving a district court's appellate jurisdiction from those invoking its original jurisdiction. *Anderson*, 524 N.W.2d at 420. Although judicial review proceedings are not a true "appeal," the courts treat them as appellate in nature and require statutory compliance to invoke district court jurisdiction. *Id*. at 421, n. 1. In contrast, other cases present a question of the court's authority to hear a particular case. *Id*. at 421, n. 2….
>
> The Iowa Supreme Court order is captioned “Statute of Limitations.” The order is within its authority to grant more time in original jurisdiction cases which it has authority to hear. However, the court cannot extend the court’s jurisdiction to hear a chapter 17A appeal if filed 30 days following the agency’s decision on an application for rehearing. It is notable that the order does not reference judicial review actions or chapter 17A. The supreme court is well-aware of its precedent. It understood it could not extend

> jurisdiction in chapter 17A appeals. That would explain why it did not refer to that category of cases in its supervisory order….
>
> For these reasons, the supreme court order did not tell the period to file this judicial review action. The court does not have jurisdiction of this matter. It must be dismissed…. (7/09/20 ruling, pp. 2-3, 4.)

The district court, however, did not consider the advocacy made on Askvig's behalf that in certain circumstances, the supreme court has inherent powers to suspend or override statutes. (resistance, pp. 23-25.) These circumstances have included:

> Do[ing] whatever is essential to the performance of its constitutional functions…. "occasions not provided for by established methods…. [Only w]hen… [established methods fail and the court shall determine that by observing them the assistance [was] necessary for the due and effective exercise of its own functions cannot be had or when an emergency arises which established methods cannot or do not instantly meet, and then does on occasion arise for the exercise of inherent power." *State ex rel. Hillis v. Sullivan*, 48 Mont., 320 N.W., 329, 137, P. 392, 395….
>
> But a court should not be required to withhold utilizing inherent power until the court is incapacitated:
>
> > "We hold that the test of reasonableness does not require the trial judge to sit by until his court ceases to function before acting. We hold he is acting within reason when he takes steps to foreseeable difficulties which are imminently threatening the functions of his court." *McAfee v. State ex re. Stodola*, supra, 258 N.W.2d Ind. At 682, 284 N.E.2d, at 782….
> >
> > This court analyzed the judiciary's inherent power:
> >
> > "The power is invested in the court. It is a part of its inherent power-a power necessary for its own protection and existence, essential to the administration of justice and the enforcement of the laws – finding its support in the same reasoning which authorizes a court to punish for

> contempt, to appoint ministerial or police officers to carry out its mandates and other similar acts. * * * Our courts are not thus powerless. The public business is not to be left thus to suffer. A court possessing such jurisdiction is not limited to the very letter of the character of its power. The charter gives it life. Of course, it has the right and power to preserve this life. The vital machinery cannot be kept in motion without **officers**… *White v. Polk County*, 17 Iowa 413, 414-415 (1864)

Webster County Board of Supervisors v. Flattery, 268 N.W.2d 869, 874-875 (Iowa 1978), [both bolding and underscores, *emph. supp.*]

As the supreme court noted in *Flattery*, at 877, "this court rarely has treated the subject of inherent judicial power… " Yet, in its *Flattery* decision displayed a range of situations in which its use was appropriate by quoting with approval from the appellate courts in other states, as well as from the Iowa supreme court. Thus, by at least analogy, therefore, the *Flattery* decision is applicable to this case.

It is because during March and April, 2020, the supreme court was aware that an "emergency had arisen in the form of coronavirus which was critically affecting that system's functioning;"

> Following Governor Reynold's State of Public Health Emergency Declaration earlier today, [on 3/17/20], the Iowa Supreme Court issued an order permitting new ways to access courts to prevent the spread of the coronavirus.
>
> "Maintaining public trust and confidence is of utmost importance to the judicial branch, and Iowa's judges stand ready to fulfill their duties," Chief Justice Susan Larson Christensen said. "However, in this time of crisis, the form in which this public service is provided must be modified in a manner that allows services to continue. We must keep our courts open to the fullest extent… (ex. III, p. 1, attached to the 7/03/20 resistance).

> Since March 12, 2020, the Iowa Supreme Court has issued seven supervisory orders relating to the spread of the novel coronavirus/COVID-19. This [4/02/20] order combines all of those orders, only substantively changing the dates to reconvene court proceedings to reflect the extension of the ongoing State of Public Health Disaster Emergency and the Iowa Department of Public Health's anticipated peak of the virus. In doing so, it extends the dates and dispensations concerning Iowa's courts to allow time for the relaxation of social distancing rules by reconvening bench trials first and gradually easing into larger gatherings of people with the commencement of jury trials.
>
> **This order replaces all previous supervisory orders relating to the spread of the novel coronavirus/COVID-19 in their entirety**. The Iowa Judicial Branch continues to carefully monitor the public health situation, balancing the need to take measures to reduce the spread of the virus with its commitment to conducting business as necessary. Accordingly, the supreme court directs as follows pursuant to its available legal authority, including Article III, section 1 and Article V, section 1 of the Iowa Constitution….
>
> **STATUTE OF LIMITATIONS**
>
> 33. **Tolled**. Any statute of limitations, statute of repose, or similar deadline for commencing an action in district court is hereby tolled from March 17 to June 1 (76 days). Tolling means that amount of time to the statute of limitations or similar deadline. So, for example, if the statute would run on April 8, 2020, it now runs on June 23, 2020 (76 days later). (ex. IV, pp. 1, 9, *emph. supp.*)

At least by analog, it also was applicable because by issuing its supervisory orders, the supreme court took "steps to forestall foreseeable difficulties which are imminently threatening the functions of the court…. " In this regard, attorneys are "officers" of the court and part of its "vital machinery."

That fact is of importance to resolution of this division's issue. It especially is because without a consideration of the supreme court's inherent power, the district court, partially based its decision on the following considerations:

> Beyond this legal authority, there are practical distinctions between judicial review proceedings and original jurisdiction cases. The coronavirus crisis created real obstacles to filing and serving original actions. Attorneys had more difficulty meeting with clients and potential witnesses before filing an action. Service is complicated because process services may need to come into personal contact with defendants. These concerns do not apply to judicial review cases. The attorneys and clients have already been through a contested case hearing and intra-agency appeal. The facts and arguments have already been developed. The decision to take the next step to Judicial review does not require the same level of personal contact. Service can be made by regular mail, so personal contact can be completely avoided, Iowa Code § 17A.19(2). Even if the supreme could have and wanted to extend the time for filing judicial review actions, there would have been good reasons not to do so. (ruling, p. 4.)

Such distinctions, however, are not evident in the record documents. (ex. III and IV, attached to this resistance.) In the supreme court's 3/17/20 document, the concerns related "public trust and confidence is of utmost importance to the judicial branch…. " (ex. III, *id*.) In the 4/02/20 order, the supreme court's concerns related to the extensions of dates and dispensations in Iowa courts… and balancing the need to take measures to reduce the spread of the virus with its commitment to conducting business as necessary…. " (ex. IV, p. I, *id*.)

In its order 33, the heading, "STATUTE OF LIMITATIONS," and its wording was "[a]ny statute of limitations, statute of repose, or <u>similar</u> <u>deadline</u>… " (ex. 4, p. 9, *id*., *emph. supp.*) The supreme court did not distinguish "between

judicial review petitions and original jurisdiction cases" or how they commenced either of those kind of cases in district court.

Moreover, order 33 really related just one member of the court system, namely its officers of the court, attorneys, (as opposed to judges, clerks of courts, court attendants, court administrators, and court reporters). It did because it was only the attorneys who could file a case within the statute of limitations, so as to maintain "public trust and confidence" in the judicial system.

Likewise, although it is agreed that "[t]he coronavirus created real obstacles to filing and serving… " petitions, it was not just the interactions because the attorney's interact with clients and witnesses. It also was with the coronavirus interference with the attorney's practice of keeping up with deadline reminders, including filing petitions within their statute of limitations.

This is exemplified by Askvig's case in which this interference was a major factor amongst various other factors, causing her judicial review petition not being filed within 30 days of the rehearing application.

Finally, it is observed that Iowa Code section 17A.19(3) does not expressly state that jurisdiction over a judicial review case is vested in the district court only if it is filed within the statutory deadline of days of a final agency decision in a contested case. It is only by judicial statutory construction of section 17A.19(3) that such jurisdictional vesting is required.

Therefore, when the supreme court exercises its inherent power to expand the period in which to file a judicial review petition temporary filing within the expanded period, such filing vests jurisdiction in the district court.

Thus, when Askvig's judicial review petition was filed on 5/18/20, it vested judicial review jurisdiction in the district court. Thus, the 7/09/20 ruling should be reversed.

Division II

THE DISTRICT COURT ERRED BY NOT CONSIDERING WHETHER THERE HAD BEEN SUBSTANTIAL COMPLIANCE WITH IOWA CODE SECTION 17A.19(3).

In its ruling, the district court stated as follows: "In the eyes of the court, the only meritorious argument was based on paragraph 33 of the Iowa Supreme Court's April 2, 2020, order regarding the coronavirus impact on court services." (ruling, pp. 1-2.) Consequently, it did not consider the advocacy made on behalf of Askvig in her resistance's page 1-22.

This advocacy raised the question of why two *pari materia* statutory provisions had been construed so differently by the supreme court. The provisions were in Iowa Code section 17A.19. In subsection 2, it had been construed that substantial compliance will satisfy the requirement that a judicial review petition had to be served on all parties within 10 days of its filing. It was, even though it

was explicitly stated in that subsection that compliance with this requirement "shall be jurisdictional."

In the other, subsection 3, it had construed that only the filing of the judicial review petition within 30 days of the final agency decision satisfied that requirement and vested jurisdiction in the district court. It did, even though that word does not appear anywhere in that subsection.

Consideration of this question is significant to Askvig's right to have the commissioner's errors judicially reviewed. It is because it was believed that under the circumstances proven, she had substantially complied with subsection 3. It further is believed that it is time to re-examine how historically one subsection allows substantial compliance, and the other does not.

The Iowa Administrative Procedure Act, ("IAPA"), was enacted for the first time in 1974, became effective on July 1, 1975, and was codified as Iowa Code chapter 17A. 1974 Iowa Acts, ch. 1090.

In 1978, the supreme court declared that "[b]efore resort can be made to the courts, §17A.19(1) provides that administrative procedure before the commissioner must be exhausted…. The right to appeal is purely statutory and is controlled by §17A.19(1)…. *Iowa Public Service Company v. Iowa State Commerce Commission*, 263 N.W.2d 766, 768 (Iowa 1978).

The unnumbered first paragraph of section 17A.19 states that:

> Except as expressly provided otherwise by another statute referring to this chapter by name, the judicial review provisions of this chapter shall be the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action. However, nothing in this chapter shall **abridge or deny** to any person or party who is aggrieved or adversely affected by any agency action the right to seek relief from such action in the courts. (both bolding & underscores, *emph. supp.*)

The "exclusive means" language in the first sentence of this paragraph has been construed very narrowly with respect to section 17A.19(3) to mean that if the petition is not precisely filed within the 30 days of a final agency decision, jurisdiction in the district court is not vested. *See, e.g.*, *Kerr v. Iowa Public Service Company*, 274 N.W.2d 283, 286, 287 (Iowa 1979); *Ford Motor Company v. Iowa Department of Transportation Regulation Board*, 282 N.W.2d 701, 702, 703 (Iowa 1979); *Black v. University of Iowa*, 362 N.W.2d 459, 462 (Iowa 1985); *Fort Dodge Security Police v. Iowa Department of Revenue*, 414 N.W.2d 660, 670 (Iowa 1987); *Sharp v. Iowa Department of Job Service*, 492 N.W.2d 668, 670 (Iowa 1992). It has even though this unnumbered paragraph did not include any express reference to "jurisdiction" or "jurisdictional prerequisite" and Iowa Code section 17A.23(2) dictates that "[t]his chapter shall be construed broadly to effectuate its purposes." (*emph. supp.*)

The second sentence of this unnumbered paragraph, however, never has been construed, even though its "abridge or deny" and "right" language contravenes narrow construction of section 17A.19. Similarly, the section

17A.19(1) language in its first sentence of "entitled to judicial review…. " also seems to militate against narrow construction of procedures for seeking judicial review.

It further is observed that the first sentence of the unnumbered paragraph of section 17A.19 only dictates the exclusivity of the "means" by which a "person or party who is aggravated or adversely affected by agency action may seek judicial review… " Yet, "means" is undefined. Further, even in common parlance, this word has multiple definitions:

Means (mēnz) ***pl. n.*** [[< MEAN[3,] *n.*]] **1** [*with sing. or pl. v.*] that by which something is done or obtained; agency [the fastest *means* of travel] **2** resources or available wealth; often, sepcif., great wealth; riches [a person of *means*] **– by all means 1** without fail **2** of course; certainly – **by any means** in any way possible; at all; somehow – **by means of** by using; with the aid of; through – **by no (manner of) means** not at all; in no way – **means to an end** a method of getting or accomplishing what one wants. *Webster's New World College Dictionary*, 4th Ed., p. 891 (2010), [bolding in orig., underscores, *emph. supp.*].

None of these definitions, however, give much guidance as to what this statutory word denotes in this statute's unnumbered paragraph. Resultantly, the word is ambiguous because the supreme court has indicated the following:

A statute or rule "is ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute." *Carolan v. Hill*, 553 N.W.2d 882, 887 (Iowa 1996).

Ambiguity may arise in two ways: (1) from the meaning of particular words; or (2) from the general scope and meaning of the statute. *Larson Manufacturing Company, Inc. v. Thorson*, 763 N.W.2d 842, 859 (Iowa 2009).

It is Askvig's position, therefore, that the first sentence in section 17A.19's unnumbered paragraph has nothing to do with this court's jurisdiction of Askvig's judicial review proceeding. Rather, it has to do with whether agency action cannot be remedied by "means" not provided in the IAPA, such as by seeking an injunction, *Kerr, supra*, at 285-286, or by seeking a declaratory judgement, *City of Des Moines v. Des Moines Police Bargaining Unit*, 360 N.W.2d 729, 730-732 (Iowa 1985).

Additionally, given that legislative intent is controlling with respect to the issues of lack of jurisdiction of the case, the Iowa appellate courts apparently never have had to address the lack of expression of legislative intent in section 17A.19(3). They only have relied on the non-jurisdictional "exclusive means" sentence in the unnumbered paragraph of section 17A.19 and non-statutory words of their own ideas of potential intent. Even so, in section 17A.19(2), the legislature expressed its intent in the following manner:

(1) "Within ten days after the filing of a petition for judicial review the petitioner shall serve by the means provided in the Iowa rules of civil procedure for the personal service of an original notice, or shall mail copies of the petition to all parties named in the petition and, if the petition involves review of agency action in the contested case, all parties of record in that case before the agency. **Such personal service or mailing shall be jurisdictional**." Iowa Code section 17A.19(2), [both bolding & underscores, *emph. supp.*)] It has been if that requirement is met with substantial compliance by the courts.

(2) "If a party files an application under section 17A.16, subsection 2, for rehearing with the agency, the petition for judicial review must be filed within thirty days after that application has been denied or deem denied." Iowa Code section 17A.19(3). In this *pari materia* subsection, however, there is no statement that such filing is "jurisdictional," and yet it is not modified if that requirement is met with substantial compliance.

(3) Consequently, the following statutory construction now should be applied for the first time to section 17A.19(3) because:

> In interpreting… [a statute we focus on] "what the legislature said." *Cit*…. Nevertheless, what the legislature did not say may be just as important as what the legislature did say. *Cit*. In this regard, we follow the rule that "legislative intent is expressed by omission as well as by inclusion." *Eaton v. Iowa Employment Appeal Board*, 602 N.W.2d 553, 556 (Iowa 1999), [*emph. supp.*]; *accord*, *Collins v. King*, 545 N.W.2d 310, 312 (Iowa 1996).

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> In the field of statutory interpretation, legislative intent is expressed by omission as well as by inclusion. The express mention of certain **conditions of entitlement** implies the exclusion of others. *Barnes v. Iowa Department of Transportation*, 385 N.W.2d 260, 263 (Iowa 1986), [both bolding & underscores, *emph. supp.*]; *accord, e.g., Marcus v. Young*, 538 N.W.2d 288, 289 (Iowa 1985), ["In examining the statutes at hand, we are to be guided by the maxim 'expressio unius est exclusion alterius,' expression of one thing is the exclusion of another."]; *Callender v. Skiles*, 591 N.W.2d 182, 186 (Iowa 1999), [*emph. supp.*]. ["We have repeatedly recognized the express mention of one thing in a statute implies the exclusion of another. *Cit*…].

In other words, Askvig's failure to file a "petition for judicial review… within thirty days after that [rehearing] application has been denied or deemed denied…."], should not make this court unable "to entertain in the particular case of Askvig's judicial review or deprive this court's "authority to hear… [this] particular case… or "of jurisdiction of… [this] case…. " *Christie, supra*, at 450. Thus, this court should reverse the district court's grant of Snap-On's motion to dismiss.

Assuming *arguendo*, however, that Askvig's failure to file her judicial review petition within the specified thirty days, section 17A.19(3) should not be applied as narrowly as it has been in the past. It should not be because reiterating the IAPA itself provides as follows that:

> Except as expressly provided otherwise by this chapter or by another statute referring to this chapter by name, the rights created and the requirements

> imposed by this chapter shall be in addition to those created or imposed by every other statute in existence on July 1, 1975, or enacted after that date….
>
> This chapter shall be construed broadly to effectuate its purposes. Iowa Code section 17A.23(1)(2), [*emph. supp.*]

In that regard, one of those "rights created" by the IAPA is the previously-quoted right that "a person or party who is aggrieved or adversely affected by agency action the right to seek relief from such action in the courts." Iowa Code section 17A.19, (unnumbered paragraph, first sentence, *emph. supp.*). Further, one of the "purposes of this chapter… [is] to simplify the process of judicial review of agency action, as well as to increase its ease and availability." Iowa Code section 17A.19(3).

Narrow statutory construction of this right and these purposes without considering why a judicial review petition was not filed within thirty days of a rehearing denial, however, "abridge or deny…. the right to seek relief from such [agency] action… [which aggrieves or adversely affects a person or party]. Section 17A.19, unnumbered paragraph, sentence 2. It also does not simplify the process of judicial review of agency action [or] "increase its ease and availability…. Section 17A.1(3).

Indeed, with respect to the *pari materia* section 17A.19(2), (the statute which makes service of the petition within ten days of the petition's filing

"jurisdictional…" unlike section 17A.19(3), the supreme court did not make this ten-day service an absolute jurisdictional requirement:

> The procedures for seeking… [judicial] review are found in section 17A.19(2)….
>
> These procedures are jurisdictional. Thus, a failure to comply with them deprives the district court of appellate over the case. *Dawson v. Iowa Merit Employment Comm'n*, 303 N.W.2d 158, 160 (Iowa 1981) (personal service rather than mailing deprived district court of jurisdiction because mailing was only permissible method of service under the statute); *accord, Neumeister v. City Dev. Bd*., 291 N.W.2d 11, 14 (Iowa 1980); *see also Record v. Iowa Merit Employment Dep't*, 285 N.W.2d 169, 172-73 (Iowa 1979) (failure to mail copy of petition to a part in the proceeding before the agency deprives district court of jurisdiction because statute required mailing to "all parties of record").
>
> Notwithstanding *Dawson, Neumeister,* and *Record*, we have consistently held that substantial – not literal – compliance with section 17A.19(2) is all that is necessary to invoke the jurisdiction of the district court.
>
> *See, e.g., Richards v. Iowa Dep't of Revenue*, 362 N.W.2d 486, 488-89 (service by party, notwithstanding prohibition of such service by Iowa Rule of Civil Procedure 52, is not a jurisdictional defect under the statute); *Buccholtz v. Iowa Dep't of Pub. Instruction*, 315 N.W.2d 789, 792-93 (Iowa 1982) (service on only one of three closely related agencies substantially complied with section 17A.19(4) requirement to name as a respondent the agency whose action is challenged, even though agency served did not render decision); *Green v. Iowa Dep't of Job Serv*., 299 N.W.2d 651, 654 (Iowa 1980) (petition naming employer in exhibits attached to petition rather than in caption substantially complied with section 17A.19(4) requirement to name as a respondent the agency whose action is challenged).
>
> According to one court,
>
> "[s]ubstantial compliance" with a statute means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it

was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

Smith v. State, 364 So.2d 1, 9 (Ala. Crim. App. 1978) (citation omitted); *accord Dorignac v. Louisiana State Racing Comm'n*, 436 So.2d 667, 669 (La. App. 1983). We essentially adopted this definition in *Superior/Ideal, Inc., v. Board of Review*, 419 N.W.2d 405, 407 (Iowa 1988).

The fighting issue here is whether mailing notice two days before judicial review proceedings are instituted is a jurisdictional defect or is in substantial compliance with section 17A.19(2). We think Brown substantially complied with the statute. We reach this conclusion for several reasons.

First, we construe the provisions of the administrative procedure act broadly to effectuate its purposes. *Frost*, 299 N.W.2d at 648; Iowa Code § 17A.23. One of those purposes is

> to simplify the process of judicial review of agency action as well as increase its ease and availability. In accomplishing its objectives, the intention of this chapter is to strike a fair balance between these purposes and the need for efficient, economical and effective governmental administration. *Cits*….
> In this case Deere makes no claim of prejudice because of the premature notice. Under these circumstances, our holding that Brown's notice substantially complied with section 17A.19(2) notice requirements serves to accomplish this laudable statutory purpose.
>
> Second, there is a substantial difference between original actions and judicial review of administrative decision. In acknowledging this difference we recently observed that
>
> > [filing a petition in an original action] commence[s] the litigation process, whereas petitions for judicial review merely initiate a further proceeding, appellate in nature, in litigations previously commenced before an agency.

> Ordinarily the parties served with a copy of the petition for judicial review have already been engaged in adversary proceedings within the agency and know what the case is all about.
>
> *Richards*, 362 N.W.2d at 488-89 (citation omitted).

This difference underscored our refusal to apply the substantial compliance doctrine in similar circumstances involving Iowa Code section 321.501 (1958), the process statute for nonresident motorists. *See Johnson v. Brooks*, 254 Iowa 278, 284-85, 117 N.W.2d 457, 461 (1962). Section 321.-501 then, as now, required a plaintiff to file a copy of the original notice with the commissioner of public safety (now director of transportation). Within ten days there after the plaintiff was required to mail the defendant a notification of the filing with the commissioner. Iowa Code § 321.501 (1958).

In *Johnson* the plaintiff mailed the commissioner a copy of the original notice on a Friday. The notice reached the commissioner's office the following Monday, at which time it was filed. The plaintiff also mailed the defendant a notification on Friday, two days before the original notice was filed in the commissioner's office.

Finding the premature notification fatal to jurisdiction, we said:

It may well be that the legislature did not desire a notification to defendant in advance of the filing with the commissioner. Such a restriction is not unreasonable, to say the least. Used as a threat before an action was actually commenced, such a notice could cause a non-resident both anxiety and expense, a situation which the legislature may have considered as undesirable, and avoidable by the use of the language employed. At any rate we hold such a notification could scarcely comply with the requirement that the defendant be notified of the actual filing.

Johnson, 254 Iowa at 284, 117 N.W.2d at 461; *accord Mech v. Borowski*, 116 Wis.2d 683, 686-87, 342 N.W.2d 759, 760-61 (1983) (service of summons and complaint on defendant before

action was commenced by filing was ineffective for personal jurisdiction). No similar undesirable potential exists with a premature notice in a judicial review proceeding because litigation has already taken place and a decision has been rendered.

Nor do we discern any other mischief that the legislature might have intended to prevent by a jurisdictional requirement forbidding the type of notice effected here. *See LeMars Mut. Ins. Co. v. Bonnecroy*, 304 N.W.2d 422, 424 (Iowa 1981) (ultimate goal in interpreting statute is to determine legislative intent, considering language used in statute, objects sought to be accomplished, and evils sought to be remedied; court places reasonable construction on statute that will be best effectuate its purpose). Given the statutory purpose mentioned earlier, we think it is reasonable to conclude the legislature did not intend to preclude a premature notice in the absence of any showing of prejudice.

Third, had the legislature intended to preclude a premature notice it could easily have said so. *See, e.g., Johnson*, 254 Iowa at 283-84, 117 N.W.2d at 460-61 (statutory requirement that defendant be notified that original notice of suit was duly filed); *cf. Mech*, 116 Wis.2d at 686, 342 N.W.2d at 760 (statutory requirement that original summons and complaint be filed together and a specific provision that no service shall be mailed. *See* Iowa Code § 17A.19(2) (1979). A possible argument could have been made that this prior language evidenced a legislative intent forbidding mailing before filing.

In 1981, however, the legislature amended section 17A.19(2) by deleting the words "file stamped." *See* 1981 Iowa Acts ch. 24, § 1. The amendment also permitted personal service in addition to mailing as an acceptable means of service. *Id*. We hypothesized in *Richards*, 362 N.W.2d at 488, "that the purpose of the amendment was to relax the statutory service requirements for persons seeking judicial review of agency decisions," a response to our decision in *Neumeister and Dawson. Se State v. Fluhr*, 287 N.W.2d 857, 862 (Iowa 1980) (legislature is presumed to know state of the law at time of

enactment). Thus, we can reasonably infer that in deleting the words "file stamped" the legislature did not intend to forbid mailing before filing when such mailing does not result in prejudice.

Finally, we think the purpose of the ten day notice requirement in section 17A.19(2) is more than served by our substantial compliance determination. Rather than ten, the employer here constructively received twelve days' notice. The two extra days were, if anything, an advantage to Deere.

In analogous circumstances, we held that a petition substantially complied with the service requirements of Iowa Code section 441.38 (1985) by serving the clerk of the board of review rather than the board's chairperson or presiding officer as the statute required. What we said is relevant here:

We believe that service of a notice of appeal on the clerk of the board of review assures compliance with the reasonable objectives of the appeal statute. What more appropriate recipient could be found to receive the notice of appeal than the person charged by statute to handle the board's paperwork.

Superior/Ideal, 419 N.W.2d at 407-08.

II. In summary, we hold that **in the absence of any showing of prejudice**, a two-day premature mailing of the petition substantially complies with the service requirements of section 17A.19(2). The district court erred in holding otherwise. Consequently, we reverse its ruling on the special appearance and remand this case to the district court for further proceedings consistent with this opinion. *Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193, 194-196 (Iowa 1988), [both bolding & underscores, *emph. supp.*, fn. del.].

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The question presented in this appeal is whether Iowa Code section 17A.19(2)(2017), which imposes a jurisdictional requirement for the petitioner in an **action** for judicial review to timely *mail* a copy of the

petition to attorneys for all the parties in the case, is satisfied when the attorney representing the petitioner timely *emails* a copy of the petition to opposing counsel….

The district court rejected Ortiz's argument that an email substantially complies with the mailing requirement of the statute. It based its holding primarily on the principle that a change in the statute can only come from the legislature. We agree the substantial-compliance doctrine under Iowa Code section 17A.19(2) cannot be applied to change the jurisdictional requirement. *Cit.* "[W]e have consistently held that substantial-not literal-compliance with section 17A.19(2) is all that is necessary to invoke the jurisdiction of the district court…. Instead, **the doctrine permits leeway in meeting the requirements of the statute when the facts and circumstances indicate the purpose and meaning of the statute have been met**…. *Cit*…. **The purpose of the statute is to make judicial review simple and accessible by providing for an efficient and effective process**. *Id*.

We acknowledge that the leeway permitted under the substantial-compliance doctrine would not normally include using a means of communication different than provided under the statute. Instead, substantial compliance has mostly been applied to circumstances involving the timing of and deviations in the notice provided, not the method of notice. *Cits*….

Email, however, is used far more often among attorneys than postal mail and has replaced postal mail as the normal means to transmit legal documents among lawyers in Iowa. This displacement draws email into the circle of substantial compliance. It is not the type of defect the doctrine was developed to reject. Instead, it fits today within its purpose and scope and, for sure, caused no prejudice. Moreover, between attorneys, the notice objective of the statute is met by the use of email as much, if not more, as by postal service mail.

Thus, while the leeway sought by Ortiz in this case might have been rejected under the substantial-compliance doctrine a decade or two ago, it cannot be rejected today. Most attorneys would even expect and want to receive such notice by email in this instance as they do in most all other instances in our court system. In fact, all the communications between the attorneys in this case occurred by email.

> To require under the substantial-compliance doctrine that postal mail be used would be perfunctory and contrary to the doctrine….
>
> Section 17A.19(2) is properly construed to include email "made upon the parties' attorney of record" when done pursuant to Iowa Court Rules governing electronic service. This interpretation promotes the objects of the statute to provide a reliable and convenient form of communication and is consistent with the common and expected manner that lawyers send and receive legal documents in Iowa today. Any other method of communication would be unexpected and jeopardize the purpose of the statute. Any other outcome would put statutes and courts out of touch with change that is expected and desired in life. *Ortiz v. Loyd Roling Construction*, 928 N.W.2d 651, 652, 654-655 (Iowa 2019), (both bolding & underscores, *emph. supp*.).

In *Brown* and *Ortiz*, the supreme court continued to reject literal compliance in favor of substantial compliance with section 17A.19(2) when it was demonstrated by the petitioner that any or all of the following factors contributed to the noncompliance:

(1) The respondent was not meaningfully prejudiced by the noncompliance;

(2) The respondent has "already been engaged in adversary proceedings within the agency and knows what the case is about…; "

(3) The facts and circumstances of the noncompliance showed an intention and/or attempt to comply with the statute;

(4) The "statute has been followed sufficiently so as to carry out the intent for which it was adopted…. " for example, to "initiate a further

proceeding, appellate in nature, in litigations previously commenced before an agency…; ”

(5) “[M]eeting the requirements of the statute when facts indicate the purpose and meaning of the statute have been met…. [such as] to make the judicial review simple and accessible by providing for an efficient and effective process….”

(6) All these factors this would and should be equally applicable to substantial compliance with section 17A.19(3).

Accordingly, in the affidavit attached to the resistance, it demonstrated inceptively that as early as 2/25/20, Askvig intended to file for judicial review if the commissioner did not correct the errors denoted in her rehearing application.

It also demonstrated that the literal deadline for filing the judicial review was 4/15/20 and at least by 5/05/20, Snap-On had been monitoring whether Askvig had carried out her intentions to file for judicial review. (*See*, Snap-On ex. B, attached to its 6/05/20 motion to dismiss).

It further demonstrated that Snap-On was willing to pay Askvig the benefit amounts awarded to Askvig by the commissioner. In this regard, Snap-On had no right to avoid appeal by any action it could have taken to do so. Perforce, there was no meaningful prejudice to Snap-On by Askvig not filing her judicial review by 4/15/20.

Even further, it was first realized from Snap-On's 5/05/20 letter that this 4/15/20 deadline had been missed. Askvig's petition was filed on 5/18/20 to initiate judicial review. Given Snap-On's 20-day delay between 4/15/20 and 5/05/20 in contacting Askvig's attorney, and the 13-day period between 5/05/20 and 5/18/20 it took to file the petition, it does not appear that Snap-On sustained any meaningful prejudice by initiating a judicial review 33 days later than 4/15/20.

Lastly, it was demonstrated in the affidavit attached to the resistance that the singular failure to file Askvig's petition occurred during a "perfect storm" of a rapidly-spreading and unexpected pandemic, combined with an attorney's very heavy workload which required him to work seven-day weeks, 50-60 hours per week, (with the exception of five days), during the 70 days between 2/05/20 and 4/15/20. Considering the overall context of the failure to file by 4/15/20, was not for just a couple of days, but also destined to be for as long as it was not realized that the deadline had been missed, namely during the thirteen days between 5/05/20 and 5/18/20. Within this overall context, thereafter, Askvig substantially complied with section 17A.19(3).

CONCLUSION

For all the reasons stated in this brief's argument, it is requested that: (i) the 7/09/20 ruling dismissing the 5/18/20 petition assessment of court costs to Askvig be reversed; (ii) the case be remanded to the district court for judicial review of the commissioner's 2/05/20 appeal decision; and (iii) the appeal costs to be taxed to Snap-On.

REQUEST FOR ORAL ARGUMENT

Askvig requests to submit this case with oral argument.

By:_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Appellant's Page Proof Copy of Brief was electronically filed via EDMS and served on September 18th, 2020 upon the Clerk of the Iowa Supreme Court and the Respondents/Appellee's attorney of record.

_____

Legal Assistant to Mark Soldat