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## ACTIONS TAKEN

The Minnesota Legislature responded to recent constitutional, ambiguity, and other problems with statutory provisions, which were raised by Minnesota's Court of Appeals or Supreme Court.

In *In re Detailing Criteria and Standards for Measuring an Electric Utility's Good Faith Efforts in Meeting the Renewable Energy Objectives Under Minn. Stat. Section 216B.1691*, 700 N.W.2d 426 (Minn.App. 2005), *aff'd*, 714 N.W.2d 426 (Minn. 2006), the Court found standards contained in Minnesota Statutes, section 216B.1691, subdivision 2, ambiguous and susceptible to more than one reasonable interpretation. The Court accepted the judgment of the Public Utilities Commission, that concluded that percentages are applied to the amount of eligible generation, not total retail electric sales. In response, the legislature extensively amended Minnesota Statutes, section 216B.1691, to provide clarification, in Laws of Minnesota 2007, chapter 3.

In *State v. Estrella*, 700 N.W.2d 496 (Minn.App. 2005), *review denied*, the Court held that a 2003 amendment to Minnesota Statutes, section 590.05, violated a defendant's right to the assistance of counsel under Article I, section 6, of the Minnesota Constitution by depriving defendants of meaningful access to one review of a criminal conviction. The Court's remedy was to sever the 2003 amendment and revive the version that existed prior to amendment. In Laws of Minnesota 2007, chapter 61, section 2, the legislature amended section 590.05, removing the unconstitutional language from the statute.

In *Schmidt v. City of Columbia Heights*, 696 N.W.2d 413 (Minn.App. 2005), the Court of Appeals addressed the issue of whether Minnesota Statutes, section 299A.465, subd. 1 (c) (2004) requires "the employer of a public safety officer who is disabled in the line of duty to continue to pay health-care benefits for the dependents of that officer when the officer dies of causes unrelated to his or her disability prior to reaching the age of 65." *Schmidt*, 696 N.W.2d at 415. The Court held that section 299A.465, subd. 1 (c) (2004) does "require the officer's employer to continue to contribute to the health coverage of the officer's dependents until the 65<sup>th</sup> anniversary of the officer's birth." *Id.* at 419. In Laws of Minnesota 2008, chapter 243, section 1, the legislature amended section 299A.465, subd. 1 (c) (2006) clarifying its intent, which was also consistent with the Court's decision in *Schmidt*.

**Minnesota Statutes, Section 13D.06, Subdivision 3**  
Open Meeting Law; Violations

**Brown v. Cannon Falls Township**  
Minnesota Court of Appeals  
October 10, 2006

Two landowners brought an action against the town's board of supervisors, alleging violations of the Open Meeting law, Minnesota Statutes, chapter 13D. The district court entered judgment against the board members, ordering them to pay fines and forfeit their offices, and awarding attorney fees to each landowner. The board members appealed.

As part of their appeal, the board members argued the district court erred in concluding that they were subject to removal from office under Minnesota Statutes, section 13D.06, subdivision 3. The statute provides for removal "if a person has been found to have intentionally violated this chapter in three or more actions brought under this chapter...."

The board members argued the underlying action did not represent "three or more actions" and that based upon the plain language of the statute, there must be three separate "adjudications" before a public official can be removed from office. The landowners responded that the phrase "three or more actions" is satisfied, because they filed four separate complaints and won on all four. "Because both parties here have offered reasonable interpretations," held the court, "we conclude that the statute is ambiguous."

The court held:

Under the Minnesota Open Meeting Law ... a public official must have been found to have intentionally violated the Open Meeting Law in three separate proceedings before the official is subject to removal from office. Because the district court's order here constitutes only one adjudication involving multiple counts, the district court erred by ordering the removal of appellants from office.

**Minnesota Statutes, Section 80A.15, Subdivision 2**  
Securities; Registration Requirements

**Risdall v. Brown-Wilbert, Inc.**  
Supreme Court of Minnesota  
July 31, 2008

Purchasers of stock brought an action against the issuing corporation and its CEO, alleging a number of causes of action due to violation of state securities registration requirements. The district court granted summary judgment to the purchasers. On appeal, the court of appeals reversed. The supreme court granted review.

The issue, as framed by the court, was whether the offer of securities must result in a sale in order to be “integrated” under Minnesota Statutes, section 80A.15. If integrated, the seller of the securities is not exempt from state registration requirements for securities that purport to be, but are not in fact, federally covered securities. Minnesota Statutes, section 80A.15, incorporated a federal regulation<sup>[1]</sup> by reference, that provided the basis for the “doctrine of integration” in Minnesota. Because the state statute incorporated the federal integration standard, the court concluded that it must also examine Rule 502(a). The parties disputed whether Rule 502(a) requires that a securities offer result in a sale in order to be integrated.

The court examined rule 502(a), which listed five factors to help determine whether offers and sales should be integrated for purpose of the exemption. The court noted that the introductory language of Rule 502(a) appeared to contemplate the integration of offers that *do not* result in a sale. Conversely, the court also observed that four of the five factors referred only to sales. As a result, the court held that Rule 502 “is ambiguous because it is ‘reasonably susceptible to more than one reasonable interpretation.’”

The court looked at the interpretation of the regulation, as applied by the Securities Exchange Commission, as well as the language of the Minnesota statute that incorporated the regulation, and concluded:

[T]he Minnesota legislature did not intend to exclude offers that do not result in sales from being integrated under Minnesota law .... Because the integration test of Rule 502 ... is best interpreted as not containing a sales requirement, we hold that a securities offer need not result in a sale in order to be integrated.<sup>[2]</sup>

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<sup>[1]</sup> Rule 502 of Regulation D, 17 C.F.R. § 230.506.

<sup>[2]</sup> The legislature repealed Minnesota Statutes, sections 80A.01 to 80A.31, effective August 1, 2007, and replaced it with the Minnesota Securities Act, codified at Minnesota Statutes, sections 80A.40 to 80A.90. Laws of Minnesota 2006, chapter 196. However, because the “predecessor act exclusively governs all actions or proceedings that are pending on, or may be instituted on the basis of conduct occurring before, August 1, 2007” the court held the case was determined by the predecessor act, Minnesota Statutes, sections 80A.01 to 80A.31. The Minnesota Securities Act does not incorporate the “integration test” contained in Rule 502 of Regulation D.

## **Minnesota Statutes, Section 256B.15, Subdivision 2**

Medical Assistance; Claims Against Estate

### **In re Estate of Barg**

Minnesota Supreme Court

May 30, 2008

The Mille Lacs County Family Services and Welfare department filed a claim against estate for the cost of Medicaid benefits correctly paid on behalf of decedent's predeceased wife. The county argued that Minnesota law allows recovery from the estate of a surviving spouse for any assets jointly owned by the couple at any point during their marriage.

The estate argued that federal Medicaid law preempts state law on the issue of what assets are eligible for recovery from an estate, thereby excluding assets from recovery that the recipient did not have an interest in at the time of her death.

Minnesota Statutes, section 256B.15, subdivision 2, authorizes recovery of assets from a surviving spouse's estate "limited to the value of the assets of the estate that were marital property or jointly owned property *at any time during the marriage.*"

The federal statute authorizes the recovery of "any real and personal property and other assets in which the individual had any legal title or interest *at the time of death.*" 42 U.S.C. § 1396p(b)(4)(B).

The court examined the language of both federal and state law, as well as case law on this issue, and held the following:

We hold that Minn. Stat. § 256B.15, subdivision 2, is partially preempted to the extent that it authorizes recovery from the surviving spouse's estate of assets that the recipient owned as marital property or as jointly-owned property *at any time* during the marriage. To be recoverable, the assets must have been subject to an interest of the Medicaid recipient at the time of her death.

**Minnesota Statutes, Section 257C.08, Subdivision 7**  
Rights of Visitation of Unmarried Parents

**Soohoo v. Johnson**  
Minnesota Supreme Court  
May 10, 2007

Appellant challenged judgment of the district court granting respondent visitation rights under Minnesota Statutes, section 257C.08, subdivision 4. Appellant argued that section 257C.08, subdivision 4 was unconstitutional because it violated her right as a fit parent to decide the care, custody, and control of her children.

Section 257C.08, subdivision 4 states as follows:

If an unmarried minor has resided in a household with a person, other than a foster parent, for two years or more and no longer resides with the person, the person may petition the district court for an order granting the person reasonable visitation rights to the child during the child's minority. The court shall grant the petition if it finds that:

- (1) visitation rights would be in the best interests of the child;
- (2) the petitioner and child had established emotional ties creating a parent and child relationship; and
- (3) visitation rights would not interfere with the relationship between the custodial parent and the child.

The court shall consider the reasonable preference of the child, if the court considers the child to be of sufficient age to express a preference.

The court analyzed section 257C.08, subdivision 4 under the strict scrutiny standard, as this case involved a parent's right to make decisions concerning the care, custody, and control of his or her children, which is a fundamental right. In order to survive the strict scrutiny standard, the statute must advance a compelling state interest and be narrowly tailored to further that interest. The court held that section 257C.08, subdivision 4 is not unconstitutional since a party seeking visitation bears the burden of proving the statutes' requirements by clear and convincing evidence.

In addition, the court analyzed Minnesota Statutes, section 257C.08, subdivision 7, also pertaining to visitation rights. This analysis was done under the strict scrutiny standard.

Section 257C.08, subdivision 7 states:

The court may not deny visitation rights under this section based on allegations that the visitation rights would interfere with the relationship between the custodial parent and the child unless after a hearing the court determines by a preponderance of the evidence that interference would occur.

The court found that section 275C.08, subdivision 7 is unconstitutional because it impermissibly places the burden on the custodial parent to prove that visitation would interfere with the parent-child relationship by interfering with the parent's fundamental right to the care, custody, and control of his or her child.



**Minnesota Statutes, Section 260C.007, Subdivision 6 (2) (i)**

Child Protection; Definition of Physical Abuse

**In re Welfare of Children of N.F.**

Minnesota Supreme Court

May 30, 2008

The parents of two boys appealed an adjudication by the district court that their boys were children in need of protection or services.

Minnesota Statutes, section 260C.007, subdivision 6, defines a “child in need of protection or services” to include a child who:

(2)(i) has been a victim of physical or sexual abuse, (ii) resides with or has resided with a victim of domestic child abuse as defined in subdivision 5, (iii) resides with or would reside with a perpetrator of domestic child abuse or child abuse as defined in subdivision 5, or (iv) is a victim of emotional maltreatment as defined in subdivision 8;

The Minnesota Supreme Court stated that it “cannot conclude that the statute is so clear and unambiguous that the phrase ‘physical abuse’ requires no interpretation.” The court of appeals equated “physical abuse” with the malicious punishment of a child, holding that it “requires unreasonable force or cruel discipline that is excessive under the circumstances.” On appeal, the court found this interpretation to be unnecessarily strict. The county advised the court to look to Minnesota Statutes, section 626.556, subdivision 2 (g) for guidance in defining physical abuse. Section 626.556 defines physical abuse for purposes of the reporting requirement as follows:

(g) "Physical abuse" means any physical injury, mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child other than by accidental means, or any physical or mental injury that cannot reasonably be explained by the child's history of injuries, or any aversive or deprivation procedures, or regulated interventions, that have not been authorized under section 121A.67 or 245.825.

The court concluded that “it is reasonable to assume that the legislature intended there to be some symmetry between conduct that must be reported to authorities,” which is defined in section 626.556, “and the conduct that actually renders a child in need of protection or services,” which is defined in section 260C.007. Therefore, the court held that a child is in need of protection or services under section 260C.007 “if there is physical conduct toward the child that causes either physical injury, or mental injury as defined in Minn. Stat. § 626.556, subdivision 2 (m).”

## **Minnesota Statutes, Section 260C.301, Subdivision 1**

### **Termination of Parental Rights**

#### **In re Welfare of Child of T.P. and P.P.**

Minnesota Supreme Court

April 17, 2008

County department of human services filed a petition to terminate parental rights of the mother and father. The district court granted petition and the mother appealed. The court of appeals affirmed the district court.

On review, the supreme court examined Minnesota Statutes, section 260C.301, subdivision 1, that sets forth the statutory grounds for the termination of parental rights and in particular, paragraph (b), clause (6), which provides in pertinent part: “that a child has experienced egregious harm in the parent’s care which is of a nature, duration, or chronicity that indicates a lack of regard for the child’s well-being....”

The “principal question” on appeal was the meaning of the phrase “in the parent’s care.” This phrase, according to the court, was “undefined and unexplained” and had “a range of possible meanings. At one extreme, it could be interpreted strictly to require that the injury to the child occur in the physical presence of, if not at the hands of, the parent. Alternatively, the phrase ... could be a reference simply to legal or physical custody of the child.”

Reviewing other provisions of section 260C.301, the court concluded “these provisions indicate a legislative intent that the use of the term ‘care’ is properly understood in the broader sense of the parent and child relationship, including providing for the well-being of a child in ways that do not require a parent to be physically present with the child. Thus, we agree with the court of appeals that ‘in the parent’s care’ should not be limited to the physical presence of a parent at the time egregious harm occurs.”

Finally, the court held that in addition to the child experiencing egregious harm “in the parent’s care,” in order to terminate the rights of a parent who has not personally inflicted egregious harm on a child, a court must find that the parent either knew or should have known that the child had experienced egregious harm. The court remanded the case to the district court to make findings based on the “knew or should have known” standard announced by the court.

## **Minnesota Statutes, Section 268.085, Subdivision 2**

Unemployment Insurance; Eligibility

### **Carlson v. Department of Employment and Economic Development**

Minnesota Court of Appeals

April 15, 2008

Unemployment compensation claimant filed an appeal from a determination of Department of Employment and Economic Development that he was ineligible for benefits received while he was serving time in a local correctional facility under a DWI sentence. Under Minnesota Statutes, section 268.085, subdivision 2, paragraph 3, an applicant who is incarcerated or performing court-ordered community service is not eligible for unemployment benefits. Applicant contended that he was eligible because he was available for work and was looking for work during his incarceration and while he served part of his sentence on electronic home monitoring (EHM).

The court concluded that the term, “incarcerated,” which was not defined within chapter 268 “is ambiguous,” but went on to hold that the claimant was “incarcerated” and ineligible for benefits during the time he was in a local correctional facility and while he was subject to EHM. First, the statute under which claimant was sentenced required “a minimum of one year of incarceration.” Minnesota Statutes, section 169A.275, subdivision 4. Secondly, for purposes of Minnesota Statutes, section 268.085, subdivision 1, requiring applicants to be “available” for suitable work as a condition of eligibility for benefits, claimant’s availability was subject to numerous restrictions. Finally, it is clear that the legislature intended to link the concepts of availability for work and incarceration.”

“Although there is no controlling case law directly on point, our conclusion that an applicant who is serving time in a local correctional facility or on EHM with the potential to obtain court approval to leave home to work, is ‘incarcerated’ and is not ‘available’ for employment without restrictions is consistent with cases that have addressed incarceration in other employment-related contexts.”

**Minnesota Statutes, Section 268.085, Subdivision 15 (e)**

Unemployment Insurance; Eligibility

**Work Connection, Inc. v. Bui**

Minnesota Court of Appeals

April 8, 2008

Appellant argued that the respondent's reliance on public transportation made him ineligible for unemployment benefits because he failed to meet the statutory requirement that he "have transportation throughout the labor market area" to be considered "available for suitable employment" under Minnesota Statutes, section 268.085, subdivision 15, paragraph (e).

The court found that the words "throughout the labor market area" to be ambiguous.

In reference to the word "throughout" in this statutory context, the court explained that it may be interpreted to mean that an individual must have transportation that gives him access to every part of a particular area without omitting any one part of that area. As a result of this interpretation, as argued by the appellant, individuals who rely on mass transit to get to work would be excluded from unemployment benefits since the bus system does not reach every part of the labor market area.

In contrast, "throughout" may also be interpreted to mean "all around" an area, but not to every place within that area. This interpretation, as argued by the respondents, would recognize public transit users as being "available for suitable employment" for purposes of eligibility for unemployment benefits.

Furthermore, the court observed that in this statutory context the term "labor market area" can have multiple meanings. For example, the court explained that the "labor market area may differ depending on the work experience and location of each applicant."

The court resolved these ambiguities by further examining the language as well as the policy and legislative history of section 268.065, subdivision 15 (e) to discern the legislative intent, adopting the respondents interpretation of "throughout the labor market area" as follows:

We conclude that the term "throughout the labor market area" does not require every applicant for unemployment benefits to have personal automobile transportation. Rather, an applicant's eligibility under the transportation requirement of Minn. Stat. § 268.085, subdivision 15 (e), is determined by examining an applicant's particular circumstances, and whether the applicant has access to transportation such that they are available for work.<sup>[1]</sup>

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<sup>[1]</sup> A petition for review of this case has been filed and was granted by the Minnesota Supreme Court on June 18, 2008. As of the release date of this report, oral arguments are awaiting scheduling.

**Minnesota Statutes, Section 299C.105, Subdivision 1**  
Crimes; DNA Analysis

**In re Welfare of C.T.L.**  
Minnesota Court of Appeals  
October 10, 2006

Following the filing of a delinquency petition alleging a juvenile aided and abetted robbery and assault, the state moved for an order requiring the juvenile to provide a biological specimen for the purpose of DNA analysis, pursuant to Minnesota Statutes, section 299C.105, subdivision 1, paragraph (a). The juvenile moved for an order certifying the issue of the statute's constitutionality to the court of appeals.

The issue, as framed by the court of appeals, was whether the provisions of Minnesota Statutes, section 299C.105, that direct law enforcement personnel to take biological specimens from juveniles and adults who have been charged with an offense, but not convicted, violate the Fourth Amendment of the U.S. Constitution and Article 1, Section 10, of the Minnesota Constitution.

The court noted that taking a biological specimen is a "search" for purposes of the Fourth Amendment. The court further noted that searches "conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment," subject only to a few specific and well-established exceptions.

According to the court, section 299C.105, subdivision 1, paragraph (a), clauses (1) and (3), "use a judicial determination of probable cause to support a criminal charge as a substitute for a judicial determination of probable cause to issue a search warrant ... a determination of probable cause to support a criminal charge, even if it is made by a judge, is not sufficient to permit a biological specimen to be taken from the person charged without a warrant."

The court went on to hold these provisions violated the Fourth Amendment of the U.S. Constitution and Article 1, Section 10, of the Minnesota Constitution. "By directing that biological specimens be taken from certain individuals who have been charged with certain offenses solely because there has been a judicial determination of probable cause to support a criminal charge, Minnesota Statutes, section 299C.105, subdivision 1(a)(1) and (3), dispense with the requirement under the Fourth Amendment that before conducting a search, law-enforcement personnel must obtain a warrant based on a neutral and detached magistrate's determination that there is a fair probability that the search will produce contraband or evidence of a crime."

**Minnesota Statutes, Section 353.656, Subdivision 4**  
Public Employees Retirement Association; Line-of-Duty Disability Benefits

**In re Masson**  
Minnesota Court of Appeals  
July 29, 2008

Police officer, terminated after sustaining injuries resulting in long-term disability that interfered with her ability to perform her duties, sought review of a decision of the board of trustees of the Public Employees Retirement Association (“PERA”), denying her request to exclude earnings from preexisting employment as a community college administrator when calculating the “reemployment” offset to her disability benefit under the “police and fire plan.”

The issue as determined by the court, was whether the relator’s compensation for preexisting employment was subject to the offset provisions of Minnesota Statutes, section 353.656, subdivision 4, paragraph (b), and specifically, the meaning of the term “reemployment.”<sup>[1]</sup> “The statute does not define the word ‘reemployment’ nor does the word ‘reemployment’ have an ordinary or common meaning, because the usage is limited...Because both parties’ interpretations of the statute are reasonable, we conclude that Minnesota Statutes, § 353.656, subd. 4(b), is ambiguous.”

Masson argued that “reemployment” referred solely to employment commenced after disability. PERA argued “reemployment” referred to the resumption of employment after a disabling injury, which includes returning to preexisting employment or starting new employment. The court went on to uphold the decision of PERA: “PERA’s interpretation ...provides a reasonable, uniform application of the statute that is consistent with the public interest...disability benefits are ‘intended to replace a *portion* of an injured worker’s salary’ ...the legislature intended section 353.656, subdivision 4(b), as a limitation on income replacement when a member is able to return to, or retain, employment not covered by the plan.”<sup>[2]</sup>

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<sup>[1]</sup> The court noted that the legislature had since amended Minnesota Statutes, section 353.656, subdivision 4, designating the existing text in the last paragraph of paragraph (b), as paragraph (c). “Since this amendment did not affect the meaning of the statute, our analysis applies equally to the amended version of the statute.”

<sup>[2]</sup> A petition for review of this case has been filed and was denied by the Minnesota Supreme Court on October 1, 2008.

## **Minnesota Statutes, Section 394.27, Subdivision 7**

Zoning; Area Variances

### **In re Stadsvold**

Minnesota Supreme Court

June 19, 2008

The Otter Tail County Board of Adjustment fined the Stadsvolds for violating the lot line and road right-of-way setbacks in the County ordinances. The Stadsvolds applied for a variance from the setback requirements. Minnesota Statutes, section 394.27, subdivision 7 governs a county's authority to permit variances and provides:

Variances shall only be permitted when they are in harmony with the general purposes and intent of the official control in cases when there are practical difficulties or particular hardship in the way of carrying out the strict letter of any official control, and when the terms of the variance are consistent with the comprehensive plan. "Hardship" as used in connection with the granting of a variance means the property in question cannot be put to a reasonable use if used under the conditions allowed by the official controls; the plight of the landowner is due to circumstances unique to the property not created by the landowner; and the variance, if granted, will not alter the essential character of the locality. Economic considerations alone shall not constitute a hardship if a reasonable use for the property exists under the terms of the ordinance.

The Board of Adjustment denied the variance concluding that the Stadsvolds had not shown an "adequate hardship."

On appeal, the court determined that Minnesota Statutes, section 394.27, subdivision 7, is ambiguous "because only 'hardship' is defined, and it therefore is not clear from the statute when a county zoning authority's decision should be based on the 'practical difficulties' or the 'particular hardship' standard in a given case."

The court examined the legislative history of section 394.27, subdivision 7, and concluded that the "practical difficulties" standard is appropriate to apply to area variances and the "particular hardship" standard is appropriate to apply to use variances. Furthermore, the court held that the factors for consideration in making a determination of "practical difficulties" are as follows:

- (1) how substantial the variation is in relation to the requirement;
- (2) the effect the variance would have on government services;
- (3) whether the variance will effect a substantial change in the character of the neighborhood or will be a substantial detriment to neighboring properties;
- (4) whether the practical difficulty can be alleviated by a feasible method other than a variance;
- (5) how the practical difficulty occurred, including whether the landowner created the need for the variance; and
- (6) whether, in light of all of the above factors, allowing the variance will serve the interests of justice.

## **Minnesota Statutes, Section 466.12**

Tort Immunity; Schools

### **Granville v. Minneapolis Public Schools, Special Dist. No. 1**

Minnesota Supreme Court

May 31, 2007

Parents of students injured at elementary school brought a negligence action against the school district. The district court dismissed the action based on statutory tort immunity and the parents appealed. On remand from the court of appeals, the district court denied the school district's motion for summary judgment. The court of appeals reversed. The supreme court granted review.

At issue was whether Minnesota Statutes, section 466.12, was in effect. This section was enacted in 1963 as part of the Municipal Tort Claims Act, codifying pre-existing common law immunity for school districts and exempting them from chapter 466 that made local government units liable for their torts. This preservation of tort immunity was not permanent and by its terms, expired January 1, 1968.<sup>[1]</sup> The legislature amended this provision on several occasions, finally extending the expiration as to all school districts to July 1, 1974.<sup>[2]</sup>

In 1996, the legislature repealed only subdivision 4 (the expiration provision) of section 466.12, as part of an "effort to remove obsolete provisions from the statute books." The court noted however, "the 1996 act did not explicitly indicate an intent to revive section 466.12; indeed, it did not express a substantive intent for any of the laws .... Ambiguity exists ... as to whether that repeal revived the rest of the section; its is far from axiomatic that repealing an expiration date revives an expired law. Faced with this ambiguity, we ask what the legislature most likely intended the repeal of subdivision 4 to accomplish."

The court went on to hold that Minnesota Statutes, section 645.36, which states that when a law is repealed which repealed a former law, the former law is not revived unless it is so specifically provided, also applies to the repeal of an expiration provision in a statute. "It is unlikely... that the legislature intended by the repeal of one expiration provision among more than 300 'obsolete' laws to make a significant change in state tort law. If the legislature had intended to enact complete tort immunity for Minnesota school districts, ...it would have drafted a statute announcing such immunity rather than reviving a long-expired statute..."

The court distinguished examples cited by the school district, of acts that repealed *future* expiration dates; in these cases, the underlying law did not expire. It also rejected the school district's argument to give effect to section 466.12 because it continued to appear in Minnesota Statutes. "Although the Minnesota Statutes are prima facie evidence of the laws of Minnesota, they are not the laws themselves. The actual laws ... as passed by the legislature ... are contained in the session laws ... We hold that Minnesota Statutes, section 466.12, expired in 1974 and was not revived."<sup>[3]</sup>

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<sup>[1]</sup> Minnesota Statutes, section 466.12, subdivision 4, provided that "this section is in effect on January 1, 1964, but all of its provisions shall expire on January 1, 1968."



<sup>[2]</sup> See *e.g.*, Laws of Minnesota 1965, chapter 748, section 1; Laws of Minnesota 1969, chapter 826, section 2.

<sup>[3]</sup> The revisor of statutes removed section 466.12 from the Minnesota Statutes publication, effective for the 2008

## **Minnesota Statutes, Section 580.24**

### **Mortgages; Redemption**

#### **Northern Realty Ventures, LLC v. Minnesota Housing Finance Agency**

Minnesota Court of Appeals

April 15, 2008

Creditor which had obtained an assigned judgment for a lien against mortgagor brought an action against a third mortgagee, seeking to quiet title to property following a foreclosure action by a second mortgagee and attempted redemptions. The district court entered judgment for the third mortgagee and the creditor appealed.

In its opinion, the court of appeals examined the redemption statute, Minnesota Statutes, section 580.24; specifically, paragraph (a), clause (2), which provides that no creditor is entitled to redeem unless the creditor “records in each office where the notice is recorded *all documents necessary to create the lien* on the mortgaged premises and to evidence the creditor’s ownership of the lien....”

The court determined that the statute was ambiguous, because two “reasonable alternative” interpretations of the statute had been presented by the case. Under one interpretation, the statute only requires a creditor to record a document with the county recorder when recording the document is necessary to create a lien. If a lien has already been created, the documents that were needed to create the lien do not have to be recorded and documents showing they’ve been recorded do not have to be presented to the sheriff during the redemption period.

However, under a second interpretation the phrase, “all documents necessary to create the lien” means the documents needed to create the lien regardless of when the lien was created. A party would need to record both documents – both the judgment that created the lien and the assignment of the lien – during the redemption period.

Following a review of the legislative history of the language, the court held the latter interpretation was correct and stated:

[T]he legislature’s intent was to reduce the difficulty that sheriffs were having when determining the priority of competing liens ... we conclude that the requirement ... to record “all documents necessary to create the lien” applies to the documents necessary ... regardless of when the lien was created ....

The court then held that since the creditor in this case, Northern Realty, did not file the judgment and the assignment of that judgment with the county recorder during the redemption period, Northern Realty was not entitled to redeem based on the judgment, reversing the district court’s determination that Northern Realty had the right to redeem.

**Minnesota Statutes, Section 609.21, Subdivision 1**  
Crimes; Vehicular Homicide

**State v. Al-Naseer**  
Minnesota Supreme Court  
July 12, 2007

Defendant was convicted of criminal vehicular homicide. Following appeals, the supreme court remanded the case to the district court for a new trial. Defendant was again convicted and on a second appeal, the court of appeals reversed. The supreme court again granted review.

In short, the issue before the court was determining what mens rea standard, i.e., knowledge by defendant, must be proven to support a charge of criminal vehicular homicide for leaving the scene of an accident, under Minnesota Statutes, section 609.21, subdivision 1. This statute provides in pertinent part:

“A person is guilty of criminal vehicular homicide ... if the person causes the death of a human being not constituting murder or manslaughter as a result of operating a motor vehicle ... where the driver who causes the accident leaves the scene of the accident in violation of section 169.09, subdivision 1 or 6.”

Looking at both sections, the court concluded “the statutes are silent about the mens rea element, which requires us to determine what degree of knowledge is required for this crime.” The court went on to review the various mens rea standards advocated and applied in this case and in other jurisdictions.<sup>[1]</sup> It then went on to hold that the “person or vehicle” standard – which would require knowledge that the driver’s vehicle was in an accident imposing a duty to stop, i.e., an accident with another person or vehicle – was the “appropriate standard.”

This conclusion, noted the court, was not only consistent with other authority, but served “the public welfare purpose of the statutes, to assure that drivers who are involved in an accident with a person or another vehicle stop, notify authorities, and give aid to any injured persons until the authorities arrive.” The court then remanded the case to the district court to reconsider its verdict in light of the mens rea standard that required the state to prove the defendant knew that his vehicle was involved in an accident with a person or another vehicle.

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<sup>[1]</sup> The court discussed the mens rea standards from the general to the most specific. (1) The state supported, but did not advocate for a “strict liability” standard – that the driver simply failed to stop at the scene of the accident; (2) the district court applied an “accident” standard – that the driver knew that he was in an accident; (3) the state advocated for a “person or vehicle” standard – that the driver knew that he was in the type of accident that would impose a duty to stop, meaning an accident involving a person or another vehicle; (4) The defendant advocated for a “person” standard – that the driver knew that he was involved in an accident that involved another person; (5) the court of appeals applied the “bodily injury or death” standard – that the driver knew that he was in an accident, that the accident involved a person, and that the person sustained bodily injury or death.

## **Minnesota Statutes, Section 609.495, Subdivision 1**

Crimes; Aiding an Offender

### **State v. Hager**

Minnesota Court of Appeals

February 23, 2007

Defendant was convicted in district court of several crimes, including aiding an offender. Defendant appealed on several grounds.

In its opinion, the court discussed the issue of whether the predicate crime for an aiding-an-offender conviction must be a felony. On this point, the court determined the language of Minnesota Statutes, section 609.495, subdivision 1, to be “ambiguous.”

The aiding-an-offender statute states in pertinent part:

“Whoever harbors, conceals, aids, or assists by word or acts another whom the actor knows or has reason to know has committed a crime .... may be sentenced to imprisonment for not more than three years or to payment of a fine of not more than \$5,000, or both if the crime committed or attempted by the other person is a felony.”

The court determined the language was susceptible to two reasonable interpretations. “Arguably, because the statute describes the predicate offense as a ‘crime’ and not a ‘felony,’ if the aiding-an-offender sentence is only imprisonment or a fine, the predicate crime need only be a gross misdemeanor or even a misdemeanor. But it is also possible to read the last phrase of the subsection, ‘if the crime committed or attempted by the other person is a felony,’ as modifying the entire subsection and as a condition precedent for finding criminal liability.”

The court then examined the statute’s legislative history and noted the statute had been recently amended,<sup>[1]</sup> but concluded “the legislative history does not indicate an intent to eliminate the requirement that the predicate crime be a felony.” The court further noted, “allowing the statute to reach aiding of underlying crimes that are less than a felony creates a logical inconsistency .... [A] person convicted of aiding a misdemeanor offender could be subject to a more severe penalty than would be imposed on the person actually committing the underlying misdemeanor ... According to the rule of lenity, ‘[t]he ambit of an ambiguous criminal law should be construed narrowly’ .... [W]e conclude that the predicate offense must be a felony and that the jury should make that determination.”

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<sup>[1]</sup> Laws of Minnesota 2001 1<sup>st</sup> Special Session, chapter 8, article 8, section 24. The amendment substituted the word “crime” for “felony” in the beginning of the statute and added the language “if the crime committed or attempted by the other person is a felony.” This amendment was in response to *In re Welfare of A.C.N.*, 583 N.W.2d 303 (Minn.App. 1998), which held the prosecution must prove the accused actually knew a felony was being committed.

**Minnesota Statutes, Section 609.66, Subdivision 1a (a) (3)**

Crimes; Dangerous Weapons

**State v. Engle**

Minnesota Supreme Court

January 3, 2008

Appellant was convicted of “recklessly discharg[ing] a firearm within a municipality,” under Minnesota Statutes, section 609.66, subdivision 1a (a) (3).

The issue on appeal was whether subdivision 1a (a) (3) requires proof of an intentional discharge of the firearm. The district court concluded that “no intent to discharge needs to be established.” The district court further concluded that “recklessly” is defined as “a conscious and intentional act that the defendant knew or should have known created an unreasonable risk of harm to others.” The court of appeals affirmed.

The Minnesota Supreme Court found the word “reckless” to be ambiguous. It explained that there are “two distinct lines” of cases that offer two divergent definitions of recklessness. In *State v. Cole*, the court defined recklessness as when a person “consciously disregards a substantial and unjustifiable risk that the element of an offense exists or will result from his conduct.” *State v. Cole*, 542 N.W.2d 43, 51-52 (Minn. 1996). The alternative definition, which was relied upon by the district court in this case, states that reckless is “a conscious and intentional act that the defendant knew, or should have known, created an unreasonable risk of harm to others.” See *State v. Bolsinger*, 21 N.W.2d 480, 484 (1946).

The court concluded that the *Cole* definition applies to section 609.66, subdivision 1a (a) (3), since the definition “comports with the most common usage of the term,” whereas the *Bolsinger* definition is unique only to the context of reckless driving. As a result, the court remanded the case for reconsideration with the instruction to apply the *Cole* definition of recklessness. The court affirmed the district court’s holding as it related to the intent requirement.

**Minnesota Statutes, Section 617.247, Subdivision 4 (a)**

Crimes; Child Pornography

**State v. Mauer**

Minnesota Supreme Court

November 15, 2007

Appellant was found guilty on three counts of possession of a pornographic work involving a minor under Minnesota Statutes, section 617.247, subdivision 4 (a), which states:

A person who possesses a pornographic work or a computer disk or computer or other electronic, magnetic, or optical storage system or a storage system of any other type, containing a pornographic work, knowing or with reason to know its content and character, is guilty of a felony.

Appellant argued that the statute violates the First Amendment for lack of an adequate scienter element. The court recognized an express scienter element within the statute by its requirement of proof that a person possessing a pornographic work does so “knowing or with reason to know its content and character.” However, the court explained that the “full range of mental states possible under the plain meaning of ‘reason to know’ includes some that may not provide sufficient scienter.” Therefore, the court concluded that the words “reason to know” are ambiguous when viewed in the context of the First Amendment.

The court examined the legislature’s stated purpose in enacting the child pornography statute, in addition to relevant case law and construed the statutory language so as to avoid constitutional conflicts, holding the following:

A possessor of child pornography has “reason to know” that a pornographic work involves a minor where the possessor is subjectively aware of a “substantial and unjustifiable risk” that the work involves a minor.

**Minnesota Statutes, Section 617.247, Subdivision 8**  
Crimes; Child Pornography

**State v. Cannady**  
Minnesota Supreme Court  
February 8, 2007

Defendant was arrested and charged with possessing child pornography. Before trial, defendant moved to dismiss the criminal complaint on constitutional grounds, arguing that Minnesota Statutes, section 617.247, subdivision 8, violated the U.S. and Minnesota Constitutions by shifting the burden of production and persuasion to the defendant on the element of age of the person depicted in the image alleged to be child pornography. Motion was denied and defendant was convicted in district court. Following appeal, the court of appeals affirmed. The supreme court granted review.

Section 617.247, subdivision 8, provides that “It shall be an affirmative defense to a charge of violation of this section that the pornographic work was produced using only persons who were 18 years or older.” The defendant argued that “the statute violates a defendant’s right to due process because it requires the defendant to affirmatively disprove one of the elements of the crime, specifically that the persons in the pictures are minors.” In response, the state argued the statutory language was “merely advisory” because the legislature could not shift the “burden of proving age, an element of the offense, to the defense.”

The court held the plain language of subdivision 8 was, in fact, an affirmative defense. Furthermore, “[b]y placing the burden of production of an essential element of the offense on the defendant, section 617.247, subdivision 8, creates a de facto shift in the burden of persuasion, because a defendant’s failure to meet the burden of production on the issue of age would prevent the issue from ever reaching the jury.... Due process does not permit the state to place on a defendant the burden of disproving an element of the crime with which she is charged .... [W]e hold that it is unconstitutional.”

The court then discussed severability. “The affirmative defense in section 617.247, subdivision 8, is the only portion ... that is unconstitutional. By severing subdivision 8 from the rest of the statute and striking only that portion, we maintain the rest of section 617.247, which criminalizes possession of child pornography as intended by the legislature.”

**Minnesota Statutes, Section 626.5572, Subdivision 2**  
Vulnerable Adults; Maltreatment

**In re Kleven**  
Minnesota Court of Appeals  
August 7, 2007

Following a decision of the Department of Human Services (DHS) to disqualify a human services technician in a group home for developmentally disabled men from being in any position that allowed direct contact with persons served by programs requiring a license, the technician appealed.

The technician challenged the DHS interpretation, applying a “reasonable person standard” to the Minnesota Vulnerable Adults Act; specifically, Minnesota Statutes, section 626.5572, subdivision 2, which provides the definition of abuse as maltreatment. Although the technician admitted to repeated instances of referring to and attempting to teach the clients various swear words, the technician argued the statute applied a “subjective standard” to the threshold determination of whether the conduct was abuse, because the legislature omitted “reasonable person” language from that provision.<sup>[1]</sup> Technician argued that since the vulnerable adults did not understand what she was saying, DHS could not make a finding that they had experienced emotional distress.

The court determined that because the statute included a reasonable person standard within the “gate-keeping ‘conduct’ provision,” but not within the description of language that could be considered abusive, “the statutory language is subject to more than one reasonable interpretation and is accordingly ambiguous.” It went on to uphold the decision of DHS however, stating the purpose of the Vulnerable Adults Act is “to protect adults who ... are particularly vulnerable ....” and that the technician’s interpretation, “is an affront to the purpose of the act and leads to absurd results, which we presume the legislature did not intend.”

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<sup>[1]</sup> The statute does include a reasonable person standard, when describing the types of conduct which may be considered abusive: “including... use of repeated or malicious oral , written, or gestured language toward a vulnerable adult .. which could be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening.” However, the statute does not include the term, “reasonable person,” in the description of abuse as maltreatment. “Conduct which is not accident or therapeutic conduct ... which produces or could reasonably be expected to produce physical pain or injury or emotional distress.”



**Minnesota Statutes, Section 634.15**  
Confrontation Clause and Laboratory Reports

**State v. Caulfield**  
Minnesota Supreme Court  
October 5, 2006

Appellant challenged his conviction of possession of a controlled substance with the intent to sell. Appellant argued that evidence admitted under Minnesota Statutes, section 634.15 violated his right to confront witnesses testifying against him as explained in *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the U.S. Supreme Court held that all testimonial statements be excluded as evidence unless the declarant is unavailable for testimony and the defendant has had a previous opportunity to cross-examine the declarant.

The challenged evidence was a Bureau of Criminal Apprehension (BCA) laboratory report identifying a substance seized from the appellant as cocaine. This evidence is admissible under section 634.15, subdivision 1 (a), which states the following:

(a) In any hearing or trial of a criminal offense ... the following documents shall be admissible in evidence:

(1) a report of the facts and results of any laboratory analysis or examination if it is prepared and attested by the person performing the laboratory analysis or examination in any laboratory operated by the Bureau of Criminal Apprehension...;

The preparer of the report did not testify at trial even though he was available. Section 634.15, subdivision 2 allows the defendant to request that the preparer of a BCA laboratory report to testify at trial as long as the defendant notifies the prosecution within 10 days of trial.

The state argued that the evidence was not testimonial and therefore not subject to the confrontation clause and also that the defendant forfeited his opportunity to contest the admission of the report by failing to comply with section 634.15, subdivision 2.

The court held that the BCA laboratory report was testimonial evidence and concluded in pertinent part:

[A]ny statute purporting to admit reports without testimony of the preparer must provide adequate notice to the defendant of the contents of the report and the likely consequences of his failure to request the testimony of the preparer. Otherwise, there is no reasonable basis to conclude that the defendant's failure to request the testimony constituted a knowing, intelligent, and voluntary waiver of his confrontation rights. Because section 634.15 does not require adequate notice to the defendant, we conclude that it violates the Confrontation Clause.

**STATE OF MINNESOTA**

**IN COURT OF APPEALS**

**A05-2340**

**A05-2341**

**A05-2342**

**A05-2343**

Kenneth Brown and Robert Banks,  
individually and on behalf of the State of Minnesota,

Respondents,

vs.

Cannon Falls Township, et al.,

Appellants.

**Filed October 10, 2006**

**Affirmed in part and reversed in part; motion denied**

**Randall, Judge**

Goodhue County District Court

File Nos. CX-05-181; C1-05-182; C3-05-183; C5-05-184

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Daniel J. Greensweig, 805 Central Avenue, P.O. Box 267, St. Michael, MN 55376 (for amicus curiae Minnesota Association of Townships)

Susan L. Naughton, League of Minnesota Cities, 145 University Avenue West, St. Paul, MN 55103-2044 (for amicus curiae League of Minnesota Cities)

Jay T. Squires, Nicole L. Tuescher, Ratwik, Roszak & Maloney, P.A., 730 Second Avenue South, Suite 300, Minneapolis, MN 55402 (for amicus curiae Association of Minnesota Counties)

Considered and decided by Kalitowski, Presiding Judge; Randall, Judge; and Peterson, Judge.

## **S Y L L A B U S**

1. To remove a public official from office under Minn. Stat. § 13D.06, subd. 3 (2002), the official must be found to have intentionally violated the open meeting law in three separate or successive proceedings.
2. Minn. Stat. § 13D.06, subd. 4(a) (2002), places a cap on the amount of attorney fees awardable to a party at \$13,000 per party.
3. If a public official is instrumental in arranging a meeting in violation of the open meeting law, the public official can be found to have violated the open meeting law even if the public official did not attend the arranged meeting.

## **O P I N I O N**

**RANDALL**, Judge

Appellants challenge the district court's judgment and amended judgment declaring that they committed violations of the Minnesota Open Meeting Law, imposing fines, awarding costs, disbursements, and reasonable attorney fees, and declaring that appellants have forfeited their right to serve on the Cannon Falls Township Board of Supervisors, "effective immediately." Appellants argue that (a) municipal officials are not subject to removal from office for multiple open meeting law violations adjudicated in a single proceeding; (b) the reliance on the advice of the township attorney and town clerk regarding compliance with the open meeting law should negate a finding of intentional violation; (c) the law does not authorize the award of \$13,000 to each respondent for costs, disbursements, and attorney fees; (d) respondents were not entitled to special notice of a meeting concerning the township attorney's representation of the township; (e) the town board of supervisors was exempt from the notice requirements under Minn. Stat. § 366.01 (2002), because they performed a site inspection; (f) an official who did not attend the meeting could not intentionally violate the open meeting law; (g) respondents were not entitled to special notice for the December 5, 2002 meeting concerning possible ordinance revisions; and (h) the finding that one of the appellants violated the open meeting law was clearly erroneous when no evidence was

introduced that he was aware of respondents' request for special notice. Respondents filed a notice of review seeking a review of the award of attorney fees.

Because public officials are not subject to removal from office until there have been findings of intentional violations of the open meeting law in three separate actions, we reverse the district court's order removing appellants from office. We affirm on all other issues and deny respondents' request for an award of additional attorney fees on appeal.

## FACTS

This appeal concerns allegations of intentional open meeting law violations for meetings that occurred from June 2002, through December 2002, in the Cannon Falls Township ("the township"). The township is governed by a three-member town board of supervisors. At the time of the alleged open meeting law violations, the board consisted of appellants Gary Hovel, Lawrence Johnson, and Keith Mahoney. Both Hovel and Mahoney are farmers and own feedlots in the township.

Respondents Ken Brown and Robert Banks own adjacent properties in the township. Their properties are also adjacent to property owned by Hovel. Both respondents' properties and Hovel's property are located in section 28 of the township and are zoned A-2. According to the township's zoning ordinances, property zoned A-2 restricts the number of residential units to 12 residential units per section. Because of the restrictions on the number of residential units per section, there is a fair amount of competition for building space.

In late 2001, Banks met with the Goodhue County administrator and advised her that he intended to apply for a building permit to build on his property. Shortly thereafter, respondents learned that Hovel had registered his neighboring property as a feedlot. Although Hovel owned a 3,000 unit hog feedlot in section 33 of the township, Hovel's newly registered feedlot, adjacent to respondents' properties, consisted of a shed and some accompanying pasture that housed about eight-to-ten cattle. That Hovel had actually registered his shed as a feedlot concerned Banks because of the proximity of Banks' property to Hovel's property. According to Goodhue County ordinances, residential building was prohibited within 2,000 feet of a registered feedlot, and *vice versa*.<sup>[1]</sup> Because the setback distances went both ways, it was first-come-first-serve as between a feedlot registrant and a building permit applicant, meaning one could knock out the rights of the other.

In early 2002, respondents met with the Goodhue County Attorney and raised their concern that Hovel had improperly registered a feedlot on his property because the feedlot was within 2,000 feet of respondents' properties. Based on the county attorney's recommendation, respondents submitted a complaint on the issue to the county. At about the same time, respondents learned that the Albers, who owned property adjacent to Banks, had also recently registered for a feedlot. Although Jack Albers was confined to a wheel chair and owned only five horses, respondents learned that Hovel convinced the Albers to fill out a feedlot registration form.<sup>[2]</sup>

Adding to their concern over their prospective building rights was respondents' discovery that the township attorney, Michael Ojile, who also served as Hovel's personal attorney, had registered a feedlot. Ojile had registered a feedlot for 50 animals despite the fact that he owned just two horses. Also, respondents were aware of pending litigation involving another township resident, Mark Olson. The Olson litigation concerned the township's revocation of Olson's building permit. Although Olson commenced litigation against the county, the township, through outside counsel, presented the township's position that Olson should not be granted a building permit due to the existence of Hovel's larger feedlot located in section 33 of the township.

On March 12, 2002, respondents, through their attorney, sent a letter to the township clerk requesting notice of certain meetings under the Minnesota Open Meeting Law. This letter stated that:

Our firm has been retained by a number of township residents, who wish to be notified of any special and regular township meetings that address the following topics:

1. Feedlot permits and set backs from residential properties;
2. Feedlot permits issued within Cannon Falls' urban expansion district or within two miles of the city limits;

This demand is made pursuant to Section 13D.04, subd. 2(d) of the Minnesota Open Meeting Law. This letter is directed to you as the responsible official under the Open Meeting Law.

Please provide notice to [respondents].

According to Brown, he wanted to send the letter because something "smelled fishy," and he was concerned about being "sandbagged" by Hovel.

The March 12 letter was copied to Ojile, and according to Ojile's billing records, he reviewed the letter on March 14, 2002. Ojile also performed statutory research regarding open meeting notices and the open meeting law. The letter was subsequently discussed with the township board at one of the June meetings.<sup>[3]</sup> At this time, the township board consisted of all three appellants.

Ojile informed the board that it was his opinion that the March 12 letter did not trigger the special notice provision in the open meeting law. According to Ojile, he informed the board that it was his opinion that the letter "related to the issuance of feedlot permits, and the Board does not issue feedlot permits, and no notice is required." Relying on Ojile's advice as the township's attorney, appellants, in their capacity as the township board, decided they did not need to provide respondents with any special notices of upcoming discussions of feedlot permits and setback requirements from residential properties. Appellants concede they did not inform respondents of their narrow reading of the letter and their intent not to provide any notice.

The lack of special notice provided to respondents for meetings occurring between June 2002, and December 2002, that discussed feedlot permits and setback requirements from residential properties provided the basis for respondents' claims. The first meeting, occurring on June 17, 2002, concerned Ojile's representation of both Hovel personally and the township board in relation to the Olson litigation. Ojile wrote a letter to the Hovels and to appellants, in their capacity as the board, explaining his dual representation and asking if the board wished for him to continue his representation of the township. The board voted 2-0 with Hovel abstaining, to continue to use Ojile as the township attorney. Respondents did not receive notice of this meeting.

The board also held meetings on both June 18 and 19, 2002. The June 18 meeting involved, in part, a discussion of the Olson litigation. At the June 19 meeting, appellants, in their capacity as the board, conducted a site inspection in the township to evaluate the setbacks for a proposed building site involving Richard Samuelson. Respondents did not receive notice of these special meetings.

On June 24, 2002, the Goodhue County zoning administrator sent a letter to Banks advising him that the county had denied his application for a building permit. Although the township board had unanimously voted to issue Banks a building permit in April 2002, the county informed Banks that a feedlot existed within 2,000 feet of his proposed dwelling site. Based on the county's advice, Banks applied for a variance.

Goodhue County also sent Hovel a letter on June 24, 2002. The letter informed Hovel that his feedlot, located next to Banks' property, was not in compliance with the Goodhue County ordinance because it was situated within 2,000 feet of existing dwellings on adjacent properties. The letter further advised Hovel that he could either remove the feedlot within 30 days or apply for a variance. Shortly thereafter, Ojile, on behalf of Hovel, requested and was granted a 30-day extension for consideration of Hovel's non-compliant feedlot.

On July 8, 2002, appellants, in their capacity as the board, held a special meeting to discuss the legal representation by Ojile and a proposed settlement in the Olson matter. Respondents did not receive notice of this special meeting. About two weeks later, Banks received a variance from Goodhue County to build on his property. The next day, appellant Johnson, the chairman of the township board, accompanied the Goodhue County feedlot officer to the Hovel feedlot adjacent to Banks' property. Johnson set a boundary marker stake in the ground on the edge of the feedlot for purposes of determining setbacks. Originally, when the township granted Banks' building permit, the distance between Banks' building site and Hovel's shed was estimated. But the stake was substantially closer to Banks' excavation site than the edge of the shed. Based on the location of the stake, Banks' building site was in violation of the township ordinance that required a one-quarter mile setback between feedlots and residences.

The board held another special meeting on July 31, 2002, to discuss the Olson matter with the Goodhue County attorney. Respondents were not sent notice of the meeting. A week later, on August 7, 2002, appellants Johnson and Mahoney convened for a regular meeting<sup>[4]</sup> where they, along with Ojile, “discussed the distance of Gary Hovel’s feedlot from Bob Banks’[s] excavation site, or proposed building site, and the difference between the county and township zoning ordinances pertaining to feedlot spacing.” The meeting had been rescheduled from August 14, 2002. Because the date and time of this regular meeting had been changed from August 14, to August 7, the special notice provision of the open meeting law was triggered pursuant to Minn. Stat. § 13D.04, subd. 1 (2002). However, the public notice of the change in the time and date was published in the newspaper *the day after* the meeting. Notably, a county board of adjustment meeting was to be held on August 12, 2002, at which time Goodhue County was expected to clarify and correct an administrative error in connection with Banks’ variance.

At the August 12 county board of adjustment meeting, the county confirmed the grant of Banks’s variance to build. Shortly thereafter, Ojile sent Banks a letter stating that Banks must comply with the township’s setback ordinance, despite the fact that the county had already granted Banks a variance. The letter stated that

the actions by the Goodhue County Board of Adjustment granting you a variance from the Hovel feedlot down to 1,160 ft. creates a problem for the [township’s] zoning code. As you know, the zoning code requires that your residence be situated on the building site at least 1,320 ft. from the Hovel feedlot.

The letter further provided that because the “stake is only 1,160 ft. from your dwelling excavation . . . you will be 160 ft. too close to the feedlot, according to the Township ordinance.”

A special meeting was held on August 27, 2002. Respondents were in attendance at the meeting because Ojile’s letter to Banks had informed him of the special meeting. At the meeting, the board voted 2-0, with Hovel abstaining, that Banks’s building site violated the township zoning ordinance. The board also advised Banks that he must apply for a variance if he wished to continue building. Banks declined to apply for a variance with the township on the basis that he already had permission from the county to build, and he did not believe a variance from the township was necessary under the county’s zoning laws.

On September 16, 2002, a special meeting was held to discuss the Olson matter and to retain attorney Peter Tiede to represent the township with respect to Banks’s building permit. The board also voted 2-0, with Hovel abstaining, to rescind Banks’s building permit and order him to stop construction. Respondents did not receive notice of this special meeting.

By October 2002, Hovel had still not complied with Goodhue County’s request and still had not filed for a variance for his feedlot adjacent to Banks’ property. Similarly, Banks still refused to apply for a variance with the township. Both sides threatened legal action on the basis that the other party was not in compliance with the proper zoning ordinances and setback regulations. A special meeting was held on December 5, 2002, where appellants, in their capacity as the board, described the meeting as a “brainstorming” session where no

action was taken. But the minutes reflect that the board discussed “updating the township ordinances regarding requirements for the building permit process such as requiring registered surveys and information from the Goodhue County feedlot officer.” Respondents did not receive notice of this special meeting.

In June 2004, respondents sent a letter to the Minnesota Department of Administration asking the commissioner to issue an advisory opinion regarding whether appellants, in their capacity as members of the township’s board, had complied with various provisions of the open meeting laws. The department subsequently issued an opinion concluding that the board had indeed violated the Minnesota Open Meeting Law on the following dates: June 15, July 8, July 31, August 7, August 27, and September 16, 2002.<sup>[5]</sup> The department further concluded that the board did not keep accurate and complete records of their postings or their minutes in 2002.

In December 2004, respondents filed four separate complaints against appellants in their capacity as members of the township board, claiming a total of eight separate violations of the Minnesota Open Meeting Law. Although not officially consolidated yet, respondents’ claims were tried together in September 2005. The district court found that appellants intentionally violated the open meeting law on eight separate occasions in 2002. The district court ordered Hovel to pay \$300 for each violation, and Johnson and Mahoney to each pay \$100 for each violation. The district court further ordered that appellants were to forfeit their offices immediately pursuant to Minn. Stat. § 13D.06, subd. 3 (2002). Finally, the district court reserved the issue of reasonable costs, disbursements, and reasonable attorney fees.

Appellants moved for amended findings of fact, conclusions of law, and an order for judgment. Appellants also objected to respondents’ request for an award of costs, disbursements, and attorney fees in the amount of \$52,000, or \$13,000 for each action. The district court subsequently clarified its decision, but otherwise denied appellants’ motions. The district court also awarded attorney fees in the amount of \$26,000, \$13,000 to each respondent. The district court concluded that \$13,000 “per party” was reasonable under Minn. Stat. § 13D.06, subd. 4(a) (2002). The district court rejected respondent’s contention that each respondent was entitled to \$13,000 per complaint for a total of \$52,000 per respondent.

In November 2005, appellants filed four appeals, an emergency motion for expedited review, and a motion for consolidation. Shortly thereafter, respondents filed a notice of review requesting a remand on the issue of attorney fees. This court denied the request for expedited review, but granted the motion for consolidation. This court also granted applications by the Association of Minnesota Counties (AMC), the Minnesota Association of Townships (MAT), the Minnesota School Board Association (MSBA), and the League of Minnesota Cities (LMC) for leave to file briefs as amici curiae.

## ISSUES



- I. Did the district court err in concluding that appellants were subject to removal from office under Minn. Stat. § 13D.06, subd. 3 (2002)?
- II. Does appellants' reliance upon township attorney Ojile's advice negate a finding of specific intent to violate the open meeting law?
- III. Does Minn. Stat. § 13D.06, subd. 4 (2002), place a cap on attorney fees at \$13,000 regardless of the number of actions or parties?
- IV. Did the district court err in concluding that respondents were entitled to special notice of the June 17, 2002 special meeting?
- V. Did the district court err in concluding that the township officials were not exempt under Minn. Stat. § 366.01 (2002) from the open meeting law when they performed a claimed site inspection?
- VI. Did the district court err in concluding that appellant Hovel violated the open meeting law on August 7, 2002, when he did not attend the meeting?
- VII. Did the district court err in concluding that respondents were entitled to special notice of the December 5, 2002 meeting?
- VIII. Did the district court err in finding that appellant Mahoney intentionally violated the open meeting law?
- IX. Are respondents entitled to attorney fees on appeal?

## ANALYSIS

### I. Removal

Appellants argue that the district court erred in concluding that they were subject to removal from office under Minn. Stat. § 13D.06, subd. 3 (2002). Statutory construction is a question of law and thus fully reviewable by this court. *Hibbing Educ. Ass'n v. Public Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985).

Minnesota's open meeting law provides that:

(a) If a person has been found to have intentionally violated this chapter *in three or more actions* brought under this chapter involving the same governing body, such person shall forfeit any further right to serve on such governing body or in any other capacity with such public body for a period of time equal to the term of office such person was then serving.

(b) The court determining the merits of any action in connection with any alleged third violation shall receive competent, relevant evidence in connection

therewith and, upon finding as to the occurrence of a separate third violation, unrelated to the previous violations, issue its order declaring the position vacant and notify the appointing authority or clerk of the governing body.

Minn. Stat. § 13D.06, subd. 3 (emphasis added).

Appellants contend that the underlying action does not represent “three or more actions” for purposes of triggering the removal provision in the statute. In support of their claim, appellants distinguish *Claude v. Collins*, 518 N.W.2d 836 (Minn. 1994), from the present case based upon the subsequent legislative history surrounding the amendment to the statute that sets forth the requirements necessary for removal of a public official from office.<sup>[6]</sup> Appellants assert that based upon the plain language of section 13D.06, and the legislative history of that statute, there must be three separate “actions” or “adjudications” before a public official can be removed from office.

In *Claude*, citizens of Hibbing brought suit against city council members, alleging that the city council held closed meetings in violation of the open meeting law. 518 N.W.2d at 838-40. The district court fined the council members for intentional violation of the open meeting law, but refused to remove any of them from office because the court believed removal was a harsh remedy never previously imposed. *Id.* at 840. This court affirmed in part, and the Minnesota Supreme Court granted further review. *Id.* at 840-41. The supreme court held that “[o]nce an official commits three separate, unrelated, and intentional violations, [Minn. Stat. § 471.705, subd. 2] mandates removal. The statute does not require, nor do any public policy considerations suggest, three separate adjudications. One adjudication of three separate, unrelated, and intentional violations is sufficient for removal under the statute.” *Claude*, 518 N.W.2d at 842. Thus, the court held that the officials, who were aware of the open meeting law requirements, but engaged in at least three separate, intentional, and unrelated violations, had to be removed from office. *Id.* at 843.

While *Claude* was pending, the legislature amended section 471.705, subd. 2. The pre-1994 statute read, in pertinent part:

Any person who violates subdivision 1 shall be subject to personal liability in the form of a civil penalty in an amount not to exceed \$100 for a single occurrence. An action to enforce this penalty may be brought by any person in any court of competent jurisdiction where the administrative office of the governing body is located. Upon a third violation by the same person connected with the same governing body, such person shall forfeit any further right to serve on such governing body or in any other capacity with such public body for a period of time equal to the term of office such person was then serving. The court determining the merits of any action in connection with any alleged third violation shall receive competent, relevant evidence in connection therewith and, upon finding as to the occurrence of a separate third violation, unrelated to the previous violations issue its order declaring the position vacant . . . .

Minn. Stat. § 471.705, subd. 2 (1992). The 1994 amended provision states, in pertinent part, that:

Any person who intentionally violates this section shall be subject to personal liability in the form of a civil penalty in an amount not to exceed \$300 for a single occurrence, which may not be paid by the public body. An action to enforce this penalty may be brought by any person in any court of competent jurisdiction where the administrative office of the governing body is located. *If a person has been found to have intentionally violated this section in three or more actions brought under this section involving* the same governing body, such person shall forfeit any further right to serve on such governing body or in any other capacity with such public body for a period of time equal to the term of office such person was then serving. The court determining the merits of any action in connection with any alleged third violations shall receive competent, relevant evidence in connection therewith and, upon finding as to the occurrence of a separate third violation, unrelated to the previous violations issue its order declaring the position vacant . . . .

Minn. Stat. § 471.705, subd. 2 (1994) (emphasis added).

The legislative action altered the 1992 statute in two ways. First, it added the word “intentionally” to mandate that an intentional violation of the open meeting law is now required before a civil penalty may be imposed. Second, the phrase “[i]f a person has been found to have intentionally violated this section in *three or more actions* brought under this section involving” was added.

The term “action” denotes a judicial proceeding. Minn. Stat. § 645.45(2) (2002) (defining “action” as any in-court proceeding). Appellants argue that, based on the language that was added in 1994 to remove a public official from office under the open meeting law, the official must be found to have intentionally violated the law in three separate or successive proceedings. Conversely, respondents argue that the phrase “three or more actions” does not mean three “separate” or “successive” court proceedings. Rather, respondents assert that the language “three or more actions” is satisfied here because they filed four separate complaints.

“When interpreting a statute, we first look to see whether the statute’s language, on its face, is clear or ambiguous. A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation.” *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (quotation and citation omitted). Words and phrases in a statute are construed according to rules of grammar and according to their common and approved usage. Minn. Stat. § 645.08(1) (2002). “The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.” Minn. Stat. § 645.16 (2002). When the words of a statute are ambiguous, we attempt to ascertain the intention of the legislature by considering, inter alia, the object of the statute, the consequences of a particular interpretation, and the legislative history. *See id.* Because both parties here have offered reasonable interpretations, we conclude that the statute is ambiguous.

At a Senate Data Privacy Subcommittee meeting on March 28, 1994, Mayor Collins, one of the defendants in *Claude*, testified as to his perspective of the bill to amend the open meeting law to require three separate adjudications of the open meeting law before a public official can be removed from office. Specifically, Mayor Collins testified that:

Right now the Supreme Court is going to hear the [*Claude*] matter, what, whether or not we should be removed from office. There are over three violations. Now our attorney is claiming that the removal from office clause is not constitutional. I think that if the law read that you had to have three separate adjudications, that would make more sense, but it allows somebody to just wait until you have three alleged violations and then try to enforce the removal from office clause. Even in drunk driving, you have to have separate adjudications before they finally invoke a jail term on you . . . .

After Mayor Collins testified, the subcommittee thoroughly discussed the matter. Initially, there appears to have been some confusion regarding what constitutes “three separate actions,” with the subcommittee debating whether to use the term “adjudication.” But as the discussion concluded, Senator Betzold clarified the matter by stating: “[the language] does identify that you have to have three or more actions brought under this section so somebody has to bring an action three different times in order to get to the remedy of having somebody forfeit their office.” The motion to amend the language of the statute subsequently passed.

As we read the intent of the legislature, we conclude that the legislature specifically intended that in order to remove a public official under the open meeting law, the official must have been found to have intentionally violated the law in three separate proceedings. The offending official is entitled to know that what they claim they thought was allowable – was not. Once there has been an adjudication, it makes sense that if there was a second adjudication, there cannot be an excuse for the third. The nexus between the former open meeting law, *Collins*, and the amended open meeting law is persuasive. The legislature’s view of public policy was that the public official had to have been tried and told that what he did was wrong before subsequent allegations could be counted up to three and trigger removal from office.

Here, there were four separate complaints filed, but they were tried together with the district court’s adjudication seriatim. This method did not give appellants the opportunity to correct their mistake because they went into one hearing with four separate alleged violations and to each count they asserted good faith. They lost all four counts, essentially at the same time. We understand judicial economy and the burden of trying each complaint separately. But it appears inescapable that “separately” was the legislative intent. There has to be separate adjudications.

There is nothing in the record to indicate that the district court sat down with the parties and their attorneys and explained that the complaints were being tried together for judicial economy, but would constitute four separate adjudications for removal. That would have given the attorneys the chance to object and insist on separate trials. We will not speculate as to what the district court would have done with that objection. But at least the record would be clear and appellants would have fully understood their exposure by going through one

hearing and facing four simultaneous adjudications. By definition, one consolidated trial would prevent the losers from finding out that what they thought was proper – was improper. Thus, the officials would have had no chance before the next private meeting to change it to one that would conform to the open meeting law, as defined (adjudication) by a district court.

Appellants could argue that the topics at the meetings were not unrelated but rather were related, and, therefore, removal was not justified because there were not three violations that were unrelated. But this is not a viable argument. If the topics discussed at the meetings had to be unrelated to the topics discussed at a previous meeting, there would be complete immunity to violate the open meeting law as long as the “same topics” were discussed at subsequent meetings. You could be fined but never removed for three, or five, or ten successive and intentional violations as long as the topics that were discussed were related! That interpretation of section 13D.06, subd. 3, would produce an absurd result. Minn. Stat. § 645.17 (2002) (stating that it is presumed that the legislature does not intend an absurd result). An argument that removal was improper because the open meeting law violations here were related fails.

Minn. Stat. § 13D.06, subd. 3, requires a finding of intentional open meeting law violations in three separate actions. We conclude the district court erred in ordering the removal of appellants from their positions as township board members. All other penalties and sanctions assessed by the district court against appellants were proper.

## **II. Good faith reliance**

Appellants argue that their reliance on township attorney Ojile’s advice regarding compliance with the open meeting law should negate a finding of intentional violation of the open meeting law. Based on the unique circumstances of this case, we disagree.

The open meeting law provides that “[n]o monetary penalties or attorney fees may be awarded against a member of a public body unless the court finds that there was a *specific intent* to violate this chapter.” Minn. Stat. § 13D.06, subd. 4(d) (2002) (emphasis added). Specific intent requires that an individual act with the intent to produce a specific result. *State v. Compassionate Home Care, Inc.*, 639 N.W.2d 393, 397 (Minn. App. 2002). Determining a party’s intent is a question of fact, and this court will not disturb the district court’s determination unless it was clearly erroneous and unsupported by reasonable evidence. *See Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 102 (Minn. 1999).

Here, the record reflects that the township clerk and the township attorney advised the board that the March 12 letter did not trigger the special notice provision in the open meeting law. Appellants all testified that they relied on Ojile’s advice, as the township’s attorney, in deciding not to issue special notice to respondents. The district court, however, found that appellants intentionally violated the open meeting law, and that “any reliance on Attorney Ojile’s legal advice on this issue was not reasonable or in good faith considering Mr. Ojile’s obvious conflict of interest.”

Appellants, along with amici curiae, vigorously argue that public policy dictates that government officials must be entitled to rely on the advice of the municipality's attorney and administrator. Appellants assert that the district court's decision sends a dangerous message that public officials may not be able to escape liability for a decision made in full reliance on the advice of the municipality's attorney. The AMC argues that board members are often laypeople, with no formal legal training, and the district court's decision essentially mandates that a township board must discern if the attorney's advice is good advice, bad advice, accurate, inaccurate, or tainted by an ethical conflict of interest.

We acknowledge that sound public policy mandates that in the course of their civic duties, public officials must be able to rely on competent legal advice without the threat of legal repercussions. Indeed, the Minnesota Constitution limits the removal of elected officials from office unless the official is shown to have committed "malfeasance or nonfeasance in the performance of [his] duties." Minn. Const. art. VIII, § 5. Nevertheless, at some point there is a line where, if crossed, a public official's reliance on the attorney's advice is no longer reasonable. Although sound public policy mandates that public officials must be able to rely on competent legal advice, we also acknowledge that sound public policy mandates that public officials should not be able to hide behind their "reliance" on the legal advice when there are specific facts showing that such reliance was clearly unreasonable.

The specific facts presented here demonstrate that appellants' reliance on attorney Ojile's legal advice was not reasonable. The record reflects that appellants were aware of the March 12, 2002 request for notice. Appellants relied on Ojile's advice that respondents were not entitled to special notice. Appellants relied on this advice despite the fact that feedlots and setback requirements were a "hot topic" in the township of Cannon Falls. The record reflects that residential building in certain sections of the township was very limited and one way to preserve a landowner's building rights was to register his or her lot as a feedlot so that setback requirements limited an adjacent landowner from exercising the landowner's right to build. Appellants were aware of the feedlot and setback requirements and the record reflects that Hovel and Ojile registered their land as feedlots despite the fact that the property housed a minimal amount of livestock. The record reflects that Hovel convinced his neighbors, the Albers, to register their lot as a feedlot even though the Albers owned only a few horses. The logical inference from this evidence is that Hovel was attempting to preserve his right to build, which, effectively, came at respondents' expense.

Further evidence that appellants' reliance on Ojile's legal advice was unreasonable is reflected by Ojile's personal representation of the Hovels. Ojile was aware of a potential conflict because the issue was raised during the June meetings. This fact should have put appellants on notice that their reliance on Ojile's advice may be unreasonable, especially in light of the conflicted circumstances Ojile was in. Ojile did eventually resign due to the conflict between his representation of the Hovels and his position as township attorney. The record shows that at times Ojile appeared to be as much a business partner of appellants as a township attorney. The unreasonableness of appellants' reliance on Ojile's advice is highlighted by respondents' repeated confrontations with appellants over the lack of notice of special meetings.<sup>[7]</sup>

Appellants assert that they, along with most public officials, lack experience and training in the interpretation of the open meeting law, making their reliance on counsel's advice so important. Appellants argue that an affirmance of the district court's decision would start this state down the slippery slope of litigating decisions made by public officials, even though the officials who made the decisions relied on the advice of competent legal counsel.

Appellants are correct that courts are mindful of a public official's need to freely rely on the advice of legal counsel. The supreme court in *Claude* noted that public officials are often inexperienced in the complexities of the open meeting law, and that "[i]gnorance due to inexperience may constitute good faith and amount to sufficient excuse where the elected official neither knows or has reason to know that he or she is violating the Open Meeting Law." 518 N.W.2d at 843 (noting that public officials should seek the advice of legal counsel to avoid violations of the open meeting law when they are inexperienced or ignorant of the law). But, the court also noted that "the excuse of inexperience very quickly wears thin." *Id.*

What is stressed here are the specific facts of this case. We conclude that appellants' reliance on township attorney Ojile's advice regarding compliance with the open meeting law was not reasonable and, thus, does not negate the district court's finding of an intentional violation of the open meeting law.

### III. Attorney fees

Appellants argue that the district court's award of attorney fees was erroneous because Minn. Stat. § 13D.06, subd. 4(a) limits the award to \$13,000 total, not \$13,000 "per party." Conversely, respondents filed a notice of review requesting that this court clarify Minn. Stat. § 13D.06, subd. 4(a), and hold that the statute permits an award of \$13,000 in attorney fees per party, per action.

Generally, an award of attorney fees is reviewed for an abuse of discretion. *See Mut. Serv. Cas. Ins. Co. v. Midway Massage, Inc.*, 695 N.W.2d 138, 143 (Minn. App. 2005), *review denied* (Minn. June 14, 2005). But here, the issue involves the statutory interpretation of Minn. Stat. § 13D.06, subd. 4(a). Accordingly, the standard of review is de novo. *See Hibbing Educ. Ass'n*, 369 N.W.2d at 529 (statutory construction is a question of law).

The open meeting law provides that: "In addition to other remedies, the court may award reasonable costs, disbursements, and reasonable attorney fees of up to \$13,000 to any party in an action under this chapter." Minn. Stat. § 13D.06, subd. 4(a). As noted above, an action is defined as an "in-court proceeding." Minn. Stat. § 645.45(2). Because there was only one "in-court proceeding" here, respondents are not entitled to \$13,000 per complaint that was filed.

Appellants argue that the district court erred in awarding each respondent \$13,000 in attorney fees under Minn. Stat. § 13D.06, subd. 4(a), because the statute limits the attorney fees award to \$13,000 total. We disagree. The statute states that a court may award "up to \$13,000 to any party in an action under this chapter." Minn. Stat. § 13D.06, subd. 4(a). The statute does not

limit the attorney fees award to a one-time cap of \$13,000 regardless of how many parties there are in the lawsuit. It is settled that a suit may be brought by more than one party. *See Vaubel Farms, Inc. v. Shelby Farmers Mut.*, 679 N.W.2d 407, 417 (Minn. App. 2004) (defining “suit” as “any proceeding by a party or parties against another in a court of law”).

Here, respondents Brown and Banks were separate plaintiffs in the suit against appellants. Because section 13D.06, subd. 4(a) provides the district court with discretion to award \$13,000 in attorney fees to “any party” under the open meeting law, the district court was within its discretion when it awarded \$13,000 in attorney fees to each respondent.

#### *IV. Special notice*

Appellants argue that the district court erred in concluding that respondents were entitled to special notice of the June 17, 2002 special meeting. On appeal, a district court’s findings of fact are given great deference and will not be set aside unless they are clearly erroneous. *Fletcher*, 589 N.W.2d at 101. “Findings of fact are clearly erroneous only if the reviewing court is ‘left with the definite and firm conviction that a mistake has been made.’ ” *Id.* (quoting *Gjovik v. Strobe*, 401 N.W.2d 664, 667 (Minn. 1987)).

The open meeting law provides that “[a] person filing a request for notice of special meetings may limit the request to notification of meetings concerning particular subjects, in which case the public body is required to send notice to that person only concerning special meetings involving those subjects.” Minn. Stat. § 13D.04, subd. 2(d) (2002). The open meeting law is designed to avoid secret meetings, to allow the public to be informed about public officials’ decision-making, and to allow members of the public to present their views to their public officials. *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch.*, 332 N.W.2d 1, 4 (Minn. 1983). The open meeting law was enacted for the public benefit and must be given a liberal construction in the public’s favor. *Claude*, 518 N.W.2d at 841.

Appellants argue that respondents were not entitled to special notice of the June 17, 2002 special meeting because the meeting involved a discussion related to Ojile’s representation of both the Hovels personally and the township board in relation to the Olson matter. Appellants claim that because the board’s discussion was only “tangentially related” to respondents’ request for notice, the district court’s finding of an intentional violation of the open meeting law related to the June 17, 2002 meeting was clearly erroneous.

Respondents’ March 12, 2002 letter requested notice of any special meetings that addressed the following topics: (1) feedlot permits and setbacks from residential properties; and (2) feedlot permits issued with Cannon Falls’ urban expansion district or within two miles of city limits. The record reflects that the Olson matter concerned litigation over the revocation of a building permit due to the existence of Hovels’ feed lot. Construing respondents’ request for notice liberally, the discussion at the June 17, 2002 meeting concerned feedlot permits and setbacks from residential properties. Accordingly, the district court did not err in concluding that respondents were entitled to special notice of the June 17, 2002 meeting.

#### *V. Exemptions*



Appellants argue that because the June 19, 2002 special meeting took place at the Samuelson property to do an onsite inspection of the proposed building site, they are exempt from the open meeting law under Minn. Stat. § 366.01, subd. 11 (2002). This statute provides:

**Open Meeting Law; exemption.** Chapter 13D does not apply to a gathering of town board members to perform on-site inspections, if the town has no employees or other staff able to perform the inspections and the town board is acting essentially in a staff capacity. The town board shall make good faith efforts to provide notice of the inspections to each news medium that has filed a written request for notice if the request includes the news medium's telephone number. The notice shall be given by telephone or by any other method used to notify the members of the public body.

Minn. Stat. § 366.01, subd. 11.

The record reflects that appellants, in their capacity as the town board, met at the Samuelson property to do an onsite inspection. But the record also reflects that the meeting constituted a "special meeting." Mahoney admitted that the board discussed the distance between an existing feedlot and a proposed building site at the June 19, 2002 meeting. Based on their previous request for notice, and the subject matter discussed at the meeting, respondents were entitled to notice of the meeting. Because the June 19, 2002 meeting served the dual purpose of an onsite inspection *and* a special meeting, appellants were not exempt from the open meeting law under section 366.01, subd. 11.

## *VI. Attendance*

Appellants argue that because Hovel did not attend the August 7, 2002 meeting, the district court erred in finding that Hovel violated the open meeting law on that date. In support of their claim, appellants cite *Brainerd Daily Dispatch v. Dehen*, where this court noted that a certain council member was not sued because he did not attend a closed meeting. 693 N.W.2d 435, 438 n.1 (Minn. App. 2005), *review denied* (Minn. June 14, 2005). Appellants assert that because *Dehen* indicates that attendance at a meeting is necessary in order to constitute an open meeting law violation, Hovel's absence from the August 7, 2002 meeting exempts him from liability.

*Dehen* does not hold that attendance at a meeting is required in order to constitute an open meeting law violation. Rather, in *Dehen*, this court simply noted, in the fact section, that a certain council member was not sued after he declined to attend a closed meeting. *Id.* Most importantly, the council member in *Dehen* consciously avoided the meeting due to concerns it was not permitted by the open meeting law. *Id.* That is not our facts.

Here, nothing in the record indicates that Hovel avoided the meeting out of concern that the meeting might violate the open meeting law. In fact, the record reflects that Hovel was aware of the meeting change and intentionally agreed to the meeting without notice to the public or to

respondents. In other words, Hovel was instrumental in arranging a meeting that violated the open meeting law. Hovel simply did not attend the meeting because he went to the county fair. The district court did not err in finding that Hovel's absence from the August 7 meeting did not exempt him from liability.

### *VII. What is a meeting?*

Appellants argue that the district court erred in concluding that respondents were entitled to special notice of the December 5, 2002 meeting because the meeting was simply a "brainstorming" session that did not trigger any special notice. We disagree. The minutes of the December 5 meeting reflect that: "The board discussed updating the township ordinances regarding requirements for the building permit process such as requiring registered surveys and information from the Goodhue County feedlot officer." Construing respondents' request for notice liberally, the meeting involved feedlot permits and setbacks from residential properties. *See Claude*, 518 N.W.2d at 841. In light of respondents' repeated requests for notice of special meetings regarding discussions of feedlot permits and setback requirements, and appellants' admission that they failed to send respondents notice of any of the special meetings, the district court did not err in concluding that respondents were entitled to notice of the December 5 meeting.

### *VIII. Intent*

Appellants argue that the district court's finding that Mahoney intentionally violated the open meeting law is clearly erroneous because: (1) Mahoney testified that he was unaware of respondents' request for special notice until January 2003; and (2) the district court's finding that respondents' request for notice was discussed during the June 2002 meetings is unsupported by the record. But the record reflects that according to Ojile's billing records, Ojile reviewed the open meeting rules on June 14, 2002, two days after the June 12, 2002 meeting and three days before the June 17, 2002 meeting. As the district court found, Ojile's billing records indicate that respondents' letter was discussed at either the June 12 or June 17 meeting, or both. Mahoney was present for both meetings. Although Mahoney testified that he did not become aware of respondents' March 12 letter until January 2003, the district court apparently did not find his testimony to be credible. *See Minn. R. Civ. P. 52.01* (stating that due regard is given to the opportunity of the district court to judge the credibility of the witnesses). Conveniently, there are no minutes of when respondents' March 12 letter was discussed, and appellants were unable to recall when the letter was addressed. In light of the unique circumstances of the case, we conclude that the record supports the district court's finding that Mahoney intentionally violated the open meeting law.

### *IX. Appellate fees*

Respondents request the recovery of attorney fees on appeal in the amount of approximately \$25,000. An appellate court may award attorney fees when the appeal is frivolous or in bad faith. *Brett v. Watts*, 601 N.W.2d 199, 202 (Minn. App. 1999), *review denied* (Minn.

Nov. 17, 1999). Fees may also be recovered if specifically authorized by contract or statute. *Van Vickle v. C.W. Scheurer & Sons, Inc.*, 556 N.W.2d 238, 242 (Minn. App. 1996), *review denied* (Minn. Mar. 18, 1997). “The award of attorney fees on appeal rests within the broad discretion of the appellate court.” *Id.*

Respondents argue that Minn. Stat. § 13D.06, subd. 4, authorizes a separate award of attorney fees on appeal, in addition to any award of fees granted by the district court. The open meeting law provides that: “In addition to other remedies, the court may award reasonable costs, disbursements, and reasonable attorney fees of up to \$13,000 to any party in an action under this chapter.” Minn. Stat. § 13D.06, subd. 4(a). Based on the plain language of the statute, section 13D.06, subd. 4(a), caps the amount of attorney fees that can be awarded to a party pursuant to the open meeting law at \$13,000. The district court awarded each respondent \$13,000 in attorney fees at the district court level (which we affirm). It is a case of first impression whether the language of the open meeting law allows each respondent additional attorney fees *on appeal*, when the district court attorney fees award hit the maximum. Both sides make reasonable arguments for their respective positions. We conclude the better course, at least for now, is to say, “A cap is a cap is a cap.” Thus, since each respondent has received the maximum allowed by statute at the district court level, we do not award respondents any additional attorney fees on appeal. Also, by definition, our decision, which reverses the removal of appellant from office, means that appellants’ appeal was not frivolous, and was not brought in bad faith.

## DECISION

Under the Minnesota Open Meeting Law, as amended, a public official must have been found to have intentionally violated the open meeting law in three separate proceedings before the official is subject to removal from office. Because the district court’s order here constitutes only one adjudication of an open meeting law violation involving multiple counts, the district court erred by ordering the removal of appellants from office. All other sanctions were proper.

**Affirmed in part and reversed in part; motion for attorney fees denied.**

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<sup>[1]</sup> The township ordinance required that the setback distance between residential construction and feedlots be only 1,320 feet. But under Minn. Stat. § 394.33 (2002), no township can “enforce official controls inconsistent with or less restrictive than the standards prescribed” by the county. Because Goodhue County’s 2,000-foot setback requirements between feedlots and residential construction is more restrictive, the township’s 1,320-foot setback requirement was preempted by the county’s more restrictive setback requirement.

<sup>[2]</sup> The Albers later rescinded their feedlot registration.

<sup>[3]</sup> Notably, there were no existing minutes documenting when the board discussed the March 12 letter, and none of the appellants had a clear recollection of when the letter was discussed.

<sup>[4]</sup> Hovel did not attend the meeting because he was at the county fair.

<sup>[5]</sup> The department concluded that it could not determine if the December 5, 2002 meeting violated the open meeting law.

<sup>[6]</sup> The statute at issue in *Claude*, Minn. Stat. § 471.705, subd. 2 (1992), was recodified in 2000 as Minn. Stat. § 13D.06 (2000), the statute at issue herein.

<sup>[7]</sup> Appellants also rely on *Mankato Free Press Co. v. City of N. Mankato*, No. C9-98-677 (Minn. App. Dec. 15, 1998), *review denied* (Minn. Feb. 24, 1999), to support their position that a public official who relies on the advice of legal counsel, is not liable under the open meeting law. The facts of *Mankato Free Press* are readily distinguishable from the facts presented here. In *Mankato Free Press*, this court held that because the respondents took steps to confirm the legality of the legal process, which included seeking the advice of the city attorney, the appellants were unable to show that respondents manipulated the law. *Mankato Free Press*, 1998 WL 865714, at \*3. But, unlike *Mankato Free Press*, the record here reflects that appellants relied on Ojile's advice for the specific purpose of benefiting themselves at the expense of respondents. Simply stated, the facts in *Mankato Free Press* reflect that the reliance on the city attorney's legal advice was reasonable. The facts presented here demonstrate that appellant's reliance on the advice of legal counsel was not reasonable.

**STATE OF MINNESOTA**  
**IN COURT OF APPEALS**

**A06-1233**

Charles Risdall, et al.,

Respondents,

vs.

Brown-Wilbert, Inc., et al.,

Defendants,

Christopher C. Brown, et al.,

Appellants.

**Filed July 3, 2007**

**Reversed and remanded**

**Willis, Judge**

Ramsey County District Court

File No. C4-03-7399

Scott D. Hillstrom, Guardian Law Group, LLC, 527 Marquette Avenue, Suite 1800, Minneapolis, MN 55402; and Peter A. Koller, Moss & Barnett, P.A., 4800 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402 (for respondents)

Kay Nord Hunt, Lommen, Abdo, Cole, King & Stageberg, P.A., 2000 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402; and George E. Antrim, III, 201 Ridgewood Avenue, Minneapolis, MN 55403 (for appellants)

Considered and decided by Randall, Presiding Judge; Klaphake, Judge; and Willis, Judge.

**S Y L L A B U S**

When a securities offering is made pursuant to Regulation D, 17 C.F.R. §§ 230.501-.508 (2006), federal law preempts any claim that the offering failed to meet the registration requirement of Minn. Stat. § 80A.08 (2006).

## OPINION

**WILLIS**, Judge

Appellants challenge the district court's grant of summary judgment to respondents on their claim that appellant corporation sold unregistered securities in violation of Minnesota securities law, entitling respondents to rescind their purchases of appellant's stock. Because we conclude that respondents' state-law claims are preempted by federal law, we reverse and remand.

## FACTS

Appellant funeral.com was incorporated in 1999; it is "principally engaged in the development and marketing of an internet website where those with funeral needs can find information and alternatives." Its CEO, appellant Christopher C. Brown, is also the president of Brown-Wilbert, Inc., a burial-vault manufacturer.<sup>[1]</sup> In March 2000, funeral.com issued a private-placement offering memorandum (PPM1) for the sale of funeral.com stock. Respondents Charles Risdall, Len Dozier, and Mary Risdall<sup>[2]</sup> learned of the stock-purchase opportunity and received copies of PPM1 from Ted Risdall, who served on funeral.com's board of directors. In March and April 2000, respondents purchased shares of funeral.com stock under PPM1.

In May 2000, funeral.com issued a second private-placement offering memorandum (PPM2). PPM2 was posted on the Internet and mailed to a list of funeral directors until funeral.com learned that general solicitation and general advertising would prevent the offering from being exempt under Regulation D from the registration requirement of the federal Securities Act. *See* 17 C.F.R. §§ 230.501-.508 (2006) (Regulation D). The web postings were removed, and PPM2 was withdrawn before any sales were made under it. Ted Risdall stated in an affidavit presented to the district court that when he learned of the general solicitation at a May 31, 2000 board meeting, he explained that such solicitation was impermissible without registration and directed the webmaster to remove the material immediately.

The record also contains a letter dated August 14, 2000, to the Securities and Exchange Commission (SEC) from funeral.com's counsel, responding to an inquiry by the SEC regarding funeral.com's use of e-mail and websites to describe an unregistered stock offering. In the letter, funeral.com's counsel admitted that information about a private-placement offering was placed on two websites "at some point after June 1, 2000," and assured the SEC that as of August 10, 2000, the material had been removed from both websites, that no stock sales had been made under the advertised offering, and that funeral.com would ensure that no future sales were made to individuals who had requested a copy of PPM2 "through the websites."

Respondents filed suit against funeral.com in March 2003, alleging consumer fraud, negligence, securities fraud, and unjust enrichment, and seeking rescission of their stock purchases. Both parties moved for summary judgment.

Respondents moved for summary judgment on the grounds that (1) funeral.com sold unregistered securities, in violation of Minn. Stat. § 80A.08 (1998) and (2) funeral.com

committed securities fraud, in violation of Minn. Stat. § 80A.01 (1998).<sup>[3]</sup> Respondents' claim that funeral.com sold unregistered securities was based on their contention that the alleged violations involving PPM2 affected the securities sales made under PPM1 because PPM1 and PPM2 were "integrated," or considered to be part of the same offering. Noting that funeral.com disputed that PPM1 and PPM2 should be integrated, the district court determined that its disposition of respondents' motion for summary judgment "hinge[d] on resolution of this single difference of position."

In its motion for summary judgment, funeral.com argued that respondents' claim is barred by federal securities law because the shares were sold under the exemption from registration provided by Regulation D, promulgated by the SEC. In the alternative, funeral.com argued that it is entitled to summary judgment because Minn. Stat. § 80A.15, subd. 2(h) (1998), provides an exemption from the registration requirement for stock that is sold "in reliance on" the Regulation D exemption. Further, funeral.com argued, there should be no integration of PPM1 and PPM2 because no sales were made under PPM2.

The district court concluded that PPM1 and PPM2 were integrated because they (1) were part of a single financing plan (i.e., starting funeral.com); (2) involved the same class of stock (i.e., common shares); (3) were sold "at or about the same time" (i.e., over a 5-month period); (4) both involved cash consideration; and (5) involved the same purpose (i.e., starting funeral.com). The district court determined that funeral.com failed to comply with Regulation D, that "purported reliance" on Regulation D does not trigger federal preemption of state securities laws in the absence of "actual compliance," and that, therefore, Minn. Stat. ch. 80A is not preempted by federal securities law here.

The district court therefore concluded that funeral.com sold unregistered securities in violation of Minn. Stat. ch. 80A, granted summary judgment to respondents on that ground, and determined that respondents were entitled to rescission of their stock purchases, repayment of the purchase price with interest, costs, and attorney fees under Minn. Stat. § 80A.23, subd. 1 (1998). But the district court denied respondents' motion for summary judgment on their securities-fraud claim on the ground that the facts material to this claim were not "sufficiently undisputed." The district court also denied funeral.com's motion for summary judgment. Respondents agreed to dismiss their remaining claims against funeral.com, including the securities-fraud claim, and final judgment for respondents was entered. This appeal by funeral.com follows.

## ISSUE

When a securities offering is made pursuant to Regulation D, 17 C.F.R. §§ 230.501-.508 (2006), does federal law preempt a claim that the offering failed to meet the registration requirement of Minn. Stat. § 80A.08 (2006)?

## ANALYSIS

This court asks two questions when reviewing a district court's decision to grant summary judgment: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). No genuine issue of material fact exists when "the record taken as a whole could

not lead a rational trier of fact to find for the nonmoving party.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)).

Interpretation of statutes regulating securities is a question of law, which this court reviews de novo. *See Nash v. Wollan*, 656 N.W.2d 585, 589 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003).

Minnesota Statutes chapter 80A (2006) regulates the sale of securities.<sup>[4]</sup> Section 80A.08 provides that “[i]t is unlawful for any person to offer or sell any security in this state unless (a) it is registered under sections 80A.01 to 80A.31 or (b) the security or transaction is exempted under section 80A.15 or (c) it is a federal covered security.” It is undisputed that funeral.com sold unregistered stock to respondents under PPM1, but because funeral.com did not generally advertise or generally solicit sales under PPM1 and the offering was therefore exempt from the registration requirements, those sales standing alone did not violate section 80A.08. And funeral.com asserts that because respondents’ state-law claims are preempted by federal law, even if PPM1 and PPM2 are integrated, there was no violation of Minn. Stat. ch. 80A.

Under the federal Securities Act of 1933, a registration statement must be filed with the SEC before a security may be offered or sold. 15 U.S.C. § 77e (2000). But federal securities law also provides a number of exemptions from the registration requirement, including Regulation D. 17 C.F.R. §§ 230.501-.508 (2006). The National Securities Markets Improvements Act (NSMIA) preempts enforcement of state registration requirements for “covered securit[ies],” which include those sold under Regulation D. 15 U.S.C. § 77r(a), (b)(4)(D) (2000). Regulation D exempts from the registration requirement “transactions by an issuer not involving any public offering.” 15 U.S.C. § 77d(2) (2000); see also *id.*, § 77d(6) (providing that offers or sales solely to accredited investors are exempt from the registration requirement “if there is no advertising or public solicitation in connection with the transaction”). An issuer purporting to use the Regulation D exemption may not “offer or sell the securities by any form of general solicitation or general advertising.” 17 C.F.R. § 230.502(c).

PPM1 provided:

The Shares offered hereby have not been registered under the 1933 Act or any state securities or “blue sky” laws. The Shares are being offered pursuant to exemption from registration. Such exemptions from registration provide that we may sell the Shares offered hereby only to investors who are “accredited investors” as such term is defined in Rule 501(a) of Regulation D promulgated under the 1933 Act.

Because the stock sold to respondents was offered “pursuant to” Regulation D, funeral.com asserts, “any allegation of improper registration is covered exclusively by federal law,” and “[a]ny claim for failure to properly register under state law or for rescission under state law is preempted.”

There appears to be no genuine dispute regarding the fact that funeral.com intended for PPM1 to be exempt from the registration requirement under Regulation D — funeral.com points to respondents’ acknowledgment in their memorandum in opposition to



funeral.com's motion for summary judgment that they "purchased their shares in an offering made pursuant to Rule 506 of Regulation D." But respondents argue that because PPM1 and PPM2 should be integrated into a single offering and funeral.com failed to comply with Regulation D when it publicly solicited securities sales under PPM2, PPM1 is not protected by Regulation D, so Minn. Stat. ch. 80A is not preempted by federal law here.

The parties' positions represent two sides of an issue that has produced conflicting results in securities cases: must a defendant in an action alleging a sale of unregistered securities "prove preemption by proving exemption?" *Grubka v. WebAccess Int'l, Inc.*, 445 F. Supp. 2d 1259, 1269 (D. Colo. 2006). Minnesota's federal district court recently concluded that "[w]hen an offering purports to be exempt under federal Regulation D, any allegation of improper registration is covered exclusively by federal law." *Pinnacle Commc'ns Int'l, Inc. v. Am. Family Mortgage Corp.*, 417 F. Supp. 2d 1073, 1087 (D. Minn. 2006); see also *Lillard v. Stockton*, 267 F. Supp. 2d 1081, 1116 (N.D. Okla. 2003); *Temple v. Gorman*, 201 F. Supp. 2d 1238, 1244 (S.D. Fla. 2002) (holding that when a private placement of securities purported to be exempt under Rule 506, "[r]egardless of whether the private placement actually complied with the substantive requirements of Regulation D or Rule 506, the securities sold to Plaintiffs are federal 'covered securities' because they were sold pursuant to those rules").

The conflicting line of authority requires that the offering actually be exempt under Regulation D by complying with its requirements before an issuer of securities may assert that federal preemption applies. See *Grubka*, 445 F. Supp. 2d at 1270 ("Nowhere does the statute indicate that a security may satisfy the definition if it is sold pursuant to a putative exemption. If Congress had intended that an offeror's representation of exemption should suffice it could have said so, but did not. Such an intent seems unlikely, in any event; that a defendant could avoid liability under state law simply by disclaiming its alleged compliance with Regulation D is an unsavory proposition and would eviscerate the statute."); see also *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 910 (6th Cir. 2007); *Hamby v. Clearwater Consulting Concepts, LLLP*, 428 F. Supp. 2d 915, 920-21 (E.D. Ark. 2006); *Buist v. Time Domain Corp.*, 926 So. 2d 290, 296 (Ala. 2005).

Although it is not binding on this court, we agree with the opinion of the Minnesota federal district court. Because federal courts are uniquely qualified to address issues of federal law, such as the availability of a Regulation D exemption, we conclude that the better view is that an offering purporting to be exempt under Regulation D is governed exclusively by federal law, and any claim under state law relating to the offering is therefore preempted. It is not genuinely disputed that PPM1 purported to be exempt under Regulation D, so it and any subsequent, integrated offerings are governed by federal law. Respondents' state-law claims are therefore preempted, and we reverse on that ground the district court's grant of summary judgment to respondents.

Even if we were to follow the conflicting line of authority and conclude that an offering must actually comply with Regulation D for federal law to preempt state-law claims relating to the offering, we would nonetheless reverse the district court's grant of summary judgment to respondents because we conclude that funeral.com complied with Regulation D in its sale of securities to respondents.

Respondents do not assert that PPM1, standing alone, violated Regulation D's prohibition on public solicitation. Therefore, their argument that PPM1 failed to meet the requirements of Regulation D relies on their contention, with which the district court agreed, that PPM1 and PPM2 should be integrated.

Regarding integration, Regulation D provides:

(a) Integration. All sales that are part of the same Regulation D offering must meet all of the terms and conditions of Regulation D. Offers and sales that are made more than six months before the start of a Regulation D offering or are made more than six months after completion of a Regulation D offering will not be considered part of that Regulation D offering, so long as during those six-month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D, other than those offers or sales of securities under an employee benefit plan as defined in rule 405 under the Act (17 CFR 230.405).

....

The following factors should be considered in determining whether offers and sales should be integrated for purposes of the exemptions under Regulation D:

- (a) Whether the sales are part of a single plan of financing;
- (b) Whether the sales involve issuance of the same class of securities;
- (c) Whether the sales have been made at or about the same time;
- (d) Whether the same type of consideration is being received; and
- (e) Whether the sales are made for the same general purpose.

17 C.F.R. § 230.502(a).

Funeral.com emphasizes the fact that the five-factor test refers to “sales” of securities and the fact that the SEC originally used the word “offerings” in its five-factor integration test but replaced it with “sales” when it codified Regulation D. *Compare* Non-Public Offering Exemption, Securities Act, 27 Fed. Reg. 11316, 11317 (Nov. 16, 1962) (introducing the five-factor test, using the word “offerings”), *with* 17 C.F.R. § 230.502(a) (1982) (codifying Regulation D, including the five-factor test, using the word “sales” rather than “offerings”). Because no sales were made under PPM2, funeral.com argues, PPM2 cannot be integrated with PPM1, and the district court erred in its application of the law when it concluded otherwise. Respondents address this argument in a footnote in which they claim that “[c]ourts and scholars have found no significance in the change from ‘offerings’ to ‘sales,’ as evidenced by the fact that they continue to use the word ‘offerings’ in discussing the current test.”

We agree with funeral.com’s argument. Such a deliberate change in the language of the SEC’s integration test cannot be dismissed as having “no significance.” Under the plain language of the federal regulation, an offering under which no sales are made cannot be integrated with another offering under Regulation D. And respondents do not dispute the fact that no sales were made under PPM2. We therefore conclude that PPM1 and PPM2 were not integrated, and respondents do not assert that PPM1, standing alone, violated the requirements of Regulation D. Because PPM1 complies with Regulation D, respondents’ state-law claims are preempted by federal law, even if we were to follow the line of cases that require defendants to prove exemption under Regulation D in order to establish federal preemption of state securities laws.

And even if respondents’ claims under Minn. Stat. ch. 80A were not preempted by federal law, because we have determined that PPM1 and PPM2 should not be integrated, we also conclude that PPM1 was exempt under Minn. Stat. § 80A.15, subd. 2(h), from the registration requirement of Minn. Stat. § 80A.08. Section 80A.15, subdivision 2(h), exempts from the registration requirement

[a]n offer or sale of securities by an issuer made in reliance on the exemptions provided by Rule 505 or 506 of Regulation D promulgated by the Securities and Exchange Commission, [17 C.F.R. §§ 230.501-.508], subject to the conditions and definitions provided by Rules 501 to 503 of Regulation D [which include the prohibition on public solicitation], if the offer and sale also satisfies the conditions and limitations in clauses (1) to (10).

. . . .

(10) The determination whether offers and sales made in reliance on the exemption set forth in paragraph (h) shall be integrated with offers and sales according to other paragraphs of this subdivision shall be made according to the integration standard set forth in Rule 502 of Regulation D . . . .

Section 80A.15, subdivision 2(h)(10), incorporates the integration standard provided in Regulation D. Because we have concluded that PPM1 should not be integrated with PPM2 and because PPM1 was offered in reliance on Regulation D and otherwise complies with subdivision 2(h), PPM1 is exempt under subdivision 2(h) from the registration requirement of section 80A.08. Therefore, even if we were to determine that respondents' claims were not preempted by federal law, we would still conclude that respondents are not entitled to judgment.

## DECISION

Because it is undisputed that funeral.com's securities under PPM1 were sold pursuant to Regulation D, the sales are governed solely by federal law, and respondents' state-law claims are preempted. We therefore reverse and remand for entry of judgment for appellants.

Reversed and remanded.

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<sup>[1]</sup> We refer to appellants collectively as "funeral.com."

<sup>[2]</sup> Mary Risdall is represented in this suit by John Risdall in his capacity as personal representative of her estate.

<sup>[3]</sup> We note that respondents' complaint did not specifically allege a violation of Minn. Stat. § 80A.08, which prohibits the public sale of unregistered securities. It also did not allege the fact of nonregistration. The issue of nonregistration was raised for the first time in respondents' memorandum in support of their motion for summary judgment, and funeral.com then responded to the issue. We conclude that the parties have litigated this issue by consent. See Minn. R. Civ. P. 15.02 (providing that when a party does not raise an issue in its pleadings, the parties may litigate the issue by express or implied consent, and the district court will treat those issues as if they were raised in the pleadings).

<sup>[4]</sup> Minn. Stat. §§ 80A.01-.31 have been repealed, effective August 1, 2007. 2006 Minn. Laws ch. 196, art. 1, §§ 51-52, at 91.

**STATE OF MINNESOTA**  
**IN COURT OF APPEALS**

**A05-2346**

In re the Estate of:

Francis E. Barg, a/k/a Francis Edward Barg.

**Filed October 17, 2006**

**Reversed and remanded**

**Lansing, Judge**

Mille Lacs County District Court

File No. PX-04-0701

Janice S. Kolb, Mille Lacs County Attorney, Dawn R. Nyhus, Assistant County Attorney, Courthouse Square, 525 Second Street Southeast, Milaca, MN 56353 (for appellant Mille Lacs County)

Thomas J. Mainz, 105 Rum River Drive South, Suite 2, Princeton, MN 55371-1816 (for respondent personal representative)

Mike Hatch, Attorney General, Robin Vue-Benson, Assistant Attorney General, 900 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for amicus curiae Minnesota Department of Human Services)

Considered and decided by Lansing, Presiding Judge; Klaphake, Judge; and Parker, Judge.\*

**S Y L L A B U S**

Under Minnesota's estate-recovery statute, Minn. Stat. § 256B.15 (2004), the interest of a deceased medical-benefits recipient in transferred joint-tenancy property that is part of a surviving spouse's estate is determined by principles of real-property law, as modified by specific provisions of the estate-recovery statute.

**OPINION**

**LANSING, Judge**

In this appeal from an order for partial recovery of medical benefits paid to Dolores Barg, the estate of Francis Barg challenges the district court's interpretation of Minnesota's estate-

recovery statute, Minn. Stat. § 256B.15 (2004). Because we conclude that the determination of the deceased recipient's interest in transferred joint-tenancy property must be based on principles of real-property law as modified by specific provisions of the estate-recovery statute, we reverse and remand for recalculation of Mille Lacs County's allowable claim against the estate.

## **F A C T S**

Dolores and Francis Barg married in 1948. In 1962 and 1967 they acquired title to real property that they held in joint tenancy. In 2001 Dolores Barg's health declined, and she eventually required out-of-home nursing care. To pay for her medical care, she applied for long-term Medicaid benefits. After participating in an asset assessment, Dolores Barg transferred her interest in the jointly held property to Francis Barg. At the time of the transfer, the assessed value of the property was \$120,800.

Dolores Barg died in 2004. Between 2001 and 2004, Dolores Barg received a total of \$108,413.53 in medical-assistance benefits through the Medicaid program. Five months after Dolores Barg's death, Francis Barg died, and his will was admitted to probate. Mille Lacs County filed a claim against the estate to recover the medical-assistance payments made to Dolores Barg. The estate's personal representative allowed \$63,880 as a claim against the estate, but disallowed \$44,533.53. The county thereafter filed a claim-allowance petition.

At the hearing on the petition, the county contended that it was entitled to full recovery of its claim because the value of the real property exceeded the value of the claim and, as marital property, Dolores Barg was entitled to an undivided interest in its full value. The estate contended that the court should, instead, apply a probate-law analysis that would limit Dolores Barg's interest in the property to a life estate, with a value of \$63,880.

Applying probate-law principles, the district court determined that Dolores Barg had a life-estate interest in the property and that the county could not recover the additional \$44,533.53. The county appeals from this determination, and the Minnesota Department of Human Services has filed an amicus brief in support of the county's position.

## **I S S U E**

Did the district court err by applying, for purposes of Minnesota's estate-recovery statute, a probate-law analysis to calculate a medical-assistance recipient's interest in transferred joint-tenancy property that is part of the surviving spouse's estate?

## **A N A L Y S I S**

In the district court, Mille Lacs County and Francis Barg's estate jointly submitted a stipulation of facts; on appeal, both acknowledge that the claim against the estate is governed by federal and state statutes. Application of a statute to undisputed facts involves a question of law. *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996). We review questions of law de novo. *Morton Bldgs., Inc. v. Comm'r of Revenue*, 488 N.W.2d 254, 257 (Minn. 1992).

Medicaid is a cooperative program between states and the federal government in which the federal government provides financial assistance to participating states. *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 9 (Minn. 2002). Participating states design their own Medicaid plans and set guidelines for eligibility and participation, but these plans must comply with federal law. *Id.* at 11.

Under Medicaid, a person who is unable to pay the cost of long-term medical care may qualify for medical-assistance benefits. *See Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 21 (Minn. 1995) (stating that Medicaid provides benefits for "medically needy"). If the person has income or assets that exceed the limits for eligibility, the person will not qualify for benefits until the available resources that exceed the eligibility level are expended. *In re Estate of Atkinson v. Minn. Dep't of Human Servs.*, 564 N.W.2d 209, 211 (Minn. 1997). Because the "spend down" requirement has the potential to impose substantial hardship on the spouse of a medical-assistance recipient, Medicaid includes provisions to avoid spousal impoverishment. *Id.* These anti-impoverishment measures preclude certain assets from being considered for eligibility purposes. *Id.* Specifically, in determining eligibility for Medicaid benefits, the value of an individual's home is not considered so long as a spouse or dependent child maintains the home as a primary residence. Minn. Stat. § 256B.056, subd. 2 (2004).

Because the spousal anti-impoverishment measures provide an exemption for a primary residence, this property is typically an asset that is subject to estate-recovery procedures. *In re Estate of Gullberg*, 652 N.W.2d 709, 714 (Minn. App. 2002). To reach these assets, Congress amended the Medicaid Act to expand the government's ability to recover from the estates of medical-assistance recipients and to require states to seek this recovery. *See id.* at 712. Although the Medicaid Act does not generally permit the government to recover medical assistance correctly paid on behalf of an individual, the government may seek recovery if one of three exceptions applies. 42 U.S.C. § 1396p(b)(1) (2000). The exception relevant to the Bargs' circumstances applies to individuals who were older than fifty-five when they received medical assistance. *Id.* § 1396p(b)(1)(B). Under this exception, the government may recover "from the individual's estate," but may only seek recovery after the death of the individual's surviving spouse. *Id.* § 1396p(b)(1)(B), (b)(2).

For purposes of recovery, federal law defines an individual's estate as "all real and personal property and other assets included within the individual's estate, as defined for purposes of [s]tate probate law." *Id.* § 1396p(b)(4)(A) (2000). The federal law, however, permits states to expand the definition of estate beyond the definition found within probate law. *Id.* § 1396p(b)(4)(B) (2000). If the state chooses, it may include "any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed . . . through joint tenancy . . . or other arrangement." *Id.*

Minnesota's estate-recovery statute provides that the state may assert a claim against the estate of a surviving spouse to recoup medical-assistance benefits provided to the predeceased spouse. Minn. Stat. § 256B.15, subd. 1a (2004). The Minnesota statute thus reflects the legislature's exercise of the option to expand the definition of estate to allow claims against the surviving spouse's estate. *Gullberg*, 652 N.W.2d at 713. But Minnesota limits a "claim against the estate of a surviving spouse . . . to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage." Minn. Stat. § 256B.15, subd. 2 (2004). Thus, the state may not recover from portions of a surviving spouse's estate that are not traceable to marital or jointly owned property.

In *Gullberg*, 652 N.W.2d at 714, this court determined that Minnesota's statute was partially preempted by federal law. Specifically, the court concluded that Minnesota's estate-recovery statute goes further than permitted by federal law because it permits recovery "to the value of the assets of the estate that were marital property," while the federal law only permits recovery "to the extent of" the individual's interest at the time of death. *Id.* To harmonize federal and state law, *Gullberg* concluded that Minnesota's estate-recovery statute "allows claims against a surviving spouse's estate only to the extent of the value of the recipient's interest in marital or jointly owned property at the time of the recipient's death." *Id.* Recovery is thus limited to "the value of the recipient's interest in those assets at the time of the recipient's death." *Id.*

Prior to *Gullberg*, the state could recover up to the full value of assets that could be traced back to marital or jointly owned property. *See* Minn. Stat. § 256B.15, subd. 2. After *Gullberg*, the state's ability to recover was limited to the recipient's interest in marital or jointly owned property at the time of the recipient's death. *Gullberg*, 652 N.W.2d at 714. Thus, the state's recovery depends on a determination of the recipient's interest in the specified assets at the time of death.

The county and the estate argue that *Gullberg* restricts the definition of the value of the recipient's interest in the estate of the surviving spouse to either probate-law or marital-property-law principles. The county contends that marital-property-law principles should be applied because the estate-recovery statute specifically refers to marital property. The estate counters that a recipient's interest is more appropriately determined by reference to probate law. We conclude that both the county and the estate read too much into *Gullberg*'s passing references to marital and probate law.

*Gullberg*'s holding was limited to the narrow issue of preemption. *Id.* at 712, 714. Rather than directly addressing the method for calculating the extent of the recipient's interest in transferred property, the court in *Gullberg* remanded the issue to the district court for determination of the recipient's interest in the assets of the surviving spouse's estate. *Id.* at 714-15. Although the *Gullberg* decision included citations to a marital-property-law case, *Searles v. Searles*, 420 N.W.2d 581 (Minn. 1988), and to a probate statute, Minn. Stat. § 524.2-402(a), (c) (2000), these citations were included merely as support for the precept that a medical-assistance recipient may continue to have some interest in property even after the recipient has transferred the property to a spouse. *Gullberg*, 652 N.W.2d at 713. Notably, *Gullberg* stated that the

recipient's transfer of his joint tenancy to his spouse was a conveyance by "other arrangement" and that it would therefore fall within the broader optional state definition of estate. *Id.* Thus the *Gullberg* opinion essentially applied the optional definition of estate, as allowed by federal law, and established that the medical-assistance recipient had *some* interest in the homestead after its conveyance, but the opinion did not address the extent of this interest. *Id.*

We therefore reject the parties' competing arguments that *Gullberg* must be read to require either a probate-law analysis or a marital-property-law analysis when calculating a medical-assistance recipient's interest under the estate-recovery laws. We are not persuaded that either analysis applies, particularly in this case. Analysis under marital-property law would require us to read into the estate-recovery statute a definition from Minn. Stat. § 518.54 (2004), which explicitly restricts its definitions to the context of marital dissolution, and provides that marital property "means property . . . acquired by the parties, or either of them, to a dissolution, legal separation, or annulment proceeding." *Id.* § 518.54, subds. 1, 5. We are unable to find a legal basis for incorporating this definition into the estate-recovery statute. *See Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114-17 (Minn. 2001) (stating that rules of statutory construction prohibit adding words or meaning to statute when legislature has not).

We are similarly unable to find a legal basis for imposing a probate-law analysis, which would require the court to apply a retrospective structuring of the medical-assistance recipient's interest in the surviving spouse's estate. This method, which was proposed by the estate and accepted by the district court, results in a life-estate interest that is based on an artificial assumption that the surviving spouse predeceased the recipient instead of the converse. In this case, Francis Barg did not include a provision for his deceased wife and left his interest in his homestead to his children. Under probate-law principles, the court would have to assume that Dolores Barg survived her husband and received a life-estate interest in his property as his surviving spouse.

This probate-law analysis would also conflict with the estate-recovery laws, which require courts to calculate the recipient's interest at the time of the recipient's death rather than on the future date of the spouse's death. The estate-recovery statute specifically provides that a recipient's joint-tenancy interests "shall not be merged into the remainder interest or the interests of the surviving joint tenants" and that the joint-tenancy interests shall be subject to the provisions of the statute. Minn. Stat. § 256B.15, subd. 1(5) (2004); *see also In re Estate of Jobe*, 590 N.W.2d 162, 165 (Minn. App. 1999) (stating that statutory language extends definition of estate to include nonprobate assets), *review denied* (Minn. May 26, 1999). Analysis under probate-law principles is also inconsistent with the federal law's expanded definition of estate, which explicitly allows a state to broaden the definition beyond the meaning used in probate law and to include joint-tenancy interests that have been previously conveyed to a spouse. 42 U.S.C. § 1396p(b)(4).

In light of the problems with the use of either probate-law or marital-property-law principles, we conclude that the plain meaning of the estate-recovery statute requires us to apply property-law principles as specifically modified by the statute. Applying this analysis, a recipient's interest in marital property for purposes of estate recovery is limited to that person's legal interest in the property at the time of death. And, under federal law and *Gullberg*, this



interest includes a conveyance of a joint tenancy to a spouse. *See id.* § 1396p(b)(4)(B); *Gullberg*, 652 N.W.2d at 713 (stating that recipient maintains joint-tenancy interest in property even after conveyance to spouse because conveyance constitutes “other arrangement”).

Applying *Gullberg*, the relevant statutes, and the principles of property law to the stipulated facts, we start from the elemental threshold that Dolores Barg had a joint-tenancy interest in the property that is now in Francis Barg’s estate and that her interest was acquired during their marriage. Before receiving Medicaid benefits, she conveyed her interest in the property to Francis Barg. For purposes of the estate-recovery statute, Dolores Barg’s estate retained a joint-tenancy interest in the homestead at the time of her death. *See* Minn. Stat. § 256B.15, subd. 1(3) (providing for modification of common law principles by allowing continuation of medical-benefit recipient’s joint-tenancy interest after recipient’s death). The “extent of her interest” is defined by the joint tenancy. A joint tenant’s interest in property is an undivided one-half interest in the property’s value. *Kipp v. Sweno*, 683 N.W.2d 259, 260, 263 (Minn. 2004). Because the stipulated facts state that the joint-tenancy property was valued at \$120,800 at the time of Dolores Barg’s death, the extent of the value of Dolores Barg’s interest at the time of her death was \$60,400. We therefore reverse and remand for the district court to recalculate the allowable claim against Francis Barg’s estate.

Finally, the Minnesota Department of Human Services filed an amicus brief in this case, supporting the county’s position and urging reversal of the district court’s decision. The department advances two independent arguments for reversal. First it asserts that *Gullberg*’s discussion of the preemptive effect of the phrase “to the extent of such interest” is dictum and should not be applied. We disagree. The *Gullberg* court did not exceed the scope of review on the preemption issue by relying on a full-text analysis of the federal act. The language of the opinion and the stated issue in the case establish that *Gullberg* squarely addresses preemption and reaches a conclusion on this issue, which became the holding of the case. *Gullberg*, 652 N.W.2d at 712, 714.

Second, the department urges this court to reverse *Gullberg* based on the department’s “more complete discussion” of the preemption issue in its amicus brief. The amicus brief provides a thoughtful and comprehensive analysis of the preemption question. But that issue was decided in *Gullberg*, and nothing in *Gullberg*’s analysis suggests that the court did not consider the full spectrum of applicable law and competing policy considerations in its determination of the preemption issue. We therefore decline to reverse *Gullberg*.

## DECISION

For purposes of obtaining reimbursement under Minnesota’s estate-recovery statute, Mille Lacs County is entitled to a claim against Francis Barg’s estate for Dolores Barg’s one-half interest in the joint-tenancy property obtained during the marriage and transferred to Francis Barg. Because the district court erred by applying a probate-law method of calculation, we reverse and remand for a recalculation of the allowance based on principles of real property as modified by specific provisions of the estate-recovery statutes.

**Reversed and remanded.**

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\*  
10. Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, §

This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2004).

**STATE OF MINNESOTA**  
**IN COURT OF APPEALS**

**A05-537**

In re the Matter of:

Nancy SooHoo, petitioner,

Respondent,

vs.

Marilyn Johnson,

Appellant.

**Filed April 4, 2006**

**Affirmed**

**Shumaker, Judge**

Hennepin County District Court

File No. MF 288082

Michael L. Perlman, Karin Gjerset, Perlman Law Office, Woodside Office Park, 10520 Wayzata Blvd., Minnetonka, MN 55305 (for respondent)

M. Sue Wilson, James T. Williamson, M. Sue Wilson Law Offices, P.A., Two Carlson Parkway, Suite 150, Minneapolis, MN 55447 (for appellant)

Considered and decided by Lansing, Presiding Judge; Shumaker, Judge; and Halbrooks, Judge.

**UNPUBLISHED OPINION**

**SHUMAKER, Judge**

Appellant, the adoptive mother of two minor children, contends that the district court abused its discretion and violated Minn. Stat. § 257C.08, subd. 4 (2004), in awarding visitation privileges to respondent, who is appellant's former domestic partner; in failing to hold an evidentiary hearing before making the visitation award; and in ordering her and the children to attend therapy or counseling. Appellant also challenges the constitutionality of Minn. Stat. § 257C.08, subd. 4. Because the district court did not abuse its discretion in its rulings and because the statute in question is constitutional, we affirm.

**FACTS**

Appellant Marilyn Johnson and respondent Nancy SooHoo cohabited as partners in a romantic relationship for about 22 years, until they separated in September 2003. During the relationship, Johnson adopted two girls from China. The first was E.J., born May 8, 1996, and adopted in 1997. J.J., the second, was born May 15, 2001, and was adopted in 2001.

SooHoo, who is of Chinese heritage, co-parented the children in the same household with Johnson from the times of the respective adoptions until the parties' separation. During that period, the parties held themselves and the children out as a family unit and the children viewed both parties as their parents, referring to each as "mom."

In October 2003, SooHoo filed a petition for an award of sole legal and physical custody of the children, claiming that she was their "de facto parent." The district court ruled that Minnesota law does not recognize a status called "de facto parent" and thus SooHoo could not be awarded custody as such. The court granted SooHoo leave to amend her petition to request visitation privileges as a person with whom the children have resided in a parent-child relationship.

Thereafter, the court conducted an extensive evidentiary hearing in stages during which it addressed a multitude of issues, including those raised on appeal. The court heard the testimony of the parties; several of their acquaintances; a daycare provider; and an evaluator for Hennepin County Family Court Services (HCFCS), whose 17-page report reflected the evaluator's personal observations of the parties and the children and the results of interviews with two psychologists and three therapists who had seen the parties professionally.

The court made various interim rulings and ultimately awarded to SooHoo visitation privileges and ordered that the parties and the children continue with counseling and therapy. Johnson appealed, challenging the visitation award and the order for therapy or counseling.

**DECISION**

### *Interference with the Parental Relationship*

Johnson first contends that the district court abused its discretion by awarding to SooHoo visitation that interferes with Johnson's parental relationship because the quantity of visitation allowed is commensurate with that awarded to a noncustodial parent, and because the visitation schedule has the purpose of preserving a parental role for SooHoo, in violation of Minn. Stat. § 257C.08 (2004).

In determining visitation issues, the district court enjoys broad discretion. *Manthei v. Manthei*, 268 N.W.2d 45, 45 (Minn. 1978). On review of visitation determinations, this court must decide whether the district court abused its discretion by making findings unsupported by the record or misapplying the law. *Courey v. Courey*, 524 N.W.2d 469, 471-72 (Minn. App. 1994). We will not reverse on the basis of findings unless they are clearly erroneous. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). Findings are clearly erroneous if the reviewing court is left with a "definite and firm conviction that a mistake has been made." *J.W. v. C.M.*, 627 N.W.2d 687, 693 (Minn. App. 2001) (citation omitted). This court reviews findings in a light most favorable to the prevailing party. *Id.*

If an unmarried minor has resided for two years or more in a household with a person who is not a foster parent, that person may petition the district court for an award of reasonable visitation rights. Minn. Stat. § 257C.08, subd. 4. The court "shall grant the petition" if three requirements are satisfied: (1) visitation rights would be in the child's best interests; (2) the petitioner and the child had established emotional ties that created a parent-child relationship; and (3) visitation rights would not interfere with the relationship between the custodial parent and the child. *Id.*, subd. 4(1)-(3).

The evidence shows that SooHoo resided in the same household as the children for at least two years, and several witnesses testified to their personal observations that there existed between SooHoo and the children emotional ties indicative of the creation of a parent-child relationship. The district court found these witnesses to be credible. Credibility determinations are within the province of the district court. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). There is nothing in the record that shows that the court clearly erred in its credibility assessments. And although Johnson cites an instance or two of the children's confusion over the visitation issue as suggesting that extensive visitation might not serve the children's best interests, the substantial focus of her challenge is on the third statutory factor, namely, that the visitation rights will not interfere with Johnson's parental relationship with the children. *See* Minn. Stat. § 257C.08, subd. 4(3).

On the third statutory factor, Johnson argues that the court awarded visitation of approximately 37% of the available time to SooHoo and also allowed a significant holiday visitation schedule. This, she contends, interferes with her right as a parent to have custody, care, and control of the children and fosters in a nonparent the role of a parent to the children. She

urges that the “visitation schedule interferes with [her] relationship with her children because it places her children with someone else for one-third of their lives and on significant holidays.”

Johnson also argues that Minn. Stat. § 257C.08 does not contemplate a visitation award that has the effect of creating and maintaining a parent-child relationship in a nonparent.

The district court found, in its order of February 1, 2005, that Johnson chose to share her home with her adopted daughters and SooHoo and “reposed in [SooHoo] enough trust and parenting responsibilities that [SooHoo] and the children were able to develop” a parent-child relationship. Johnson permitted SooHoo to perform a nurturing role with the children and to share parental duties to such an extent that HCFCS psychologist Susan DeVries concluded that the children would suffer emotional harm if they were not provided with frequent and regular contact with SooHoo. But DeVries also concluded that the children continued to have a “primary attachment” to Johnson and perceived Johnson as their “primary parent.”

The court noted that Johnson “self-reported that, despite months of visitation, the girls were ‘happy and secure’” in their home with Johnson. Thus, the record shows that SooHoo was awarded a visitation schedule that the district court believed would permit the continuous nurturing by SooHoo that Johnson had permitted and encouraged; that any significant decrease in SooHoo’s visitation frequency would be deleterious to the children; and, even with SooHoo’s frequent visitation, the children have not lost sight of who their primary parent is and where the security of their home lies. As the district court points out, the evidence does not show so much an interference with Johnson’s relationship with the children as an interference with the “relationship” between the parties. The court illustrates the point with an example pertaining to the children’s Chinese heritage:

[Johnson’s] adopted children are Chinese, as is [SooHoo]. If it is true that visitation with [SooHoo] would advance the girls’ best interests in part because [SooHoo] and her extended Chinese family are better able to advance the girls’ Chinese cultural understanding and appreciation, a fact that has been conceded by [Johnson] . . . , it would make little sense to halt SooHoo’s visitation simply because she “interfered” with [Johnson’s] wishes if suddenly [Johnson] no longer wanted the girls exposed to Chinese culture. The Court does not mean to suggest that [Johnson] actually objects to the girls receiving Chinese cultural education. Rather, the illustration was adduced to show that any disagreement regarding the girls’ cultural education is not the same as interference with [Johnson’s] relationship with the girls. Her relationship could remain strong, and even flourish, despite a disagreement regarding the girls’ cultural education.

The court concludes that Johnson confuses her displeasure and unhappiness at having to deal with SooHoo with the notion that the acrimony of the connection with SooHoo is tantamount to an interference with Johnson’s parental relationship with the children. The evidence supports the court’s conclusion. Other than the bare assertion that too much visitation time

detracts from her ability to parent the children, Johnson has not shown how that is so. The court compared the impact of SooHoo's involvement with the children before the separation and her impact afterward and stated: "More important, however, is the absence of any credible evidence indicating that [Johnson's] relationship with the children was compromised under the old dynamics, let alone will be compromised under the new dynamics." The court's observation is supported by the record.

Johnson focuses much of her argument on the quantity of the visitation time awarded to SooHoo. The court took that argument into consideration, saying that "the Court understands that the amount of visitation, as distinct from the mere award of some visitation, could have an impact on [Johnson's] relationship with the children." The court relied heavily on the recommendation of HCFCS and psychologist DeVries that SooHoo's "contact with the girls not be reduced . . . ." The court then stated: "What appears to be important to these adopted girls is continued contact with someone who they believed was 'mother #2,' especially in light of their fears of abandonment as a result of what transpired in China."

On this record, which includes the district court's extensive and thoughtful findings and conclusions, we are unable to find any instance of a clear abuse of discretion in the visitation award.

*Constitutionality of Minn. Stat. § 257C.08, subd. 4.*

Johnson contends that section 257C.08, subd. 4, is unconstitutional on its face and as applied to the circumstances of this litigation, and the attorney general has declined to participate in these proceedings. The district court held otherwise. "Minnesota Statutes are presumed constitutional, and our power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). Constitutional challenges to statutes are questions of law because they involve statutory interpretations. *In re Blilie*, 494 N.W.2d 877, 881 (Minn. 1993). And we are not bound by the district court's interpretations. *Id.*

Fit parents are granted the presumption that they act in their children's best interests. *Troxel v. Granville*, 530 U.S. 57, 68 120 S. Ct. 2054, 2061 (2000). "Parents have a right to limit visitation of their children with third persons[.]" *Id.* at 63, 120 S. Ct. at 2059 (citation omitted). The Fourteenth Amendment's Due Process Clause contains a "substantive component that 'provides heightened protection against governmental interference with certain fundamental rights and liberty interests,' including parents' fundamental rights to make decisions concerning the care, custody, and control of their children[.]" *Id.* at 57, 120 S. Ct. at 2056 (quotation omitted). "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 72-73, 120 S. Ct. at 2064. When a court intervenes into the private realm of a family, it should give "at least some special weight" to a fit parent's determination of whether to allow a relationship to form between their child and a third party. *Id.* at 70, 120 S. Ct. at 2062.

a. Unconstitutional as written

In support of her argument that Minn. Stat. § 257C.08, subd 4, is unconstitutional as written, Johnson cites *Troxel*. In that case the Supreme Court found that the particular Washington nonparental visitation statute in question was unconstitutional because it was overly broad. *Troxel*, 530 U.S. at 63, 120 S. Ct. at 2059. However, in the present case, the district court correctly stated “extensive reliance on *Troxel* [is] unwise because it [is] a plurality opinion that generated much disagreement among the Supreme Court justices.” Further, the analysis in *Troxel* is limited to a Washington visitation statute, as applied by the trial court. That statute allowed “[a]ny person” to petition the court “at any time” with the only requirement being that visitation “serve the best interest of the child[.]” *Id.* at 67, 120 S. Ct. at 2061. The breadth of the statute and the Washington trial court’s application failed to accord any deference to the parent’s decision that visitation is not in the best interest of the child, and was found as applied to exceed the bounds of the Due Process Clause. *Id.* However, the Supreme Court did not find that any visitation order to which a parent objects violates the Due Process Clause. *Id.* at 73, 120 S. Ct. at 2064 (stating, “[w]e do not, and need not, define today the precise scope of the parental due process right in the visitation context.”).

In the case at hand, we agree with the district court that Minn. Stat. § 257C.08, subd. 4, is the “antithesis” of the statute in *Troxel*. Among other things, the enactment of Chapter 257C after the release of the *Troxel* decision was not a coincidence. *In re Kayachith*, 683 N.W.2d 325, 328 n.1 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). Moreover, the Minnesota statute provides protection for the parent by allowing only a limited class of persons to seek visitation. A person must first qualify for visitation under section 257C.08, subd 4. Qualification requires a showing of residence with the children for at least two years and emotional bonding that produced a parent-child relationship. It must also be shown that visitation is in the children’s best interests and would not interfere with the relationship the parent has with the children. Finally, the visitation must be reasonable.

The requirements of section 257C.08, subd. 4, give deference to a parent by safeguarding the parental relationship against interference and by narrowly tailoring the qualifications of a nonparent to only those who by residence and emotional bonding reasonably should be accorded visitation. The statute is not facially unconstitutional.

b. Unconstitutional as applied

Although the district court concluded that Minn. Stat. § 257C.08, subd. 4, is not “breathhtakingly broad,” it acknowledged that it may still be applied in a manner that violates Johnson’s substantive due-process rights. In *Troxel*, the Supreme Court noted that the Washington trial court’s decision was based on a “mere disagreement” between the trial judge and the parent over who should be allowed to influence the child’s development. *Troxel*, 530 U.S. at 68, 120 S. Ct. at 2061. The trial court’s application of the Washington statute created a situation in which a parent is subject “to any individual judge’s choice of a child’s associates from out of the general population merely because the judge might think himself more enlightened than the child’s parent.” *Id.* at 79, 120 S. Ct. at 2067.



By requiring that the petitioner have resided with the child for two years and have established a parent/child like relationship, Minn. Stat. § 257C.08, subd. 4, restricts a court's discretion as to which nonparent may have visitation. A court cannot then merely choose anyone from the general population and give visitation rights to that person. And the district court here has narrowly applied the statute in a manner that only a demonstrably qualified nonparent was awarded visitation. Furthermore, at least initially, Johnson did not object to SooHoo's visitation. During HCFCS' evaluation, Johnson "was given ample opportunity to express her wishes . . . and she advised the evaluators that visitation, even including overnights, was consistent with the [children's] best interests."

In defining a parent/child relationship, the court in *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535, S. Ct. 571, 573 (1925), established that a parent not only nurtures a child, but also has the right and duty to prepare the child for the future. The visitation order here does not award to SooHoo any parental rights, or any right to direct the children's future. The order simply grants her visitation and the opportunity to continue the previously well-established nurturing relationship to which Johnson acceded before the separation. In support of its determination, the district court stated that Minn. Stat. § 257C.08, subd. 4, "merely permits someone who has significantly nurtured and directed the destiny of a child to remain in that child's life via reasonable visitation."

Because Minn. Stat. § 257C.08, subd 4, is not overly broad, because the district court narrowly applied the statute to a demonstrably qualified nonparent, and because the court gave full effect to the children's best interests in awarding visitation, we hold that the statute is not unconstitutional as written or as it was applied in this case.

#### *Evidentiary Hearing*

Johnson's third argument on appeal is that the district court abused its discretion by awarding visitation without first holding an evidentiary hearing on the issues of visitation and interference with appellant's relationship with the children.

Minn. Stat. § 257C.08, subd. 7, states that "[t]he court may not deny visitation rights under this section based on allegations that the visitation rights would interfere with the relationship between the custodial parent and the child unless after a hearing the court determines by a preponderance of the evidence that interference would occur."

Although subdivision 7 requires Johnson to prove the alleged interference by a preponderance of the evidence, the district court determined that, regardless of who bears the burden of proof, an award of visitation would not interfere with Johnson's relationship with the

children.<sup>[1]</sup> One basis for the district court's determination was that closure of this matter was in the best interest of the children. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995) (stating, "it is . . . important to children to have closure on matters such as this."). Additionally, as discussed above, the district found through extensive evidence that Johnson's complaints of interference, such as SooHoo insisting that the children call her "mommy" (which the children did without insistence before the parties separated) are conclusory allegations that the court did not have to address. *See Axford v. Axford*, 402 N.W.2d 143, 145 (Minn. App. 1987) (determining that trial court did not abuse its discretion when it refused to hold an evidentiary hearing based on affidavits lacking specific, credible evidence to support the allegations). The record shows that ultimately the court received extensive evidence, both testimonial and documentary, and thus we cannot find any denial to Johnson of an opportunity to present whatever evidence she wished.

Johnson also argues that the district court erred by relying "extensively" on HCFCS' evaluation. According to Johnson, the evaluation provided insufficient evidence because it was based on the premise that Johnson and SooHoo were equal parents and relied on Minn. Stat. § 518.17 (2004) rather than Minn. Stat. § 257C.04 (2004) in evaluating the best interests of the children. Minn. Stat. § 257C.04, subd. 1, lists 12 factors that are considered in determining the best interest of the child when two or more parties seek custody. The factors are: (1) the wishes of the parties involved, (2) the preference of the child, (3) the primary caretaker of the child, (4) the intimacy of the relationship between the parties and the child, (5) the interaction and interrelationship between the child and the parties involved, (6) the ease with which the child adjusts to the home, school, and community, (7) the amount of time the child has lived in a "stable, satisfactory environment" and the benefits of maintaining that environment, (8) the permanence of the family unit in the existing or proposed home, (9) the mental and physical health of the involved individuals, (10) the likelihood of the child receiving "love, affection, and guidance" and continued education about the child's culture, religion or creed, if any, (11) the cultural background of the child, and (12) the effects on the child of abuse the child has sustained, if any. Minn. Stat. § 257C.04, subd 1.

Minn. Stat. § 518.17 lists all the same best-interest factors as Minn. Stat. § 257C.04, but also directs the court to consider the disposition of each parent to encourage and permit frequent and continuing contact by the other "parent" with the child. Minn. Stat. § 518.17, subd (1)(a)(13). That HCFCS relied on the section 518.17 factors in its evaluation is shown by the fact that the evaluation reviewed not only the 12 best-interest factors listed in Minn. Stat. § 257C.04, subd. 1, but also included the one additional factor that appears only in section 518.17. Although there is only one distinguishing factor between the two statutes, Johnson contends that the evaluation did not provide the court with adequate information on which to base its determination. Because both statutes require the court to address the best interests of the children, which is the primary consideration in the visitation award, and because HCFCS addressed all pertinent statutory factors, the district court did not abuse its discretion in relying on the HCFCS' evaluation.

Johnson's final argument on appeal is that chapter 257C does not confer on the district court jurisdiction to order her and the children to attend therapy or counseling. She contends that, because these statutes do not confer such jurisdiction, the district court violated her right to due process by relying on them.

Despite Johnson's allegations, Minn. Stat. § 257C.02 clearly "appl[ies] to third-party and de facto custody proceedings unless otherwise specified . . . ." Minn. Stat. § 257C.02 (2004). In ordering therapy, the court relied in part on the following provisions from Chapter 518:

[T]he parent with whom the child resides may determine the child's upbringing, including . . . health care . . . unless the court after hearing, finds, upon motion by the other parent, that in the absence of a specific limitation of the authority of the parent with whom the child resides, the child's . . . emotional health is likely to be endangered or the child's emotional development impaired."

Minn. Stat. § 518.176, subd. 1 (2004). Johnson contends that the district court lacked authority to order therapy under Minn. Stat. § 518.176 (2004), because SooHoo did not move for an order requiring therapy, and could not have done so because she is not a parent. However, the district court found that although the parties had a non-traditional family, they both "functioned as parents." Further, when SooHoo petitioned for custody, she asked that "the Court grant such other and further relief as the Court determines is fair, just, reasonable, and necessary, as the Court, in its discretion, shall deem proper." Therefore, SooHoo did make a motion broad enough to include a therapy order.

The other provision the court relied on when ordering therapy states that "[i]n a proceeding brought for custody . . . the court may grant a temporary order . . . for . . . one or both of the parties to perform or not to perform such additional acts as will . . . protect the parties or their children from . . . emotional harm." Minn. Stat. § 518.131, subd. 1(j) (2004). Johnson contends that Minn. Stat. § 518.131, subd 1, limited the court to ordering therapy only on a temporary basis and not as part of a final order. However, we agree with the district court that because the primary concern is the best interests of the children, "[i]t is highly unlikely that the legislature would authorize the trial court to order therapy on a temporary basis in an order to protect the children from harm, but deny the trial court the authority to include the same protection in a final order." The court did not abuse its discretion in its order for therapy.

**Affirmed.**

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<sup>[1]</sup> Placing the burden of proof on Johnson could be problematic in light of *Troxel*, where the court took issue with the Washington visitation statute effectively putting the burden of proof on the parent who opposed court-ordered visitation. *Troxel*, 530 U.S. at 58, 120 S. Ct. at 2057

**STATE OF MINNESOTA**  
**IN SUPREME COURT**

**A07-152**

Court of Appeals

Page, J.  
Took no part, Dietzen, J.

In the Matter of the Welfare of the Children of:  
N.F. and S.F., Parents.

Filed: May 30, 2008  
Office of Appellate Courts

**S Y L L A B U S**

1. “Physical abuse,” for purposes of the definition of a “child in need of protection or services” under Minn. Stat. § 260C.007, subd. 6(2)(i) (2006), is not limited to the crime of malicious punishment of a child, as defined in Minn. Stat. § 609.377, subd. 1 (2006).
2. Drawing upon the definition of “physical abuse” under Minn. Stat. § 626.556, subd. 2(g) (2006), “physical abuse,” for purposes of the definition of a “child in need of protection or services” under Minn. Stat. § 260C.007, subd. 6(2)(i) (2006), includes physical conduct that causes the child either physical injury, or mental injury as defined in Minn. Stat. § 626.556, subd. 2(m) (2006).
3. The facts of this matter, as stipulated to by the parties and found by the district court, are inadequate to establish either mental or physical injury by clear and convincing evidence.
4. Remand of the matter for further development of the factual record is not in the interests of justice, given the nearly three years that have passed since the incident during which time the children have been in the custody of their parents.

Affirmed in part, reversed in part.

Heard, considered, and decided by the court en banc.

**O P I N I O N**

**PAGE**, Justice.

In 2005, S.F. disciplined his 12-year-old son, G.F., by paddling G.F. on the back of the upper thighs with moderate force a total of about 36 times. After a hearing on stipulated facts and limited witness testimony, the district court adjudicated G.F. and his younger brother, C.F., to be in need of protection or services (CHIPS) under Minn. Stat. § 260C.007, subd. 6(2) (2006). The boys’ parents, S.F. and N.F., appealed. The court of appeals reversed the district court. Relying on the definition of “malicious prosecution of a child” under Minn. Stat. § 609.377, subd. 1 (2006), one of the crimes constituting “child abuse” under Minn. Stat. § 260C.007, subd. 5 (2006), the court held that “physical abuse” under section 260C.007, subdivision 6(2), “requires unreasonable force or cruel discipline that is excessive under the circumstances.” *In re Welfare*

*of Children of N.F. & S.F.*, 735 N.W.2d 735, 738 (Minn. App. 2007). The court further held that, considering such circumstances as G.F.'s age and weight, the force used was not unreasonable and the paddling was not cruel or excessive discipline. We granted review and now affirm the court of appeals as to its reversal of the CHIPS adjudication of G.F. and his brother C.F., but reverse the court of appeals as to its definition of "physical abuse."

At the adjudication hearing in November 2006, the parties stipulated to the basic facts, and our recitation of the facts reflects that stipulation. In 2005, G.F. weighed 195 pounds and was 5 feet, 2 inches tall. He left home that year without permission "numerous times." G.F. would then refuse to say, or would lie about, where he had been. G.F.'s parents, N.F. and S.F., first tried to change his behavior by withdrawing privileges and grounding G.F. In June 2005, the parents discussed with G.F. various Bible verses about corporal punishment and posted the verses on the refrigerator. The parents told G.F. that if he left home again without permission, or if he was disrespectful to them, he would be paddled once for each year of his age. The parents told G.F. that S.F. would do the paddling, but that S.F. would not paddle G.F. while S.F. was angry.

On June 29, 2005, instead of going to bed as instructed, G.F. left the house without permission shortly before 9:00 p.m. C.F. reported G.F.'s departure to his father. When G.F. returned, between 15 and 30 minutes later, S.F. told G.F. that he was going to get a "hot seat" for leaving home without permission. S.F. used a paddle, stipulated by the parties to be a "small maple paddle," to strike the back of G.F.'s upper thighs "approximately 12 times with moderate force." After G.F. had a temper tantrum, S.F. again paddled G.F. 12 times on the back of the upper thighs "with moderate force" for being disrespectful. G.F. then grabbed a knife and threatened to kill himself. S.F. disarmed G.F. and paddled him an additional 12 times, again with "moderate force." S.F. sent G.F. to bed, but G.F. climbed out his bedroom window. The police found G.F. around 11 p.m. as he was walking down the street. On July 5, 2005, Hennepin County Human Services and Public Health Department (County) filed a petition alleging that

G.F. and C.F. were in need of protection or services. As a result, G.F. and C.F. were removed from the home and placed in foster care. The boys were returned to their parents' care on December 23, 2005.

At the adjudication hearing in November 2006, the parties, in addition to stipulating to the basic facts, also submitted as evidence the paddle and two photographs of the back of G.F.'s upper thighs. The photos show no bruising on G.F.'s legs; however, the record does not indicate when the photos were taken. In addition, S.F. gave limited testimony about the impact of the proceedings on his aspirations to become a teacher. The district court concluded that "[s]triking a child with a wooden paddle 36 times" was not reasonable or moderate discipline and therefore constituted physical abuse. The court further concluded that the boys' environment was injurious or dangerous and adjudicated both as children in need of protection or services (CHIPS) based on the physical abuse of G.F. The court continued the boys' placement in the care and custody of their parents, subject to compliance with a case plan that included, among other things, individual and family therapy and oversight by a county social worker.

N.F. and S.F. appealed the district court’s CHIPS adjudication, arguing that the term “physical abuse” as used in section 260C.007, subdivision 6(2)(i), requires proof of a physical injury. *In re the Children of N.F. & S.F.*, 735 N.W.2d at 738. The County argued that “physical abuse” should be considered the same as bodily harm under Minn. Stat. § 609.02, subd. 7 (2006), which includes physical pain but does not require other injury. *Id.* The court of appeals noted that the definition of “child in need of protection or services” under Minn. Stat. § 260C.007, subd. 6(2), “refers to the definition of ‘child abuse’ in Minn. Stat. § 260C.007, subd. 5.” *Id.* at 738. The court then noted that “child abuse” under subdivision 5 requires violation of one of a list of criminal statutes, including malicious punishment of a child. *Id.* “Malicious punishment of a child,” in turn, is defined as “an intentional act or a series of intentional acts with respect to a child, [which] evidences unreasonable force or cruel discipline that is excessive under the circumstances.” *Id.* (quoting Minn. Stat. § 609.377, subd. 1). The court of appeals concluded, therefore, that “ ‘physical abuse,’ like ‘child abuse,’ requires unreasonable force or cruel discipline that is excessive under the circumstances.” *Id.* at 739. Citing G.F.’s age and weight and the fact that the force used was “moderate,” the court concluded that “the discipline was not cruel discipline that was excessive.” *Id.* The court also concluded that the district court’s “dangerous environment” finding was premised on the erroneous finding of abuse and reversed the district court’s CHIPS adjudication as to both G.F. and his brother. *Id.* We accepted the appeal of the County and the guardian ad litem, and rejected the parents’ cross-appeal of whether Minn. Stat. § 260C.007 (2006) is unconstitutional and quasi-criminal in nature.

## I.

Minnesota Statutes § 260C.007, subd. 6, defines a “child in need of protection or services” to include a child who:

(2)(i) has been a victim of physical or sexual abuse, (ii) resides with or has resided with a victim of domestic child abuse as defined in subdivision 5,<sup>[1]</sup> (iii) resides with or would reside with a perpetrator of domestic child abuse or child abuse as defined in subdivision 5, or (iv) is a victim of emotional maltreatment as defined in subdivision 8.<sup>[2]</sup>

We first address the meaning of “physical abuse” as used in subdivision 6(2)(i).

The meaning of “physical abuse” is a matter of statutory interpretation. Our primary goal in statutory interpretation is to give effect to the intent of the legislature. *Heine v. Simon*, 702 N.W.2d 752, 764 (Minn. 2005). We cannot conclude that the statute is so clear and unambiguous that the phrase “physical abuse” requires no interpretation. *See ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005) (when a statute’s meaning is plain from its language, judicial construction is not necessary). Nor does section 260C.007 provide an explicit definition of “physical abuse.”

When the words of a statute are not explicit, we may consider such matters as the occasion and necessity for the law, the object to be attained, and the consequences of a particular

interpretation. Minn. Stat. § 645.16 (2006). We also may look to other statutes upon the same or similar subjects. *Harris v. County of Hennepin*, 679 N.W.2d 728, 732 (Minn. 2004); *see also State v. Lucas*, 589 N.W.2d 91, 94 (Minn. 1999) (“The doctrine of *in pari materia* is a tool of statutory interpretation that allows two statutes with common purposes and subject matter to be construed together to determine the meaning of ambiguous statutory language.”). To interpret “physical abuse,” we therefore look first—as the court of appeals did—to other provisions of the same statute, interpreting “physical abuse” in light of them. *See Hince v. O’Keefe*, 632 N.W.2d 577, 582 (Minn. 2001) (separate provisions within the same statute are to be interpreted in light of each other).

We note initially that Minn. Stat. § 260C.007, subd. 6(2), delineates two categories of children in need of protection or services: those who are themselves victims of physical abuse, sexual abuse, or emotional maltreatment (subdivision 6(2)(i) and (iv)); and those who are in need of protection or services only because they reside with victims of domestic child abuse or with perpetrators of domestic child abuse or child abuse (subdivision 6(2)(ii) and (iii)). The legislature provided specific definitions of “child abuse” and “domestic child abuse” in Minn. Stat. § 260C.007, subs. 5 and 13, and it is the definition of “child abuse” upon which the court of appeals relied in interpreting “physical abuse” in this case. 735 N.W.2d at 738. More particularly, the court of appeals held that (1) because malicious punishment of a child is “child abuse” under Minn. Stat. § 260C.007, subd. 6(2)(ii) and (iii), and (2) because malicious punishment of a child under Minn. Stat. § 609.377, subd. 1, requires “unreasonable force or cruel discipline that is excessive under the circumstances,” then (3) “physical abuse” for purposes of Minn. Stat. § 260C.007, subd. 6(2)(i), likewise “requires unreasonable force or cruel discipline that is excessive under the circumstances.” 735 N.W.2d at 738.

We agree that malicious punishment of a child constitutes physical abuse that renders the child in need of protection or services. The problem is the court of appeals’ holding that physical abuse “*requires* unreasonable force or cruel discipline that is excessive under the circumstances.” 735 N.W.2d at 738 (emphasis added). We conclude that to limit “physical abuse” under Minn. Stat. § 260C.007, subd. 6(2)(i), to conduct that constitutes the crime of malicious punishment of a child is error.

First, the legislature did not use “child abuse” to define children who are in need of protection or services because they have themselves been the victim of abuse or neglect. Rather, the legislature used the term “physical abuse.” Minn. Stat. § 260C.007, subd. 6(2). We presume that distinctions in language in the same context are intentional, and we apply them consistent with that intent. *Transport Leasing Corp. v. State*, 294 Minn. 134, 137, 199 N.W.2d 817, 819 (1972). That the legislature did not use “child abuse”—limited as it is to specific enumerated crimes—in the context of children who have themselves been the victim of abuse or neglect indicates that the legislature intended to protect a broader range of such children. That is, the legislature intended to protect children who have been subjected to conduct constituting physical abuse, regardless of whether that conduct rises to the level of one of the criminal statutes enumerated in the definition of “child abuse” under Minn. Stat. § 260C.007, subd. 5. A broad construction of the definition of children in need of protection or services, with respect to actual victims of abuse and maltreatment, is reasonable in light of the statute’s express instruction that



“[t]he paramount consideration in all proceedings concerning a child alleged or found to be in need of protection or services is the health, safety, and best interests of the child.” Minn. Stat. § 260C.001, subd. 2 (2006).

The legislature uses “child abuse” only in the definition of children who are in need of protection or services because of their residence—either with a victim or with a perpetrator of “child abuse.” Minn. Stat. § 260C.007, subd. 6(2)(ii), (iii). We view this as a limitation on the children who are to be adjudicated as in need of protection or services due solely to their residence, and not because they themselves have been the victim of abuse or neglect. Such a narrow construction of subdivision 6(2) is reasonable in light of the statute’s express intent to remove a child from the custody of the parents “only when the child’s welfare or safety cannot be adequately safeguarded without removal.” Minn. Stat. § 260C.001, subd. 2.

Second, while we must strictly construe criminal statutes, resolving all reasonable doubt concerning the intent of the legislature in favor of the defendant, *State v. Koenig*, 666 N.W.2d 366, 372-73 (Minn. 2003), remedial statutes are to be construed liberally, *State v. Indus. Tool & Die Works*, 220 Minn. 591, 604, 21 N.W.2d 31, 38 (1945). In equating “physical abuse” with the crime of malicious punishment of a child, the court of appeals necessarily adopted a strict construction of what constitutes physical abuse. A strict construction of what constitutes “physical abuse” that renders a child in need of protection or services is contrary to the liberal construction that is to be given to remedial legislation like child protection laws.

Finally, “child abuse” as defined in Minn. Stat. § 260C.007, subd. 5, includes not just malicious punishment, but also such crimes as assault of the child (Minn. Stat. 10 §§ 609.221, .222, .223, .224, .2242 (2006)), use of the child in prostitution (Minn. Stat. §§ 609.322, .324 (2006)), and criminal sexual conduct (Minn. Stat. §§ 609.342, .343, .344, .345 (2006)). The assault or rape of a child surely constitutes “physical abuse” that renders the child in need of protection or services, even if it does not constitute “unreasonable force or cruel discipline that is excessive under the circumstances.”

We therefore conclude that the court of appeals erred in limiting the physical abuse that renders a child in need of protection and services to that which constitutes the crime of malicious punishment of a child under Minn. Stat. § 609.377.

In interpreting an ambiguous statutory provision, we consider not only the statute in which the ambiguous provision appears, but also other statutes that address the same subject. Minn. Stat. § 645.16. The county urges us to look to Minn. Stat. § 626.556 (2006), which requires the reporting of the maltreatment of minors, for guidance in the interpretation of “physical abuse” of a child. The stated purpose of chapter 260C is

to secure for each child alleged or adjudicated in need of protection or services and under the jurisdiction of the court, the care and guidance, preferably in the child’s own home, as will best serve the spiritual, emotional, mental, and physical welfare of the child; to provide judicial procedures which protect the welfare of the child; to preserve and strengthen the child’s family ties whenever possible and

in the child's best interests, removing the child from the custody of parents only when the child's welfare or safety cannot be adequately safeguarded without removal; and, when removal from the child's own family is necessary and in the child's best interests, to secure for the child custody, care and discipline as nearly as possible equivalent to that which should have been given by the parents.

Minn. Stat. § 260C.001, subd. 2. Similarly, Minn. Stat. § 626.556, subd. 1, declares it to be the public policy of the state "to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse." In addition,

it is the policy of this state to require the reporting of neglect, physical or sexual abuse of children in the home, school, and community settings; to provide for the voluntary reporting of abuse or neglect of children; to require a family assessment, when appropriate, as the preferred response to reports not alleging substantial child endangerment; to require an investigation when the report alleges substantial child endangerment; and to provide protective, family support, and family preservation services when needed to appropriate cases.

*Id.* Section 626.556, therefore requires certain persons "who know[] or [have] reason to believe a child is being neglected or physically or sexually abused" to report that information to local authorities. Minn. Stat. § 626.556, subd. 3. To be sure, not every report of neglect or of physical or sexual abuse will result in an adjudication of the child as in need of protection or services. But it is reasonable to assume that the legislature intended there to be some symmetry between conduct that must be reported to authorities, and the conduct that actually renders a child in need of protection or services. Therefore, we conclude that it is appropriate to look to section 626.556 for guidance in defining physical abuse under section 260C.007, subdivision 6(2)(i).

Section 626.556 defines "physical abuse" for purposes of the reporting requirement as follows:

"Physical abuse" means any physical injury, mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child other than by accidental means, or any physical or mental injury that cannot reasonably be explained by the child's history of injuries, or any aversive or deprivation procedures, or regulated interventions, that have not been authorized under section 121A.67 or 245.825.

Minn. Stat. § 626.556, subd. 2(g). Section 626.556 does not define "physical injury," but it does provide this definition of "mental injury":

"Mental injury" means an injury to the psychological capacity or emotional stability of a child as evidenced by an observable or substantial impairment in the child's ability to function within a normal range of performance and behavior with due regard to the child's culture.

Minn. Stat. § 626.556, subd. 2(m).

Because the definition of “physical abuse” under the reporting statute, Minn. Stat. § 626.556, subd. 2(g), expressly includes “mental injury,” section 626.556 requires the reporting of the infliction of mental, as well as physical, injuries upon a child. Physical abuse may result in significant mental injury, even if it results in no observable physical injury.<sup>[3]</sup> It would be incongruous for the legislature to require the reporting of mental injuries inflicted upon a child, yet leave the courts without jurisdiction to provide protection to such an injured child or to require that services be provided to the child’s family. At the same time, the legislature’s definition of “mental injury” under the reporting statute appropriately narrows the range of adverse mental effects that qualify as mental injury for these purposes: the injury must be “evidenced by an observable or substantial impairment in the child’s ability to function within a normal range of performance and behavior.” Minn. Stat. § 626.556, subd. 2(m). We therefore conclude that the court of appeals erred in excluding physical abuse that results in mental injury from conduct that renders a child in need of protection or services under Minn. Stat. § 260C.007, subd. 6(2)(i).

Based on the foregoing analysis, we conclude that physical abuse that causes only mental injury may nevertheless qualify as physical abuse for purposes of the definition of a child in need of protection or services under Minn. Stat. § 260C.007, subd. 6(2)(i). A child is therefore in need of protection or services under section 260C.007 if there is physical conduct toward the child that causes either physical injury, or mental injury as defined in Minn. Stat. § 626.556, subd. 2(m).

## II.

We next apply this definition to the stipulated facts of this case. As to whether there was physical injury to G.F., the county concedes the record is unclear. The guardian ad litem urges us to find that the infliction of physical pain, even without specific injury, should be sufficient, and argues that we can infer that paddling a child 36 times inflicts pain. We are unwilling to establish a bright-line rule that the infliction of any pain constitutes either physical injury or physical abuse, because to do so would effectively prohibit all corporal punishment of children by their parents. Because the definition of “physical abuse” under the reporting statute, Minn. Stat. § 626.556, subd. 2(g), and the definition of “emotional maltreatment” under the CHIPS statute, Minn. Stat. § 260C.007, subd. 15, both explicitly exclude “reasonable discipline,” it is clear to us that the legislature did not intend to ban corporal punishment.<sup>[4]</sup> Moreover, even if pain alone

could be a basis on which to conclude that physical abuse has occurred, the bare-bones stipulation of facts that forms this record is an inadequate basis on which to reach such a conclusion here.

As to whether there was mental injury comprising physical abuse for purposes of Minn. Stat. § 260C.007, subd. 6(2)(i), the question is whether the stipulated facts establish by clear and convincing evidence “an injury to the psychological capacity or emotional stability of [G.F.] as evidenced by an observable or substantial impairment in [his] ability to function within a normal range of performance and behavior.” Minn. Stat. § 626.556, subd. 2(m). G.F.’s use of the knife to make a suicide threat suggests the paddling may have had some effect on G.F.’s psychological or emotional stability. Clearly, wielding the knife in conjunction with the suicide threat raises serious concerns that must be addressed. But for there to be a mental injury and thus physical abuse there must be more. There must be a showing that the injury resulted in an “impairment in [G.F.’s] ability to function within a normal range of performance and behavior.” The bare-bones record here does not support a conclusion that there was such an impairment. The record is simply silent on G.F.’s ongoing ability to function within a normal range of performance and behavior. Given this silence, we are not in a position to hold, based solely on the suicide threat involving the knife, that G.F. is in need of protection or services.

Because of the inadequacies of the factual record before us, we could remand the matter to the district court for further development of the record. We decline to do so, for several reasons. First, the County had the opportunity to make a more complete factual record at the time, but was apparently satisfied with the facts as stipulated. Second, almost three years have passed since the incident at issue, during most of which time the children have been living at home without apparent further incident. A second determination now as to whether the children

were in need of protection or services three years ago seems a needless use of judicial resources under those circumstances.

We therefore conclude that the stipulated record does not provide sufficient information on which to conclude that either mental or physical injury has been proven by clear and convincing evidence, and that remand to allow supplementation of the record is not in the interests of justice.<sup>[5]</sup>

### **III.**

The district court also concluded that G.F. and his brother were in need of protection or services under Minn. Stat. § 260C.007, subd. 6(9), because their “behavior, condition, or environment is such as to be injurious or dangerous to the child or others.” However, the district court’s conclusion in this regard appears to rest on the same findings as its conclusion that G.F. was in need of protection or services as a victim of physical abuse. There are no other findings with respect to the boys’ “behavior, condition, or environment.” Because we hold that the stipulated record does not provide sufficient information on which to conclude that either mental or physical injury has been proven by clear and convincing evidence, we similarly reverse the district court’s conclusion that the boys’ “behavior, condition, or environment is such as to be injurious or dangerous” under Minn. Stat. § 260C.007, subd. 6(9). Therefore, we affirm as modified the court of appeals’ decision reversing the district court’s adjudication of G.F. and C.F. as children in need of protection or services.

#### **Affirmed in part, reversed in part.**

DIETZEN, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

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<sup>[1]</sup> We presume this reference in the 2006 version of Minn. Stat. § 260C.007, subd. 6, which applies to these proceedings, should be to subdivision 13 of section 260C.007, which defines “domestic child abuse.” The legislature

recently corrected this apparent error by changing the reference to subdivision 13, which defines “domestic child abuse.” S.F. 3674, 85th Leg., 2008 Reg. Sess. (Minn. 2008) (enacted).

<sup>[2]</sup> We also presume that this reference in the 2006 version of Minn. Stat. § 260C.007, subd. 6, which applies to these proceedings, should be to subdivision 15 of section 260C.007, which defines “emotional maltreatment.” The legislature recently corrected this apparent error by changing the reference to subdivision 15, which defines “emotional maltreatment.” S.F. 3674, 85th Leg., 2008 Reg. Sess. (Minn. 2008) (enacted).

<sup>[3]</sup> The provision in section 260C.007, subdivision 6(2)(iv), making a victim of “emotional maltreatment” a child in need of protection or services is not inconsistent with the inclusion of mental injury within the scope of physical abuse. Section 260C.007 defines “emotional maltreatment” as “the consistent, deliberate infliction of mental harm on a child by a person responsible for the child’s care, that has an observable, sustained, and adverse effect on the child’s physical, mental or emotional development.” Minn. Stat. § 260C.007, subd. 15. Further, emotional maltreatment requires the “*consistent, deliberate* infliction of mental harm, *id.* (emphasis added), whereas “physical abuse” involves any *nonaccidental* injury inflicted on a child, Minn. Stat. § 626.556, subd. 2(g). Accordingly, the emotional maltreatment provision in Minn. Stat. § 260C.007, subd. 6(2)(iv), does not always cover a mental injury caused by physical abuse.

<sup>[4]</sup> In their brief, respondents suggest that appellants’ underlying purpose in these proceedings is to challenge the right of parents to use corporal punishment. Appellants deny such a purpose. That issue, however, is not before us. Nor should our decision be seen as either condoning or condemning the use of corporal punishment. By excepting “reasonable and moderate physical discipline” from the definition of “physical abuse” in section 626.556, the legislature has made a policy decision to permit corporal punishment. Whether we agree or disagree with that policy decision is of no importance. Our role is limited to interpreting the law as the legislature has enacted it.

<sup>[5]</sup> Having concluded that the record is inadequate to establish either the physical or mental injury necessary to a finding of physical abuse under Minn. Stat. § 260C.007, subd. 6(2)(i), we need not examine whether the exception for reasonable and moderate discipline in the definition of physical abuse under section 626.556, subdivision 2(g), applies.

**STATE OF MINNESOTA**

**IN SUPREME COURT**

**A07-16**

Court of Appeals

Anderson, G. Barry, J.  
Took no part, Dietzen, J.

In the Matter of the Welfare of the Child of: T.P.  
and P.P., Parents  
In the Matter of the Welfare of the Child of: T.P.  
and D.W., Parents.

Filed: April 17, 2008  
Office of Appellate Courts

**S Y L L A B U S**

1. Pursuant to Minn. Stat. § 260C.301, subd. 1(b)(6) (2006), a child can be considered to have experienced egregious harm “in the parent’s care” even though the parent was not physically present at the time the harm occurred.
2. Under the facts of this case, the injured child was “in the parent’s care” where, at the time the child was injured, the family was intact, the child resided in the home with the parents, and the parent whose rights were terminated acknowledged her role as one of the child’s primary caretakers.
3. Minnesota Statutes § 260C.301, subd. 1(b)(6), does not authorize the termination of the rights of a parent who has not personally inflicted egregious harm on a child unless there is clear and convincing evidence that the parent knew or should have known that egregious harm occurred.

Affirmed in part, reversed in part, and remanded.

Heard, considered, and decided by the court en banc.

## OPINION

ANDERSON, G. Barry, Justice.

In this appeal, appellant T.P. (“Mother”) challenges an order of the Otter Tail County District Court terminating her parental rights under Minn. Stat. § 260C.301, subd. 1(b)(6) (2006), arguing that the district court erred in concluding that there was clear and convincing evidence that the statutory criteria for termination of her parental rights were met. Mother appealed the termination of her parental rights to the court of appeals, which affirmed the district court. We granted review to consider whether the statutory grounds for termination were satisfied, and we affirm the decision of the court of appeals in part, reverse in part, and remand to the district court.

K.L.P., born prematurely on January 23, 2006, is the daughter of Mother and P.P. (“Father”).<sup>[1]</sup> Before being placed in foster care, both K.L.P. and A.R.W., Mother’s child from a previous relationship, resided with Mother and Father at the family’s home in Fergus Falls. In April 2006, after K.L.P. began attending daycare, Mother noticed several small bruises on K.L.P.’s arms and legs. Mother and Father discussed the bruises, and Father reportedly raised the issue with the daycare facility at a parent conference.

On May 8, 2006, Mother noticed a small red mark on the left side of K.L.P.’s face after Father took K.L.P. into another room to change her diaper. Father told Mother that K.L.P. had kicked herself into the side of the changing table. The head morning teacher at the daycare facility K.L.P. attended also observed on May 8 that K.L.P. had bruises on the left side of her face. Father, who brought K.L.P. to the daycare facility that day, told the teacher that K.L.P. had fallen off a changing table.<sup>[2]</sup> The teacher documented the injuries she observed and Father’s explanation of how they occurred.

On the morning of Saturday, June 3, 2006, Father brought K.L.P. to his mother’s home. Father’s mother, a retired registered nurse, noticed a bruise on the left side of K.L.P.’s face, as well as bruising around the eye and marks on her forehead. Father first told his mother that K.L.P. had fallen off a bed, and when Father’s mother questioned how K.L.P. could have been bruised so badly simply by falling on the floor, Father explained that there was a set of keys on the floor with a pair of his pants. Father’s mother examined K.L.P.’s injuries and monitored the child’s behavior through the morning and into the afternoon. She observed that K.L.P. seemed alert, that she had no blood in the whites of her eyes, and that her eyes “tracked.” Father’s mother did not report K.L.P.’s injuries to the authorities. Mother was at work when K.L.P. sustained these bruises, but later that day Father explained to Mother that K.L.P. had fallen off the bed.

The bruises on K.L.P.’s face were still visible when Father brought K.L.P. to daycare on Monday, June 5. Father explained to the head morning teacher that K.L.P. had fallen off a



bed and hit a dresser, and the teacher documented K.L.P.'s injuries. Theresa Melmer of the Otter Tail County Department of Human Services ("Otter Tail DHS") received a report that K.L.P. had bruises on her face. Melmer, in turn, contacted Detective Carol Schmaltz of the Fergus Falls Police Department. Melmer and Schmaltz met at the daycare facility, where Melmer photographed the bruises on K.L.P.'s face and forehead.

Melmer and Schmaltz met with Mother and Father when the parents came to the daycare facility to pick up K.L.P. Father again explained that K.L.P. had rolled off the bed on the previous Saturday. Melmer and Schmaltz then went to the parents' apartment, where Father demonstrated with a stuffed animal where he had placed K.L.P. on the bed and where he found her on the floor. Melmer testified that the dresser was approximately 17 inches from the bed. Schmaltz told Father that his explanation was not consistent with K.L.P.'s injuries. In the meantime, Melmer arranged for the photographs of K.L.P.'s bruises to be shown to a local pediatrician. Based on those photographs and the explanation offered by Father for K.L.P.'s injuries, the pediatrician recommended that K.L.P. be held for further examination. K.L.P. and A.R.W. were both placed in emergency foster care.

The pediatrician examined K.L.P. on the following day, June 6. He noted three linear bruises on the left side of K.L.P.'s forehead, a more recent bruise under K.L.P.'s left eye, and other bruises on the right side of her forehead and in front of her ears. The pediatrician recommended that X-rays be taken of K.L.P.'s long bones, ribs, and skull. An initial review of K.L.P.'s X-rays showed no fractures, but a second review revealed that K.L.P. had suffered "classic metaphyseal fractures" to her left wrist and right ankle. There were signs of healing in the ankle fracture that usually do not appear until between 4 days and 10 days after the injury, and the absence of such signs of healing near the wrist fracture indicated that it most likely occurred after the ankle fracture.

Otter Tail DHS contacted a medical director of the Red River Children's Advocacy Center who is also a pediatrician to request an evaluation of K.L.P. At the medical director's recommendation, K.L.P. was admitted to the hospital for further testing. Those tests showed no signs of bruising or bleeding in the brain and indicated that K.L.P. did not have a blood disorder that would have caused the bruises on her face.

Otter Tail DHS filed Child in Need of Protection or Services (CHIPS) petitions for K.L.P. and A.R.W. In July 2006, Otter Tail DHS filed petitions to terminate the parental rights of Mother and Father to K.L.P. and a petition to terminate the parental rights of Mother to A.R.W. The petitions to terminate parental rights alleged that "a child has experienced egregious harm while in the parent(s)' care." The district court subsequently ordered, pursuant to Minn. Stat. § 260.012(a)(1) (2006), that reasonable efforts to prevent placement and for rehabilitation and reunification were not required because the petitions established a prima facie case of egregious harm. The CHIPS petitions and the petitions to terminate parental rights were consolidated for trial.

At trial, the physicians who examined K.L.P.'s injuries testified regarding the likely cause of K.L.P.'s facial bruising and wrist and ankle fractures. The medical director of the Red River Children's Advocacy Center stated that the bruising on K.L.P.'s face was likely not caused by a fall from a bed or by striking a set of keys, which was how Father accounted for the injuries, and explained that the parallel bruising pattern on K.L.P.'s face instead correlated to a handprint or finger markings. The medical director also testified that the fractures suffered by K.L.P. are not typically caused by short falls in children with healthy bones but are "highly specific for nonaccidental trauma." Indeed, the testimony of the medical director, the pediatrician who initially examined K.L.P., and the diagnostic radiologist who noticed the fractures on K.L.P.'s X-rays indicated that these types of fractures are most often caused by shaking, twisting, or bending of the limbs. The medical director clarified, however, that he would not expect Mother to have noticed tenderness around the fractures.

The district court found that each of the physicians provided reliable and credible opinions and conclusions about the nature and likely cause of K.L.P.'s bruising and fractures, and the court adopted their opinions as findings of fact. The court concluded that K.L.P. "experienced egregious harm in her parents' care" and that it was contrary to A.R.W.'s best interests to be in the care of Mother in light of the harm experienced by K.L.P. The court also concluded as follows:

[Father] admitted to numerous individuals that [K.L.P.] was in his care when the injuries observed on May 8, 2006, and on June 5, 2006, occurred. Additionally, [Mother] acknowledged that she and [Father] were [A.R.W.'s and K.L.P.'s] primary caretakers before the children were removed from the home. As such, the Court finds clear and convincing evidence to believe that the injuries to [K.L.P.'s] head occurred on June 3, 2006, and at a time when she was in the direct physical care of [Father]. Moreover, the Court finds clear and convincing evidence to believe that [K.L.P.'s] fractures occurred at a time when she was in the care of [Father and Mother] either jointly or individually. The egregious harm [K.L.P.] suffered does not have to have been sustained at [Mother's] hand, but merely while [K.L.P.] was in her care and custody.

Concluding that it was in the best interests of the children, the court ordered the termination of Mother's parental rights to K.L.P. and A.R.W. and the termination of Father's parental rights to K.L.P.

Mother appealed, arguing that there was no clear and convincing evidence that the children suffered egregious harm while in her care, that the termination of her parental rights was not in the best interests of the children, and that she was denied effective assistance of counsel. In an unpublished opinion, the court of appeals held that the district court "did not clearly err in finding that clear and convincing evidence exists to show that K.L.P. suffered egregious harm while in [Mother's] care." *In re Welfare of Child of T.P. & P.P.*, No. A07-16, 2007 WL 2178052, at \*5 (Minn. App. July 31, 2007). The court of appeals rejected Mother's argument "that there was insufficient evidence that she 'knew or should have known that abuse was taking place' " because the explanation for K.L.P.'s injuries offered by Father was inconsistent with K.L.P.'s mobility. *Id.* at \*3-4. The court of appeals also determined that the record supported the

finding that K.L.P. experienced egregious harm in Mother's care because (1) Mother and Father were the primary caretakers of K.L.P., (2) Father provided explanations for K.L.P.'s injuries that were inconsistent with K.L.P.'s physical abilities, and (3) Mother must have noticed the bruising because it was noticed by daycare providers. *Id.* at \*4. Finally, the court of appeals held that the record supported the finding that termination of Mother's parental rights was in the best interests of the children. *Id.* at \*6. We granted review on the issue of whether the requirements of Minn. Stat. § 260C.301, subd. 1(b)(6), were satisfied in this case.

## I.

Minnesota Statutes § 260C.301, subd. 1 (2006), sets forth the statutory grounds for the termination of parental rights. The district court terminated Mother's parental rights pursuant to Minn. Stat. § 260C.301, subd. 1(b)(6) ("the egregious harm provision"), under which a court may terminate the rights of a parent to a child if it finds the following:

that a child has experienced egregious harm in the parent's care which is of a nature, duration, or chronicity that indicates a lack of regard for the child's well-being, such that a reasonable person would believe it contrary to the best interest of the child or of any child to be in the parent's care.

"Egregious harm" is defined as "the infliction of bodily harm to a child or neglect of a child which demonstrates a grossly inadequate ability to provide minimally adequate parental care." Minn. Stat. § 260C.007, subd. 14 (2006). The definition also includes a non-exclusive list of specific conduct towards a child that constitutes egregious harm. *Id.* That K.L.P. suffered egregious harm is not disputed here.

The principal question presented in this appeal is the meaning of the phrase "in the parent's care" found in the egregious harm provision, a phrase that is undefined in the child protection statutes. Statutory interpretation is a question of law that we review de novo. *In re Welfare of J.M.*, 574 N.W.2d 717, 721 (Minn. 1998).

The undefined and unexplained phrase "in the parent's care" has a range of possible meanings. At one extreme, it could be interpreted strictly to require that the injury to the child occur in the physical presence of, if not at the hands of, the parent. Alternatively, the phrase "in the parent's care" could be a reference simply to legal or physical custody of a child.<sup>[3]</sup> When a statute is open to more than one interpretation, we "adopt the most logical and practical definition" after determining the probable intent of the legislature. *Nelson's Office Supply Stores, Inc. v. Comm'r of Revenue*, 508 N.W.2d 776, 778 (Minn. 1993). But we also "read and construe a statute as a whole," and we "'interpret each section in light of the surrounding sections to avoid conflicting interpretations.'" *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 12 (Minn. 2002) (quoting *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000)); see also *Wong v. Am. Family Mut. Ins. Co.*, 576 N.W.2d 742, 745 (Minn. 1998) ("We have stated that the 'meaning of doubtful words in a legislative act may be determined by reference to their association with other associated words and phrases.'" (quoting *State v. Suess*, 236 Minn.

174, 182, 52 N.W.2d 409, 415 (1952))). Therefore, we turn first to other provisions of section 260C.301 for guidance.

Section 260C.301 uses the term “care” in several other provisions providing grounds for termination. For example, subdivision 1(b)(2) permits termination of the rights of a parent who has failed “to provid[e] the child with necessary food, clothing, shelter, education, and other *care* and control necessary for the child’s physical, mental, or emotional health and development.” Minn. Stat. § 260C.301, subd. 1(b)(2) (emphasis added). Similarly, subdivision 1(b)(4) permits termination of the rights of a parent deemed “palpably unfit” to be a party to the parent-child relationship because the parent is unable “to *care* appropriately for the ongoing physical, mental, or emotional needs of the child.” *Id.*, subd. 1(b)(4) (emphasis added). Though none of these provisions exactly repeats the phrase “in the parent’s care” from the egregious harm provision, these provisions indicate a legislative intent that the use of the term “care” is properly understood in the broader sense of the parent and child relationship, including providing for the well-being of a child in ways that do not require a parent to be physically present with the child.

Thus, we agree with the court of appeals that “in the parent’s care” should not be limited to the physical presence of a parent at the time egregious harm occurs. *See In re Welfare of Child of T.P. & P.P.*, 2007 WL 2178052, at \*3-5. But for purposes of this opinion, it is not necessary for us to determine whether, at the other extreme, “in the parent’s care” requires nothing more than legal or physical custody. Here, K.L.P.’s fractures and facial bruising occurred at a time when Mother’s relationship with Father was intact, K.L.P. resided with both parents, and Mother acknowledged that she and Father were the primary caretakers for K.L.P. We further conclude that, under these circumstances, the record supports the district court’s finding that Mother’s relationship with K.L.P. satisfied the requirement of the egregious harm provision that a child has experienced egregious harm while “in the parent’s care,” and we affirm the court of appeals on this point as well.

## II.

Termination of parental rights under the egregious harm provision requires more than a child experiencing egregious harm “in the parent’s care.” Minn. Stat. § 260C.301, subd. 1(b)(6). It also requires a finding that the egregious harm “is of a nature, duration, or chronicity that indicates a lack of regard for the child’s well-being, such that a reasonable person would believe it contrary to the best interest of the child or of any child to be in the parent’s care.” *Id.* We now address Mother’s argument that, under the egregious harm provision, the rights of a parent who has not inflicted egregious harm may not be terminated unless that parent either knew or should have known that egregious harm occurred.

Where a parent has not personally inflicted egregious harm on the child, it is difficult to conceive how the “nature, duration, or chronicity” of that harm could indicate that parent’s lack of regard for the well-being of the child unless that parent were somehow aware of the harm and its cause. Stated differently, the mere fact that a child experienced egregious harm does not indicate a lack of regard for the well-being of the child on the part of a parent who did not personally inflict the egregious harm, did not actually know about the harm, and could not have been expected to know about the harm. Interpreting the egregious harm

provision to permit termination where a parent did not know and could not have been expected to know that a child experienced egregious harm would contradict the statutory requirement that the “nature, duration, or chronicity [of the egregious harm] indicates a lack of regard for the child’s well-being.” Minn. Stat. § 260C.301, subd. 1(b)(6). The language of the egregious harm provision, taken as a whole, does not support termination of parental rights where a parent neither knew nor should have known that a child experienced egregious harm.

Therefore, we hold that to terminate the rights of a parent who has not personally inflicted egregious harm on a child, a court must find that the parent either knew or should have known that the child had experienced egregious harm.<sup>[4]</sup> As with findings addressing other statutory criteria in termination cases, the court must find that the non-perpetrating parent knew or should have known that egregious harm occurred by clear and convincing evidence. *See* Minn. Stat. § 260C.163, subd. 1(a) (2006) (“To be proved at trial, allegations of a petition alleging a child to be in need of protection or services must be proved by clear and convincing evidence.”); *In re Children of T.A.A.*, 702 N.W.2d 703, 708 (Minn. 2005) (“In reviewing a decision to terminate parental rights, the appellate court determines whether there is clear and convincing evidence to support at least one statutory ground for termination \* \* \*.”).

The district court made several findings and conclusions related to Mother’s lack of regard for K.L.P.’s well-being as a result of the nature, duration, or chronicity of the egregious harm K.L.P. experienced. The court of appeals rejected Mother’s argument that the evidence against her was not clear and convincing as to her culpability, relying on the district court’s finding that the harm to K.L.P. occurred while K.L.P. was in the parents’ care “either jointly or individually.” *In re Welfare of Child of T.P. & P.P.*, 2007 WL 2178052, at \*4. But none of the district court’s findings or conclusions specifically addresses the “knew or should have known” standard we announce here. As a result, we are unable to determine from the record whether Mother knew or should have known that K.L.P. experienced egregious harm. Therefore, we reverse the decision of the court of appeals affirming the termination of Mother’s parental rights and remand to the district court to address whether there is clear and convincing evidence that Mother knew or should have known that the bruising and the fractures K.L.P. sustained occurred as a result of some conduct satisfying the “egregious harm” definition.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

DIETZEN, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

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<sup>[1]</sup> The district court’s decision to terminate the parental rights of Father to K.L.P. is not a part of this appeal.

<sup>[2]</sup> The head morning teacher testified that although K.L.P. “was not rolling over at that time” and did not “scoot around,” she could “wiggle her legs a little bit.” Mother testified that on May 8 K.L.P. was “[n]ot rolling over” but “was scooting around on her back.”

<sup>[3]</sup> “Care” is defined as “[w]atchful oversight” or “charge or supervision,” as in “*left the child in the care of a neighbor.*” *The American Heritage Dictionary of the English Language* 281 (4th ed. 2000). This common understanding of the word “care” also does little to clarify the specific issue before us.

<sup>[4]</sup> It is appropriate to clarify here that, where a parent who has not inflicted egregious harm but who either knew or should have known that a child experienced egregious harm, the “nature, duration, or chronicity” of the egregious harm may not necessarily “indicate[] a lack of regard [by that parent] for the child’s well-being.” Minn. Stat. § 260C.301, subd. 1(b)(6). That such a parent either knew or should have known that a child experienced egregious harm is necessary, but not sufficient, to satisfy that statutory requirement. Other factors will be relevant to whether that requirement is met in a given case. Because it is unnecessary to our decision in this case, however, we express no opinion on this matter here.

**STATE OF MINNESOTA**  
**IN COURT OF APPEALS**

**A07-28**

Richard A. Carlson,

Relator,

vs.

Department of Employment and Economic Development,

Respondent.

**Filed April 15, 2008**

**Affirmed**

**Schellhas, Judge**

Department of Employment and Economic Development

File No. 12580 06

Richard A. Carlson, 8529 Zenith Road, Bloomington, MN 55431-1550 (pro se relator).

Lee B. Nelson, Katrina I. Gulstad, Minnesota Department of Employment and Economic Development, 1st National Bank Building, 332 Minnesota Street, Suite E200, St. Paul, MN 55101-1351 (for respondent).

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

**S Y L L A B U S**

Under Minn. Stat. § 268.085, subd. 2(3) (2006), an applicant who is incarcerated or performing court-ordered community service is not eligible for unemployment benefits. An applicant who is serving a statutory minimum sentence of “one year of incarceration” under Minn. Stat. § 169A.275, subd. 4 (2006), after a fifth conviction for alcohol-related driving offenses, is “incarcerated” and not eligible for unemployment benefits while serving time (a) in a local correctional facility and (b) under house arrest and subject to electronic home monitoring, even if the applicant is eligible for work-release privileges.

**O P I N I O N**

## **SHELLHAS, Judge**

In this certiorari appeal from an unemployment-law judge's decision of ineligibility for unemployment benefits, relator argues he was eligible for benefits while he served his felony DWI sentence in a correctional facility and while on electronic home monitoring (EHM). Despite the provision of Minn. Stat. § 268.085, subd. 2(3) (2006), that one who is incarcerated is not eligible for unemployment benefits, relator contends that he was eligible because he was available for work and was looking for work during his incarceration and while he served part of his sentence on EHM.

### **FACTS**

Relator Richard A. Carlson became unemployed in September 2005. On November 4, 2005, he was charged with his fifth alcohol-related driving offense, a felony DWI. Effective November 11, 2005, he established an unemployment-benefits account. On April 7, 2006, after pleading guilty to a felony DWI, relator, who was still unemployed, was sentenced to one year and one day of incarceration to be served at the Hennepin County correctional facility.

When he was released from the correctional facility, relator was required to serve the balance of his sentence under house arrest, subject to EHM. Relator could leave his home only for activities approved by the sentencing judge. Relator had approval to work up to six days per week, if he could obtain employment. To obtain permission to attend an interview, relator would call his attorney, who would then contact the sentencing judge. If permission was granted, the judge would give written notice to the correctional facility by facsimile transmission. Obtaining permission took 24-48 hours. About one month after his release from the correctional facility, relator was hired by a mortgage company. He began his new employment on July 30, 2006.

Throughout the time that relator was incarcerated at the correctional facility and then on EHM, relator reported to respondent that he was not employed, he was seeking work, and he was available for work. Relator sought and obtained unemployment benefits for both periods. Respondent later determined that relator was not eligible for unemployment benefits because he was incarcerated, basing that determination on Minn. Stat. § 268.085, subd. 2(3) (2006). Relator appealed that determination, arguing that because he was available for work and was eligible for work-release privileges, he was entitled to benefits, even while incarcerated. The unemployment-law judge affirmed the determination that relator was ineligible. Relator's request for reconsideration was denied and this appeal followed.

### **ISSUE**

Is an applicant for unemployment benefits, who is eligible for work-release privileges while serving a statutory minimum sentence of at least one year of incarceration, "incarcerated" and ineligible for benefits while serving time in a local correctional facility and while subject to electronic home monitoring?

### **ANALYSIS**



This court may affirm, remand, reverse, or modify the decision of an unemployment-law judge (ULJ), if the substantial rights of the relator may have been prejudiced because the findings, conclusion, or decision are, among other things, affected by an error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(4), (5) (Supp. 2007).

Questions of law are reviewed de novo; findings of fact are upheld if they are supported by substantial evidence. *Yswsf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). Whether the decision was proper is a question of law reviewed de novo. *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006) (citing *Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 523 (Minn. 1989)).

Unemployment insurance and benefits are governed by Minnesota Statutes, sections 268.001-268.23 (2006). The section at issue in this case is 268.085 (2006). That section establishes “eligibility conditions,” for those seeking unemployment benefits. Minn. Stat. § 268.085, subd. 1. Among other requirements, an applicant must be “able to work,” be “available for suitable employment,” and be “actively seeking suitable employment.” *Id.*, subd. 1(4). The next subdivision describes those who are “not eligible” for benefits. *Id.*, subd. 2. Included in this subdivision are those who are “incarcerated or performing court ordered community service.” *Id.*, subd. 2(3). If an applicant is “unable to work or is unavailable,” or if the applicant “is incarcerated,” weekly benefits are reduced by one-fifth for each day that the applicant is not eligible for benefits. *Id.*, subds. 1(4), 2(3).

The critical issue is whether relator was “incarcerated” during the periods in question, within the meaning of Minn. Stat. § 268.085, subd. 2(3). Statutory interpretation is a question of law, which we review de novo. *Houston v. Int’l Data Transfer Corp.*, 645 N.W.2d 144, 149 (Minn. 2002). We must ascertain and give effect to legislative intent and, if possible, construe the statute “to give effect to all its provisions.” Minn. Stat. § 645.16 (2006).

Words and phrases in a statute are to be construed according to their plain and ordinary meaning. *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). “Where the legislature’s intent is clearly discernible from plain and unambiguous language, statutory construction is neither necessary nor permitted and we apply the statute’s plain meaning.” *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 539 (Minn. 2007); *see also* Minn. Stat. § 645.16 (providing that when the language of a statute is “clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit”). A statute is ambiguous only if its language is subject to more than one reasonable interpretation. *Am. Family Ins. Group*, 616 N.W.2d at 277. The threshold question is whether the statutory reference to an applicant who is “incarcerated” is unambiguous.

The term is not defined within chapter 268. Various other Minnesota statutes refer to “incarceration” and “incarcerated” persons, but none provides an explicit definition for these terms. Minn. Stat. § 609.135, subd. 1(b) (2006), defines “intermediate sanctions” as imprisonment, including incarceration in a local facility, “home detention, electronic monitoring, intensive probation, sentencing to service,” community work service, and other alternatives. The statute under which relator was sentenced requires “a minimum of one year of incarceration, at least 60 days of which must be served consecutively in a local

correctional facility.” Minn. Stat. § 169A.275, subd. 4(a)(1) (2006). It does not specify where the balance of the “one year of incarceration” is to be served.

Dictionary definitions may be helpful, especially if they are consistent. *Cf. Houston*, 645 N.W.2d at 150 (comparing similar dictionary definitions and interpreting unemployment statute on disqualification from benefits, due to misconduct). *Black’s Law Dictionary* defines “incarceration” as “[t]he act or process of confining someone,” and “confinement” as “the state of being imprisoned or restrained.” *Black’s Law Dictionary* 775, 318 (8th ed. 2004). Under these definitions, incarceration is dependent on restraint and confinement, but not on the nature of the facility in which that restraint occurs. *Black’s* defines “house arrest” as the “confinement of a person . . . to his or her home, usually by attaching an electronically monitored bracelet.” *Id.* 756. Because both incarceration and house arrest are characterized by confinement, it would be logical to infer that incarceration includes house arrest. But other dictionaries define “incarcerate” in a manner that does not necessarily include house arrest: “to put in jail, to shut in; [to] confine.” *The American Heritage College Dictionary* 700 (4th ed. 2007). Accordingly, we conclude that the term “incarcerated” is ambiguous.

When the language of a statute is ambiguous or “not explicit,” we must ascertain legislative intent, considering the purpose of the law, its legislative history, and any existing legislative or administrative interpretations. Minn. Stat. § 645.16. Statutory provisions governing unemployment benefits are to be liberally construed in favor of those unemployed through no fault of their own, and disqualification provisions are to be narrowly construed. *Jenkins*, 721 N.W.2d at 289; *see also* Minn. Stat. § 268.03, subd. 1 (2006) (declaring public purpose of unemployment insurance). Courts may “accord substantial consideration” to administrative interpretations by the responsible agency, especially when the statutory language is highly technical. *J.C. Penney Co. v. Comm’r of Econ. Sec.*, 353 N.W.2d 243, 246 (Minn. App. 1984) (quotation omitted). An administrative determination is entitled to greater weight if it is of longstanding duration. *In re Claim by Meuleners*, 725 N.W.2d 121, 123 (Minn. App. 2006). Respondent’s interpretation of “incarcerated” to include those serving time at a local correctional facility is well established, but the record does not establish the existence of a longstanding policy of treating applicants subject to EHM, but eligible for work-release privileges, as “incarcerated.”

For three reasons, we conclude that relator was “incarcerated” and ineligible for benefits during the time that he was in a local correctional facility and while he was subject to EHM.

First, the statute under which relator was sentenced requires “a minimum of one year of incarceration.” Minn. Stat. § 169A.275, subd. 4(a). It is undisputed that relator was subject to that sentence during the entire period for which he sought benefits. When a term is not defined in the statute being interpreted, it is appropriate to “consider other statutes relating to the same subject matter as far as they shed light on the question.” *Hahn v. City of Ortonville*, 238 Minn. 428, 436, 57 N.W.2d 254, 261 (1953) (considering the use of “person” in other statutes, to determine whether it included municipal corporations). It is clear that the sentencing statute includes time spent in a local correctional facility *and* time after release from that facility in its reference to the one-year minimum period of incarceration. Interpreting the same term in the

unemployment statute to include the entire duration of the applicant's sentence ensures consistency.

Second, we must interpret the term "incarceration" in context, as it relates to whether the applicant was "available for suitable employment." *See* Minn. Stat. § 268.085, subd. 1(4) (requiring that applicant be "available" as a condition of eligibility for benefits). Availability for suitable employment requires both the applicant's willingness to accept work in the labor market and that there "be no other restrictions, either self-imposed or created by circumstances, *temporary or permanent*, that prevent [the applicant from] accepting employment." Minn. Stat. § 268.085, subd. 15(a) (emphasis added). While incarcerated at the correctional facility, relator was subject to multiple restrictions, including the inability to attend interviews without obtaining written permission, the requirement that he plan interviews at least one week in advance (because the approval process took that long), the inability to receive incoming telephone calls, and the inability to apply for work in person. Once he was on EMH, relator was still required to obtain written approval to attend interviews or to leave his home, he could not work more than six days per week, and he was required to wear an electronic monitoring bracelet. Thus, relator was subject to numerous restrictions that affected his availability for work. Although those restrictions were temporary, and relator eventually obtained new employment, the statute specifically requires that there be "no . . . restrictions," including "temporary" ones. *See id.* Because relator's availability for suitable work was subject to numerous restrictions, we conclude that he was both "incarcerated" and "unavailable" for work throughout the period in dispute.

Third, it is clear that the legislature intended to link the concepts of availability for work and incarceration. In 1997, the statute was amended to provide that applicants who are incarcerated are "not eligible" for unemployment benefits. 1997 Minn. Laws ch. 66, § 37. In 1999, the statute was amended to provide that applicants who are performing court-ordered community service also are "not eligible" for benefits. 1999 Minn. Laws ch. 107, § 42. (The statute has since been renumbered, and these provisions now appear in Minn. Stat. § 268.085, subd. 2(3).) At the time, an administrative rule provided that an incarcerated applicant who was "unable to accept employment under a work release program is not available for work." Minn. R. 3305.0500, subp. 7 (1997). Arguably, the reverse inference that might be drawn from the rule is that an incarcerated applicant for benefits who *is* eligible for a work-release program might qualify as "available" for employment, although there are no reported cases establishing that the rule was applied in that manner. In 1999, the legislature repealed that rule. 1999 Minn. Laws ch. 107, § 67. At the same time, the legislature rewrote section 268.085, so that it now "addresses many of the subjects [formerly] addressed by chapter 3305 [of the Minnesota Rules]." *Mueller v. Comm'r of Econ. Sec.*, 633 N.W.2d 91, 93 (Minn. App. 2001). But the legislature did not choose to include in the revised statute all of the exceptions that had been set forth in the administrative rules. *See id.* (noting failure to incorporate into the revised statute a provision that an applicant whose physical or mental condition restricts availability to do full-time work may, nonetheless, be eligible for benefits). For this court to construe section 268.085 to include an exception previously set forth in an administrative rule would in effect modify the statute. And that is unauthorized. *See State v. Fleck*, 281 Minn. 247, 252, 161 N.W.2d 309, 312 (1968) (concluding that it must be assumed that, had the legislature desired to expand upon a statutory section, it would have effectuated this desire by amending that section).

There is a general presumption that the legislature is aware of existing laws on the same subject and that it enacts new statutes in light of that knowledge. *Minneapolis E. Ry. v. City of Minneapolis*, 247 Minn. 413, 418, 77 N.W.2d 425, 428 (1956). But we need not rely on a presumption in this instance, because the legislature specifically identified the rules that it was repealing, and it did so in the very same chapter of the session laws in which it rewrote the statute, to address many of the same subjects. See 1999 Minn. Laws ch. 107, §§ 42, 67. Because the rule creating an exception for incarcerated applicants who are eligible for work-release has been repealed, relator—like the applicant for benefits in *Mueller*—was required to establish that he was available for work and there were “no other restrictions” that limited his ability to accept suitable employment. See *Mueller*, 633 N.W.2d at 94. As discussed above, relator’s availability for employment was subject to restrictions, and he failed to satisfy that requirement.

Although there is no controlling caselaw directly on point, our conclusion that an applicant who is serving time in a local correctional facility or on EHM with the potential to obtain court approval to leave home to work is “incarcerated” and not “available” for employment without restrictions is consistent with cases that have addressed incarceration in other employment-related contexts. In *Grushus v. Minn. Mining & Mfg. Co.*, 257 Minn. 171, 100 N.W.2d 516 (1960), the Minnesota Supreme Court concluded that an applicant who was “unable to accept” an offer of employment “because of his incarceration” was ineligible for and disqualified from receiving benefits because he had failed to accept suitable employment for reasons attributable solely to him. *Id.* at 175-76, 100 N.W.2d at 520. The court declined to adopt a rule applicable to all situations, recognizing that illegal detention of an applicant or an eventual determination of innocence might potentially preclude a finding that a particular applicant was at fault for failing to accept an offer of employment made during a period of incarceration. *Id.* at 176, 100 N.W.2d at 520. The applicant in *Grushus* was incarcerated as a result of his “plea of guilty,” *id.* at 172, 100 N.W.2d at 517, which is also true of the relator in this case. Although “fault” is not the applicable test in this case, the basis of relator’s unavailability for employment is clearly his own conduct and his guilty plea, which resulted in his criminal sentence.

The cases addressing whether incarceration constitutes “misconduct” when it results in an applicant’s inability to appear for work as scheduled are consistent with our conclusion today and with the stated public purpose of providing unemployment benefits to those “who are unemployed through no fault of their own.” See Minn. Stat. § 268.03, subd. 1. When an employee fails to appear for work, due to an unanticipated period of incarceration, that failure is likely to result in disqualification from benefits, even if the employee “obviously did not intend” that result and returned to work as soon as he was able to do so. *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 45 (Minn. App. 1984). But if an employee has made arrangements to maintain existing employment while on work release and the employer’s failure to cooperate results in the incarcerated employee being unable to appear for work as scheduled, those facts may preclude a finding of disqualifying misconduct, if the employee establishes “that she could have come to work despite her incarceration.” *Jenkins*, 721 N.W.2d at 292. Although “misconduct” is not the applicable test in this case, relator was not already employed, he identified no fault of any employer that resulted in his inability to accept employment while he was incarcerated and on EHM, and his inability to obtain and accept employment was solely attributable to his conduct.

## DECISION

The unemployment-law judge correctly determined that relator was not eligible for unemployment benefits while serving a sentence in a correctional facility or while on EHM, despite the availability of work-release privileges because, during both periods, relator was incarcerated within the meaning of Minn. Stat. § 268.085, subd. 2(3) (2006).

**Affirmed.**

**KLAPHAKE**, Judge (dissenting)

I respectfully dissent. Although I agree that relator is ineligible for unemployment benefits during the time he was physically incarcerated in the Hennepin County Corrections Facility, from April 28, 2006, through June 26, 2006, this period of ineligibility should have ended upon his release to his home with an electronic monitoring device.

Minn. Stat. § 268.085, subd. 2(3) (2006), states that an applicant is ineligible for unemployment benefits while incarcerated or performing court-ordered community service. I agree with the majority that this statute is ambiguous as applied here. The statute supplies no definition for “incarcerated,” and, as the majority points out, the rule that formerly provided some instruction was repealed. *See* Minn. R. 3305.0500 (1997), *repealed* 1999 Minn. Laws ch. 107, § 67.

But we must determine and give effect to legislative intent in construing the statute, and must construe it, if possible, to give effect to all its provisions. Minn. Stat. § 645.16 (2006). The majority argues that Minn. Stat. § 268.085, subd. 2(3), creates ineligibility beyond the factors of availability for work listed in subdivision 1. The plain language of Minn. Stat. § 268.085, subd. 2(3), describes availability, however, not blanket ineligibility: “The applicant’s weekly unemployment benefit amount shall be reduced by one-fifth for each day the applicant is incarcerated[.]” Thus, the statute contemplates that an applicant can continue to collect weekly benefits, presumably when available for work, so long as those benefits are reduced by one-fifth for each day that the applicant is incarcerated, or presumably unavailable for work. Notably, the legislature included as ineligible a person performing community service. This again shows legislative concern for availability and not blanket ineligibility. Once relator was released and put on electronic monitoring, he was available for all approved activities, which included employment of up to six days per week. We can reconcile the provisions of this statute by balancing ineligibility and availability.

The majority relies on *Mueller v. Comm’r of Econ. Sec.*, 633 N.W.2d 91 (2001), to argue that relator is unavailable for employment because of significant restrictions on his availability. But in *Mueller*, the employee had serious physical limitations from an injury and surgery that prevented her from working the hours that are “normal for the applicant’s usual occupation or employment.” *Id.* at 93. Relator was available for employment up to six days per week, more than a normal work week, and for the usual hours of his chosen occupation.

We also are assisted in ascertaining legislative intent by examining other laws on the same or similar subjects. Minn. Stat. § 645.16(5). Although chapter 268 fails to include a definition of incarceration, the criminal code provides insight on what the legislature considers to be included within the meaning of “incarceration.” Minn. Stat. § 609.135, subd. 1(a) (2006), refers to different levels of sanctions: imprisonment, probation, and intermediate sanctions. “Intermediate sanctions” are further defined to include

incarceration in a local jail or workhouse, home detention, electronic monitoring, intensive probation, sentencing to service, reporting to a day reporting center, chemical dependency or mental health treatment or counseling, restitution, fines, day-fines, community work service, work service in a restorative justice program, work in lieu of or to work off fines and, with the victim’s consent, work in lieu of or to work off restitution.

*Id.* at subd. 1(b). Thus, the legislature clearly makes a distinction between incarceration and electronic monitoring.

Further, Minn. Stat. § 609.135, subd. 4 (2006), permits a court to order as a condition of probation incarceration in a county jail, regional jail, work farm, workhouse, or other local correctional facility. Subdivision 6 urges a court “staying imposition or execution of a sentence that does not include a term of incarceration as a condition of the stay” to use intermediate sanctions. Again, the legislature provides guidance for interpretation of the term “incarcerated” by not extending its meaning to include the lesser sanction of electronic monitoring. Had the legislature intended to include intermediate sanctions, such as electronic monitoring, in the list of circumstances which renders relator ineligible for benefits, it would have done so.

In my view, the majority’s reliance on *Smith v. Am. Indian Chem. Dep. Diversion Project*, 343 N.W.2d 43, 44 (Minn. App. 1984) and *Jenkins v. Am. Exp. Fin. Corp.*, 721 N.W.2d 286, 288-89 (Minn. 2006) is not helpful. In *Smith*, the employee lost his job because he failed to appear at work while incarcerated. Relator was unemployed and had established an account with the department before his incarceration; he did not lose his job because of the incarceration. In *Jenkins*, the Minnesota Supreme Court discussed whether the incarceration of an employee who was eligible for work release, but whose employer refused to cooperate with the details of obtaining work release, constituted misconduct for purposes of a denial of eligibility. Again, that is not the situation confronting us here.

The purpose of the unemployment compensation program is to protect workers who are unemployed through no fault of their own. Minn. Stat. § 268.03, subd. 1 (2006). The statute is deemed to be remedial in nature; as such, this court should narrowly construe disqualification provisions. *See Jenkins*, 721 N.W.2d at 289. Relator was unemployed, and available for and actively seeking employment. I would reverse the ULJ’s decision finding relator ineligible for benefits solely because he was on electronic monitoring.

**STATE OF MINNESOTA**

# **IN COURT OF APPEALS**

**A07-0348**

The Work Connection, Inc.,

Relator,

vs.

Son Q. Bui,

Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed April 8, 2008**

**Affirmed**

**Minge, Judge**

**Concurring in part, dissenting in part, Schellhas, Judge**

Department of Employment and Economic Development

File No. 14471 06

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respondent department)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Schellhas, Judge.

## **S Y L L A B U S**

1. In reviewing the decision of an unemployment law judge (ULJ), the court of appeals may consider an issue first raised by a party and determined by the ULJ on reconsideration.
2. An applicant for unemployment benefits who relies on public transit may meet the requirement of having “transportation throughout the labor market area” to be available for suitable employment in accordance with Minn. Stat. § 268.085, subd. 15(e) (2006).

3. An applicant's eligibility under the transportation requirement of Minn. Stat. § 268.085, subd. 15(e), is determined by examining an applicant's particular circumstances and whether the applicant has access to transportation such that he/she is available for work.

## **OPINION**

**MINGE**, Judge

Relator employer appeals from the award of unemployment-insurance benefits to respondent employee, arguing that the employee who relies on public transportation is not available for employment throughout the labor market area as required by Minn. Stat. § 268.085, subd. 15(e) (2006). We affirm.

## **FACTS**

Relator The Work Connection, Inc., is a temporary-staffing service that employed Son Bui from February 2, 2004, to August 29, 2006. Bui worked at Work Connection's client, Technical Resin and Packaging, until he called in sick on August 29, 2006, and his employment was terminated. Two days later, Bui called Work Connection and requested to be placed in a new job.

Bui lives in Brooklyn Park; he does not own a car. He either rode a bicycle or, in inclement weather, used public bus transportation to commute to his job at Technical Resin. That work site was located about four miles from his residence. Both his home and the job were within walking distance of a bus route. The record does not indicate that he had any difficulty getting to work using these methods of transportation for the two years he was employed by Work Connection.

On September 18, Work Connection offered to place Bui in a position at a warehouse in Coon Rapids. The warehouse was six miles from where he lived. Bui asked whether it was accessible from a bus line. He was told that it was not. He asked relatives whether they could give him a ride and was told they could not guarantee him a ride to work every day. Bui declined the job offer because the work was not accessible to a bus line and eventually applied for unemployment benefits.

DEED initially determined that Bui was qualified for benefits. Work Connection contested the award of benefits, arguing that Bui had rejected its offer of suitable employment without "good cause." An unemployment law judge (ULJ) found that because Bui relies on public transportation and the job offered was not on a bus line, Bui had rejected the offer for good cause. Work Connection moved for reconsideration, arguing instead that because Bui relied on public transportation, he was not "available for suitable employment" as required by Minn. Stat. § 268.085, subd. 15(e) (2006), and was therefore ineligible for benefits. The ULJ rejected that argument, noting that



Bui would have public transportation to a reasonable number of locations in the labor market area. He would be available for employment at any location which is on a bus line. Therefore, it cannot be said that Bui is not available for employment in the labor market area.

This certiorari appeal follows.

## ISSUES

- I. Can the court of appeals consider issues that are not addressed by the ULJ in the initial decision but are raised and addressed for the first time on a motion for reconsideration?
- II. Did respondent's reliance on public transportation make him ineligible for unemployment benefits because he failed to meet the statutory requirement that he have transportation throughout the labor market area to be considered "available for suitable employment" under Minn. Stat. § 268.085, subd. 15(e) (2006)?

## ANALYSIS

### I.

The first issue is whether the argument that Bui is ineligible for benefits because he is not available for work throughout the labor market area as required by Minn. Stat. § 268.085, subd. 15(e) (2006), can be properly considered on appeal. This is a legal question, which we review de novo. *See Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006) (allowing appellate courts to exercise independent judgment when reviewing questions of law).

Respondent Minnesota Department of Employment and Economic Development (DEED) argues that in the initial proceeding before the ULJ, Work Connection claimed that Bui did not have "good cause" to refuse its offer of employment. DEED asserts that Work Connection did not claim, and the ULJ did not consider, whether Bui was ineligible for benefits because of the different requirement of "availability" under Minn. Stat. § 268.085, subd. 15(e), until Work Connection moved for reconsideration. Accordingly, DEED argues that the "availability" argument is not properly before us on appeal.

Minn. Stat. § 268.105, subd. 7 (2006), does not specifically indicate how arguments brought before the ULJ on reconsideration, rather than at the initial hearing, should be treated on appeal to this court. On a request for reconsideration, the employer or the employee may comment on perceived factual or legal error in a decision, and the ULJ may modify or affirm the

decision. *Id.*, subd. 2(a), (b) (2006). The decision on reconsideration is DEED's final action. *Id.*, subd. 2(f) (2006). It is this final action that is subject to the review of this court. *Id.*

Moreover, when reviewing a ULJ's final decision, this court may

affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious.

*Id.*, subd. 7(d). We note that the introductory language provides for reversal or remand "if the substantial rights of the [relator] may have been prejudiced" based on "error of law," without regard to whether any such error was considered by the ULJ before or after the initial evidentiary hearing. *Id.* This indicates that we may take up issues even if they were first considered by the ULJ after a reconsideration motion. A contrary decision would leave the final decision of the ULJ unreviewable.

In its motion for reconsideration, Work Connection argued that Bui was ineligible for benefits not because he had declined a job offer and did not comply with Minn. Stat. § 268.085, subd. 13c, but because he did not have "transportation throughout the labor market area" as required under the availability requirement of Minn. Stat. § 268.085, subd. 15(e). This argument was not raised at the original hearing. However, in the final reconsideration order, the ULJ ruled that, although he had not considered the availability argument in the initial hearing, Bui was "available for employment" because he had reliable transportation to a reasonable number of locations within the labor market area. It appears that the record was sufficiently developed; there was no request on reconsideration to introduce additional evidence.

Because the ULJ addressed this issue in the final ruling under review on appeal, and because it appears that the record was sufficiently developed for the ULJ to render a decision, we conclude that Work Connection's argument that Bui was ineligible for benefits because of his unavailability for suitable employment under Minn. Stat. § 268.085, subd. 15(e), is properly before this court.

## II.

The second issue is whether Bui was available for employment and thus eligible for unemployment benefits despite his reliance on public transportation. This court reviews a final ULJ decision to determine whether it is affected by an error of law, not supported by substantial evidence, or arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d)(4)-(6). Questions of law are reviewed de novo. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). We view the ULJ's findings of fact in the light most favorable to the decision and will not disturb them as long as there is evidence that reasonably tends to sustain those findings. *Id.*

An applicant must be “available for suitable employment” in order to be eligible for unemployment benefits. Minn. Stat. § 268.085, subd. 1(4) (2006). That phrase is defined by law:

(a) “Available for suitable employment” means an applicant is ready and willing to accept suitable employment in the labor market area. The attachment to the work force must be genuine. An applicant may restrict availability to suitable employment, but there must be no other restrictions, either self-imposed or created by circumstances, temporary or permanent, that prevent accepting suitable employment.

....

(e) An applicant must have transportation throughout the labor market area to be considered “available for suitable employment.”

Minn. Stat. § 268.085, subd. 15.<sup>[1]</sup>

#### *A. Availability, Good Reason, Good Cause*

As a preliminary matter, Work Connection urges that we treat the transportation question in determining availability for work the same as in determining eligibility after rejecting a job offer or quitting a job. However, those are their distinctly different bases for determining eligibility for benefits, and each has its own statutory standard. Whether or not an applicant has “good cause” for rejecting employment requires a finding that the applicant rejected work for a reason that would cause a reasonable individual who wants suitable employment to decline the offer. Minn. Stat. § 268.085, subd. 13c(b) (2006). This finding involves a different standard of inquiry from the one at hand. *See* Minn. Stat. § 268.085, subd. 15(e) (requiring that the applicant be “available for suitable employment”). Likewise, whether an applicant had “good reason” to *quit* employment requires a finding that the applicant terminated his or her employment because of “good reason *caused by the employer*.” Minn. Stat. § 268.095, subd. 1(1) (2006) (emphasis added). Again, there is a different standard.<sup>[2]</sup>

In support of its argument, Work Connection cites *Hill v. Contract Beverages, Inc.*, 307 Minn. 356, 240 N.W.2d 314 (1976), a supreme court case, and several unpublished decisions of this court that deal with quit and job rejection situations. *Hill* determined that an applicant did not quit for good reason *caused by the employer* when he could no longer arrange transportation to an existing job. *Hill*, 307 Minn. at 358, 240 N.W.2d at 316. Because *Hill* analyzes a different issue and does not address the availability question, the standard it uses should be limited to

cases involving a quit. See *Cherry v. Am. Nat'l Ins. Co.*, 426 N.W.2d 475, 477 (Minn. App. 1988) (limiting *Hill's* identification of transportation as the responsibility of the employee to cases concerning whether an employee had “good cause” in quitting employment rather than a consideration of whether an employee’s failure to provide transportation constituted “misconduct” under the unemployment-insurance statutes). There are no published cases considering the transportation dimension of the requirement that an applicant be “available for suitable employment.” We therefore turn to the statutory language in section 268.085, subdivision 15(e).

### *B. Ambiguity*

When the words of a law are clear and free from all ambiguity, we apply the law according to the plain and ordinary meaning of its terms. Minn. Stat. § 645.16 (2006). Language is ambiguous only if it is capable of more than one reasonable interpretation. *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999); see also *Abrahamson v. Abrahamson*, 613 N.W.2d 418, 421-22 (Minn. App. 2000) (“When . . . the words of a statute are not explicit and more than one reasonable interpretation is possible, the statute must be construed.”).

The statute states that to be “available” for work, “an applicant must have transportation *throughout* the labor market area.” Minn. Stat. § 268.085, subd. 15(e) (emphasis added). The word “throughout” may be used as an adverb or a preposition. *The American Heritage College Dictionary* 1436 (4th ed. 2002). As “throughout” is used in Minn. Stat. § 268.085, subd. 15(e), it is a preposition.<sup>[3]</sup> The dictionary definition of “throughout,” used as a preposition, is: “[i]n, to, through, or during every part of; all through.” *Id.* In turn, “through” is defined in relevant part as: “Here and there in; around; *a tour through France.*” *Id.* Using these definitions of “throughout” and “through,” there are two relevant meanings: (1) all “here and there in” or all “around,” or, paraphrased more generally, to various locales representative of the whole; or (2) “in . . . every part of,” “to . . . every part of,” and “through . . . every part of.” Thus, in the first meaning, if someone states that she has traveled “throughout” Wisconsin, it does not indicate that she has visited *every* place within the state, but that she has been “all around” the state or, restated, to locations that are representative of its various parts. By contrast, “in,” “to,” or “through” every part of a particular area would preclude the omission of any “part.” The adverb definition appears to emphasize this narrower, more demanding meaning.

Furthermore, we observe that the context in which the word “throughout” appears is important to its meaning. “Throughout” does not appear in splendid isolation. A key phrase in the same sentence is “labor market area,” and all of these words are part of the legislative effort to define the phrase “available for suitable employment.” Thus, when applying this phrase of the statute to a person claiming benefits, DEED must consider the relevant “labor market area” based on surrounding circumstances. If it is a metropolitan area, there are thousands of places of employment in hundreds of neighborhoods, industrial parks, and other identifiable hubs of activity. There are also discrete, individual locations that are more isolated. The statute does not necessarily require that, to be “available,” one must have transportation to every single employment site in an entire metropolitan area. It requires that the applicant for benefits have transportation “throughout” the relevant labor market area. The labor market area may differ depending on the work experience and location of each

applicant for benefits. Thus, the relevant labor market is different for a brain surgeon and a common laborer; it is different for an urban and a rural Minnesotan; and it may be different for ex-urban and inner-city parts of a metropolitan area. As a result, the transportation required to be available throughout the labor market has an inherent ambiguity.

Because the statutory language is subject to more than one interpretation, there is ambiguity, and we look to the purpose of the statute and legislative history to further elucidate the nature of the transportation requirement under Minn. Stat. § 268.085, subd. 15(e).

### *C. Statutory Construction*

When the language is ambiguous,

the intention of the legislature may be ascertained by considering, among other matters:

- (1) the occasion and necessity for the law;
- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;
- (4) the object to be attained;
- (5) the former law, if any, including other laws upon the same or similar subjects;
- (6) the consequences of a particular interpretation;
- (7) the contemporaneous legislative history; and
- (8) legislative and administrative interpretations of the statute.

Minn. Stat. § 645.16. This court is “to read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations.” *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). “Although this court retains the authority to review de novo administrative interpretations of statutes, an agency’s interpretation of a statute that it administers is entitled to deference.” *In re Kleven*, 736 N.W.2d 707, 709 (Minn. App. 2007).

#### *1. Purpose*

Here, relator challenges DEED’s interpretation of a provision of the Minnesota Unemployment Insurance Law, Minn. Stat. §§ 268.001-.23 (2006). The primary purpose of the program is to “provid[e] workers who are unemployed through no fault of their own a temporary partial wage replacement” to assist them in finding new employment. Minn. Stat. § 268.03, subd. 1 (2006). This statement of public policy is not to be ignored in determining whether benefits are available under the statute. *Jenkins*, 721 N.W.2d at 293 (Gildea, J., dissenting) (citing *Grushus v. Minn. Mining & Mfg. Co.*, 257 Minn. 171, 175, 100 N.W.2d 516, 519 (1960)). In order to effectuate this purpose, provisions that disqualify a person for benefits are narrowly construed. *Garcia v. Alstom Signaling, Inc.*, 729 N.W.2d 30, 33 (Minn. App. 2007).

#### *2. Legislative History*

Legislative history is relevant to interpretation of a statute. Minn. Stat. § 645.16(7). The meaning of the transportation requirement was raised during the legislative hearings in the following exchange:

Sen. Anderson: [Does section 268.085] repeat what's already in the rules? I wasn't aware of this before, for example, you have to have transportation throughout the labor market area to be considered available, is that, that's been what the rule has been? I'm just curious how that gets interpreted.

Mr. Nelson:<sup>[4]</sup> [Subdivision 15(e)] is almost exactly word for word from [the Minnesota Rules] § 3305.0500. There is nothing new here. Yes, you do have to have transportation throughout your labor market area. That usually comes up . . . in a situation which someone lives in rural Minnesota, then all of a sudden, doesn't have a car anymore. And they may be out on a farm and say I can't get anywhere to work.

Sen. Anderson: That means they get no benefits?

Mr. Nelson: The law would provide that you're not available for work because you don't have transportation. The law does require that you be available for work. Transportation being among the most fundamental requirements. In the metropolitan area, of course, there is the mass transit available. The metro area is not generally a problem. But in outstate, it can be, if you live in a very rural area and you lose your transportation. But this is the present law.

Sen. Anderson: This is the present law. Thank you.

Hearing on S.F. No. 1218 Before the Senate Comm. on Jobs, Energy, and Community Development (Mar. 19, 1999).

As indicated by this exchange, the legislature was advised that an applicant's access to transportation under subdivision 15(e) is determined by the surrounding circumstances. Mr. Nelson, as an agency witness, acknowledged that access to the metropolitan mass-transit system, and willingness to use it, is generally adequate to meet the demands of the "availability" requirement of subdivision 15(e). The rule that Nelson referred to as being codified by subdivision 15(e) read "[a] claimant . . . must have transportation from residence *to* labor market area." Minn. R. 3305.0500, subp. 13 (1997) (emphasis added), *repealed by* 1999 Minn. Laws ch. 107, § 67, at 456.

### *3. Administrative History*

The precursor rule, as explained by Nelson at the legislative hearing, apparently represents the position of DEED in this appeal that Bui should not be considered unavailable to work because he does not own a vehicle. Rather, access and willingness to use public transportation is generally sufficient to satisfy the availability requirement in the metro area. This court considers the agency position in interpreting the statute. *Kleven*, 736 N.W.2d at 709. The

Minnesota unemployment insurance program does not expressly limit benefits to people who have cars, or to people who can travel to every worksite within a labor market. The legislature was capable of imposing such a requirement had it so desired. In enacting the statute, the legislature demanded that the applicant's "attachment to the work force" be genuine.<sup>[5]</sup> Minn. Stat. § 268.085, subd. 15(a). A determination of an applicant's access to transportation should be considered in those terms.

#### *4. Absurd Result*

We also consider whether Work Connection's interpretation would lead to an absurd result if accepted. "In seeking for the meaning of a statute, it is proper to consider the result which would follow a particular construction. The legislature cannot be presumed to intend to bring about an absurd or unjust condition." *Johnson Motor Co., Inc., v. Cue*, 352 N.W.2d 114, 116-17 (Minn. App. 1984) (quoting *Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Pierce*, 103 Minn. 504, 508, 115 N.W. 649, 651 (1908)), *review denied* (Minn. Oct. 11, 1984); *see also* Minn. Stat. §§ 645.16(6) (allowing a consideration of the consequences of a particular interpretation of a law as a method of construction), .17(1) (2006) (instructing courts to presume that the legislature does not intend an absurd or unreasonable result).

The effect of Work Connection's argument would be to exclude from unemployment benefits those who rely on mass transit to get to work. For the fiscal year ending June 30, 2008, the Minnesota State Legislature appropriated \$93,453,000 to the Metropolitan Council for bus system operations. 2007 Minn. Laws ch. 143, art. 1, § 4, subd. 2, at 1592. Commuter transit is a recognized purpose of our public transportation system. Further, public transportation is heavily used by many low-income workers to commute, and their eligibility for benefits would be compromised if we found this form of transportation to be inadequate. Having invested significant effort and resources to provide an extensive transportation system that employees in the metro area can use to get to work, it would be absurd to conclude that the legislature intends that unemployed workers who rely on that system be considered unavailable for work in the labor market and disqualified from receiving unemployment benefits.

We conclude that the term "throughout the labor market area" does not require every applicant for unemployment benefits to have personal automobile transportation. Rather, an applicant's eligibility under the transportation requirement of Minn. Stat. § 268.085, subd. 15(e), is determined by examining an applicant's particular circumstances, and whether the applicant has access to transportation such that they are available for work.

#### *D. Application*

Bui's reliance on public transportation must be evaluated in terms of his situation. Bui worked as a line assembly packager for \$8.25 per hour. He was subsequently offered a job in warehouse shipping and receiving at \$10 per hour. From the record, it appears that he is an unskilled, trainable laborer who lives in Brooklyn Park close to a bus line. He is not a highly paid or specialized worker with a limited number of potential employers. There are many labor positions in various locations throughout<sup>[6]</sup> the Twin Cities metropolitan area for

unskilled, trainable laborers. The routes of the public transportation system in this metropolitan area reach a vast number of these employers. The ULJ found that

[t]he evidence shows that Bui worked for the employer for approximately two years and took a bus to work. The unrefuted facts are that Bui did not have a car and he lives in Brooklyn Park. The offer of September 18, 2006 was in Coon Rapids, and admittedly not on a bus line. The employer does not dispute this. Bui would have public transportation to a reasonable number of locations in the labor market area. He would be available for employment at any location which is on a bus line. Therefore, it cannot be said that Bui is not available for employment in the labor market area.

These findings are complemented by those in the ULJ's initial order, which stated that Bui credibly testified that he had employed good-faith efforts in attempting to obtain transportation through his relatives.

We conclude that the ULJ's finding that Bui, as an unskilled, trainable worker, was available for employment throughout the labor market area is supported by substantial evidence.<sup>[7]</sup> Bui's access to and willingness to use public transportation is not disputed. The ULJ concluded that Bui met the requirement of having "transportation throughout the labor market area" as required by Minn. Stat. § 268.085, subd. 15(e). Based on this record and our limited standard of review of factual findings, we affirm that determination.

## DECISION

This court may review questions first raised and considered by the ULJ on a request for reconsideration. Accordingly, we review the question of whether respondent has adequate transportation to be available for employment under Minn. Stat. § 268.085, subd. 15(e). We conclude that respondent's reliance on public transit is adequate to satisfy the requirement of transportation throughout the labor market area, *id.*, and that respondent is therefore eligible for unemployment compensation.

**Affirmed.**

Dated:

**SCHELLHAS**, Judge (concurring in part and dissenting)

I concur with the majority that this court may properly consider arguments raised in Work Connection's motion for reconsideration before the ULJ, but I respectfully dissent with the majority's affirmance of the ULJ's eligibility decision.

The majority begins by stating that "[r]elator employer appeals from the award of unemployment-insurance benefits to respondent employee, arguing that the employee who relies on public transportation is not available for employment throughout the labor market area as



required by Minn. Stat. § 268.085, subd. 15(e) (2006).” But Work Connection does not make this argument. Work Connection argues that Bui is not eligible for unemployment-insurance benefits because he lacks transportation throughout his labor market area. Citing Minn. Stat. § 268.085, subd. 15(a), (e), Work Connection argues that whatever Bui’s mode of transportation, public or otherwise, he “must have transportation throughout the labor market area to be considered ‘available for suitable employment,’ ” i.e., “ready and willing to accept suitable employment in the labor market area.” Work Connection argues that Bui’s lack of transportation, whatever modes are lacking, is a restriction that is self-imposed or imposed by circumstances and, as such, a restriction that renders Bui unavailable for suitable employment. *Id.* In short, Work Connection argues that because Bui lacks “transportation throughout the labor market area,” he cannot be considered to be “available for suitable employment,” and therefore cannot be eligible for unemployment benefits under the plain meaning of the statute. *Id.*

The ULJ, in his Order of Affirmation, noted that “Bui would have public transportation to a reasonable number of locations in the labor market area” and that he “would be available for employment at any location which is on a bus line” and that “[t]herefore, it cannot be said that Bui is not available for employment in the labor market area.” This conclusion conspicuously omits the word, “throughout,” ignoring the plain language of Minn. Stat. § 268.085, subd. 15(e), which provides that “[a]n applicant *must* have transportation *throughout* the labor market area to be considered ‘available for suitable employment.’ ” (Emphasis added.)

The majority frames the eligibility issue as “whether Bui was available for employment and thus eligible for unemployment benefits despite his reliance on public transportation.” But “available for employment” is not a phrase found in the applicable statutes. The issue is whether Bui was available for *suitable* employment under Minn. Stat. § 268.085, subd. 15(a), (e). “Available for suitable employment” is defined by the legislature in Minn. Stat. § 268.085, subd. 15(a):

“Available for suitable employment” means an applicant is ready and willing to accept suitable employment in the labor market area. The attachment to the work force must be genuine. An applicant may restrict availability to suitable employment, but *there must be no other restrictions, either self-imposed or created by circumstances, temporary or permanent, that prevent accepting suitable employment.*

(Emphasis added.) In addition, “[a]n applicant must have transportation *throughout* the labor market area to be considered ‘available for suitable employment.’ ” *Id.*, subd. 15(e) (emphasis added).

The majority decides that the meaning of the term “throughout” is ambiguous and that whether an applicant has transportation throughout a labor market area depends on an applicant’s specific circumstances. Relying on this construction of “throughout,” the majority determines that because of “Bui’s access to and willingness to use public transportation,” “this meets the requirement of having ‘transportation throughout the labor market area’ as required by Minn. Stat. § 268.085, subd. 15(e).” I disagree.

The unemployment-benefits statutes are unambiguous. First, they contain no allowable restrictions for availability to suitable employment on the basis of reliance on public transportation or reliance on any specific mode of transportation. Minn. Stat. § 268.085, subd. 15(a). Second, the use of the term “throughout” in Minn. Stat. § 268.085, subd. 15(a), (e), is unambiguous. As noted by the majority, the plain meaning of “throughout,” as it appears as a preposition in section 15 (e), is the dictionary definition, “[i]n, to, through, or during every part of; all through.” *The American Heritage Dictionary of the English Language* 1436 (4th ed. 2000). “Throughout” is not reasonably subject to more than one interpretation; therefore, it is not ambiguous. The majority concludes that the definition of “throughout” urged by Work Connection is not appropriate because Work Connection relies on a dictionary definition of “throughout” in its adverb form: “[i]n or through all parts; everywhere.” The distinction between the definitions of “throughout” as an adverb and a preposition is insignificant and, in this case, whichever definition is used, the ULJ reached his decision completely ignoring the presence of the word “throughout” in Minn. Stat. § 268.085, subd. 15(e), when he concluded that:

Bui would have public transportation to a reasonable number of locations in the labor market area. He would be available for employment at any location which is on a bus line. *Therefore, it cannot be said that Bui is not available for employment in the labor market area.*

(Emphasis added.)

Using the definition of “throughout,” as a preposition, and applying that definition in this case, the issue is whether Bui had transportation “in, to, through, or during every part of” or “all through” his labor market area. If reliance on public transportation does not provide access to “every part of” Bui’s labor market area, or “all through” his labor market area, Bui does not have “transportation throughout the labor market area” and therefore is not “available for suitable employment” under Minn. Stat. § 268.085, subd. 15(a).

While I am mindful that the public policy in chapter 268 urges us to narrowly construe disqualification provisions, I see no reason to apply a different standard to an employee declining the offer of new employment because of lack of transportation than the standard applied by the Minnesota Supreme Court to an employee leaving a job he already has because of a lack of transportation. In *Hill v. Contract Beverages, Inc.*, 307 Minn. 356, 240 N.W.2d 314 (1976), the supreme court denied unemployment benefits to an employee who could no longer get to his employment because of a shift change unilaterally imposed by his employer. In support of its conclusion, the supreme court said:

When relator originally accepted the employment on the third shift, he had no knowledge that he would be able to obtain transportation from some person on that shift or any other shift. Relator accepted the employment before he obtained the transportation upon the expectation that he could find a fellow employee who would provide his transportation. Fortunately, he found transportation on his assigned shift, but the fact that such transportation was not available on another shift cannot be attributed as a fault of the employer. *In the absence of contract or*

*custom imposing an obligation of transportation upon the employer, transportation is usually considered the problem of the employee.*

*Id.* at 358, 240 N.W.2d at 316 (emphasis added) (citations omitted).

Here, like *Hill*, when first hired, Bui did not tell Work Connection about his lack of transportation or dependence on public transportation. In fact, he both rode the bus and biked to the employment from which he was terminated. That employment was approximately four miles from Bui's home. He then declined Work Connection's offer of full-time employment that was approximately six miles from his home because the employment was beyond the bus line. The employment Bui declined was well within Bui's labor market area. *See Preiss v. Comm'r of Economic Security*, 347 N.W.2d 74, 76 (Minn. App. 1984) (concluding that a drive of 22 miles does not render an available position unsuitable).

The majority states that "[t]he effect of Work Connection's argument would be to exclude from unemployment benefits those who rely on mass transit to get to work." I disagree; this purported effect is exaggerated. The effect of not applying the plain meaning of Minn. Stat. § 268.085, subd. 15(e), as written, is to shift the burden of transportation from employees to employers in violation of clear statutory language and judicial precedent.

The legislature could have provided that applicants who are dependent on public transportation are deemed to "have transportation throughout the labor market," *see* Minn. Stat. § 268.085, subd. 15(e), or that applicants may restrict their availability to only that employment accessible by public transportation, *see id.*, subd. 15(a), but it has not done so. For this court to construe subdivision 15 (a) and (e) to include that language is, in effect, to modify the statute, and that is unauthorized. *See State v. Fleck*, 281 Minn. 247, 252, 161 N.W.2d 309, 312 (1968) ("It must be assumed that, had the legislature desired to expand upon § 627.01, it would have effectuated this desire by amending that section."). We must presume that when the legislature enacted section 268.085, subdivision 15, it acted with full knowledge of previous statutes, agency rules, and existing case law. *See Minneapolis E. Ry. Co. v. City of Minneapolis*, 247 Minn. 413, 418, 77 N.W.2d 425, 428 (1956) (quoting rule that when legislature enacted statutes it was presumed to have in mind all existing laws relating to the subject matter). Under Minn. Stat. § 268.085, subd. 15(e), Bui was required to have transportation throughout the labor market area, and Bui failed to satisfy that requirement. Therefore, he was not available for suitable employment and is not eligible for unemployment benefits.

I would reverse the ULJ's decision finding Bui eligible for unemployment-insurance benefits when he declined the full-time employment offered to him by Work Connection.

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<sup>[1]</sup> Suitable employment is further defined in Minn. Stat. § 268.035, subd. 23a. Although not raised by the parties, that definition states that "the distance of the employment from the applicant's residence shall be considered." *Id.* subd. 23a(a). We note that other portions of the statute at issue, such as the suitability requirement, do not demand absolutely that an applicant accept any proffered job in order to be eligible for benefits. Rather, it is an inquiry into the broader factual circumstances of each case.

<sup>[2]</sup> We also note the distinct purposes and operation of the three different statutory standards. The “availability” requirement merely demands that applicants who have lost their employment remain genuine in their willingness to accept new and suitable employment. It provides the lowest statutory bar. The provision requiring that a potential employee have “good cause” to decline employment provides a higher bar: an applicant must show that he or she had good reason to reject the offered job. When an employee quits a position that he already holds, the bar is still higher: applicants must now show that the quit is caused by the employer.

<sup>[3]</sup> See *The Chicago Manual of Style* § 5.172 at 187 (15th ed. 2003) (stating that when a term is used as a preposition, it takes on an object, as in “Let’s slide *down* the hill;” when used as an adverb, it does not, as in “we sat *down*.”).

Work Connection argues that, in this context, “throughout” must mean that an applicant is capable of getting “everywhere” within the labor market area, citing *Webster’s New World Dictionary* 1483 (2d Coll. ed. 1974) and an online version of *The American Heritage College Dictionary* 1436 (4th ed. 2002). In making this argument, Work Connection relies on the dictionary definition of “throughout” in its adverb form, which is “[i]n or through all parts; everywhere.” *The American Heritage College Dictionary* 1436 (4th ed. 2002). The adverb definition is not appropriate.

<sup>[4]</sup> We note that Nelson, who testified at the legislative hearing, was then an attorney on the staff of DEED and is one of the attorneys representing DEED as respondent in this proceeding. Because Nelson was not aware in 1999, when he testified, that he would be acting in an advocacy role in 2008, the legislative testimony may be considered in this proceeding.

<sup>[5]</sup> We acknowledge that, as recognized in the legislative hearing reproduced above, a car may be required in some cases in order for an applicants’ attachment to the labor market to be genuine, as when they reside at a location without alternative access to the labor market. In some places, it is common for people to walk or bike to work, such as around small towns or in urban areas. In others, such as the suburbs, this method of transportation may not be adequate to show a genuine attachment to the work force.

<sup>[6]</sup> Again, we do not use the term “throughout” to mean that labor jobs are available at every place within the metro area, but rather that there are many such jobs dispersed within the specified geographical range.

<sup>[7]</sup> Work Connection points out that the proffered warehouse job was located only about 6 miles from Bui’s home. We note that Bui was not informed of the location of the warehouse until the initial evidentiary hearing with the ULJ. Regardless, this factual information was part of relator’s argument that Bui did not decline the position for “good cause” under Minn. Stat. § 268.085, subd. 13c(b), not its claim on appeal that Bui was unavailable for suitable employment. Work Connection has not appealed the ULJ’s determination that Bui declined the job offer for good cause, and we do not consider that question.

**STATE OF MINNESOTA**  
**IN COURT OF APPEALS**

**A06-874**

In the Matter of the Welfare of: C.T.L., Juvenile

**Filed October 10, 2006**

**Certified question answered in the affirmative**

**Peterson, Judge**

Washington County District Court

File No. J4-05-52203

Mike Hatch, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Douglas H. Johnson, Washington County Attorney, Mary M. Pieper, Assistant County Attorney, 14949 62nd Street North, P.O. Box 6, Stillwater, MN 55082 (for appellant)

John M. Stuart, State Public Defender, Lawrence Hammerling, Deputy Assistant Public Defender, 2221 University Avenue Southeast, Suite 425, Minneapolis, MN 55414; and

Megan H. Schlueter, Assistant Washington County Public Defender, 1825 Curve Crest Boulevard West, Suite 202, Stillwater, MN 55082 (for respondent)

Considered and decided by Randall, Presiding Judge; Kalitowski, Judge; and Peterson, Judge.

**S Y L L A B U S**

1. Unless an exception to the warrant requirement applies, before taking a biological specimen from a person for the purpose of DNA analysis, law-enforcement personnel must obtain a search warrant based on a neutral and detached magistrate's determination that there is a fair probability that taking the specimen will produce evidence of a crime.
2. When determining whether a search is reasonable, the privacy interest of a person who has been charged with a criminal offense, but who has not been convicted, is not outweighed by the state's interest in taking a biological specimen from the person for the purpose of DNA analysis.

## **OPINION**

**PETERSON**, Judge

A delinquency petition was filed alleging that respondent aided and abetted first-degree aggravated robbery and committed fifth-degree assault. Appellant moved for an order requiring respondent to provide a biological specimen for the purpose of DNA analysis pursuant to Minn. Stat. § 299C.105 (Supp. 2005). Respondent challenged the constitutionality of Minn. Stat. § 299C.105 and moved for an order certifying the issue of the statute's constitutionality to this court as an important and doubtful question. The district court held that the statute's "compulsory DNA profiling of criminal defendants prior to conviction" is unconstitutional and certified as important and doubtful the question of whether the provisions of Minn. Stat. § 299C.105 that require charged defendants to provide a DNA sample upon a judicial finding of probable cause, but before any conviction on the charged offense, is an unconstitutional search in violation of the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution. We answer the certified question in the affirmative.

## **FACTS**

Respondent C.T.L., a juvenile, was charged with one count each of fifth-degree assault, in violation of Minn. Stat. § 609.224, subd. 1(1)(2) (2004), and aiding and abetting first-degree aggravated robbery, in violation of Minn. Stat. § 609.245, subd. 1 (2004). Appellant State of Minnesota moved for an order requiring C.T.L. to report to the sheriff's office immediately after his initial appearance in district court to provide a biological specimen for the purpose of DNA analysis pursuant to Minn. Stat. § 299C.105 (Supp. 2005). Respondent then moved for an order finding that the provisions of Minn. Stat. § 299C.105 that require law-enforcement personnel to obtain biological samples from certain defendants before any finding of guilt violate the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution. Respondent also moved for an order certifying the issue of the statute's constitutionality to this court as an important or doubtful question.

Following a hearing, the district court issued an order holding unconstitutional the statute's "compulsory DNA profiling of criminal defendants prior to conviction" and certifying the issue to this court as important and doubtful because of its "broad and far reaching implications for all defendants charged with crimes in the state of Minnesota."

## **ISSUE**

Do the portions of Minn. Stat. § 299C.105, subd. 1(a)(1) and (3) (Supp. 2005), that direct law-enforcement personnel to take a biological specimen from a person who has been charged with an offense, but not convicted, violate the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution?

## ANALYSIS

“This court accepts certification of questions regarding criminal statutes as important and doubtful when the challenged statute has statewide application and the question has not previously been decided.” *State v. Mireles*, 619 N.W.2d 558, 561 (Minn. App. 2000), *review denied* (Minn. Feb. 15, 2001). Whether Minn. Stat. § 299C.105 (Supp. 2005) directs law-enforcement personnel to conduct unconstitutional searches in violation of the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution<sup>[1]</sup> has not been addressed by Minnesota appellate courts, and an answer to this question will have statewide application. Therefore, the district court properly certified the question.

The constitutionality of a statute is a question of law, which this court reviews de novo. *State v. Wright*, 588 N.W.2d 166, 168 (Minn. App. 1998), *review denied* (Minn. Feb. 24, 1999). Minnesota Statutes are presumed to be constitutional, and a court’s power to declare a statute unconstitutional “should be exercised with extreme caution and only when absolutely necessary.” *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998) (quoting *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989)). A party challenging a statute has the burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional. *Id.* (quotation omitted).

The statute that C.T.L. challenges directs law-enforcement personnel to take a biological specimen from C.T.L. for the purpose of DNA analysis. The statute states:

Sheriffs, peace officers, and community corrections agencies operating secure juvenile detention facilities shall take or cause to be taken biological specimens for the purpose of DNA analysis as defined in section 299C.155, of the following:

. . . .

(3) juveniles who have appeared in court and have had a judicial probable cause determination on a charge of committing . . .

(iv) robbery under section 609.24 or aggravated robbery under section 609.245[.]

Minn. Stat. § 299C.105, subd. 1(a)(3)(iv).

Minn. Stat. § 299C.155, subd. 1 (Supp. 2005), defines “DNA analysis” as “the process through which deoxyribonucleic acid (DNA) in a human biological specimen is analyzed and compared with DNA from another human biological specimen for identification purposes.” The Bureau of Criminal Apprehension (BCA) is required to “adopt uniform procedures and protocols to maintain, preserve, and analyze human biological specimens for DNA” and “establish a centralized system to cross-reference data obtained from DNA analysis.” Minn. Stat. § 299C.155, subd. 3 (Supp. 2005). The BCA is also required to “perform DNA analysis and make data obtained available to law enforcement officials in connection with criminal

investigations in which human biological specimens have been recovered.” Minn. Stat. § 299C.155, subd. 4 (Supp. 2005). Biological specimens taken under Minn. Stat. § 299C.105, subd. 1(a), must be forwarded to the BCA within 72 hours. Minn. Stat. § 299C.105, subd. 1(b).

In addition to the provision that applies to C.T.L., Minn. Stat. § 299C.105, subd. 1(a), directs law-enforcement personnel to take biological specimens from (1) juveniles who have had a probable-cause determination on a charge of any one of several enumerated offenses or who have been adjudicated delinquent for committing, or attempting to commit, any of the offenses; Minn. Stat. § 299C.105, subd. 1(a)(3); (2) persons who have had a judicial probable-cause determination on a charge of committing, or have been convicted of committing or attempting to commit, any of several enumerated offenses; Minn. Stat. § 299C.105, subd. 1(a)(1); and (3) persons sentenced as patterned sex offenders under Minn. Stat. § 609.108; Minn. Stat. § 299C.105, subd. 1(a)(2).

The certified question before us involves only the portions of Minn. Stat. § 299C.105, subd. 1(a)(1) and (3) that direct law-enforcement personnel to take biological specimens from juveniles and adults who have had a probable-cause determination on a charged offense but who have not been convicted. If one of these people is later found not guilty, the BCA is required to destroy the biological specimen taken from the person who is found not guilty and to return all records to the person. Minn. Stat. § 299C.105, subd. 3(a). If the charge against one of these people is later dismissed, the BCA is required to destroy the biological specimen and return all records to the person upon the request of the person who submitted a biological specimen. *Id.* If the BCA destroys a person’s biological specimen under either of these circumstances, the BCA is also required to “remove the person’s information from the [BCA’s] combined DNA index system and return all related records and all copies or duplicates of them.” Minn. Stat. § 299C.105, subd. 3(b).

The state does not dispute that taking and analyzing biological specimens as required under the statute is a search under the Fourth Amendment. *See Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 618, 109 S. Ct. 1402, 1413 (1989) (“the collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches”). The Fourth Amendment and Article I, section 10, of the Minnesota Constitution prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. “[T]he most basic constitutional rule in this area is that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions.’ ” *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2032 (1971) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)).

In *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826 (1966), the United States Supreme Court explained the role of the Fourth Amendment when the state directs that a biological specimen be taken from a person and analyzed. *Schmerber* involved a defendant who was arrested at a hospital while receiving treatment for injuries that he had suffered when the automobile that he apparently had been driving was involved in an accident. *Id.* at 758, 86 S. Ct. at 1829. A police officer directed that a blood sample be drawn from the defendant by a



physician at the hospital, and a chemical analysis of the sample indicated intoxication. *Id.* at 758-59, 86 S. Ct. at 1829. At the defendant's trial for driving an automobile while under the influence of intoxicating liquor, the report of the chemical analysis was admitted into evidence over the defendant's objection that the blood had been drawn without his consent. *Id.* at 759, 86 S. Ct. at 1829. The defendant contended that in that circumstance, the withdrawal of the blood and the admission of the report denied him his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment. *Id.*

In considering whether administering the blood test violated the Fourth Amendment, the Supreme Court explained that

the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring [the defendant] to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.<sup>[2]</sup>

*Id.* at 768, 86 S. Ct. at 1834.

The Supreme Court acknowledged that there was plainly probable cause for the officer to arrest the defendant and charge him with driving an automobile under the influence of alcohol. *Id.* But the court determined that the considerations that ordinarily permit a search of a defendant incident to an arrest

have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of [the defendant's] blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." The importance of informed, detached and deliberate determinations of the issue

whether or not to invade another's body in search of evidence of guilt is indisputable and great.

*Id.* at 769-70, 86 S. Ct. 1835 (quoting *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S. Ct. 367, 369 (1948) (citation omitted)).

The Supreme Court then recognized that the officer who directed the physician to draw the defendant's blood might reasonably have believed that the delay necessary to obtain a warrant threatened the destruction of the evidence because the amount of alcohol in the blood begins to diminish shortly after drinking stops. *Id.* at 770, 86 S. Ct. 1835. Given the fact that the evidence could disappear during the time that it would take to seek out a magistrate and obtain a search warrant, the Supreme Court held that the officer's attempt to secure evidence of blood-alcohol content was an appropriate incident to the defendant's arrest. *Id.* at 771, 86 S. Ct. 1836.

The significant principle to be drawn from *Schmerber* with respect to Minn. Stat. § 299C.105, subd. 1(a), is that establishing probable cause to arrest a person is not, by itself, sufficient to permit a biological specimen to be taken from the person without first obtaining a search warrant. In *Schmerber*, the facts that established probable cause to arrest the defendant were the smell of liquor on his breath, and the blood-shot, watery, and glassy appearance of his eyes. *Id.* at 769, 86 S. Ct. 1835. These symptoms of drunkenness also suggested that there was alcohol in the defendant's blood. But, by itself, the strong inference that there was alcohol in the defendant's blood was not enough to permit the police officer to direct the physician to draw the defendant's blood. It was only because evidence of alcohol in the defendant's blood could disappear during the time it would take to obtain a search warrant that the Supreme Court permitted the search without a warrant. Otherwise, a search warrant was required, and the inferences to support the warrant needed to be drawn by a neutral and detached magistrate, instead of the police officer.

The state acknowledges that the Fourth Amendment requires a showing of probable cause in order for a search warrant to be issued. But it argues that Minn. Stat. § 299C.105, subd. 1(a), satisfies this requirement because, under the statute, a biological specimen will not be taken until a court makes a probable-cause determination. What this argument fails to recognize, however, is that probable cause to support a criminal charge is not the same thing as probable cause to issue a search warrant.

Probable cause to support a criminal charge exists when “the evidence worthy of consideration \* \* \* brings the charge against the prisoner within reasonable probability.” *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003) (quoting *State v. Florence*, 306 Minn. 442, 446, 239 N.W.2d 892, 896 (1976)). Probable cause to issue a search warrant exists when, given the totality of the circumstances, there is “a fair probability that contraband or evidence of a crime will be found in a particular place.” *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (quotation omitted).

Minn. Stat. § 299C.105, subd. 1(a)(1) and (3), use a judicial determination of probable cause to support a criminal charge as a substitute for a judicial determination of probable cause to issue a search warrant. But, just as in *Schmerber*, where the existence of probable cause to

arrest the defendant was not sufficient to permit an intrusion into his body without a warrant, a determination of probable cause to support a criminal charge, even if it is made by a judge, is not sufficient to permit a biological specimen to be taken from the person charged without a warrant. The fact that a judge has determined that the evidence in a case brings a charge against the defendant within reasonable probability does not mean that the judge has also determined that there is a fair probability that contraband or evidence of a crime will be found in a biological specimen taken from the defendant.

By directing that biological specimens be taken from individuals who have been charged with certain offenses solely because there has been a judicial determination of probable cause to support a criminal charge, Minn. Stat. § 299C.105, subd. 1(a)(1) and (3), dispense with the requirement under the Fourth Amendment that before conducting a search, law-enforcement personnel must obtain a warrant based on a neutral and detached magistrate's determination that there is a fair probability that the search will produce contraband or evidence of a crime. Under the statute, it is not necessary for anyone to even consider whether the biological specimen to be taken is related in any way to the charged crime or to any other criminal activity.

Citing federal court opinions that conclude that requiring a defendant to submit to DNA sampling does not violate the defendant's Fourth Amendment right against unreasonable searches and seizures, the state argues that this court should examine the reasonableness of Minn. Stat. § 299C.105 under a general balancing test that weighs a defendant's right to privacy against the state's interest in collecting and storing DNA samples. But all of the opinions that the state cites involve statutes that require specimens for DNA testing to be taken only from individuals who have been convicted of a criminal offense, and when weighing the individual's right to privacy against the state's interest in DNA testing, the opinions recognize that an individual who has been convicted of an offense has a reduced expectation of privacy and conclude that this reduced expectation of privacy does not outweigh the state's interest in DNA testing. *Kruger v. Erickson*, 875 F. Supp. 583 (D. Minn. 1995), *aff'd on other grounds*, 77 F.3d 1071 (8th Cir. 1996); *Johnson v. Quander*, 370 F. Supp. 2d 79 (D.D.C. 2005), *aff'd*, 440 F.3d 489 (D.C. Cir. 2006); *Padgett v. Ferrero*, 294 F. Supp. 2d 1338 (N.D. Ga. 2003), *aff'd sub nom.*, *Padgett v. Donald*, 401 F.3d 1273 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 352 (2005); *United States v. Sczubelek*, 255 F. Supp. 2d 315 (D. Del. 2003), *aff'd*, 402 F.3d 175 (3rd Cir. 2005), *cert. denied*, 126 S. Ct. 2930 (2006).

The question certified by the district court involves only biological specimens to be taken from individuals who have been charged with a criminal offense but who have not been convicted. Therefore, the reduced expectation of privacy that was present in the cases the state cites is not present here.

Furthermore, Minn. Stat. § 299C.105, subd. 3, requires the BCA to destroy a biological specimen and remove information about the specimen from the combined DNA index system when the person from whom the specimen was taken is found not guilty or the charge against the person is dismissed. This requirement suggests that the legislature has determined that the state's interest in collecting and storing DNA samples is outweighed by the privacy interest of a person who has not been convicted. Consequently, unless the privacy expectation of a

person who has been charged and is awaiting the disposition of the charge is different from the privacy expectation of a person who was charged but the charge was dismissed or the person was found not guilty, we see no basis for concluding that the state's interest in taking a biological specimen from a person solely because the person has been charged outweighs the person's right to privacy. And because a person who has been charged is presumed innocent until proved guilty, we see no basis for concluding that before being convicted, a charged person's privacy expectation is different from the privacy expectation of a person who was charged but the charge was dismissed or the person was found not guilty. Therefore, we conclude that the privacy interest of a person who has been charged but has not been convicted is not outweighed by the state's interest in collecting and analyzing a DNA sample.

## DECISION

Because Minn. Stat. § 299C.105, subd. 1(a)(1) and (3) (Supp. 2005), direct law-enforcement personnel to conduct searches without first obtaining a search warrant based on a neutral and detached magistrate's determination that there is a fair probability that the search will produce contraband or evidence of a crime, and because the privacy interest of a person who has been charged with a criminal offense, but who has not been convicted, is not outweighed by the state's interest in taking a biological specimen from the person for the purpose of DNA analysis, the portions of Minn. Stat. § 299C.105, subd. 1(a)(1) and (3), that direct law-enforcement personnel to take a biological specimen from a person who has been charged but not convicted violate the Fourth Amendment to the United States Constitution and Article I, Section 10 of the Minnesota Constitution.

Certified question answered in the affirmative.

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<sup>[1]</sup> The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Although there are minor differences in language and punctuation, Article I, Section 10 of the Minnesota Constitution is substantively the same as the Fourth Amendment.

<sup>[2]</sup> C.T.L. does not claim that the means and procedures for taking a biological specimen from him do not respect relevant Fourth Amendment standards of reasonableness. The only question before us is whether the statute may require that biological specimens be taken from individuals who have been charged with an offense, but not convicted.

**STATE OF MINNESOTA**  
**IN COURT OF APPEALS**

**A07-1571**

In the Matter of the Disability Earnings Offset of Mylan Masson

**Filed July 29, 2008**

**Affirmed**

**Wright, Judge**

Public Employees Retirement Association

File No. 814639

William A. Cumming, Hessian & McKasy, 4000 Campbell Mithun Tower, 222 South Ninth Street, Minneapolis, MN 55402 (for relator Mylan Masson)

Lori Swanson, Attorney General, Rory H. Foley, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent Public Employees Retirement Association)

Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and Wright, Judge.

**S Y L L A B U S**

When calculating a “reemployment” offset to a disability benefit for a member of the “police and fire plan” pursuant to Minn. Stat. § 353.656, subd. 4(b) (2006), the Public Employees Retirement Association of Minnesota must include earnings from any employment that is not covered by the police and fire plan, regardless of whether that employment began before or after the date of disability.

**O P I N I O N**

**WRIGHT**, Judge

Relator challenges the decision of the board of trustees of respondent Public Employees Retirement Association of Minnesota to deny relator’s request to exclude her earnings from her preexisting employment as a community-college administrator when calculating the “reemployment” offset to her disability benefit pursuant to Minn. Stat. § 353.656, subd. 4(b) (2006). We affirm.

**F A C T S**

In 1991, relator Mylan Masson was hired as a full-time police officer with the Minneapolis Park and Recreation Board (the park board). Approximately three years later, Masson began a second full-time position as the assistant director of the criminal justice and law enforcement program at Minneapolis Community and Technical College (MCTC).

On July 27, 2001, Masson was injured in a motor-vehicle accident while on duty as a police officer. Masson's employment with the park board was terminated because the injuries Masson sustained in the accident resulted in a long-term disability that interfered with her ability to perform her duties as a police officer. But Masson's disability did not interfere with her ability to perform the duties of her position with MCTC, and she experienced no break in her employment with MCTC.

After the disability-related termination, Masson applied to Public Employees Retirement Association of Minnesota (PERA) for line-of-duty disability benefits. *See* Minn. Stat. § 353.656, subd. 1 (a)(2) (2006) (providing for payment of disability benefits to members of PERA police and fire plan who are injured in line of duty). PERA approved Masson's request, and she began receiving disability benefits in May 2004.

PERA subsequently learned of Masson's employment with MCTC. In 2006, PERA requested information from Masson regarding her "reemployment earnings." Although Masson provided information regarding her earnings from MCTC, she maintained that these earnings were not from "reemployment" because she was employed by MCTC prior to the disability. In mid-2006, PERA also learned that Masson had received a payment of \$39,000 for workers' compensation benefits. In November 2006, based on the information it gathered regarding Masson's earnings from MCTC and her workers' compensation benefits, PERA offset Masson's disability benefits and advised her that she had been overpaid \$12,701.72 during the period between May 2004 and November 2006. PERA notified Masson that 25 percent of her monthly benefit payment would be withheld until it recovered the overpayment.

Masson objected to PERA offsetting her disability benefits based on her MCTC earnings, arguing that her MCTC position was not "reemployment" within the meaning of Minn. Stat. § 353.656, subd. 4(b) (2006). The PERA board of trustees reviewed Masson's objection and referred the matter for a fact-finding conference before an administrative law judge (ALJ). After the conference, the ALJ issued findings of fact, conclusions of law, and a recommendation that the PERA board of trustees deny Masson's objection and request for recalculation of her police and fire plan line-of-duty disability benefits. The PERA board of trustees adopted the ALJ's findings, conclusions, and recommendation, and it denied Masson's request to exclude her MCTC earnings when calculating the "reemployment" offset to her disability benefit. This certiorari appeal followed.

## ISSUE

Did PERA err by concluding that relator's compensation for preexisting employment was subject to the offset provisions of Minn. Stat. § 353.656, subd. 4(b) (2006)?

## ANALYSIS

For the purposes of appellate review, a public-retirement-fund board, like the PERA board of trustees, is analogous to an administrative agency. *Axelson v. Minneapolis Teachers' Ret. Fund Ass'n*, 544 N.W.2d 297, 299 (Minn. 1996). On certiorari appeal from a quasi-judicial agency decision that is not subject to the administrative procedures act, we review whether the determination was arbitrary, oppressive, unreasonable, fraudulent, under erroneous theory of law, or without any evidence to support it. *Stang v. Minn. Teachers Ret. Ass'n Bd. of Trs.*, 566 N.W.2d 345, 347 (Minn. App. 1997). Although we afford an administrative agency deference within the agency's area of expertise, we do not defer to an agency's decision with respect to questions of law. *Id.* at 347-48. Statutory interpretation presents a question of law, which we review de novo. *In re Application for PERA Police & Fire Plan Line of Duty Disability Benefits of Brittain*, 724 N.W.2d 512, 516 (Minn. 2006).

When interpreting a statute, we must "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2006). In doing so, we first determine whether the statute's language, on its face, is ambiguous. *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). A statute's language is ambiguous when its language is subject to more than one reasonable interpretation. *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999). We construe words and phrases according to their plain and ordinary meaning. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980); *see also* Minn. Stat. § 645.08(1) (2006) (providing that words are construed according to their common usage). When the legislature's intent is clearly discernible from a statute's plain and unambiguous language, we interpret the language according to its plain meaning without resorting to other principles of statutory construction. *State v. Anderson*, 683 N.W.2d 818, 821 (Minn. 2004).

PERA administers several disability-benefit plans for public employees, including the "police and fire plan" (the plan), which provides for payment of disability benefits to police officers and firefighters who, like Masson, become occupationally disabled because of injuries sustained in the line of duty. *See* Minn. Stat. §§ 353.64 (defining membership qualifications for the plan), 353.656, subd. 1(a)(2) (providing for line-of-duty disability benefits for members of the plan) (2006). But section 353.656, subdivision 4, sets forth a mandatory limitation on disability benefits:

If a disabled member [of the plan] resumes a gainful occupation with earnings that, when added to the normal disability benefit, and workers' compensation benefit if applicable, exceed the disabilitant reemployment earnings limit, the amount of the disability benefit must be reduced as provided in this paragraph. The disabilitant reemployment earnings limit is the greater of:

- (1) the salary earned at the date of disability; or
- (2) 125 percent of the base salary currently paid by the employing governmental subdivision for similar positions.

The disability benefit must be reduced by one dollar for each three dollars by which the total amount of the current disability benefit, any workers' compensation benefits if applicable, and actual earnings exceed the greater

disabilitant reemployment earnings limit. In no event may the disability benefit as adjusted under this subdivision exceed the disability benefit originally allowed.

Minn. Stat. § 353.656, subd. 4(b) (2006).<sup>[1]</sup> The crux of the parties' dispute is the meaning of the term "reemployment" in section 353.656, subdivision 4(b).

Although they disagree as to its meaning, both parties argue that the language of subdivision 4(b) is unambiguous. The statute does not define the word "reemployment"; nor does the word "reemployment" have an ordinary or common meaning, because its usage is limited. And there is no caselaw defining "reemployment" in this context. But as both parties implicitly acknowledge, "reemployment" cannot comprise returning to a position covered by the plan. *Id.*, subd. 5a (2006) (requiring cessation of benefits when member returns to full-time or part-time employment in position covered by the plan).

Masson argues that "reemployment" refers solely to employment commenced after disability. Her interpretation reasonably comports with the common meaning of the prefix "re-" and the statutory phrase "resumes a gainful occupation." *See The American Heritage Dictionary* 1503 (3d ed. 1992) (defining "re-" as again or anew). PERA argues that "reemployment" refers to the resumption of employment after a disabling injury, which includes returning to preexisting employment or starting new employment. In support of its argument, PERA emphasizes the statutory prerequisites to payment of benefits. *See* Minn. Stat. § 353.656, subd. 4(a) (requiring impairment of member's salary in position covered by the plan and exhaustion of member's annual leave and sick leave before member is entitled to disability benefits).<sup>[2]</sup> Because both parties' interpretations of the statute are reasonable, we conclude that Minn. Stat. § 353.656, subd. 4(b), is ambiguous.

To ascertain and effectuate the legislature's intent when the words of a statute are susceptible to more than one reasonable interpretation, we examine several factors, including

- (1) the occasion and necessity for the law;
- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;
- (4) the object to be attained;
- (5) the former law, if any, including other laws upon the same or similar subjects;
- (6) the consequences of a particular interpretation;
- (7) the contemporaneous legislative history; and
- (8) legislative and administrative interpretations of the statute.

Minn. Stat. § 645.16. We presume that the legislature intends to favor the public interest as against any private interest. Minn. Stat. § 645.17(5) (2006). Preservation of public funds is in the public interest. *See Lolling v. Midwest Patrol*, 545 N.W.2d 372, 376 (Minn. 1996) (relying on section 645.17(5) in holding that public interest favored statutory interpretation permitting Department of Economic Security to consider employer's untimely objection to distribution of "reemployment insurance benefits").



The “police and fire fund” (the fund) is the source from which PERA pays disability benefits to members of the plan. Minn. Stat. § 353.65 (2006). The fund is established pursuant to a public policy and endowed with public funds. Minn. Stat. §§ 353.63 (articulating pertinent public policy that “special consideration should be given to employees of governmental subdivisions who devote their time and skills to protecting the property and personal safety of others”), 353.28, subd. 1 (requiring employers of members of the plan to pay majority of contributions to the fund, which they are required to pay “out of moneys collected from taxes or other revenue”) (2006). The fund, therefore, is a public fund, and its preservation is in the public interest. *Cf. Jackson v. Minneapolis-Honeywell Regulator Co.*, 234 Minn. 52, 55, 47 N.W.2d 449, 451 (1951) (emphasizing that unemployment-benefit payments are “not made to discharge any liability or obligation of [the employer], but to carry out a policy of social betterment for the benefit of the entire state”); *Lolling*, 545 N.W.2d at 376 (citing *Jackson* for proposition that unemployment benefits are “state funds” and, therefore, section 645.17(5) raises presumption that legislature intended to limit their expenditure). Indeed, the legislature recognized the public interest in preserving the fund by explicitly framing section 353.656, subdivision 4, as a mandatory “[l]imitation on disability benefit payments.”

We decline to embrace Masson’s interpretation of the statute because, although facially reasonable, it leads to absurd results. Minn. Stat. § 645.17(1) (2006). For example, Masson concedes that, under her interpretation of the statute, had she terminated her employment with MCTC the day before her disabling injury but returned to MCTC in the same capacity the day after the injury, that “new” employment would be “reemployment” subject to the offset provisions of section 353.656, subdivision 4(b). By comparison, however, had Masson worked on only a limited basis for MCTC before her disability but increased her hours substantially after becoming disabled, that employment would not be considered “reemployment” and, therefore, all earnings from the MCTC employment would be excluded from the offset calculation, regardless of how significant they were. And if Masson wished to leave MCTC for alternate employment, even for good cause, her interpretation of the statute would force her to choose between subjecting the benefit to a possible offset because of new employment or staying with the preexisting employment so as to avoid the offset.

To avoid such absurd results and to fairly administer section 353.656, subdivision 4(b), PERA would have to examine the facts of each member’s postdisability earnings to determine whether they result from uninterrupted preexisting employment. This could result in a substantial administrative burden on PERA and, by extension, additional administrative costs. *See* Minn. Stat. § 645.16(6) (permitting examination of consequences of particular interpretation). PERA’s interpretation of the statute, by contrast, provides a reasonable, uniform application of the statute that is consistent with the public interest in preserving PERA disability benefits for all qualified members.

The legislative history with respect to section 353.656, subdivision 4(b), informs our analysis. *See* Minn. Stat. § 645.16 (7)-(8) (permitting consideration of legislative history and legislative interpretation of ambiguous statutory language). Specifically, in 1994, the legislature amended section 353.656, subdivision 4, creating subpart (b) and altering the previous limitation rule. 1994 Minn. Laws ch. 463, § 1, at 311-12. The legislative commission on pensions and retirement (the commission) reviewed the two bills that led to the statutory amendment.<sup>[3]</sup> In a

report to the commission regarding the bills, the commission's deputy director explained that "[i]ncome replacement is the concept underlying the benefits, both for retirement and disability." Deputy Director of Minn. Legis. Comm'n on Pensions & Ret., Rep. on S.F. No. 793 & H.F. No. 985, at 1 (Mar. 2, 1994) (hereinafter Comm'n Rep.). The disability benefits are "intended to replace a *portion* of an injured worker's salary" to remedy the destruction of that worker's earning capacity. *Id.* (emphasis added). Thus, this expression of legislative intent indicates that the object of the benefit is to effectively insure a certain minimum level of income for all qualifying members. *See* Minn. Stat. § 645.16(8) (permitting consideration of legislative interpretations of a statute to ascertain intent behind ambiguous statute).

The legislature did not directly address the unique circumstances presented here. Rather, the legislative record suggests that the legislature assumed that members of the plan would work solely in their capacity as police officers and firefighters, relying on overtime earnings to supplement their base salaries, if necessary, rather than seeking additional employment. *See* Minn. Stat. § 353.64, subds. 1, 2 (defining qualifications for membership in the plan and providing for membership of part-time police officers or firefighters only by resolution of governmental subdivision); Hearing on S.F. No. 793 Before the Senate Comm. on Gov't Operations & Reform (Mar. 29, 1994) (discussing importance of increasing disability limit to account for reliance on overtime earnings); Comm'n Rep., at 2 (same).

When an occupationally disabled member of the plan is able to continue employment that is not covered by the plan, which the member started before the date of disability, the income-replacement purpose of the statute no longer applies and the public interest in preserving the fund prevails. Indeed, the commission's deputy director clarified that, "if a person regains sufficient earning power to replace that which was lost due to the disability, the obligation of the pension plan should be diminished and the reemployed disability limit does this." Comm'n Rep., at 2. Thus, the legislature intended section 353.656, subdivision 4(b), as a limitation on income replacement when a member is able to return to, or retain, employment not covered by the plan. Accordingly, the offset provisions of subdivision 4(b) require PERA, when calculating a member's "reemployment" offset to disability benefits, to include any earnings from employment not covered by the plan, whether those earnings are from preexisting employment continued after disability or from employment commenced after disability.

## DECISION

PERA correctly interpreted Minn. Stat. § 353.656, subd. 4 (2006), to permit inclusion of relator's earnings from her preexisting employment as a community-college administrator when calculating the "reemployment" offset to her disability benefits.

**Affirmed.**

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<sup>[1]</sup> We refer to the 2006 version of the statute because it was the version at issue before PERA. We observe, however, that the legislature amended subdivision 4 by designating the existing text in the last paragraph of part (b)

as part (c). 2007 Minn. Laws ch. 134, art. 4, § 20, at 1209-10. Since this amendment did not affect the meaning of the statute, our analysis applies equally to the amended version of the statute.

<sup>[2]</sup> Moreover, a recent amendment to section 353.656, subdivision 4, specifying when line-of-duty disability benefits accrue informs our analysis of the legislature’s intent with respect to these prerequisites. *See* 2007 Minn. Laws ch. 134, art. 4, § 24, at 1213 (providing that disability benefit accrues when applicant “is no longer receiving any form of compensation, whether salary or paid leave”).

<sup>[3]</sup> The commission is a standing legislative body, established to study and investigate state public pension plans and report its findings to the legislature. Minn. Stat. § 3.85, subds. 1-2 (2006). The commission comprises ten members—five each from the Minnesota House of Representatives and the Minnesota Senate. *Id.*, subd. 3 (2006).

**STATE OF MINNESOTA**  
**IN SUPREME COURT**

**A06-1696**

Court of Appeals

Page, J.  
Concurring, Gildea, J.  
Took no part, Magnuson, C.J., and Dietzen, J.

In re the Matter of the Decision of County  
of Otter Tail Board of Adjustment to  
Deny a Variance to Cyril Stadsvold and  
Cynara Stadsvold.

Filed: June 19, 2008  
Office of Appellate Courts

**S Y L L A B U S**

1. The issue of whether setback requirements in a county ordinance could be applied to a grandfathered nonconforming lot was not presented or considered below and therefore is waived on appeal.
2. An area variance may be permitted by a county board of adjustment when the applicant makes a showing of “practical difficulties” under Minn. Stat. § 394.27, subd. 7 (2006), whereas an applicant for a use variance must establish “particular hardship” as set forth in the statute.
3. Factors for consideration under the “practical difficulties” standard include: (1) how substantial the variation is in relation to the requirement; (2) the effect the variance would have on government services; (3) whether the variance will effect a substantial change in the character of the neighborhood or will be a substantial detriment to neighboring properties; (4) whether the practical difficulty can be alleviated by a feasible method other than the variance; (5) how the practical difficulty occurred, including whether the landowner created the need for the variance; and (6) whether, in light of all of the above factors, allowing the variance will serve the interests of justice.
4. Remand is appropriate when the county board of adjustment did not have the benefit of the proper “practical difficulties” standard under which to consider a request for an area variance. On remand, the board must consider the factors set out in its own ordinance to avoid its decision from being arbitrary and capricious.
5. When a county board of adjustment considers an application for a variance, it must consider all factors set out in the county ordinance.
6. A county zoning authority should not unreasonably limit its analysis by treating an after-the-fact variance application as though it were a before-the-fact application.

Reversed and remanded.

Heard, considered, and decided by the court en banc.

## OPINION

PAGE, Justice.

This case arises from the decision of respondent Otter Tail County Board of Adjustment (Board) to deny an application for an area variance sought by appellants Cyril and Cynara Stadsvold under the County's Shoreland Management Ordinance. On appeal to the district court, the Board's denial of the variance was affirmed. On appeal to the court of appeals, the district court's decision was affirmed. We granted the Stadsvolds' petition for review. The issues on appeal include: (1) whether the setback requirements in the County ordinance apply to grandfathered nonconforming lots; (2) the proper standards to be applied to area and use variance requests; (3) whether the Board's decision to deny the Stadsvolds' variance request was arbitrary and capricious; and (4) whether the Board may consider an after-the-fact variance request as if it were before-the-fact. For the reasons discussed below, we reverse and remand for further proceedings, concluding that a county board of adjustment may grant an area variance on a showing of "practical difficulties."

The relevant facts in this case are largely undisputed. The Stadsvolds purchased an undeveloped lot on Blanche Lake in Otter Tail County in July 1982. The Stadsvolds' lot is a grandfathered nonconforming lot under the County's Shoreland Management Ordinance. The lot is 100 feet wide with an area of 17,627 square feet.<sup>[1]</sup> In 2001, the Stadsvolds developed plans to build a lake home and garage on the lot. They filed an application for a site permit with the County in November 2001 and amended their application in May 2002.

The ordinance provides that an applicant for a site permit "shall stake out all lot lines and road right-of-ways" before the County's pre-approval inspection. Otter Tail County, Minn., Shoreland Management Ordinance § V.1.A (2004). The ordinance provides setback requirements for structures built on single family residence recreational developmental lake lots covered by the ordinance. *Id.* § III.4.A. Such structures must be set back 10 feet from lot lines and 20 feet from road right-of-ways. *Id.*

The Stadsvolds' site permit application indicated lot line setbacks for the house and garage of 10 feet and right-of-way setbacks of 22 feet for the house and 20 feet for the garage. The Stadsvolds did not have the lot surveyed, however, and the measurements set out in the application were based on stakes and pins put in place when the lot was initially platted. Using these same stakes and pins, the county inspector measured the house as 10 and 17 feet from the lot lines, the garage as 11 and 50 feet from the lot lines, and the garage as 26 feet from the road right-of-way. On that basis, the County approved the application for a site permit on August 8, 2002. The County physically inspected the lot on October 16, 2002, November 19, 2002, and July 15, 2003. Construction of both the house and garage was completed by July 15, 2003, and the County approved the completed project on that date.

In October 2004, it was discovered that the house and garage had been built within the setback areas. A subsequent survey of the lot confirmed that the house and garage were within the setback areas, with the house being 5 feet from the lot lines and 16.7 feet from the road right-of-way, and the garage being 5.1 feet from the road right-of-way.

On July 11, 2005, the Board of Adjustment cited the Stadsvolds for violating the lot line and road right-of-way setbacks in the County ordinance. At that point, the Stadsvolds had invested \$236,917.44 in constructing the house and garage.

On August 8, 2005, the Stadsvolds applied to the Board for a variance from the setback requirements. Evidence submitted at the hearing on the variance application indicated that during an inspection of the Stadsvolds' property by three of the Board's members, one of the members expressed the view that obtaining the variance should not be a problem due to the substandard lot size. There was also evidence indicating that surrounding landowners did not oppose the variance being granted and that other property owners in the area had received variances for structures built within the road right-of-way setback area.

At the hearing on the variance, the Board chairperson indicated that the Board's decision would be based on the Stadsvolds' application and the physical visits to the lot by the Board members. The chairperson indicated that the Board would treat the application for the variance as if the variance had been sought before the house and garage had been built. Applying that approach, the Board members concluded that they would not have approved the request had it been sought before-the-fact because "[t]here was plenty of room on this lot" for reasonable use and the Stadsvolds could "[s]queeze [the house and garage] together a little bit." The Board therefore denied the variance. In its written denial, the Board concluded the Stadsvolds showed "no adequate hardship unique to the property" that would support granting the variance. In doing so, the Board noted that it would not have approved the variance had it been requested before construction on the property commenced, and that there was adequate room on the lot to obtain a reasonable use of the property without a variance.

The Stadsvolds appealed to the district court, which granted summary judgment in the County's favor. The court concluded that "the decision by the Board was reasonable, and the reasons for the decision are legally sufficient and have a factual basis." The court of appeals affirmed, concluding that the Board used the proper standard when it considered the Stadsvolds' application and that the Board's decision was not arbitrary or capricious. *In re Decision of County of Otter Tail Bd. of Adjustment*, No. A06-1696, 2007 WL 1898565, at \*4-5 (Minn. App. July 3, 2007).

## I.

The preliminary question we address is whether an owner of a grandfathered nonconforming lot, which meets the criteria of the exemption for grandfathered lots, also must meet the ordinance's setback requirements. The exemption provides that structures may be built on grandfathered lots that do not conform to minimum square footage and lot width, "provided a Site Permit for the structure is obtained, all sanitary requirements are complied with and the

proposed use is permitted within the district.” Otter Tail County, Minn., Shoreland Management Ordinance § IV.13.B. The Stadsvolds claim that they are entitled to a building permit without having to meet the ordinance’s other requirements because their lot is a grandfathered nonconforming lot, they obtained a site permit for the construction of the house and garage, they met all sanitary requirements, and the house and garage are permitted uses under the ordinance. The County argues that the Stadsvolds failed to raise this issue in front of the Board and therefore the issue has been waived.

Minnesota Statutes § 394.27, subd. 9, provides that decisions of the Board may be appealed to the district court. Minn. Stat. § 394.27, subd. 9 (2006). However, we have held that an appellate court must generally consider only those issues that were presented and considered below. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *see also Sletten v. Ramsey County*, 675 N.W.2d 291, 302 (Minn. 2004) (“Issues raised for the first time on appeal are not to be considered.”). Here, the issue of whether the ordinance’s setback requirements could be applied to a grandfathered nonconforming lot was not presented to or considered by the Board. We, therefore, agree with the County that the issue is not properly before us.

## II.

The Stadsvolds also argue that the Board erred in applying an “adequate hardship” standard when determining whether to grant the variance because Minn. Stat. § 394.27, subd. 7 (2006), permits a county board of adjustment to grant a variance when a landowner would face “practical difficulties or particular hardship” in meeting the terms of the official control. The Stadsvolds contend that the less stringent “practical difficulties” standard applies to area variances, while the more stringent “particular hardship” standard applies to use variances. The County contends that the Stadsvolds cannot meet either standard.

Minnesota Statutes § 394.27, subd. 7, governs a county’s power to grant variances and provides:

Variances shall only be permitted when they are in harmony with the general purposes and intent of the official control in cases when there are practical difficulties or particular hardship in the way of carrying out the strict letter of any official control, and when the terms of the variance are consistent with the comprehensive plan. “Hardship” as used in connection with the granting of a variance means the property in question cannot be put to a reasonable use if used under the conditions allowed by the official controls; the plight of the landowner is due to circumstances unique to the property not created by the landowner; and the variance, if granted, will not alter the essential character of the locality. Economic considerations alone shall not constitute a hardship if a reasonable use for the property exists under the terms of the ordinance.<sup>[2]</sup>

With certain additions, the Otter Tail County ordinance mirrors this language.<sup>[3]</sup> Otter Tail County, Minn., Shoreland Management Ordinance § V.5. Therefore, we have no need to differentiate between the language of the statute and the language of the ordinance.

We have not had occasion in the past to consider the difference, if any, between the “practical difficulties” and “particular hardship” standards. Determining whether there is a difference between the two standards and how to apply them requires us to construe Minn. Stat. § 394.27, subd. 7, which we do de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998). When a statute’s language is plain and unambiguous, we engage in no further construction. *Mavco, Inc. v. Eggink*, 739 N.W.2d 148, 153 (Minn. 2007). A statute is ambiguous when the language “is subject to more than one reasonable interpretation.” *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999). When construing statutes, our goal is to ascertain and give effect to the legislature’s intent. Minn. Stat. § 645.16 (2006). We conclude that section 394.27, subdivision 7, is ambiguous because only “hardship” is defined, and it therefore is not clear from the statute when a county zoning authority’s decision should be based on the “practical difficulties” or the “particular hardship” standard in a given case.

The legislature is presumed to have intended both “practical difficulties” and “particular hardship” to have meaning. *See* Minn. Stat. § 645.16 (“Every law shall be construed, if possible, to give effect to all its provisions.”); Minn. Stat. § 645.17(2) (2006) (“The legislature intends the entire statute to be effective and certain.”); *Mavco*, 739 N.W.2d at 153 (citing *Van Asperen v. Darling Olds, Inc.*, 254 Minn. 62, 74, 93 N.W.2d 690, 698 (1958), for the proposition that we presume that the legislature “understood the effect of its words and intended the entire statute to be effective and certain”). We also presume that the legislature did not intend absurd or unreasonable results. *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003). Moreover, distinctions in language in the same context are presumed to be intentional, and we apply the language consistent with that intent. *Transp. Leasing Corp. v. State*, 294 Minn. 134, 137, 199 N.W.2d 817, 819 (1972).

Because they derogate the common law, we construe zoning ordinances narrowly against the government and in favor of the property owner. *Frank’s Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980). Zoning ordinances were established “to control land use, and development in order to promote public health, safety, welfare, morals, and aesthetics.” *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 676 N.W.2d 401, 407 (Wis. 2004) (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 265, 394-95 (1926)). The purpose of a variance is to provide “the opportunity for amelioration of unnecessary hardships resulting from the rigid enforcement of a broad zoning ordinance,” thereby “avoid[ing] the acknowledged evils of ‘spot zoning.’ ” *Curry v. Young*, 285 Minn. 387, 396, 173 N.W.2d 410, 415 (1969) (regarding a municipal variance) (quoting *Flagstad v. City of San Mateo*, 318 P.2d 825, 827 (Cal. App. 1958)); *see also* Minn. Stat. § 394.22, subd. 10 (2006) (defining “variance” as “any modification or variation of official control where it is determined that, by reason of exceptional circumstances, the strict enforcement of the official controls would cause unnecessary hardship”).

There are two types of variances: use variances and area variances. “A use variance permits a use or development of land other than that prescribed by zoning regulations.” *In re Appeal of Kenney*, 374 N.W.2d 271, 274 (Minn. 1985). In Minnesota, the authority of a county board of adjustment to grant a use variance is limited by statute: “No variance may be granted that would allow any use that is prohibited in the zoning district in which the subject property is



located.” Minn. Stat. § 394.24, subd. 7; *see Kenney*, 374 N.W.2d at 274-75 (discussing circumstances under which use variances are permitted). An area variance controls “lot restrictions such as area, height, setback, density and parking requirements.” *Kenney*, 374 N.W.2d at 274; *see generally* 3 Kenneth H. Young, *Anderson’s American Law of Zoning* § 20.07, at 426-27 (4th ed. 1996). We have noted that unlike use variances, area variances do “not change the character of the zoned district.” *Kenney*, 374 N.W.2d at 274.

Looking to the history of the legislation that formed the basis for the enactment of section 394.27, subdivision 7, we conclude that the “practical difficulties” standard is the appropriate standard to apply to area variances and the “particular hardship” standard is the appropriate standard to apply to use variances. The “practical difficulties” and “unnecessary hardship” standards originated in the 1916 New York City Building Zone Resolution. *See* David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 Colum. J. Envtl. L. 279, 282, 285, 285 n.15 (2004). The original drafters of the New York ordinance recognized that an ordinance “could not fully anticipate all of the variations in particular parcels of land, individual land uses, and peculiar situations that would arise with zoning implementation.” *Id.* at 283. Accordingly, the drafters intentionally used vague and general terms to allow local zoning boards to use variances as “a safety valve” for unforeseen circumstances. *Id.* at 283, 285 n.19. Over time, the New York courts distinguished between the two standards by directing zoning authorities to consider whether there was a “unique” or “unnecessary” hardship when considering use variances and whether there were practical difficulties when considering area variances. *See, e.g., Vill. of Bronxville v. Francis*, 150 N.Y.S.2d 906, 909 (N.Y. App. Div.), *aff’d*, 135 N.E.2d 724 (N.Y. 1956). The New York courts have also given definition to the term “practical difficulties,” concluding that when addressing area variance requests, zoning boards should consider:

(1) how substantial the variation is in relation to the requirement, (2) the effect, if the variance is allowed, of the increased population density thus produced on available governmental facilities \* \* \*, (3) whether a substantial change will be produced in the character of the neighborhood or a substantial detriment to adjoining properties created, (4) whether the difficulty can be obviated by some method, feasible for the applicant to pursue, other than a variance, and (5) whether in view of the manner in which the difficulty arose and considering all of the above factors the interests of justice will be served by allowing the variance.

*Wachsberger v. Michalis*, 191 N.Y.S.2d 621, 624 (N.Y. Sup. Ct. 1959), *aff’d*, 238 N.Y.S.2d 309, 309 (N.Y. App. Div. 1963).<sup>[4]</sup> Minnesota enacted section 394.27 in 1959 but did not adopt a specific statutory standard for granting variances at that time. Act of Apr. 24, 1959, ch. 559, § 7, 1959 Minn. Laws 882, 885-86. In 1974, the legislature amended section 394.27, when the legislature provided a definition of a “variance” and incorporated the “practical difficulties or particular hardship” language. Act of Apr. 11, 1974, ch. 571, § 27, 1974 Minn. Laws 1401, 1408-09.

Courts across the country have taken differing approaches when construing language similar or identical to the “practical difficulties or particular hardship” language in Minn. Stat. § 394.27, subd. 7. *See* 3 Young, *supra*, § 20.48, at 579-80. “[U]naided by statutory or other

legislative language,” courts have applied different standards to requests for use and area variances. *Id.* “In most states, the courts will approve an area variance upon a lesser showing by the applicant than is required to sustain a use variance.” *Id.* Courts in some states with zoning enabling statutes containing both the “practical difficulties” and “hardship” standards have concluded that area variance applicants are required to meet the less rigorous “practical difficulties” standard. *See, e.g., Matthew v. Smith*, 707 S.W.2d 411, 416 (Mo. 1986) (adopting the New York approach and holding area variances may be granted upon a “slightly less rigorous” standard of “practical difficulties”). Other jurisdictions do not make a distinction between the two standards. *See, e.g., 165 Augusta St., Inc. v. Collins*, 87 A.2d 889, 891 (N.J. 1952) (“We perceive no practical difference between [undue hardship] or [peculiar and exceptional practical difficulties]. \* \* \* The former is necessarily inclusive of the latter, for where peculiar and exceptional difficulties exist undue hardship also exists.”) (internal citations omitted).

Even in states in which the enabling legislation uses a singular “hardship” standard, the courts have read into the statutes a less rigorous standard for area variances. For example, although Ohio Rev. Code § 303.14(B) (2006) permits variances to be granted based only on “unnecessary hardship,” the Ohio Supreme Court also followed the New York approach and echoed the *Wachsberger* “practical difficulties” factors for area variances. *See Duncan v. Vill. of Middlefield*, 491 N.E.2d 692, 695 (Ohio 1986). Similarly, Wisconsin Statutes § 59.694(7)(c) (2006) sets out a single “unnecessary hardship” standard for variances. The Wisconsin Supreme Court, however, has held that area variances may be granted upon a lesser showing. *See State v. Outagamie County Bd. of Adjustment*, 628 N.W.2d 376, 383-89 (Wis. 2001) (plurality opinion) (overturning prior decision holding “unnecessary hardship” applied to both use and area variances because holding “defies practical workability, lacks sufficient justification, and is detrimental to the coherence of the law of zoning in this state”).

We are persuaded that the reasoning of the states applying a lesser standard to area variance requests is sound. As the Wisconsin Supreme Court has noted, applying the higher use variance standard is “largely disconnected from the purpose of area zoning, fails to consider the lesser effect of area variances on neighborhood character, and operates to virtually eliminate the statutory discretion of local boards of adjustment to do justice in individual cases.” *Ziervogel*, 676 N.W.2d at 404. Further, recognizing that most courts distinguish between the effect that area and use variances have on the use of the land, “in the case of area variances, it is assumed by most courts that adequate protection of the neighborhood can be effected without the imposition of the stringent limitations which have been developed in the use variance cases.” *Outagamie County Bd. of Adjustment*, 628 N.W.2d at 389 (quoting *Young, supra*, § 20.48 at 581).

Given that we have recognized the different effects of use and area variances, *see In re Appeal of Kenney*, 374 N.W.2d at 274, we hold that area variances shall be permitted by a county zoning authority when the applicant makes a showing only of “practical difficulties” under Minn. Stat. § 394.27, subd. 7, whereas an applicant for a use variance must establish particular hardship as set forth in the statute. We further hold that the factors for consideration under the “practical difficulties” standard include: (1) how substantial the variation is in relation to the requirement; (2) the effect the variance would have on government services; (3) whether the variance will effect a substantial change in the character of the neighborhood or will be a substantial detriment

to neighboring properties; (4) whether the practical difficulty can be alleviated by a feasible method other than a variance;<sup>[5]</sup> (5) how the practical difficulty occurred, including whether the landowner created the need for the variance; and (6) whether, in light of all of the above factors, allowing the variance will serve the interests of justice.

Noting that the legislature has limited the authority to grant variances to “exceptional circumstances,” Minn. Stat. § 394.22, subd. 10, we caution, as did the Wisconsin Supreme Court, that our adoption of a less rigorous standard for area variances “is not to say that area variances should be, or are, automatic or easy to obtain.” *Outagamie County Bd. of Adjustment*, 628 N.W.2d at 389.

### III.

Having concluded that the practical difficulties standard is the standard to be applied when county zoning authorities consider area variances and having identified the parameters of that standard, we now turn to the Board’s denial of the Stadsvolds’ application for a variance in this case. We review zoning actions to determine whether the zoning authority “ ‘was within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, oppressively, or unreasonably, and to determine whether the evidence could reasonably support or justify the determination.’ ” *Frank’s Nursery Sales, Inc.*, 295 N.W.2d at 608 (quoting *Vill. of Edina v. Joseph*, 264 Minn. 84, 93, 119 N.W.2d 809, 815 (1962)).

The Board, using an “adequate hardship” standard, did not consider practical difficulties. The Stadsvolds argue the Board’s decision was therefore arbitrary and capricious. The Board did not have the benefit of our holding in this case regarding “practical difficulties.” We cannot tell whether the Board’s decision was arbitrary and capricious. Therefore, remand is required to allow the Board to consider the Stadsvolds’ variance application in light of our holding that applications for area variances are to be considered using the “practical difficulties” standard in Minn. Stat. § 394.27, subd. 7.

Although we remand to allow the Board to determine whether the Stadsvolds’ variance request meets the “practical difficulties” standard, we also, in order to provide guidance on remand, address the Stadsvolds’ claim that the Board’s denial of the variance was arbitrary and capricious because it failed to consider the factors set out in the County’s ordinance.

Whether a local zoning body’s decision is reasonable is measured against the standards set forth in the applicable ordinance. *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 n.6 (Minn. 1983). In addition to requiring the Board to consider whether there are “practical difficulties or unnecessary hardship,” the ordinance also requires the Board to consider whether: (1) “the variance will secure for the applicant a right or rights that are enjoyed by other owners in the same area”; (2) sewage treatment systems need upgrading; and (3) “the variance will be contrary to the public interest or damaging to the rights of other persons or property values in the neighborhood.” Otter Tail County, Minn., Shoreland Management Ordinance § V.5.E. There is no indication in the record that the Board considered any of these factors. We have held that when resolving variance requests, the zoning authority must “articulate the

reasons for its ultimate decision, with specific reference to relevant provisions of its zoning ordinance.” *Earthburners, Inc. v. County of Carlton*, 513 N.W.2d 460, 463 (Minn. 1994). When the zoning authority fails to comply with this requirement, it is difficult if not impossible for a reviewing court to determine whether the zoning authority’s decision was proper, was predicated on insufficient evidence, or was the result of the zoning authority’s failure to apply the relevant provisions of the zoning ordinance. *See generally In re Livingood*, 594 N.W.2d 889, 895 (Minn. 1999); *VanLandschoot*, 336 N.W.2d at 508. A decision predicated on insufficient evidence or arising from a failure to apply relevant provisions of the ordinance would be arbitrary and capricious. In the absence of the Board in this case having articulated its reasons in the manner required by *Earthburners*, we cannot determine the basis for the Board’s decision.

If the zoning authority’s decision is arbitrary and capricious, the standard remedy is that the court orders the permit to be issued. *In re Livingood*, 594 N.W.2d at 895 (“[T]he general principle [is] that when a governmental body denies a permit with such insufficient evidence that the decision is arbitrary and capricious, the court should order issuance of the permit.”). However, an exception to the general rule exists when the zoning authority’s decision is premature and “not necessarily arbitrary.” *Earthburners*, 513 N.W.2d at 463. In *Earthburners*, we remanded to the zoning authority to allow “renewed consideration” of the zoning application because it was unclear as to whether the authority had applied the relevant provisions of the statute. *Id.* To prevent unfairness, we required the zoning authority on remand to “confine its inquiry to those issues raised in earlier proceedings before the planning commission and county board while allowing adequate opportunity for a meaningful discussion of those issues.” *Id.* Thus, on remand in this case, the Board must apply both the “practical difficulties” standard, including the factors discussed above, and all of the other factors required by the ordinance. Also, as required by *Earthburners*, the Board shall “articulate its reasons for its ultimate decision, with specific reference to relevant provisions of its zoning ordinance” and “confine its inquiry to those issues raised in [the] earlier proceedings.”

#### IV.

Finally, we consider the Stadsvolds’ argument that the Board erred by treating their application as a before-the-fact variance request. The County argues that it has broad discretion to treat before-the-fact and after-the-fact variances the same and that it “makes sense” because “it discourages people from purposely violating the [ordinance]” and then presenting the Board with the fact of the completed construction.

First, we note that, because circumstances involved in before-the-fact variance requests and after-the-fact variance requests are fundamentally different, treating them the same can produce unfair results. At the same time, we acknowledge that boards of adjustment generally have broad discretion in considering variance requests. But we also note that the Board here had the authority to consider the facts as they existed at the time of the Stadsvolds’ request. In *In re Appeal of Kenney*, a case involving a county board of adjustment’s authority to grant the variance sought, we suggested that the board, on remand, consider certain after-the-fact elements, including whether the applicant acted in good faith, attempted to comply with the ordinance, and made a substantial investment. 374 N.W.2d at 275. We also “urged” the board to consider whether (1) the construction was completed, (2) there were similar structures in the

area, and (3) the county's benefits were outweighed by the applicant's burden if the applicant were required to comply with the ordinance. *Id.* Here, it is not clear from the record, however, that the Board understood that it had such authority.

To the extent that the County is concerned about variance applications arising out of purposeful violations of its ordinance, such concerns should be alleviated by considering whether the applicant acted in good faith and attempted to comply with the ordinance, and whether, in light of all the factors, the interests of justice will be served by granting the variance. Further, there would be nothing inappropriate in the Board distinguishing between an "unintentional mistake" and "wilful and intentional encroachment." *See Moyerman v. Glanzberg*, 138 A.2d 681, 685 (Pa. 1958); *see also* 3 Young, *supra*, § 20.57, at 617 ("Some courts have given relief where the good faith of the applicant was apparent and the offense to the ordinance was small or harmless."). Indeed, we have affirmed a permanent injunction in a case involving landowners who

knew that they were proceeding without a permit when they started remodeling and that in doing so they were violating the ordinance. They knowingly violated the law, and the fact that they spent money in so doing does not justify them nor avail them of the hardship clause in the ordinance.

*Newcomb v. Teske*, 225 Minn. 223, 227, 30 N.W.2d 354, 356 (1948). Here, there is nothing in this record to suggest, and the County does not argue that, the Stadsvolds acted in bad faith, engaged in a willful and intentional encroachment, proceeded without a permit, or otherwise intentionally violated the ordinance. In fact, the record suggests that the Stadsvolds made a good-faith mistake that resulted in an unintentional violation of the ordinance. Further, the record indicates that other properties in the area have received a variance for similar setback violations. Therefore, on remand, we urge the Board to treat the Stadsvolds' variance application as an application for an after-the-fact variance and consider the equitable factors we set out in *Kenney*.

### **Reversed and remanded.**

MAGNUSON, C.J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

DIETZEN, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

## **C O N C U R R E N C E**

**GILDEA**, Justice (concurring).

I join in the majority's conclusion that the matter be reversed and remanded to the Otter Tail County Board of Adjustment. I write separately because I disagree with the way in which the majority reaches its conclusion to reverse and remand.

The majority rewrites the relevant statute, Minn. Stat. § 394.27, subd. 7 (2006), so that the "practical difficulties" standard in the statute applies only to area variances and the

“particular hardship” standard applies only to use variances. But we long ago recognized that we are not to add words to statutes or otherwise judicially legislate. *State v. Willrich*, 72 Minn. 165, 167, 75 N.W. 123, 124 (1898) (“We must accept the law as we find it, and not attempt any judicial legislation to supply supposed omissions.”). In addition, it seems to me that the restrictions the majority writes into the statute are arguably inconsistent with our precedent that we are to construe zoning ordinances in favor of landowners. *Frank’s Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980). Before today, both the “practical difficulties” and “particular hardship” standards were available to landowners, but now a landowner is restricted depending on the type of variance she seeks. Such restrictions should be made by the legislative branch, not the judicial branch.

Finally, rewriting the statute is not necessary to the resolution of this case. As the majority concludes, the Board did not apply the “practical difficulties” standard to the variance application in this case. Thus, a remand is required for the Board to consider the application under that standard. In addition, and as the majority also concludes, the Board’s decision does not reflect whether it considered the requirements of its own ordinance and so the record is not adequate for meaningful judicial review. As such, a remand is required to the Board for this reason as well. *See Earthburners, Inc. v. County of Carlton*, 513 N.W.2d 460, 463 (Minn. 1994) (“In the proceedings on remand, the board must articulate the reasons for its ultimate decision, with specific reference to relevant provisions of its zoning ordinance.”).

Because the Board did not apply the “practical difficulties” standard and its decision does not reflect that it followed its own ordinance, I would remand this matter for further consideration by the Board, and I would not reach the question of whether the statute needs to be rewritten.

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<sup>[1]</sup> The ordinance requires, among other things, 40,000 minimum square footage and 150 feet minimum lot width for lots on recreational development lakes. Otter Tail County, Minn., Shoreland Management Ordinance § III.4.A (2004). The ordinance provides that lots existing before the 1971 effective date of the ordinance are exempt from the minimum area and width requirements set out in the ordinance, provided a site permit is obtained for construction of any structures, all sanitary requirements are met, and the proposed use is permitted in the district. *Id.* § IV.13.B.

<sup>[2]</sup> The statutory standard for municipal variances is different. *See* Minn. Stat. § 462.357, subd. 6(2) (2006). Unlike section 394.27, subdivision 7, the municipal standard requires a showing of “undue hardship.” Minn. Stat. § 462.357, subd. 6(2).

<sup>[3]</sup> The ordinance additionally provides that the Board must consider:

1. Whether the variance will secure for the applicant a right or rights that are enjoyed by other owners in the same area;
2. Whether existing sewage treatment systems on the property need upgrading before additional development is approved;
3. Whether granting the variance will be contrary to the public interest or damaging to the rights of other persons or to property values in the neighborhood.

Otter Tail County, Minn., Shoreland Management Ordinance § V.5.E. The ordinance further provides that “[n]o variance shall be granted simply because there are no objections or because those who do not object outnumber those who do.” *Id.*

<sup>[4]</sup> In 1992, New York enacted legislation setting out a formula that balances the impact of the variance request on the applicant and the community. *See Sasso v. Osgood*, 657 N.E.2d 254, 257-58 (N.Y. 1995). As a result, area variance applicants no longer have to prove “practical difficulties.” However, the legislative formula parallels the judicially-created factors used to define “practical difficulties.” *See id.* at 259.

<sup>[5]</sup> Economic considerations play a role in the analysis under this factor.

**STATE OF MINNESOTA**

**IN SUPREME COURT**

**A05-1377**

**A05-1378**

Court of Appeals

Anderson, G. Barry, J.

David Granville and Marlyss Granville,  
as parents and natural guardians of  
Kailynn Granville, a minor,

Appellants,

Jacqueline Johnson, as parent and natural  
guardian of Shanel Andrews, a minor,

Appellant,

vs.

Filed: May 31, 2007  
Office of Appellate Courts

Minneapolis Public Schools, Special School  
District No. 1,

Respondent.

**SYLLABUS**

Minnesota Statutes § 466.12 (2006) expired in 1974 and was not revived.

Reversed and remanded.

Heard, considered, and decided by the court en banc.

**OPINION**

**ANDERSON, G. Barry, Justice.**

Appellants, parents of two children injured at school during gym, brought an action in Hennepin County District Court against the respondent, Minneapolis School District, alleging negligence. The school district asserted immunity from tort liability under Minn.



Stat. § 466.12 (2006) and ultimately moved the district court for summary judgment. The district court denied the school district's motion for summary judgment, finding that section 466.12 violates the equal protection guarantees of the United States and Minnesota Constitutions. The court of appeals reversed, holding that section 466.12 does not violate either Equal Protection Clause. This court granted review, heard oral argument, and requested supplemental briefing on the issue of whether section 466.12 was revived after it expired in 1974. We hold that it was not revived and the school district is not immune from tort liability.

On November 1, 2001, two Loring Elementary School students were injured while participating in a game of "flashlight tag" during physical education class. Flashlight tag involves turning off all the lights in the gymnasium and shining a flashlight beam around the room while children run in the darkness to avoid it. During the game, the students collided and injuries resulted. Appellants David and Marlyss Granville and Jacqueline Johnson, the parents of the children, filed separate lawsuits against the Minneapolis School District in Hennepin County District Court, alleging negligence.

The school district moved to dismiss the actions on the ground that the school district is immune from tort liability under Minn. Stat. § 466.12, subd. 3a (2006). This statute requires a school district to secure liability insurance if it is able to do so at a cost of \$1.50 or less per student per year. The statute confers immunity on a school district if the district is unable to obtain insurance at the statutory rate and the commissioner of insurance certifies that such insurance is unobtainable. The legislature added the \$1.50 provision in 1969, and has not changed the dollar amount since. Act of May 27, 1969, ch. 826, § 2, 1969 Minn. Laws 1515, 1515-16. It is undisputed that no school district in the state can currently obtain liability insurance for \$1.50 per student. Before appellants' children were injured, the school district had requested and received certification from the commissioner of commerce (the statutory successor to the commissioner of insurance) that the district could not obtain liability insurance at the \$1.50 per student rate.

In response to the school district's motion to dismiss appellants' lawsuits on the basis of section 466.12, appellants argued to the district court that the section violates the Equal Protection Clauses of the United States and Minnesota Constitutions. The district court applied rational basis review, concluded that the statute was constitutional, and dismissed. The court of appeals affirmed the district court's use of the rational basis test, but reversed and remanded for findings on whether the \$1.50 provision was relevant to section 466.12's purpose under current market conditions. *Granville v. Minneapolis Pub. Sch.*, 668 N.W.2d 227, 235 (Minn. App. 2003), *rev. denied* (Minn. Nov. 18, 2003).

On remand, the school district moved for summary judgment in each action and the district court denied the motions by separate, identical orders. The district court concluded that the statute violates the equal protection guarantees of both the United States and Minnesota Constitutions because under current market conditions the \$1.50 statutory rate was not rationally related the purpose of protecting governmental entities' financial stability. The school district appealed. The court of appeals consolidated the actions and reversed, concluding that section

466.12 does not violate the federal or state Equal Protection Clauses because the application of the \$1.50 per student rate allows every district in the state to assert immunity. *Granville v. Minneapolis Sch. Dist.*, 716 N.W.2d 387, 394 (Minn. App. 2006). This court granted appellants' petition for review. In their reply brief, appellants argued for the first time that section 466.12 expired in 1974 and was never revived. We questioned the parties at oral argument and requested supplemental briefing on the issue of whether section 466.12 was revived.<sup>[1]</sup>

## I.

Before considering appellants' challenges under the United States and Minnesota Constitutions, we must determine whether section 466.12 is currently in effect. While we generally do not address issues not raised in a petition for review, *In re GlaxoSmithKline PLC*, 699 N.W.2d 749, 757 (Minn. 2005) (citation omitted), this court may take any action that justice may require. Minn. R. Civ. App. P. 103.04. When we are asked to find a statute unconstitutional, there can be little doubt that we must first ask whether the statute is currently in effect. Mindful that appellants first raised this issue in their reply brief, we have given the school district an opportunity to respond at oral argument and in a supplemental brief.

Section 466.12 was enacted in 1963 as part of the Municipal Tort Claims Act, Minn. Stat. ch. 466 (2006), in which the legislature responded to our abrogation of common law tort immunity for local government units in *Spanel v. Mounds View School District No. 621*, 264 Minn. 279, 118 N.W.2d 795 (1962). Act of May 22, 1963, ch. 798, § 12, 1963 Minn. Laws 1396, 1400-01. Section 466.12 codified pre-existing common law immunity for school districts and exempted school districts from the provisions of chapter 466 that made local government units liable for their torts. § 12, subd. 1, 1963 Minn. Laws at 1400. But the legislative preservation of tort immunity for school districts was not permanent; section 466.12, subdivision 4 provided that section 466.12 would expire on January 1, 1968. § 12, subd. 4, 1963 Minn. Laws at 1401 ("This section is in effect on January 1, 1964, but all of its provisions shall expire on January 1, 1968."). In 1965, the legislature extended the reprieve from liability for school districts by changing the expiration date for section 466.12 to January 1, 1970. Act of May 25, 1965, ch. 748, § 1, 1965 Minn. Laws 1126, 1126. Before the 1970 expiration date arrived, the legislature added the \$1.50 provision at issue in this case, extending tort immunity for school districts that were unable to purchase insurance for \$1.50 per pupil or less. Act of May 27, 1969, ch. 826, § 2, 1969 Minn. Laws 1515, 1515-16. In the same act, the legislature extended the expiration date for section 466.12 to July 1, 1974. § 3, 1969 Minn. Laws at 1516. In 1974, the legislature amended subdivision 4 to postpone the expiration of section 466.12 for towns not exercising municipal powers. Act of April 11, 1974, ch. 472, § 1, 1974 Minn. Laws 1189, 1189-90. But the legislature did not change the July 1, 1974 expiration date for school districts, even though that date was less than three months away. *See id.* The school district concedes that section 466.12 and its exemption from tort liability expired as to all school districts on July 1, 1974.

In 1996 the legislature repealed subdivision 4 (the expiration provision). Act of Mar. 15, 1996, ch. 310, § 1, 1996 Minn. Laws 185, 187. The relevant section of the act was titled "Repealer," and the act was described as "[a]n act relating to state government; repealing obsolete laws." It appears that the repealer was part of a bookkeeping effort to remove obsolete provisions from the statute books. The only apparent common thread in the over 300 repealed

laws is that they involved dates in the past.<sup>[2]</sup> The 1996 act did not explicitly indicate an intent to revive section 466.12; indeed, it did not express a substantive intent for any of the affected laws.

The school district relies on the repealer to advance the proposition that the immunity provisions of Minn. Stat. § 466.12 were revived and thus the personal injury actions at issue here were barred. Appellants argue that there was no revival of section 466.12. They contend that Minn. Stat. § 645.36 (1996), which states that “[w]hen a law is repealed which repealed a former law, the former law shall not thereby be revived, unless it is so specifically provided,” supports the conclusion that section 466.12 was not revived. Appellants propose that, for revival purposes, there is no meaningful difference between a law that has been repealed and one that has expired, and we agree.

The main argument advanced by the school district is that we must presume that the legislature knew what it was doing with the 1996 act, and therefore we must presume that the legislature intended to revive the rest of section 466.12 when it repealed the expiration provision. We agree that we must presume that the legislature generally knows what it is doing, but this presumption undermines as much as it supports the school district’s position. Applying the school district’s reasoning, we must presume that when the legislature enacted the repealer at issue, it acted with awareness of section 645.36 and that section’s logical implication that repealing a lapsed expiration provision does not revive the underlying law.

The school district contends that we may not apply section 645.36 because the 1996 act is unambiguous. “The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (2006). “When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” *Id.* If a statute is ambiguous, however, we look to other factors to determine legislative intent. *Id.* We agree with the school district that the language of the 1996 act plainly repealed section 466.12, subdivision 4. Ambiguity exists, however, as to whether that repeal revived the rest of the section; it is far from axiomatic that repealing an expiration date revives an expired law. Faced with this ambiguity, we ask what the legislature most likely intended the repeal of subdivision 4 to accomplish.

It is unlikely, at best, that the legislature intended by the repeal of one expiration provision among more than 300 “obsolete laws” to make a significant substantive change in state tort law. If the legislature had intended to enact complete tort immunity for Minnesota school districts, we believe that it would have drafted a statute announcing such immunity rather than reviving a long-expired statute that creates such immunity by setting out a dollar figure unadjusted for 27 years of inflation. Our skepticism is heightened because section 466.12 requires school districts to request certification from the “commissioner of insurance,” an office that no longer exists. The successor to the “commissioner of insurance” is the “commissioner of commerce.” *See* Act of June 7, 1983, ch. 289, § 114, subd. 1, 1983 Minn. Laws 1246, 1307 (instructing the revisor of statutes to replace all appearances of the term “commissioner of insurance” with the term “commissioner of commerce”).

The school district raises a variety of arguments that section 466.12 was revived. Urging us not to apply section 645.36, the school district does not suggest any substantive difference between the repeal of a repealer and the repeal of an expiration provision, but instead argues that section 645.36 is an abrogation of common law and therefore limited to its express wording or necessary implication. *See Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 703 N.W.2d 513, 521 (Minn. 2005) (stating that “if [a] statute is intended to abrogate the common law, the abrogation must be ‘by express wording or necessary implication’ ”) (quoting *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 377-78 (Minn. 1990)); 1A Norman J. Singer, *Sutherland Statutory Construction* § 23:32, at 564 (6th ed. 2002) (noting the common law rule of interpretation that the repeal of a repealing statute operates to revive the original enactment). We find this argument unpersuasive. We can find no evidence that repealers were treated differently than expiration provisions at common law, so we find it sensible to treat them similarly under section 645.36. The school district, furthermore, does not direct us to any common law doctrine that would govern the repeal of a lapsed expiration provision in the absence of section 645.36. Accepting the district’s limited reading of section 645.36 would leave us bereft of statutory *and* common law direction in this case. Unable to perceive any meaningful difference between repealers and expiration provisions in this context, we believe section 645.36 applies.

The school district also asserts that the Minnesota legislature has repealed “numerous” expiration dates in other statutes. But of the four acts cited by the school district, none revived an expired law. For example, two acts repealed future expiration dates.<sup>[3]</sup> As the intention of the legislature when it amends or repeals the expiration date of an unexpired law is not in question, these examples are not helpful. The third act cited by the school district repealed the June 1, 1999, expiration of the powers of a “municipal board” that no longer existed, having been replaced by a different entity elsewhere in the act.<sup>[4]</sup> The fourth act<sup>[5]</sup> repealed the June 30, 2001 expiration provision of Minn. Stat. § 144.148 (2000). The repeal was “effective the day following final enactment” of the act, which was signed by the governor on June 30, 2001. Thus, the law expired on June 30, 2001, and the expiration provision was repealed on July 1, 2001. A “day” “comprises the time from midnight to the next midnight.” Minn. Stat. § 645.45 (2006). Section 144.148 therefore expired at midnight as June 30 ended, and the expiration provision was repealed at the same instant as July 1 began. But the repealer at issue was not part of a mass repealer as we have here and, while we do not decide the issue, we think the best interpretation of this confluence of events is that section 144.148 never expired. These four examples do not persuade us that the legislature intended to revive section 466.12 by repealing its expiration provision.

The school district also argues that section 645.36 should not apply because an expiration provision is not akin to a repealer, but rather to a suspension or an exception created by a later statute. Where a suspension or exception is repealed, the original statute becomes effective again, *see Strand v. Vill. of Watson*, 245 Minn. 414, 420, 72 N.W.2d 609, 614 (1955), *superseded by statute*, Act of Feb. 24, 1967, ch. 19, § 10, 1967 Minn. Laws 54, 71-76, *as recognized by Mjos v. Vill. of Howard Lake*, 287 Minn. 427, 431-32, 178 N.W.2d 862, 866 (1970), or becomes effective without the exception, *see Pepin Twp. v. Sage*, 129 F. 657, 662-63 (8th Cir. 1904). The expiration provision in question, however, is not akin to a suspension. A suspension is, by definition, temporary. *See Black’s Law Dictionary* 1487 (8th ed. 2004). Subdivision 4 of section 466.12 however, stated that the section would permanently expire as to school districts on July 1,

1974. Nor is the provision akin to a statutory exception, which “exempt[s] certain persons or conduct from [a] statute’s operation.” *Black’s Law Dictionary* 604 (8th ed. 2004). Subdivision 4 completely ended school district immunity under section 466.12. When the legislature creates a statutory suspension or exception to an existing law, it contemplates that the existing law will continue to operate with the exception or will remain ready to become effective upon removal of the suspension. This was not the case with section 466.12. The legislature allowed that section to expire and made no provision for revival.

The school district also argues that it would be improper to refuse to give effect to section 466.12 because it continues to appear in Minnesota Statutes. In support of this argument, the district cites Minn. Stat. § 3C.13 (2006): “Any volume of Minnesota Statutes, supplement to Minnesota Statutes, and Laws of Minnesota certified by the revisor according to section 3C.11, subdivision 1, is prima facie evidence of the statutes contained in it in all courts and proceedings.” Section 3C.13 does not limit this court to construing statutes as they are printed in Minnesota Statutes; it also instructs us to look to Laws of Minnesota as a prima facie source of the state’s statutes. According to Laws of Minnesota, section 466.12 expired in 1974 and the legislature repealed the expiration provision in 1996. Therefore we can properly interpret the 1996 act and its effects on section 466.12.

As prima facie evidence, the statutes as printed in Minnesota Statutes “will establish a fact or sustain a judgment unless contradictory evidence is produced.” *Black’s Law Dictionary* 598 (8th ed. 2004). “Although the Minnesota Statutes are prima facie evidence of the laws of Minnesota, they are not the laws themselves. The actual laws of Minnesota as passed by the legislature \* \* \* are contained in the session laws \* \* \*.” *Ledden v. State*, 686 N.W.2d 873, 877 (Minn. App. 2004) (citation omitted), *rev. denied* (Minn. Dec. 22, 2004). “If the revisor has erred in codifying legislative enactments, it is the duty of the judiciary to give effect to the legislative intent and not to the letter of the law as codified because the revisor lacks the authority to make changes in the law.” *Kuiawinski v. Palm Garden Bar*, 392 N.W.2d 899, 903 (Minn. App. 1986) (citing *State v. Vill. of Pierz*, 241 Minn. 37, 41, 62 N.W.2d 498, 501 (Minn. 1954)), *rev. denied* (Minn. Oct. 29, 1986).

In *Village of Pierz*, the legislature revised a statute authorizing the public examiner to undertake an inspection of the books of any village on a petition from its inhabitants. 241 Minn. at 38-39, 62 N.W.2d at 499-500. The amending acts increased the number of required petitioners from 10 freeholders to three freeholders per 100 inhabitants with 10 freeholders minimum. 241 Minn. at 39-40, 62 N.W.2d at 500. The revisor of statutes inserted the new petition requirement but mistakenly deleted the language authorizing the inspection in the first place. 241 Minn. at 40, 62 N.W.2d at 500. The village, which had requested and received an inspection but did not wish to pay for it, argued that under the language of the revised statute as printed, the public examiner had no authority to conduct the inspection. 241 Minn. at 40, 62 N.W.2d at 499-500. We held that

where an ambiguity had arisen by virtue of a deletion, omission, or change of language, it is as much our function to ascertain the legislative intent, if we can, from the language used in the new revision as it is in those cases where we construe a single act of the legislature.

241 Minn. at 40, 62 N.W.2d at 500. In giving effect to the language mistakenly deleted by the revisor, we went on to explain that while the act conferred on the revisor authority to consolidate, simplify, and codify the statutes, “[i]t was not the intention of the legislature to confer upon the revisor authority to make changes in existing laws.” 241 Minn. at 41, 62 N.W.2d at 501. We are not in a position to determine why section 466.12 continues to appear in Minnesota Statutes, but that appearance alone does not require us to give effect to an expired law that was not revived.

Acknowledging that section 466.12 is no longer in force will not significantly disturb the expectations and budgets of Minnesota school districts. The school district does not dispute that it is the only school district to have claimed immunity since 1996; in fact, the school district admitted in testimony by a school officer that it had “laid low” by not telling other districts about the immunity provision for fear that the legislature would abolish it. Apparently, the school district is the only district in the state that had any expectation of immunity under section 466.12. Even so, the school district has been self-insured for tort claims since 1990 and has paid claims it deemed meritorious during that time. We hold that Minn. Stat. § 466.12 (2006) expired in 1974 and was not revived. Because the statute has expired, we need not reach appellants’ arguments that the statute is unconstitutional, and the school district’s pending motion to strike is dismissed as moot.

### **Reversed and remanded.**

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<sup>[1]</sup> Also before the court is the school district’s motion to strike an equal protection argument that appellants raised for the first time in their reply brief.

<sup>[2]</sup> Other sections repealed by the act include: Minn. Stat. § 412.018, subd. 2 (1994) (granting an option for certain cities to change their incorporation status by July 1, 1975); Minn. Stat. § 446A.10 (1994) (transferring responsibility for a wastewater grant program to the Minnesota public facilities authority as of July 1, 1988); Minn. Stat. § 458.1931 (1994) (stating that a port authority city’s recently-granted power to tax was cumulative with the power it enjoyed on April 28, 1957); Minn. Stat. § 466.10 (1994) (stating that Laws 1963, chapter 798, was not retroactive); Minn. Stat. § 471.9975 (1994) (stating that failure to comply with the requirements of Laws 1984, chapter 651, prior to August 1, 1987, did not give rise to a cause of action); Minn. Stat. § 471.998 (1994) (requiring a report to the commissioner of employee relations by October 1, 1985).

<sup>[3]</sup> Act of Apr. 18, 1988, ch. 551, § 1, 1988 Minn. Laws 507 (repealing Jan. 1, 1989 expiration provision in Minn. Stat. § 469.012, subd. 10 (supp. 1987)); Act of June 1, 1981, ch. 356, § 378, 1981 Minn. Laws 1770, 1790 (repealing Act of Mar. 22, 1978, ch. 510, § 10 (imposing June 30, 1981 expiration on Act now codified and amended as Minn. Stat. § 3.9223 (2006))).

<sup>[4]</sup> Act of March 5, 2002, ch. 223, § 29, 2002 Minn. Laws 179, 202 (repealing the expiration of the municipal board’s powers); *see* § 1, 2002 Minn. Laws at 179 (replacing the Minnesota municipal board with the office of strategic and long-range planning).

<sup>[5]</sup> Act of June 30, 2001, ch. 9, art. 1, § 62, 2001 Minn. Laws 2133, 2181 (2001 1st Sp. Session).

**STATE OF MINNESOTA**  
**IN COURT OF APPEALS**

**A07-0800**

Northern Realty Ventures, LLC,  
Appellant,

vs.

Minnesota Housing Finance Agency,  
Respondent.

**Filed April 15, 2008**

**Reversed and remanded**

**Peterson, Judge**

Ramsey County District Court

File No. C1-06-6614

Kirk M. Anderson, John G. Westrick, Westrick & McDowall-Nix, P.L.L.P., 450 Degree of Honor Building, 325 Cedar Street, St. Paul, MN 55101 (for appellant)

Lori Swanson, Attorney General, Thomas K. Overton, Darryl Henchen, Assistant Attorney Generals, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent)

Considered and decided by Peterson, Presiding Judge; Shumaker, Judge; and Stoneburner, Judge.

**S Y L L A B U S**

The requirement in Minn. Stat. § 580.24(a)(2) to record “all documents necessary to create the lien on the mortgaged premises” applies to the documents necessary to create any creditor’s lien on the mortgaged premises, regardless of when the lien was created.

**O P I N I O N**

**PETERSON**, Judge

In this appeal from summary judgment, appellant Northern Realty Ventures, LLC argues that the district court erred in determining that respondent Minnesota Housing Finance Agency is the fee owner of certain property because respondent substantially and sufficiently complied with the requirements to redeem the property following a mortgage foreclosure sale, and, by notice of review, respondent argues that the district court erred in determining that appellant was entitled to redeem the property following the foreclosure sale. Because we conclude that the district court incorrectly interpreted the redemption statute, we reverse the determinations that respondent substantially and sufficiently complied with the requirements of the redemption statute and that appellant was entitled to redeem, and remand for further proceedings.

## FACTS

In July 2001, Jendayi Place, Inc. granted Western Bank a mortgage on a parcel of property in St. Paul, and the mortgage was recorded with the Ramsey County Recorder. Jendayi granted Community Loan Technologies a second mortgage on the property in March 2002, and the mortgage was recorded with the Ramsey County Recorder on April 4, 2002. On December 13, 2002, Jendayi granted a third mortgage on the property to respondent Minnesota Housing Finance Agency (MHFA) to secure a loan in the amount of \$263,725. The mortgage was recorded with the Ramsey County Recorder on January 2, 2003.

On December 27, 2002, which was after Jendayi granted MHFA the third mortgage, but before that mortgage was recorded, a \$17,523.85 judgment against Jendayi in favor of Staffing, Training and Alternative Resources, Inc. was docketed in the Ramsey County District Court. The judgment was later assigned to appellant Northern Realty Ventures, LLC.

Jendayi defaulted on its mortgage to Community Loan Technologies, and Community Loan Technologies foreclosed. On October 25, 2005, the property was sold for \$96,518.36 at a sheriff's sale, and the sheriff's certificate of sale was recorded with the county recorder. Jendayi, as mortgagor, had the right to redeem the property from the sheriff's sale within six months after the sale. *See* Minn. Stat. § 580.23, subd. 1 (2006). Jendayi did not exercise its right to redeem, and the redemption period expired April 25, 2006. Because Jendayi did not redeem, the six-month redemption period was followed by a series of seven-day periods during which creditors with liens on the property subsequent to the foreclosed mortgage could redeem. *See* Minn. Stat. § 580.24(a) (2006). The creditor whose lien had the highest priority could redeem during the first seven-day period, and in the order of the priority of their liens, each additional creditor had a seven-day period during which the creditor could redeem. *See id.* To be entitled to redeem, a creditor needed to record certain documents and deliver copies of the recorded documents to the sheriff during Jendayi's six-month redemption period. *See id.*

On March 8, 2006, MHFA filed with the county recorder a notice of intention to redeem the property from the foreclosure sale. On April 11, 2006, MHFA delivered a copy of its recorded notice of intention to redeem and a copy of its recorded mortgage to the sheriff.

On April 24, 2006, Northern Realty filed in the Ramsey County District Court its assignment of the judgment against Jendayi, and the assignment was docketed. On April 25, 2006,



Northern Realty filed with the county recorder a notice of intent to redeem from the Community Loan foreclosure sale based on the assignment of judgment. The same day, Northern Realty delivered to the sheriff copies of the notice of intent to redeem based on the assignment of judgment, a certified copy of the notice of entry and statement of judgment, and a certified copy of the assignment of judgment. Also on April 25, 2006, Northern Realty filed with the county recorder an additional lien on the property in the amount of \$1,591.32, which was based on the payment of property taxes by Northern Realty, and a second notice of intent to redeem based on the additional lien and then delivered to the sheriff a copy of the additional lien for payment of property taxes and a copy of the notice of intent to redeem based on the additional lien.

Because Jendayi's redemption period expired on April 25, 2006, the redemption period for the creditor whose lien had the highest priority subsequent to the foreclosed mortgage expired seven days later on May 2, 2006, and the redemption period for the next creditor expired on May 9, 2006. On April 27, during the first seven-day redemption period, the sheriff determined that even though Northern Realty was the senior creditor, it did not have the right to redeem because it had not filed with the sheriff documents that showed that the December 27, 2002 judgment against Jendayi in favor of Staffing, Training and Alternative Resources, Inc. and the assignment of that judgment to Northern Realty had been filed with the Ramsey County Recorder. The sheriff then informed MHFA that it was the senior creditor with the right to redeem, and on April 28, 2006, which was still within the first seven-day redemption period, MHFA delivered to the sheriff the payment for redemption and an affidavit showing the amount due on MHFA's lien and required to be paid in order to redeem from MHFA. The sheriff issued a certificate of redemption to MHFA, and MHFA filed the certificate of redemption and the affidavit of additional amounts due on redemption with the county recorder.

On May 2, 2006, the final day of the first seven-day redemption period, Northern Realty attempted to redeem as senior creditor by delivering to the sheriff a payment and an affidavit stating the amount due on Northern Realty's lien and required to be paid in order to redeem from Northern Realty. Based upon the previous determination that Northern Realty was not entitled to redeem, the sheriff refused to accept the payment and affidavit. On May 9, 2006, the final day of the second seven-day redemption period, Northern Realty's attorney wrote to the sheriff and to the Ramsey County Attorney, stating that Northern Realty would bring an action for a writ of mandamus if it was not allowed to redeem from the Community Loan foreclosure. On May 12, 2006, which was after the second seven-day redemption period had expired, the sheriff changed his earlier decision and determined that Northern Realty was entitled to redeem as senior creditor; accepted payment from Northern Realty; issued to Northern Realty a certificate of redemption, which Northern Realty filed on that same day; and informed MHFA that it was entitled to redeem as junior creditor after Northern Realty. Also on May 12, 2006, MHFA tendered to the sheriff a payment to redeem from Northern Realty, and the sheriff issued to MHFA a revised certificate of redemption, which MHFA filed with the county recorder.

On May 15, 2006, Northern Realty filed with the county recorder an affidavit showing the amount required to be paid in order to redeem from Northern Realty, and on May 16, 2006, which was the last day of the third seven-day redemption period, Northern Realty made a payment to the sheriff in an effort to redeem from itself based on its additional lien for payment of property taxes. By letter dated May 17, 2006, Northern Realty refused to accept the payments tendered to the sheriff by MHFA to redeem from Northern Realty. On May 18, 2006, Northern Realty filed with the county recorder a certificate of redemption from foreclosure sale by a holder of a sheriff's certificate.

While the foreclosure and redemption procedures related to Jendayi's second mortgage on the property were occurring, Jendayi also defaulted on its first mortgage to Western Bank, and Western Bank began foreclosure proceedings. On December 14, 2005, the property was sold at a sheriff's sale to Western Bank. Based on their attempts to redeem following the foreclosure of the second mortgage, both Northern Realty and MHFA claimed to own the property, and both attempted to redeem as fee owners following the sheriff's sale to Western Bank. The sheriff refused to allow redemption by either party because he could not determine which party was the fee owner.

Northern Realty brought this action against MHFA seeking to quiet title to the property. The parties filed cross-motions for summary judgment and entered into a receivership agreement for management of the property pending the outcome of this action. The district court determined that because Northern Realty provided to the sheriff the documents required under Minn. Stat. § 580.24, Northern Realty had the right to redeem as senior creditor when it tendered payment to the sheriff on May 2, 2006, the last day of the first seven-day redemption period, and the sheriff refused to accept the payment. But even though MHFA was not the senior creditor when the sheriff had accepted payment from MHFA during the first seven-day redemption period and MHFA did not redeem from Northern Realty as a junior creditor until after the second seven-day redemption period expired, the district court determined that MHFA was the fee owner of the property because MHFA substantially and sufficiently complied with the redemption requirements. The district court explained:

The Sheriff's actions should not penalize MHFA so as to preclude their redemption after [Northern Realty's] redemption payment was accepted. MHFA provided all of the statutorily required documents to the Sheriff in a timely fashion, and provided a payment to redeem in the amount due at the direction of the Sheriff at the time the Sheriff determined it to be the senior creditor. It cannot reasonably be expected that MHFA would refuse to redeem under these circumstances or that it had an obligation to persuade the Sheriff that his interpretation of statutory law may be wrong.

On this basis, the district court granted summary judgment for MHFA.

Northern Realty appeals from the summary judgment for MHFA. MHFA filed a notice of review challenging the district court's determination that Northern Realty filed the documents required under Minn. Stat. § 580.24(a) in order to be entitled to redeem.

## ISSUES

- I. Did the district court err in determining that Northern Realty filed the documents required under Minn. Stat. § 580.24(a) (2006) in order to be entitled to redeem?
- II. Did the district court err in determining that MHFA is the fee owner of the property because it substantially and sufficiently complied with the statutory redemption requirements?

## ANALYSIS

On appeal from a summary judgment, this court examines the record to determine whether any genuine issues of material fact exist and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). This court reviews de novo whether a genuine issue of material fact exists and whether the district court erred in applying the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). Statutory construction is a question of law, which we review de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998)

### I.

The validity of a redemption depends on whether the party redeeming has substantially complied with the statutory redemption procedures. To promote certainty in real-estate transactions, redemption statutes are interpreted strictly according to their terms. But strict construction does not preclude redemption when formal defects do not prejudice the rights of junior lienors. While the essential elements of the statute must be strictly adhered to, failure to comply with the more formal requirements may be overlooked.

*TCM Properties, LLC v. Gunderson*, 720 N.W.2d 344, 350 (Minn. App. 2006) (quotation and citations omitted).

The statute that governs redemption following a foreclosure sale states:

If no redemption is made by the mortgagor, the mortgagor's personal representatives or assigns, the most senior creditor having a legal or equitable lien upon the mortgaged premises, or some part of it, subsequent to the foreclosed mortgage, may redeem within seven days after the expiration of the redemption period determined under section 580.23 or 582.032, whichever is applicable; and each subsequent creditor having a lien may redeem, in the order of priority of their respective liens, within seven days after the time allowed the prior lienholder by paying the amount required under this section. However, no creditor is entitled to redeem unless, within the period allowed for redemption by the mortgagor, the creditor:

(1) records with each county recorder and registrar of titles where the foreclosed mortgage is recorded a notice of the creditor's intention to redeem;

(2) records in each office where the notice is recorded all documents necessary to create the lien on the mortgaged premises and to evidence the creditor's ownership of the lien; and

(3) after complying with clauses (1) and (2), delivers to the sheriff who conducted the foreclosure sale or the sheriff's successor in office a copy of each of the documents required to be recorded under clauses (1) and (2), with the office, date and time of filing for record stated on the first page of each document.

Minn. Stat. § 580.24(a) (2006).

Northern Realty argues that because it was the most-senior creditor in line to redeem when Jendayi's six-month redemption period expired at midnight on April 25, 2006, it had seven days, or until May 2, 2006, to redeem the property from the sheriff's sale. Northern Realty contends that it redeemed on May 2, and MHFA then had seven days, or until May 9, to redeem from Northern Realty, but MHFA failed to do so. Northern Realty argues that because MHFA was not the most-senior creditor, its attempt to redeem on April 28 was premature, and because the seven-day period for MHFA to redeem as a junior creditor expired on May 9, MHFA's attempt to redeem on May 12 was too late. Therefore, Northern Realty contends, the district court erred as a matter of law when it denied Northern Realty's motion for summary judgment and granted MHFA's motion for summary judgment.

MHFA concedes that because the judgment that was assigned to Northern Realty was docketed in the district court before MHFA's mortgage was recorded in the county recorder's office, Northern Realty was the most-senior creditor with a lien on the property subsequent to the foreclosed mortgage. *See* Minn. Stat. § 548.09, subd. 1 (2006) (stating that from time of docketing, a "judgment is a lien, in the amount unpaid, upon all real property in the county then or thereafter owned by the judgment debtor"). But MHFA argues that although Northern Realty was the most-senior creditor, Northern Realty was not entitled to redeem under the assignment of judgment because Northern Realty did not comply with the filing requirements of Minn. Stat. § 580.24(a).

Minn. Stat. § 580.24(a) unambiguously states that "no creditor is entitled to redeem unless, within the period allowed for redemption by the mortgagor, the creditor" records a notice of the creditor's intention to redeem, records all documents necessary to create the creditor's lien and to evidence the creditor's ownership of the lien, and delivers to the sheriff copies of all of these documents that show when and where the documents were recorded. Under the plain meaning of this language, a creditor who fails to do the three required things during the mortgagor's redemption period is not entitled to redeem. Therefore, if Northern Realty failed to do any of the three required things during the six months following the sheriff's sale, it was not entitled to redeem even if it was the most-senior creditor.

MHFA acknowledges that Northern Realty recorded a notice of its intention to redeem as required by the statute but argues that Northern Realty was not entitled to redeem because it did not record the judgment and assignment and did not deliver to the sheriff copies of the

recorded judgment and assignment that showed where and when the documents had been recorded. Northern Realty argues that it was not required to record the judgment and assignment in the county recorder's office because Minn. Stat. § 580.24(a)(2) required it to record "all documents necessary to create" its lien and to show its ownership of the lien. Northern Realty contends that its lien was created when the judgment was docketed in the district court and its ownership of the lien was shown when the assignment was filed in the district court. Consequently, Northern Realty concludes, recording the judgment and the assignment in the county recorder's office was not necessary to create its lien and to show its ownership of the lien, and it was not required to record the judgment and the assignment.

The district court agreed with Northern Realty's interpretation of the statute, and concluded that Northern Realty provided the required documents when it delivered to the sheriff a copy of the notice of intent to redeem based on the assignment of judgment, a certified copy of the notice of entry and statement of judgment that was filed in the district court, and a certified copy of the assignment of judgment that was filed in the district court. The district court stated:

Considering the pertinent redemption statute as a whole, Minn. Stat. § 580.24(a)(2) is reasonably construed to require a creditor to file with the County Recorder those documents that then create the lien, not those that have already created a lien. In other words, where a judgment and assignment have been properly filed and docketed by the court administrator, certified copies of those documents are sufficient for purposes of the requirements of the redemption statutes. (emphasis in original)

The district court interprets Minn. Stat. § 580.24(a)(2) to require a creditor to record a document with the county recorder only when recording the document is necessary to create a lien on the mortgaged property. Under this interpretation, if a lien has already been created, the documents that were needed to create the lien do not have to be recorded and copies of the documents showing that they have been recorded do not have to be presented to the sheriff during the mortgagor's redemption period.

But MHFA presents a reasonable alternative interpretation of the statute in which the phrase "all documents necessary to create the lien" means the documents needed to create the lien regardless of when the lien was created. Under this interpretation, because the judgment needed to be filed in the district court to create the lien, the judgment is a document necessary to create the lien, and because the assignment is needed to show that Northern Realty became the owner of the lien, the assignment is a document necessary to evidence Northern Realty's ownership. Therefore, to be entitled to redeem, Northern Realty needed to record both documents with the county recorder during Jendayi's redemption period.

Statutory interpretation is a question of law subject to de novo review. *Metro. Sports Facilities Comm'n v. County of Hennepin*, 561 N.W.2d 513, 515 (Minn. 1997). The object of statutory interpretation is to determine and give effect to the legislature's intent. Minn. Stat. § 645.16 (2006). When the words in a statute are clear and unambiguous, a court must give effect

to the plain meaning of the language. *Tuma v. Comm’r of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986). But when a statute is ambiguous, that is, when it is reasonably susceptible to more than one interpretation, the court must determine the probable legislative intent and construe the statute in a manner consistent with that intent. *Astleford Equip. Co., Inc. v. Navistar Int’l Transp. Corp.*, 611 N.W.2d 33, 37 (Minn. App. 2000), *aff’d in part, rev’d in part*, 632 N.W.2d 182 (Minn. 2001).

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

- (1) the occasion and necessity for the law;
- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;
- (4) the object to be attained;
- (5) the former law, if any, including other laws upon the same or similar subjects;
- (6) the consequences of a particular interpretation;
- (7) the contemporaneous legislative history; and
- (8) legislative and administrative interpretations of the statute.

Minn. Stat. § 645.16. Also, “when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language.” Minn. Stat. § 645.17(4) (2006).

Our examination of Minn. Stat. § 580.24(a)(2) in light of these principles of statutory interpretation persuades us that the district court erred when it determined that Minn. Stat. § 580.24(a)(2) requires a creditor to record a document with the county recorder only when a lien has not already been created and recording the document is necessary to create a lien on the mortgaged property. Minn. Stat. § 580.24(a)(2) was added to the redemption statute in 2004. 2004 Minn. Laws ch. 234, § 4, at 724. Before this amendment, to be entitled to redeem after a mortgagor failed to redeem, a creditor only needed to file for record with the county recorder a notice of intention to redeem. Minn. Stat. § 580.24 (2002). But under *Brady v. Gilman*, 96 Minn. 234, 236, 104 N.W. 897, 897 (1905), a notice of intention to redeem is void unless it is filed after a lien on the property has been created. In *Brady*, a judgment creditor filed notice of his intention to redeem, but the creditor’s judgment was not docketed until four hours later on the same day. *Id.* at 235, 104 N.W. at 897. The Supreme Court held that the judgment creditor was not entitled to redeem and explained:

The judgment becomes a lien on the unexempted land of the judgment debtor only from the time of so docketing it. A creditor having a junior lien, legal or equitable, on mortgaged premises, may redeem from a foreclosure sale thereof, provided he files notice of his intention to do so within the year allowed for redemption. It is a condition precedent to the exercise of the right of such creditor to redeem that he file a notice of his intention to do so, and *to entitle him to give the notice he must have a lien on the premises at the time he files his notice. Therefore a notice of an intention so to redeem, filed by an intended redemptioner*

*before he is in fact a lien creditor, is void*, even though by the docketing of his judgment he afterwards becomes such creditor before the year to redeem expires.

*Id.* at 236, 104 N.W. at 897 (emphasis added) (citations omitted).

This means that before the redemption statute was amended in 2004, a creditor could become entitled to redeem only by filing a notice of intention to redeem after a lien on the property had been created. Because a lien on the property needed to be created before a creditor was entitled to record a notice of intention to redeem, any documents that needed to be recorded in order to create the lien had to be recorded before the notice was recorded. Consequently, there was no need for the legislature to amend the statute to require a creditor recording a notice of intention to redeem to also record any documents that needed to be recorded in order to create the creditor's lien. Under the previous statute, the creditor was already required to have a lien before recording the notice of intention to redeem.

Also, the contemporaneous legislative history of the enactment of Minn. Stat. § 580.24(a)(2) indicates that the recording requirement for "all documents necessary to create the lien" does not apply only to documents that must be recorded in order to create a lien. The legislation that became Minn. Stat. § 580.24(a)(2) was part of an amendment to H.F. No. 2419, which was a bill related to purchase-money mortgages. During the Senate debate on the amendment, the author of the amendment explained the amendment to the Senate as follows:

This amendment is intended to address a situation that has been causing the sheriffs a lot of problems. And that's when there's a mortgage foreclosure and redemption, at the end of that time period, the sheriff doesn't know who the right person is to redeem or what order of creditor they are. You know, generally speaking, the owner gets the first right to redeem and then after that it's a sequential order of the first senior, then the second, and third. There's a little bit of a race, sometimes, to be the last person to redeem, and what this amendment would do is set up a process that's more clear, particularly for the sheriffs. So it would require that in order to be a person who can redeem, you have to file your notice of intent to redeem, that's current law. Number two, you have to make sure you file your actual mortgage or lien or judgment. Sometimes, people have them, but they don't file them or record them with the county recorder. Thirdly, after you've done that, you have to deliver both of these documents to the sheriff. And the sheriff would be allowed to collect a fee of \$100, and they'd keep these documents on record, and then they would know who the potential creditors are, junior creditors who would be eligible to redeem the property.

Senate Floor Debate on H.F. No. 2419 (May 11, 2004) (statement of Sen. Neuville).

The Senate adopted the amendment and passed H.F. No. 2419 as amended. State of Minnesota, *Journal of the Senate*, 83rd Sess. 4569 (May 11, 2004). H.F. No. 2419 was then returned to the House of Representatives, where the House author moved to concur in the Senate amendments and that H.F. No. 2419 be repassed as amended by the Senate. State of Minnesota,

*Journal of the House*, 83rd Sess. 7615 (May 13, 2004). During the debate on the motion, the House author explained the Senate amendment as follows:

The amendment put on by the Senate was brought to Senator Neuville by the Sheriff's Association and essentially members what it does is it allows the sheriff to verify a creditor's right to redeem in the priority level of various creditors. It is very technical but there was concern on the part of the sheriffs that when a redemption was going to occur or if a redemption is to occur, who has the priority rights; how those rights line up. That's the amendment that was put on in the Senate.

House Floor Debate on H.F. No. 2419 (May 13, 2004) (statement of Rep. Kohls).

In response to a question, the author explained further:

That's one of the concerns that the sheriffs have. They want to make sure that whoever is claiming they have a right to redeem the property that they actually do. And that's why what this is doing it requires creditors to obtain documentation from the recorder's office, provide that information to the sheriff so that, so that the sheriff's department knows who the creditors are, what the priorities are, and who has a right to the property.

*Id.*

The motion to concur in the Senate amendments to H.F. No. 2419 and to repass the bill as amended prevailed, and H.F. No. 2419 was repassed by the House. State of Minnesota, *Journal of the House*, 83rd Sess. 7615 (May 13, 2004).

The statements made by the authors of the 2004 legislation during debate reveal the legislature's intent when it required a creditor to record all documents necessary to create the creditor's lien. Following a sheriff's sale in a foreclosure proceeding, it is possible to have several creditors who are entitled to redeem. Therefore, to administer the redemption process, it is necessary to know the priority of each lien. The documents used to create individual liens are used to determine the priority order of competing liens. But, as the facts of this case illustrate, some liens are created by recording documents in the county recorder's office and other liens are created by filing documents in other places, such as the district court. As a result, the sheriff responsible for administering the redemption process may have to determine the priority order of liens that were created by documents filed in different places.

The amendment to Minn. Stat. § 580.24 was enacted to reduce the difficulty of determining the priority of competing liens by requiring any creditor who wishes to become entitled to redeem to file in the county recorder's office all documents necessary to create the creditor's lien. Because the legislature's intent was to reduce the difficulty that sheriffs were having when determining the priority of competing liens, we conclude that the requirement in Minn. Stat. § 580.24(a)(2) to record "all documents necessary to create the lien" applies to the documents necessary to create any creditor's lien on the property, regardless of when the lien



was created. If the requirement did not apply to all liens, the legislation would not accomplish its purpose because the sheriff would not receive the information needed to determine when each creditor's lien was created, and without information about each lien, the sheriff could not determine the priority order of all of the creditors' liens. Also, Minn. Stat. § 580.24(a)(3) (2006) requires creditors to deliver to the sheriff "a copy of each of the documents required to be recorded under clauses (1) and (2)." If the recording requirement under clause (2) did not apply to the documents necessary to create every creditor's lien, the documents required to be delivered to the sheriff under clause (3) would not always include all of the information needed to administer the redemption process.

Because the recording requirement in Minn. Stat. § 580.24(a)(2) applies to the documents necessary to create every creditor's lien, Northern Realty was not entitled to redeem based on the December 27, 2002 judgment unless it filed the judgment and assignment of judgment with the county recorder during Jendayi's redemption period. In its memorandum, the district court found that "[t]he judgment and assignment were not filed with the County Recorder." In light of this finding, we conclude that the district court erred when it determined that Northern Realty had the right to redeem when it tendered payment to the sheriff on May 2, 2006. Therefore, Northern Realty should not have been permitted to redeem, and any payment that Northern Realty made to the sheriff to redeem based on the December 27, 2002 judgment should be refunded.

## **II.**

After determining that Northern Realty had the right to redeem when it tendered payment to the sheriff on May 2, 2006, the district court went on to determine that MHFA substantially and sufficiently complied with the requirements for redeeming from Northern Realty and, therefore, MHFA is now the owner of the property. But because the district court incorrectly interpreted Minn. Stat. § 580.24(a)(2), its determination that MHFA substantially and sufficiently complied with the redemption requirements is based on an incorrect interpretation of the redemption statute. Therefore, we reverse the determination that MHFA is now the owner of the property and remand to permit the district court to determine whether MHFA complied with Minn. Stat. § 580.24(a) as we have interpreted the statute.

Finally, the district court did not address whether Northern Realty was entitled to redeem based on its additional lien for payment of property taxes. On remand, the district court should determine whether Northern Realty complied with the requirements for redeeming based on this lien.

## **DECISION**

Because Northern Realty did not file the December 27, 2002 judgment and the assignment of that judgment with the county recorder during Jendayi's redemption period as required under Minn. Stat. § 580.24(a)(2), Northern Realty was not entitled to redeem based on that judgment. The district court applied an incorrect interpretation of Minn. Stat. § 580.24(a)(2)

when it determined that MHFA substantially and sufficiently complied with the requirements of the redemption statute. Therefore, we reverse the district court's determinations that Northern Realty had the right to redeem when it tendered payment to the sheriff on May 2, 2006, and that MHFA is now the owner of the property. We remand to permit the district court to determine the amount of the payment that the sheriff must return to Northern Realty, to reconsider whether MHFA complied with the requirements of the redemption statute, and to determine whether Northern Realty complied with the requirements for redeeming based on its additional lien for payment of property taxes.

**Reversed and remanded.**

**STATE OF MINNESOTA**

**IN SUPREME COURT**

**A05-1394**

Court of Appeals

Hanson, J.

State of Minnesota,

Appellant,

vs.

Filed: July 12, 2007  
Office of Appellate Courts

Mohammad G. Al-Naseer,

Respondent.

**S Y L L A B U S**

The mens rea element that must be proven to support a charge of criminal vehicular homicide for leaving the scene of an accident, under Minn. Stat. § 609.21, subd. 1(7) (2006), is that the driver knew that his or her vehicle was involved in the type of accident that would impose a duty to stop, meaning an accident with a person or another vehicle.

Affirmed in part, reversed in part, and remanded for reconsideration.

Heard, considered, and decided by the court en banc.

**O P I N I O N**

**HANSON**, Justice.

The issue before us involves the mens rea element of the crime of criminal vehicular homicide for leaving the scene of an accident that caused the death of a human being. The district court found respondent Mohammad G. Al-Naseer guilty of the crime based on the finding that Al-Naseer knew that he had been involved in an accident. The court of appeals reversed, holding that the mens rea element required that the state prove beyond a reasonable doubt that the driver “knew or had reason to know that the accident caused bodily injury to or death of a person.” *State v. Al-Naseer*, 721 N.W.2d 623, 627 (Minn. App. 2006) (*Al-Naseer III*). We adopt a mens rea standard that requires the state to prove beyond a reasonable doubt that Al-Naseer had knowledge that he had been involved in the type of accident that would impose a duty to stop, an accident with a person or another vehicle. Accordingly, we affirm the reversal of Al-Naseer’s conviction but remand to the district court for reconsideration of the verdict and for amended findings based on this mens rea standard.

In June 2002, a car driven by Al-Naseer struck and killed a person who was changing a tire along the side of Highway 10 near Glyndon, Minnesota. As a result of the victim's death, Al-Naseer was charged with two counts of criminal vehicular homicide: (1) gross negligence under Minn. Stat. § 609.21, subd. 1(1) (2006) ("gross negligence"); and (2) leaving the scene of an accident under Minn. Stat. § 609.21, subd. 1(7) (2006) ("leaving-the-scene").<sup>[1]</sup>

At his first trial, Al-Naseer was convicted of both counts. The court of appeals affirmed the gross negligence conviction but reversed the leaving-the-scene conviction, concluding that "[t]he legislature has not clearly indicated its intent to dispense with a *mens rea* requirement, and the district court should have implied a knowledge requirement as a matter of law." *State v. Al-Naseer*, 678 N.W.2d 679, 696 (Minn. App. 2004) ("*Al-Naseer I*"). The court of appeals remanded the leaving-the-scene charge for a new trial, but did not specify the precise legal standard to be applied to determine *mens rea*. The state did not seek review of the reversal of the leaving-the-scene conviction.

We granted Al-Naseer's petition for review of the gross negligence conviction to address whether the district court erred in refusing to instruct the jury on the lesser-included offense of careless driving. *State v. Al-Naseer*, 690 N.W.2d 744, 747-48 (Minn. 2005) ("*Al-Naseer II*"). We reversed the gross negligence conviction and remanded for a new trial, holding that "the jury, as fact finder, was not given a jury instruction on the lesser-included offense of careless driving and therefore was not in a position to weigh whether Al-Naseer's conduct constituted gross negligence or ordinary negligence." *Id.* at 753.

On remand, Al-Naseer waived his right to a jury trial. The physical evidence and testimony at the second trial revealed the following facts. A friend of the victim, who was helping the victim change a flat tire at the time of the accident, testified that the back of the victim's vehicle was well lit with three visible lights—two red flashing emergency lights and one constant white light from the trunk of the car; at the time of the impact, he heard a loud thud and then he saw the victim rolling in front of his car; and after the impact he saw Al-Naseer's car continue driving and pull back from the shoulder of the road gradually onto the right lane of traffic with no "abrupt swerve."

Trooper Randall Harms, a certified accident reconstructionist, testified that the victim's vehicle was parked with flashers illuminated; there was a gouge and smudge on the roadway created by Al-Naseer's vehicle running over the spare tire, showing that "a great amount of force was applied"; at the point of impact the victim was thrown between the two cars, causing a dent to the hood of Al-Naseer's vehicle; Al-Naseer would have heard the impact because it created a loud noise; Al-Naseer would have felt a jolt; the impact sent debris from Al-Naseer's car sliding down the road; when Al-Naseer's car was stopped after the accident, one of the tires was flat, thus his vehicle would likely pull to one side; after the impact Al-Naseer had to steer his vehicle to get the vehicle back onto the highway; and when Al-Naseer's car was stopped after the accident, Al-Naseer's headlights were not working.

Al-Naseer did not testify at trial. Dilworth police officer Jonathan Froemke testified that he pulled over Al-Naseer's vehicle after he observed Al-Naseer's vehicle traveling without any

headlights. Officer Froemke testified that Al-Naseer was equivocal about whether he had hit something. Clay County Sheriff's Deputy Bruce Fleury, who joined Officer Froemke and Al-Naseer, testified that Al-Naseer stated, "Yes, I hit something just a few miles back," but Al-Naseer would not clarify or expand on that admission except to say that he did not know what he had hit.

The district court found Al-Naseer not guilty of the gross negligence charge but guilty of the careless driving and leaving-the-scene charges. As to the mens rea element of the leaving-the-scene charge, the court found beyond a reasonable doubt that Al-Naseer "was aware and/or conscious that he had been involved in a motor vehicle accident and consciously and intentionally left the scene of the accident."

Although the district court's general verdict did not discuss the precise legal standard applied for determining mens rea, the court stated on the record, when announcing its verdict at the conclusion of trial, as follows:

The [c]ourt interprets this statute that when a person dies as a result of an accident, it is not necessary for the defendant to actually know that he *struck a person* and killed him, but that it is only necessary for the defendant to know that he was involved in a motor vehicle collision. And the great damage to the vehicle and other circumstances I have just stated indicate to the [c]ourt that the [s]tate has proven beyond a reasonable doubt that [Al-Naseer] was *aware that he was involved in an accident*.

(Emphasis added.)

The court of appeals reversed the leaving-the-scene conviction, concluding that the district court incorrectly determined that the mens rea standard only required that the driver knew that he hit "something." *Al-Naseer III*, 721 N.W.2d at 626. The court of appeals concluded that the mens rea standard requires that "the driver knew or had reason to know that the accident caused bodily injury to or death of a person." *Id.* at 627.

The statute under which Al-Naseer was charged is Minn. Stat. § 609.21, subd. 1(7), which provides:

A person is guilty of criminal vehicular homicide resulting in death and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than \$20,000, or both, if the person causes the death of a human being not constituting murder or manslaughter as a result of operating a motor vehicle:

\* \* \* \*

(7) where the driver who causes the accident leaves the scene of the accident in violation of section 169.09, subdivision 1 or 6.

Minnesota Statutes §169.09, subds. 1 and 6 (2000), referred to in section 609.21, subdivision 1(7), provides:

The driver of any vehicle involved in an accident resulting in immediately demonstrable bodily injury to or death of any person shall immediately stop the vehicle at the scene of the accident, or as close to the scene as possible, but shall then return to and in every event, shall remain at, the scene of the accident until the driver has fulfilled the requirements of this chapter as to the giving of information. The stop shall be made without unnecessarily obstructing traffic.

\* \* \* \*

The driver of a vehicle involved in an accident resulting in bodily injury to or death of any person shall, after compliance with the provisions of this section, by the quickest means of communication, give notice of the accident to the local police department, if the accident occurs within a municipality, or to a state patrol officer if the accident occurs on a trunk highway, or to the office of the sheriff of the county.

As can be seen, the statutes are silent about the mens rea element, which requires us to determine what degree of knowledge is required for this crime.

## I.

We will first address two procedural concerns that could limit our review: (1) the failure of the state to seek review of *Al-Naseer I* and (2) the failure of Al-Naseer to argue for a more specific mens rea standard at the second trial.

As to the first concern, in *Al-Naseer I*, the court of appeals held that the leaving-the-scene statute did not provide for strict liability because the legislature did not clearly indicate an intent to dispense with a mens rea element. 678 N.W.2d at 696. The court of appeals concluded that a mens rea element was implied. *See id.* The state did not seek further review of that holding and the second trial was conducted on the assumption that there was a mens rea element. The state argues, in its brief to this court, that the statute could be read to impose strict liability. Ordinarily, that argument would be precluded by the law of the case doctrine. *See Sigurdson v. Isanti County*, 448 N.W.2d 62, 66 (Minn. 1989) (“Law of the case applies when the appellate court has ruled on a legal issue and remanded for further proceedings on other matters. The issue decided becomes ‘law of the case’ and may not be relitigated in the trial court or reexamined in a second appeal.”).

As to the second concern, at the second trial Al-Naseer’s counsel appeared to accept a mens rea standard that only required proof that Al-Naseer knew he had been involved in an accident. In his opening statement he said that Al-Naseer could not be found guilty of leaving-the-scene “unless the state proves that Mr. Al-Naseer left with knowledge that the accident had occurred.” In his closing argument he said that the court must decide whether Al-Naseer knew that “he had an accident.” Al-Naseer’s counsel did not argue that the state must also prove either

that Al-Naseer knew that the accident involved a “person” or that Al-Naseer knew that the accident involved “bodily injury to or death of a person.” Ordinarily, these two arguments would be precluded because they were not made in the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this court generally considers only those issues that were presented and considered by the district court).

The strict enforcement of these two procedural bars would severely restrict our ability to interpret the relevant statutes, and thus make any interpretation of questionable application to future cases. Accordingly, we exercise our discretion to consider all arguments concerning the mens rea standard for the leaving-the-scene statute.

## II.

Statutory interpretation is a question of law that we review de novo. *State v. Loge*, 608 N.W.2d 152, 155 (Minn. 2000). If the language of the statute is clear and free of all ambiguity we will apply the plain meaning. *Id.* If the meaning is not plain, but is ambiguous, we may ascertain the intention of the legislature by considering: (1) the occasion and necessity for the law; (2) the circumstances under which it was enacted; (3) the mischief to be remedied; (4) the object to be attained; (5) the former law; (6) the consequences of a particular interpretation; (7) the contemporaneous legislative history; and (8) legislative and administrative interpretation of the statute. Minn. Stat. §645.16 (2006). In addition, we rely on certain presumptions, such as that the legislature does not intend a result that is absurd, impossible of execution, or unreasonable; the legislature intends the entire statute to be effective; and the legislature intends to favor the public interest against any private interest. Minn. Stat. §645.17(1), (2), and (5) (2006).

The district court, court of appeals, and the parties each advance a different mens rea standard. From the most general to the most specific, they are: (1) the state supports, but does not primarily advocate for, a “strict liability” standard—that the driver simply failed to stop at the scene of an accident; (2) the district court applied an “accident” standard—that the driver knew that he was in an accident; (3) the state advocates for the “person or vehicle” standard—that the driver knew that he was in the type of an accident that would impose a duty to stop, meaning an accident involving a person or another vehicle; (4) Al-Naseer advocates for the “person” standard—that the driver knew that he was in an accident and that the accident involved another person; and (5) the court of appeals applied the “bodily injury or death” standard—that the driver knew that he was in an accident, that the accident involved a person, and that the person sustained bodily injury or death.

There is a split of authority among other jurisdictions on the degree of knowledge required under leaving-the-scene statutes that are silent about the mens rea element.

In many jurisdictions, the statutes defining the offense of hit-and-run do not contain the express requirement of knowledge by the motorist of the accident, injury, or damage. In such jurisdictions, some courts have taken the view that proof of the defendant’s knowledge of the occurrence of the collision only was required, and it need not also be shown that the defendant knew of any resulting injury or damage. However, a number of courts have held that \* \* \* proof of the

defendant's knowledge of both the collision and the resultant injury or damage was required.

In a few jurisdictions, courts have held \* \* \* that \* \* \* such proof [of a collision, injury, or damage] was not required in a prosecution under the statute, essentially making the offense one of strict liability, although noting that a showing of a lack of knowledge may be a valid defense.

Marjorie A. Caner, Annotation, *Necessity And Sufficiency of Showing, In Criminal Prosecution Under "Hit-And-Run" Statute, Accused's Knowledge of Accident, Injury, or Damage*, 26 A.L.R.5th 1, 22-23 (1995) (internal cross-references omitted).

At least one state has held that strict liability applies where the statute is silent about mens rea in a leaving-the-scene statute. *See People v. Manzo*, 144 P.3d 551, 559 (Colo. 2006). The Colorado Supreme Court concluded that the driver's failure to perform his duty to stop at the scene, render aid, and fulfill other statutory requirements satisfied the mens rea standard because it constituted an omission to perform an act that the driver was capable of performing. *Id.* at 555.

Some courts have determined that the mens rea standard only requires that the driver know that an accident has occurred. *See, e.g., Dettloff v. State*, 97 P.3d 586, 590 (Nev. 2004) (noting the additional requirement of proof that the driver have knowledge that the accident caused bodily harm would defeat the public interest and encourage drivers to hastily retreat in order to avoid gaining knowledge that someone was injured); *State v. Vela*, 673 P.2d 185, 188 (Wash. 1983) (concluding that any requirement of additional knowledge "would tend to defeat the public interest which is served by requiring persons involved in vehicle collisions to stop and provide identification \* \* \* and to be available to render assistance if required"); *State v. Wall*, 482 P.2d 41, 45 (Kan. 1971) (noting that only requiring knowledge that an accident has occurred is consistent with the humanitarian purpose of the statute).

One court determined that the mens rea standard requires proof of knowledge that there was an accident and that the accident involved a "person." *See People v. Digirolamo*, 688 N.E.2d 116, 124 (Ill. 1997). The Illinois Supreme Court said that the requirement that the state prove knowledge that the accident involved a person "best effectuates the legislative intent" because "the only reason for this substantial increase in the penalty \* \* \* is because a *person*, as opposed to a piece of property, has been injured." *Id.* (emphasis in original).

Other courts have held that the mens rea standard requires proof of knowledge that there was an accident, that the accident involved a person, and that the person was injured. In *People v. Holford*, the California Supreme Court concluded that the appropriate mens rea standard is one that attaches criminal liability to "a driver who knowingly leaves the scene of an accident if he actually knew of the injury or if he knew that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person." 403 P.2d 423, 427 (Cal. 1965). *See also, e.g., State v. Dumas*, 700 So. 2d 1223, 1225-26 (Fla. 1997) (requiring knowledge of an injury but not of death); *Micinski v. State*, 487 N.E.2d 150, 152-53 (Ind. 1986) (requiring knowledge of an injury); *State v. Sidway*, 431 A.2d 1237, 1240 (Vt. 1981) (requiring constructive knowledge of an injury: "It is not necessary to show, by direct or circumstantial



evidence, that the defendant had actual knowledge of any resultant injury or damage. If an impact occurs under such circumstances that a reasonable person would anticipate injury to person or property, knowledge of that fact is imputed to the driver.”).

### *The “Strict Liability” Standard*

In its brief to this court, the state suggests that we could conclude that criminal vehicular homicide for leaving-the-scene is a strict liability crime, but at oral argument the state conceded that the statute required some level of knowledge and was therefore not a strict liability crime. We agree that both section 169.09, subdivisions 1 and 6, and section 609.21, subdivision 1(7), require some level of knowledge and are not strict liability statutes.

We have said that strict liability offenses are disfavored. *State v. Arkell*, 672 N.W.2d 564, 567 (Minn. 2003). And the rule of lenity requires that we construe a statute against strict criminal liability. *See id.* This is particularly true for traffic offenses. In *City of Minneapolis v. Altimus*, we said:

While general traffic offenses do not require that the wrongdoer specifically intend to commit the crime for which he is charged, we have held that before criminal liability can attach it is essential that the defendant intentionally or negligently do the act which constitutes the crime.

306 Minn. 462, 466, 238 N.W.2d, 851, 855 (1976).

Here, the act of continuing to drive (or failing to stop) is not criminal in itself, but only becomes criminal if the driver has caused an accident that is of the type that imposes a legal obligation to stop. In order for a person to be criminally liable for failing to stop, basic fairness requires that the person be on notice that events that trigger the legal duty to stop have occurred.

This conclusion is consistent with the distinctions we made in our decisions in *State v. Benniefield*, 678 N.W.2d 42 (Minn. 2004), and *In re C.R.M.*, 611 N.W.2d 802 (Minn. 2000). In *Benniefield*, we held that knowledge that a defendant was in a school zone was not required because the underlying act of possession of illegal drugs was already a crime. 678 N.W.2d at 48-49. But, in *In re C.R.M.*, we held that knowledge that the defendant possessed a knife on school property was required because possession of a knife was not a crime in all circumstances. 611 N.W.2d at 810. Similarly, because failure to stop is not a crime in all circumstances, knowledge that an event has occurred that triggered the duty to stop is required.

### *The “Bodily Injury to or Death of any Person” Standard*

To the other extreme, the court of appeals construed subdivision 1 of section 169.09 as requiring that the state prove that Al-Naseer knew or should have known three facts: that (1) he was involved in an accident; (2) the accident was with a person; and (3) the person sustained bodily injury or death. *Al-Naseer III*, 721 N.W.2d at 626-27.

The court of appeals relied in part on the words “an accident resulting in immediately demonstrable bodily injury to or death of any person,” contained in section 169.09, subdivision 1, as reinforcing its interpretation. *See Al-Naseer III*, 721 N.W.2d at 626. But, as the state points out, it is more likely that the legislature included the phrase “immediately demonstrable” to prevent criminal liability for leaving-the-scene after first stopping, where the victim does not complain of injury at the scene of the accident. And, although section 609.21, subdivision 1(7), applies where the driver violates either subdivision 1 or 6 of section 169.09, subdivision 6 does not include “immediately demonstrable” language.

It may be impossible for the driver to know, without stopping, whether or not the accident produced bodily injury or death. In fact, the requirement that the bodily injury or death be “immediately demonstrable” suggests that the driver has performed some investigation. Stated another way, if the duty to stop only arises when the driver can perceive, at the moment of the accident, that the person has an immediately demonstrable bodily injury, the duty to stop will be severely reduced. This is inconsistent with the public safety purposes of section 169.09, to encourage drivers to stop, to notify authorities, and to give aid.

Finally, the court of appeals’ interpretation would be particularly limiting when applied to some of the other subdivisions of section 609.21. In 1996, when the legislature amended section 609.21 to add the leaving-the-scene offense, it inserted that crime within each of the six subdivisions that describe criminal vehicular crimes: criminal vehicular homicide resulting in death (subdivision 1), criminal vehicular operation resulting in great bodily harm (subdivision 2), criminal vehicular operation resulting in substantial bodily harm (subdivision 2a), criminal vehicular operation resulting in bodily harm (subdivision 2b), criminal vehicular operation resulting in death to an unborn child (subdivision 3), and criminal vehicular operation resulting in injury to an unborn child (subdivision 4). Act of Apr. 11, 1996, ch. 442, § 33, 1996 Minn. Laws 1176, 1194-1198. Applying the court of appeals’ interpretation of the mens rea standard of section 609.21 would render subdivisions 3(7) and 4(7) virtually meaningless because it would require that the driver not only know that he hit a person who had immediately demonstrable bodily injury, but also know that there was injury to an unborn child.

Ultimately, we reject the requirement of knowledge of bodily injury or death because a driver has an affirmative duty to stop in situations where there has been no bodily injury or death. For example, a driver has a statutory duty to stop if the driver has an accident involving an unattended vehicle. *See* Minn. Stat. §169.09, subd. 4 (2006). We conclude that the mens rea standard must relate to the culpable act (failing to stop when there was a duty to stop), not to the consequences of that act (causing property damage or bodily injury).<sup>[2]</sup>

### *The “Accident” Standard*

The district court applied an “accident” mens rea standard that only required proof that the driver knew that there was an accident. This standard would be appropriate if there was a legal requirement to stop for every type of accident, because then knowledge of any accident would put the driver on notice of the duty to stop. But some accidents do not impose a duty to stop,<sup>[3]</sup> and thus knowledge of an accident alone is not sufficient to satisfy the mens rea element.

### *The “Person” Standard*

Al-Naseer argues that a driver is required to know that (1) he had an accident, and (2) the accident involved a “person.” We agree that this is part of the mens rea standard, but we do not agree that the required knowledge is limited to the involvement of a person because the statutes also impose a duty to stop if the driver’s vehicle hit another vehicle, whether occupied or unattended. Minn. Stat. §169.09, subds. 2 and 4 (2006).

### *The “Person or Vehicle” Standard*

At oral argument the state made clear that it was advocating for a mens rea standard that would require knowledge that the driver’s vehicle was in an accident of the type that imposes a duty to stop—i.e., one involving a person or another vehicle. We agree that this is the appropriate standard because it bases the mens rea element on the culpable act.

This conclusion is supported, at least indirectly, by the court of appeals’ decision in *State v. Angulo*, which held that “a defendant who fires a gun intending to kill is put on notice that if a peace officer engaged in official duties is killed, whether or not the defendant knew the officer’s identity, the defendant will be charged [with an enhanced crime] under Minn. Stat. § 609.185(4).” 471 N.W.2d 570, 573 (Minn. App. 1991), *rev. denied* (Minn. Aug. 2, 1991). Similarly, a driver who knows that he or she has been involved in an accident with a person or another vehicle is put on notice that there is a duty to stop, and the failure to stop justifies an enhanced crime where the accident results in the death of another person, whether or not the driver knew that the accident caused the death of another person.

This conclusion also serves the public welfare purpose of the statutes, to assure that drivers who are involved in an accident with a person or another vehicle stop, notify authorities, and give aid to any injured persons until the authorities arrive.<sup>[4]</sup>

### *The “Reason to Know” Standard*

The state’s full argument is that the mens rea element is satisfied if the driver knew “or had reason to know” that the accident involved a person or a vehicle. But we are reluctant to imply a negligence standard for criminal liability where the legislature has not expressed such a standard. Where the legislature has intended to include negligence in a criminal mens rea standard, it typically has done so expressly.<sup>[5]</sup> Because the leaving-the-scene statute does not describe any mens rea standard, we decline to imply an intent to base criminal liability on a reason to know.

This is not to say that the state must prove knowledge by direct evidence. The proof of knowledge may be by circumstantial evidence. *See State v. Siirila*, 292 Minn. 1, 10, 193 N.W.2d 467, 473 (1971) (noting that it is permissible to infer that the defendant knew he had marijuana in his jacket from evidence that the marijuana was found in the jacket the defendant was wearing). Actual knowledge that there was a duty to stop is proven where the circumstantial evidence leads the fact finder to conclude, beyond a reasonable doubt, that the driver must have known that there was an accident that involved a person or a vehicle. *See, e.g., Sidway*, 431 A.2d

at 1239-40 (stating that a driver’s actual knowledge of an accident may be proven by circumstantial evidence concerning the extent of the damage and the force of the impact); *Tooke v. Commonwealth*, 627 S.E.2d 533, 536-37 (Va. Ct. App. 2006) (stating that the circumstantial evidence is sufficient to prove beyond a reasonable doubt that the defendant knew he had caused an accident in which occupants of the vehicle forced off the road would have sustained personal injury, where the evidence shows that two other drivers stopped and rendered aid or reported the accident and that the defendant had an opportunity to observe the accident equal to or better than that of the other drivers).

### III.

We next consider whether the district court’s verdict applied this mens rea standard. The state argues that the district court’s verdict incorporated this standard because the court found that Al-Naseer was aware that he had been involved in a “motor vehicle accident.” The state argues that the words “motor vehicle accident” imply that the defendant’s vehicle hit a person or another vehicle. The state suggests that if the “driver hits a wild animal, for example, he has not been in an ‘accident.’ ”

We do not find this differentiated definition of “motor vehicle accident” in the statute and conclude that it cannot be implied from the context. Section 169.09 does not use the term “motor vehicle accident,” but repeatedly uses the term “accident” to describe both situations where there is a duty to stop and situations where there is no duty to stop. *Compare* Minn. Stat. 169.09, subd. 1 (stating that the driver who is “involved in an *accident* resulting in immediately demonstrable bodily injury to or death of any person shall immediately stop the vehicle” (emphasis added)), *with* Minn. Stat. § 169.09, subd. 5 (2000) (stating that the driver who is “involved in an *accident* resulting only in damage to fixtures legally upon or adjacent to a highway” need only notify the owner and report the accident (emphasis added)).

The state further argues that we can infer that the district court applied the “accident with a person or vehicle” standard from the finding that Al-Naseer “consciously and intentionally left the scene of the accident in violation of Minn. Stat. § 609.21, subd. 1(7).” But this finding simply begs the question of what standard was used to establish a violation of section 609.21, subdivision 1(7).

Accordingly, we affirm the reversal of Al-Naseer’s conviction but remand to the district court to reconsider its verdict based on the present record and to make amended findings in light of the mens rea standard that requires proof that Al-Naseer knew that his vehicle was involved in an accident with a person or another vehicle.

### **Affirmed in part, reversed in part, and remanded for reconsideration.**

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<sup>[1]</sup> The parties cite to the 2000 version of this statute, but neither subdivision 1(1) nor subdivision 1(7) have been amended since the accident at issue in this case, and thus we will refer to the 2006 version of section 609.21.

<sup>[2]</sup> See, e.g., *Benniefield*, 678 N.W.2d at 48-49 (concluding that because the mere possession of drugs is an illegal act, the possessor need not know that the illegality is enhanced by possession in a particular location, such as

school property).

<sup>[3]</sup> See, e.g., Minn. Stat. § 169.09, subd. 5 (2006) (providing that the driver involved in an accident resulting in damage to fixtures legally upon or adjacent to a highway is only required to take reasonable steps to locate and notify the owner or person in charge of the property). As the state concedes, and Al-Naseer agrees, the statutes do not impose a duty to stop if a vehicle hits a deer, or a highway sign. Thus a person who does not know what his vehicle hit is not on notice that he has a duty to stop. In other words, knowledge of an accident alone is not enough to provide notice because certain accidents (animals and fixtures) do not require the driver to stop.

<sup>[4]</sup> If the factfinder determines that the driver did not have knowledge that the accident was of the type that triggered the duty to stop, the mens rea element described above would not be satisfied. This may be a shortcoming in the statute because there could be good reason for the legislature to require such a driver to stop for the limited purpose of determining what type of accident occurred, and then to prohibit the driver from leaving the scene if the investigation reveals that the accident was of the type that imposed a duty to stop. But the statute as currently written cannot be reasonably read to include that requirement.

<sup>[5]</sup> See, e.g., Minn. Stat. § 609.322, subd. 1(3) (2006) (“receives profit, knowing or *having reason to know* that it is derived from the prostitution” (emphasis added)); Minn. Stat. § 609.342, subd. 1(e)(ii) (2006) (“the actor knows or *has reason to know* that the complainant is mentally impaired” (emphasis added)); Minn. Stat. § 609.53, subd. 1 (2006) (“knowing or *having reason to know* the property was stolen” (emphasis added)); Minn. Stat. § 609.749, subd. 1(1) (2006) (the actor knows or *has reason to know* [that the conduct] would cause the victim under the circumstances to feel frightened (emphasis added)).

**STATE OF MINNESOTA**  
**IN COURT OF APPEALS**

**A05-2410**  
State of Minnesota,

Respondent,

vs.

David Paul Hager,

Appellant.

**Filed February 23, 2007**

**Affirmed in part, reversed in part, and remanded**

**Minge, Judge**

Itasca County District Court

File No. 31-CR-04-2976

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

John J. Muhar, Itasca County Attorney, Todd S. Webb, Assistant County Attorney, 123 County Courthouse, 123 N.E. Fourth Street, Grand Rapids, MN 55744 (for respondent)

John M. Stuart, State Public Defender, Michael F. Cromett, Assistant Public Defender, 2221 University Avenue S.E., Suite 425, Minneapolis, MN 55414 (for appellant)

Considered and decided by Hudson, Presiding Judge; Shumaker, Judge; and Minge, Judge.

## **S Y L L A B U S**

1. A conviction for aiding an offender under Minn. Stat. § 609.495, subd. 1(a) (2004), requires that the predicate offense be identified and be a felony.
2. A district court's failure to instruct a jury that the crime of obstruction of legal process under Minn. Stat. § 609.50, subd. 1(2) (2004), requires physical interference with an officer's performance of his duties constitutes prejudicial error.

## **O P I N I O N**

**MINGE**, Judge

Appellant David Hager challenges his convictions of receiving stolen property, aiding an offender, and obstructing legal process. Appellant contends that the district court's jury instructions on aiding an offender and obstructing legal process were prejudicially erroneous, that his conviction for possession of stolen property is not supported by sufficient evidence, and that the district court erred by imposing a sentence for both aiding an offender and obstructing legal process. We affirm in part, reverse in part, and remand.

## **F A C T S**

D.S. reported theft from his Itasca County lake property. This was the second time in less than a year that items had been stolen from D.S.'s property. The items stolen included a four-wheeler, a generator, chain saws, tools, a pump, a tackle box, a garbage can, a television, a portable shed, a camper trailer, plastic chairs, a picnic table, and a grill.

Itasca County Deputy Sheriff Mark Greiner responded to D.S.'s report. He remembered seeing items similar to those reported stolen while he was executing an arrest warrant on appellant's property. Deputy Greiner obtained a search warrant and, accompanied by four other deputies, went to appellant's property to conduct a search. After knocking on the door of appellant's home, Deputy Greiner saw appellant inside and heard him yell "cops." Because the occupants did not open the door, the deputies forced their way into the residence. Appellant, appellant's two sons, and three women were inside.

The officers testified that the residence's occupants failed to comply with officers' instructions. Deputy Greiner and Deputy Ryan Gunderson saw Samuel Hager, one of appellant's sons, throw an object into a barrel stove, where a fire was burning. When the officers attempted to grab Samuel Hager, he resisted. At trial, Deputy Greiner testified that when he attempted to open the stove to determine what Samuel Hager had thrown inside, appellant pushed him out of the way and lay down in front of the stove, delaying the deputies from looking inside. The officers also testified that appellant pushed Deputy Aaron Apitz, which appellant disputed.

While the officers attempted to subdue the home's occupants, the stove's vent dislodged, smoke poured into the room, and there was a pervasive, irritating "chemical" smell. The smoke caused the officers to cough for 30-45 minutes. One officer became sick. Deputy Apitz testified that he believed the smell was burning methamphetamine.

After subduing the occupants and securing the scene, the deputies searched appellant's residence. They found a glass pipe in the stove. They also observed several of the items listed in the search warrant. The officers applied for a second warrant to search the residence for other items, including drugs. During the second search, the officers found drug paraphernalia, including pen tubes containing a white, powdery substance, a roach clip, a razor blade, a digital scale, and plastic baggies. Deputy Greiner testified that the roach clip had a marijuana odor. The officers did not find any drugs during the search.

Behind appellant's residence, officers found D.S.'s camper and a dismantled shed that matched the description of the one D.S. reported stolen. Appellant claimed that his son, Samuel Hager, had purchased the camper and shed from Sheldon Warner, but that otherwise, he did not know where the items had come from. Appellant also claimed that he did not know any of the items were stolen. Warner testified that he had never seen any of the items before.

Samuel Hager testified that he purchased the camper and shed from Warner in July or August 2004 for about \$1,000, and that he did not know any of the items had been stolen. Samuel also confirmed that he threw a glass pipe into the stove after the officers entered the residence.

The record shows that Samuel Hager was convicted of gross misdemeanor obstructing legal process. The record is silent as to whether he was convicted of any other crimes. Appellant was charged with felony possession of stolen property (in violation of Minn. Stat. § 609.53, subd. 1 (2004)), felony aiding an offender (in violation of Minn. Stat. § 609.495, subd. 1(a) (2004)), and gross misdemeanor obstructing legal process (in violation of Minn. Stat. § 609.50, subs. 1(2), 2(2) (2004)). A jury found appellant guilty of all three counts. The district court sentenced appellant to 19 months in prison for receiving stolen property, a concurrent 19-month sentence for aiding an offender, and 90 days, concurrent, for obstructing legal process. This appeal follows.

## **ISSUES**

- I. Was the district court's jury instruction for aiding an offender prejudicially erroneous, entitling appellant to a new trial?
- II. Was the district court's jury instruction for obstructing legal process prejudicially erroneous, entitling appellant to a new trial?



III. Is appellant's conviction for possession of stolen property supported by sufficient evidence?

IV. Did the district court err by imposing sentences for appellant's convictions of aiding an offender and obstructing legal process?

## ANALYSIS

### I.

The first issue is whether the district court's aiding-an-offender jury instruction was prejudicially erroneous and, if so, whether appellant is entitled to a new trial on this charge. Appellant contends that the instruction was prejudicially erroneous because it neither identified the crime that appellant aided nor limited the conviction to aiding a crime that was a felony.

#### A. Plain Error

Appellant did not object at trial to the jury instruction he now challenges. A party's failure to object to a jury instruction at trial generally waives consideration of the issue on appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). But we may review the issue for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). For an appellate court to grant relief for "an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *Id.* If all three prongs of this test are satisfied, the court may "remedy the error to ensure fairness and the integrity of the judicial proceedings." *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002).

District courts are allowed "considerable latitude" in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). We review jury instructions in their entirety to determine whether they fairly and adequately explain the law of the case. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

Minnesota's aiding-an-offender statute provides:

Whoever harbors, conceals, aids, or assists by word or acts another whom the actor knows or has reason to know has committed a crime under the laws of this or another state or of the United States with intent that such offender shall avoid or escape from arrest, trial, conviction, or punishment, may be sentenced to imprisonment for not more than three years or to payment of a fine of not more than \$5,000, or both if the crime committed or attempted by the other person is a felony.

Minn. Stat. § 609.495, subd. 1(a).<sup>[1]</sup> The district court instructed the jury on the crime of aiding an offender, in pertinent part, as follows:

The elements of aiding an offender are:

First, Samuel Hager committed a crime.

Second, the defendant knew or had reason to know that Samuel Hager had committed a crime. “To know” requires that the defendant believed that Samuel Hager had committed a crime.

Here, the state concedes that the district court’s failure to specify the criminal offense that appellant aided constitutes plain error. We agree. Specificity in an aiding-the-offender offense instruction is important. *See State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001). When there is ambiguity about what predicate conduct by the original offender constitutes the crime, the instruction is erroneous. *See id.* at 354. Further, unless the full jury identifies the offender’s criminal act that the accused has aided, the accused may be denied the right to a unanimous verdict. *See State v. Pendleton*, 725 N.W.2d 717, 730-31 (Minn. 2007); *Stempf*, 627 N.W.2d at 355; *State v. Begbie*, 415 N.W.2d 103, 105-06 (Minn. App. 1987), *review denied* (Minn. Jan. 20, 1988).

In *Pendleton*, the Minnesota Supreme Court reviewed United States Supreme Court and state court decisions and recognized the distinction between the basic elements of the crime and the facts underlying those basic elements. 725 N.W.2d at 731. While unanimity is required on the basic elements of the crime, it is not regarding the facts. *Id.* The *Pendleton* analysis limits the unanimous verdict requirement to situations where the offenses of the accused are inherently separate and juror confusion or disagreement would deny the accused due process. *Id.* at 732; *see also Ihle*, 640 N.W.2d at 917-19 (finding the requirement of unanimity inapplicable when the conduct of the accused obstructed officer action in several ways at the same time). Because, as concluded below, the predicate offense in this aiding-an-offender charge must be a felony, the identification of the offense is not simply an underlying fact, but a basic element of the crime.

The state argues that because the context at trial made it clear that the predicate crime was Samuel Hager’s felony possession of methamphetamine, appellant failed to show that the error affected his substantial rights. This argument brings us back to the conduct of Samuel Hager, who appellant aided. The record indicates that, at trial, much of the evidence focused on Samuel’s possession of methamphetamine. The parties admitted that Samuel Hager had possessed methamphetamine in other contexts. The state argues that the only reason for the struggle at the time of the first search warrant’s execution was to prevent the officers from discovering Samuel’s methamphetamine. The state contends that the jury only had this criminal conduct by Samuel in mind when it reached its verdict.

However, we note that there were several things happening during the search and accompanying tumult. The officers discovered stolen property. Initially, the search was triggered by the theft complaint and the investigation into what property was at appellant’s home, who stole the property, whether Samuel Hager had bought the property, why appellant had the property, and possibly whether appellant was keeping some of the property for his son. A significant part of the trial testimony dealt with the theft offense. The jury may have decided that this line of evidence supported a charge that appellant aided Samuel Hager in concealing or covering up the crime of theft.

The state emphasizes that the record also indicates that by rolling on the floor in front of the barrel stove, appellant temporarily prevented the officers from opening the stove and delayed or prevented discovery of what Samuel had thrown inside the stove. The toxic smoke that sickened one of the officers is evidence that there was a potent substance inside and that appellant's obstructionist activity may have prevented discovery of that substance. Also, the officers eventually found a glass pipe inside the stove. Samuel Hager admitted that he tossed that pipe in the stove. This was arguably a pipe used to smoke methamphetamine. The jury may have decided that possession of such a pipe by Samuel was a criminal act. *See* Minn. Stat. § 152.092 (2004) (providing that possession of drug paraphernalia is a petty misdemeanor).

Finally, the record is clear that Samuel was in fact convicted of obstructing legal process. Perhaps the jury determined that appellant aided Samuel in Samuel's obstruction offense. The record does not clearly identify the crime or crimes appellant aided. In fact, the jury was not even clearly told which specific crimes were in play. Instead, the jury had the entire fact scenario to consider and was permitted to choose a crime that appellant may have aided.

This uncertainty is inherently prejudicial. As previously stated, appellant is entitled to a unanimous verdict on each basic element of his charged offense. Minn. R. Crim. P. 26.01, subd. 1(5); *Pendleton*, 725 N.W.2d at 730. When more than one predicate act could constitute the predicate offense and the acts relate to different crimes and arise out of complex circumstances, it is not clear which offense the jury identified. Here, one group of jurors may have determined that the theft offense by Samuel was the predicate criminal conduct, while another group may have disagreed but viewed methamphetamine possession as the requisite predicate offense, the third group may have only thought of paraphernalia possession as the offense, and a fourth may have focused on the obstruction charge against Samuel. There is no assurance that the jury reached a unanimous decision on the predicate offense by Samuel and the aiding conduct by appellant. Because we cannot be assured of a unanimous verdict, we conclude that appellant's substantive rights have been affected and that the plain-error test is met. Accordingly, we reverse and remand the aiding-an-offender conviction.

## **B. Felony Requirement**

We also face the issue of whether the predicate crime for an aiding-an-offender conviction must be a felony. Although the instruction used by the district court did not reach this question, the matter must be considered in a new trial.

The words "crime" and "felony" both appear in Minnesota's aiding-an-offender statute. Minn. Stat. § 609.495, subd. 1(a). Arguably, because the statute describes the predicate offense as a "crime" and not a "felony," if the aiding-an-offender sentence is only imprisonment or a fine, the predicate crime need only be a gross misdemeanor or even a misdemeanor. *Id.* But it is also possible to read the last phrase of the subsection, "if the crime committed or attempted by the other person is a felony," as modifying the entire subsection and as a condition precedent for finding criminal liability. *Id.* Because the statutory language is ambiguous, we proceed to examine the statute's legislative history. *In re Molly*, 712 N.W.2d 567, 571 (Minn. App. 2006).

Minnesota's aiding-an-offender statute was amended in 2001. *See* 2001 Minn. Laws 1st Spec. Sess. ch. 8, art. 8, § 24, at 2082-83. Prior to that amendment, the word "felony" appeared in the earlier portion of the subsection in place of the present word "crime." *Id.* at 2082. Prior to the amendment, it was clear that the predicate offense must be a felony. The amendment not only substituted "crime" for "felony," but it also reduced the state's burden of proof by allowing the prosecutor to show that the accused "has reason to know" a crime has been committed. *Id.* At the same time, the amendment added the following language at the end of the subsection: "if the crime committed or attempted by the other person is a felony." *Id.* at 2038.

Legislative history indicates that the amendment was a reaction to a court decision holding that the prosecution must prove that the accused actually knew that a felony was being committed. *See In re Welfare of A.C.N.*, 583 N.W.2d 303, 306 (Minn. App. 1998); Hearing on S.F. No. 1334 Before the Senate Comm. on Crime Prevention (Apr. 6, 2001). While the change eliminates this high standard, the legislative history does not indicate an intent to eliminate the requirement that the predicate crime be a felony.

We also note that allowing the statute to reach aiding of underlying crimes that are less than a felony creates a logical inconsistency. Under such an interpretation, a person convicted of aiding a misdemeanor offender could be subject to a more severe penalty than would be imposed on the person actually committing the underlying misdemeanor offense. Finally, as a general rule of law, courts have developed the rule of lenity. According to the rule of lenity, "[t]he ambit of an ambiguous criminal law should be construed narrowly . . . ." *State v. Zeimet*, 696 N.W.2d 791, 794 (Minn. 2005). As applied to this case, the rule of lenity suggests that the underlying offense must be a felony. Based on the foregoing considerations, we conclude that the predicate offense must be a felony and that the jury should make that determination.

## II.

The next issue is whether the district court's obstructing-legal-process jury instruction was prejudicially erroneous and, if so, whether appellant is entitled to a new trial on this charge. Generally, an appellant's failure to object to the instruction at trial waives consideration of the issue on appeal. *Cross*, 577 N.W.2d at 726. But we may review for plain error, as described in our discussion of the previous issue. *See Griller*, 583 N.W.2d at 740.

Appellant contends that his conviction for obstructing legal process was the result of plain error, affecting his substantial rights, because the jury instruction failed to limit the offense to *physical* obstruction or interference with a peace officer. The relevant statute provides that an individual obstructs legal process when he intentionally "obstructs, resists, or interferes with a peace officer while the officer is engaged in the performance of official duties." Minn. Stat. § 609.50, subd. 1(2). Minnesota caselaw requires that the words or acts of the accused have the effect of a physical obstruction. *Ihle*, 640 N.W.2d at 915-16; *State v. Krawsky*, 426 N.W.2d 875, 877 (Minn. 1988). In *Krawsky*, for example, the supreme court construed the obstructing-legal-process statute to "forbid[] intentional physical obstruction or interference with a police officer in the performance of his official duties." *Krawsky*, 426 N.W.2d at 877.

The recommended jury instruction for obstructing legal process has been updated to reflect the *Ihle* and *Krawsky* decisions. See 10A *Minnesota Practice*, CRIMJIG 24.26 cmt. (2006). This instruction describes the second element of the crime in this manner:

[T]he defendant physically obstructed, hindered, or prevented the execution of legal process. ‘Physically obstructed, hindered, or prevented’ means the words and acts of the defendant must have the effect of substantially frustrating or hindering the officer in the performance of the officer’s duties.

10A *Minnesota Practice*, CRIMJIG 24.26 (2006).

Here, in contrast to the updated jury instructions, the district court instructed the jury, in pertinent part, as follows:

The elements of obstructing legal process are: . . .

Second, the defendant obstructed, resisted, or interfered with Deputy Greiner, and/or Deputy Apitz, and/or Deputy Gunderson in the performance of official duties.

During its deliberations, the jury presented the district court with a question: “For Count 3 of obstructing legal process, does the definition of obstruction or interference include verbal actions, or is it limited to physical actions?” Both attorneys agreed that the jury should be told: “You have the instructions necessary to make your decision.” The district court then instructed the jury accordingly.

Here, the obstructing-legal-process jury instruction did not fairly and adequately explain the law as interpreted by the *Ihle* and *Krawsky* decisions. This error was plain. Respondent concedes that the instruction constitutes plain error but maintains that appellant has failed to prove that the error affected his substantial rights. But the jury asked a question during its deliberations regarding physical acts, indicating its uncertainty. Under these circumstances, we conclude that the erroneous instruction prejudiced appellant’s substantial rights, and we reverse and remand the conviction of obstructing legal process.

### III.

The next issue is whether appellant’s conviction of possession of stolen property is supported by sufficient evidence. In considering a claim of insufficient evidence, “our review . . . is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did.” *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). “We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could

reasonably conclude that the defendant was proven guilty of the offense charged.” *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

“[A] conviction based entirely on circumstantial evidence merits stricter scrutiny than convictions based in part on direct evidence.” *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). Even though we scrutinize circumstantial evidence more carefully, it “is entitled to the same weight as direct evidence.” *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). The circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the defendant’s guilt as to exclude beyond a reasonable doubt any other reasonable inference. *Jones*, 516 N.W.2d at 549. But the jury is best suited to evaluate circumstantial evidence, and its verdict is deserving of deference. *Webb*, 440 N.W.2d at 430.

A person is guilty of receiving stolen property when that person “receives, possesses, transfers, buys or conceals any stolen property or property obtained by robbery, knowing or having reason to know the property was stolen or obtained by robbery . . . .” Minn. Stat. § 609.53, subd. 1. The crime is a felony when the value of the property exceeds \$500. Minn. Stat. § 609.52, subd. 3(3)(a) (2004).

Appellant contends that there is insufficient evidence that he knew or had reason to know that the property at issue was stolen. Here, property stolen from D.S. was found on appellant’s property, both inside and outside of his home. This property had been stolen from D.S. during two separate occasions. Legitimate acquisition of property from both thefts is improbable and presents a question of credibility. And, with few exceptions, appellant was unable to explain where the property had come from. An individual’s “unexplained possession of stolen property within a reasonable time after a . . . theft will in and of itself be sufficient to sustain a conviction.” *State v. Bagley*, 286 Minn. 180, 188, 175 N.W.2d 448, 454 (1970).

Both appellant and Samuel Hager testified that Samuel purchased certain property from Sheldon Warner. But Warner denied ever having seen the property in question. This presented a question of credibility, and we defer to the jury’s opportunity to view witnesses and make credibility determinations. *State v. Pippitt*, 645 N.W.2d 87, 94 (Minn. 2002). Samuel also testified that he paid approximately \$1,000 for the camper and shed. But D.S. estimated the total value of these two items at \$2,700, nearly three times the amount Samuel claimed he paid. A jury may infer that the accused knows that property is stolen when the defendant purchases the property “shortly after it [is] stolen for a price far below its actual value.” *State v. Simonson*, 298 Minn. 235, 236, 214 N.W.2d 679, 681 (1974).

Appellant also contends that the evidence is insufficient to support his conviction because he did not attempt to hide the shed or camper. But the evidence regarding the property’s location was contradictory. Deputy Greiner testified that the camper “couldn’t really [be] see[n] from the road.” Appellant testified that the shed could be seen “from a mile away.” But the shed had been taken apart and may have been unrecognizable in its dismantled form. In any event, some of the smaller stolen items were found inside appellant’s home.

Based on the record in this case, it was not unreasonable for the jury to draw the inference that appellant knew the property was stolen. Accordingly, we conclude that sufficient

evidence supports appellant's conviction for receiving stolen property and affirm that conviction.

#### IV.

The final issue is whether the district court erred by imposing a sentence for both aiding an offender and obstructing legal process. “[I]f a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses . . . .” Minn. Stat. § 609.035, subd. 1 (2004). The single behavioral incident rule “protects defendants from both multiple sentences and multiple prosecutions and ensures that punishment [is] commensurate with the criminality of defendant[s’] misconduct.” *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000) (quotation omitted). The factors that we use to determine whether the offenses constitute a single behavioral incident include “time, place, and whether the offenses were motivated by a desire to obtain a single criminal objective.” *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997). The state bears, by a preponderance of the evidence, the burden to show that the conduct does not constitute a single behavioral incident. *Williams*, 608 N.W.2d at 840-41. We will not reverse a district court’s determination of whether the conduct arose from a single behavioral incident unless that determination is clearly erroneous. *State v. Heath*, 685 N.W.2d 48, 61 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

Here, the state concedes that the sentences of aiding an offender and obstructing legal process constitute error. In this appeal it appears that both charges are based on conduct that occurred during the execution of the first search warrant. As thus presented, both offenses occurred during a single course of conduct and sentencing appellant concurrently for both offenses was impermissible.

### DECISION

Because appellant’s conviction for receiving stolen property is supported by sufficient evidence, we affirm. But because the district court erroneously instructed the jury on the law of aiding an offender and obstructing legal process, and impermissibly sentenced appellant for both convictions, we reverse those convictions and remand.

**Affirmed in part, reversed in part, and remanded.**

Dated:

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<sup>[1]</sup> The criminal code identifies two “aiding” offenses. The first is the offense just set forth, addressing the conduct of aiding the offender. Minn. Stat. § 609.495, subd. 1(a). The statute sets forth the penalties for this offense. *Id.* The second “aiding” offense is aiding and abetting in the commission of a crime. Minn. Stat. § 609.05, subd. 1 (2004). This aiding offense is otherwise defined by the criminal law and carries the penalty specified for that offense. *Id.*

**STATE OF MINNESOTA**

**IN SUPREME COURT**

**A05-2423**

Court of Appeals

Anderson, Russell A., C.J.

State of Minnesota,

Respondent,

vs.

Filed: January 3, 2008  
Office of Appellate Courts

Timothy Kenbert Engle,

Appellant.

**SYLLABUS**

A conviction under Minn. Stat. § 609.66, subd. 1a(a)(3) (2006), which prohibits reckless discharge of a firearm in a municipality, does not require proof of an intentional discharge, but rather requires a conscious or intentional act in connection with the discharge of a firearm that creates a substantial and unjustifiable risk that the actor is aware of and disregards.

Remanded.

Heard, considered, and decided by the court en banc.

**OPINION**

**ANDERSON**, Russell A., Chief Justice.

We granted review in this case to determine whether a conviction under Minn. Stat. § 609.66, subd. 1a(a)(3) (2006), which proscribes recklessly discharging a firearm in a municipality, requires proof that the firearm was intentionally discharged. We hold that a conviction under Minn. Stat. § 609.66, subd. 1a(a)(3), does not require proof of an intentional discharge, but rather requires proof of a conscious or intentional act, in connection with the discharge of a firearm, that creates a substantial and unjustifiable risk that the actor is aware of and disregards. We remand to the district court for reconsideration consistent with this opinion.



Appellant Timothy Kenbert Engle was convicted of recklessly discharging a firearm in a municipality in violation of Minn. Stat. § 609.66, subd. 1a(a)(3). The court of appeals affirmed. *State v. Engle*, 731 N.W.2d 852 (Minn. App. 2007).

On November 2, 2003, Engle, a private security guard, arrived at a St. Paul housing complex to assist a fellow security guard in apprehending a suspected thief. The suspect attempted to flee, but eventually the guards held him at gunpoint, sitting in the driver's seat of a stolen car. Somehow, in the course of removing the suspect from the car, Engle discharged his gun, shooting and paralyzing the suspect. Both parties concede that the discharge was unintentional.

After a bench trial, the district court found Engle guilty of recklessly discharging a firearm within a municipality. The court defined "recklessly" as "a conscious and intentional act that the defendant knew or should have known created an unreasonable risk of harm to others." The court noted that "[b]oth parties agree that the discharge of the firearm was unintentional" but concluded that "[t]he law is clear to me that no intent to discharge \* \* \* needs to be established." The court found that the reckless act satisfying the statutory requirement "was having the weapon positioned so that it could be discharged and cause harm while [Engle extracted the suspect] from the car." The court stayed imposition of Engle's sentence and placed him on probation for 2 years.

Engle appealed, arguing to the court of appeals, among other things that the district court erred in not requiring proof that he intentionally discharged his weapon. *Engle*, 731 N.W.2d at 854. The court of appeals affirmed, holding that discharge need not be intentional. *Id.* at 862. Engle petitioned this court for review, which we granted only as to the issue of whether subdivision 1a(a)(3) requires an intentional discharge of a firearm.

## I.

We review questions of statutory interpretation de novo. *State v. Wiltgen*, 737 N.W.2d 561, 570 (Minn. 2007). "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions." Minn. Stat. § 645.16 (2006). If a statute is unambiguous, it is to be given its plain meaning. *Id.*; *State v. Al-Naseer*, 734 N.W.2d 679, 684 (Minn. 2007). If a statute is ambiguous or unclear, we consider "(1) the occasion and necessity for the law; (2) the circumstances under which it was enacted; (3) the mischief to be remedied; (4) the object to be attained;" (5) any former law; "(6) the consequences of a particular interpretation;" (7) legislative history; and "(8) legislative and administrative interpretations of the statute." Minn. Stat. § 645.16.

Minnesota Statutes § 609.66, subd. 1a(a), provides that a person who "(2) intentionally discharges a firearm under circumstances that endanger the safety of another; or (3) recklessly discharges a firearm within a municipality" is guilty of a felony. In subdivision 1a(a)(3), the adverb "recklessly" modifies the verb "to discharge." On its face, then, the

statute prohibits discharging a firearm in a reckless manner. Whether there is ambiguity depends on the definition of “reckless,” to which we now turn.

“Reckless” is an ambiguous term. It is not defined in the Minnesota criminal code. *See* Minn. Stat. § 609.02 (2006). The term has not always been used consistently, although it is generally used to define a level of culpability more serious than ordinary negligence and less serious than specific intent to harm. 1 Wayne F. LaFare, *Substantive Criminal Law* § 5.4, at 365-66 (2d ed. 2003). “Recklessness” often describes conduct that exceeds ordinary negligence in two respects: a higher degree of risk, and a higher degree of fault—the actor must be subjectively aware that his conduct creates the risk. *Id.* at 366; *see also* 1 Charles E. Torcia, *Wharton’s Criminal Law* § 27, at 167-68 (15th ed. 1993) (“A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists.”).

Two distinct lines of our cases offer two different definitions of recklessness. We were called upon in *State v. Cole* to define recklessness for purposes of, among other provisions, Minn. Stat. § 609.66, subd. 1(1) (2006), which proscribes recklessly handling a gun so as to endanger the safety of another. 542 N.W.2d 43, 51 (Minn. 1996). Relying on *State v. Zupetz*, in which we defined “recklessly” in the context of reckless homicide, 322 N.W.2d 730, 733-34 (Minn. 1982), we said, “A person acts ‘recklessly’ when he consciously disregards a substantial and unjustifiable risk that the element of an offense exists or will result from his conduct \* \* \* . [Both the reckless actor and the intentional] actor [create] a risk of harm. The reckless actor is aware of the risk and disregards it.” *Cole*, 542 N.W.2d at 51-52 (alterations in original); *see also* *State v. Mauer*, 741 N.W.2d 107, 115 (Minn. 2007); *State v. Frost*, 342 N.W.2d 317, 319-20 (Minn. 1983).

The definition of “recklessness” in the second line of cases is embodied in the model jury instruction for Minn. Stat. § 609.66, subd. 1a(a)(3), upon which the district court relied in this case. The instruction states that “ ‘[r]ecklessly’ means a conscious and intentional act that the defendant knew, or should have known, created an unreasonable risk of harm to others.” 10A Minn. Dist. Judges Ass’n, *Minnesota Practice—Jury Instruction Guides, Criminal, CRIMJIG* 32.10 (5th ed. 2006). This definition originated in our reckless driving jurisprudence. *See State v. Bolsinger*, 221 Minn. 154, 157, 21 N.W.2d 480, 484 (1946).

We conclude that the *Cole* definition applies to Minn. Stat. § 609.66, subd. 1a(a)(3). The *Cole* definition comports with the most common usage of the term. *See* Torcia, *supra*, § 27; 22 C.J.S. *Criminal Law* § 51 (2006) (“A person is said to act recklessly when he or she consciously disregards a substantial and unjustifiable risk that an injury will occur, or when his or her action is grossly heedless of consequences.”); 21 Am. Jur. 2d *Criminal Law* § 138 (2d ed. 1998) (“Recklessness requires that an actor consciously disregard a substantial and unjustifiable risk.”). We see no reason why this general definition of “recklessness” should not apply to felony weapons offenses.

By contrast, the *Bolsinger* line of cases expressly limits its definition of “recklessness” to the unique context of reckless driving, which involves criminal negligence concepts. *See* Minn.

Stat. §§ 169.11, 169.13 (2006) (current statutes dealing with criminal negligence and reckless driving); *State v. Meany*, 262 Minn. 491, 495-96, 115 N.W.2d 247, 251 (1962) (“The crime of *criminal negligence* is defined in Minn. St. 169.11 \* \* \*. The meanings of the terms ‘reckless’ and ‘grossly negligent,’ *as used in this statute*, are exhaustively reviewed in *State v. Bolsinger* \* \* \*.”(emphasis added)); *Bolsinger*, 221 Minn. at 157, 21 N.W.2d at 484 (“In order to apply § 169.11 \* \* \*, we must first determine what it means. \* \* \* The meaning of the word ‘reckless,’ *so far as it relates to driving*, is found in § 169.13.”(emphasis added)). We find no indication that the legislature intended to apply a reckless driving standard to a wholly separate regulatory scheme. Accordingly, we adopt the *Cole* definition and hold that for purposes of Minn. Stat. § 609.66, subd. 1a(a)(3), one acts recklessly by creating a substantial and unjustifiable risk that one is aware of and disregards.

## II.

Having clarified that “recklessly” as used in Minn. Stat. § 609.66, subd. 1a(a)(3), requires the creation of a substantial and unjustifiable risk that the actor is aware of and disregards, it remains for us to determine whether the act creating that risk must be the intentional act of discharge or whether other acts can also constitute reckless discharge. Any crime, including reckless crimes, requires some voluntary act. *See* 1 Torcia, *supra*, § 25. It is not clear from Minn. Stat. § 609.66, subd. 1a(a)(3), whether that act must be the act of discharge or whether any act in connection with the discharge of a firearm evincing a conscious disregard of a substantial and unjustifiable risk can suffice. In arguing that an intent requirement should be read into the statute, Engle cites dicta in *State v. Richardson*, 670 N.W.2d 267, 283 (Minn. 2003).<sup>[1]</sup>

The court of appeals relied upon the provision in Minn. Stat. § 645.16 that statutes should be construed to give effect to every provision. *Engle*, 731 N.W.2d at 862. The court reasoned that reading an intent component into subdivision 1a(a)(3) would render subdivision 1a(a)(2) superfluous, because intentional discharge in a reckless manner within a municipality necessarily falls within the ambit of intentional discharge in a manner that endangers another’s safety. *Id.* Although much conduct would fall under both statutes, one could arguably be reckless in violation of subdivision 1a(a)(3) without endangering another in violation of subdivision 1a(a)(2).

It is significant, however, that subdivision 1a(a)(2), which existed in its current form when 1a(a)(3) was added in 1993, explicitly includes an intent requirement. *See* Act of May 20, 1993, ch. 326, art. 1, § 15, 1993 Minn. Laws 1974, 1986. This fact strongly suggests that the legislature deliberately decided against using the same “intentionally discharges” language in the new section. Had the legislature wanted subdivision 1a(a)(3) to mean “intentionally discharges a firearm in a reckless manner within a municipality,” it could have mirrored the existing language in subdivision 1a(a)(2).<sup>[2]</sup>

Engle argues that *not* reading an intent component into subdivision 1a(a)(3) leads to an absurd result, namely that it “would render any licensed, trained individual (including law enforcement officers), acting entirely in accordance with accepted procedures, subject to criminal prosecution and conviction for any unintentional firearm discharge caused by a reflexive response.” This argument misleadingly suggests that rejecting Engle’s proposed intent

requirement would negate any mental state requirement. On the contrary, the statute requires on its face that the discharge be reckless. A reckless crime requires both intentional conduct and the creation of a risk. Mere reflex, where an actor had not taken voluntary actions creating a risk, could not in any event subject a person to penalty under the statute.

Moreover, the policy of the statute—protecting the community from death or injury by firearms—is best served by holding actors responsible for consciously disregarding risks of harm, whether they do so by intentionally pulling the trigger or by another act that increases the likelihood that the gun will discharge accidentally, involuntarily, or reflexively. In light of the absence of any language of intent in subdivision 1a(a)(3), the corresponding presence of the word “intentionally” in an adjacent and preexisting section, and the legislative policy of protecting the public from the irresponsible use of firearms, we conclude that a person need not intend the discharge. We disavow any dicta in *Richardson* that says otherwise. We hold that a person has the requisite mental state for Minn. Stat. § 609.66, subd. 1a(a)(3), if he commits a conscious or intentional act in connection with the discharge of a firearm that creates a substantial and unjustifiable risk that he is aware of and disregards.

Although the district court correctly concluded that the State need not prove that Engle intentionally discharged his firearm, the court applied the model jury instruction definition of recklessness, requiring only that Engle knew or should have known of the unreasonable risk he created. Because we hold here that a higher standard is proper for purposes of Minn. Stat. § 609.66, subd. 1a(a)(3), we must remand for reconsideration based on the existing record in light of this opinion. On remand, the district court must determine whether Engle committed a conscious or intentional act, in connection with the discharge of a firearm, that created a substantial and unjustifiable risk that he was aware of and disregarded.

### **Remanded.**

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<sup>[1]</sup> In *Richardson*, the appellant argued that the jury should have received an instruction on Minn. Stat. § 609.66, subd. 1a(a)(3), as a lesser-included offense. 670 N.W.2d at 283. In rejecting appellant’s argument, we stated, citing to the CRIMJIG, that “[r]eckless discharge of a firearm within a municipality requires proof that the defendant intentionally discharged a weapon in a municipality in a manner that the defendant should have known created an unreasonable risk of harm to others.” *Id.*

<sup>[2]</sup> Indeed, several states have statutes that delineate distinct mental state requirements for the act of firearm discharge and for the result. *E.g.*, Iowa Code § 724.30 (2007) (penalizing one who “intentionally discharges a firearm in a reckless manner”).

**STATE OF MINNESOTA**  
**IN SUPREME COURT**  
**A05-460**

Court of Appeals

Hanson, J.

State of Minnesota,

Respondent,

vs.

Filed: November 15, 2007  
Office of Appellate Courts

Helmut Mauer,

Appellant.

**S Y L L A B U S**

1. Because the First Amendment of the United States Constitution requires that laws criminalizing the possession of child pornography include some element of scienter, and “reason to know” is broad enough to include some mental states that may not satisfy that requirement, “reason to know” as used in Minn. Stat. § 617.247, subd. 4(a) (2006) is ambiguous.
2. Under Minn. Stat. § 617.247, subd. 4(a), a possessor of child pornography has “reason to know” that a pornographic work involves a minor where the possessor is subjectively aware of a “substantial and unjustifiable risk” that the work involves a minor.
3. Because it is unclear whether the district court’s findings of fact and conclusions of law would support appellant’s conviction under the “reason to know” standard, as thus interpreted, the appropriate disposition is to remand to the district court to reconsider its findings of fact and conclusions of law, on the present record, applying the legal standard announced in this opinion.

Affirmed in part, reversed in part, and remanded to the district court for further proceedings consistent with this opinion.

Heard, considered, and decided by the court en banc.

**O P I N I O N**

**HANSON**, Justice.

We are asked to decide whether the provision within Minn. Stat. § 617.247, subd. 4(a) (2006) (the “child pornography statute”), making it a crime to possess child pornography if the possessor has “reason to know” that the work involves a minor, requires proof of a constitutionally adequate element of scienter. Following a bench trial, the district court found appellant Helmut Horst Mauer guilty on three counts of possession of a pornographic work involving a minor because Mauer had reason to know that performers in the videos he possessed would be children. Mauer appealed but also sought postconviction relief, arguing that the statute violates the First Amendment for lack of an adequate scienter element. The district court denied Mauer’s postconviction petition because it concluded that “reason to know” contained a constitutionally adequate level of scienter. The court of appeals affirmed, interpreting “reason to know” to require that a child pornography possessor be “in some manner aware” of facts which lead him to believe that a performer in the pornographic work is a child. *State v. Mauer*, 726 N.W.2d 810, 814 (Minn. App. 2007). Because we conclude that the child pornography statute is not unconstitutional, but we interpret “reason to know” in a manner that is slightly different than the court of appeals, we affirm in part, reverse in part, and remand to the district court for reconsideration consistent with this opinion.

The facts of this case are undisputed. In May 2003 Mauer received a solicitation to purchase videos from a business known as “C.R.T.” The business had actually been seized by United States postal inspectors, who prepared the solicitation as part of an undercover operation. The postal inspectors obtained Mauer’s name and address from C.R.T.’s customer records, which indicated that he had ordered several films of child erotica in 1998 in response to a similar solicitation.<sup>[1]</sup> The May 2003 solicitation graphically described sexual acts depicted in the videos and the ages of individuals involved in them, including references to a “12 year old,” “preteens,” “young girls 11-13 years old,” and “[performers] from 9 to 14 years old.” Mauer ordered videos fitting those descriptions, and requested more information about the solicitation’s “Write Your Own Script” option through which C.R.T. customers could send in details of a sexual fantasy to be acted out by a 13-year-old girl.

A postal inspector, posing as a Federal Express employee, delivered the videos to Mauer at his business in Minneapolis. Shortly after Mauer took that delivery, law enforcement officers entered his business and discovered that Mauer had opened the packages but had not viewed the contents of any of the videos. Based on these facts, the State charged Mauer with four counts of possession of pornographic works involving minors. At trial, Mauer testified that he did not believe the videos would actually involve minors,<sup>[2]</sup> but the parties stipulated that some of the videos seized from Mauer included performers that were minors.

The district court found Mauer guilty on three counts because he had reason to know that some performers in the videos were minors. Mauer appealed and also pursued postconviction relief on the grounds that the child pornography statute violates the First Amendment for lack of a sufficient scienter element. The district court denied Mauer’s petition for postconviction relief.

The court of appeals affirmed the conviction and the denial of postconviction relief. The court interpreted “reason to know” to “require a possessor [of sexually explicit material involving a minor] to be ‘in some manner aware’ that the performer is a child.” *Mauer*, 726

N.W.2d at 814. The court then concluded that its narrowing construction satisfied the First Amendment because it imposed a “scienter requirement that is more demanding than a civil - or a criminal - negligence standard.” *Id.* at 813-14. The court recognized that the district court did not explicitly use that narrowing construction, but held that the district court’s findings nevertheless satisfied this standard. *Id.* at 815-16.

## I.

We first consider whether Minnesota’s child pornography statute contains a sufficient scienter element to satisfy the First Amendment. Although non-obscene pornography involving adult performers is protected speech under the First Amendment, child pornography is not protected. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72-73 (1994); *New York v. Ferber*, 458 U.S. 747, 764-65 (1982). Because of the state’s compelling interest in protecting the “physical and psychological well-being” of children, a state may constitutionally prohibit possession of child pornography. *Osborne v. Ohio*, 495 U.S. 103, 109 (1990). In order to prohibit the possession of child pornography and yet avoid the risk of chilling protected speech in adult pornography, child pornography laws must include an element of scienter with respect to the age of minority of the performers. *See X-Citement Video*, 513 U.S. at 73 (“[T]he age of the performers is the crucial element separating legal innocence from wrongful conduct.”); *see also Ferber*, 458 U.S. at 756 (“Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy.”); *Mishkin v. New York*, 383 U.S. 502, 511 (1966) (“The Constitution requires proof of scienter [in obscenity laws] to avoid the hazard of self-censorship of constitutionally protected material.”).

Scienter is the “degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission.” *Black’s Law Dictionary* 1373 (8th ed. 2004). In order to satisfy the First Amendment, the demonstration of a child pornography possessor’s scienter requires proof of some subjective awareness, not just proof that the possessor was objectively negligent in failing to know that a performer in the work was a minor. “Negligence is not a state of mind; it is a standard of conduct a defendant is expected to maintain regardless of his state of mind.” Christina Egan, *Level of Scienter Required for Child Pornography Distributors: The Supreme Court’s Interpretation of “Knowingly” in 18 U.S.C. § 2252*, 86 J. Crim. L. & Criminology 1341, 1379 (1996). Because the negligent possessor need not be aware of facts related to the performer’s age, the risk of chilling protected speech would increase as possessors of constitutionally permissible material were compelled to discover the ages of those performing. *Cf. id.* at 1379 (noting the same potential chilling effect of imposing a negligence standard on distributors).

With this context in mind, we turn to Minnesota’s child pornography statute, Minn. Stat. § 617.247, subd. 4(a), which reads:

A person who possesses a pornographic work or a computer disk or computer or other electronic, magnetic, or optical storage system or a storage system of any

other type, containing a pornographic work, *knowing or with reason to know its content and character*, is guilty of a felony.<sup>[3]</sup>

(Emphasis and footnote added.) Mauer argues that the “reason to know” culpability standard in the child pornography statute permits conviction where a possessor is merely negligent with respect to the age of minority of a performer, and thus dispenses with the constitutional scienter requirement. Addressing this argument requires that we determine the meaning of the phrase “reason to know” as it is used in the child pornography statute.

Statutory interpretation is a question of law that we consider under a de novo standard of review. *State v. Al-Naseer*, 734 N.W.2d 679, 683 (Minn. 2007). The primary objective for a court’s interpretation of statutory language is to ascertain and give effect to the legislature’s intent. Minn. Stat. § 645.16 (2006). “When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” *Id.* An ambiguity exists only where a statute’s language is subject to more than one reasonable interpretation. *State v. Stevenson*, 656 N.W.2d 235, 238 (Minn. 2003).

The child pornography statute contains an express scienter element. It requires proof that a person possessing a pornographic work does so “knowing or with reason to know its content and character.” Minn. Stat. § 617.247, subd. 4(a). The terms “content and character” refer to the nature of the “pornographic work,” the definition of which requires that individuals depicted in the work are minors. Minn. Stat. § 617.246, subd. 1(f)(2)(i) (2006). This relationship between the definition of “pornographic work” and the scienter element eliminates any question of whether the child pornography statute is “completely bereft of a scienter requirement as to the age of the performers.” *See X-Citement Video*, 513 U.S. at 78. And the express inclusion of a scienter element in the child pornography statute means that this is not a case where we may treat a statute’s silence on the scienter element as an ambiguity, which would then allow us to imply a constitutionally sufficient scienter requirement. *See, e.g., Al-Naseer*, 734 N.W.2d at 683 (implying a mens rea element for criminal vehicular homicide for leaving the scene of an accident); *State v. Oman*, 261 Minn. 10, 17, 110 N.W.2d 514, 520 (1961) (implying a scienter requirement in an obscenity statute). Thus, we are left with the question whether “reason to know” is clear and free of ambiguity, in which case we must enforce its plain meaning, or is ambiguous, in which case we may resort to the rules of construction. *See, e.g., Olmanson v. LeSueur County*, 693 N.W.2d 876, 879-80 (Minn. 2005) (“If a statute is ambiguous, the construction that avoids constitutional problems should be used, even if such a construction is less natural.”).

Mauer argues that our decision in *State v. Grover*, 437 N.W.2d 60, 63 (Minn. 1989), established the plain meaning of similar words by interpreting the phrase “reason to believe” to create an objective standard of criminal negligence. As an initial matter, we observe that the words “reason to know” and “reason to believe,” in ordinary usage, convey a range of meanings that could conceivably include everything from civil negligence to actual knowledge.<sup>[4]</sup> Second, we note that *Grover* was decided after the child pornography statute was first enacted in 1982, containing the “reason to know” standard. Finally, we do not read *Grover* to establish that the legislature’s use of words “reason to believe” evidenced an intent to limit those words



exclusively to an objective culpability standard, such as civil or criminal negligence. In other words, we read *Grover* to provide an inclusive, not an exclusive, interpretation of “reason to believe.”

In *Grover* we rejected a vagueness argument by concluding that “reason to believe” was “sufficiently clear and definite to provide a standard for [the crime of failing to report child abuse].” 437 N.W.2d at 64. Because *Grover* did not involve a First Amendment concern, the child abuse reporting statute’s terms could constitutionally include the whole range of culpability described by “reason to believe.” In fact, the State in *Grover* was only required to prove culpability under the broadest interpretation of “reason to believe.” Thus, culpability could include “culpability [that] is merely negligent rather than purposeful, knowing or reckless.” *Id.* at 63. In other words, we were not required in *Grover* to resolve the ambiguity presented by the range of possible meanings of “reason to believe” because each of the possible meanings presented a sufficient basis for culpability.

Because the child pornography statute implicates the First Amendment requirement of scienter, the full range of mental states possible under the plain meaning of “reason to know” includes some that may not provide sufficient scienter. Accordingly, we are required to resolve the ambiguity presented by the range of possible meanings.

## II.

Having concluded that the words “reason to know” are ambiguous when viewed in the context of the First Amendment requirement that child pornography laws contain a sufficient element of scienter, we now resort to the rules of statutory construction to determine the precise meaning of those words when used in the child pornography statute. The rules of construction permit a broad review of the purpose of and occasion for the statute and any legislative history.<sup>[5]</sup> Minn. Stat. § 645.16. Importantly, the rules also provide the presumption that “[t]he legislature does not intend to violate the constitution of the United States or of this state.” Minn. Stat. § 645.17(3) (2006). Resorting to that presumption, we are bound to adopt an interpretation of “reason to know” that would avoid a constitutional conflict. *See Schumann v. Commissioner of Taxation*, 312 Minn. 477, 481-82, 253 N.W.2d 130, 132 (1977) (“Where a statute is ambiguous, the construction that will avoid constitutional conflict is to be preferred, even though it is less natural.”).

We observe that the legislature’s stated purpose in enacting the child pornography statute is to penalize possession of pornographic work involving minors and to protect the children who are victimized by their involvement in the pornographic work. Minn. Stat. § 617.247, subd. 1 (2006). That declaration of purpose suggests that the legislature intended section 617.247, subd. 4(a), to extend the penalty to the full extent permitted under the First Amendment. Preserving the legislative intent to proscribe possession of child pornography as broadly as possible can be accomplished best by selecting from the range of meanings the lowest level of awareness permitted by the First Amendment. *Cf. State v. Cannady*, 727 N.W.2d 403, 408 (Minn. 2007) (severing a constitutionally defective affirmative defense but maintaining the rest of the child pornography statute in light of its stated purpose to penalize possession of child pornography and

protect its child victims). Precisely what that minimum standard is remains unclear because the Supreme Court has avoided defining just how much or how little awareness of the content and character of an obscene work or a work of child pornography the First Amendment requires. *See Smith v. California*, 361 U.S. 147, 154 (1959); *Ginsberg v. New York*, 390 U.S. 629, 644-45 (1968).<sup>[6]</sup>

The court of appeals applied the presumption that the legislature does not intend to enact laws that are unconstitutional and construed “reason to know” as follows:

In light of \* \* \* First Amendment concerns that apply to child pornography, we conclude that Minn. Stat. § 617.247, subd. 4(a), should be \* \* \* interpreted to require that the possessor be “in some manner aware” that the performer is a minor. The “in some manner aware” standard is substantially similar, if not equivalent, to the recklessness standard approved in *Osborne*. --In this context, a person has “reason to know” only if he has knowledge of facts that subjectively lead him to believe that the performer is a child.

*Mauer*, 726 N.W.2d at 814 (citation omitted). The court of appeals’ application of the presumption in section 645.17(3) led it to adopt the “in some manner aware” construction of “reason to know” because that standard had survived a constitutional challenge in *Mishkin*, 383 U.S. at 510-11, and *Ginsberg*, 390 U.S. at 643-44. *Mauer*, 726 N.W.2d at 814. We have also interpreted a statute banning the distribution of obscene material to penalize “only those who are in some manner aware of the character of the material they attempt to distribute,” without further explanation of the precise awareness required by that standard. *Oman*, 261 Minn. at 17, 110 N.W.2d at 520.

The adoption of the court of appeals’ narrowing construction of the “reason to know” language becomes more problematic in this case because it means that a possessor must have “knowledge of facts that subjectively lead him to believe that the performer is a child.” *Mauer*, 726 N.W.2d at 814. *Mauer* argues that this construction renders the phrase “reason to know” superfluous and conflicts with the presumption that the legislature “intends an entire statute to be effective.” Minn. Stat. § 645.17(2) (2006). For a person to “‘know’ requires only that the actor believes that the specified fact exists.” Minn. Stat. § 609.02, subd. 9(2) (2006).<sup>[7]</sup> *Mauer* argues that the court of appeals’ use of the “in some manner aware” standard ultimately equates “reason to know” with a possessor’s subjective belief that a pornographic work uses a minor, and the term “knowing” must also be read to require a possessor’s belief that the pornographic work uses a minor. *Mauer* argues that this construction would transform the disjunctive phrase “knowing *or* with reason to know” into a single standard of subjective belief, contradicting not only the presumption that the legislature intends the entire statute to be effective but also the plain intent of the statute to specify separate mental states.

But we can avoid *Mauer*’s argument that the court of appeals’ narrowing construction renders the phrase “reason to know” superfluous if we determine that the lowest level of awareness permitted by the First Amendment is something less than the “in some manner aware” standard. We conclude that the recklessness standard represents the lowest level of scienter that has thus far been affirmatively approved by the Supreme Court under the First Amendment.

Because the state does not propose a scienter standard less than recklessness, we will not attempt to fashion one for this case, but we recognize the possibility that the Supreme Court might, in some future case, approve a lesser standard and that, if the Court does so, it may have implications for the interpretation of Minnesota's child pornography statute.

The Supreme Court approved a recklessness standard in *Osborne v. Ohio*, 495 U.S. at 115. Ohio's legislature had defined recklessness as: "A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a *known risk* that such circumstances are likely to exist." Ohio Rev. Code Ann. § 2901.22(c) (LexisNexis 2006) (emphasis added). In *State v. Zupetz* we explained that "[a] person acts 'recklessly' when he *consciously* disregards a substantial and unjustifiable risk that the element of an offense exists." 322 N.W.2d 730, 733 (Minn. 1982) (emphasis added). We distinguished between "recklessness" and "negligence," explaining that "[t]he reckless actor is *aware* of [a] risk and disregards it; the negligent actor is *not aware* of the risk but should have been aware of it." *Id.* at 733-34 (quoting 2 Charles E. Torcia, *Wharton's Criminal Law* § 168 at 272 (14th ed. 1979) (BB R5.2(e))). Our explanation of recklessness in *Zupetz* comports with the recklessness standard approved in *Osborne* against a scienter challenge.

Accordingly, we hold that, under Minn. Stat. § 617.247, subd. 4(a), a possessor of child pornography has "reason to know" that a pornographic work involves a minor where the possessor is subjectively aware of a "substantial and unjustifiable risk" that the work involves a minor. Our conclusion that "reason to know" in the child pornography statute requires a showing of recklessness satisfies the rule that we construe statutory language to avoid constitutional conflicts because it avoids the serious constitutional question of whether an objective mental state, such as civil or criminal negligence, would satisfy the scienter requirement. *See Schumann*, 312 Minn. at 481-82, 253 N.W.2d at 132; *see also Egan, supra*, at 1379. It also furthers the legislative purpose for the enactment of the child pornography statute by selecting the lowest level of scienter permitted by the First Amendment, as affirmatively approved by the Supreme Court. Finally, it designates a level of scienter that can be sufficiently differentiated from actual knowledge to satisfy the statutory presumption that the legislature intends the entire statute to be effective.

We feel obliged to emphasize that our announcement of the appropriate construction of the phrase "reason to know" in Minn. Stat. § 617.247, subd. 4(a), does nothing to alter the manner by which knowledge of facts may be proved. We have long held that the proof of knowledge may be made by circumstantial evidence. *See Al-Naseer*, 734 N.W.2d at 688 (citing *State v. Siirila*, 292 Minn. 1, 10, 193 N.W.2d 467, 473 (1971); *see also Oman*, 261 Minn. at 25-26, 110 N.W.2d at 525 (Gallagher, Frank T., J., concurring specially) (noting that, although knowledge must be proved to sustain a conviction, "the jury can find the existence of such knowledge from any relevant circumstances pointing to the probability that the defendant obtained knowledge \* \* \*"). Proof of either actual knowledge or reason to know that a pornographic work involves a minor may also be made by circumstantial evidence.

### III.

In light of our interpretation of the mental state required by the phrase “reason to know” in the child pornography statute, we must now consider what legal standard the district court applied to the facts in this case when it reached its conclusion. The district court made several findings of fact related to its ultimate conclusion that Mauer had reason to know the videos contained child pornography. For instance, the district court found:

16. In 1998, [Mauer] ordered two projects of “child erotica” from C.R.T.
17. The child erotica projects involved actual children, as opposed to people of majority age who looked young.
18. [Mauer] threw out the child erotica projects two weeks after receiving them when he watched them and realized the actors were in fact children.
19. [Mauer] admitted on cross-examination that the descriptions for the child erotica from 1998 and the descriptions for the material for which he is presently convicted were similar.

\* \* \* \*

21. [Mauer] asserted a mistake of fact defense. The defense was premised on [Mauer’s] statements that when he ordered the projects for which he is being prosecuted, he believed the actors would be of majority age, but would look young. Although mistake of fact is not prohibited by Minn. Stat. § 617.247, the Court found that the State has proven the nonexistence of this defense as a matter of fact beyond a reasonable doubt.
22. Therefore, the Court found that [Mauer] had reason to know that the actors in the present videos would be actual children.

Based on these findings, the district court concluded that, because Mauer had previously purchased child erotica from C.R.T., and that erotica involved minors, Mauer had reason to know that when C.R.T. advertises a project as involving children, the project does involve children.

It is possible that the district court determined Mauer had reason to know because, despite being unaware of a risk that the videos would involve children, a reasonable person under the circumstances should have known. It is also possible that the court determined that Mauer had reason to know because he was subjectively aware of a substantial and unjustifiable risk that the videos would involve children. Because we cannot be certain that the district court’s findings of fact and conclusions of law would support Mauer’s conviction under our narrowing construction of “reason to know,” we conclude that the district court is in the best position to review the record and reach a conclusion as to whether Mauer was subjectively aware of a substantial and unjustifiable risk that the videos he ordered from C.R.T. would involve minors. *See State v. Hipp*, 298 Minn. 81, 87, 213 N.W.2d 610, 614 (1973) (“[I]f [a] law is found [to be] overbroad or vague as applied to others], it may not be applied to [a defendant] either, until and unless a satisfactory limiting construction is placed on the statute.” (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 620 (1971) (White, J., dissenting))); *In re Welfare of S.L.J.*, 263 N.W.2d 412, 419 n.5 (Minn. 1978) (“The Supreme Court, in fact, has encouraged state supreme courts to sustain the constitutionality of their offensive-speech statutes by construing them

narrowly to punish only fighting words. Thus, \* \* \* it vacated and remanded for reconsideration [several cases].”). See also *Astleford Equipment Co. v. Navistar Int’l Transp. Co.*, 632 N.W.2d 182, 193 (Minn. 2001) (concluding that the district court was in the best position to determine applicability of newly articulated statutory standard).

**Affirmed in part, reversed in part, and remanded to the district court for further proceedings consistent with this opinion.**

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[1] When interviewed by law enforcement officers concerning the videos he ordered from 1998, Mauer stated that he kept them for two weeks, but upon discovering there were actual children depicted in them, he threw them away.

[2] A postal inspector testified that during the interview of Mauer after the initial controlled delivery, Mauer admitted that he knew the videos would involve actual children.

[3] “Pornographic work” is defined in Minn. Stat. § 617.246, subd. 1(f) (2006). Because the parties stipulated that certain videos in Mauer’s possession included actual minors involved in sexual conduct, the portion of the definition relevant to this case is contained in subdivision 1(f)(2)(i), which reads: “ ‘Pornographic work’ means \* \* \* any visual depiction, including any \* \* \* video \* \* \* whether made or produced by electronic, mechanical, or other means that \* \* \* uses a minor to depict actual or simulated sexual conduct.”

[4] A possessor of child pornography could be said to have “reason to know” under a civil negligence standard where he should be aware of a risk that the work involves a minor. See *Grover*, 437 N.W.2d at 63 (comparing civil and criminal negligence). A possessor of child pornography could have “reason to know” under a criminal negligence standard where he should be aware of a substantial and unjustifiable risk that the work involves a minor, and his failure to recognize that risk involves a gross deviation from the standard of care. See *id.* A possessor of child pornography could have “reason to know” under a recklessness standard where he is subjectively aware of a substantial and unjustifiable risk that the work involves a minor. See *State v. Zupetz*, 322 N.W.2d 730, 733 (Minn. 1982). A possessor of child pornography could have “reason to know” under the court of appeals’ standard, where he has knowledge of facts that subjectively lead him to believe that the work involves a minor. *Mauer*, 726 N.W.2d at 814. Finally, a possessor of child pornography could have “reason to know” where he has actual knowledge that the performer is a child, because actual knowledge encompasses, and does not exclude, reason to know.

[5] The available legislative history does not reveal a precise meaning intended by the use of “reason to know” in the child pornography statute.

[6] Mauer argues that the standard of scienter required by the First Amendment with respect to the age of a performer is actual knowledge, relying on the United States Supreme Court’s decision in *X-Citement Video*, 513 U.S. at 73, 78. But that case did not address the minimum level of scienter required by the First Amendment for child pornography laws. The Court has repeatedly suggested that some level of scienter less than actual knowledge will satisfy the First Amendment. See, e.g., *Ferber*, 458 U.S. at 765 (“As with obscenity laws, criminal responsibility may not be imposed without *some element of scienter* on the part of the defendant.” (emphasis added)); *X-Citement Video*, 513 U.S. at 78 (“[Obscenity and child pornography cases] suggest that a statute *completely bereft of a scienter requirement* as to the age of the performers would raise serious constitutional doubts.” (emphasis added)). In fact, the Supreme Court has held that a state law criminalizing possession of child pornography with a mental state of recklessness “plainly satisfies the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter.” *Osborne v. Ohio*, 495 U.S. at 115.

<sup>[7]</sup> Though section 609.02, subd. 9 refers to crimes “in this chapter,” its definitions apply to statutory crimes outside chapter 609 “[u]nless expressly stated otherwise, or the context otherwise requires.” Minn. Stat. § 609.015, subd. 2 (2006). We can see no reason why either of these exceptions applies to the use of “knowing or with reason to know” in the child pornography statute.

**STATE OF MINNESOTA**

**IN SUPREME COURT**

**A05-811**

Court of Appeals

Page, J.

State of Minnesota,

Respondent,

vs.

Filed: February 8, 2007  
Office of Appellate Courts

Scott Edward Cannady,

Appellant.

**S Y L L A B U S**

1. Minnesota Statutes § 617.247, subd. 8, which is properly categorized as an affirmative defense, creates a de facto shift in the burden of persuasion to the defendant on the age of the persons depicted in alleged child pornography, an essential element of the crime, and is therefore unconstitutional.
2. We invalidate only as much of a law as is unconstitutional and therefore only invalidate subdivision 8.
3. Application of the affirmative defense provision in Minn. Stat. § 617.247, subd. 8, had no prejudicial effect on appellant's trial and was therefore harmless error.

Affirmed in part, reversed in part.

Heard, considered, and decided by the court en banc.

**O P I N I O N**

**PAGE**, Justice.

After a court trial in Ramsey County District Court, appellant Scott Edward Cannady was convicted of 23 counts of possessing child pornography in violation of Minn. Stat. § 617.247, subd. 4(a) (2006), based on photographic images found on his computer. Cannady appealed his conviction, arguing that Minn. Stat. § 617.247, subd. 8 (2006), an affirmative defense provision,

unconstitutionally shifts the burden of production and persuasion to the defendant on the element of age of the persons depicted in the alleged pornographic images. The court of appeals affirmed Cannady's convictions, relying on its 2002 decision in *State v. Myrland*, which upheld the constitutionality of section 617.247, subdivision 8, on the basis that only the burden of production is shifted to the defendant and not the burden of persuasion. 644 N.W.2d 847, 851 (Minn. App. 2002), *rev. denied* (Minn. Aug. 6, 2002). While we agree with the court of appeals that section 617.247, subdivision 8, shifts the burden of production to criminal defendants, we hold that this shift violates a criminal defendant's right to due process because it also creates a de facto shift in the burden of persuasion. But we further hold that to the extent the trial court applied section 617.247, subdivision 8, in this case, that error was harmless beyond a reasonable doubt. We therefore affirm Cannady's convictions.

This appeal arises out of the following events. In December of 2003, St. Paul police executed a search warrant at Cannady's home. As a result of the search, police seized and forensically searched the hard drive of Cannady's computer. Analysis of the computer hard drive revealed what were determined to be a number of photographic images of what was thought to be child pornography. On March 16, 2004, the Ramsey County Attorney's office charged Cannady with 25 counts of possession of child pornography in violation of section 617.247, subdivision 4(a). Each count involved a separate image of an alleged minor found on the computer and described in detail a sexual act taking place in the image. Before trial, Cannady moved to dismiss the complaint on constitutional grounds, arguing that, among other things, section 617.247, subdivision 8, violates the U.S. and Minnesota Constitutions by shifting the burden of production and persuasion to the defendant on the element of the age of the person depicted in the photographic image alleged to contain child pornography.<sup>[1]</sup> The state opposed Cannady's motion, asserting that the court of appeals held the statute constitutional in *Myrland*. The trial court denied Cannady's motion.

After the trial court dismissed Cannady's motion, Cannady gave notice of his intent to rely on the affirmative defense in section 617.247, subdivision 8. On September 7, 2004, while expressly preserving his right to appeal the constitutionality of section 617.247, Cannady waived his right to a jury trial and agreed to a court trial. As part of the trial, the parties stipulated to the admission of 16 exhibits into evidence, including the complaint, the police reports, and the photographic images constituting the alleged child pornography. Cannady made clear to the court that, although he stipulated to the police reports and that the police found the photographs on the computer, he was not conceding "the age of the people in the photographs," but instead was "leaving that for the Court to decide." Cannady again asserted the affirmative defense found in section 617.457, subdivision 8, and stated that he was "not conceding the element of age, and expects that to be an element proven by the State." Cannady did not testify or otherwise offer any evidence in his defense.

On September 20, 2004, the trial court issued its findings of fact, conclusions of law, and guilty verdicts on 23 counts and verdicts of not guilty on the remaining two. The court also put its findings and the verdicts on the record. In doing so, the court noted that, although Cannady asserted the statutory affirmative defense, "[t]he burden of proof remained with the State to prove beyond a reasonable doubt that each photograph contained \* \* \* pornography involving a minor." The court further noted that the state had proved the element of age



beyond a reasonable doubt based on the physical depiction of the persons in the photographs and how the photographs were described (e.g., “pre13”). The court made no mention of the effect, if any, of Cannady’s invocation of the affirmative defense.

On appeal to the court of appeals, Cannady challenged the constitutionality of the affirmative defense in section 617.457, subdivision 8, and the court’s earlier decision in *Myrland*. *State v. Cannady*, No. A-05-811, 2006 WL 997782 \*1, \*3 (Minn. App. 2006). Relying on *Myrland*, the court of appeals upheld subdivision 8’s constitutionality and affirmed Cannady’s convictions. Cannady now asks us to overrule *Myrland* and find section 8 unconstitutional.

## I.

Statutes are presumed constitutional, and we exercise our power to declare a statute unconstitutional with extreme caution and only when absolutely necessary. *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). Constitutional challenges are questions of law, which we review de novo. *In re Blilie*, 494 N.W.2d 877, 881 (Minn. 1993).

Section 617.247, subdivision 4, makes possession of child pornography a felony: “A person who possesses a pornographic work or a computer disk or computer \* \* \* containing a pornographic work, knowing or with reason to know its content and character, is guilty of a felony.” The definition of “pornographic work” is as follows:

(f) “Pornographic work” means:

- (1) an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing of a sexual performance *involving a minor*; or
- (2) any visual depiction, including any photograph, film, video, picture, drawing, negative, slide, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means that:
  - (i) *uses a minor* to depict actual or simulated sexual conduct;
  - (ii) has been created, adapted, or modified to appear that *an identifiable minor* is engaging in sexual conduct; or
  - (iii) is advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexual conduct.

For the purposes of this paragraph, an identifiable minor is a person who was a minor at the time the depiction was created or altered, whose image is used to create the visual depiction.

Minn. Stat. § 617.246, subd. 1(f) (2006) (emphasis added). In all cases except under section 617.246, subdivision 1(f)(2)(iii), the state must prove, as an essential element of its case, that the person or persons in the pornographic work are minors.<sup>[2]</sup>

Section 617.247, subdivision 8, provides that, “It *shall be an affirmative defense* to a charge of violating *this section* that the pornographic work was produced using only persons who were 18 years or older.” (Emphasis added.) Cannady argues that the statute’s language is plain and leaves no discretion regarding whether age is an affirmative defense because it uses the word “shall,” which is mandatory. Minn. Stat. § 645.44, subd. 16 (2004). Thus, he concludes that the statute violates a defendant’s right to due process because it requires the defendant to affirmatively disprove one of the essential elements of the crime, specifically that the persons in the pictures are minors. In response, the state argues that, despite the language of the statute, subdivision 8 is “merely advisory” because the legislature “cannot shift any burden of proving age, an element of the offense, to the defense.”

In Minnesota, defendants bear the burden of production when asserting an “affirmative defense.” *State v. Auchampach*, 540 N.W.2d 808, 816-17 n.7 (Minn. 1995). In certain situations, a defendant may also be required to bear the burden of persuasion. *See id.* (explaining our past treatment of the term “affirmative defense”). In discussing our past treatment of the term “affirmative defense,” we have noted that the legislature is aware of these definitions and has “used affirmative defense to require the defendant to bear not only the burden of production but also the burden of persuasion.” *Id.* Further, we assume that when the legislature uses a term of art—as it did in subdivision 8 with “affirmative defense”—it intends to use the accepted definition of that term of art. *Minn. & Pac. R.R. Co. v. Sibley*, 2 Minn. 13, 19 (Gil. 1) (1858) (“When terms of art or peculiar phrases are used, it must be supposed they are used in the sense as understood by persons familiar and acquainted with such terms.”).

Given the plain language of subdivision 8, including the legislature’s use of the term of art “affirmative defense,” we conclude that the legislature intended subdivision 8 to be, and it in fact is, an affirmative defense.

But the legislature did not indicate in subdivision 8 whether the affirmative defense shifts the burden of production or the burden of persuasion on the element of age to the defendant. The court of appeals in *Myrland* concluded that if the affirmative defense shifted the burden of production, it would be constitutional, but if it shifted the burden of persuasion, it would be unconstitutional. 644 N.W.2d at 851. The court of appeals held that the affirmative defense could be construed as “merely requir[ing] respondents to make a prima facie showing that the age of the persons involved is a disputed issue. As such, the state is never freed of its burden to prove the age of the persons involved and the charges will be dismissed if it fails to meet that burden.” *Id.* (internal footnote omitted).

But the *Myrland* court did not consider what would happen if a defendant fails to make out a prima facie case on the element of age, which in this case is an essential element of the crime. It is well-established law that a defendant’s failure to meet his or her burden of production on a defense prohibits the assertion of that defense. *State v. Yang*, 644 N.W.2d 808, 819 (Minn. 2002); *State v. Charlton*, 338 N.W.2d 26, 30-31 (Minn. 1983). By placing the burden of production of an *essential element of the offense* on the defendant, section 617.247, subdivision 8, creates a de facto shift in the burden of persuasion because a defendant’s failure to meet the burden of production on the issue of age would prevent the issue from ever reaching the jury. “It is well settled that due process ‘protects the accused against conviction except upon proof

beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.’ ” *State v. Hage*, 595 N.W.2d 200, 204 (Minn. 1999) (quoting *Patterson v. New York*, 432 U.S. 197, 204 (1977)). As a result, “[d]ue process does not permit the state to place on a defendant the burden of disproving an element of the crime with which she is charged.” *Id.* Because the affirmative defense in subdivision 8 creates a de facto shift in the burden of persuasion to the defendant on the essential element of age, we hold that it is unconstitutional.

## II.

When we hold a statute to be unconstitutional, we invalidate only as much of the law as is unconstitutional. Minn. Stat. § 645.20 (2004); *State v. Shattuck*, 704 N.W.2d 131, 143 (Minn. 2005). To do so, we first look to the intent of the legislature, with our primary goal of creating a remedy that would conform to the legislature’s intent had it known a provision of the law was invalid. *Shattuck*, 704 N.W.2d at 143. Absent a provision to the contrary, all provisions of a law are severable. Minn. Stat. § 645.20; *Shattuck*, 704 N.W.2d at 143.

The legislature has stated that its policy and intent, in enacting section 617.247, was “to penalize possession of pornographic work[s] depicting sexual conduct which involve minors or appears to involve minors in order to protect the identity of minors who are victimized by involvement in the pornographic work.” Minn. Stat. § 617.247, subd. 1. The affirmative defense in section 617.247, subdivision 8, is the only portion of section 617.247 that shifts the burden of persuasion to the defendant on the element of age and thus is the only portion of the statute that is unconstitutional. By severing subdivision 8 from the rest of the statute and striking only that portion, we maintain the rest of section 617.247, which criminalizes possession of child pornography as intended by the legislature.

## III.

Our determination that section 617.247, subdivision 8, is unconstitutional does not end our inquiry. A deprivation of rights in a criminal trial may be harmless error, even though it is a constitutional violation. *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991); *Chapman v. California*, 386 U.S. 18, 23 (1967); accord *State ex rel. Kons v. Tahash*, 281 Minn. 467, 475 n.3, 161 N.W.2d 826, 832 n.3 (1968). Constitutional error is not reversible error when the error is harmless beyond a reasonable doubt. *State v. Larson*, 389 N.W.2d 872, 875 (Minn. 1986). When determining whether the error is harmless, we consider all of the facts and circumstances of the case. *State v. Bouwman*, 354 N.W.2d 1, 8 (Minn. 1984).

The United States Supreme Court has held that the harmless-error analysis applies to errors that occurred during the trial that can be “quantitatively assessed” in the context of the rest of the trial and the evidence presented. *Fulminante*, 499 U.S. at 307-08. The Court has rejected the use of the harmless-error test in cases in which “[t]he entire conduct of the trial from beginning to end is obviously affected,” such as in the case of a biased judge, the deprivation of the right to counsel at trial, the exclusion of jurors based on racial bias, the right to self-representation at trial, and the right to a public trial. *Id.* at 309-10.

Even in cases in which the Court has invalidated a state statute that was related to the defendant's trial, the Court has used the harmless-error test. *Id.* at 307 (citing *Hopper v. Evans*, 456 U.S. 605 (1982), as an example). In *Hopper*, the defendant had been charged with a capital offense in Alabama, which had a statute precluding the consideration of lesser-included offenses in capital cases. 456 U.S. at 607-08. After the defendant appealed, the Court held in a different case that a sentence of death could not be imposed after a guilty verdict in a capital case if lesser-included offenses had not been included in the jury instructions, provided that the evidence would have supported the lesser-included offense. *Id.* at 609. When considering the defendant's case in *Hopper*, the Court concluded that even though the preclusion statute was unconstitutional, Hopper would not have been entitled to the instruction because no evidence in his trial would support the lesser-included offense. *Id.* at 612-13. The Court concluded that "[t]he preclusion clause did not prejudice respondent in any way, and a new trial is not warranted." *Id.* at 613-14.

So, too, in this case Cannady was not prejudiced by the existence of section 617.247, subdivision 8. Cannady asserted the affirmative defense, without presenting any evidence that the persons depicted in the photographic images were 18 years or older. The record, however, indicates that the trial court not only considered the issue of age, despite Cannady's failure to meet his burden of production, it required the state to prove beyond a reasonable doubt that the photographs included minors. The court found Cannady guilty on 23 of the 25 counts beyond a reasonable doubt, made a clear record, both in writing and verbally, indicating that the state had met its burden of proving age beyond a reasonable doubt, and explained in some detail exactly how the state had met that burden. The court noted:

I have found the Defendant, Scott Cannady, not guilty of Counts 6 and 11, as I did not find that the evidence was sufficient to prove beyond a reasonable doubt that those photographs in Mr. Cannady's possession constituted child pornography. However, I found, as it relates to photographs 1 through 5, 7 through 10 and then 12 through 25, that the State did prove beyond a reasonable doubt that each of those photographic images constitute child pornography. \* \* \* [T]hese photographs include a minor, a subject under the age of 18. My conclusion that the State proved that element beyond a reasonable doubt is two-fold: One, the actual photograph, the physical facial depiction of the child, as well as the categorization of the photograph \* \* \* how the photographs were listed, how they were described, whether it be "pre13," "pre14," "little girl," "preteen Lolita."

Thus, despite the fact that Cannady asserted the affirmative defense in section 617.247, subdivision 8, the trial court unequivocally required the state to prove the elements of the offense beyond a reasonable doubt. *Cf. State v. Ayers*, 303 Minn. 562, 562, 228 N.W.2d 547, 547 (1975) (holding that it was not prejudicial error in a bench trial for the court to state the wrong standard of review—clear and convincing, instead of beyond a reasonable doubt—when "the trial court made it clear that he applied the proof-beyond-a-reasonable-doubt standard in finding defendant guilty"). Additionally, a review of the photographic images from the 23 counts for which Cannady was convicted shows that each of the alleged pornographic works depicts persons so clearly under the age of 18 that there can be no question that the state met its constitutional burden of persuasion without regard to any obligation placed on Cannady by subdivision 8.

Thus, we hold that even though section 617.247, subdivision 8, is unconstitutional, any error in Cannady's bench trial was harmless beyond a reasonable doubt and therefore affirm his conviction.

**Affirmed in part, reversed in part.**

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<sup>[1]</sup> Cannady also argued that section 617.247, subdivision 4, is overbroad, in violation of the First Amendment to the U.S. Constitution. Cannady did not raise that argument on appeal and it is therefore not before us.

<sup>[2]</sup> In this case, as in *State v. Fingal*, 666 N.W.2d 420, 422 (Minn. App. 2003), *rev. denied* (Minn. Oct. 21, 2003), the trial court determined that section 617.246, subdivision 1(f)(2)(iii), was unconstitutional under the First Amendment to the U.S. Constitution, relying in part on *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Cannady did not raise the constitutionality of section 617.246, subdivision 1(f)(2)(iii), in this appeal. Because the subdivision's constitutionality is not before us, we express no opinion regarding that issue.

# **STATE OF MINNESOTA**

## **IN COURT OF APPEALS**

**A06-1799**

In the Matter of the  
Maltreatment and Disqualification of Margie Kleven.

**Filed August 7, 2007**

**Affirmed**

**Kalitowski, Judge**

Department of Human Services

File No. 12-1800-17060-2

Matthew P. Franzese, Traverse County Attorney, Leuthner Law Office, 218 Third Avenue East, Suite 102, Alexandria, MN 56308 (for relator Margie Kleven)

Lori Swanson, Attorney General, Jonathan Geffen, Amber Hawkins, Assistant Attorneys General, 900 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2131 (for respondent Commissioner of Human Services)

Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and Klaphake, Judge.

## **S Y L L A B U S**

The Minnesota Vulnerable Adults Act mandates the reporting of a caregiver's conduct that "is not an accident or therapeutic conduct . . . which produces or could reasonably be expected to produce physical pain or injury or emotional distress" in a reasonable person.

## **O P I N I O N**

**KALITOWSKI**, Judge

Relator Margie Kleven challenges a decision by the Minnesota Department of Human Services disqualifying her from being in any position which allowed direct contact with persons served by programs requiring a license under Minn. Stat. §§ 245C.14, subd. 1(a)(3), 245C.15, subd. 4 (2004), based on her treatment of the vulnerable adults under her care. She argues that the department misinterpreted Minn. Stat. § 626.5572, subd. 2(b)(2) (2004), by considering the objective, rather than subjective, effects her conduct had on the vulnerable adults.

## **F A C T S**

Relator Margie Kleven worked as a human services technician in a group home housing for developmentally disabled adult men. The men:

[F]unction mentally at about the level of a normal eighteen-month-old child. They cannot communicate verbally. They do not use words to communicate, either oral or written. With very few exceptions related to their daily routine, the clients do not understand words spoken to them. They have some signs and behaviors to indicate some needs. [One man] cannot dress himself and wears an incontinence brief. [The other men] can dress themselves, with prompts. Due to their inability to provide self-care, the clients are assisted with most of their activities of daily living, including bathing, shaving, and meals.

The record indicates, and relator does not dispute, that she repeatedly referred both to and about the men as “a--holes” and that she attempted to teach one of the men to say “f-ck you.”

Following a department investigation and hearing, an administrative law judge (ALJ) recommended relator’s disqualification from any position which allowed direct contact with persons served by programs requiring a department of human services license under Minn. Stat. §§ 245C.14, subd. 1(a)(3), 245C.15, subd. 4 (2004), based on her treatment of the vulnerable adults under her care. The Commissioner of Human Services affirmed the ALJ’s decision.

## ISSUE

Does the Minnesota Vulnerable Adults Act, Minn. Stat. §§ 626.557, subd. 1, 626.5572, subd. 2(b)(2) (2004), mandate reporting of a caregiver’s conduct that “is not an accident or therapeutic conduct . . . which produces or could reasonably be expected to produce physical pain or injury or emotional distress” in a reasonable person?

## ANALYSIS

Statutory construction is a question of law, which this court reviews de novo. *Brookfield Trade Ctr. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998). “When construing a statute, our goal is to ascertain and effectuate the intention of the legislature.” *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000). The rules of statutory construction require that a statute’s words and phrases are to be given their plain and ordinary meaning. Minn. Stat. § 645.16 (2004). When reviewing a statute, this court assumes that the legislature does not intend absurd or unreasonable results. *Schroedl*, 616 N.W.2d at 278.

“When interpreting a statute, we first look to see whether the statute’s language, on its face, is clear or ambiguous. A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation.” *Id.* at 277 (quotation and citation omitted). When the language of the statute is ambiguous, the intent of the legislature controls. Minn. Stat. § 645.16. “A statute should be interpreted, whenever possible, to give effect to all of its provisions; ‘no word, phrase, or sentence should be deemed superfluous, void, or insignificant.’ ” *Schroedl*, 616 N.W.2d at 277 (quoting *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999)). And

this court is “to read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations.” *Id.*

Although this court retains the authority to review de novo administrative interpretations of statutes, an agency’s interpretation of a statute that it administers is entitled to deference. *In re Denial of Eller Media Co.’s Applications for Outdoor Adver. Device Permits*, 664 N.W.2d 1, 7 (Minn. 2003); *In re Univ. of Minn.*, 566 N.W.2d 98, 103 (Minn. App. 1997).

Here, relator challenges the department’s interpretation of a provision of the Minnesota Vulnerable Adults Act. The primary purpose of the Vulnerable Adults Act is to protect vulnerable adults. Minn. Stat. § 626.557, subd. 1 (2004). The act is a remedial statute designed to protect a specific class of individuals, and we interpret the statute in favor of that class. *See Smith v. Employers’ Overload Co.*, 314 N.W.2d 220, 221-22 (Minn. 1981).

The provision of the Minnesota Vulnerable Adults Act that relator challenges is the definition of abuse as maltreatment defined in Minn. Stat. § 626.5572, subd. 2(b)(2) (2004):

Conduct which is not an accident or therapeutic conduct . . . which produces or could reasonably be expected to produce physical pain or injury or emotional distress including, but not limited to, the following: . . .

(2) use of repeated or malicious oral, written, or gestured language toward a vulnerable adult or the treatment of a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening.

The ALJ concluded, and the commissioner agreed, that:

Appellant’s conduct of attempting to have a vulnerable adult say “f[-]ck you” is abuse . . . because it is conduct involving language toward a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, and humiliating.

Appellant’s repeated instances of directly calling a vulnerable adult “a[--]hole” is abuse . . . because it is repeated oral language toward a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, and humiliating.

Relator argues that the department must not only find that her statements were repeated or malicious and that the conduct would be considered by a reasonable person to be offensive, but also that her conduct did or reasonably could cause emotional distress in these four vulnerable adults. Rather than an objective standard, relator interprets the statute to apply a subjective standard of the likelihood of causing “physical pain or injury or emotional distress.” Relator reasons that because the vulnerable adults did not understand what relator was saying, the department could not make a finding that they experienced or could reasonably be expected to experience emotional distress as a result of her statements.



We first address whether the statutory language is ambiguous. *Schroedl*, 616 N.W.2d at 277. The statute does not prescribe a standard to apply when making the initial determination of whether “[c]onduct . . . which produces or could reasonably be expected to produce physical pain . . . or emotional distress” is maltreatment. Minn. Stat. § 626.5572, subd. 2(b). If the conduct does not meet this threshold qualification of the definition of maltreatment, the specific examples of conduct provided, and any standard contained within those subdivisions, are irrelevant. Here, relator suggests that the statute is properly interpreted to apply a subjective standard to the threshold determination because the legislature specifically omitted “reasonable person” language in that provision. Respondent argues that the statute is properly interpreted to apply a reasonable person standard because to do otherwise would lead to absurd results. Because the statute includes a standard with subdivision 2(b)(2) but not within the gate-keeping “conduct” provision, we conclude that the statutory language is subject to more than one reasonable interpretation and is accordingly ambiguous. Therefore, we must examine the legislative intent in adopting the act.

Relator’s interpretation of the statute is contrary to the policy of the Vulnerable Adults Act. The act has the stated purpose “to protect adults who, because of physical or mental disability or dependency on institutional services, are particularly vulnerable to maltreatment [and] to assist in providing safe environments for vulnerable adults.” Minn. Stat. § 626.557, subd. 1. As relator admits, application of her interpretation of the statute would mean that the more vulnerable the adult, the worse his caretaker could permissibly treat him. Under relator’s interpretation, this provision of the act results in decreasing protection for increasingly vulnerable adults. Relator’s interpretation is an affront to the purpose of the act and leads to absurd results, which we presume the legislature did not intend. *Schroedl*, 616 N.W.2d at 278 (stating that “courts should construe a statute to avoid absurd results and unjust consequences”). Given the deference owed to the department’s interpretation, the interpretation’s support of the stated purpose of the statute, the statute’s remedial nature, and the potentially absurd results that relator’s interpretation could present, we conclude that the department did not err in its interpretation of the statute.

## DECISION

We conclude that the legislature intended that Minn. Stat. §§ 626.557, subd. 1, 626.5572, subd. 2(b)(2), the Minnesota Vulnerable Adults Act, mandates reporting of a caregiver’s conduct that “is not an accident or therapeutic conduct . . . which produces or could reasonably be expected to produce physical pain or injury or emotional distress” in a reasonable person.

**Affirmed.**

**STATE OF MINNESOTA**

**IN SUPREME COURT**

**A04-1484**

Court of Appeals

Hanson, J.  
Dissenting, Anderson, G. Barry, J.  
Anderson, Russell A., C. J., and Gildea, J.

State of Minnesota,

Respondent,

vs.

Filed: October 5, 2006  
Office of Appellate Courts

Scott Caulfield,

Appellant.

**S Y L L A B U S**

1. A Bureau of Criminal Apprehension lab report, offered at trial to prove that a substance seized from the defendant was cocaine, is testimonial, implicating the defendant's confrontation rights under *Crawford v. Washington*.

2. The notice-and-demand statute, which makes lab reports admissible without the testimony of the preparer unless the defendant requests, at least 10 days before trial, that the preparer be called to testify, but which does not inform the defendant of the consequences of the failure to make a request, imposes an unreasonable burden on the defendant's confrontation rights.

3. The error in admitting the report was not harmless beyond a reasonable doubt.

Reversed and remanded for a new trial.

Heard, considered, and decided by the court en banc.

**O P I N I O N**

**HANSON**, Justice.

Appellant Scott Caulfield challenges his conviction of possession of a controlled substance with intent to sell. Caulfield argues that a Bureau of Criminal Apprehension (BCA) laboratory report identifying a substance seized from him as cocaine was testimonial evidence

under *Crawford v. Washington*, 541 U.S. 36 (2004). He contends that his confrontation rights were violated because the report was admitted into evidence even though the BCA analyst who prepared the report did not testify at trial. He also argues that Minn. Stat. § 634.15 (2004) violated his confrontation rights under the United States Constitution because it required him to request the testimony of the analyst 10 days before trial.<sup>[1]</sup> We hold that the report is testimonial and that its admission, under the statute permitting its introduction without the testimony of the analyst, violated Caulfield's rights under the Confrontation Clause. We also determine that the error in admitting the report was not harmless beyond a reasonable doubt and therefore reverse and remand for a new trial.

During the fall of 2001, employees at Kathy's Pub in Rochester, Minnesota noticed the unusual behavior of Scott Caulfield, a frequent customer. Caulfield would repeatedly go into a back hallway or alley with people who had approached him in the bar, then return after 10 to 15 minutes.

On October 24, 2001, Rochester Police Officer James Novak and another Rochester policeman responded to a call from the bar prompted by Caulfield's behavior and the suspicion that Caulfield was dealing drugs out of the bar. The officers approached Caulfield and asked him to step outside, where Novak asked Caulfield whether he was selling drugs. Caulfield said he did not have drugs in his possession and consented to a search, which produced a small bottle with six plastic bags containing a fine white powder substance. Novak testified that Caulfield identified the substance as "drugs," then specified "cocaine."

Novak arrested Caulfield and seized the substance. Novak conducted a field test of the substance in one of the six plastic baggies and the substance tested positive for cocaine or cocaine solvents. The next day, Rochester Police Officer Tom Pingel also field tested the substance and obtained a positive result for cocaine.<sup>[2]</sup> Pingel then sent the substance to the BCA lab in St. Paul to confirm the preliminary indication that the substance was cocaine. The BCA analyst produced a report stating that the substance contained cocaine.

Caulfield was initially charged with fifth-degree possession of a controlled substance, in violation of Minn. Stat. § 152.025, subd. 2(1) (2004). Later, the charge was upgraded to third-degree sale of a controlled substance in violation of Minn. Stat. § 152.023, subd. 1(1) (2004). Subsequently, the BCA report was issued, and the BCA analyst was added to the state's witness list for Caulfield's trial.

Caulfield waived his right to a jury trial. The state presented the testimony of Officer Pingel, who explained the results of his field test and opined that the drugs were packaged for sale; Officer Novak, who explained the results of his field test; and two bartenders from Kathy's Pub, who described their observations of Caulfield over a period of months. The state also offered the BCA report. Caulfield objected to the admission of the report based on the United

States Supreme Court's ruling in *Crawford*. After a discussion of the applicability of *Crawford*, the district court admitted the report without explaining its reasoning. Caulfield did not testify.

The district court found Caulfield guilty of third-degree sale and the lesser-included offense of fifth-degree possession. The court convicted Caulfield of third-degree sale and sentenced him to an executed 27-month term.

The court of appeals recognized that the BCA report could be testimonial, but did not decide the issue. *State v. Caulfield*, No. A04-1484, 2005 WL 1804353, at \*4 (Minn. App. Aug. 2, 2005). Instead, the court found that even if the district court abused its discretion in admitting the report, its admission was harmless beyond a reasonable doubt. *Id.* at \*6.

## I.

Generally, evidentiary rulings—including the admission of chemical or scientific test reports—are within the discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Fields*, 679 N.W.2d 341, 345 (Minn. 2004); *Lindberg v. Comm'r of Pub. Safety*, 498 N.W.2d 301, 303 (Minn. App. 1993) (citing *State v. Sneva*, 353 N.W.2d 134, 134 (Minn. 1984)). But whether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law this court reviews de novo. *State v. King*, 622 N.W.2d 800, 806 (Minn. 2001).

Because the state does not counter Caulfield's assertion that the BCA lab report is a hearsay statement, the first point of dispute is whether the BCA report is testimonial. In *Crawford*, the Supreme Court revised the test for admission of testimonial out-of-court statements from a witness who is not present at trial. 541 U.S. at 59-62. The Court rejected the test it had prescribed in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), which allowed the admission of out-of-court statements that were either within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. 541 U.S. at 59-62. *Crawford* mandated that all testimonial statements be excluded unless the declarant is unavailable to testify at trial and the defendant has had a prior opportunity to cross-examine the declarant. 541 U.S. at 68. The state does not contend that the BCA analyst was not available or that Caulfield had a prior opportunity for cross-examination.

The state argues that the BCA report is not testimonial, suggesting that it is not analogous to the specific examples of testimonial statements provided by the Supreme Court in *Crawford* (prior testimony and police interrogation) and noting the difference between a fact witness and a BCA analyst who can only provide foundational testimony. Further, the state argues that the preparation of such reports is nonadversarial, and that the analysts who prepare them are not directly involved in police investigations.

The state has the burden to prove that the BCA report is not testimonial. *State v. Burrell*, 697 N.W.2d 579, 600 (Minn. 2005) (citing *State v. King*, 622 N.W.2d 800, 807 (Minn. 2001)). The Supreme Court in *Crawford* declined to offer a comprehensive definition of "testimonial," but it did outline three general categories of testimonial statements:

- *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the

defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.

- extrajudicial statements \* \* \* contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.
- statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

541 U.S. at 51-52 (internal citations and quotation marks omitted; bullet points added).

The BCA lab report bears characteristics of each of the three generic descriptions offered by the Supreme Court in *Crawford*. The lab analyst submitting the report attested to her findings. The report functioned as the equivalent of testimony on the identification of the substance seized from Caulfield. The report was prepared at the request of the Rochester police for the prosecution of Caulfield, and was offered at trial specifically to prove an element of the crimes with which he was charged. The report conforms to the types of statements about which the Court in *Crawford* expressed concern—affidavits and similar documents admitted in lieu of present testimony at trial. *See* 541 U.S. at 43, 51.

We have said the critical determinative factor in assessing whether a statement is testimonial is whether it was prepared for litigation. *See State v. Bobadilla*, 709 N.W.2d 243, 250-51 (Minn. 2006) (noting that this court and numerous others have “determined that the testimonial question turns on whether government questioners or declarants take or give a statement ‘with an eye toward trial’ ”); *State v. Scacchetti*, 711 N.W.2d 508, 513 (Minn. 2006) (recognizing that the central consideration in assessing potentially testimonial evidence was “whether either a declarant or government questioner is acting, to a substantial degree, in order to produce a statement for trial”).

The BCA report was clearly prepared for litigation. The substance to be tested was seized from Caulfield by Rochester police as part of an investigation into his suspected drug dealing. It was sent to the BCA lab after the police had preliminarily determined that it was cocaine and Caulfield had been arrested. The BCA report was introduced by the state at trial for the purpose of proving beyond a reasonable doubt that the substance was cocaine.

As to the state’s argument that state crime lab analysts play a nonadversarial role and are removed from the prosecutorial process, we have already rejected an approach that focuses on the intent of the declarant. *Bobadilla*, 709 N.W.2d at 251-52 n.3 (“We do not think that an approach that makes the declarant’s perspective dispositive gives adequate consideration to *Crawford*’s fear of government abuses.”). Further, the majority in *Crawford* stated, “The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by ‘neutral’ government officers.” 541 U.S. at 66.<sup>[3]</sup>

The state refers us to cases from other states that, after *Crawford*, hold that lab reports are not testimonial. But these cases seem to wrongly focus on the reliability of such reports. *See Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005) (holding that drug certificates “merely state the results of a well-recognized scientific test determining the composition and

quantity of the substance” and are within the state public records hearsay exception); *State v. Dedman*, 102 P.3d 628, 634-36 (N.M. 2004) (holding a report not testimonial and within public records exception because it was prepared by agency that is not law enforcement); *State v. Cao*, 626 S.E.2d 301, 305 (N.C. Ct. App. 2006) (holding that lab reports are nontestimonial business records only when the testing on which they are based is mechanical), *rev. denied* (N.C. Jan. 17, 2006); *Oregon v. Thackaberry*, 95 P.3d 1142, 1145 (Or. Ct. App. 2004) (finding that lab report may be similar to a business record), *rev. denied* (Or. Aug. 11, 2004). In *Crawford*, the Court observed, “Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’ ” 541 U.S. at 61.

We are persuaded that the better line of cases are those that have held that lab reports are testimonial under *Crawford*. See *Shiver v. State*, 900 So.2d 615, 618 (Fla. Dist. Ct. App. 2005) (finding that parts of affidavit related to maintenance of breathalyzer were testimonial because they were statements one would reasonably expect to be used prosecutorially and were made in circumstances that would lead an objective witness to reasonably believe the statements would be available for trial); *People v. Lonsby*, 707 N.W.2d 610, 618 (Mich. Ct. App. 2005) (holding that lab report on identification of evidence was testimonial and inadmissible), *rev. denied* (Mich. Mar. 27, 2006); *People v. Rogers*, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004) (holding that report of test of victim’s blood alcohol, admitted to prove inability to consent, was testimonial); *State v. Crager*, 844 N.E.2d 390, 397, 399 (Ohio Ct. App. 2005) (holding that DNA report was testimonial and admission without testimony of analyst who prepared it violated defendant’s Confrontation Clause rights), *appeal accepted* (Ohio Apr. 26, 2006).

We conclude that the BCA lab report admitted at trial against Caulfield was testimonial evidence under *Crawford*.

## II.

The BCA report was admitted in evidence pursuant to the notice-and-demand provisions of section 634.15, which permits the admission of “a report of the facts and results of any laboratory analysis or examination if it is prepared and attested by the person performing the analysis or examination in any laboratory operated by the Bureau of Criminal Apprehension.”<sup>[4]</sup> Minn. Stat. § 634.15, subd. 1(a) (2004). The statute allows a defendant who wants to cross-examine the analyst to “request, by notifying the prosecuting attorney at least ten days before the trial, that the [analyst] testify in person at the trial on behalf of the state.” Minn. Stat. § 634.15, subd. 2(a) (2004). The statute does not explicitly state what the consequences will be if a defendant does not request that the analyst testify. The state argues that a defendant’s failure to make the request results in a forfeiture of his confrontation rights. According to the state, the statute permits introduction without cross-examination unless the accused demands the person be present for trial. Caulfield objected at trial to the admission of the report. He conceded that he had not requested that the analyst testify at trial, but argued that section 634.15, “which purports to permit this evidence to be introduced without any further ado,” violated Caulfield’s constitutional rights under *Crawford*.

The construction and constitutionality of a statute are questions of law this court reviews de novo. *State v. Tennin*, 674 N.W.2d 403, 406 (Minn. 2004).<sup>[5]</sup> Our standard presumption is that

the statute is constitutional and the party challenging the constitutionality of a statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt. *State v. Frazier*, 649 N.W.2d 828, 832 (Minn. 2002).

The state argues that Caulfield “forfeited” his opportunity to contest the admission of the report by failing to comply with section 634.15. But the state fails to recognize that if Caulfield were deemed to have forfeited his objection under the Confrontation Clause, by not requesting the analyst’s testimony at least 10 days before trial, we could still review his argument under the plain error standard. See *State v. Osborne*, 715 N.W.2d 436, 441 (Minn. 2006) (citing *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001), for the proposition that review of evidentiary errors implicating constitutional rights can be forfeited); Minn. R. Crim. P. 31.02 (allowing for plain error review when an error affects substantial rights). Instead, the state argues that any error in admitting the report was harmless beyond a reasonable doubt—our standard for constitutional errors. See *State v. Juarez*, 572 N.W.2d 286, 291 (Minn. 1997). As such, we read the state’s argument to be one of waiver, rather than forfeiture, and analyze it accordingly.

The confrontation right is not absolute. See *Maryland v. Craig*, 497 U.S. 836, 844 (1990); see also *Cooper v. California*, 386 U.S. 58, 62 n.2 (1967) (noting that the Confrontation Clause does not require the prosecution to call all possible witnesses). Further, *Crawford* did not eliminate hearsay exceptions that were accepted at the time of the drafting of the Constitution. 541 U.S. at 56 n.6; see *State v. Martin*, 695 N.W.2d 578, 585-86 (Minn. 2005) (finding a continuing exception for dying declarations). And confrontation rights can be waived at trial by certain wrongful actions. See *Illinois v. Allen*, 397 U.S. 337, 345-46 (1970) (holding that defendant who engaged in disruptive conduct during trial and was expelled from courtroom “lost his right” to confront witnesses against him); *State v. Gillam*, 629 N.W.2d 440, 450-52 (Minn. 2001) (same). Thus, we have held that confrontation rights are not among those (right to a jury trial and right to counsel) that require an affirmative waiver in writing or on the record. *Osborne*, 715 N.W.2d at 442. We have found that a defendant who absents himself from the courtroom waives his Sixth Amendment right to be present (and confront witnesses). *State v. Worthy*, 583 N.W.2d 270, 277-78 (Minn. 1998). We have also found that the waiver by wrongdoing doctrine survives *Crawford*. See *Davis v. Washington*, 547 U.S. \_\_\_, 126 S. Ct. 2266, 2280 (2006); *Crawford*, 541 U.S. at 62; *State v. Wright*, 701 N.W.2d 802, 814-15 (Minn. 2005) (discussing forfeiture of the right of confrontation by procuring the unavailability of a witness); *judgment vacated and remanded*, 126 S. Ct. 2979 (2006).

The state points to the waiver by wrongdoing doctrine in support of its argument that Confrontation Clause rights are subject to reasonable restrictions. The state contends that the requirement in section 634.15 for a defendant to request an analyst’s testimony 10 days before trial is reasonable in light of the law’s purpose “to allow the report into evidence routinely, thereby preventing unnecessary and costly court appearances or document production.” *Glick v. Comm’r of Pub. Safety*, 362 N.W.2d 15, 16 (Minn. App. 1985). The state argues that the statute fairly balances an accused person’s confrontation right against the obvious realities that the contents of laboratory reports are rarely contested, the samples are typically subject to independent testing per Minn. R. Crim. P. 9.01, subd. 1(4), and requiring BCA analysts to authenticate every lab report admitted is an unnecessary burden on the state’s resources.

But, by our reading, *Crawford* removed the flexibility courts had to balance the state's interests, however legitimate, against the need for prior cross-examination and unavailability of the witness before testimonial evidence can be admitted. Compare *Craig*, 497 U.S. at 849 (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895), for the proposition that confrontation rights "must occasionally give way to considerations of public policy and the necessities of the case"), with *Crawford*, 541 U.S. at 61 (noting that confrontation is a procedural, not a substantive, requirement, because the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination").<sup>[6]</sup>

Even before *Crawford*, the Illinois Supreme Court concluded that the state's notice-and-demand statute

impermissibly require[d] the defendant to take affirmative action to secure a right that he has already been constitutionally guaranteed or be deemed to have waived that right. We are unaware of any authority that permits the legislature to make a defendant's confrontation rights contingent upon action by the defendant \* \* \*.

*People v. McClanahan*, 729 N.E.2d 470, 475-76 (Ill. 2000). The court in *McClanahan* noted that if the right of the defendant to demand the appearance of the report preparer were enough,

there would be no constitutional problem with allowing the State to introduce all of its evidence by affidavit as long as a defendant is allowed to bring the prosecution's witnesses into court himself. Trial by affidavit is the primary evil that the confrontation clause was designed to prevent.

729 N.E.2d at 477 (citation omitted).

We are attracted by the rationale discussed by the Ohio Court of Appeals in an unpublished opinion, *State v. Smith*, 2006 WL 846342 (Ohio Ct. App. 2006). There, the statute authorized the state to submit a lab report as evidence in a drug case if it served a copy on the defendant and the defendant failed to demand the testimony of the preparer within seven days of receiving the report. *Smith* did not demand the testimony, but at trial he objected to the admission of the report on confrontation grounds. The Ohio court noted that a defendant can waive his confrontation rights by failing to demand the testimony of the preparer. *Id.* at \*5. Reasoning from the premise that a defendant may waive his confrontation rights by failing to object at trial, the court observed that the statute can require a defendant to assert his right at an earlier time. *Id.* The court also suggested that the action required of the defendant, to merely demand the testimony of the preparer, is not burdensome. *Id.* at \*6. But the court ultimately concluded that "waiver of a confrontation right *before trial* must be made knowingly, intelligently, and voluntarily," *id.* at \*6 (emphasis added), and that the state's notice to the defendant, under the statute, was inadequate to fully inform the defendant as to the consequences of waiver under the statute, *id.* at \*7. The court said:

Where the prosecutor fails to notify the defendant of the purpose for serving a copy of the report on the defendant, fails to indicate that it is being served pursuant to R.C. 2925.51, and fails to indicate that it is evidentiary material that



will be entered into evidence without the defendant having the right to confront the technician unless he demands to do so, the defendant has not been properly put on notice that he is waiving his confrontation right as provided in the statute. Therefore, we cannot say that Smith knowingly, intelligently, and voluntarily waived his right to confrontation.

*Id.* at \*7.

Similarly, we conclude that although there may be legitimate public policy reasons to advance the time to assert confrontation rights to a reasonable time before trial, such a shift cannot be constitutionally accomplished without adequate notice to the defendant that his failure to request the testimony of the analyst will result in the waiver of his confrontation rights, especially when the report is offered to prove an element of the offense with which the defendant is charged. Although we realize that this conclusion may give the defendant a strategic advantage that could potentially be abused—to reserve his objection for trial—the constitutional concerns presented by Caulfield’s appeal warrant such a construction. *Cf. Davis v. Washington*, 547 U.S. \_\_\_, 126 S. Ct. at 2280 (“We may not \* \* \* vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.”).

At a minimum, any statute purporting to admit testimonial reports without the testimony of the preparer must provide adequate notice to the defendant of the contents of the report and the likely consequences of his failure to request the testimony of the preparer. Otherwise, there is no reasonable basis to conclude that the defendant’s failure to request the testimony constituted a knowing, intelligent, and voluntary waiver of his confrontation rights.

Because section 634.15 does not require adequate notice to the defendant, we conclude that it violates the Confrontation Clause. And because the record does not show that the state did otherwise provide adequate notice to Caulfield, we conclude that the admission of the BCA lab report against him was error.

### III.

In his concurrence in *Crawford*, the late Chief Justice William Rehnquist said that “the mistaken application of [the majority’s] new rule by courts which guess wrong as to the scope of the rule is subject to harmless-error analysis.” 541 U.S. at 76 (Rehnquist, C.J., concurring). This court also recently subjected a Confrontation Clause violation under *Crawford* to the constitutional harmless error analysis. *State v. Courtney*, 696 N.W.2d 73, 79 (Minn. 2005) (noting that “it is well settled that violations of the Confrontation Clause are subject to such analysis”). A constitutional error does not mandate reversal and a new trial if we determine that the error was harmless beyond a reasonable doubt. *State v. Juarez*, 572 N.W.2d 286, 291 (Minn. 1997).

The court of appeals found that any error in admitting the BCA report was harmless beyond a reasonable doubt, noting that

[t]he evidence established that the substance in Caulfield’s possession tested positive for cocaine on two field tests, that it was packaged in small bags consistent with the sale of drugs, that Caulfield had been observed in short-term encounters consistent with drug transactions, and that Caulfield made an un rebutted statement to police that the substance was cocaine.

*Caulfield*, 2005 WL 1804353, at \*6. In other words, the court found that the circumstantial evidence of guilt was “very strong.” *Id.* Caulfield argues that the court of appeals erred by essentially using a sufficiency of the evidence analysis instead of determining that the verdict was surely unattributable to the error.

We have acknowledged that the constitutional harmless error analysis is not a matter of “analyz[ing] whether a jury would have convicted the defendant without the error, [but] rather \* \* \* whether the error reasonably could have impacted upon the jury’s decision.” *Juarez*, 572 N.W.2d at 292. We have said:

When determining whether a jury verdict was surely unattributable to an erroneous admission of evidence, the reviewing court considers the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by the defendant. “[O]verwhelming evidence of guilt is a factor, often a very important one, in determining whether, beyond a reasonable doubt, the error has no impact on the verdict.” But the court cannot focus on the evidence of guilt alone.

*State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005) (quoting *Townsend v. State*, 646 N.W.2d 218, 224) (citations omitted).

With regard to the first *Al-Naseer* factor, the manner in which the evidence was presented, we note that Caulfield’s bench trial was a very short affair. There is no chance that the report was lost among a plethora of other evidence. The BCA report was presented in the logical flow of Officer Pingel’s testimony, to confirm that the substance seized from Caulfield was cocaine. We have said, “Where the evidence was aimed at having an impact on the verdict, we cannot say that the verdict was surely unattributable to the error.” *State v. Litzau*, 650 N.W.2d 177, 184 (Minn. 2002). All indications here are that the BCA report was presented in a way that was designed to secure the state’s verdict.

As to the second *Al-Naseer* factor, lab testing identifying a substance as cocaine generally would have to be characterized as highly persuasive evidence. But the question of whether it was required or was merely cumulative of other evidence is somewhat debatable. The court of appeals rested its harmless error determination, in part, on *State v. Olhausen*, 681 N.W.2d 21, 28 (Minn. 2004), stating that the identity of a substance may be proven by circumstantial evidence and officer testimony without scientific testing. *Caulfield*, 2005 WL 1804353, at \*5.<sup>[7]</sup> Arguably the BCA report could be seen as cumulative, given the police officers’ testimony as to the results of their field tests and Caulfield’s admission. But the lab report has the appearance of being conclusive proof, whereas the other evidence could be subject to challenge. Caulfield’s counsel argued, in opposing admission of the report, that the report “basically provides, in my view, the conclusive proof that this product that Mr. Caulfield was possessing was, in fact, a controlled substance.”

As to the third *Al-Naseer* factor, the state did reference the report in closing argument, stating that the report was “clear on what the contents of the packages [seized from Caulfield]

were” and showed that there was “no reasonable doubt about what was in the defendant’s pocket.” The state had also mentioned the report in its opening statement. Measured by the first three of the *Al-Naseer* factors, it cannot be said that the verdict was surely unattributable to the erroneous admission of the BCA report.<sup>[8]</sup>

We are left with the fourth *Al-Naseer* factor, whether the evidence was effectively countered by the defendant, and the fifth factor, whether the other evidence of guilt was overwhelming. These factors are difficult to apply under the present facts.

Ordinarily, the ability of the defendant to effectively counter the questioned evidence would favor the state because if the evidence has been effectively countered, the verdict is unlikely to be attributed to it. But cases where the defendant does not attempt to counter the evidence on the merits, and only objects to its admissibility, are less clear. Should this weigh in favor of the defendant because the impact of the un rebutted evidence is greater? Or should this weigh in favor of the state because the defendant should not be allowed to complain about the evidence (i.e., the conclusions in the report) if he neither criticizes the methodology used nor offers any alternative conclusions? Because our inquiry is to estimate the impact that the report may have had on the decision of guilt, it would seem that the better answer is that un rebutted evidence has greater impact. This answer is also more consistent with the general proposition that the state has the burden of proof and the defendant need not offer any proof. Thus, this factor weighs in favor of finding the error to be prejudicial.

This brings us to the “overwhelming evidence” factor. We must acknowledge that our decisions have not been completely clear or consistent on the question of whether overwhelming evidence of guilt can be used to trump the other factors in determining whether an error reasonably could have impacted the decision. As noted by one commentator:

The nature of the issue lends itself to an *ad hoc* determination in each case based on the particular facts involved. Even the legal standard appears to vary depending on the nature of the case and the nature of the error.

11 Peter N. Thompson, *Minnesota Practice: Evidence* § 103.02 (3d ed. 2001).

Prior to *Al-Naseer*, our case law took a few turns. In *State v. Townsend*, we said that harmless beyond a reasonable doubt means “that the weight of all the other evidence is such that it ‘justifies the verdict regardless of the erroneous admission \* \* \*.’ ” 546 N.W.2d 292, 297 (Minn. 1996) (quoting *State v. Ford*, 539 N.W.2d 214, 227 (Minn. 1995)). But in *Juarez*, we criticized *Townsend* as an example of a case where we “inadvertently misstated the significance of the strength of the evidence of guilt in harmless error analysis.” 572 N.W.2d 286, 291 n.6 (Minn. 1997). We went on in *Juarez* to say:

[T]hat the evidence was sufficient, or even overwhelming, does not mean that the error was necessarily harmless. Harmless error analysis is better labelled as ‘harmless error impact analysis’ because it is the impact of that error that the appellate court must consider. The overwhelming evidence of guilt is a factor, often a very important one, in determining whether, beyond a reasonable doubt, the error has no impact on the verdict.

*Id.* at 291. In *Juarez*, the error was the admission of a defendant’s statement to police requesting counsel, which could be interpreted by the jury as a badge of guilt. *Id.* at 290-91. We held that the erroneously admitted evidence reasonably could not have impacted the verdict, but we did not discuss the factors of how the evidence was presented or whether it was used in the state’s closing argument. *Id.* at 292-93. Without saying so, we apparently concluded that the

erroneously admitted evidence was not highly persuasive because it was, at best, indirect and circumstantial.

We articulated the factors that govern a harmless-beyond-a-reasonable-doubt analysis in *State v. Ferguson*, 581 N.W.2d 824, 833 (Minn. 1998) (citing *Maurer v. Department of Corrections*, 32 F.3d 1286, 1289 (8th Cir. 1994)). The challenged evidence was the victim's dying declaration: "It was the Bloods." *Id.* at 832. We observed that (1) this evidence was minimized when it was presented—the state did not argue that the victim actually saw the shooter and the officer who heard the statement admitted that the victim may have been guessing; (2) during its closing argument, the state agreed that no one saw the shooter; and (3) the court gave a cautionary instruction on the use of witness identification evidence. Based on these factors, but not the strength of the evidence of guilt, we concluded that the verdict was surely unattributable to the dying declaration. *Id.* at 833.

Next, we reconsidered *Townsend* in response to his postconviction petition. *Townsend v. State*, 646 N.W.2d 218 (Minn. 2002). We agreed to apply the proper standard for harmless error beyond a reasonable doubt, in light of the misstatement of the significance of the strength of the evidence of guilt in our harmless error analysis on direct review. *Id.* at 222. The challenged evidence was the excessive detailing of an attempted murder committed by the defendant as part of the same episode as the charged murder (we held that some of the evidence was admissible, but that the evidence allowed at trial was too extensive, being more prejudicial than probative). *Id.* at 223. We did determine that the other evidence of guilt was strong and that this could be considered as one factor. *Id.* at 224. But we also concluded that (1) the evidence was presented in a manner whereby the jury would not have focused unduly on it; (2) the evidence was not the focus of any single witness's testimony; (3) the evidence was not disputed; and (4) the prosecutor did not dwell on it in either the opening statement or closing argument.<sup>[9]</sup> *Id.* at 223-24.

This brings us to *Al-Naseer*, where we detailed the factors for a constitutional harmless error analysis and emphasized that the strength of the evidence of guilt is one factor but should not be the focus of the analysis. 690 N.W.2d at 748. The challenged evidence was the videotaped interview of defendant by police, held to be inadmissible because of the failure to obtain the defendant's waiver of his right to remain silent. *Id.* at 750. The videotape did not contain any admissions of guilt and the state only used it to challenge the defendant's credibility. *Id.* at 748. We held that the error was not harmless, observing that (1) the state used it in the opening statement; (2) several witnesses commented on it during their examination; (3) the defendant was cross-examined about it; and (4) the state referred to it in closing argument. *Id.* at 749-50. We did not weigh the strength of the evidence against these factors.

To recap, in applying the harmless-error-beyond-a-reasonable-doubt standard, we have found the error to be harmless only where several factors weigh in that direction: the evidence was presented in a manner that did not give it significant focus; the state did not dwell on it in opening and closing statements or in examining witnesses; the evidence was not highly persuasive but was circumstantial. In those cases, the harmless error conclusion has been reinforced by the strength of the evidence of guilt. But we do not have a single case applying the constitutional harmless error analysis where we have held that the strength of the evidence of

guilt controls even though the other factors weigh in favor of prejudicial error. Stated another way, we do not have a single case where we have held that the admission of direct and persuasive evidence on an element of the crime is harmless because other less direct and less persuasive or largely circumstantial evidence is strong.

Here, the other evidence relied on by the state is the admission of Caulfield to police and the two field tests of the substance. Although these are clearly sufficient to support the finding of guilt, they each are of lesser persuasive quality than the lab report, which was relied on by the state to be the definitive evidence of the identification of the substance as cocaine. We conclude that the erroneous admission of the report was not harmless beyond a reasonable doubt.

**Reversed and remanded for new trial.**

## **D I S S E N T**

**ANDERSON, G. Barry, J.** (dissenting).

I respectfully dissent. While I agree with the majority that the Bureau of Criminal Apprehension (BCA) lab report is testimonial, I believe that Caulfield's failure to request the BCA analyst's testimony constitutes a valid waiver of his Sixth Amendment right to confront that analyst in court. Minnesota Statutes § 634.15 (2004) adequately guards a defendant's constitutional right to confrontation. The majority argues that a defendant must receive notice of the likely consequences of failing to request the preparer's testimony before confrontation rights may be waived.<sup>[10]</sup> This additional safeguard, however desirable, is not required by either the statute or the United States Constitution.

I begin with the observation that this question has had relatively little attention, and there are few decisions on point, with none from our court. Nonetheless, the United States Supreme Court has provided some guidance with respect to this issue.

"[T]he most basic rights of criminal defendants are . . . subject to waiver." *New York v. Hill*, 528 U.S. 110, 114 (2000) (quoting *Peretz v. United States*, 501 U.S. 923, 936 (1991)). "What suffices for waiver depends on the nature of the right at issue." *Id.* In order for a defendant to waive his right to confront witnesses against him, there must be "an intentional relinquishment or abandonment of a known right or privilege." *Barber v. Page*, 390 U.S. 719, 725 (1968).

The issue, then, is whether Caulfield's failure to request the BCA analyst's testimony under section 634.15 can be characterized as an "intentional relinquishment" of a "known right." Under Supreme Court precedent, I would answer that question in the affirmative.

Caulfield's failure to request the BCA analyst's testimony can be construed as an "intentional relinquishment" of his right to confrontation. The Supreme Court has held that a waiver of a constitutional right need not be explicit. *See Illinois v. Allen*, 397 U.S. 337, 345-46 (1970).<sup>[11]</sup> There is no constitutional requirement, then, that every waiver of a constitutional right must be affirmatively conceded by the defendant on the record. Since we presume that members of society are acquainted with the law, *State v. Jacobson*, 697 N.W.2d 610, 615 (2005), when defendants choose not to exercise their right to confront the BCA analyst under section 634.15, I believe that right is relinquished.

The Supreme Court has also held that a constitutional right may not be waived unless it is a “known right or privilege.” *Barber*, 390 U.S. at 725. But the Court has not required defendants to have complete knowledge of their rights in order to effectuate a valid waiver. For example, in *Taylor v. United States*, the defendant failed to return to his trial after a lunch recess. 414 U.S. at 17. The district court continued with the defendant’s trial, despite his inability to testify and confront witnesses against him. The Supreme Court held that the defendant voluntarily waived his rights, noting that, “[i]t is wholly incredible to suggest that petitioner \* \* \* entertained any doubts about his right to be present at every stage of his trial.” *Id.* at 20. The Court did not require that the defendant demonstrate knowledge of, let alone affirmatively state, the precise constitutional right he was waiving.<sup>[12]</sup>

Similar reasoning can be applied to Minn. Stat. § 634.15. The statute clearly states that the results of a laboratory analysis authorized by the BCA are admissible into evidence. Minn. Stat. § 634.15, subd. 1(a) (2004). The statute provides that the defendant may cross-examine the analyst at trial “by notifying the prosecuting attorney at least ten days before the trial” of the defendant’s intention. *Id.* subd. 2(a). The clear and necessary consequence of failing to give the statutory notice to the prosecution is that the analyst will not be available for cross-examination. It is “wholly incredible” that Caulfield “entertained any doubts” that the analyst would not be a prosecution witness at trial, after Caulfield failed to give notice under the statute. Minnesota Statutes § 634.15, as written, provides a defendant with adequate notice under the Constitution to voluntarily relinquish his right to confront the analyst.

As a matter of policy and court rule, I would not disagree that a more detailed waiver of the confrontation right is desirable, and there are procedures available that may lead to the adoption of just such a rule. But I conclude that by failing to request the analyst’s testimony as provided by Minn. Stat. § 634.15, Caulfield waived his constitutional right to confront the analyst, and, therefore his conviction should be upheld.

ANDERSON, Russell A., Chief Justice (dissenting).

I join in the dissent of Justice G. Barry Anderson.

GILDEA, Justice (dissenting).

I join in the dissent of Justice G. Barry Anderson.

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<sup>[1]</sup> The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right \* \* \* to be confronted with the witnesses against him.” U.S. Const. amend. VI. The Minnesota Constitution contains virtually identical language: “The accused shall enjoy the right \* \* \* to be confronted with the witnesses against him.” Minn. Const. art. 1, § 6.

<sup>[2]</sup> Both Novak and Pingel testified that they used a “NIK kit” to test the substance seized from Caulfield. Pingel indicated that a NIK kit is a standard method of making a preliminary identification of a controlled substance.

<sup>[3]</sup> See also Paul C. Giannelli, *Admissibility of Lab Reports: The Right of Confrontation Post-Crawford*, 19 Crim. Just., Fall 2004, at 26, 30-31 (discussing scandals at labs to underscore the need for cross-examination of lab report declarants).

<sup>[4]</sup> In 2003 the legislature substituted “results of any laboratory analysis” for “results of a laboratory analysis” in the language cited, and substituted the word “documents” for “reports” in the introductory clause of subdivision 1. See Act of May 12, 2003, ch. 29, § 1, 2003 Minn. Laws 298. The 2003 amendment also added authorization of the admission into evidence of chain-of-custody documentation. See *id.*

<sup>[5]</sup> Although we have not addressed the validity of section 634.15, the court of appeals has done so in two pre-*Crawford* cases. In *State v. Pearson*, the court of appeals approved section 634.15, characterizing the act as a permissible shift of the burden of proof by the legislature of a kind that this court had approved. 633 N.W.2d 81, 84-85 (Minn. App. 2001) (citing *Lott v. Davidson*, 261 Minn. 130, 141-42, 109 N.W.2d 336, 344 (1961)). The court of appeals did not address the Confrontation Clause in *Pearson* and has not done so in any other case. Prior to *Pearson*, in *Glick v. Commissioner of Public Safety*, the court of appeals stated that section 634.15 “provides for prima facie authenticity of the report by requiring it to be issued by an authorized laboratory.” 362 N.W.2d 15, 16 (Minn. App. 1985).

<sup>[6]</sup> Nonetheless, at least two other state supreme courts have approved, since *Crawford*, their notice-and-demand statutes on reliability grounds. *State v. Cunningham*, 903 So.2d 1110 (La. 2005); *City of Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005), *cert. denied*, 126 S. Ct. 1786 (2006). But both decisions rest in part on state case law. See *Cunningham*, 903 So.2d at 1117, 1119 (relying on *State v. Powdrill*, 684 So.2d 350 (La. 1996), and *State v. Hancock*, 854 P.2d 926 (Or. 1993)); *Walsh*, 124 P.3d at 207-08, (relying on *DeRosa v. District Court*, 985 P.2d 157 (Nev. 1999)). Because waiver of confrontation rights is a federal question, it is controlled by federal law. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966).

<sup>[7]</sup> But the defendant in *Olhausen* had destroyed the evidence, while the substance seized from Caulfield was available for testing. 681 N.W.2d at 28.

<sup>[8]</sup> We acknowledge that evidentiary errors may be less prejudicial in a bench trial than in a jury trial. See *Sandberg v. Comm’r of Revenue*, 383 N.W.2d 277, 282 (Minn. 1986) (admission of improper evidence less likely to require new trial where case was tried to court); *Irwin v. State*, 400 N.W.2d 783, 786 (Minn. App. 1987) (affirming postconviction court’s analysis that effect of *Spreigl* evidence was less prejudicial because it was admitted at bench trial), *rev. denied* (Minn. Mar. 25, 1987). But the trial judge here, while finding Caulfield’s *Crawford* argument “interesting,” overruled his objection and admitted the evidence. The obvious implication is that the judge found the evidence relevant and probative.

<sup>[9]</sup> In retrospect, it is curious that we used the harmless-error-beyond-a-reasonable-doubt standard in *Townsend* because no constitutional error was claimed. In any event, *Townsend* does stand as authority for the proper application of the constitutional harmless error standard.

<sup>[10]</sup> The majority also states that defendants must be advised of the actual contents of a BCA report in order for waiver to be valid. Because the appellant has not argued that he did not receive a copy of the report, this requirement is not before us and I therefore address only the notice issue in this dissent.

<sup>[11]</sup> The Supreme Court has found nonexplicit waivers of confrontation rights in several contexts. See, e.g., *Taylor v. United States*, 414 U.S. 17 (1973) (finding waiver where defendant voluntarily absented himself from courtroom); *Illinois v. Allen*, 397 U.S. 337 (1970) (finding waiver where defendant’s conduct caused his expulsion from courtroom); *Reynolds v. United States*, 98 U.S. 145 (1878) (finding waiver where defendant procured witness’s unavailability). While these examples involve defendant misconduct and are not directly comparable with the facts before us, section 634.15 provides a mechanism through which the defendant may choose or not choose to confront the witness; this is greater protection than that granted to defendants in misconduct circumstances, where the defendants were almost certainly not considering their trial rights.

<sup>[12]</sup> While the defendant’s misconduct in *Taylor* makes the case distinguishable, the broader proposition is that waivers may be effectuated in many different ways, depending on the right and the context in which that right arises. I do not suggest, for example, that in the guilty plea context, a silent record might be sufficient to waive all trial rights. See *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). A BCA analyst’s testimony, while important, arises in an

evidentiary context, which lacks the same finality as a guilty plea. Section 634.15 adequately safeguards defendants' rights in those circumstances.