OFFICE OF THE REVISOR OF STATUTES

REPORT CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT AND COURT OF APPEALS

Submitted to the Legislature of the State of Minnesota | November 2012

OFFICE OF THE REVISOR OF STATUTES

Minnesota Legislature

To: Minnesota Legislature

From: Michele L. Timmons, Revisor of Statutes

Date: November 15, 2012

Subject: Court Opinions Report

Minnesota Statutes, section 3C.04, subdivision 3, requires the Office of the Revisor of Statutes to biennially report to the Legislature on statutory changes recommended or statutory deficiencies noted in opinions of the Supreme Court and Court of Appeals of Minnesota.

I am, therefore, pleased to present our report on opinions issued by those courts between October 1, 2010, and September 30, 2012. This report will also be displayed electronically on the Revisor's office website.

If you would like to discuss any issues raised in the report, or request that we prepare draft legislation, please feel free to contact us.

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2012

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Covering Opinions Issued Between October 2010 and September 2012

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2012 Court Opinion Report Summary

Minnesota Statutes, section 3C.04, subdivision 3, requires the Office of the Revisor of Statutes to biennially report to the Legislature "any statutory changes recommended or discussed or statutory deficiencies noted in any opinion of the Supreme Court or the Court of Appeals of Minnesota." This report highlights the Minnesota Supreme Court and Minnesota Court of Appeals opinions identifying ambiguous, vague, preempted, constitutionally suspect or otherwise deficient statutes.

The 2012 court opinions report includes 18 cases — 8 from the Minnesota Supreme Court and 10 from the Minnesota Court of Appeals. The cases identify the following deficiencies:

- 13 court opinions relating to **ambiguity** in the state statutes;
- 1 court opinion relating **constitutional considerations**;
- 1 court opinion relating to **federal preemption**;
- 1 court opinion relating to **clarity**;
- 1 court opinion relating to **implementation issues**; and
- 1 court opinion relating to a **conflict with the juvenile court rules**.

The report provides a summary of each deficiency noted by the Minnesota Supreme Court or the Minnesota Court of Appeals. Each summary includes the text of the applicable deficient statutory provision, a statement of the deficiency, and a brief discussion of the deficiency. Where possible, the words or phrase identified as deficient have been underlined. Additionally, the court opinion discussing each respective deficiency can be found in the appendix.

Actions Taken

The Minnesota Legislature responded to a recent statutory deficiency raised by the Minnesota Court of Appeals. In *State v. Retzlaff,* 807 N.W.2d 437 (Minn. App. 2011), the Court of Appeals considered the effect of a "plain-language 'loophole'" in Minnesota Statutes, section 169A.24, subdivision 1.

In 2007, the legislature renumbered section 609.21, subdivision 2a, to section 609.21, subdivision 1, clause (3). At the same time, the legislature amended section 169A.24, enhancing to a first-degree felony a DWI offense committed subsequent to a conviction under section 609.21, subdivision 1. Section 169A.24 did not, however, include a reference to the same conviction as it was previously codified under section 609.21, subdivision 2a (2006).

The result was that any driver convicted of criminal vehicular operation by injuring another person before section 609.21, subdivision 2a, was renumbered in 2007 was exempt from the enhancement provision.

In Laws of Minnesota 2012, chapter 222, section 3, the legislature addressed this issue directly and amended Minnesota Statutes, section 169A.24, subdivision 1, to include the offense of criminal vehicular operation both as it is currently numbered and as it was numbered before 2007.

2012 Court Opinions Table

This table lists sections, subdivisions, paragraphs, and clauses that have been held deficient by the Minnesota Supreme Court or the Minnesota Court of Appeals between October 1, 2010 and September 30, 2012.

Statute Citation	Deficiency	Court Opinion
97B.328, subd. 1	Ambiguity	*State of Minnesota v. Hansen*, 805 N.W.2d 915 (Minn. App. 2011). (NO. A11-546)
97B.328, subd. 3	Ambiguity	*State of Minnesota v. Hansen*, 805 N.W.2d 915 (Minn. App. 2011). (NO. A11-546)
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122A.40, subd. 1	Ambiguity	*Emerson v. School Board of Independent School District 199*, 809 N.W.2d 679 (Minn. 2012). (NO. A09-1134)
169.61, para. (b)	Ambiguity	*Sarber v. Commissioner of Public Safety*, 819 N.W.2d 465 (Minn. App. 2012). (NO. A12-0110)
181.940, subd. 2	Ambiguity	*Hansen v. Robert Half Intern., Inc.,* 813 N.W.2d 906 (Minn. 2012). (NO. A10-1558)
204C.20, subd. 1	Implementation issues	*In re Petition regarding 2010 Gubernatorial Election*, 793 N.W.2d 256 (Minn. 2010). (NO. A10-2022)
206.86, subd. 1	Implementation issues	*In re Petition regarding 2010 Gubernatorial Election*, 793 N.W.2d 256 (Minn. 2010). (NO. A10-2022)
260C.415, subd. 1	Conflicts with Court Rule	*In the Matter of the Welfare of the Child of T.L.M. and M.J.S.,* 804 N.W.2d 374 (Minn. App. 2011). (NO. A11-1323)
302A.751, subd. 1	Clarity	*U.S. Bank N.A. v. Cold Spring Granite Co.*, 802 N.W.2d 363, (Minn. 2011). (NO. A10-0252)
353.01, subd. 10	Ambiguity	*In the Matter of the PERA Salary Determinations Affecting Retired and Active Employees of the City of Duluth*, 820 N.W.2d 563 (Minn. App. 2012). (NO. A11-1330)
462.357, subd. 1e, para. (a), clause (2)	Ambiguity	*Ortell v. City of Nowthen*, 814 N.W.2d 40 (Minn. App. 2012). (NO. A11-1155)
518.58, subd. 2	Preemption	*Angell v. Angell,* 791 N.W.2d 530 (Minn. 2010). (NO. A09-349)
595.02, subd. 1, para. (a)	Ambiguity	*State v. Zais,* 790 N.W.2d 853 (Minn. App. 2010). (NO. A10-1020)
604.02, subd. 1	Ambiguity	*Staab v. Diocese of St. Cloud*, 813 N.W.2d 68 (Minn. 2012). (NO. A09-1335)
609.221, subd. 2, para. (b)	Ambiguity	*State v. Leathers*, 799 N.W.2d 606 (Minn. 2011). (NO. A09-0926, A09-0934)
609.2232	Ambiguity	*Johnson v. State,* 820 N.W.2d 24 (Minn. App. 2012) (NO. A11-2226)
609.2241, subd. 2, clause (2)	Ambiguity	*State v. Rick*, Not reported in N.W.2d, 2012 WL 5752 (Minn. App. 2012). (NO. A12-0058)
609.505, subd. 2	Constitutional considerations	*State v. Crawley*, 819 N.W.2d 94 (Minn. 2012). (NO. A09-1795)
626A.35, subd. 2a	Ambiguity	*State v. Hormann,* 805 N.W.2d 883 (Minn. App. 2011) (NO. A10-1872)

Minnesota Statutes, section 97B.328, subdivisions 1 and 3

Subject: Hunting; baiting prohibited.

Court Opinion: *State of Minnesota v. Hansen*, 805 N.W.2d 915 (Minn. App. 2011). (NO. A11-546)

Applicable text of section 97B.328, subdivision 1:

> A person may not hunt deer: (1) with the aid or use of bait or feed; or (2) in the vicinity of bait or feed if the person knows or has reason to know that bait or feed is present.

Applicable text of section 97B.328, subdivision 3:

> For the purposes of this section, "bait or feed" includes grains, fruits, vegetables, nuts, hay, or other food that is capable of attracting or enticing deer and that has been placed by a person. Liquid scents, salt, and minerals are not bait or feed. Food that has not been placed by a person and resulting from normal or accepted farming, forest management, wildlife food plantings, orchard management, or other similar land management activities is not bait or feed.

Statutory Deficiency: Section 97B.328, subdivisions 1 and 3, cannot be implemented because the words "vicinity" and "placed," and the phrases "food…placed by a person" and "food…resulting from normal or accepted farming…activities," are ambiguous.

Discussion: "As written, [section 97B.328] prohibits a farmer from hunting 'in the vicinity' of food capable of enticing deer when the food was 'placed' by the farmer."

The word "vicinity" is ambiguous because it lacks sufficient specificity. According to the court, "vicinity" could mean "within shooting range of the hunter, or it could refer to the distance from which 'placed' food would attract deer." Because the legislature did not differentiate between the multiple potential meanings, the language is ambiguous.

Further, since the word "placed" has multiple dictionary definitions, the court found it to be ambiguous within the fact context presented. The court identified a volitional element to the word "placed," and contended that such a volitional element is inconsistent with routine farming activities. As a consequence, the court noted, "this restriction could apply to any movement of crops due to human volition, including harvesting corn with large machinery or moving pumpkins from the field where they were grown to another place on the farm for storage, further processing, or another farm-related purpose."

Finally, the court explained that "[b]y including the 'normal or accepted farming activities' language in the list of activities that do not meet the definition of deer bait, the legislature expressed an intention to make a statutory exception for farmers who transport their crops as part of carrying out their livelihoods. However, farmers meet the definition of deer baiting during harvest and at other times when they hunt within the 'vicinity' of crops that constitute deer food that has been 'placed' by them." As a consequence, the phrases "food…placed by a person" and "food…resulting from normal or accepted farming…activities" are inconsistent—and therefore ambiguous.

The court did not resolve the ambiguities it identified in section 97B.328. However, it noted that "[u]ntil the statute can distinguish between innocent conduct related to farming and unlawful baiting of deer, the statute does not effectuate the intent of the legislature."

Minnesota Statutes, section 117.187

Subject: Eminent domain; minimum compensation statute.

Court Opinion: *County of Dakota v. Cameron,* 812 N.W.2d 851 (Minn. App. 2012). (NO. A11-1273)

Applicable text of section 117.187:

> When an owner must relocate, the amount of damages payable, at a minimum, must be sufficient for an owner to purchase a comparable property in the community and not less than the condemning authority's payment or deposit under section 117.042, to the extent that the damages will not be duplicated in the compensation otherwise awarded to the owner of the property. For the purposes of this section, "owner" is defined as the person or entity that holds fee title to the property.

Statutory Deficiency: The terms “comparable property” and “community,” as well as the method of calculating “the amount of damages” are ambiguous.

Discussion: The court held that the term “comparable property” does not have to be a “specific existent property, which the displaced owner can actually purchase.” Rather, a comparable property may be a property that “has already been sold as of the date of taking.” Additionally, in identifying a comparable property under the minimum compensation statute, one should consider the “land size, features, and location; the square footage, age, design, and construction quality of any structures on the land; as well as features related to the property’s usage.”

In addition, the court defined “community” as a “group of people living in the same locality and under the same government.” However, the court qualified this definition by stating that “the relevant community inevitably will be fact dependent.” If the property subject to eminent domain is located in a “smaller municipality,” then that municipality may be considered the community. However, if the subject property is located in a larger metropolitan area, “the community may be a neighborhood or geographic area within the metropolis.”

Finally, the court determined that the market-value analysis is the proper method to calculate “the amount of damages” under the minimum compensation statute. Within this analysis, the list or offer price of a comparable property in the community may be an appropriate consideration but “is not the only basis for a damages calculation.”

Minnesota Statutes, section 122A.40, subdivision 1

Subject: Schools; employment; contracts; termination.

Court Opinion: *Emerson v. School Board of Independent School District 199*, 809 N.W.2d 679 (Minn. 2012). (NO. A09-1134)

Applicable text of section 122A.40, subdivision 1:

> A principal, supervisor, and classroom teacher and any other professional employee required to hold a license from the state department shall be deemed to be a "teacher" within the meaning of this section. A superintendent is a "teacher" only for the purposes of subdivisions 3 and 19.

Statutory Deficiency: The phrase "required to hold a license from the state department" in section 122A.40, subdivision 1, is ambiguous.

Discussion: Section 122A.40, subdivision 1, defines which school district employees are classified as teachers, and are thereby entitled to continuing-contract rights under the statute. The phrase "required to hold a license from the state department" is ambiguous, because (1) it is unclear what the word "required" means; and (2) it is unclear what the word "required" modifies. Specifically, by whom is a professional employee "required" to be licensed, the state licensing authority or the school district?

In chapter 122A, the legislature has "promulgated one unified system for the licensing of all qualified teachers." All licenses are issued through the Minnesota Department of Education (MDE). Section 122A.18 sets forth the procedures for licensing principals, supervisors, and classroom teachers, and MDE has promulgated rules to provide for the licensing of specific positions, including those professional employees required to hold a license. *See* Minn. R. 8710.5900-6400 (2011).

"A school district, however, does not have the legal authority under Minn. Stat. chapter 122A to issue a license to professional employees." While the school board of a district may require licensure not mandated by statute or rule for certain professional positions, using such a licensure requirement as a basis for defining "teacher" under the section 122A.40, subdivision 1, would force MDE "to adopt rules to license any position for which a school board decided to impose a license requirement."

The court concluded the most "logical interpretation of the language is to recognize a relationship between the entity that 'issues' the license and the entity that 'requires' the employee to hold a license. It logically follows that the 'required to hold a license' language means a professional employee required by the state licensing authority in chapter 122A to hold a license from the MDE." Consequently, when a professional employee is not required by MDE to hold a license, that individual is not a "teacher" within the meaning of the continuing-contract statute.

Minnesota Statutes, section 169.61, paragraph (b)

Subject: Traffic regulations; motor vehicles; composite beams.

Court Opinion: *Sarber v. Commissioner of Public Safety*, 819 N.W.2d 465 (Minn. App. 2012). (NO. A12-0110)

Applicable text of section 169.61:

> When the driver of a vehicle approaches a vehicle within 1,000 feet, such driver shall use a distribution of light, or composite beam, so aimed that the glaring rays are not projected into the eyes of the oncoming driver.

Statutory Deficiency: The phrase "glaring rays" in section 169.61, paragraph (b), is ambiguous.

Discussion: Section 169.61 prohibits drivers from projecting "glaring rays" into the eyes of oncoming drivers. "As the statute does not define the term 'glaring,' [the court] must look to its ordinary and customary meaning."

According to the basic dictionary definition used by the court, a light is "glaring" if it shines "intensely *and blindingly*." (Emphasis in original.) Prior versions of the statute included the term "dazzling," the dictionary definition of which includes the phrase "to *blind with intense light*." (Emphasis in original.) Considering these definitions, the court concluded that "[b]riefly flashing one's high beams at another driver does not, standing alone, amount to use of a light 'intensely and blindingly.'" Further, "[a] bright light of extremely short duration does not amount to 'glaring rays.'"

In unpublished Minnesota opinions, courts have explained that "merely illuminating one's high beams within 1,000 feet of another vehicle is not, by itself, sufficient to establish a violation; the lights must project glaring rays at another driver." Similarly, courts in other states with comparable statutes—including Wisconsin and New York—have held that "intermittently flashing" or "flicking" high beams at approaching vehicles are insufficient to establish violations.

Had the legislature intended to expressly prohibit briefly flashing one's high beams, it could have done so. Because it did not, the court concluded "that the language of Minn. Stat. § 169.61(b) does not prohibit drivers from momentarily flashing their high beams at oncoming traffic, so long as the flashing is brief and conducted in such a manner that it does not blind or impair other drivers.

Minnesota Statutes, section 181.940, subdivision 2

Subject: Employment; wrongful termination.

Court Opinion: *Hansen v. Robert Half Intern., Inc.,* 813 N.W.2d 906 (Minn. 2012). (NO. A10-1558)

Applicable text of section 181.940, subdivision 2:

"Employee" means a person who performs services for hire for an employer from whom a leave is requested under sections 181.940 to 181.944....

Statutory Deficiency: Section 181.940, subdivision 2, does not clearly specify the terms of how an employee "requests leave" under the Minnesota Parenting Leave Act (MPLA) (sections 181.940 to 181.944).

Discussion: Under the MPLA, "[a]n employer must grant an unpaid leave of absence to an employee who is a natural or adoptive parent in conjunction with the birth or adoption of a child."

The definition of employee for the purposes of the MPLA is "a person who performs services for hire for an employer from whom a leave is requested under section 181.940 to 181.944...."

At issue was whether or not an employee must expressly request leave under the statute in order to invoke the protections of the MPLA or if giving notice of a qualifying reason for leave was sufficient.

Because the plain language of the act did not specify the terms by which leave must be requested, the court stated "assuming the statute is ambiguous due to silence as to the mechanism by which an employee is entitled to the protections of the statute, we determine the intent of the Legislature by other means."

In its decision, the court noted that in general, a statute is interpreted liberally if it is "remedial in nature."

The court concluded that "[i]n construing the MPLA liberally, an employee should be entitled to the protections of the Act when she informs her employer of a qualifying reason for the needed leave and is otherwise eligible for such leave." Expressly invoking the statute is not required for an employee to receive the protections of the MPLA.

Minnesota Statutes, sections 204C.20, subd. 1, and 206.86, subd. 1

Subject: Elections; counting the number of ballots.

Court Opinion: *In re Petition regarding 2010 Gubernatorial Election*, 793 N.W.2d 256 (Minn. 2010). (NO. A10-2022)

Applicable text of section 204C.20, subdivision 1:

> The election judges shall determine the number of ballots to be counted by adding the number of return envelopes from accepted absentee ballots to the number of signed voter's certificates, or to the number of names entered in the election register.

Applicable text of section 206.86, subdivision 1:

> In precincts where an electronic voting system is used, as soon as the polls are closed the election judges shall secure the voting systems against further voting. They shall then open the ballot box and count the number of ballot cards or envelopes containing ballot cards that have been cast to determine that the number of ballot cards does not exceed the number of voters shown on the election register or registration file.

Statutory Deficiency: Section 204C.20, subdivision 1, and section 206.86, subdivision 1, cannot be implemented because each section refers to election documents no longer used at the polling place.

Discussion: An individual seeking to vote is required to sign a polling place roster under section 204C.10, paragraph (a). After the individual signs the roster, the election judge provides the voter a "voter receipt" as required under section 204C.10, paragraph (c). The individual then exchanges the voter receipt for a ballot.

After the close of polls on election day, section 204C.20, subdivision 1, requires election judges to "determine the number of ballots to be counted" based on "the number of signed *voter's certificates*" or "the number of names entered in the *election register*."

Section 206.86, subdivision 1, provides the process where an electronic voting system is used. As soon as the polls close, the election judges shall "open the ballot box and count the number of ballot cards or envelopes containing ballot cards that have been cast to determine that the number of ballot cards does not exceed the number of voters shown on the *election register* or *registration file*."

The court explained that "*voter's certificates*," "*election registers*," and "*registration files"* are documents "no longer used at the polling place in Minnesota elections." And, "[a] statute that cannot be complied with because it refers to nonexistent documents is, by its very terms, ambiguous."

According to the court, the legislative intent of sections 204C.20, subdivision 1, and 206.86, subdivision 1, "appears to be to design a process that would guard against more ballots being counted than eligible voters voting." Further, the court demonstrated that the former law on the subject "has consistently permitted reference to the election judge's indicator of voter eligibility and right to receive a ballot as a basis for determining the number of ballots to be counted."

The court concluded that the "[l]egislature intends the processes prescribed by" sections 204C.20, subdivision 1, and 206.86, subdivision 1, "to be based on either the number of signatures on polling place rosters, or on the number of voter's receipts."

Minnesota Statutes, section 260C.415, subdivision 1

Subject: Juvenile courts; appeals.

Court Opinion: *In the Matter of the Welfare of the Child of T.L.M. and M.J.S.,* 804 N.W.2d 374 (Minn. App. 2011). (NO. A11-1323)

Applicable text of section 260C.415:

> An appeal may be taken by the aggrieved person from a final order of the juvenile court affecting a substantial right of the aggrieved person, including but not limited to an order adjudging a child to be in need of protection or services, neglected and in foster care. The appeal shall be taken within 30 days of the filing of the appealable order. The court administrator shall notify the person having legal custody of the minor of the appeal. Failure to notify the person having legal custody of the minor shall not affect the jurisdiction of the appellate court. The order of the juvenile court shall stand, pending the determination of the appeal, but the reviewing court may in its discretion and upon application stay the order.

Statutory Deficiency: The timing requirement to file an appeal under section 260C.415 conflicts with the timing requirement found in the Minnesota Rules of Juvenile Protection Procedure.

Discussion: An appeal of a final order of the juvenile court affecting a substantial right of an aggrieved person must be made within 30 days of the order pursuant to section 260C.415. Minnesota Rules of Juvenile Protection Procedure, rule 47.02, subdivision 2, requires the appeal to be made within 20 days and therefore conflicts with section 260C.415.

The court noted that the Minnesota Supreme Court has held that "the rules of the court displace inconsistent statutes with respect to matters of court procedure. (see, e.g. *State v. Losh*, 721 N.W.2d 886, 891-92 (Minn. 2006)). This principle has been applied to juvenile protection cases. The court further explained that the "rationale for these holdings is that, due to the doctrine of separation of powers, the supreme court has primary responsibility to regulate matters of trial and appellate procedure."

Therefore, the court concluded that "the 20-day appeal period of Minn. R. Juv. Prot. P. 47.02, subd. 2, applies, and the 30-day appeal period of Minn. Stat. § 260C.415, subd. 1, does not apply."

Minnesota Statutes, section 302A.751, subdivision 1

Subject: Business corporations; shareholder rights.

Court Opinion: *U.S. Bank N.A. v. Cold Spring Granite Co.*, 802 N.W.2d 363, (Minn. 2011). (NO. A10-0252)

Applicable text of section 302A.751, subdivision 1:

A court may grant any equitable relief it deems just and reasonable in the circumstances or may dissolve a corporation and liquidate its assets and business:....

(b) In an action by a shareholder when it is established that:....

(3) the directors or those in control of the corporation have acted in a manner unfairly prejudicial toward one or more shareholders in their capacities as shareholders or directors of a corporation that is not a publicly held corporation, or as officers or employees of a closely held corporation;....

Statutory Deficiency: The term "unfairly prejudicial" in section 302A.751, subdivision 1, is not explicitly defined and is therefore unclear.

Discussion: The court noted previous court of appeals decisions in which "unfairly prejudicial" conduct was defined as conduct that "frustrates the reasonable expectations of shareholders."

In addition, the court looked "to other statutes upon the same or similar subjects" to provide further guidance. Section 302A.751, subdivision 3a, relating to closely held corporations, "indicates that unfairly prejudicial conduct includes conduct that violates the reasonable expectations of the minority shareholder."

Finally, the court considered that courts in other jurisdictions have equated unfairly prejudicial conduct as a violation of reasonable expectations.

Therefore, the court concluded "that in the context of a reverse stock split, unfairly prejudicial conduct under Minn. Stat. § 302A.751 includes conduct that violates the reasonable expectations of the shareholder."

Minnesota Statutes, section 353.01, subdivision 10

Subject: Retirement; determining salary.

Court Opinion: *In the Matter of the PERA Salary Determinations Affecting Retired and Active Employees of the City of Duluth*, 820 N.W.2d 563 (Minn. App. 2012). (NO. A11-1330)

Applicable text of section 353.01, subdivision 10:

(a) Subject to the limitations of section 356.611, "salary" means:

(1) the periodic compensation of a public employee, before deductions for deferred compensation, supplemental retirement plans, or other voluntary salary reduction programs, and also means "wages" and includes net income from fees;....

Statutory Deficiency: The definition of "salary" in section 353.01, subdivision 10, is ambiguous as applied to "salary-supplement payments."

Discussion: Section 353.01, subdivision 10, defines the term "salary." A municipal employee's salary is used to calculate "contributions to and benefits from retirement plans managed by" the Public Employees Retirement Association (PERA).

The court explained that the statutory definition of "salary" is ambiguous as applied to compensation made to a municipal employee in the form of "deferred compensation" payments, which the court referred to as "salary-supplement payments."

Since the court found ambiguity as to whether or not "salary-supplement payments" should be included by PERA in the definition of "salary," PERA's interpretation and resulting enforcement of the ambiguous statute is only valid if the interpretation was longstanding.

The court held that PERA's decision to interpret the definition of salary to not include salary-supplement payments was an interpretive rule that is invalid because the board's interpretation was not a longstanding interpretation of the ambiguous statute.

Minnesota Statutes, section 462.357, subdivision 1e, paragraph (a), clause (2)

Subject: Property; rebuilding nonconforming property.

Court Opinion: *Ortell v. City of Nowthen*, 814 N.W.2d 40 (Minn. App. 2012). (NO. A11-1155)

Applicable text of section 462.357, subdivision 1e:

> Except as otherwise provided by law, any nonconformity, including the lawful use or occupation of land or premises existing at the time of the adoption of an additional control under this chapter, may be continued, including through repair, replacement, restoration, maintenance, or improvement, but not including expansion, unless:
>
> (1) the nonconformity or occupancy is discontinued for a period of more than one year; or
>
> (2) any nonconforming use is destroyed by fire or other peril to the extent of greater than 50 percent of its estimated market value, as indicated in the records of the county assessor at the time of damage, and no building permit has been applied for within 180 days of when the property is damaged. In this case, a municipality may impose reasonable conditions upon a zoning or building permit in order to mitigate any newly created impact on adjacent property or water body.

Statutory Deficiency: Section 462.357, subdivision 1e, paragraph (a), clause (2), is ambiguous.

Discussion: Under section 462.357, subdivision 1e, a nonconformity may be continued through "repair, replacement, restoration, maintenance, or improvement" unless one of the conditions in section 462.357, subdivision 1e, paragraph (a), clause (1) or (2), exists.

The court found that section 462.357, subdivision 1e, paragraph (a), clause (2), was ambiguous because it did not clearly define when a property owner was able to rebuild a nonconformity and under what circumstances a municipality could impose reasonable conditions.

In order to resolve the ambiguity, the court considered legislative intent and noted two controlling considerations. First, because the legislature permits a municipality to adopt and enforce laws that limit nonconformities, allowing a nonconformity not to lapse is an "absurd result." "[T]he legislature would not give a municipality the power to regulate nonconformities and then block their ability to regulate." Second, in seeking to give effect to all provisions of statute, the court looked at the first clause of the paragraph which provides that a nonconformity ceases if it is discontinued for a period of more than one year. The court found that this clause would have "no meaning" if a property owner could apply at any time for a building permit.

Thus, the court determined that a nonconformity may continue if the property owner applies for a building permit within 180 days of the damage, subject to the reasonable conditions of the municipality. If a building permit is not applied for within 180 days of the damage, the nonconformity ends.

Minnesota Statutes, section 518.58, subdivision 2

Subject: Marriage dissolution; division of non-marital property.

Court Opinion: *Angell v. Angell,* 791 N.W.2d 530 (Minn. 2010). (NO. A09-349)

Applicable text of section 518.58, subdivision 2:

> If the court finds that either spouse's resources or property, including the spouse's portion of the marital property as defined in section 518.003, subdivision 3b, are so inadequate as to work an unfair hardship, considering all relevant circumstances, the court may, in addition to the marital property, apportion up to one-half of the property otherwise excluded under section 518.003, subdivision 3b, clauses (a) to (d), to prevent the unfair hardship.

Statutory Deficiency: The federal anti-attachment statutes protecting certain federal military death benefits preempt section 518.58, subdivision 2, to the extent section 518.58 authorizes a district court to award a beneficiary's spouse a portion of federal military death benefits as divisible non-marital property.

Discussion: Federal military death benefits available both under the Servicemembers' Group Life Insurance program, authorized by 38 U.S.C. §§ 1965-80A (2006) and regulated under 38 C.F.R. Pt. 9 (2010), and under 10 U.S.C. § 1475 (2000), contain anti-attachment provisions, which bar "the diversion of [the] military death benefits from the designated beneficiaries of those benefits."

Section 518.58, subdivision 2, authorizes a court to award a spouse a portion of the other spouse's non-marital property in order to prevent an unfair hardship that may have resulted from one spouse having inadequate resources or property compared to the other spouse.

The court determined that a district court's award of a portion of federal military death benefits as divisible non-marital property under section 518.58, subdivision 2, to a beneficiary's spouse directly conflicts with the federal anti-attachment provisions protecting those benefits. Therefore, federal anti-attachment provisions preempt district court orders apportioning federal military death benefits to a non-beneficiary spouse under section 518.58, subdivision 2.

Minnesota Statutes, section 595.02, subdivision 1, paragraph (a)

Subject: Witnesses; marital privilege.

Court Opinion: *State v. Zais,* 790 N.W.2d 853 (Minn. App. 2010). (NO. A10-1020)

Applicable text of section 595.02, subd. 1, paragraph (a):

> A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during the marriage. This exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other…

Statutory Deficiency: The phrase "a crime committed by one against the other" is ambiguous as applied to a prosecution of the crime of disorderly conduct.

Discussion: In analyzing whether the crime of disorderly conduct applies to the marital testimonial privilege, the court sought to balance two conflicting goals: "protecting the marital relationship through application of the privilege and ensuring that our judicial processes determine the truth."

The court first determined that the crime of disorderly conduct can be committed against an individual or against the public in general. As such, disorderly conduct may be considered as either a private offense or a public offense.

Second, the phrase "crime committed by one against the other" is broad language that does not necessarily require a "personal injury" to "trigger the exception to marital privilege."

Third, the court noted that when determining whether a crime is a "crime against a person" the Minnesota Supreme Court has repeatedly looked to "the substance of the crime and the underlying conduct" rather than the existence of personal injury.

Fourth, the court found that other jurisdictions have interpreted "committed by one against the other" to include "property offenses with no risk of physical harm."

The court concluded that the exception to the marital testimonial privilege "applies to a prosecution for disorderly conduct if the underlying conduct was directed at and adversely affected or endangered the testifying spouse."

Minnesota Statutes, section 604.02, subdivision 1

Subject: Civil liability; apportionment of damages among multiple tortfeasors.

Court Opinion: *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68 (Minn. 2012). (NO. A09-1335)

Applicable text of section 604.02, subdivision 1:

> When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:
>
> (1) a person whose fault is greater than 50 percent;
>
> (2) two or more persons who act in a common scheme or plan that results in injury;
>
> (3) a person who commits an intentional tort; or
>
> (4) a person whose liability arises under chapters 18B – pesticide control, 115 – water pollution control, 115A – waste management, 115B – environmental response and liability, 115C – leaking underground storage tanks, and 299J – pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01…

Statutory Deficiency: The phrase "when two or more persons are severally liable" in section 604.02, subdivision 1, is ambiguous to the extent it is unclear whether or to what extent the Legislature retained the common law doctrines of several liability and joint and several liability in cases involving multiple tortfeasors.

Discussion: Section 604.02 "was intended to modify the common law rule of joint and several liability in Minnesota." However, the language of section "604.02 does not express an intent to modify the common law meaning of 'several liability' or 'joint and several liability.'" Thus, the court concluded "the Legislature intended to adopt the special meaning those phrases acquired at common law." The court was also unable to discern any intent to limit the word "persons" to only the parties to a civil action. Instead, it determined "persons" must mean all parties to the tortious transaction—consistent with the common law convention.

The court also noted that the statute does not express an intent to modify the common law rule that liability is created at the time the tort is committed. As a consequence, several liability is determined at the time the tort is committed, and a severally liable defendant is responsible for his or her equitable share of an award.

"The legislative history that predates the 2003 amendments to section 604.02, subdivision 1, spans more than twenty years and provides an unbroken chain of legislative intent to limit joint and several liability in Minnesota." Prior to 2003, the statute provided for several liability proportionate to each tortfeasor's individual fault, but joint and several liability between all tortfeasors for the damages as a whole. The 2003 amendments, however, "eliminated the blanket exception that 'each is jointly and severally liable for the whole award' and substituted four specific exceptions." Therefore, the court concluded the statute clearly indicates the Legislature's intent to "limit joint and several liability to the four circumstances enumerated in the exceptions clause, and to apply the rule of several liability in all other circumstances."

Ultimately, the court held that "persons" includes "all 'parties to the transaction,' and therefore section 604.02, subdivision 1, applies when a jury apportions fault between a sole defendant and a nonparty tortfeasor, and limits the amount collectible from the defendant to its percentage share of the fault assigned by the jury."

Minnesota Statutes, section 609.221, subdivision 2, paragraph (b)

Subject: Criminal penalties; eligibility for supervised release.

Court Opinion: *State v. Leathers*, 799 N.W.2d 606 (Minn. 2011). (NO. A09-0926, A09-0934)

Applicable text of section 609.221, subdivision 2, paragraph (b):

> (b) A person convicted of assaulting a peace officer or correctional employee as described in paragraph (a) shall be committed to the commissioner of corrections for not less than ten years, nor more than 20 years. A defendant convicted and sentenced as required by this paragraph is not eligible for probation, parole, discharge, work release, or supervised release, until that person has served the full term of imprisonment as provided by law, notwithstanding the provisions of sections 241.26, 242.19, 243.05, 244.04, 609.12, and 609.135.

Statutory Deficiency: The phrase "full term of imprisonment" in section 609.221, subdivision 2, paragraph (b), is ambiguous.

Discussion: Section 609.221, subdivision 2, paragraph (b), prohibits a person convicted of assaulting a peace officer from becoming eligible for supervised release until that person has served the full term of imprisonment.

Because the phrase "full term of imprisonment" was subject to two reasonable interpretations, the court looked to the canons of statutory construction to determine its meaning and considered the doctrines of *in pari materia* and the rule of lenity.

First, the doctrine of *in pari materia* "allows two statutes with common purposes and subject matter to be construed together." The court determined that chapters 244 and 609 were related in subject matter and thus considered the definition in section 244.01, subdivision 8, of "term of imprisonment" as "two-thirds of an offender's executed sentence."

Second, the court applied the rule of lenity which provides that when the language of a criminal law is ambiguous, the court construes it narrowly.

The court ultimately concluded that for the purposes of section 609.221, subdivision 2, paragraph (b), "full term of imprisonment" means "two-thirds of an offender's executed sentence."

Minnesota Statutes, section 609.2232

Subject: Crimes; inmate of state correctional facility.

Court Opinion: *Johnson v. State,* 820 N.W.2d 24 (Minn. App. 2012). (NO. A11-2226)

Applicable text of section 609.2232:

> If an inmate of a state correctional facility is convicted of violating section 609.221, 609.222, 609.223, 609.2231, or 609.224, while confined in the facility, the sentence imposed for the assault shall be executed and run consecutively to any unexpired portion of the offender's earlier sentence.

Statutory Deficiency: The phrase "an inmate of a state correctional facility" in section 609.2232 is ambiguous when applied to a person serving a sentence in a private correctional facility.

Discussion: Chapter 609 does not provide definitions for "inmate" or "state correctional facility." The court concluded that "inmate" and "state correctional facility" were ambiguous in the context of section 609.2232 as applied to a person serving a sentence in a private correctional facility. In order to resolve the ambiguity, the court utilized several canons of statutory construction.

First, the court found that section 609.2232 and chapter 244 (relating to criminal sentencing) "have common purposes and subject matter, and the doctrine of *in pari materia* supports construing 'inmate of a state correctional facility' in section 609.2232 consistent with the section 244.01 definitions." Section 244.01, subdivision 2, defines an inmate as "person who is convicted of a felony, is committed to the custody of the commissioner of corrections and is confined in a state correctional facility or released from a state correctional facility pursuant to" work release or furlough. Section 244.01, subdivision 4, defines a correctional facility as "any state facility under the operational authority of the commissioner of corrections."

The court concluded that since the appellant had not been committed to the custody of the commissioner of corrections at the time of his conviction, "he was not an 'inmate' under section 244.01, subdivision 2." And, since a private correctional facility is not "under the operational authority of the commissioner of corrections," the appellant was not incarcerated in a "correctional facility" under section 244.01, subdivision 4. In addition, the court inferred that the legislature was aware of the chapter 244 definitions when drafting section 609.2232, since the chapter 244 definitions existed prior to the enactment of section 609.2232.

Second, the court concluded that the legislature did not intend that section 609.2232 apply to persons in private correctional facilities because the legislature "failed to explicitly reference private facilities" in section 609.2232.

Third, when ambiguity is found in criminal law, the court construes the law narrowly according to the rule of lenity, which holds that ambiguity should be resolved in favor of lenity toward the defendant.

Therefore, based on the court's "inferences of legislative intent, and in light of the rule of lenity," the court concluded that the phrase, "an inmate of a state correctional facility," does not include a person confined in a private correctional facility for purposes of section 609.2232.

Minnesota Statutes, section 609.2241, subdivision 2, clause (2)

Subject: Criminal law; knowing transfer of communicable disease.

Court Opinion: *State v. Rick*, Not reported in N.W.2d, 2012 WL 5752 (Minn. App. 2012). (NO. A12-0058)

Applicable text of section 609.2241, subdivision 2:

> It is a crime, which may be prosecuted under section 609.17, 609.185, 609.19, 609.221, 609.222, 609.223, 609.2231, or 609.224, for a person who knowingly harbors an infectious agent to transfer, if the crime involved: (1) sexual penetration with another person without having first informed the other person that the person has a communicable disease; (2) transfer of blood, sperm, organs, or tissue, except as deemed necessary for medical research or if disclosed on donor screening forms; or (3) sharing nonsterile syringes or needles for the purpose of injecting drugs.

Statutory Deficiency: Section 609.2241, subdivision 2, clause (2), is ambiguous, as applied to sexual penetration resulting in the transfer of sperm.

Discussion: Section 609.2241 governs criminal knowing transfer of communicable disease. While the court acknowledged the legislature "generally intended to prevent the spread of serious communicable disease, [it] found little support for the state's contention that the legislature clearly and unambiguously intended to prevent the spread of disease by criminalizing *informed* sexual penetration between consenting adults." (Emphasis in original.) Had the legislature enacted section 609.2241 solely to protect the public health—and not to criminalize dishonesty with sexual partners about communicable disease only—it would not have required the state to prove the accused had lied to the victim about the disease prior to engaging in sexual penetration in order to convict under subdivision 1.

Further, had the legislature "intended to prevent the spread of communicable disease by criminalizing all conduct that results in the exchange of bodily fluids known to spread communicable disease—including informed sexual penetration—it would have included vaginal secretions in subdivision 2(2), thereby preventing the spread of communicable disease from women to men."

Finally, the court determined that following the state's interpretation would lead to potentially absurd, unintended results; namely, it would criminalize the behavior of one gender based on conduct resulting from identical behavior.

Because the legislature has not clearly indicated its intent to criminalize the spread of communicable disease during informed sexual penetration, the court construed section 609.2241 in the accused's favor under the rule of lenity. Section 609.2241, subdivision 2, clause (2), "does not apply to acts of sexual penetration, including those that result in a transfer of sperm." The court also noted, "[r]esolution of these important policy concerns is a matter for the legislature."

Minnesota Statutes, section 609.505, subdivision 2

Subject: Crimes; falsely reporting a crime.

Court Opinion: *State v. Crawley*, 819 N.W.2d 94 (Minn. 2012). (NO. A09-1795)

Applicable text of section 609.505, subdivision 2:

> Whoever informs, or causes information to be communicated to, a peace officer, whose responsibilities include investigating or reporting police misconduct, that a peace officer, as defined in section 626.84, subdivision 1, paragraph (c), has committed an act of police misconduct, knowing that the information is false, is guilty of a crime and may be sentenced as follows:
>
> (1) up to the maximum provided for a misdemeanor if the false information does not allege a criminal act; or
>
> (2) up to the maximum provided for a gross misdemeanor if the false information alleges a criminal act.

Statutory Deficiency: In order for section 609.505, subdivision 2, to be upheld as constitutional, it must be narrowly construed to refer only to defamation.

Discussion: The court determined that section 609.505, subdivision 2, is overly broad as written as it punishes both a substantial amount of protected speech as well as unprotected speech. The type of unprotected speech prohibited by section 609.505, subdivision 2, according to the court, can be categorized as defamation.

The court explained that the United States Supreme Court "generally allows, and even encourages, state supreme courts to sustain the constitutionality of state statutes regulating speech by construing them narrowly to punish only unprotected speech." Therefore, in order to uphold the constitutionality of section 609.505, subdivision 2, the court construed section 609.505, subdivision 2, narrowly to refer only to defamation.

Minnesota's defamation law has four elements: the plaintiff must show that (1) the defamatory statement is communicated to someone other than the plaintiff; (2) the statement is false; (3) the statement tends to harm the plaintiff's reputation; and (4) the recipient of the false statement reasonably understands it to refer to a specific individual.

The court held that section 609.505, subdivision 2, failed to satisfy the first and fourth elements of defamation. The statute does not "require knowingly false accusations of police misconduct to be communicated to someone other than the plaintiff in order for the speech to be criminal" and the statute does not "require the statement to be 'of and concerning' a specific individual."

Therefore, a person may only be subject to criminal sanctions under section 609.505, subdivision 2, if the state proves that "the person informed a police officer, whose responsibilities include investigating or reporting police misconduct, that another officer has committed an act of police misconduct, knowing that the information is false" and that "the officer receiving the information reasonably understands the information to refer to a specific individual."

Minnesota Statutes, section 626A.35, subdivision 2a

Subject: Crimes; using a mobile tracking device.

Court Opinion: *State v. Hormann,* 805 N.W.2d 883 (Minn. App. 2011). (NO. A10-1872)

Applicable text of section 626A.35:

> Subdivision 1. **In general.** Except as provided in this section, no person may install or use a pen register, trap and trace device, or mobile tracking device without first obtaining a court order under section 626A.37.
>
> Subd. 2a. **Exception.** The prohibition of subdivision 1 does not apply to the use of a mobile tracking device where the consent of the owner of the object to which the mobile tracking device is to be attached has been obtained.

Statutory Deficiency: The term "owner" in section 626A.35, subdivision 2a is ambiguous.

Discussion: The Court of Appeals held that the term "owner" is ambiguous "because, by placing the definite article 'the' prior to the term 'owner,' the statute appears to exclude the possibility that an 'object' may have more than one owner and because it does not address what property interest constitutes ownership for the purposes of the statute."

In order to resolve the ambiguity, the Court of Appeals used the doctrine of *in pari materia,* which 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."

The court concluded that where a tracking device is being applied to a vehicle, section 626A.35, subd. 2a, and sections 168A.01 to 168A.40 (the vehicle title statutes) "are *in pari materia* and may be construed together."

Minnesota Statutes section 168A.01, subdivision 13, defines a vehicle owner as "a person, other than a secured party, having the property in [*sic*] or title to a vehicle. The term includes a person entitled to the use and possession of a vehicle subject to a security interest in another person, but excludes a lessee under a lease not intended as security." The court concluded that, based on the section 168A.01, subdivision 13, definition of owner, "[n]othing limits ownership" of a vehicle "to only one person."

In addition, the court applied the rule of lenity, which "holds that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity toward the defendant." *State v. Stevenson*, 637 N.W.2d 857, 862 (Minn. App. 2002).

Based on the court's construction of the term "owner" and the rule of lenity, the court held that the "statutory exception" established in section 626A.35, subdivision 2a, "applies when the vehicle or object to which the tracking device is attached has multiple owners, one of whom has consented to the tracking device."

Appendix: Court Opinions

STATE OF MINNESOTA

IN COURT OF APPEALS

A11-546

State of Minnesota,

Respondent,

vs.

Donald Carrol Hansen,

Appellant.

Filed November 21, 2011

Reversed

Klaphake, Judge

St. Louis County District Court

File No. 69HI-VB-10-2059

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Brian D. Simonson, St. Louis County Attorney's Office, Hibbing, Minnesota (for respondent)

Nancy A. Roe, Colosimo Patchin Kearney & Brunfelt, Virginia, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Larkin, Judge; and Stauber, Judge.

S Y L L A B U S

Minn. Stat. § 97B.328 (2010), which prohibits a hunter from using bait to hunt deer, does not prohibit a vegetable farmer, who has a normal and accepted agricultural practice of transporting discarded vegetables to a fallow field for use as fertilizer, from hunting within range of the discarded vegetables.

O P I N I O N

KLAPHAKE, Judge

Appellant was convicted of petty misdemeanor deer baiting under Minn. Stat. § 97B.328, for hunting deer on his farm[1] from a deer blind located within the vicinity of a pile of discarded vegetables. Appellant claims that the district court erred by finding him guilty because as a farmer whose use of discarded vegetables as fertilizer is part of a normal and long-standing agricultural practice, his conduct was specifically exempted from the statutory definition of deer baiting.

F A C T S

Appellant Donald Carrol Hansen and his father, Charles Hansen, own a 40-acre farm south of Hibbing, where appellant raises vegetables that he sells wholesale to local grocery stores. He also sells produce at two stands, one located in Virginia, and one located on the farm. He grows an array of consumable vegetables, as well as jack-o-lantern pumpkins that are not sold for consumption. Appellant's tillable land includes three fields that encompass 20 to 22 acres, and he leaves one field fallow each year on a rotating basis, sometimes planting the fallow field with "green manure," such as clover or rye, to improve soil quality. Because the soil on appellant's farm is not very fertile, and consistent with optimal recommended agricultural farming practices, appellant also tills spoiled or unsold vegetables into his fields as green manure.

On November 6, 2010, the opening day of deer hunting in appellant's area, appellant received a petty misdemeanor citation for hunting deer with the aid of bait. He had erected a hunting blind just off his centrally-located fallow field, not far from a pile of pumpkins and other discarded vegetable residue. Appellant challenged the citation, and the case proceeded to trial before the district court.

Appellant was charged with violating Minn. Stat. § 97B.328, subd. 1 (2010), which prohibits a person from hunting deer "with the aid or use of bait or feed" or "in the vicinity of bait or feed if the person knows or has reason to know that bait or feed is present." "Bait or feed" is defined as "grains, fruits, vegetables, nuts, hay or other food that is capable of attracting or enticing deer and that has been placed by a person . . . . *Food that has not been placed by a person and resulting from normal or accepted farming . . . activities . . . is not bait or feed.*" *Id.*, subd. 3 (emphasis added).

The State's Witnesses

Three Department of Natural Resources (DNR) officers testified for the state. Lieutenant Gregory Payton, DNR district supervisor for the Eveleth District, testified that a DNR pilot took aerial photographs of appellant's property on October 19, 2010, and that there were no pumpkins in appellant's fallow field, which was the field closest to appellant's deer blind. Lieutenant Payton testified that on November 4, two days before the opening of deer hunting season, a DNR pilot conducted a second fly-over of appellant's property and took aerial photographs that show a "substantial pile of pumpkins" and "other crop residue" on the field, including corn and other residue Payton could not identify.

On November 6, Lieutenant Payton approached appellant on his property and observed that appellant was hunting from a deer blind located about "50 to 60 yards" from the pumpkin pile. Payton issued appellant the citation and seized his hunting rifle. Payton admitted on cross-examination that appellant's fallow field was too wet for farm machinery on November 6 and that at least one of appellant's planted fields was within shooting range of his deer blind.

DNR conservation officer Donald Bozovsky testified that he drove past appellant's property on November 5, 2010, and observed the pumpkin pile on appellant's fallow field. He stated that he had not seen the pumpkin pile there when he drove by a few days earlier. Bozovsky also testified that he issued a 2009 deer baiting citation to appellant's 14-year-old nephew when the nephew was hunting on appellant's property. Bozovsky stated that the nephew's unlawful behavior on that occasion involved hunting over a pile of pumpkins from an elevated deer stand located about 80 yards from a pumpkin pile on one of appellant's other fields.

Major Roger Tietz, a DNR administrative manager whose responsibilities include enforcement division work, testified that he spoke with appellant at his farm in July and August 2010 about a complaint appellant had made to the DNR about his nephew's 2009 citation. During those conversations, Tietz warned appellant that if he continued to hunt over pumpkins that he had transported into areas where they had not been grown, the DNR would consider it a violation of law. During his visits, Tietz noticed that appellant had "quite a bit of crop damage" and that he was throwing old produce in the fallow field as green manure; he specifically noticed pumpkins and other crop residue in the field in July and August 2010.

During cross-examination, Tietz admitted that in its interpretation of the deer baiting statute, the DNR did not have a "clear understanding of what is a normal agricultural practice." He also admitted that some DNR officers would not have issued a ticket in appellant's situation. On re-cross-examination, he further testified that even if the definition of "agricultural practice" was unclear, the deer baiting statute clearly prohibits a person from placing bait and then hunting over it. The court also questioned Major Tietz and elicited testimony that the DNR permits people to grow "food plots" to attract deer and hunt over them, as long as the food plots are not harvested.

Defense Witnesses

Testifying for the defense were appellant; Kendall Dykhuis, an agronomist and horticulturist farm worker for the University of Minnesota Extension Service; Ann Bozich, a farm employee; and Charles Hansen, appellant's father.

Appellant testified that he did not place pumpkins in the fallow field for purposes of baiting deer. Appellant stated that pumpkins and squash are the last crops he harvests during a planting season. The pumpkins that he grows can be used only as jack-o-lanterns, and then have no economic value after October 31. Appellant further stated that he dumped the pumpkins on the fallow field after Halloween because he intended to spread them on the field as green manure

in early November, but that the field was too wet to permit the use of farm machinery. He also testified that on the date of his citation there were pumpkins in all three of his fields, some rotten or partially eaten.

Appellant further testified that he could shoot a deer in any of his three fields from the location of his deer blind, and that his deer blind was actually closer to the pumpkin patch than it was to the pile of discarded pumpkins in the fallow field.[2]

Kendall Dykhuis testified that he had informed appellant about recommended farming practices over the course of 20 years, including advising appellant about how to use green manure to improve soil fertility. He stated that the use of green manure is "pretty standard in the industry" because "[w]e have very low fertility up here" and because the use of green manure is cost effective and a "best management" practice. Dykhuis also testified that the extension service recommends that harvested crops that are no longer viable in the retail market be used for green manure.

Ann Bozich described the farm's harvest and vegetable selling operation; she testified that there was typically "a lot" of crop damage to the pumpkins caused by deer.

Finally, Charles Hansen testified that he and appellant had maintained green manure practices on the farm since 1987 and that from June through mid-December the farm experienced a constant problem with crop damage caused by foraging deer.

The district court found appellant guilty of deer baiting, noting "that the pumpkins were food, they were placed there by a person[,] and [appellant] was hunting in the vicinity or over it." Appellant was sentenced to a $385 fine that was stayed pending this appeal.

I S S U E

Did the district court err by finding appellant guilty of baiting deer within the meaning of Minn. Stat. § 97B.328?

A N A L Y S I S

Under the Minnesota and United States Constitutions, a person may not be deprived of liberty or property without due process of law. U.S. Const. amends. V, XIV, § 1; Minn. Const. art. I, § 7. "To comport with due process, criminal statutes must provide defendants with 'fair warning' by defining crimes clearly enough that an ordinary person can understand what conduct is prohibited." *State v. Ali*, 775 N.W.2d 914, 921 (Minn. App. 2009) (quoting *State v. Reha*, 483 N.W.2d 688, 690-91 (Minn. 1992)). "The key to the fair-warning requirement is that 'the statute, either standing alone or as construed, [must make] it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* (quoting *United States v. Lanier*, 520 U.S. 259, 267, 117 S. Ct. 1219, 1225 (1997)).

Further, "[b]efore conduct hitherto innocent can be adjudged to have been criminal, the legislature must have defined the crime, and the act in question must *clearly* appear to be within

the prohibitions or requirements of the statute[.]" *State v. Finch*, 37 Minn. 433, 435, 34 N.W. 904, 905 (1887) (emphasis added). This point of law has been more recently stated to require that when a penal statute is ambiguous, it must be "resolved in favor of the criminal defendant in the interest of lenity." *State v. Leathers*, 799 N.W.2d 606, 608 (Minn. 2011); *State v. Holmes*, 778 N.W.2d 336, 339 (Minn. 2010). However, when a criminal statute is ambiguous, the rule of lenity does not require "the narrowest possible interpretation to the statute." *State v. Carufel*, 783 N.W.2d 539, 542 (Minn. 2010) (quotation omitted).

This court reviews questions of statutory interpretation de novo. *State v. Heiges*, ___ N.W.2d ___, 2011 WL 3586167, at *12 (Minn. Aug. 17, 2011); *State v. Peck*, 773 N.W.2d 768, 771 (Minn. 2009). "When interpreting a statute we must give the statute's words and phrases their plain and ordinary meaning." *Id.* at 772; *State v. Reese*, 692 N.W.2d 736, 743 (Minn. 2005) (stating that reviewing court interprets a criminal statute "[b]ased on the plain language of the statute and our previous decisions interpreting the statute"). The rule of lenity does not apply if statutory language is clear and, under ordinary circumstances, if 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." Minn. Stat. § 645.16 (2010); *but see State v. Wukawitz*, 662 N.W.2d 517, 525 (Minn. 2003) (stating that even when a statute has a plain meaning, an appellate court will further construe the statute if it "conclude[s] that the plain meaning leads to absurd or unreasonable results that depart from the purpose of the statute").

No appellate court of this state has interpreted Minn. Stat. § 97B.328, or otherwise defined how this statute may limit a farmer's right to hunt deer on his own property when crops grown and transported on the property meet the definition of deer bait. Under these circumstances, this court must determine whether the statute clearly prohibits appellant's conduct.

The district court found appellant guilty because it interpreted the deer baiting statute to require both that the food was not "placed by a person" and that it did not "result[] from normal or accepted farming . . . activities" in order for appellant's hunting conduct to be excused. Because appellant admittedly placed the pumpkins and other vegetables on his fallow field, he was found guilty even though he provided strong evidence that his placement of the pumpkins was the result of a normal and accepted farming practice that he had engaged in throughout the growing season.

Our threshold question is whether Minn. Stat. § 97B.328 is ambiguous. *State v. Vue*, 797 N.W.2d 5, 16-17 (Minn. 2011). "A statute is ambiguous if its language is subject to more than one reasonable interpretation." *Peck*, 773 N.W.2d at 772. When the statute is read in full, several of the statute's words and phrases are unclear in their application to farmers hunting on their own property. As written, the statute prohibits a farmer from hunting "in the vicinity" of food capable of enticing deer when the food was "placed" by the farmer.

Neither "in the vicinity" nor "placed" is defined in the statute, however, and both are subject to a variety of reasonable interpretations. "Vicinity" describes a proximal relationship between two items, but it lacks specificity and is therefore ambiguous. *See The American*

Heritage Dictionary of the English Language 1990 (3rd ed. 1992) (defining "vicinity" as "[t]he state of being near in space or relationship; proximity"). "Vicinity" could mean within shooting range of a hunter, which is also a variable distance due to choice of weapon or skill of the hunter, or it could refer to the distance from which "placed" food would attract deer. In appellant's case, photos and trial testimony established that appellant's farm was teeming with pumpkins and other vegetables because appellant is a vegetable farmer—vegetables were located in the pile that was the source of appellant's citation, as well as in visible piles located near outbuildings and machinery, and in the form of vegetable pieces that had been partially tilled into the ground. The word "vicinity" is ambiguous as used in Minn. Stat. § 97B.328.

We next turn to the word "placed," which, although it has numerous dictionary definitions, can most closely be defined as "[t]o put in or as if in a particular place or position; set." *American Heritage Dictionary* at 1382. The definition of "placed" necessarily includes a volitional aspect that is inconsistent with a farmer's routine activities, which may inadvertently attract deer by "placement" of harvested or discarded crops. Conceivably, this restriction could apply to any movement of crops due to human volition, including harvesting corn with large machinery or moving pumpkins from the field where they were grown to another place on a farm for storage, further processing, or another farm-related purpose. Here, under the language of the statute, appellant was prohibited from hunting within the vicinity of *any* crops he had transported on his own land. The word "placed" is also ambiguous within the factual context presented here.

Further, as applied to farmers, by exempting from the statutory prohibition "[f]ood that has not been placed by a person and resulting from normal or accepted farming . . . activities," the statute apparently gives with one hand and takes with the other. By including the "normal or accepted farming activities" language in the list of activities that do not meet the definition of deer bait, the legislature expressed an intention to make a statutory exception for farmers who transport their crops as part of carrying out their livelihoods. However, farmers meet the definition of deer baiting during harvest and at other times when they hunt within the "vicinity" of crops that constitute deer food that has been "placed" by them. Thus, the phrases "food . . . placed by a person" and "food . . . resulting from normal or accepted farming . . . activities" are inconsistent with each other, and the juxtaposition of these two phrases creates an ambiguity in the statute.

Because the statute is ambiguous, we turn to the canons of construction to discern the intent of the legislature. Minn. Stat. § 645.16. We may consider the occasion and necessity for the law, as well as "the mischief to be remedied." *Id.* Further, in ascertaining legislative intent, we presume that the legislature did not intend an absurd result. Minn. Stat. § 645.17 (1) (2010). Here, to construe the deer baiting statute as urged by respondent would so restrict the right of a farmer who hunts on his own property that the farmer's right to hunt would not exist. This is an absurd result that the legislature certainly did not intend. With regard to farmers who hunt on their own property, the "mischief to be remedied" is to prohibit farmers from using bait to entice deer for hunting purposes. Until the statute can distinguish between innocent conduct related to farming and unlawful baiting of deer, the statute does not effectuate the intent of the legislature.

D E C I S I O N

Because Minn. Stat. § 97B.328 is ambiguous as applied to appellant's factual scenario, we conclude that appellant's conviction violates due process. We therefore apply the rule of lenity and reverse appellant's conviction.

Reversed.

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[1] It is uncontested that appellant is a farmer and that his land is designated as agricultural land in Minnesota for tax purposes.

[2] Appellant also testified that between 20 and 25 deer forage on the farm regularly and cause between $5,000 and $7,000 in annual crop damage, and that until six or seven years earlier, the DNR had issued him permits to shoot as many as ten deer by any means to facilitate thinning of the herd. He also stated that he lost roughly 40% of the pumpkin harvest due to crop damage or rotting.

STATE OF MINNESOTA

IN COURT OF APPEALS

A11-1273

The County of Dakota,

Respondent,

vs.

George W. Cameron, IV,

Appellant.

Filed March 26, 2012

Affirmed

Larkin, Judge

Dakota County District Court

File No. 19HA-CV-09-3756

James C. Backstrom, Dakota County Attorney, Michael R. Ring, Assistant County Attorney, Hastings, Minnesota (for respondent)

Daniel Biersdorf, Edward Kelly Keady, Biersdorf & Associates, P.A., Minneapolis, Minnesota (for appellant)

Thomas L. Grundhoefer, Susan Naughton, League of Minnesota Cities, St. Paul, Minnesota (for amicus curiae League of Minnesota Cities)

Jon W. Morphew, Kirk A. Schnitker, Schnitker Law Office, P.A., Spring Lake Park, Minnesota; and

Leland J. Frankman, Harry A. Frankman, Minneapolis, Minnesota; and

Bradley J. Gunn, Malkerson, Gunn & Martin, LLP, Minneapolis, Minnesota (for amicus curiae Minnesota Eminent Domain Institute)

Considered and decided by Peterson, Presiding Judge; Larkin, Judge; and Collins, Judge.*

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

S Y L L A B U S

1. The terms "comparable property" and "community" in Minnesota's eminent-domain minimum-compensation statute, Minn. Stat. § 117.187 (2010), are defined according to their common usage.

2. A determination of damages under Minn. Stat. § 117.187 is based on traditional market-value analysis of comparable properties in the community.

O P I N I O N

LARKIN, Judge

In this eminent-domain proceeding, appellant challenges the district court's award of damages under Minnesota's minimum-compensation statute, Minn. Stat. § 117.187. Appellant argues that the district court misconstrued section 117.187 in determining minimum compensation for the taking of his property and that the district court erred in refusing to award him all of the attorney fees that he requested. Because the district court properly construed section 117.187 and awarded appellant just compensation, and because the district court did not err in determining a reasonable award of attorney fees, we affirm.

FACTS

In 2008, respondent the County of Dakota commenced a condemnation action to acquire various properties in Inver Grove Heights and South St. Paul to provide a right-of-way for reconstruction of County State-Aid Highway 56, also known as Concord Boulevard. One of the properties was owned by appellant George W. Cameron IV. Cameron's property was located at 6566 Concord Boulevard East in Inver Grove Heights (the taken property). The taken property consisted of approximately 13,000 square feet of land and a building that was constructed in 1885. The building had 4,444 square feet of space on the ground level, and a 1,756-square-foot, unfinished basement. The effective date of taking was July 25, 2008.

Cameron is the sole shareholder of Cameron's Warehouse Liquors Inc. Prior to the taking, Cameron's Warehouse Liquors occupied the taken property and sold beer, wine, and liquor under a liquor license issued by the city of Inver Grove Heights. According to Cameron, Cameron's Warehouse Liquors' trade area was on the west side of the Mississippi River within a three-mile radius of the property. After the taking, Cameron's Warehouse Liquors relocated to a temporary location. Although sales have increased at the new location, Cameron's Warehouse Liquors is losing money because expenses are significantly greater at the new location.

The county initially offered Cameron $560,400 for the taken property based on a real-estate appraisal. Cameron rejected the offer. The parties were unable to agree on an award of damages, and the dispute was heard by three court-appointed condemnation commissioners on April 28-30, 2009. At the hearing, the county's appraiser increased his estimate of the fair market value of the taken property to $580,400. The commissioners ultimately awarded Cameron $655,000 in damages. Cameron appealed the commissioners' decision to the district court.

At the ensuing evidentiary hearing in district court, Cameron argued that he was entitled to minimum compensation under Minn. Stat. § 117.187, that is, an amount of money that would enable him to purchase a comparable property in the community. But Cameron's expert testified that no comparable property was available for purchase in the community. Cameron therefore argued that he should be awarded funds sufficient to purchase vacant land and construct a new building comparable to the building on the taken property. Cameron presented a detailed estimate showing that it would cost $2,175,000 to purchase the land and construct a comparable building. Cameron requested damages in that amount.

The county's expert offered evidence regarding his minimum-compensation analysis, which was based on the value of a recently sold liquor store located on South Robert Trail in Inver Grove Heights. The expert opined that the South Robert Trail property was comparable to the taken property. The South Robert Trail property sold for $505,000 in June 2008. Of that amount, $155,000 was compensation for the business and the remaining $350,000 was compensation for the building and land. The expert concluded that because Cameron's property had appraised for more than the South Robert Trail sale price, Cameron was not entitled to minimum compensation and should merely receive the appraised value of his property. Although the county did not advocate a specific amount of compensation at the hearing, it opposed Cameron's request for damages in the amount necessary to purchase land and construct a new building.

The district court determined that the South Robert Trail property was comparable to the taken property. Next, the district court engaged in a market-value analysis based on the sale price of the South Robert Trail property and concluded that Cameron was entitled to $997,055.84 as just compensation. Later, the district court issued an amended order, awarding Cameron $161,964.50 in reasonable attorney fees and $62,006.63 in litigation expenses, appraisal fees, expert fees, and other related costs. Cameron had requested $217,991.45 in attorney fees, which was the actual amount of fees incurred under his attorney-fee agreement. This appeal follows, in which Cameron challenges the damages and attorney-fee awards.

ISSUES

I. Is Minn. Stat. § 117.187 ambiguous and therefore properly subject to judicial interpretation?

II. Did the district court err in its construction and application of the term "comparable property" under Minn. Stat. § 117.187?

III. Did the district court err in its construction and application of the term "community" under Minn. Stat. § 117.187?

IV. Did the district court err in using a market-value analysis to determine a minimum-compensation award under Minn. Stat. § 117.187?

V. Is the district court's award of $997,055.84 just compensation?

VI. Did the district court err in awarding attorney fees?

ANALYSIS

I.

In this case of first impression, we are asked to review the district court's award of minimum compensation under Minn. Stat. § 117.187 in an eminent-domain proceeding. Minn. Stat. § 117.187 states that:

> When an owner must relocate, the amount of damages payable, at a minimum, must be sufficient for an owner to purchase a comparable property in the community and not less than the condemning authority's payment or deposit under section 117.042, to the extent that the damages will not be duplicated in the compensation otherwise awarded to the owner of the property.

The statute sets forth a measure of damages that must be utilized when an owner must relocate. "Owner" is defined as "the person or entity that holds fee title to the property." Minn. Stat. § 117.187. The parties agree that the minimum-compensation statute is applicable in this case because Cameron was the fee owner of the taken property, he suffered a total taking, and he had to relocate his business to continue its operation. Thus, the damages payable must, at a minimum, be sufficient for Cameron "to purchase a comparable property in the community." *Id.*

The parties disagree regarding how minimum compensation is determined under the statute, arguing that the statute is ambiguous and urging this court to resolve the ambiguity through statutory interpretation. The county asserts that the statute "is so vague and ambiguous that reasonably minded persons cannot agree upon its meaning." The district court recognized the purported ambiguity, observing that key terms were left undefined and understandably stating that it hoped "the legislature will revise the minimum-compensation statute to more directly and clearly define the concepts of 'purchase,' 'comparable property,' and 'in the community.'"

We agree that the minimum-compensation statute leaves many questions unanswered, including when an owner must relocate; whether a relocating owner must actually purchase a property to receive minimum-compensation; how "comparable property" should be defined; whether a "comparable property" may be a recently sold property or must be one that is available for purchase; how "community" should be defined; whether minimum compensation should be calculated using a traditional market-value analysis; and, if there is no "comparable property" in

the community, whether damages should be based on the amount that it would cost to construct an identical property in the community.

The parties have presented more than one reasonable interpretation of the minimum-compensation statute in an attempt to answer these questions. We therefore conclude that the statute is ambiguous and that statutory interpretation is appropriate. *See Brayton v. Pawlenty*, 781 N.W.2d 357, 363 (Minn. 2010) ("[I]f a statute is ambiguous, [appellate courts] apply canons of construction to discern the Legislature's intent."); *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) ("[An appellate court] first look[s] 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." (quotation and citation omitted)). But we limit our de novo interpretation to only those issues that are necessary to our review of the district court's damages award in this case: the definition of "comparable property," the definition of "community," and the damages-calculation method. *See Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007) ("Statutory construction is . . . a legal issue reviewed de novo.").

II.

We begin by defining the term "comparable property" under the minimum-compensation statute. Cameron argues that a comparable property "must be a specific, existent property, which the displaced owner can actually purchase, as opposed to a non-existent hypothetical property." Cameron contends that the legislature intended that the displaced owner would be able to relocate to the comparable property and that "[s]uch an intent can only be fulfilled when an actual property is identified which will accommodate the relocation." Cameron therefore argues that "a comparable property cannot be a property that has already been sold as of the date of taking."

Cameron's argument is not persuasive for several reasons. We first observe that Cameron's interpretation is inconsistent with his assertion that a displaced owner is not required to purchase a substitute property in order to obtain minimum-compensation damages. Cameron asserts that "an owner can keep the fair market compensation . . . and do nothing." Assuming, as Cameron argues, that he is not required to purchase a replacement property to obtain damages under the minimum-compensation statute,[1] there is no need to limit the universe of comparable properties to only those properties that are available for purchase.

We next observe that Cameron's proposed definition of "comparable property" is based on his assertion that the legislature intended to guarantee a displaced business owner's purchase of a replacement property that would allow continued operation of his or her business. We reject this construction for two reasons. First, although Cameron generally alleges that an anti-government-taking atmosphere followed the United States Supreme Court's decision in *Kelo v. City of New London, Conn.*, 545 U.S. 469, 489-90, 125 S. Ct. 2655, 2668 (2005) (holding that the city's exercise of eminent-domain power in furtherance of an economic development plan satisfied the constitutional "public use" requirement), and suggests that the 2006 passage of the minimum-compensation statute was a result of that atmosphere, he does not cite to anything in the legislative record or history of the minimum-compensation statute to support his assertion

regarding legislative intent. Nor does our thorough review of the legislative history of the minimum-compensation statute reveal a legislative intent to guarantee the purchase of a replacement property, or, as Cameron argues, the continued operation of a displaced business. In fact, the legislature's concurrent passage of what is now Minn. Stat. § 117.186 (2010), which provides for loss-of-going-concern[2] compensation when a business or trade is destroyed by a taking, indicates that the legislature recognized that relocation and continuation of a displaced business may not always be possible. In sum, our review of the legislative history of the minimum-compensation statute, combined with the legislature's contemporaneous enactment of Minn. Stat. § 117.186, reveals that, although the legislature intended to increase the damages award to enable a displaced owner of property to purchase a comparable property in the community, the legislature nevertheless recognized that relocation may not be possible. *See* Minn. Stat. § 117.186; *see also Schroedl*, 616 N.W.2d at 277 ("We are to read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations.").

Cameron's proposed construction of the term "comparable property" is also unpersuasive because it is unreasonable. *See* Minn. Stat. § 645.17 (2010) (stating that, in ascertaining legislative intent, courts presume that the legislature does not intend results that are "absurd, impossible of execution, or unreasonable"); *Coop. Power Ass'n v. Aasand*, 288 N.W.2d 697, 701 (Minn. 1980) (stating that, in order to survive review, "a requirement of reasonableness must be read into" the terms of a statute). There are numerous reasons why the purchase of a replacement property may not be possible even though a comparable property is available for purchase in the community. Although the legislature may reasonably require an award of damages sufficient to purchase a property—assuming that a purchase can be finalized—the legislature cannot reasonably guarantee consummation of the purchase. And because the legislature cannot guarantee completion of a purchase, we reject Cameron's argument that a comparable property must be an existing property that is available for purchase. We instead define "comparable property" according to its common usage.

When a word or phrase is undefined we follow the general rule that "words and phrases are construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning, or are defined in chapter [645], are construed according to such special meaning or their definition." Minn. Stat. § 645.08(1) (2010). "Comparable" is commonly defined as "similar or equivalent." *American Heritage Dictionary of the English Language* 384 (3rd ed. 1992). And the term "comparable property" is commonly used in other contexts. For example, when utilizing the comparable-sales approach to real-estate valuation "in estimating and determining the value of lands for the purpose of taxation," the appraiser must "consider and give due weight to lands which are comparable in character, quality, and location, to the end that all lands similarly located and improved will be assessed upon a uniform basis and without discrimination." Minn. Stat. § 273.12 (2010). Upward or downward adjustments are regularly made to account for property differences, including age and size. *See, e.g.*, *McNeilus Truck & Mfg. Inc. v. Cnty. of Dodge*, Nos. C2-04-248, CV-05-357, CV-06-11, 2006 WL 3155657, at *5 (Minn. Tax Ct. Oct. 31, 2006). Consistent with this approach, in identifying a comparable property under the minimum-compensation statute, one should consider land size, features, and location; the square

footage, age, design, and construction quality of any structures on the land; as well as features related to the property's usage.

The district court determined that the South Robert Trail property is comparable to the taken property because it had "similar effective age, condition, quality, and parking/landscaping." The district court also noted that both properties were used to house liquor stores. Cameron argues that despite these similarities, the South Robert Trail property is not comparable because "it is too small." But the district court acknowledged that the South Robert Trail property is significantly smaller than the taken property, and, as discussed in section IV, appropriately accounted for the size difference. In sum, the district court did not err in determining that the South Robert Trail property was a comparable property under the minimum-compensation statute.

III.

We next define the term "community" under the minimum-compensation statute. Cameron argues that the "community" in this case is Cameron's Warehouse Liquors' trade area, which is "a three mile radius on the west side of the Mississippi River." The district court rejected this argument, concluding that the South Robert Trail property can "fairly be regarded as being in the same community for purposes of the statute, regardless of whether the South Robert Trail property lies within Cameron's trade area." Cameron suggests that the district court erred because all of the witnesses testified that his trade area constitutes the "community." We disagree that the evidentiary record compels any conclusion regarding the definition of the term "community." "The appropriate definition of a statutory term is a legal conclusion." *Thomas v. W. Nat'l Ins. Grp.*, 543 N.W.2d 712, 714 (Minn. App. 1996), *aff'd*, 562 N.W.2d 289 (Minn. 1997). In making a legal conclusion, a court may rely on arguments of counsel and evidence supporting those arguments, but the court is not bound to adopt the opinions of the witnesses when defining statutory terms.

Moreover, Cameron's proposed definition is limited to the commercial-property context, whereas the language of the minimum-compensation statute is not limited to commercial-property takings. Discussions at the relevant legislative hearings indicated that the legislature intended the statute to apply in both residential and commercial contexts. Hearing on S.F. No. 2750 Before the S. Judiciary Comm. (Mar. 9, 2006). Because the legislature did not limit application of the minimum-compensation statute to commercial-property takings, we will not construe the statute as if it had. Instead, we define "community" in a way that has meaning in both residential and commercial contexts, and therefore reject Cameron's trade-area definition because it is meaningless in the residential-property context. And because the term "community" is not technical, we define it according to its common usage. *See* Minn. Stat. § 645.08(1) (stating that undefined, nontechnical words and phrases are construed according to rules of grammar and according to their common and approved usage).

Community is commonly defined as "[a] group of people living in the same locality and under the same government." *American Heritage Dictionary of the English Language* 383 (3rd ed. 1992). Under this common-usage definition, a determination of the relevant community inevitably will be fact dependent. The district court concluded that the South Robert Trail

property is in the same community as the taken property because both properties are located in Inver Grove Heights. The district court stated:

> While location in the same city might not be significant or dispositive as to 'community' in a large city such as St. Paul, with a population of hundreds of thousands, it does not seem particularly out of line to make that connection in a suburb of 30,000 people such as Inver Grove Heights.

The district court's reasoning is sound. If the subject property is located in a smaller municipality, the municipality may be the community. But if the property is located in a large metropolitan area, the community may be a neighborhood or geographic area within the metropolis.

We recognize that the district court defined "community" as "meaning a location where a business can survive and be profitable," and that this definition is inconsistent with the common-usage definition adopted by this court. But the district court's ultimate conclusion that the South Robert Trail property is within the community is correct under the definition adopted herein. Thus, any district court error in construing the term is not a basis for reversal. *See* Minn. R. Civ. P. 61 (stating that "any error or defect in the proceedings which does not affect the substantial rights of the parties" must be disregarded). In sum, because the district court's conclusion that the South Robert Trail property is in the same community as the taken property is consistent with the common-usage definition of community, the district court's conclusion is not erroneous.

IV.

Having defined the terms "comparable property" and "community" according to their common usage, we next consider the method by which a damages award is calculated under the minimum-compensation statute; that is, how does one determine an amount that is sufficient to purchase a comparable property in the community? Cameron contends that this amount must be based on one of two figures: the purchase price of a comparable property in the community; or, if no such property exists, the cost to construct a comparable property in the community with no allowance for depreciation.[3] Cameron argues that "a purchase price . . . is the basis for determining damages" under the minimum-compensation statute and that the district court erred in using a "valuation methodology" to determine damages, asserting that "[t]his is not a market value case. This is a minimum compensation case."

Cameron's argument that the measure of damages must be based on the list or offer price of a comparable property in the community that is available for purchase is based on a premise that we have rejected, namely, that the minimum-compensation statute guarantees the purchase of a replacement property. Because the statute does not guarantee a purchase, we discern no reason to require that the damages calculation be based on the list or offer price of a comparable property that is available for purchase at the time of the taking. Although the list or offer price may be an appropriate consideration when a comparable property in the community is available for purchase at the time of the taking, it is not the only basis for a damages calculation under the minimum-compensation statute.

A market-value analysis is traditionally used to determine just compensation in an eminent-domain case. *See Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 876 (Minn. 2010) ("[A] condemning authority must give the property owner a full and exact equivalent for the property taken. This equivalent is usually the market value of the property at the time of the taking contemporaneously paid in money." (quotations and citations omitted)). We discern no reason not to rely on traditionally utilized market value approaches when determining damages under the minimum-compensation statute. But instead of determining the market value of the taken property, the focus shifts to the market value of comparable properties in the community.

"To determine the fair market value of property in a condemnation proceeding any competent evidence may be considered, if it legitimately bears upon the market value." *Cnty. of Ramsey v. Miller*, 316 N.W.2d 917, 919 (Minn. 1982) (quotation omitted). "The measure of compensation is the amount which a purchaser willing, but not required, to buy the property would pay to an owner willing, but not required, to sell it, taking into consideration the highest and best use to which the property can be put." *Id.* "[C]ourts have traditionally used three methods of determining fair market value of real property: (1) market data approach based on comparable sales; (2) income-capitalization approach; and (3) reproduction cost, less depreciation." *Id.* "Artificial rules of evidence which exclude from the consideration of the jurors matters which men consider in their everyday affairs hinder rather than help them at arriving at a just result." *Id.* at 921 (quotation omitted). "In no branch of the law is it more important to remember this, than in cases involving the valuation of property, where at best, evidence of value is largely a matter of opinion." *Id.* (quotation omitted).

After determining that the South Robert Trail property was a comparable property in the community, the district court utilized a market-data approach to determine minimum compensation, utilizing the sale price of the South Robert Trail property. In doing so, the district court recognized that the South Robert Trail property was significantly smaller than Cameron's taken property: the main-floor square footage of the South Robert Trail property was 1,560 square feet and the main-floor square footage of Cameron's property was 4,444 square feet. The district court reasoned that "[s]ince the South Robert Trail property has considerably less main floor space than the Cameron property, the figures from [the South Robert Trail] sale will need to be extrapolated to determine a suitable award in this case." The district court divided the $350,000 building-and-land purchase price of the South Robert Trail property by the property's 1,560 main-floor square footage and concluded that the property sold for $224.36 per main-floor square foot. The district court declined to adopt certain adjustments that an appraiser had made to the price-per-square-foot calculation, such as land-to-building ratios, reasoning that such adjustments were inconsistent with "the interests of equity and justice." The district court concluded that the "unadjusted price per square foot more accurately reflects [the] reality" that Cameron was not "voluntarily looking for a place to move his business." The district court multiplied the $224.36 main-floor-square-foot price of the South Robert Trail property by 4,444, the main-floor square footage of the taken property, for a total of $997,055.84, which is the amount it awarded as minimum compensation.

Cameron argues that the district court erred in using this extrapolation method to account for the size difference between the two properties. We disagree. Although the statute does not specifically authorize this process, it is consistent with traditional market-value analysis. For

example, "[t]he comparable sales method attempts to value a property by comparing the recent arm's length sales prices of similar properties and then adjusting those sales prices for differences between the sold property and the subject property." *Kmart Corp. v. Cnty. of Becker*, 709 N.W.2d 238, 240 (Minn. 2006).

Cameron also argues that the district court's use of the 4,444 square foot figure in its extrapolation is erroneous because his property contained 6,200 square feet: 4,444 square feet on the main floor and 1,756 square feet in the basement. But the district court's price-per-square-foot calculation is based on the main-floor square footage of the South Robert Trail property and not on its total square footage. As the district court explained, it would have been inappropriate to multiply the South Robert Trail main-floor-square-foot price by the total square footage of the taken property. The district court further explained that if it had based its extrapolation on the total square footage of the taken property, the district court would have calculated the South Robert Trail price per square foot based on that property's total square footage. In which case, the price per square foot would have been $112.18 (i.e., the $350,000 South Robert Trail sale price divided by the property's total square footage of 3,120) and Cameron's award would have been $695,516 (i.e., $112.18 multiplied by 6,200 square feet), which is substantially less than the district court's award. The district court stated that it "gave Cameron the benefit of the doubt by using the more advantageous 'price per main floor square foot' approach."

Lastly, Cameron argues that the record does not provide support for the district court's extrapolation method. Cameron asserts that if this extrapolation had been undertaken by an appraiser, "it would be considered a 'back of a napkin' appraisal with no analysis and a total lack of credibility." But the district court had to base its decision on the evidence presented by the parties. *See Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) ("[A] party cannot complain about a district court's failure to rule in [the party's] favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question."), *review denied* (Minn. Nov. 25, 2003). And as explained in section V, the district court concluded that neither the appraised value of the taken property nor Cameron's proposed new construction costs would constitute just compensation. Once the district court rejected these alternatives, it had no choice but to fashion a remedy based on the evidence submitted by the parties. Because the resulting extrapolation was based on evidence presented at the hearing, because it was adequately explained by the district court, and because Cameron has not otherwise shown it to be defective, we conclude that it was not erroneous. *See 444 Lafayette, LLC v. Cnty. of Ramsey*, ___ N.W.2d ___, ___, 2012 WL 204534, at *1 (Minn. Jan. 25, 2012) (stating that "when the tax court rejects the testimony of both appraisers, that court must indicate one way or another the basis for its calculations and must provide an adequate explanation and factual support in the record for its conclusions" (quotation omitted)). In sum, the district court properly relied on recent sales data regarding the South Robert Trail property to determine damages under the minimum-compensation statute.

V.

Having determined that the district court did not err in its calculation of the damages award, we now consider whether the award is just compensation. "A state's ability to use eminent domain to take an individual's property is an awesome power." *Anda*, 789 N.W.2d at

875. "Both the United States and Minnesota Constitutions limit this sovereign power, requiring a public purpose and a payment of just compensation to the property owner for each taking." *Id.* at 876. The Fifth Amendment to the United States Constitution provides that private property shall not be "taken for public use, without just compensation." U.S. Const. amend. V. The Minnesota Constitution states that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured." Minn. Const. art. I, § 13. The supreme court has "observed that because a constitutional provision for just compensation was inserted for the protection of the citizen, it ought to have a liberal interpretation, so as to effect its general purpose." *Anda*, 789 N.W.2d at 876 (quotation omitted).

> Although condemnation awards are usually based on the fair market value of the property in whatever condition the property is at the time of the taking, the constitutional standard that courts must adhere to is 'just compensation.' Courts can be fluid in the standards they apply to determine 'just compensation' when fairness so requires.
>
> When market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards. Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is "just" *both to an owner whose property is taken and to the public that must pay the bill?*

Id. (emphasis added) (quotation omitted). "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity.'" *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124, 70 S. Ct. 547, 549 (1950).

The district court appropriately considered constitutional precedent in determining that $997,055.84 in damages is just compensation. The district court's order is supported by a well-reasoned memorandum that explains the court's analysis. The district court observed that it was involved in a "delicate balancing act." The court considered that Cameron's building was 124 years old and "exhibited wear, tear, and maintenance issues commensurate with its age." The district court also recognized that Cameron "enjoyed a loyal customer base, was apparently content where he was, and had no intention of moving his business." The district court reasoned that "for no other reason than his property being taken through eminent domain, Cameron is forced to bear the costs of obtaining a new location for his business and complying with code and zoning." The district court concluded that "the mere payment of the strict replacement cost of a well-worn 124 year old property may not adequately compensate Cameron for what he lost in the taking." The district court therefore rejected the county's argument that "Cameron should not receive a 'betterment' over what he had before the taking."

But the district court also correctly reasoned that "Cameron should not enjoy a windfall as a result of the taking." *See State by Lord v. Malecker*, 265 Minn. 1, 6-7, 120 N.W.2d 36, 39 (1963) (indicating the supreme court's objection to a damages-calculation method that would result in a windfall to the owner), *overruled on other grounds by Miller*, 316 N.W.2d at 920-22. The district court explained that:

> If Cameron had ever desired to move his business to a new, fully compliant building on his own, he would have done so at significant expense to himself. If Cameron were to get a new building fully at the County's expense simply because his old building was taken, such would seem to put him in a significantly better position than he would have been in had the taking not occurred.

On balance, the district court concluded that Cameron should not have to bear "complete financial responsibility for the incremental 'upgrade' to a more modern building." The district court explained that the county "should not be able to fulfill its obligation to provide just compensation by merely paying the strict replacement cost of a century-old non-compliant building, when reality dictates that it will cost Cameron significantly more than that to obtain a modern building that can house his liquor store business." But the district court rejected Cameron's request for funds to construct a brand new building. We agree with the district court's implicit conclusion that both alternatives would have resulted in a manifest injustice—the former to Cameron and the latter to the public.

The district court's fluid approach to its just-compensation determination is sound. *See Anda*, 789 N.W.2d. at 880 ("Courts can be fluid in the standards they apply to determine 'just compensation' when fairness so requires."). The district court appropriately considered what compensation was just "both to [the] owner whose property [was] taken and to the public that must pay the bill." *Id.* (quotation omitted). And although the district court rejected Cameron's new construction proposal as providing too great a windfall, it awarded him significantly more than the county's appraiser and the commissioners recommended, based on its determination that Cameron would need greater funds to purchase a comparable replacement property in the community. The resulting damages award of $997,055.84 is fair and equitable, and it provides just compensation for the taking. We therefore affirm the award.

VI.

We last consider Cameron's challenge to the district court's attorney-fee award. Minn. Stat. § 117.031(a) (2010) provides that

> [i]f the final judgment or award for damages, as determined at any level in the eminent domain process, is more than 40 percent greater than the last written offer of compensation made by the condemning authority prior to the filing of the petition, the court shall award the owner reasonable attorney fees, litigation expenses, appraisal fees, other experts fees, and other related costs in addition to other compensation and fees authorized by this chapter.

It is undisputed that the district court's final award exceeded the last written offer of compensation by more than 40%. The county therefore concedes that Cameron is entitled to reasonable attorney fees. Cameron argues that the district court erred in determining the amount of the fee award. Cameron argues that he should have been awarded $217,991.45 in attorney fees. This amount represents the actual fees that he incurred under his attorney-fee agreement, which provided for attorney fees based on one-third of the recovery over the county's original offer or an hourly fee, whichever was greater.

Generally, appellate courts "review the district court's award of attorney fees or costs for abuse of discretion." *Brickner v. One Land Dev. Co.*, 742 N.W.2d 706, 711 (Minn. App. 2007), *review denied* (Minn. Mar. 18, 2008). But Minn. Stat. § 117.031(a) requires the district court to award "reasonable attorney fees," and the reasonable value of counsel's work is a question of fact that we must uphold unless it is clearly erroneous. *See Amerman v. Lakeland Dev. Corp.*, 295 Minn. 536, 537, 203 N.W.2d 400, 400-01 (1973). In determining the reasonableness of attorney fees, the district court should consider: (1) the time and labor required; (2) the nature and difficulty of responsibility assumed; (3) the amount involved and the result obtained; (4) the fee customarily charged for similar legal services; (5) the experience, reputation, and ability of counsel; (6) the fee arrangement existing between counsel and the client. *State by Head v. Paulson*, 290 Minn. 371, 373, 188 N.W.2d 424, 426 (1971).

In determining a reasonable amount of attorney fees, the district court observed that this case required considerable time and labor, and that "it was a difficult case to handle, especially in view of the lack of appellate guidance on the central issue." The district court acknowledged that Cameron's counsel is "highly respected and has considerable experience and ability in the field of eminent domain." In addition, the district court stated that the fees and the fee arrangement were not out of line with what is customarily charged for similar work. The only "problem" that the district court had with Cameron's fee request related to "the amount involved and the results obtained." The district court observed that Cameron sought $279,998.08 in fees, which was incurred to recover an additional $485,893.49 in compensation. The court stated:

> In other contexts, the net result of recovering $205,895.41 more than was spent in fees and costs might be considered an excellent result. Here, however, the Court did not go along with the bulk of Cameron's arguments, and he did not recover nearly the amount that he was seeking. Cameron sought $1,614,600 (plus interest) more than the County offered; the Court awarded him $485,893.49 (including interest). The amount that Cameron did recover came chiefly as the result of the Court's own legal and equitable analysis of what constitutes minimum and just compensation in this case, as opposed to the unsuccessful arguments that Cameron's counsel made regarding new construction, etc. In view of the results obtained, the Court feels that a modest reduction in the requested fees is appropriate.

The district court therefore awarded Cameron one-third of the additional $485,893.49 that he recovered.[4]

In arguing that the district court abused its discretion, Cameron focuses on the fee arrangement, asserting that, "[i]f the claim for reimbursement and/or the affidavits presented in court by attorneys or others demonstrate that the fees considered are reasonable in light of what is regularly charged in the community, the fee [] should be held to be *prima facie* 'reasonable' under the statute." We disagree with Cameron's suggestion that so long as the underlying fee arrangement is reasonable, any fees incurred under the arrangement are reasonably awarded under section 117.031(a). A fee arrangement is only one of six factors to be considered by the district court when determining a reasonable award of attorney fees. *Paulson*, 290 Minn. at 373, 188 N.W.2d at 426. Adoption of Cameron's approach, wherein the fee arrangement alone determines the reasonable fee award, would constitute a departure from precedent. We cannot

change the law in this manner. *See Lake George Park, L.L.C. v. IBM Mid-America Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998) (stating that "[t]his court, as an error correcting court, is without authority to change the law"), *review denied* (Minn. June 17, 1998). And because the district court appropriately considered all of the relevant factors and did not clearly err in determining the reasonable value of counsel's work, we affirm its attorney-fee award.

D E C I S I O N

The district court's determination that the South Robert Trail property was a "comparable property" within the "community" is consistent with the common-usage definitions of these terms under the minimum-compensation statute. And the district court appropriately used a market-value analysis based on recent sales data regarding the South Robert Trail property to calculate damages under the minimum-compensation statute. Because the resulting calculation provided just compensation for the taking of Cameron's property, and because the district court did not err in determining a reasonable attorney-fee award, we affirm.

Affirmed.

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[1] Because this issue is not disputed in this appeal, we need not address whether, or to what degree, Cameron's assumption is accurate.

[2] Loss-of-going-concern damages are not at issue here because, at the time of the evidentiary hearing, Cameron's Warehouse Liquors continued to operate at a new location and Cameron did not request loss-of-going-concern damages.

[3] Because we conclude that the district court correctly determined that the South Robert Trail property is a comparable property in the community, we do not address Cameron's arguments regarding application of the minimum-compensation statute when no such property exists.

[4] The brief of Amicus Curiae Minnesota Eminent Domain Institute states that "[p]erhaps the most common method of setting fees between attorneys and clients in Minnesota condemnation cases is a contingent fee based on the recovery over the offer made by the condemning authority."

STATE OF MINNESOTA

IN SUPREME COURT

A09-1134

Court of Appeals — Dietzen, J.

Dissenting, Stras and Page, JJ.

Took no part, Anderson, Paul H., J.

Steven Emerson,
Appellant,

vs.

School Board of Independent School District 199,
Inver Grove Heights, Minnesota,

Respondent.

Filed: February 1, 2012

Office of Appellate Courts

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Joseph E. Flynn, Jennifer K. Earley, Knutson, Flynn & Deans, P.A., Mendota Heights, Minnesota, for amicus curiae Minnesota School Boards Association.

S Y L L A B U S

1. Pursuant to Minn. Stat. § 122A.40, subd. 1 (2010), a professional employee is required to hold a license issued from the Minnesota Department of Education to be deemed a "teacher" within the meaning of the statute.

2. An activities director does not qualify as a "teacher" under Minn. Stat. § 122A.40, subd. 1, because a person in that position is not required by Minn. Stat. ch. 122A (2010) to hold a license from the Minnesota Department of Education, and therefore is not a "professional employee required to hold a license from the state department."

Affirmed.

O P I N I O N

DIETZEN, Justice.

Appellant Steven Emerson was employed by respondent Independent School District No. 199 (school district) in Inver Grove Heights, Minnesota, for 3 school years as the activities director, and then for 1 school year as interim middle school principal. Subsequently, the school district terminated Emerson's employment. Emerson filed a grievance on the ground that he was a continuing-contract employee and entitled to continuing-contract rights under Minn. Stat. § 122A.40 (2010). The school district denied the grievance and his subsequent grievance appeals. Emerson filed a petition for writ of certiorari with the court of appeals, which affirmed the decision of the school district. We affirm.

In March 2005 Emerson responded to a posting by the school district for the position of district activities director.[1] The posting stated, among other things, that "[c]andidates must hold a current Minnesota principal license or be in the process of obtaining administrative licensure." At the time of his application and during his employment with the school district, Emerson held a K-12 principal's license. At no time during Emerson's employment did the Minnesota Department of Education (MDE) require a person in the position of activities director to be licensed.

The school district employed Emerson as activities director for 3 school years, from the fall of 2005 to the spring of 2008. Subsequently, an opening occurred for the position of interim middle school principal for the 2008-09 school year, and the school district hired Emerson for that position. In April 2009, the school board voted to not renew Emerson's contract for the 2009-10 school year. The school board did not conduct a hearing or afford Emerson the rights of a continuing-contract employee.

Emerson filed a grievance, arguing that while he was employed as activities director he was a "teacher" within the meaning of section 122A.40, subdivision 1, the continuing-contract statute, and therefore had continuing-contract rights. The continuing-contract statute defines a "teacher" as "a principal, supervisor, and classroom teacher and any other professional employee required to hold a license from the state department." Minn. Stat. § 122A.40, subd. 1. The school board denied the grievance on the ground that Emerson was only a "teacher" when he was employed for 1 year as middle school principal, and therefore was still within the probationary period under Minn. Stat. § 122A.40, and could be terminated at the discretion of the school board.[2] Emerson filed the necessary grievance appeals, which were also denied by the school board. Emerson then filed a petition for writ of certiorari to the court of appeals.

The court of appeals affirmed the decision of the school board that Emerson was not a continuing-contract employee, and therefore the decision to not renew his contract was not an error of law. *Emerson v. Sch. Bd. of Indep. Sch. Dist. 199*, 782 N.W.2d 844, 847 (Minn. App. 2010). The court determined that a school district employee is not a "teacher" under the continuing-contract statute, Minn. Stat. § 122A.40, unless the MDE requires a license for the work performed by the employee. *Id*. The court reasoned that the statutory definition of a teacher "unambiguously hinges on state licensure requirements," and because the MDE does not require an activities director to be licensed, Emerson did not qualify as a "teacher" while he was employed as an activities director and was not entitled to the rights of a continuing-contract employee. *Id.* at 846-47. Subsequently, we granted review.

I.

The question we must decide is whether appellant Steven Emerson's employment by the school district as an activities director falls within the definition of a "teacher" under section 122A.40, subdivision 1, and therefore he is entitled to continuing-contract rights under the statute.

Emerson argues that he qualifies as a "professional employee" under section 122A.40, subdivision 1, because the school district required that he hold a license as a principal to be employed as activities director. The school district counters that whether an individual qualifies as a "teacher" under subdivision 1 depends solely on whether the MDE requires the individual to hold a license for one of the positions enumerated in the statute. Amici curiae Education Minnesota and the Minnesota School Boards Association also urge us to adopt the interpretation proposed by the school district. It is undisputed that an activities director is not required to be licensed by the MDE. It is also undisputed that the school district advertised that an applicant for activities director must either hold a license as a principal, or be in the process of obtaining administrative licensure, in order to be hired to the position of activities director.

Statutory construction is a question of law that we review de novo. *Premier Bank v. Becker Dev., LLC*, 785 N.W.2d 753, 758 (Minn. 2010). The goal of all statutory construction is to effectuate the intent of the legislature. Minn. Stat. § 645.16 (2010). In construing the language of a statute, we give words and phrases their plain and ordinary meaning. Minn. Stat. § 645.08 (2010); *Amaral v. Saint Cloud Hosp*., 598 N.W.2d 379, 384 (Minn. 1999). Thus, if the language of a statute is clear and free from ambiguity, our role is to enforce the language of the statute. A statute is unclear or ambiguous only if it is susceptible to more than one reasonable interpretation. *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000).

Minnesota Statutes § 122A.40, subd. 1, provides:

> A principal, supervisor, and classroom teacher and any other professional employee required to hold a license from the state department shall be deemed to be a "teacher" within the meaning of this section. A superintendent is a "teacher" only for purposes of subdivisions 3 and 19.[3]

The court of appeals concluded that Emerson was hired by the school district as an activities director, that an activities director is not a "professional employee required to hold a license from the state department," and therefore Emerson was not a "teacher" within the meaning of the continuing-contract statute.

The crux of the dispute turns on the meaning of the statutory phrase "required to hold a license from the state department." It is undisputed that in subdivision 1 the "state department" means the MDE. *See* Minn. Stat. § 122A.40, subd. 1. The dispute centers on what the word "required" means, and what the word "required" modifies. Put differently, a professional employee is "required *by whom*" to be licensed.[4]

We conclude that the phrase "required to hold a license from the state department" in the statute is susceptible of two reasonable interpretations, and therefore is ambiguous. On the one hand, the broad interpretation proposed by Emerson that "required to hold a license" means required by any person or entity with authority to impose the obligation, including a school district as part of its hiring policy, is reasonable. On the other hand, the narrower interpretation proposed by the school district and amici Education Minnesota and Minnesota School Boards Association is also a reasonable interpretation of the statutory language. The school district and amici contend that the "license" in the statutory phrase "required to hold a license from the state department" is a license not only issued by the state department, but also *required by* the state department. This interpretation recognizes a connection between the authority that requires the license and the authority that issues the license. The Legislature could reasonably have presumed that since there is a logical connection between issuing a license and requiring a license, that the explicitly identified issuing entity ("from the state department") and the requiring entity were intended to be the same. In other words, the reference to the licensing agency (the state department) in section 122A.40 negated the need for a precursor reference to its licensing statute.[5] That this interpretation of the statutory language is reasonable is bolstered by two factors. First, the Legislature used similar "required to hold a license from" language in Minn. Stat. § 122A.06, subd. 2 (2010) ("*required to hold a license from* the Board of Teaching") (emphasis added), and in that context Emerson's proposed broader interpretation would make no sense. *See infra* pp. 14-15. Second, the school district's narrower interpretation has been consistently used by school districts and amici for decades.[6]

Because there are two reasonable interpretations, the statutory language is ambiguous. Consequently, we must resolve the ambiguity of whether the statutory phrase "required to hold a license" means "required [by the State licensing authority] to hold a license from the state department," or "required [by the school district] to hold a license from the state department," or both.

When the language of a statute is unclear or ambiguous, we will go beyond the specific language of the statute to determine the intent of the legislature. Minn. Stat. § 645.16. The Legislature has set forth a nonexclusive list of factors we should consider to determine legislative intent. *Id.*

We believe that the most relevant factors in this case are: the purpose of the legislation, the occasion and necessity for the law, the mischief to be remedied, the object to be attained, and

the consequences of the interpretations proposed by the parties. *See* Minn. Stat. § 645.16 (1), (3), (4), (6).

Minnesota Statutes § 122A.40, which is popularly known as the continuing-contract statute, was enacted in 1937.[7] Act of Apr. 5, 1937, ch. 161, § 1, 1937 Minn. Laws 229, 229-30. The purpose of the continuing-contract statute was "to do away with the then existing chaotic conditions in respect to termination of teachers' contracts." *Downing v. Indep. Sch. Dist. No. 9*, 207 Minn. 292, 297, 291 N.W. 613, 615 (1940). Before enactment of the continuing contract statute, many teachers were left in a "state of uncertainty" as to whether their teaching contract would be renewed for the next school year. *Id.* To address this problem, the Legislature added statutory language that provided for automatic contract renewal unless the contract was terminated prior to April 1. 207 Minn. at 297, 291 N.W. at 616. Under the statute, if no termination of the contract occurred before April 1, the contract continued in "full force and effect." *Id.* Thus, the statute adopted a uniform standard—April 1—that was applicable to all school districts and teachers. In doing so, the Legislature enacted one unified system applicable to all school districts to avoid the chaotic conditions that resulted from individual determinations by individual school districts.

The school district's proposed interpretation that the licensure requirement to qualify for continuing-contract status must be imposed by the State licensing authority furthers the legislative purpose of having one unified system that is applicable to all school districts. Moreover, such an interpretation avoids the chaotic conditions that result in individualized determinations by hundreds of different school districts. Emerson's proposed interpretation is contrary to the legislative purpose of having one unified system applicable to all school districts.

Notably, the Legislature has promulgated one unified system for the licensing of all qualified teachers. Specifically, Minn. Stat. ch. 122A (2010), sets forth the procedure for principals, supervisors, and classroom teachers to be licensed. *See* Minn. Stat. § 122A.18, subd. 1 (providing that the Board of Teaching must license "teachers" as defined in section 122A.15, subdivision 1, and the Board of School Administrators must license "supervisory personnel" (including principals) as defined in section 122A.15, subdivision 2); Minn. Stat. § 122A.162 (providing that the Commissioner of Education sets the requirements for all other positions within the school system). More importantly, all licenses are issued through the MDE. Minn. Stat. § 122A.18, subd. 1(c). And the MDE has promulgated rules to provide for the licensing of specific positions. *See, e.g.*, Minn. R. 3512.0300, subps. 1, 3-5 (2011) (requiring any individual who serves as or performs the duties of a principal to hold a license); Minn. R. 8710.2000-.5800 (2011) (setting forth the licensure requirements for specific teaching positions). The professional employees required to hold a license from the MDE are enumerated in specific rules promulgated by the MDE pursuant to statute. *See, e.g.*, Minn. R. 8710.5900-.6400 (2011) (setting forth licensure requirements for "other school professionals," including school nurses, psychologists, and social workers).

The broad interpretation proposed by Emerson, and embraced by the dissent, does not support the legislative purpose of one uniform standard for determining continuing-contract status applicable to all school districts. Rather, Emerson's interpretation will create a decentralized system in which hiring policies adopted by individual school districts, including

licensure requirements not imposed by the State, as here, will result in hundreds of different continuing-contract standards. This potential for uncontrolled variations in positions through which a person can achieve continuing-contract status is magnified by the possible delegation of hiring standards from a school board to each school principal, or even a faculty-community committee.

Moreover, an individual school district's variation from state-imposed licensing requirements that make a position eligible for continuing-contract status may adversely affect other school districts as well. Specifically, section 122A.40, subdivision 5, provides that after the first 3 years of experience in a qualifying position in one school district, the probationary period in a subsequent school district is only 1 year. Thus, when a prior school district establishes its own standards that qualify for continuing-contract status, the subsequent-hiring school district may be required to grant continuing-contract status in only 1 year to a person who does not qualify by its own standards. Consequently, a subsequent school district could easily determine that the uncertainty created by differing license standards for continuing contract rights among school districts renders it too risky to hire a "transferred" employee and determine within 1 year whether to grant that employee continuing-contract status. Significantly, the net result of the uncertainty created by differing standards is to adversely affect the transferability of state-licensed employees to subsequent school districts. The uncertainty of differing standards among school districts is the type of condition that the statute was intended to avoid.

In contrast, the school district's proposed interpretation, which recognizes a relationship between the authority that requires the license and the authority that issues the license, harmonizes the language of section 122A.40, subdivision 1—"license from the state department"—with the licensing statutes in sections 122A.15 and 122A.18. *See Schroedl*, 616 N.W.2d at 277 (interpreting each section of a statute in light of the surrounding sections "to avoid conflicting interpretations"). Pursuant to this interpretation, subdivision 1 limits the individuals included within the meaning of a teacher, and does not expand continuing-contract rights to all professional employees the school district may choose to employ. Notably, a school district may impose additional hiring qualifications for the position of activities director, but those additional qualifications are not required by either chapter 122A or an applicable rule promulgated by the MDE. A school district, however, does not have the legal authority under Minn. Stat. chapter 122A to issue a license to professional employees. *Cf. Bd. of Ed. of Minneapolis v. Sand*, 227 Minn. 202, 211, 34 N.W.2d 689, 695 (1948) (stating that a right to tenure cannot be created through representations by a school district when not authorized by statute).

Additionally, the school district's proposed interpretation that recognizes a relationship between the authority that requires the license and the authority that issues the license is supported by other provisions in the continuing-contract statute that implicate state licensing requirements rather than district hiring standards. Section 122A.40, subdivision 3, provides that "[c]ontracts for teaching and supervision of teaching can be made only with qualified teachers." Minnesota Statutes § 122A.16(a) defines a qualified teacher as "one holding a valid license, under this chapter, to perform the particular service for which the teacher is employed in a public school." Thus, a contract recognized under the continuing-contract statute can only be with a qualified teacher, and the definition of qualified teacher requires a fit between the teaching

position and the license required by the State licensing authority under chapter 122A, not a license required only by school district hiring policy. The relationship mandated in subdivision 3 between the license required by State law and the position for which the teacher is hired is consistent with the relationship between State licensure requirements and the teaching position inherent in the school board's interpretation of the language in subdivision 1.

Emerson's proposed interpretation of section 122A.40, subdivision 1, would lead to absurd results. As noted above, the Legislature used similar language in section 122A.06, subdivision 2, by defining teacher to mean "a classroom teacher or other similar professional employee *required to hold a license from* the Board of Teaching." Minn. Stat. § 122A.06, subd. 2 (emphasis added). This definition is "[f]or the purpose[s] of section[s] 122A.05 to 122A.09 . . . unless another meaning is clearly indicated." *Id*., subd. 1. Sections 122A.05 to 122A.09 establish and set out the licensing authority of the Board of Teaching. Applying Emerson's proposed interpretation of section 122A.40, subdivision 1, would lead to results that are absurd and unreasonable. Specifically, defining "teacher" to mean the hiring policies of each school board would make the provisions of sections 122A.05 to 122A.09 almost impossible to execute. For example, section 122A.09, subdivision 4(a), provides that "[t]he board must adopt rules to license public school teachers and interns." The broad interpretation proposed by Emerson would require the Board of Teaching to adopt rules to license any position for which a school board decided to impose a license requirement from the Board. Similarly, section 122A.09, subdivision 4(c), provides that the "board must adopt rules to approve teacher preparation programs." Emerson's interpretation of "required to hold a license" would put in the hands of each school district what position-preparation programs the Board would need to address. In summary, the consequence of Emerson's proposed interpretation of section 122A.40, subdivision 1, applied to section 122A.06, subdivision 2, is that any professional employee required by any entity, such as a school district, to hold a license from the Board of Teaching is a teacher, and therefore the scope of the Board's responsibilities would be governed by hundreds of individual school districts.

Finally, we observe that the school board's proposed interpretation has been uniformly applied by school districts and teachers' unions for decades. Although this is not an administrative interpretation within the meaning of section 645.16(8), it is not insignificant that these parties operated under this interpretation since the statute was enacted. The consequence of Emerson's proposed interpretation would be to overturn an interpretation that is long-standing.

We conclude that an activities director is not a professional employee "required to hold a license from the state department" and therefore is not a "teacher" within the meaning of the continuing-contract statute. Emerson's proposed interpretation that one entity may require the license (school district) and another entity may issue it is sufficiently reasonable to indicate ambiguity in the language. But the more logical interpretation of the language is to recognize a relationship between the entity that "issues" the license and the entity that "requires" the employee to hold a license. It logically follows that the "required to hold a license" language means a professional employee required by the state licensing authority in chapter 122A to hold a license from the MDE. Our interpretation furthers the legislative purpose of the statute to adopt one unified system applicable to all school districts and avoids the chaotic situations that would result from individualized determinations by hundreds of school districts. Moreover, our

interpretation is consistent with the licensing procedures of the MDE, and with related statutes in chapter 122A. Accordingly, we hold that Emerson was not a "professional employee required to hold a license from the state department," and therefore is not a "teacher" under section 122A.40. Minn. Stat. § 122A.40, subd. 1.

II.

Appellant also argues that he should be deemed a continuing-contract employee because "while employed in the Activities Director position [appellant] was performing job duties typically performed by a principal." But appellant makes this argument for the first time in his reply brief to this court. We acknowledge that in his initial brief appellant made a one-sentence reference to his duties as activities director, stating that many of his duties were consistent with employment as a principal. But appellant made no argument in that brief that he should have been considered a "principal" for purposes of section 122A.40 based on those duties. Similarly, in his brief to the court of appeals, appellant referenced his job responsibilities, but did not explicitly argue that those job responsibilities made the activities director position a "principal" position under the statute.

Previously, we have held that we will not address issues raised for the first time on appeal, particularly when the issue is raised in a reply brief. *See George v. Estate of Baker*, 724 N.W.2d 1, 7 (Minn. 2006) (citations omitted). Accordingly, appellant's argument based on his job duties as activities director is not properly before the court, and we decline to address it.

Affirmed.

ANDERSON, Paul H., J., took no part in the consideration or decision of this case.

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[1] This position is referred to in the record as "District Director of Activities," "Activities Director," and "District Activities Director." For consistency, we will refer to this position as "activities director."

[2] Pursuant to section 122A.40, when a teacher has completed either a 3-year probationary period, or a 1-year probationary period if the teacher has already achieved continuing-contract status in another district, the teacher may only be dismissed for reasons provided within the statute. Minn. Stat. § 122A.40, subds. 5, 7. Moreover, the teacher is allowed certain procedural protections, including a hearing before the school board or an arbitrator. Minn. Stat. § 122A.40, subds. 14, 15.

There is a discrepancy over whether Emerson was required to complete 3 years as a probationary teacher or whether he had already attained continuing-contract status in another district and thus was only required to complete 1 year as a probationary teacher. The court of appeals stated that Emerson "did not complete three probationary 'teacher' years." *Emerson*, 782

N.W.2d at 847. The school district, however, does not deny that Emerson had already attained continuing-contract status in another district, and therefore he needed to complete only 1 year of probationary teaching. Emerson does not address this question, but the answer does not affect our analysis because Emerson was employed by the school district for a total of 4 years, encompassing either period in which to establish continuing-contract status under the statute.

[3] It is important to note that section 122A.40 only applies to school districts in cities that are not "first-class." Minn. Stat. § 122A.40, subd. 18. A first-class city is one having "more than 100,000 inhabitants." Minn. Stat. § 410.01 (2010). Inver Grove Heights is not a city of the first class.

[4] Emerson argues that the "required to hold a license" language in section 122A.40, subdivision 1, modifies "other professional employee" and does not modify the other positions specified in the statute, namely the positions of "principal," "supervisor," and "classroom teacher." Emerson cites the grammatical rule of the "last antecedent" that a limiting clause or phrase modifies only the noun or phrase it immediately follows to support his argument. *See Barnhart v. Thomas*, 540 U.S. 20, 26-27 (2003); *see also Woodhall v. State*, 738 N.W.2d 357, 361-62 (Minn. 2007) (construing statutory language by using the rule of the last antecedent as a "rule of grammar" in conjunction with the "clear language of the statute"). To the extent that Emerson suggests that a "principal," "supervisor," or "classroom teacher" is not required to hold a license to qualify as a teacher under the statute, the argument lacks merit.

In subdivision 1, the Legislature identified two groups of employees: (1) "principal[s], supervisor[s], and classroom teacher[s]," and (2) "any other professional employee[s] required to hold a license from the state department." Minn. Stat. § 122A.40, subd. 1. Specifically, it makes sense that the Legislature did not attach the "required to hold a license from the state department" language to the first group, because every principal, supervisor, or classroom teacher is required by law to hold a license from the department. *See* Minn. Stat. §§ 122A.15, subd. 1, 122A.18, subd. 1. The "required to hold a license" language would have been superfluous if applied to principals, supervisors, and classroom teachers. In contrast, the second category, "other professional employee," includes some positions for which a license is required from the department and others for which no license is required.

More importantly, Emerson's argument is a nonsequitur. Simply stated, Emerson's conclusion that "required to hold a license from the state department" modifies "professional employee" does not resolve the primary dispute between the parties over the meaning of a "professional employee required to hold a license from the state department."

[5] The dissent contends that we depart from established methods of statutory interpretation by finding ambiguity in legislative silence and by adding words to the statute. We do not agree that the narrower interpretation is based on silence, in the sense that silence has been addressed in previous cases. Nor do we add words to the statute. Rather, the interpretation draws a logical inference from words that do appear in the statute: the answer to the question "required by whom" is provided by a logical inference from the reference in the following clause to the issuer of the license, the state department. Moreover, even if this were an example of legislative

silence, our approach to interpretation is not as rigid as portrayed by the dissent. We have explained:

> [S]ilence in a statute regarding a particular topic does not render the statute unclear or ambiguous unless the statute is susceptible of more than one reasonable interpretation. Put differently, we must resolve whether the statutory construction issue here involves a failure of expression or an ambiguity of expression. If the legislature fails to address a particular topic, our rules of construction forbid adding words or meaning to a statute that are purposely omitted or inadvertently overlooked. But if the silence causes an ambiguity of expression resulting in more than one reasonable interpretation of the statute, then we may go outside the language of the statute to determine legislative intent.

Premier Bank, 785 N.W.2d at 760 (citations omitted) (internal quotations omitted). To the extent that the statute at issue here is silent, that silence causes an ambiguity of expression that results in two reasonable interpretations of the language. The examples cited by the dissent of statutes in which the Legislature has made express cross-reference to another statute are unhelpful because none have a subsequent clause that makes specific reference to a state licensing agency and, implicitly, its licensing authority.

[6] The dissent also contends that reference to this long-standing practical application of the statute is an improper reference to extrinsic evidence to create ambiguity. In assessing whether an interpretation of statutory language is reasonable, it is not improper to note that the regulated parties have used that interpretation for decades. *Cf. Mattson v. Flynn*, 216 Minn. 354, 358, 13 N.W.2d 11, 14 (1944) ("A member of the present attorney general's staff has written an opinion in conflict with those of his predecessors in office. The fact that able lawyers, after careful study of the provisions of the statute, have taken opposite views as to its meaning supports the conclusion that the language itself does not explicitly convey the intention of the legislature and that construction is necessary.").

[7] In 1937, the continuing-contract statute was codified at Mason's Minn. Stat. § 2903 (Supp. 1940). Subsequently, it was renumbered as Minn. Stat. § 130.18 (1957); Minn. Stat. § 125.12 (1996); and Minn. Stat. § 122A.40 (2010).

D I S S E N T

STRAS, Justice (dissenting).

The question presented by this case is whether Steven Emerson, who was an employee of Independent School District No. 199 ("ISD-199") for 4 years, was a teacher entitled to the procedural protections granted by statute to continuing-contract employees. The answer to that question turns on the plain and unambiguous language of Minn. Stat. § 122A.40, subd. 1 (2010), which defines the class of "teacher[s]" who are eligible for continuing-contract rights. Here, Emerson is entitled to continuing-contract rights because, under the plain language of subdivision 1, Emerson was a "professional employee required to hold a license from the [Minnesota Department of Education]." Minn. Stat. § 122A.40, subd. 1. Only by adding words to the unambiguous language in subdivision 1 does the court conclude otherwise. Because the court's interpretation of subdivision 1 is inconsistent with the statute's plain language, I respectfully dissent.

I.

Minnesota Statutes § 122A.40 provides rules for the hiring and firing of Minnesota "teacher[s]" employed by school districts that are not located in "first-class" cities.[D-1] Minn. Stat. § 122A.40 (2010). For "probationary" employees, a school board generally has discretion about whether to renew a teacher's annual contract as the board "see[s] fit." Minn. Stat. § 122A.40, subd. 5(a). A teacher who has completed his or her probationary period, however, is entitled to certain procedural protections, including written notice and a possible hearing, prior to termination of his or her contract. *Id.*, subd. 7. Typically, "[t]he first three consecutive years of a teacher's first teaching experience in Minnesota in a single district is deemed to be a probationary period of employment." *Id.*, subd. 5(a). But for a teacher who has completed a probationary period in another Minnesota school district, "the probationary period in each district in which the teacher is thereafter employed shall be one year." *Id.*

ISD-199 concedes that Emerson completed a probationary period with another Minnesota school district prior to beginning his employment with ISD-199. Emerson worked at ISD-199 for 3 years as its District Director of Activities ("activities director") and one year as an interim middle school principal. Emerson argues that, because the activities director position falls within the definition of "teacher" in Minn. Stat. § 122A.40, subd. 1, he was entitled to the procedural protections granted to employees who have attained continuing-contract rights, including the right to a hearing before ISD-199 discharged him.[D-2]

Whether Emerson satisfied the statutory definition of "teacher" is a question of law that is subject to de novo review. *See Larson v. State*, 790 N.W.2d 700, 703 (Minn. 2010). In interpreting statutes, we "give words and phrases their plain and ordinary meaning." *Premier Bank v. Becker Dev., LLC*, 785 N.W.2d 753, 759 (Minn. 2010) (citing Minn. Stat. § 645.08 (2010)). If a statute is unambiguous on its face, then we look no further than the statute's plain language to determine its meaning. *See Hutchinson Tech., Inc. v. Comm'r of Revenue*, 698 N.W.2d 1, 8 (Minn. 2005) (citations omitted).

Minnesota Statutes § 122A.40, subd. 1, states in relevant part: "A principal, supervisor, and classroom teacher and any other professional employee required to hold a license from the state department shall be deemed to be a 'teacher' within the meaning of this section." To qualify as a "teacher" eligible for continuing-contract rights under subdivision 1, a school employee must be a principal, supervisor, classroom teacher, or other professional employee. Minn. Stat. § 122A.40, subd. 1. If the employee is a professional employee, then he or she must be "required to hold a license from the state department." *Id.* As the court correctly notes, the "state department" refers to the Minnesota Department of Education ("MDE").

Emerson was a "professional employee," and neither the court nor ISD-199 assert otherwise. A professional is someone "engaged in . . . an occupation requiring a high level of training and proficiency." *Webster's Third International Dictionary of the English Language Unabridged* 1811 (2002). ISD-199's job description for activities director stated that Emerson was "responsible for the overall operation of K-12 co-curricular programs of ISD-199." Emerson's job responsibilities included planning and implementing programs for ISD-199; supervising, evaluating, and recruiting coaches and counselors throughout ISD-199; developing and maintaining the activities budget for ISD-199; and reporting directly to the superintendent of ISD-199. The qualifications required for the position emphasized supervisory and leadership experience in school settings. Given the job requirements and correspondingly high level of responsibility for the position of activities director, Emerson's position qualifies as "an occupation requiring a high level of training and proficiency." Therefore, Emerson was a "professional employee" under Minn. Stat. § 122A.40, subd. 1.

The dispute in this case is whether Emerson was "required to hold a license from the state department." It is undisputed that Emerson held three licenses during his employment with ISD-199: a K-12 principal's license, a license to teach English and language arts, and a coaching license. The MDE issued each of Emerson's licenses. Even so, the parties dispute whether Emerson was "*required* to hold a license from the" MDE as activities director for ISD-199. Minn. Stat. § 122A.40, subd. 1 (emphasis added).

The question presented, therefore, is what it means to "require" a license from the MDE. In this context, the meaning of the word "require" is "to demand as necessary or essential." *Webster's Third International Dictionary of the English Language Unabridged* 1929 (2002); *see also The American Heritage Dictionary of the English Language* 1482 (4th ed. 2009) (defining "require" as "[t]o call for as obligatory or appropriate; demand"). Implicit in the definition of the word "require" is that the person, entity, or other body making the demand must have the authority to deem something necessary and essential. In other words, a particular qualification or characteristic cannot be "required" unless the entity imposing the obligation has the authority to do so.

In this case, a variety of entities and bodies had the authority to require Emerson to hold a license *from* the MDE. The Minnesota Legislature has the power to enact statutes requiring licensure, as it has done here for professional employees. By statute, the Board of Teaching "must adopt rules to license public school teachers," Minn. Stat. § 122A.09, subd. 4(a) (2010), and the Board of School Administrators must "license school administrators," Minn. Stat. § 122A.14, subd. 1 (2010). For those positions "not licensed by the Board of Teaching or Board of

School Administrators," the MDE "may make rules relating to the licensure of school personnel." Minn. Stat. § 122A.162 (2010). In addition, the school district that hires a professional employee and sets the minimum job requirements for the position also has the authority to "require[] a license from the" MDE. After all, it is unquestionably the prerogative of the school district to refuse to hire any employee who does not meet a position's minimum qualifications, as communicated by the school district through its job announcements and position listings.

ISD-199's job announcement stated the following requirement for its activities director position: "Candidates *must* hold a current Minnesota principal license or be in the process of obtaining administrative licensure." (Emphasis added). The position description also required a principal's license for the activities director.[D-3] As the hiring entity, and unlike certain other groups in the school district, such as a parent teacher association or a student group, there can be no serious argument that ISD-199 lacked the authority to "require[]" Emerson to hold a particular license or qualification. ISD-199 made the ultimate hiring decision with respect to the activities director position, and as a result, had the authority to reject candidates who did not meet certain qualifications, such as having a K-12 principal's license. Accordingly, Emerson was eligible for continuing-contract rights under section 122A.40 because he was a "professional employee required to hold a license from the state department."

II.

The court apparently agrees that ISD-199 had the authority to require Emerson, as a professional employee, to "hold a license from the" MDE. Despite ISD-199's unquestioned authority to "require" Emerson "to hold a license from the state department," the court argues that subdivision 1 imposes an additional requirement: the MDE, the Board of Teaching, or the Board of School Administrators must require a professional employee to hold a license from the MDE. The flaw in the court's approach, however, is that subdivision 1 does not hint, much less contain, any language that supports the court's interpretation. Indeed, the plain language of subdivision 1 does not explicitly limit the entities that may require a professional employee to hold a license from the MDE.

Instead of interpreting the statute as written, the court finds an ambiguity through legislative silence and then proceeds to add words to the statute to support its unnatural reading of subdivision 1. In the court's view, the Legislature *really meant* to enact the following statute: "[a] principal, supervisor, and classroom teacher and any other professional employee required *by the State licensing authority* to hold a license from the state department shall be deemed to be a 'teacher' within the meaning of this section." But that is not the statute the Legislature enacted, and the court's strained approach to statutory interpretation finds no support in our case law or in the canons of statutory construction.

First, this court has never found an ambiguity through legislative silence because a statute does not contain a sufficiently comprehensive definition of a term. As we have repeatedly stated, courts may not add words to a statute "that are purposely omitted or inadvertently overlooked" by the Legislature. *Premier Bank* 785 N.W.2d at 760 (citing *Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114, 117 (Minn. 2001)). I can find only two cases in which this court has found an

ambiguity through legislative silence: in *Burkstrand v. Burkstrand*, 632 N.W.2d 206 (Minn. 2001), and *MBNA America Bank, N.A. v. Commissioner of Revenue*, 694 N.W.2d 778 (Minn. 2005), the statutes at issue set forth a specific procedural requirement, but then failed to provide a remedy for violation of the requirement.[D-4] Given that subdivision 1 merely defines the term "teacher," the court does not contend—nor could it—that subdivision 1 contains a procedural requirement or is silent regarding a remedy for violation of such a procedural requirement. *See MBNA Am. Bank*, 694 N.W.2d at 782; *Burkstrand*, 632 N.W.2d at 210; *see also Beardsley v. Garcia*, 753 N.W.2d 735, 738-39 (Minn. 2008) (discussing *MBNA America Bank* and *Burkstrand*, and rejecting, "especially," the suggestion that silence in the statute at issue created an ambiguity). Therefore, the court's conclusion that subdivision 1 is ambiguous is contrary to our longstanding rule that we may not add words to a statute that "are purposely omitted or inadvertently overlooked" by the Legislature. *Premier Bank*, 784 N.W.2d at 760.

Second, the court is simply wrong that subdivision 1 is ambiguous. In concluding that subdivision 1 is ambiguous through legislative silence, the court fails to point to any ambiguity in the express language of the statute. Instead, the court concludes that subdivision 1 is ambiguous because ISD-199's interpretation "recognizes a connection between the authority that requires the license and the authority that issues the license," and because this interpretation "has been consistently used by school districts and amici for decades." The court apparently concludes, therefore, that the mere mention of the MDE in the text of subdivision 1 means that the MDE is the only entity that may "require" a professional employee to hold a license. The flaw in the court's alternative interpretation of subdivision 1, however, is that it is flatly inconsistent with the plain language of the statute.

The fact that subdivision 1 explicitly references the MDE tells us only that Emerson must be required to hold a license "*from*" the MDE—a fact compelled by the text of the statute and not disputed by anyone—not that Emerson must be required to hold a license *by* the MDE. To find an ambiguity, the court must therefore alter the text of subdivision 1 as follows: "any other professional employee required [by the State licensing authority] to hold a license from the state department." That alternative interpretation is unreasonable, however, because the statute does not include the bracketed phrase added to the statute by the court: "by the State licensing authority." It is axiomatic that a court may not create a statutory ambiguity by changing the plain text of an otherwise unambiguous statute. To hold otherwise would mean that we could deem any statute ambiguous once we conceive of alternative language that the Legislature could have included in the statute. *See Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 438 (Minn. 2009) (stating that this court "cannot rewrite a statute under the guise of statutory interpretation" by substituting words in the statute (citation omitted)); *Beardsley*, 753 N.W.2d at 740 (rejecting an invitation to rewrite the text of a statute in order to find ambiguity because "[t]he prerogative of amending a statute in such a fashion belongs to the legislature, not to this court").

Third, the court contravenes case law by using extrinsic evidence to conclude that subdivision 1 is ambiguous. Specifically, the court relies on the fact that its alternative interpretation is consistent with "decades" of interpretation and practice by school districts. Even aside from the fact that there is no evidence in the record to suggest that school districts have consistently interpreted subdivision 1 to mean that only the licensing authorities may require a professional employee to hold a license, we have repeatedly held that it is improper to resort to

extrinsic evidence to find a statutory ambiguity. *In re Welfare of R.S.*, 805 N.W.2d 44, 52 (Minn. 2011) ("[E]xtrinsic evidence can be used only to resolve existing statutory ambiguity; it cannot be used to create ambiguity where none exists."); *Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006) ("[U]se of extrinsic aids to determine legislative intent where there is no ambiguity in the express language of the statute would be unnecessary and improper."). Here, the court improperly bootstraps extrinsic, historical evidence of custom and practice into its finding of ambiguity, and then relies on that same extrinsic evidence to conclude that its alternative interpretation of the statute is the more reasonable one. Such an analysis deviates from our traditional approach to statutory interpretation.

In sum, the court's opinion represents a radical departure from traditional methods of statutory interpretation. The court finds an ambiguity through legislative silence in a novel circumstance, the court adds words to a statute to create an alternative interpretation of an otherwise unambiguous statute, and the court resorts to extrinsic evidence to support its conclusion that the statute is ambiguous. In my view, the court concludes that subdivision 1 is ambiguous by creating a false dichotomy: either (1) the Legislature intended to include the phrase "required by [*the school district*] to hold a license"; or (2) the Legislature intended to include the phrase "required by [*the State licensing authority*] to hold a license." But the court apparently overlooks a third alternative: the statute means exactly what it says and the Legislature failed to include any language qualifying who or what may require a school employee to hold a license from the MDE.[D-5] I would adopt that third interpretation, which gives effect to the plain and unambiguous language of subdivision 1 without adding words to the statute or otherwise modifying the statutory text.

III.

In this case, the statute at issue requires Emerson to show: (1) that he is a "professional employee"; and (2) that he was required to hold a license issued from the MDE. Minn. Stat. § 122A.40, subd. 1. By satisfying both statutory requirements, Emerson is entitled to continuing-contract rights. Accordingly, I would reverse the decision of the court of appeals and remand this case to the school board of ISD-199 for further proceedings consistent with this opinion.

PAGE, J. (dissenting).

I join in the dissent of Justice Stras.

[D-1] A "first-class" city has more than 100,000 inhabitants. Minn. Stat. § 410.01 (2010). Inver Grove Heights is not a "first-class" city.

[D-2] Neither party disputes that Emerson was a "teacher" within the meaning of section 122A.40, subdivision 1, when he worked as an interim middle school principal during the 2008–09 school year. Nonetheless, Emerson's single year as a principal was insufficient, by itself, to confer continuing-contract rights because ISD-199 informed Emerson in April 2009 that it did

not intend to renew his contract for an additional year. Minn. Stat. § 122A.40, subd. 5(a) (Supp. 2011) (allowing the school board to decline to renew a teacher's contract during his or her probationary period, so long as it provides written notice of that decision before June 1). Accordingly, to attain continuing-contract rights under Minn. Stat. § 122A.40, Emerson must show that he was a "professional employee required to hold a license from the state department" in any or all of the 3 years he served as activities director. *Id.*, subd. 1.

[D-3] The position description for activities director stated in relevant part: "*Must* hold a principal licensure or be in the process of obtaining licensure which must be completed within 24 months from the date of employment." (Emphasis added). Even assuming, as ISD-199 argues, that the position required only that the activities director obtain a principal's license within 24 months of hiring, rather than immediately, Emerson would still be eligible for continuing-contract rights because of his 2 years of continuous service with the school district following that 24-month period. In other words, even if ISD-199 is correct that a principal's license was not strictly required for the first 2 years of Emerson's employment as activities director, he would still have met the statutory definition of "teacher" during his third year as activities director and first year as interim principal because licensure was required for both years. Those 2 years of service would exceed the 1-year probationary period required for continuing-contract rights under Minn. Stat. § 122A.40, subd. 5(a). *See supra* note 2.

[D-4] In *Burkstrand*, the statute at issue was silent regarding the consequences of the district court's failure to hold a hearing within 7 days after issuing an order of protection, as required by Minn. Stat. § 518B.01, subd. 7(c) (2000). 632 N.W.2d at 208-10. Because section 518.01, subdivision 7(c), was silent about the "consequences" of a district court's noncompliance with the statute's requirements, we concluded that the statute was ambiguous. *See Burkstrand*, 632 N.W.2d at 210. Similarly, in *MBNA America Bank*, we declared a statute ambiguous when it required the Commissioner of Revenue to provide certain information in assessment notices mailed to taxpayers, but provided no remedy for the Commissioner's noncompliance with that procedural requirement. *See* 694 N.W.2d at 779-82.

[D-5] Section 122A.40 does not hint, much less provide, a limitation on who may require a teacher to obtain a license from the MDE. Notably, in a number of other statutes, the Legislature has explicitly cross-referenced a certain chapter or statutory provision when it intends to limit or delineate the scope of a particular statutory requirement. *See* Minn. Stat. § 60A.08, subd. 12 (2010) (stating that commercial automobile policies "must provide coverage for rented vehicles *as required in Chapter 65B*" (emphasis added)); Minn. Stat. § 62E.06, subd. 4 (2010) (describing that a health maintenance organization is a number three qualified plan if it provides services "*required by Chapter 62D*" (emphasis added)); Minn. Stat. § 79.34, subd. 5 (2010) (referring to insurance "*required by chapter 176*" (emphasis added)); Minn. Stat. § 116.073, subd. 1(a)(3) (2010) (explaining Pollution Control Agency staff and Department of Natural Resources Conservation officers can issue citations to a person who "fails to take discharge preventive or preparedness measures *required under chapter 115E*" (emphasis added)). And in statutes relating to education, the Legislature also has been explicit when it intends to incorporate the requirements of a particular chapter or statute in delineating the obligations imposed by another statute. *See* Minn. Stat. § 123A.79 (2010) (establishing a "joint powers board" for districts and stating that notice of regular and special meetings must be given "*as required under Chapter*

13D" (emphasis added)); Minn. Stat. § 126C.63, subd. 4 (2010) (defining a "[d]ebt service fund" as aggregate of funds maintained by school districts for paying off principal and interest "*as required by Chapter 475*" (emphasis added)). The fact that the Legislature has not similarly limited the scope of subdivision 1 by including an explicit cross-reference to statutes discussing the duties of the state licensing authorities undermines the court's interpretation of the statute.

STATE OF MINNESOTA

IN COURT OF APPEALS

A12-0110

Aaron Neil Sarber, petitioner,

Appellant,

vs.

Commissioner of Public Safety,

Respondent.

Filed August 27, 2012

Reversed

Rodenberg, Judge

Mille Lacs County District Court

File No. 48CV111988

Richard L. Swanson, Chaska, Minnesota (for appellant)

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Judge; and Willis, Judge.*

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

S Y L L A B U S

A driver's conduct in twice flashing the high-beam headlights of his vehicle at oncoming traffic is not an objective basis for an investigatory traffic stop when the record contains no evidence that the headlights projected "glaring rays . . . into the eyes of the oncoming driver" in a manner that blinded, impaired, or distracted another driver. Minn. Stat. § 169.61(b) (2010).

O P I N I O N

RODENBERG, Judge

In this implied-consent case, Aaron Neil Sarber appeals from the revocation of his driver's license and impoundment of his license plates. He argues that the traffic stop underlying the revocation order was unlawful because it was based solely on the officer's observation of appellant twice flashing his high beams as the officer approached. We conclude that the Commissioner of Public Safety failed to establish that the police officer had a reasonable, articulable suspicion of a traffic violation, and accordingly, we reverse.

FACTS

A Mille Lacs County sheriff's deputy was on patrol during the late night hours of August 19, 2011, when he noticed appellant's vehicle approaching from the other direction. The road was straight and flat, and the deputy could see for a long distance. Appellant's vehicle was less than 2,000 feet away when the deputy first saw it, and the low-beam headlights were illuminated. When appellant's vehicle was within about "six to seven hundred feet away" from the deputy, appellant flashed his high beams once at the deputy. When the vehicles were "a couple hundred" feet closer, appellant again flashed his high beams. These flashes were brief in duration, lasting "less than a second, maybe half a second. . . . just like you would flash somebody high beams, on and off," according to the deputy's testimony. Both flashes occurred in quick succession, "within a few seconds" of one another. The deputy assumed that appellant was signaling him to dim the headlights on the patrol car. The deputy did not testify that his vision was impaired as a result of the two brief flashes.

The deputy conducted a traffic stop based solely on the flashing headlights, which he believed to be a violation of Minn. Stat. § 169.61. This statute provides that "[w]hen the driver of a vehicle approaches a vehicle within 1,000 feet, such driver shall use a distribution of light, or composite beam, so aimed that the glaring rays are not projected into the eyes of the oncoming driver." *Id*. The deputy believed that this statute required the use of low beams at all times within a thousand feet of an approaching vehicle. During the encounter with appellant after the traffic stop, the deputy observed evidence of appellant's intoxication.

The Commissioner of Public Safety subsequently issued an order revoking appellant's driver's license and impounding his license plates. Appellant filed an implied-consent petition pursuant to Minn. Stat. § 169A.53 (2010), seeking rescission of the revocation order on the basis that the traffic stop was unlawful. Appellant maintained that his behavior in twice flashing the high beams did not violate the statute because there was no evidence that the brief flashing projected "glaring rays . . . into the eyes of the oncoming driver." Minn. Stat. § 169.61(b).

Following the implied-consent hearing, the district court issued an order denying appellant's petition. It found that appellant's headlights had been "directly [and] frontally visible to oncoming traffic" when he flashed his high beams. The court concluded that the phrase "glaring rays" is "not limited to the narrow definition urged by [appellant]," and that the

commissioner was not required to show "that the light was distracting or impairing the oncoming vehicle." This appeal followed.

ISSUE

Does a driver's behavior in briefly flashing the high-beam headlights at an oncoming car provide objective justification for an investigatory traffic stop when there is no evidence that the headlights blinded, impaired, or distracted another driver and where there is no other evidence of unlawful or suspicious driving conduct?

ANALYSIS

Appellant argues that the deputy's testimony was insufficient to establish reasonable justification for the traffic stop. When considering the justification for an investigatory traffic stop, this court reviews the district court's factual findings for clear error. *Wilkes v. Comm'r of Pub. Safety*, 777 N.W.2d 239, 243 (Minn. App. 2010). But, we review de novo the legality of an investigatory traffic stop, including whether the officer had a reasonable suspicion for the stop. *Id*. at 242–43.

Both the federal and state constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A limited, investigatory stop of a motorist is reasonable if the state can demonstrate that the officer had a particularized and objective legal basis for suspecting the person of violating the law. *State v. Anderson*, 683 N.W.2d 818, 822–23 (Minn. 2004). An officer may lawfully stop a driver for violating a traffic law, no matter how insignificant the violation. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997). However, a stop is not justified if it is based on a mistaken interpretation of the law. *Id*. at 578–79 (holding that a traffic stop was unlawful because it was based on the officer's erroneous belief that the defendant's headlight configuration violated the law); *see also Anderson*, 683 N.W.2d at 823–24 (holding that "an officer's mistaken interpretation of a statute may not form the particularized and objective basis for suspecting criminal activity necessary to justify a traffic stop").

I. Minnesota law does not prohibit drivers from briefly flashing their high beams in a manner that does not blind or impair approaching drivers.

Appellant argues that the officer lacked an objective basis for the stop because briefly flashing one's high beams does not violate the law, absent evidence that the high beams blinded, distracted, or impaired another driver. This argument turns on statutory interpretation. Statutory interpretation presents a question of law, which this court reviews de novo. *Swenson v. Nickaboine*, 793 N.W.2d 738, 741 (Minn. 2011).

Minnesota law requires drivers who are within a thousand feet of an approaching vehicle to "use a distribution of light, or composite beam, so aimed that the glaring rays are not projected into the eyes of the oncoming driver." Minn. Stat. § 169.61(b). Our courts have not directly addressed the question of whether this statute prohibits briefly flashing or flickering one's high beams at another driver.

Examining the language of the statute, the legislature's inclusion of the term "glaring" leads us to conclude that briefly flashing or flickering one's high beams at an oncoming vehicle is not a violation, unless another driver was at least temporarily blinded or impaired by the lights. As the statute does not define the term "glaring," we must look to its ordinary and customary meaning. *See State v. Taylor*, 594 N.W.2d 533, 535 (Minn. App. 1999) (observing that courts must construe non-technical words "according to common and accepted usage"). A light is "glaring" if it shines "intensely *and blindingly*." *The American Heritage Dictionary* 770 (3d ed. 1992) (emphasis added). Earlier versions of the statute also included the term "dazzling," which commonly means "[t]o dim the vision of, especially *to blind with intense light*." *Id.* at 478 (emphasis added); *see* Mason's Minn. Stat. § 2720-50(a), (c) (1927) (prohibiting head lamps and auxiliary lamps from projecting "glaring or dazzling light" to persons in front of the vehicle).[1] Thus, the statute prohibits use of headlights in a manner that blinds or impairs other drivers.

The larger context of the language in Minn. Stat. § 169.61 also supports our interpretation. *See Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (noting that courts must construe statutory language in light of the surrounding sections). The statute as a whole provides for the safe use and configuration of headlights, and its evident purpose is to prevent hazards caused by the use of high beams in a way that blinds, distracts, or impairs other drivers.

Briefly flashing one's high beams at another driver does not, standing alone, amount to use of a light "intensely and blindingly." A bright light of extremely short duration does not amount to "glaring rays." Accordingly, it is a common practice for drivers to flash their high beams to warn other drivers of hazards, or to signal others to adjust their own headlights. Although by no means authoritative, the Minnesota Driver's Manual (published by the Minnesota Department of Vehicle Safety) recommends that drivers flash their headlights to alert a sleepy or distracted driver approaching in the wrong lane.[2] Our unpublished cases also document instances where state troopers have flashed their high beams to signal approaching drivers to adjust their headlights. *See State v. Schmuhl*, No. A11-566, 2012 WL 1813278, at *1 (Minn. App. May 21, 2012) (noting that the deputy flashed his high beams to signal the approaching driver to dim her headlights); *Gertken v. Comm'r of Pub. Safety*, No. C0-96-319, 1996 WL 495024, at *1 (Minn. App. Sept. 3, 1996) (noting that the trooper flashed his headlights at an oncoming driver to signal her to dim her high beams). In some instances, then, flashing one's high beams may serve to avert risk rather than cause it.

The parties and the district court have focused on several unpublished cases as persuasive authority.[3] In *State v. Wold*, the issue was whether the officer had an objective basis for a traffic stop when the respondent failed to immediately dim his high beams after rounding a curve and facing a hill. *See* No. A03-1940, 2004 WL 1489054, at *2 (Minn. App. Jul. 6, 2004). The respondent testified that he did not immediately see the officer's approaching vehicle due to the hill and background city lights, but he immediately dimmed his headlights when he saw the vehicle. *Id.* Although the trooper observed the glow of respondent's high beams in the distance, he "did not testify that respondent's headlights were glaring or otherwise projecting into his eyes." *Id.* Thus, this court held that the trooper "was mistaken in his belief that respondent

violated the law merely because he failed to dim his headlights within 300 to 500 feet of the trooper's oncoming vehicle." *Id*.

Wold recognizes that merely illuminating one's high beams within 1,000 feet of another vehicle is not, by itself, sufficient to establish a violation; the lights must project glaring rays at another driver. Here, as in *Wold*, the deputy did *not* testify that the flashing high beams were glaring or projecting into his eyes. He testified only that he believed the flashing itself to be a traffic violation.

Similarly, in *Gertken*, this court upheld the validity of a traffic stop based on the driver's alleged failure to dim her high beams at any point while approaching an oncoming vehicle. 1996 WL 495024, at *1. The officer testified that the "extreme brightness" of the headlights led him to believe they were high beams. *Id*. Although the district court found that respondent had not, in fact, been using her high beams, this court upheld the validity of the stop because it was based on the officer's honest mistake of fact. *Id*. at *2. Had respondent actually been driving with her high beams on, as the officer believed, she would have been violating Minn. Stat. § 169.61. *Id*.; *accord State v. Opsal*, No. C3-96-1187, 1997 WL 20326, at *1 (Minn. App. Jan. 21, 1997) (upholding validity of traffic stop, despite officer's mistake of fact, when he reasonably believed that respondent failed to dim the high beams "because of a distracting amount of glare coming from [respondent's] headlights"), *review denied* (Minn. Mar. 18, 1997). Thus, the officer's testimony regarding the "extreme brightness" of the headlights was central to this court's holding.

Finally, in *Holm v. Comm'r of Pub. Safety*, a published case, the respondent failed to dim his high beams at any time for oncoming traffic and was also observed drifting into the parking lane on the side of the roadway. 416 N.W.2d 473, 474 (Minn. App. 1987). This court held that the stop was justified because "[a] driver must dim his lights when approaching a vehicle and failure to do so is a violation of Minn. Stat. § 169.61." *Id*. at 475. However, in *Holm*, the respondent failed to dim his high beams at any time. The court therefore did not need to address whether the "glaring" requirement was satisfied. *Id*. at 474–75.

Read in combination, the cases all recognize that failing to dim the high beams violates the statute when the lights glare into other drivers' eyes. The cases do not support the proposition that brief flashing of high-beam headlights violates the statute regardless of whether the lights are "glaring rays . . . projected into the eyes of the oncoming driver." Minn. Stat. § 169.61(b).

Other jurisdictions are divided as to whether similarly worded statutes prohibit drivers from flickering or flashing their high beams at oncoming traffic. In a case addressing facts virtually identical to those present here, the Wisconsin Court of Appeals held that a traffic stop was not justified on the basis of the driver's flashing his high-beam headlights. *Waukesha Cnty. v. Meinhardt*, 630 N.W.2d 277, *1–2 (Wis. Ct. App. May 23, 2001) (table of unpublished opinions). The relevant statute provided that, when approaching another vehicle within 500 feet, the driver "shall dim, depress or tilt the vehicle's headlights so that the glaring rays are not directed into the eyes of the operator of the other vehicle." *Id*. at *2 (quoting Wis. Stat. § 347.12(1) (1997–98)). The court held that the plain language of the statute "does not prohibit the flashing of one's high-beam headlights" at oncoming traffic. *Id*. It noted that the Wisconsin

Legislature had recently amended the statute to clarify that it did not "prohibit an operator from intermittently flashing the vehicle's high-beam headlamps at an oncoming vehicle whose high-beam headlamps are lit." *Id*. (quoting 1999 Wis. Sess. Laws 967).

Likewise, a New York appellate court held that a similar law did not prohibit a driver from briefly flashing her high beams several times at oncoming traffic. *People v. Lauber*, 617 N.Y.S.2d 419, 419–20 (N.Y. App. Term 1994). The statute required drivers to operate their headlights "so that dazzling light does not interfere with the driver of the approaching vehicle." *Id*., 617 N.Y.S.2d at 149 (quoting N.Y. Veh. & Traf. Law § 375(3) (McKinney 1986)). The court held that a mere showing that the defendant "flipped" or "flicked" her high beams at approaching vehicles was insufficient to establish a violation. *Id*., 419 N.Y.S.2d at 419–20.

The Alaska Court of Appeals held that a traffic stop *was* justified, under a statute nearly identical with Minnesota's, when the defendant flashed his high beams at an oncoming trooper. *Kunz v. State*, No. A-10273, 2009 WL 4893594, at *1–2 (Alaska Ct. App. Dec. 16, 2009). In that case, however, the driver had modified his truck's lighting so that his bright auxiliary "moose lights" also activated whenever he flashed his high beams. *Id*. at *1. Thus, the combination of the high beams and the "moose lights" blinded the trooper, and he testified that he "saw spots for several seconds." *Id*.

Finally, the North Dakota Supreme Court held that a state law prohibited drivers from flashing their high beams for any length of time. *State v. Westmiller*, 730 N.W.2d 134, 139 (N.D. 2007). The court interpreted the statute at issue as expressly requiring the use of low-beam headlights whenever a driver is approaching another vehicle within a minimum distance.[4] *Westmiller*, 730 N.W.2d at 138. While recognizing that "drivers may be accustomed to quickly flashing their high-beam headlights at an oncoming vehicle as a signal to dim headlights," it concluded that the statute's plain language did not permit any such momentary use of the high beams. *Id*. at 138–39.

As in *Meinhard* and *Lauber*, Minnesota's statute does not expressly prohibit briefly flashing one's high beams. Had the legislature intended such a result, it could have provided more specific language, such as that interpreted in *Westmiller* to require the use of low-beam headlights at all times within some minimum distance. The district court's interpretation in this case effectively removed the "glaring" requirement from the statute. The common meaning of this term as "blinding," and the statute's overarching purpose to avoid road hazards caused by intensely blinding lights, support appellant's position. Thus, we conclude that the language of Minn. Stat. § 169.61(b) does not prohibit drivers from momentarily flashing their high beams at oncoming traffic, so long as the flashing is brief and conducted in such a manner that it does not blind or impair other drivers.

II. The officer in this case lacked an objective basis for the traffic stop.

At the implied-consent hearing, the deputy testified that the sole basis for the traffic stop was appellant's action in twice flashing his high beams at the deputy. The district court found that this flashing was directly visible to oncoming traffic. However, the deputy did not testify

that the high beams blinded, distracted, or otherwise impaired him or other drivers.[5] To the contrary, the deputy affirmed that what he saw amounted to two "very quick flash[es]," each less than a second in duration. The deputy testified that he assumed appellant was merely trying to signal him to dim his own headlights. The record reveals no other articulable facts, besides the headlight-flashing, that would have supported the stop.[6] In fact, the deputy testified that he was specifically attentive to the possibility of other traffic violations, but saw none.

Because there was no indication that this brief flashing projected "glaring rays . . . into the eyes of the oncoming driver," appellant's behavior did not violate the statute. Minn. Stat. § 169.61(b). The commissioner thus failed to meet his burden in establishing a reasonable justification for the stop. As the record unquestionably reflects that the sole basis for the traffic stop was the deputy's mistaken interpretation of the law, the stop was unjustified. *Cf. George*, 557 N.W.2d at 578–79 (holding that the officer did not have an objective basis for a traffic stop when it was based on an erroneous interpretation of the law). The district court therefore erred as a matter of law in denying appellant's implied-consent petition seeking rescission of the revocation of his driver's license.

D E C I S I O N

The commissioner did not satisfy his burden of establishing objective justification for the investigatory traffic stop of appellant's vehicle. The stop was based solely on the deputy's mistaken belief that briefly flashing one's high-beam headlights violates a traffic law. As there was no evidence that the headlights in this instance blinded, distracted, or impaired another driver, appellant's vehicle did not project "glaring rays . . . into the eyes of the oncoming driver" within the meaning of Minn. Stat. § 169.61(b).

Reversed.

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[1] This court may consider former versions of the statute when the current language is ambiguous, as it is here. *See* Minn. Stat. § 645.16(5) (2010).

[2] *See* Minn. Dep't of Pub. Safety, Driver & Vehicle Servs. Div., *Minnesota Driver's Manual*, 81–82, https://dps.mn.gov/divisions/dvs/forms-documents/Documents/Minnesota_Drivers_Manual.pdf (last visited July 27, 2012).

[3] Although not precedential, unpublished opinions may be persuasive. *See* Minn. Stat. § 480A.08, subd. 3 (2010) ("Unpublished opinions of the Court of Appeals are not precedential."); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993) (recognizing that unpublished opinions may be persuasive). We elect to address several unpublished cases herein because the parties discussed those cases extensively in the briefing.

[4] The statute at issue in *Westmiller* contained language similar to Minn. Stat. § 169.61(b), but further provided that low-beam headlights "must be deemed to avoid glare at all times,

regardless of road contour and loading." N.D. Cent. Code § 39-21-21(1) (1997). No such provision is present in the Minnesota statute.

[5] The record is silent as to the presence of other traffic besides appellant and the deputy.

[6] For example, the deputy did *not* express any belief, based on surrounding circumstances, that the flashing headlights were a signal for help. *Cf. State v. Carlile*, No. 17270, 1999 WL 301422, at *1, *3–4 (Ohio Ct. App. May 14, 1999) (affirming traffic stop based on flashing high beams where officer testified that he believed the driver may have been signaling for police assistance, as it was not yet dark enough outside to necessitate high beams); *State v. Campbell*, 789 A.2d 926, 927–28 (Vt. 2001) (upholding traffic stop when appellant's car was pulled off to the side of the road on a dark, stormy night, and flashed its headlights at a marked patrol car; the officer reasonably believed the car was signaling for assistance).

STATE OF MINNESOTA

IN SUPREME COURT

A10-1558

Court of Appeals

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

Kim Hansen,

Appellant,

vs.

Filed: May 30, 2012
Office of Appellate Courts

Robert Half International, Inc.,

Respondent.

Thomas A. Harder, Greta Bauer Reyes, Foley & Mansfield, PLLP, Minneapolis, Minnesota, for appellant.

Dayle Nolan, Susan E. Tegt, Larkin, Hoffman, Daly & Lindgren, Ltd., Bloomington, Minnesota, for respondent.

S Y L L A B U S

1. An employee is only required to state a qualifying reason for leave under the Minnesota Parenting Leave Act ("MPLA"), Minn. Stat. §§ 181.940-181.944 (2010), to invoke the protections of the Act. Because appellant clearly indicated childbirth as the reason for taking leave, she is entitled to the protections of the MPLA.

2. An extension of MPLA leave does not extend the right to reinstatement under the statute. Even though there is a genuine dispute of material fact regarding whether appellant's MPLA leave was extended, she was not entitled to reinstatement, as a matter of law, because her right to reinstatement under the MPLA was never extended. The district court, therefore, did not err in granting summary judgment to respondent on appellant's right to reinstatement claim under the MPLA.

3. Because appellant failed to plead a retaliation claim under the MPLA in her amended complaint, the district court did not err in granting summary judgment in favor of respondent on appellant's retaliation claim.

4. Because there is no genuine dispute of material fact that respondent engaged in a bona fide reduction in force and that appellant failed to show that her pregnancy was a factor in

respondent's termination decision, the district court did not err in granting summary judgment to respondent on appellant's sex discrimination claim under the Minnesota Human Rights Act ("MHRA"), Minn. Stat. § 363A.08 (2010).

Affirmed.

O P I N I O N

ANDERSON, G. Barry, Justice.

This case involves an employment termination dispute in which appellant Kim Hansen challenges the district court's summary judgment determination that her employer, respondent Robert Half International, Inc. ("RHI"), did not violate the Minnesota Parenting Leave Act ("MPLA"), Minn. Stat. §§ 181.941-181.944 (2010), or the Minnesota Human Rights Act ("MHRA"), Minn. Stat. § 363A.08 (2010), when it terminated Hansen's employment shortly after she returned from maternity leave and failed to reinstate her to the same or a similar position. Because we agree that there are no genuine issues of material fact and that judgment is appropriate as a matter of law, we affirm.

RHI's Business

RHI is an international staffing service registered to do business in the State of Minnesota. Two of its divisions are Office Team and Robert Half Legal ("RHL"). RHL places lawyers, paralegals, law clerks, and legal support professionals on a temporary and permanent basis throughout the United States.

RHL's United States operations are divided into three zones: the Eastern Zone, the Central Zone, and the Western Zone. The Minneapolis office of RHL is in the Central Zone. The other offices in the Central Zone are in Chicago, Illinois; Dallas, Texas; Houston, Texas; Denver, Colorado; Columbus, Ohio; and Saint Louis, Missouri.

The Central Zone was supervised by the zone president, Bob Clark. Beginning in October 2008, Marilyn Bird managed the Central Zone operations of RHL as district director; she reported directly to Clark. Beginning in the fall of 2007, the branch manager of the Minneapolis office of RHL, who reported to Bird, was Amber Hennen. The division directors, who supervised teams of recruiting managers or account executives within the Minneapolis office, reported to Hennen. In April 2004, RHI hired appellant Kim Hansen as a staffing manager in the Office Team division. She held this position until 2006, when she was transferred to the RHL division as a member of the team that placed permanent candidates. Hennen was Hansen's direct supervisor from September 2007 until Hansen's position was eliminated in December 2008. Prior to the summer of 2008, Hennen was supervised by a regional manager, Jackie Moes. In the summer of 2008, the regional manager position was eliminated, and Moes joined RHI's management resources team.

Within the Minneapolis office of RHL, employees are assigned to the permanent placement team ("perm team") or temporary placement team ("temp team"). Recruiting

managers are responsible for placement of permanent candidates, while account executives are responsible for placement of temporary employees. Due to the immediate nature of many of the temporary staffing requests, the temp team has less flexible work hours. Employees on the temp team are required to be present during normal office hours, from 7:30 a.m. until 5:30 p.m., and to stay after 5:30 p.m. if client needs necessitate it.

RHL evaluates the performance of employees on its perm team based on their production using monthly calculations known as "per desk average" ("PDA"). The PDA represents the total monthly production of each member, averaged over a number of months. An employee's "production" is comprised of the fees paid by entities using RHL's placement services. In general, perm team members who have been in their positions for at least 9 months are expected to have an average PDA of $25,000 each month. Employees are evaluated in relation to their PDA because their actual production numbers may fluctuate from month to month. Initially, new employees have lower billing expectations; RHL expects $30,000 in total billings from new employees in the first 3 months (i.e., $10,000 a month), then $20,000 per month for the next 4 to 8 months, then full production ($25,000) after 9 months.

Hansen testified that while the "expected PDA is $25,000," there is a "bottom line cutoff" of $16,000. Moes testified that she told Hansen that there was an absolute PDA baseline of roughly $16,000 or $17,000 required in order to avoid layoff at RHL.

Hansen's Employment History

On April 6, 2004, RHI hired Hansen as a staffing manager in the Office Team division. As a staffing manager, Hansen placed administrative professionals into temporary positions. She held this position until March 2006, when she requested a transfer to the RHL division after her return from maternity leave for the birth of her first child. Hansen requested the transfer because she wanted a reduced workday so that she could manage her child's daycare schedule. After this transfer, Hansen worked for RHL's perm team. In contrast to a typical member of the perm team who worked from 8:00 a.m. until 5:00 or 5:30 p.m., Hansen worked from 8:00 a.m. until 3:00 or 3:30 p.m. Despite Hansen's reduced schedule, she was expected to meet the same production goals as all other full-time employees of the perm team. Initially, Hansen was only responsible for recruiting candidates, not for marketing to clients. In the spring of 2007, Hansen became a recruiting manager after the resignation of another employee. Hansen inherited a book of business from the resigning employee, which increased her production numbers. Hansen's PDA in 2007 was approximately $26,811.74.

Hansen was promoted to division director around January 1, 2008. As a division director, Hansen was responsible for marketing to clients and placing candidates, as well as supervising the performance of others on the perm team. Soon after her promotion, Hansen's production numbers began to decline and were below what was expected from a division director. During the first quarter of 2008, Hansen's PDA was the lowest on the perm team in the Minneapolis office, given her tenure.[1] Bird noticed that Hansen was underperforming in the division director role. Bird participated in frequent discussions with Clark, Moes, Hennen, and RHI's legal department regarding Hansen's underperformance throughout 2008. Additionally, Moes and Hennen held regular discussions with Hansen about her performance during the spring of 2008.

In March 2008, Moes reduced the number of employees Hansen supervised so that Hansen could increase her personal production. Even after this reduction in responsibilities, Hansen's production numbers continued to decline; her production numbers for the months of March and April were $19,900 and $18,087, respectively, below the expected $25,000 PDA.

Due to Hansen's failure to increase her PDA, Moes made the decision to demote Hansen from her position as division director back to her role as recruiting manager. Hansen was not immediately replaced as division director, but ultimately Jessica Kuhl assumed this position.

After her return to the role of recruiting manager, Hansen's production numbers increased, although her second-quarter PDA of $22,522.58 was below the level expected of a recruiting manager with her experience. As of mid-2008, Hansen's PDA was $20,296.60. Consequently, her immediate supervisors, Hennen and Kuhl (who had taken over Hansen's role as division director by this time) met with Hansen to talk about her underperformance and to inform her that she needed to bill a minimum of $27,000 for the month of August. Hansen's production numbers were $18,007.50 in July and $8,050.00 in August.

Hansen's Pregnancy

Hansen learned she was pregnant with her second child in late January 2008. Hennen learned of Hansen's pregnancy in January or February 2008. At some point, Hansen advised Hennen that her doctors suggested she might have medical complications related to the pregnancy. By the summer, Hansen began to experience pregnancy-related health problems. Hennen advised Hansen that she had the option of taking an early maternity leave to address any health issues related to her pregnancy, but Hansen did not accept the offer. Instead, Hansen worked part-time for the last 2 weeks of her pregnancy.

Hansen gave birth to her second child on August 29, 2008. Her leave of absence began that day. The leave of absence form completed and signed by Hansen selects "section A" as the type of leave that she was requesting. Section A is a request for "short-term medical disability," "pregnancy-related disability," or "worker's compensation disability" leave and states: "Note: Leave under FMLA runs concurrently with Short-Term Medical Leave." Hansen completed the line entitled "[p]regnancy-related disability" and filled in her delivery date.

RHI sent Hansen a letter dated September 11, 2008, confirming her leave as short term disability/FMLA leave and enclosing a copy of the leave of absence manual ("LOA manual"). The letter advised Hansen that she was eligible for up to 12 weeks of short term disability/FMLA leave in a 12 month period. Hansen was also advised that she could request a personal leave of up to 4 weeks at the conclusion of her short term disability/FMLA leave. But she was also advised that an employee has "no guarantee of job reinstatement" at the "conclusion of a personal leave."

RHI has established policies regarding leaves of absence set out in its LOA manual. RHI provides a short term medical and pregnancy disability leave ("short term disability leave"),[2] described in part II, section 1 of the LOA manual. This leave is available to all full-time RHI employees starting on their first day of work. Employees are eligible for such leave if they are

medically disabled and unable to work for more than five business days due to an "illness, injury, or disability or disability related to pregnancy/childbirth." The maximum amount of short term disability leave available under this policy is 12 weeks or the length of the employee's disability, whichever is less. RHI also provides leave under the FMLA, described in part II, section 2 of the LOA manual. In order to qualify for FMLA leave, employees must meet the requirements established by federal law and regulations.

Part III of the LOA manual, which addresses the interrelation of the various types of leave, states that if an employee is eligible for leave under the short term disability leave and FMLA, the employee's leave will be charged under both policies. This part of the LOA manual makes clear that short-term disability leave and FMLA leave run concurrently and that an employee is not entitled to more than 12 weeks of total leave under these policies in any given 12-month period.

Part I, section 9 of the LOA manual clearly advises employees about their right to reinstatement and specifically provides:

> Upon completion of an approved leave of absence an employee will be reinstated to the employee's former position or a position that is substantially similar to the employee's former position without reduction in pay, benefits or service.

But reinstatement is not available if "the position or substantially similar position ceases to exist because of legitimate business reasons unrelated to the employee's leave."

Hansen returned to work on December 1, 2008, after completion of her approved leave of absence.

The Economic Downturn

The economic downturn in the general economy that began in September 2008 severely affected RHL's business. The need for the company's staffing services decreased dramatically; RHL's monthly sales from permanent placements in the Central Zone decreased by more than 90% between August and December 2008. RHL's Central Zone business declined by more than 50% during this time period.

To account for the decrease in demand, Clark directed Bird to reduce the number of employees on the perm team within the Central Zone. Bird had sole discretion to determine which positions to eliminate. Hennen knew of general plans to reduce personnel in the Minneapolis office, but she was not involved in specific employment termination decisions. RHL reduced personnel on the perm team because the job order flow was significantly less than it had been before the economic downturn and RHL was producing less revenue.

From the fourth quarter of 2008 to the first quarter of 2009, Bird reduced the number of perm team employees in the Central Zone from 20 to 8. In January 2009 the perm teams in RHL's Columbus, Ohio and Saint Louis, Missouri offices were eliminated. In addition, the salaries of almost all perm team employees were reduced. The perm team in the Minneapolis

office was reduced from four employees to one employee. The only perm team employee who remained was Kuhl, who had the highest PDA for 2008.

Hansen's Employment Termination

In determining which positions to eliminate, Bird compared total production from individual offices within the Central Zone, as well as the lowest performing employees within each of the offices. In comparing the performances of the relevant employees, she considered their production numbers for 2008, as well as their relative tenure with RHL. Bird decided to eliminate Hansen's position as part of this reduction in force. Bird chose to eliminate Hansen's position because, given her tenure, Hansen's PDA was consistently the lowest of all employees on the perm team in the Minneapolis office and the Central Zone during 2008. Kuhl was retained on the perm team because she had the highest PDA for 2008, $30,413. In comparison Hansen's PDA for 2008 was $18,479, and Sarah Dunn's PDA for 2008 was $23,524. In calculating Hansen's PDA for 2008, Bird did not evaluate Hansen's performance while she was on maternity leave.

Hennen did not make the decision to terminate Hansen, although she was informed of Bird's decision-making and knew it was possible that Hansen's position might be eliminated. It was not until December 2, 2008, that Bird informed Hennen that Hansen's position was being eliminated. Once Bird had notified Hennen that Hansen's position had been eliminated, Hennen met with Hansen around lunchtime on December 2, 2008, and informed Hansen that her job had been eliminated.

Litigation

Hansen subsequently brought suit against RHI and asserted the following claims: (1) RHI violated the MPLA by failing to reinstate her to her position or a comparable position after her maternity leave; (2) RHI violated the MPLA by retaliating against her for taking maternity leave; and (3) RHI violated the MHRA by terminating her because of her sex. At the close of discovery, RHI moved for summary judgment on all counts, and Hansen moved for partial summary judgment on her failure to reinstate claim. The district court granted RHI's motion in full and denied Hansen's motion. Regarding Hansen's first claim, the court concluded that Hansen had no right to reinstatement under the MPLA because the MPLA requires employees to request leave specifically under the MPLA, and Hansen failed to do so. The court also found that Hansen was terminated as a result of a bona fide reduction in force, which eliminated her reinstatement rights by operation of Minn. Stat. § 181.942, subd. 1(b). Regarding Hansen's second claim, the court held that Hansen did not have a proper retaliatory-discharge claim under the MPLA. In reaching this conclusion, the district court determined that Hansen failed to plead such a claim in her amended complaint and that RHI established a legitimate non-discriminatory reason for Hansen's termination, defeating Hansen's retaliation claim as a matter of law. The court also dismissed Hansen's claim of sex discrimination under the MHRA, concluding that Hansen failed to establish a prima facie case of sex discrimination; because Hansen's position was eliminated as part of a bona fide reduction in force, she had the burden of showing that her sex was a factor in the decision to eliminate her position, and she failed to meet that burden. The court of appeals affirmed the district court's grant of summary judgment. This appeal followed.

I.

At issue in this case is whether an employee must expressly request leave under the MPLA to invoke the protections of the Act. Hansen argues that the district court erred as a matter of law because the MPLA only requires an employee to inform her employer of the conditions that may necessitate a leave under the MPLA and that Hansen did so in this case. Hansen also argues that RHI agreed to extend her MPLA leave, and that by doing so, RHI also extended her right of reinstatement.[3]

For the reasons discussed below, we conclude that an employee is required only to state a qualifying reason for needing leave under the MPLA in order to invoke the protections of the Act and that Hansen did so in this case. We also conclude that there is at least a material dispute of fact as to whether Hansen's leave was extended. But even if her leave was extended, Hansen is not entitled to reinstatement, as a matter of law, because her right to reinstatement was not extended.

Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "On appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law." *State v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

We review the district court's construction of a statute de novo. *Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 815 (Minn. 2004); *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). The first step when interpreting a statute is to determine whether the language of the statute is ambiguous. *See Gassler v. State*, 787 N.W.2d 575, 584 (Minn. 2010). A statute is ambiguous when the language is subject to more than one reasonable interpretation. *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 539 (Minn. 2007). When the Legislature's intent is not clearly discernible from the explicit words of the statute, we advance to other steps to ascertain the intent of the Legislature. *See* Minn. Stat. § 645.16 (2010).

A.

The district court held that Hansen was required to specifically invoke the MPLA when requesting leave. Hansen argues that the court erred as a matter of law in dismissing her reinstatement claim under the MPLA because (1) the MPLA is silent as to how leave should be requested and (2) the court should have followed the parallel federal cases interpreting the Family and Medical Leave Act ("FMLA"), which only require an employee to inform her employer of the conditions that may necessitate a leave under the FMLA. Hansen has the better argument here.

Under the MPLA, "[a]n employer must grant an unpaid leave of absence to an employee who is a natural . . . parent in conjunction with the birth . . . of a child. The length of the leave shall be determined by the employee, but may not exceed six weeks, unless agreed to by the employer." Minn. Stat. § 181.941, subd. 1. The MPLA defines an employee as "a person who

performs services for hire for an employer *from whom a leave is requested under sections 181.940 to 181.944*." Minn. Stat. § 181.940, subd. 2 (emphasis added).

Contrary to the result reached by the district court and the position advanced by RHI here, the plain language of the MPLA does not require an employee to specifically refer to the Act when requesting a leave. The language relied on by the court—"from whom leave is requested under sections 181.940 to 181.944"—does not specify the terms by which such leave must be requested. When interpreting statutes, "words and phrases are construed according to rules of grammar and according to their common and approved usage." Minn. Stat. § 645.08(1). *Merriam-Webster's Collegiate Dictionary* 1363 (11th ed. 2004) defines the word "under" as "subject to the authority, control, guidance, or instruction of." According to this definition, an employee must request leave that is "subject to the authority" of the MPLA, *i.e.*, she must request leave for one of the reasons specified in sections 181.941 to 181.9413 (birth or adoption of a child, school conference and activities, or illness or injury of child) but is not required to specifically reference the MPLA in doing so. The common and approved usage of the word "under" has never been "to expressly invoke."

In arguing for a plain meaning definition that requires express invocation of the MPLA, RHI attempts to contrast the FMLA with the MPLA. RHI argues that "the FMLA does not contain any provision requiring, or even suggesting, that an employee must specifically request leave under the FMLA." But similar to the MPLA, the FMLA defines "eligible employee" as one "who has been employed . . . for at least 12 months by the employer with respect to *whom leave is requested under section 2612 of this title*." 29 U.S.C. § 2611(2)(A)(i) (2006) (emphasis added). Given this similarity, it is significant that the Department of Labor has promulgated rules providing that express invocation of the FMLA is unnecessary: "An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave . . . ." 29 C.F.R. § 825.301(b) (2011). Case law has been consistent with this regulation. *See, e.g.*, *Kobus v. Coll. of St. Scholastica, Inc.*, 608 F.3d 1034, 1036-37 (8th Cir. 2010); *Rask v. Fresenius Med. Care N. Am.*, 509 F.3d 466, 474 (8th Cir. 2007).

Assuming the statute is ambiguous due to silence as to the mechanism by which an employee is entitled to the protections of the statute, we determine the intent of the Legislature by other means. "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; [and] (4) the object to be attained . . . ." Minn. Stat. § 645.16 (2010). The MPLA is a remedial law.[4] Generally, "statutes which are remedial in nature are entitled to a liberal construction, in favor of the remedy provided by law, or in favor of those entitled to the benefits of the statute." *Blankholm v. Fearing*, 222 Minn. 51, 54, 22 N.W.2d 853, 855 (1946) (citation omitted). In construing the MPLA liberally, an employee should be entitled to the protections of the Act when she informs her employer of a qualifying reason for the needed leave and is otherwise eligible for such leave. A narrow reading of the MPLA would deny an employee the protections of the statute based on the technicality of failing to expressly invoke the statute.

The record shows Hansen informed RHI of a qualifying reason for her leave. When Hansen completed her leave of absence request form, she completed section A of the form pertaining to "short-term medical disability," "pregnancy-related disability," or "worker's compensation disability" leave. She completed the line entitled "[p]regnancy-related disability" and stated her delivery date. In addition, Hennen admitted that she was on notice that Hansen would need to leave due to Hansen's complications related to her pregnancy. Because Hansen stated a qualifying reason for needing leave under the MPLA—childbirth—we conclude that she invoked the protections of the Act.

B.

Hansen next argues that RHI agreed to extend her MPLA leave, and that by doing so, RHI also extended her right to reinstatement. We conclude that an extension of MPLA leave does not extend the right to reinstatement. Thus, even though Hansen's leave may have been extended, she was not entitled to reinstatement, as a matter of law, because her right to reinstatement was never extended.

Minnesota Statutes § 181.941, subd. 1 provides: "The length of the leave shall be determined by the employee, but may not exceed six weeks, *unless agreed to by the employer*." (Emphasis added.) Hansen argues that RHI agreed to extend her MPLA leave to December 1, 2008. The evidence she cites in support of her argument is a leave of absence personnel action form ("PAF") filled out by Amber Hennen on October 29, 2008. Under leave type, Hennen checked the box for "Maternity," leaving blank the box for "FMLA" and "personal" leave. Under the caption of "Action Codes," Hennen selected the box "Extend Existing Leave" as opposed to the box "Change Leave Type." In the "Anticipated Return Date" box, Hennen wrote in December 1, 2008. Based on this evidence, we conclude that there is at least a material dispute of fact whether RHI agreed to extend Hansen's leave under the MPLA.

But we agree with the district court that, even if Hansen's MPLA leave was extended, her right to reinstatement was not extended. Even assuming that RHI agreed to extend Hansen's leave under the MPLA, there is no language in the MPLA to suggest that an extension of leave also extends the right to reinstatement. Because the FMLA provides that upon return from a leave covered by the Act, an employee is entitled to be restored to the same or equivalent position by the employer, we find the jurisprudence interpreting the FMLA instructive. *See* 29 U.S.C. § 2614(a) (2006). Federal courts interpreting the FMLA have held that an expiration of leave terminates the right to reinstatement to the same or equivalent position. *See Hunt v. Rapides Healthcare Sys., LLC*, 277 F.3d 757, 763-64 (5th Cir. 2001); *Mondaine v. Am. Drug Stores, Inc.*, 408 F. Supp. 2d 1169, 1205-06 (D. Kan. 2006). The absence of statutory language extending the right to reinstatement and the case law interpreting the FMLA support our conclusion that, absent a specific agreement to reinstate, an extension of leave under the MPLA does not extend the right to reinstatement. RHI's September 11, 2008 letter to Hansen shows that RHI never agreed to extend Hansen's right to reinstatement: "At the conclusion of your Short Term Disability/FMLA Leave, a Personal Leave may be granted at the discretion of your manager for up to four weeks. An employee on personal leave *has no guarantee of job reinstatement to any position at the conclusion of a personal leave*." (Emphasis added.) RHI clearly and unequivocally, in the September 11, 2008 letter, advised Hansen that she would forfeit her right to reinstatement if she extended her leave past 12 weeks. Because we conclude

that Hansen's right to reinstatement was never extended, we hold that the district court did not err in granting summary judgment to RHI on Hansen's reinstatement claim.

II.

We next turn to Hansen's argument that the district court erred in granting summary judgment in favor of RHI on her retaliation claim under the MPLA. Specifically, she argues that (1) she properly pleaded a retaliation claim under the MPLA in her amended complaint and (2) RHI's reason for eliminating her position was a pretext for retaliation. Because we conclude that Hansen failed to plead a retaliation claim under the MPLA, we do not reach the issue of whether RHI's reason for eliminating her position was a pretext for retaliation.

The applicable provision of the MPLA provides: "An employer shall not retaliate against an employee for requesting or obtaining a leave of absence as provided by this section." Minn. Stat. § 181.941, subd. 3. Minnesota is a notice-pleading state that does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it. *See* Minn. R. Civ. P. 8.01 (requiring pleading to include "a short and plain statement of the claim showing that the pleader is entitled to relief"); *see also Roberge v. Cambridge Coop. Creamery Co*., 243 Minn. 230, 232, 67 N.W.2d 400, 402 (1954) (stating that pleadings must "be framed so as to give fair notice of the claim asserted and permit the application of the doctrine of *res judicata*").

In her amended complaint, Hansen alleges:

> 34. The Minnesota Parenting Leave Act, Minn. Stat. § 181.941, mandates that an employee be granted a leave of absence in connection with the birth of a child.
> . . . . . .
>
> 36. Upon her return from leave, Plaintiff was not returned to her former position or a comparable position. Instead, she was returned to work for one day, allowed to perform no duties during that day, and then terminated the following day under the pretext that her position had been eliminated.
>
> 37. Defendant's actions above violate[] the Minnesota Parenting Leave Act.

Hansen's amended complaint, at most, asserts that she was fired on a pretextual basis; it says nothing whatsoever about retaliation for requesting a leave and thus fails to put RHI on notice of a retaliation claim. Because Hansen failed to plead a retaliation claim under the MPLA in her amended complaint, we hold that the district court did not err in granting summary judgment to RHI on the retaliation claim.

III.

Regarding her sex discrimination claim under the MHRA, Hansen argues that she established a prima facie case. Specifically, she argues that RHI did not engage in a bona fide reduction in force and that, even if it did, she met her burden of showing that her pregnancy was a factor in RHI's termination decision. We conclude that there is no material dispute of fact that

RHI engaged in a bona fide reduction in force and that Hansen failed to show that her pregnancy was a factor in RHI's termination decision.

Claims under the MHRA, not involving direct evidence of discriminatory animus, are subject to the three-part burden-shifting framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001). Under this framework, a plaintiff must first make out a prima facie case of discrimination. *McDonnell Douglas Corp.*, 411 U.S. at 802. Once established, the burden then shifts to the employer to articulate a legitimate and nondiscriminatory reason for the adverse employment action. *Goins v. W. Grp.*, 635 N.W.2d 717, 724 (Minn. 2001). The burden then shifts again to the plaintiff to put forward sufficient evidence to demonstrate that the employer's proffered explanation was pretextual. *Id.*

To establish a prima facie case of discriminatory discharge, an employee must show that: (1) she is a member of a protected class; (2) she was qualified for her position; (3) she was discharged; and (4) the employer assigned a nonmember of the protected class to do the same work. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 442 (Minn. 1983). When an employee is discharged pursuant to a bona fide reduction in force, however, " 'some additional showing [is] necessary to make a prima facie case.' " *Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 324 (Minn. 1995) (quoting *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1165 (8th Cir. 1985)). Specifically, an employee must make an additional showing that her sex was a factor in the termination decision. *Cf. Dietrich*, 536 N.W.2d at 324-25 (requiring an additional showing that age was a factor in the termination decision). RHI makes no contention that Hansen failed to establish the first four elements of the prima facie case but argues that, because she was discharged pursuant to a reduction in force, she must make an additional showing that sex was a factor in the termination decision. Hansen argues that there is at least a question of fact as to whether a reduction in force occurred and that therefore summary judgment was inappropriate.

The district court did not err in determining that, as a matter of law, a bona fide reduction in force occurred. In *Dietrich*, we adopted the standard articulated by the Sixth Circuit:

> [a] work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company. An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge. However, a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another person is hired or reassigned to perform the plaintiff's duties.

Id. at 324 (alteration in original) (quoting *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990)). There is no material question of fact that RHI eliminated one or more positions within the company; the severe revenue reductions resulted in significant employee layoffs. At the beginning of 2008, RHL's perm team in the Central Zone had 20 employees, but by the end of the first quarter of 2009, the team had been reduced to a total of 8. The perm teams in Columbus, Ohio, and Saint Louis, Missouri, were completely eliminated. The perm team in the Minneapolis office was reduced from four employees to one employee.

Hansen disputes the occurrence of a reduction in force because "all employees on the permanent team, except [her], were 'afforded the opportunity' to transfer to the temporary team instead of being eliminated." But Hansen does not dispute that the perm team positions were eliminated, and she does not allege that any of the transferred employees continued to perform perm team duties. She does not allege, for example, that employees transferred to the temp team continued to place permanent candidates. Furthermore, there is no evidence suggesting that Hansen or anyone else on the perm team was "replaced" after termination, *i.e.*, no one was hired to handle perm team duties after the positions were eliminated.[5]

When an employee's position is eliminated as part of a reduction in force, the employee has the burden of showing that her sex was a factor in the decision to eliminate her position. *See Dietrich*, 536 N.W.2d at 324-25. To make this showing, Hansen needs to offer evidence from which a fact finder might reasonably conclude that the employer intentionally discriminated. *See Holley*, 771 F.2d at 1166. To make this further showing, an employee

> must present additional evidence of a discriminatory motive, whether in the form of discriminatory comments by the decisionmaker, statistical evidence that the employer consistently lays off members of the plaintiff's [protected category], or some such evidence.

Munshi v. Alliant Techsystems, Inc., No. CIV. 99-516PAMJGL, 2001 WL 1636494, at *4 (D. Minn. June 26, 2001); *see Holley*, 771 F.2d at 1166.

Hansen does not offer evidence that RHI systematically discriminated against women who took pregnancy-related leave. Hansen contends that RHI discriminated against her because she was the only employee on the perm team not given the opportunity to transfer. She also argues that RHI's contention that she was a poor performer was pretextual. But Hansen offers no evidence that other women who took pregnancy leaves were discriminated against or that women without children were preferred. Instead she focuses on one isolated case, her own, and contends that the "only factor setting [her] apart from all of the other employees" was the fact that she "just had a baby and had just returned from pregnancy leave." To the best of Bird's knowledge, "none of the other 11 [RHL] permanent placement employees selected for termination in the Central Zone were pregnant." Hansen fails to make the "additional showing" that her sex was a factor in RHI's decision to terminate her employment.

Hansen argues that comments made by Hennen establish a discriminatory animus. Hansen testified that Hennen—upon learning that a female employee was on fertility drugs—stated "if she was going to become pregnant she had to get rid of her or she was going to be stuck with her because she was pregnant." Hansen also recalls Hennen stating, after interviewing a potential female employee, "too bad we can't hire her, because she is great, because she is pregnant." Hansen also recalls Hennen telling Sarah Dunn not to talk about her pregnancy.

Under the *McDonnell Douglas* framework, "stray remarks, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process are insufficient to establish a prima facie case." *Smith v. DataCard Corp.*, 9 F. Supp. 2d 1067, 1079

(D. Minn. 1998). Hennen's comments fail to establish a discriminatory animus because Hennen played no part in the decision to terminate Hansen; instead it was Bird who decided to eliminate Hansen's position. Because there is no genuine dispute of material fact that RHI engaged in a bona fide reduction in force and Hansen failed to show that her sex was a factor in RHI's termination decision, we conclude that the district court did not err in granting summary judgment to RHI on Hansen's sex discrimination claim under the MHRA.

Affirmed.

DIETZEN, Justice, took no part in the consideration or discussion of this case.

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[1] Specifically, Hansen's PDA was $18,070, while Sarah Dunn and Jessica Kuhl, other members of the perm team, had PDAs of approximately $40,327 and $40,846, respectively. While Melissa Zollman's PDA of $11,342 was lower than Hansen's, Zollman did not join RHL until December 2007, and her production expectations were therefore lower.

[2] Employees with at least 6 months of service with RHI are eligible to have all or part of their salary continued during a qualified short term disability leave for the period of time that the employee is disabled according to a doctor's note.

[3] Hansen also argues that section 181.942, subdivision 1(b), does not apply because (1) Hansen did not lose her position *during* her leave and (2) the district court determined that Hansen lost her job as a result of a reduction in force, not a layoff. Because we conclude that Hansen's right to reinstatement was never extended, we do not reach the issue of whether section 181.942, subdivision 1(b), applies here.

[4] Minn. Stat. § 181.944 provides:

> [A] person injured by a violation of sections 181.940 to 181.943 may bring a civil action to recover any and all damages recoverable at law, together with costs and disbursements, including reasonable attorney's fees, and may receive injunctive and other equitable relief as determined by a court.

[5] Hansen contends that there is a question of material fact whether anyone was hired to handle perm team duties after the positions were eliminated because Jennifer Hedin, John Nilsen, and Lisa Breiland were hired while Hansen was on leave. Marilyn Bird sent Hedin a letter dated September 30, 2008, offering her a position as a recruiting manager. This offer of employment was sent before the fourth quarter of 2008, when Bird was directed by Clark to start reducing the number of employees. John Nilsen began his employment as a recruiting manager on August 27, 2008, but was terminated a few weeks later. Neither Hedin nor Nilsen could be said to have "replaced" Hansen, because Hansen's employment was not terminated until December 2, 2008. Lisa Breiland was hired as an account executive for the temp team and her hiring is irrelevant to determining whether the perm team positions were eliminated as part of a reduction in force.

STATE OF MINNESOTA

IN SUPREME COURT

A10-2022

Original Jurisdiction — Per Curiam

Took no part, Anderson, Paul H., and Stras, JJ.

In re Petition regarding — Filed: December 7, 2010

2010 Gubernatorial Election. — Office of Appellate Courts

Sam Hanson, Diane B. Bratvold, Neal T. Buethe, Briggs and Morgan, P.A., Minneapolis, Minnesota; and

Tony P. Trimble, Matthew W. Haapoja, Trimble & Associates, Ltd., Minneapolis, Minnesota, for petitioner Tom Emmer.

Susan Gaertner, Ramsey County Attorney, Darwin J. Lookingbill, Assistant Ramsey County Attorney, St. Paul, Minnesota, for respondent Ramsey County.

Robert M. A. Johnson, Anoka County Attorney, Thomas G. Haluska, Assistant Anoka County Attorney, Anoka, Minnesota, for respondent Anoka County.

Marc E. Elias, Kevin J. Hamilton, Perkins Coie LLP, Washington, D.C.; and

Charles N. Nauen, William A. Gengler, Lockridge Grindal Nauen PLLP, Minneapolis, Minnesota; and

David L. Lillehaug, Fredrikson & Byron, P.A., Minneapolis, Minnesota, for respondent Mark Dayton.

Lori Swanson, Attorney General, Alan I. Gilbert, Solicitor General, Kenneth E. Raschke, Jr., Assistant Attorney General, St. Paul, Minnesota, for respondent Secretary of State Mark Ritchie.

Michael O. Freeman, Hennepin County Attorney, Daniel P. Rogan, Patrick S. Diamond, Assistant Hennepin County Attorneys, Minneapolis, Minnesota, for respondent Hennepin County Auditor Jill Alverson.

S Y L L A B U S

Because Minn. Stat. §§ 204C.20, subd. 1, and 206.86, subd. 1 (2008), use obsolete language that does not include the terms "polling place roster" or "voter's receipts," they do not unambiguously require local election officials to determine the number of ballots to be counted based only on the number of signatures on the polling place roster or prohibit reliance on the number of voter's receipts.

Construing the legislative intent of the ambiguous language in Minn. Stat. §§ 204C.20, subd. 1, and 206.86, subd. 1, based on the purpose to be achieved by the statutes, the language of current and former statutes on the subject, and the longstanding administrative interpretation of the statutes, it is clear that the Legislature intended to permit reliance on either signatures on polling place rosters or voter's receipts to determine the number of ballots to be counted.

O P I N I O N

PER CURIAM.

On Wednesday, November 17, 2010, Tom Emmer, the Republican Party's candidate for Governor of Minnesota, filed a petition under Minn. Stat. § 204B.44 (2008), alleging that the Minnesota State Canvassing Board was about to commit an error in certifying the correctness of the results of the November 2, 2010, general election.

Petitioner alleged that local election officials had failed to properly determine the number of ballots to be counted on election night and that, as a result, there may have been more ballots counted than there were voters who cast ballots. Petitioner asked the court to order the State Canvassing Board, prior to its certification of the 2010 election results for Governor of the State of Minnesota, to conduct a statewide determination of the number of persons voting on Election Day by counting signatures on the precinct polling rosters, and not voter's receipts. Petitioner contends that the number of signatures must be used to determine the proper number of ballots to count in accordance with Minn. Stat. § 204C.20, subd. 1 (2008). After expedited briefing, we heard oral argument on November 22, 2010.[1] We filed an order on November 22, 2010, denying the petition, with this opinion to follow.

This case involves the statutes that govern two processes that occur at the polling place on Election Day: the process by which voters obtain a ballot on which to vote, and the process of determining the correct number of ballots to count after the polls have closed. The first process is currently prescribed in Minn. Stat. § 204C.10 (2008). Under section 204C.10(a), an individual desiring to vote is required to "sign a polling place roster." After the individual signs the roster, an election judge gives the voter a "voter's receipt." Minn. Stat. § 204C.10(c). The voter gives the receipt to the election judge in charge of ballots and receives a ballot in exchange. *Id.*

The second process is prescribed in Minn. Stat. § 204C.20, subd. 1. After the polls close on Election Day, that statute requires election judges in each precinct to determine the number of ballots to be counted based on either "the number of signed voter's certificates" or "the number of names entered in the election register." *Id.*[2] The statute provides:

> The election judges shall determine the number of ballots to be counted by adding the number of return envelopes from accepted absentee ballots to *the number of signed voter's certificates*, or to *the number of names entered in the election register*. The election judges shall then remove all the ballots from the box. Without considering how the ballots are marked, the election judges shall ascertain that each ballot is separate and shall count them to determine whether the number of ballots in the box corresponds with the number of ballots to be counted.

Minn. Stat. § 204C.20, subd. 1 (emphasis added). If there are more ballots in the ballot box than the number of ballots to be counted, subdivision 2 of section 204C.20 prescribes additional steps that election officials are to take. *See* Minn. Stat. § 204C.20, subd. 2 (2008). If, "after following these steps," there remains "an excess of properly marked ballots," one election judge is to remove ballots from the ballot box "without looking" until the number of ballots remaining in the ballot box agrees with the number of ballots to be counted. *Id.*[3]

Petitioner asserts that local election officials did not perform the second process, determining the correct number of ballots to be counted, in accordance with Minn. Stat. § 204C.20, subd. 1. Specifically, petitioner argues that section 204C.20, subdivision 1, requires election officials to count voter signatures on polling place rosters to determine the number of ballots to be counted. He asserts that at the election on November 2, local election officials counted voter's receipts instead of voter signatures and, because voter's receipts are not signed by the voter, determining the number of ballots to be counted based on the number of voter's receipts does not comply with section 204C.20. Petitioner further alleges that because the number of ballots to be counted was not properly determined, any "excess" ballots were not removed from the ballot box before the votes were recorded, as required by Minn. Stat. § 204C.20, subd. 2.[4]

Petitioner's argument is premised on section 204C.20, subdivision 1. He contends that the statute clearly requires officials to count voter signatures because the statute refers to the number of "signed" voter's certificates and because, he asserts, the election register—specified in subdivision 1 as the other means of determining the number of ballots to be counted—is the predecessor of the present day signed polling place roster.

Petitioner's claim presents an issue of statutory interpretation—that is, whether either section 204C.20 or section 206.86, or both, allows only voter signatures on the polling place roster to be considered in determining the number of ballots to be counted. The object of all statutory interpretation is to ascertain and effectuate the intent of the Legislature. Minn. Stat. § 645.16 (2008). Our starting point is the language of the statutes. *E.g., Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim*, 784 N.W.2d 834, 840 (Minn. 2010). If the language of the statutes is unambiguous, we do not look further to determine their meaning. *Hutchinson Tech., Inc. v. Comm'r of Revenue*, 698 N.W.2d 1, 8 (Minn. 2005) ("We have repeatedly held that we must give effect to the plain meaning of statutory text when it is clear and unambiguous."). If the language is ambiguous, the Legislature has provided direction as to how its intent "may be ascertained." Minn. Stat. § 645.16. The first question then is whether the language of the statutes is ambiguous.

A.

Petitioner argues that sections 204C.20 and 206.86 are not ambiguous, and that the plain language of the statutes unambiguously requires determination of the number of ballots to be counted based only on the number of voter signatures on polling place rosters. He further argues that the plain language of the statutes precludes local election officials from using voter's receipts to determine the number of ballots to be counted.

The plain language of the statutes does not support petitioner's arguments. Neither section 204C.20, subdivision 1, nor section 206.86, subdivision 1, includes the terms "polling place rosters" or "voter's receipts"—the terms used in section 204C.10 to describe the current process by which a voter obtains a ballot. We cannot, therefore, conclude that the plain language of the statutes at issue either requires counting signatures on the polling place rosters or prohibits counting voter's receipts.

But, petitioner argues, the reference to "signed" voter's certificates in section 204C.20, subdivision 1, indicates the Legislature's intent that only documents signed by the voter may be considered in determining the number of ballots to be counted. The plain language of section 204C.20, subdivision 1, however, is not as limited as petitioner argues. In addition to referencing the number of signed voter's certificates, the statute also provides for counting "the number of names entered in the election register." Minn. Stat. § 204C.20, subd. 1. Likewise, section 206.86, subdivision 1, instructs election judges to compare the number of ballots to "the number of voters shown on the election register." Although it is no longer in use, the "election register," when it was used, was not signed by the voter. *See, e.g.*, Minn. Stat. § 204A.295 (1978).

An examination of the process used when the election register system was in place demonstrates that that system did not involve voter signatures. The election register was a document used in precincts where there was no permanent voter registration system. *Id.*, subd. 1. In the absence of permanent voter registration, a person who wished to vote in a particular election was required to first satisfy an election board that he was eligible to vote in the precinct. *Id.* If the applicant was eligible to vote at the precinct, an election judge wrote the voter's name, residence, and address of most recent prior registration in the election register and then handed the voter a ballot. *Id.*, subd. 4. Beginning in 1978, an election register was therefore a list, prepared by election judges on election day, of the voters who had qualified to vote and received ballots in that precinct for that particular election. *See id.* This list did not contain signatures of voters. Because sections 204C.20 and 206.86, in their plain terms, allow election officials to count something other than signatures, specifically, names on the election register, petitioner's plain-language argument fails.

That the plain language of the statutes does not require that election officials count only voter signatures does not fully resolve the question presented here. This is so because the express language of the statutes also does not provide, as petitioner notes, for local election officials to count voter's receipts. As noted above, the express language of section 204C.20 provides for counting either the number of "signed voter's certificates" or the "number of names entered in the election register." The express language of section 206.86 similarly directs election judges to count the ballot cards to determine that their number does not exceed the number of voters

shown on the "election register" or "registration file." But "voter's certificates," "election registers," and "registration files" are documents no longer used at the polling place in Minnesota elections. The statutes that previously prescribed the use of those documents in the processes by which voters obtained ballots at the polls have been repealed or amended, and the current statute, section 204C.10, establishes a process that instead uses polling place rosters and voter's receipts. Accordingly, neither section 204C.20, subdivision 1, nor section 206.86, subdivision 1, can be implemented in accordance with its express terms. A statute that cannot be complied with because it refers to nonexistent documents is, by its very terms, ambiguous. *See* Minn. Stat. § 645.17(1) (2008) (stating that "the legislature does not intend a result that is . . . impossible of execution").[5]

B.

We must, therefore, attempt to determine how the Legislature intends election officials to determine the number of ballots to be counted in light of the obsolete, and therefore ambiguous, language of sections 204C.20 and 206.86. In determining the intent of the Legislature, "[w]hen the words of a law are not explicit," the Legislature has stated that we may consider, among other things, "the occasion and necessity for the law," " the object to be attained," "the former law, if any, including other laws upon the same or similar subjects," and "administrative interpretations of the statute." Minn. Stat. § 645.16(1), (4), (5), (8).

With respect to "the occasion and necessity for the law" and "the object to be attained" by the law, the operative provisions of the statutes direct local election officials to determine the proper number of ballots to be counted. *See* Minn. Stat. §§ 204C.20, subds. 1, 2, and 206.86, subd. 1. Because the law requires that the determination be made before the ballots are counted, the legislative intent appears to be to design a process that would guard against more ballots being counted than eligible voters voting. Petitioner has not shown how counting voter's receipts, which are given only to voters after they have signed the polling place roster and which constitute "proof of the voter's right to vote," Minn. Stat. § 204C.10(c), is inconsistent with this legislative intent.

When we turn to the former law on this and related subjects, it is even more clear that petitioner's statutory argument that only voter signatures can be counted fails because the information that Minnesota law has historically directed local election officials to use in determining the proper number of ballots to be counted was not signed by the voter. A form of the unsigned "election register" was used in elections from at least 1939[6] until it was eliminated in 1984,[7] and was specifically identified in the statutes as a basis for determining the proper ballot numbers beginning in 1939.[8] Although signed voter's certificates were used in elections starting in at least 1939,[9] the statutory provisions providing for determining the number of ballots to be counted did not mention voter's certificates until 1977.[10] Instead, from 1939 until 1977, the statutory predecessors of section 204C.20, subdivision 1, provided for determination of the number of ballots to be counted based on either the election register or the "registration file." *See, e.g.*, Minn. Stat. § 601-6(10)c (Supp. 1940) (election register); Minn. Stat. § 204A.41, subd. 1 (1976) (election register or registration file). During those years, the registration file was a collection of duplicate voter registration cards, *see, e.g.*, Minn. Stat. § 201.121, subd. 1 (1976), on which the election judge recorded "the fact of voting" before handing the voter a ballot, *see,*

e.g., Minn. Stat. § 204A.29, subd. 2 (1976). Like the election register, the registration file was not signed by the voter at the polls.[11]

Rather than indicating intent to rely exclusively on voter signatures, relevant former law demonstrates legislative intent to permit reliance, as well, on documentation created by election judges of the voters' eligibility to vote and receipt of a ballot. The election laws for many years permitted reliance on either the election register or the registration file.

As described above, in precincts without permanent voter registration, after the voter had demonstrated his eligibility to vote, an election judge entered the voter's name on the election register. The voter's name on the register served both as the proof of eligibility to vote and the record that the voter had voted.

Precincts with a permanent voter registration system used a registration file to document eligibility to vote. The registration file was composed of a registration card for each voter registered in the precinct. In order to vote, the voter was required to sign a voter's certificate. *E.g.*, Minn. Stat. § 204A.29, subd. 1 (1978). The election judge then compared the signature on the certificate to the signature on the voter's registration card. *E.g., id.*, subd. 2 (1978). If the signatures matched, the election judge initialed the certificate, returned it to the voter, and recorded the "fact of voting" on the back of the voter's registration card. *Id.* The voter exchanged the certificate, which served as "proof of his right to vote," for a ballot. *Id.* Until 1977, the predecessor of section 204C.20, subdivision 1, did not provide for, much less require, reliance on the signed voter's certificates. Instead, the statute provided for reliance on the registration file, Minn. Stat. § 204A.41, subd. 1 (1976), which meant counting the number of voter registration cards in the registration file on which election judges had recorded the fact of voting.

In 1977, the Legislature amended the predecessor of section 204C.20, subdivision 1, by eliminating use of the registration file in determining the number of ballots to be counted and adding the option to use the "number of signed voter's certificates," while retaining the existing language that allowed reference to the election register. Act of May 18, 1977, ch. 91, § 4, 1977 Minn. Laws 164, 165-66 (amending Minn. Stat. § 204A.41, subd. 1). As a result of this amendment, in precincts with permanent registration, election judges could count slips of paper—the voter's certificates—that were exchanged for a ballot "as proof of his right to vote," Minn. Stat. § 204A.29, subd. 2 (1978), instead of counting individual voter registration cards that had been marked to indicate "the fact of voting," as was previously done.

In 1990, as part of the statutory changes that required the Secretary of State to implement a computerized statewide voter registration system, the Legislature discontinued use of the registration card system and the associated voter's certificates. *See* Act of May 3, 1990, ch. 585, §§ 16, 27, 1990 Minn. Laws 2208, 2215-16, 2221 (amending Minn. Stat. §§ 201.221 and 204C.10). The new statutory process, applicable in all precincts and still in effect today, requires prospective voters to sign a "polling place roster" that contains the names of voters registered in the precinct. Minn. Stat. § 204C.10 (2008). Once the election judge determines that the voter is eligible to vote, the voter is given a receipt, which serves as proof of the right to vote and is exchanged for a ballot. *Id.* In other words, the voter's receipt is the evidence provided by the election judge that the voter is qualified to vote.

Petitioner focuses his argument on the fact that, when in use, voter's certificates had to be signed. But it is significant that, when it was in use, the voter's certificate served two functions. It served as a repository of the voter's signature, as emphasized by petitioner. In addition, when returned to the voter by an election judge, the voter's certificate provided proof of the right to vote to the election judge in charge of distributing ballots. *E.g.*, Minn. Stat. § 204A.29, subd. 2 (1978). Under the current procedure, the polling place roster serves the first function, as a repository of the voter's signature. It is the voter's receipt that now serves the second function: when given to the voter by an election judge, the receipt serves as proof of the right to vote that can be exchanged for a ballot. Minn. Stat. § 204C.10 (2008). In this respect, the voter's receipt serves the same legislative purpose that the voter's certificate previously served.

In summary, Minnesota's election laws have not relied exclusively on documents signed by voters to determine the number of ballots to be counted in the election. Instead, the Legislature has consistently permitted reference to the election judge's indicator of voter eligibility and right to receive a ballot as a basis for determining the number of ballots to be counted. In addition, the voter's receipt specifically serves one of the two purposes previously served by the signed voter's certificate, namely, proof of the right to vote. In the face of this evidence of legislative intent, and lacking any direct statutory language to the contrary, we conclude that the Legislature intends the processes prescribed by Minn. Stat. § 204C.20, subd. 1, and Minn. Stat. § 206.86, subd. 1, to be based on either the number of signatures on polling place rosters, or on the number of voter's receipts.

The final factor the Legislature has authorized us to consider in ascertaining legislative intent is "legislative and administrative interpretations of the statute." Minn. Stat. § 645.16(8). With respect to this factor, respondents Secretary of State and county election officials rely on an administrative rule promulgated by the Secretary of State as authority for the option to use either the number of voter's receipts or the number of names signed on the polling place roster in determining the number of ballots to be counted. The rule, Minn. R. 8200.9300, subp. 10 (2009), provides:

> The election judges shall determine the number of ballots to be counted by adding the number of return envelopes from accepted absentee ballots to the number of voter's receipts issued pursuant to Minnesota Statutes, section 204C.10, subdivision 2, or to the number of names signed on the polling place roster. The election jurisdiction may require that the election judges number or initial each voter's receipt as it is issued.

A version of this rule authorizing use of voter's receipts in this process has been in place since 1982. *See* 1 MCAR § 2.1005(I) (1982) (providing that election judges could determine the number of ballots to be counted using "the number of voter's receipts issued pursuant to Minn. Stat. [§] 204C.10, subd. 2 or . . . the number of names signed on the precinct election lists").

Petitioner argues that the rule is invalid because it is beyond the rulemaking authority of the Secretary of State and because in allowing the use of voter's receipts it is contrary to the express language of section 204C.20, subd. 1. Because we find that counting voter's receipts is consistent with legislative intent, petitioner's second argument, that the rule is contrary to the

express language of the statute, necessarily fails.[12] And while we do not reach the parties' arguments concerning the scope of the Secretary of State's rulemaking authority,[13] the longstanding administrative interpretation of the statutes, embodied in the rule, allowing reliance on voter's receipts in determining the number of ballots to be counted, and the use of that interpretation in practice, supports our conclusion that the Legislature did not intend to require exclusive reliance on the number of signatures on the polling place roster in determining the number of ballots to be counted on election night. *See R.S. v. State*, 459 N.W.2d 680, 694 (Minn. 1990) ("When the legislative intent behind a statute is not clear, we have secondarily relied on an agency's contemporaneous interpretation of the statute in question."). Moreover, the Legislature has twice reenacted section 206.86, subdivision 1, to make other minor changes without updating its language to either reflect the changes in election procedures discussed in this opinion or to negate the Secretary of State's rule. *See* Act of May 13, 1997, ch. 147, § 68, 1997 Minn. Laws 913, 936-37; Act of May 7, 1999, ch. 132, § 38, 1999 Minn. Laws 530, 542.

Our review of the purpose of the statutes, relevant prior legislation, and the longstanding administrative interpretation establishes that the Legislature intends the processes prescribed by Minn. Stat. § 204C.20, subd. 1, and Minn. Stat. § 206.86, subd. 1, to be based on either the number of signatures on polling place rosters, or on the number of voter's receipts. Because we conclude that the practice petitioner claims is in error, that is, determining the number of ballots to be counted on election night by counting the number of voter's receipts, is permissible under both Minn. Stat. § 204C.20 and Minn. Stat. § 206.86, we hold that petitioner has not demonstrated any "wrongful act, omission, or error" that provides a basis for relief under Minn. Stat. § 204B.44. The petition must therefore be denied.

Petition denied.

ANDERSON, PAUL H., and **STRAS**, JJ., took no part in the consideration or decision of this matter.

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[1] Responses in opposition to the petition were filed by Ramsey County, Anoka County, Mark Dayton, Secretary of State Mark Ritchie, and Hennepin County Auditor Jill Alverson.

[2] The statute also includes the number of return envelopes from accepted absentee ballots in determining the number of ballots to be counted. *See* Minn. Stat. § 204C.20, subd. 1. Because absentee ballots are no longer counted at the precinct level, they are not at issue in this case. *See* Act of March 24, 2010, ch. 194, § 9, 2010 Minn. Laws 120, 124-27 (amending Minn. Stat. § 203B.121 (2008) to require absentee ballots to be opened and counted by the municipal or county ballot board).

[3] Minnesota Statutes § 206.86 (2008) establishes a procedure similar to that set out in section 204C.20, subdivision 1, for use in precincts where an electronic voting system is used, as in Hennepin and Ramsey Counties. Section 206.86, subdivision 1, provides that in precincts with

electronic voting systems, the election judges shall "open the ballot box and count the number of ballot cards or envelopes containing ballot cards that have been cast to determine that the number of ballot cards does not exceed the number of voters shown on the election register or registration file." The statute further provides that if there is an excess number of ballots, the judges must transport the ballots in a sealed container to the county auditor or municipal clerk, who "shall process the ballots in the same manner as paper ballots are processed in section 204C.20, subdivision 2." *Id.* Like subdivision 1 of section 204C.20, subdivision 1 of section 206.86 provides a process for determining whether the number of ballots in the ballot box is consistent with the information recorded as voters obtain their ballots throughout the election day. But in contrast to section 204C.20, section 206.86 specifies comparison to the "number of voters shown on the election register or registration file," instead of to the "number of signed voter's certificates" or "the number of names entered in the election register."

[4] Petitioner's argument that excess ballots were not removed as required by statute is based on his assertion that the number of ballots to be counted was not properly determined because election officials relied on voter's receipts. Because we decide that it was not improper to rely on voter's receipts to determine the number of ballots to be counted, petitioner's contention regarding excess ballots fails. In responses filed to the petition, certain local election officials appear to have conceded that they are not removing excess ballots, although they do not concede a statutory violation. *See* Minn. Stat. § 204C.20, subd. 2 ("If there is still an excess of properly marked ballots, the election judges shall replace them in the box, and one election judge, without looking, shall withdraw from the box a number of ballots equal to the excess."). The validity of this practice was not raised in the petition and has not been fully presented to this court. Therefore, this issue is not before us, and we do not discuss it further.

[5] Our conclusion that the statutes contain obsolete terms raises the question whether those statutes retain any viable meaning. By failing to change the terminology of sections 204C.20 and 206.86 to keep pace with changes in the processes and terminology of related statutes, the Legislature could have intended to render section 204C.20, subdivision 1, and section 206.86, subdivision 1, ineffective, in essence repealing them by implication. But repeal of statutes by implication is not favored. *Fingerhut v. Comm'r of Revenue*, 278 N.W.2d 528, 531 (Minn. 1979). And, in ascertaining legislative intent, we are to presume that the Legislature intends the entire statute to be effective. Minn. Stat. § 645.17(2) (2008).

Moreover, other provisions of our election laws continue to refer to and rely on the process of determining the number of ballots to be counted, indicating legislative intent that the process remain effective. For example, section 206.86, subdivision 1, incorporates the process for removal of excess ballots created in section 204C.20, subdivision 2, which is dependent on determination of the correct number of ballots to be counted. *See* Minn. Stat. § 206.86, subd. 1 (requiring the county auditor or municipal clerk to process excess ballots "in the same manner as paper ballots are processed in section 204C.20, subdivision 2"). Notably, section 206.86, subdivision 1, which includes this cross-reference and also specifies the process to be used in precincts in which an electronic voting system is used, has been reenacted, with minor amendments, as recently as 1999. Act of May 7, 1999, ch. 132, § 38, 1999 Minn. Laws 530, 542 (amending Minn. Stat. § 206.86, subd. 1). Even more recently, during the 2010 legislative session, the Legislature indicated its intent that precincts continue to determine the number of

ballots to be counted, by amending Minn. Stat. § 204C.24, subd. 1 (2008), to add the requirement that the report of the number of individuals who voted at the election "equal the total number of ballots cast in the precinct, *as required by sections 204C.20 and 206.86, subdivision 1*." Act of April 1, 2010, ch. 201, § 40, 2010 Minn. Laws 172, 190 (emphasis added). Where the Legislature has recently incorporated a reference to a statute, we cannot conclude that the Legislature intended the referenced statute to have been repealed or rendered ineffective. We decline to deem Minn. Stat. §§ 204C.20 and 206.86 repealed by implication.

[6] Act of April 21, 1939, ch. 345, pt. 2, ch. 5, § 4, 1939 Minn. Laws 530, 546 (enacting Minn. Stat. § 601-2(5)c (Supp. 1940)).

[7] Act of April 25, 1984, ch. 560, § 26, 1984 Minn. Laws 1024, 1033 (repealing Minn. Stat. § 204C.11).

[8] Act of April 21, 1939, ch. 345, pt. 6, ch. 10, § 4, 1939 Minn. Laws 530, 609-10 (enacting Minn. Stat. § 601-2(2)k (Supp. 1940)).

[9] Act of April 21, 1939, ch. 345, pt. 6, ch. 8, § 12, 1939 Minn. Laws 530, 600 (enacting Minn. Stat. § 601-2(2)k (Supp. 1940)).

[10] Act of May 18, 1977, ch. 91, § 4, 1977 Minn. Laws 164, 165-66 (amending Minn. Stat. § 204A.41, subd. 1).

[11] In 1981, the Legislature provided the option for local election jurisdictions to adopt an electronic voter registration system in place of the card system. Minn. Stat. § 201.071, subd. 5 (1982). For jurisdictions that opted for an electronic system, the statutes provided for voters to sign a duplicate "registration file" at the polling place and in turn, to receive a "voter's receipt," which served as proof of the right to vote and was exchanged for a ballot. Minn. Stat. § 204C.10, subd. 2 (1982). Nevertheless, section 204C.20, subdivision 1, was not amended to recognize this new procedure or terminology, and made no reference to either the registration file or voter's receipts at that time.

[12] Petitioner challenges the wisdom of a policy that permits reliance on unsigned voter's receipts to determine the number of ballots to be counted, but that policy discussion must be directed to the Legislature.

[13] Our conclusion on statutory interpretation also makes it unnecessary for us to address the other procedural and substantive arguments raised by respondents.

STATE OF MINNESOTA

IN COURT OF APPEALS

A11-1323

In the Matter of the Welfare of the Child of:

T.L.M. and M.J.S., Parents.

Filed October 3, 2011

Appeal dismissed

Johnson, Chief Judge

Carver County District Court

File No. 10-JV-11-69

Laura Schultz, Tuttle Bergeson Petros, P.A., Shakopee, Minnesota (for appellant father M.J.S.)

Mark Metz, Carver County Attorney, Melissa J. Jacobsen, Assistant County Attorney, Chaska, Minnesota (for respondent Carver County Community Social Services)

Nancy C. Platto, Chaska, Minnesota (for respondent mother T.L.M.)

Brenda Dehmer, Elko, Minnesota (guardian ad litem)

Considered and decided by Johnson, Chief Judge; Hudson, Judge; and Ross, Judge.

S Y L L A B U S

An appeal from a final, appealable order in a juvenile-protection proceeding must be served and filed within 20 days, as provided by Minn. R. Juv. Prot. P. 47.02, subd. 2. The 30-day provision of Minn. Stat. § 260C.415, subd. 1 (2010), does not apply.

S P E C I AL T E R M O P I N I O N

JOHNSON, Chief Judge

After a three-day trial, the district court terminated the parental rights of the mother and father of a four-year-old girl, T.I.M. The father, M.J.S., brought this appeal more than 20 days, but less than 30 days, after the district court administrator served notice of filing of the termination order. We conclude that the appeal is untimely because it was not perfected within 20 days of the notice.

The district court's decision on the county's petition to terminate parental rights is reflected in two orders issued on June 23, 2011. The first order contains the district court's findings of facts. The second order provides certain information to the person to whom guardianship was transferred, as required by statute. *See* Minn. Stat. § 260C.317, subd. 3(a) (2010). The second order also states that the parents have the right to "file an appeal of the order pursuant to Minn. R. Juv. P. 47 within 30 days."

On June 24, 2011, the district court administrator served notice of filing of the order terminating parental rights, by United States Mail, as required by Minn. R. Juv. Prot. P. 10.04. The court administrator's notice states that an appeal is governed by Minn. R. Juv. Prot. P. 47 and also states, in bold-face type, that an appeal "shall be taken within twenty (20) days of the date the Court Administrator served this Notice of Filing of Order." *See* Minn. R. Juv. Prot. P. 47.02, subd. 2.

On July 21, 2011, M.J.S. served and filed a notice of appeal by United States Mail. M.J.S.'s statement of the case asserts that the appeal was served and filed within the 30- day period of Minn. Stat. § 260C.415, subd. 1 (2010). This court questioned whether the appeal is timely in light of the 20-day appeal period prescribed by Minn. R. Juv. Prot. P. 47.02, subd. 2. M.J.S. and the county filed memoranda. M.J.S. argues that the appeal is timely because it was brought within the statute's 30-day appeal period. The county argues that the appeal should be dismissed as untimely because it was not brought within the rule's 20-day appeal period.

D E C I S I O N

In a juvenile-protection proceeding, an aggrieved person may appeal from a final order of the juvenile court that affects a substantial right. Minn. R. Juv. Prot. P. 47.02, subd. 1. The district court's June 23, 2011, order terminating M.J.S.'s parental rights is a final, appealable order. *See In re Welfare of L.M.M.*, 372 N.W.2d 431, 433 (Minn. App. 1985) (holding that order terminating parental rights is final and appealable), *review denied* (Minn. Oct. 18, 1985).

As a general rule, an appeal from a final, appealable order may be taken within 60 days of service by any party of written notice of its filing, "[u]nless a different time is provided by statute." Minn. R. Civ. App. P. 104.01, subd. 1. A statute governing juvenile-protection proceedings purports to provide for a different time period in which to appeal: an appeal "from a final order of the juvenile court affecting a substantial right of the aggrieved person . . . shall be taken within 30 days of the filing of the appealable order." Minn. Stat. § 260C.415, subd. 1 (2010).

Until August 1, 2009, the Minnesota Rules of Juvenile Protection Procedure were consistent with section 260C.415, subdivision 1, in that the rules also provided for a 30-day

period in which to appeal a final, appealable order. *See* Minn. R. Juv. Prot. P. 47.02, subd. 2 (2008). But in 2009, the supreme court amended that rule to provide that such an appeal must be taken within 20 days of the service of notice of filing of the court's order. Minn. R. Juv. Prot. P. 47.02, subd. 2. The amendment to this rule became effective August 1, 2009. Order Promulgating Amendments to the Rules of Juvenile Protection Procedure and the Rules of Adoption Procedure, No. C1-01-927 (Minn. June 10, 2009).

In light of the inconsistency between the statute and the rule, the question arises as to which provision governs. The question has effectively been answered by supreme court caselaw, which provides that rules of court displace inconsistent statutes with respect to matters of court procedure. *See, e.g.*, *State v. Losh*, 721 N.W.2d 886, 891-92 (Minn. 2006) (holding that rule of criminal procedure concerning time for appeal governs despite contrary provision in statute). This principle has been applied in juvenile-protection cases. *See In re Welfare of J.R., Jr.*, 655 N.W.2d 1, 3 (Minn. 2003) (holding that rule of juvenile-protection procedure concerning service of notice of appeal governs rather than provision in juvenile-protection statute). The rationale for these holdings is that, due to the doctrine of separation of powers, the supreme court has primary responsibility to regulate matters of trial and appellate procedure. *Losh*, 721 N.W.2d at 891-92. A matter is deemed procedural if it concerns "the method by which" factual and legal issues are determined and "neither creates a new cause of action nor deprives a defendant of any defense on the merits." *Id.* at 891 (quotations and alterations omitted). The time in which a party may appeal is a procedural matter. *J.R., Jr.*, 655 N.W.2d at 2-3. Thus, the 20-day appeal period of Minn. R. Juv. Prot. P. 47.02, subd. 2, applies, and the 30-day appeal period of Minn. Stat. § 260C.415, subd. 1, does not apply.

In this case, the district court administrator served notice of filing of the district court's termination order on June 24, 2011. Because the notice was served by United States Mail, it is appropriate to add three days to the appeal period. *See* Minn. R. Juv. Prot. P. 4.02. The twenty-third day after the notice was July 17, 2011. Because that day was a Sunday, the appeal period did not expire until the following business day, Monday, July 18, 2011. *See* Minn. R. Juv. Prot. P. 4.01. M.J.S. did not serve and file his notice of appeal until July 21, 2011. *See* Minn. R. Juv. Prot. P. 47.02, subd. 3. Thus, M.J.S.'s appeal is untimely.

M.J.S. contends that the time in which to appeal in this case should be extended because the district court's second order erroneously stated that he had 30 days in which to appeal. But the time for perfecting an appeal may not be extended by an order of the district court. *Brown's Bay Marine Corp. v. Skrypec*, 271 Minn. 523, 527-28, 136 N.W.2d 590, 593 (1965). M.J.S. also contends that this court should extend the time for his appeal because the untimely appeal "was excusable under the circumstances." *See* Minn. R. Civ. App. P. 126.02. But rule 126.02 applies only to a time period "prescribed by these rules," *i.e.*, the rules of civil appellate procedure; Minn. R. Civ. App. P. 126.02 does not apply to a time period prescribed by the rules of juvenile-protection procedure. *See J.R., Jr.*, 655 N.W.2d at 2-3 (stating that court of appeals erred by applying Minn. R. Civ. App. P. 103.01, subd. 1, to determine manner of perfecting juvenile-protection appeal). Only the supreme court has inherent authority to extend the deadline for an appeal that is untimely under the applicable rules. *See Township of Honner v. Redwood Cnty.*, 518 N.W.2d 639, 641 (Minn. App. 1994) (holding that court of appeals lacks jurisdiction to consider untimely appeal), *review denied* (Minn. Sept. 16, 1994). We note that the supreme court

has indicated, in similar circumstances, that it will not invoke its inherent authority to allow an untimely appeal based on "simple attorney negligence, inadvertence, or oversight." *J.R., Jr.*, 655 N.W.2d at 4.

In sum, M.J.S.'s appeal is untimely because it was not served and filed within 20 days, as required by Minn. R. Juv. Prot. P. 47.02, subd. 2. The timing requirement of that rule is jurisdictional. *See J.R., Jr.*, 655 N.W.2d at 6. Therefore, we must dismiss the appeal.

Appeal dismissed.

STATE OF MINNESOTA

IN SUPREME COURT

A10-0252

Court of Appeals

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

U. S. Bank N. A., et al.,

Appellants,

vs.

Filed: September 7, 2011
Office of Appellate Courts

Cold Spring Granite Company, et al.,

Respondents,

and

Patrick D. Alexander,

Respondent.

Peter J. Gleekel, Craig S. Krummen, Winthrop & Weinstine, P.A., Minneapolis, Minnesota, for appellants.

William Z. Pentelovitch, Wayne S. Moskowitz, Martin S. Fallon, Maslon, Edelman, Borman & Brand, LLP, Minneapolis, Minnesota, for respondents Cold Spring Granite Company, et al.

Joseph W. Anthony, Cheryl A. Stanton, Anthony Ostlund Baer & Louwagie, P.A., Minneapolis, Minnesota, for respondent Patrick D. Alexander.

S Y L L A B U S

1. The term "fraud' as used in Minn. Stat. § 302A.423 (2010) refers to common law fraud.

2. A reverse stock split and redemption of fractional shares for cash does not give rise to dissenters' rights under Minn. Stat. § 302A.471 (2010).

3. Unfairly prejudicial conduct under Minn. Stat. § 302A.751 (2010) means conduct that frustrates the reasonable expectations of the shareholder.

4. Undertaking the procedures necessary to redeem a minority shareholder's shares for cash in a reverse stock split does not, without more, breach the common law fiduciary duty a board of directors and majority shareholders have toward the minority shareholder.

5. The district court did not err in determining the fair value of the stock of minority shareholders when it adopted a valuation of the closely-held corporation that relied in part on asset value.

6. Appellant not prevailing in the district court was not entitled to interest, fees, and costs.

Affirmed.

O P I N I O N

ANDERSON, G. Barry, Justice.

This case arises out of a reverse stock split in which minority shareholders were forced to accept cash in exchange for their shares. Thomas Moore, Ann McCabe, and U.S. Bank (Moores) are trustees of eight appellant family trusts (Moore Trusts) that brought suit against respondent Cold Spring Granite Company (CSG) and its chairman and CEO respondent Patrick D. Alexander after CSG stock belonging to the trusts was fractionalized in a reverse stock split and redeemed for cash at a price determined by CSG's board of directors (Board). The district court appointed a special master who conducted a bench trial and issued recommended findings of fact and conclusions of law. After the trial, the court accepted the special master's recommendations and dismissed all of the Moores' claims. The court of appeals affirmed, and we granted the Moores' petition for review of the decision of the court of appeals and now affirm.

The Cold Spring Granite Company, a Minnesota corporation, has been in the granite business since 1898. Respondent Patrick D. Alexander has been CSG's CEO since 1983 and the chairman of the Board since 1997. Alexander is also a shareholder of CSG. Appellants Thomas Moore, his sister Ann McCabe, and U.S. Bank are trustees, in varying combinations, of eight family trusts, all of which owned CSG stock until the reverse stock split at issue in this case.

Capitalization of CSG

CSG has three types of stock: preferred, Class B common, and Class A common. Preferred shares do not have voting rights, but are entitled to annual dividends. Common shares do not receive dividends, but have voting rights (100 votes per Class B share and one vote per Class A share). Before the reverse stock split at issue, there were 151,396 shares of preferred stock outstanding, which were held by more than 300 shareholders. There were 70 shares of Class B common stock outstanding, all of which Alexander owned. Finally, there were 76,890 shares of Class A common stock. Alexander and the Alexander Family Trust, of which

Alexander was trustee, together owned approximately 93% of the Class A common stock. The Moore Trusts collectively owned 5,067 shares, or 6.58% of the Class A common stock.

Alexander's Previous Offers to the Moores

After Alexander became CEO in 1983, he made several attempts to acquire all minority holdings of CSG stock. In 1985 the company offered to convert its common stock to preferred stock. The vast majority of shareholders accepted this offer. But the mother of Moore and McCabe, then trustee of the Moore Trusts, rejected the offer, believing the conversion value of the common stock was too low. Alexander also attempted to purchase the Moores' stock in 1990 and 1998; his offers were again rejected.

Kahlert Litigation

In May 2005, two other minority shareholders of CSG, John Kahlert and James Kahlert (Kahlerts), filed a derivative action on behalf of CSG against CSG's management, alleging breaches of fiduciary duty. Ann McCabe submitted an affidavit in support of the Kahlerts expressing concern that CSG was profitable but had not paid dividends. The district court dismissed the Kahlerts' action.

Despite its dismissal, the Kahlerts' litigation sparked additional efforts by Alexander to buy out CSG's minority shareholders. In January 2006, counsel for CSG advised the Board at a special meeting that minority shareholders of CSG could be removed for the cash value of their shares by effecting a reverse stock split, to be followed by redemption of resulting fractional shares for cash. Counsel further advised the Board that, unlike a cash-out merger, a reverse stock split would not require a shareholder vote and would not give shareholders the right to judicial determination of the fair value of their shares. To avoid fractionalization of the Alexander family's holdings, CSG's counsel recommended that the shares held by Alexander personally be combined with those held by the Alexander Trust into a newly formed holding company.

The Board discussed appraisals of the company to determine how much the Class A common shares were worth. CSG had been appraised several times since 1994 for unrelated purposes. Also, by this time, Alexander and other members of CSG's management had already begun to arrange for the appraisals of the company necessary for the purpose of removing minority shareholders. The various appraisals of CSG that had been done over the years are as follows.

Appraisals of CSG

Between 1994 and 2001, Piper Jaffray and U.S. Bank conducted a number of valuations of CSG. The valuations varied widely, from a low value of $13.8 million in 1994 and reaching a high value of $94.5 million in 1999. By 2001, U.S. Bank valued the company at $35 million. Additionally, CSG management personnel undertook a number of valuations of CSG between 2004 and 2005. In October 2004, Chief Financial Officer Greg Flint created a spreadsheet of possible valuations of CSG in order to understand how much money the company might need to pursue a redemption of minority shareholders. The valuations ranged from $77 million to $209

million, and were labeled "A" through "D". Flint testified that Alexander and the CSG board told him that the "A" projection was "too pessimistic." Accordingly, Flint prepared three versions titled "B" through "D," based on aspirational sales projections. Flint also prepared a valuation entitled "D-1," based on version "D" on June 23, 2005. This version valued CSG at $142 million, again, based on aspirational sales figures. As it happened, CSG did not meet even the sales figures used in the version "A" projection, and all of Flint's valuations appear to have been overly optimistic compared with the subsequent financial performance of CSG. This variation was due to CSG's financial troubles. In 2003, CSG adopted an aggressive growth strategy, which involved opening residential countertop stores across the nation. By 2005 this strategy had failed, and CSG had begun making cost-cutting measures.

On June 23, 2005, CSG board member Patrick Mitchell, who is not a trained appraiser, prepared a handwritten valuation in connection with preparations to eliminate minority shareholdings. Mitchell valued the company at a range from $74.3 million to $162.7 million. Finally, CSG prepared three budgets for 2006 to be given to U.S. Bank, based on three different scenarios with respect to a buyout of minority shares. These budgets did not undertake to value CSG as a whole.

The Kahlerts commissioned an appraisal of CSG from Schmidt Financial in connection with their lawsuit. The Schmidt report was dated February 10, 2005, and valued CSG at $246.7 million as of December 31, 2004. Schmidt relied heavily on management-provided financial analyses. CSG hired Arthur Cobb, a CPA with over 30 years of litigation appraisal experience, to critique the Schmidt report. Cobb's critique report concluded that the Schmidt report was "a superficial, mathematical exercise, apparently designed to compute an extreme overstated estimate of value."

Cobb also conducted an independent appraisal of CSG. Cobb's appraisal report valued CSG at $85 million as of December 31, 2005. Cobb considered three valuation approaches: the market approach, the income approach, and the net asset value approach. Cobb rejected a final determination based on the market approach, concluding that there were no businesses sufficiently comparable to CSG to yield an accurate determination of CSG's value. Cobb then valued CSG using the income approach and the asset approach. Using the asset approach, Cobb valued the non-operating investment land separately from the granite operations. He valued the non-operating land at $20 million, because it was producing no income. Cobb then valued the granite operations using the income approach at $37-40 million, and using the asset approach at approximately $57 million. Because Cobb concluded that the asset value should establish the minimum value of the company, and the asset value was higher than the income value, he adopted the asset value in his final valuation. Finally, Cobb added $5 million in equity investments to reach his final total of approximately $85 million.

In December 2005, CSG retained Jason Vavra of Chartwell Financial to prepare an opinion comparing the Schmidt report with Cobb's critique report and appraisal report. Vavra concluded that Cobb's value was closer to the "average" value established by a range of possible values based on historical performance of CSG. Vavra concluded that Cobb's appraisal was more reasonable than the Schmidt appraisal.

The Moores later retained Neil Lapidus to value CSG for litigation purposes. Lapidus did not consider or include the value of the non-operating real estate. Lapidus valued the company at $218 million at the end of 2005 using the market approach, and at $131.37 million using the discounted cash flow method. Like Schmidt, Lapidus relied on Greg Flint's sales projections.

The Reverse Stock Split

On January 30, 2006, the Board met and prepared to carry out the reverse stock split. Before passing the resolutions necessary to effect the split, the Board considered the various valuations of CSG. Cobb, who was present at the meeting, presented his findings on the value of CSG. Jason Vavra then discussed the differences between the Cobb reports and the Schmidt report. At this point, all interested directors, including Alexander, left the room, and the remaining directors discussed the differences between the Cobb reports and the Vavra report. They noted that Schmidt's report assumed that the company would achieve sales targets that it had not, in fact, achieved. The Board accepted Cobb's valuation of CSG.

The Board reconvened the next day, and took the necessary action to effect the split. First, the Board combined all Class A common stock at a rate of 1 for 7,132.23 shares. This was the number necessary to reduce the number of shares owned by Alexander and the Alexander Trust and contained in the holding company to exactly ten. All other outstanding share holdings were reduced to fractional shares. The board then redeemed these fractional shares for cash at a price of $986.50 per share. As a result, all minority shareholders of CSG—most significantly, the Moore Trusts—ceased to be shareholders of CSG.

On February 6, 2006, Alexander sent a letter to Moore informing him that "shareholders who owned less than 7132.23 shares of stock have had their stock redeemed as a result of owning fractional shares." The letter invited the Moores to tender their shares to U.S. Bank for payment of their value as determined by the Board.

Litigation

The Moores commenced this action, alleging: (1) breach of fiduciary duty; (2) violation of Minn. Stat. § 302A.751 (2010)[1]; (3) violation of shareholder and dissenter/appraisal rights; (4) violation of the Uniform Fraudulent Transfer Act; (5) promissory estoppel; and (6) fraud. The case was heard before a special master, who recommended that the Moores' action be dismissed. The district court made a de novo review of the challenged portions of the special master's findings of fact and all of the conclusions of law, and adopted the special master's findings of fact and conclusions of law in their entirety.

The district court concluded that the reverse stock split was validly undertaken and shareholder approval was not required. The district court characterized the "fair value" of the common shares at $1,142.92 per share, but concluded that the disparity between the district court's finding of fair value was not so different from the Board's finding of fair value as to suggest fraud. The court concluded that the Board's decision to use Cobb's valuation was not the product of fraud, and did not give rise to dissenters' rights under Minn. Stat § 302A.471 (2010), nor a court-supervised valuation proceeding under Minn. Stat. § 302A.751. Finally, the court

found that the Moores had failed to prove a violation of the Uniform Fraudulent Transfer Act, and also failed to establish grounds for promissory estoppel.

The Moores appealed to the court of appeals. *U.S. Bank, N.A. v. Cold Spring Granite Co., (CSG),* 788 N.W.2d 160 (Minn. App. 2010). The court of appeals affirmed. *Id.* at 169. The court of appeals agreed that the reverse stock split was permissible and that the Board's valuation was not fraudulent, and was therefore conclusive under Minn. Stat. § 302A.423 (2010).[2] *CSG*, 788 N.W.2d at 165. The court of appeals also concluded that the district court did not err by denying the Moores' request for dissenters' rights under Minn. Stat. § 302A.471.[3] *CSG*, 788 N.W.2d at 166. The court of appeals noted its discomfort at the different treatment of shareholders squeezed out in a reverse stock split, compared with those squeezed out in other methods of eliminating minority interests, but concluded that it was bound to apply the law as written. *Id*. The court of appeals concluded that the district court was wrong to decide that the judicial intervention statute, Minn. Stat. § 302A.751 (2010), was inconsistent with section 302A.423, which provides that the Board's determination of the value of fractional shares is conclusive absent fraud. *CSG*, 788 N.W.2d at 167. But the court concluded that there had been no violation of section 302A.751 in any case. *CSG*, 788 N.W.2d at 167-69. The concurrence emphasized "the broad remedial powers available to the district courts under Minn. Stat. § 302A.751." *CSG*, 788 N.W.2d at 169 (Lansing, J., concurring). We granted the Moores' petition for review of the decision of the court of appeals.

There are six issues before us on review: (1) was the Board's determination of the value of fractional shares the product of fraud; (2) are dissenter's rights available when a corporation pays cash for shares fractionalized in a reverse stock split; (3) was the Board's conduct unfairly prejudicial under Minn. Stat. § 302A.751; (4) did the Board breach a common law fiduciary duty; (5) was Cobb's valuation method flawed as a matter of law; and (6) are the Moores entitled to interest, fees, and costs?

Because the Moores did not move for a new trial, our review of the facts is limited to determining whether the evidence sustains the findings of fact, and whether the findings sustain the conclusions of law and the judgment. *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976); *Meiners v. Kennedy*, 221 Minn. 6, 8, 20 N.W.2d 539, 540 (1945); *Potvin v. Potvin*, 177 Minn. 53, 54, 224 N.W. 461, 462 (1929). But we may freely review substantive questions of law properly raised before the district court. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan*, 664 N.W.2d 303, 310 (Minn. 2003).

Under Minn. R. Civ. P. 52.01 we may not set aside "[f]indings of fact, whether based on oral or documentary evidence, . . . unless clearly erroneous." "The findings of a referee, to the extent adopted by the court, shall be considered as the findings of the court." *Id.* We have said: "If there is reasonable evidence to support the [district] court's findings of fact, a reviewing court should not disturb those findings." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). We do not defer to the district court on questions of law. *Frost-Benco Electric Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984).

I.

The first issue before us is the Moores' challenge to the Board's determination of the value of the Moores' shares. The procedure used by CSG to eliminate the Moores' ownership of CSG stock consisted of two steps, governed by two different provisions of Minn. Stat. ch. 302A (2010). The first step of the transaction at issue, the initial share combination, or reverse stock split, which resulted in one new share being given in exchange for every 7,132.23 old shares was authorized by Minn. Stat. § 302A.402, which provides, "A corporation may effect a . . . combination of its shares . . . ." A corporation may carry out a reverse stock split without a shareholder vote if the combination will not adversely affect the rights or preferences of any class of shares, and if the reverse stock split does not result in an increase in the percentage of authorized but unissued shares. *Id.* Neither of these limitations applies here, and thus the Board had the authority to carry out the reverse stock split without a shareholder vote in this case.

The second step of the transaction at issue, the exchange of the fractional shares resulting from the reverse stock split for cash, was authorized by Minn. Stat. § 302A.423, which provides: "A corporation may issue fractions of a share . . . . If it does not issue fractions of a share, it shall in connection with an original issuance of shares . . . (b) pay in money the fair value of fractions of a share as of the time when persons entitled to receive the fractions are determined . . . ." The use of this procedure to cash out minority shares is limited by Minn. Stat. § 302A.423, subd. 2, which provides: "A corporation shall not pay money for fractional shares if that action would result in the cancellation of more than 20 percent of the outstanding shares of a class or series." This prohibition protects shareholders against "excessive abuse of the power granted by subdivision 1(b)" to cash out fractional shares. *See* Minn. Stat. Ann. § 302A.423 (West 2011), reporters notes–1981. The reverse stock split at issue resulted in the cancellation of less than 7% of CSG's common shares, and therefore, the 20% limitation is not applicable in this case. As a result of this two-step procedure, a minority shareholder ceases to be a shareholder in the corporation.

There is broad consensus that a reverse stock split may validly be used for the sole purpose of removing minority shareholders, subject to the restriction that the removal of the minority shareholders must not constitute a breach of fiduciary duty on the part of the majority shareholders or directors of the corporation. *See, e.g., Laird v. I.C.C.*, 691 F.2d 147, 151 (3d Cir. 1982) (finding that a reverse stock split is legal under Missouri law); *Goldman v. Union Bank & Trust*, 765 P.2d 638 (Colo. App. 1988) (deciding that the Colorado Corporation Code authorized a reverse stock split that 'froze out' minority stockholders); *FGS Enters., Inc. v. Shimala*, 625 N.E.2d 1226 (Ind. 1993) (ruling that the Indiana General Corporation Act permits reverse stock splits in which corporation acquired fractional shares); *Lerner v. Lerner Corp.*, 750 A.2d 709, 719 (Md. Ct. Spec. App. 2000); *see also* Elliot M. Kaplan & David B. Young, *Corporate 'Eminent Domain': Stock Redemption and Reverse Stock Splits*, 57 UMKC L. Rev. 67, 74 (1988) ("No jurisdiction has any per se rule against squeeze-outs by means of reverse stock splits or otherwise . . . ."). It is clear that the use of a reverse stock split to redeem minority shareholder interests is a powerful weapon in the majority shareholder's arsenal, particularly where, as in the Minnesota statutory scheme, neither the administration of the reverse stock split nor the valuation process is subject to contemporary judicial supervision. While the fairness of this approach is open to debate, these policy decisions are within the province of the Legislature.

Under Minn. Stat. § 302A.423, subd. 1(b), the price paid for fractionalized shares must be their "fair value . . . as of the time when persons entitled to receive the fractions are determined." Minn. Stat. § 302A.423, subd. 2, provides that "[a] determination by the board of the fair value of fractions of a share is conclusive in the absence of fraud." The first issue before us is what the term "fraud" means in the context of Minn. Stat. § 302A.423. The Moores argue that the meaning of fraud is best determined by the decision of the court of appeals in *Sifferle v. Micom Corp.*, 384 N.W.2d 503, 507 (Minn. App. 1986), *rev. denied* (Minn. June 13, 1986). CSG does not concede that *Sifferle* fraud is applicable here, but argues that even if it is, the Moores have failed to establish even the broader definition of fraud outlined by the court of appeals in *Sifferle*.

The term "fraud" is not defined in Minn. Stat. ch. 302A. But under Minn. Stat. § 645.08(1) (2010), "words and phrases are construed according to the rules of grammar and according to their common and approved usage." We have said that "when the legislature uses a phrase we assume the legislature is aware of the common law understanding of the phrase and that the legislature intended to use the phrase according to its commonly understood meaning." *Gassler v. State*, 787 N.W.2d 575, 586 (Minn. 2010); *In re Welfare of D.D.S.*, 396 N.W.2d 831, 832 (Minn. 1986). Our court has established the common law meaning of fraud in several cases. *See, e.g.*, *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 747 (Minn. 2000); *Davis v. Re-Trac Mfg. Corp.*, 276 Minn. 116, 149 N.W.2d 37 (1967); *Vandeputte v. Soderholm*, 298 Minn. 505, 507-508, 216 N.W.2d 144, 146-47 (1974). Under *Gassler*, 787 N.W.2d at 586, we assume that the Legislature was aware of our definitions of common law fraud when it enacted the relevant language of Minn. Stat. § 302A.423 in 1981. *See* Act of May 27, 1981, ch. 270, § 62, 1981 Minn. Laws 1141, 1180-81 (codified at Minn. Stat. § 302A.423 (2010)). Therefore, we conclude that when the Legislature used the term "fraud" in Minn. Stat. § 302A.423 it was referring to common law fraud. *See* Minn. Stat. § 645.17(4) (2010).

The Moores argue that the definition of fraud used by the court of appeals in *Sifferle*, 384 N.W.2d at 507, is preferable. In *Sifferle*, a minority shareholder sought to put aside a cash-out merger that eliminated his minority shareholder interest. *Id*. at 505. The district court declined to set aside the merger, concluding in the absence of fraud, the minority shareholder's only remedy was to assert his dissenter's rights under Minn. Stat. § 302A.471 (2010) and receive fair value for his shares. *Sifferle*, 384 N.W.2d at 505. The district court concluded that the minority shareholder had failed to establish fraudulent conduct under the common law standard. *Id*. at 509. The court of appeals, examining the reporter's notes to Minn. Stat. § 302A.471, concluded that "the Minnesota legislature intended the term "fraudulent" in § 302A.471, subd. 4, to be construed more broadly than strict common-law fraud." *Sifferle*, 384 N.W.2d at 507. Specifically, the court said:

> [I]f a complaint pleads with specificity that a merger was carried out through deception, misrepresentation, actual fraud, or in violation of applicable statutes or articles of incorporation, or in violation of a fiduciary duty, it should not be dismissed for failure to state a claim

Id.

The Legislature has not specifically adopted the *Sifferle* definition of fraud. Moreover, the basis for the court of appeals' holding is the language of the reporter's notes regarding Minn.

Stat. § 302A.471, not the statute at issue here, Minn. Stat. § 302A.423. Specifically, the court of appeals noted that, when discussing the scope of the term "fraudulent," the reporter's notes used the following language:

> However, the fact that shareholders can get paid off does not justify the corporation in proceeding *unlawfully or fraudulently*. If the corporation attempts to carry through an action in violation of the corporation law on voting, in violation of charter clauses prohibiting it, by deception of shareholders or in violation of a fiduciary duty the court's freedom to intervene is unaffected.

Sifferle, 384 N.W.2d at 507 (emphasis added) (citing Minn. Stat. Ann. § 302A.471 (West 2011) reporter's notes—1981). The language on which the court of appeals relied in Sifferle is limited to Minn. Stat. § 302A.471 and we see no reason to extend it to Minn. Stat. § 302A.423.[4]

Having concluded that the common law definition of fraud applies to a claim under section 302A.423, we consider whether the Moores have established common law fraud in this case. To establish common law fraud, the Moores must prove: (1) a false representation of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made without knowing whether it was true or false; (3) with the intention to induce action in reliance thereon; (4) that the representation caused action in reliance thereon; and (5) pecuniary damages as a result of the reliance. *Martens*, 616 N.W.2d at 747. Fraud may also be established by concealment of the truth. *Estate of Jones v. Kvamme*, 449 N.W.2d 428, 431 (Minn. 1989).

The district court concluded that the Moores failed to prove by a preponderance of the evidence that the Board's decision to use a value of $85 million for the entire company was the product of common law fraud. *CSG*, 788 N.W.2d at 163. The Moores allege that CSG's concealment of management financial projections and misrepresentation of the true value of granite rights in Texas owned by CSG constituted fraud.

We have said that only *material* misrepresentation or concealment can support a claim for fraud. For example, in *Richfield Bank & Trust Co. v. Sjogren* we said,

> if a party *conceals* a fact material to the transaction, and peculiarly within his own knowledge, knowing that the other party acts on the presumption that no such fact exists, it is as much a fraud as if the existence of such fact were expressly denied, or the reverse of it expressly stated.

309 Minn. 362, 365, 244 N.W.2d 648, 650 (1976) (emphasis added) (citing *Thomas v. Murphy*, 87 Minn. 358, 361, 91 N.W. 1097, 1098 (1902)).

The Moores have failed to prove that any management projections were intentionally concealed from Cobb, the individual appraising CSG's common stock or the Board. Moreover, Cobb testified that he would not have relied on management financial projections or on CSG's representations of the value of CSG's Texas granite rights even if that information had been available to him. Therefore, any concealed information was not material.

Cobb further testified that he did not rely on Flint's projections because they assumed growth on the part of CSG that would have been very difficult to achieve, and the projections therefore would not have been relied upon by any willing buyer. Cobb also testified that he would not have relied on Mitchell's handwritten valuation.

The testimony of Flint and Mitchell confirms Cobb's testimony. Flint testified that after management criticized his original projections as "too pessimistic," he "pulled a number out of the air," in an attempt to reach a higher value than that reached in his version "A." Mitchell testified that the assumptions used in version "D" were internally inconsistent, because version "D" relied on growing profits while reducing capital expenditure. Mitchell also testified that he was not a trained appraiser, or a good valuer of properties, and that he adopted Cobb's valuation in preference to his own. Finally, there was sufficient evidence to support the finding that CSG's 2006 budget sent to U.S. Bank was immaterial. The budget was not prepared to determine fair value of the company, and employed conservative assumptions.

With respect to the valuation of Texas granite rights owned by CSG, there is sufficient evidence to support the district court's finding that the granite rights had minimal value. The granite rights standing alone generated no income for the company, were unlikely to generate income in the future, and were not marketable. Therefore, there is sufficient evidence that the granite rights had minimal value.

The misconduct that the Moores complain of—the withholding of information by management—even if intentional, was irrelevant to the Board's determination of value. Therefore, any misrepresentation was immaterial, and did not constitute common law fraud. We hold that the Board's valuation of CSG was not the product of common law fraud.

II.

The second issue before us is whether, regardless of the validity of the Board's determination of the value of the Moores' fractionalized shares, the Moores are entitled to dissent from the reverse stock split and have a court, rather than CSG's board, determine the value of their shares. The district court concluded that dissenters' rights are not available for a reverse stock split under Minn. Stat. § 302A.471, and the court of appeals agreed. *CSG*, 788 N.W.2d at 167.

Dissenters' rights in Minnesota are governed by Minn. Stat. § 302A.471. Subdivision 1 lists the situations in which dissenters' rights apply. First, and most significantly, dissenters' rights arise from:

> (a) unless otherwise provided in the articles, an amendment of the articles that materially and adversely affects the rights or preferences of the shares of the dissenting shareholder in that it:
> . . .
>
> (2) creates, alters, or abolishes a right in respect of the redemption of the shares . . . ;
> . . .

(4) excludes or limits the right of a shareholder to vote on a matter, . . . ; or

(5) eliminates the right to obtain payment under this subdivision . . . .

Minn. Stat. § 302A.471, subd. 1.[5]

Minnesota Statutes § 302A.471 is intended to "enable shareholders to liquidate their equity investment in the corporation for its fair cash value" in the event of certain fundamental corporate changes. John H. Matheson & Philip S. Garon, *Corporation Law & Practice* § 7.22 (2d ed. 2004). Although Minnesota's dissenters' rights provisions are "among the most liberal," they do not explicitly provide for dissenters' rights when fractionalized shares are cashed out pursuant to Minn. Stat. §§ 302A.402 and 302A.423. Matheson & Garon, *supra* § 7.22.

The Moores nevertheless argue that the redemption of fractionalized shares does entitle them to dissenters' rights in this situation. The Moores argue that the reverse stock split constituted an amendment of the articles that materially and adversely affects the rights or preferences of the shares of the dissenting shareholder in that it: (1) creates, alters, or abolishes a right in respect of the redemption of the shares; (2) excludes or limits the right of a shareholder to vote on a matter; and (3) eliminates the right to obtain payment under this subdivision. *See* Minn. Stat. § 302A.471, subd. 1.

This issue presents a question of statutory interpretation. When construing statutes, we attempt "to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2010). Under Minn. Stat. § 645.16, "[w]hen 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."

The language of Minn. Stat. § 302A.471, subd. 1, taken in isolation, could be interpreted to provide for dissenters' rights after a reverse stock split. But such an interpretation would render § 302A.471, subd. 1, in conflict with the more specific statutory provision in Minn. Stat. § 302A.423, which makes a determination by the board of directors of the fair value of fractionalized shares conclusive in the absence of fraud. Under Minn. Stat. § 645.16, "[e]very law shall be construed, if possible, to give effect to all of its provisions." *See also* Minn. Stat. § 645.26 (2010) (providing that when a specific provision conflicts with a general provision, the specific provision prevails). If we were to conclude that a shareholder was entitled to a judicial valuation under Minn. Stat. § 302.471 in the event of a reverse stock split, the conclusivity provision of section 302A.423, subdivision 2, would be rendered ineffective. The determination by a board of directors of fair value would *not* be conclusive in the absence of fraud—it would only be conclusive in the absence of a desire by a cashed-out shareholder to exercise dissenters' rights under Minn. Stat. § 302A.471.[6] Therefore, we conclude that Minn. Stat. § 302A.471 does not provide for dissenters' rights in the event of a reverse stock split.

III.

The Moores further argue that even if they are not entitled to dissenters' rights under Minn. Stat. § 302A.471 they are entitled to equitable relief under Minn. Stat. § 302A.751. Under

Minn. Stat. § 302A.751, subd. 1(b), a buyout can be granted on motion of a shareholder when "the directors or those in control of the corporation have acted in a manner unfairly prejudicial toward one or more shareholders in their capacities as shareholders." The district court rejected the Moores' claim, reasoning that in the absence of fraud, granting relief under section 302A.751 would be inconsistent with Minn. Stat. § 302A.423 (making a director's determination of value conclusive in the absence of fraud). *See* CSG, 788 N.W.2d at 167. The court of appeals concluded otherwise: "it would be an unusual case in which a court would find no *Sifferle* fraud but find unfairly prejudicial conduct. Nevertheless, given its broad remedial purpose, we read § 302A.751 to require a separate analysis of whether respondents' conduct was unfairly prejudicial." *Id.*

Whether 302A.751 and .423 are Consistent

We first address whether the court of appeals correctly determined that Minn. Stat. § 302A.423 does not preclude the application of Minn. Stat. § 302A.751 in the absence of fraud. Whenever it is possible to give effect to all statutory provisions, we are required to do so. *See* Minn. Stat. § 645.16. It is possible to give effect to both provisions here. Minn. Stat. § 302A.423 provides that a determination by the board of the fair value of fractional shares shall be conclusive in the absence of fraud. But section 302A.423 does not say anything about the validity of the underlying transaction with respect to issues other than price. Inadequate value is only one of the ways in which a reverse stock split can be detrimental to a minority shareholder. It may, for example, violate an agreement between shareholders or constitute a breach of fiduciary duty. In such a case, the inability of a minority shareholder to establish common law fraud related to the actual valuation of his shares does not preclude relief under Minn. Stat. § 302A.751. Therefore, we conclude that section 302A.751 clearly permits relief notwithstanding the absence of fraud under section 302A.423.

We also note that the need for further scrutiny does not disappear simply because a reverse stock split complies with Minn. Stat. § 302A.402 and Minn. Stat. § 302A.423. Conduct that is technically legally permissible may nonetheless constitute a violation of rights that should be protected. Recognizing the distinction between narrow technical authorization and broader principles of fairness, the Delaware Supreme Court has said "inequitable action does not become permissible simply because it is legally possible." *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971), quoted in F. Hodge O'Neal & Robert B. Thompson, *O'Neal & Thompson's Oppression of Minority Shareholders and LLC Members* § 7:2 (2d ed. 2009). Courts from several jurisdictions have noted that, even when a reverse stock split is allowed by statute, "majority shareholders must meet certain standards of fairness." *Lerner v. Lerner Corp.*, 750 A.2d 709, 721 (Md. Ct. Spec. App. 2000) (citations committed) (internal quotation marks omitted); *see also Boland v. Boland*, 5 A.3d 106 (Md. Ct. Spec. App. 2010); *Teschner v. Chicago Title & Trust Co.*, 322 N.E.2d 54 (Ill. 1974); *Leader v. Hycor, Inc.*, 479 N.E.2d 173, 177 (Mass. 1985); *Clark v. Pattern Analysis & Recognition Corp.*, 384 N.Y.S.2d 660, 662 (N.Y. Sup. Ct. 1976).[7] "Fiduciary duty principles provide an opportunity . . . to move the case from narrow technical grounds where the action may be unassailable to 'broad considerations of corporate duty and loyalty.' " O'Neal & Thompson, *supra* § 7:3 (2d ed. 2009) (quoting *Guth v. Loft*, 5 A.2d 503, 511 (Del. 1939). We therefore conclude that, even in the absence of fraud, Minn. Stat. § 302A.423 does not preclude relief under Minn. Stat. § 302A.751 for a reverse stock split.

Whether CSG acted Unfairly Prejudicially

The Moores contend that the CSG's board's actions toward them were unfairly prejudicial. Again, the object of interpretation and construction of laws is to ascertain and effectuate the intention of the Legislature. Minn. Stat. § 645.16. The term "unfairly prejudicial" is not explicitly defined in Minn. Stat. § 302A.751 or elsewhere in Minn. Stat. ch. 302A. Moreover, when applied to a situation such as the one before us, the term is unclear. When legislative intent is unclear from the language of the statute in its application to a given situation, we consider canons of construction and extrinsic sources to determine legislative intent. See *State v. Engle*, 743 N.W.2d 592, 593 (Minn. 2008); Minn. Stat. §§ 645.16, 645.17.

The court of appeals has defined the term "unfairly prejudicial" in the context of Minn. Stat. § 302A.751 in *Berreman v. W. Publ'g Co.,* 615 N.W.2d 362, 374 (Minn. App. 2000). The court said, "We conclude that unfairly prejudicial conduct . . . is conduct that frustrates the reasonable expectations of shareholders in their capacity as shareholders . . . of a corporation that is not publicly held . . . ." *Id*. The court in this case applied this definition. *CSG*, 788 N.W.2d at 166-67.

In *Berreman*, the court of appeals concluded that the term "unfairly prejudicial" should be liberally construed. *Berreman*, 615 N.W.2d at 373 (citing Minn. Stat. Ann. § 302A.751, subd. 1(b)(3) (West 1985) reporter's notes-1982 to 1984). The court noted that several courts had defined the term "unfairly prejudicial" as frustration of reasonable expectations. *Id*. at 374 (citing *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 527 S.E.2d 371, 386 (S.C. Ct. App. 2000)).[8] The court concluded that the "reasonable expectations" language was most consistent with the Legislature's intention in using the term "unfairly prejudicial." *Id*. The court cited the provision in section 302A.751, subd. 3a, providing that courts should take into consideration the reasonable expectations of the shareholders. *Id*. The court also noted that the advisory task force had set out as a goal the desire to "provide, as rules, all of the provisions that would normally be expected to result from associative bargaining" and that the reasonable expectations definition was consistent with this goal. *Id*. (citing Advisory Task Force on Corporation Law, Report to the Senate (1981), *reprinted in* Minn. Stat. Ann. § 302A.001 (West Supp. 2000)).

We also take guidance from other statutory provisions in Minn. Stat. ch. 302A. Minnesota Statutes § 302A.751, subd. 3a, provides that in determining whether to grant equitable relief, courts shall "take into consideration the duty which all shareholders in a closely held corporation owe one another to act in an honest, fair, and reasonable manner in the operation of the corporation and the reasonable expectations of all shareholders." By its terms, this provision applies only to statutory closely held corporations, and CSG is not a statutory closely held corporation.[9] Therefore, subdivision 3a does not apply to the Moores' claims against CSG. But we have said that when statutory language is unclear, we may look to other statutes upon the same or similar subjects. *In re Welfare of Children of N.F.*, 749 N.W.2d 802, 807 (Minn. 2008); *Harris v. Cnty. of Hennepin*, 679 N.W.2d 728, 732 (Minn. 2004); *see also State v. Lucas*, 589 N.W.2d 91, 94 (Minn. 1999).

In this case, subdivision 3a of section 302A.751 is particularly instructive. Although CSG is not a statutory closely held corporation, it does share many of the same features as a closely held corporation as we have described it under the common law. First, "shareholders are . . . active in the business"—particularly Alexander. *See Westland Capital Corp. v. Lucht Eng'g Inc.,* 308 N.W.2d 709, 712 (Minn. 1981). Second, there is no market for a minority interest in the stock. *Id*. Third, dividends are not distributed. *Id*. Minnesota Statutes § 302A.751, subd. 3a, informs our interpretation of the term "unfairly prejudicial" in subdivision 1, and indicates that "unfairly prejudicial" conduct includes conduct that violates the reasonable expectations of the minority shareholder.

At least two other states equate unfairly prejudicial conduct with violation of reasonable expectations. See *Kortum v. Johnson*, 755 N.W.2d 432, 441 (N.D. 2008); *Icahn v. Lions Gate Entm't Corp.,* No. 651076/2010, 2011 WL 1233362, at *3 (N.Y. Sup. Ct. Mar. 30 2011) ("The intent of the statute is to provide shareholders a forum for bringing an oppression application whenever the alleged oppressive or unfairly prejudicial conduct adversely affects their reasonable expectations as shareholders."). Moreover, courts in several other states apply the reasonable expectations test in determining the meaning of the closely related term "oppressive." *See, e.g., Stefano v. Coppock*, 705 P.2d 443, 446 (Alaska 1985); *Smith v. Leonard*, 876 S.W.2d 266, 272 (Ark. 1994); *Fox v. 7L Bar Ranch Co.,* 645 P.2d 929, 933-34 (Mont. 1982); *see also* O'Neal & Thompson, *supra* § 7:12. We therefore conclude that in the context of a reverse stock split, unfairly prejudicial conduct under Minn. Stat. § 302A.751 includes conduct that violates the reasonable expectations of the shareholder.[10]

We turn, then, to determine whether those in control of CSG engaged in conduct that frustrated the Moores' reasonable expectations as shareholders. The Moores argue that CSG and Alexander frustrated their reasonable expectations by (1) denying them the fair value of their shares; (2) violating section 7.4 of CSG's bylaws; and (3) acting in a manner inconsistent with the parties' course of dealings.

To prevail on their first argument, the Moores must establish that they did not receive the fair value of their shares. The Moores rely on what the district court characterized as the "fair value" of the common shares at $1,142.92 per share, which is more than the $986.50 per share paid by CSG. But this argument is inconsistent with the provision in Minn. Stat. § 302A.423 which provides that a board's determination of fair value is conclusive absent fraud. Because the decision of fair value was delegated to the Board, and fraud has not been established, the Moores did receive the "fair value" of their shares.[11]

The Moores argue that the reverse stock split at issue also violated section 7.4 of the CSG bylaws. Section 7.4 of the bylaws provides that "[t]ransfer of shares on the books of the corporation may be authorized only by the shareholder named in the certificate." A book transfer of stock means a transfer without physical movement of the stock. *See Harriman's Financial Dictionary* 39 (Simon Briscoe & Jane Fuller eds., 2007). The restriction in section 7.4 therefore appears to restrict only transfers by CSG of stock from one owner to another without transfer of the actual stock certificate. But as CSG and Alexander note, there is no evidence that the Moores' shares were transferred only on CSG's books, without a transfer of the actual stock certificates.

The Moores third argument is, based on the parties' course of dealings, that the Moores reasonably expectated that they would not be forced out involuntarily at a price set by the Board. The court of appeals concluded that evidence of Alexander's repeated attempts to redeem the Moores' shares supports the district court's finding that the Moores "were completely aware of Alexander's desire to acquire their minority interest and concentrate control of CSG and his intent to operate it as a family business." *CSG*, 788 N.W.2d at 168 (internal quotation marks omitted). We reject the idea that repeated attempts to redeem a shareholder's stock itself legitimizes a later redemption of a shareholders stock if a shareholder otherwise has a reasonable expectation that he or she will not be forced out involuntarily. But shareholders may be forced out involuntarily by statute, for example, in a cash-out merger. *See* Minn. Stat. §§ 302A.613, 302A.641, subd. 1. For this reason, it is unreasonable for a shareholder to expect that their shares may never be redeemed involuntarily. Absent evidence of some other support for the belief that they would be safe from involuntary redemption of their shares, the Moores' expectation of indefinite ownership in CSG is not reasonable. There is no such evidence in the record, and we conclude that the Moores have not shown that they had a reasonable expectation that they would not be cashed out involuntarily.

IV.

The Moores further argue that the court of appeals erred when it concluded that the preferential treatment afforded Alexander and the Alexander Family Trust—treatment that insulated their shares from being fractionalized—was not a breach of fiduciary duty. Specifically, the Moores argue that those in charge of CSG, as a closely held corporation, had a fiduciary duty to treat the Moores fairly, and that preparation to effect the reverse stock split violated this duty.

CSG is not a statutory closely held corporation under Minn. Stat. § 302A.011, subd. 6a (defining "closely held corporation" to mean a corporation with 35 or fewer shareholders). We have never decided whether the statutory definition of a closely held corporation abrogates the common law definition. But in *Berreman*, 615 N.W.2d at 370, the court of appeals concluded that "the common law definition of a close corporation continues to apply for purposes of determining fiduciary relationships." We agree with the *Berreman* court. We presume that "the Legislature does not intend to abrogate the common law unless it does so by express wording or necessary implication." *Siewert v. N. States Power Co.*, 793 N.W.2d 272, 281 (Minn. 2011) (citations omitted) (internal quotation marks omitted). The Legislature has not expressly, or by implication, overruled common law fiduciary duties for Minnesota closely held corporations.[12] *Cf*. Del. Code Ann. tit. 8, § 341 (West 2011) ("Unless a corporation elects to become a close corporation under this subchapter in the manner prescribed in this subchapter, it shall be subject in all respects to this chapter, except this subchapter."). We have also continued to cite closely held corporation case law after the enactment of Minn. Stat. § 302A.011, subd. 6a, which was originally enacted in 1983. *See Advanced Commc'n Design, Inc., v. Follett*, 615 N.W.2d 285, 294 (Minn. 2000) (*ACD*) (citing *Fewell v. Tappan*, 223 Minn. 483, 493-94, 27 N.W.2d 648, 654 (1947); *Venier v. Forbes*, 223 Minn. 69, 74, 25 N.W.2d 704, 708 (1946)).

At least two other jurisdictions—Illinois and Nevada—have concluded that the enactment of statutory closely held corporation statutes does not abrogate the common-law definition of a closely held corporation. *See Doherty v. Kahn*, 682 N.E.2d 163 (Ill. Ct. App. 1997); *Hollis v. Hill*, 232 F.3d 460 (5th Cir. 2000) (applying Nevada law); *see also Sery v. Fed. Bus. Ctrs., Inc.*, 616 F. Supp. 2d 496, 502 (D.N.J. 2008) ("the Court is unwilling to accept Plaintiffs' argument that any fiduciary duties that may normally apply are completely abrogated by [statute]."). Because the Legislature has not expressed an intention to abrogate the common law definition or fiduciary duties of a close corporation, we conclude that the common law of closely held corporations is still in effect.

Under Minnesota common law, a closely held corporation is identified by three characteristics: (1) shareholders are usually active in the business; (2), there is usually no market for a minority interest in the stock; and (3) dividends are seldom distributed. *Westland*, 308 N.W.2d at 712; *see also Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 511-12 (Mass. 1975). Minority shareholders in a closely held corporation are often in a vulnerable position, because a majority shareholder can deny them income by refusing to employ them or pay dividends. *Westland*, 308 N.W.2d at 712. Applying these criteria to the case before us, the majority shareholder in terms of voting power (Alexander), is in control and is employed by the corporation. There is no evidence that there is a market for a minority interest in the stock outside the corporation itself. Finally, dividends are not distributed to the common shareholders. We conclude that CSG is a closely held corporation under the common law.

Because CSG is a closely held corporation under the common law, CSG and Alexander had certain fiduciary duties toward the Moores as minority shareholders. We have said that co-owners in a close corporation owe each other "the highest standard of integrity and good faith in their dealings with each other." *Fewell*, 223 Minn. at 494, 27 N.W.2d at 654 (citations omitted) (internal quotation marks omitted); *see also ACD*, 615 N.W.2d at 293-94 (holding a majority or controlling shareholder owes a fiduciary duty to the corporation or its other shareholders). Beyond this statement, however, we have not defined what this standard entails.

Courts in other jurisdictions have identified three primary standards by which to measure the fiduciary duties of majority shareholders. *See* 6A William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 2857.10 (perm. ed., rev. vol. 2005). These standards are (1) the business purpose test; (2) the entire fairness test; and (3) the reasonable expectations test. *Id*. Neither party takes a position on which test or tests we should adopt in Minnesota. Moreover, in *Berreman*, the court of appeals did not undertake to define the scope of common law close corporation fiduciary duty, deciding only that majority shareholders have a duty to deal "openly, honestly, and fairly with other shareholders." *Berreman*, 615 N.W.2d at 371 (citing *Pedro v. Pedro*, 489 N.W.2d 798, 801 (Minn. App. 1992)). The court concluded that this duty included a duty to disclose material facts. *Id*. (citing *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972)). We need not determine the content of the common law fiduciary duties of a majority shareholder in Minnesota because, even under the standard they allege, the Moores have not demonstrated a breach of fiduciary duty.

The Moores allege that Alexander and the Alexander Family Trust treated themselves preferentially with respect to their use of corporate assets, because the advice to set up a holding

company to avoid fractionalization of their stock came at company expense. But as we have mentioned, eliminating a minority shareholder without more is expressly permitted where made possible by the jurisdiction's statutory scheme. *See Leader*, 395 Mass. at 221, 479 N.E.2d at 177 ("minority shareholders are bound by majority rule to accept cash or debt in exchange for their common shares, even though the price they receive may be less than the value they assign to these shares. But this alone does not render freezeouts objectionable." (citations omitted) (internal quotation marks omitted)); *Lerner*, 511 A.2d at 505-07 (stating that judicial relief was not required "simply because the majority use[s] the letter of the corporation statutes to acquire the shares of the minority who are unwilling to sell and who claim the price is inadequate.").

None of the cases cited by the Moores stand for the proposition that merely conducting an involuntary redemption of the stock of minority shareholders at a fair price, without more, can constitute a breach of fiduciary duty.[13] *See Crosby v. Beam*, 548 N.E.2d 217, 218 (Ohio 1989) (noting that use of corporate funds for personal use constitutes a breach of fiduciary duty); *Tillis v. United Parts, Inc.*, 395 So.2d 618, 619 (Fla. Dist. Ct. App. 1981) (holding use of corporate surplus to buy back majority stock while denying liquidity to minority constituted breach of fiduciary duty); *Comolli v. Comolli*, 246 S.E.2d 278, 281 (Ga. 1978) (same); Clark, 384 N.Y.S.2d at 664-65 (holding where there is an allegation of fraud, illegality or bad faith and no compelling business purpose, a minority shareholder may have a breach of fiduciary duty claim); *Edick v. Contran Corp*, No. 7662, 1986 WL 3418 (Del. Ch. 1986) (holding nondisclosure of material information related to reverse stock split sufficient to state a claim for breach of fiduciary duty); *Kirtz v. Grossman*, 463 S.W.2d 541, 544-45 (Mo. App. 1971) (holding that paying price to minority for stock that is demonstrably lower than fair value constitutes breach of fiduciary duty); *Sullivan v. First Mass. Fin. Corp.*, 569 N.E.2d 814, 817 (Mass. 1991) (holding price must be fair and reasonable); *Lebold v. Inland Steel Co.*, 125 F.2d 369, 373-74 (7th Cir. 1941) (holding that asset sale depriving minority shareholders of all returns on investment is breach of fiduciary duty). Therefore, under any standard, to establish a breach of fiduciary duty, the Moores must establish some conduct beyond the mere use of a reverse stock split to redeem the stock of the minority shareholders.

We conclude that the Moores have not done so. The conduct that the Moores complain of is the consolidation of the shares of the majority into a holding company to avoid their fractionalization. But the consolidation of the majority's stock was nothing more than a discrete step in the process necessary to effect the redemption of minority shares in the reverse stock split. The process of conducting a reverse stock split, without more, does not establish any of the myriad grounds that might justify relief for a breach of common law fiduciary duty.

V.

The Moores argue that Cobb's valuation methodology is flawed as a matter of law, because he relied on net asset value to value CSG, used book value to establish the value of CSG's equipment and machinery, and used the discounted cash valuation methodology to value CSG.

We have said that to determine fair value, the trial court may rely on proof of value by any technique that is generally accepted in the relevant financial community and should consider

all relevant factors, provided the value is fair and equitable to all parties. *See ACD*, 615 N.W.2d at 290. We have also explicitly rejected the use of bright-line rules in the valuation context. *Id*. at 292. Courts in other jurisdictions are similarly deferential to trial court determinations of fair value. *See, e.g.*, *Nw. Inv. Corp. v. Wallace* 741 N.W.2d 782, 785 (Iowa. 2007); *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 35 (Del. 2005); *Dodd v. Potomac Riverside Farm, Inc.*, 664 S.E.2d 184, 190-191 (W. Va. 2008). The Moores' assertion that the district court was categorically wrong to accept the use of net asset value, book value, or discounted cash value is inconsistent with our deferential review of valuation decisions. *ACD*, 615 N.W.2d at 292. Therefore, we conclude that the district court's acceptance of Cobb's valuation was not erroneous as a matter of law.

VI.

Finally, the Moores contend that they are entitled to interest on the payment for their shares, and to costs and fees incurred as a result of this litigation. The Moores rely on Minn. Stat. § 302A.473, subd. 5(a), which provides:

> After the corporate action takes effect, or after the corporation receives a valid demand for payment, whichever is later, the corporation shall remit to each dissenting shareholder who has complied with subdivisions 3 and 4 the amount the corporation estimates to be the fair value of the shares, plus interest.

But because we determine that the Moores were not entitled to dissenters' rights under Minn. Stat. § 302A.471, Minn. Stat. § 302A.473 does not apply, and the Moores are not entitled to interest under this provision.

The Moores also rely on Minn. Stat. § 549.09 (2010), which provides for interest on judgments or awards. But the Moores have not yet received a judgment or award, and therefore Minn. Stat. § 549.09 does not apply.

Finally, the Moores claim that the district court improperly denied them attorney fees and expenses. Such an award is only proper when a party prevails. Specifically, Minn. Stat. § 302A.467 provides:

> If a corporation or an officer or director of the corporation violates a provision of this chapter, a court [may] . . . grant any equitable relief it deems just and reasonable in the circumstances and award expenses, including attorneys' fees and disbursements, to the shareholder.

Because we conclude that the district court did not err, the Moores are not entitled to costs and attorney fees.

Affirmed.

STRAS, J., took no part in the consideration or decision of this case.

[1] Allowing judicial intervention to protect shareholders.

[2] See Minn. Stat. § 302A.423 (stating that a board determination of the value of fractional shares is conclusive absent fraud).

[3] Minn. Stat. § 302A.471 (2010) enumerates situations in which a shareholder has the right to a court determination of the fair value of their shares.

[4] We are mindful of the fact that our decision today results in the presence of two interpretations of the term "fraud" in Minn. Stat. ch. 302A. Under normal circumstances, this asymmetry would weigh in favor of altering the competing definition, or reaching a different result. *Cf. Akers v. Akers*, 233 Minn. 133, 141, 46 N.W.2d 87, 92 (1951) (holding that the same word used in different subdivisions of the same statute must be given the same meaning). The continued validity of *Sifferle* is not before us, and we reach no opinion on that issue. Whether or not *Sifferle* is correct in context, the rationale for its broad definition of fraud is simply inapplicable here. Therefore, despite the asymmetry that results from our interpretation, we are limited to construing the words before us. Any rationalization of the statutory scheme must be done by the Legislature.

[5] Section 302A.471 lists five other situations in which shareholders may, with certain exceptions, dissent and obtain payment for the fair value of their shares, none of which are applicable to the transaction at issue in this case.

[6] The Moores argue that our decision in *Whetstone v. Hossfeld Mfg. Co.*, 457 N.W.2d 380 (Minn. 1990) requires that we interpret Minn. Stat. § 302A.471 broadly enough to include a reverse stock split. In *Whetstone*, a shareholder owning 36% of a closely held corporation's stock brought an action to dissent after the articles of incorporation were amended to indirectly eliminate his veto power. *Whetstone*, 457 N.W2d at 381. The district court granted the shareholder's motion for summary judgment, and the court of appeals reversed. *Id*. We reversed, holding that even *indirectly* removing the shareholder's veto power constituted an amendment of the articles that "materially and adversely affects the rights or preferences of the shares of the dissenting shareholder in that it excludes or limits the right of a shareholder to vote on a matter." *Id*. at 382 (quoting Minn. Stat. § 302A.471, subd. 1). We reasoned that investors in a closely held corporation had a strong interest in preventing those in control of the corporation from cutting off a return on investment. *Id*. at 383-84. In *Whetstone*, we focused on a situation in which a minority investor is unable to realize a return on an investment, or dispose of this investment. *Id*. In this case, however, the investment has been disposed of for fair value or approximately fair value, and therefore, the Whetstone rationale does not apply. Also, *Whetstone* did not discuss a reverse stock split, which is specifically authorized by statute.

[7] Our conclusion is strengthened by the fact that those jurisdictions that have denied claims based on fiduciary duty have done so on the basis of dissent and appraisal rights, which generally provide that their remedies are exclusive absent fraud. *See, e.g.*, *Sound Infiniti, Inc. v. Snyder*, 237 P.3d 241 (Wash. 2010) (citing Wash. Rev. Code § 23B.13.020, subd. 2 (2008)); *Weber v.*

Iowa State Bank & Trust Co., 457 F.3d 857 (8th Cir. 2006) (citing Iowa Code § 490.1302.4 (2005)). Minnesota minority shareholders do not have the benefit of dissent and appraisal rights, and are not subject to similar exclusivity provisions. *See* Minn. Stat. § 302A.471.

[8] Approximately seven months after *Berreman* was decided, the South Carolina Supreme Court overruled *Kiriakides*. *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 541 S.E.2d 257 (S.C. 2001) (*Kiriakides II*). The supreme court concluded that "the Court of Appeals' broad view of oppression is contrary to the legislative intent and is an unwarranted expansion of section 33-14-300." *Kiriakides II*, 541 S.E.2d at 263. Because of the *Berreman* court's reliance on the overruled decision, we examine whether *Kiriakides II* should affect our confidence in the reasoning of the *Berreman* decision.

The test criticized by the South Carolina Supreme Court is significantly broader than that articulated by the *Berreman* court. *Kiriakides I* articulated five factors, any one of which was sufficient to demonstrate unfairly prejudicial conduct. *Kiriakides I*, 527 S.E.2d at 387-88. But the *Berreman* court adopted only one of these factors—the reasonable expectations test. *Berreman*, 615 N.W.2d at 374. Therefore, the test articulated by the *Berreman* court is, and always was, much narrower than the broad test criticized by the South Carolina Supreme Court. Moreover, under the South Carolina statute, dissolution is the only available remedy. Under such a statute, a narrower test of fiduciary duty is appropriate.

[9] Closely held corporations are defined as corporations with 35 or fewer shareholders. Minn. Stat. § 302A.011, subd. 6a. It appears from the record that CSG has more than 300 shareholders.

[10] Our opinion today leaves open the possibility that conduct other than conduct violating the reasonable expectations of the shareholder may also be "unfairly prejudicial." Because the Moores only argued on the basis of reasonable expectations, we need not delineate today what other conduct might constitute unfairly prejudicial conduct.

[11] We also note the apparent inconsistency of the district court's finding of fair value with Minn. Stat. § 302A.423. Because the Board's determination of fair value is conclusive absent fraud, and the district court concluded that fraud was not present here, the district court's finding that fair value was different from the figure determined by the Board is problematic. Nevertheless, any error would not affect the result here, and we need not address it further.

[12] The reporter's notes state "This is a new definition used primarily in connection with the Buy-Out on Motion, 302A.751." Minn. Stat. Ann. § 302A.011 reporters notes-1982 to 1984 (West 2011).

[13] In addition to the cases cited here, the Moores also cite *Lerner and Leader*. Given the language we cite above, these cases do not support the Moores' argument.

STATE OF MINNESOTA

IN COURT OF APPEALS

A11-1330

In the Matter of the PERA Salary Determinations Affecting Retired and Active Employees of the City of Duluth.

Filed August 6, 2012

Affirmed in part, reversed in part, and remanded

Johnson, Chief Judge

Public Employees Retirement Association of Minnesota

Elizabeth A. Storaasli, Dryer Storaasli Knutson & Pommerville, Ltd., Duluth, Minnesota (for relators)

Lori Swanson, Attorney General, Julie Ann Leppink, Assistant Attorney General, St. Paul, Minnesota (for respondent Public Employees Retirement Association)

Considered and decided by Johnson, Chief Judge; Chutich, Judge; and Crippen, Judge.*

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

S Y L L A B U S

The Public Employees Retirement Association's interpretation of Minn. Stat. § 353.01, subd. 10, as it concerns the city's salary-supplement payments, is invalid because the interpretation is an improper promulgation of a new rule. The association's interpretation of that statute is subject to the rulemaking requirements of the Minnesota Administrative Procedure Act, is inconsistent with the plain meaning of the statute, and is not a longstanding interpretation of the statute.

The Public Employees Retirement Association's interpretation of Minn. Stat. § 353.01, subd. 10(b)(2), as it concerns the city's insurance-supplement payments, is not an improperly promulgated new rule. The association's interpretation of that statute is consistent with the plain meaning of the statute.

O P I N I O N

JOHNSON, Chief Judge

In March 2009, the Public Employees Retirement Association (PERA) notified 485 active and retired employees of the City of Duluth that PERA intended to make adjustments to their defined-benefit retirement plans. PERA decided that adjustments were necessary because it determined that the city had, for more than a decade, miscalculated the amounts of contributions to its employees' retirement plans. PERA's adjustments would result in smaller retirement annuity payments for retired city employees.

Some of the persons who received PERA's notices challenged the decision, which led to contested-case proceedings before an administrative law judge. At the culmination of those proceedings, the PERA Board of Trustees reaffirmed the decision to make adjustments to the affected retirement plans. We are asked to review the PERA board's decision by way of a writ of certiorari. We conclude that the PERA board's decision is correct with respect to one form of compensation that the city paid to its employees because PERA's interpretation of the relevant statute is consistent with the plain meaning of the statute. But with respect to the other form of compensation that the city paid to its employees, we conclude that the PERA board's decision is erroneous because it is based on an improperly promulgated new rule that is inconsistent with the plain meaning of the relevant statute and is not a longstanding interpretation of the statute. Therefore, we affirm in part, reverse in part, and remand to PERA for further proceedings.

FACTS

A. Overview of PERA

PERA administers several public-sector employee retirement plans. As a general rule, employees of municipalities are required to be members of PERA and to participate in one of its retirement plans. Minn. Stat. § 353.01, subd. 2a (2010). Both municipal employees and their municipal employers must contribute to an employee's retirement plan each pay period. Minn. Stat. §§ 353.27, subds. 2, 3, .65, subds. 2, 3 (2010).

Upon retirement, a member employee is entitled to receive a defined benefit from a PERA retirement plan in the form of monthly annuity payments. Minn. Stat. §§ 353.29, subd. 1, .651, subd. 1 (2010). The amount of the annuity payment is based on the employee's compensation before his or her retirement. Minn. Stat. §§ 353.29, subd. 3, .651, subd. 3. Both the employer and the employee must make periodic contributions to an employee's retirement plan, which also are based on the employee's compensation. Minn. Stat. §§ 353.27, subds. 2, 3, 4, .65, subds. 2, 3, .29, subd. 3, .651, subd. 3.

Not all types of compensation are considered for purposes of calculating contributions. The forms of compensation that are included in or excluded from an employee's so-called "PERA salary" are determined by statute. *See* Minn. Stat. § 353.01, subd. 10 (2010). If the employer makes an error in determining an employee's PERA salary, PERA is required by statute to make refunds of erroneous contributions. *Id*., subd. 7(c) (2008). Furthermore, "[i]n the

event that a retirement annuity . . . has been computed using invalid service or salary, [PERA] must adjust the annuity or benefit and recover any overpayment . . . ." *Id.*, subd. 7(d) (2010).

B. The City's Payment of Supplemental Compensation

During the past two decades, the city has compensated some of its employees with monthly payments that supplement their regular salaries. The city first agreed to pay supplemental compensation in a 1995-96 collective-bargaining agreement (CBA) with one of its unions. Beginning in 1997, the city agreed to make similar monthly payments of supplemental compensation to members of four other unions. Initially, the city agreed to make monthly payments of $25 to each represented employee's qualified deferred-compensation plan. In subsequent CBAs, the city increased the monthly payments several times until they reached $229 in 2009. The parties refer to these monthly payments as "deferred compensation" payments, but it is more appropriate for this court, for purposes of this opinion, to refer to them as "salary supplement" payments.[1]

Beginning in 1997, the CBAs between the city and the five unions also provided employees with an alternative form of supplemental compensation. Specifically, the CBAs permitted city employees to elect, in lieu of salary-supplement payments, to receive monthly payments that could be applied to the employee's purchase of group health insurance. The parties refer to these monthly payments as "insurance supplement" payments. Both salary-supplement payments and insurance-supplement payments were included in future CBAs that governed the city's labor-management relationships until 2008 and 2009.

C. The City's Treatment of Supplemental Compensation as PERA Salary

As previously stated, the city is required to report salary information to PERA each pay period and to remit contributions to its employees' retirement plans. Minn. Stat. §§ 353.27, subds. 3, 4, .65, subd. 3. From 1995 to 2007, the city included both the salary-supplement payments and the insurance-supplement payments in its calculations of so-called "PERA salary." The city relied on PERA staff when deciding to include the supplemental payments in PERA salary. According to a former payroll employee, Jackie Morris, the city sought guidance from PERA staff when it began making salary-supplement payments in 1995 and was told to include those payments in PERA salary. The city implemented PERA staff's guidance and adopted the same approach two years later with respect to insurance-supplement payments.

In July or August of 2007, however, the city auditor, Wayne Parson, contacted PERA staff and was told that the city should *not* include either salary-supplement payments or insurance-supplement payments in the city's calculations of PERA salary. The city discontinued the practice of including supplemental payments in PERA salary in September 2007. One year later, in September 2008, the city's chief administrative officer, Lisa Potswald, sent a letter to PERA stating that the supplemental payments to employees had been erroneously included in PERA salary. After receiving Potswald's letter, PERA staff and the city conducted a joint investigation to determine the scope of the payments that had been included in PERA salary. This investigation led to the decision by PERA staff that it was necessary to make adjustments to the contributions and benefits of the city's employees.

In March 2009, PERA sent letters to 485 active and retired employees, advising them that "PERA staff has determined that certain amounts reported to our association as 'salary' by [the city] cannot be used for purposes of calculating retirement plan contributions or benefits." PERA's letters advised each employee or retiree of the total amount of contributions that had been improperly withheld during employment and, thus, would be refunded. PERA's letters also advised each retiree of a downward adjustment to his or her monthly retirement annuity payment, as well as the amount of overpaid benefits that they would be required to repay.

D. Administrative Review

Seventy current and former city employees filed petitions for review by the PERA Board of Trustees. *See* Minn. Stat. § 356.96 (2010). The PERA board referred the petitions to the Office of Administrative Hearings for contested-case proceedings before an administrative law judge (ALJ). The petitions were consolidated and assigned to a single ALJ. The petitioners argued that PERA had erred by interpreting section 353.01, subdivision 10, to exclude the supplemental payments from their PERA salary.

After denying motions for summary disposition and holding an evidentiary hearing, the ALJ issued a 62-page, single-spaced order with findings of fact, conclusions of law, and a recommendation to PERA. With respect to the salary-supplement payments, the ALJ concluded that PERA's interpretation of the statute was not properly promulgated as an interpretive rule and, thus, may not be applied to the city and petitioners. With respect to the insurance-supplement payments, the ALJ concluded that PERA's interpretation of the statute is an interpretive rule that may be applied to the city's supplemental payments to the petitioners because the interpretation is consistent with the plain meaning of the statute. Accordingly, the ALJ recommended that the PERA board reverse the decision of PERA staff in part by not adjusting contributions and benefits based on the salary-supplement payments.

Some petitioners and the PERA staff filed exceptions to the ALJ's findings, conclusions, and recommendation. The PERA board issued an order that modified some of the ALJ's findings, rejected some of the ALJ's conclusions of law, and accepted the ALJ's recommendation in part. Contrary to the ALJ's recommendation, the PERA board concluded that the PERA staff's decision in March 2009 to make adjustments that would exclude salary-supplement payments from PERA salary was based on a longstanding interpretation of the statute that could be applied to the petitioners without the promulgation of a rule. But the PERA board adopted the ALJ's recommendation that the PERA staff's decision to make adjustments to exclude insurance-supplement payments from PERA salary was consistent with the plain meaning of the statute. Accordingly, the PERA board affirmed the PERA staff's downward adjustments of deductions and benefits and its determinations of overpaid benefits.

Seven petitioners now appeal to this court by way of a petition for writ of certiorari.

ISSUES

I. Did the PERA board engage in improper rulemaking by interpreting Minn. Stat. § 353.01, subd. 10 (2010), to not include the city's salary-supplement payments in "PERA salary?"

II. Did the PERA board engage in improper rulemaking by interpreting Minn. Stat. § 353.01, subd. 10(b)(2) (2010), to exclude the city's insurance-supplement payments from "PERA salary?"

III. Was the PERA board's decision untimely due to a statute of limitations, barred by the doctrine of estoppel, or a violation of relators' constitutional rights?

IV. Did the PERA board err by not awarding attorney fees to relators?

ANALYSIS

"For the purposes of appellate review, a public-retirement-fund board, like the PERA board of trustees, is analogous to an administrative agency." *In re Disability Earnings Offset of Masson*, 753 N.W.2d 755, 757 (Minn. App. 2008). Accordingly, this court may reverse or modify a decision by the board only if

> the substantial rights of the [relators] may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:
>
> (a) in violation of constitutional provisions; or
> (b) in excess of the statutory authority or jurisdiction of the agency; or
> (c) made upon unlawful procedure; or
> (d) affected by other error of law; or
> (e) unsupported by substantial evidence in view of the entire record as submitted; or
> (f) arbitrary or capricious.

Minn. Stat. § 14.69 (2010).

As noted above, both contributions to and benefits from retirement plans managed by PERA are calculated based on an employee's "salary." Minn. Stat. §§ 353.27, subds. 2, 3, .65, subds. 2, 3, .29, subd. 3, .651, subd. 3. For these purposes, the term "salary" is defined by statute, in relevant part, as follows:

> (a) Subject to the limitations of section 356.611, "salary" means:
>
> (1) the periodic compensation of a public employee, before deductions for deferred compensation, supplemental retirement plans, or other voluntary salary reduction programs, and also means "wages" and includes net income from fees; . . . . . .

(b) Salary does not mean:

. . . . . .

(2) employer-paid amounts used by an employee toward the cost of insurance coverage, employer-paid fringe benefits, flexible spending accounts, cafeteria plans, health care expense accounts, day care expenses, or any payments in lieu of any employer-paid group insurance coverage, including the difference between single and family rates that may be paid to a member with single coverage and certain amounts determined by the executive director to be ineligible; . . . .

Minn. Stat. § 353.01, subd. 10. The PERA board relied on this definitional statute when deciding that the city's supplemental payments should be excluded from the calculations of PERA salary and retirement annuity payments.

I.

Relators first argue that the PERA board erred by adjusting contributions and benefits and recouping overpaid benefits on the ground that the city's salary-supplement payments were improperly included in PERA salary. Specifically, relators argue that the PERA board's decision is based on an improperly promulgated new rule.

Administrative agencies generally formulate policy by promulgating administrative rules. See *Bunge Corp. v. Commissioner of Revenue*, 305 N.W.2d 779, 785 (Minn. 1981). An administrative agency's authority to adopt administrative rules is governed by the Minnesota Administrative Procedure Act (MAPA), Minn. Stat. §§ 14.01-.69 (2010), which requires that administrative rules be promulgated by giving public notice and providing all interested persons an opportunity to submit comments, Minn. Stat. §§ 14.14, .22. An administrative rule is defined to include "every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure." Minn. Stat. § 14.02, subd. 4. In light of this expansive definition of rule, an agency must promulgate legislative rules (those that are "promulgated pursuant to delegated powers to make substantive law") as well as interpretive rules (those that "make specific the law enforced or administered by the agency"). *Cable Communications Bd. v. Nor-West Cable Communications P'ship*, 356 N.W.2d 658, 667 (Minn. 1984) (quotations omitted).

The requirement that an interpretive rule be promulgated may give rise to one of three possible consequences. First, an administrative rule that is properly promulgated, whether legislative or interpretive, "shall have the force and effect of law." Minn. Stat. § 14.38, subd. 1. Second, an interpretive rule that has not been properly promulgated may nonetheless be valid in two situations: "if the agency's interpretation of a [statute] corresponds with its plain meaning, or if the [statute] is ambiguous and the agency interpretation is a longstanding one." *Cable Communications Bd.*, 356 N.W.2d at 667. In either situation, "the agency is not deemed to have promulgated a new rule," *id.*, and the agency's interpretation is not invalid, "although it does not have the force and effect of law," *In re Contested Case of Good Neighbor Care Ctrs., Inc. v. Minnesota Dep't of Human Servs.*, 428 N.W.2d 397, 402-03 (Minn. App. 1988), *review denied* (Minn. Oct. 19, 1988). Rather, a reviewing court proceeds to determine the degree of deference

that is appropriate. *See In re Contested Case of St. Otto's Home v. Minnesota Dep't of Human Servs.*, 437 N.W.2d 35, 43-44 (Minn. 1989); *In re Contested Case of Mapleton Cmty. Home, Inc. v. Minnesota Dep't of Human Servs.*, 391 N.W.2d 798, 801-02 (Minn. 1986). Third, if an agency's interpretation of a statute is not properly promulgated, and if it is not within either of the above-stated exceptions for a valid interpretation of a statute, the rule is "invalid and cannot be used as the basis for agency action." *Good Neighbor*, 428 N.W.2d at 402.

In response to relators' argument that PERA engaged in improper rulemaking, PERA concedes that the statutory definition of "salary" is ambiguous as applied to the city's salary-supplement payments. In light of that concession, which we agree is warranted, PERA cannot establish the first exception to the general rule, that its interpretation of section 353.01, subdivision 10, is justified by the plain meaning of the statute. *See id*. at 402-03. But PERA contends that the second exception to the general rule applies, *i.e.*, that its interpretation of section 353.01, subdivision 10, is a longstanding interpretation of the statute and, thus, is not an improperly promulgated rule.

The Minnesota caselaw recognizes that an agency's longstanding interpretation of a statute may be valid, but the caselaw does not provide extensive guidance on the circumstances in which an agency's interpretation may be deemed longstanding. In some opinions, the appellate courts have described the exception without applying it. *See White Bear Lake Care Ctr., Inc. v. Minnesota Dep't of Pub. Welfare*, 319 N.W.2d 7, 8-9 (Minn. 1982); *In re Contested Case of Ebenezer Soc'y v. Minnesota Dep't of Human Servs.*, 433 N.W.2d 436, 439 (Minn. App. 1988). In other opinions, the appellate courts simply have held that an agency's interpretation of a recently adopted statute or rule was not longstanding. *See Cable Communications*, 356 N.W.2d at 667; *In re Application of Crown CoCo, Inc*., 458 N.W.2d 132, 137 (Minn. App. 1990), *review dismissed* (Minn. Sept. 14, 1990). *In re Contested Case of Mapleton Cmty. Home, Inc*., 373 N.W.2d 815, 819 (Minn. App. 1985), *aff'd sub nom*, *In re Contested Case of Mapleton Cmty. Home, Inc. v. Minnesota Dep't of Human Servs.*, 391 N.W.2d 798 (Minn. 1986).

The principle that a longstanding interpretation of a statute may be valid, even if not properly promulgated, apparently is derived from federal caselaw. Long ago, our supreme court relied on a United States Supreme Court opinion in asserting that the weight that should be given to an agency's interpretation of a statute "is dependent upon such construction's having been long-continued." *State v. Dancer (In re Estate of Abbott)*, 213 Minn. 289, 296, 6 N.W.2d 466, 469 (1942) (citing *United States v. Healy*, 160 U.S. 136, 16 S. Ct. 247 (1895)); *see also White Bear Lake Care Ctr.*, 319 N.W.2d at 8 (articulating same principle, citing 2 K. Davis, *Administrative Law Treatise*, § 7.22 (2d ed. 1979)). But the federal caselaw also does not clearly describe the requirements for deeming an agency's interpretation longstanding.

It appears that, under federal law, the duration and the consistency of an agency's interpretation of a statute are just two of several factors that determine the level of deference to be given to an agency's interpretation of a statute. As the United States Supreme Court has explained, "'The weight [given an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, *its consistency with earlier and later pronouncements*, and all those factors which give it power to persuade, if lacking power to control.'" *United States v. Mead Corp*., 533 U.S. 218, 228, 121 S. Ct. 2164,

2172 (2001) (emphasis added) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944)). Consistent with this statement, federal courts decline to recognize an agency's interpretation of a statute if the agency has been inconsistent in its interpretation. *See, e.g., Leary v. United States*, 395 U.S. 6, 25, 89 S. Ct. 1532, 1542 (1969) (holding that interpretation was not longstanding in part because of government's inconsistent position in previous case); *Thorson v. Gemini, Inc.*, 205 F.3d 370, 379 (8th Cir. 2000) (explaining that court is "far less inclined to yield to agency opinion if the administrative agency's interpretation of a matter appears to be inconsistent"). These cases are in harmony with the Minnesota Supreme Court's recognition that administrative "'notice and comment procedures exist for good reason: to ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rulemaking before an informed and skeptical public.'" *Swenson v. Emerson Elec. Co.*, 374 N.W.2d 690, 702 (Minn. 1985) (quoting *New Jersey v. Department of Health & Human Servs.*, 670 F.2d 1262, 1281 (3d Cir. 1981)).

Given the purposes of promulgated rules and the above-described caselaw, we proceed to analyze whether PERA's interpretation of section 353.01, subdivision 10, is longstanding. As an initial matter, however, we note that the evidence on which PERA relies concerns an employer's *matching* contribution of an employee's contribution to a deferred-compensation plan. Such payments usually are variable in amount, based on an employee's election as to whether to make contributions to a deferred-compensation plan and, if so, the amount of the contribution. In this way, the employer's matching contribution is similar to the various forms of fringe benefits that are expressly excluded by subdivision 10(b)(2). But the city's salary-supplement payments are different in nature. Each represented employee is entitled to a fixed monthly payment, solely because of his or her continued employment. In that way, the salary-supplement payments are similar to payments of ordinary salary. PERA's asserted interpretation of the statute does not account for the qualitative differences between matching contributions to deferred-compensation plans and the city's salary-supplement payments to deferred compensation plans. Instead, PERA's interpretation of subdivision 10 treats alike all types of contributions to deferred-compensation plans, with an emphasis on the nature of the account to which the contribution is made. But PERA's own Employer Manual states that the classification decision "must go beyond the name that is given to the payment and consider what the payment is for and the source of the payment."

Even if we assume that PERA's interpretation of subdivision 10 is applicable to the facts of this case, we cannot conclude that it is longstanding, for several reasons. First, PERA's purported longstanding interpretation of the statute is of uncertain origin. There is no evidence in the record as to exactly when PERA adopted the interpretation of the statute that was applied to the city's salary-supplement payments. Without knowing the date of its adoption, it is difficult to conclude that the interpretation is longstanding. Second, PERA's interpretation of the statute is unwritten and, consequently, indefinite. The provisions of a properly promulgated rule are known or knowable based on the language of its express terms. In fact, the MAPA requires that promulgated rules adhere to certain forms and be published. *See* Minn. Stat. §§ 14.07, .20, .27, .47. But the precise terms of PERA's interpretation of section 353.01, subdivision 10, are unwritten and unpublished and, thus, impossible to discern. Third, PERA's interpretation has been inconsistent over time. The evidence presented to the ALJ demonstrates that the city

received conflicting answers from PERA staff regarding whether the city's salary-supplement payments are within the statutory definition of PERA salary.

PERA's most specific argument as to why its interpretation of section 353.01, subdivision 10, is longstanding is based on advice that PERA staff provided to another municipal employer in 2004. The record of the contested-case proceeding includes a letter that a PERA staff member sent to the City of St. Paul, which the ALJ stated was the "only . . . written expression" of PERA's interpretation of the statute relevant to the city's salary-supplement payments. The letter states, "After reviewing the information that you provided concerning the deferred compensation match established in the labor agreement . . . , we find that our decision is the same as a previous response dated May 19, 1992 (copy enclosed)." This letter fails to establish the existence of a longstanding interpretation of the statute. As an initial matter, the letter does not describe the PERA staff member's interpretation of the statute but, rather, simply states a conclusory answer to the City of St. Paul's situation-specific question. The letter states that "PERA considers employer-paid amounts to deferred compensation plans as payments ineligible for PERA withholdings," but this conclusory statement does not reveal the reasons for that policy, which might allow this court to infer an interpretive rule. In addition, the information provided by the City of St. Paul, which also was in evidence, describes *matching* contributions to employees' deferred-compensation plans in amounts that depended only on an employee's years of service. As explained above, this form of compensation is not the same as the salary-supplement payments in this case, which means that the correspondence between the PERA staff member and the City of St. Paul is of only limited relevance to the City of Duluth. Thus, the letter from a PERA staff member to the City of St. Paul in 2004 does not establish a longstanding interpretation of the statute that supports PERA's decision to exclude the city's salary-supplement payments from PERA salary.

In light of the circumstances and all the evidence in the agency record, we conclude that PERA's interpretation of section 353.01, subdivision 10, as it concerns the city's salary-supplement payments, is not a longstanding interpretation of the statute. If we are to accept an improperly promulgated rule as valid on the ground that it is "longstanding," we must insist on a greater level of formality and consistency than is evident in the agency interpretation in this case. Thus, PERA's interpretative rule excluding the city's salary-supplement payments from relators' PERA salary is an invalid rule, which "cannot be used as the basis for agency action." *Good Neighbor*, 428 N.W.2d at 402. Accordingly, we reverse the decision of the PERA board that was taken in reliance on PERA's unpromulgated interpretive rule. *See St. Otto's Home*, 437 N.W.2d at 45 (reversing agency decision based on unpromulgated interpretive rule); *Crown CoCo*, 458 N.W.2d at 139 (same).

II.

Relators next argue that the PERA board erred by adjusting contributions and benefits and recouping overpaid benefits on the ground that the city's insurance-supplement payments were improperly included in PERA salary. The ALJ and the PERA board concluded that the decision of PERA staff to exclude the city's insurance-supplement payments from PERA salary is consistent with the plain meaning of the statute and, thus, is not based on an improperly promulgated rule. On appeal, relators do not challenge this conclusion, and we agree that

PERA's decision is consistent with the plain meaning of the statute insofar as it concerns the city's insurance-supplement payments. This is so because the statutory definition of "salary" does not include "employer-paid amounts used by an employee toward the cost of insurance coverage." Minn. Stat. § 353.01, subd. 10(b)(2).

Having conceded that the PERA board's interpretation of the statute is consistent with its plain meaning, relators argue only that the PERA board erred because its decision is arbitrary, unreasonable, and not supported by substantial evidence. Specifically, relators contend that the city's treatment of the insurance-supplement payments is inconsistent with federal tax law. Relators do not establish that federal tax law is relevant to the application of section 353.01, subdivision 10(b)(2), or to the city's insurance-supplement payments. The PERA board can apply the pertinent language of subdivision 10(b)(2) to the city's insurance-supplement payments without encountering any issue of federal tax law.

Relators also contend that the PERA board erred because it relied on evidence of supplemental payments that is inaccurate, according to an affidavit provided by a former payroll employee of the city. But another city employee testified that the payroll records provided by the city are official city records obtained from back-up tapes for 1997-2004 and from its present accounting system for 2005-2007. This testimony shows that PERA's recalculation of contributions and benefits is based on substantial evidence. *See In re Excelsior Energy Inc.*, 782 N.W.2d 282, 290 (Minn. App. 2010) (stating that relator has burden to prove that agency findings are not supported by substantial evidence).

Thus, the PERA board did not err by adjusting contributions and benefits and recouping overpaid benefits with respect to the city's insurance-supplement payments.

III.

Relators next argue that the PERA board erred for three additional reasons. Because we already have concluded that the PERA board's decision concerning the city's salary-supplement contributions is erroneous, we limit our consideration of these three arguments to the city's insurance-supplement payments.

A. Statute of Limitations

Relators argue that the PERA board cannot adjust retirement plan contributions and benefits and recoup overpaid benefits after the lapse of a three-year statute of limitations. The ALJ rejected this argument on the ground that no limitations period applied at the time of the PERA board's action. The PERA board adopted the ALJ's recommendation.

The statute governing adjustments for erroneous deductions and contributions has been amended several times. Before 1990, a three-year limitations period applied. Minn. Stat. § 353.27, subd. 7 (1988). The statute later was amended to provide that adjustments could be made "at any time." Minn. Stat. § 353.27, subd. 7(c) (1994). In 2006, the statute was amended again to make adjustments mandatory; in the process, the "at any time" language was removed. 2006 Minn. Laws ch. 271, art. 3, § 16, at 952. The resulting statute permitted and required the PERA

board to make adjustments to retirement-plan contributions upon discovery of an error, without regard for when the error occurred:

> Employer contributions and employee deductions taken in error from amounts which are not salary under section 353.02, subdivision 10, are invalid upon discovery by the association and must be refunded as specified in paragraph (d).

Minn. Stat. § 353.27, subd. 7(c) (2008). This version of the statute was in effect in March 2009, when the PERA board took action to adjust contributions and benefits and to recoup overpaid benefits.[2] Thus, PERA's action was not subject to a statute of limitations.

Relators also contend that the PERA board's action is barred by statutes of limitations that are codified outside chapter 353 of the Minnesota Statutes. See Minn. Stat. §§ 541.05(1), (2), (4); .07(2), (5) (2010). Each of these statutes of limitations, however, governs "actions," which refers "to judicial proceedings." *Har-Mar, Inc. v. Thorsen & Thorshov, Inc.*, 300 Minn. 149, 152, 218 N.W.2d 751, 754 (1974). These provisions of chapter 541 do not apply to the PERA board's ability to adjust contributions and benefits or to recoup overpaid benefits.

Thus, at the time the PERA board took action to adjust relators' contributions and benefits, there was no limitation on the timing of its action.

B. Estoppel

Relators argue that the PERA board should be estopped from adjusting retirement plan contributions and benefits and from recouping overpaid benefits. The ALJ rejected this argument, and the PERA board adopted the ALJ's recommendation.

The doctrine of estoppel "cannot be applied when doing so would cause an agency to act outside the bounds of its authority." *In re Application for PERA Ret. Benefits of McGuire*, 756 N.W.2d 517, 519 (Minn. App. 2008), *review denied* (Minn. Dec. 16, 2008); *see also Axelson v. Minneapolis Teachers' Ret. Fund Ass'n*, 544 N.W.2d 297, 299-300 (Minn. 1996). The PERA board is required by law to adjust contributions and benefits and to recoup overpaid benefits if it discovers an erroneous calculation of PERA salary. Minn. Stat. § 353.27, subd. 7(c)-(e). This rationale is sufficient to dispose of relators' arguments on this issue. The PERA board cannot be estopped from making an adjustment that is required by law.

C. Constitutional Rights

Relators argue that the PERA board's adjustment of contributions and benefits and its recoupment of overpaid benefits violate the constitutional prohibitions against impairment of contracts and takings of private property without just compensation. Although relators presented these arguments to the ALJ, neither the ALJ nor the PERA board addressed them. Nonetheless, they are properly addressed for the first time on appeal. *See Neeland v. Clearwater Mem'l Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977) (stating that administrative agencies lack subject-matter jurisdiction to decide constitutional issues, which are within exclusive province of judicial branch).

1. Impairment of Contracts

Both the United States Constitution and the Minnesota Constitution prohibit the impairment of contracts. U.S. Const. art. I, § 10, cl. 1; Minn. Const. art. I § 11. Relators' argument, however, focuses on the enforceability of their *statutory* right to benefits. They do not argue that they had a *contractual* right under the CBAs to have the salary-supplement and insurance-supplement payments *treated as PERA salary*. In *Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740 (Minn. 1983), the supreme court held that the legislature's amendment of a statute concerning public employees' retirement benefits was an unconstitutional impairment of the employment contracts of employees who already had retired. *Id*. at 750-52. But in this case, there has been no change to the statutory benefits to which relators are entitled, and relators have not identified a contractual right to have their insurance-supplement payments included in PERA salary. Thus, their impairment-of-contracts claim fails.

2. Takings

Both the United States Constitution and the Minnesota Constitution prohibit the taking of private property for public use without just compensation. U.S. Const. amend. V; Minn. Const. art. I, § 13. To establish a taking, relators must show that they had a right to have the insurance-supplement payments included in PERA salary. *See State ex rel. Humphrey v. Philip Morris Inc*., 606 N.W.2d 676, 697 (Minn. App. 2000) (explaining that "where there is no right, there can be no taking" (quotation and alteration omitted)), *review denied* (Minn. Apr. 25, 2000). Relators have not established a right to have the city's insurance-supplement payments included in their calculation of PERA salary. Thus, relators' takings claim also fails.

IV.

Relators last argue that the ALJ and the PERA board erred by not granting their requests for attorney fees. Relators requested attorney fees in their post-hearing submission to the ALJ and again in their exceptions to the ALJ's findings, but neither the ALJ nor the PERA board addressed the requests.

In a contested-case proceeding, if the prevailing party shows "that the position of the state was not substantially justified, the court or administrative law judge shall award fees and other expenses to the party unless special circumstances make an award unjust." Minn. Stat. § 15.472(a) (2010). Relators were not the prevailing parties in the administrative review proceedings that led to the PERA board's decision. But relators have prevailed, in part, in this court. In light of relators' partial success on appeal, the PERA board on remand should reconsider whether relators are entitled to attorney fees pursuant to section 15.472(a).[3]

D E C I S I O N

The PERA board erred by adjusting relators' contributions and benefits and by recouping overpayments of benefits based on the city's salary-supplement payments. The PERA board may not rely on its purported longstanding interpretation of the statute and, thus, may not make adjustments to contributions and benefits based on the salary-supplement payments. The PERA

board did not err by adjusting relators' contributions and benefits and in recouping overpayments of benefits based on the city's insurance-supplement payments. On remand, the PERA board shall modify its adjustments to relators' contributions and benefits and shall modify its recoupment of overpayments of benefits so as to ensure that the city's salary-supplement payments to relators are included in the calculation of relators' so-called "PERA salary." The PERA board also shall reconsider whether relators are entitled to attorney fees.

Affirmed in part, reversed in part, and remanded.

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[1] It is unclear whether the monthly salary-supplement payments truly qualify for deferral of income taxes under federal or state law. *See* 26 U.S.C. § 457 (2006); Minn. Stat. § 290A.03, subd. 3(1)(b)(xi) (2006). But that issue is not dispositive of this appeal, which is focused on the question whether the city's payments are within the statutory definition of "salary" in section 353.01, subdivision 10. That question should be analyzed according to the nature of the payment, not the parties' labels or terminology.

[2] During its 2009 session, the legislature amended the statute again by restoring the three-year limitations period. 2009 Minn. Laws ch. 169, art. 4, § 11, at 2329. That amendment, however, did not become effective until May 23, 2009. *See* 2009 Minn. Laws ch. 169, art. 4, § 11, at 2330, 2443. But the legislature expressly allowed for municipalities with "adjustments . . . due to invalid salary amounts . . . in process" as of the effective date to elect to apply the new three-year statute of limitations by passing a resolution to that effect and transmitting it to PERA's executive director within 90 days. 2009 Minn. Laws ch. 169, art. 4, § 50(a), at 2351. Two years later, the legislature gave municipalities another opportunity to elect a three-year statute of limitations. 2011 Minn. Laws 1st Spec. Sess. ch. 8, art. 1, § 4, at 1088. The latter act makes clear that if a municipality "declines the treatment permitted under paragraph (a) or fails to submit a resolution in a timely manner, the statute of limitations specified in paragraph (a) does not apply." *Id*. It appears that the city did not elect to apply the new statute of limitations after the 2009 or 2011 amendments to the statute.

[3] Relators also contend that they are entitled to attorney fees on three other grounds, but each contention is without merit. (Rel. Br. at 46-49.) First, relators contend that they are entitled to fees under Minn. Stat. § 353.03, subd. 3(a)(7), which directs the PERA board to provide for the payment of costs to administer the plans. But that statute does not authorize the payment of attorney fees incurred by parties challenging an adjustment of contributions or benefits. Second, relators also contend that they are entitled to fees under the private attorney general statute, Minn. Stat. § 8.31, subd. 3a (2010). But that statute provides for recovery of attorney fees only in a "civil action" to enforce specifically enumerated consumer-protection statutes. This was an administrative proceeding, and none of the enumerated statutes was invoked. Third, relators further contend that they are entitled to fees under the federal Employee Retirement Income Security Act (ERISA). *See* 29 U.S.C. § 1132(g)(1) (2006). But this matter is not an action to enforce ERISA. Thus, relators' entitlement to attorney fees, if any, is based solely on section 15.472(a).

STATE OF MINNESOTA

IN COURT OF APPEALS

A11-1155

Daniel S. Ortell,

Respondent,

vs.

City of Nowthen,

Appellant.

Filed April 2, 2012

Reversed

Klaphake, Judge

Anoka County District Court

File No. 02-CV-10-5487

Daniel S. Ortell, Andover, Minnesota (pro se respondent)

James J. Monge, League of Minnesota Cities, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and Cleary, Judge.

S Y L L A B U S

Under Minn. Stat. § 462.357, subd. 1e(a)(2) (2010), a nonconformity may be continued until it is destroyed to the extent of greater than 50 percent of its value and no building permit is applied for within 180 days after the property is damaged. If a building permit is applied for within 180 days of the damage, the municipality may impose reasonable conditions on the building permit to mitigate any newly created impact on adjacent properties or water bodies. But if no building permit is applied for within 180 days of the damage, the nonconformity must end and any subsequent use or occupancy must be a conforming one.

O P I N I O N

KLAPHAKE, Judge

Appellant City of Nowthen (the city) challenges the district court's summary judgment in favor of respondent Daniel Ortell that permits respondent to rebuild his nonconforming property. Appellant argues that the district court erred in interpreting Minn. Stat. § 462.357, subd. 1e(a)(2), to permit restoration of a nonconformity that is destroyed by greater than 50 percent of its value without the need for a variance, when the property owner fails to apply for a building permit within 180 days after the damage.

Because we conclude that the statute is ambiguous and that the district court's interpretation of the statute is not in accord with legislative intent, we reverse.

FACTS

Respondent owns property within the boundaries of the city. Respondent's home, an old farmhouse, is located within the 150-foot setback from the adjacent county road and is therefore a nonconformity under the city's current zoning code. In September 2007, respondent applied for and received a permit from the city to replace the roof, siding, and windows of the house. In October 2007, the house was largely destroyed when roofers swung a boom into the rotting frame and the house collapsed. According to the county assessor, the value of the house was diminished by more than 50 percent following its collapse. In November 2007, respondent began rebuilding the house; this activity was observed by the city building inspector, who issued a stop-work order because the construction was beyond the activity allowed by the original permit. The building inspector provided respondent with an application for a building permit to rebuild the structure.

Respondent had health problems following the collapse of the house and did not apply for a building permit. In January 2010, respondent applied for a variance so that he could rebuild the house on the existing foundation. The city council, relying on the zoning commission's recommendation, denied the variance. On appeal, the board of adjustment voted to affirm the city council's denial of the variance request. Respondent appealed the decision to the district court.

Both parties moved for summary judgment. The district court issued its order granting summary judgment to the city, concluding that the city properly denied respondent's request for a variance because respondent had not demonstrated undue hardship. But the district court also granted summary judgment in favor of respondent, stating that the city "improperly denied [respondent] the right to rebuild his destroyed property without a variance based on its determination that he had failed to apply for a permit within 180 days of the accident which destroyed his nonconforming home." The court concluded that the city's findings were inadequate "to support its determination that [respondent] lacked the right to repair or replace the nonconforming structure." This appeal followed.

ISSUE

Did the district court err by concluding that under Minn. Stat. § 462.357, subd. 1e(a)(2), respondent was entitled to rebuild his nonconforming house without a variance, despite his failure to apply for a building permit within 180 days after the property was damaged and its value was reduced by more than 50 percent?

ANALYSIS

On appeal from summary judgment, we consider whether there are any genuine issues of material fact and whether the district court erred in applying the law. *Taylor v. LSI Corp. of America*, 796 N.W.2d 153, 155 (Minn. 2011). Because there are no disputed material facts here, the issue before us is one of statutory construction, which is a question of law subject to de novo review. *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 726 (Minn. 2010). When construing a statue, we must assess whether, on its face, the language is clear as written. *Id.* at 726. When a statute is clear and unambiguous, a reviewing court may not ignore the letter of the law "under the pretext of pursuing the spirit." Minn. Stat. § 645.16 (2010). We assume that the legislature does not intend an absurd or unreasonable result, or one that is impossible to execute, and that it intends that all parts of a statute are to be given effect. Minn. Stat. § 645.17 (2010).

Minn. Stat. § 462.357, subd. 1e(a) states that a nonconforming use may be continued

> including through repair, replacement, restoration, maintenance, or improvement, but not including expansion, unless:
>
> (1) the nonconformity or occupancy is discontinued for a period of more than one year; or
>
> (2) any nonconforming use is destroyed . . . to the extent of greater than 50 percent of its estimated market value . . . and no building permit has been applied for within 180 days of when the property is damaged. In this case, a municipality may impose reasonable conditions upon a zoning or building permit in order to mitigate any newly created impact on adjacent property or water body.

The district court interpreted the second clause to mean that a property owner has the absolute right to rebuild a nonconformity if the owner applies for a building permit within 180 days; but if the application is not made within 180 days, the property owner has the right to restore the nonconformity subject to the municipality's reasonable conditions. The district court reasoned that the sentence, "[i]n this case, a municipality may impose reasonable conditions . . ." would serve no purpose unless a property owner was permitted to restore a nonconformity.

Equally, the city maintains that this sentence permits a municipality to place conditions on a building permit, if the property owner applies within 180 days of the damage, and that otherwise the nonconformity may not continue. Both the district court and the city assert that this language is not ambiguous.

A statute is ambiguous if it is susceptible to more than one reasonable meaning. *Brayton v. Pawlenty*, 781 N.W.2d 357, 363 (Minn. 2010). We conclude that the statute here is ambiguous because it can reasonably be interpreted in more than one way. Because it is ambiguous, we must

attempt to ascertain the legislative intent. When a statute is ambiguous, we may consider the following:

> (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 obtained;
> (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) the legislative and administrative interpretations of the statute.

Minn. Stat. § 645.16; *Brayton*, 781 N.W.2d at 364.

There are several general principles underlying zoning law. "Zoning ordinances were established to control land use, and development in order to promote public health, safety, welfare, morals, and aesthetics." *In re Stadsvold*, 754 N.W.2d 323, 329 (Minn. 2008). Competing with this are common law property rights, for which reason zoning ordinances are construed narrowly against the municipality and broadly in favor of the property owner. *Id.* Because of these competing interests, nonconformities are generally permitted to continue, but not expand, to encourage elimination of the nonconformity "due to obsolescence, exhaustion, or destruction." *Freeborn Cnty. v. Claussen*, 295 Minn. 96, 99, 203 N.W.2d 323, 325 (1972); *see also Krummenacher*, 783 N.W.2d at 726.

Our review of the legislative history of this statute reveals a certain progression in the development of the law. In the first version of the statute from 2002, a nonconformity could continue, including repair or maintenance, until discontinued for more than a year or if destroyed to the extent of 50 percent of its market value; there were no conditions included that would permit a nonconformity to continue after either occurrence. 2001 Minn. Laws ch. 174, § 1. In 2004, this subsection was amended to read:

> Any nonconformity, including the lawful use or occupation of land or premises existing at the time of the adoption of an additional control under this chapter, may be continued, including through repair ~~or~~, replacement, restoration, maintenance, ~~but if~~ or improvement, but not including expansion, unless
>
> (1) the nonconformity or occupancy is discontinued for a period of more than one year~~,~~; or
>
> (2) any nonconforming use is destroyed by fire or other peril to the extent of greater than 50 percent of its market value, and no building permit has been applied for within 180 days of when the property is damaged. In this case, a municipality may impose reasonable conditions upon a building permit in order to mitigate any newly created impact on adjacent property.

2004 Minn. Laws ch. 258, § 2. In 2009, the subsection was again amended to directly address shoreland issues. This progression suggests that the legislature intended to provide greater protection to a property owner's right to continue a nonconformity over time.

But we must also reconcile this evident intent with two other considerations. First, the legislature permits a municipality to adopt and enforce zoning laws, including laws that create or limit nonconformities. If subdivision 1e(a)(2) is interpreted to mean that there is effectively no time after which a nonconformity lapses, it is an absurd result; the legislature would not give a municipality the power to regulate nonconformities and then block their ability to regulate. *See* Minn. Stat. § 645.17(1) ("[T]he legislature does not intend a result that is absurd."). Second, we seek to give effect to all the provisions of a statute. Minn. Stat. § 645.17(2). If a nonconforming property owner may apply at any time, without limit, for a building permit, the first clause of the subdivision, which states that a nonconformity ceases if it is discontinued for a period of more than one year, has no meaning. Only one interpretation of this subdivision satisfies the rules of statutory construction: the language "[i]n this case" must refer to a building permit applied for within 180 days of the damage to the property.

We conclude that the legislature intended to permit a property owner to obtain a permit to rebuild a nonconformity if the permit was obtained within 180 days, but subject to reasonable conditions that would ameliorate the effect of permitting the nonconformity to continue.

D E C I S I O N

Under Minn. Stat. § 462.357, subd. 1e(a)(2), a nonconformity may be continued until any nonconforming use is destroyed to the extent of greater than 50 percent of its value and no building permit is applied for within 180 days after the property is damaged. If a building permit is applied for within 180 days of the damage, the municipality may impose reasonable conditions on the building permit to mitigate any newly created impact on adjacent properties or water body. But if no building permit is applied for within 180 days of the damage, the nonconformity must end and any subsequent use or occupancy must be a conforming one.[1]

Reversed.

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[1] Although it is regrettable that respondent may have forfeited his right to rebuild his house without the need for a variance solely because ill health prevented him from applying for a building permit, the recent legislative amendment to Minn. Stat. § 462.357, subd. 6 (Supp. 2011), which permits a variance to be granted upon a showing of "practical difficulties," rather than the more stringent standard of "undue hardship," may allow him to qualify for a variance.

STATE OF MINNESOTA

IN SUPREME COURT

A09-349

Court of Appeals

Gildea, C.J.

In re the Marriage of:
Loretta Marie Angell,

Respondent,

vs.

Filed: December 9, 2010
Office of Appellate Courts

Gordon William Angell, Jr.,

Appellant.

Peter L. Radosevich, Esko, Minnesota, for appellant.

Arthur M. Albertson, Duluth, Minnesota, for respondent.

Mary Catherine Lauhead, Law Offices of Mary Catherine Lauhead, St. Paul, Minnesota, Michael D. Dittberner, Linder, Dittberner & Bryant, Ltd., Edina, Minnesota, for amicus curiae Family Law Section, Minnesota State Bar Association.

S Y L L A B U S

Federal anti-attachment provisions preempt a district court's order apportioning $150,000 in federal death benefits to a non-beneficiary spouse under Minn. Stat. § 518.58, subd. 2 (2008) in a marriage dissolution.

Affirmed.

O P I N I O N

GILDEA, Chief Justice.

The question in this case is whether federal law preempts the district court's award of death benefits to a non-beneficiary spouse. The court of appeals held that the award of federal death benefits to the non-beneficiary spouse conflicted with federal law. Because we hold that the anti-attachment provisions in 38 U.S.C. § 1970(g) (2006) and 38 U.S.C. § 5301(a)(1) (2006) preempt the court's award made under state law, we affirm.

This action arises from the dissolution of the marriage between appellant Gordon William Angell, Jr. (appellant), and respondent Loretta Marie Angell (respondent). Appellant and respondent married in 1981. They had five children together. During the marriage, respondent worked part-time as a substitute rural postal carrier, earning approximately $1,100 a month. Respondent generally handled the finances and paid the bills.

One of the parties' children, Levi Angell, enlisted in the Marines in 2002 when he turned 18. Levi Angell died in active combat in Iraq in 2004. He was insured under the federal Servicemembers' Group Life Insurance program (SGLI), which is authorized by 38 U.S.C. §§ 1965–80A (2006) and regulated under 38 C.F.R. Pt. 9 (2010). Levi listed only his mother, the respondent, as a beneficiary on the SGLI policy election form. Levi also designated only respondent as the sole beneficiary of his death gratuity benefits, which are authorized by 10 U.S.C. § 1475 (2000), and allow payments from the federal government to designated survivors of servicemembers killed in combat.

Immediately following her son's death in April 2004, respondent received death gratuity payments totaling $100,000. Respondent also received a payment of $250,352.66 in May 2004 because of her status as the sole beneficiary under her son's SGLI plan. Respondent received an additional $150,000 from the federal government in 2005 under a program that provided additional payouts to prior SGLI beneficiaries. In total, respondent received $500,352.66 in federal death benefits because of her son's death.[1]

All of the federal death benefit checks were made out solely to respondent or deposited directly into an account on her behalf. Appellant did not ask respondent for a share of the federal death benefits, other than $500 to buy clothes for his son's funeral. Respondent spent approximately $133,000 on gifts to her surviving adult children and on a family trip. At some point before the marriage dissolution proceedings were commenced, respondent moved most of the remaining federal death benefits into a bank account in another state. An adult daughter of respondent and appellant was designated the primary owner of that account.

Appellant moved out of the family home and moved in with his elderly mother in July 2006. Appellant had no bank or checking account, additional real property other than the homestead, retirement savings, or assets other than one car. He had a seventh-grade education, no job or vocational training, and has not held a full-time job since 2002. He has a disability that requires him to speak with a device and his primary source of income was a $424 monthly social security disability payment. Appellant's living expenses were about $600 a month.

Respondent filed for marriage dissolution on January 29, 2007. Sometime before the proceedings were commenced, respondent went on disability leave from her job. At the time of the marriage dissolution, she received $203 a month in General Assistance and additional

supplemental social security disability benefits. Her monthly living expenses at the time were approximately $2,172.

Respondent and appellant came to several agreements during the proceedings. Specifically, the parties agreed that respondent would get sole physical and legal custody of their then-minor son. Appellant and respondent also agreed that respondent would keep a nonmarital parcel of unimproved land that respondent inherited during their marriage, that they would divide the household goods, furnishings, cars, and other personal property before trial, and that they would sell their home and split the proceeds equally. Appellant and respondent also stipulated that "no spousal maintenance should be awarded to either party."

The only issue for trial, according to the district court, was the proper characterization and division of the federal death benefits. After trial, the court found the parties' stipulations "to be reasonable" and incorporated them into its judgment and decree. As to the federal death benefits, the court determined that the death gratuity payments were marital property, and the court divided them evenly between the parties. The court further determined that the SGLI payouts were respondent's nonmarital property. The court then determined that appellant was entitled to $100,000 from respondent's nonmarital assets to prevent an unfair hardship, as authorized by Minn. Stat. § 518.58, subd. 2 (2008).[2] Appellant's total award therefore was $150,000.

Respondent filed a post-trial motion to amend the judgment and decree, asserting that because she was the sole named beneficiary of the death gratuity benefits, those benefits were solely her nonmarital property. Respondent also asserted that federal law barred the district court from distributing any portion of either the death gratuity benefits or the SGLI proceeds to appellant because the payments were "within the exclusive jurisdiction of the federal government." Respondent asked the court to amend the judgment and decree to remove the $150,000 award to appellant, or alternatively, to order a new trial.

The district court amended the judgment and decree to designate all of the federal death benefits as respondent's nonmarital property. The court then increased its award to appellant from respondent's nonmarital property under the section 518.58, subdivision 2, "unfair hardship" provision to $150,000, leaving appellant with the same $150,000 award that the court originally ordered. The court denied the remainder of respondent's motions.

Respondent appealed to the court of appeals. Respondent asserted on appeal that the district court erred by awarding appellant any share of her nonmarital property or, alternatively, that the court erred by increasing the share of the award of her nonmarital property from $100,000 to $150,000. *Angell v. Angell*, 777 N.W.2d 32, 35 (Minn. App. 2009). Appellant in turn challenged the reclassification of the death gratuity benefits as nonmarital property. *Id.*

The court of appeals first determined that the district court did not err by designating all of the federal death benefits as nonmarital property. *Id.* at 37. The court determined that Levi's designation of respondent as the sole beneficiary of his federal death benefits provided enough evidence to overcome the state law presumption that because the federal death benefits were received during the marriage, they were marital property. *Id.* at 36.

The court of appeals then turned to the issue of whether the property division was proper. *Id.* at 37. The court determined that based on appellant's financial and medical circumstances, the award under the section 518.58, subdivision 2, unfair hardship provision "accord[ed] with the statute's hardship concerns." *Angell*, 777 N.W.2d at 38. But the court also found that the district court's order awarding appellant a share of the federal death benefits directly conflicted with the express prohibition under federal law barring the diversion of military death benefits from designated beneficiaries of those benefits. *Id.* at 40. The court reversed solely on the latter issue and remanded the case to the district court to make a property distribution consistent with its holding. *Id.* at 41. We granted appellant's petition for review.[3]

I.

It is well settled that "[a] trial court has broad discretion in evaluating and dividing property in a marital dissolution and will not be overturned except for abuse of discretion." *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). But we review de novo the question of whether federal law preempts state law. *In re Estate of Barg*, 752 N.W.2d 52, 63 (Minn. 2008).

Under the Supremacy Clause of the U.S. Constitution, a federal law prevails over a conflicting state law. U.S. Const. art. VI, cl. 2 (stating that the laws of the United States "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding"). Congressional purpose is " 'the ultimate touchstone' " of the inquiry into whether a federal statute preempts a state law. *Barg*, 752 N.W.2d at 63 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). And when considering issues arising under the Supremacy Clause, we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Divorce and other family law matters are traditionally within the historic police power of the states. *See Langston v. Wilson McShane Corp.*, 776 N.W.2d 684, 689 (Minn. 2009) (citing *Ankenbrandt v. Richards*, 504 U.S. 689, 703-04 (1992)).

Appellant relies on the traditional role of state courts in the marital dissolution area in arguing that federal law does not preempt the district court's order. Respondent argues, and the court of appeals held, that two federal anti-attachments statutes operated to preempt the district court's assignment of any portion of the federal death benefits to appellant. *Angell*, 777 N.W.2d at 40. First, 38 U.S.C. § 1970(g) (2006), which governs the SGLI proceeds, states in relevant part:

> *Any payments due or to become due under Servicemembers' Group Life Insurance* or Veterans' Group Life Insurance *made to*, or on account of, an insured or *a beneficiary* shall be exempt from taxation, shall be exempt from the claims of creditors, and *shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.*

(Emphasis added.) Second, 38 U.S.C. § 5301(a)(1) (2006), which governs (among other veterans' benefits) the death gratuity benefits, states:

> *Payments of benefits due or to become due under any law administered by the Secretary* shall not be assignable except to the extent specifically authorized by law, and such payments *made to*, or on account of, *a beneficiary* shall be exempt from taxation, shall be exempt from the claim of creditors, and *shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.*

(Emphasis added.) The question presented in this case is whether, notwithstanding the historic role the states have played in the area of domestic relations, either of these provisions of federal law preempts the district court's award of a portion of the federal death benefits to appellant.

A.

Federal law may preempt state law in several ways. *Barg*, 752 N.W.2d at 63 (citing *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987)). First, Congress may preempt state law "with express language preempting state law." *Id*. Second, Congress may preempt state law by enacting a "scheme of federal regulation [that] is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Id.* (quoting *Guerra*, 479 U.S. at 280-81). Third, preemption may exist "when state law actually conflicts with federal law." *In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 251 (Minn. 2005). This case concerns the third kind of preemption, sometimes called conflict preemption.

A state law conflicts with a federal law when "it is impossible for a private party to comply with both state and federal requirements" or when the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (citations omitted) (internal quotation marks omitted). Under this standard, a "state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Ridgway v. Ridgway*, 454 U.S. 46, 55 (1981).

We conclude that the district court's award of a portion of the federal death benefits to appellant interferes with the congressional objective expressed in the federal anti-attachment statutes. In these statutes, Congress made clear—through the exemption of the federal death benefits from "any legal or equitable process whatever"—that these benefits belong only to the beneficiary. 38 U.S.C. §§ 1970(g), 5301(a)(1). But the court's award requires that respondent pay over to appellant a portion of the federal death benefits. Because the court's award of the federal death benefits to appellant conflicts with 38 U.S.C. §§ 1970(g) and 5301(a)(1), it cannot stand.

The Supreme Court's decision in *Ridgway* supports our conclusion. 454 U.S. at 60-61. In *Ridgway*, the Court held that a federal anti-attachment statute applicable to the SGLI program, identical in all relevant respects to section 1970(g), preempted the imposition of a state law constructive trust on the proceeds of a servicemember's life insurance proceeds. 454 U.S. at 60-61. The servicemember directed that the proceeds of the life insurance policy be paid as specified by law. *Id.* at 48. The statutory scheme designated his second wife as the sole beneficiary. *Id.* at

48-49. The servicemember's first wife sued his second wife seeking an order requiring that the proceeds of the insurance policy be used to support the children from the servicemember's first marriage. *Id*. at 49. The state supreme court issued an order directing that the funds be held in trust for support of the children. *Id*. at 49-50. The Supreme Court reversed, holding that the constructive trust conflicted with the federal statute. *Id*. at 61.

The Supreme Court in *Ridgway* determined that Congress's purpose for enacting anti-attachment statutes was to ensure that benefits remain the sole property of the beneficiary. *Id*. at 56. Emphasizing that anti-attachment provisions are "strong language" that have an "unqualified sweep," the Court held that state action attaching or diverting benefits subject to anti-attachment laws from the intended beneficiary conclusively conflicts with this congressional purpose. *Id*. at 61-62; *see also Hisquierdo v. Hisquierdo*, 439 U.S. 572, 584, 586, 594-95 (1979) (stating that anti-attachment language in general "pre-empts all state law that stands in its way" and holding that anti-attachment language prohibits state courts from awarding federal benefits to a non-beneficiary spouse in a divorce action in spite of the Court's reluctance to impact domestic matters traditionally within the discretion of the states); *Wissner v. Wissner*, 338 U.S. 655, 659 (1950) (holding that state action diverting benefits after they have been paid out to the intended beneficiary is in "flat conflict" with anti-attachment provisions).

B.

Despite this strong precedent, appellant asserts that 38 U.S.C. § 1970(g) and 38 U.S.C. § 5301(a)(1) did not prohibit the district court's award of the SGLI proceeds and death gratuity benefits to prevent an unfair hardship to appellant under Minn. Stat. § 518.58, subd. 2. First, appellant argues that by their plain terms, the anti-attachment statutes do not apply to the district court's award. Second, he argues that the statutes do not operate to preempt the district court's award because the award was in the nature of a support obligation. We address each argument in turn.

1.

As a matter of statutory construction, appellant argues that the anti-attachment statutes do not apply to him because he is not a creditor and because the district court's award was not an "attachment, levy, or seizure" as expressly prohibited by the statutes. As to the first point, the Supreme Court has recognized that the sweep of the anti-attachment statutes is broad and that the statutes "make no exception for a spouse." *Hisquierdo*, 439 U.S. at 586. The fact that appellant is not a creditor therefore does not render the federal statutes inapplicable.

As to appellant's second statutory point, when the district court made the award, it invoked its authority under section 518.58, subdivision 2 to "*apportion* up to one-half of the *property* to the other spouse." (Emphasis added.) In its findings, the court specifically described the federal death benefits, designated those benefits as nonmarital property, took a portion of that nonmarital property, and gave that portion to appellant. Therefore the court "attach[ed], lev[ied], or seiz[ed]" precisely those benefits when it awarded them to appellant. *See* 38 U.S.C. §§ 1970(g), 5301(a)(1); *cf. Ridgway*, 454 U.S. at 60 ("Any diversion of the proceeds of Sergeant Ridgway's SGLIA policy by means of a court-imposed constructive trust would . . . operate as a

forbidden 'seizure' of those proceeds."); *Wissner*, 338 U.S. at 659 (noting that a state court order that diverted payments from the beneficiary was "in effect" a seizure of those funds). In short, appellant's statutory arguments are without merit.

2.

In addition to his arguments based on the language of the anti-attachment statutes, appellant also argues that the statutes do not preempt the district court's award because the award was in the nature of a support obligation. Appellant relies on *Wissner* and *Rose v. Rose*, 481 U.S. 619 (1987), to support his argument, contending that in these cases the Supreme Court has indicated it would be appropriate for an exception to anti-attachment statutes to apply in cases involving "support obligations."

In *Wissner*, Army Major Wissner named his mother and father as the beneficiaries of his federal National Service Life Insurance policy, deliberately excluding his estranged wife. 338 U.S. at 657. Upon Wissner's death, Wissner's widow claimed one-half of the life insurance proceeds under California's community property laws. *Id*. The Supreme Court reversed the state court's award of one-half of the proceeds to Wissner's widow, determining that "Congress ha[d] spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Id*. at 658. Congress did this when it included language in the governing statute that the policyholder "shall have the right to designate the beneficiary or beneficiaries" and that "[n]o person shall have a vested right" to the proceeds. *Id*. at 658, 661 (citations omitted) (internal quotation marks omitted). The *Wissner* Court noted, however, that it would be less likely to find that an award from a veteran's benefits was prohibited by federal statutes in cases implicating the "moral obligation of supporting spouse and children." *Id*. at 660. The Court distinguished this "moral obligation" implicated by "alimony and support cases" from "the business relationship of man and wife for their mutual monetary profit" implicated by property division cases. *Id*.

In *Rose*, a state court ordered the appellant, a disabled veteran, to pay child support. 481 U.S. at 622. The appellant's only sources of income were federal social security and veterans' disability benefits which were subject to an anti-attachment provision similar to those at issue in this case. *Id*. at 622, 630 (concluding that veterans' disability benefits were not liable to attachment under the anti-attachment provision). The Supreme Court analyzed whether the state court's child support award from those benefits conflicted with the federal anti-attachment provision. *Id*. at 630. The Court determined that "Congress clearly intended veterans' disability benefits to be used, in part, for the support of veterans' dependents." *Id.* at 631. On this basis, and invoking the "moral obligation" concepts from *Wissner*, the Court held that the child support award from the appellant's veterans' benefits did not conflict with the federal anti-attachment provision because the award was consistent with Congress's intent for veterans' disability benefits to be used for the support of the veteran *and* his dependents. *Id*. at 632, 636.

Appellant contends that the section 518.58, subdivision 2, unfair hardship provision reflects the same "deeply rooted moral responsibilit[y]" policy rationale as the child support obligation at issue in *Rose*, and distinguishes the unfair hardship award from the "business relationship" nature of a typical property division award. *Rose*, 481 U.S. at 632. Appellant argues that even though the district court awarded him a portion of the federal death benefits pursuant to

a property division order in this case, it did not necessarily "mean the Court's action [was] a property division." Appellant claims that the equitable nature of the unfair hardship provision takes the district court's order out of the realm of "property divisions" and into the realm of "support obligations" held not to be preempted by anti-attachment provisions under the rule in *Rose*.

Appellant's argument fails because the exception to anti-attachment provisions set forth in *Rose* does not apply to this case. *Rose* concerned different benefits with different congressional purposes, and the Court has drawn "a distinction between programs that are intended for the beneficiary alone and those that are intended to support the beneficiary and others." *Dep't of Pub. Aid ex rel. Lozada v. Rivera*, 755 N.E.2d 548, 553 (Ill. App. Ct. 2001). In *Rose*, the Court determined that Congress intended for veterans' disability benefits to be used for the support of the veteran *and* the veteran's dependents; and that as a result, a state court's order directing a veteran to use his disability benefits to pay child support did not conflict with the anti-attachment statutes' purpose to ensure benefits remain the property of the intended beneficiary. 481 U.S. at 636.

This case, in contrast, concerns life insurance and death gratuity benefits. As the Supreme Court stated in *Ridgway*, a servicemember has "an absolute right to designate the policy beneficiary. That right is personal to the servicemember alone. It is not a shared asset subject to the interests of another." 454 U.S. at 59-60. Respondent was the only named beneficiary of the federal death benefits in this case. Therefore, an order diverting the benefits to anyone other than respondent—even her dependents—stands in direct conflict with Congress's clearly expressed intent.

Moreover, the apportionment made under section 518.58, subdivision 2, is not the same kind of "support obligation" as the obligation to pay child support at issue in *Rose*. Federal and state case law draw a clear distinction between awards of federal benefits in property division cases—which are held to be preempted by anti-attachment provisions—and awards of federal benefits in child and spousal support orders—which are held to be exempt from the preemptive effect of anti-attachment provisions.[4] The district court's award in this case was a division of property, not an award of support, and therefore falls in the class of cases subject to the preemptive effect of anti-attachment provisions.

The language of Minn. Stat. § 518.58, subd. 2, confirms this result. The plain terms of subdivision 2 authorize the district court to "apportion" up to one-half of a spouse's nonmarital property in the same manner that it "apportions" the marital property. The Minnesota Legislature has, in contrast, separately provided for the support of a spouse under the spousal maintenance statute. *See* Minn. Stat. § 518.552 (2008). The term "maintenance" is defined as "an award made in a dissolution or legal separation proceeding of payments from the future income or earnings of one spouse for the *support* and maintenance of the other." Minn. Stat. § 518.003, subd. 3a (2008) (emphasis added). By enacting the spousal maintenance provision, the Legislature provided the means and circumstances under which a district court orders a spouse to "support" another.

The district court's order in accordance with section 518.58, subdivision 2, also supports the conclusion that the award was a division of property and not an award of spousal support.

The district court first characterized the sole issue at trial as the "*division of certain money which was received upon the death of the parties' son*." (Emphasis added.) Then the court invoked its authority under section 518.58, subdivision 2, to "apportion up to one-half of the *property* to the other spouse." (Emphasis added.)

In summary, by enacting the anti-attachment provisions, " 'Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other.' " *Ridgway*, 454 U.S. at 55 (quoting *Wissner*, 338 U.S. at 658). We hold that federal law preempts the award of a portion of the federal death benefits to appellant under state law.

Affirmed.

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[1] We refer to the proceeds from the federal death gratuity program and the SGLI program collectively as the "federal death benefits."

[2] This statute provides: "If the court finds that either spouse's resources or property . . . are so inadequate as to work an unfair hardship, considering all relevant circumstances, the court may, in addition to the marital property, apportion up to one-half of the property otherwise excluded . . . to prevent the unfair hardship." Minn. Stat. § 518.58, subd. 2.

[3] Appellant made three arguments in support of his petition: (1) that the court of appeals erred by failing to consider whether appellant was an intended beneficiary of the death benefits; (2) that the court of appeals erred by characterizing the death benefits as a nonmarital "gift;" and (3) that the courts of appeals erred by determining that federal anti-attachment statutes preempted the district court's award. Appellant briefed only the third issue to this court. Accordingly, we do not reach the other issues raised in his petition. *See Peterson v. BASF Corp*., 711 N.W.2d 470, 482 (Minn. 2006) ("It is well-established that failure to address an issue in brief constitutes waiver of that issue."). For her part, respondent contends that appellant waived his claim to the federal death benefits by waiving spousal maintenance. Because the preemption issue is dispositive, we do not reach this argument.

[4] *Compare Hisquierdo*, 439 U.S. at 590 (holding that an award of federal railroad retirement benefits to ex-spouse in property division action conflicted with anti-attachment provision), *Wissner*, 338 U.S. at 658-59 (holding that an award of deceased veteran's federal life insurance benefits taken from the intended beneficiary and given to ex-spouse conflicted with anti-attachment provision), *In re Marriage of Crook*, 813 N.E.2d 198, 206 (Ill. 2004) (holding that anti-attachment provisions conflicted with trial court's order dividing spouse's federal social security benefits in a property division action), *In re Marriage of Wojcik*, 838 N.E.2d 282, 295 (Ill. App. Ct. 2005) (holding that on award of veteran's disability benefits to ex-spouse in property division and spousal support action conflicted with anti-attachment provision), *and Young v. Young*, 931 So.2d 541, 548 (La. Ct. App. 2006) (holding that a trial court was forbidden by anti-attachment statutes from including federal social security disability benefits in computation of distribution of marital property), *with Rose*, 481 U.S. at 636 (holding that court

order requiring veteran to use federal disability payments to cover child support obligations did not conflict with anti-attachment provisions), *In re Marriage of Anderson*, 522 N.W.2d 99, 102 (Iowa Ct. App. 1994) (holding that anti-attachment provisions did not preclude trial court from ordering veteran spouse to use federal disability benefits to pay alimony), *and Schwagel v. Ward*, No. A06-1812, 2007 WL 2600747, at *2 (Minn. App. Sept. 11, 2007) (holding that anti-attachment provisions did not prevent trial court from ordering veteran to use federal disability payments to cover child support).

STATE OF MINNESOTA

IN COURT OF APPEALS

A10-1020

State of Minnesota,

Appellant,

vs.

Thomas Allen Zais,

Respondent.

Filed November 30, 2010

Reversed and remanded

Lansing, Judge

Hennepin County District Court

File No. 27-CR-10-4809

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Paul D. Baertschi, Tallen & Baertschi, Minneapolis, Minnesota (for appellant)

William Ward, Fourth District Chief Public Defender, James A. Kamin, Assistant Public Defender, Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Kalitowski, Judge.

S Y L L A B U S

The exception to the marital testimonial privilege codified in Minn. Stat. § 595.02, subd. 1(a) (2008), which permits spouses to testify in a criminal proceeding for a crime "committed by one against the other," applies to a prosecution for disorderly conduct if the underlying conduct was directed at and adversely affected or endangered the testifying spouse.

O P I N I O N

LANSING, Judge

This appeal is from the district court's pretrial order in a prosecution for disorderly conduct, concluding as a matter of law that, absent Thomas Zais's consent, his wife, Debra Zais, may not testify against him. Because we conclude that Debra Zais's testimony comes within the exception to the marital testimonial privilege in Minn. Stat. § 595.02, subd. 1(a) (2008), which permits spousal testimony in a criminal action or proceeding for a crime committed by one spouse against the other, we reverse and remand.

F A C T S

The facts relevant to this appeal are based on police reports admitted by stipulation and a written offer of proof that relies on Debra Zais's recorded statement to Maple Grove police. For purposes of determining the applicability of the marital testimonial privilege, these facts are undisputed.

Respondent Thomas Zais (Zais), his wife Debra Zais, and their fifteen-year-old daughter live in Maple Grove. The disorderly conduct charge at the center of this appeal stems from a November 15, 2009 incident in the driveway of their house, in front of their attached garage. About 6:20 p.m. Debra Zais called the Maple Grove police and reported that Zais had been drinking, was in the driveway in his pickup truck, and was trying to break down the garage door.

One of the officers responding to the call had been at the Zaises' house the previous evening in response to a phone call by Debra Zais reporting that Zais was arguing with, and had pushed, their daughter. Police told Debra Zais that the pushing conduct was insufficient to support a criminal charge. After the altercation with his daughter, Zais left the house. Debra Zais, who feared for her safety and the safety of her daughter, removed the garage-door opener from Zais's pickup so he could not enter the house.

Zais called his wife at the house on the afternoon of November 15 and told her that he was coming to the house and would break in or do whatever was necessary to gain entry. When Debra Zais saw him attempting a forcible entry, she called 911 and the police arrived at the house around 6:30 p.m.

The first officer to arrive saw the pickup in the driveway and saw Zais standing by the garage door. The officer also saw that "square panels on the garage door had been knocked out." Zais told him that Debra Zais would not let him in and that he had knocked out the panels to gain entrance to the house.

After Zais said that he had consumed alcohol, the officer administered field sobriety tests, which Zais failed. A preliminary breath test indicated that Zais had a .31 alcohol concentration. The officers told Zais that he was under arrest. He refused to comply with the officers" requests to put his hands behind his back and started to run away. After running a short distance, Zais turned to face the officers and "got into a fighting position with clenched fists." The officers

again told him that he was under arrest. Following a sequence of Zais's yelling and failing to comply with directives, police discharged a Taser. When Zais fell to the ground, the police handcuffed him and placed him in the squad car. In the car he twice hit his head against the interior, and, because of the resulting head injuries, was transported by ambulance to North Memorial Hospital. A consensual blood test registered an alcohol concentration of .23.

The state charged Zais with second-degree driving while impaired (DWI), third-degree DWI, obstruction of legal process or arrest, careless driving, and disorderly conduct. In pretrial discovery, the state notified Zais that Debra Zais was a voluntary witness in the proceeding. Zais moved to exclude her testimony based on the marital testimonial privilege in Minn. Stat. § 595.02, subd. 1(a) (2008).

The state and Zais submitted memoranda on the applicability of the marital testimonial privilege and, at the direction of the district court, the state submitted an offer of proof setting forth the substance of Debra Zais's proposed testimony. Following submission of the memoranda and argument, the district court concluded that disorderly conduct is not a crime that creates "a personal injury sufficient to destroy the spousal privilege," and therefore, as a matter of law, Debra Zais was precluded from testifying against Zais without his consent.

The state appeals this pretrial order. In his response brief, Zais raises an additional issue, characterized as a "structural error," contending that the case should be dismissed for prosecutorial impropriety in the state's decision to appeal.

I S S U E S

I. Does the exception to the marital testimonial privilege provided in Minn. Stat. § 595.02, subd. 1(a), for "a criminal action or proceeding for a crime committed by one against the other" apply to a prosecution for disorderly conduct when a spouse, who is the complaining witness, is adversely affected by the conduct underlying the complaint?

II. Did the prosecutor's decision to appeal this case inject structural error that requires dismissal of the appeal?

A N A L Y S I S

I.

Minnesota Rule of Criminal Procedure 28.04 allows the state to appeal pretrial orders, subject to some restrictions. To prevail in a pretrial appeal, the state must show clearly and unequivocally that the order will have a critical impact on its ability to prosecute the case, and that the order constitutes error. *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005). The critical-impact requirement is satisfied if the suppression of evidence destroys the prosecution's ability to prosecute or "significantly reduces the likelihood of a successful prosecution." *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998). We consider the state's evidence as a whole in

deciding what impact the exclusion of evidence will have on the state's case. *State v. Zanter*, 535 N.W.2d 624, 631 (Minn. 1995).

Critical Impact

Significantly, Zais does not dispute the critical impact of the excluded testimony. And the record, although limited, establishes that the state would rely heavily on Debra Zais's testimony to prove that Zais engaged in disorderly conduct, defined by statute as "offensive, obscene, abusive, boisterous, or noisy conduct" or "language tending reasonably to arouse alarm, anger, or resentment in others." Minn. Stat. § 609.72, subd. 1(3) (2008).

The record indicates that Debra Zais is the only eyewitness to Zais's conduct and that her testimony, particularly her telephone conversation with Zais, would bear directly on a determination of whether Zais "[knew], or [had] reasonable grounds to know that [his actions would], or [would] tend to, alarm, anger or disturb others." *Id*. Without Debra Zais's testimony the likelihood of a successful prosecution would be significantly reduced. *See Scott*, 584 N.W.2d at 416 (recognizing critical impact can be satisfied not only if suppressed evidence destroys prosecution's case but if likelihood of successful prosecution is significantly reduced). We conclude that the order will have a critical impact on the state's ability to prosecute the case, and we turn to the question of whether the district court's order on the applicability of the marital testimonial privilege was in error.

Marital Privilege

Under Minnesota law, "[a] husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during the marriage." Minn. Stat. § 595.02, subd. 1(a). This exception to the general rule that any "person of sufficient understanding" may testify in a judicial proceeding is commonly referred to as the "marital privilege," and this privilege also has exceptions. *Id*. One exception provides that the marital privilege does not apply "to a criminal action or proceeding for a crime committed by one [spouse] against the other." *Id*. We agree with the district court's statement that "[t]he crux of the issue of the applicability of the spousal privilege is whether the charge of [d]isorderly [c]onduct may be considered a crime committed against [Debra] Zais." If it is a crime "committed against" his wife, then Zais cannot invoke the privilege to prevent her from testifying.

Court decisions applying Minnesota's marital privilege distinguish between the general prohibition against testimony (referred to as the testimonial privilege) and the specific prohibition against communication testimony (referred to as the communications privilege). *E.g., State v. Gianakos*, 644 N.W.2d 409, 416 (Minn. 2002). In this appeal the testimonial privilege is at issue, and more specifically, the exception to the privilege that makes it inapplicable "to a criminal action or proceeding for a crime committed by one [spouse] against the other." Minn. Stat. § 595.02, subd. 1(a). "The burden of proving the applicability of the marital privilege rests on the spouse who invokes the privilege." *State v. Palubicki*, 700 N.W.2d 476, 483 (Minn. 2005).

Ordinarily, "[t]he availability of a privilege is an evidentiary ruling to be determined by the [district] court and reviewed on appeal for an abuse of discretion." *Id.* at 482. But the district court's evidentiary ruling is based on its interpretation of the statutory phrase "a crime committed by one against the other" to mean that there must be personal injury for the exception to apply and that "[d]isorderly [c]onduct does not create a personal injury sufficient to destroy the spousal privilege afforded by [section] 609.72." Because statutory interpretation is a question of law, we review the ruling de novo. *State v. Mauer*, 741 N.W.2d 107, 111 (Minn. 2007).

The goal of statutory interpretation "is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2008). To determine legislative intent we look first to the specific language of the statute. *State v. Gorman*, 546 N.W.2d 5, 8 (Minn. 1996). If the statute's language is clear, "statutory construction is neither necessary nor permitted and [we] apply the statute's plain meaning." *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). But if the statute is not clear—and is ambiguous—we apply the canons of construction. *Id.*; Minn. Stat. § 645.16.

The state and Zais present competing interpretations of the exception to marital privilege for "crime[s] committed by one [spouse] against the other." Zais's interpretation, which was adopted by the district court, relies on the specific elements of a disorderly conduct offense to conclude that it is not a crime that is committed by one spouse against the other. This interpretation also relies on a concept of the public nature of disorderly conduct in contrast to the private nature suggested by the phrase "crime committed by one against the other" as it relates to conduct between spouses. Additionally, this interpretation reads "crime . . . against the other" to require "personal injury." It essentially interprets the exception to apply to a category of crimes or criminal proceedings that inherently involve a personal crime against another. This interpretation, although not literally drawn from the statute, is reasonable.

The state's interpretation that disorderly conduct, depending on its facts, may constitute a "crime committed by one [spouse] against the other" is also reasonable. The statute's use of the word "crime" is a broad reference that does not limit the term to a specific category of crimes and could reasonably be read to mean any crime, including disorderly conduct, if it was committed against a spouse. And, it is reasonable to interpret a privilege narrowly and its exceptions broadly. *See U.S. v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 3108 (1974) (stating that privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth"); *Larson v. Montpetit*, 275 Minn. 394, 402, 147 N.W.2d 580, 586 (Minn. 1966) (recognizing that "evidentiary privileges constitute barriers to the ascertainment of truth and are therefore to be disfavored and narrowly limited to their purposes").

Because the statute is susceptible to more than one reasonable interpretation it is ambiguous, and we apply the canons of construction to ascertain legislative intent. *See Am. Tower,* L.P., 636 N.W.2d at 312 (stating statute is ambiguous if it is subject to more than one reasonable interpretation); Minn. Stat. § 645.16 (identifying list of considerations to resolve ambiguity). In construing an ambiguous statute, our rules of statutory construction "permit a broad review of the purpose of and occasion for the statute." *Mauer*, 741 N.W.2d at 113. To determine legislative intention we consider, among other factors, the "occasion and necessity for

the law," "circumstances under which it was enacted," "mischief to be remedied," "object to be obtained," and "consequences of a particular interpretation." Minn. Stat. § 645.16.

The marital privilege has its origins in the common law. *Trammel v. United States*, 445 U.S. 40, 44, 100 S. Ct. 906, 909 (1980); *State v. Frey*, 76 Minn. 526, 528, 79 N.W. 518, 518 (1899). The common-law rule emerged from two canons of medieval jurisprudence that are today long abandoned: (1) because of his perceived interest in the proceeding, an accused was prohibited from testifying on his own behalf and (2) because husband and wife were viewed as a single legal entity and a wife did not have a discrete legal status, the husband was the entity for legal purposes. *Trammel*, 445 U.S. at 44, 100 S. Ct. at 909. The result was that wives were prohibited from testifying when their husbands were defendants. *Id*. Over time this rule of absolute disqualification evolved into one of privilege. *Id*.

In Minnesota the common-law privilege prevented either spouse from testifying "for or against each other in any legal proceeding to which the other was a party." *Frey*, 76 Minn. at 528, 79 N.W. at 518. But the common law recognized an exception "in all cases of personal injuries committed by [one] against the other." *Id*. at 528, 79 N.W. at 519. Although the scope of this exception and its specific phrasing was never precisely settled, the source of the exception was a general concept of public justice and a recognition that enforcing the privilege without the exception would deny an injured spouse a remedy. *Id*.; 8 Wigmore, Evidence § 2239, n.1 (McNaughton rev. 1961). Significantly, the Minnesota Legislature did not adopt the "personal injury" language when it codified the common-law exception. *See* Gen. St. 1851, c. 95, § 53 (omitting any reference to "personal injury").

The mischief to be remedied and the object to be obtained have evolved over time. Minnesota's jurisprudence initially, and for many years, justified the marital testimonial privilege on the ground that it furthers the public policy of protecting the marriage relationship—both in avoiding the corruption to marital harmony that adversarial positions would cause and in avoiding the general corruption to public morality. These dual concepts are reflected in the supreme court's observation that Minnesota "recognized the burden which antagonistic interests impose upon the intimate relations of husband and wife and the harm to the public which results from marital discord, and ha[s], as a general rule, refused for this reason to permit one spouse to testify against the other without the latter's consent." *Gianakos*, 644 N.W.2d at 416 (quoting *State v. Feste*, 205 Minn. 73, 74-75, 285 N.W. 85, 86 (1939)).

This less-than-flexible application of the privilege and its underlying assumption that it protects marital harmony produced judicial results that at times seemed to frustrate the policy the privilege was presumed to further. For example, the decision in *Gianakos* declining to adopt a "sham marriage" exception to the testimonial marital privilege under circumstances in which the legitimacy of the marriage was questioned, emphasized that "a strong showing is required to conclude that the marriage protected" is "so empty" that it would "render the purpose of the privilege valueless." *Id*. at 418; *see also Feste*, 205 Minn. at 75, 285 N.W. at 86-87 (holding that marital privilege applied to bar wife's testimony in claim, brought before marriage, against husband for fathering her illegitimate child); *Frey*, 76 Minn. at 527, 530, 79 N.W. at 518-19 (holding that marital privilege applied to bar wife, who was victim, from testifying against

defendant husband charged with "carnally knowing a female child under the age of [sixteen] years," even though crime occurred before marriage).

Despite this general proposition that the privilege protects marital harmony, courts began to question whether aspects of this policy-driven doctrine had become anachronistic and even harmful to the administration of justice. *See Trammel*, 445 U.S. at 44-49, 100 S. Ct. at 909-12 (summarizing criticism of rule and state law changes to marital privilege). The Supreme Court recognized in *Trammel* that "we cannot escape the reality that the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggests the need for change." *Id*. at 48, 100 S. Ct. at 911. Determining that the "ancient foundations for so sweeping a privilege have long since disappeared," and that the modern justification of preserving marital harmony is unpersuasive, the Court modified the federal marital-privilege rule and vested the testimonial privilege entirely in the witness spouse. *Id*. at 52-53, 100 S. Ct at 913-14. The Court also recognized that the use of the privilege weighed substantially against positive societal considerations to seek the truth in judicial proceedings and to prosecute wrongdoing. *Id*.

Minnesota has also considered the competing policy interests of protecting the marital relationship and ascertaining the truth in its modern interpretations of the marital communication privilege. In *Hannuksela*, the court determined that protecting marital harmony "without erecting artificial 'barriers to the ascertainment of truth' " is served through a narrow interpretation of the meaning of confidential interspousal "communication." *State v. Hannuksela*, 452 N.W.2d 668, 676 (Minn. 1990) (quoting *Montpetit*, 275 Minn. at 402, 147 N.W.2d at 586). Although *Hannuksela's* narrowing interpretation does not directly address the marital testimonial privilege at issue in this appeal, it is consistent with the more modern approach embodied by the Supreme Court in *Trammel*.

The last criterion that we consider to resolve statutory ambiguity is the consequences of the competing interpretations. Zais's argument, distinguishing public and private crimes and requiring "personal injury," is focused on distinguishing categories of offenses, while the state's interpretation focuses on the conduct underlying the crime. We agree that it is the underlying conduct that determines whether there is any marital harmony to protect, and therefore any purpose to be served by the privilege.

Thus, we conclude that the state's interpretation more reasonably advances the modern approach of properly balancing two conflicting goals: protecting the marital relationship through application of the privilege and ensuring that our judicial processes determine the truth. Commentators have suggested that the use of the marital privilege to exclude testimony for the supposed purpose of assuring marital harmony may, in many circumstances, miss the mark:

> [I]f the promotion of marital peace, and the apprehension of marital dissension, are the ultimate ground of the privilege, it is an overgenerous assumption that the wife who has been beaten, poisoned or deserted is still on such terms of delicate good feeling with her spouse that her testimony must not be enforced lest the iridescent halo of peace be dispelled by the breath of disparaging testimony.

8 Wigmore, Evidence § 2239 at 243 (McNaughton rev. 1961).

At least two Minnesota cases have observed that the actual relationship between spouses, rather than any ideal concept, should influence the application of the privilege; that is, the degree to which the privilege can or should be asserted should depend in part upon the integrity of the union purporting to justify its application. *See Gianakos*, 644 N.W.2d at 417 (acknowledging that "[the supreme] court has at least implicitly recognized the legitimacy of the marriage as a factor" when determining applicability of marital privilege); *State v. Leecy*, 294 N.W.2d 280, 283 (Minn. 1980) ("[T]here is modern authority that a marriage well on its way to final dissolution will not support a claim of the privilege."). This is consistent with legislative amendments to the marital testimonial privilege, which preclude asserting the privilege to bar testimony about hostile or invidious conduct by one spouse against the other. *See* Minn. Stat. § 595.02, subd. 1(a) (2008) (amended 1969, 1987) (providing that marital testimonial privilege is inapplicable in "a criminal action or proceeding for a crime committed by one [spouse] . . . against a child of either or against a child under the care of either spouse, . . . [or] an action or proceeding for nonsupport, neglect, dependency, or termination of parental rights").

In addition to these considerations, four other reasons persuade us that the state's interpretation—focusing on the specific conduct underlying the offense—more accurately reflects the legislative intent of the exception for a "crime committed by one [spouse] against the other." These reasons are: (1) the lack of substance in Zais's distinction between disorderly conduct as a "public offense" and a "private offense"; (2) the lack of a "personal injury" requirement in the exception; (3) the interpretation of similar phrases in Minnesota statutes; and (4) the interpretation of similar statutes in other jurisdictions. We address, in turn, each of these reasons.

First, Zais's categorization of disorderly conduct as a "public offense" rather than a "personal offense" does not readily coincide with the language of the marital testimonial privilege and its exceptions or with caselaw considering the crime of disorderly conduct. "Conduct is 'disorderly' in the ordinary sense when it is of such nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment . . . ." *State v. Reynolds*, 243 Minn. 196, 200, 66 N.W.2d 886, 889 (1954) (citation omitted). But the disorderly conduct statute criminalizes the prohibited conduct in either a "public or private place." Minn. Stat. § 609.72, subd. 1. And Minnesota caselaw has established that a disorderly conduct charge can be brought when there is only one witness or one intended victim of the behavior. *See City of St. Paul v. Azzone*, 287 Minn. 136, 140, 177 N.W.2d 559, 562 (1970) (upholding disorderly conduct charge when group of defendants chanted obscenities at officer in police station with no members of public present); *Reynolds*, 243 Minn. at 202, 66 N.W.2d at 891 (depending on facts and circumstances, disorderly conduct may occur when peace of only one person or member of public is disturbed). In the unpublished opinion *Craig v. State*, No. A07-1949, 2008 WL 5136170, *5-6 (Minn. App. Dec. 9, 2008), we held that "others" in the disorderly conduct statute does not require the presence of more than one other person. Although we do not accord precedential effect to unpublished opinions, the reasoning is persuasive. *See City of Saint Paul v. Eldredge*, 788 N.W.2d 522, 526-27 (Minn. App. 2010) (recognizing that unpublished opinions may have persuasive value). The caselaw establishes that disorderly conduct is an offense that can be aimed at an individual rather than the public generally.

This extension of disorderly conduct to include a "personal offense" is also reflected in the holding that "self-defense is applicable to a charge of disorderly conduct [when] the behavior forming the basis of the offense presents the threat of bodily harm." *State v. Soukup*, 656 N.W.2d 424, 429 (Minn. App. 2003). This holding recognizes that disorderly conduct is not limited to general disturbances but can target individuals.

Second, neither "personal injury" nor "personal offense" is a term that is used in the marital-privilege statute. *See* Minn. Stat. § 595.02, subd. 1(a) (omitting any reference to personal injury or offense). At common law "personal injury" was required to invoke the privilege's exception. *Frey*, 76 Minn. at 528, 79 N.W. at 518-19. Even at common law, however, the meaning of the exception was unclear and courts applied varied interpretations of what constituted a personal injury against a spouse. *See* 8 Wigmore, Evidence § 2239 at 242 (McNaughton rev. 1961) (indicating that bodily injury always invoked the exception but the exception did not extend "to all wrongs done to the wife").

Some caselaw relies on the common-law origins of the marital-privilege rule to suggest that its provisions should be retained in the codification. *E.g.*, *Frey*, 76 Minn. at 528, 79 N.W. at 519. But the legislature, in enacting section 595.02, chose the broader language of "crime committed by one against the other" rather than the narrower common-law concept of "personal injury." *Cf. State v. Armstrong*, 4 Minn. 335, 342, 4 Gil. 251, 259 (1860) (quotation omitted) (holding that exception did not apply to prosecution of husband for adultery).

Armstrong, one of the earliest cases interpreting the statute, uses broad language in recognizing that a wife's testimony is admissible against her husband when she has experienced "personal violence," "ill treatment," or a "personal outrage." *Id*. at 341, 4 Gil. at 258 (citing *The People v. Chegaray*, 18 Wend. 642; 3 *Phil. Ev. with notes by Cow. and Hill*, p. 76). In *Huot*, decided in 1880, the court identified the marital-privilege statute's ambiguity.

> If this statute merely laid down the rule disabling the husband and wife from testifying for or against each other, it might be urged that it was only a statutory adoption of the common-law rule, and that it adopted also the common-law application of the rule, including the exceptions. But it also prescribes the application of, and defines and limits the exception to, the rule of disability. This excludes resort to the common law to determine how far the rule shall prevail, and what cases shall be excepted from it. So it is immaterial that the common law did or did not . . . .

Huot v. Wise, 27 Minn. 68, 69-70, 6 N.W. 425, 426 (1880). Accordingly, a personal injury is not required to trigger the exception to marital privilege for proceedings in which a crime is committed by one spouse against the other.

Third, although no Minnesota case has interpreted the phrase "crime committed by one against the other," the supreme court has repeatedly held that the similar phrase, "crime against a person," applies to crimes whose elements and classifications do not specifically include "personal injury," based on the substance of the crime and the underlying conduct. *See State v. Myers*, 627 N.W.2d 58, 62-63 (Minn. 2001) (holding obstruction of legal process is crime against person if underlying conduct creates special danger to human life); *State v. Notch*, 446

N.W.2d 383, 385 (Minn. 1989) (holding burglary is crime against person if, "as committed," it is against person).

Similarly, we have held that the definition of "domestic abuse" focuses on the defendant's conduct rather than on a list of offenses. *State v. Barnslater*, 786 N.W.2d 646, 651 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010). *Barnslater* concluded that Minn. Stat. § 634.20's applicability is governed by "whether the accused's *underlying conduct* constitutes domestic abuse," not by whether the charged offense falls within the statutory definition of a "domestic abuse" crime. *Id*. Accordingly, the admissibility of prior acts of "domestic abuse" is determined by the underlying conduct, not by the category of the charged offense. *Id*.

Fourth, other jurisdictions with similar statutes have interpreted "committed by one against the other" to include property offenses with no risk of physical harm. *See State v. Thornton*, 835 P.2d 216, 217-18 (Wash. 1992) (holding that entering spouse's house, breaking window, slashing waterbed, and stealing suitcase is crime committed against spouse even when spouse not at home); *Hudson v. Com*, 292 S.E.2d 317, 318-19 (Va. 1982) (holding that "offense committed by one [spouse] against the other" includes crimes against person and property); *Peters v. Dist. Court of Iowa Linn Co.*, 183 N.W.2d 209, 210, 212 (Iowa 1971) (holding that husband's arson of marital home is crime committed against wife); *Dill v. People*, 36 P. 229, 233 (Colo. 1894) (holding that perjury intended to deprive victim spouse of financial rights and interests is crime committed against spouse). A statute excepting a "personal wrong or injury" rather than a "crime" has also been interpreted to include property crimes. *See People v. Butler*, 424 N.W.2d 264, 266 (Mich. 1988) (holding that arson of person's dwelling is personal wrong or injury to that person). Similarly, in an unpublished opinion from this court, we held that the marital testimonial privilege did not apply to arson charges for burning the jointly owned home because the act of burning the house was a crime committed by one spouse against the other even though the testifying spouse was not at home. *State v. Hawkins*, No. C3-97-857, 1997 WL 834952, at *2 (Minn. App. Feb. 10, 1997).

Finally, we note that construing the marital-privilege exception to take into account the specific conduct alleged is consistent with developments in other states that have addressed this question of statutory interpretation. Other jurisdictions have relied on a case-by-case analysis that considers the charged offense, the nature of the conduct underlying the charged offense, and surrounding circumstances, including the status of the marital relationship and the willingness of the witness-spouse to testify. *See, e.g., United States v. Smith*, 533 F.2d 1077, 1079 (8th Cir. 1976) (holding that crime was committed against spouse when defendant spouse hid heroin on spouse for smuggling); *Kirby v. Commonwealth*, 570 S.E.2d 832, 835 (Va. 2002) (holding that crime was committed against spouse when defendant spouse shot two rounds of ammunition into bedroom floor while wife was in adjoining room, fifteen feet away); *State v. Thornton*, 835 P.2d 216, 218 (Wash. 1992) (determining that burglary of spouse's home was crime against spouse even though spouse was not in home at time); *State v. Kilponen*, 737 P.2d 1024, 1027 (Wash. 1987) (holding that burglary of spouse's home with intent to commit violent crime was crime committed against spouse); *State v. Whitaker*, 544 P.2d 219, 224 (Ariz. 1975) (holding that firing shots into wife's apartment was crime committed against spouse even though shots did not hit her).

For all of these reasons we conclude that the exception to the marital testimonial privilege provided in Minn. Stat. § 595.02, subd. 1(a), which permits spouses to testify in a criminal proceeding for a crime "committed by one against the other," applies to a prosecution for disorderly conduct if the underlying conduct was directed at and adversely affected or endangered the testifying spouse.

The summary of Debra Zais's proposed testimony that was submitted in the state's offer of proof and the stipulated police reports establishes that Zais's alleged disorderly conduct was directed at and adversely affected or endangered Debra Zais. According to the offer of proof, Debra Zais would testify that she did not want Zais in the home and was fearful for her safety and her daughter's safety on the day of the incident, that Zais had left the home the day before because of an altercation with their daughter in which the police were called, that she had contacted a domestic-abuse advocacy program for help, and that Zais called her at the home threatening to break into the house or do whatever he had to do to get inside. Whether this conduct will ultimately be determined to constitute disorderly conduct is not at issue in this pretrial appeal. Our determination is confined to whether this action is a criminal action or a proceeding "for a crime committed by one [spouse] against the other" for purposes of the marital testimonial privilege. We conclude that, on these facts, the alleged disorderly conduct is a crime committed by one spouse against the other. Because the exception to the marital privilege applies, Zais may not invoke the marital testimonial privilege to prevent his wife from testifying against him in the prosecution of the disorderly conduct charge. We therefore reverse and remand to the district court.

II.

Zais argues in his responsive brief that the appeal should be dismissed because of prosecutorial impropriety in the state's decision to appeal the district court's ruling. Zais argues that the prosecutor improperly delegated to the Maple Grove Police Department the decision to appeal and that the City of Maple Grove's payment of a fee for the prosecution of the appeal creates an impermissible conflict of interest for the prosecutor, resulting in structural error. The claims are broadly drawn—both factually and legally—and we conclude that neither allegation provides a basis for dismissal of the appeal.

We start from the fundamental principle that the Minnesota Constitution divides the powers of government into three distinct departments—two of which are the executive and the judicial. Minn. Const. art. III, § 1. The prosecution power, including the decision of what cases to prosecute, resides in the executive department. *Johnson v. State*, 641 N.W.2d 912, 917 (Minn. 2002); *State v. Foss*, 556 N.W.2d 540, 540 (Minn. 1996). Courts are constitutionally obligated to defer to prosecutorial decisions of the executive branch and may not probe the reasons for the exercise of discretion without some coherent or specific allegation of a clear violation of law. *See State v. Johnson*, 514 N.W.2d 551, 556 (Minn. 1994) ("[T]he prosecutor's decision whom to prosecute and what charge to file is a discretionary matter which is not subject to judicial review absent . . . deliberate discrimination . . . ." (quoting *State v. Herme*, 298 N.W.2d 454, 455 (Minn. 1980))).

Zais's allegations are insufficiently specific or legally coherent to describe a violation of the prosecutorial power. The claim of improper delegation of the prosecutor's decision to appeal is based on the prosecutor's comment to Zais's attorney and the district court judge that he was contacting a police department sergeant for "authorization" because the police department would be "footing the bill for the appeal." The record does not clarify whether the prosecutor was referring to the bill for his legal services or for the "[r]easonable attorney fees and costs" that the governmental unit responsible for a pretrial criminal appeal must pay to the defendant. *See* Minn. R. Crim. P. 28.04, subd. 2 (6) (allowing defendant fees and costs in prosecutorial appeal of pretrial order).

In either case, the prosecutor explained on the record in the district court that, although the sergeant was consulted, his opinion was not conclusive and that the prosecutor and his law partner would make the decision on whether to appeal. He further stated that the reference to the sergeant's authorization was only to explain the "channels in [the] formal discussion." No evidence in the record describes the fee arrangement between the City of Maple Grove and the prosecutor or how the prosecutor is paid for trials or appeals.

Zais's claim that the prosecutor has an impermissible conflict of interest because he is receiving fees for representing Maple Grove in the appeal also lacks the necessary specificity and legal coherence to support a challenge to the exercise of prosecutorial discretion. This claim relies on the same exchange between Zais's attorney and the prosecutor about Maple Grove "footing the bill." Again, no evidence is provided anywhere in the record that shows how Maple Grove pays the prosecutor for his representation.

Zais analogizes the circumstances in this prosecution to a case in which the United States Supreme Court determined that it was a violation of the Fourth and Fourteenth Amendments for a state to pay a non-salaried justice of the peace a fee for each search warrant that he authorized but no fee for warrants that he denied. *Connally v. Georgia*, 429 U.S. 245, 250, 97 S. Ct 546, 548 (1977). The analogy fails because the issuance of the warrants in *Connally* was a judicial action by an officer of the court, not a discretionary prosecutorial function by the executive branch of government. *Id*.

Zais's claim that the appeal should be dismissed because of structural error in the prosecutor's decision to appeal this case is not supported by facts in the record or by applicable law. He has failed to demonstrate that the prosecutor unlawfully delegated to the Maple Grove Police Department the decision to appeal or that Maple Grove's payment of a fee for the prosecution of the appeal creates an impermissible conflict of interest.

D E C I S I O N

Because the exception to the marital testimonial privilege provided in Minn. Stat. § 595.02, subd. 1(a), for "a criminal action or proceeding for a crime committed by one against the other" applies to a prosecution for disorderly conduct when a spouse, who is the complaining witness, is adversely affected by the conduct underlying the complaint and because the alleged crime in this case was directed at Debra Zais, the district court erred in excluding Debra Zais's

testimony under the marital testimonial privilege. We conclude that there was no structural error in the prosecutor's discretionary decision to appeal the district court's pretrial order.

Reversed and remanded.

STATE OF MINNESOTA

IN SUPREME COURT

A09-1335

Court of Appeals

Dietzen, J.

Dissenting, Meyer, Page, and Anderson, Paul H., JJ.

Alice Ann Staab,

Appellant,

vs.

Filed: April 18, 2012

Office of Appellate Courts

Diocese of St. Cloud,

Respondent.

Kevin S. Carpenter, Carpenter Injury Law Office, St. Cloud, Minnesota; and

H. Morrison Kershner, Pemberton, Sorlie, Rufer & Kershner, PLLP, Fergus Falls, Minnesota, for appellant.

Dyan J. Ebert, Laura A. Moehrle, Quinlivan & Hughes, P.A., St. Cloud, Minnesota, for respondent.

Richard J. Thomas, Bryon G. Ascheman, Corinne Ivanca, Burke & Thomas, PLLP, St. Paul, Minnesota, for amicus curiae Minnesota Defense Lawyers Association.

S Y L L A B U S

When a jury attributes 50% of the negligence that caused a compensable injury to the sole defendant in a civil action and 50% to a nonparty to the lawsuit, Minn. Stat. § 604.02, subd. 1 (2010), requires that the defendant contribute to the award only in proportion to the fault attributed to the defendant by the jury.

Affirmed and remanded.

O P I N I O N

DIETZEN, Justice.

This appeal requires us to interpret the meaning of Minn. Stat. § 604.02, subd. 1 (2010), to determine whether a defendant must pay an entire damages award when a special jury verdict attributes 50% of the negligence to the sole defendant and 50% of the negligence to a nonparty to the lawsuit. Appellant Staab brought suit against respondent Diocese of St. Cloud for injuries she sustained on premises it owned and operated. The district court ruled that Minn. Stat. § 604.02, subd. 1, does not apply in an action against only one defendant and ordered the defendant to pay the entire damages award. The court of appeals reversed, holding that under the plain language of section 604.02, subdivision 1, the defendant must pay only in proportion to the percentage of fault attributed to the defendant by the jury. We affirm the court of appeals under a different analysis and remand to the district court to enter judgment in favor of appellant consistent with this opinion.

According to the complaint, on April 9, 2005, appellant Alice Ann Staab and her husband, Richard Staab, attended a social event at the Holy Cross Parish School in Kimball, Minnesota. The school is owned and operated by respondent Diocese of St. Cloud's Holy Cross Parish. Appellant relies on a nonmotorized wheelchair for mobility. As appellant was leaving the school, Richard Staab pushed her wheelchair through an open doorway, and the wheelchair went over what has been described as an unmarked 5-inch drop-off. Appellant fell forward out of her wheelchair onto a cement sidewalk and was injured as a result of her fall.

After her fall, appellant brought an action against the Diocese, alleging that the Diocese failed to use reasonable care to protect her from an unreasonable risk of harm caused by the conditions at the school. Richard Staab was not named as a party to the lawsuit by the appellant or the respondent. The matter proceeded to a jury trial. Respondent requested and the district court approved a special verdict form that asked the jury to separately determine whether the Diocese was negligent when appellant was injured and, if so, whether the negligence of the Diocese directly caused appellant's injuries. Similarly, the jury was asked to determine whether Richard Staab was negligent when appellant was injured and, if so, whether the negligence of Richard Staab directly caused appellant's injuries. Finally, the special verdict form asked the jury to attribute to the Diocese and to Richard Staab a percentage of the negligence that directly caused appellant's injuries.

The jury found that the Diocese and Richard Staab each were negligent and that the negligence of each directly caused appellant's injuries. The jury attributed 50% of the negligence that directly caused appellant's injuries to the Diocese and 50% to Richard Staab. The jury awarded compensatory damages of $224,200.70: $50,000 for past pain, disability, disfigurement, embarrassment, and emotional distress; and $174,200.70 for past health care expenses. The district court adopted the special verdict as its findings of fact, concluded that appellant was entitled to judgment against the Diocese in the amount of $224,200.70, and ordered entry of judgment for $224,200.70 plus costs and disbursements.

The Diocese moved for amended findings of fact, conclusions of law, and judgment, asking the district court to reduce the judgment against the Diocese to 50% of the damages award. The Diocese argued that Minn. Stat. § 604.02, subd. 1, limits the liability of the Diocese to the percentage of fault attributed to it by the jury. The district court denied the motion. The court concluded that because subdivision 1 addresses contributions to awards "[w]hen two or more persons are severally liable," it did not apply in this case because "[l]iability arises only where there is a judgment. In this case, Richard Staab was not a party in the lawsuit and therefore cannot be held liable." As a result, the district court held the Diocese responsible to pay all of the $224,200.70 award.

The Diocese appealed, and the court of appeals reversed. *Staab v. Diocese of St. Cloud*, 780 N.W.2d 392, 396 (Minn. App. 2010). The court observed that "the statute is not a model of clarity," but concluded that requiring the Diocese to pay 100% of the damages award "does not comport with the plain language" of subdivision 1. *Id.* According to the court, the Diocese and Richard Staab are each "persons" within the meaning of the statute, and "[u]nder the plain language of the statute, they are 'each' to 'contribute' to the damages 'award' 'in proportion to the percentage of fault attributable to each.' " *Id.* at 394. Therefore, the court concluded that the Diocese is severally liable for 50% of the damages award. *Id.* We granted appellant's petition for further review.

I.

This appeal presents the court with its first opportunity to interpret Minn. Stat. § 604.02, subd. 1, as amended by the Legislature in 2003. At issue in this appeal is whether the sole defendant, the Diocese of St. Cloud, although found by the jury to be only 50% at fault, must pay 100% of the $224,200.70 jury award because Staab elected not to join her husband as a defendant.[1] The outcome turns on whether Minn. Stat. § 604.02, subd. 1, is interpreted to require that a sole defendant in a lawsuit is liable for a nonparty's liability.

The goal of all statutory interpretation is to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2010); *Brayton v. Pawlenty*, 781 N.W.2d 357, 363 (Minn. 2010). We give words and phrases in a statute their plain and ordinary meanings, and "technical words and phrases . . . are construed according to [their] special meaning or their definition." Minn. Stat. § 645.08(1) (2010); *accord Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999). Further, we construe the statute to give effect to all its provisions. Minn. Stat. § 645.16.

Our first step in interpreting a statute is to examine the statutory language to determine whether the words of the law are clear and free from all ambiguity. *Id.* The words are not free from ambiguity if, as applied to the facts of the particular case, they are susceptible to more than one reasonable interpretation. *See Amaral*, 598 N.W.2d at 384. If the words are free of all ambiguity, we apply the statutory language. *See* Minn. Stat. § 645.16. If the words are not free of ambiguity, the court may look beyond the statutory language to ascertain the Legislature's intent. *Id.*

Generally, statutes in derogation of the common law are strictly construed. *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 327 (Minn. 2004). Therefore, we presume that statutes are consistent with the common law, *In re Shetsky*, 239 Minn. 463, 469, 60 N.W.2d 40, 45 (1953), and do not presume that the Legislature intends to abrogate or modify a common law rule except to the extent expressly declared or clearly indicated in the statute, *Do v. Am. Family Mut. Ins. Co*., 779 N.W.2d 853, 858 (Minn. 2010). It is undisputed that Minn. Stat. § 604.02 was intended to modify the common law rule of joint and several liability in Minnesota. Thus, we must carefully examine the express wording of the statute to determine the nature and extent to which the statute modifies the common law. *See id*.

II.

Minnesota Statutes § 604.02, subd. 1, states:

> When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:
>
> (1) a person whose fault is greater than 50 percent;
> (2) two or more persons who act in a common scheme or plan that results in injury;
> (3) a person who commits an intentional tort; or
> (4) a person whose liability arises under [certain environmental laws].

The language of subdivision 1 presents two fundamental challenges that must be resolved in order to ascertain its meaning. First, subdivision 1 does not explain the meaning of "[w]hen," that is, the point in time the statute is applicable to determine whether "persons are severally liable." Specifically, subdivision 1 does not explain whether liability for purposes of the statute is determined at the time the tort is committed, at the time of judgment in a civil action, or at some other point in time. The answer to the question of when liability is determined for purposes of the statute directly impacts whether a sole defendant in a lawsuit must pay more than its equitable share of a judgment as measured by the percentage of fault apportioned to it by the jury. Thus, in order to interpret the statutory phrases "persons are severally liable" and "persons are jointly and severally liable," we must examine when "persons are . . . liable" at common law and determine whether the statute modifies the common law rule.

At common law, "liability is created at the instant [a] tort is committed." *White v. Johnson*, 272 Minn. 363, 371, 137 N.W.2d 674, 679 (1965), *overruled on other grounds by Tolbert v. Gerber Indus., Inc*., 255 N.W.2d 362, 368 n.11 (Minn. 1977) (adopting comparative fault contribution). Under Minnesota common law, "persons are . . . liable" at the instant those persons' acts cause injury to a victim. Applying the common law, a tortfeasor's liability *exists* prior to and independent of any claim or civil action that arises from that liability; hence, a judgment on a plaintiff's cause of action in tort in a civil action *enforces* that liability only against the defendant or defendants who are parties to the civil action.[2] Moreover, the language of section 604.02 provides no clear indication that it modifies the common law rule regarding the time of creation of tort liability. Subdivision 1 therefore cannot be read to indicate that "persons

are . . . liable" as a result of the jury's apportionment of fault because those "persons" are *already* liable at the time the tort was committed.

Second, the statute does not define the phrases "severally liable" and "jointly and severally liable." Each phrase does, however, have a special meaning at common law. Pursuant to the canons of construction, words and phrases that have acquired a special meaning or definition are construed according to their special meaning or definition. Minn. Stat. § 645.08(1). Consequently, we must examine the meanings of "several liability" and "joint and several liability" in the common law and determine whether those phrases have acquired a special meaning or definition, and if so, interpret those phrases according to such special meaning or definition.

Pursuant to Minnesota common law, "several liability" means "[l]iability that is separate and distinct from another's liability, so that the plaintiff may bring a separate action against one defendant without joining the other liable parties." *Black's Law Dictionary* 998 (9th ed. 2009). Moreover, whether a person is "[an]other liable part[y]" for the purposes of several liability is a separate question from whether that person is joined as a defendant in a plaintiff's lawsuit. In contrast, "joint liability" is "[l]iability shared by two or more parties." *Black's Law Dictionary* 997 (9th ed. 2009). Additionally, at common law, tortfeasors whose concurrent negligence produces a single, indivisible injury are jointly and severally liable to the person harmed. *Flaherty v. Minneapolis & St. Louis Ry. Co*., 39 Minn. 328, 329, 40 N.W. 160, 160-61 (1888) (adopting joint and several liability principles). Under the rule of joint and several liability, a plaintiff may bring an action to hold any or all of the jointly and severally liable tortfeasors liable for the entire harm. *See Thorstad v. Doyle*, 199 Minn. 543, 553, 273 N.W. 255, 260 (1937). A tortfeasor is "severally liable," however, when that person's liability is separate from another person's liability so that an injured person may bring an action against one defendant without joining the other liable person. Pursuant to the common law rules of joint and several liability and several liability, a plaintiff may sue fewer than all of the tortfeasors who caused the harm. But the difference between the two rules is that a "jointly and severally liable" defendant is responsible for the entire award, whereas a "severally liable" defendant is responsible for only his or her equitable share of the award.

More importantly, the common law provides that "two or more persons are severally liable" at the instant multiple tortfeasors commit an act that causes a single, indivisible injury to a plaintiff.[3] *See Flaherty*, 39 Minn. at 329, 40 N.W. at 160-61 (adopting joint and several liability principles); *see also Spitzack v. Schumacher*, 308 Minn. 143, 145, 241 N.W.2d 641, 643 (1976) (stating that joint liability " 'is created at the instant the tort is committed' " (quoting *White*, 272 Minn. at 371, 137 N.W.2d at 679)); *Emp'rs Mut. Cas. Co. v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co*., 235 Minn. 304, 309-10, 50 N.W.2d 689, 693 (1951) (stating that tortfeasors' common liability exists immediately after the acts which give rise to a cause of action against them).

Section 604.02 does not express an intent to modify the common law meaning of "several liability" or "joint and several liability." Additionally, the statute does not express an intent to modify the common law rule that liability is created at the time a tort is committed.[4] Consequently, we conclude that the Legislature intended to adopt the special meaning those

phrases acquired at common law. The plain meaning of subdivision 1 must be examined in light of the common law rules that a "severally liable" defendant is responsible for his or her equitable share of an award, and that "several liability" is determined at the time the tort is committed.

A.

Subdivision 1 contains three additional words or phrases that are important to understand its meaning. First, we examine the meaning of the word "persons." The plain and ordinary meaning of the word "persons" is very broad. *See Black's Law Dictionary* 1257 (9th ed. 2009) (defining "person" as "[a] human being" or "[a]n entity . . . that is recognized by law as having most of the rights and duties of a human being"); *see also American Heritage Dictionary* 1310 (4th ed. 2006) (recognizing the legal definition of "person" as "[a] human or organization with legal rights and duties"). We discern no legislative intent to limit the word "persons" to the parties to the lawsuit. Had the Legislature intended to do so, it could have done so expressly. Further, a broad interpretation is consistent with the common law principle that several liability is examined at the time the tort is committed. Therefore, we interpret the word "persons" to mean not only "parties to the lawsuit," as urged by appellant and the dissent, but also to extend to the "parties to the transaction," as urged by respondent.

Second, the next clause of subdivision 1 provides that "contributions to awards shall be in proportion to the percentage of fault attributable to each." Minn. Stat. § 604.02, subd. 1. We construe this clause to provide that the principle of several liability limits the magnitude of a severally liable person's contribution to an amount that is in proportion to his or her percentage of fault, as determined by the jury. *See* Restatement (Third) of Torts: Apportionment of Liability § 11 (2000) ("[An] injured person may recover only the severally liable person's comparative-responsibility share of the injured person's damages."). We do not read this clause to mandate contribution from a severally liable person who is not a party to the lawsuit.[5] Notably, the statute does not say, "When two or more persons are severally liable, *each shall contribute* to the award in proportion to the percentage of fault attributable to each." Contrary to the dissent's assertion, the clause is not made ineffective if a severally liable person who is not a party to the lawsuit and not subject to an adverse judgment makes no contribution. The clause would be ineffective, however, if a severally liable person were compelled to contribute out of proportion to his or her percentage of fault.

Third, a tortfeasor's *liability*—whether joint, several, or both—arises and exists independently of the tortfeasor's participation in a lawsuit and, therefore, is independent of the tortfeasor's obligation to contribute to any judgment entered in such a lawsuit. Accordingly, the third clause providing "except that the following persons are jointly and severally liable for the whole award" need not be read to imply that an award is enforceable against the persons identified in the enumerated exceptions. Instead, it stands for the unremarkable proposition that the limitation on the extent of contribution established by the second clause of subdivision 1 does not apply to anyone who falls within the enumerated exceptions (1)-(4). In other words, a person who falls within one of the exceptions is subject to the traditional joint and several liability rule. As a result, the definition of "persons" in subdivision 1 does not exclude parties to the transaction who are not parties to the lawsuit.[6]

Notably, subdivision 2, which provides for the reallocation of uncollectible judgments, states:

> Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a *party's* equitable share of the obligation is uncollectible from that *party* and shall reallocate any uncollectible amount among the other *parties*, including a claimant at fault, according to their respective percentages of fault. A *party* whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Minn. Stat. § 604.02, subd. 2 (2010) (emphasis added). A "party" is "[o]ne who takes part in a transaction" or "[o]ne by or against whom a lawsuit is brought." *Black's Law Dictionary* 1231-32 (9th ed. 2009). Previously we have determined that the word "party" in subdivision 2 includes all parties to the transaction giving rise to the cause of action. *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 293 (Minn. 1986). Because "party" in subdivision 2 means all persons who are parties to the tort, regardless of whether they are named in the lawsuit, it logically follows that "persons" in subdivision 1 must also mean all parties to the tort.

The dissent's interpretation that "person" in subdivision 1 is limited to "parties to the lawsuit" creates a conflict with our decision in *Hosley*. It is illogical to conclude that "persons" in subdivision 1 has a narrower meaning than "parties" in subdivision 2. It is more reasonable to conclude that persons and parties in subdivisions 1 and 2 would extend to all persons who are parties to the tort, regardless of whether they are parties to the lawsuit. *See* Minn. Stat. § 645.17(1) (2010). Moreover, our decision in *Hosley* clearly contemplates assignment of equitable shares of an obligation to nonparty tortfeasors, but we did not read the phrase "shall reallocate" to imply the creation of an obligation enforceable against nonparties where none would otherwise exist. Rather, we interpreted the statute to govern the extent of the equitable shares apportioned to each party to the transaction. *Hosley*, 383 N.W.2d at 293. We therefore conclude that section 604.02 applies whenever multiple tortfeasors act to cause an indivisible harm to a victim, regardless of how many of those tortfeasors are named as parties in a lawsuit arising from that tort.

We conclude that whether "two or more persons are severally liable" for purposes of section 604.02, subdivision 1, is determined at the time the tort was committed and not at the time of judgment in a civil action arising from the tort. The predicate to this interpretation is that the Legislature did not modify the common law rule that liability is created at the moment a tort is committed, and therefore the statute incorporates the common law rule. Moreover, "persons" and "parties" in the statute extends to all persons who are parties to the tort, regardless of whether they are parties to the lawsuit. Because the statute does not explicitly state that it applies at the time of judgment, this interpretation is reasonable, and the most logical.

B.

Alternatively, it is possible to interpret the phrase "[w]hen two or more persons are severally liable" to mean that liability is determined at the time of the judgment. Essentially, this is the interpretation proposed by the dissent. The predicate to this proposed interpretation is that

the Legislature modified the common law rule that several liability is created at the moment the tort is committed.

Because the statute is susceptible to more than one reasonable interpretation, it is ambiguous, and we must examine prior versions of the statute to ascertain legislative intent. *See* Minn. Stat. § 645.16. The legislative history that predates the 2003 amendments to section 604.02, subdivision 1, spans more than twenty years and provides an unbroken chain of legislative intent to limit joint and several liability in Minnesota. Specifically, after the 1978 amendments to chapter 604, parties against whom judgment had been entered no longer were jointly and severally liable for the entire judgment if another party's share of the judgment proved to be uncollectible. Act of Apr. 5, 1978, ch. 738, § 8, 1978 Minn. Laws 836, 840. Rather, under section 604.02, subdivision 2, the uncollectible share would be reallocated according to the "respective percentages of fault" attributed to each party. *Id*. After the 1986 and 1988 amendments, a person's fault generally had to exceed 15% and the fault of the state or of a municipality had to be at least 35%, in order for joint and several liability to apply. Act of Apr. 12, 1988, ch. 503, § 3, 1988 Minn. Laws 375, 378. We conclude the intent of the Legislature, ascertained through the history of section 604.02, was to limit joint and several liability in Minnesota. Not once has the Legislature sought to expand joint and several liability.

Notably, until the Legislature adopted the 2003 amendments, the statute provided that tortfeasors' "contributions to awards shall be in proportion to [their] percentage of fault" but "each is jointly and severally liable for the whole award." *See* Act of May 19, 2003, ch. 71, § 1, 2003 Minn. Laws 386. The 2003 amendments eliminated the blanket exception that "each is jointly and severally liable for the whole award" and substituted four specific exceptions. *Id*.; Minn. Stat. § 604.02, subd. 1(1)-(4). In so doing, the Legislature explicitly limited the common law principle of joint and several liability to the four enumerated circumstances, thus enabling an injured person to recover more than a tortfeasor's comparative-responsibility share in only those four circumstances. Therefore, we conclude that the 2003 amendments to the statute clearly indicate the Legislature's intent to limit joint and several liability to the four circumstances enumerated in the exception clause, and to apply the rule of several liability in all other circumstances. In order to give effect to this intent, the statute must be interpreted to apply in all circumstances in which a person would otherwise be jointly and severally liable at common law, and a person is liable at common law at the moment the tort is committed, not as a result of a judgment. This interpretation is consistent with the common law and limits the application of joint and several liability to those circumstances that are explicitly specified in the statute.

The dissent correctly points out that joint and several liability survived within Minnesota's statutory comparative fault scheme at least through 1988. *See Johnson v. Am. Family Mut. Ins. Co*., 426 N.W.2d 419, 423 (Minn. 1988) ("Minnesota law has retained the concept of joint and several liability, even while embracing a comparative negligence or comparative fault doctrine.") But this observation is incomplete. Specifically, Minnesota *retained* the doctrine of joint and several liability, but it also *limited the application* of the doctrine under the statutory comparative negligence scheme. Thus, the mere retention of joint and several liability in limited form prior to the 2003 amendments does not inform the analysis of the extent to which the 2003 amendments further limited the doctrine.

Moreover, the dissent suggests that it is fair to apply common law joint and several liability and deny application of Minn. Stat. § 604.02 because the Diocese could have brought appellant's husband into the action as a third-party defendant. It relies on *Imlay v. City of Lake Crystal*, 453 N.W.2d 326 (Minn. 1990), and *Schneider v. Buckman*, 433 N.W.2d 98 (Minn. 1988), to support this argument. Both cases are readily distinguishable. In *Imlay*, two plaintiffs sued a single defendant, and the defendant brought in a third-party defendant; the jury found the original defendant 20% at fault and the third-party defendant 80% at fault. 453 N.W.2d at 328. In a footnote, we "question[ed] the applicability of joint and several liability under these pleadings because the [plaintiffs] did not sue [the joint tortfeasor]; rather his estate was brought in by [the defendant] as a third-party defendant." *Id.* at 330 n.3. The footnote, however, does not support the conclusion that the doctrine of joint and several liability is inapplicable to cases involving a single defendant, as claimed by the dissent. Instead, the doctrine of joint and several liability applies under the circumstances in *Imlay* because joint and several liability arises at the time the tortfeasors commit the tort. Whether particular liable persons are joined to a lawsuit—and by which party—is irrelevant to the question of whether the doctrine of joint and several liability applies.

Schneider also does not support the dissent's argument. At issue was a version of Minn. Stat. § 604.02 that predated the 2003 amendments. Subdivision 1 provided that "[w]hen two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, *except that each is jointly and severally liable for the whole award*." Minn. Stat. § 604.02, subd. 1 (2002) (emphasis added). Thus, when only one liable person was joined to the suit, that person was liable "for the whole award" under the pre-2003 version of the "except" clause of subdivision 1 and therefore could not use the reallocation provision of subdivision 2 to escape payment of other liable persons' equitable shares of the award. Put differently, in the version of the statute in effect at the time *Schneider* was decided, the "except" clause encompassed *all* liable persons, and therefore encompassed the defendant. Therefore, subdivision 1 did not limit the defendant's contribution to an amount "in proportion to [his] percentage of fault," but rather left him liable "for the whole award." Turning to the facts in *Schneider*, fault was apportioned among four persons: two of those were not parties to the lawsuit, and a third was dismissed under the doctrine of respondeat superior. 433 N.W.2d at 99. As a result, the sole remaining defendant was, under the plain language of subdivision 1 as it existed at the time, "jointly and severally liable for the whole award," and the jury's allocation of fault to persons not parties to the lawsuit was of no practical consequence.[7] *Id.* at 103. Thus, Schneider recovered 100% of his damages from the sole defendant as a result of the defendant's joint and several liability for the whole award under the pre-2003 version of subdivision 1.[8]

Finally, the dissent's proposed interpretation that "persons" means named parties to the lawsuit is flawed and will lead to unreasonable results in the application of the exceptions in the statute. *See* Minn. Stat. § 645.17(1) (2010). For example, the interpretation of "persons" as "parties to the lawsuit" will destroy the subdivision 1(2) exception that retains joint and several liability for "two or more persons who act in a common scheme or plan that results in injury." [9]

III.

We hold that "persons" includes all "parties to the transaction," and therefore section 604.02, subdivision 1, applies when a jury apportions fault between a sole defendant and a nonparty tortfeasor, and limits the amount collectible from the defendant to its percentage share of the fault assigned to it by the jury. Consequently, the Diocese must pay to Staab 50% of the jury award, which corresponds to the Diocese's share of the fault as determined by the jury. Accordingly, we affirm the court of appeals as modified and remand to the district court for entry of judgment consistent with this opinion.

Affirmed and remanded.

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[1] In Minnesota, the doctrine of interspousal immunity no longer presents a bar to an action in negligence between a husband and wife. *Beaudette v. Frana*, 285 Minn. 366, 173 N.W.2d 416 (1969) (abrogating interspousal immunity for actions in tort); *see also Barile v. Anderson*, 295 Minn. 152, 203 N.W.2d 366 (1972) (rejecting interspousal immunity as a defense to a negligence action brought by husband against wife).

[2] Thus, the district court was incorrect to conclude that "[l]iability arises only where there is a judgment." Moreover, the court of appeals was incorrect to conclude that "both [tortfeasors] are 'severally liable' *because they were found* to share a portion of the fault." *Staab*, 780 N.W.2d at 394 (emphasis added). Rather, the common law liability of the Diocese and appellant's husband existed at the moment the tort was committed.

[3] This is so because several liability is a component of joint and several liability. It is not logically possible for a tortfeasor to be jointly and severally liable without being severally liable, so several liability for an indivisible harm necessarily arises at the same instant as joint and several liability for that harm.

[4] The dissent correctly observes that cases stating and applying the rule regarding the time of creation of common (i.e., joint and several) liability involved disputes over contribution between jointly and severally liable tortfeasors. This observation has no bearing, however, on the validity of the rule that such liability arises at the time of commission of the tort, or on our conclusion that section 604.02, subdivision 1, incorporates and relies upon that rule to determine "[w]hen two or more persons are severally liable."

[5] It is settled that a judgment may not be enforced against persons who are not parties to an action. *See Hurr v. Davis*, 155 Minn. 456, 459, 193 N.W. 943, 944 (1923). Because Minn. Stat. § 604.02, subd. 1, addresses the magnitude of contributions rather than the existence of a particular person's obligation to contribute, neither our interpretation of subdivision 1 nor the dissent's conflicts with this rule.

[6] As the dissent correctly notes, a plaintiff cannot recover an entire award from a person whose fault is greater than 50% unless that person is a party to the lawsuit. But the dissent is not correct to conclude that this fact renders the second clause of subdivision 1 ineffective unless

"persons" is read to exclude "parties to the transaction" who are not also "parties to the lawsuit." Minnesota Statutes § 604.02, subd. 1, does not address whether a particular severally liable person is obligated to contribute to a judgment.

[7] The dissent relies on *Schneider* to support its argument that section 604.02, subdivision 1, does not apply in a case with a single defendant. Specifically, the dissent contends that *Schneider* "held that the defendant was liable for the entire award *because* 'there are no other defendants against whom judgment can be entered.' " (Emphasis added.) But *Schneider* did not address the interpretation or application of subdivision 1. Rather, we held that reallocation under subdivision 2 is not possible when the sole defendant is 100% liable and there are no other persons subject to the judgment between whom uncollectible amounts can be reallocated. *See also Hurr v. Davis*, 155 Minn. 456, 458-59, 193 N.W. 943, 944 (1923) (holding that judgment entered against persons who are not parties to an action is "extrajudicial and void"). The application of subdivision 2 to this case is not before us, however, and therefore we do not reach it.

[8] Put differently, the defendant was required to pay 100% of Schneider's damages because he was jointly and severally liable for the entire award under the common law rule as applied through subdivision 1; here, the Diocese is *not* required to pay 100% of Staab's damages because it is *not* jointly and severally liable for the entire award under subdivision 1. Neither the holding in *Schneider* nor our holding in this case relies upon the reallocation procedures of subdivision 2, and our holding in this case in no way alters our previous decisions regarding subdivision 2.

[9] Consider, for instance, a scenario in which a plaintiff, P, is injured on the negligently-maintained premises of a bar owner, A, as a result of the negligent conduct of customers B and C. P sues A, and A brings a third-party claim against B. During the trial, A discovers and presents evidence that B had acted in a common scheme with nonparty tortfeasor C. The judge properly submits the fault of P, A, B, and nonparty C to the jury, which returns a special verdict determining that B and C "act[ed] in a common scheme or plan that result[ed] in injury" to P, and apportioning no fault to P, 15% of the fault to A, 45% of the fault to B, and 40% of the fault to C.

Under our interpretation of subdivision 1: A is severally but not jointly liable and required to contribute 15% of the award, in proportion to its percentage of fault; B and C—as persons who had "act[ed] in a common scheme or plan that result[ed] in injury"—are "jointly and severally liable for the whole award." Because C is a nonparty not subject to the judgment, C cannot be required to contribute anything and B is required to contribute at least the remaining 85%.

The dissent's interpretation, however, will create confusion and inconsistent results. Initially, it is unclear how the dissent would deal with nonparty C's fault in this scenario. Specifically, under the dissent's interpretation, subdivision 1 would apply, but it is not clear whether it would require A and B to pay, respectively, 15% and 45% of the award, thus leaving C's 40% unpaid, or if it would instead divide nonparty C's share between them based upon their relative fault, such that A would pay 25% and B would pay 75%. But it is the dissent's failure to deal with the application of subdivision 1(2) that is the most troubling. Specifically, the dissent's interpretation that "persons" means named parties to the lawsuit results in the conclusion that

because C is not a party to the lawsuit, the case lacks "two or more [parties to the lawsuit] who act in a common scheme" and therefore subdivision 1(2), which provides for joint and several liability for participants in a common scheme, does not apply. Clearly, this outcome is inconsistent with the plain meaning of the statute. It is unreasonable to conclude that the Legislature intended participants in a common scheme to be jointly and severally liable if more than one of the participants is a party to a lawsuit, but merely severally liable if only one participant is a party to the lawsuit and the jury apportions some fault to a defendant tortfeasor who did not participate in the scheme.

D I S S E N T

MEYER, Justice (dissenting).

I respectfully dissent. Following the 2003 amendments, Minn. Stat. § 604.02, subd. 1 (2010), provides that "[w]hen two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each." The majority concludes that because the jury found the sole defendant 50% at fault for the plaintiff's injury, the defendant is liable for only 50% of the jury award, which leaves the innocent plaintiff uncompensated for half of her damages. To reach this result, the majority abandons the common law and adopts an illogical construction in which the term "persons" has different meanings in different provisions of the same statute. Reading the statute as a whole, which we must, I conclude that the several liability provision in Minn. Stat. § 604.02, subd. 1, is not triggered when there is only one party liable for the award.

A.

The issue in this appeal concerns how much of the $224,200.70 jury award Alice Ann Staab can recover from the Diocese of St. Cloud, the only defendant in this case. Resolving this issue involves the interpretation of Minn. Stat. § 604.02, subd. 1. Our goal in statutory interpretation is to ascertain and effectuate the intent of the Legislature. *Educ. Minn.-Chisholm v. Indep. Sch. Dist. No. 695*, 662 N.W.2d 139, 143 (Minn. 2003).

Section 604.02 modifies the common law rule of joint and several liability in Minnesota. The dispute here centers on whether the 2003 amendments altered the common law in this situation—a case involving a single defendant. Under established principles of statutory construction, we must presume that statutes are consistent with the common law. *In re Shetsky*, 239 Minn. 463, 469, 60 N.W.2d 40, 45 (1953). We will not construe a statute as abrogating or modifying the common law "unless the statute does so explicitly." *Nelson v. Productive Alts., Inc.*, 715 N.W.2d 452, 455 (Minn. 2006).

The majority acknowledges that we "do not presume that the Legislature intends to abrogate or modify a common law rule except to the extent expressly declared or clearly indicated in the statute." Therefore, before proceeding to the language of the statute, I first examine the common law that applies in this situation. Under Minnesota common law, joint and several liability is the general rule in cases involving multiple tortfeasors that have caused a single, indivisible injury to a plaintiff. *See Flaherty v. Minneapolis & St. Louis Ry. Co.*, 39 Minn. 328, 329, 40 N.W. 160, 160-61 (1888). When persons are jointly and severally liable, the plaintiff can hold any or all of those persons liable for the entire resulting injury. *Thorstad v. Doyle*, 199 Minn. 543, 553, 273 N.W. 255, 260 (1937). In other words, if a plaintiff sues a single tortfeasor for her injury, that tortfeasor is liable for the entire injury, notwithstanding the existence of other tortfeasors the plaintiff could have sued. *See Schneider v. Buckman*, 433 N.W.2d 98, 101 (Minn. 1988) (explaining that "a plaintiff may sue one, all, or any number of joint tortfeasors"). Therefore, under the circumstances here, a sole defendant like the Diocese, which is 50% at fault for a plaintiff's injury, is liable for the entire award.

The focus here is on the 2003 amendments to Minn. Stat § 604.02, subd. 1. Act of May 19, 2003, ch. 71, § 1, 2003 Minn. Laws 386. Among other changes, the Legislature changed the language of the triggering clause from "[w]hen two or more persons are *jointly* liable" to "[w]hen two or more persons are *severally* liable." *Id*. (emphasis added). As amended, Minn. Stat. § 604.02, subd. 1, provides:

> When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:
>
> (1) a person whose fault is greater than 50 percent;
> (2) two or more persons who act in a common scheme or plan that results in injury;
> (3) a person who commits an intentional tort; or
> (4) a person whose liability arises under [certain environmental laws].

The majority concludes that the Legislature modified the common law here based primarily on the Legislature's perceived intent "to limit joint and several liability in Minnesota." The 2003 amendments to section 604.02 do have a significant effect on joint and several liability in cases in which two or more defendants have caused indivisible harm to a plaintiff. But the perceived intent of the Legislature to limit joint and several liability falls far short of the express statutory language needed to modify the common law in situations not controlled by the statutory language—cases involving a single defendant. We presume that the Legislature says what it means in a statute, *Goodman v. Best Buy, Inc.*, 777 N.W.2d 755, 758 (Minn. 2010), and cannot base our interpretation on what the Legislature might have intended, *see Haghighi v. Russian-Am. Broad. Co*., 577 N.W.2d 927, 930 (Minn. 1998) ("If the literal language of this statute yields an unintended result, it is up to the legislature to correct it.").

When amending the statute in 2003, the Legislature framed the several liability provision as a conditional statement—"*[w]hen* two or more persons are severally liable." Minn. Stat. § 604.02, subd. 1 (emphasis added). And the Legislature chose to retain the triggering language that requires "*two or more persons*" for the several liability provision to apply. *Id*. (emphasis added). In cases involving a single defendant, there is only one person who can be liable for an award. *See Hurr v. Davis*, 155 Minn. 456, 458-59, 193 N.W. 943, 944 (1923). Thus, in cases with only one defendant, there cannot be two or more persons liable for the award, and the statute, by its plain language, does not apply.

In a previous interpretation of the comparative fault statute, we recognized that although a jury may determine the fault of nonparties, the jury's allocation of fault to nonparties is "of no practical consequence" when "there is but one defendant against whom judgment can be or has been entered." *Schneider*, 433 N.W.2d at 103. For example, in *Schneider*, even though the jury had apportioned fault among a single defendant and other nonparties, we held that the defendant was liable for the entire award because "there are no other defendants against whom judgment can be entered." *Id.; see also Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 330 n.3 (Minn. 1990) (questioning the applicability of the joint and several liability provision of the comparative fault statute in cases in which the plaintiff sues a single defendant). Therefore, our case law supports the conclusion that Minn. Stat. § 604.02, subd. 1, does not apply in a single defendant

case. *See Engquist v. Loyas*, 803 N.W.2d 400, 404-05 (Minn. 2011) ("Our previous interpretation of a statute guides us in determining its meaning."). [D-1] Because the several liability provision is not implicated under the circumstances of this case, the common law rule controls, and the Diocese is liable for the entire award.

The majority purports to be relying on legislative intent to support an expansive interpretation of Minn. Stat. § 604.02, subd. 1, but there is no legislative history indicating that the Legislature intended the statute to apply in a single defendant case or that the Legislature even considered how the statute might apply in a single defendant case. *See* Michael K. Steenson, *Joint and Several Liability in Minnesota: The 2003 Model*, 30 Wm. Mitchell L. Rev. 845, 860 (2004) (stating that "[n]o clear guidance concerning the interpretation of the [2003 amendments] appears in the history"). If the Legislature had intended that the statute cover nonparties in this situation, the Legislature could have included an express directive to this effect. *See* Joshua D. Shaw, *Limited Joint and Several Liability Under Section 15-38-15: Application of the Rule and the Special Problem Posed by Nonparty Fault*, 58 S.C. L. Rev. 627, 634-35 & n.49 (2007) (observing that "jurisdictions that allow juries to allocate fault to nonparties have statutes with express language to that effect" and noting "a multitude of models" for state legislatures to follow).

Moreover, contrary to our rule requiring strict construction of statutes in derogation of the common law, the majority interprets Minn. Stat. § 604.02, subd. 1, as broadly as possible, concluding that "the statute must be interpreted to apply in all circumstances in which a person would otherwise be jointly and severally liable at common law." *See Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 327 (Minn. 2004) ("Generally, statutes in derogation of the common law are to be strictly construed."). We should not be so quick to abandon our century-old common law, particularly when our action is based on unexpressed legislative intent. *See Francis v. W. Union Tel. Co.*, 58 Minn. 252, 265, 59 N.W. 1078, 1081 (1894) (stating that it would be "presumptuous" for the court "to lightly discard a [common law] doctrine which has been so long approved").

B.

The majority essentially rewrites Minn. Stat. § 604.02, subd. 1, in an attempt to make the statute work in a single defendant case. The majority reads "persons" expansively in the several liability provision to include all parties to the transaction, which leads to the conclusion that the several liability provision is triggered by the presence of one defendant and one nonparty tortfeasor. But the majority's construction of the statute is not reasonable when considering the context of the statute as a whole. *See Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000).

The majority's construction of the triggering clause—"[w]hen two or more persons are severally liable"— to include nonparties as "persons" results in an ineffective remedial clause—"contributions to awards shall be in proportion to the percentage of fault attributable to each." Minn. Stat. § 604.02, subd. 1. Because "each" necessarily refers to each "person[]" in the triggering clause, and "shall" is mandatory, Minn. Stat. § 645.44, subd. 16 (2010), under the majority's interpretation, each "person[]" would have an obligation to contribute to the award,

even nonparties. Further, section 604.02, subdivision 1, provides that certain "persons" are "jointly and severally liable for the whole award," for example, "a person whose fault is greater than 50 percent." Minn. Stat. § 604.02, subd. 1(1). Consequently, if the jury had found Richard Staab to be 51% at fault for his wife's injury, and "persons" includes all parties to the transaction, Richard Staab would be a "person[]" who is jointly and severally liable for the whole award. Nonparties, however, cannot be required to contribute to the award, let alone be jointly and severally liable for the whole award. *See Hurr v. Davis*, 155 Minn. 456, 459, 193 N.W. 943, 944 (1923) (holding that a judgment against persons not parties to the action was "clearly void for want of jurisdiction").

To avoid holding nonparties liable for an award, the majority effectively rewrites the statute to provide that contributions to awards shall be in proportion to the percentage of fault attributable to each *person subject to an adverse judgment*. But "[w]e may not add words to a statute." *Johnson v. Cook Cnty*., 786 N.W.2d 291, 295 (Minn. 2010); *see also Beardsley v. Garcia*, 753 N.W.2d 735, 740 (Minn. 2008) (declining to interpret statute so as to "effectively rewrite" it because that prerogative belongs to the Legislature). The majority's construction of the statute also does not comport with the language the Legislature actually used. According to the majority, determining which "persons" are severally liable for purposes of the triggering clause does not depend on the judgment because "a person is liable at common law at the moment the tort is committed"; [D-2] however, determining which "persons" must contribute to an award under the remedial clause does depend on the judgment because only parties can be liable for the judgment. This interpretation of section 604.02 violates our rules of construction that require courts to give a consistent meaning to the same terms appearing in the same statute. *See Langston v. Wilson McShane Corp*., 776 N.W.2d 684, 690 (Minn. 2009). Under the majority's interpretation, the word "persons" has different meanings in the same sentence of the same subdivision of the same statute—"persons" in the triggering clause encompasses all parties to the transaction, whereas the reference to "each person" in the remedial clause includes only parties to the case. [D-3]

The majority's construction of the statute appears to be motivated by a concern that requiring the defendant to pay the entire award is not fair, but this has been the common law rule in Minnesota for over a century. *See Flaherty v. Minneapolis & St. Louis Ry. Co*., 39 Minn. 328, 329, 40 N.W. 160, 160-61 (1888). The common law places the interests of an innocent plaintiff above the interests of the at-fault tortfeasor. *See, e.g., Mathews v. Mills*, 288 Minn. 16, 22, 178 N.W.2d 841, 845 (1970). The result reached by the majority in this case leaves the innocent plaintiff uncompensated for over $100,000 in damages. At the same time, the Diocese acknowledges that a defendant typically would have some recourse in this situation: the "right to bring a third-party claim against any other persons who may have contributed to a plaintiff's injuries." Finally, the majority's construction of Minn. Stat. § 604.02 exposes the statute to constitutional challenges, particularly in the absence of adequate procedural safeguards to protect the rights of plaintiffs whose recovery can be reduced by fault shifted to nonparties. [D-4]

C.

Notwithstanding the majority's attempt to limit the payment of the Diocese to the innocent plaintiff, the majority's interpretation of the reallocation provision in section 604.02

will effectively obligate the Diocese to pay the entire award anyway. The reallocation provision provides:

> Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Minn. Stat. § 604.02, subd. 2. The majority interprets the term "party" in subdivision 2 to mean "all persons who are parties to the tort, regardless of whether they are named in the lawsuit." Applying that meaning of "party" here, Richard Staab is a party to the tort whose "equitable share of the obligation is uncollectible," Minn. Stat. § 604.02, subd. 2, because he cannot be required to contribute to the judgment. Upon motion, the district court would be required to reallocate that uncollectible amount to the Diocese. *See id*. Accordingly, the majority's interpretation of subdivision 2 undoes the effect of its interpretation of subdivision 1.

D.

Construing the plain language of the statute, I conclude that the several liability provision in Minn. Stat. § 604.02, subd. 1, applies only when there is more than one party with an obligation to contribute to the award. Consistent with the common law, the Diocese, as the sole defendant, is jointly and severally liable for the entire award. Therefore, I would reverse the court of appeals' decision and reinstate the judgment against the Diocese.

PAGE, Justice (dissenting).

I join in the dissent of Justice Meyer.

ANDERSON, PAUL H., Justice (dissenting).

I join in the dissent of Justice Meyer.

[D-1] The majority's efforts to distinguish these cases fail. The majority indicates that *Schneider* does not support my argument because prior to the 2003 amendments, Minn. Stat. § 604.02, subd. 1 (2002), provided that "[w]hen two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award." According to the majority, "when only one liable person was joined to the suit, that person was liable 'for the whole award.' " That person was liable for the whole award, but because of the common law rule, not the statute. Under the majority's interpretation of the statutory language—"contributions to awards shall be in proportion to the percentage of fault attributable to each"—the defendant in *Schneider* would have been required to contribute to the award only in proportion to his percentage of fault,

with the plaintiff recovering the uncollectible amounts under the reallocation procedures of the statute. But the court in *Schneider* specifically rejected this analysis, concluding that the reallocation procedures "are not implicated" when there is only one defendant against whom judgment can be entered. 433 N.W.2d at 103. The majority in essence is concluding that the contribution provision has a different meaning after the 2003 amendments, even though the Legislature did not touch that language. Further, in *Imlay*, we were questioning the applicability of the *statute* to cases involving a single defendant. 453 N.W.2d at 330 n.3

[D-2] The majority misapprehends the common law rule that "[c]ommon liability 'is created at the instant the tort is committed.' " *Spitzack v. Schumacher*, 308 Minn. 143, 145, 241 N.W.2d 641, 643 (1976) (quoting *White v. Johnson*, 272 Minn. 363, 371, 137 N.W.2d 674, 679 (1965), *overruled on other grounds by Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 368 n.11 (Minn. 1972)). The cases relied upon by the majority are all contribution cases for which "common liability" is a prerequisite. *See also Am. Auto. Ins. Co. v. Molling*, 239 Minn. 74, 76, 57 N.W.2d 847, 849 (1953). In this context, we have explained that "[a] determination of whether common liability exists is to be made at the instant the tort is committed," *Ascheman v. Vill. of Hancock*, 254 N.W.2d 382, 384 (Minn. 1977), regardless of whether a joint tortfeasor " 'subsequently acquire[s] a particular defense against an injured party,' " *Hammerschmidt v. Moore*, 274 N.W.2d 79, 81 (Minn. 1978) (quoting *Spitzack*, 308 Minn. at 145, 241 N.W.2d at 643). Therefore, the common law rule cited by the majority is taken out of context and does not affect the interpretation of Minn. Stat. § 604.02 (2010).

[D-3] To avoid a result that requires nonparties to contribute to the award, the majority also ascribes meaning to the Legislature's choice of the passive voice in the contribution provision. The majority implies that the result here would be different if the Legislature had said, "*each shall contribute* to the award," as opposed to "contributions to awards shall be in proportion to the percentage of fault attributable to each," Minn. Stat. § 604.02, subd. 1. The majority concludes that the statute does not mean what it says—that Minn. Stat. § 604.02, subd. 1, does not address the existence of a particular person's obligation to contribute to the judgment. The Legislature's decision to use the passive voice rather than the active voice makes no difference in the meaning of the statute; the difference is mainly one of style. *See, e.g., McMullan v. Wohlgemuth*, 308 A.2d 888, 902 n.6 (Pa. 1973) (Pomeroy, J., dissenting) ("The difference between the active and passive voices is stylistic only, and it is not such as to change the result.").

In addition, the majority uses strained logic to avoid a result that finds nonparty "persons" jointly and severally liable for the whole award. The majority indicates that the statutory language providing that certain "persons are jointly and severally liable for the whole award," Minn. Stat. § 604.02, subd 1, does not necessarily mean liability for an award that is "enforceable." It is not reasonable to assume that the Legislature intended to assign responsibility for unenforceable awards.

[D-4] *See generally* Nancy A. Costello, Note, *Allocating Fault to the Empty Chair: Tort Reform or Deform?*, 76 U. Det. Mercy L. Rev. 571, 581-82 (1999) (noting multitude of constitutional challenges to statutory "empty chair" provisions, a couple of them successful). *See, e.g., Plumb v. Fourth Judicial Dist. Court*, 927 P.2d 1011, 1019-21 (Mont. 1996) (holding that

apportionment of liability to nonparties violated substantive due process, in part, because juries are likely to assign a disproportionate share of liability to unrepresented parties). Following *Plumb,* the Montana Legislature enacted legislative changes that included major restrictions on comparisons of fault with nonparties and significant procedural safeguards to protect the interests of plaintiffs. *See* Mont. Code Ann. § 27-1-703 (2011).

STATE OF MINNESOTA

IN SUPREME COURT

A09-0926
A09-0934

Court of Appeals

Meyer, J.

State of Minnesota,

Respondent,

vs.

Filed: July 20, 2011
Office of Appellate Courts

Steven Dale Leathers,

Appellant.

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and John J. Muhar, Itasca County Attorney, Grand Rapids, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

S Y L L A B U S

The definition of the phrase "full term of imprisonment" in Minn. Stat. § 609.221, subd. 2(b) (2010), means two-thirds of a defendant's executed prison sentence.

Reversed.

O P I N I O N

MEYER, Justice.

Steven Dale Leathers was convicted of five counts of first-degree assault against a peace officer, Minn. Stat. § 609.221, subd. 2(a) (2010) (prohibiting a person from assaulting a peace officer by using or attempting to use deadly force while the officer is engaged in a lawful duty),

arising out of an October 20, 2006, incident involving five law enforcement officers. The district court imposed concurrent sentences totaling 189 months with eligibility for supervised release after 126 months in prison. Leathers appealed his conviction. The State appealed the sentence, arguing that the district court erred when it ruled that Leathers would be eligible for supervised release after serving 126 months in prison (two-thirds of his 189-month sentence). The court of appeals upheld Leathers' conviction, but reversed the sentence, holding that Leathers was not eligible for supervised release. *State v. Leathers*, Nos. A09-926, A09-934, 2010 WL 2265601 at *6-8 (Minn. App. June 8, 2010). This court granted review on the supervised release issue, and we now reverse the court of appeals and affirm the district court's decision.

Whether Minn. Stat. § 609.221, subd. 2(b) (2010), bars the possibility of supervised release is a question of statutory interpretation, which we review de novo. *See State v. Bluhm*, 676 N.W.2d 649, 651 (Minn. 2004). "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2010). "[W]hen the legislature's intent is clear from plain and unambiguous statutory language, this court does not engage in any further construction and instead looks to the plain meaning of the statutory language." *Bluhm*, 676 N.W.2d at 651 (internal quotation marks omitted). "A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation." *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999) (citing Minn. Stat. § 645.16 (2010)). When the court is faced with an ambiguous criminal statute, the ambiguity should be resolved in favor of the criminal defendant in the interest of lenity. *State v. Niska*, 514 N.W.2d 260, 265 (Minn. 1994).

Minnesota Statutes § 609.221, subd. 2(a), establishes that a person who assaults a peace officer "may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $30,000, or both." The offense is subject to a minimum sentence:

> A person convicted of assaulting a peace officer . . . shall be committed to the commissioner of corrections for not less than ten years, nor more than 20 years. A defendant convicted and sentenced as required by this paragraph is not eligible for probation, parole, discharge, work release, or supervised release, until that person has served the full term of imprisonment as provided by law, notwithstanding the provisions of sections 241.26, 242.19, 243.05, 244.04, 609.12, and 609.135. Notwithstanding section 609.135, the court may not stay the imposition or execution of this sentence.

Id., subd. 2(b). The district court interpreted this provision to mean that Leathers was eligible for supervised release after serving 126 months of his 189-month term of imprisonment. The court of appeals interpreted this provision to mean that the phrase "full term of imprisonment" required Leathers to serve his entire sentence with no eligibility for supervised release. *Leathers*, 2010 WL 2265601, at *8.

Determining the legislative intent requires us to define the phrase "full term of imprisonment." Leathers argues that a term of imprisonment is two-thirds of an executed sentence as defined in Minn. Stat. § 244.01, subd. 8 (2010). Under that definition, the language of the first-degree assault statute would require Leathers to serve two-thirds of his executed sentence in prison. After that time, assuming he had no disciplinary violations, he would be

eligible for supervised release, work release, and, eventually, discharge. The State argues that the definition in section 244.01 does not apply; that nothing in the language of Minn. Stat. § 609.221, subd. 2(b), limits a term of imprisonment to two-thirds of a sentence; and that absent such language in the first-degree assault statute itself, a person convicted under that statute must serve the entire term of his or her sentence in prison. The court of appeals held that the definitions in Minn. Stat. § 244.01 apply exclusively to sections 244.01 through 244.11 and that the phrase "full term of imprisonment" requires Leathers to serve the full amount of time imposed by the sentence in prison without the possibility of supervised release. *Leathers*, 2010 WL 2265601, at *8.

The plain language of Minn. Stat. § 609.221, subd. 2(b), makes an offender convicted under subdivision 2(a) ineligible for "probation, parole, discharge, work release, or supervised release" until the offender has served the "full term of imprisonment." Neither section 609.221 nor the remainder of chapter 609 provides a definition for the key phrase in the statute: "full term of imprisonment." In the absence of a statutory definition, we generally turn to the plain, ordinary meaning of a statutory phrase. *See* Minn. Stat. § 645.08 (2010). One reasonable interpretation of the phrase "full term of imprisonment" is "the complete or entire duration of a fixed and definite extent of time a person *is confined in prison*." This definition of the phrase "full term of imprisonment" does not contemplate or require *any* period of supervised release, much less a period of supervised release not to exceed one-third of an offender's executed sentence. Rather, this interpretation of the phrase "full term of imprisonment" speaks only to the entirety of an inmate's fixed and definite period of confinement in prison, not to whether an offender is eligible for probation, parole, discharge, supervised release, or work release at some point during his or her executed sentence.

However, "full term of imprisonment" is susceptible to another reasonable interpretation. In construing statutes, we assume that the Legislature enacts statutes "with full knowledge of prior legislation on the same subject." *Meister v. W. Nat. Mut. Ins. Co.*, 479 N.W.2d 372, 378 (Minn. 1992). Here, another statutory provision defining the phrase "term of imprisonment" as two-thirds of an executed sentence preceded the Legislature's enactment of section 609.221, subdivision 2, by four years. *See* Act of May 30, 1997, ch. 239, art. 3, § 10, 1997 Minn. Laws 2742, 2779 (codified at Minn. Stat. § 609.221, subd. 2 (2010)); Act of May 20, 1993, ch. 326, art. 9, § 3, 1993 Minn. Laws 1974, 2087 (codified at Minn. Stat. § 244.01, subd. 8). Minnesota Statutes § 244.01, subd. 8, defines the phrase "term of imprisonment" as "the period of time equal to two-thirds of the inmate's executed sentence." These two chapters of the Minnesota Statutes are interrelated: chapter 244 governs the sentencing of offenders convicted of crimes defined in chapter 609. Therefore, another reasonable interpretation of the phrase "full term of imprisonment" is "the period of time equal to two-thirds of the inmate's executed sentence." [1]

Although chapter 244 provides the framework for imposing sentences for criminal offenses, express statutory language limits the applicability of the definitions in section 244.01 to certain provisions in chapter 244. According to section 244.01, subdivision 1, the definitions, including the definition for the phrase "term of imprisonment," are "for purposes of sections 244.01 to 244.11." Because the definitions in section 244.01 do not expressly apply to subdivision 2 of section 609.221, it would be reasonable to apply the plain, ordinary meaning of the phrase "full term of imprisonment."

Limiting the application of section 244.01, however, disregards the interrelationship between chapters 244 and 609. Chapter 244 provides the procedures for sentencing offenders and managing the conditions of confinement for crimes committed under chapter 609, including the offense of first-degree assault of a police officer. In other words, the very provisions to which the statutory definition of "term of imprisonment" are expressly limited—sections 244.01 to 244.11—relate to the imposition and administration of sentences for crimes committed under chapter 609. Section 244.10, for example, sets forth the grounds upon which district courts may depart from the Sentencing Guidelines. Minn. Stat. § 244.10 (2010). Similarly, section 244.11 governs appellate review of sentences, including sentences imposed for crimes committed under chapter 609. *Id.* § 244.11 (2010). In fact, case law recognizes the interrelationship between chapters 244 and 609. *See, e.g.*, *Vickla v. State*, 793 N.W.2d 265, 270 (Minn. 2011) (concluding that Minn. Stat. § 244.11, subd. 2(b) (2010), allows appellate courts to review sentences imposed under Minn. Stat. § 609.1095, subd. 4 (2010)); *State v. Edwards*, 774 N.W.2d 596, 607 n.10 (Minn. 2009) (noting that an amendment to Minn. Stat. § 244.10 (2008) clarified the extent to which Minn. Stat. § 609.035 (2008) limited the imposition of upward departures); *State v. Leake*, 699 N.W.2d 312, 321 (Minn. 2005) (referencing chapter 609 and chapter 244 to interpret a defendant's term of imprisonment with the possibility of supervised release).

On the one hand, because the definitions in section 244.01 are "for purposes of sections 244.01 to 244.11," it is reasonable to interpret the phrase "full term of imprisonment" in section 609.221, subdivision 2(b), without reference to section 244.01. Yet the broad-ranging applicability of chapter 244 to offenders sentenced for crimes committed under chapter 609 supports a different interpretation—that the phrase "full term of imprisonment" is the period of time equal to two-thirds of the offender's executed sentence. Accordingly, we conclude that subdivision 2(b) of section 609.221 is ambiguous because it is susceptible to more than one reasonable interpretation.

II.

When a statutory provision is ambiguous, it is appropriate to turn to the canons of statutory construction to ascertain a statute's meaning. *See Tuma v. Commissioner of Economic Sec.*, 386 N.W.2d 702, 706 (Minn. 1986). Relying on two canons of statutory construction—the doctrine of in pari materia and the rule of lenity—we conclude that the better interpretation of "full term of imprisonment" in section 609.221, subdivision 2(b), is a period of time equal to two-thirds of an offender's executed sentence.

First, sections 609.221, subdivision 2(b), and 244.01, subdivision 8, must be construed together because they are in pari materia. "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." *State v. Lucas*, 589 N.W.2d 91, 94 (Minn. 1999). As stated above, chapter 244 sets out the procedures for the imposition and administration of criminal sentences, while chapter 609 defines the underlying criminal offenses. Therefore, chapters 244 and 609 share a common purpose and subject matter because together they provide for the conviction and sentencing of criminal offenders in Minnesota.

Moreover, according to another section in chapter 244, every executed sentence imposed after August 1, 1993, must have the following two parts: "(1) a specified minimum term of imprisonment that is equal to two-thirds of the executed sentence; and (2) a specified maximum supervised release term that is equal to one-third of the executed sentence." Minn. Stat. § 244.101, subd. 1 (2010). Although section 609.221, subdivision 2(b), requires a court to sentence an offender to the "full term of imprisonment" "notwithstanding the provisions of sections 241.26, 242.19, 243.05, 244.04, 609.12, and 609.135," section 609.221 does not prohibit, nor even mention, the application of section 244.101 in calculating an offender's sentence. Requiring an offender to spend the entirety of his or her executed sentence in prison would never permit a person convicted of first-degree assault of a peace officer to become eligible for supervised release, which directly contravenes the requirements of section 244.101, subdivision 1.

Second, we apply the rule of lenity under these circumstances. "[W]hen the language of a criminal law is ambiguous, we construe it narrowly according to the rule of lenity." *State v. Maurstad*, 733 N.W.2d 141, 148 (Minn. 2007); *see also Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."). In keeping with that principle, we also "strictly construe minimum term statutes against the State." *State v. Lubitz*, 472 N.W.2d 131, 133 (Minn. 1991).

We conclude that the definition of the phrase "full term of imprisonment" in Minn. Stat. § 609.221, subd. 2(b), means two-thirds of a defendant's executed prison sentence. Thus, Leathers is ineligible for work release or supervised release until he has served a full two-thirds of his sentence, after which point he may be eligible for supervised release subject to the completion of any disciplinary confinement period and other requirements for supervised release. *See* Minn. Stat. § 244.05, subd. 1b.

We therefore reverse the court of appeals and affirm the district court's decision.

Reversed.

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[1] The State emphasizes the fact that subdivision 2(b) of section 609.221 uses the phrase "*full* term of imprisonment" (emphasis added) rather than "term of imprisonment," only the latter of which is defined in subdivision 8 of section 244.01. The plain and ordinary meaning of the word "full" is "[c]omplete" or "entire." *The American Heritage Dictionary of the English Language* 710 (4th ed. 2009). The use of the word "full" before the phrase "term of imprisonment" in Minn. Stat. § 609.221, subd. 2(b), means that an offender convicted of first-degree assault of a peace officer must serve his or her "complete" or "entire" term of imprisonment before becoming eligible for probation, parole, discharge, work release, or supervised release. The addition of the word "full" in section 609.221, subdivision 2(b), adds little to our interpretive task here, which is to determine whether "term of imprisonment" means two-thirds of an offender's executed sentence or the fixed period of time an offender must be confined in prison. Neither party disputes that an offender convicted under subdivision 2 of

section 609.221 must serve the *full* term of imprisonment; rather, the parties disagree about the meaning of the phrase "term of imprisonment."

STATE OF MINNESOTA

IN COURT OF APPEALS

A11-2226

Michael A. Johnson, petitioner,

Appellant,

vs.

State of Minnesota,

Respondent.

Filed August 27, 2012

Reversed and remanded

Kalitowski, Judge

Swift County District Court

File No. 76-CR-08-62

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Robin Finke, Swift County Attorney, Harry D. Hohman, Assistant County Attorney, Benson, Minnesota (for respondent)

Considered and decided by Chutich, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

S Y L L A B U S

A person confined in a private correctional facility is not an "inmate of a state correctional facility" subject to mandatory consecutive sentencing pursuant to Minn. Stat. § 609.2232 (2006).

O P I N I O N

KALITOWSKI, Judge

Appellant Michael A. Johnson challenges the district court's denial of his petition for postconviction relief, asserting that the district court erred in concluding that Minn. Stat. § 609.2232 mandated a consecutive sentence for an assault he committed while serving a Washington state sentence at a private correctional facility located in Minnesota.

FACTS

Prior to December 2007, appellant was convicted of an offense in Washington state and sentenced by a Washington state court. To serve the sentence, appellant was incarcerated at the Prairie Correctional Facility (PCF), owned by Corrections Corporation of America (CCA) and located in Appleton, Minnesota.

On December 1, 2007, appellant punched a fellow PCF inmate and was charged with third-degree assault—substantial bodily harm, in violation of Minn. Stat. § 609.223, subd. 1 (2006). Appellant pleaded guilty to third-degree assault with the condition that the offense be sentenced as a gross misdemeanor. Relying on Minn. Stat. § 609.2232, the district court committed appellant to the custody of the commissioner of corrections for 365 days and ordered that the sentence run consecutively to his Washington state sentence.

Appellant filed a petition for postconviction relief, arguing that Minn. Stat. § 609.2232 was inapplicable and requesting that his sentence be modified to run concurrently. The district court determined that the phrase "state correctional facility" was ambiguous, but reasoned that construing section 609.2232 as inapplicable to inmates of private facilities would lead to the absurd result that offenders confined in private facilities would be treated more favorably than offenders confined in state-operated facilities. The district court concluded that "state correctional facility" applied to PCF and therefore Minn. Stat. § 609.2232 mandated consecutive sentencing for appellant's third-degree assault conviction.

ISSUE

Does Minn. Stat. § 609.2232 mandate consecutive sentencing for an assault committed by a person confined in a private correctional facility?

ANALYSIS

The construction of a criminal statute is a question of law subject to de novo review. *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003). The object of all statutory interpretation is to effectuate the intent of the legislature. Minn. Stat. § 645.16 (2010). We construe the words and phrases in a statute in accordance with their plain and ordinary meaning, and if the statute is unambiguous, we apply the plain language. *State v. Zais*, 805 N.W.2d 32, 38 (Minn. 2011).

When construing a penal statute, all reasonable doubt as to the legislature's intent is resolved in favor of the defendant. *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002).

We first determine whether section 609.2232 is ambiguous. Minn. Stat. § 609.2232 provides:

> If an inmate of a state correctional facility is convicted of violating section 609.221, 609.222, 609.223, 609.2231, or 609.224 [first-, second-, third-, fourth-, or fifth-degree assault], while confined in the facility, the sentence imposed for the assault shall be executed and run consecutively to any unexpired portion of the offender's earlier sentence. The inmate is not entitled to credit against the sentence imposed for the assault for time served in confinement for the earlier sentence. The inmate shall serve the sentence for the assault in a state correctional facility even if the assault conviction was for a misdemeanor or gross misdemeanor.

Appellant argues that the plain meaning of "state correctional facility" is a facility under the operational authority of the Minnesota Commissioner of Corrections. In support, appellant refers to the definition of "correctional facility" in Minn. Stat. § 244.01, subd. 4 (2006): "any state facility under the operational authority of the commissioner of corrections." Therefore, appellant argues, "state correctional facility" does not include a private correctional facility.

The state disagrees, arguing that the plain meaning of "state correctional facility" is any correctional facility located in Minnesota and licensed by the commissioner of corrections, citing Minn. Stat. § 241.021, subd. 1(a) (2006), which requires that the commissioner of corrections inspect and license "all correctional facilities throughout the state, whether public or private."

Neither the word "inmate" nor the phrase "state correctional facility" is defined in chapter 609. But when Minn. Stat. § 609.2232 is read as a whole, its plain meaning is clarified. *See* Minn. Stat. § 645.16 (stating that a statute should be construed "to give effect to all of its provisions"). The third sentence, "[t]he inmate shall serve the sentence for the assault in a state correctional facility even if the assault conviction was for a misdemeanor or gross misdemeanor," indicates that "state correctional facility" refers to a facility where an offender would not otherwise serve a misdemeanor or gross-misdemeanor sentence. Minn. Stat. § 609.2232.

Sentences of one year or less are generally served in county jails or workhouses. *See* Minn. Stat. § 609.105, subd. 3 (2006) ("A sentence to imprisonment for a period of one year or any lesser period shall be to a workhouse, . . . county jail, or other place authorized by law."); *see also Black's Law Dictionary*, 1314 (9th ed. 2009) (defining "prison" as "[a] state or federal facility of confinement for convicted criminals, esp[ecially] felons"); *id.* at 910 (defining "jail" as "[a] local government's detention center where . . . those convicted of misdemeanors are confined"). Because county jails and workhouses are located within the State of Minnesota and licensed by the commissioner of corrections, the phrase "state correctional facility" must not refer to all facilities located within the state and licensed by the commissioner, as the state contends.

But even if "inmate of a state correctional facility" does not include a person confined in a county jail, we conclude that it remains ambiguous as applied to appellant, a person serving a sentence at PCF.

When statutory language is ambiguous, we may apply canons of statutory construction to discern the legislature's intent. *State v. Leathers*, 799 N.W.2d 606, 611 (Minn. 2011). The intention of the legislature may be ascertained by considering the circumstances under which it was enacted, the object to be attained, other laws upon the same or similar subjects, the consequences of a particular interpretation, and contemporaneous legislative history. Minn. Stat. § 645.16. "[W]e assume that the [l]egislature enacts statutes with full knowledge of prior legislation on the same subject." *Leathers*, 799 N.W.2d at 609 (quotation omitted).

Minn. Stat. § 609.2232 is an exception to the presumption under Minnesota law that multiple sentences run concurrently. *See* Minn. Stat. § 609.15, subd. 1 (2006). The district court concluded that the legislative intent behind Minn. Stat. § 609.2232 was to impose additional penalties and thereby encourage inmates to obey the law while incarcerated. We agree. But this general intent does not differentiate among facilities, and as discussed above, the plain language of the statute makes it inapplicable to persons confined in county jails. Therefore, further consideration of legislative intent is necessary.

Appellant argues that the definitions in Minnesota Statutes chapter 244 are indicative of the legislature's intent as to the application of section 609.2232. We agree.

Minn. Stat. § 244.01 defines terms "[f]or purposes of sections 244.01 to 244.11." Minn. Stat. § 244.01, subd. 1 (2006). Subdivision two defines "[i]nmate" as "any person who is convicted of a felony, is committed to the custody of the commissioner of corrections and is confined in a state correctional facility or released from a state correctional facility pursuant to" statutory provisions providing for work release or furlough. *Id.*, subd. 2 (2006). Subdivision four defines "[c]orrectional facility" as "any state facility under the operational authority of the commissioner of corrections." *Id.*, subd. 4.

In *Leathers*, the supreme court analyzed Minn. Stat. § 609.221, subd. 2(b) (2010), which makes an offender ineligible for probation or supervised release until the offender serves the "full term of imprisonment." 799 N.W.2d at 608-11. The court reasoned that because Minn. Stat. § 244.01, subd. 8 (2010), which defines "[t]erm of imprisonment," was enacted before the relevant provision in chapter 609, and because chapters 244 and 609 are "interrelated," section 244.01, subdivision 8, provides a reasonable definition for purposes of section 609.221. *Id.* 609-10. The supreme court concluded that the two statutory provisions have common purposes and subject matter, and therefore "must be construed together because they are in pari materia." *Id.* at 611.

Likewise, the relevant language in Minn. Stat. § 244.01, subds. 2, 4, was adopted before the enactment of Minn. Stat. § 609.2232, and we infer that the legislature was aware of the section 244.01 definitions when drafting section 609.2232. *See* Minn. Stat. § 244.01, subds. 2, 4 (1996) (defining "[i]nmate" and "[c]orrectional facility"); 1997 Minn. Laws ch. 239, art. 9, § 37, at 2885 (enacting Minn. Stat. § 609.2232). Chapter 244 "sets out the procedures for the

imposition and administration of criminal sentences," *Leathers*, 799 N.W.2d at 611, and section 609.2232 addresses sentencing for certain offenses under specific circumstances. Therefore, as in *Leathers*, Minn. Stat. § 609.2232 and Minn. Stat. § 244.01 have common purposes and subject matter, and the doctrine of in pari materia supports construing "inmate of a state correctional facility" in section 609.2232 consistent with the section 244.01 definitions. Because appellant had not been committed to the custody of the commissioner of corrections at the time he committed third-degree assault, he was not an "inmate" under section 244.01, subdivision 2. And because PCF was not "under the operational authority of the commissioner of corrections," appellant was not incarcerated in a "correctional facility" under section 244.01, subdivision 4.

This conclusion is confirmed by the legislature's use of the phrase "state correctional facility" throughout the Minnesota statutes. As the following examples show, when the legislature uses the phrase "state correctional facility," it generally refers to a facility funded by the state and subject to day-to-day oversight by the commissioner of corrections. *See, e.g.*, Minn. Stat. § 241.023, subd. 2 (2006) ("Any state correctional facility now or hereafter established shall be designated as a Minnesota correctional facility according to the geographical area in which located."); Minn. Stat. § 241.07 (2006) (stating that the "commissioner of corrections may transfer an inmate of any state correctional facility to a state institution under the control of the commissioner of human services or to a private medical facility" for medical care); Minn. Stat. § 241.75, subd. 2 (2006) (providing that the medical director of the department of corrections "may make a health care decision for an inmate incarcerated in a state correctional facility"); Minn. Stat. § 242.43 (2006) ("The commissioner of corrections shall receive, clothe, maintain, and instruct all children duly committed to the [c]orrections [d]epartment and placed in a state correctional facility . . . ."); Minn. Stat. § 243.556, subd. 1 (2006) ("No adult inmate in a state correctional facility may use or have access to any [i]nternet service" except for purposes approved by the commissioner); Minn. Stat. § 243.557 (2006) ("Where inmates in a state correctional facility are not routinely absent from the facility . . . the commissioner must make three meals available Monday through Friday . . . and at least two meals available on Saturdays, Sundays, and holidays."). Private correctional facilities, by contrast, are not funded by the state, and are subject only to licensing requirements and other "minimum standards" promulgated by the commissioner. Minn. Stat. § 241.021, subd. 1(a).

Appellant also argues that the legislature demonstrated that it did not intend Minn. Stat. § 609.2232 to apply to private correctional facilities by its failure to explicitly reference private facilities. We agree.

In Minn. Stat. § 609.221, subd. 2(c)(1) (2006), defining first-degree assault—use of deadly force against a peace officer or correctional employee, the legislature defined "correctional employee" as "an employee of a public or private prison, jail, or workhouse." And in Minn. Stat. § 243.52 (2006), the legislature provided that a person may use force in defense of an assault by "any inmate of any adult correctional facility either under the control of the commissioner of corrections or licensed by the commissioner of corrections under section 241.021."

Moreover, in the 1997 bill enacting Minn. Stat. § 609.2232, the legislature amended the definition of "[a]dministrative agency" and "agency" in Minn. Stat. § 241.42, subd. 2 (1996),[1]

by adding the following language: "any regional or local correctional facility licensed or inspected by the commissioner of corrections, whether public or private, established and operated for the detention and confinement of adults or juveniles, including, but not limited to . . . lockups, work houses, work farms, and detention and treatment facilities." 1997 Minn. Laws ch. 239, art. 9, § 11, at 2875.

We conclude that, contemporaneous with the enactment of section 609.2232, the legislature used explicit language when it intended that a statute apply to a private correctional facility. Because it declined to do so here, we infer that the legislature did not intend that section 609.2232 apply to persons in private correctional facilities.

The district court reasoned that if Minn. Stat. § 609.2232 was not applicable to offenders in all facilities, "an inmate would be able to commit assaults while incarcerated without any additional penalty." The district court also determined that it would be absurd if the location where an offender was confined dictated whether the offender received a consecutive sentence.

We are not persuaded that interpreting section 609.2232 as inapplicable to persons confined in private facilities leads to absurd results. Even if consecutive sentencing is not mandatory, the sentencing court is not prohibited from imposing a consecutive sentence for an assault committed while incarcerated. Under the Minnesota Sentencing Guidelines, consecutive sentences are presumptive "when the conviction is for a crime committed by an offender serving an executed prison sentence" if "the presumptive disposition for the current offense(s) is commitment to the [c]ommissioner of [c]orrections." Minn. Sent. Guidelines II.F (2008). And consecutive sentencing is permissive when the current felony conviction is listed in section VI of the guidelines and the offender was previously sentenced for an offense listed in section VI that has not expired or been discharged. Minn. Sent. Guidelines II.F.1 (2008). Third-degree assault is listed in section VI. Moreover, if an offender commits a misdemeanor or gross-misdemeanor assault, the sentencing guidelines are inapplicable and the sentencing court may, in its discretion, impose a consecutive sentence. *See* Minn. Stat. § 609.15, subd. 1(b) ("When a court imposes sentence for a misdemeanor or gross misdemeanor offense and specifies that the sentence shall run consecutively to any other sentence, the court may order the defendant to serve time in custody for the consecutive sentence in addition to any time in custody the defendant may be serving for any other offense . . . ."); *State v. Campbell*, 814 N.W.2d 1, 6 (Minn. 2012) (stating that the sentencing guidelines do not apply to gross misdemeanors).

Finally, "when the language of a criminal law is ambiguous, we construe it narrowly according to the rule of lenity." *State v. Maurstad*, 733 N.W.2d 141, 148 (Minn. 2007). Based on our inferences of legislative intent, and in light of the rule of lenity and Minnesota's presumption in favor of concurrent sentencing, we conclude that Minn. Stat. § 609.2232 is inapplicable to a person who commits an assault while confined in a private correctional facility. Therefore, on remand, the district court must apply the appropriate sentencing considerations and determine whether appellant's assault sentence should run concurrently or consecutively to his Washington state sentence.

D E C I S I O N

Because Minn. Stat. § 609.2232 does not apply to an offender who commits an assault while confined in a private correctional facility, the district court erred in concluding that consecutive sentencing is mandatory for appellant's third-degree assault conviction. We therefore reverse the district court's denial of appellant's petition for postconviction relief and remand for resentencing.

Reversed and remanded.

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[1] Minn. Stat. § 241.42, subd. 2, was repealed by 2003 Minn. Laws 1st Spec. Sess. ch. 2, art. 5, § 18 at 1427.10

STATE OF MINNESOTA

IN COURT OF APPEALS

A12-0058

State of Minnesota,

Respondent,

vs.

Daniel James Rick,

Appellant.

Filed September 24, 2012

Reversed

Larkin, Judge

Dissenting, Collins, Judge*

Hennepin County District Court

File No. 27-CR-10-18858

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Elizabeth Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Grant S. Smith, Landon J. Ascheman, Ascheman & Smith, LLC, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Collins, Judge.

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

S Y L L A B U S

Minn. Stat. § 609.2241, subd. 2(2) (2008), does not apply to acts of sexual penetration, as that term is defined in statute, including those that result in a transfer of sperm.

O P I N I O N

LARKIN, Judge

In this case of first impression, appellant challenges his felony conviction under Minn. Stat. § 609.2241, subd. 2(2), the knowing-transfer-of-communicable-disease statute. We conclude that Minn. Stat. § 609.2241, subd. 2, is subject to more than one reasonable interpretation and that the statute is therefore ambiguous. We further conclude that the legislature has not clearly indicated its intent to prevent the spread of communicable disease by criminalizing sexual penetration under circumstances in which one of the participants harbors an infectious agent and discloses that fact to the other participant prior to penetration. We reach this conclusion for several reasons, including that under the state's interpretation of the statute, only men, and not women, would be subject to criminal liability for identical conduct. And because the legislature has not clearly indicated its intent to criminalize the spread of communicable disease during informed sexual penetration, we construe section 609.2241 in appellant's favor under the rule of lenity and reverse his conviction.

FACTS

Appellant Daniel James Rick is HIV-positive. In May 2009, he had a sexual relationship with another man, D.B. Shortly thereafter, D.B. tested positive for HIV. The state charged Rick with attempted first-degree assault under Minn. Stat. § 609.221, subd. 1 (2008), and Minn. Stat. § 609.2241, subd. 2(1), (2) (2008), the knowing-transfer-of-communicable-disease statute. The case was tried to a jury.

At trial, the state's first witness was Margaret Simpson, M.D., the director of the Red Door Clinic, Hennepin County's sexually transmitted disease clinic. She has worked in HIV patient care for more than 20 years. Dr. Simpson explained what HIV is, how it affects the body, how it is treated, and how it progresses to AIDS. Dr. Simpson then testified regarding the transmission of HIV, explaining that HIV is in the bloodstream and that it is transmitted to others by blood, vaginal secretions, and semen. She indicated that the exchange of these bodily fluids is required to transfer HIV to another person. Typical exchanges include needle-sharing, blood transfusions, and fluid exchange during sexual activity. According to Dr. Simpson, the person who is at the highest risk of contracting HIV is someone who receives bodily fluids, e.g., semen, in the rectum after engaging in anal sex.

The state also called D.B. as a witness. D.B. testified that he engaged in sexual activity with Rick on several occasions. On the first occasion, D.B. performed fellatio on Rick and received anal intercourse from Rick. D.B. testified that Rick did not use a condom and that he believed Rick ejaculated inside of him because, after the anal intercourse, he had a bowel movement and observed a white substance on the toilet paper that he used. D.B. testified that

Rick did not inform him that he was HIV positive before, during, or after their first sexual encounter. D.B. testified that he engaged in anal intercourse with Rick on two additional occasions. He believed that Rick ejaculated inside of him on one occasion, and he allowed Rick to ejaculate inside of him on the other occasion. D.B. testified that Rick did not disclose his HIV status on either occasion. D.B. later tested positive for HIV, in October 2009. In November 2009, D.B. once again engaged in sexual activity with Rick. D.B. testified that the two men engaged in anal intercourse and that each man ejaculated inside of the other.

After the state rested its case, Rick argued to the district court that Minn. Stat. § 609.2241, subd. 2(2), which applies to the "transfer of blood, sperm, organs, or tissue, except as deemed necessary for medical research or if disclosed on donor screening forms," does not apply to sexual acts. He also argued that application of subdivision 2(2) to sexual acts would be unconstitutional. Rick therefore argued that the district court should only instruct the jury under subdivision 2(1), which applies to "sexual penetration with another person without having first informed the other person that the person has a communicable disease." The court rejected Rick's argument based on a "plain reading of Subdivision 2(2)." Nevertheless, the district court indicated that it would provide the jury with a special-verdict form specifically asking the jury to determine whether the state had met its burden of proof under subdivision 2(1) and under subdivision 2(2).

After the district court ruled on the jury instructions, Rick testified on his own behalf. He explained that he tested positive for HIV on January 23, 2006, and that another test confirmed this result on February 6, 2006. He was counseled regarding his HIV-status and was advised to always use a condom.

Rick testified that before he engaged in anal intercourse with D.B., he told D.B. that he was HIV positive. He testified that D.B. did not appear to be bothered by this disclosure. Rick also testified that he asked D.B. if he was HIV positive. Rick learned that there was a probability that D.B. was already HIV positive, due to D.B.'s previous, unprotected sexual encounters with other people who are HIV positive. Rick acknowledged that he engaged in anal intercourse with D.B. after this exchange of information.

In closing argument, the state argued that Rick was guilty of violating subdivision 2(1) of the knowing-transfer-of-communicable-disease statute because he engaged in sexual penetration with D.B. without first informing D.B. of his HIV status. The state also argued that Rick was guilty of violating subdivision 2(2) because "[w]henever the male penis is inserted inside an anus or vagina, that is the attempt to transfer a fluid." The jury found Rick not guilty under subdivision 2(1), but guilty under subdivision 2(2), specifically rejecting the state's evidence that Rick did not disclose his HIV status to D.B.

In a posttrial motion for acquittal or new trial, Rick argued that the district court erred in instructing the jury under subdivision 2(2) because that subdivision only applies to medical procedures and that any other interpretation yields absurd results, results in strict liability, is contrary to legislative intent, leads to broad enforcement, is unconstitutionally vague, and violates the right to privacy. The district court denied Rick's motion for judgment of acquittal or new trial. The district court granted Rick a downward dispositional departure from the

presumptive guidelines sentence of 49 months in prison. The district court sentenced Rick to 49 months in prison but stayed execution of the sentence for five years. Rick appeals his conviction.

ISSUE

I. Does Minn. Stat. § 609.2241, subd. 2(2), apply to acts of sexual penetration that result in a transfer of sperm?

ANALYSIS

Rick has asserted several arguments for reversal of his conviction. Some are based on statutory construction. Others are based on constitutional challenges. One of Rick's arguments is that section 609.2241, subdivision 2, is ambiguous and the ambiguity should be resolved in his favor under the rule of lenity.[1] Because we are persuaded that the statute is ambiguous and that application of the rule of lenity requires reversal, we limit our analysis to that issue, without addressing Rick's constitutional challenges. *See Rickert v. State*, 795 N.W.2d 236, 240 (Minn. 2011) ("Generally, we will not address a constitutional issue if there is another basis upon which the case can be decided."); *In re Senty-Haugen*, 583 N.W.2d 266, 269 n.3 (Minn. 1998) ("It is well-settled law that courts should not reach constitutional issues if matters can be resolved otherwise.").

I.

The issue in this case is whether a person violates Minn. Stat. § 609.2241, the knowing-transfer-of-communicable-disease statute, by engaging in an act of sexual penetration that results in a transfer of sperm, even when the person first informed the other participant that he has a communicable disease. Minn. Stat. § 609.2241 provides, in part, that:

> It is a crime, which may be prosecuted under section 609.17, 609.185, 609.19, 609.221, 609.222, 609.223, 609.2231, or 609.224, for a person who knowingly harbors an infectious agent to transfer,[2] if the crime involved:
>
> (1) sexual penetration with another person without having first informed the other person that the person has a communicable disease;
>
> (2) transfer of blood, sperm, organs, or tissue, except as deemed necessary for medical research or if disclosed on donor screening forms; or
>
> (3) sharing of nonsterile syringes or needles for the purpose of injecting drugs.

Minn. Stat. § 609.2241, subd. 2.

Whether Minn. Stat. § 609.2241, subd. 2(2), encompasses an act of sexual penetration that results in a transfer of sperm is a question of first impression. We review issues of statutory interpretation de novo. *State v. Leathers*, 799 N.W.2d 606, 608 (Minn. 2011). When interpreting a statute, our goal is to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2008). The "first step in interpreting a statute is to examine the statutory language to

determine whether the words of the law are clear and free from all ambiguity." *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 72 (Minn. 2012). "[W]hen the legislature's intent is clear from plain and unambiguous statutory language, this court does not engage in any further construction and instead looks to the plain meaning of the statutory language." *State v. Bluhm*, 676 N.W.2d 649, 651 (Minn. 2004) (quotation omitted). "A statute is ambiguous if its language is subject to more than one reasonable interpretation." *State v. Peck*, 773 N.W.2d 768, 772 (Minn. 2009).

Rick interprets subdivision 2(1) as applying to all acts of sexual penetration, including those that result in a transfer of sperm. Under Rick's interpretation, acts of sexual penetration are governed solely by subdivision 2(1), and such acts cannot be a basis for criminal liability under subdivision 2(2). Rick's interpretation finds support in the language of subdivision 2. Subdivision 2 lists three alternative methods of violating section 609.2241. One of those methods specifically and exclusively addresses sexual penetration. *See* Minn. Stat. § 609.2241, subd. 2(1). The other two methods do not mention sexual penetration. *See id.*, subd. 2(2), (3). Based on the way subdivision 2 is written, it is reasonable to interpret subdivision 2(1) as providing the only means of imposing criminal liability for an act of sexual penetration under section 609.2241.

Moreover, Rick's interpretation finds support in the statutory definitions that are applicable under section 609.2241. As used in section 609.2241, " '[s]exual penetration' means any of the acts listed in section 609.341, subdivision 12, when the acts described are committed without the use of a latex or other effective barrier." Minn. Stat. § 609.2241, subd. 1(e). Section 609.341, subdivision 12, defines sexual penetration, in relevant part, as "any of the following acts . . . whether or not emission of semen occurs: (1) sexual intercourse, cunnilingus, fellatio, or anal intercourse." Minn. Stat. § 609.341, subd. 12(1) (2008). Thus, as defined under section 609.2241, sexual penetration includes anal intercourse, without the use of a latex or other effective barrier, even when semen is emitted.[3] From a practical perspective, under that definition, a transfer of sperm is likely. Thus, subdivision 2(1) is reasonably interpreted as applying to acts of sexual penetration that result in a transfer of sperm. But under subdivision 2(1), such conduct is not criminal so long as the infected person discloses that he has a communicable disease before engaging in the sexual penetration. Minn. Stat. § 609.2241, subd. 2(1).

The state argues that subdivision 2(2) "unambiguously applies" to sexual penetration. The state asserts that subparts (1) and (2) of Minn. Stat. § 609.2241, subd. 2, must be read together to give their words plain meaning and effect. The state argues that when the subparts are "[r]ead together with each other and with the definitions provided in subdivision 1, these subparts criminalize two separate sets of acts: (1) unprotected and unwarned sexual penetration of another person without emission of blood, sperm, or other bodily fluid and (2) sexual or blood-borne transmission of . . . sperm . . . regardless of sexual penetration or warning." In sum, the state's position is that "subpart (1) covers only sexual penetration *not* involving transmission of sperm or blood while subpart (2) covers any *sexual* (or blood related) activity *involving* the transmission of sperm or blood."

Thus, we are presented with two reasonable interpretations of Minn. Stat. § 609.2241, subd. 2. Under the state's interpretation, an act of sexual penetration that results in a transfer of sperm is always a basis for criminal liability, regardless of any pre-penetration disclosure of the

presence of a communicable disease. Under Rick's interpretation, an act of sexual penetration that results in a transfer of sperm is not a basis for criminal liability, so long as there was pre-penetration disclosure of the presence of a communicable disease. The statute therefore is ambiguous.

If a statute is ambiguous, the intent of the legislature controls. *See* Minn. Stat. § 645.16 (2008). Intent may be ascertained by considering the mischief to be remedied, the object to be attained, the consequences of a particular interpretation, and the contemporaneous legislative history. *Id.* (3), (4), (6), (7). When ascertaining legislative intent, we presume that the legislature does not intend an unreasonable result or to violate the constitutions of the United States or of this state. Minn. Stat. § 645.17 (1), (3) (2008).

But a rule of strict construction applies to penal statutes, under which all reasonable doubt concerning legislative intent should be resolved in favor of the defendant. *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002). If construction of a statute is uncertain, the statute may not be interpreted to create a criminal offense that the legislature did not contemplate. *Id.* Instead, "[w]hen the court is faced with an ambiguous criminal statute, the ambiguity should be resolved in favor of the criminal defendant in the interest of lenity." *Leathers*, 799 N.W.2d at 608. Under the rule of lenity, an ambiguous criminal law is narrowly construed. *State v. Zeimet*, 696 N.W.2d 791, 794 (Minn. 2005). If doubt exists as to the legislative intent of a penal statute, the "doubt [] must be resolved in favor of the defendant." *State v. Serstock*, 402 N.W.2d 514, 516 (Minn. 1987). In sum, although it is the legislature's prerogative to enact a law criminalizing the knowing and forewarned transfer of a communicable disease from one consenting adult to another during sexual penetration,[4] "[b]efore conduct hitherto innocent can be adjudged to have been criminal, the legislature must have defined the crime, and the act in question must clearly appear to be within the prohibitions or requirements of the statute." *State v. Finch*, 37 Minn. 433, 435, 34 N.W. 904, 905 (1887).

With those principles in mind, we turn our attention to legislative intent. Rick argues that the legislature intended to criminalize three types of conduct under the knowing-transfer statute: sexual penetration, medical procedures, and needle use. Rick argues that "[t]he legislature did not intend for the state to prosecute people like Mr. Rick under [subdivision] 2(2), which only applies to medical procedures." We observe that subdivision 2(2) uses the term "sperm" and not "semen." Minn. Stat. § 609.2241, subd. 2(2). To the extent that "sperm" is associated with medical procedures such as in vitro fertilization, the legislature's word choice, and its references to "medical research" and "donor screening forms," tends to support Rick's argument that the legislature intended subpart (2) to apply only to medical procedures and not to sexual penetration. *Id.*

Rick further argues that with regard to sexual penetration, the legislature "intended for the state to prove that an alleged victim did not know his partner had a communicable disease before engaging in sexual penetration" and that the "legislature sought to criminalize dishonesty with sexual partners about communicable disease, not sexual acts between fully informed, consenting adults." Rick's explanation of legislative intent is based on his review of the legislative history of section 609.2241 and audio recordings of the legislative hearings on the proposed legislation. *See* Minn. Stat. § 645.16 (7) (stating that when ascertaining the intent of the

legislature, a court may consider "the contemporaneous legislative history"). Rick quotes several statements made at the relevant hearings that tend to suggest that his interpretation of subdivision 2 is consistent with legislative intent.

The state argues that "[e]vidence of intent drawn from legislative committee discussion or floor debate is to be treated with caution." The state further argues that the legislature's intent was broader than "merely punishing individuals who lie about their disease status; it indicates an intent to prevent the spread of serious communicable disease."

Although we agree that the legislature generally intended to prevent the spread of serious communicable disease, we find little support for the state's contention that the legislature clearly and unambiguously intended to prevent the spread of disease by criminalizing *informed* sexual penetration between consenting adults. For example, Rick argues that "if the [l]egislature was truly concerned with the spread of disease as a public health issue and enacted [section 609.2241] to protect the public health, it would not have required the state to prove that the accused lied to his victim about his disease before engaging in sexual penetration in order to convict under [subdivision] 2(1)." We find this argument persuasive.

Moreover, we observe that the legislature's failure to include vaginal secretions within subdivision 2(2) suggests that the legislature did not intend subdivision 2(2) to prohibit all behavior that involves the exchange of infectious bodily fluids, including informed sexual penetration. Dr. Simpson testified that HIV is transmitted by the exchange of bodily fluids such as blood, vaginal secretions, and semen and that these fluids are exchanged during sexual activity.[5] Even though HIV can be transmitted from a woman to a man through the woman's vaginal secretions during sexual intercourse, subdivision 2(2) does not reference vaginal secretions. Subdivision 2(2) prohibits the "transfer" of four things: "blood, sperm, organs, or tissue." Minn. Stat. § 609.2241, subd. 2(2). "Vaginal secretions" is noticeably absent from that list—even though the exchange of vaginal secretions during sexual intercourse is a demonstrated method of transferring HIV. If, as the state suggests, the legislature intended to prevent the spread of communicable disease by criminalizing all conduct that results in the exchange of bodily fluids known to spread communicable disease—including informed sexual penetration—it would have included vaginal secretions in subdivision 2(2), thereby preventing the spread of communicable disease from women to men. *See* Minn. Stat. § 645.16 (3), (4) (stating that when ascertaining the intent of the legislature, a court may consider "the mischief to be remedied" and "the object to be attained").

Finally, we consider the consequences of the state's interpretation of subdivision 2. *See* Minn. Stat. § 645.16 (6) (stating that when ascertaining the intent of the legislature, a court may consider "the consequences of a particular interpretation"). Once again, even though HIV can be transmitted from a woman to a man by the woman's vaginal secretions during sexual intercourse, subdivision 2(2) does not refer to vaginal secretions. Therefore, under the state's interpretation of subdivision 2, if a woman informs her male sexual partner that she has a communicable disease, engages in unprotected sexual intercourse with her partner, transfers vaginal secretions during the intercourse, and thereby risks the spread of the communicable disease, her conduct is not criminal. That result follows because the woman complied with the disclosure requirements of

subpart (1), but she did not transfer a prohibited substance under subpart (2). See Minn. Stat. § 609.2241, subd. 2(1), (2).

On the other hand, if a man informs his female sexual partner that he has a communicable disease, engages in unprotected sexual intercourse with his partner, transfers sperm during the intercourse, and thereby risks the spread of the communicable disease, his conduct is criminal. That result follows because, even though the man complied with the disclosure requirements of subpart (1), he transferred a prohibited substance under subpart (2). See Minn. Stat. § 609.2241, subd. 2(1), (2). If both semen and vaginal secretions are demonstrated modes of transmission of an infectious agent that causes a communicable disease, we do not discern an obvious reason why they would not be treated similarly. And we presume the legislature did not intend to enact a law that subjects only men, and not women, to criminal liability for identical conduct. *See* Minn. Stat. § 645.17 (1), (3) (stating presumptions that legislature does not intend unreasonable result or to violate the constitutions of the United States or of this state).

In sum, the record simply does not support the state's argument that the legislature clearly intended to implement a broad public-health policy by criminalizing the spread of communicable disease during informed sexual penetration, especially where imposition of criminal liability under the state's interpretation of the statute depends on whether the infecting party is a man or a woman. And having determined that Minn. Stat. § 609.2241, subd. 2, is ambiguous, we will not forgo application of the rule of lenity in the absence of such a clear statement of legislative intent. *See State v. McGee*, 347 N.W.2d 802, 805-06 (Minn. 1984) (stating that when applying the rule of lenity to the Minnesota Sentencing Guidelines, "commission policy and official commission interpretation should be looked to in resolving ambiguities"). Instead, we resolve all reasonable doubt regarding legislative intent in Rick's favor. *See Colvin*, 645 N.W.2d at 452.

Nor will this court forgo application of the rule of lenity in favor of policy objectives. The parties make compelling arguments regarding the positive and negative policy implications associated with their respective constructions of Minn. Stat. § 609.2241. Resolution of these important policy concerns is a matter for the legislature and not this court. *See LaChapelle v. Mitten*, 607 N.W.2d 151, 159 (Minn. App. 2000) ("Because this court is limited in its function to correcting errors it cannot create public policy."), *review denied* (Minn. May 16, 2000). We limit our review to a determination of whether the legislature has unambiguously made it a crime for a person who has a communicable disease to transfer sperm during sexual penetration, even when the person has first disclosed his communicable-disease status. We conclude that under the language of section 609.2241, the legislature has not done so. And because subdivision 2 is ambiguous, we resolve the ambiguity in Rick's favor and hold that Minn. Stat. § 609.2241, subd. 2(2), does not apply to acts of sexual penetration, including those that result in a transfer of sperm.

D E C I S I O N

Because Minn. Stat. § 609.2241, subd. 2(2), does not unambiguously apply to acts of sexual penetration, and because sexual penetration was the only method of sperm transfer proved by the state at trial, we reverse Rick's conviction under section 609.2241, subd. 2(2).

Reversed.

COLLINS, Judge (dissenting)

In my view, the majority creates ambiguity in Minn. Stat. § 609.2241 (2008), the knowing-transfer-of-communicable-disease statute, by writing words and phrases into the plain language of the statute. Because the statute is unambiguous and applies to appellant's conduct, I respectfully dissent.

Section 609.2241, subdivision 2(1), criminalizes sexual penetration when the infected person fails to inform the other person that he has a communicable disease. Section 609.2241, subdivision 2(2), criminalizes the transfer of sperm. On its face, subdivision 2(2) applies to all activity involving the transfer of sperm by an infected person, except when the transfer of sperm is "deemed necessary for medical research" or "disclosed on donor screening forms." Minn. Stat. § 609.2241, subd. 2(2). Nonetheless, the majority concludes that subdivision 2(2) may reasonably be interpreted as having an exception for a transfer of sperm that occurs during sexual penetration. But nothing in the plain language of subdivision 2(2) supports this interpretation. The legislature did not except from subdivision 2(2) a transfer of sperm that occurs during sexual penetration, and we are not at liberty to write such an exception into the plain language of the statute. *See* Minn. Stat. § 645.16 (2010); *State ex rel. Rockwell v. State Bd. of Educ.*, 213 Minn. 184, 189, 6 N.W.2d 251, 256-57 (1942) (holding that a court may not write words of limitation into an otherwise unambiguous statute under the guise of interpretation).

The majority also concludes that the definition of "sexual penetration" supports appellant's interpretation of section 609.2241. The majority essentially concludes that subdivision 2(1) is rendered superfluous by the plain language of subdivision 2(2) because subdivision 2(1), by definition, includes the transfer of sperm. Again, however, the plain language of the statute does not support this interpretation.

The term "sexual penetration" is defined in two relevant places. First, "sexual penetration" is defined in the knowing transfer of communicable disease statute and "means any of the acts listed in section 609.341, subdivision 12, when the acts described are committed without the use of a latex or other effective barrier." Minn. Stat. § 609.2241, subd. 1(e). Second, "sexual penetration" is defined in the criminal-sexual- conduct statutes and "means any of the following acts committed without the complainant's consent, except in those cases where consent is not a defense, whether or not emission of semen occurs." Minn. Stat. § 609.341, subd. 12 (2008).

Both definitions of "sexual penetration" take similar forms. They each begin by prohibiting the acts listed in section 609.341, subdivision 12.[6] Both definitions then qualify what those acts may or may not entail. The majority writes the qualification "whether or not emission of semen occurs" from the definition of "sexual penetration" as used in the criminal sexual conduct statutes into the definition of "sexual penetration" as used in the knowing-transfer-of-communicable-disease statute. This interpretation is contrary to the plain language of the statute. The knowing-transfer-of-communicable-disease statute utilizes section 609.341,

subdivision 12, for one thing and one thing only: "the acts listed." Minn. Stat. § 609.2241, subd. 1(e) ("'Sexual penetration' means *any of the acts listed* in section 609.341, subdivision 12, when the acts described are committed without the use of a latex or other effective barrier." (emphasis added)). Because the qualification "whether or not emission of semen occurs" is not one of the acts listed in section 609.341, subdivision 12, it has no relevance to the definition of "sexual penetration" as used in the knowing-transfer-of-communicable-disease statute.[7]

Had the legislature intended to define "sexual penetration" as having the same definition given in section 609.341, subdivision 12, it could have done so. *See, e.g.*, Minn. Stat. § 609.066, subd. 1 (2010) ("'Peace officer' has the meaning given in section 626.84, subdivision 1."); Minn. Stat. § 609.223, subd. 2 (2010) (" '[C]hild abuse' has the meaning given it in section 609.185, clause (5)."); Minn. Stat. § 609.2247, subd. 1(b) (2010) (" 'Family or household members' has the meaning given in section 518B.01, subdivision 2."); Minn. Stat. § 325E.38, subd. 5 (2010) ("For purposes of this section, the 'CFC' has the definition given in section 116.70, subdivision 3."); Minn. Stat. § 253B.02, subd. 1a (2010) (" 'Case manager' has the definition given in section 245.462, subdivision 4, for persons with mental illness."). But the legislature did *not* define "sexual penetration" in this way. Thus, under the plain language of the statute, subdivisions 2(1) and 2(2) criminalize different conduct. Subdivision 2(1) criminalizes "sexual penetration." By definition, a violation of subdivision 2(1) is triggered at the moment an infected person engages in one of the acts listed in section 609.341, subdivision 12. It matters not what happens thereafter, even if the infected person subsequently transfers sperm. Subdivision 2(2) criminalizes the transfer of sperm. Not all acts of sexual penetration result in the transfer of sperm, but under the plain language of the statute, those that do may be prosecuted under subdivision 2(2).

Appellant contends that drawing the line at ejaculation is absurd. On the contrary, that is the most logical line to draw, given the legislature's clear purpose in enacting the statute, which is to prevent the spread of communicable diseases. Health-care professionals advise that transferring bodily fluids is required to transfer a communicable disease. Thus, as Dr. Simpson testified in this case, one way to reduce the risk of transferring a communicable disease is simply to not "exchange bodily fluids." The statute accounts for this: subdivision 2(1) allows sexual penetration (defined as a sexual act committed without the use of a condom) provided there is full disclosure of the communicable disease. But once the transfer of bodily fluids occurs, there is a great risk of transferring the communicable disease to others. Indeed, as Dr. Simpson testified in this case, someone who receives bodily fluids, i.e., semen, in the rectum is at the highest risk of receiving a communicable disease from an infected person. The statute accounts for this as well: subdivision 2(2) prohibits behavior which involves the exchange of bodily fluids. Thus, any reasonable person reading this statute would understand that he may engage in unprotected sexual activity as long as he discloses his disease status to the other person, but that he should not transfer sperm to the other person, just as he has been so advised by his health-care professional.

As I view it, the language in section 609.2241 is clear and unambiguous. Subdivision 2(2) prohibits the "transfer of . . . sperm" and, because appellant's conduct involved the "transfer of . . . sperm," he may be prosecuted under this subdivision notwithstanding the fact that his conduct also involved sexual penetration. Moreover, this interpretation of the statute is the only

interpretation that effectuates the intent of the legislature: to prevent the spread of communicable diseases. *See* Minn. Stat. § 645.16 (stating that the goal of statutory interpretation and construction "is to ascertain and effectuate the intention of the legislature"). The legislature criminalized the knowing transfer of communicable diseases, communicable diseases are transferred through the exchange of bodily fluids, and subdivision 2(2) explicitly prohibits the transfer of such fluids, regardless of the type of activity engaged in. To me, there is no other reasonable interpretation of this statute. Therefore, I would address the constitutional arguments raised by appellant.

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[1] Rick raises application of the rule of lenity in a section of his appellate brief concerning the constitutionality of section 609.2241, subdivision 2(2). But at oral argument, Rick clarified that his lenity argument applies both to his statutory-interpretation and constitutional challenges.

[2] "'Transfer' means to engage in behavior that has been demonstrated epidemiologically to be a mode of direct transmission of an infectious agent which causes the communicable disease." Minn. Stat. § 609.2241, subd. 1(d) (2008).

[3] Even the state acknowledged, at oral argument, that the definition of sexual penetration under section 609.2241 is problematic because it "would include with or without ejaculation," recognizing that this qualifier is contained in the criminal-sexual-conduct statute that is referred to in section 609.2241. The state's concession buttresses our conclusion that the words of the statute are not "clear and free from all ambiguity." *Staab*, 813 N.W.2d at 72.

[4] Because it is not necessary to our resolution of this case, we do not address any constitutional questions that such a law might raise.

[5] Dr. Simpson's testimony is consistent with current information from the Centers for Disease Control and Prevention (CDC). *See HIV Transmission*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/hiv/resources/qa/transmission.htm (last updated March 25, 2010). According to the CDC, "it is possible for either partner to become infected with HIV through vaginal sex (intercourse). In fact, it is the most common way the virus is transmitted in much of the world. HIV can be found in the blood, semen [ ], pre-seminal fluid [ ], or vaginal fluid of a person infected with the virus. In women, the lining of the vagina can sometimes tear and possibly allow HIV to enter the body. HIV can also be directly absorbed through the mucous membranes that line the vagina and cervix. In men, HIV can enter the body through the urethra (the opening at the tip of the penis) or through small cuts or open sores on the penis." *Id*.

[6] That list is as follows:

> (1) sexual intercourse, cunnilingus, fellatio, or anal intercourse; or
> (2) any intrusion however slight into the genital or anal openings:
> (i) of the complainant's body by any part of the actor's body or any object used by the actor for this purpose;

> (ii) of the complainant's body by any part of the body of the complainant, by any part of the body of another person, or by any object used by the complainant or another person for this purpose, when effected by a person in a position of authority, or by coercion, or by inducement if the child is under 13 years of age or mentally impaired; or
>
> (iii) of the body of the actor or another person by any part of the body of the complainant or by any object used by the complainant for this purpose, when effected by a person in a position of authority, or by coercion, or by inducement if the child is under 13 years of age or mentally impaired.

Minn. Stat. § 609.341, subd. 12.

[7] The majority nonetheless contends that it is acceptable to write this qualification into the plain language of the statute based, in part, on the similar position taken by the state at oral argument. But we are not compelled to adopt an unreasonable interpretation asserted by the parties at oral argument. See *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (stating that "it is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities" (quotation omitted)); see also *State v. Leathers*, 799 N.W.2d 606, 608 (Minn. 2011) (noting that we review issues of statutory interpretation de novo).

STATE OF MINNESOTA

IN SUPREME COURT

A09-1795

Court of Appeals

Anderson, G. Barry, J.

Dissenting, Stras, Anderson, Paul H.

and Meyer, JJ.

State of Minnesota,

Appellant,

vs.

Filed: August 8, 2012

Office of Appellate Courts

Melissa Jean Crawley,

Respondent.

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S Y L L A B U S

1. Minnesota Statutes § 609.505, subd. 2 (2010), narrowly construed, makes it a crime for a person to inform a peace officer, whose responsibilities include investigating or reporting police misconduct, that another peace officer committed an act of police misconduct, knowing that the information is false.

2. Under our narrowing construction, Minn. Stat. § 609.505, subd. 2, criminalizes defamation, a category of speech not protected by the First Amendment.

3. Because Crawley was convicted under section 609.505, subdivsion 2, before our narrowing construction of the statute, due process considerations entitle her to a new trial.

4. Minnesota Statutes § 609.505, subd. 2, falls within two of the exceptions to the constitutional prohibition against content discrimination set forth in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

5. Under our narrowing construction, Minn. Stat. § 609.505, subd. 2, is constitutional.

Reversed and remanded.

O P I N I O N

ANDERSON, G. Barry, Justice.

The question presented here is whether a Minnesota statute that prohibits knowingly false reports of police misconduct violates the First Amendment because it allows the State to punish some people, but not others, depending on the viewpoint expressed about the police. A jury found Melissa Jean Crawley guilty of violating the challenged law, Minn. Stat. § 609.505, subd. 2 (2010), based on the fact that she informed a police officer that another officer forged her signature, knowing that the information conveyed was false. The court of appeals reversed her conviction after concluding that section 609.505, subdivision 2, is unconstitutional because it criminalizes false speech "critical" of the police but not false speech that favors the police. *State v. Crawley*, 789 N.W.2d 899, 910 (Minn. App. 2010). Because we narrowly construe section 609.505, subdivision 2, to criminalize only defamatory speech not protected by the First Amendment, and because the statute falls within two of the exceptions to the constitutional prohibition against content discrimination in an unprotected category of speech, we reverse the court of appeals' judgment that the statute is unconstitutional. Because Crawley's conviction under section 609.505, subdivision 2, preceded our narrow construction of the statute, due process considerations entitle her to a new trial. We therefore reverse her conviction and remand for a new trial based on our narrowing construction of the statute.

On April 17, 2008, Melissa Jean Crawley went to the Winona County Law Enforcement Center, met with Winona Police Department Sergeant Christopher Nelson, and informed Nelson that a police officer had forged her signature on a medical release form at a Winona hospital. Nelson asked Crawley who she thought had forged her signature. Crawley noted that the form

was signed "Melissa Crawley at 0600 hours," and informed Nelson that "it has to be a police officer that did that. I don't sign things and date them 0600 hours." The release related to treatment Crawley received at the hospital for injuries sustained in an assault that Winona police were investigating, and Crawley informed Nelson she thought her signature was forged by "the police officer who requested the records, whoever was doing the investigation."

Nelson investigated Crawley's report. During his investigation, Nelson spoke to a nurse who told Nelson that she saw Crawley sign the release while Crawley was at the hospital. The State charged Crawley on April 30, 2008, with falsely reporting an act of police misconduct, Minn. Stat. § 609.505, subd. 2(a)(2), and falsely reporting a crime, Minn. Stat. § 609.505, subd. 1 (2010).[1] Subdivision 2, the statutory provision at issue in this appeal, provides:

> (a) Whoever informs, or causes information to be communicated to, a peace officer, whose responsibilities include investigating or reporting police misconduct, that a peace officer, as defined in section 626.84, subdivision 1, paragraph (c), has committed an act of police misconduct, knowing that the information is false, is guilty of a crime and may be sentenced as follows:
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> (1) up to the maximum provided for a misdemeanor if the false information does not allege a criminal act; or
>
> (2) up to the maximum provided for a gross misdemeanor if the false information alleges a criminal act.
>
> (b) The court shall order any person convicted of a violation of this subdivision to make full restitution of all reasonable expenses incurred in the investigation of the false allegation unless the court makes a specific written finding that restitution would be inappropriate under the circumstances. A restitution award may not exceed $3,000.

Crawley moved to dismiss the charge under subdivision 2(a)(2). In her motion to dismiss, Crawley relied wholly on *Chaker v. Crogan*, 428 F.3d 1215 (9th Cir. 2005). In *Chaker*, the United States Court of Appeals for the Ninth Circuit held that a California statute, Cal. Penal. Code § 148.6, criminalizing knowingly false reports of police misconduct violated the First Amendment for targeting "only knowingly false speech *critical* of peace officer conduct during the course of a complaint investigation," but not "[k]nowingly false speech *supportive* of peace officer conduct." 428 F.3d at 1228. The Winona County District Court denied the motion to dismiss and, after a trial, a jury found Crawley guilty of both counts. The district court concluded subdivision 1 was a lesser included offense of subdivision 2(a)(2), convicted Crawley of subdivision 2(a)(2), and sentenced her to 15 days in jail.

Crawley appealed her conviction to the Minnesota Court of Appeals. In a divided decision, the court of appeals reversed Crawley's conviction and remanded the case for sentencing on the subdivision 1 verdict. *Crawley*, 789 N.W.2d at 910. The majority of the court categorized the speech at issue as an "intentional lie" that was not protected by the First Amendment. *Id.* at 903 (emphasis omitted). The majority stated that "even though intentional falsehoods are subject to regulation, the government cannot pick and choose which falsehoods to prohibit so as to criminalize certain false statements but not others based on the content of the

speech or viewpoint of the speaker." *Id.* at 904. The majority concluded that subdivision 2 violates the First Amendment because it criminalizes "false critical information" but not "false exonerating information," contrary to the prohibition on viewpoint discrimination announced in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992). *Crawley*, 789 N.W.2d at 910. The court of appeals dissent, on the other hand, concluded that the statute targeted speech within the unprotected category of defamation, not simple "lies." *Id.* (Harten, J., dissenting) (emphasis omitted). The dissent reasoned that, when viewed as a regulation of defamation, section 609.505, subdivision 2, comes within the exceptions to the *R.A.V.* prohibition on content discrimination. *Crawley*, 789 N.W.2d at 911-12 (Harten J., dissenting). The State sought further review,[2] which we granted.[3]

We begin by noting certain principles of First Amendment law that will frame our discussion of this case. Content-based restrictions of speech[4] are presumptively invalid, *R.A.V.*, 505 U.S. at 382, and ordinarily subject to strict scrutiny, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). But the Supreme Court "ha[s] long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black*, 538 U.S. 343, 358 (2003). As explained recently by the Supreme Court in *United States v. Stevens*:

> From 1791 to the present, . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations. These historic and traditional categories long familiar to the bar . . . include[d] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct . . . .

__ U.S. __, 130 S. Ct. 1577, 1584 (2010) (citations omitted) (internal quotation marks and alterations omitted). Categories of speech such as obscenity and defamation that may be restricted without violating the First Amendment are often called "unprotected speech," *R.A.V.*, 505 U.S. at 406, and can, "consistently with the First Amendment, be regulated because of their constitutionally proscribable content." *Id.* at 383 (emphasis omitted). But these unprotected categories of speech are not "entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *Id.* at 383-84. Thus, the government is prohibited from discriminating on the basis of content within unprotected categories of speech unless one of the exceptions set forth in *R.A.V.* apply. *Id.* at 388-90

Following this framework, in Part I of this opinion, we conclude that section 609.505, subdivision 2, is a content-based regulation of speech. In Part II, we construe section 609.505, subdivision 2, narrowly and conclude that the statute punishes only speech that meets the Minnesota definition of defamation, an unprotected category of speech. In Part III, we evaluate the statute under the constitutional rule that prohibits the State from drawing distinctions based on content within an unprotected category of speech. Finally, in Part IV, we conclude that under our narrowing construction, section 609.505, subdivision 2, is constitutional.

I.

The constitutionality of a statute presents a question of law, which we review de novo. *State v. Cox*, 798 N.W.2d 517, 519 (Minn. 2011); *State v. Melde*, 725 N.W.2d 99, 102 (Minn. 2006). In this case, the court of appeals held that section 609.505, subdivision 2, criminalizes the "intentional lie." *State v. Crawley*, 789 N.W.2d 899, 903 (Minn. App. 2010) (emphasis omitted). The court of appeals determined that the intentional lie is one type of expression that is subject to regulation, since it "fails to 'materially advance[] society's interest in uninhibited, robust, and wide-open debate on public issues.' " *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)). Nevertheless, the court of appeals concluded that the statute is facially unconstitutional because it exposes some speakers but not others to criminal sanction based on the speaker's expressed viewpoint regarding the police. *Id.* at 905 ("The provision challenged in this case punishes only those known falsehoods that are *critical* of police conduct."). Crawley asks us to affirm, arguing that the statute impermissibly discriminates against "a certain class of anti-government speech" while permitting an otherwise "similarly situated class of pro-government speech" to go unpunished. To address Crawley's argument, we must first determine whether section 609.505 is a content-based regulation of speech.

Section 609.505, subdivision 2, criminalizes knowingly false reports of police misconduct. Neither party disputes that the statute regulates speech. But while Crawley contends that the statute impermissibly discriminates on the basis of content, and even viewpoint,[5] the State argues that the statute is a content-neutral time, place, and manner restriction. We conclude that section 609.505, subdivision 2, is a content-based regulation of speech because whether a person may be prosecuted under the statute depends entirely on what the person says. *See Holder v. Humanitarian Law Project*, __ U.S. __, 130 S. Ct. 2705, 2712, 2723-74 (2010) (concluding a law that made it a crime to "knowingly provid[e] material support or resources to a foreign terrorist organization" regulated speech based on its content because whether plaintiffs could speak without sanction "depends on what they say").

II.

Because section 609.505, subdivision 2, is a content-based regulation of speech, we must determine if the statute, as written, criminalizes only unprotected speech.[6] *See United States v. Stevens*, __ U.S. __, 130 S. Ct. 1577, 1584 (2010) (traditional categories of unprotected speech "long familiar to the bar" include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct). If the statute, as written, criminalizes a substantial amount of protected speech in addition to unprotected speech, we must then determine if we can uphold the statute's constitutionality by construing it narrowly to reach only unprotected speech.

To be a constitutional exercise of the police power of a state, a statute that punishes speech must not be overly broad.[7] *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). In general, a statute can be said to be overly broad if it prohibits or chills a substantial amount of protected speech along with unprotected speech. *See Ashcroft v. Free Speech Coal.* 535 U.S. 234, 244 (2002). But when possible, we uphold a law's constitutionality by narrowly construing the law so as to limit its scope to conduct that falls outside First Amendment protection while clearly prohibiting its application to constitutionally protected expression. *See In re Welfare of S.L.J.*, 263 N.W.2d 412, 419 (Minn. 1978) (disorderly conduct statute limited to "fighting words" to preserve constitutionality); *see also New York v. Ferber*, 458 U.S. 747, 769, n.24

(1982) ("If the invalid reach of the law is cured [by narrow judicial construction], there is no longer reason for proscribing the statute's application to unprotected conduct.").

We construe statutes de novo. *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 726 (Minn. 2010). Our primary objective is to ascertain and give effect to the legislature's intent. Minn. Stat. § 645.16 (2010). We follow the directive that "[w]hen 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.* Ambiguity exists only where statutory language is subject to more than one reasonable interpretation. *In re Welfare of J.B.*, 782 N.W.2d 535, 540 (Minn. 2010).

A.

We begin with the language of the statute. Section 609.505, subdivision 2, provides in relevant part:

> (a) Whoever informs, or causes information to be communicated to, a peace officer, whose responsibilities include investigating or reporting police misconduct, that a peace officer, as defined in section 626.84, subdivision 1, paragraph (c), has committed an act of police misconduct, knowing that the information is false, is guilty of a crime and may be sentenced as follows:
>
> (1) up to the maximum provided for a misdemeanor if the false information does not allege a criminal act; or
>
> (2) up to the maximum provided for a gross misdemeanor if the false information alleges a criminal act.

Under the statute, in order for a person to be subject to criminal sanctions, he or she must "know[]" that the information he or she communicates to a peace officer is false. And the statute specifies the "information" that is actionable: "that a peace officer . . . has committed an act of police misconduct."

"[A]ct of police misconduct" has a clear, technical meaning when we turn to other statutes on the same subject, and to applicable rules. *See* Minn. Stat. § 645.08(1) (2010) (requiring that, when Minnesota statutes are construed, "technical words and phrases and such others as have acquired a special meaning . . . are construed according to such special meaning or their definition"). First, Minnesota Rules 6700.2000–.2600 (2011) create procedures and guidelines for the investigation, processing, and resolution of misconduct allegations against licensed peace officers. The rules define "[m]isconduct" as "an act or omission by an employee or appointee of an agency licensed by the board which may result in disciplinary action by the agency or appointing authority." Minn. R. 6700.2000, subp. 3. The model state professional conduct policy, developed by the state Board of Police Officer Standards and Training pursuant to Minn. Stat. § 626.8457, subd. 1, 2, (2010), outlines 35 rules of conduct, including a prohibition against committing a crime while on or off duty. *See* Board of Police Officer Standards and Training, *Professional Conduct of Peace Officers Model Policy* (2011). Considering these provisions, we construe "act of police misconduct" in Minn. Stat. § 609.505,

subd. 2, to mean a specific act or omission that violates a policy or rule of professional conduct, adopted by a law enforcement agency, which would expose a peace officer to discipline.

The use of the identical phrase "a peace officer" in section 609.505, subdivision 2, can apply to situations in which the officer who is the subject of the false report is the same officer who is informed about the report. The statute can also apply to situations where the officer who is the subject of the false report is not the same officer who is informed about the report. A peace officer is identified generally by the reference to the statutory definition of "peace officer" at Minn. Stat. § 626.84, subd. 1(c)(1)(2010).[8] Although the two instances of the phrase "a peace officer" are followed by different descriptive clauses—"whose responsibilities include investigating or reporting police misconduct" and "has committed an act of police misconduct"—there is no requirement that a peace officer being informed of the misconduct must be a different person than the peace officer who is accused of committing misconduct in order for the speech to be criminal.

We thus conclude that section 609.505, subdivision 2, as written, makes it a crime for a person to inform a peace officer, whose responsibilities include investigating or reporting police misconduct, that a peace officer, who may or may not be the same peace officer being so informed, committed an act of police misconduct, knowing that the information conveyed is false.

B.

It is clear that, as written, section 609.505, subdivision 2, is overly broad because it punishes a substantial amount of protected speech in addition to unprotected speech.[9] As explained below, while the statute, as written, criminalizes defamatory speech, which is unprotected under the First Amendment, it also criminalizes a substantial amount of speech that is not defamatory and thus protected speech.

To establish a defamation claim in Minnesota, a plaintiff must prove four elements: he or she must show that the defamatory statement is "communicated to someone other than the plaintiff;" that "the statement is false;" that the statement tends to "harm the plaintiff's reputation" and to lower the plaintiff "in the estimation of the community," *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919-20 (Minn. 2009); and that the recipient of the false statement reasonably understands it to refer to a specific individual, *see Glenn v. Daddy Rocks, Inc.*, 171 F. Supp. 2d 943, 948 (D. Minn. 2001) (stating, under Minnesota law, that the "of and concerning" element requires the plaintiff in a defamation lawsuit to prove that the statement at issue either explicitly referred to the plaintiff or that a reader "by fair implication" would understand that the statement referred to the plaintiff). "If the defamation affects the plaintiff in his business, trade, profession, office or calling, it is defamation per se and thus actionable without any proof of actual damages." *Bahr*, 766 N.W.2d at 920 (citation omitted) (internal quotation marks and alteration omitted).

Because the statute, as written, does not require knowingly false accusations of police misconduct to be communicated to someone other than the plaintiff in order for the speech to be criminal, the statute fails to fulfill the first element of defamation: publication to a third person.

The statute also fails to fulfill the fourth element because it does not require the statement to be "of and concerning" a specific individual. Because the statute does not satisfy all of the elements of defamation, it punishes a substantial amount of protected speech and is therefore facially unconstitutional.

The United States Supreme Court has recognized that the overbreadth doctrine as "strong medicine" that has been employed "sparingly." *Broadrick*, 413 U.S. at 613. "Because of the wide-reaching effects of striking down a statute on its face," the Supreme Court has employed the overbreadth doctrine "with hesitation, and then 'only as a last resort.' " *Ferber*, 458 U.S. at 769 (quoting *Broadrick*, 413 U.S. at 613). "Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick*, 413 U.S. at 613. In *In re Welfare of R.A.V.*, we stated

> [T]he complete invalidation of legislatively adopted laws [the overbreadth doctrine] permits is "strong medicine" that this court does not hastily prescribe. Where the overbreadth of the challenged law is both "real" and "substantial," and where "the words of the [law] simply leave no room for a narrowing construction," "so that in all its applications the [law] creates an unnecessary risk of chilling free speech," this court will completely invalidate it. When possible, however, this court narrowly construes a law subject to facial overbreadth attack so as to limit its scope to conduct that falls outside first amendment protection while clearly prohibiting its application to constitutionally protected expression.

464 N.W.2d 507, 509 (Minn. 1991) (citations omitted) (*rev'd sub nom. R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)).

Although the statute does not satisfy all of the elements of defamation, we can uphold its constitutionality by construing it narrowly to refer only to defamation. The United States Supreme Court generally allows, and even encourages, state supreme courts to sustain the constitutionality of state statutes regulating speech by construing them narrowly to punish only unprotected speech. For example, in *Chaplinsky*, the Supreme Court upheld a New Hampshire statute as constitutional because the highest court of New Hampshire authoritatively construed the statute to reach only "fighting words." 315 U.S. at 573. The statute at issue in *Chaplinsky* provided: "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name . . . ." *Id.* at 569 (internal quotation marks omitted). The state court limited the statute's reach to "fighting words" by holding that the statute only prohibited words that "have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." *Id.* at 573 (citation omitted). In upholding the constitutionality of the statute, the Supreme Court stated:

> We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace.

Id.

The Supreme Court has also deferred to our authoritative construction of statutes regulating speech. In *S.L.J.*, we examined the constitutionality of the disorderly conduct statute, Minn. Stat. § 609.72, subd. 1(3) (1976).[10] 263 N.W.2d 412. We stated that, as written, section 609.72, subdivision 1(3), was both "overly broad and vague" because it did not satisfy the definition of "fighting words":

> Since the statute punishes words alone—"offensive, obscene, or abusive language"—it must be declared unconstitutional as a violation of the First and Fourteenth Amendments unless it only proscribes the use of "fighting words." Section 609.72, subd. 1(3), however, punishes words that merely tend to "arouse alarm, anger, or resentment in others" rather than only words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Since the statute does not satisfy the definition of "fighting words," it is unconstitutional on its face.

S.L.J., 263 N.W.2d at 418-19. But we went on to hold that although section 609.72, subdivision 1(3) "clearly contemplates punishment for speech that is protected under the First and Fourteenth Amendments, we can uphold its constitutionality by construing it narrowly to refer only to 'fighting words.' " *S.L.J.*, 263 N.W.2d at 419. We noted that the Supreme Court has, in fact, "encouraged state supreme courts to sustain the constitutionality of their offensive-speech statutes by construing them narrowly" to punish only unprotected speech. *Id.* at 419 n.5 (collecting cases).

Then in *In re R.A.V.*, 464 N.W.2d at 510, we relied on our previous construction in *S.L.J.* to limit the application of the statute at issue to "fighting words." In *In re R.A.V.*, prior to Supreme Court review, we considered a St. Paul ordinance that made it a misdemeanor to display a symbol, "including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." 464 N.W.2d at 508 (citation omitted). Applying our previous construction in *S.L.J.*, we limited the phrase "arouses anger, alarm, or resentment in others" to punish only unprotected "fighting words," defined as "conduct that itself inflicts injury or tends to incite immediate violence." *In re R.A.V.*, 464 N.W.2d at 510. Although as written, the statute did not satisfy the elements of "fighting words," we narrowly construed it to refer only to "fighting words." *Id.* On appeal, the Supreme Court deferred to our authoritative construction of the ordinance: "In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court. Accordingly, we accept the Minnesota Supreme Court's authoritative statement that the ordinance reaches only those expressions that constitute fighting words, within the meaning of *Chaplinsky*." *R.A.V.*, 505 U.S. at 381 (internal citations omitted).[11]

Based on prior decisions, including *Chaplinsky, S.L.J., and R.A.V.*, we uphold the constitutionality of section 609.505, subdivision 2, by narrowly construing it to punish only "defamation."[12] Accordingly, we hold that to subject a person to criminal sanctions under section 609.505, subdivision 2, the State must prove that the person informed a police officer, whose responsibilities include investigating or reporting police misconduct, that another officer has committed an act of police misconduct, knowing that the information is false. In addition, in order to satisfy the "of and concerning" element of defamation, the State must prove that the

officer receiving the information reasonably understands the information to refer to a specific individual.[13]

Under our narrowing construction, we conclude that the only speech reached by section 609.505, subdivision 2, is defamation.[14] Because under our limiting construction we require the State to prove that a person, in order to be convicted under the statute, has informed a peace officer of an act of police misconduct by *another* officer, the first element of defamation—communication to a third party—is fulfilled. The statute also requires the communicator of the information to know that it is false, fulfilling the second element. Because an act of misconduct is an allegation that affects a peace officer "in his business, trade, profession, office or calling" the requirement for defamation per se is satisfied. *See Bahr*, 766 N.W.2d at 920 (citation omitted) (internal quotation marks omitted). Finally, requiring the State to prove that the officer receiving the information reasonably understands the information to refer to a specific individual satisfies the fourth element.

Moreover, the mental state required for a conviction under section 609.505, subdivision 2, exceeds the actual malice standard for defamation of a public official established by the Supreme Court. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (concluding that a public official may not recover damages for "a defamatory falsehood" absent proof that the statement was made with knowledge it was false, or with reckless disregard of whether the statement was true or false); *Garrison v. Louisiana*, 379 U.S. 64, 77-78 (1964) (applying *New York Times* standard to a criminal defamation statute). Under *New York Times* and *Garrison*, a person is exposed to liability for making a statement that he or she knew to be false, or for making a statement with reckless disregard for its truth. Under section 609.505, subdivision 2, the State must prove that a person *knew* the allegation that a peace officer committed an act of misconduct was false. Thus, section 609.505, subdivision 2, reaches only speech that is defamatory.[15]

C.

Crawley was convicted under section 609.505, subdivision 2, before our narrowing construction of the statute. She is therefore entitled to have a jury determine whether her statements to Winona Police Department Sergeant Christopher Nelson were "of and concerning" another peace officer. *See State v. Vance*, 734 N.W.2d 650, 657 (Minn. 2007) ("[D]ue process . . . 'entitle[s] a criminal defendant to a jury determination that [she] is guilty of every element of the crime with which [s]he is charged, beyond a reasonable doubt.' " (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000)). We, therefore, reverse Crawley's conviction and remand for a new trial based on our narrowing construction of section 609.505, subdivision 2.

III.

Section 609.505, subdivision 2, does not pass constitutional muster based solely upon our construction that narrows the statute to defamation. Rather, we must evaluate the statute under Supreme Court precedent laying out the constitutional prohibition on content discrimination within unprotected categories of speech, and we turn now to that analysis.

A.

Defamation and other categories of speech that may be restricted without violating the First Amendment are often referred to as "not within the area of constitutionally protected speech." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (quoting *Roth v. United States*, 354 U.S. 476, 483 (1957)). These unprotected areas of speech can, "consistently within the First Amendment, be regulated *because of their constitutionally proscribable content.*" *Id.* But these unprotected categories of speech are not "invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *Id.* at 383-84. Thus, the government is prohibited from discriminating on the basis of content within unprotected categories of speech unless one of the exceptions set forth in *R.A.V.* apply. *Id.* at 384, 388-90.

Crawley argues that subdivision 2 is viewpoint-based, in addition to being content-based, because it impermissibly discriminates against "a certain class of anti-government speech" while permitting an otherwise "similarly situated class of pro-government speech" to go unpunished. We disagree and conclude that subdivision 2 is not viewpoint-based. Speech that is supportive of peace officer conduct fails to satisfy the elements of defamation because it does not tend to harm the plaintiff's reputation and to lower the plaintiff in the estimation of the community. If the statute were to reach pro-government speech as well as defamation, the statute would punish a substantial amount of protected speech and be facially unconstitutional as overly broad. Because speech that is supportive of peace officer conduct does not fall within the unprotected category of defamation, the statute does not discriminate on the basis of viewpoint.

B.

We begin with the general rule of *R.A.V.*, which is that content-based distinctions drawn within unprotected categories of speech are unconstitutional. 505 U.S. at 382. But these content-based distinctions may survive constitutional attack if one or more specified exceptions from *R.A.V.* apply. *Id.* at 388-90.

In *R.A.V.*, the Supreme Court considered a St. Paul ordinance that made it a misdemeanor to display a symbol, "including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others *on the basis of* race, color, creed, religion or gender." 505 U.S. at 380 (emphasis added) (citation omitted). The Supreme Court was bound by our construction of the ordinance, limiting the ordinance to reach only "fighting words," *R.A.V.*, 505 U.S. at 381, but nonetheless reversed, concluding that the ordinance was facially unconstitutional. *Id.* at 396.

The focus of the Court's reasoning was on the use of the words "on the basis of race, color, creed, religion or gender," stating that it was "obvious that the symbols which will arouse 'anger, alarm or resentment in others on the basis of race, color, creed, religion or gender' are those symbols that communicate a message of hostility based on one of these characteristics." *Id.* at 393 (citation omitted). The Court explained the constitutional problem:

> Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

Id. at 391. The Court underscored the nature of the constitutional failing of the St. Paul ordinance when it decided *Virginia v. Black*, 538 U.S. 343 (2003). In *Black*, the Court upheld a Virginia statute that banned cross burning "with the intent of intimidating any person or group of persons." 538 U.S. at 348, 362–63 (citation omitted). In contrast with the ordinance in *R.A.V.*, the Virginia law survived scrutiny because it squarely based its prohibition on cross-burning upon intimidation—which the Court held is a type of "true threat" not protected by the First Amendment—but not upon intimidation that results from or is based on any topic, subject, idea, or characteristic. 538 U.S. at 360, 362. It was the inclusion of the "on the basis of" factors that doomed the ordinance in *R.A.V. R.A.V.*, 505 U.S. at 396; *see Black*, 538 U.S. at 362.

By prohibiting "only a particular type of threat"—cross burning—within the broader unprotected category of "true threats," the Virginia cross-burning statute fell within the first of three exceptions to the general prohibition against content-based discrimination within unprotected categories of speech announced in *R.A.V. Black*, 538 U.S. at 362; *R.A.V.*, 505 U.S. at 388-90. The first exception to the *R.A.V.* prohibition can be stated as follows: when the basis for the content discrimination of a subclass "consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *R.A.V.*, 505 U.S. at 388. The second exception to *R.A.V.* states that a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech.' " *R.A.V.*, 505 U.S. at 389 (emphasis omitted) (quoting *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986)). The third *R.A.V.* exception allows distinguishing a subclass even without identifying "any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 390. Together, the exceptions allow content-based distinctions, within unprotected categories of speech, that pose little danger of government action eliminating or driving out ideas or viewpoints from public conversation. *Id.* at 388-90.

Turning to this case, because we construe section 609.505, subdivision 2, to reach defamation, *R.A.V.* controls our analysis here. Subdivision 2 criminalizes a content-based subclass of defamation because it applies to defamation per se that alleges an act of misconduct implicating a peace officer, made to a specific sort of peace officer: one "whose responsibilities include investigating or reporting police misconduct." Rather than criminalizing defamation generally, subdivision 2 prohibits a subset of defamatory speech with certain content—that a peace officer committed an act of misconduct—made to a certain audience—a peace officer whose responsibilities include investigating and reporting police misconduct. Because the statute addresses a subset of defamatory speech, in order to decide whether section 609.505, subdivision

2, is constitutional, we must examine and apply the exceptions announced in *R.A.V.* 505 U.S. at 388-90. We proceed now to those three exceptions.

1.

The first exception identified in *R.A.V.* is the exception that the Court applied in *Black*: when the basis for the content discrimination of a subclass "consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." 505 U.S. at 388. As examples of this exception, in *R.A.V.* the Court described a subclass of obscenity that is prohibited because of its exceptionally prurient nature; threats against the President, which carry "special force" when compared with "true threats" against other persons; and the decision of a state to "choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) *is in its view greater there*." *Id.* at 388-89 (emphasis added) (citation omitted). As contrasting examples of subclasses that would be improper, the Court pointed to an ordinance that prohibited obscene material that contained certain political messages; a prohibition on threats against the President that "mention his policy on aid to inner cities"; and a ban on commercial messages that applies only to commercial advertising "that depicts men in a demeaning fashion." *Id.*

The Court further explained and applied the first *R.A.V.* exception in *Black,* concluding that the Virginia cross-burning statute at issue validly banned a "particularly virulent form of intimidation." 538 U.S. at 363 ("Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence."). In contrast, the St. Paul ordinance in *R.A.V.* that banned the display of a burning cross or other symbols failed because of its "on the basis of" language, through which the ordinance banned "fighting words . . . *that communicate messages* of racial, gender, or religious intolerance." 505 U.S. at 393-94 (emphasis added).

Turning to the issues in this case, we conclude that section 609.505 subdivision 2, fails to meet the first *R.A.V.* exception.

The Supreme Court describes "[t]he legitimate state interest" underlying defamation as "the compensation of individuals for the harm inflicted upon them by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). Here the basis for the content discrimination of the subclass does not "consist [] entirely of the very reason the entire class of speech at issue is proscribable." *R.A.V.*, 505 U.S. at 388. As discussed in Part III(B)(2) of this opinion, the secondary effects of the statute, such as the expending of public resources to investigate false reports of misconduct and the diversion of personnel and resources from legitimate reports of crime or misconduct, provide the primary justification for the statute.

2.

The second exception to *R.A.V.* states that a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is

'*justified* without reference to the content of the . . . speech.' " *R.A.V.*, 505 U.S. at 389 (quoting *Renton*, 475 U.S. at 48).

We note, first, that secondary-effects jurisprudence is an independent and complex area of First Amendment law that, as in *Renton*, most often applies to municipal efforts to regulate, through measures such as zoning ordinances, constitutionally-protected speech that occurs at legal businesses, such as theaters that exhibit pornographic movies or stage nude dancing.[16] *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Renton*, 475 U.S. 41.

Knowingly false accusations of misconduct against a peace officer have substantial secondary effects—they may trigger the expenditure of public resources to conduct investigations of the accusations. Minn. R. 6700.2200 requires the chief law enforcement officer to "establish written procedures for the investigation and resolution of allegations of misconduct against" licensed peace officers. These procedures must "minimally specify" the "misconduct which may result in disciplinary action" and "the process by which complaints will be investigated." Minn. R. 6700.2200. Section 609.505, subdivision 2(b), which was enacted in the same law as subdivision 2(a), indicates that the statute targets recouping the cost of investigations that arise from knowingly false reports of acts of police misconduct. Act of June 2, 2005, ch. 136, § 30, 2005 Minn. Laws 901, 1138. Subdivision 2(b) *requires* a court to order "any person convicted of a violation of [subdivision 2] to make full restitution of all reasonable expenses incurred in the investigation of the false allegation unless the court makes a specific written finding that restitution would be inappropriate under the circumstances. A restitution award may not exceed $3,000."[17]

In addition, other matters requiring police time and attention may suffer as a result of investigations of knowingly false reports of police misconduct. The public resources dedicated to law enforcement agencies are already inadequate in many communities throughout the State to maintain an ideal level of order and safety. The public resources, including wasted police time, expended in investigating knowingly false reports of police misconduct would further exacerbate this problem. Thus, the secondary effects of knowingly false accusations of peace officer misconduct—the expenditure of public resources to conduct investigations and the diversion of those resources away from other matters—justify the regulation " 'without reference to the content of the . . . speech.' " *R.A.V.*, 505 U.S. at 389 (quoting *Renton*, 475 U.S. at 48). We thus conclude that subdivision 2 is valid under the second *R.A.V.* exception.

3.

The third *R.A.V.* exception is a general exception that allows distinguishing a subclass even without identifying "any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 390. The Court's example for the third exception was a prohibition on "only those obscene motion pictures with blue-eyed actresses." *Id.* This exception implicates, here, the question of whether a false statement of fact is, or may be, an "idea."

The Supreme Court has made a distinction between ideas and false statements of fact:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.[18]

Gertz, 418 U.S. at 339-40 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Nevertheless, false statements of fact are "inevitable in free debate" and "a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship." *Id.* at 340. But false statements of fact that can be characterized as defamation can be proscribed without running afoul of the First Amendment.[19] *See New York Times Co.*, 376 U.S. at 279-80 (concluding that a public official may not recover damages for "a defamatory falsehood" absent proof that the statement was made with knowledge it was false, or with reckless disregard of whether the statement was true or false); *Garrison*, 379 U.S. at 77-78 (applying *New York Times* standard to a criminal defamation statute).

Turning to the instant case, section 609.505, subdivision 2, criminalizes knowingly false reports of police misconduct, which are false statements of fact. As discussed in Part I of this opinion, we construe "an act of police misconduct" to mean a specific act or omission which violates a policy or rule of professional conduct, adopted by a law enforcement agency, that would expose a peace officer to discipline. In order for a person to be convicted under section 609.505, subdivision 2, he or she must knowingly report a specific act or omission by a peace officer that may subject the peace officer to disciplinary action. For instance, under the statute, a knowingly false accusation that a peace officer engaged in a specific act of illegal racial profiling may be punishable, whereas a statement that "a peace officer is a scoundrel" would never be criminal. Accordingly, we hold that section 609.505, subdivision 2, does not pose a threat of "official suppression of ideas." *R.A.V.*, 505 U.S. at 390. We thus conclude that our construction of section 609.505, subdivision 2, meets the third R.A.V. exception.

4.

We note here that reliance on *Chaker v. Crogan*, 428 F.3d 1215 (9th Cir. 2005), cited by Crawley and the court of appeals, is misplaced. In *Chaker*, the United States Court of Appeals for the Ninth Circuit decided that a California statute prohibiting false reports of police misconduct impermissibly discriminated on viewpoint because, while the government could prohibit false speech during misconduct investigations, it could not prohibit only false speech that implicated officers. 428 F.3d at 1227 (finding Cal. Penal Code § 148.6 unconstitutional under *R.A.V.*). *Chaker* is unpersuasive for several reasons. Most importantly, while the *Chaker* court applied the *R.A.V.* rule, it did not mention—let alone analyze—the exceptions announced by the Supreme Court. *See Chaker*, 428 F.3d at 1227-28. Moreover, in *Chaker*, the Ninth Circuit defined the unprotected speech at issue to be "knowingly false speech"—a category that has been since questioned by federal appellate courts in more recent decisions. *Id.* at 1228; *see Alvarez*, 132 S. Ct. at 2545 (plurality opinion) ("[F]alsity alone may not suffice to bring the speech outside the First Amendment."); 281 *Care Comm. v. Arneson*, 638 F.3d 621, 633-34 (8th Cir.

2011) (declining to recognize "knowingly false campaign speech" as categorically unprotected in absence of Supreme Court precedent).

IV.

Because we construe section 609.505, subdivision 2, narrowly to reach only defamatory speech not protected by the First Amendment, and because the statute falls within two of the *R.A.V.* exceptions to the constitutional prohibition against content discrimination within a category of unprotected speech, we conclude that section 609.505, subdivision 2 is constitutional. Accordingly, we reverse the judgment of the court of appeals that the statute is unconstitutional. But because Crawley was convicted under section 609.505, subdivision 2, before our narrowing construction of the statute, we reverse her conviction and remand for a new trial.

Reversed and remanded.

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[1] Minnesota Statutes § 609.505, subd. 1, provides:

> Whoever informs a law enforcement officer that a crime has been committed or otherwise provides information to an on-duty peace officer, knowing that the person is a peace officer, regarding the conduct of others, knowing that it is false and intending that the officer shall act in reliance upon it, is guilty of a misdemeanor. A person who is convicted a second or subsequent time under this section is guilty of a gross misdemeanor.

[2] Crawley does not challenge the constitutionality of Minn. Stat. § 609.505, subd. 1. Our review is therefore limited to section 609.505, subdivision 2.

[3] The State and amicus curiae Minnesota Attorney General ask us to limit our review to section 609.505, subdivision 2(a)(2), the subparagraph that addresses knowingly false reports of police misconduct that allege the officer committed a crime, rather than review subdivision 2 as a whole. (Subdivision 2 also includes subparagraph (a)(1), which applies to false reports of police misconduct in which the alleged act of misconduct is not a crime.) Crawley and amicus curiae American Civil Liberties Union of Minnesota oppose a limited review, arguing that the statutory text implicating the First Amendment—"[w]hoever informs, or causes information to be communicated, to a peace officer . . . knowing that the information is false, is guilty of a crime"—is within paragraph 2(a), which is antecedent to and applies to both subparagraphs (a)(1) and (a)(2).

We will not limit our review as requested by the State and amicus Minnesota Attorney General. In the statement of the case Crawley filed in the court of appeals, she identified the legal issue in her appeal as whether the district court erred "in failing to conclude that Minnesota Statutes section 609.505, subdivision 2, constitutes a viewpoint- and content-based restriction that violates the First Amendment." In its brief to the court of appeals, the State argued that

review should be limited to subdivision 2(a)(2), a limit that Crawley opposed as she does here. The court of appeals addressed the entirety of subdivision 2 in its decision. *Crawley*, 789 N.W.2d at 902, 910. When the State sought our review, it identified in its petition that the legal issue here was whether "subdivision 2" violates the First Amendment. Moreover, the Legislature added subdivision 2 in its entirety to section 609.505 in the same law, *see* Act of June 2, 2005, ch. 136, § 30, 2005 Minn. Laws 901, 1138, making its whole text relevant to our review. *See generally Christensen v. Dep't of Conservation, Game & Fish*, 285 Minn. 493, 499-500, 175 N.W.2d 433, 437 (1970) (construing statutory language in context of act that contains it). Finally, we note that the court of appeals has since relied on its decision in *Crawley* to reverse at least one conviction in an order opinion that addresses only subdivision 2. *State v. Farkarlun*, No. A09-2092, Order at 2 (Minn. App. filed Dec. 13, 2010), *rev. stayed* (Minn. Feb. 15, 2011).

Given the record on appeal, the decision of the court of appeals holding subdivision 2 unconstitutional, and the fact that the constitutionality of subdivision 2 is an important question with statewide impact that is likely to recur until we resolve it, *see* Minn. R. Civ. App. P. 117, subd. 2(a), (b), (d), we address the entirety of section 609.505, subdivision 2, in this opinion.

[4] Content-neutral time, place, and manner restrictions, on the other hand, are subject to a less exacting standard of review: "[Reasonable time, place, or manner restrictions] are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

[5] Crawley argues that subdivision 2 discriminates on the basis of viewpoint because it criminalizes false critical information but not false exonerating information. In *Morse v. Frederick*, 551 U.S. 393, 436 (2007) (Stevens, J., dissenting), Justice Stevens noted that "censorship that depends on the viewpoint of the speaker" is "subject to the most rigorous burden of justification":

> Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

(citation omitted) (internal quotation marks omitted). We address whether section 609.505, subdivision discriminates on the basis of viewpoint in Part III.

[6] The court of appeals held that section 609.505, subdivision 2, criminalizes the "intentional lie." *State v. Crawley*, 789 N.W.2d 899, 903 (Minn. App. 2010) (emphasis omitted). The court of appeals further concluded that the intentional lie is subject to regulation because it "is one type of expressive action that fails to 'materially advance[] society's interest in uninhibited, robust, and wide-open debate on public issues.' " *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)). We disagree. Recent decisions by federal appellate

courts have cast serious doubt on the intentional lie or knowingly false speech as a category of unprotected speech. *See United States v. Alvarez*, __ U.S. __, 132 S. Ct. 2537, 2545 (2012) (plurality opinion) ("[F]alsity alone may not suffice to bring the speech outside the First Amendment."); *281 Care Comm. v. Arneson*, 638 F.3d 621, 633-34 (8th Cir. 2011) (declining to recognize "knowingly false campaign speech" as categorically unprotected). We thus decline to recognize the intentional lie or knowingly false speech as a category of unprotected speech.

[7] The Supreme Court has held that although as applied to a particular defendant an ordinance might be neither vague nor overbroad or otherwise invalid, the defendant could raise its vagueness or unconstitutional overbreadth as applied to others, and an ordinance which was facially unconstitutional could not be applied to the defendant unless a satisfactory limiting construction was placed on the ordinance by state courts. *See Plummer v. City of Columbus*, 414 U.S. 2, 3 (1973) (per curiam).

[8]

> "Peace officer" means . . . an employee or an elected or appointed official of a political subdivision or law enforcement agency who is licensed by the [Board of Peace Officer Standards and Training], charged with the prevention and detection of crime and the enforcement of the general criminal laws of the state and who has the full power of arrest, and shall also include the Minnesota State Patrol, agents of the Division of Alcohol and Gambling Enforcement, state conservation officers, Metropolitan Transit police officers, Department of Corrections Fugitive Apprehension Unit officers, and Department of Commerce Insurance Fraud Unit officers, and the statewide coordinator of the Violent Crime Coordinating Council . . . .

Minn. Stat. § 626.84, subd. 1(c) (2010).

[9] A statute may be declared facially unconstitutional as overly broad if it prohibits or chills a substantial amount of protected speech along with unprotected speech. *See Ashcroft*, 535 U.S. at 244. The categories of speech that have been held unprotected by the First Amendment include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *See Stevens*, 130 S. Ct. at 1584. Since section 609.505, subdivision 2, does not criminalize words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," the prohibited speech cannot be categorized as "fighting words." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). We also conclude that the speech prohibited by section 609.505, subdivision 2, cannot be categorized as obscenity, fraud, incitement, or speech integral to criminal conduct. But a large portion of the speech prohibited by section 609.505, subdivision 2, can be categorized as defamation, and our analysis proceeds on this basis.

[10] Minnesota Statutes § 609.72, subd. 1 (1976), provided:

> Whoever does any of the following in a public or private place, knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor:
>
> (1) Engages in brawling or fighting; or

> (2) Disturbs an assembly or meeting, not unlawful in its character; or
>
> (3) Engages in offensive, obscene, or abusive language or in boisterous and noisy conduct tending reasonably to arouse alarm, anger, or resentment in others.

See S.L.J., 263 N.W.2d at 415.

[11] As discussed later in our opinion, although the Supreme Court deferred to our authoritative construction of the St. Paul ordinance to punish only "fighting words," it concluded that the ordinance was facially unconstitutional because the ordinance impermissibly discriminated on the basis of content within the category of "fighting words." *R.A.V.*, 505 U.S. at 391.

[12] Unlike the resolution at issue in *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), and the statute at issue in *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947 (1984), section 609.505, subdivision 2 is susceptible to a narrowing construction. In *Board of Airport Commissioners*, the Supreme Court held that a resolution banning all "First Amendment activities" at Los Angeles International Airport was unconstitutional because it was "substantially overbroad" and "not fairly subject to a limiting construction." 482 U.S. at 570, 577.

In *Secretary of State of Maryland*, the Supreme Court struck down a statute regulating fundraising activities because there was "no core of easily identifiable and constitutionally proscribable conduct that the statute prohibit[ed]." 467 U.S. at 965-66. The Maryland statute at issue prohibited a charitable organization, in connection with any fundraising activity, from paying expenses of more than 25% of the amount raised, but authorized a waiver of this limitation where it would effectively prevent the organization from raising contributions. *Id.* at 950-51 & n.2. In holding that the statute was unconstitutional, the Supreme Court stated:

> Here there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits. . . . The flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud.

Id. at 965-66.

Unlike the resolution in *Board of Airport Commissioners* and the statute in *Secretary of State of Maryland*, section 609.505, subdivision 2 is susceptible to a narrowing construction. Although section 609.505, subdivision 2, as written, contemplates the punishment of protected speech in *some* of its applications, there is a "core of easily identifiable and constitutionally proscribable conduct"—defamation—that the statute prohibits.

[13] The dissent erroneously asserts that we "rely on the canon of constitutional avoidance" to uphold subdivision 2. *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (describing the canon of constitutional avoidance as an "interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts"). We do not

claim that subdivision 2 is ambiguous. Instead, in conformity with our *S.L.J.* and *R.A.V.* decisions, as well as the Supreme Court's guidance that "[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute," *Broadrick*, 413 U.S. at 613, we uphold the statute by limiting its application to speech constituting defamation.

[14] The dissent argues that "subdivision 2 creates a greater risk of chilling protected speech than the now-invalidated Stolen Valor Act" because "[u]nlike the Stolen Valor Act—which regulated "easily verifiable facts"—subdivision 2 regulates false statements that are not easily or objectively verifiable" (citation omitted). But whether or not alleged defamatory statements contain "easily verifiable facts" has never been an element of defamation. *See Bahr*, 766 N.W.2d at 919-20; *Glenn*, 171 F. Supp. 2d at 948. The dissent's distinction between the Stolen Valor Act and subdivision 2 is therefore irrelevant for purposes of our analysis.

[15] The dissent asserts that subdivision 2 "punishes precisely the type of speech that is at the 'very center' of the First Amendment: statements critical of government officials" (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)), and therefore "risks chilling valuable speech" (quoting *Gertz*, 418 U.S. at 342). But because subdivision 2 requires a heightened *mens rea*—knowingly—it does not risk "chilling" valuable speech. *See New York Times Co.*, 376 U.S. at 279; *Garrison*, 379 U.S. at 74. Furthermore, even if a person communicates a false statement about police misconduct in the privacy of one's home, or at a social club, that is later communicated to an officer whose responsibilities include investigating or reporting police misconduct, that person would not be subject to criminal liability unless he made the statements "knowing that the information is false." Subdivision 2 therefore does not risk "chilling" valuable speech.

[16] We also note that the examples the Court gave for the "secondary effects" exception in *R.A.V.* are not consistent with zoning ordinances applied to protected expression. For one example of this exception, the Court said that a state "could, for example, permit all *obscene* live performances except those involving minors." *R.A.V.*, 505 U.S. at 389 (emphasis added). The Court also explained that "since words can in some circumstances violate laws directed not against speech but against conduct," there would be no First Amendment problem if "sexually derogatory 'fighting words' " were the manner in which a person violated the federal law prohibiting sexual discrimination in employment practices, or if a law prohibiting treason were violated with words. *Id.* at 389. The Court summarized: "Where the government does not target conduct *on the basis of* its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 390. What all of these examples have in common is that they are "*justified* without reference to the content of the . . . speech." *Id.* at 389 (citations omitted) (internal quotation marks omitted).

The Supreme Court has held that direct impact on listeners cannot be a "secondary effect" within the meaning of *Renton. R.A.V.*, 505 U.S. at 394. When it applied the secondary-effects exception to the St. Paul ordinance in *R.A.V.*, the Court rejected an argument from the City of St. Paul, which had asserted that the ordinance was intended to "protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against," not to impact "the right of free

expression of the accused." *Id.* (citation omitted) (internal quotation marks omitted). The Court rejected this approach, noting that "emotive impact of speech on its audience" and "[l]isteners' reactions" could not be " 'secondary effects' we referred to in *Renton*." *Id. Renton* dealt with municipal zoning of movie theaters that displayed pornographic films, and an ordinance that prevented such theaters from opening in areas near schools, churches, residential neighborhoods, and the like. *Renton*, 475 U.S. at 44. "The [Renton] ordinance *by its terms* is designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life, not to suppress the expression of unpopular views." *Id.* at 48 (alterations in original omitted) (emphasis added). If the City of Renton had been concerned with restricting the message or content of the pornographic films, the Court explained "it would have tried to close them or restrict their number rather than circumscribe their choice as to location." *Id.*

[17] Testimony at a House committee hearing on the proposed law supports this analysis. A sponsor of the House legislation who was also a state conservation officer gave two examples of investigations from the Minnesota Department of Natural Resources: one investigation required a computer to be analyzed; another required an outside investigator to be assigned the case because of potential conflicts of interest. Each of the investigations cost the agency $5,000. *See* Hearing on H.F. 381, H. Comm. Pub. Safety Policy and Fin., 84th Minn. Leg., Feb. 15, 2005 (audio tape) (statement of Rep. Tony Cornish).

[18] The Ninth Circuit also noted that "laws targeting false statements of *fact* . . . are unlikely to *directly* express or relate to an identifiable viewpoint, meaning that the exception in *R.A.V.* for cases in which 'there is no realistic possibility that official suppression of *ideas* is afoot,' would probably apply." *United States v. Alvarez*, 617 F.3d 1198, 1204 n.4 (9th Cir. 2010) (citation omitted) (quoting *R.A.V.*, 505 U.S. at 390), *aff'd*, __ U.S. __, 132 S. Ct. 2537 (2012).

[19] As we concluded earlier, the speech that is criminalized by section 609.505, subdivision 2, as we have narrowly construed it, falls squarely within the category of defamation.

D I S S E N T

STRAS, Justice (dissenting).

The question presented by this case is whether Minn. Stat. § 609.505, subd. 2 (2010), is a law unconstitutionally "abridging the freedom of speech" under the First Amendment to the United States Constitution. The court concludes that subdivision 2 fully comports with the Constitution, but does so only after rewriting the statute. Construing the statute as written, I would hold that subdivision 2 is an unconstitutional content- and viewpoint-based restriction on core First Amendment speech. Therefore, I respectfully dissent.

I.

In answering the constitutional question presented by this case, the first step is to determine the kind and extent of speech regulated by Minn. Stat. § 609.505, subd. 2. Subdivision 2 states as follows:

> Whoever informs, or causes information to be communicated to, a peace officer, whose responsibilities include investigating or reporting police misconduct, that a peace officer, as defined in section 626.84, subdivision 1, paragraph (c), has committed an act of police misconduct, knowing that the information is false, is guilty of a crime . . . .

Subdivision 2 requires proof of only four elements. In order to obtain a conviction, the State must prove the defendant (1) informed or caused information to be communicated to (2) a peace officer, whose responsibilities include investigating or reporting police misconduct, (3) that a peace officer committed an act of police misconduct, (4) knowing the information communicated is false. The statute is unambiguous, and it has no other requirements.

The court largely agrees with my reading of subdivision 2. Yet, rather than applying the statutory provision as written, the court engrafts two additional elements onto subdivision 2 that are absent from the text of the statute. First, that a defendant must communicate the alleged act of police misconduct to a *different* peace officer than the officer against whom the misconduct is alleged. Second, that the officer receiving the communication must reasonably understand the communication to refer to a specific individual. The court does so to support its conclusion that subdivision 2 criminalizes only common law defamation, an unprotected category of speech under the First Amendment. The court's analysis, however, forces a square peg in a round hole. And the court concedes as much: "the statute, *as written* . . . , fails to fulfill the first element of defamation: publication to a third person. The statute also fails to fulfill the fourth element [of defamation] because it does not require the statement to be 'of and concerning' a specific individual." (Emphasis added).

In adopting a limiting construction, the court appears to rely on the canon of constitutional avoidance, which provides that, "[w]here possible," we "should interpret a statute to preserve its constitutionality." *Hutchinson Tech., Inc. v. Comm'r of Revenue*, 698 N.W.2d 1, 18 (Minn. 2005); *see also United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is

unconstitutional but also grave doubts upon that score."). However, the canon of constitutional avoidance—like other canons of statutory construction—may not be used to circumvent a statute's plain meaning. *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (describing the canon of constitutional avoidance as an "interpretive tool, counseling that *ambiguous* statutory language be construed to avoid serious constitutional doubts" (emphasis added)); *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933) ("[A]voidance of a [constitutional] difficulty will not be pressed to the point of disingenuous evasion.").

In this case, the court applies the canon of constitutional avoidance beyond its permissible scope by giving subdivision 2 an unreasonable construction.[D-1] In fact, by engrafting two additional elements onto the text of subdivision 2, the court effectively rewrites the statute. The court's decision may save the statute's constitutionality, but it does so at the expense of ignoring the actual words used by the Legislature. Under the court's application of the canon of constitutional avoidance, this court now possesses the power to preserve, solely at our discretion, statutes that would otherwise be unconstitutional, simply by adding our own limiting language. The court's approach is inconsistent with the proper, limited role of the judiciary.[D-2] *See Clark v. Martinez*, 543 U.S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions *as a means of choosing between them*."); *United States v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909) (prohibiting the application of the canon of constitutional avoidance when a statute is unambiguous and the unambiguous interpretation results in the unconstitutionality of the statute).

The court justifies its approach by relying primarily on two decisions of the Supreme Court of the United States. In one, the Court examined the constitutionality of a state statute regulating offensive speech, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and in the other, the constitutionality of a municipal ordinance criminalizing bias-motivated expression, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In answering the First Amendment questions presented in each case, the Court deferred to the limiting constructions given to those statutes by each state's highest court. *See R.A.V.*, 505 U.S. at 381; *Chaplinsky*, 315 U.S. at 572. It is therefore true that our construction of a state statute binds the Supreme Court. *See, e.g., Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."). But just because the Supreme Court must defer to our interpretation of a state statute does not mean that we *should* rewrite a criminal statute to avoid a difficult constitutional question.[D-3] To my knowledge, the Court has never suggested that the constitutional avoidance canon permits courts to engraft two new elements onto a criminal offense. To the contrary, the Court has recognized that employing the canon to rewrite an otherwise unambiguous statute constitutes "a serious invasion of the legislative domain." *United States v. Stevens*, __ U.S. __, 130 S. Ct. 1577, 1592 (2010) (citation omitted) (internal quotations marks omitted); *see also United States v. Reese*, 92 U.S. 214, 221 (1875) (recognizing that judicially modifying a statute improperly substitutes "the judicial for the legislative department of the government").

In contrast to the court's approach, I would not rewrite subdivision 2 to fit into common law defamation in order to evade constitutional scrutiny. Instead, I would give the statute its

plain and ordinary meaning. Accordingly, the relevant constitutional question is not whether the State may regulate defamation, but whether the State may broadly criminalize knowingly false statements regarding police misconduct.

II.

Answering that question first requires determining the applicable standard of review. The threshold step in determining the standard of review is to decide whether the statute regulates protected or unprotected speech. If the statute regulates *protected* speech in a non-content-neutral fashion, then the court must subject the statute to strict scrutiny, which requires the State to show a compelling interest justifying the statute and that the statute is narrowly tailored to achieve that compelling interest. *See Brown v. Entm't Merchs. Ass'n*, __ U.S. __, 131 S. Ct. 2729, 2738 (2011); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). On the other hand, if the statute regulates *unprotected* speech in a non-content-neutral fashion—which is the conclusion the court reaches about subdivision 2—then the court must apply the framework of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), to determine the statute's constitutionality.[D-4]

A.

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I. These words are broad, categorical, and arguably absolute. Yet the Supreme Court has recognized that certain categories of speech—including "[incitement]; obscenity; defamation; speech integral to criminal conduct; so-called 'fighting words'; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has a power to prevent"—are unprotected. *United States v. Alvarez*, __ U.S. __, 132 S. Ct. 2537, 2544 (2012) (plurality opinion) (internal citations omitted); *see also United States v. Stevens*, __ U.S. __, 130 S. Ct. 1577, 1584 (2010) (including a similar list). It is undisputed that subdivision 2 does not regulate expression that is "directed to inciting or producing imminent lawless action," *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), is obscene, *Roth v. United States*, 354 U.S. 476, 485 (1957), is integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949), is fraudulent, *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003), qualifies as fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), is a true threat, *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam), or is speech presenting a grave and imminent threat, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). Nor, as I conclude above, is subdivision 2 limited solely to the regulation of defamatory speech.

1.

Subdivision 2 criminalizes knowingly false statements of fact. *See State v. Crawley*, 789 N.W.2d 899, 903 (Minn. App. 2010) (referring to the category of speech criminalized by subdivision 2 as the "intentional lie" (emphasis omitted)). The threshold constitutional question is whether such statements are categorically unprotected under the First Amendment.

In *United States v. Alvarez*, the Supreme Court answered that question, concluding that knowing falsehoods are not a separate category of unprotected speech. Specifically, the question in *Alvarez* was the constitutionality of the Stolen Valor Act, 18 U.S.C. § 704(b), (c) (2006), which made it a crime for a person to falsely claim the receipt of a military decoration or medal. *Alvarez*, 132 S. Ct. at 2542 (plurality opinion). No opinion garnered a majority of the Court, but six Justices agreed that knowing falsehoods are not categorically unprotected. *See id.* at 2546-47; *see also id.* at 2553 (Breyer, J., concurring). The plurality (authored by Justice Kennedy and joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor) squarely "reject[ed] the notion that false speech should be in a general category that is presumptively unprotected." *Id.* at 2546-47 (plurality opinion). Although the Court had occasionally suggested that false statements of fact are entitled to lesser First Amendment protection, the plurality rejected a categorical approach because "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation." *Id.* at 2544. To hold otherwise, the plurality explained, "would endorse government authority to compile a list of subjects about which false statements are punishable." *Id.* at 2547. Such broad and far-reaching governmental power would have "no clear limiting principle," resembling Oceania's Ministry of Truth from George Orwell's *1984*. *Id.*

The opinion concurring in the judgment (authored by Justice Breyer and joined by Justice Kagan), which is arguably the binding rationale of *Alvarez*, largely eschewed a "strict categorical analysis." *Id.* at 2551 (Breyer, J., concurring); *see also Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." (citation omitted) (internal quotation marks omitted)). Yet the reasoning of Justice Breyer's concurring opinion makes clear that knowing falsehoods are entitled to First Amendment protection. Indeed, the concurrence explained that the Court's prior statements on the lesser First Amendment value of false statements could not be read to "mean no protection at all" because such statements can "serve useful human objectives" in social, public, technical, philosophical, and scientific contexts. *Alvarez*, 132 S. Ct. at 2553 (internal quotation marks omitted). Moreover, in applying intermediate scrutiny rather than the *R.A.V.* framework applicable to categorically unprotected speech, the concurrence necessarily concluded that false statements are entitled to some First Amendment protection. *See id.* at 2552 (applying intermediate scrutiny in reviewing the Stolen Valor Act); *see also infra* n.6 (discussing Justice Breyer's application of intermediate scrutiny in *Alvarez*).

Accordingly, we are bound by the conclusion of a majority of Justices in *Alvarez* that knowing falsehoods are not categorically unprotected under the First Amendment. *See State v. Brist*, 812 N.W.2d 51, 54 (Minn. 2012) ("Supreme Court precedent on matters of federal law, including the interpretation and application of the United States Constitution, is binding on this court.").

2.

Moreover, even if some of the speech criminalized by Minn. Stat. § 609.505, subd. 2, is constitutionally unprotected, the statute nevertheless risks First Amendment harm because it has

a "chilling effect" on other, more valuable protected speech. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986); *see also Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring) (discussing the need for "breathing room" for more valuable speech); *id.* at 2563 (Alito, J., dissenting) (explaining the need to "extend a measure of strategic protection [to unprotected speech] in order to ensure sufficient breathing space for protected speech" (citation omitted) (internal quotation marks omitted)). Put differently, subdivision 2 regulates within an area of expression that lies at the heart of the First Amendment—speech that is critical of the government—and fails to provide sufficient " 'breathing space' " to core, protected expression. *Hepps*, 475 U.S. at 778 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964)).

As the Supreme Court has recognized, an animating principle of the First Amendment was to limit the government's ability to suppress dissident and minority expression. *See Roth*, 354 U.S. at 484; *see also Citizens United v. FEC*, __ U.S. __, 130 S. Ct. 876, 898 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints."). Substantial historical evidence also supports the view that, at the time the First Amendment was ratified, the public understood the freedom of speech and the freedom of the press to encompass an unrestrained right of free discussion of government affairs and public officials. *See* Zechariah Chafee, *Free Speech in the United States* 19 (1941); *see also Burson v. Freeman*, 504 U.S. 191, 196 (1992) (plurality opinion) (" '[T]here is practically universal agreement that a major purpose of th[e] [First] Amendment was to protect the free discussion of governmental affairs.' " (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966))).

Commentators have observed that the First Amendment was responsive in part to the law of seditious libel, as developed by the English Court of the Star Chamber, which made it a crime for citizens to publish or make comments that were critical of the King. *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 11.1.1, at 923 (3d ed. 2006); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 342-43 (1868). Truth was not a defense to a charge of seditious libel. In fact, the more truth associated with the libelous statement, the greater the libel and the harm to the government. *See* John E. Nowak & Ronald Rotunda, *Constitutional Law* § 16.3, at 1266 (8th ed. 2010). Based on that history, one commentator observed that the First Amendment was ratified in part "to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America." Chafee, *supra*, at 21; *see also Beauharnais v. Illinois*, 343 U.S. 250, 272 (1952) (Black, J., dissenting) ("[T]he First Amendment repudiated seditious libel for this country.").

Professor Chafee's account of the First Amendment is arguably in tension with the Sedition Act of 1798, which Congress passed just 7 years after the First Amendment's ratification. The Sedition Act criminalized the publication of "false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame . . . or to bring them . . . into contempt or disrepute." Sedition Act of 1798, ch. 74, 1 Stat. 596. Following its passage, however, the Act met widespread, vociferous opposition—including by Thomas Jefferson and First Amendment drafter James Madison—"reflect[ing] a broad consensus that the

Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *New York Times Co.*, 376 U.S. at 276; *see also id.* at 274 (noting that the *Virginia Resolutions of 1798*, drafted by Madison and adopted by the General Assembly of Virginia, protested that the Act was "levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right" (citation omitted)). Indeed, Congress later repaid fines levied in the prosecution of the Sedition Act on the ground that the Act itself was unconstitutional. *See id.* at 276 (citing Act of July 4, 1840, c. 45, 6 Stat. 802, accompanied by H.R. Rep. No. 86, 26th Cong., 1st Sess. (1840)). The Court therefore declared in *New York Times* that, "[a]lthough the Sedition Act was never tested in [the Supreme] Court, the attack upon its validity has carried the day in the court of history." *Id.*

The point of the foregoing discussion is not to conclusively resolve the historical debate over the primary motivation animating the ratification of the First Amendment, but rather to highlight the indisputable principle that criticism of the government—and those who run it—is at the core of the First Amendment. The Supreme Court has recognized as much: "[c]riticism of government is at the very center of the constitutionally protected area of free discussion[, and] [c]riticism of those responsible for government operations must be free, lest criticism of government itself be penalized." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). Put differently, "[i]t is vital to our form of government that citizens and press alike be free to discuss and, if they see fit, impugn the motives of public officials." *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1305 (8th Cir. 1986); *see also Snyder v. Phelps*, __ U.S. __, 131 S. Ct. 1207, 1215 (2011) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." (citation omitted)). The statute at issue here, Minn. Stat. § 609.505, subd. 2, punishes precisely the type of speech that is at the "very center" of the First Amendment: statements critical of government officials—in this case, peace officers. *Cf. Gray v. Udevitz*, 656 F.2d 588, 591 (10th Cir. 1981) (collecting cases holding that police officers are considered public officials under the First Amendment).

Because subdivision 2 regulates within an area of core First Amendment expression, it risks chilling valuable speech unless it provides sufficient breathing space to prevent self-censorship or suppression. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). That is, in order to prevent the chilling of truthful speech on a matter of public concern—police misconduct—subdivision 2 must contain either "[e]xacting proof requirements," *Madigan*, 538 U.S. at 620, such as a heightened *mens rea*, *New York Times Co.*, 376 U.S. 279-80; a showing of specific harm, *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 539-41 (1987); or a showing of materiality, *United States v. Lepowitch*, 318 U.S. 702, 704 (1943); or contain some other "limitations of context" that help to ensure that "the statute does not allow its threat of . . . criminal punishment to roam at large," *Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring). Given the breadth and practical application of subdivision 2, the statute fails to provide sufficient breathing space for core First Amendment speech.

The key risk posed by subdivision 2—a criminal statute—is that legitimate, truthful criticism of public officials will be suppressed for fear of unwarranted prosecution. "[E]ven minor punishments can chill protected speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234,

244 (2002); *see also Alexander v. United States*, 509 U.S. 544, 565 (1993) (Kennedy, J., dissenting) ("There can be little doubt that regulation and punishment of certain classes of unprotected speech have implications for other speech that is close to the proscribed line, speech which is entitled to the protections of the First Amendment."). Thus, the mere threat of prosecution may cause some would-be government critics to refrain from voicing their legitimate criticism, "because of doubt whether [their statement] can be proved in court or fear of the expense of having to do so." *New York Times Co.*, 376 U.S. at 279; *cf.* James Madison, *Report on the Virginia Resolutions, Jan. 1800*, in 5 *The Founders' Constitution* 141, 145 (Philip B. Kurland & Ralph Lerner, eds., 1987) ("[W]here simple and naked facts alone are in question, there is sufficient difficulty in some cases, and sufficient trouble and vexation in all, of meeting a prosecution from the Government with the full and formal proof necessary in a court of law.").

To be sure, subdivision 2's scienter requirement—that the defendant must *know* that the statement of police misconduct is false—reduces the risk that a person would suppress a truthful report of police misconduct. But, as the Court has explained, the threat of criminal punishment creates a strong chilling effect, and a scienter requirement may be an insufficient "antidote to the inducement to . . . self-censorship." *Gertz*, 418 U.S. at 342. In *Alvarez*, for example, the Court invalidated the Stolen Valor Act on the ground that there was an unreasonable risk of chilling that was "not completely eliminated" by the statute's heightened scienter requirement because "a speaker might still be worried about being *prosecuted* for a careless false statement." *Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring) (emphasis in original); *see also id.* at 2545 (plurality opinion) (explaining that the First Amendment scienter requirement in defamation and fraud cases should not be relied upon to restrict speech; instead, it "exists to allow more speech, not less"). In particular, Justice Breyer was concerned about the potentially far-reaching applicability of the Stolen Valor Act, which criminalized lies told in "family, social, or other private contexts," where little harm would result, and in political contexts, where the risk of selective prosecution is high. *Id.* at 2555 (Breyer, J., concurring).

Like the Stolen Valor Act, the potentially far-reaching applicability of Minn. Stat. § 609.505, subd. 2, risks significant First Amendment harm. Subdivision 2 authorizes punishment not only for a person who directly reports police misconduct, but also for a person who "*causes information* [that a peace officer has committed an act of police misconduct] *to be communicated* to[] a peace officer." Minn. Stat. § 609.505, subd. 2 (emphasis added). The required mental state for "caus[ing] information to be communicated to a peace officer" is not before us in this case, but a privately spoken or written statement could subject a speaker to punishment under subdivision 2. In fact, under subdivision 2's plain language, a speaker who merely repeats a false report of police misconduct told to him by a friend or family member may be subject to prosecution if the statement is later communicated to an officer whose responsibilities include investigating or reporting police misconduct. Put differently, subdivision 2 does not require a person to communicate the false statement directly to a peace officer, which means that a false statement about police misconduct made on the news, in the privacy of one's home, or at a social club could potentially subject a person to criminal liability. Subdivision 2 is therefore similar to the type of far-reaching regulation of speech that the Court struck down in *Alvarez*. *See Alvarez*, 132 S. Ct. at 2547 (plurality opinion) ("The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings."); *id.* at 2555 (Breyer, J.,

concurring) (explaining that the Stolen Valor Act did not have "limiting features" and criminalized speech in a wide variety of contexts).

In fact, subdivision 2 creates a greater risk of chilling protected speech than the now-invalidated Stolen Valor Act. Unlike the Stolen Valor Act—which regulated "easily verifiable facts," *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring)—subdivision 2 regulates false statements that are not easily or objectively verifiable. The government can readily verify the receipt (or non-receipt) of a military honor or medal, but resolution of a report of police misconduct is far more complicated and will often turn on disputed and objectively *un*verifiable facts. In such circumstances, subdivision 2 may cause some complainants to decide that the risk associated with criminal prosecution outweighs the benefit of speaking out against police misconduct, particularly when a speaker justifiably is concerned about "being *prosecuted* for a careless false statement, even if he does not have the intent required to render him liable." *Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring). Thus, subdivision 2 creates exactly the type of chilling effect that the First Amendment guards against: a danger that a potential complainant will suppress a statement, believed to be true, for fear that the statement will later be proven false. *See Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring) (noting that a criminal statute must provide sufficient breathing space by "reducing an honest speaker's fear that he may accidentally incur liability for speaking").

Finally, even the three dissenters in *Alvarez* (Justices Alito, Scalia, and Thomas) likely would be skeptical about the constitutionality of subdivision 2. The *Alvarez* dissent recognized that "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." *Alvarez*, 132 S. Ct. at 2564 (Alito, J., dissenting). For instance, laws regulating false expression near the core of the First Amendment—such as "false statements about philosophy, religion, history, the social sciences, the arts, and *other matters of public concern*"—would threaten the chilling "of other, valuable speech." *Id.* (emphasis added). Hence, even the *Alvarez* dissenters acknowledged that false speech on matters of public concern is entitled to protection under the First Amendment.[D-5] *Id.*; *cf. Snyder*, 131 S. Ct. at 1219 (setting aside a jury verdict finding tort liability because the hate speech at issue was on a matter of public concern). As the dissent succinctly stated, "it is perilous to permit the state to be the arbiter of truth." *Alvarez*, 132 S. Ct. at 2564.

B.

Having concluded that the speech regulated by Minn. Stat. § 609.505, subd. 2, is entitled to protection under the First Amendment, the next question is whether subdivision 2 is a content-based or content-neutral regulation of speech. If the statute regulates speech based on content, then it is unconstitutional unless it survives strict scrutiny. *See Playboy Entm't Grp., Inc.*, 529 U.S. at 813. On the other hand, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny." *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

A statute regulates content when it "singles out speech of a particular content and seeks to prevent its dissemination completely." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976). I agree with the court that subdivision 2 is a content-based

restriction on speech because criminality under the statute turns *entirely* on the subject matter of the speech. The statute does not apply broadly across all categories of false speech. To the contrary, it singles out false speech with particular content: false speech communicating police misconduct. *See also Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002) (stating that a provision in the Minnesota Code of Judicial Conduct preventing judicial candidates from announcing their views on disputed political or legal issues was a content-based restriction on speech). For that reason, I would conclude that subdivision 2 is a content-based restriction on speech, and is therefore unconstitutional unless it can survive strict scrutiny.[D-6] *See Playboy Entm't Grp., Inc.*, 529 U.S. at 813.

III.

Strict scrutiny is a "demanding standard." *Brown v. Entm't Merchs. Ass'n*, __ U.S. __, 131 S. Ct. 2729, 2738 (2011). It requires the State to prove that Minn. Stat. § 609.505, subd. 2, furthers a compelling government interest and is narrowly tailored to achieve that interest. *See Citizens United v. FEC*, __ U.S. __, 130 S. Ct. 876, 898 (2010).

The State asserts that the sole purpose of subdivision 2 is to "reduce the adverse impact on public safety occasioned by the diversion of investigative resources away from resolving legitimate complaints." The State's interest in preventing the unwarranted expenditure or diversion of valuable public resources is no doubt a legitimate government interest, and may even be a compelling one. But even assuming that subdivision 2 furthers a compelling government interest, the statute is unconstitutional because it is not narrowly tailored. *See R.A.V. v. City of St. Paul*, 505 U.S 377, 395-96 (1992).

First, subdivision 2 is unnecessarily *overinclusive*; the statute punishes more speech than is necessary to further the statute's asserted justification. *See Brown*, 131 S. Ct. at 2741 (invalidating an overinclusive statute as incompatible with the narrow tailoring required by strict scrutiny). Subdivision 2 proscribes *all* knowingly false statements about police misconduct that are communicated to a peace officer whose responsibilities include investigating complaints of police misconduct, even if the statements at issue do not cause the government to divert *any* investigative resources. Put differently, even those false police reports that are palpably untrue, and do not result in an expenditure of public resources, would violate subdivision 2. As a result, subdivision 2 is an overly broad solution for a narrow problem.

Second, subdivision 2 is unnecessarily *underinclusive*. *See id.* at 2740 (invalidating a statute regulating violent video games based in part on its underinclusiveness); *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) ("[A] regulation of speech may be impermissibly underinclusive." (emphasis omitted)). Subdivision 2 is underinclusive because it singles out and discriminates against speech based on its content. When the government passes a statute discriminating against the content of certain types of speech, the existence of less discriminatory alternatives "undercut[s] significantly" the government's defense of the statute. *Boos v. Barry*, 485 U.S. 312, 329 (1988).

Accordingly, subdivision 2 can survive strict scrutiny only if the State is able to demonstrate that its decision to single out false statements regarding the misconduct of peace

officers is "actually necessary" to achieve its asserted compelling interest. *Brown*, 131 S. Ct. at 2738. The State argues that "[t]here are no adequate content-neutral alternatives for deterring the needless diversion of public safety resources to investigate false reports of crimes." The State's argument falls flat because less discriminatory alternatives already exist. For example, Minn. Stat. § 609.505, subd. 1 (2010), prohibits any person from providing knowingly false information regarding the conduct of others to an on-duty peace officer.[D-7] The State does not explain how subdivision 1—which prohibits *all* knowingly false statements regarding the conduct of others—fails to advance the State's interest in preventing the unwarranted diversion of investigative resources. Further, the State could reduce the adverse impact of false reports of police misconduct by punishing truly defamatory statements under Minn. Stat. § 609.765 (2010), which *actually* prohibits criminal defamation. The "dispositive question" here is whether subdivision 2's content discrimination is "reasonably necessary to achieve [the State's] compelling interests; it plainly is not." *R.A.V.*, 505 U.S. at 395. A statute "not limited to the [dis]favored topics . . . would have precisely the same beneficial effect." *Id.* at 396. Therefore, subdivision 2 fails strict scrutiny.

IV.

Subdivision 2 also fails to survive constitutional scrutiny because, as the court of appeals observed, the statute is viewpoint discriminatory. *State v. Crawley*, 789 N.W.2d 899, 905 (Minn. App. 2010). Indeed, regardless of whether subdivision 2 regulates defamatory speech or knowingly false statements, subdivision 2 is unconstitutional because it is viewpoint discriminatory. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (explaining that viewpoint discrimination "is presumed impermissible"); *see also Morse v. Frederick*, 551 U.S. 393, 436 (2007) (Stevens, J., dissenting) (stating that a viewpoint-discriminatory statute is "presumed to be unconstitutional" (citation omitted)).

Viewpoint discrimination represents a particularly "egregious" form of content discrimination. *Gen. Media Commc'ns, Inc. v. Cohen*, 131 F.3d 273, 281 (2d Cir. 1997) (citation omitted) (internal quotation marks omitted). When the government engages in viewpoint discrimination, it goes beyond mere regulation of subject matter and regulates speech based upon the particular position or point of view that the speaker wishes to express. *See Rosenberger*, 515 U.S. at 829. Absent compelling justification, punishment of speech based on the speaker's point of view is a "blatant" violation of the First Amendment. *Id.* at 829; *see Morse*, 551 U.S. at 436 (Stevens J., dissenting) ("[C]ensorship that depends on the viewpoint of the speaker[] is subject to the most rigorous burden of justification.").

An example of viewpoint-discriminatory speech regulation occurred in *R.A.V.*, a case in which the Supreme Court examined a St. Paul ordinance that targeted "fighting words" that the speaker "knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. at 380. The Court held the ordinance facially unconstitutional because it was content- and viewpoint-discriminatory, and it failed strict scrutiny. In explaining why the challenged law was viewpoint discriminatory, the Court observed that the law selectively targeted certain racist, sexist, and anti-religious speech for punishment, and, as a result, effectively handicapped only one side of the debate on any number of issues:

> [Under the St. Paul ordinance,] "fighting words" that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.

Id. at 391-92.

The Supreme Court once again addressed viewpoint discrimination in *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). In that case, the Court examined the constitutionality of a New York law permitting school boards to adopt regulations for the use of school property when school was not in session. *Lamb's Chapel*, 508 U.S. at 386. Pursuant to the law, the school board authorized the use of school property for social, civic, or recreational uses, and for use by political organizations. *Id.* at 387. However, the board prohibited use of the school by a religious congregation to show a six-part film series containing lectures by Dr. James Dobson regarding Christianity and family values. *Id.* at 387-88. Even though the school board's policy applied to all religious organizations equally, the Court struck down the statute as viewpoint discriminatory. *Id.* at 393. The problem, the Court stated, was that other films about family values shown by social, civic, or recreational organizations were permissible under the school board's policy, while the policy prohibited a religious organization's attempt to show a film on that topic. *Id.* at 393-94. The policy therefore discriminated against religious viewpoints about family values. The rule that emerged from the case was that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Id.* at 394 (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

Like the law in *R.A.V.* and the policy in *Lamb's Chapel*, subdivision 2 discriminates based on the viewpoint of the speaker. It criminalizes speech on only one side of the issue of police misconduct: speech that is critical of the conduct of peace officers. It does not prohibit, for example, a third party from using false statements of fact to impugn the credibility of a complainant alleging police misconduct. Nor does it prohibit any party from communicating a false statement of fact supportive of a peace officer. To state the issue differently, the State can prosecute an individual under subdivision 2 for holding a sign at a rally against police brutality falsely stating that "Officer A beat me when I was arrested," but the State cannot prosecute someone for holding a sign falsely stating that "Officer A has never beat a suspect." Subdivision 2 targets for punishment only those false statements of fact that are critical of the government; false factual statements seeking to absolve a police officer or impugn a complainant "would seemingly be useable *ad libitum*." *R.A.V.*, 505 U.S. at 391; *see also Chaker v. Crogan*, 428 F.3d 1215, 1228 (9th Cir. 2005) (concluding that a similar, but more narrowly drafted, California

statute criminalizing false complaints about police misconduct constituted unconstitutional viewpoint discrimination).

Subdivision 2, however, is even more problematic than the laws at issue in *R.A.V.* and *Lamb's Chapel* because the particular viewpoint that is targeted here by subdivision 2—anti-government sentiment—is at the core of the First Amendment. *See supra* Part II.A.2. Individuals who report police misconduct are directly criticizing a public official, typically in relation to the exercise of the official's public functions and duties. "Suspicion that viewpoint discrimination is afoot is at its zenith when the speech restricted is speech critical of the government," *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004), because "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures," *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944). *Cf. Schacht v. United States*, 398 U.S. 58, 63 (1970) ("[A statute] which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment.").

Some commentators have observed that viewpoint-discriminatory laws regulating protected areas of speech may be per se unconstitutional. 1 Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* § 3.11, at 3-14 to 3-15 (3d ed. 1996). Indeed, in *Rosenberger*, 515 U.S. 819, and *Lamb's Chapel*, 508 U.S. 384, the Court invalidated viewpoint-discriminatory laws without analyzing them under strict scrutiny. In this case, I do not need to resolve the uncertainty over the applicable test for viewpoint-discriminatory laws because subdivision 2 fails strict scrutiny. *See supra* Part III. And, in any event, regardless of whether viewpoint-discriminatory laws must be analyzed under strict scrutiny, it is undisputed that viewpoint discrimination targeting criticism of the government is exactly the type of regulation of speech that the First Amendment forbids. Accordingly, subdivision 2 is unconstitutional regardless of the test applicable to viewpoint-discriminatory laws under the First Amendment.

V.

For the foregoing reasons, I would hold that subdivision 2 is an unconstitutional restriction on the freedom of speech under the First Amendment to the United States Constitution. I would therefore affirm the court of appeals, reverse Crawley's conviction under Minn. Stat. § 609.505, subd. 2, and remand to the district court for conviction and sentencing on the lesser-included offense under Minn. Stat. § 609.505, subd. 1.

ANDERSON, Paul H. (dissenting).

I join in the dissent of Justice Stras.

MEYER, Justice (dissenting).

I join in the dissent of Justice Stras.

[D-1] Even if the court is correct that it is not applying the canon of constitutional avoidance to subdivision 2—a dubious proposition at best—the line of overbreadth cases relied upon by the court still require a limiting construction to be a *reasonable* interpretation of the challenged statute. *See United States v. Stevens*, __ U.S. __, 130 S. Ct. 1577, 1591-92 (2010) ("[T]his court may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction. We will not rewrite a . . . law to conform it to constitutional requirements." (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 (1997) (citations omitted) (internal quotation marks omitted)).

[D-2] The statute upheld by the court in this case scarcely resembles the statute enacted by the Legislature. The court evaluates the following statute for its compliance with the First Amendment (with the court's alterations in italics):

> Whoever informs, or causes information to be communicated to, a peace officer, whose responsibilities include investigating or reporting police misconduct, that *another* peace officer, as defined in section 626.84, subdivision 1, paragraph (c), *who can be reasonably identified from the statement or its context*, has committed an act of police misconduct, knowing that the information is false, is guilty of a crime . . . .

It is one thing to apply a narrowing construction to an ambiguous statute with two or more reasonable constructions to avoid constitutional infirmity. But it is entirely another to add language to an otherwise unambiguous statute. As we have stated, "[i]t is the exclusive province of the [L]egislature to define by statute what acts shall constitute a crime." *State v. Forsman*, 260 N.W.2d 160, 164 (Minn. 1977). It is our job, by contrast, to interpret, apply, and evaluate criminal statutes as written, not to rewrite legislative enactments to ensure that they survive constitutional scrutiny. *See Premier Bank v. Becker Dev., LLC*, 785 N.W.2d 753, 760 (Minn. 2010) (stating that our rules of construction prohibit us from adding words to a statute that "are purposely omitted or inadvertently overlooked").

[D-3] The court's opinion leaves the reader with the impression that the Supreme Court has encouraged state courts to rewrite statutes to survive First Amendment scrutiny. Nothing could be further from the truth. In fact, the Supreme Court has disapproved of the practice by state courts of *rewriting*, rather than adopting a *reasonable* limiting construction of, statutes and ordinances. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969); *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216-17 & nn.14-15 (1975) (concluding that an ordinance was overbroad under the First Amendment because it was not "susceptible of a narrowing construction" and any limiting construction would require "a rewriting of the ordinance"). In one such case, the Supreme Court recognized a state court's interpretation of an ordinance as binding, as it had to, but was less than convinced by the unduly narrow interpretation given to the ordinance by the Supreme Court of Alabama:

> It is said, however, that no matter how constitutionally invalid the Birmingham ordinance may have been as it was written, nonetheless the authoritative construction that has now been given it by the Supreme Court of Alabama has so modified and narrowed its terms as to render it constitutionally acceptable. . . . [I]n affirming the petitioner's conviction in the present case, the Supreme Court

> of Alabama performed a remarkable job of plastic surgery upon the face of the ordinance.

Shuttlesworth, 394 U.S. at 153.

[D-4] The other possibilities are that the statute regulates protected or unprotected speech in a content-neutral fashion, but neither the court nor the parties assert that subdivision 2 is content-neutral.

[D-5] The strongest argument in favor of the constitutionality of subdivision 2 is that each of the opinions in *Alvarez* discussed the potential constitutionality of 18 U.S.C. § 1001 (2006), which makes it a federal crime to "knowingly and willfully" make any "materially false, fictitious, or fraudulent statement or representation" in "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." *See Alvarez*, 132 S. Ct. at 2546 (plurality opinion); *id.* at 2554 (Breyer, J., concurring); *id.* at 2561 (Alito, J., dissenting). Even so, *Alvarez's* discussion of section 1001 does not lead to a conclusion that subdivision 2 is constitutional. First, none of the opinions explicitly assert that section 1001 passes First Amendment scrutiny. Rather, Justice Breyer's concurring opinion in *Alvarez* merely discusses the differences between section 1001 and the Stolen Valor Act, while the plurality and the dissent assume the constitutionality of section 1001 in analyzing the constitutionality of the Stolen Valor Act. *See Alvarez*, 132 S. Ct. at 2540 (plurality opinion) (rejecting the government's argument that the assumed constitutionality of section 1001 "lead[s] to the broader proposition that false statements are unprotected when made to any person, at any time, in any context"); *id.* at 2554 (Breyer, J., concurring) (discussing the fact that section 1001 includes harm and materiality requirements, but rendering no opinion on the constitutionality of the statute); *id.* at 2561 (Alito, J., dissenting) (assuming the constitutionality of section 1001). Second, by its terms, section 1001 is limited to "materially" false and fraudulent statements, a limitation not present in subdivision 2. *See id.* at 2554 (Breyer, J., concurring) (discussing the importance of section 1001's materiality requirement). Third, section 1001 regulates all materially false and fraudulent statements made to government officials within the jurisdiction of the executive, legislative, or judicial branches, no matter the content of the statements or the viewpoints that are expressed. In contrast, subdivision 2 is a content-based regulation that is viewpoint discriminatory. *See infra* Parts II.B, IV.

[D-6] In *Alvarez*, Justice Breyer analyzed the Stolen Valor Act under "intermediate scrutiny," which requires a proportional "fit" between the government interest and the restriction on speech. 132 S. Ct. at 2551-52 (Breyer, J., concurring) (citing *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). Nonetheless, intermediate scrutiny is inapplicable here for two reasons. First, Justice Breyer's concurring opinion does not reject the Court's longstanding rule that content-based regulations of speech are subject to strict scrutiny. Instead, Justice Breyer applied intermediate scrutiny without addressing whether the Stolen Valor Act was a content-discriminatory regulation. Even if Justice Breyer's opinion had garnered the five or more votes necessary to constitute a majority opinion, we cannot assume that the Court has abandoned its content-based/content-neutral distinction *sub silentio*. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (explaining that the Supreme Court does not implicitly overrule its own precedent, even when five or more Justices express doubt about the precedent in question). Second, Justice Breyer, like the dissenters in *Alvarez*, concluded that when the government

regulates speech at or near the core of the First Amendment, strict scrutiny applies to laws regulating false statements. *See Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring). As I conclude in Part II.A.2, *supra*, subdivision 2 regulates speech at the core of the First Amendment: statements critical of the government and government officials.

[D-7] Minn. Stat. § 609.505, subd. 1, provides:

> Whoever informs a law enforcement officer that a crime has been committed or otherwise provides information to an on-duty peace officer, knowing that the person is a peace officer, regarding the conduct of others, knowing that it is false and intending that the officer shall act in reliance upon it, is guilty of a misdemeanor. A person who is convicted a second or subsequent time under this section is guilty of a gross misdemeanor.

STATE OF MINNESOTA

IN COURT OF APPEALS

A10-1872

State of Minnesota,

Respondent,

vs.

Danny Lee Hormann,

Appellant.

Filed October 19, 2011

Affirmed in part and reversed in part

Minge, Judge

Douglas County District Court

File No. 21-CR-10-656

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Chad Larson, Douglas County Attorney, Timothy S. Hochsprung, Assistant County Attorney, Alexandria, Minnesota (for respondent)

Ted Sampsell-Jones, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Minge, Judge; and Ross, Judge.

S Y L L A B U S

A person with a presumptive marital-property interest and unfiled title interest in a motor vehicle may not be criminally prosecuted under Minn. Stat. § 626A.35, subd.1 (2008) for installing a tracking device on that vehicle.

O P I N I O N

MINGE, Judge

Appellant Danny Lee Hormann challenges his convictions of stalking his then-wife and installing a mobile tracking device on her car, arguing (1) the district court abused its discretion by admitting testimonial evidence of his misconduct during the marriage; (2) the district court erred by denying his motion for acquittal and submitting the tracking-device charge to the jury; and (3) the stalking statute is unconstitutionally vague. We affirm the evidentiary ruling and the conviction of stalking, reverse the tracking-device conviction, and do not reach the constitutional question.

FACTS

Appellant was charged with one count of stalking his then-wife, M.H., in violation of Minn. Stat. § 609.749, subd. 2(a)(2) (2008), and one count of using a tracking device on the vehicle driven by his wife in violation of Minn. Stat. § 626A.35, subd. 1. He pleaded not guilty, and the matter was set for a jury trial.

Prior to trial, appellant moved to exclude evidence of any prior bad acts. On the morning of trial, the prosecutor indicated that M.H. would testify about the general nature of her marriage to appellant, a January 18, 2010 incident of domestic abuse, and repeated occasions on which appellant had confronted her after locating her in places where he had no reason to know she would be. The prosecutor informed the court that this evidence was necessary to demonstrate that appellant knew that placing the tracking device on the car his wife was driving would cause her to feel frightened, which is one element of the stalking charge. The district court denied appellant's motion, ruling that both the general testimony about the marriage and the January 18 specific-incident testimony were admissible but cautioning the state that the testimony should be presented "without getting into a lot of specifics" and "delv[ing] into the prejudicial area where it would be cut off at some point by the Court."

The criminal complaint alleged that the stalking occurred "[o]n or about March 10, 2010." The record indicates that on March 10, 2010, M.H. had a mechanic inspect her car to look for a tracking device. The mechanic testified that he found a tracking device magnetically attached to the underside of the car. M.H. told police that she believed appellant had been monitoring her car's movements and that, in late 2009, appellant had unexpectedly located her in a lakeside cabin, entered the cabin, and physically attacked an acquaintance of M.H.'s. The complaint stated that the police determined that appellant had purchased the device and that the car was registered to M.H.

During the trial, when asked to describe her marriage to appellant, M.H. testified:

> [The marriage] hasn't been good for 20 years. . . . [T]here was a lot of fighting. . . . [T]here was a lot of violence. [Appellant] gets very angry. He's very controlling. He controlled all the money. . . . Literally every door in the house had a hole in it or had been broken. There [were] holes in the wall. He drove his pickup through the back end of the garage because he was mad. I've had several bruises. I've been pushed up against the wall many times. I've been pushed, I've been shoved, I've been spit on, I've had beer poured on me. . . . [Appellant] didn't like me to have friends. He didn't like my family.

Appellant's counsel objected repeatedly to the general testimony but was sustained only once with respect to a nonresponsive answer.

M.H. also testified that, after she informed appellant in October 2008 that she intended to divorce him, appellant became obsessive about her whereabouts, acquaintances, and social life. She testified that appellant put spyware on her cell phone that allowed him to intercept her text messages and that he also seemed to know everything she was doing on the family computer. She said she became specifically concerned about a tracking device on her car because appellant always seemed to know where she had been after she used the car.

M.H. gave detailed additional testimony about four prior incidents. Three occurred in late 2009. In one, appellant demonstrated a knowledge of where she had been after she returned home; in the other two, he confronted her in locations (including a remote lakeside cabin she thought was unknown to appellant) without her having told him where she would be. On each occasion, M.H. had been using the car on which the tracking device was later found. M.H. also testified about the January 18, 2010, incident. It involved domestic violence and precipitated her moving out of the family home. She stated that after she moved out, appellant continued to send her text messages, commenting on where she had been and otherwise indicating that he was still monitoring her movements. The mechanic testified that the tracking device was activated when he found it.

At the close of evidence, appellant moved for an acquittal on the tracking-device charge, asserting that his marital interest in the car exempted him from prosecution. *See* Minn. Stat. § 626A.35, subd. 2a (2008) (providing that the prohibition does not apply when the owner has consented to the attachment of the tracking device). He also pointed out that M.H. signed the title to the car over to him prior to March 10, 2010, to facilitate its sale. The prosecution countered that the transfer was never completed by filing documents with the state Department of Public Safety. Appellant argued that the ownership of the vehicle was a question of law that should not be submitted to the jury. The district court denied the motion and submitted the ownership question to the jury, which found appellant guilty on both the stalking and the tracking-device counts. The district court sentenced appellant on the stalking conviction; it imposed no sentence on the tracking-device conviction. This appeal follows.

ISSUES

I. Did the district court abuse its discretion by admitting evidence of bad acts committed by appellant during his marriage to M.H.?

II. Did the district court err by denying appellant's motion for acquittal on the tracking-device charge?

III. Is the stalking statute unconstitutionally vague?

ANALYSIS

I. BAD ACTS EVIDENCE

Appellant challenges the district court's decision to admit M.H.'s (1) general testimony about her marriage to appellant; and (2) specific testimony about the four incidents that occurred in late 2009 and in January 2010. Appellant argues that, to the extent M.H.'s testimony describes alleged prior bad acts, it is character evidence under Minn. R. Evid. 404(b) and inadmissible because the state failed to comply with applicable procedural safeguards prior to introducing the evidence.

We will not reverse the district court's admission of evidence of other crimes or bad acts unless appellant can demonstrate both an abuse of discretion and that he was prejudiced by the erroneous admission. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). If the district court has erred in admitting evidence, we must determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994).

The record reflects that the parties and the court reviewed four bases for admitting M.H.'s general and specific testimony about appellant's marriage to M.H.: as *Spreigl* evidence, under Minn. R. Evid 404(b); as res gestae (immediate-episode) evidence; as evidence of similar conduct against the victim of domestic abuse under Minn. Stat. § 634.20 (2008); or as relationship evidence governed by Minnesota caselaw. We address each in turn.

A. Spreigl/404(b) Evidence

Evidence of prior bad acts generally "is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). This is also known as *Spreigl* evidence. *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). But *Spreigl* evidence may be admissible to prove other things, such as motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident, provided the state complies with various procedural safeguards. Minn. R. Evid. 404(b); *Spreigl*, 272 Minn. at 491, 139 N.W.2d at 169.

Appellant vigorously argues that the challenged evidence was not admissible as *Spreigl* evidence. We agree. Indeed, the record indicates that the state did not offer the testimony concerning the marriage as *Spreigl* or rule 404(b) evidence. Rather, as we observe below, the testimony bore directly on the history of the existing relationship between appellant and M.H. and was relevant in demonstrating, as was the state's burden, that appellant had reason to know that attaching the tracking device to M.H.'s car would cause her to feel fearful. Such relationship evidence is not *Spreigl* evidence. *See State v. Kanniainen*, 367 N.W.2d 104, 106 (Minn. App. 1985) (rejecting *Spreigl* argument when evidence "bore directly on the history of the relationship existing between the two parties"). Accordingly, the *Spreigl* analysis is inapposite, and we turn to other bases for admission of the evidence.

B. Immediate-episode evidence

The state argues that the contested evidence is so "intimately tied" to the stalking offense that it needed to be offered as substantive proof of the crime. The state is essentially contending that evidence of M.H. and appellant's marriage relates to offenses or misconduct that were a part of the "immediate episode for which [a] defendant is being tried." *See State v. Townsend*, 546 N.W.2d 292, 296 (Minn. 1996) (quotation omitted).

"Immediate-episode evidence is a narrow exception to the general character evidence rule." *State v. Riddley*, 776 N.W.2d 419, 425 (Minn. 2009). Other-crime evidence is admissible as immediate-episode evidence "where two or more offenses are linked together in point of time or circumstances so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the res gestae." *State v. Wofford*, 262 Minn. 112, 118, 114 N.W.2d 267, 271 (1962); *see Riddley*, 776 N.W.2d at 425−26. "Res gestae" means "[t]he events at issue, or other events contemporaneous with them." *Black's Law Dictionary* 1423 (9th ed. 2009).

Appellant argues that the *Riddley* decision transformed *Wofford*'s disjunctive admissibility test for immediate-episode evidence into a conjunctive test that requires a close relationship on both *Wofford* issues—time *and* causation. We recognize that the *Riddley* court deemed prior-misconduct evidence to be inadmissible despite first finding "a close connection in terms of the time . . . between the charged offenses and" the challenged bad-acts evidence because it later found that "there is not a close causal connection" between them. *Riddley*, 776 N.W.2d at 426−27. But we do not read *Riddley* as having conflated the two *Wofford* issues in all cases. We read it for the narrower proposition that a close causal relationship must exist between the evidence of prior bad acts and the charged offense to admit the bad-acts evidence under the immediate-episode-evidence exception; that is, a temporal link alone may be insufficient. The cases cited approvingly by *Riddley* to explain the exception affirmed the admissibility of evidence because the evidence had a strong causal link to the offense even without a close temporal link. *See, e.g., State v. Martin*, 293 Minn. 116, 128, 197 N.W.2d 219, 226−27 (1972) (affirming admissibility of evidence of victim's threats to report older crimes because the evidence established a motive for the charged killing); *see also State v. Nunn*, 561 N.W.2d 902, 908 (Minn. 1997) (affirming admissibility of evidence of kidnapping that occurred one month before the charged killing because the kidnapping evidence established the motive for the killing).

Here, the criminal complaint specifies that the stalking offense occurred "[o]n or about March 10, 2010." [1] In light of this narrow time frame, appellant argues that his prior acts, some of which took place years previously, are not properly part of the substantive proof of the stalking offense.

However, some of appellant's prior bad acts were admitted to establish that his former wife became fearful on discovering that he was monitoring her movements with the tracking device. Although this evidence might not demonstrate a close temporal link establishing admissibility under the immediate-episode-evidence doctrine, it is consistent with the causal-link alternative basis for admissibility because victim fear is an element of the stalking offense. *See* Minn. Stat. § 609.749, subds. 1, 2 (2008) (defining stalking to require proof that the victim felt

"frightened, threatened, oppressed, persecuted, or intimidated"). We need not consider the doctrine further here, however, because the concept of relationship evidence, discussed below, is a broader basis for admissibility of the same evidence.

C. Minn. Stat. § 634.20

The district court stated that evidence of the January 18, 2010 episode of domestic violence was likely admissible under Minn. Stat. § 634.20, which provides for the admission of "[e]vidence of similar conduct by the accused against the victim of domestic abuse," subject to certain procedural safeguards. To trigger admissibility under section 634.20, the currently charged offense must constitute domestic abuse. *See State v. McCurry*, 770 N.W.2d 553, 561 (Minn. App. 2009) (stating that "[w]hen the state cannot charge a crime constituting domestic abuse, it may not use § 634.20 to circumvent rules of admissibility for prior bad acts"), *review denied* (Minn. Oct. 28, 2009).

Here, the state does not contend that stalking or the illegal use of a tracking device, as defined, constitutes domestic abuse and does not claim that section 634.20 is applicable. *See* Minn. Stat. §§ 518B.01, subd. 2(a) (2008) (defining domestic abuse); 609.749, subd. 2(a)(2) (defining stalking); 626A.35, subd. 1 (defining illegal use of a tracking device). Thus, we do not further consider the use of section 634.20 as a basis for admitting evidence of the general relationship or the four specific incidents, including the January 18, 2010 domestic-abuse incident.

D. Relationship Evidence

Minnesota caselaw has established a basis for the introduction of relationship evidence independent of Minn. Stat. § 634.20, the *Spreigl*/rule 404(b) process, or the immediate-episode doctrine: "[R]elationship evidence is character evidence that may be offered to show the strained relationship between the accused and the victim . . . [and] such evidence has further probative value when it serves to place the incident for which appellant was charged into proper context." *State v. Loving*, 775 N.W.2d 872, 880 (Minn. 2009) (quotations omitted). Minnesota precedent requires neither an underlying domestic-abuse charge nor *Spreigl*/rule 404(b) notice prior to the introduction of relationship evidence. *State v. Boyce*, 284 Minn. 242, 260, 170 N.W.2d 104, 115 (1969). Courts typically apply parts of the *Spreigl*/rule 404(b) analysis to relationship evidence. *See State v. Bauer*, 598 N.W.2d 352, 364 (Minn. 1999) (applying *Spreigl* analysis to relationship evidence by requiring the district court to find by clear and convincing evidence that defendant committed the prior act and that the probative value of the evidence outweighs any unfair prejudice).

1. Four Incidents

Based upon our careful review of the transcript, we conclude that M.H.'s testimony concerning the four specific incidents that occurred after October 2008 was admissible as relationship evidence as the doctrine has developed in Minnesota caselaw. The state's express purpose in offering the evidence was to establish the context in which the charged conduct occurred, appellant's intent, and the effect his actions had on his wife. M.H.'s testimony about

the four incidents also meets the balancing requirements of rule 404. Appellant argues that the January 18 incident was not proved by clear and convincing evidence. But that standard can be met by the uncorroborated testimony of a single witness, even if that witness is the victim of the charged offense. *State v. Kennedy*, 585 N.W.2d 385, 389−90 (Minn. 1998). Because M.H. testified about the incident, the standard is met.

Appellant also contends that the testimony about the four specific incidents was not relevant and was unfairly prejudicial. But, the four specific incidents were clearly probative of appellant's strained relationship with M.H. and assisted the jury in determining why appellant engaged in the charged stalking conduct. *See Loving*, 775 N.W.2d at 880 (concluding that relationship evidence helped establish, among other things, motive and intent). The stalking charge cannot be proved without some context: in order to demonstrate why M.H. was frightened when she suspected (and then confirmed) that appellant was tracking her, the state needed to establish that appellant had given her reason to fear him through his repeated confrontational and intimidating conduct and his use of technology to monitor her movements and communications. We conclude that the evidence of the four specific incidents was admissible to demonstrate appellant's relationship with M.H.

2. General Marital Relationship

We next address the admissibility of M.H.'s more general statements about the marriage. Those statements, which were made early in M.H.'s testimony (and over repeated objections that the testimony was narrative and nonresponsive), lack the specificity of the testimony concerning the four discrete incidents. Instead, the statements broadly, and without temporal specificity, characterize appellant as someone who, during a 20-year marriage, broke every door in the couple's home, broke the walls, physically abused his wife, engaged in "a lot of violence," was "very angry," "controlled all the money," didn't want his wife to have friends, and continually subjected her to humiliating, controlling, and hostile behavior.

In short, although M.H.'s general testimony about the marriage was only marginally relevant to establish why she believed her car was being tracked by appellant, the testimony—which is devoid of detail as to time, place, circumstance, or context—presents the risk of leading the jury to improperly conclude that appellant has a propensity to behave criminally and should now be convicted, and punished, for the charged offenses. *See Old Chief v. United States*, 519 U.S. 172, 180−82, 117 S. Ct. 644, 650−51 (1997) (noting that evidence of prior bad acts often "rais[es] the odds" that defendant committed the charged act "or, worse," promotes "preventive conviction" regardless of guilt, and noting that "the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance" (quotation omitted)); *Townsend*, 546 N.W.2d at 296 (holding prolonged description of prior-crimes evidence prejudicial because it improperly "inflame[d] the jury"); *State v. DeWald*, 464 N.W.2d 500, 504 (Minn. 1991) (noting that preventing a "conviction based on prejudice created by evidence of other crimes is the underlying purpose" for excluding such evidence).

This open-ended and narrative testimony had little apparent value other than to establish appellant's bad character and was unnecessary in light of the specific-incident testimony. We

note that the district court warned the state that if too much relationship or res gestae evidence was being introduced, the court would "cut [it] off." However, the cutoff did not occur. The limited probative value of the evidence was outweighed by the danger of prejudice and the district court abused its discretion by admitting it. We therefore must proceed to determine whether the error was harmless. *State v. Vanhouse*, 634 N.W.2d 715, 721 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001).

E. Harmless Error

The erroneous admission of evidence is "harmless if there is no reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Robinson*, 718 N.W.2d 400, 407 (Minn. 2006) (quotations omitted). It is true that the disputed testimony was prejudicial because it showed appellant to be an angry, violent, and controlling person without furnishing relevant and probative details that could assist the jury in its role as finder of fact; but reversal requires more.

Our review of the record leads us to conclude that the wrongfully admitted evidence did not unfairly lead to appellant's conviction. The proof is overwhelming that appellant had a tracking device affixed to the car which M.H. drove and that he confronted her in an intimidating manner with the information gathered from this device. The admission of testimony concerning the four specific incidents after October 2008 reasonably assisted the jury to determine that appellant knew his conduct would cause his wife to feel threatened. The properly admitted evidence of M.H.'s acquaintances concerning the impact of appellant's surveillance on M.H. reinforced her testimony. Although the general relationship evidence was excessive, on this record we find no reasonable possibility that it significantly affected the verdict. We conclude that the district court's erroneous admission of that evidence was, therefore, harmless.

II. TRACKING-DEVICE CHARGE

The second issue is whether appellant's use of the tracking device violated Minn. Stat. § 626A.35, subd. 1. [2] Appellant argues that the district court erred in denying his motion for acquittal (made at the close of the state's case) because he had an ownership interest in the car sufficient to preclude conviction under Minn. Stat. § 626A.35, subd. 1. That statute, by its terms, does not apply "where the consent of the owner of the [vehicle] to which the mobile tracking device is to be attached has been obtained." Minn. Stat. § 626A.35, subd. 2a. Appellant contends that because he had a marital interest in the vehicle and because its title had been signed over to him, he could not be prosecuted under the statute. Appellant further contends that because the ownership of the vehicle was a question of law, the district court erred by submitting it to the jury.

"A motion for acquittal is procedurally equivalent to a motion for a directed verdict." *State v. Slaughter*, 691 N.W.2d 70, 74 (Minn. 2005). The standard for deciding a motion for a directed verdict is whether, after viewing the evidence and all resulting inferences in the light most favorable to the state, the evidence is sufficient to present a fact question for the jury. *Id*. at 74−75. A district court may grant a motion to acquit if it determines that the state's evidence,

when viewed in the light most favorable to the state, is insufficient to sustain a conviction. *See id*. at 75.

The question of vehicle ownership may be a question of fact for the jury. *See Holland Am. Ins. Co. v. Baker*, 272 Minn. 473, 478−79, 139 N.W.2d 476, 480 (1965) (reviewing district court's finding as to ownership in the context of an insurance dispute involving the policy's "temporary substitute vehicle" clause and the applicable principles with respect to giving an automobile as a gift). But here, appellant's conviction turns on the meaning of the word "owner" in the tracking-device statute; appellant's right, as a spouse, to the car; and the affect of M.H.'s signing title to the car over to him. Statutory interpretation and the determination of whether an asset is marital property are questions of law that we review de novo. *See Savig v. First Nat'l Bank of Omaha*, 781 N.W.2d 335, 338 (Minn. 2010) (statutory interpretation); *Gottsacker v. Gottsacker*, 664 N.W.2d 848, 852 (Minn. 2003) (marital property).

A. The Statutes

The term the "owner" is not defined in the tracking-device statute, which refers only to "the owner of the object to which the mobile tracking device is to be attached." Minn. Stat. § 626A.35, subd. 2a. We conclude that, as used in this provision, the term "owner" is ambiguous because, by placing the definite article "the" prior to the term "owner," the statute appears to exclude the possibility that an "object" may have more than one owner and because it does not address what property interest constitutes ownership for the purposes of the statute. *See Tuma v. Comm'r of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986) (stating that "[a] statute is ambiguous when it can be given more than one reasonable interpretation"). When a statutory provision is ambiguous, we follow the canons of statutory construction to ascertain the statute's meaning. *Id.* at 706−07.

"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." *State v. Lucas*, 589 N.W.2d 91, 94 (Minn. 1999). We conclude that where, as here, a tracking device is being applied to a vehicle, Minn. Stat. § 626A.35, subd. 2a, and Minn. Stat. §§ 168A.01−.40 (2008) (the vehicle-title statutes) are in pari materia and may be construed together. The vehicle-title statutes define a vehicle "owner" as "a person, other than a secured party, having the property in [sic] or title to a vehicle. The term includes a person entitled to the use and
possession of a vehicle subject to a security interest in another person, but excludes a lessee under a lease not intended as security." Minn. Stat. § 168A.01, subd. 13. Nothing limits ownership to only one person. The evidence at trial established that, although M.H. drove the car the overwhelming majority of the time and appellant would need her permission to use the car, appellant nonetheless had the requisite use and possession of the vehicle and did drive it on occasion.

B. Marital Interest

This brings us to the issue of whether appellant, as a spouse, had an interest in the vehicle sufficient to allow him to place the tracking device on it. "All property acquired by either spouse

during the marriage is presumptively marital, but a spouse may defeat the presumption by showing by a preponderance of the evidence that the property acquired is nonmarital." *Baker v. Baker*, 753 N.W.2d 644, 649−50 (Minn. 2008) (citing Minn. Stat. § 518.003, subd. 3b (2006)). At trial, M.H. testified that she and appellant purchased the car with marital funds. The vehicle was therefore presumptively marital property.

The state did not present evidence to rebut the presumption that, because the car was acquired during the marriage with marital funds, appellant had a marital interest in it. We also note that the record reflects that, on occasion, appellant drove the vehicle. Tellingly, in response to a question posed at the appellate oral argument, the state acknowledged that it would not prosecute appellant for auto theft were M.H. to report that the car was stolen because appellant was driving the car without her consent. This reflects the understanding that appellant, as a spouse, had access to and an interest in the vehicle.

C. Title to the Vehicle

To defeat the marital presumption, the prosecution presented the title records from the Minnesota Department of Public Safety showing that M.H. is the sole registered owner. But, the title documents in the possession of appellant and M.H. and the testimony at trial show that M.H. signed the title over to appellant in June 2009. Although that transfer was never recorded and there is testimony that M.H. signed over the title to facilitate a sale (that fell through), it is noteworthy that the vehicle's documents in the couple's home files show appellant to be the owner. Furthermore, this transfer demonstrates how, in a marriage relationship, incidents of formal ownership of marital property may not accurately reflect who is using a vehicle.

D. Rule of Lenity

"When the language of a criminal law is ambiguous, we construe it narrowly according to the rule of lenity." *State v. Maurstad*, 733 N.W.2d 141, 148 (Minn. 2007). "The rule of lenity holds that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity toward the defendant." *State v. Stevenson*, 637 N.W.2d 857, 862 (Minn. App. 2002). Our construction of "the owner," consistent with the rule of lenity, leads us to conclude that the statutory exception applies when the vehicle or object to which the tracking device is attached has multiple owners, one of whom has consented to the tracking device.

Finally, we note that the statute does not criminalize an owner's attaching such a device to a vehicle in which he has an ownership interest. That would be absurd. *See* Minn. Stat. § 645.17(1) (2010) (stating that courts may presume that legislature does not intend absurd results). We conclude that because appellant presumptively had a marital interest in the car and because he had an unfiled title interest in the car, he had a right of access that made him an "owner" within the meaning of Minn. Stat. § 626A.35, subd. 2a; that appellant is not subject to prosecution under that statute for attaching the tracking device; and that the district court erred by submitting the issue to the jury instead of granting appellant's motion for acquittal. We therefore reverse appellant's conviction for violating Minn. Stat. § 626A.35, subd. 1. [3]

III.

Appellant argues that the stalking statute, Minn. Stat. § 609.749, is unconstitutionally vague. Because appellant did not raise this argument to the district court, and because "[t]he law is clear in Minnesota that the constitutionality of a statute cannot be challenged for the first time on appeal," *State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980), we do not reach the constitutional question.

D E C I S I O N

Although the district court erred by admitting excessive general relationship evidence that included appellant's bad character and propensity for criminality, we conclude that the error was harmless and affirm appellant's conviction for stalking. But because the car to which the tracking device was attached was presumptively marital property and because the title documents in appellant's possession showed that the title was signed over to him, we conclude that he had a sufficient ownership interest to exclude him from prosecution under Minn. Stat. § 626A.35, subd. 2a and that the district court erred by denying his motion for acquittal on the tracking-device charge. Accordingly, we reverse appellant's conviction on that charge.

Affirmed in part and reversed in part.

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[1] The state's argument that "on or about" might reasonably be expanded to include acts that occurred months, or years, prior to March 10, 2010 is similarly unavailing. The district court denied the state's motion to amend the complaint to base the stalking charge on incidents occurring over an expanded time frame.

[2] We note that this section and other provisions of the law dealing with such devices focus on prohibiting their improper use by law enforcement. *See* Minn. Stat. §§ 626A.35−.391 (2008). However, the statutes do not exempt improper use by individuals. *Id.* The parties have not addressed the reach of the statutes, and we do not consider the question.

[3] Because we conclude that the district court erred by denying appellant's motion for acquittal and submitting the tracking-device issue to the jury, we do not address appellant's arguments that the jury instructions were erroneous.