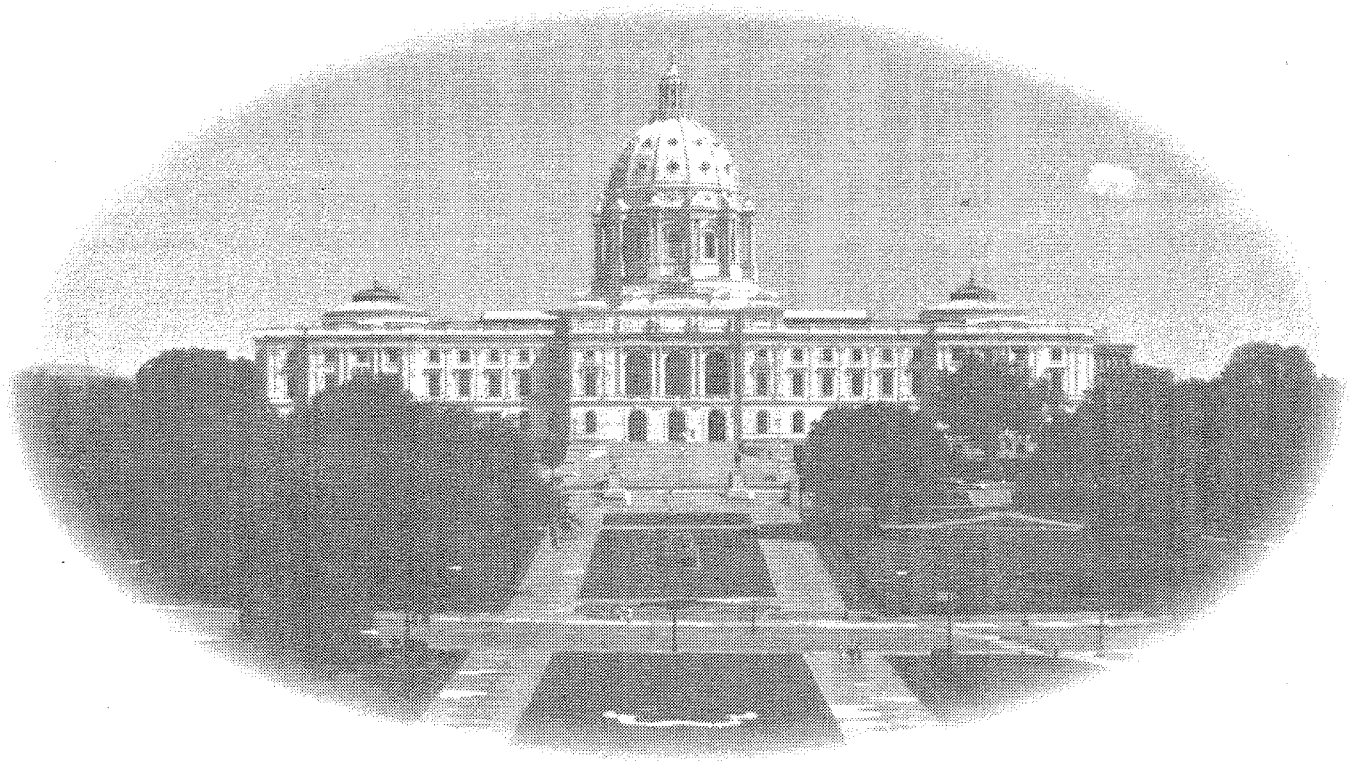
REPORT OF THE
REVISOR OF STATUTES

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT AND COURT OF APPEALS



Submitted to the Legislature of the State of Minnesota
November 2000

Office of the Revisor of Statutes
Minnesota Legislature

Michele L. Timmons
REVISOR

November 15, 2000

The Honorable Allan Spear
President of the Senate
Room 120
Capitol Building

The Honorable Steve Sviggum
Speaker of the House of Representatives
Room 463
State Office Building

Dear Mr. Speaker and Mr. President:

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 of Minnesota.

I am, therefore, pleased to transmit to you our report on opinions issued by the Supreme Court between October 1, 1998, and September 30, 2000.

Sincerely,

Michele L. Timmons
Revisor of Statutes

cc: The Honorable Don Samuelson
President of the Senate-Elect

The Honorable Jane Ranum
Chair, Senate Judiciary Committee
And Members

The Honorable Steve Smith
Chair, House Civil Law Committee
And Members

MLT:kmj

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Prevailing Wage

Associated Builders and Contractors, et al., v. Ventura, et al.
Minnesota Supreme Court
March 31, 2000

The legislature enacted an amendment to Minnesota Statutes, section 123B.71, subdivision 2 (formerly 121.15, subd. 1a), incorporating the definition of "project" from Minnesota Statutes, section 177.42, subdivision 2. See Laws 1997, chapter 231, article 16, section 4. This amendment essentially required that the prevailing wage rate be paid for constructing or remodeling educational facilities when the job was estimated to cost more than $100,000. The amendment was included in a bill commonly known as the omnibus tax bill. The title of the bill as enacted contained no words describing the amendment, such as "prevailing wage," "school district," "construction," "project," or "labor," did not mention section 177.42, but did indicate that section 121.15, subdivision 1a, was amended by that act.

The district court, court of appeals, and supreme court held that the amendment violated the single subject and title requirements of Article IV, Section 17, of the Minnesota Constitution. The Supreme Court noted that (1) the purpose of the subject requirement is to prevent logrolling, which is essentially the practice of including into a large bill of related, popular provisions other provisions that are unrelated, unpopular, and unlikely to be enacted on their own merit and (2) the purpose of the title requirement is to provide sufficient notice of the interests affected by the act and to prevent fraud and surprise on the legislature. The Supreme Court concluded "... the prevailing wage amendment violates the single subject provision of our constitution" and "the title did not provide sufficient notice of the amendment to legislators and school districts to meet the constitutional requirement of Section 17."

Finally, the court severed the amendment and held the remainder of the act constitutional, stating that "severance is a resolution clearly consistent with our holding that the prevailing wage provision is unrelated to tax reform and relief" and therefore appropriate.

Minnesota Statutes, sec. 145.64, subd. 2

Exception to Restricted Access to Data on Physicians

Amaral, et al., v. Saint Cloud Hospital

Minnesota Supreme Court

August 12, 1999

Physicians brought an action to obtain access to peer review information about the physicians, which was held by a hospital. The physicians argued that their request for the information was supported by Minnesota Statutes, section 145.64, subdivision 2, which reads:

> The restrictions in subdivision 1 shall not apply to professionals requesting or seeking through discovery, data, information, or records relating to their medical staff privileges or participation status. However, any data so disclosed in such proceedings shall not be admissible in any other judicial proceeding than those brought by the professional to challenge an action relating to the professional's medical staff privileges or participation status. [Emphasis added.]

The court interpreted the phrases "requesting or seeking through discovery" in the first sentence and "in such proceedings" in the second sentence, which it felt were ambiguous.

With regard to the first sentence, the plaintiff physicians argued that "or" is used in a disjunctive sense to mean that the information should be made available to physicians when either it is requested or it is sought through discovery. The hospital maintained that "or" is used in a conjunctive sense to make the information available only when either requested through discovery or sought through discovery, and that "through discovery" qualifies both "seeking" and "requesting." The court agreed with the hospital, concluding that the words "requesting" and "seeking" each modify the term "through discovery."

With regard to the second sentence, the court described the phrase "in such proceeding" as "particularly troublesome" and stated that "it could ... be argued that the proceedings referred to are the proceedings of the review organization." The court felt that the legislative history was not helpful "to discern with any certainty the intended meaning of the ... language," but after analyzing the purpose underlying the statute held "the proceedings referred to are discovery proceedings."

In conclusion, the court held that the appellants were not entitled to the requested information.

Minnesota Statutes, sec. 176.081
Attorney Fees in Workers' Compensation Cases
Separation of Powers Doctrine

Irwin v. Surdyk's Liquor, et al.
and
Frisch v. S & S Carpet Designs, et al.
Minnesota Supreme Court
September 2, 1999

The attorney for Irwin and Frisch (employees) was denied the full amount of attorney fees claimed for work incurred to obtain compensation for his clients who sustained work-related injuries. He was awarded fee amounts permissible under Minnesota Statutes, section 176.081, which limits attorney fees allowed for workers' compensation awards. The attorney fees claimed were characterized as reasonable by the workers compensation judges for both hearings. The workers' compensation court of appeals (WCCA) did not address the issue of the reasonableness of the claimed attorney fees on behalf of Surdyk stating "the current statute provides no standards for determining whether a contingent fee award is inadequate to reasonably compensate an attorney for representing an employee in a medical or rehabilitation dispute" and agreed that, with regard to attorney fees for work incurred on behalf of Frisch, the compensation judge, "instead of awarding reasonable attorney's fees, ... has awarded permissible attorney's fees, which is what the law now provides."

Employees appealed, arguing that Minnesota Statutes, section 176.081 is unconstitutional as violating the Separation of Powers Clause of the Minnesota Constitution, Article III, Section 1, which reads:

> The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

Compensation judges and the WCCA are members of the executive branch. Employees asserted that the 1995 amendments to section 176.081 violate the separation of powers doctrine because the judiciary has exclusive control over attorneys and the practice of law.

The court specifically set out the amendments to section 176.081, subdivisions 1 and 9, which limit and provide for the calculation and maximum amount of attorney fee awards, and subdivision 3, which provides for review of the fees by the WCCA. The court stated that the section set the maximum attorney fee based on the dollar amount recovered without regard to factors considered before the 1995 amendments "in determining reasonable attorney fees, such as the amount involved, the time and expense necessary to prepare for trial, the responsibility assumed by counsel, the expertise of counsel, the

difficulties of the issues, the nature of proof involved, and the results obtained." The court also found that while subdivision 3 provided for fee review by appeal to the WCCA, the WCCA was limited to subdivision 9's maximum permissible fee provision and that even if subdivision 3 were read as allowing judicial review by the Supreme Court, "our sole review power would be limited to determining whether the statutory formula had been properly applied by the compensation judge and the WCCA, both members of the executive branch ... Legislation that prohibits this court from deviating from the precise statutory amount of awardable attorney fees impinges on the judiciary's inherent power to oversee attorneys and attorney fees by depriving this court of a final, independent review of attorney fees."

The court held that "legislative delegation of attorney fee regulation exclusively to the executive branch violates the doctrine of separation of powers of Minn. Const. art. III, [section] 1. Accordingly, to the extent it impinges on our inherent power to oversee attorneys and attorney fees and deprives us of a final, independent review of attorney fees, we hold that [Minnesota Statutes,] section 176.081 is unconstitutional."

The court remanded the cases to the WCCA to review and determine the reasonableness of the claimed attorney fees.

Minnesota Statutes, secs. 221.011, subd. 23; and 221.171
Federal Supremacy Clause; Household Goods Transportation

A. A. Metcalf Moving & Storage v. North St. Paul Schools, et al.
Minnesota Court of Appeals
December 29, 1998
Reviewed Denied March 16, 1999

A.A. Metcalf Moving & Storage Co., Inc. (moving company) entered into a contract with North St. Paul – Maplewood – Oakdale Schools, a/k/a Independent School District No. 622 (school district) after submitting the lowest bid of $19,854 (compared with bids of $59,880 and $83,972 by two competitors) to move the school district's property into a new building one block away. At the end of the first day of the move, the moving company presented the school district with a bill of lading that included an estimate of $20,000 and a statement that "[s]hipment is subject to all rules, regulations, rates and charges in lawfully applicable tariff filed with the Minnesota Department of Transportation." During the move, moving company presented a bill for $16,686 which the school district paid. When the move was completed, the school district received a bill for $49,159. The school district paid $3,168 and moving company sued for breach of contract.

Moving company argued that Minnesota Statutes, section 221.171, subdivision 1, prevented it from deviating from its rate schedule filed with the Minnesota Department of Transportation. The subdivision states in pertinent part:

> No permit carrier shall charge or receive a greater, lesser, or different compensation for the transportation of ... property ..., than the rates ... named in the carrier's schedule on file and in effect with the commissioner ... nor shall a permit carrier refund or remit ... the rates and charges required to be collected ... under the carrier's schedules or under the rates, if any, fixed by the board.

In addition, moving company argued that the transportation of household goods is an exception to the federal ICC Termination Act which generally preempts state rate schedules for motor carriers. See United States Code, title 49, section 14501, subsection (c), paragraph (1), (1997). The definition of household goods in Minnesota Statutes, section 221.011, subdivision 23, includes "personal effects and property ... in the owner's dwelling" plus "... furniture, fixtures, equipment and property of business places and institutions, public or private ..."

However, the court found that the federal definition was controlling and that it did not include the property or effects moved under the facts of this case. The court relied on the ICC Termination Act at United States Code, title 49, section 13102, paragraph (10), which appears to limit household goods to "personal effects and property used or to be

used in a dwelling, when a part of the equipment or supply of such dwelling ...." The court stated that "the legislative history illustrates that the act was specifically designed to eliminate the regulation of office moves."

The court ruled for the school district when it held: "Because application of the Minnesota definition of 'household goods' results in creation of an impermissible conflict with the express federal intent to further deregulate the motor carrier industry and abolish carrier rate schedules, federal law preempts the enforcement of state-approved rate schedules for the move."

Minn. Stat., secs. 245A.04, subds. 3b and 3d; and 256.045, subd. 3
Hearing Before Disqualification of Health Professional

Fosselman, et al., v. Commissioner of Human Services
Minnesota Court of Appeals
July 3, 2000

Two nurses and a qualified mental retardation professional (petitioners) were disqualified by the Commissioner of Human Services from holding certain direct-contact, personal care occupations for failure to report alleged maltreatment of a resident by a coworker. The maltreatment reportedly occurred at a residential, intermediate care facility for individuals with developmental disabilities. On receiving a complaint of the maltreatment, the commissioner investigated and disqualified the petitioners under Minnesota Statutes, section 245A.04, subdivision 3d, for not reporting the maltreatment. The commissioner granted reconsideration under subdivision 3b of that section, which provides that "the commissioner's decision ... is the final administrative agency action and shall not be subject to further review in a contested case under chapter 14," and affirmed the disqualification of the petitioners. The petitioners were not granted a hearing and "at no stage were ... [they] given the opportunity to present oral testimony on their behalf or to confront and cross-examine the individuals who provided the information adverse to them. They did not have the power to subpoena persons to give information on their behalf." The petitioners asserted that they had a right to a hearing in accordance with the due process clauses of the state and federal constitutions or pursuant to Minnesota Statutes, section 256.045, subdivision 3, which states in pertinent part:

> Subd. 3. State agency hearings. (a) State agency hearings are available for the following: ... (6) any person to whom a right of appeal according to this section is given by other provision of law. [Emphasis added.]

The court noted that the due process protections afforded by the United States and Minnesota Constitutions are identical and reviewed state and federal cases that interpreted and enumerated due process protections.

The court noted that a person's livelihood and good name are protected interests, found that job "disqualification proceedings are subject to the requirements of procedural due process," and concluded that the petitioners were denied due process in not receiving a hearing. In order to construe section 256.045, subdivision 3, so as to uphold its constitutionality and afford the petitioners a hearing, the court held that the words "other provision of law" is "to be construed to include due process." However, the court went on to hold: "To the extent this conclusion is inconsistent with [Minnesota Statutes, section 245A.04, subdivision 3b, paragraph (e)] (1998), which states that the commissioner's decision on reconsideration of a disqualification is the final administrative agency action, we conclude that this provision denies [petitioners] due process."

Minnesota Statutes, chap. 508 and sec. 541.023, subd. 1
Applicability of Marketable Title Act to Registered Title

Hersh Properties, L.L.C. v. McDonald's Corporation, et al.
Minnesota Supreme Court
February 4, 1999

The certificates of title to two adjoining Torrens properties (parcels of land, titles to which were registered under Minnesota Statutes, chapter 508, commonly known as the Torrens Law) show that the parcel owned by Hersh Properties, L.L.C. (Hersh) had, in 1950, reserved an appurtenant easement over the other property now occupied by a McDonald's restaurant. In 1995, the appellant wanted to erect a sign in the claimed easement.

McDonald's Corporation, et al. (McDonald's) refused, asserting that the easement had been extinguished by operation of the Minnesota Marketable Title Act (MTA), which states in relevant part:

> As against a claim of title based upon a source of title, which ... has ... been of record at least 40 years, no action affecting the possession or title of any real estate shall be commenced by a person ... after January 1, 1948, to enforce any ... claim ... founded upon any ... transaction which was executed or occurred more than 40 years prior to the commencement of such action, unless within 40 years after such execution or occurrence there has been recorded in the office of the county recorder or filed in the office of the registrar of titles in the county in which the real estate affected is situated, a notice ...." Minnesota Statutes, section 541.023, subdivision 1.

Respondent purchased the property in 1984. The certificate of title issued to the respondent conveyed a fee simple interest and expressly provided that title to the parcel is burdened by the signage easement. McDonald's argued, among other things, that (1) the MTA applied to Torrens property, (2) appellant did not file the notice required under the MTA within 40 years from the 1950 creation and grant of the easement, and therefore (3) the easement interest was extinguished by operation of the MTA. The Court of Appeals essentially agreed with McDonald's and went on to conclude that McDonald's "source of title" was the 1950 conveyance to a previous owner which established the easement interest and, therefore, adequate as a defense to Hersh's claim.

Hersh argued that the 1984 conveyance of the parcel to respondent, and other conveyances between 1950 and 1995, served as constructive notice of the claim and satisfied the notice requirements of the MTA since the certificates of titles issued "showed the easement existed and was, therefore, valid." Hersh also challenged the lower court's characterizations of "source of title" and "claim of title" as applied by the MTA.

The Supreme Court characterized the facts of the case as "important ..., considered for the first time by the court" and dependent upon a determination of the "following questions: (1) whether the MTA is applicable to property that has been registered pursuant to the ... Torrens Act; and if ... in the affirmative, then (2) whether a certificate of title constitutes a 'source of title' under the MTA." The court discussed the histories and purposes of the Torrens Law and MTA and noted a part of the Torrens Law as relevant:

> Every person receiving a certificate of title pursuant to a decree of registration and every subsequent purchaser of registered land who receives a certificate of title in good faith and for a valuable consideration shall hold it free from all encumbrances and adverse claims, excepting only the ... interests as may be noted in the last certificate of title in the office of the registrar ...." Minnesota Statutes, section 508.25

The court noted that the MTA was amended in 1959 by adding a subdivision to define "source of title." Minnesota Statutes, section 541.023, subdivision 7, states that a source of title can be "any deed ... or other instrument which transfers or confirms ... a fee simple title to real estate." The court found this broad definition ambiguous, providing "a reasonable basis for more than one interpretation." The court concluded "that due to the unique nature of Torrens property, McDonald's 'source of title' can refer only to the certificate of title that was issued to McDonald's in 1984 when it acquired fee simple title to its property.

The court noted that its challenge was to find a way to effectuate "the purpose of both the MTA and the Torrens Act." The court held that the MTA applies to Torrens property, but that it is McDonald's source of title at issue, not Hersh's, and that "... the source of title held by an owner of Torrens property is the certificate of title issued to that owner upon his or her acquisition of fee simple title. Here, the 'source of title' must properly be interpreted to refer to McDonald's receipt of its certificate of title issued in 1984, which ... has not been of record for at least 40 years. Accordingly, ... McDonald's lacks an adequate 'source of title' to invoke the MTA as a defense to Hersh's claimed easement. Therefore, Hersh's easement is not ... extinguished under ... the MTA."

Minnesota Statutes, sec. 609.109, subd. 3, para. (a), clauses (2) & (3)(iii)
Sentencing Enhancement to Life Term for Attempt Crime

State v. Ronquist
Minnesota Supreme Court
July 22, 1999

Ronquist (defendant) was convicted of attempted first-degree criminal sexual conduct under Minnesota Statutes, section 609.342. Defendant had two prior sex offense convictions and was sentenced under the sentencing enhancement statute to life imprisonment under Minnesota Statutes 1996, section 609.346, subdivision 2a (subsequently repealed and reenacted as section 609.109, subdivision 3), which states in relevant part:

> Subd. 2a. [now subd. 3] Mandatory life sentence. (a) The court shall sentence a person to imprisonment for life, notwithstanding the statutory maximum sentence under section 609.342 if:
> (1) [now (2)] the person is convicted under section 609.342; and
> (2) [now (3)] the court determines ... that any of the following circumstances exists:
> * * *
> (iii) the person has two previous sex offense convictions under section 609.342 ....

Defendant argues that an attempt conviction under section 609.342 is not a conviction for purposes of the sentencing enhancement statute. Subdivision 1 of the enhancement statute defines "offense" as "a completed offense or an attempt to commit an offense." However, subdivision 2a [now 3] of that statute is directed at a person who "is convicted under section 609.342." Therefore, argued the defendant, the enhancement statute is available for commission of the offense, not an attempt, and the sentence for an attempt crime under Minnesota Statutes, section 609.17, subdivision 4, paragraph (a), would be a maximum sentence of either 15 or 20 years imprisonment.

The court looked at the enhancement statutes as a whole and held that the legislature intended to include an attempted first-degree criminal sexual conduct with two qualifying prior convictions as qualifying for enhancement to life imprisonment. It noted that subdivision 3 "refers to the present conviction as the 'present offense of conviction' thereby indicating that the present offense includes attempts." The court also concluded that the attempt statute did not limit the enhancement sentencing provisions because the enhancement statute, as a specific provision dealing only with sex offenders, supercedes the general attempt sentencing statute under rules of statutory construction.

Minnesota Statutes, sec. 609.11, subd. 5, para. (a)
Possession of Firearm During Burglary

State v. Herbert
Minnesota Court of Appeals
September 21, 1999

Herbert (defendant) broke into a residence and stole several firearms. He pleaded guilty of second degree burglary in violation of Minnesota Statutes, section 609.582, subdivision 2, which reads in relevant part:

> Subd. 2. Burglary in the second degree. Whoever enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building ... commits burglary in the second degree and may be sentenced to imprisonment for not more than ten years ... if:
> (a) the building is a dwelling ....

At the sentencing hearing, the state argued that defendant possessed a firearm during the burglary and should be sentenced to a minimum of three years under Minnesota Statutes, section 609.11, subdivision 5, which states in pertinent part:

> Subd. 5. Firearm. (a) ... [A]ny defendant convicted of ... [burglary] ... in which the defendant ..., at the time of the offense, had in possession or used ... a firearm, shall be committed to the commissioner of corrections for not less than three years .... [Emphasis added.]

The court below disagreed, concluded the minimum sentencing statute did not apply, and imposed a stayed sentence of 23 months. The state appealed.

The court of appeals characterized the terms "at the time of the offense" as a latent ambiguity. The defendant argued that all the elements of the offense of second degree burglary were met at the time he entered the dwelling to commit the burglary but before he possessed the guns and that the legislature could not have intended that those who steal guns, whether or not with the intent to use them and whether or not they are usable at the time of the theft, should receive a harsher penalty than those who steal other things.

The court found the defendant's illegal course of conduct did not end when all elements of the offense were in place, but rather continued while in the dwelling. In addition, to impose a harsher penalty on burglars who steal firearms is consistent with the legislature's aim of deterring acts that increase the risk of violence since the risk of violence by firearms still increases whether the burglar carries firearms into the dwelling or steals them after entering the dwelling.

The court also found that the minimum sentence statute and the first-degree burglary statute should be construed in light of each other. Minnesota Statutes, section 609.582, subdivision 1, reads in pertinent part:

> Subdivision 1. Burglary in the first degree. Whoever enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building ... commits burglary in the first degree and may be sentence to imprisonment for not more than 20 years or to payment of a fine of not more than $35,000, or both, if:
> * * *
> (b) the burglar possesses when entering or at any time while in the building ... a dangerous weapon .... [Emphasis added.]

In summary, the court held that the defendant "possessed the stolen firearms at the time of the offense and is subject to the three-year miniumum sentence mandated by [the minimum sentencing statute]. The case was reversed and remanded.

Minnesota Statutes, sec. 609.531, subd. 6a

Innocent Owner Defense When Administrative Forfeiture Initiated

Blanche v. 1995 Pontiac Grand Prix

Minnesota Supreme Court
September 9, 1999

The police stopped a 1995 Pontiac Grand Prix and found crack cocaine with a retail value of $180 on the pavement next to the vehicle. The vehicle contained four males, driven by the son (appellant) of the vehicle's owner (appellant). The vehicle was seized under the administrative forfeiture statute, Minnesota Statutes, section 609.5314, subdivision 1, paragraph (a), clause (2), which provides a presumption for the forfeiture of vehicles containing a controlled substance worth $100 or more. Pursuant to Minnesota Statutes, section 609.5314, subdivision 3, the appellants timely demanded a judicial determination and argued that their demand converted the administrative forfeiture proceeding into a judicial forfeiture proceeding under Minnesota Statutes, section 609.5311, with its accompanying "innocent owner" defense in subdivision 3, paragraph (d), which states:

> (d) Property is subject to forfeiture under this section only if its owner was privy to the [unlawful] use or intended [unlawful] use described ..., or the unlawful use or intended use of the property otherwise occurred with the owner's knowledge or consent.

Section 609.5314, subdivision 3, requires that, following an adequate demand for a judicial determination, the forfeiture be conducted under 609.531, subdivision 6a, which, in turn, provides that the agency "has the benefit of the evidentiary presumption of section 609.5314, subdivision 1" which requires the property owner to rebut the presumption of forfeiture before the owner may recover the property.

The state argued the forfeitures statutes set out two different forfeiture procedures for different types of property and that administrative forfeiture proceedings do not incorporate the innocent owner defense.

The court found that (1) both proceedings may be begun to confiscate property located near controlled substances, (2) all property subject to administrative forfeiture comes within the definition of property subject to judicial forfeiture, (3) the administrative forfeiture proceeding is a streamlined process for uncontested forfeitures, (4) the administrative forfeiture statute itself contains a notice provision warning claimants that if they do not demand a judicial determination that they lose their rights to the property, (5) not allowing the innocent owner defense could lead to absurd results and fail to satisfy the legislature's stated aims to deter crime and reduce economic incentives to commit crimes, and (6) the innocent owner defense is an affirmative defense that must be proven by the claimant.

In summary, the court held that "the innocent owner defense is available to a claimant who demanded judicial determination of a forfeiture initiated as an administrative forfeiture."

Minnesota Statutes, sec. 609.66, subd. 1d
Possession of Weapon on School Property
Strict Liability or Knowledge Crime

In re the Welfare of C.R.M.
Minnesota Supreme Court
June 15, 2000

C. R. M., a juvenile, was found with a folding knife with a four-inch blade at a day school in Anoka County and convicted for possessing a dangerous weapon on school property in violation of Minnesota Statutes, section 609.66, subdivision 1d, which states in pertinent part:

> (b) Whoever possesses ... a dangerous weapon ... on school property is guilty of a felony and may be sentenced to imprisonment for not more than two years or to payment of a fine of not more than $5,000, or both.

The court of appeals affirmed the conviction ruling that C. R. M. should have known that the knife was in his coat, reasoning that the fact of the presence of the knife was not unwitting because C. R. M. "was aware that he had a duty to avoid bringing a weapon to school" and that he had possessed the weapon two days before the offense. C. R. M. appealed, asserting that the prosecution was obligated to prove that he had knowledge that he had possession of the knife in order to show general intent to violate the law. The state argued that knowledge and intent were not elements necessary to prove the crime, that section 609.66, subdivision 1d, is a strict liability crime, and that the prosecution need only show that C. R. M. possessed the dangerous weapon on school property.

The court noted from a review of state case law that (1) the legislature has authority to enact criminal strict liability offenses but they "are generally disfavored," (2) legislative intent to enact such laws must be clear, (3) a determination of such legislative intent can only be reached after careful consideration of the statute, and (4) the court must "apply the 'rule of lenity' requiring penal statutes to be strictly construed in favor of a criminal defendant."

The court discussed the purposes of enacting strict liability crimes and the considerations necessary in determining whether the crime requires knowledge (mens rea) or is a strict liability crime.

After finding that the statute did not clearly evidence legislative intent to make the offense a strict liability crime, the court held that "in light of our jurisprudential history requiring clear legislative intent to dispense with proof of means rea and our heightened concern when it relates to felony level crimes, and because we believe the nature of the weapon here - a knife - was not so inherently dangerous that [C. R. M. should be on notice that mere possession would be a crime, [the prosecution] was required to prove that appellant knew he possessed the knife on school property as an element of the section 609.66, subd. 1d, offense charged."

APPENDIX

STATE OF MINNESOTA

IN SUPREME COURT

C8-98-1383
C1-98-1385
C4-98-1428

Court of Appeals

Stringer, J.
Dissenting, Page, J.
Concurring in part, dissenting in part, Anderson, Paul H., J.

Associated Builders and Contractors, et al.,

Respondents,

vs

Filed: March 31, 2000
Office of Appellate Courts

The Honorable Jesse Ventura, et al., petitioners,

Appellants (C8-98-1383),

Defendants (C1-98-1385, C4-98-1428),

Granite City Electric, Inc., et al., petitioners,

Appellants (C1-98-1385),

Intervenors (C8-98-1383, C4-98-1428),

International Brotherhood of Electrical Workers,
Local 292, petitioner,

Appellant (C4-98-1428),

Intervenor (C8-98-1383, C4-98-1385).

S Y L L A B U S

A statutory amendment requiring that the prevailing wage be paid in the construction or remodeling of all educational facilities where the cost exceeds $100,000 violates the Single

Subject and Title Clause of the Minnesota Constitution, Article IV, Section 17, when passed as part of a 1997 omnibus tax bill relating to tax relief and reform.

A provision of a law that is ruled unconstitutional because it violates Article IV, Section 17, of the Minnesota Constitution may be severed if it is not connected to the remaining provisions of the law.

Affirmed.

Heard, considered and decided by the court en banc.

OPINION

STRINGER, Justice.

An amendment to the prevailing wage law providing that prevailing wages must be paid in all construction or remodeling projects of educational facilities exceeding $100,000 was enacted as part of a 1997 omnibus tax bill relating to tax relief and reform. Respondents Associated Builders and Contractors (Associated Builders), Independent School District No. 882 (ISD 882) and Wright Electric, Inc. (Wright Electric) challenge the constitutionality of the amendment claiming it violates the Single Subject and Title Clause of the Minnesota Constitution, Article IV, Section 17, which states "No law shall embrace more than one subject, which shall be expressed in its title."[1] The district court granted respondents" motion for summary judgment ruling that the amendment violates both clauses of Section 17. The court of appeals affirmed, holding that the prevailing wage amendment was "not remotely related [to the bill's subject of] tax reform and relief," and that the title provision was violated because the title made no reference to topics such as "prevailing wage," "school districts" or "labor." *Associated Builders and Contractors v. Carlson*, 590 N.W.2d 130, 136 (Minn. 1999). The court of appeals then severed the amendment pursuant to Minn. Stat. § 645.20 (1998) permitting severance of an unconstitutional provision where it is unconnected to the remaining provisions of the law. *See Associated Builders and Contractors,* 590 N.W.2d. at 137. We affirm the court of appeals.

The appropriate context for our analysis begins with a brief history of the prevailing wage law and passage of the challenged amendment.[2] The prevailing wage law-a law requiring the payment of wages on projects financed with state funds to be comparable to wages paid for similar work in the community as a whole-was first introduced as House File 134 on January 11, 1973 and was the subject of hearings both in the House Labor-Management Relations Committee and Senate Committee on Labor and Commerce.[3] It was passed by a house vote of 84-39, by the senate 56-0 and was enacted as chapter 724 on May 24, 1973.[4] The purpose of the prevailing wage law is explained in the statute's preface:

> It is in the public interest that public buildings and other public works be constructed and maintained by the best means and highest quality of labor reasonably available and that persons working on public works be compensated according to the real value of the services they perform. It is therefore the policy of this state that wages of laborers,

> workers, and mechanics on projects financed in whole or part by state funds should be comparable to wages paid for similar work in the community as a whole.

Minn. Stat. § 177.41 (1998). The statutory scheme requires that employees working on certain state funded construction projects be paid an hourly wage based on prevailing wages in the area. *See id.* A project is defined as the "erection, construction, remodeling, or repairing of a public building or other public work financed in whole or in part by state funds." Minn. Stat. § 177.42, subd. 2 (1998).

In 1995, in *NewMech Cos., Inc. v. Independent Sch. Dist. No. 206*, 540 N.W.2d 801, 803 (Minn. 1995), we held that the prevailing wage statute language "financed in whole or part by state funds" did not include state aid payments to school districts through Debt Service Equalization Aid (DSEA) or Homestead and Agricultural Credit Aid (HACA) because those payments were intended to provide property relief to taxpayers, not to subsidize construction costs. *NewMech* thus narrowed the prevailing wage law by limiting its application to direct state funding only. *Id.* at 805.[5]

In response to our decision in *NewMech,* and with the stated purpose of overturning it, an amendment to the prevailing wage law's definition of "project" was introduced in the House of Representatives on March 13, 1997 and was referred to the House Committee on Labor-Management Relations.[6] There was no companion bill in the senate. House File 1512, now codified at Minn. Stat. § 123B.71, subd. 2 (1998),[7] was described by Representative Thomas Bakk as a "pretty simple little bill, four lines * * * [stating that] on school construction here in Minnesota, it [should be] public policy that any school construction over $100,000 in cost be covered by Minnesota's prevailing wage rate law."[8] The bill amends the previous definition of "project" by including all educational facilities where the estimated cost of building exceeds $100,000:

> Minnesota Statutes, 1996, section [123B.71, subd. 2], is amended by adding a subdivision to read:
>
> Subd. 1A. PROJECT. The construction, remodeling, or improvement of a building or site of an educational facility at an estimated cost exceeding $100,000 is a project under section 177.42, subdivision 2.[9]

Notably the bill did not amend the prevailing wage law directly-instead, it amended Minn. Stat. § 123B.71, subd. 2, relating to "review and comment for school district construction" by adding a new definition of "project" under the prevailing wage law. Thus, only by cross reference could the amendment be tracked to its substantive effect.

During the committee meeting Tom Deans, legal counsel for the Minnesota School Board Association, offered this comment about the bill:

> This bill makes all school district projects, that are projects for purposes of the prevailing wage law, all of them over $100,000, that means whether or not there is a

> dime of state money that comes in * * * this would require [those districts] to pay prevailing wages as well * * *.
> * * *
>
> * * * So what you're doing is, you're taking those higher costs [from paying the prevailing wage rather than a lower wage] and you're passing them onto property tax payers for 20 to 30 years * * *.[10]

At the close of the committee meeting Representative Bakk moved that the bill be passed and referred to the Committee on Taxes.[11] There was little discussion of the prevailing wage amendment in the tax committee and the bill was incorporated into the Omnibus Tax Bill.[12]

Four days later, on the house floor, Representative Dee Long, Chair of the House Tax Committee, gave an overview of the Omnibus Tax Bill. She described the bill as one that "achieves both property tax relief and long-term reform and does it without raising any other taxes * * *."[13] Representative Long characterized the article in which the prevailing wage amendment was included as making "a number of miscellaneous and minor changes in tax laws."[14] Legislators questioned why a bill pertaining to prevailing wages should be incorporated in a tax bill, but an amendment to delete the provision from the tax bill was defeated by a vote of 50-81.[15]

There was no discussion on the prevailing wage amendment in the senate and, other than brief references to it during Tax Conference Committee meetings on May 13 and 16, 1997, there was no substantive discussion on the merits of the amendment or how it was related to tax relief and reform.[16] The Omnibus Tax Bill passed both legislative houses on May 19, 1997 by a vote of 127 to 6 in the house and 66 to 0 in the senate[17] and was signed into law by Governor Arne H. Carlson on June 2, 1997.[18]

The Omnibus Tax Act, as the bill became known upon passage, is a prodigious work of legislation covering 247 pages with 16 articles and is entitled "An act relating to the financing and operation of state and local government; * * *."[19] The first 15 articles pertain to a variety of subjects including property tax reform, income taxes and property tax refunds, special taxes, regional development commissions, waste management taxes and tax increment financing. Article 16, entitled "Miscellaneous," contains 31 separate sections. The prevailing wage amendment appears as section 4 of article 16 and now appears in the statutory structure as Minn. Stat. § 123B.71, subd. 2. It is included in the statutory chapter covering school district powers and duties. *See* Minn. Stat. ch. 123B (1998).

The underlying facts of the controversy now before the court are not in dispute. In the fall of 1997 ISD 882 began preparation for bids for the construction of a new Monticello High School in Wright County to be financed by funds received by the sale of ISD 882 bonds-the parties agreed that no state funding was provided. The bids were originally scheduled to be submitted in October of 1997 but to comply with the prevailing wage amendment, ISD 882 delayed the bid deadline until December, 1997. It then requested that contractors submit two bids, one based on the prevailing wage amendment and one without consideration of the prevailing wage amendment. The low bidder for the electrical subcontracting work was respondent Wright

Electric at $2,217,187.00 on its bid submitted without consideration of the prevailing wage amendment. Appellant Granite City Electric was the low bidder for the electrical subcontracting work at $2,310,000.00 based on the prevailing wage amendment. ISD 882 awarded the contract for electrical subcontracting work to Wright Electric as the low bidder.

Wright Electric, ISD 882 and Associated Builders and Contractors, a construction trade industry organization, commenced this action in Ramsey County District Court on November 12, 1997 against the Governor of Minnesota, the Minnesota Commissioner of Labor and Industry, and the Minnesota Commissioner of Children, Families and Learning seeking injunctive relief and a declaration that the amendment was inapplicable by its terms or, alternatively, that it violated the Single Subject Clause of Article IV, Section 17, of the Minnesota Constitution.[20]

On cross motions for summary judgment the district court ruled that the prevailing wage act violated the single subject and title requirements of Article IV, Section 17. The court first rejected appellants' argument that chapter 231 encompassed the single subject matter of "the common notion of taxation and government operations," holding that several provisions in the Act had nothing to do with government operations and that the prevailing wage amendment was unconstitutionally adopted in violation of Section 17 beyond a reasonable doubt. The court also concluded that the Act violated the title provision, noting that although the title contained over 800 words and numerals, neither the words "labor," "wages," "school districts," "construction," and "project," nor "Minn. Stat. § 177.41" appeared in the title.

The court of appeals affirmed, also holding that the amendment violated the Single Subject and Title Clause of the Minnesota Constitution. *See Associated Builders and Contractors*, 590 N.W.2d at 137. The court reasoned that the bill's broad subject was tax reform and tax relief but the prevailing wage amendment, since it covered educational facilities built regardless of state funding, was not "remotely" related to either. *See id.* at 136. The court also observed that absent from the bill's title were words that even suggested the inclusion of the prevailing wage amendment such as "labor," "school districts," "construction" or "prevailing wages," and noted this court's repeated warnings to the legislature that omnibus bills were at high risk of running afoul of the single subject and title constitutional requirements. *See id.* at 135-36. The court then severed the amendment pursuant to Minn. Stat. § 645.20 leaving intact the remainder of chapter 231. *See Associated Builders and Contractors*, 590 N.W.2d at 135-36.

Appellants challenge the court of appeals decision, arguing that the prevailing wage amendment does not violate the Single Subject and Title Clause of Article IV, Section 17, and that, if it does, the court cannot sever it and must invalidate chapter 231 in its entirety.

I. Constitutionality

In an appeal from a summary judgment where there is no dispute of material fact our review is limited to determining whether the lower court erred in its application of the law. *See Metropolitan Property and Cas. Ins. Co. v. Metropolitan Transit Comm'n*, 538 N.W.2d 692, 695 (Minn. 1995). Where the constitutionality of a statute is at issue our review is de novo, *see State v. Behl,* 564 N.W.2d 560, 566 (Minn. 1997), and we proceed on the presumption that Minnesota statutes are constitutional and that our power to declare a statute unconstitutional

should be exercised with extreme caution. *See id.*; State v. Merrill, 450 N.W.2d 318, 321 (Minn. 1990). The challenger of the constitutional validity of a statute must meet the very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional. *See Behl*, 564 N.W.2d at 566; *Merrill,* 450 N.W.2d at 321.

Early in Minnesota history the potential for mischief in bundling together into one bill disparate legislative provisions was well known. In the Minnesota Democratic Constitutional Convention in 1857, a proposal that addressed only the requirement that a title give some indication of the contents of the bill was amended following the comments of Mr. Meeker:[21]

> My object in moving this amendment, is to guard against a practice which has been to a greater or less extent, prevalent in this Territory, as well as in other States, of grouping together several different subjects in one bill, and passing them through by means of a system known as log-rolling.

The Debates and Proceedings of the Minnesota Constitutional Convention 124, 262-63 (Francis H. Smith, reporter 1857). Thus evolved the current language in Article IV, Section 17, that "No law shall embrace more than one subject, which shall be expressed in its title." Minn. Const. art. IV, § 17.

The first case to test this constitutional requirement was decided by this court in 1858, only a year after its adoption. In *Board of Supervisors of Ramsey County v. Heenan*, 2 Minn. 330, 339 (Gil. 281, 291) (1858), we upheld the constitutionality of a law reorganizing county and township governments but also requiring the register of deeds to deliver tax documents to the county board of supervisors. We concluded that the single subject requirement was not offended because there was "no attempt at fraud, or the interpolation of matter foreign to the subject expressed in the title." *Id.* Thirty-three years later we further developed our analysis in *Johnson v. Harrison*, 47 Minn. 575, 578, 50 N.W. 924, 924 (1891), when we held that "[a]n act to establish a Probate Code" providing for procedures in probate courts and for property rights in deceased's estates did not violate either the subject or the title provision of Section 17. In doing so we clarified the purpose of the Single Subject and Title Clause-to prevent "log-rolling legislation" or "omnibus bills."[22]

We explained however, that despite these constitutional restrictions, the single subject provision should be interpreted liberally and the restriction would be met if the bill were germane to one general subject:

> [W]hile this provision is mandatory, yet it is to be given a liberal, and not a strict, construction. It is not intended, nor should it be so construed as, to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, or by multiplying their number, or by preventing the legislature from embracing in one act all matters properly connected with one general subject. The term 'subject,' as used in the constitution, is to be given a broad and extended meaning * * *. All that is necessary is that the act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or

related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject.

Johnson, 47 Minn. at 577, 50 N.W. at 924. As to the title provision, we explained that the clause is intended to prevent fraud or surprise upon the legislature and the public by prohibiting the inclusion of "provisions in a bill whose title gives no intimation of the nature of the proposed legislation," *id.*, 50 N.W. at 924, but we accord it the same liberal construction as the single subject provision. *See State ex rel. Olsen v. Board of Control of State Insts.,* 85 Minn. 165, 172, 88 N.W. 533, 536 (1902). In *Olsen* we held "[e]very reasonable presumption should be in favor of the title." *Id.* at 175, 88 N.W. at 537. Again in *State ex rel. Pearson v. Probate Court*, 205 Minn. 545, 552, 287 N.W. 297, 301 (1939), we noted that the generality of the title of an act is not grounds for invalidation as long as the title gives notice of the general subject because "the title was never intended to be an index of the law." We held that the title "An Act relating to persons having a psychopathic personality" and providing for the commitment of sexual offenders did not violate the title clause because it gave notice that the act concerned "sexually irresponsible persons." *See id.* at 552-53, 287 N.W. at 301.

While the policy objective of the constitutional restriction and framework for analysis have long been settled, early challenges to statutory enactments under Section 17 were more successful than in recent years. In *Winona & St. Peter R.R. Co. v. Waldron*, 11 Minn. 515, 535 (Gil. 392, 410) (1866), this court held that an act to "facilitate the construction of a railroad from Winona westerly by way of St. Peter" violated the single subject provision because it included "Consolidation; bridging the Mississippi; taxation." *See id.* at 529, 535 (Gil. 394, 410). In *Anderson v. Sullivan*, 72 Minn. 126, 130-31, 75 N.W. 8, 8-9 (1898), we held that a law authorizing county officers' compensation to be increased was invalid because it was not expressed in the act's title, "An act authorizing and directing the county commissioners * * * to reduce the compensation and number of officers and other employees of such counties." We observed that to hold otherwise would permit logrolling to increase salaries of some officers at the expense of others. *See id.* at 131, 75 N.W. at 8-9.

Later, in *State v. Women's & Children's Hosp.*, 143 Minn. 137, 138-39, 173 N.W. 402, 402 (1919), we held that an act protecting abandoned or homeless children and "for the regulation of agencies receiving such children for care or placing out, and women during confinement" violated the Single Subject and Title Clause because the second part of the provision "relating to women during confinement" was "in no way germane to the former [and] has to do with places where mothers from almost every walk of life are received and cared for during confinement." Finally, in *State ex rel. Finnegan v. Burt*, 255 Minn. 86, 88, 29 N.W.2d 655, 656 (1947), we held the title provision was violated when a law relating to the discharge and demotion of employees appeared in an act entitled "An act to establish a classification and salary system in all counties of this state." We also held that the law covered a separate and distinct subject not suggested in the title of the act. *See id.* at 89, 29 N.W.2d at 656-57.

Since the late 1970's we have addressed the Single Subject and Title Clause in five cases and in no instance have we held that the law being challenged offended the constitutional restriction. In *Wass v. Anderson,* 312 Minn. 394, 399-400, 252 N.W.2d 131, 135-36 (1977), we rejected plaintiff's challenge that the single subject provision was violated by "an act relating to

transportation" that incorporated a constitutional amendment levying taxes on fuel for vehicles on public highways and bonds issued to finance highway construction. We held that there was no evidence of fraud and that the single subject provision was not violated because the proposed constitutional amendment was germane to the same general subject as the act's other provisions. *See id.* at 400; 252 N.W.2d at 135-36. We rejected plaintiff's claim of logrolling and that the term "transportation" was too broad to express a single subject because even though "transportation" is a general term, it was not misleading. *See id.* at 401-03, 252 N.W.2d at 136-37. We held "it is not essential that the best or even an accurate title be employed, if it be suggestive in any sense of the legislative purpose." *Id.* at 403, 252 N.W.2d at 137 (quoting *Olsen,* 85 Minn. at 175, 88 N.W. at 537).

Similarly, in *Lifteau v. Metropolitan Sports Facilities Comm'n,* 270 N.W.2d 749, 752-53 (Minn. 1978), we rejected a claim that an act titled "An act relating to metropolitan government; providing for sports facilities; establishing a sports commission and prescribing its powers and duties * * * " violated the title provision of Section 17 when it empowered a commission established pursuant to the act to work with the Metropolitan Council to impose a two percent tax on the sale of alcohol near the stadium. We reiterated the purpose of the title provision and held that the act's title provided sufficient notice of the contents. *See id.* at 753. we also took judicial notice of the fact that no proposal received more coverage in the media and the legislative process than what was then known as the stadium bill. *See id.*

In the three most recent cases to come before this court however, while we have held that the challenged law did not violate Section 17, we have taken quite a different approach. In each instance we took the occasion to sound an alarm that we would not hesitate to strike down oversweeping legislation that violates the Single Subject and Title Clause, regardless of the consequences. In *State ex rel. Mattson v. Kiedrowski,* 391 N.W.2d 777, 778, 783 (Minn. 1986), an act permitting the legislature to transfer responsibilities of the State Treasurer to the Commissioner of Finance was challenged on the ground that the act violated the separation of powers doctrine as well as the single subject and title constitutional restrictions. We held the act unconstitutional as a violation of the separation of powers doctrine and therefore we did not reach the single subject issue, but in a concurring opinion by Justice Yetka, joined by Justice Simonett, the disparate provisions of the act were cited prompting Justice Yetka to declare that "now all bounds of reason and restraint seem to have been abandoned." *Id.* at 784 (Yetka, J., concurring specially). He referenced, for example, provisions relating to agricultural land, a council of Asian-Pacific Minnesotans and the establishment of a recycling program. *See id.* Justice Yetka questioned whether this court has been too lax in permitting such legislation and observed "[t]he worm that was merely vexatious in the 19th century has become a monster eating the constitution in the 20th." *Id.* He concluded with an alert to the legislature as to what was to come if an act violated the single subject and title provisions in the future:

> [W]e should send a clear signal to the legislature that this type of act will not be condoned in the future. Garbage or Christmas tree bills appear to be a direct, cynical violation of our constitution * * *. It is clear to me that the more deference shown by the courts to the legislature and the more timid the courts are in acting against constitutional infringements, the bolder become those who would violate them.

> * * * [W]e should publicly warn the legislature that it if does hereafter enact legislation similar to Chapter 13, which clearly violates Minn. Const. art IV, § 17, we will not hesitate to strike it down regardless of the consequences to the legislature, the public, or the courts generally.

Id. at 785.

A similar note of alarm was sounded three years later in *Blanch v. Suburban Hennepin Regional Park District,* 449 N.W.2d 150, 154 (Minn. 1989), where a law was challenged under Section 17 that authorized a metropolitan park district to acquire land and to develop a park in an act titled "relating to the organization and operation of state government." We commented that "[t]he common thread which runs through the various sections of chapter 686 is indeed a mere filament," but we upheld the provision because the park bill was designed to allow the legislature to appropriate funds from the preceding session-thus it fell under the broad subject of appropriations for the operation of state government. *See id.* at 155. Justice Yetka again concurred, joined once again by Justice Simonett, observing that while the court correctly resolved the challenge because the legislature did not have the opportunity to heed the court's earlier warning in *Mattson,* "[t]he legislature hereafter has full notice of the consequences of overstepping constitutional limitations in its drafting of omnibus bills." *Id.* (Yetka, J., concurring specially). Chief Justice Popovich also picked up the cudgel when he observed, in a concurring opinion, that "the court is increasingly concerned about the possibilities of future violations of art. IV, § 17. * * * The views of the justices expressed today should be considered as instructive, alerting a co-equal branch of government, the legislature, to our concerns." *Id.* at 156-57 (Popovich, C.J., concurring specially).

Then in *Metropolitan Sports Facilities Comm'n v. County of Hennepin*, 478 N.W.2d 487, 490 (Minn. 1991), we held that a law exempting certain space in the Metrodome from property taxation did not violate the single subject provision of Section 17 because the amendment was part of an omnibus fiscal bill and the title of the bill included taxation. We concluded that the property tax provision was germane and not unexpected. *See id.* We also acknowledged that while the bill could have been more consistent with the single subject requirement, it was enacted prior to the *Blanch* warning about the constitutional frailty of "garbage bills." *See Metropolitan Sports Facilities Comm'n,* 478 N.W.2d at 490.

With the benefit of the history of Section 17 in this court, we turn to the claims of the parties here. Appellants assert that the prevailing wage amendment is germane to the subject of tax relief and the "operation of state and local government" since the amendment was intended to overturn *NewMech,* a decision impacting tax relief. None of our prior rulings would indulge such a strained reasoning however, nor do we believe the clear wording of Section 17 permits the inclusion of such disparate provisions in one bill. While the amendment may have a tax impact by affecting construction costs, clearly that is not its purpose and nowhere is consideration of tax relief and reform mentioned in its very short text. The connection between the amendment and any subject of tax in the Omnibus Tax Act falls far short of even the mere filament test. The other sections in chapter 231 concerned subjects such as property tax reform, income taxes and property tax refunds, sales and special taxes, tax increment financing and mineral taxes-all subjects related to tax reform. In any event, clearly more than an impact on

state finances is required to establish even a minimum thread of germaneness, as virtually any bill that relates to government financing and government operations affects, in some way, expenditure of state funds.

Respondents contend that the prevailing wage amendment is even less germane to the subject of financing and operation of local government because under the amendment prevailing wages are required to be paid regardless of whether the school project is publicly funded. Appellants counter that the legislature did not intend the amendment to apply beyond publicly funded projects.[23] We do not resolve that argument of statutory ambiguity, but note that the language of the amendment contains no apparent limitation on the school projects to which it applies other than the $100,000 requirement. We have held that taxes on motor vehicle fuel and bonds issued to finance highway construction are germane to the subject of transportation, property tax exemptions in the Metrodome are germane to the subject of taxation, and a metropolitan park district acquisition of land is germane to an appropriations bill. But even under a liberal interpretation-to avoid "embarrassment" of legislation-to construe an amendment requiring prevailing wages that lacks any express limitation to public funding as related to the subject of financing and operation of state and local government would push the mere filament to a mere figment. We decline to do so.[24]

Appellants next argue that there was no evidence of impermissible logrolling and therefore the mischief the constitutional restriction was intended to address is not present. Appellants" contention is misdirected. The Single Subject and Title Clause, as Minnesota's first "sunshine law," requires that the legislature not fold into larger, more popular bills, wholly unrelated and potentially unpopular provisions that may not pass as a stand-alone bill. The purpose of preventing logrolling is to preclude unrelated subjects from appearing in a popular bill, not to eliminate unpopular provisions in a bill that genuinely encompasses one general subject. We fully recognize that it is the legislature's prerogative to establish our state's public policy in the area of prevailing wages and that the legislative process is not bound by rigid textbook rules. Nonetheless, lawmaking must occur within the framework of the constitution. So while we do not conclude that there was suspicious conduct on the part of the legislature nor impugn its motive in including the prevailing wage amendment in a bill that was predominately tax reform and relief, we are concerned about the lack of a single subject and the characteristics of logrolling. First, prevailing wages have been historically discussed in the labor committees, not tax committees.[25] Amendments to Minn. Stat. § 123B.71, subd. 2, where the prevailing wage amendment now appears, have historically come about through education bills.[26] That most discussions on prevailing wages took place in the tax committee suggests, if not logrolling, an unexplained deviation from the history of labor committee discussions on the prevailing wage act.

Second, the issue of prevailing wages had no companion bill in the senate, received little consideration in the house committee hearings and was inserted into a much broader and popular bill with an entirely different legislative theme. Third, while we acknowledge that the legislative process is complicated and the rationale for pursuing one particular process or another is not always clear, obviously a more direct route to adopting the amendment would have been to redefine "project" in Minn. Stat. § 177.42, which includes the original definition of "project" for prevailing wage purposes. These factors raise concerns about the legislative

process, and with the lack of germaneness to the general subject of taxes and tax reform, we conclude that the prevailing wage amendment violates the single subject provision of our constitution.

Finally, appellants argue that chapter 231 does not violate the title provision of Section 17 because its title gave sufficient notice of the amendment to the prevailing wage law. The single subject and title provisions of Section 17 are often discussed together, but the title provision serves a different purpose and requires a somewhat different analysis. The purpose of the title provision is to prevent fraud or surprise on the legislature and the public-in essence to provide notice of the nature of the bill's contents. *See Johnson*, 47 Minn. at 577, 50 N.W. at 924. Here, the title references "financing and operation of state and local government" and property tax relief and rate reform, tax rebates, truth in taxation, local tax levies and tax credits-all themes of tax reform and relief. Nowhere is there a reference to labor, wages, school construction or a myriad of other words that would suggest that it contains a provision having a potentially significant impact on the cost of school construction. The first clause in the title of the bill seems to be virtually generic, as other appropriations bills passed in the same legislative session have the same general title—"relating to the organization and operation of state government"[27]--hardly giving notice of "the interests likely to be affected" we required in Wass, 312 Minn. at 398, 252 N.W.2d at 134, or that is "suggestive in any sense of the legislative purpose." *Olsen*, 85 Minn. at 175, 88 N.W. at 537. Even with "every reasonable presumption * * * in favor of the title," *id.*, 88 N.W. at 537, the failure of chapter 231 to give even a hint that the prevailing wage amendment was part of the bill leads us to the conclusion that the title did not provide sufficient notice of the amendment to legislators and school districts to meet the constitutional requirement of Section 17.

II. Severability

We consider next whether the entirety of chapter 231 must be held unconstitutional because it contains more than a single subject and its title does not give reasonable notice of its contents, or whether there can be a severance of the offending amendment permitting to stand the other statutory provisions of chapter 231. For several reasons we conclude that the constitutional construal of Article IV, Section 17, does not require the entire law to be declared unconstitutional.

First, the words of Section 17 do not require such a draconian outcome. By the plain words of the article, it does not prohibit a bill from becoming law if it does embrace more than one subject-it only states that "No law shall embrace more than one subject, which shall be expressed in its title."[28] Minn. Const. art. IV, § 17. It is at least implicit that on judicial review, the court has the option of bringing the law into constitutional compliance by severing a provision that is not germane to the theme of the law. *Cf. Sullivan*, 72 Minn. at 133, 75 N.W. at 9-10 (stating that "while a part of the statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also"). Moreover, litigation calls into challenge but one aspect of the law. Our goal of constitutional compliance relates to the particular provision of the law being challenged only and we are not prejudging that any other aspect of the law is germane.

Second, it is no more reasonable to conclude that the constitution's language requires the entire law to be declared unconstitutional than it is to proceed on a far less disruptive course of severing from the law the offending provision-here the prevailing wage amendment-and preserving its other parts. Indeed it could well be argued that to hold the entire law unconstitutional, when the great weight of the other provisions are so singularly related to the common theme of tax relief and reform, would be overstepping our judicial bounds in disregard of the constitutional principle of separation of powers. *See Koehnen v. Dufuor*, 590 N.W.2d 107, 113 (Minn. 1999).

Third, the severance remedy is certainly not a novel resolution of how far the effect of unconstitutionality reaches when the challenged provision is unrelated to the theme of the law. Over a hundred years ago, in *Sullivan,* we invalidated one provision of a law but upheld the remainder:

> The familiar rule on the subject is that, while a part of the statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other.

72 Minn. at 133, 75 N.W. at 9-10. On several occasions between 1901 and 1932 this court held provisions of a statute unconstitutional under Section 17 but, without even a comment on the breadth of the ruling, declined to invalidate the entire statute. *See, e.g., Egekvist Bakeries, Inc. v. Benson,* 186 Minn. 520, 523, 243 N.W. 853, 854 (1932) (holding that sanitary wrapping of bread was not germane to an act regulating the weight of bread and severing only the unconstitutional portion of the statute); *In re Day,* 93 Minn. 178, 182, 102 N.W. 209, 211 (1904) (invalidating only the last provision of a law); *Winters v. City of Duluth,* 82 Minn. 127, 132-33, 84 N.W. 788, 790 (1901) (holding that one provision of an act was invalid because the title of the act was not broad enough to include it, but "we do hold that the act * * * is constitutional"). In *Finnegan,* we upheld the remainder of a statute after invalidating one of its provisions on the ground that the unconstitutional provision was unrelated to the subject matter of the remainder of the law and thus could be severed. *See* 225 Minn. at 89-90, 29 N.W.2d at 657.

Precedent leading to the more draconian result of invalidating the entire law is not particularly useful. In *Women's & Children's Hospital,* we ruled that the law violated Section 17 and invalidated the entire law, but the circumstances were clearly distinguishable from those here. *See* 143 Minn. at 139, 173 N.W. at 402. There the law contained two distinct subjects and if either provision was to survive, the court would be required to engage in a balancing of importance between the two-clearly a legislative process.[29] Here, where chapter 231 includes a provision that clearly is not germane to the subject of otherwise massive legislation, we need not engage in such a pursuit.[30]

In *State ex rel. Foster v. Naftalin*, 246 Minn. 181, 200, 74 N.W.2d 249, 261 (1956), we observed that an entire law is unconstitutional generally in two instances: where its terms conflict with a constitutional provision, or where the method of enactment does not comply with

constitutional requirements. There, we held unconstitutional a law that included an amendment never passed by the legislature. *See id.* at 185, 192, 74 N.W.2d at 253, 257. We invalidated the entire law noting that although the balance of a constitutionally enacted law can be upheld even if one provision violates the constitution, "[i]t does not follow that, where a bill never has become a law for failure to follow constitutional mandates in the process of enactment, a part of it can be sustained." *Id.* at 199, 74 N.W.2d at 261. Importantly, and as the special concurrence and dissent seems to overlook, we specifically distinguished the circumstances in *Naftalin* from "cases where the constitutional prerequisites to enactment of a law have been followed but where parts of the act are unconstitutional for some other reason *such as failure to comply with Minn. Const. art 4, [§ 17].*" 246 Minn. at 199, 74 N.W.2d at 261 (emphasis added); *see also Freeman v. Goff,* 206 Minn. 49, 53, 287 N.W. 238, 241 (1939).

The court of appeals relies heavily on Minn. Stat. § 645.20,[31] enacted in 1941, permitting courts to sever an unconstitutional provision from a comprehensive law. We have reservation that an act of the legislature could substantively determine the breadth of the sweep of Section 17 under traditional principles of separation of powers. *See, e.g., Petition for Integration of Bar of Minnesota,* 216 Minn. 195, 199, 12 N.W.2d 515, 518 (1943) ("The supreme court is thereby made the final authority and last resort in [interpreting] * * * the constitution."). Since the legislature cannot authorize the court to do what the constitution prohibits, we reiterate that our authority to sever the offending provision comes not from the legislature, but from the constitution itself and precedent interpreting Section 17.

Central to our determination to sever a provision from a law is whether "all the provisions are connected in subject-matter." *Sullivan*, 72 Minn. at 133, 75 N.W. at 10. As we have determined that the prevailing wage amendment is not connected in subject matter to the common theme of the law, severance is a resolution clearly consistent with our holding that the prevailing wage provision is unrelated to tax reform and relief. In light of our prior case law and our review of *Naftalin* and *Blanch* we conclude that severance is appropriate.

Appellants correctly point out that in *Blanch* we questioned whether we would invalidate entire laws in future violations of Section 17.[32] *See Blanch*, 449 N.W.2d at 155. We decline that path now in favor of a more pragmatic result that is consistent with our constitution and the cases interpreting provisions in violation of the Single Subject and Title Clause. This decision both informs the legislature that we do not hesitate to declare unconstitutional a statutory provision violating the Single Subject and Title Clause, but avoids the draconian outcome of holding, on these facts, that an unrelated provision in a law should bring the whole law down.[33] Where the common theme of the law is clearly defined by its other provisions, a provision that does not have any relation to that common theme is not germane, is void, and may be severed.[34]

Affirmed.

DISSENT

Page, J. (dissenting).

I respectfully dissent. I do so because I disagree with the court's conclusion that the 1997 Omnibus Tax Bill, Act of June 2, 1997, ch. 231, 1997 Minn. Laws 2394, violates Article IV, Section 17, of the Minnesota Constitution which provides that "No law shall embrace more than one subject, which shall be expressed in its title."[35] Laws passed by our legislature are presumed constitutional and "our powers to declare a [law] unconstitutional should be exercised with extreme caution and only when absolutely necessary." *In re Haggerty,* 448 N.W.2d 363, 364 (Minn. 1989). Further, we have said that a law will withstand a single subject challenge even when "the common thread which runs through the various sections * * * is * * * a mere filament." *Blanch v. Suburban Hennepin Reg'l Park Dist.*, 449 N.W.2d 150, 155 (Minn. 1989). With respect to a subject being expressed in the title of the enactment, we have said "it is sufficient that the title is fairly suggestive of the enactments which follow." *State v. Pioneer Press Co.,* 100 Minn. 173, 175, 110 N.W. 867, 868 (1907).

Chapter 231 is "[a]n act relating to the financing and operation of state and local government * * *."[36] In their complaint, respondents allege that the prevailing wage requirements enacted in article 16, section 4 of chapter 231 will result in a cost increase more than $2 million above and beyond the initial cost budgeted for completion of ISD 882's high school construction project. Given the fiscal and tax implications of article 16, section 4 of chapter 231, as alleged by respondents in support of their contention that chapter 231 is unconstitutional, it is difficult to see how that section is not connected to the other enactments contained in chapter 231 by, at a minimum, a "mere filament." *See* Act of June 2, 1997, ch. 231, article 16, section 4, 1997 Minn. Laws 2394, 2629. The court also suggests that article 16, section 4 does not involve state and local government financing or operation. I believe that suggestion is incorrect. The language of article 16, section 4, now codified at Minn. Stat. § 123B.71, subd. 2 (1998), provides that school construction projects exceeding $100,000 in cost are projects under Minn. Stat. § 177.42, subd. 2 (1998) of the state's prevailing wage act. As such, the applicability of article 16, section 4 is limited to "*projects* financed in whole or in part by state funds * * *." Minn. Stat. § 177.41 (1998) (emphasis added). "Project" under the prevailing wage act means "[the] erection, construction, remodeling, or repairing of a *public* building or other *public* work financed in whole or part by state funds."[37] *See* Minn. Stat. § 177.42, subd. 2. Thus, there is also a direct connection to state and local government financing and operation. Based on these connections and the law's title, I cannot conclude that article 16, section 4 of chapter 231 violates Article IV, Section 17, of the Minnesota Constitution.

Interestingly, article 16, section 4 of chapter 231 has a far greater connection to the title of chapter 231 as well as to the majority of the provisions contained in chapter 231 than do any of the provisions of article 15, which deal exclusively with the regulation of certain insurance companies. Article 16, section 4 of chapter 231 also has as much if not more of a connection to the majority of the provisions of chapter 231 than do article 16, section 1, which deals with reporting of local government lobbying expenditures; article 16, section 2, which deals with the power and authority of sanitary districts; article 16, section 3, which deals with the appeal of certain eminent domain awards; article 16, section 5, which deals with utility easements and the conveyance of property by the Commissioner of Transportation; article 16, section 11, which deals with the distribution of income by cooperatives; article 16, section 12, which prohibits rebates and concessions by wholesalers in connection with the sale of cigarettes; article 16, section 19, which deals with a county's, home rule charter city's, statutory city's, town's, school

district's or other political subdivision's authority to create a corporation and the validity of certain lease purchase agreements; and article 16, section 27, which requires that computer hardware and software purchased with money appropriated in chapter 231 be Year 2000 compliant.

While I believe the court is in error when it concludes that chapter 231 violates Article IV, Section 17, of the Minnesota Constitution, I do not believe that error is the court's most serious or most troubling. By severing article 16, section 4 from the remainder of chapter 231, the court has taken on the role of a super legislature, deciding which provisions of chapter 231 will be given effect by picking and choosing between the law's various provisions, even though all of its provisions are unconstitutional. Under article IV, section 17, this court is not vested with the power to determine that certain provisions of an enactment will become law and that others will not.[38] The court's only power is to declare the entire law either constitutional or unconstitutional. Interestingly, in severing what it believes to be the offending provision of chapter 231, the court does not rely on language from the constitution.[39] It does not because under article IV, section 17, it cannot. Article IV, section 17, of the constitution says "*No law* shall embrace more than one subject which shall be expressed in its title." (Emphasis added.) The language of article IV, section 17 could not be clearer or more explicit. It says "no law," it does not say "no provision of a law."

In defending the severance of what it believes to be the offending provision of chapter 231, the court relies on verbal sleight-of-hand. While talking about the constitutionality of chapter 231, under article IV, section 17 of our constitution, the court applies the principles we use to determine whether a statute or a provision of a statute is constitutional. The court acts as though our responsibility is not to determine the constitutionality of the law being challenged. Indeed, the court states that "Our goal of constitutional compliance relates to the particular provision of the law being challenged only * * *." That statement is incorrect. The court evidently does not understand the distinction between a law that, while validly enacted, contains a provision that is unconstitutional and a law that is unconstitutional because it was never validly enacted.

Our responsibility is to determine whether the law which was enacted as chapter 231, when enacted, was a law embracing "more than one subject" at least one of which was not "expressed in its title." The court knows that article 16, section 4, standing alone, does not offend the Minnesota Constitution. The only possible constitutional offense is that by article 16, section 4's inclusion in the law that was enacted as chapter 231, the law was not validly enacted because it embraces "more than one subject" at least one of which was not "expressed in its title." While the mere presence of article 16, section 4 in chapter 231 may render all of chapter 231 unconstitutional because it was never validly enacted, the mere presence of the provision does not render the provision itself unconstitutional.

The underlying purpose of article IV, section 17, as the court notes, is to prevent logrolling legislation. In addition, article IV, section 17 is intended to ensure that citizens are fairly apprised of the subjects of laws being considered by the legislature. Those purposes are not and cannot be met by severing any one offending provision of a law. First, as indicated, it puts the court into the role of super legislature in violation of Article III, Section 1, of the Minnesota Constitution.

More importantly, declaring only the offending provision unconstitutional does nothing to discourage the legislature from engaging in the conduct that article IV, section 17 seeks to prevent. Indeed, it may even encourage such conduct. If the legislature enacts a law in violation of article IV, section 17, four things can happen, only one of which discourages laws in violation of article IV, section 17, from being passed. The law may go unchallenged or the law may be challenged but, for whatever reason the reviewing court may decline to strike it down. In either of these cases, the legislature will not be discouraged from violating article IV, section 17.

The law may also be challenged, held unconstitutional and the offending provision severed. Finding the law unconstitutional and severing the offending provision, however, does nothing to discourage the legislature from passing laws in violation of article IV, section 17. On the surface it would seem that severing the offending provision would discourage the legislature from enacting such laws; in fact it does not, because in reality having the offending provision held unconstitutional and then severed from those provisions which go unchallenged results in the legislature (or those behind the offending provisions) being no worse off than if the severed provision had not been enacted at all. Given the possibility that the law may not be challenged at all or if challenged, may be held constitutional, there is no downside to enacting such legislation if the worst position the legislature will be in if the law violates the constitution is the same position it would have been in had the offending provision not been enacted. Further, there may be some political benefit to be gained by including such provisions in a law even if the law is subsequently held unconstitutional and only the offending provision is severed from the remaining provisions of the law.

Finally, the challenged law may be held unconstitutional and the entire law struck down. This is the only outcome that provides an incentive for the legislature to refrain from enacting laws which offend article IV, section 17. Moreover, the clear language of article IV, section 17 requires that result.

While I disagree with the court's conclusion that article 16, section 4 of chapter 231 violates Article IV, Section 17, of the Minnesota Constitution, to the extent that the court is correct and I am wrong on that point, the clear language of article IV, section 17 and the purposes behind that constitutional provision mandate that the law in question, chapter 231, be struck down in its entirety as unconstitutional because "[n]o law shall contain more than one subject which, shall be expressed in its title."[40] Minn. Const. art. IV, § 17.

CONCURRENCE & DISSENT

ANDERSON, Paul H., J. (concurring in part and dissenting in part).

> *People who love sausage and respect the law should never watch either of them being made.*--Otto von Bismark[41]

I agree with the majority that chapter 231 violates the Single Subject and Title Clause of Article IV, Section 17 of the Minnesota Constitution, but I do not agree that we can simply excise one offending provision and allow the remainder of the law to continue in effect. Therefore, I respectfully dissent on Part II of the majority opinion.

For the reasons expressed in the majority opinion, the inclusion of a prevailing wage law concerning school construction in what was essentially a tax bill violated Article IV, Section 17 of the Minnesota Constitution. While the "mere filament" test has served this court for many years, its interpretation has now become so deferential as to render Section 17 ineffectual. Part I of the majority opinion correctly reflects the trend of our court's decisions on Section 17 over the past 15 years and returns our court to its proper role in interpreting this section of our constitution, namely to give each part of the constitution the plain meaning and effect of its language.

While agreeing that chapter 231 is unconstitutional under Section 17, I cannot agree with the majority's conclusion that we can simply strike the offending provision of this law and permit the remainder to continue in effect. The majority's analysis ignores the constitution's plain language, confuses the various phases through which a legislative enactment must pass, and ultimately encourages the very mischief Section 17 was designed to prevent.

Section 17 is directly worded, stating that: "No law shall embrace more than one subject, which shall be expressed in its title." Minn. Const. art. IV, § 17. The majority claims that this language does not require us to invalidate chapter 231 in its entirety. But such a reading ignores that Section 17 is contained in Article IV, which defines the legislature and the procedures by which legislation is enacted. As such, Section 17's language has meaning only in the context of enacted session laws; otherwise, the application of Section 17's title provision would be meaningless. The title of a law exists only with respect to the session law and is not part of the statutes as codified by the revisor of statutes. *See generally* Minn. Stat. § 3C.08 (1998). Furthermore, Section 17 in no way addresses the validity of the provisions of a law. The majority's interpretation essentially would rewrite Section 17 to read: "No provision of a law shall be valid unless it is embraced by the subject of the law, of which there shall be only one, and which shall be expressed in its title." But Section 17 does not give us any authority by which to hold a *provision* of a law unconstitutional. As stated above, Section 17's mandate is simple and clear, "No *law* shall embrace more than one subject, which shall be expressed in its title." Minn. Const. art. IV, § 17 (emphasis added).

The majority fails to appreciate the distinctions between bills, laws, and statutes. A bill is proposed legislation that has not completely made its way through the legislative process. Laws are bills that have been enacted by the legislature and then signed by the governor, enacted after three days of gubernatorial inaction, or passed by a legislative override of the governor's veto. *See* Minn. Const. art. IV, § 23. Statutes are enacted laws that are codified, organized, and assembled by the revisor of statutes. *See generally* Minn. Stat. § 3C.10 (1998) (defining the publication powers of the revisor of statutes).

Our court has authority articulated in Minn. Stat. § 645.20 (1998) to sever a provision of a law that has been found to be unconstitutional. In the context of a statute, this makes sense because

any particular provision of a statute may have been passed years apart from the remainder of the statute. This section also reflects the legislature's intent that, when possible, only the unconstitutional provision of a validly enacted law be stricken and that the balance of the law be preserved. However, severing a provision of a law found to be in violation of Section 17 is profoundly different from severing an unconstitutional provision under section 645.20.

The severability of a provision of a law as articulated in section 645.20 is predicated on the basis that the law containing the challenged provision was properly enacted and that a court has subsequently determined that the provision's requirements or prohibitions violate the constitution. Such a determination is different from saying that the law containing the provision itself was not validly enacted. The latter infirmity is not only fatal to the challenged provision, but to every other provision of the same law. A violation of Section 17 strikes at the validity of the entire law, not merely the challenged provision.[42] We commented on the consequence of a violation of Section 17 in *Blanch v. Suburban Hennepin Regional Park District* when we said: "[W]e are constrained to observe that since it is the presence of more than one subject which renders a bill constitutionally infirm, it appears to us at this time unlikely that any portion of such a bill could survive constitutional scrutiny." 449 N.W.2d 150, 155 (Minn. 1989). Our reasoning in *Blanch* was sound and there is no cause to depart from that reasoning today.

I agree with Justice Page when he notes in his dissent that severing the challenged provision defeats the purpose of Section 17. Not only would severance encourage "logrolling," it may well facilitate it. The majority correctly notes that the purpose of Section 17 is that of a "Sunshine law." Section 17 is designed to ensure that bills are passed with reasonable notice of their contents, both to legislators and to the public at large. It is also designed to ensure that unpopular and unrelated provisions are not hidden in voluminous bills or attached to popular bills to ensure their passage. Severance of a challenged provision of a law found to be in violation of Section 17 would defeat Section 17's purpose and establish the judiciary as a "super-legislature."

By allowing severance, the majority essentially permits the legislature to pass whatever bills it pleases, knowing that if challenged, the courts will strike only the challenged provisions. As Justice Page points out, the legislature may be willing to act on the remote chance that a provision will be challenged and, if challenged, struck. Even more problematic would be the ability of the legislature to pass provisions popular with the general public, but injurious to certain parties, with the ability to assure those parties that the courts will likely excise the provisions if challenged.

As the introductory quotation suggests, the passage of a legislative enactment is a complex process whereby diverse interests are harmonized and consensus is built. It is a process that involves compromise and negotiation. Section 17 limits that process. We recognized that limit in *State v. Women's & Children's Hospital* where the challenged law contained only two provisions on distinct subjects: homeless children and hospitalization for pregnant women. *See* 143 Minn. 137, 138-39, 173 N.W. 402, 402 (1919). The majority claims that chapter 231 is clearly distinguishable from the law in *Women's & Children's Hospital.* I disagree. The dispositive issue in *Women's & Children's Hospital* was not the balancing of the two provisions, but rather the inclusion of more than a single subject in the law. *See id.* While chapter 231 is

more complex and comprehensive than the legislation in *Women's & Children's Hospital,* it still suffers the exact same constitutional infirmity: the inclusion of more than a single subject.

The majority argues that because chapter 231 is so complex, we may sever an unrelated part as we would an unconstitutional provision in a validly enacted law. Again, this argument ignores the basic fact that the aforementioned authority to sever is specifically articulated in Minn. Stat. § 645.20. Here, our authority comes directly from Section 17, which dictates the title clause and the single subject requirements. By excising the challenged provision, the majority has now created a piece of legislation that was not passed by either house of the legislature nor signed by the governor. The majority essentially establishes a "judicial line-item-veto" without any constitutional basis. I cannot countenance such a usurpation of the legislative function by the judiciary. Therefore, I am compelled to conclude that when a law is found to have violated Section 17, then it is the entire law that is invalidated.

I am not unmindful of the drastic effect that invalidating a major piece of legislation such as chapter 231 will have on those in this state who have reasonably relied on its validity. This is especially true when that legislation has been in effect for many years. Nor can I ignore the potential rush of litigation that this result may encourage. I also acknowledge the role our court may have played in encouraging this reliance by our overlong unwillingness to give Section 17 its stated force and effect. For the past 30 years, we have not used Section 17 to invalidate any piece of legislation. We may have been overly deferential to the legislature's continuing abuses in this area.

In recent years, members of this court have warned the legislature that omnibus legislation will receive greater scrutiny under Section 17. But the recurring nature of omnibus-tax and fiscal legislation in recent years should indicate to the court that our colleagues' warnings have gone unheeded. I find this understandable. While the writings of individual justices of this court are important parts of the judicial process, this court only speaks as a co-equal branch of government through its majority decisions. *See generally Anchor Cas. Co. v. Miller*, 258 Minn. 585, 585-86, 105 N.W.2d 689 (Minn. 1960). This court has issued no warnings of a like nature through its majority opinions.[43]

I believe that the inclusion of the prevailing wage provision in Minnesota Laws 1996, chapter 231 violates the single subject and title requirements of Article IV, Section 17 of the Minnesota Constitution and that a violation of Section 17 renders the entire session law invalid. However, for all the reasons I have previously stated and under the precedent of our rulings in *Holmberg v. Holmberg,* 588 N.W.2d 720, 726-27 (Minn. 1999), *Nieting v. Blondell*, 306 Minn. 122, 132, 235 N.W.2d 597, 603 (Minn. 1975), and *Spanel v. Mounds View School District No. 621,* 264 Minn. 279, 292-94, 118 N.W.2d 795, 803-04 (Minn. 1962), I would have the effect of this decision be prospective, applying only to those laws passed after the date of this opinion. Such application may also give the legislature an opportunity, if it so desires, to consider such constitutional amendments necessary to exempt omnibus fiscal legislation from the requirements of Section 17.[44]

[1] This single subject and title provision was originally Minnesota Constitution, Article IV, Section 27. In 1974 it became Section 17. Minn. Const. art. IV, § 17.

[2] The prevailing wage law is found in Minn. Stat. §§ 177.41-.44 (1998).

[3] *See* 1 Journal of the House of Representatives 116, 666 (68th Minn. Leg. Jan. 11 and Mar. 15, 1973); 1 Journal of the Senate 861 (68th Minn. Leg. Mar. 29, 1973); 2 Journal of the Senate 2186 (68th Minn. Leg. May 3, 1973).

[4] *See* 1 Journal of the House of Representatives 965 (68th Minn. Leg. Mar. 28, 1973); 2 Journal of the Senate 3093 (68th Minn. Leg. May 16, 1973). The original Act was entitled "An act relating to labor * * * prohibiting wage rates lower than prevailing wage rates * * *." Act of May 24, 1973, ch. 724, 1973 Minn. Laws 2077. The words "financed in whole or in part by state funds" were added to Minn. Stat. § 177.41 in 1975 by a bill entitled "An act relating to labor; providing for the determination of prevailing wage rates for state financed projects * * *." Act of May 17, 1975, ch. 191, 1975 Minn. Laws 521.

[5] "Because DESA and HACA payments do not bear a direct relationship to a particular construction project, we conclude that the meaning of 'financed in whole or in part by state funds' does not encompass state aid payments to school districts through DSEA or HACA." *NewMech*, 540 N.W.2d at 805.

[6] *See* 1 Journal of the House of Representatives 690 (80th Minn. Leg. Mar. 13, 1997).

[7] Once enacted the prevailing wage amendment was codified at Minn. Stat. § 121.15, subd. 1a (Supp. 1997). *See* Act of June 2, 1997, ch. 231, art. 16, § 4, 1997 Minn. Laws 2629. In 1998, Minn. Stat. § 121.15, subd. 1a, was renumbered as Minn. Stat. § 123B.71, subd. 2.

[8] Hearing on H.F. 1512, H. Comm. Labor-Management Rel., 80th Minn. Leg., March 24, 1997 (audio tape) (comments of Rep. Bakk, house sponsor of the bill).

[9] H.F. 1512, 80th Minn. Leg. 1997.

[10] Hearing on H.F. 1512, H. Comm. Labor-Management Rel., 80th Minn. Leg., March 24, 1997 (audio tape).

[11] *See id.*

[12] *See* Hearing on H.F. 1512, H. Comm. Tax, 80th Minn. Leg., April 21, 1997 (audio tape).

[13] House debate on H.F. 2163, 80th Minn. Leg., April 25, 1997 (audio tape).

[14] *id.*

[15] *See* 3 Journal of the House of Representatives 3172 (80th Minn. Leg. Apr. 25, 1997).

[16] *See* Hearing on H.F. 2163, Comm. Tax Conf., 80th Minn. Leg., May 13 and 16, 1997 (audio tape).

[17] *See* 5 Journal of the House of Representatives 5252-53 (80th Minn. Leg. May 19, 1997); 4 Journal of the Senate 4290 (80th Minn. Leg. May 19, 1997).

[18] *See* Act of June 2, 1997, ch. 231, 1997 Minn. Laws 2640.

[19] The title itself contains over 800 words. *See id.* at 2394-95.

[20] The trial court permitted intervention by Granite City Electric, three trade associations, the Minnesota Mechanical Contractors Association, the Sheet Metal, Air Conditioning and Roofing Contractors Association, and the National Electrical Contractors Association, and the International Brotherhood of Electrical Workers, Local 292, a labor union whose members work for Granite City Electric.

[21] Bradley B. Meeker was appointed judge in the new territory of Minnesota in 1849 and presided at the first term of court in Minneapolis. After leaving the bench he was a member of the constitutional convention in 1857. Meeker county is named for him. *See XIV Collections of the Minnesota Historical Society, Minnesota Biographies 1655-1912,* 501 (compiled by Warren Upham and Rose Barteau Dunlap, 1912).

[22] We defined logrolling as the "combination of different measures, dissimilar in character, * * * united together * * * compelling the requisite support to secure their passage." *State v. Cassidy,* 22 Minn. 312, 322 (1875) (subject provision's purpose is to "secure to every distinct measure of legislation a separate consideration and decision, dependent solely upon its individual merits, by prohibiting the fraudulent insertion therein of matters wholly foreign").

[23] Appellants argue that the inclusion of the amendment in Minn. Stat. § 123B.71, subd. 2, entitled "review and comment for school district construction" restricts its application to public schools. However, revisor's headnotes are not part of the statute and thus do not determine its scope or meaning. *See* Minn. Stat. § 645.49 (1998) ("The headnotes printed in boldface type before sections and subdivisions in editions of Minnesota Statutes are mere catchwords to indicate the contents of the section or subdivision and are not part of the statute.").

[24] The dissent argues that article 16, section 4, has a greater connection to the subject of chapter 231 than other sections in articles 15 and 16. However, of the eight sections listed by the dissent, seven pertain to state actors, for example the Commissioner of Commerce in article 15 and the Commissioner of Revenue in article 16, section 10, or they refer to state property and government operations. *See, e.g.,* art. 16, § 2 (addressing power and authority of sanitary districts); art. 16, § 3 (addressing the appeal of certain eminent domain awards). The remaining section, article 16, section 12, prohibits rebates in connection with the sale of cigarettes, a prohibition with clear tax reform implications. Unlike these sections, article 16, section 4, is related neither to the subject of tax reform nor to state government financing and operation.

[25] *See supra* note 3.

[26] *See, e.g.,* Act of Apr. 3, 1996, ch. 412, 1996 Minn. Laws 739 (entitled "An act relating to education * * * amending Minnesota Statutes 1994 * * * [123B.71, subd. 2]"); Act of June 30, 1997, ch. 4, 1997 Minn. Laws Spec. Sess. 3207 (entitled "An act relating to education * * * amending Minnesota Statutes 1996 * * * [123B.71, subd. 2]").

[27] The title of chapter 200 is "An act relating to the organization and operation of state government; appropriating money for economic development and certain agencies of state government * * *." Act of May 22, 1997, ch. 200, 1997 Minn. Laws 1415. Chapter 216 is entitled "An act relating to the organization and operation of state government; appropriating money for environmental, natural resource, and agricultural purposes * * *." Act of May 30, 1997, ch. 216, 1997 Minn. Laws 1995. Other laws are entitled with more specificity, for example chapter 162 is entitled "An act relating to family and early childhood education * * *." Act of May 16, 1997, ch. 162, 1997 Minn. Laws 1045.

[28] The constitutional history casts no light on the relation of wording, but the practical result of a more draconian wording might have cast a shadow over the nature of much of the work of the legislature which would be in doubt until reviewed by the courts.

[29] The special concurrence and dissent asserts that our analysis ignores the distinctions between a bill, a law and a statute. However for over 100 years we have consistently viewed severability as the appropriate remedy when a provision of a law is unrelated to the law's general subject, and invalidated the entire law only when it contained two distinct subjects.

[30] We take this opportunity to observe that both dissents are of the view that severing the offending provision will do little to discourage the legislature from obscuring from public view laws that may be unpopular unless we take the more draconian step of declaring the entire law unconstitutional. We do not perceive that as our responsibility. The thrust of the court's ruling is to honor the legislative process by upholding, where possible, the constitutionality of the law in principle and constitutionally rejecting only the offending provision. Were we to declare the entire law unconstitutional, we would engage in far greater encroachment on the legislative process than our ruling here.

[31] This section provides:

> Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable. If any provision of a law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Minn. Stat. § 645.20.

[32] The special concurrence and dissent refers to *Blanch* as signaling the path the court will take if it holds a bill to violate Section 17. That was not our ruling in *Blanch*. In *Blanch*, we upheld the constitutionality of the law under Section 17 and in dictum, cautioned, "we are constrained to observe that since it is the presence of more than one subject which renders a bill constitutionally infirm, it appears to us at this time unlikely that any portion of such a bill could survive constitutional scrutiny." *Blanch,* 449 N.W.2d. at 155. However, we also suggested the reverse: "[w]ere we not of the opinion that the park bill * * * is germane to the broad subject of appropriations for the operation of state government, we would, despite our long-standing tradition of deference to the legislature, be compelled to declare [the park bill] violative of art. 4, § 17, and, hence, unconstitutional and void." *Blanch,* 449 N.W.2d at 155. *Blanch* thus expresses our concern with the practice of severance in cases involving Section 17, but also indicates that had we held the park law unconstitutional we would have invalidated only that portion of the law. Concurring specially, Chief Justice Popovich prophetically voiced his concern:

> It is evident by the opinions of the justices in this matter that the court is increasingly concerned about the possibilities of future violations of article 4, section 17. I have written separately because of the chaos that could result if an omnibus appropriation bill was declared invalid. * * * [A] likely possibility exists that if an improper provision is included in a major appropriation law the entire law could fall. This approach clearly would be a greater deterrent to risking a constitutional violation than severing only a challenged provision--because the latter approach would then permit the legislature "to take a chance" since the entire law would not fall.

Blanch, 449 N.W.2d at 156 (Popovich, C.J., concurring specially).

[33] The special concurrence and dissent's reference to our severance of the provision as a "judicial line-item-veto" represents a serious misunderstanding of the difference between a simple session law containing two provisions and a massive session law such as this one where the challenged provision is clearly a misfit with respect to the subject of the balance of the law. It is difficult to rationalize the dissent's preference for declaring the entire law unconstitutional-a total veto, in the dissent's parlance-with its anxious concern for declaring only the offending provision unconstitutional.

[34] Our review here is limited to cases and controversies before us. *See Lipka v. Minnesota Sch. Employees Ass'n, Local 1980*, 550 N.W.2d 618, 622 (Minn. 1996).

[35] Article IV, section 17, is intended "to prevent the title [of the law] from being made a cloak or artifice to distract attention from the substance of the act itself." *Wass v. Anderson,* 312 Minn. 394, 398, 252 N.W.2d 131, 135 (Minn. 1977) (quoting *State ex rel. Olsen v. Board of Control,* 85 Minn. 165, 175, 88 N.W. 533, 537 (1902)). "The single subject rule was not intended to inhibit comprehensive legislation." *Id.* at 400, 252 N.W.2d at 136. Its purpose is to prevent "log-rolling," which is the attachment of undesirable riders upon bills that are more likely to be passed. Proper observance of the single subject rule of the constitution assures that every distinct piece of legislation is considered on its own merits. *See State v. Cassidy,* 22 Minn. 312, 322 (1875).

[36] Act of June 2, 1997, ch. 231, 1997 Minn. Laws 2394

[37] The court states that "to construe an amendment requiring prevailing wages that lacks any express limitation to public funding as related to the subject of financing and operation of state and local government would push the mere filament to a mere figment." The court then "declines" to do so in this case. In making that statement and in declining to construe the amendment here, the court, by way of legerdemain, ignores the express limitations contained in the prevailing wage act.

[38] The practice of severing select provisions ignores the fact that even if a provision of a law is not germane to its title or is inconsistent with its subject, it does not mean that the provision, as part of the original bill, played no role in the bill being enacted into law. Therefore, there is no guarantee that absent the offending provision the bill *would have* become a law.

[39] The court does say "By the plain words of the article, it does not prohibit a bill from becoming law if it does embrace more than one subject * * *." And the court is correct in that statement. The article does not prevent such a bill from becoming law. But our concern is not with "bills" which have not been enacted into law, our constitutional concern is with laws that have been enacted. The court acknowledges as much at the end of the sentence quoted above when it states "it only states that 'No law shall embrace more than one subject, which shall be expressed in its title.'" The court then goes on to ignore the constitution's language.

[40] In footnote 33 of the court's opinion, the court makes reference to the "dissent's preference for declaring the entire law unconstitutional * * *." That statement is based on a false premise. I have no preference for declaring the entire law unconstitutional. First, as I have indicated, my reading of article 16, section 4 of chapter 231, in light of our case law and the purposes underlying article IV, section 17 of our constitution, leads me to the conclusion that chapter 231 does not violate the constitution. Moreover, my conclusion that the court lacks the constitutional authority to sever an offending provision of a law that violates article IV, section 17 is not guided by any personal preference but only by the constitution's clear mandate. To the extent that I am guided by any preference, my preference would be that this court give meaning to article IV, section 17's language and comply with its mandate.

[41] While the exact origin and form of this quotation are not readily ascertainable, the comparison of law and sausage making is widely attributed to German Chancellor Otto von Bismark-Schoenhausen (1815-1898). *See* Lewis D. Eigen & Jonathan P. Siegel, *The Macmillan Dictionary of Political Quotations* 325 (1993).

[42] The majority refers to our comment in *Foster v. Naftalin*, 246 Minn. 181, 74 N.W.2d 249 (1956), to support the proposition that a violation of Section 17 is not a flaw in a law's enactment. However, *Naftalin* dealt with a fatal variance between the bill passed by the legislature and that signed by the governor, not a violation of the Single Subject and Title Clause. *See* 246 Minn. at 199, 74 N.W.2d at 261.

[43] The majority today argues that such a warning was given in *Blanch*. In *Blanch*, Justice Yetka claimed that "the majority opinion adopts the position of my concurrence in *Mattson [v.*

Kiedrowski, 391 N.W.2d 777, 783 (Minn. 1986) (Yetka, J., concurring specially)]." 449 N.W.2d at 155 (Yetka, J., concurring). However, the *Blanch* majority did not explicitly do so and appears to apply the same deferential "mere filament" standard to uphold the challenged legislation. *Id.* at 155. *Blanch* is a tepid warning at best.

[44] Many states that have single subject provisions in their constitutions also have created constitutional exceptions for omnibus fiscal legislation. *See generally* Millard R. Rudd, "*No Law Shall Embrace More Than One Subject,*"42 Minn. L. Rev. 389, 414, n. 102 (1958).

STATE OF MINNESOTA

IN SUPREME COURT

CX-98-784

Anderson, Paul H., J.
Concurring Specially, Stringer, J.
and Anderson, Russell A., J.

Court of Appeals

Michael A. Amaral, et al., petitioners,

Appellants,

vs.

The Saint Cloud Hospital,

Respondents.

Filed: August 12, 1999
Office of Appellate Courts

SYLLABUS

Minnesota Statutes § 145.64, subd. 2 (1998), the provider data exception of Minnesota's review organizations statute, Minn. Stat. §§ 145.61-.67 (1998), does not permit professionals as defined by the statute to access a hospital's review organization information merely upon request; rather, access is limited to circumstances where there is an adverse determination by the hospital concerning the professionals' medical staff privileges or participation status.

Affirmed.

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

OPINION

ANDERSON, Paul, H., Justice.

This case requires us to examine the scope of Minn. Stat. § 145.64, subd. 2 (1998), the provider data exception to the privilege provision of Minnesota's review organizations statute, Minn. Stat. §§ 145.61-.67 (1998). Appellants, Dr. Michael A. Amaral and Dr. Dan E. Miulli, are physicians with staff privileges at respondent, The Saint Cloud Hospital. The two physicians requested information about themselves from certain of the hospital's medical peer review organizations. The hospital refused their request, stating that the information sought was confidential under the privilege provision of the statute, Minn. Stat. § 145.64, subd. 1 (1998). The hospital further

asserted that under the provider data exception, the information sought was only discoverable in a court action challenging an adverse determination concerning the physicians' staff privileges or participation status. Both physicians then commenced an action in district court for declaratory and injunctive relief. They sought judgment declaring that they had a right to the requested information and that the hospital violated Minn. Stat. § 145.64, subd. 2. They also sought an injunction enjoining and restraining the hospital from violating the statute or from interfering with their access to the requested information. The hospital moved for summary judgment and the court awarded summary judgment to the hospital based on the plain language of the statute. The court of appeals affirmed, basing its affirmance on the purposes underlying the statute. We affirm.

On April 18, 1997, Dr. Michael A. Amaral and Dr. Dan E. Miulli each sent a letter to The Saint Cloud Hospital requesting records, information, and data relating to themselves from the following of the hospital's medical review organizations: Credentials Committee, Critical Care Committee, Medical Care Review Committee, and Executive Committee. Both physicians practice at the hospital and have staff privileges there; therefore, they are subject to the hospital's peer review process. Citing Minn. Stat. § 145.64, subd. 2, the provider data exception to the review organizations statute, Amaral requested the following information for the time frame of September 1995 to the date of the letters:

1.Records and documents that refer or relate to reviews, evaluations, grants, denials, or recommendations regarding [my] staff privileges or status;
2.Minutes of meetings where [I] [was] discussed;
3.Complaints, criticisms, reports, recommendations, requests for review, requests for investigation, or any inquiries directed to [the committee or the committee head or representative] referring or relating to [me]; and
4.Any records or documents [the committee or the committee head or representative] received, reviewed or considered in reviewing or reaching any decision about [me], [my] staff privileges or status.

Miulli requested the same information regarding himself for the time frame of July 1995 to April 1997. In addition, Miulli requested "any records or documents referring or relating in any way to the grant, suspension, denial, or withdrawal of my staff privilege or opportunity to do steratactic surgery or procedures."

The hospital responded, citing the privilege provision of the statute, Minn. Stat. § 145.64, subd. 1, and stating that the information the physicians sought could only be obtained through the discovery process and was "only discoverable if the physician has received an adverse determination and challenges that determination in court." The hospital asserted that, because the physicians had received no adverse determination regarding their privileges or participation status and thus had commenced no legal action based on such an adverse determination, the requested information was privileged and could not be disclosed.

The physicians again wrote to the hospital, requesting that the hospital provide "the authority upon which the hospital's position [was] based." The hospital responded by directing the physicians to the text of the privilege provision. In addition, the hospital attached a letter from its

attorney, which stated in essence the same information the hospital had conveyed to the physicians in its previous letter.

Following their receipt of the hospital's second letter, the physicians commenced an action in Stearns County District Court requesting: (1) a declaratory judgment that they had a right to examine the requested information, (2) a declaratory judgment that the hospital had violated the review organizations statute, specifically the provider data exception, and (3) an injunction enjoining and restraining the hospital from further violating the provider data exception. The physicians then served discovery requests on the hospital, seeking the same information they had requested in their April 18 letters. The hospital moved for summary judgment and a protective order. Together with its motion for summary judgment, the hospital submitted all correspondence between the parties up to that point and an affidavit from Dr. Daniel J. Whitlock, the hospital's Vice President of Medical Affairs. In his affidavit, Dr. Whitlock stated that confidentiality of review organization information "is essential to the effective functioning of physician review of physician performance and conduct in the Hospital." He further stated that "[t]he extent to which such review [of review organization information] is available to scrutiny beyond the process itself affects the extent, nature, and effect of that process, in that the desired open, candid, honest, and critical evaluation of physician practice and conduct, as it affects patient care in the [h]ospital, will be adversely affected." The physicians then filed a motion to compel the production of the information sought in their discovery requests.

The district court awarded summary judgment in favor of the hospital. The summary judgment was based on the court's conclusion that the language of the provider data exception was unambiguous. The provider data exception allows limited access to review organization information for "professionals requesting or seeking through discovery data, information, or records relating to their medical staff privileges, membership, or participation status." Minn. Stat. § 145.64, subd. 2. The court concluded that the word "or" as used in the phrase "requesting or seeking through discovery" should be read as "a conjunction of two essentially similar words, `requests' and `seeks through discovery.'"

The court went on to conclude that reading the word "or" as disjunctive would not be a reasonable construction of the statute for two reasons. First, citing to a thesaurus, the court determined that the word "`[s]eek' is synonymous with `request.'" The court also concluded that "discovery is essentially comprised of requests by each party" and that "[t]he rules governing discovery are replete with references to `requests' in almost every instance." Second, reading the word "or" as disjunctive would be at odds with the policy underlying the privilege provision, which provision grants confidentiality to the proceedings and records of medical review organizations, protecting such information from discovery or introduction into evidence in civil actions against a professional health care provider; *see* Minn. Stat. § 145.64, subd. 1. The court stated that the privilege provision encourages "free and uninhibited discussion among members of peer review [organizations] without fear of retaliation or of legal action brought by professionals subject to the peer review process." The court then concluded that this policy "would be defeated if a request by a professional at any time would mandate the turning over of documents that are otherwise protected by [the privilege provision]."

The court of appeals affirmed on different grounds. *See Amaral v. Saint Cloud Hosp.,* 586 N.W.2d 141, 143-44 (Minn. App. 1998). Specifically, the court declined to engage in an analysis of the plain language of the statute, relying instead on legislative intent. *See id.* at 143. In dismissing any plain language analysis, the court stated that "the legislative intent of the statute is clear, even though the language itself is not." *Id.* The court, in examining the legislative intent, relied on two decisions of our court to ascertain the purpose behind the privilege provision- *Kalish v. Mount Sinai Hosp.,* 270 N.W.2d 783 (Minn. 1978), and *Campbell v. St. Mary's Hosp.,* 312 Minn. 379, 252 N.W.2d 581 (1977). *See Amaral,* 586 N.W.2d at 143-44. In those cases, we concluded that the statutes providing for confidentiality and immunity for peer review organizations and persons involved in the peer review process reflect a legislative intent both to improve the quality of health care by providing for confidentiality of review organization information and to encourage self-monitoring in the medical profession. *See Kalish,* 270 N.W.2d at 785; *Campbell,* 312 Minn. at 389, 252 N.W.2d at 587. On the basis of our statements in *Kalish* and *Campbell,* the court of appeals concluded that

> [t]he extent to which peer review materials are available to outside sources could well affect the nature and result of the monitoring process. The practice of medicine involves referrals, collegiality, and cooperation. Confidentiality of physician files is essential to ensure the highest quality medical practice. If physicians could access all peer review materials at any time, even without any adverse decision affecting their status or privileges, other physicians may be reluctant to participate fully in peer review activities or to make full and candid reports about their colleagues. Without the complete confidentiality protections of the statute, the legislative purpose of the statute would be defeated. Judicial interference with the self-monitoring of medical professionals is inconsistent with *Campbell* * * *.
>
> * * * *
>
> In essence, this case involves two competing concerns: [the physicians'] right to view materials relating to them and [the hospital's] right to ensure the highest quality of care. * * * It is the individual right of [the physicians], however, that must give way. *See* Minn. Stat. § 645.17(5) (1996) (presuming that legislature intends to favor public interest over any private interest).

Amaral, 586 N.W.2d at 144.

On appeal to our court, the physicians argue that under the plain language of the provider data exception and in accordance with the legislative history and policies underlying that exception, the hospital is required to turn over, upon the physicians' requests, the peer review information they endeavor to obtain. The hospital again maintains that the statute must be read as providing confidentiality to review organizations absent a discovery request made in conjunction with a legal action challenging an adverse determination regarding the physicians' staff privileges or participation status.

Our review of an award of summary judgment is limited to determining whether there are any genuine issues of material fact and whether the district court erred in its application of the law.

See Offerdahl v. University of Minn. Hosps. & Clinics, 426 N.W.2d 425, 427 (Minn. 1988). The proper construction of a statute is a question of law that we review de novo. *See Bedow v. Watkins,* 552 N.W.2d 543, 546 (Minn. 1996). Thus, we must review whether the district court properly interpreted the scope of the provider data exception. In so doing, we must determine whether the district court erred in its application of the law and whether any genuine issues of material fact remain. *State by Cooper v. French,* 460 N.W.2d 2, 4 (Minn. 1990).

"The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (1998). When the language of a statute is plain and unambiguous, that plain language must be followed. *See id.* A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation. *Tuma v. Commissioner of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986). When interpreting a statute, we may not disregard the letter of the law under the pretext of pursuing the spirit of the law. *See* Minn. Stat. § 645.16.

Under basic canons of statutory construction, we are to construe words and phrases according to rules of grammar and according to their most natural and obvious usage unless it would be inconsistent with the manifest intent of the legislature. *See* Minn. Stat. § 645.08(1) (1998); *Homart Dev. Co. v. County of Hennepin,* 538 N.W.2d 907, 911 (Minn. 1995). "Every law shall be construed, if possible, to give effect to all its provisions." Minn. Stat. § 645.16. Whenever it is possible, no word, phrase, or sentence should be deemed superfluous, void, or insignificant. *See Owens v. Federated Mut. Implement & Hardware Ins.*, 328 N.W.2d 162, 164 (Minn. 1983). We presume that the legislature intended to favor a public interest over a private interest. *See* Minn. Stat. § 645.17(5) (1998).

The Statute

Minnesota's review organizations statute, enacted in 1971, provides a broad grant of confidentiality for the proceedings and records of medical peer review organizations. The privilege provision of the statute states, in pertinent part:

> The proceedings and records of a review organization shall not be subject to discovery or introduction into evidence in any civil action against a professional arising out of the matter or matters which are the subject of consideration by the review organization.

Minn. Stat. § 145.64, subd. 1. A professional is defined as "a person licensed or registered to practice a healing art." Minn. Stat. § 145.61, subd. 2 (1998).

In 1991, the legislature created an exception to the privilege provision, adding what is now the first sentence of the provider data exception. *See* 1991 Minn. Laws ch. 137, § 5 (codified at Minn. Stat. § 145.64, subd. 2 (Supp. 1991)). That sentence granted to professionals an exception to the privilege provision, thereby creating for professionals the means to gain access to review organization information regarding their own staff privileges or participation status. *See id.* As written in 1991, the exception provided:

> The restrictions in subdivision 1 shall not apply to professionals requesting or seeking through discovery, data, information, or records relating to their medical staff privileges or participation status.

Id.

The following year, 1992, the legislature added the word "membership" to the existing language of the provider data exception and also added another sentence to the exception that limited the use of any information disclosed to a professional by a review organization. *See* 1992 Minn. Laws ch. 549, art. 7, § 7. This new version of the provider data exception, which remains unchanged today, reads:

> The restrictions in subdivision 1 shall not apply to professionals requesting or seeking through discovery, data, information, or records relating to their medical staff privileges, membership, or participation status. However, any data so disclosed in such proceedings shall not be admissible in any other judicial proceeding than those brought by the professional to challenge an action relating to the professional's medical staff privileges or participation status.

Minn. Stat. § 145.64, subd. 2.

Specific Language of the Statute

The proper interpretation of the provider data exception to the privilege provision of the review organizations statute is at issue in this case. More specifically, we are asked to interpret the phrase "requesting or seeking through discovery" in the first sentence and the phrase "in such proceedings" in the second sentence of the exception. The physicians contend that the district court erred in its interpretation of the statute. They argue that, because the terms "requesting" and "seeking through discovery" are separated by the disjunctive word "or," they refer to two different means by which the physicians are entitled to gain access to the information they endeavor to obtain. The physicians further argue that if the statute is construed to mean that "requesting" and "seeking" each modify the term "through discovery," the word "requesting" would be rendered superfluous.

The hospital argues that the word "or" should be read as a conjunctive connecting two synonymous words and that, therefore, the words "requesting" and "seeking" should be read as both modifying the term "through discovery." Thus, the hospital argues that the provider data exception should be read as granting the physicians access to the information they endeavor to obtain only when they request the information through discovery or seek the information through discovery. The hospital further contends that the phrase "in such proceedings" in the second sentence of the provider data exception clarifies that the legislature intended that more than a mere request is required to obtain review organization information. Accordingly, the hospital maintains that because review organization information may only be disclosed in the discovery process, the exception must be read to mean that the physicians may request or seek the information through discovery only after the hospital has made an adverse ruling concerning their staff privileges or participation status.

Absent context revealing that the word "or" should be read as a conjunctive, we have generally read "or" to be disjunctive. *See, e.g., Berry v. Walker Roofing Co.,* 473 N.W.2d 312, 314-15 (Minn. 1991); *Aberle v. Faribault Fire Dept. Relief Ass'n,* 230 Minn. 353, 360, 41 N.W.2d 813, 817 (1950). Reading only the first sentence of the provider data exception, it appears that the word "or" should be read in its general sense-as a disjunctive term. However, while the first sentence standing alone seems fairly clear, when read in the context of the rest of the provider data exception, the intended meaning of "or" becomes more elusive.

Particularly troublesome is the phrase in the second sentence of the provider data exception referring to data disclosed "in such proceedings." This phrase can reasonably be read as implying that the legislature intended that something more than a mere request for information should be required in order to prompt disclosure. However, it could also be argued that the proceedings referred to are the proceedings of the review organization. Ascertaining how the word "proceedings" is used elsewhere in the statute provides little assistance to our inquiry. The word "proceedings" is used in the privilege provision, referring to the proceedings of a review organization, but later, in the provider data exception, it is used to refer to judicial proceedings. The American Heritage Dictionary supports either reading, defining the noun "proceeding" as "a course of action; a procedure" and the noun "proceedings" as "a sequence of events occurring at a particular place or occasion," "a record of business carried on by a society or other organization," and "the instituting or conducting of legal action." American Heritage Dictionary at 1444 (3d ed. 1992). Thus, the intended antecedent for the phrase "in such proceedings," like the meaning of the word "or," is not entirely clear.

Legislative History

The legislative history of the provider data exception adds little to our search for the intended meaning of the part of the provider data exception with which we are concerned. When the first sentence of the exception was added in 1991, there was no discussion either in committee or on the floor concerning its meaning. In fact, there was no discussion whatsoever regarding this provision.

In 1992, the word "membership" was added to the first sentence and the second sentence was added as well. *See* 1992 Minn. Laws ch. 549, art. 7, § 7. Parts of the 1992 language were introduced at different times during the legislative term. Initially, the word "membership" was not added to the first sentence and the second sentence read, "However, any data so disclosed in such proceedings shall not be admissible in any other judicial proceeding." H.F. 2800, art. 7, 77th Minn. Leg. 1992 (as attached to minutes of Hearing on H.F. 2800, H. Appropriations Comm., Subcomm. on Health and Human Servs., 77th Minn. Leg., Apr. 3, 1992). There was no discussion in committee or on the floor regarding this initial language.

It was in a later amendment that the word "membership" was added to the first sentence and the phrase "than those brought by the professional to challenge an action relating to the professional's medical staff privileges or participation status" was added to the second sentence. Amendment 33 to H.F. 2800, 77th Minn. Leg. 1992 (as attached to minutes of Hearing on H.F. 2800, H. Appropriations Comm., Subcomm. on Health and Human Servs., 77th Minn. Leg., Apr. 3, 1992). The subcommittee discussion concerning the amendment was limited and somewhat

contradictory. At the hearing, an individual unidentified by status or affiliation stated that the language in the second sentence was "clarifying language" and that the language was meant to clarify the initially-proposed language by adding that "data disclosed *in discovery* is not admissible in other proceedings, other than those brought to challenge" in court the specified adverse actions by a review organization. Hearing on H.F. 2800, H. Appropriations Comm., Subcomm. on Health and Human Servs., 77th Minn. Leg., Apr. 3, 1992 (audio tape) (Statement of Mr. Chen). This comment implies that the language concerning data disclosed "in such proceedings" was intended to refer to discovery proceedings. However, without more information, it is difficult to use this legislative history to discern with any certainty the intended meaning of the 1992 language.

Purpose Underlying the Statute

In the face of statutory language that lacks clarity and a less than illuminating legislative history, we turn for guidance to the purposes underlying the enactment of review organizations statutes in order to determine how the provider data exception fits within those purposes. Nationwide, review organizations statutes have been enacted for the purpose of improving the quality of health care through the use of the medical peer review system. *See Jenkins v. Wu*, 468 N.E.2d 1162, 1168 (Ill. 1984) (stating that the purpose of Illinois' review organizations statute is "to ensure the effectiveness of professional self-evaluation, by members of the medical profession, in the interest of improving the quality of health care" and noting that "the majority of State legislatures have passed legislation in the area of hospital-committee confidentiality"). *See also State ex rel. Chandra v. Sprinkle,* 678 S.W.2d 804, 806-07 (Mo. 1984) (en banc); *Franco v. District Ct. In and For the City and County of Denver,* 641 P.2d 922, 928-29 (Colo. 1982) (en banc).

The purpose underlying Minnesota's review organizations statute is identical to that of other review organizations statutes. Two opinions of our court support this conclusion*: Campbell v. St. Mary's Hospital*, 312 Minn. 379, 252 N.W.2d 581 (1977); *Kalish v. Mount Sinai Hospital*, 270 N.W.2d 783 (Minn. 1978). Both *Campbell* and *Kalish* were written before 1991, when the provider data exception was made a part of the statutory scheme.

We first addressed the purpose underlying the review organizations statute in *Campbell.* There, we held that the district court properly awarded summary judgment to persons involved with the hospital's medical peer review process in the face of a physician's claims of interference with business relationships, defamation, and conspiracy. *Campbell*, 312 Minn. at 380-81, 252 N.W.2d at 583. We stated as to the grant of immunity that:

> The clear import of [the review organizations statute] is to encourage the medical profession to police its own activities with a minimum of judicial interference * * * courts are ill-equipped to pass judgment on the specialized expertise required of a physician, particularly when such a decision is likely to have a direct impact on human life.

Id. at 389, 252 N.W.2d at 587. The following year, in *Kalish,* 270 N.W.2d at 783, a medical malpractice case, we stated that the policy and purpose behind Minn. Stat. §§ 145.61-.67 as they relate to health care organizations is that:

> These statutes, and similar statutes in many other states, are designed to serve the strong public interest in improving the quality of health care. The statutes reflect a legislative judgment that improvements in the quality of health care will be fostered by granting certain statutory protections to health care review organizations.

Id. at 785 (footnotes omitted). Thus, it is clear, both nationally and in Minnesota, that the purpose underlying review organizations statutes is the strong public interest in improving health care by granting certain statutory protections to medical review organizations.

Confidentiality

In pursuit of their goal of improving the quality of health care through the use of the peer review system, state legislatures have recognized that professionals will be reluctant to participate freely in peer review proceedings if full participation includes: (1) the possibility of being compelled to testify against a colleague in a medical malpractice action, and (2) the possibility of being subjected to a defamation suit by another professional. *See Bredice v. Doctors Hosp., Inc.,* 50 F.R.D. 249, 250 (D.D.C. 1970), *aff'd without opinion,* 479 F.2d 920 (D.C. Cir. 1973) ("Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit."); *Holly v. Auld,* 450 So. 2d 217, 220 (Fla. 1984) ("A doctor questioned by a review committee would reasonably be just as reluctant to make statements, however truthful or justifiable, which might form the basis of a defamation action against him as he would be to proffer opinions which could be used against a colleague in a malpractice suit."). Accordingly, state legislatures have generally granted broad confidentiality privileges to the information and proceedings of peer review organizations in an effort to encourage full participation in the peer review process and foreclose the possibility that a professional might be compelled to testify against a colleague in a malpractice suit or subjected to a defamation suit.

Minnesota's review organizations statute, including the provider data exception, specifically forecloses each of these possibilities. In the privilege provision, the statute specifically states that "the proceedings and records of a review organization shall not be subject to discovery or introduction into evidence in any civil action against a professional arising out of the matter or matters which are the subject of consideration by the review organization." Further, the provider data exception specifically states that a professional who gains access to review organization information may use that information *only* in a judicial proceeding "to challenge an action relating to the professional's medical staff privileges or participation status." As written, the review organizations statute supports the overarching purpose of the peer review process, improving the quality of patient care through what is essentially a teaching and learning process used to guide the establishment of standards and goals for the provision of improved future health care.

Another reason state legislatures have granted broad confidentiality to review organization information and proceedings involves the nature of the medical profession. We agree with the court of appeals' conclusion that medical professionals rely on collegiality with and referrals from their peers. *See Amaral,* 586 N.W.2d at 144; *see also Jenkins,* 468 N.E.2d at 1168. Granting professionals access to review organization information at any time by merely requesting the information might have a chilling effect on the peer review process. *See Claypool v. Mladineo,* 724 So. 2d 373, 383 (Miss. 1998); *Cruger v. Love,* 599 So. 2d 111, 114-15 (Fla. 1992). Specifically, the quality of patient care could be compromised if fellow professionals are reluctant to participate fully in peer review activities by coming forward with candid and honest reports about a colleague because they fear the colleague will use the provider data exception to completely eliminate the confidentiality protections of the review organizations statute. At the same time, professionals are under an ethical responsibility to put patient care ahead of collegiality and the need for referrals. *See American Medical Ass'n Code of Medical Ethics, Statement V,* p. xiv (1997). Thus, the privilege provision strikes a balance between these sometimes conflicting motivations and favors the public interest of patient well-being over the private interest of the physicians' desire to gain access to a review organization's proceedings and information by creating a situation where one professional may speak freely about a colleague's performance without fear of retaliation. *See* Minn. Stat. § 645.17(5). We do not believe that the legislature intended to so fundamentally alter this balance by granting to professionals unfettered access to review organization information.

Public Interest in Quality Health Care Outweighs Private Right to Access

In the case before us, the two physicians request access to the hospital's review organization information even though the hospital has made no adverse determination concerning the physicians' staff privileges or participation status at the hospital. This request requires us to balance the physicians' private right to access this information against the public interest in quality health care. In so doing, we conclude that, in these circumstances, the physicians' right to the review organization information does not outweigh the public interest in quality health care. The provider data exception was not meant to be used as a tool for individual physicians to penetrate the wall of confidentiality that the legislature has so carefully constructed merely because the physicians are curious about what was said about them.

We conclude that the legislature did not intend for the provider data exception to grant professionals access to review organization information absent an adverse determination regarding their staff privileges or participation status. Thus, we conclude as to the first sentence of the provider data exception that in the phrase "requesting or seeking through discovery," the words "requesting" and "seeking" each modify the term "through discovery." As to the second sentence, we conclude that in the clause regarding information disclosed "in such proceedings," the proceedings referred to are discovery proceedings. Accordingly, we hold that the physicians are not entitled to the review organization information they have requested.

Affirmed.

SPECIAL CONCURRENCE

STRINGER, Justice (concurring specially).

I concur with the result of the majority and much of its reasoning as to the strong policy and intent behind Minn. Stat. § 145.64 (1998). I write separately because I believe the statute is clearly unambiguous and that the appellants are not entitled to the information they seek in the absence of legal proceedings challenging an adverse action regarding their medical staff privileges, membership or participation status. The trial court correctly analyzed the statute and appropriately concluded that the phrase "requesting or seeking through discovery" should be read as a unitary reference to efforts to obtain information through discovery in judicial proceedings. Minn. Stat. § 145.64, subd. 2. The reference in the next sentence to admissibility of the information "in any *other* judicial proceeding" gives further support to this conclusion. *See id.* (emphasis added). Applied accordingly, the statute is clear and consistent with the policy to accord confidentiality to medical review organizations, and we need not be concerned with the legislative proceedings or statutory history.

ANDERSON, Russell A., Justice (concurring specially).

I join in the special concurrence of Justice Stringer.

STATE OF MINNESOTA

IN SUPREME COURT

C6-99-95
CX-99-178

Workers' Compensation Court of Appeals

Gilbert, J.
Dissenting, Anderson, Russell A., J. and Lancaster, J.
Took no part, Stringer, J.

John Irwin,

Relator,

vs.

Surdyk's Liquor and
American Compensation Insurance/RTW, Inc.,

Respondents,

and
Craig L. Frisch,

Relator,

vs.

S & S Carpet Designs and
State Farm Insurance Company,

Respondents.

Filed: September 2, 1999
Office of Appellate Courts

SYLLABUS

1. The attorney fee provisions of Minn. Stat. § 176.081 (1998) that impinge upon our inherent power to oversee attorneys and attorney fees and deprives this court of a final, independent review of attorney fees violate the doctrine of separation of powers, and are unconstitutional.

2. Under Minn. Stat. § 176.081, subd. 1(a)(1) (1998), attorney fees based on medical or rehabilitation benefits awarded are to be based on the actual amount awarded pursuant to the fee schedule of Minn. Stat. § 176.136 (1998).

3. Where the need for future medical benefits is uncertain and speculative, an award of attorney fees based on future medical benefits is inappropriate.

4. An award to the employee under Minn. Stat. § 176.081, subd. 7 (1998) is to be based on all attorney fees awarded, not just those paid by the employee.

Affirmed in part, reversed in part, and remanded.

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

OPINION

GILBERT, Justice.

The relators in these consolidated cases challenge the attorney fees awarded by the compensation judge and the Workers' Compensation Court of Appeals (WCCA) pursuant to Minn. Stat. § 176.081 (1998). The relators assert that the 1995 amendments to section 176.081, which limit the availability and amounts of attorney fees, violate the Separation of Powers and Due Process Clauses of the Minnesota Constitution. *See* Minn. Const. art. III, § 1, and art. I, § 7. Neither of the lower courts addressed the constitutionality of the statute, acknowledging that they lacked jurisdiction. We hold that the statutorily imposed limitation on attorney fees violates the doctrine of separation of powers insofar as it is not subject to review by a duly established court and grants final authority over attorney fees to a non-judicial body. We therefore reverse and remand.

The relators further assert that the provisions of Minn. Stat. § 176.081 allowing for an award of attorney fees based on "the dollar value of the medical benefit awarded" should be interpreted to mean the dollar amount billed by the provider of the medical benefit, rather than the fee schedule amount awarded. We disagree, and affirm the holding of the WCCA. Relator John Irwin makes two additional arguments. He first asserts that where the right to receive future medical expenses is secured, the award of attorney fees should include an award on those future medical expenses. We hold that where future medical benefits and disputes based thereon are speculative, the attorney is not entitled to an award based on such expenses, and therefore affirm the WCCA. Secondly, Irwin asserts that pursuant to Minn. Stat. § 176.081, subd. 7, awards to employees based upon a percentage of attorney fees paid should be based on all attorney fees awarded, not just on those paid by the employee through contingent fees. We conclude that this is a proper reading of the plain language of the statute, and reverse the WCCA's holding to the contrary.

Irwin v. Surdyk's Liquor et al

John Irwin was involved in a work-related motor vehicle accident on September 13, 1996. As a result of that accident, he suffered neck, shoulder, and jaw pain and headaches. Surdyk's Liquor and its insurer, American Compensation Insurance Company (hereinafter referred to

collectively as "Surdyk's") denied liability, and Irwin retained attorney David C. Wulff. Wulff filed a claim petition and represented Irwin at the hearing. Irwin claimed 15% permanent partial disability, payment of treatment from a physician for a billed amount of $4612.53, payment of treatment from another physician for a billed amount of $4955.12, payment of medical mileage reimbursement in the amount of $15.12, and statutory interest on all benefits.

The compensation judge awarded Irwin $6000 for 8% permanent partial disability benefits, payment of all of one and a portion of the other physicians' charges pursuant to the fee schedule, medical mileage of $15.12, and statutory interest on each of these amounts. The compensation judge also ordered reimbursement of costs and disbursements advanced by Wulff and contingent fees to be withheld from Irwin's permanent partial disability award of $6000. Neither party appealed the award.

On February 5, 1998, Wulff filed an application for payment of the withheld contingent fees and additional fees based on and related to the recovery of medical expenses, commonly called *Roraff* fees. *See generally Roraff v. State,* 288 N.W.2d 15 (Minn. 1980). In this application, Wulff claimed that he performed 37 hours of professional services. He sought payment of the contingent fees already being withheld from Irwin's permanent partial disability award, and *Roraff* fees payable by Surdyk's in the amount of $4150. The requested *Roraff* fees and the contingent fees totaled $5550, which would have compensated Wulff for his 37 hours at the hourly rate of $150.

Following a hearing, the compensation judge found that the 37 hours spent by Wulff were reasonable and necessary in light of the issues involved in the case. Surdyk's did not contest that the $150 per hour rate was reasonable. The compensation judge found that the $1400 contingent fee was inadequate to reasonably compensate Wulff for his 37 hours of services, and that Wulff was therefore entitled to *Roraff* fees based on the medical expenses paid. Those fees were based on 20% of the fee schedule amount paid, and totaled $1682.99. Combined with the $1400 contingent fee, the compensation judge awarded Wulff a total of $3082.99.

The compensation judge also awarded Irwin 30% of all attorney fees paid to Wulff in excess of $250, under Minn. Stat. § 176.081, subd. 7. The judge interpreted this statute to provide "an award (not a reimbursement)" based on all attorney fees paid to claimant's attorney pursuant to Minn. Stat. § 176.081, not just contingent fees. Further, the compensation judge determined that although Wulff requested attorney fees for future medical benefits that might become payable, any such award would be premature, as no future medical benefits had been paid or disputed by the employers or insurers.

Cross-appeals were filed by both parties. On appeal, Surdyk's did not contest the compensation judge's finding that the contingent fee award was inadequate to reasonably compensate Irwin's attorney, but disputed the compensation judge's finding that the amount of time Wulff spent on the case was reasonable. The WCCA upheld the award of *Roraff* fees based on medical expenses paid and held that the compensation judge's method of determining the adequacy of the contingent fees as compensation for the attorney was reasonable. After outlining the 1995 amendments to Minn. Stat. § 176.081, the WCCA stated, "the current statute provides no standards for determining whether a contingent fee award is inadequate to reasonably

compensate an attorney for representing an employee in a medical or rehabilitation dispute." While noting that there was some merit to Irwin's position challenging the constitutionality of Minn. Stat. § 176.081, subd. 1, the WCCA acknowledged that it lacked jurisdiction to determine the constitutionality of the statute. The WCCA concluded that the statute allowed an additional award based on medical benefits only in accordance with the precise percentage-based formula of Minn. Stat. § 176.081, subd. 1(a). Accordingly, the WCCA did not address the reasonableness of the requested attorney fees.

The WCCA found "no merit" in Irwin's assertion that the attorney fee award should be based on the actual amount billed by the provider. The WCCA determined that Minn. Stat. § 176.136, subd. 1(a) (1998) limits the liability of an employer or insurer to the fee schedule amount, and because "the compensation judge could not award a medical benefit in excess of that provided in this schedule," the fee schedule amount was the proper amount on which to base attorney fees.

As to Irwin's contention that attorney fees should be awarded for future medical benefits, the WCCA stated that "the phrase `benefit awarded' [as used in Minn. Stat. § 176.081, subd. 1(a)(1)] is plain and unambiguous and limits the attorney fees to the dollar amount of the benefits awarded in the proceeding."

Finally, the WCCA determined that the compensation judge erred in ordering payment to the employee of 30% of all attorney fees under Minn. Stat. § 176.081, subd. 7. The WCCA looked to the purpose of subdivision 7, which is "to reduce the impact of withholding reasonable attorney fees from the compensation benefits to which the employee is entitled." The WCCA determined that because "courts have traditionally treated subdivision 7 fees as reimbursement to the employee," subdivision 7 fees should be based only on attorney fees paid by the employee, not on those paid by the employer.

Frisch v. S & S Carpet Design et al.

Craig Frisch sustained a work-related back injury on November 20, 1995. S & S Carpet Designs and its insurer, State Farm Insurance Company (hereinafter referred to collectively as "S & S") accepted primary liability and paid temporary total disability benefits from November 20, 1995 through January 15, 1996. On January 15, 1996, Frisch accepted a position as an assistant manager in training at a retail store, at a lower rate of pay than he had earned at S & S. In late January or early February, S & S contacted Frisch and told him that work was available. S & S did not specify the type of work or rate of pay, and Frisch informed S & S that he was already employed and thus unavailable. S & S then refused to pay medical expenses and wage loss benefits, and Frisch retained Wulff.

Wulff filed a claim petition and represented Frisch at the hearing. Frisch claimed temporary partial disability, and sought compensation of the difference between what he would have earned at S & S and what he earned at his new job, until the new job paid equivalent to his job at S & S. Frisch also claimed 5% permanent partial disability, payment of treatment from two chiropractors, one for a billed amount of $326.90 and the other for a billed amount of $358. The compensation judge found Frisch to have a permanent partial disability rating of 0%, and did not award any benefits for permanent partial disability. The compensation judge ordered S & S to

pay temporary partial disability benefits based on Frisch's earnings at his new job, both chiropractic bills pursuant to the fee schedule, and costs and disbursements advanced by Wulff. Pursuant to Minn. Stat. § 176.081, subd. 7, the compensation judge also ordered S & S to pay Frisch 30% of all attorney fees paid pursuant to Minn. Stat. § 176.081. Neither party appealed the award.

Wulff filed an application for *Roraff* and contingent fees. Wulff claimed that he performed 43.4 hours of services. He sought $401.16 in contingent fees, to be withheld from Frisch's award of $1604.65.**[1]** Wulff also sought *Roraff* fees payable by S & S, which together with the contingent fees, totaled $6510, an amount that would have compensated Wulff for his 43.4 hours at the hourly rate of $150.

Following a hearing, the compensation judge found that the 43.4 hours spent by Wulff was reasonable, as was Wulff's rate of $150 per hour, given his experience and expertise in the area. The compensation judge thus determined that $6510 was a reasonable attorney fee. The compensation judge found that the contingent fee was inadequate to reasonably compensate Wulff for his services, and that Wulff was therefore entitled to *Roraff* fees based on the medical expenses paid. However, the compensation judge determined that Minn. Stat. § 176.081, subd. 1(a) limits *Roraff* fees to 25% of the first $4000 awarded, and that Wulff was therefore entitled to only $179.48, based on 25% of the fee schedule amounts paid plus medical mileage. The compensation judge thus awarded Wulff a total of $575.94 of *Roraff* and contingent fees, stating that because of the statutory limits, "the undersigned has no authority to award reasonable attorney's fees and must, instead, award the fee based on the contingent fee. Instead of awarding reasonable attorney's fees, the undersigned has awarded permissible attorney's fees, which is what the law now provides."

On appeal, the WCCA affirmed the compensation judge's order as to its lack of authority to award fees in excess of the statutory limitation, and acknowledged that it lacked jurisdiction to determine the merits of Frisch's constitutional claims. The WCCA instead preserved the constitutional claims for determination by this court. On appeal, S & S did not contest the compensation judge's determination as to the reasonableness of the attorney fees sought, and given its other holdings, the WCCA did not address this issue. The WCCA also rejected Frisch's arguments that the *Roraff* fees should be based on the amount billed by the provider rather than the amount paid under the fee schedule and that *Roraff* fees should be awarded based on possible future medical expenses.

I.

We first address relators' contention that Minn. Stat. § 176.081 (1998) violates the Separation of Powers Clause of the Minnesota Constitution. *See* Minn. Const. art. III, § 1. To challenge the constitutionality of a statute, a party must raise the issue before the lower court and notify the attorney general of the intended challenge in a timely fashion. *See Automotive Merchandise, Inc. v. Smith,* 297 Minn. 475, 476-77, 212 N.W.2d 678, 679-80 (1973); *see also* Minn. R. Civ. App. P. 144 (1999). A party is deemed to have waived any such challenge by failing to raise the issue and notify the attorney general in a timely manner. *Cf. Automotive Merchandise,* 297 Minn. at

476-77, 212 N.W.2d at 679-80 (refusing review where party failed to raise issue at trial court and to notify attorney general). Both requirements were satisfied in these cases, and thus we turn to the merits of relators' assertion.

All statutes come to us with a strong presumption in favor of their constitutionality, and the party challenging the statute bears a heavy burden of proving it unconstitutional. *See Mack v. City of Minneapolis,* 333 N.W.2d 744, 751 (Minn. 1983).

The Minnesota Constitution delineates the division of powers necessary among the three branches of government. The Separation of Powers Clause reads:

> The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

Minn. Const. art. III, § 1. As we have previously noted, the separation of powers doctrine "has roots deep in the history of Anglo-American political philosophy." *Wulff v. Tax Court of Appeals*, 288 N.W.2d 221, 222 (Minn. 1979). In *Wulff*, we acknowledged that:

> [w]hile * * * the actual workings of such a balanced government has been altered through the years, the basic principle remains; too much power in the hands of one governmental branch invites corruption and tyranny. Notwithstanding the separation of powers doctrine, there has never been an absolute division of governmental functions in this country, nor was such even intended.

Id. at 223.

Workers' compensation claims are handled by the Department of Labor and Industry, an executive branch agency. *See generally* Minn. Stat. § 175.006 (1998). The industrial commission of the Department of Labor and Industry handled these claims until 1973, when they were transferred to the workmen's compensation commission.[2] *See* Act of May 19, 1973, ch. 388, § 3, 1973 Minn. Laws 787, 789-90, *codified at* Minn. Stat. § 175.006. Under the workers' compensation commission, workers' compensation claims are heard by a compensation judge, a member of the executive branch. *See* Minn. Stat. § 176.011, subd. 7a(3) (1998). The determinations of the compensation judge may be appealed to the WCCA, an independent agency of the executive branch. See Minn. Stat. § 175A.01, subd. 1 (1998). The WCCA has exclusive jurisdiction to hear all appeals allowed under the Workers' Compensation Act. *See id.* § 175A.01, subd. 5 (1998). This court, however, retains authority to review all decisions of the WCCA to ensure that the WCCA's order conforms to the Workers' Compensation Act, that the WCCA has not committed any other error of law, and that the order and the findings of fact are supported by substantial evidence. *See* Minn. Stat. § 176.471, subd. 1 (1998).

We have upheld the former attorney fee provisions of the Workers' Compensation Act against separation of powers challenges. *See, e.g.*, Mack, 333 N.W.2d at 752-53*; cf. Breimhorst v.*

Beckman, 227 Minn. 409. 432, 35 N.W.2d 719, 733-34 (1949) (upholding quasi-judicial powers of industrial commission). However, each of these challenges was brought under the predecessor statute. The 1995 amendments enacted significant changes in the Workers' Compensation Act as it relates to attorney fees and our ability to regulate such fees.

Prior to its amendment in 1995, Minn. Stat. § 176.081 provided a contingent fee formula by which attorney fees were determined. *See* Minn. Stat. § 176.081, subd. 1(a) (1994). The formula allowed attorney fee awards of 25% of the first $4000 awarded an employee and 20% of the next $60,000 of the employee's award. *See id.* Where a compensation judge determined the contingent fee to be inadequate, section 176.081 allowed a compensation judge to determine and award reasonable attorney fees based on several factors, such as the difficulties of the issues and the amount of the claim. *See id.* § 176.081, subd. 5(d). In cases involving medical benefits, attorneys could also apply for *Roraff* fees, which were not limited in amount but could be awarded up to the point necessary to reasonably compensate the attorney. *See id.* § 176.081, subd. 1(a); *Roraff*, 288 N.W.2d at 16. Until the 1995 amendments, these awards were appealable to the WCCA, whose decision was in turn reviewable by us by certiorari. *See* Minn. Stat. § 176.081, subd. 3 (1994); Minn. Stat. § 176.481 (1994). Because the statute allowed judicial review of attorney fees and deviation from the contingent fee formula where that amount did not adequately compensate the attorney, we upheld the pre-1995 statute against separation of powers challenges. *See, e.g., Mack*, 333 N.W.2d at 754.

As amended, the statute reads:

> Subdivision 1. (a) A fee for legal services of *25 percent of the first $4000 of compensation awarded to the employee and 20 percent of the next $60,000 of compensation awarded to the employee is the maximum permissible fee* and does not require approval by the commissioner, compensation judge, or any other party. All fees, including fees for obtaining medical or rehabilitation benefits, must be calculated according to the formula under this subdivision, except as otherwise provided in clause (1) or (2).
> (1) The contingent attorney fee for recovery of monetary benefits according to the formula in this section is presumed to be adequate to cover recovery of medical and rehabilitation benefit or services concurrently in dispute. Attorney fees for recovery of medical or rehabilitation benefits or services shall be assessed against the employer or insurer only if the attorney establishes that the contingent fee is inadequate to reasonably compensate the attorney for representing the employee in the medical or rehabilitation dispute. In cases where the contingent fee is inadequate the employer or insurer is liable for attorney fees based on the formula in this subdivision or in clause (2).
> For the purposes of applying the formula where the employer or insurer is liable for attorney fees, the amount of compensation awarded for obtaining disputed medical and rehabilitation benefits under sections 176.102, 176.135, and 176.136 shall be the dollar value of the medical or rehabilitation benefit awarded, where ascertainable.
> (2) The maximum attorney fee for * * * any * * * disputed medical or rehabilitation benefit for which a dollar value is not reasonably ascertainable, is the amount charged in hourly fees for the representation or $500, whichever is less, to be paid by the employer or insurer.

(3) The fees for obtaining disputed medical or rehabilitation benefits are included in the $13,000 limit in paragraph (b). * * *
* * * *
(b) *All fees for legal services related to the same injury are cumulative and may not exceed $13,000.* * * *
* * * *
(e) Employers and insurers may not pay attorney fees or wages for legal services of more than $13,000 per case.
* * * *
Subd. 3. A party that is dissatisfied with its attorney fees *may file an application for review by the workers' compensation court of appeals.* The application shall state the basis for the need of review * * *. The workers' compensation court of appeals shall have the authority to raise the issue of the attorney fees at any time upon its own motion and shall have continuing jurisdiction over attorney fees.
* * * *
Subd. 9. An attorney who is hired by an employee to provide legal services with respect to a claim for compensation made pursuant to this chapter shall prepare a retainer agreement in which the provisions of this section are specifically set out. * * * No fee shall be awarded pursuant to this section in the absence of a signed retainer agreement * * * [which shall state]:
The maximum fee allowed by law for legal services is 25 percent of the first $4000 of compensation awarded to the employee and 20
percent of the next $60,000 of the compensation awarded to the employee subject to a cumulative maximum fee of $13,000 for fees
related to the same injury.

Minn. Stat. § 176.081 (1998) (emphasis added).

As amended, section 176.081 sets "the maximum permissible fee" based exclusively on the dollar amount of the recovery. Minn. Stat. § 176.081, subd. 1(a) (1998), *see also id.* §176.081, subd. 9 (requiring an attorney retained in a workers' compensation claim to include in the written retainer agreement notice of "[t]he maximum fee allowed by law"). The amount is set without regard to factors that were previously considered in determining reasonable attorney fees, such as the amount involved, the time and expense necessary to prepare for trial, the responsibility assumed by counsel, the expertise of counsel, the difficulties of the issues, the nature of proof involved, and the results obtained. *Compare* Minn. Stat. § 176.081, subd. 1(a) (1998) *with* Minn. Stat. § 176.081, subds. 1(a), 5(d) (1994). While the current version of Minn. Stat. § 176.081 provides a means of appeal to the WCCA, *see* Minn. Stat. § 176.081, subd. 3 (1998), it also specifically sets the "maximum permissible fee," thus limiting the WCCA's, and in turn, this court's power of review. Minn. Stat. § 176.081, subd. 1(a) (1998).

The WCCA recognized that "[t]he 1995 amendments effected a radical change in the Minnesota attorney fee statutes, significantly altering both the availability of attorney fees and the manner in which attorney fees are to be determined and paid." *Ramirez v. Dee, Inc.*, 1998 WL 95888 at *3 (Minn. Work. Comp. Ct. App. February 9, 1998). In the instant cases, the WCCA remained mindful of these major statutory changes. Although the WCCA felt that the employees' positions

were meritorious, it acknowledged that it lacks jurisdiction to determine the constitutionality of statutes. *See generally* Minn. Stat. § 175A.01, subd. 5 (1998); *Hagen v. Venem*, 366 N.W.2d 280, 288 (1985) (noting that WCCA is a court of limited jurisdiction having jurisdiction only over matters arising out of Minnesota's workers' compensation statutes).

As they did before the compensation judge and the WCCA, relators continue to assert that the 1995 amendments violate the separation of powers doctrine because the judiciary has the exclusive control over attorneys and the practice of law. Relators argue that since the limits set by the legislature are not subject to judicial review, the legislature has usurped the judiciary's power.

We have carefully preserved over the years the concept that the judiciary retains final control over attorneys. As long ago as 1937, we stated:

> We must not lose sight of the fact that an attorney is an officer of the court. * * * The court has plenary and summary authority to control and protect the attorneys appearing therein, including as well their relation to suitors, to the end that no injustice be done and no overreaching by counsel of his client take place.

Hollister v. Ulvi, 199 Minn. 269, 277, 271 N.W. 493, 497 (1937) (discussing the appropriateness of contingent fee contracts).

Similarly, in *In re Petition for Integration of the Bar*, 216 Minn. 195, 12 N.W.2d 515 (1943), we stated:

> The fundamental functions of the court are the administration of justice and the protection of the rights guaranteed by the Constitution. To effectively perform such functions * * * it is essential that the court have the assistance and cooperation of an able, vigorous, and honorable bar. It follows that the court has not only the power, but the responsibility as well, to make any reasonable orders, rules, or regulations which will aid in bringing this about, and that the making of regulations and *rules governing the legal profession falls squarely within the judicial power thus exclusively reserved to the court.*

Id. at 199, 12 N.W.2d at 518 (emphasis added).

In *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973), we struck down as unconstitutional a statute requiring attorney registration fees to be diverted into the state's general fund rather than into a separate fund for use in the administration of the bar. *See id.* at 429, 210 N.W.2d at 282. While expressing reluctance to strike down a legislative act when that action "involves a determination of what is a legislative prerogative and what is a judicial function," we stated, "if it is a judicial function that the legislative act purports to exercise, we must not hesitate to preserve what is essentially a judicial function." *Id.* at 423, 210 N.W.2d at 279. We acknowledged that we had previously acquiesced in other legislative acts prescribing various rules regarding attorneys. *See id.* at 424, 210 N.W.2d at 279. However, we went on to clearly state that we so acquiesced only "as long as such acts did not usurp the right of the court to make the final decision." *Id.* We noted that, "when the legislature attempts to go beyond merely

indicating what it deems to be desirable, we have not hesitated to strike down such acts as unconstitutional." *Id.*

We have permitted delegation of quasi-judicial functions to executive branch agencies in legislative "specialty" areas such as taxation and workers' compensation, but only so long as the expansion of that delegation did not result in a significant impingement on the judicial branch. *See Breimhorst*, 277 Minn. at 433, 35 N.W.2d at 734. In *Breimhorst*, we held that statutory regulation of attorney fees in the Workers' Compensation Act was permissible because the statute provided for review by certiorari and thus, the agency determination lacked judicial finality. *See id.* We reasoned:

> In the exercise of the police power, the vesting by the legislature in the industrial commission of quasi-judicial powers-inclusive of the power to determine facts and apply the law thereto in employment-accident controversies-is not in violation of state constitutional provisions for the division of the powers of government or for the vesting of the judicial power in the courts, *as long as* the commission's awards and determinations are not only subject to review by certiorari, but lack judicial finality in not being enforceable by execution or other process in the absence of a binding judgment entered thereon by a duly established court.

Id. (emphasis added). We have since stated that "the criteria set out in *Breimhorst* mark the outside limit of allowable quasi-judicial power in Minnesota." *Wulff*, 288 N.W.2d at 223. We recently declined to limit *Breimhorst* or adopt a less stringent standard in our separation of powers analysis. *See Holmberg v. Holmberg*, 588 N.W.2d 720, 725 (Minn. 1999).

In *Mack*, we upheld section 176.081 as it existed prior to the 1995 amendments. *See Mack*, 333 N.W.2d at 753. There, the employee's attorney, whose client was awarded over $700,000 in benefits, challenged the statute on due process and separation of powers grounds. *See id.* at 746. In addressing the separation of powers challenge, we synthesized the *Sharood v. Hatfield* and *Hollister v. Ulvi* opinions and concluded that "these cases indicate that not all conceivable regulation of attorney fees would be constitutionally permissible." *Mack*, 333 N.W.2d at 752. We determined that Minn. Stat. § 176.081 (1982) did not grant "final authority over attorney fees * * * to a non-judicial body, since ultimately we [could] review all attorney fee decisions." *Id.* We thus held that "power in the commission to set attorney fees [was] constitutionally permissible, because the awards [were] reviewable by this court." *Id.* at 753.

Similarly, in addressing a challenge to the prior statute, we stated that "we have not found the delegation of quasi-judicial powers to executive branch agencies * * * to be a violation of the constitutional provision for the separation of powers of government *so long as* the determinations of those agencies lack judicial finality and are subject to judicial review." *Quam v. State*, 391 N.W.2d 803, 810 n.6 (Minn. 1986) (emphasis added).

Thus, actions by the commission, including regulation of attorney fees, are permissible only *so long as* they lack judicial finality and are subject to judicial review. Accordingly, we do not take issue with the actual percentage or dollar limitations adopted by the legislature in Minn. Stat. § 176.081 (1998). The legislature has been vested with wide discretion in making laws and

determining issues of public policy, even when those issues involve establishing attorney fee guidelines. However, in order for the legislative guidelines to be constitutionally permissible, we must retain final authority over attorney fee determinations.

Respondents urge us to conclude that Minn. Stat. § 176.081, subd. 3 (1998) which allows for review of attorney fees by the WCCA, provides sufficient judicial review so as to render the statute constitutional. However, the review provision of Minn. Stat. § 176.081, subd. 3, is subject to the "maximum permissible fee" as set out in Minn. Stat. § 176.081, subd. 1(a). Respondents concede that even if we read subdivision 3 as allowing review by this court, our sole review power would be limited to determining whether the statutory formula had been properly applied by the compensation judge and the WCCA, both members of the executive branch.

This limitation goes beyond merely indicating what the legislature deems desirable. Even as here, where there was a finding that the fees awarded were inadequate to reasonably compensate relators' attorney, the legislature has prohibited any deviation from the statutory maximum. Legislation that prohibits this court from deviating from the precise statutory amount of awardable attorney fees impinges on the judiciary's inherent power to oversee attorneys and attorney fees by depriving this court of a final, independent review of attorney fees. This legislative delegation of attorney fee regulation exclusively to the executive branch of government violates the doctrine of separation of powers of Minn. Const. art. III, § 1. Accordingly, to the extent it impinges on our inherent power to oversee attorneys and attorney fees and deprives us of a final, independent review of attorney fees, we hold that section 176.081 is unconstitutional.**[3]**

The compensation judges made a finding of reasonable fees in both cases under consideration. However, because the WCCA in both cases determined that it had no authority to exceed the maximum amount allowed by the statute, the WCCA declined to address the reasonableness of the requested attorney fees. Those portions of section 176.081 that do not violate the doctrine of separation of powers remain valid. *See* Minn. Stat. § 176.651 (1998). Therefore, we remand to the WCCA to review the compensation judges' determination of reasonable attorney fees. In its review, the WCCA should not only consider the statutory guidelines, but also the amount involved, the time and expense necessary to prepare for trial, the responsibility assumed by counsel, the experience of counsel, the difficulties of the issues, the nature of the proof involved, and the results obtained. Because of this decision, we do not reach the issue of whether Minn. Stat. § 176.081 violates due process.

II.

Minnesota Statute § 176.081, subd. 1(a), limits attorney fees to 25% of the first $4000 awarded and 20% of the next $60,000 awarded to the employee. Where that amount is inadequate, subdivision 1(a)(1) allows attorney fees to be awarded based on the same percentages of medical or rehabilitation benefits awarded, where ascertainable. Subdivision 1(a)(1) states that the attorney award shall be based on "the *dollar value* of the medical or rehabilitation benefit *awarded*, where ascertainable." Minn. Stat. § 176.081 1(a)(1) (1998) (emphasis added). Relators assert that such an award of attorney fees should be based on the dollar amount of the actual

charges of the health care provider, rather than the amount payable pursuant to the fee schedule of Minn. Stat. § 176.136 (1998). This presents a question of statutory construction which we review de novo. *See In re Blilie*, 494 N.W.2d 877, 881 (Minn. 1993).

The WCCA stated that it found "no merit" to relators' argument and that the attorney fee award must be based on the fee schedule amount awarded. In so concluding, the WCCA stated, "the statute expressly states the attorney fees shall be based on the dollar value of the benefit `awarded.'" The WCCA correctly determined that an award of attorney fees based on the dollar amount of the benefit awarded is appropriate. *See* Minn. Stat. § 176.136 (1998). Thus, we affirm.

III.

Prior to the 1995 amendments, when part of an attorney's work involved obtaining future medical benefits for the claimant, that work could be taken into consideration in determining the reasonableness of the fees awarded. *See* Minn. Stat. § 176.081, subd. 1 (1994). However, the statute now provides for attorney fees to be awarded based on the medical benefits awarded. Minn. Stat. § 176.081, subd. 1(a) (1998). When the dollar value of the benefits awarded is not readily ascertainable, "[t]he maximum attorney fee for obtaining * * * any other disputed medical or rehabilitation benefit * * * is the amount charged in hourly fees for the representation or $500, whichever is less, to be paid by the employer or insurer." *See id.* § 176.081, subd. 1(a)(2).

Irwin asserts that he is entitled to attorney fees based on future medical benefits because, "[b]y establishing primary liability on behalf of Relator, Attorney Wulff not only recovered past medical expenses discussed above, he also secured the right for Relator to continue to receive future medical expenses reasonably required to cure or relieve the effects of his now established work-related injury."

The compensation court held that an award of attorney fees for future medical expenses would be premature, but that once the employee incurred future expenses, Wulff could file a request for additional fees. The WCCA disagreed, stating:

> Under the amended statute, payment of *Roraff* or *Heaton* fees is limited to a percentage of "the dollar value of the medical or rehabilitation benefit awarded." Minn. Stat. § 176.081, subd. 1(a)(1). We believe the phrase "benefit awarded" is plain and unambiguous and limits attorney fees to the dollar amount of the benefits awarded in the proceeding. Whether the employee may be entitled to additional medical benefits in the future is speculative. Receipt of future medical benefits is dependent upon proof that the medical expenses claimed were reasonably necessary to cure and relieve the employee from the effects of the personal injury. If a dispute arises with respect to future medical expenses, the employee's attorney may be entitled to additional fees based on the amount of the benefits ultimately awarded.

Thus, the compensation court and the WCCA read the statute differently, yet both came to the conclusion that an award was inappropriate in the present case.

There is nothing in the record to show that Irwin will necessarily need future medical benefits. Thus, an award of additional attorney fees based on speculative future medical benefits is inappropriate at this time. Should a dispute arise with respect to future medical expenses, Wulff may at that time seek reimbursement for services relating to that dispute. We thus affirm the WCCA's holding with respect to any award of attorney fees based on future medical expenses.

IV.

Irwin's final assertion is that attorney fee reimbursement to the employee pursuant to Minn. Stat. § 176.081, subd. 7 (1998), should be based on all attorney fees paid pursuant to Minn. Stat. § 176.081, rather than only on contingent fees paid out of the employee's award. The compensation judge awarded subdivision 7 fees based on all attorney fees awarded, and the WCCA reversed, holding that subdivision 7 is intended to reimburse the employee only for attorney fees paid by the employee.

Subdivision 7 states in part:

> If the employer or insurer files a denial of liability, * * * or fails to make payment of compensation or medical expenses within the statutory period * * * or otherwise unsuccessfully resists the payment of compensation or medical expenses, * * * and the injured person has employed an attorney at law, who successfully procures payment on behalf of the employee * * * the compensation judge, commissioner, or the workers' compensation court of appeals upon appeal, upon application, shall award to the employee against the insurer * * * in addition to the compensation benefits paid or awarded to the employee, an amount equal to 30 percent of that portion of the attorney's fee which has been awarded pursuant to this section that is in excess of $250.

Minn. Stat. § 176.081, subd. 7 (1998).

The WCCA has treated subdivision 7 awards as reimbursement to the employee for attorney fees deducted from his compensation award pursuant to the contingent fee formula. *See Sailes v. Ford Motor Co.*, 1992 WL 383680 (Minn. Workers' Comp. Ct. App. November 18, 1992); *Bednar v. Interior Wood Prods.*, 1991 WL 88589 (Minn. Workers' Comp. Ct. App. February 26, 1991). More recently, the WCCA refused to award subdivision 7 fees for a different reason. *See Salahud-Din v. Compassionate Care Group*, 1997 WL 815380 (Minn. Workers' Comp. Ct.App. December 16, 1997). There, the WCCA reasoned that because traditional *Roraff* fees were paid pursuant to Minn. Stat. § 176.135, rather than § 176.081, which previously made no provision for an award based on medical expenses, *Roraff* fees were not paid "pursuant to [section 176.081]" and thus subdivision 7 fees were not appropriate. *Id.* at *2.

However, the 1995 changes to Minn. Stat. § 176.081 added a provision for attorney fees based on medical expenses. *See* Minn. Stat. § 176.081, subd. 1(a) (1998). Subdivision 7 allows an award to the employee on an "attorney's fee which has been awarded pursuant to *this section*." *Id.* § 176.081, subd. 7 (1998) (emphasis added). In *Mack*, 333 N.W.2d at 747, we followed the plain language of the statute, which provided, as does the current statute, for an award of subdivision 7 fees based on attorney fees awarded "pursuant to *this section*." *Id.* (citing Minn. Stat. § 176.081,

subd. 7 (1982)) (emphasis added). We there held that subdivision 7 awards should be made on all attorney fees awarded under section 176.081, even those fees paid by the employer. *Id.* Thus, under the plain language of the statute, a subdivision 7 award should be based on all attorney fees paid pursuant to Minn. Stat. § 176.081, including attorney fees based on medical expenses pursuant to Minn. Stat. § 176.081, subd. 1(a). We therefore reverse the holding of the WCCA.

Affirmed in part, reversed in part, and remanded.

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

DISSENT

ANDERSON, Russell A., Justice (dissenting).

I respectfully dissent. The narrow issue before us is the validity of section 176.081, subd. 1(a)(1) (1998) as it relates to the calculation of an injured employee's attorney fees when such fees are shifted to the employer and its workers' compensation carrier. Given that the subject matter is a statutory right imposed on the employment relationship pursuant to the police power of the state, and in view of the American Rule pursuant to which courts may not award fees against the unsuccessful party in the absence of a statute or contract, I can only conclude that statutory limitations on fee shifting do not violate the Separation of Powers Clause of our constitution. While the limitations contained in the current legislation might implicate serious due process concerns to the extent they might deprive a claimant of adequate legal representation, they do not amount to an assumption of judicial power.

The majority relies in large measure on dictum found in *Mack v. City of Minneapolis*, 333 N.W.2d 744, (Minn. 1983), to conclude that statutory limitations on fees effectively deny judicial review, in the sense that fees may not be awarded beyond the statutory maximum, and therefore violate the Separation of Powers Clause. *See id.* at 752-53. The relators in *Mack* asserted a separation of powers challenge to the legislative imposition of limits on fees and the assignment of responsibility to set those fees to the workers' compensation commission. *See id.* Although the *Mack* court surmised constitutional boundaries to the regulation of fees, it was the legislative assignment of quasi-judicial functions to the workers' compensation commission, the executive branch, which caused separation of powers concern and not the establishment of statutory limitations on fees in the first instance by the legislature. *See id.* Given this court's review of fees set by the commission, and in view of the nearly uniform practice throughout the country of assigning responsibility for the supervision of fees to the commission or court handling compensation administration, we declined to invalidate the statute allowing the commission to set those fees as a violation of the Separation of Powers Clause. *See id.* at 753. In the present case, however, the majority has essentially declared that legislative limitations on fees encroach on the judiciary's inherent power to regulate attorneys and their fees.

Under the "American Rule," unless authorized by statute or contractual agreement between the parties, "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser," *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). The rule dates back to the beginning of the United States federal system. *See, e.g., Arcambel v. Wiseman*, 3 U.S.

(3 Dall.) 306, 306 (1796). That fees may not be shifted in the absence of a statute or contract was settled more than 100 years ago in this state by *Kelly v. Rogers*, 21 Minn. 146, 152-53 (1874). With limited exception, this court has consistently adhered to the American Rule. *See, e.g., Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 363 (Minn. 1998); *Fownes v. Hubbard Broadcasting, Inc.*, 310 Minn. 540, 542, 246 N.W.2d 700, 702 (1976); *Benson Cooperative Creamery Association v. First Dist. Ass'n,* 276 Minn. 520, 530, 151 N.W.2d 422, 428 (1967). The obvious corollary of this oft-recognized rule that fees may not be shifted absent contractual or legislative authorization is that the legislature, not the court, has the power to determine when, or if, an attorney should be awarded attorney fees against unsuccessful litigants. In my view the legislature has the power to determine when such fees should be awarded and in addition possesses, inherent within this power, the authority to establish statutory maximums. Our role is to review the application of this statutory scheme to ensure that the lower courts have applied it properly.

The majority also contends that a statutory maximum infringes on this court's power to regulate the practice of law. I disagree. In the context of compensation for attorneys representing indigents in criminal cases, courts elsewhere have acknowledged that statutory maximums on fees do not infringe on the court's power to regulate the practice of law. *See, e.g., Pickens v. State,* 783 S.W.2d 341 (Ark. 1990); *Makemson v. Martin County*, 491 So.2d 1109, 1112 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987). The role of the legislature in restricting attorney fees in workers' compensation matters has long been recognized as a proper exercise of the police power of the state. *See Yeiser v. Dysart*, 267 U.S. 540, 541 (1925). In fact, most states have statutory restrictions on workers' compensation fees. *See* 8 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, § 83.14 at 15-1416 (1998). In that the regulation of workers' compensation fees is a proper legislative function, I would not invoke the Separation of Powers Clause as a basis for invalidating the statute.

That is not to say, however, that the absolute ceiling on fees for the recovery of medical benefits would necessarily be constitutionally permissible. But unless it can be shown that a regulatory scheme makes legal representation unavailable, evidencing the illegitimacy of the scheme, the scheme does not violate constitutional protection. *See United States Dep't of Labor v. Triplett*, 494 U.S. 715, 724 (1990). Although relators argue that the statutory limitation on fees for the recovery of medical benefits deprives claimants of adequate legal representation, no evidence was heard or factual findings made. I would remand these cases to the compensation division for the development of a record, factual findings and legal conclusions pertaining to whether workers' compensation claimants are unable to retain qualified counsel and whether the cause of such inability is the fee system set up by the legislature.

LANCASTER, Justice (dissenting).

I join in the dissent of Justice Russell A. Anderson.

Footnotes

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[1] The compensation judge found that wage loss benefits paid to Frisch were $1569.82, and that Wulff's compensation therefrom would total $392.46, rather than $401.16.

[2] In 1975, the name of the commission was changed from the workmen's compensation commission to the workers' compensation commission. *See* Act of June 4, 1975, ch. 359, § 23, 1975 Minn. Laws 1168, 1189.

[3] The dissent relies on the common law "American Rule" of attorney fees in concluding that section 176.081 is not unconstitutional. However, the American Rule applies only when attorney fees are not provided for by statute. *See Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 257 (1975). Because the Workers' Compensation Act specifically provides for fee-shifting, the American Rule has never been relied upon by this court in workers' compensation cases. Furthermore, none of our cases cited by the dissent involve or even mention workers' compensation cases, but instead deal with common law, rather than statutory, causes of action. *See, e.g., Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 363 (Minn. 1998) (dealing with tortious interference of contract claim, yet still not applying the American Rule); *Fownes v. Hubbard Broadcasting, Inc.*, 310 Minn. 540, 542, 246 N.W.2d 700, 702 (1976) (dealing with successful shareholder writ of mandamus, not applying American Rule); *Benson Coop. Creamery Ass'n v. First Dist. Ass'n,* 276 Minn. 520, 530, 151 N.W.2d 422, 428 (1967) (applying American Rule to contractual claims). Accordingly, the American Rule is wholly irrelevant to any discussion of statutorily mandated attorney fees under the Workers' Compensation Act.

The dissent's reliance on *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986) which addressed the issue of statutory maximum fee limitations for state-funded attorneys representing indigent clients in criminal cases is also misplaced. Contrary to the dissent's assertion, in *Makemson*, the Florida Supreme Court held that "[a]lthough facially valid, we find the statute unconstitutional when applied in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused." *Id.* at 1112. The court accordingly held this encroachment to be a violation of the Florida Constitution's separation of powers provision. *Id.* It further found such statutory maximums as applied interfered with the accused's Sixth Amendment right to counsel and the facts in the case were sufficiently extraordinary to warrant the award of fees by the trial court in excess of statutory maximums. *Id.* at 1113.

Finally, the dissent seems to conclude that we should hold the statute constitutional because "most states have statutory restrictions on workers' compensation fees." However, the dissent fails to note that the majority of state statutes include a provision whereby attorney fees may be increased when necessary, and that those statutes which do not include such a provision almost universally do not make the attorney's acceptance of additional compensation a crime, as does Minn. Stat. § 176.081, subd. 10 (1998). *See* 10 Arthur Larson and Lex. K. Larson, *Larson's Workers' Compensation Law*, App. B, at 18B-2 - 18B-4 (1998).

STATE OF MINNESOTA
IN COURT OF APPEALS
C5-98-1308

A.A. Metcalf Moving & Storage Co., Inc.,
Respondent,

vs.

North St. Paul-Maplewood-Oakdale
Schools, a/k/a Independent School District No. 622,
Appellant.

Filed December 29, 1998
Reversed
Holtan, Judge*
Concurring in part, dissenting in part, Kalitowski, Judge

Ramsey County District Court
File No. C5-97-11533

John D. McKenzie, 1360 Energy Park Drive, Suite 310, St. Paul, MN 55108 (for respondent)

Karen P. Kepple, 3300 Century Avenue North, White Bear Lake, MN 55110 (for appellant)

Considered and decided by Kalitowski, Presiding Judge, Shumaker, Judge, and Holtan, Judge.

S Y L L A B U S

In the absence of an exception, federal law preempts the application of a carrier's state tariff-rate schedule. A bill of lading is a basic transportation contract that binds the shipper and carrier who have negotiated, agreed to, and signed the contract.

O P I N I O N

HOLTAN, Judge

Appellant challenges the district court's finding that Minnesota tariff-rate schedules govern the disposition in this case. Because the district court incorrectly interpreted both (1) whether federal law preempted state motor carrier tariff schedules, and (2) the terms of the parties' carrier contract, we reverse.

FACTS

In 1996, while preparing to move into a new building one block away, appellant, Independent School District No. 622, contacted three professional moving companies, including respondent A.A. Metcalf Moving & Storage Company, to solicit quotes for the cost of moving the school's property. The range in bids was considerable; respondent bid $19,854, in contrast to two other bids of $59,880 and $83,972. In response to the disparity, an employee of appellant contacted respondent to discuss its bid. In the district court, respondent acknowledged this conversation, in which respondent had affirmed that it was "comfortable" with the bid.

Prior to the move, the parties exchanged correspondence and discussed the terms of the agreement and dates. In January 1997, appellant issued a purchase order for respondent's services, including a reference to respondent's bid. The parties discussed the move in person and by telephone approximately five times during the next six months. No changes to the pricing agreement were ever discussed.

At the end of the first day of the move, June 9, 1997, one of respondent's employees presented a bill of lading which was signed by one of appellant's employees. The bill included a $20,000 estimate on the front page. But the bill also included terms and conditions at the bottom of the first page explaining that "[s]hipment is subject to all rules, regulations, rates and charges in lawfully applicable tariff filed with the Minnesota Department of Transportation." The move continued. On June 26, 1997, respondent presented to appellant an invoice for $16,686, which appellant paid. Appellant had requested an invoice before its fiscal year end on June 30. After the move was completed, respondent presented a second invoice for $49,159. Appellant paid $3,168, the remaining amount of the original bid of $19,854.

Respondent sued appellant for breach of contract damages of $45,991, which represented the unpaid portion of the second invoice. In response to the parties' cross-motions for summary judgment, the district court ordered appellant to pay the $45,991, plus prejudgment interest, costs, and disbursements.

ISSUES

I. Does the Federal Interstate Commerce Commission (ICC) Termination Act of 1995 preempt Minnesota intrastate motor carrier tariff regulations?

II. If federal preemption applies, did the parties come to a price agreement so as to create a binding contract?

ANALYSIS

On appeal from summary judgment, a reviewing court must determine whether the district court erred in its application of the law and whether there are any genuine issues of material fact. *W.V. Nelson Constr. Co. v. City of Lindstrom*, 565 N.W.2d 434, 435 (Minn. App. 1997) (citing *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990)). In so doing, a reviewing court views "the evidence in the light most favorable to the party against whom judgment was granted."*Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Nonetheless, this court is not bound by a district court's decision on a question of law. *Nelson*, 565 N.W.2d at 435 (*citing Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984)).

Under Minnesota law, motor carriers must file with the Department of Transportation tariff rate schedules with which they must comply under Minn. Stat. § 221.171, subd. 1 (1996). Subdivision 1 states that:

> No permit carrier shall charge or receive a greater, lesser, or different compensation for the transportation of persons or property or for related service, than the rates and charges named in the carrier's schedule on file and in effect with the commissioner * * * nor shall a permit carrier refund or remit in any manner or by any device, directly or indirectly, the rates and charges required to be collected by the carrier under the carrier's schedules or under the rates, if any, fixed by the board.

Id. Finding that a motor carrier cannot deviate from its previously filed rate schedule, the district court ruled that respondent's fixed carrier rate schedule determined the compensation owed for services and the original bid was not controlling.

The district court rejected appellant's contention that the ICC Termination Act preempted Minnesota's tariff rate schedules. The relevant portion of the act reads as follows:

> [A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C.A § 14501(c)(1) (1997). Despite this mandatory prohibition of carrier rate schedules, an exception exists for the transportation of "household goods." *Id.* at (c)(2)(B) (1997). If the "household goods" exception applies, the carrier may seek to enforce scheduled rates.

The district court stated that the application of section 14501(c)(1) rested on the definition of "household goods." Neither the parties nor the court found a statutory definition for "household goods" which applied to section 14501(c)(1). As a result, the parties debated the application of the Federal Highway Administration's definition of "household goods," under U.S. Department of Transportation regulations, found at 49 C.F.R. § 375.1(b)(1) (1997). [1]

The court rejected the Federal Highway Administration's definition of "household goods" and instead relied on a Minnesota definition of the term. The court rejected the federal definition because it explicitly applied only to interstate or foreign commerce. The court ruled that this explicit reference to interstate or foreign commerce did not support a finding of implied federal preemption of intrastate carrier rates.

In further pursuit of a definition, the court turned to Minn. Stat. § 221.011, subd. 23 (1996), which defines "household goods."

> [P]ersonal effects and property used or to be used by the owner in the owner's dwelling; furniture, fixtures, equipment and property of business places and institutions, public or private, when a part of the stock, equipment, supplies or property of such establishments.

Id. The court ruled that the school property moved by respondent fell under this definition. As a result, the court ruled that the "household goods" exception in the ICC Termination Act prevented federal preemption of state regulated intrastate carrier rate schedules. The court based its order for payment on respondent's tariff rates filed with the state under Minn. Stat. § 221.171, subd. 1.

I.

Appellant argues that 49 U.S.C.A. § 14501(c) preempts state tariff regulations of motor carriers. "Questions of statutory construction are questions of law and are fully reviewable by an appellate court." *Metropolitan Sports Facilities Comm'n v. County of Hennepin*, 561 N.W.2d 513, 515 (Minn. 1997). The court of appeals reviews an interpretation of the law de novo. *Winkler v. Magnuson*, 539 N.W.2d 821, 825 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

Under the U.S. Constitution's Supremacy Clause, "the Laws of the United States * * * shall be the supreme Law of the Land * * * any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. State laws that "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution" are invalid. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). "The ways in which federal law may pre-empt state law are well established and in the first instance turn on congressional intent." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604, 111 S. Ct. 2476, 2481 (1991) (citation omitted). But the "`historic police powers of the [s]tates' are not to be eclipsed unless to do so was `the clear and manifest purpose of Congress.'" *Dahl v. Charles Schwab & Co.*, 545 N.W.2d 918, 922 (Minn. 1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947)) , *cert. denied*, 117 S. Ct. 176 (1996).

The district court found that Congress did not expressly intend to preempt state law, basing this finding on the perceived lack of a federal definition of "household goods." Furthermore, the district court rejected an implicit preemption of state rate schedules. The court looked to *Scholtz v. Hyundai Motor Co.*, 557 N.W.2d 613 (Minn. App. 1997), *review denied* (Minn. Mar. 26, 1997), *cert. denied*, 118 S. Ct. 80 (1997), to determine whether Congress implied a preemption of the state regulation: "[s]tate regulation will be impliedly preempted if: (1) Congress has entirely displaced the possibility of state regulation; or (2) state regulations conflict with federal law." *Id.* at 615 (citations omitted.) The court decided that Congress did not implicitly intend to preempt state law. *See Dahl*, 545 N.W.2d at 924 (providing four main considerations as a test to determine whether Congress has implied federal preemption of a state regulation).

Unfortunately, the district court and the parties overlooked the explicit intent of Congress and the statutory definition of "household goods" found in the ICC Termination Act. "To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138, 111 S. Ct. 478, 482 (1990). Based on our examination of the statutory language and purpose, we conclude that Congress intended to preempt state regulation of intrastate moves of "household goods."

The language of the ICC Termination Act demonstrates an express intent to abolish rate schedules, except under particular and enumerated circumstances. The first expression of Congressional intent is the chosen name of section 14501--"Federal authority over intrastate transportation." Section 14501(c)(1) expressly prohibits state motor carrier price regulation. The only exception applicable to this case is the exception for "household goods," set forth in section 14501(c)(2)(B).

Congress defined "household goods" at 49 U.S.C.A. § 13102(10) (1997). Section 13102(10) provides that "`household goods,' as used in connection with transportation, means personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling." Congress further defined "transportation" to include "services related to * * * arranging for, receipt, delivery, elevation, transfer in transit, refrigeration * * * storage, handling, packing, unpacking, and interchange of passengers and property." 49 U.S.C.A. § 13102(19) (1997).

Any further doubt as to the express intent of Congress will be removed by a reading of the act's legislative history. Sections 14501 and 13102 were recodified from previous acts into the ICC Termination Act, passed by Congress in 1995, which was intended to "substantially deregulate[] the rail and motor carrier industries." H.R. Rep. No. 104-311, at 82 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 793. In describing the definitions section, the report noted that "[r]evisions have been made to the definition of household goods to deregulate office and trade show moves." *Id.* at 199, *reprinted in* 1995 U.S.C.C.A.N. at 884. Finally, in relation to federal authority of intrastate transportation, the House report establishes that section 14501 was intended to preserve "existing prohibitions against intrastate regulation of * * * trucking prices." *Id.* at 218, *reprinted in* 1995 U.S.C.C.A.N. at 903.

Both the express language in section 14501 prohibiting intrastate regulations and the legislative history of the act demonstrate that Congress clearly intended to deregulate intrastate carrier prices and to eliminate state rate schedules. The federal act provides a more focused and applicable definition of "household goods" than that applied by the district court in this case. The federal definition excludes all but the transportation of certain goods from a dwelling--not a business or institution, public or private. *Compare* Minn. Stat. § 221.011, subd. 23, *with* 49 U.S.C.A. § 13102(10).

The next issue is whether Congress intended that the move of school property constitute the transport of "household goods." "[T]he Constitution invests the Judiciary, not the Legislature, with the final power to construe the law." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325, 112 S. Ct. 1344, 1349 (1992). While the act fails to define the term "dwelling," the legislative history illustrates that the act was specifically designed to eliminate the regulation of

office moves. See H.R. Rep. No. 104-422, at 199, *reprinted in* 1995 U.S.C.C.A.N. at 884. This move of an entire school is analogous to an office move and not to the move of "personal effects and property" used in a "dwelling." ***See*** 49 U.S.C.A. § 13102(10). Moreover, "[u]nder the supremacy clause of the federal constitution, federal law preempts conflicting state law." *MNVA R.R., Inc. v. John Alden Life Ins. Co.*, 507 N.W.2d 15, 17 (Minn. App. 1993) (citation omitted). Because application of the Minnesota definition of "household goods" results in creation of an impermissible conflict with the express federal intent to further deregulate the motor carrier industry and abolish carrier rate schedules, federal law preempts the enforcement of state-approved rate schedules for the move.

Because we find that federal law preempts Minnesota tariff rate schedules, it is unnecessary to respond to appellant's arguments regarding (1) the relevance of the mandatory bidding process under Minn. Stat. §§ 123.37 (1996) and 471.345 (1996), and (2) appellant's affirmative defense under Minn. R. 7800.2000 (1997).

II.

Our finding that federal law preempts enforcement of Minnesota's carrier rate schedules leads this court to review the existence of a contract between the two parties. Generally, a reviewing court may consider only issues presented to and considered by the trial court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Nevertheless, the "construction and effect of a contract are questions of law for the court." *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979).

The supreme court has explained that "[t]he cardinal purpose of construing a contract is to give effect to the intention of the parties as expressed in the language they used in drafting the whole contract." *Art Goebel, Inc. v. North Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997) (citation omitted). When interpreting a contract, "the language found in a contract is to be given its plain and ordinary meaning." *Turner*, 276 N.W.2d at 67 (citations omitted).

The parties' pre-move agreement and the bill of lading are persuasive evidence as to the existence of a contract. In determining the existence of a contract, a party's "outward manifestation of assent is determinative, rather than a party's subjective intention. *"Speckel by Speckel v. Perkins*, 364 N.W.2d 890, 893 (Minn. App. 1985*); see also Cederstrand v. Lutheran Bhd.*, 263 Minn. 520, 532, 117 N.W.2d 213, 221 (1962) ("Expressions of mutual assent, by words or conduct, must be judged objectively, not subjectively.").

The parties agree that respondent initially bid that moving the school's property would cost $19,854. Respondent has contended that this was nothing more than a simple estimate, on which appellant should not have relied. But then on what should appellant have relied? Judging respondent's "expression" of willingness to perform the move for the stated amount "objectively," we can see no basis for disregarding that outward manifestation of assent to the contract. At no point prior to the move did respondent retract this manifestation of assent to the contract, and there is no evidence that appellant "took advantage" of respondent in relying on that assent.

However, we need not rely entirely on the parties' accepted bid of respondent, because we have the bill of lading signed by both parties. A bill of lading is a basic transportation contract and its terms and conditions bind the shipper and carrier. *Bankruptcy Estate of United Shipping Co. v. Tucker Co.*, 474 N.W.2d 835, 840-41 (Minn. App. 1991) (citing *Southern Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342, 102 S. Ct. 1815, 1820 (1982)), *review denied* (Minn. Oct. 31, 1991). Obligations arising under a bill of lading "`are measured by its terms.'" *Carbic Mfg. Co. v. Western Express Co.*, 149 Minn. 467, 469, 184 N.W. 35, 35 (1921) (citation omitted).

The parties agree that the bill of lading constitutes a contract. The price term specified in the bill of lading is $20,000. Because the parties have not addressed the de minimis difference between the amounts specified in the bid and the bill of lading, we do not. We conclude that the bill of lading demonstrates the parties' intent to contract and to be bound by those terms.

In the district court, respondent argued that it was entitled to the reasonable value of services and materials provided under quasi-contract principles or quantum meruit. Respondent did not brief this argument to this court and did not request a remand for the district court to address these alternative theories. *See Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d 173, 175-76 (Minn. 1988) (respondent who fails to seek remand is barred from asserting alternative arguments in the district court after reversal on appeal); *see also Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (issues not briefed on appeal are waived).

Even if these issues were properly presented, we conclude that respondent is not entitled to relief. In support of its argument, respondent cites *Olsen v. Independent & Consol. Sch. Dist. No. 50*, 175 Minn. 201, 201, 220 N.W. 606, 606 (1928), which explained that a school district has a "quasi contractual obligation * * * to pay the reasonable value of any benefits which it receives in the transaction." Yet, in so relying, respondent overlooks crucial factual distinctions: the school district in *Olsen* had restrained plaintiff's performance of the contract. 175 Minn. at 205, 220 N.W. at 607. There is no evidence in this case that appellant restrained respondent in performance, caused respondent to incur extra costs, or caused respondent to make an erroneous bid as to the moving costs.

Respondent contends that appellant is seeking to take advantage of respondent's first offer. Respondent argues that appellant should have been aware that the bid was a mistake, based on the other two much higher solicited bids. "An offeree `will not be permitted to snap up an offer that is too good to be true; no agreement based on such an offer can * * * be enforced by the acceptor.'" *Speckel*, 364 N.W.2d at 893 (quoting 1 *Williston on Contracts* § 94 (3d ed. 1957)). But a party's "unilateral mistake in entering a contract is not a basis for rescission unless there is ambiguity, fraud, misrepresentation, or where the contract may be rescinded without prejudice to the other party." Id. at 893 (citation omitted).

We are not persuaded by respondent's argument. Respondent has failed to establish that it should be entitled to relief from a contract based on its offer. Furthermore, respondent is attempting to impose far too much responsibility in the bidding process upon appellant. Respondent is a professional moving company, and it is only natural that the school board relied on its estimated

cost of the move. [2] Appellant should not be expected to be experienced in matters of moving costs--that is why it dealt with respondent in the first place.

Moreover, there is no evidence that appellant behaved or acted in any way to mislead or take advantage of respondent. In fact, an employee of appellant made further inquiry into respondent's bid and confirmed respondent's confidence in that bid. Respondent cannot now ask that the courts provide a remedy for respondent's unilateral mistake. [3] Respondent won the informal bidding process, and it will find no refuge to escape from its contract with the school.

DECISION

Accordingly, we reverse the district court. Federal law preempts Minnesota's scheduled rate tariffs. The $20,000 quote enumerated in the bill of lading reflects the final intent of the parties as to price. Respondent is entitled to recover $146, which is the difference between what appellant paid ($19,854) and that price.

Reversed.

KALITOWSKI, Judge (concurring in part, dissenting in part)

I concur with the determination that under these facts the state motor carrier tariff schedules are preempted by federal law. Because the district court found the state tariffs were controlling, it did not address issues raised regarding the existence and terms of a contract between the parties. Therefore, I respectfully dissent from the decision to address these issues rather than remand them for initial consideration by the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (reviewing court will generally only consider matters presented and considered by district court).

Footnotes

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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.

[1] The court and parties mistakenly cited to 49 C.F.R. § 1056.1(b)(1) (1996), which was redesignated 49 C.F.R. § 375.(b)(1). 61 Fed. Reg. 54707 (1996).

[2] *Cf. Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc.*, 291 Minn. 113, 116-20, 190 N.W.2d 71, 73-76 (1971) (ruling that under principles of promissory estoppel, detrimental reliance and acceptance of a bid creates a contract, and explaining that a loss resulting from carelessness falls upon the party guilty of the error) (citations omitted).

[3] We note that respondent's total charge for the move is $69,013, which is three and a half times the amount of its bid. This unexplained disparity by professional movers questions the good faith and claimed error of the bidder.

STATE OF MINNESOTA
IN COURT OF APPEALS
C5-99-2095
C7-99-2096
C9-99-2097

Laura Ann Fosselman,
Relator (C5-99-2095),

Vikki Lee Lindstrom,
Relator (C7-99-2096),

Linda Carol Hughes,
Relator (C9-99-2097),

vs.

Commissioner of Human Services,
Respondent.

Filed July 3, 2000
Reversed and remanded; motion granted
Poritsky, Judge*

Department of Human Services

Kevin M. Lindsey, 1611 Ames Avenue, St. Paul, MN 55106 (for relators)

Mike Hatch, Attorney General, Theresa Meinholz Gray, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127 (for respondent)

Samuel D. Orbovich, Orbovich & Gartner Chartered, 408 St. Peter Street, Suite 417, St. Paul, MN 55102-1187 (for amicus curiae Association of Residential Resources in Minnesota)

Considered and decided by Kalitowski, Presiding Judge, Willis, Judge, and Poritsky, Judge.

S Y L L A B U S

1. Individuals who are mandated by Minn. Stat. § 626.556, subd. 3 (Supp. 1999), to report maltreatment of minors may be disqualified from employment in direct-contact positions by the Commissioner of Human Services pursuant to Minn. Stat. § 245A.04, subd. 3d(4) (Supp. 1999), for failure to make mandated reports. Such individuals are entitled, however, to an agency hearing pursuant to Minn. Stat. § 256.045, subd. 3(a)(6) (1998), after the commissioner has made the disqualification determination and denied their requests for reconsideration.

2. Before disqualifying a mandated reporter for failure to report the maltreatment a minor, the commissioner must specifically determine that the maltreatment was recurring or serious. In order to make a determination of serious maltreatment, the commissioner must find (a) sexual abuse occurred, or (b) the maltreatment resulted in death, or (c) the maltreatment resulted in serious injury or harm that reasonably required the care of a physician, whether or not that care was sought; or (d) there was abuse resulting in serious injury.

OPINION

PORITSKY, Judge *

The Department of Human Services (DHS) disqualified relators from employment in positions allowing direct contact with persons receiving services from (1) programs licensed by DHS or the Department of Health or (2) unlicensed personal-care-provider programs. DHS based relators' disqualifications on their failure to report the maltreatment of a child that allegedly occurred at an intermediate-care facility where relators were employed. Respondent Commissioner of Human Services denied relators' requests for reconsideration in separate decisions, and they have petitioned this court for writs of certiorari. We have consolidated their appeals.

Relators assert that they are entitled to a fair hearing pursuant either to statute or the Due Process Clause. They further contend that (1) the commissioner's determination that relators had a duty to report maltreatment is not supported by substantial evidence; (2) the commissioner failed to conclude that the alleged maltreatment caused the child's death or caused her serious injury; (3) the commissioner violated relators' due process rights by applying collateral estoppel to the issue of whether maltreatment occurred in the facility; and (4) the commissioner's decisions were arbitrary and capricious. The commissioner has filed a motion to strike certain documents in relators' appendix that are not contained in the record. We reverse the commissioner's decisions disqualifying relators and remand, and we grant the commissioner's motion to strike.

FACTS

Relators Laura Ann Fosselman and Vikki Lee Lindstrom are registered nurses, and Linda Carol Hughes is a qualified mental retardation professional (QMRP). Relators are employed by AXIS Minnesota, Inc., a residential, intermediate-care facility for individuals with developmental disabilities.

R.W. was a resident at AXIS. At approximately 3:30 p.m. on February 6, 1998, C.B., a nurse at AXIS, received a call from R.W.'s school requesting that someone from the facility pick up R.W. because R.W. was extremely agitated. C.B. went to the school, administered chloral hydrate to R.W. to alleviate R.W.'s agitation, and brought her back to AXIS. C.B. then monitored R.W. every 15 minutes. At approximately 8:15 p.m., C.B. activated the emergency alarm after noticing R.W. was not breathing. Neither the facility's nurses nor the paramedics, who arrived a short time later, were able to revive R.W., and she was pronounced dead.

Fosselman was on duty the evening of R.W.'s death, and she assisted C.B. in preparing a report on what occurred with R.W. that evening. Lindstrom and Hughes were not on duty that night. A few days later, the three relators spoke to two other nurses about the other nurses' concerns regarding the care R.W. received on February 6. Relators expressed their determination that C.B. had complied with the orders of R.W.'s physician. Relators did not report maltreatment to outside authorities.

The Department of Human Services (DHS) disqualified relators from working in direct contact with individuals receiving services from (1) programs licensed by DHS or the Department of Health or (2) unlicensed personal-care-provider organizations. Each relator filed a request for reconsideration of the disqualification with the Commissioner of Human Services. The commissioner denied relators' requests for reconsideration, and relators appealed.

ISSUES

1. Does the right to procedural due process entitle relators to an agency hearing under Minn. Stat. § 256.045, subd. 3(a)(6) (1998)?

2. Did the commissioner make an error of law in disqualifying relators for failure to report serious maltreatment when the commissioner made no finding that the alleged maltreatment caused R.W.'s death or caused serious injury or harm to her?

3. Should the commissioner's motion to strike documents in relators' appendix be granted?

ANALYSIS

A quasi-judicial agency decision not subject to the Administrative Procedure Act (APA) is reviewed on writ of certiorari by inspecting the record to determine whether the decision was "`arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.'" *Rodne v. Commissioner of Human Servs.*, 547 N.W.2d 440, 444-45 (Minn. App. 1996) (quoting *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992) (other quotations omitted)).

I.

We first address relators' assertion that they have a statutory right to a hearing. There are two statutory provisions that might grant a hearing to an individual disqualified from direct-contact positions under Minn. Stat. § 245A.04, subd. 3d(4) (Supp. 1999), for failure to report child maltreatment. The first, Minn. Stat. § 245A.04, subd. 3c (1998), provides, in effect, that public employees may request contested case hearings under the APA. This provision does not apply here, however, because relators are not public employees. [1] The second statute, Minn. Stat. § 256.045 (1998), provides for "state agency" hearings to review DHS matters.

Relators rely on the latter statute, section 256.045, subdivision 3(a)(6), and claim that they are entitled to a state agency hearing. They do not dispute that subdivision 3 of the statute contains a list of persons expressly entitled to such hearings. They also do not dispute that persons accused

of failing to report maltreatment, such as relators, are not expressly mentioned in the list. However, they point to subparagraph (6) of subdivision 3, which grants a hearing to "any person to whom a right of appeal according to this section is given by other provision of law" and argue that the Due Process Clauses of the United States and Minnesota Constitutions are "other provision[s] of law" within the meaning of the statute. Alternatively, they argue that if they are not granted a statutory right to a hearing, then the statutory scheme is unconstitutional in that it deprives them of procedural due process.

It is a cardinal rule of construction that, when reasonably possible, a statute must be construed so as to uphold its constitutionality. *Minnesota Higher Educ. Facilities Auth. v. Hawk*, 305 Minn. 97, 103, 232 N.W.2d 106, 110 (1975) ("Statutes are to be construed so as to uphold their constitutionality." (Citations omitted)); *see also* Minn. Stat. § 645.17(3) (1998) (stating legislature does not intend to violate state or federal constitution). If the failure to grant relators a hearing did in fact deprive them of due process, then, if possible, the statute must be construed to grant them such a hearing. If the statute cannot be so construed, then the statute must be declared unconstitutional. Either way, therefore, it comes down to the same issue: Did the failure to grant relators a hearing deprive them of due process?

In disqualifying relators, the commissioner proceeded in the following manner:

First, upon receiving a complaint that there had been maltreatment of R.W., Mary Kelsey, an investigator with the DHS Licensing Division, conducted an investigation, which concluded that C.B. had maltreated R.W. by failing to provide her with medical care.

Second, Jackie Spies, supervisor of the Licensing Division, made a five-point determination, as to each relator, based on Kelsey's report: (1) relators were mandated reporters; (2) they had reason to believe that R.W. had been maltreated; (3) relators failed to report the maltreatment; (4) the maltreatment was substantiated; and (5) the maltreatment was recurring. Based on this determination, relators were disqualified by a letter over Spies's signature. [2]

Third, relators exercised their right to request the commissioner to reconsider their disqualification. DHS, through Spies's letter, informed relators that they could request reconsideration. But the letter stated that the commissioner would only consider three grounds: (1) whether the information upon which DHS relied was incorrect; (2) whether the maltreatment was not recurring; or (3) whether relators would not pose a risk to persons served by AXIS. *See* Minn. Stat. § 245A.04, subd. 3b(a) (1998) (stating individual requesting reconsideration must present information demonstrating information commissioner relied on is incorrect or inaccurate or demonstrating individual does not pose risk of harm to persons served by applicant or license holder). Relators were allowed to submit written material in support of their position.

Fourth, after completing the "correctness review," the commissioner affirmed relators' disqualifications.

Certain aspects of the above procedure should be noted. At no stage were relators given the opportunity to present oral testimony on their behalf or to confront and cross-examine the individuals who provided the information adverse to them. They did not have the power to

subpoena persons to give information on their behalf. Moreover, under Minn. Stat. § 245A.04, subd. 3b(a)(1), once the commissioner has issued a final order in an appeal from a maltreatment determination or disposition, "the commissioner's order is conclusive on the issue of maltreatment." Thus, in this case, once DHS determined in C.B.'s case that C.B. was guilty of maltreatment--a determination that C.B. did not contest--under the statute, relators could not contest this issue in their own
disqualification proceedings.

With respect to relators' due process argument, the first issue is whether disqualification proceedings are subject to due process requirements. At the onset, we note that the due process protections granted under the United States and Minnesota Constitutions are identical. *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988).

In defining those areas in which governmental action is restricted by procedural due process, the United States Supreme Court has stated:

> Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.

Mathews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 901 (1976).

In *Mathews*, the Court noted that an individual could not be deprived of Social Security benefits without procedural due process. *Id.* (recognizing continued receipt of these benefits is statutorily created property interest protected by Fifth Amendment). In *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 1589 (1971), the Court held that if a driver's license is essential to one's livelihood, any proceeding to suspend that license must be consistent with procedural due process. This court stated in *Humenansky v. Minnesota Bd. of Med. Exam'rs*, 525 N.W.2d 559, 566 (Minn. App. 1994), *review denied* (Minn. Feb. 14, 1995), "A license to practice medicine is a property right deserving constitutional protection." (Citing *Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 1411 (1959) (other citations omitted).) Relators, two of whom are RNs and one of whom is a QMRP, clearly have a property interest in working in direct-contact positions.

Not only are relators' property interests involved, but the courts have also recognized that if a person's good name, reputation, honor, or integrity is at stake because of governmental action, the person is entitled to procedural due process. *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 510 (1971); *see also Boutin v. LaFleur*, 591 N.W.2d 711, 718 (Minn. 1999) (recognizing liberty interest is implicated when loss of reputation is coupled with loss of another tangible interest), *cert. denied*, 120 S. Ct. 417 (1999). Because relators have been disqualified for alleged failure to carry out the provisions of a law embodying an important policy—that of protecting children's health and welfare--it is clear to us that disqualification has tainted their good names and reputations.

The commissioner all but concedes on appeal (1) that relators have a protected property interest in holding their jobs free from unreasonable governmental interference and (2) that they have a protected liberty interest in protecting their names and associations in the community and in

protecting their freedom to pursue future employment opportunities involving direct contact with persons served by certain programs. We conclude that disqualification proceedings are subject to the requirements of procedural due process.

Having reached that conclusion, we turn to the second issue: Did the procedure by which relators were disqualified deprive them of due process? "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333, 96 S. Ct. at 902 (quotation omitted). In *Mathews*, the Court identified the distinct factors that should be considered in determining the specific dictates of due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest, through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 96 S. Ct. at 903 (citation omitted).

The first of the *Mathews* factors, relators' private interest, weighs heavily in their favor. According to relators, their disqualification both precludes them from working in their chosen field for seven years and renders their opportunity to re-enter that field at the discretion of the commissioner. [3] *See Bell*, 402 U.S. at 539, 91 S. Ct. at 1589 (holding if driver's license is essential to one's livelihood, any proceeding to suspend that license must be consistent with due process); *Falgren v. State, Bd. of Teaching*, 545 N.W.2d 901, 909 (Minn. 1996) (noting revocation of teaching license affects ability to work in chosen profession and quoting United States Supreme Court, "`the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood.'" (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543, 105 S. Ct. 1487, 1494 (1985))); *Humenansky*, 525 N.W.2d at 566 ("A license to practice medicine is a property right deserving constitutional protection.").

The second *Mathews* factor--risk of erroneous deprivation of relators' ability to work in their chosen profession and the probable value of additional procedural safeguards--also weighs heavily in favor of relators. *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970), is instructive on this score. In *Goldberg*, the Court held that the New York procedure for terminating welfare benefits, before giving recipients the opportunity for an evidentiary hearing, denied recipients due process. *Id.* at 268, 90 S. Ct. at 1021. After noting that due process requires the opportunity to be heard and that the hearing must be at a meaningful time and in a meaningful manner, the Court held that the failure to grant recipients the opportunity to present evidence orally or to confront and cross-examine adverse witnesses was "fatal to the constitutional adequacy" of the New York procedures. *Id.* at 267-68, 90 S. Ct. at 1020-21. In regard to the issue of oral versus written presentations, the Court first noted that many welfare recipients may not have the education to write effectively. *Id.* at 269, 90 S. Ct. at 1021. Then, as relates to the instant cases, the Court made two observations. First, the Court said:

> Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many [welfare] termination proceedings, written submissions are a wholly unsatisfactory basis for decision.

Id. Second, the Court said:

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses.

Id. While credibility is an essential issue in welfare termination cases, as the Court noted, it is no less important in disqualification proceedings, where much of the evidence for failure to report maltreatment may well come from a perpetrator of the maltreatment.

In the instant cases, before the maltreatment determination and their subsequent disqualification, the only opportunity relators had to give their side was when they were interviewed by a DHS investigator. It is not clear from the record whether relators were told they were the subject of the investigation or were told what specific allegations had been made against them. It may have appeared to relators that C.B. was the subject of the investigation. Only after they were formally disqualified were relators given an opportunity to submit written evidence in connection with their request for reconsideration. At no point in the proceedings were relators given the opportunity to present oral testimony, to confront and cross-examine witnesses against them, or to subpoena witnesses on their behalf. Disqualification proceedings--which involve questions of whether an individual was maltreated and whether the mandated reporter knew or had reason to know of the maltreatment--may well be as fact intensive as welfare termination proceedings and thus have the same need for the procedural safeguards noted in *Goldberg*.

As to the conduct of a hearing, we have noted above that under Minn. Stat. § 245A.04, subd. 3b(a)(1), once the commissioner has issued a final order in an appeal from a maltreatment determination or disposition, "the commissioner's order is conclusive on the issue of maltreatment." In the case involving the nurse, C.B., DHS had determined that C.B. was guilty of maltreatment—a determination that C.B. did not contest--and as a result, under the statute relators could not contest this issue in their disqualification proceedings. Preventing an individual from challenging an essential fact on which the government bases an adverse action may result in a denial of due process.

In *Bell*, 402 U.S. at 537, 91 S. Ct. at 1588, Bell was a clergyman who needed his car to travel to the various rural Georgia localities within his ministry. He was involved in an auto accident but apparently did not have liability insurance. *Id.* He was thereafter informed by the Director of the Georgia Department of Public Safety that he was required either to post security in an amount sufficient to cover potential liability or to present a notarized release from liability, plus he was to file proof of future financial responsibility. *Id.* If he failed to comply with these requirements, his driver's license would be suspended. *Id.* Bell requested an administrative hearing before the director, asserting that he was not at fault for the accident and was therefore not liable for damages resulting from it. *Id.* At the administrative hearing, Bell's proffer of evidence on the

issue of liability was rejected on the ground that the applicable statute did not recognize absence of liability as an excuse for not complying with the financial requirements noted above. *Id.* at 538, 91 S. Ct. at 1589. The Georgia Superior Court ruled in Bell's favor, but the Georgia Court of Appeals reversed. *Id.* On review, the United States Supreme Court reversed and held that it was a denial of due process to foreclose Bell from raising the issue of liability. *Id.* at 543, 91 S. Ct. at 1591. The Court ruled:

> Since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing.
>
> The hearing required by the Due Process Clause must be meaningful, and appropriate to the nature of the case. It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard.

Id. at 541-42, 91 S. Ct. at 1590-91 (citations and quotations omitted).

This principle is controlling in the instant cases. Relators, like Bell, are unable to pursue their chosen occupations by reason of the state administrative action, and the Minnesota statute, as did the Georgia procedure, "excludes consideration of an element essential to the decision." To the extent that Minn. Stat. § 245A.04, subd. 3b(a)(1), takes DHS's determination that C.B. was guilty of
maltreatment and makes it conclusive upon relators, the statute denies due process.

Finally, we note that as a measure of what due process requires, the legislature has provided that persons determined to have actually committed maltreatment are granted a right to a hearing after exercising a right to reconsideration by the commissioner. *See* Minn. Stat. §§ 256.045, subd. 3(a)(8) (stating individual determined to have maltreated child has right to hearing after exercising right to reconsideration by commissioner), 626.556, subd. 10i (Supp. 1999) (stating if commissioner determines individual maltreated child, individual may request agency reconsideration). At such a hearing, the accused individual has these rights: to have counsel; to appear personally, testify, and offer evidence; and to examine and cross-examine witnesses. Minn. Stat. § 256.045, subd. 4. Parties to DHS agency hearings also have the right to obtain subpoenas to compel witnesses to appear. Minn. Stat. § 256.045, subd. 6(b). A maltreatment determination may be used to support disqualification from direct-contact positions only after the commissioner enters a final order pursuant to this review process and after DHS determines that such maltreatment was recurring or serious. *See* Minn. Stat. § 245A.04, subd. 3b(a)(1) (stating commissioner's order conclusive on issue of maltreatment if commissioner has issued final order in appeal under Minn. Stat. § 256.045), subd. 3d(4) (listing "substantiated serious or recurring maltreatment of a minor under 626.556 * * * for which there is a preponderance of evidence that the maltreatment occurred" as reason for disqualification). As noted above, the commissioner's position in the instant proceeding is that individuals accused of failing to report maltreatment, such as relators, do not have a right to a hearing. This position ironically grants greater procedural protections to persons who actually perpetrate maltreatment than to those individuals who merely fail to report it. [4]

Turning to the third *Mathews* factor, the government's interest, the government's primary interest here lies in protecting individuals being treated in direct-contact facilities. Due to statutory options granted to the commissioners, this interest would not be obstructed by providing a hearing. Those options include placing individuals who request a hearing on restricted status or removing them from direct-contact positions pending the hearing's outcome. *Cf.* Minn. Stat. § 245A.04, subd. 3a(b) (Supp. 1999) (describing procedures pending reconsideration decisions including: immediate removal of disqualified individuals posing imminent risk of harm; restrictive status for those posing some risk; and no change in status for those posing no imminent risk of harm). The government has an additional interest in avoiding the cost and administrative burden of providing individuals disqualified from working in direct-contact facilities with a hearing. Requiring some form of hearing will undoubtedly increase costs and be an added burden to DHS. The burden on the department is lessened, however, because DHS already has procedures in place for hearings in other human services cases. *See* Minn. Stat. § 256.045 (describing procedures for review of human services matters). These procedures include the existing power of the commissioner to appoint state human services referees to conduct state agency hearings. *Id.*, subd. 1. Although this *Mathews* factor weighs against granting relators an agency hearing, its weight is not significant, and it is clearly outweighed by the other two *Mathews* factors.

We conclude that (1) Minn. Stat. § 256.045, subd. 3(a)(6), affords a statutory right to a hearing where due process rights would otherwise be violated; (2) disqualification proceedings are subject to procedural due process protections; and (3) consideration of the *Mathews* factors yields the conclusion that due process requires that relators receive an agency hearing. Therefore, we reverse and remand the commissioner's decisions.

II.

Because we are remanding these cases to the commissioner for further proceedings, it is essential to address relators' claim that the commissioner committed an error of law in his decisions. Specifically, relators assert that the commissioner erred in disqualifying them without first finding that C.B.'s alleged maltreatment caused R.W.'s death or caused serious injury or harm to her.

After completing a background study, DHS may disqualify individuals from working in any position allowing direct contact with persons receiving services from programs licensed by DHS or the Department of Health or from unlicensed personal-care-provider organizations. *See* Minn. Stat. §§ 144.057 (1998) (stating background studies for Department of Health shall be conducted by DHS), 245A.04, subd. 3 (1998) (describing DHS background studies and stating employees providing direct-contact services in personal-care-provider organizations shall also be studied), 245A.04, subd. 3d (Supp. 1999) (stating, after background study, individual may be disqualified from positions allowing direct contact with persons receiving services from license holder). In order to disqualify an individual for failing to report maltreatment of a child, the commissioner must make an administrative determination that includes all of the following elements:

1. The individual was a mandated reporter under Minn. Stat. § 626.556, subd. 3 (Supp. 1999);

2. The individual knew or had reason to know that a child was maltreated;

3. The maltreatment was substantiated;

4. The maltreatment was recurring or serious; and

5. The individual failed to make the required report.

See Minn. Stat. §§ 245A.04, subd. 3d(4) (stating individual disqualified from positions involving direct contact if there is administrative determination that individual failed to make reports required under section 626.556, subdivision 3, where maltreatment was substantiated and maltreatment was recurring or serious), 626.556, subd. 3 (identifying mandated reporters).

With respect to the elements listed above, it is undisputed that relators are mandated reporters and that they did not report C.B.'s alleged maltreatment of R.W. The commissioner concluded that relators had reason to know of the maltreatment and that the maltreatment was substantiated. Relators contest the commissioner's conclusions on the latter two elements, but their argument on this score focuses on the remaining element: Based on the commissioner's findings, the commissioner could not draw the conclusion that C.B.'s maltreatment of R.W. was recurring or serious.

Initially, DHS concluded that C.B.'s maltreatment was "recurring." The record does not support the conclusion that C.B. was guilty of recurring maltreatment with respect to R.W. The commissioner realized that it was erroneous to label the maltreatment as "recurring," and in his final orders he changed the characterization of maltreatment from "recurring" to "serious."

At no point in his orders did the commissioner make a finding that C.B.'s conduct caused R.W.'s death or caused serious injury or harm to her. In fact, the commissioner made an express finding that the DHS investigation did not establish such causation. In his findings, the commissioner quoted Mary Kelsey's report, which included the following, "The investigation did not establish the extent to which [C.B.'s] failure to supply [R.W.] with medical care contributed to [R.W.'s] death." In conclusion seven of each order, the commissioner concluded, "The DHS investigation did not establish the extent to which [C.B.'s] failure to supply [R.W.] with medical care contributed to [R.W.'s] death."

Relators point to the definition of "serious maltreatment" found in Minn. Stat. § 245A.04, subd. 3d(4), which is, insofar as it pertains to this case,

> maltreatment resulting in death; or maltreatment resulting in serious injury or harm which reasonably requires the care of a physician whether or not the care of a physician was sought.

Relators argue that since the commissioner did not establish the extent to which C.B.'s maltreatment (i.e., failure to supply R.W. with medical care) contributed to R.W.'s death or caused her serious injury, the necessary causation is missing. That is, absent abuse, to be serious maltreatment under the statute, the maltreatment must result in serious injury or death. Thus,

relators conclude, the necessary statutory element is missing, and the disqualification for failure to report serious maltreatment is legally unfounded.

The commissioner responds to this argument by pointing to the following language, also found in conclusion seven:

> However, [R.W.] was in respiratory distress that reasonably required the care of a physician whether or not the care of a physician was sought. Under Minn. Stat. § 245A.04, subd. 3d(4) maltreatment resulting in death or maltreatment resulting in serious injury or harm which reasonably requires the care of a physician whether or not the care of a physician is sought is serious maltreatment

But what the statute requires is that the *maltreatment* cause the death or the serious injury or harm requiring the physician's care. Conclusion seven states that *the underlying condition*--R.W.'s respiratory distress--not the maltreatment, caused the need for a physician's care. In his brief, the commissioner attempts to bridge the gap:

> C.B.'s neglect was serious because the child needed medical care to improve her condition. C.B.'s failure to follow the physician's orders and risk management plan and his failure to notify the child's doctor of her deteriorating condition *caused her to continue to experience agitation and respiratory distress* that reasonably required the care of a physician.

(Emphasis added.) As noted above, however, the commissioner did not make a finding that C.B's conduct caused any change in R.W.'s condition, and, in point of fact, he ruled expressly that the investigation did not make a finding that C.B.'s conduct caused R.W's death. R.W. had, in fact, numerous health problems, which had resulted in five hospitalizations between July 1997 and January 1998, and which are detailed in the DHS report dated October 29, 1998. Dr. Terence J. Coyne, R.W.'s treating physician, submitted to the commissioner an affidavit dated February 8, 1999, in which Dr. Coyne stated that he reviewed his orders and the records in connection with R.W.'s care, treatment, and medication. Dr. Coyne went on to state, "The actions taken and documented were consistent with my orders." From all that appears in the record, it appears as likely that R.W.'s death resulted from her underlying condition as from any inaction on C.B.'s part. In light of (1) the commissioner's express finding that a link between C.B.'s conduct and R.W.'s death was not established, and (2) the commissioner's failure to find that C.B.'s alleged maltreatment caused R.W.'s death or caused serious injury or harm to her, his conclusion that C.B. was guilty of serious maltreatment is not supported by his findings and is thus an error of law.

III.

The commissioner requests that this court strike certain documents contained in relators' appendix. The commissioner moves to strike Dr. Coyne's second affidavit, dated January 7, 2000; a stipulation-and-consent order between C.B. and the Board of Nursing; a memorandum from the Office of the Ombudsman for Mental Health and Mental Retardation; and two letters from the Board of Nursing.

As the commissioner correctly observes, these documents are not contained in the file. There are also additional documents in relators' appendix that are not contained in the file, including (a) an affidavit from relators' attorney; (b) two letters from relators' attorney to the commissioner; and (c) a letter from an assistant commissioner to relators' attorney.

The record on certiorari review includes the documents filed with the agency. *See* Minn. R. Civ. App. P. 110.01 (stating record on appeal includes papers filed in trial court, exhibits, and transcript), 115.04, subd. 1 (applying provisions of rule 110 to certiorari review and stating references to trial court shall be read as references "to body whose decision is to be reviewed"). Thus, the documents in relators' brief that are not contained in the record are stricken, and the commissioner's motion is granted. *See Mitterhauser v. Mitterhauser*, 399 N.W.2d 664, 667 (Minn. App. 1987) (reviewing court must strike matters outside record). Our decision to strike these documents does not preclude relators from introducing them on remand. Both relators and DHS shall have the opportunity to introduce additional evidence on remand.

DECISION

The commissioner's failure to grant relators a state agency hearing deprived them of due process. Pursuant to the rule that if possible a statute must be construed to preserve its constitutionality, we conclude that the phrase, "other provision of law" appearing in Minn. Stat. § 256.045, subd. 3(a)(6) (1998), is to be construed to include due process. To the extent this conclusion is inconsistent with Minn. Stat. § 245A.04, subd. 3b(e) (1998), which states that the commissioner's decision on reconsideration of a disqualification decision is the final administrative agency action, we conclude that this provision denies relators due process.

The commissioner also erred as matter of law when he concluded that R.W. was the subject of serious maltreatment yet did not first determine that C.B. caused R.W.'s death or caused serious injury or harm to her. Although the commissioner is not precluded on remand from concluding that R.W. was the subject of serious maltreatment, such a conclusion must be supported by a determination that C.B.'s actions caused R.W.'s death or caused serious injury or harm to R.W. Because of our decision on the foregoing issues, we need not address the additional issues raised by relators.

The Commissioner of Human Services' decisions denying relators' requests for reconsideration are reversed. These matters are remanded to the commissioner for further proceedings consistent with this decision.

Additionally, we grant the commissioner's motion to strike documents contained in relators' appendix that are not contained in the agency file.

Reversed and remanded; motion granted.

Footnotes

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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.

[1] In any case, in *Rodne*, 547 N.W.2d at 444, this court noted that DHS is not required to conduct a contested case proceeding when an individual who is not subject to Minn. Stat. § 245A.04, subd. 3c, requests reconsideration under Minn. Stat. § 245A.04, subd. 3b (1998), as did relators in this case.

[2] In his brief, the commissioner states that the Licensing Division Investigations Unit performed the initial investigation and that the Investigations Unit then referred the matter to the Licensing Division Background Studies Unit, which made the five-point determination supporting relators' disqualification. We can find no explanation of this process in the record or in the applicable statutes or rules, and we can find no support for the commissioner's statement that two separate units of the Licensing Division were involved in this matter.

[3] Although Minn. Stat. § 245A.04, subd. 3d(4), is not clear on this point, we conclude that relators have given a plausible reading to the statute, which, in determining the extent of the harm to relators, must be credited.

[4] In the unpublished opinion, *J.L.H. v. Commissioner of Human Servs.*, No. C2-97-316, 1997 WL 435877, at *1 (Minn. App. Aug. 5, 1997), J.L.H. was disqualified from working in direct-contact positions as a result of committing maltreatment while working in a DHS-licensed facility. J.L.H. argued, in part, that she was not afforded procedural due process. *Id.* at *3. This court disagreed and concluded that the reconsideration procedure that allowed her to submit written information to the commissioner afforded her due process. *Id.* at *4.

The law regarding suspected perpetrators of maltreatment changed immediately before this court filed *J.L.H. See* 1997 Minn. Laws ch. 203, art. 5, § 29 (adding Minn. Stat. § 626.556, subd. 10i, which permits individual determined to have maltreated child to request reconsideration), 1997 Minn. Laws ch. 203, art. 5, § 6 (adding subsection (8) to Minn. Stat. § 256.045, subd. 3; subsection provides individual determined to have maltreated minor has right to state agency hearing after exercising right to reconsideration; provision applies only to maltreatment occurring on or after July 1, 1997). Although J.L.H. did not receive these additional procedural protections because her actions took place before the statute's effective date, the legislature's decision to change the law and grant suspected perpetrators of maltreatment the right to challenge a maltreatment determination, both through a request for reconsideration and a subsequent request for an agency hearing, reflects legislative recognition of the need for due process in such cases.H.

STATE OF MINNESOTA

IN SUPREME COURT

C9-97-992

Court of Appeals — Anderson, Paul H., J.

Hersh Properties, LLC, petitioner,

Appellant,

vs.

McDonald's Corporation, et al.,

Respondent.

Filed: February 4, 1999
Office of Appellate Courts

SYLLABUS

By its plain language, the Minnesota Marketable Title Act, Minn. Stat. § 541.023, subds. 1-7 (1998), is applicable to both registered and unregistered property.

Under the Minnesota Torrens Act, Minn. Stat. §§ 508.01-.84 (1998), and the Minnesota Marketable Title Act, Minn. Stat. § 541.023, subds. 1-7 (1998), the source of title held by an owner of Torrens property is the certificate of title issued to that owner upon his or her acquisition of fee simple title.

Affirmed in part, reversed in part, and remanded.

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

OPINION

ANDERSON, Paul H., Justice.

In 1950, the predecessor in title to a Torrens parcel of real property, now occupied by Dinkytown Wine & Spirits, reserved an appurtenant easement for ingress and egress and signage over an abutting Torrens parcel of real property. The abutting Torrens parcel is currently occupied by a McDonald's restaurant. Certificates of title to both parcels contain a recital of the easement. Today, almost a half-century after its creation, there is no evidence that this easement has ever been utilized, and the area encompassing the easement is being used by McDonald's as a parking lot. Appellant Hersh Properties, the owner of Dinkytown Wine & Spirits, is now attempting to utilize the easement to erect a sign advertising liquor. However, respondents McDonald's

Corporation and Choate & Company, Inc., the McDonald's restaurant franchisee, assert that the Minnesota Marketable Title Act (MTA) extinguished the easement.

Hersh brought a declaratory judgment action in district court seeking a determination of the validity of its claimed easement. The court granted summary judgment in favor of McDonald's and Choate on the grounds that the MTA terminated Hersh's claimed easement. The Minnesota Court of Appeals affirmed, concluding that the MTA is applicable to Torrens property and that, under the MTA, Hersh's easement was extinguished because the recital of the easement on the Torrens certificates of title did not satisfy the MTA notice requirements. We affirm the court of appeals' conclusion that the MTA is applicable to Torrens property, but we reverse the court of appeals' conclusion that the easement was extinguished because the MTA notice requirements were not satisfied.

McDonald's is the fee owner of a Torrens parcel of real property (McDonald's Parcel) located at 407 15th Avenue Southeast in Minneapolis, Minnesota. Choate operates a McDonald's restaurant on this parcel. Hersh is the fee owner of a Torrens parcel of real property (Hersh Parcel) located at 1412 5th Avenue Southeast, which is adjacent to the McDonald's Parcel. The certificates of title for both the McDonald's Parcel and the Hersh Parcel expressly recite the existence of an ingress and egress and signage easement. The disputed easement was created by an August 1, 1950 conveyance.

Prior to 1950, Arthur and Doris Robinson owned both the Hersh Parcel and the McDonald's Parcel in fee simple. In 1925, the Robinsons registered title to their undivided property under the Torrens Act. In 1944, the Robinsons divided their property into two parcels and registered them separately, but retained ownership of both until 1950. Since 1950, the Hersh Parcel has been sold three times while the McDonald's Parcel has been sold once.

The Hersh Parcel was first sold on August 1, 1950, when the Robinsons conveyed it by warranty deed to a corporation. In the deed, the Robinsons granted the new corporate owners an easement over the remaining parcel, what is now known as the McDonald's Parcel. The deed provided for, among other things, the following easement (hereinafter referred to as the signage easement):

> for ingress and egress * * * over the Northeasterly 15 feet of the southwesterly 65 feet of Lot One (1), said Block O, and together with the right to maintain a sign upon the 15 foot easement strip last referred to at the point where it connects with Fifteenth Avenue Southeast.

After the deed to the Hersh Parcel was recorded, the Hennepin County Registrar of Titles issued a residue certificate of title to the Robinsons for the remaining property, the McDonald's Parcel. The Robinsons' residue certificate of title contained a recital that the McDonald's Parcel was subject to, among other things, the signage easement.

The second conveyance of the Hersh Parcel occurred over a decade later, on March 18, 1964, when the parcel was conveyed by warranty deed to a new owner. The final conveyance of the Hersh Parcel occurred on June 27, 1995, when the parcel was conveyed to Hersh by warranty

deed. The legal description of the Hersh Parcel in each of these conveyances expressly provided that title to the parcel is benefited by the signage easement.

The only sale of the McDonald's Parcel occurred on November 5, 1984, when McDonald's acquired a fee simple interest in its parcel under a personal representative's deed from the estate of Doris Robinson. The certificate of title issued to McDonald's as a result of this transfer expressly provided that title to the McDonald's Parcel is burdened by the signage easement.

In the fall of 1995, Hersh informed McDonald's and Choate that it intended to place a sign advertising liquor within the area of its claimed signage easement. The area encompassing the easement has since been paved and McDonald's is using it as a parking lot. McDonald's and Choate responded by challenging the validity of the easement and stating that they would oppose any attempted exercise of the easement.

Hersh then brought a declaratory judgment action in Hennepin County District Court to determine the validity of the signage easement. As an affirmative defense to Hersh's action, McDonald's and Choate asserted that the MTA extinguished Hersh's claim. McDonald's argued that the easement was extinguished because, following the grant of the easement by the Robinsons in the 1950 warranty deed, neither Hersh nor its predecessors in title filed a sworn notice as required by the MTA. More particularly, McDonald's pointed to the fact that neither Hersh nor its predecessors in title filed, within 40 years of the creation of the easement, a sworn notice with the county recorder or registrar of titles setting forth the name of the claimant, a description of the real estate affected, and the instrument on which the claim is founded. Because no such notice was filed, McDonald's asserts that under the MTA the easement was presumed abandoned and, therefore, extinguished. McDonald's also argued that because there was no evidence that the easement had ever been used, the easement was also extinguished by common law abandonment.

Hersh did not dispute that it failed to comply with the explicit notice requirements of the MTA. Rather, Hersh argued that the MTA notice requirements were constructively satisfied because the recital of the signage easement was contained in the conveyance of the McDonald's Parcel in 1984 and the conveyances of the Hersh Parcel in 1964 and 1995. Hersh claimed that under the Torrens system, the certificates of title conclusively showed that the easement existed and was, therefore, valid.

On cross-motions for summary judgment, the district court granted summary judgment in favor of McDonald's and Choate on the grounds that Hersh abandoned its interest in the signage easement as evidenced by its failure to record its interest in the property within 40 years of the date the easement was created. The court first determined that the MTA was applicable to Torrens property and that, while a certificate of title is conclusive evidence of everything contained in it, when the source of the title has been of record at least 40 years, a sworn notice has to be filed with the registrar of titles. The court found that the source of the easement was the August 1, 1950 Robinson conveyance, which had been of record at least 40 years. In addition, the court determined that the presumption of abandonment was present because Hersh failed to record any notice of its interest in the property within 40 years from the date the easement was created. The court then found that there was no indication that Hersh was in possession of the

signage easement because the record was devoid of evidence that any sign had ever been placed on the easement by Hersh or any prior owner. Based on these findings, the court concluded that under the provisions of the MTA the easement was presumed abandoned and, therefore, terminated. The court did not address the issue of common law abandonment on the grounds that the MTA was dispositive of the issue.

Hersh appealed to the court of appeals, arguing that the district court erroneously determined that because the access and signage easement was created on August 1, 1950, this date controlled for purposes of triggering the MTA's 40-year limitation period. Hersh argued that the MTA did not apply to the facts in this case because Hersh acquired its interest in the signage easement when it purchased its parcel in June 1995. Specifically, Hersh asserted that, under the MTA, the date on which it purchased its parcel is critical and the date of the "source of title" for the easement is irrelevant. Hersh also argued that the court erroneously determined that the MTA notice requirements were not satisfied and asserted that sufficient notice of the easement was recorded in the parties' respective certificates of title.

In response, McDonald's argued that it was entitled to invoke the MTA as a defense to Hersh's claimed right to utilize the signage easement. First, McDonald's asserted that, although it only had its "claim of title" for 13 years, the "source of title" is derived from the 1950 Robinson deed. More specifically, McDonald's argued that because its "claim of title" was based on a "source of title" that is over 40 years old, the MTA is available as a defense to Hersh's claimed right to the easement. Second, McDonald's argued that the MTA extinguished the easement because Hersh's predecessors in title failed to follow the explicit MTA notice requirements. Specifically, McDonald's argued that the MTA does not recognize constructive notice as a method of preserving an interest in real property.

The court of appeals affirmed the district court. In making its determination, the court of appeals held first that the MTA is applicable to Torrens property, and second, the MTA extinguished the signage easement because the recital of the easement on the certificates of title did not satisfy the explicit MTA notice requirements. In making its determination, the court stated that the party invoking the MTA must have "a claim of title based upon a source of title, which source has then been of record at least 40 years" and "[t]he party against whom the MTA is invoked must have an interest founded on an instrument executed more than 40 years before an action to enforce that interest is commenced." *Hersh Properties, LLC v. McDonald's Corp.*, 573 N.W.2d 386, 391 (Minn. App. 1998) (citations omitted).

The court of appeals went on to hold that McDonald's source of title was the 1950 conveyance that created the signage easement. The court then distinguished between a "claim of title" and a "source of title." The court reasoned that the "age of the *claim of title* for the party invoking the MTA is immaterial so long as that claim is based on a *source of title* more than 40 years old." *Id.* (emphasis in original). The court stated that "McDonald's acquired its claim of title in 1984 when it purchased the McDonald's parcel, the source of title to which was the 1950 conveyance that has been of record for more than 40 years." *Id.* The court went on to conclude that McDonald's was able to invoke the MTA as a defense against the Hersh easement because McDonald's had an adequate source of title. *Id.*

In Hersh's present appeal, it is undisputed that following the grant of the signage easement by the Robinsons in the 1950 warranty deed, no owner in the chain of title to the Hersh Parcel filed a sworn notice with the county recorder or registrar of titles as required by the MTA. Further, there is no evidence that Hersh or its predecessors in title have ever used the easement. Nevertheless, Hersh asserts that the easement is still valid. Hersh argues that the MTA does not apply to bar its right to enforce the easement because McDonald's does not have the requisite "source of title" to invoke the MTA. Hersh challenges the court of appeals' interpretation and application of "claim of title" and "source of title" as they co-exist in Minn. Stat. § 541.023, subd. 1 (1998).

I.

The facts of this case present an important question, considered for the first time by this court. We must determine whether an owner of Torrens property, whose certificate of title is less than 40 years old, may invoke the MTA to extinguish a signage easement that is expressly recited as an encumbrance on such owner's certificate of title. The issue presented requires interpretation of the Minnesota Torrens Act (Torrens Act), Minn. Stat. §§ 508.01-.84 (1998), and the MTA, Minn. Stat. § 541.023, subds. 1-7 (1998).

Statutory construction presents a legal question, which this court reviews de novo. *Hibbing Educ. Assoc. v. Public Employment Relations Bd.,* 369 N.W.2d 527, 529 (Minn. 1985). To properly address the issue raised in this appeal, we must answer the following questions: (1) whether the MTA is applicable to property that has been registered pursuant to the Minnesota Torrens Act; and if the answer to the first question is in the affirmative, then (2) whether a certificate of title constitutes a "source of title" under the MTA. We acknowledge that these questions cannot properly be answered without an understanding of the history and purpose of the Torrens Act and the MTA and, for this reason, we will discuss both.

Our system of real property conveyance is "predicated upon the assumption" that a purchaser of real property can determine whether a seller has marketable title by examining written evidence of the property's chain of title. Paul E. Basye, *Trends and Progress - The Marketable Title Acts,* 47 Iowa L. Rev. 261, 261 (1962). Accordingly, to determine the status of title, prospective purchasers of real property must examine the recorded evidence of transfers and encumbrances. With the passage of time and the inevitable lengthening of chains of title, this process understandably becomes more cumbersome and uncertain. Every time title to real property changes hands, the number of documents in a chain of title increases and the encumbrances that may constitute a defect in title increase in direct proportion. *Id.* at 264. Thus, many title examiners feel compelled to raise any and all possible defects, even those that may be considered de minimus, when ascertaining whether title is marketable. *See id.* at 265. As a result, examination of titles becomes less efficient and the status of title becomes less certain.

The mounting difficulties associated with transferring real property and the uncertainty of title gave rise to enactment of reform measures intended to promote efficiency and certainty. *See, e.g.,* John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age,* 18 Wm. Mitchell L. Rev. 61, 70 (1992). In Minnesota, two such measures include the enactment of the Torrens Act of 1901 and the enactment of the current version of the MTA in 1947. The Torrens Act operates to vest conclusive title in the holder of a certificate of title issued pursuant

to judicial proceedings. The MTA, on the other hand, operates to extinguish those ancient interests that interfere with the efficient and certain transfer of real property. Notwithstanding the differences of these acts, it is clear that both endeavor to promote the efficient and certain transfers of title.

A. Torrens System

Prior to 1901, all real property in Minnesota was abstract property. Under the abstract system, documents evidencing marketable title may be found in recorded documents or by material outside the recording system. *See Lucas v. Indep. School Dist. No. 284,* 433 N.W.2d 94, 96 (Minn. 1988). Generally, the prospective purchaser of real property looks at recorded documents to determine marketable title of record. *Id.* at 97. These documents consist of written evidence of transactions that affect the real property and are recorded with the county recorder in the particular county where the property is located. The recorded documents then become public records and operate as an instrument of conveyance as well as a means to appraise title. Typically, a summary of the material parts of these recorded or filed documents-an abstract of title-is prepared to provide a prospective purchaser or mortgagor with a simplified and convenient method to ascertain marketability of title. *See id.* at 97.

In 1901, Minnesota adopted the Torrens system. Act of Apr. 11, 1901, ch. 237, §§ 1-98, 1901 Minn. Laws 348, 348-378, *codified at* R.L. § 3370-403 (1905). The purpose of the Torrens system was to create a title registration procedure intended to simplify conveyancing by eliminating the need to examine extensive abstracts of title by issuance of a single certificate of title, free from "any and all rights or claims not registered with the registrar of titles * * *." *In re Juran,* 178 Minn. 55, 58, 226 N.W. 201, 202 (1929). Torrens registration provides a means to determine the state of title through the inspection of a single document, the certificate of title, except for seven specified interests enumerated in Minn. Stat. § 508.25 (1998). *See Mill City Heating & Air Cond. Co. v. Nelson,* 351 N.W.2d 362, 364-65 (Minn. 1984).

At the time the Torrens Act was adopted in Minnesota, the Torrens system had a long and established history. As early as the 1850's, Sir Robert Richard Torrens implemented the Torrens system of title registration in South Australia, "though a similar system had been in vogue" for several years in Europe. *Peters v. Duluth,* 119 Minn. 96, 98, 137 N.W. 390, 391 (1912). When Minnesota adopted the Torrens system, the goal of the legislature was "to clear up and settle land titles" and, to that end, a proceeding was authorized by which title could be settled by judicial decree. *Id.* at 103, 137 N.W. at 393. An officer of the court, the examiner of titles, oversees all stages of registration of title under the Torrens system. See Minn. Stat. § 508.321 (1998).

Title registration does not create or transfer a legal interest until the examiner of titles, subject to the jurisdiction of the court, makes a comprehensive assessment of the current state of title. *See* Minn. Stat. §§ 508.13 (1998), 508.16, subd. 2 (1998). Initial title registration of real property is a relatively involved proceeding that ultimately results in a certificate of title being issued, which "shall be received in evidence in all the courts of this state and be conclusive evidence of all matters and things contained in it." Minn. Stat. § 508.36 (1998). The Torrens Act provides in relevant part that:

> Every person receiving a certificate of title pursuant to a decree of registration and every subsequent purchaser of registered land who receives a certificate of title in good faith and for a valuable consideration shall hold it free from all encumbrances and adverse claims, excepting only the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar * * *.

Minn. Stat. § 508.25 (1998).

Unlike the abstract system, where *evidences of title* are recorded, under the Torrens system there is a judicial proceeding whereby *title itself* is registered. *See Henry v. White,* 123 Minn. 182, 184, 143 N.W. 324, 325 (1913) (stating "[t]he basic principle of the [Torrens] system is the registration of the title to land instead of registering only the evidence of such title"). The conclusiveness of certificates of title is maintained by court adjudication and through statutes of limitations. *See* Minn. Stat. §§ 508.22 (1998), 508.28 (1998). Accordingly, in order to maintain the reliability of certificates of title, certain subsequent transfers of title and changes to the certificate must be made either by court order or by approval of the examiner of titles. *See, e.g.,* Minn. Stat. §§ 508.58 (1998), 508.62 (1998), 508.68 (1998). Subsequent transfers of title where the old certificate of title is cancelled and a new certificate of title is issued can only occur when the registrar of titles follows specific procedures. *See* Minn. Stat. § 508.52 (1998). No erasure, alteration, or amendment to the certificate of title can be made except by court order or by approval of the examiner of titles. *See* Minn. Stat. § 508.71, subd. 1 (1998). The conclusive nature of certificates of title allows real property owners to rely on the certificate of title while disregarding most interests not evidenced on the current certificate of title.

B. Marketable Title Act

The current version of the MTA was adopted in 1947 in order to prevent "ancient records [from] fetter[ing] the marketability of real estate." Minn. Stat. § 541.023, subd. 5 (1998). The central tenet of the MTA is that a determination of title should be possible from an examination of documents in the chain of title recorded in the 40-year period preceding the search. This principle represents a marked departure from the policy and operation underlying our land transfer system. As we have previously stated, "[t]he Marketable Title Act is a comprehensive plan for reform in conveyancing procedures * * *." *Wichelman v. Messner,* 250 Minn. 88, 105, 83 N.W.2d 800, 816 (1957). The MTA provides, in relevant part, that:

> As against a claim of title based upon a source of title, which source has then been of record at least 40 years, no action affecting the possession or title of any real estate shall be commenced by a person, partnership, corporation, state, or any political division thereof, after January 1, 1948, to enforce any right, claim, interest, incumbrance or lien founded upon any instrument, event or transaction which was executed or occurred more than 40 years prior to the commencement of such action, unless within 40 years after such execution or occurrence there has been recorded in the office of the county recorder or filed in the office of the *registrar of titles* in the county in which the real estate affected is situated, a notice sworn to by the claimant or the claimant's agent or attorney setting forth the name of the claimant, a description of the real estate affected and of the instrument, event or transaction on which

such claim is founded, and stating whether the right, claim, interest, incumbrance or lien is mature or immature.

Minn. Stat. § 541.023, subd. 1 (1998) (emphasis added). If a party fails to record notice of a certain interest within the 40-year statutory period, the interests not so recorded are subject to the MTA's conclusive presumption of abandonment. *See* Minn. Stat. § 541.023, subd. 5 (1998).

C. Applicability of the MTA to Torrens property

Having reviewed the history and purpose of both the Torrens Act and the MTA, we now proceed to determine whether the MTA is applicable to property registered under the Torrens system. In construing the MTA, we first must look at the specific language to determine its meaning. If a statute is free from ambiguity, we look only at its plain language. *Tuma v. Comm'r of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986).

Here, the language of the MTA clearly and unambiguously states that it applies to "any real estate." *See* Minn. Stat. § 541.023, subd. 1. While the MTA provides several exceptions to this mandate, it noticeably fails to exempt Torrens property. Further, the MTA also requires that a notice to preserve an interest within 40 years of its creation must be filed in the office of the county recorder, which handles abstract property, *or* the office of the registrar of titles, which handles Torrens property exclusively. The language that specifically provides for the recording of notice in the office of the registrar of titles would be unnecessary if the legislature did not contemplate that the MTA would be applicable to Torrens property. Consequently, the plain language of the MTA leads us to hold that the MTA applies to property registered pursuant to the Torrens Act.

II.

Having determined that the MTA applies to Torrens property, we must now determine whether the MTA applies to bar Hersh's right to enforce the signage easement. The MTA essentially provides that unless an interest is preserved by filing a sworn notice within 40 years of the creation of the interest, that interest cannot be asserted against a claim of title based on a source of title that has then been of record at least 40 years. *See* Minn. Stat. § 541.023, subd. 1. Therefore, in applying the MTA, we must first determine which party is required to have the requisite "claim of title based upon a source of title." *See id.* We conclude that the proper inquiry is the age of McDonald's source of title for its property rather than the age of the source of Hersh's easement.

Our conclusion is supported by our most comprehensive decision addressing the MTA. *See Wichelman*, 250 Minn. at 88, 83 N.W.2d at 800. In *Wichelman,* we stated that in order for the MTA to operate in a particular case to extinguish any interest, two requirements are necessary: (1) "the party desiring to invoke the statute for his own benefit must have a requisite `claim of title based upon a source of title, which source has then been of record at least 40 years'"; and (2) "the person against whom the [MTA] is invoked must be one who is `conclusively presumed to have abandoned all right, claim, interest * * *' in the property." *Wichelman,* 250 Minn. at 111, 83 N.W.2d at 819 (ellipses in original).

The language we used in *Wichelman* and in subsequent decisions rendered by this court makes it clear that it is McDonald's source of title that is at issue rather than Hersh's source of title. *See, e.g., United Parking Stations, Inc. v. Calvary Temple,* 257 Minn. 273, 275, 101 N.W.2d 208, 210 (1960) (analyzing the source of title of the party attempting to invoke the protection of the MTA). Here, Hersh initiated the declaratory judgment action against McDonald's and Choate, requesting the district court to determine whether the signage easement is valid. As an affirmative defense, McDonald's and Choate asserted that Hersh's claim was barred by the MTA. Because McDonald's and Choate are invoking the MTA for their own benefit, as a means to extinguish Hersh's easement, McDonald's must have the requisite "claim of title based upon a source of title, which source has then been of record at least 40 years." *Wichelman,* 250 Minn. at 111, 83 N.W.2d at 819 (citation omitted).

The next question we must answer is whether McDonald's and Choate have the requisite "claim of title based upon a source of title" to bar Hersh's ability to utilize the signage easement. A significant feature of the MTA is that it protects only those property owners whose "claim of title [is] based upon a source of title." Minn. Stat. § 541.023, subd. 1. As such, the critical issue before this court concerns the proper interpretation of "claim of title" and "source of title" as they co-exist in subdivision 1 of the MTA. It is significant that the phrase "claim of title" is not defined in the statute, but the term "source of title" is defined. When the MTA was enacted in its current form in 1947, the MTA used the term "source of title," but failed to define it. *See* Act of Mar. 24, 1947, ch. 118, § 1, 1947 Minn. Laws 143, 143-45, *codified at* Minn. Stat. § 541.023, subd. 1 (1949). This omission was addressed in 1959 when Minn. Stat. § 541.023, subd. 7 was added to define a "source of title." *See* Act of Apr. 24, 1959, ch. 492, § 1, 1959 Minn. Laws 665, 665-66, *codified at* Minn. Stat. § 541.023, subd. 7 (1961). As defined, the source of title can be "any deed, judgment, decree, sheriff's certificate, or other instrument which transfers or confirms, or purports to transfer or confirm, a fee simple title to real estate * * *." Minn. Stat. § 541.023, subd. 7 (1998).

McDonald's has attempted to invoke the MTA by tracing its "source of title" back to the 1950 Robinson conveyance. The court of appeals essentially agreed and held that the source of McDonald's title was the 1950 conveyance. The court then distinguished between a "claim of title" and a "source of title." Under the court's analysis, subdivision 1 of the MTA contemplates two distinct interests. The court interpreted "claim of title" as the point at which McDonald's acquired its interest in what is now known as the McDonald's parcel, and the "source of [their] title" as the 1950 Robinson conveyance that created the signage easement. Accordingly, the court held that the 1950 conveyance became the fee simple "source" of McDonald's current interest.

Hersh disputes this conclusion, arguing that the certificate of title issued to McDonald's in 1984 when McDonald's acquired its parcel is its source of title. Hersh also maintains that when interpreted and applied correctly, "the MTA and the Torrens Act together provide that if a party's certificate of title for Torrens property has been registered with the Registrar of Title for more than 40 years, that party can use the MTA as a defense against hostile claims, such as a claim for an easement."

The MTA is not a model of clarity and the broad definition of "source of title" provides a reasonable basis for more than one interpretation. Therefore, our reading of subdivision 7 of the

MTA leads us to conclude that it is ambiguous. *See Tuma*, 386 N.W.2d at 706 (stating that a statute is ambiguous when it can be given more than one reasonable interpretation). If a statute is ambiguous, we must ascertain and effectuate the intent of the legislature. *See* Minn. Stat. § 645.16 (1998). The legislature's intent may be ascertained by considering the "occasion and necessity for the law; [t]he circumstances under which it was enacted; [t]he mischief to be remedied; [t]he object to be attained; [and] [t]he consequences of a particular interpretation." *Id.* The legislature has indicated that the MTA should be liberally construed to protect landowners from "ancient records" that "fetter the marketability of real estate," while the Torrens Act provides that a certificate of title should be "conclusive evidence of all matters and things contained in it." *Compare* Minn. Stat. § 541.023, subd. 5 *with* Minn. Stat. § 508.36. Our challenge is to resolve the MTA's ambiguity in such a manner that effectuates the purpose of both the MTA and the Torrens Act.

We are persuaded that Hersh is correct in its argument that to affirm the court of appeals would destroy the binding and conclusive nature of certificates of title under the Torrens Act. It is difficult to see what purpose a certificate of title would serve if sellers, purchasers, mortgagors, title examiners, et al. could no longer rely on a certificate of title's conclusive nature. Indeed, such a holding would effectively ignore the purpose of registering title and remove the protection afforded by the Torrens Act. For example, the examination of title to Torrens property consists primarily of a review of the most recent certificate of title. To require a title examiner to expand his or her search if the certificate of title is not at least 40 years old will substantially increase the time, expense, and uncertainty in the examination of Torrens property, effectively destroying the purpose of the Torrens Act. There is nothing in the MTA to indicate that the legislature intended to abrogate the purpose of the Torrens Act through enactment of the MTA, and we cannot presume the legislature intended such an absurd result. *See* Minn. Stat. § 645.17(1) (1998) (interpreting statutes requires the courts to presume the "legislature does not intend a result that is absurd"). We conclude that due to the unique nature of Torrens property, McDonald's "source of title" can refer only to the certificate of title that was issued to McDonald's in 1984 when it acquired fee simple title to its property.

For the foregoing reasons, we hold that the source of title held by an owner of Torrens property is the certificate of title issued to that owner upon his or her acquisition of fee simple title. Here, the "source of title" must properly be interpreted to refer to McDonald's receipt of its certificate of title issued in 1984, which certificate of title has not been of record for at least 40 years. Accordingly, we conclude that McDonald's lacks an adequate "source of title" to invoke the MTA as a defense to Hersh's claimed easement. Therefore, Hersh's easement is not presumed abandoned and is not extinguished under the provisions of the MTA.

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

STATE OF MINNESOTA

IN SUPREME COURT

C6-98-2385

Court of Appeals

Stringer, J.
Concurring specially, Gilbert, J.

In re the Welfare of C.R.M., child.

Filed: June 15, 2000
Office of Appellate Courts

SYLLABUS

Proof of a felony offense prohibiting the possession of a dangerous weapon on school property under Minnesota Statutes § 609.66, subd. 1d (1998), requires the state to prove beyond a reasonable doubt that the accused knew he possessed a knife while on school property.

Reversed.

Heard, considered and decided by the court en banc.

OPINION

STRINGER, Justice.

In the course of a standard contraband check conducted on students' coats at a juvenile day school in Anoka County, Minnesota on Monday, November 2, 1998, a teacher found a folding knife with a four-inch blade in appellant C.R.M.'s coat pocket. Appellant, a minor, was a student at the school. Appellant identified the coat as his and said he forgot to remove the knife from his coat after whittling over the weekend. Appellant was convicted for possessing a dangerous weapon on school property under Minn. Stat. § 609.66, subd. 1d (1998), a felony offense. The court of appeals affirmed holding that appellant should have known that the knife was in his coat. *See In re C.R.M.*, No. C6-98-2385, 1999 WL 595371, *2 (Minn. App. Aug. 10, 1999). Appellant challenges his conviction here, arguing that the state must prove that he had knowledge of possession. We reverse.

Appellant attended Anoka County Juvenile Day School pursuant to a prior dispositional order. Contraband searches are conducted on the students' coats nearly every day at the school after the coats are hung on hooks in the hallway near the students' classrooms. If contraband is found, the school's procedure is for the teacher to enter the classroom nearest to where the coats are hung and to ask who owns the coat. When the coat is identified the student who owns it is asked about the contraband. If the contraband is "serious" [1] the school authorities contact probation officers or the police.

On Monday, November 2, 1998 the lead teacher of the school, Waneta Hord, and several students conducted a routine contraband search. A student brought a coat to Hord reporting a knife in the coat pocket. Hord brought the coat into the nearest classroom, displayed the coat and asked who owned it. Appellant immediately identified the coat as his but when asked by Hord what was in the coat pocket, he said that he did not know. Hord told him that a knife was found in his pocket and removed a folding knife with a four-inch blade. Appellant responded, "Oh man, I forgot to take it out, I was whittling this weekend." In accordance with school procedure upon finding serious contraband, Hord called the police and retained possession of the knife until the police confiscated it.

Anoka County Police Sergeant Hammes responded to the call from the school and after investigation appellant was charged with violating Minn. Stat. § 609.66, subd. 1d, which makes possession of a dangerous weapon on school property a felony level offense. At trial, Hord testified that when she asked who owned the jacket, appellant immediately responded "I do" and was very cooperative throughout all of her questioning. She also testified that when she pulled the knife out and appellant said he had been whittling, his reaction was "spontaneous" and "believable." Sergeant Hammes testified that appellant admitted that the knife was his, and that the day before he had been whittling with the knife and had put it in his coat pocket but forgot to take it out. Appellant also told Sergeant Hammes that before coming to school on Monday he patted himself down but missed the knife. Appellant's mother told the court that appellant had on a "double jacket" that morning so even though he patted himself down, he could not feel the knife. A probation officer also told the court there was no evidence that appellant brought the knife to school to get into a fight. The court concluded, "I don't know that I believe that [appellant] was whittling. I believe he brought it accidentally."

After testimony from Horn and Hammes appellant moved for a directed verdict, [2] arguing that any reasonable interpretation of section 609.66, subd. 1d, would require appellant to know that the knife was in his coat pocket and that general intent required knowledge of possession. The prosecutor responded that the statute does not require knowledge or intent because it creates a strict liability crime-the state need only show appellant possessed a dangerous weapon on school grounds.

The district court determined that appellant was guilty, noting:

> I'm going to find him guilty as the law is written because he did possess the knife that was in his coat.
> Now I'm going to let you take it up but I can't get you to take it up unless I find him guilty, and if someone wants to indicate that in order to achieve a felony status there's got to be mens rea that he had that knife and he knew that he had that knife when he walked in there fine, but right now this isn't the way the statute reads.

A dispositional order was filed on November 24, 1998, ordering appellant to comply with previously imposed conditions relating to the earlier offenses, [3] to write a letter of apology and to possess no weapons, including knives, until he turned 19.

The court of appeals affirmed. *See In re C.R.M.,* 1999 WL 595371 at *2. The court first reasoned that although a person cannot be found guilty for unwitting possession, this was not unwitting possession [4] because appellant was "aware that he had a duty to avoid bringing a weapon to school" and two days prior to the offense he knowingly possessed the weapon. *Id.* at 1. The court noted that although the district court believed appellant accidentally brought the knife to school, the district court made no finding as to whether the possession was unwitting. *See id.* [5] The court of appeals concluded that "[b]ecause there is sufficient evidence that appellant should have known that the knife was in his coat, we affirm the trial court." *Id.* at *2. The court relied heavily on the fact that even though appellant was charged and convicted of a felony, his sentence was light, explaining that where there is a substantial loss of liberty a different approach may be appropriate, but in negligent possession cases there is "little reason to expect * * * severe loss of liberties * * *." *Id.*

On review here appellant again argues that section 609.66, subd. 1d, requires the state to prove that appellant knew that he possessed a dangerous weapon. Minnesota Statutes § 609.66, subd. 1d, states:

> [W]hoever possesses, stores, or keeps a dangerous weapon or uses or brandishes a replica firearm or a BB gun on school property is guilty of a felony and may be sentenced to imprisonment for not more than two years or to payment of a fine of not more than $5,000, or both.

Minn. Stat. § 609.66, subd. 1d.

The object of statutory interpretation is to determine and effectuate legislative intent, *see* Minn. Stat. § 645.16 (1998), construing words according to their common and approved usage, *see* Minn. Stat. § 645.08, subd. 1 (1998); in so doing here, we are aware that the legislative authority to create criminal strict liability offenses has been recognized in Minnesota. *See State v. Morse,* 281 Minn. 378, 383-84, 161 N.W.2d 699, 702-03 (1968). We are also mindful however, that strict liability statutes are generally disfavored, *see Staples v. United States,* 511 U.S. 600, 606 (1994), and legislative intent to impose strict criminal liability must be clear, *see State v. Neisen,* 415 N.W.2d 326, 329 (Minn. 1987). Our determination that the legislature intended to create a strict liability crime can only be reached after a careful and close examination of the statutory language, *see State v. Orsello,* 554 N.W.2d 70, 74 (Minn. 1996), and we are to apply the "rule of lenity" requiring penal statutes to be strictly construed in favor of a criminal defendant. *See Orsello,* 554 N.W.2d at 74.

Our first consideration is whether the legislature intended the terms "possesses, stores or keeps" to require the state to prove that the defendant knew that he possessed, stored or kept a weapon. These terms are not defined in the statute and dictionary definitions provide little guidance [6]-thus we turn to legislative history. Section 609.66, subd. 1d, was introduced in the legislature in February 1993 in three separate bills, none including a reference to knowledge or intent. [7] Legislative discussion before the House Subcommittee on Criminal Justice and Family Law suggests a focus on regulatory concerns, [8] and that the bill was intended to address inconsistencies in the law by making it a felony for a student to possess a pistol on school

grounds as well as to possess other weapons, such as switchblades. An important objective of the bill was thus to make the possession of weapons other than guns in school zones a felony.

The two goals of the bills-to create safer schools and to create consistent felonies for weapon possession in schools-were based on concerns for the public welfare and thus implicate decisions of the United States Supreme Court and this court regarding the mens rea [9] in enforcement of statutes enacted for the welfare of the public. In *Morissette v. United States,* the Court reflected on the role of public welfare offenses as part of a criminal statutory scheme:

> Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. * * * [T]heir occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same. * * * Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused * * * usually is in a position to prevent [the violation] with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.

342 U.S. 246, 255-56 (1952).

More recently in *Staples*, the Court provided important guidance for our analysis here when it held that the prosecution is required to prove beyond a reasonable doubt that a defendant charged under the National Firearms Act for possessing a machine-gun knew that the weapon he possessed was in fact a machinegun. 511 U.S. at 602. The Court first acknowledged that "the existence of a mens rea is the rule of, rather than the exception to," common law crimes and may be read into common law crimes even where the statute does not explicitly require it. *Id.* at 605 (quoting *United States v. United States Gypsum Co.,* 438 U.S. 422, 436 (1978)). However, the Court noted that statutes concerning "public welfare" or "regulatory offenses," which typically "regulate potentially harmful or injurious items," are not subject to a presumption requiring proof of a mens rea to establish liability. *Id.* at 606-07. The rationale for eliminating such a presumption is that regulatory statutes impose liability for the "type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liparota v. United States,* 471 U.S. 419, 433 (1985). The Court also reasoned that wile there is no tradition of lawful possession or selling of hand grenades or narcotics, "there is a long tradition of widespread lawful gun ownership by rivate individuals in this country," thus the mere possession of a firearm does not put owners on notice that they are engaging in conduct inherently dangerous to the public. *Staples,* 511 U.S. at 610. In fact, the Court observed that precisely because certain guns are "commonplace and generally available * * * we [do] not consider them to alert individuals to the likelihood of strict regulation." *Id.* at 611.

The *Staples* Court went on to emphasize the importance of the level of punishment attached to an offense in considering whether a statute is regulatory, observing "[h]istorically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea." *Id.* at 616. The Court noted that fines and short jail sentences, but not imprisonment, have historically been legitimate punishment for strict liability offenses and reasoned that the less severe penalties attached to public welfare statutes

"logically complement" the absence of the mens rea requirement. *Id.* at 616. The Court then "questioned whether imprisonment is compatible with the reduced culpability required for * * * regulatory offenses." *Id.* at 617-18. Observing that the public welfare analysis "hardly seems apt" for a felony, *id.* at 618, the Court appeared to stop just short of holding that a public welfare offense cannot be a felony. The Court held

> where, as here, dispensing with mens rea would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate the mens rea requirement. In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply.

Id. at 618-19. The Court then concluded that the penalty attached to the statute indicated that Congress did not intend to eliminate the mens rea requirement because "if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect." *Id.* at 620.

In Minnesota, the distinction between strict liability crimes and those requiring a mens rea has been recognized in both our case law and statutes; for example and relevant here, is Minn. Stat. § 609.02, subd. 9 (1998), providing definitions for chapter 609 offenses:

> (1) When criminal intent is an element of a crime in this chapter, such intent is indicated by the term "intentionally," the phrase "with intent to," the phrase "with intent that," or some form of the verbs "know" or "believe."
> (2) "Know" requires only that the actor believes that the specified fact exists.
> (3) "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result. In addition * * * the actor must have knowledge of those facts which are necessary to make the actor's conduct criminal and which are set forth after the word "intentionally."
> (4) "With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result.

Minn. Stat. § 609.02, subd. 9. While we have not yet ruled whether under this statute a chapter 609 offense must be interpreted as a strict liability crime where it contains no language indicating intent or knowledge, in several opinions we have ruled on whether mere "possession" in various contexts requires a mens rea. In *State v. Siirila,* we affirmed a conviction under Minn. Stat. § 618.02 (1969), which stated "it shall be unlawful for any person to * * * possess * * * any narcotic drug" where appellants had an unusable quantity of marijuana. 292 Minn. 1, 10, 193 N.W.2d 467, 473 (1971). We observed that the legislature had reduced the crime of possession of a small amount of marijuana from a felony to a gross misdemeanor, *see id.* at 7, 193 N.W.2d at 471, and concluded

> the inference is permissible that, marijuana having been found in a jacket shown to belong to defendant and to have been worn by him, whatever was in the jacket was there with his knowledge. The element of knowledge need not be proved from direct testimony, but may be shown by circumstantial evidence.

Id. at 10, 193 N.W.2d at 473. Later, in *State v. Florine,* we held that the defendant was guilty under Minn. Stat. § 152.09, subd. 1(2) (1974), of the felony offense of unlawful possession of cocaine, but noted "to convict a defendant of unlawful possession of a controlled substance, the state must prove that defendant consciously possessed * * * the substance and that defendant had actual knowledge of the nature of the substance." 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975).

Again in *State v. Strong,* we held that Minn. Stat. § 243.55 (1978 & Supp. 1979), which provided "[a]ny person who brings * * * into any state correctional facility * * * any firearms, weapons or explosives of any kind * * * shall be guilty of a felony" required the state to show that the defendant had knowledge of possession of the offensive item. 294 N.W.2d 319, 320 n.1 (Minn. 1980). Because this was not a chapter 609 offense, we specifically declined to address whether section 609.02 cited above dispensed with proof of a mens rea in a chapter 609 offense absent words of intent. *See id.* at 320. We did observe however, that "most commentators have argued that the legislature should never use strict liability for crimes carrying a sentence of imprisonment and the moral condemnation going with such crimes." *Id.* (citing Wayne R. LaFave and Austin W. Scott, Jr., *Criminal Law,* § 31 at 218, 223 (1972)). We concluded:

> We see no reason why the element of scienter should be dispensed with in this situation and we are not convinced that the legislature intended to do so, any more than it intended to dispense with the requirement of scienter when it enacted the penalties for felonious possession of controlled substances.

Id.

In *Orsello* we considered whether a stalking statute, Minn. Stat. § 609.749 (1992 & Supp. 1993), defined a crime of general or specific intent. [10] 554 N.W.2d at 72. We sought guidance from section 609.02, subd. 9, and concluded that the statute required specific intent because the terms "intentional conduct" and "in a manner that" indicate specific rather than general intent. *See id.* at 74. We observed that "[a] criminal state of mind, or a criminal intent, is, of course, a necessary element of any crime having its origin in common law. * * * If the legislature chooses not to include an intent requirement in a statutory crime, one is implied as a matter of law." *Id.* at 72 (citation omitted). Finally, we recently held that Minn. Stat. § 169.122, subd. 3 (1998), which provides that "keep[ing]" an open bottle of alcohol in a vehicle on a highway is a misdemeanor, does not require the state to prove that the driver of a vehicle had knowledge of the existence of the open bottle containing intoxicating liquor. *See State v. Loge,* 608 N.W.2d 152, 153 (Minn. 2000).

The rulings of the United States Supreme Court and this court thus highlight the long established principle of American criminal jurisprudence that in common law crimes and in felony level offenses mens rea is required. Nonetheless, respondent argues that because Minn. Stat. § 609.02,

subd. 9, specifically provides that if the legislature intends to include mens rea in a chapter 609 crime it must be evidenced in the statutory language by some form of the terms "knowledge," "belief" or "intent," and none appears in section 609.66, subd. 1d, it is clear that the legislature did not intend to include mens rea as an element of the crime charged.

In the context of Supreme Court and this court's criminal jurisprudence regarding the relationship of felony level offenses and mens rea, and our long accepted rules of statutory construction, we do not believe the expression of legislative intent of section 609.02, subd. 9, is so clear. We observe initially that the legislature never explicitly indicated that it intended to create a strict liability offense. The legislative discussion of the severe penalty [11] attached to the section 609.66, subd. 1d, offense is an important factor in our analysis because it underscores that the weapon possession statute was intended to be more than merely regulatory-its legislative sponsor emphasized that the bill was intended to create and expand felony level penalties to include the possession of all dangerous weapons on school grounds.

Further, section 609.02, subd. 9, definitions provide no clearer illumination as to the legislature's intent with respect to the weapon possession offense. The Supreme Court has suggested that some indication of legislative intent, whether express or implied, is required to dispense with mens rea as an element of a felony level crime. In *Staples,* the Court stated that if the legislature wanted to make "outlaws" of those possessing weapons while being completely ignorant of the offending characteristics of the weapons, it would have spoken clearly to that effect. 511 U.S. at 620. Similarly, in *United States Gypsum,* the Court noted that "[c]ertainly far more than a simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." 438 U.S. at 438. We have expressed similar concerns, for example in *Niesen* we stated that "we are guided by the public policy that if criminal liability, particularly gross misdemeanor or felony liability, is to be imposed for conduct unaccompanied by fault, the legislative intent to do so should be clear." 415 N.W.2d at 329. [12] We conclude that the "catch all" language of section 609.02, subd. 9, which provides that proof of intent with respect to the numerous criminal statutes included in chapter 609 is an element of the crime when the words "know," "intentionally," or "with intent to" are used is not a sufficiently clear expression of legislative intent to dispense with it with respect to the felony level crime charged here. If it is the legislature's purpose to convict a student for a felony for the unknowing possession of a knife on school property, it should say so directly and unequivocally with respect to that specific crime and not with the convenient but far less specific "if we did not say it we do not mean it."

The public welfare nature of the offense charged here is also an important consideration in our analysis. Certain items of property, for example unlicensed hand grenades, by their very nature suggest that possession is not innocent because possession itself is demonstrative of intent. *See Staples,* 511 U.S. at 609 (citing *United States v. Freed,* 401 U.S. 601, 609 (1971)). On the other hand, great care is taken to avoid interpreting statutes as eliminating mens rea where doing so criminalizes a broad range of what would otherwise be innocent conduct. *See id.* at 610. In *Staples* the Court held that lawful gun ownership fell into the second category, pointing to the tradition of gun ownership and the fact that guns have not historically been considered of such a dangerous nature that their owners should be on notice that mere possession is a crime. Applying this analysis to the facts here, we observe that knives as common household utensils are clearly not inherently dangerous, as they can be used for a myriad of completely benign purposes-for

example peeling an orange or sharpening a pencil-and are certainly not as inherently anti-social as illegal drugs and hand grenades. Moreover, mere possession of something that may fit the statutory definition of "dangerous weapon" [13]-for example, a paring knife or scissors-would not create a level of panic, even on school property, that a "reasonable person should know [possession] is subject to stringent public regulation * * *." *Liparota,* 471 U.S. at 433. In many if not most cases prosecuted under a statute proscribing occurrences on school property, we note further, the accused will be a school-aged minor. [14]

Thus we conclude that in light of our jurisprudential history requiring clear legislative intent to dispense with proof of mens rea and our heightened concern when it relates to felony level crimes, and because we believe the nature of the weapon here-a knife-was not so inherently dangerous that appellant should be on notice that mere possession would be a crime, respondent was required to prove that appellant knew he possessed the knife on school property as an element of the section 609.66, subd. 1d, offense charged. [15]

We reverse the court of appeals decision and remand to the trial court to determine whether appellant had knowledge of possession of the knife while on school property.

Reversed.

SPECIAL CONCURRENCE

GILBERT, Justice (concurring specially).

I concur with the result reached by the majority. However, I write separately to emphasize my concern about the majority opinion's new requirement that if the legislature intends to make a crime a strict liability offense, "it should say so directly and unequivocally." This new requirement deviates from our longstanding precedent relating to strict liability crimes that requires only that there be clear legislative intent to dispense with mens rea, rather than requiring a direct and unequivocal statement of intent to create a strict liability offense. *See State v. Neisen,* 415 N.W.2d 326, 329 (Minn. 1987). We have held that clear intent to create a strict liability offense can come from interpreting the statute as a whole, *see State v. Loge,* 608 N.W.2d 152, 155-56 (Minn. 2000). While we were interpreting a misdemeanor statute in *Loge,* the requirement that intent be clear comes from *Neisen,* in which we stated the rule was particularly appropriate for "gross misdemeanor or felony liability." 415 N.W.2d at 329. In effect and contrary to our precedent, the majority unnecessarily adopts a per se rule that absent a direct and unequivocal statement obviating the need to prove intent, no felony criminal statute can be interpreted to create a strict liability offense. This change in our law is an unnecessary departure where here, after looking for and failing to find an express statement, the majority engages in the very analysis which it declares is unnecessary: it looks at the statute as a whole and concludes that there is not clear legislative intent to enact a strict liability offense.

Footnotes

[1] Contraband was described by a school authority as everything from tobacco products and gum to weapons.

[2] The appropriate motion under the Minnesota Rules of Criminal Procedure is a motion for judgment of acquittal. *See* Minn. R. Crim. P. 26.03, subd. 17.

[3] For appellant's earlier offenses he was placed under the supervision of Anoka County Juvenile Corrections until his 19th birthday, he was ordered to pay restitution of $85.47 to the victims of his assaults, to have no contact with the victims, one victim's family members and his accomplices, to engage in no assaultive or violent behavior, to attend counseling and to be monitored under home electronic monitoring.

[4] The court stated that an example of unwitting possession would be if a classmate put the knife into appellant's coat without his knowledge. *See In re* C.R.M., 1999 WL 595371 at *1.

[5] The court also cited *United States v. Garrett,* 984 F.2d 1402, 1413 (5th Cir. 1993), for the holding that passengers possessing weapons on airplanes are guilty of a misdemeanor if they knew or should have known that they were carrying a concealed weapon as they boarded an airplane. *See In re C.R.M.,* 1999 WL 595371 at *2. Although the court in *Garrett* explicitly stated that the "should have known" standard was appropriate in large measure because the offense was a misdemeanor and not a felony, *Garrett,* 984 F.2d at 412-13, the court of appeals referred to Minnesota statutes creating felonies in negligence crimes, for example Minn. Stat. § 609.205 (1998), which provides a penalty of up to 10 years in prison for culpable negligence resulting in the death of another, and Minn. Stat. § 609.576(b)(3) (1998), which provides a three-year penalty for culpable negligence resulting in a fire causing property damage. *See In re C.R.M.,* 1999 WL 595371 at *2.

[6] Webster's defines "possess" as "to have and to hold as property." *Webster's Third New International Dictionary* 1770 (1961). "Store" is defined as "to collect as a reserved supply: lay away: accumulate * * * something that is stored or kept for future use." *Id.* at 2252. Among the *Webster's* definitions of "keep" is "to retain or continue to have in one's possession or power esp. by conscious or purposive policy." *Id.* at 1235.

[7] *See* H.F. 222, H.F. 559, S.F. 494, 78th Minn. Leg. 1993.

[8] For example, Representative Charles Weaver testified that three million crimes occur on school campuses every year, 160,000 children skip school every year for fear of being hurt, and weapons are appearing more frequently in Minnesota schools. *See* Hearing on H.F. 222, H. Subcomm. Crim. Justice and Fam. Law, 78th Minn. Leg., March 3, 1993 (audio tape) (comments of Rep. Charles R. Weaver).

[9] Mens rea is "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness * * *. *Mens rea* is * * * [an] essential element[] of every crime at common law." *Black's Law Dictionary* 999 (7th ed. 1999).

[10] "General intent requires only that the defendant engaged intentionally in specific, prohibited *conduct* * * * In contrast, specific intent requires that the defendant acted with the intention to produce a specific *result,* such as is the case in premeditated murder." *Orsello,* 554 N.W.2d at 72 (citation omitted).

[11] "A severe penalty is a * * * factor tending to suggest that [the legislature] did not intend to eliminate the mens rea requirement." *Staples,* 511 U.S. at 618.

[12] Some states imposing a felony penalty on the possession of a weapon on school property require knowledge of possession. For example, in Illinois:

> [a] person commits the offense of unlawful use of weapons when he *knowingly:*
>
> * * * *Carries or possesses on about his person any * * * switchblade knife * * * while in the building or on the grounds of any elementary or secondary school, community college, college or university.* * * *
>
> Any person convicted of [this] violation * * * commits a * * * felony.

720 Ill. Comp. Stat. 5/24 - 1(a)(12) & (b) (1998) (emphasis added).
We also note the federal statute with wording very similar to our weapon possession statute-the Gun-Free Schools Act of 1994-provides "each State receiving Federal funds under this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than
one year a student who is determined to have brought a weapon to school." *See* 20 U.S.C. § 8921(b)(1) (1998). At least with respect to gun-free school zones, Congress did not make knowledge a requirement of the violation but also did not impose a criminal sanction.

[13] A "dangerous weapon" is defined as:

> any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or great bodily harm, any combustible or flammable liquid or other device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm, or any fire that is used to produce death or great bodily harm.

Minn. Stat. § 609.02, subd. 6 (1998).

[14] We express a note of concern regarding the court of appeals' comment that the statute was a strict liability offense because of the mild penalty imposed on appellant. The fact that appellant received a light sentence is of no consequence in the determination of whether mens rea is required under the statute because obviously the state's burden of proof of guilt cannot be determined by the level of sentence the trial court later imposes.

[15] The special concurrence obviously misreads and overstates the majority holding when it suggests that we are creating a new standard requiring the legislature to explicitly state its intent to create strict liability offenses in all felony level crimes.

STATE OF MINNESOTA

IN SUPREME COURT

C4-97-1502

Court of Appeals Page, J.

State of Minnesota,

Respondent,

vs.

Richard Thomas Ronquist, petitioner,

Appellant.

Filed: July 22, 1999
Office of Appellate Courts

SYLLABUS

(1) The legislature intended that when a defendant's present conviction is for an attempt to violate Minn. Stat. § 609.342 (1998), the sentence for that conviction qualifies for enhancement under Minn. Stat. § 609.346, subd. 2a(a)(2)(iii) (1996).
(2) Minnesota Statutes § 609.17, subd. 4(1) (1998), does not operate to prevent a defendant's sentence from being enhanced to a mandatory term of life imprisonment under Minn. Stat. § 609.346, subd. 2a(a)(2)(iii) (1996).
(3) The provisions of Minn. Stat. § 609.346, subd. 2a(a)(2)(iii) (1996), requiring that the sentence of a defendant convicted of an attempt to violate Minn. Stat. § 609.342 be enhanced to a mandatory term of life imprisonment, are mere sentencing considerations and are not elements of the crime that need to be proven at trial.
(4) The legislature's 1998 amendment to Minn. Stat. § 609.346 (1996), which added language requiring prosecution by way of a grand jury indictment and which was recodified at Minn. Stat. § 609.109 (1998), constitutes a change to, not a clarification of, the statute.
(5) There is nothing in the record that would support a conclusion that appellant's trial counsel's performance fell below an objective standard of reasonableness or that appellant was prejudiced by his trial counsel's performance.

Affirmed.

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

OPINION

PAGE, Justice.

Appellant Richard Thomas Ronquist was charged by complaint with, and subsequently convicted of, attempted criminal sexual conduct in the first-degree in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (1998) and Minn. Stat. § 609.17 (1998). The statutory maximum sentence for attempted criminal sexual conduct in the first-degree is 15 years imprisonment. [1] Minnesota Statutes § 609.346, subd. 2a(a)(2)(iii) (1996), *repealed by* Act of April 16, 1998, ch. 367, art. 6, § 16, 1998 Minn. Laws 666, 735, *recodified* at Minn. Stat. § 609.109 (1998) (enhancement statute), however, provides that if an individual convicted under Minn. Stat. § 609.342 has two previous qualifying sex offense convictions, the individual shall be sentenced to life imprisonment. [2] At his sentencing hearing, the trial court found that Ronquist had two previous qualifying sex offense convictions and, pursuant to the enhancement statute, imposed a life sentence. The court of appeals affirmed Ronquist's conviction and sentence. We also affirm.

On appeal to this court, Ronquist argues that the state's failure to prosecute him by grand jury indictment divested the trial court of its jurisdiction to sentence him to a life sentence. Ronquist also argues that he was denied effective assistance of trial counsel. By Order dated February 16, 1999, the court, on its own motion, requested supplemental briefing on two issues not raised by either party:

A. Minn. Stat. § 609.109, subd. 1, provides that for the purposes of section 609.109, "offense" means a completed offense or an attempt to commit an offense." Minn. Stat. § 609.109, subd. 3, provides that the court shall sentence a person to life imprisonment if, inter alia, "the person is convicted under section 609.342 * * *." *Id.*, subd. 3(2). Is a person convicted of an attempt to commit an offense enumerated in section 609.342 "convicted under section 609.342" for purposes of section 609.109?[[3]]

B. If the answer to (A) is yes, where the current conviction for which life imprisonment is prescribed under Minn. Stat. § 609. 109, subd. 3, is for an attempt rather than a completed offense, does the attempt statute contained in Minn. Stat. § 609.17 limit the maximum punishment to 20 years?

I.

We first address the question of whether a person convicted of an attempt to commit an offense under Minn. Stat. § 609. 342 is "convicted under section 609.342" for purposes of section 609.346, subd. 2a(a)(2)(iii) (1996). In order to ensure certainty in the application of criminal statutes, we have said that "the legislature has an obligation to state its intention as clearly as possible. When it cannot be said with certainty that the legislature intended to authorize the imposition of a minimum term or an extended term in a particular situation, the presumption must be that the legislature did not intend to do so." [4]

Under the enhancement statute, a defendant shall be sentenced to life imprisonment if the present conviction is for a violation of section 609.342 and the defendant has two previous sex offense

convictions under sections 609.342, 609.343, or 609.344. [5] The enhancement statute defines "conviction of offense" as follows: "[f]or purposes of this section, the term `offense' means a completed offense or an attempt to commit an offense." [6] Therefore, it is clear that two previous convictions for an attempt to violate section 609.342 meet the definition of "previous sex offense convictions under section 609.342" contained in Minn. Stat. § 609.346, subd. 2a(a)(2)(iii) (1996). However, Minn. Stat. § 609.346, subd. 2a(1) (1996), refers to the present conviction only as "convicted under section 609.342." Noticeably absent is the word "offense." Therefore, it can be argued that a present conviction for an attempt does not qualify for sentencing under the enhancement statute because the legislature specifically included the word "offense" when referring to previous sex *offense* convictions and did not do so when referring to the present conviction.

Looking at Minn. Stat. § 609.346 (1996) as a whole, we conclude that the legislature intended that when the present conviction is for an attempt to violate section 609.342, the sentence for that conviction qualifies for enhancement under the enhancement statute. We find support for this conclusion in the statute itself. For example, section 609.346, subd. 3 (1996), refers to the present conviction as the "present offense of conviction" thereby indicating that the present offense includes attempts.

We also conclude that Minn. Stat. § 609.17, subd. 4, which limits the length of sentences for attempts, does not operate to limit Ronquist's sentence for his conviction of attempted first-degree criminal sexual conduct. We reach that conclusion because as Ronquist's counsel concedes, section 609.17 is a general statute whereas section 609.346 (1996) is a specific statute dealing only with the sentencing of repeat sex offenders. Under our rules of statutory construction, when two statutes addressing the same subject are in conflict, the specific statute controls the general "unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail." [7] In this case, section 609.346 (1996), dealing specifically with recidivist sex offenders, was enacted at the later session. Therefore the enhancement statute contained in Minn. Stat. § 609.346 (1996) prevails over the more general attempt statute contained in Minn. Stat. § 609.17.

II.

We turn now to the question of whether the state's decision to prosecute Ronquist by complaint rather than indictment divested the trial court of jurisdiction to impose a mandatory life sentence. This question involves statutory construction, a question of law which we review de novo. [8] "Where an indictment or presentment by a grand jury is required by constitutional or statutory provisions in the case of a specified type of crime, a prosecution in any other mode is unauthorized and an absolute nullity for want of jurisdiction." [9]

The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." [10] The United States Supreme Court has held that this provision applies only to prosecutions in the federal courts and not to prosecutions by the states. [11] As a result, in state court, prosecution by complaint where permitted by statute and the state Constitution comports with due process. [12]

In Minnesota, the requirement that a defendant be prosecuted by grand jury indictment has evolved from a near blanket constitutional requirement for all criminal prosecutions to a narrow rule that requires a grand jury indictment only for those offenses punishable by life imprisonment. [13] The Minnesota Constitution in its original form provided that "[n]o person shall be held to answer for a criminal offense unless on the presentment or indictment of a Grand Jury." [14] That language was deleted in 1904 as part of an amendment that repealed, except in certain specified cases not relevant to our discussion here, the requirement for prosecution by grand jury indictment for criminal offenses. [15] In place of the deleted language, language providing that "no person shall be held to answer for a criminal offense without due process of law" was added to the Constitution and remains in effect today. [16]

In 1909, the legislature statutorily limited the requirement of prosecution by indictment to criminal cases in which the maximum punishment exceeded 7 years' imprisonment, [17] and later further limited the requirement to cases in which the maximum punishment exceeded 10 years' imprisonment. [18] This statute was amended in 1935 to require prosecution by indictment in all cases where the offense was punishable by life imprisonment. [19] That provision was repealed in 1979. [20] The repeal was in response to this court's adoption of its Rules of Criminal Procedure, specifically Rule 17.01, which at all relevant times has provided that "[a]n offense which may be punished by life imprisonment shall be prosecuted by indictment." [21]

Because sections 609.342, 609.17, and 609.346 (1996) do not make any reference to the need for a grand jury indictment, the state sought and obtained Ronquist's conviction for attempted first-degree criminal sexual conduct without first seeking a grand jury indictment. Upon his conviction, the state sought to have him sentenced to a mandatory term of life imprisonment under the enhancement provisions of section 609.346 (1996). Because Ronquist had at least two previous sex offense convictions, the sentencing court sentenced him to life imprisonment as required by the enhancement statute. Absent the application of the enhancement provisions of Minn. Stat. § 609.346 (1996), the maximum sentence that Ronquist could have received for attempted first-degree criminal sexual conduct was 15 years.

As noted, in 1998 the legislature amended the enhancement statute to require a grand jury indictment before the mandatory life imprisonment provision can be applied. [22] In contrast, when Ronquist was prosecuted and convicted, the enhancement statute then in effect did not require a grand jury indictment before its mandatory provisions were triggered. Nonetheless, Ronquist argues that the 1998 amendment supports his contention that an indictment was required before a life sentence could be imposed on him because, in amending the statute, the legislature indicated that it was merely recodifying and clarifying the statute and did not intend any substantive change to the recodified sections. [23] There are at least two problems with this argument. First, as discussed earlier, the pre-1998 enhancement statute made no reference to any requirement of a grand jury indictment. Second, and more importantly, the 1998 amendment did not clarify any existing language; rather it added new language where none had been before. On this basis, we conclude that the 1998 amendment resulted in a change rather than a clarification of the enhancement statute. [24]

Ultimately, the question we must answer is whether Ronquist's conviction of the offense of attempted first-degree criminal sexual conduct, which normally carries a maximum sentence of

15 years imprisonment, when coupled with his enhanced sentence of life imprisonment, constitutes conviction of "an offense which may be punished by life imprisonment." [25] Ronquist argues that the previous sex offense convictions that required him to be sentenced under the enhancement statute are elements of his present offense and create an offense punishable by life imprisonment which must be prosecuted by indictment. [26] He contends that because he was not prosecuted by indictment, he may not be sentenced to more than 15 years imprisonment.

An element of an offense is that which must be proven beyond a reasonable doubt to convict a defendant of a crime as defined by statute. [27] In order to convict Ronquist of the offense for which he was charged, attempted first-degree criminal sexual conduct, the state was required to prove beyond a reasonable doubt that Ronquist intentionally engaged in an act or acts which were a substantial step toward causing personal injury to his victim while using force or coercion to accomplish sexual penetration. [28] There is certainly no requirement that the state had to prove that Ronquist had any previous sex offense convictions on his record. In fact, evidence relating to those convictions may well not have been admissible at trial at all and at most may have been admissible for limited purposes. [29]

Even under the enhancement statute, the previous sex offense convictions only became relevant once the elements of the present offense were proven beyond a reasonable doubt and Ronquist was convicted. Accordingly, we conclude that the provisions of section 609.346, subd. 2a(a)(2)(iii) (1996), fall into the category of sentencing considerations and do not constitute elements of the crime to be proven at trial.

Our conclusion is supported by the Supreme Court's recent decision in *Almendarez-Torres v. United States*. [30] The issue in *Almendarez-Torres* was whether a sentencing enhancement statute for repeat offenders was a penalty provision or a separate offense. [31] The Court held that it was constitutionally permissible to interpret increased penalties for repeat offenders as mere sentencing considerations that did not need to be proven as elements of the offense at trial. [32] The Court determined that the statute's language, structure, subject matter, context, and history supported a conclusion that Congress intended the enhancement provision in question to be nothing more than a factor to be considered at sentencing. [33] The same can be said for our legislature's enactment of the sentencing enhancement provisions of section 609.346 (1996).

III.

Ronquist next argues pro se that he is entitled to a new trial based on ineffective assistance of his trial counsel. He claims eleven instances of deficient performance by his trial counsel. A claim of ineffective assistance of trial counsel is established if it is shown both that the performance of trial counsel fell below an objective standard of reasonableness and that the defendant was prejudiced by the deficient performance. [34]

Based on our review of each of the eleven claims, we conclude that none of the claims has any merit. There is nothing in the record that would support a conclusion that Ronquist's trial counsel's performance fell below an objective standard of reasonableness. There is also nothing to suggest that Ronquist was prejudiced by his trial counsel's performance.

Affirmed.

Footnotes

[1] *See* Minn. Stat. §§ 609.342, subd. 2; 609.17, subd. 4(2).

[2] Minn. Stat. § 609.346, subd. 2a (1996) provides in relevant part:

> Subd. 2a. Mandatory life sentence. (a) The court shall sentence a person to imprisonment for life, notwithstanding the statutory maximum sentence under section 609.342 if:
>
> (1) the person is convicted under section 609.342; and
> (2) the court determines on the record at the time of sentencing that * * *
>
> (iii) the person has two previous sex offense convictions under section 609.342, 609.343, or 609.344.

[3] At the time of Ronquist's conviction, the enhancement statute was codified at Minn. Stat. § 609.346 (1996). In 1998, the enhancement statute was amended and recodified at Minn. Stat. § 609.109 (1998). We referenced section 609.109 in making the request because the two issues that gave rise to our request for supplemental briefing were not affected by the statute's amendment. However, the enhancement statute's 1998 amendment is germane to the indictment issue raised by Ronquist. Therefore, for ease of discussion and to avoid confusion we will, except when discussing the 1998 amendment, reference Minn. Stat. § 609.346 or the "enhancement statute" in our discussion of all the issues -- including the two issues raised by our supplemental brief request.

[4] *See State v. Simmons*, 258 N.W.2d 908, 910 (Minn. 1977) (explaining that "criminal statutes must be sufficiently clear and definite to inform a person of ordinary intelligence what conduct is punishable and how severe the punishment might be").

[5] *See* Minn. Stat. § 609.346, subds. 2a(a)(1), 2a(a)(2)(iii) (1996).

[6] Minn. Stat. § 609.346, subd. 1 (1996).

[7] Minn. Stat. § 645.26, subd. 1 (1998).

[8] *See State v. Johnson*, 514 N.W.2d 551, 553 (Minn. 1994).

[9] 42 C.J.S. *Indictments and Informations* § 6a (1991); *see also State v. Mitchell*, 282 Minn. 113, 122, 163 N.W.2d 310, 316 (1968) (stating that "the county attorney had no choice but to seek an indictment" because the penalty for murder in the first-degree is

imprisonment for life).

[10] U.S. Const. amend. V.

[11] *See Hurtado v. California*, 110 U.S. 516, 534-35 (1884).

[12] *See, e.g., State v. Keeney*, 153 Minn. 153, 155, 189 N.W. 1023, 1024 (1922).

[13] *Compare* Minn. Const. of 1857, art. I, § 7 *with* Minn. R. Crim. P. 17.01.

[14] Minn. Const. of 1857, art. I, § 7.

[15] Act of January 6, 1905, 1905 Minn. Laws 3, 4.

[16] Minn. Const. art. I, § 7. Ronquist has not challenged the state's failure to prosecute him by grand jury indictment on due process grounds.

[17] Act of April 22, 1909, ch. 398, § 1, 1909 Minn. Laws 473, 474.

[18] Act of March 13, 1913, ch. 65, § 1, 1913 Minn. Laws 55, 56-57.

[19] Act of April 17, 1935, ch. 194, § 1, 1935 Minn. Laws 358, 358-60*; see also State v. Mitchell*, 282 Minn. 113, 123, 163 N.W.2d 310, 317 n.4 (1968).

[20] Act of May 29, 1979, ch. 233, § 42, 1979 Minn. Laws 485, 500.

[21] Minn. R. Civ. P. 17.01.

[22] Act of April 6, 1998, ch. 367, art. 6, § 6, 1998 Minn. Laws 666, 730.

[23] *See* Act of April 6, 1998, ch. 367, art. 6, § 2, 1998 Minn. Laws 666, 727.

[24] *See State v. Niska*, 514 N.W.2d 260, 264 (Minn. 1994) (stating that the fact that legislature inserted word "clarifying" into the title of the amending act by itself is not sufficient to justify retroactive application).

[25] *See* Minn. R. Civ. P. 17.01.

[26] In support of his argument, Ronquist relies on the court of appeals' decision *in State v. Stewart*, 486 N.W.2d 444, 446-47 (Minn. App. 1992), which in turn relied on this court's decision in *State v. Findling*, 123 Minn. 413, 144 N.W. 142 (1913). In *Findling*, we held that prior convictions resulting in increased penalties must be set out in an indictment and ultimately decided by the adjudicatory jury. *See Findling*, 123 Minn. at 416, 144 N.W.2d at 143. Reliance on *Findling* and *Stewart*, even indirectly, under the facts of this case is misplaced. At issue in *Findling* and *Stewart* was the question of whether the factors resulting in the enhancement of the defendants' sentences were permitted to be pled in their indictments. In *Findling*, we adopted the

general rule utilized in most jurisdictions at the time the case was decided, "that the evidence, and a verdict of the jury finding the prior conviction, are essential to the power of the court to impose the increased punishment. At least such is the rule in nearly all the states where no statutory method of determining the prior conviction is prescribed." *Id.* at 416, 144 N.W.2d at 143. Because there was no statutory method to determine the enhancement factors, we concluded that the state was required to plead them in the indictment. That is not the case here. First, unlike the situation in *Findling* and *Stewart* where the question of whether an indictment was required for prosecution was not raised, that is the central issue in this case. Second, unlike the situation in *Findling*, here the statutory language at issue in Minn. Stat. § 609.346, subd. 2a(a)(2)(iii) (1996), explicitly states that the existence of the previous sex offense convictions must be determined on the record at the time of sentencing by the sentencing court. As such, there is clearly a statutory method prescribed for determining the existence of prior convictions. Therefore, it was not required that the previous sex offense convictions be pled in an indictment. The question of what may be presented to a grand jury when an indictment is required is a far different question than whether an indictment is required in the first instance.

[27] *See People v. Clark*, 15 Cal. Rptr. 2d 709, 710 (Ct. App. 1992).

[28] *See* Minn. Stat. § 609.342, subd. 1(e)(1); Minn. Stat. § 609.17, subd. 1.

[29] *See* Minn. R. Evid. 404(b) (mandating that evidence of other crimes or misconduct is not admissible to prove the defendant's character for the purpose of showing that he or she acted in conformity with that character); *see also State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965).

[30] ____ U.S. _____, 118 S.Ct. 1219 (1998).

[31] *Id.* at 1222.

[32] *Id.* at 1231-32.

[33] *Id.* at 1230-32.

[34] *See Gates v. State*, 398 N.W.2d 558, 561-62 (Minn. 1987) (adopting the standard from *Strickland v. Washington*, 466 U.S. 668 (1984)).

STATE OF MINNESOTA

IN SUPREME COURT

C4-97-2259

Court of Appeals

Blatz, C.J.
Dissenting, Stringer, J.

James Blanche, et al.,

Appellants,

vs.

1995 Pontiac Grand Prix
(VIN: 162WJ12M95F268403),

Respondent.

Filed: September 9, 1999
Office of Appellate Courts

SYLLABUS

When a claimant demands a judicial determination of a forfeiture initiated as an administrative forfeiture, the proceeding is converted into a judicial forfeiture procedure and incorporates the innocent owner defense.

Reversed and remanded.

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

OPINION

BLATZ, Chief Justice.

On April 10, 1996, police stopped the respondent vehicle, a 1995 [1] Pontiac Grand Prix. A small plastic bag containing nine rocks of crack cocaine was found on the pavement next to the vehicle, leading police to believe the vehicle contained the drugs when it was stopped. The vehicle was seized under the administrative forfeiture statute, Minn. Stat. § 609.5314 (1998), which provides for the forfeiture of conveyance devices containing $100 or more of a controlled substance. [2] Appellants requested judicial determination of the forfeiture as set forth by statute.

Minn. Stat. § 609.5314, subd. 3 (1998). After the hearing, the district court ordered forfeiture of the vehicle, rejecting appellants' contention that they were entitled to the innocent owner defense. The court of appeals affirmed the district court. We now reverse and remand.

The facts are essentially undisputed. At around 7:30 p.m. on April 10, 1996, an off-duty St. Paul police officer heard gunshots near the intersection of University Avenue and Dunlap Street in St. Paul. As the officer ran toward the scene, he observed three vehicles driving away. One of the vehicles, a 1995 Pontiac Grand Prix occupied by four males and driven by appellant Carlos Blanche, became ensnarled in traffic. The officer ran to the driver's side of the vehicle with his gun drawn, ordered Blanche to turn off the ignition, and instructed everyone in the car to raise their hands. The officer testified that as he stood behind the vehicle waiting for additional police assistance, the passengers fidgeted and did not comply with his order to keep their hands visible. He further testified that as he waited he had a clear view of the pavement near the vehicle's passenger door and saw no controlled substances on the ground.

When additional police arrived at the scene, the occupants were removed from the vehicle one at a time. After two occupants exited the passenger side of the vehicle, the police found a small plastic bag containing what was later determined to be nine rocks of crack cocaine on the pavement just outside the passenger door. No controlled substances were found in the respondent vehicle, and none of the occupants were charged with an offense relating to controlled substances. Vehicle ownership records indicated James Blanche, Carlos Blanche's father, was the registered owner of the vehicle.

The vehicle was seized pursuant to a statute providing for administrative forfeiture of "all conveyance devices containing controlled substances with a retail value of $100 or more if possession or sale of the controlled substance would be a felony under chapter 152."Minn. Stat. § 609.5314, subd. 1(a)(2) (1998). Appellants James and Carlos Blanche were given notice as required by the administrative forfeiture statute, [3] and both appellants timely exercised their right to demand a judicial determination of the forfeiture by filing a civil complaint.

At the forfeiture hearing, appellants contended that their demand for judicial determination of the administrative forfeiture converted the administrative forfeiture into a judicial forfeiture, with all of its accompanying defenses. Appellants then argued that as they were not privy to and had no knowledge of the presence of crack cocaine in the vehicle, they were innocent owners whose property should not be forfeited. Appellants also asserted that because the crack cocaine was found outside the vehicle and no controlled substance offense charges were filed, the county was not entitled to the presumption of forfeitability accorded in administrative forfeitures. The state maintained that a plain reading of the forfeiture statute shows that appellants are not entitled to an innocent owner defense for forfeitures initiated as administrative forfeitures.

Rejecting appellants' claims, the district court found that Carlos Blanche was the vehicle's owner, that when the vehicle was stopped it contained the plastic bag which held crack cocaine with a retail value of $180.00, and that the vehicle was subject to forfeiture under the administrative forfeiture statute. The district court also found that "[i]t was not proven by clear and convincing evidence that Carlos Blanche was privy to the fact that cocaine was in the Defendant automobile, or that possession of such cocaine occurred with Carlos Blanche's knowledge or consent."

Blanche v. 1996 Pontiac Grand Prix, No. C4-97-5762 at 3 (4th Dist. Minn. 1996). Finally, the district court ordered the vehicle to be forfeited.

The court of appeals affirmed, reasoning that there was sufficient evidence for the district court to find that the crack cocaine was inside the vehicle when it was stopped. *Blanche v. 1995 Pontiac Grand Prix*, No. C4-97-2259, 1998 WL 405018 at *2 (Minn. App. 1998). By focusing on the differences between forfeitures initiated as administrative forfeitures and those initiated as judicial procedures, the court of appeals also concluded that the innocent owner defense does not apply to administratively initiated forfeitures. *Id.*

I.

Appellants first argue that the district court erred in finding that their motor vehicle contained a controlled substance, and therefore the forfeiture was improperly initiated as an administrative forfeiture. A district court's findings of fact shall not be set aside unless clearly erroneous. *See Kornberg v. Kornberg*, 542 N.W.2d 379, 386 (Minn. 1996). However, we review de novo the district court's determination that the action was properly initiated as an administrative forfeiture, as this presents a question of law. *See Bruggeman v. Jerry's Enterprises, Inc.*, 591 N.W.2d 705, 708 (Minn. 1999).

At the forfeiture hearing, a police officer testified that after he stopped the respondent vehicle, he stood behind the vehicle waiting for additional police assistance. From behind the vehicle he had a clear view of the pavement near the passenger door of the vehicle, and he testified that he did not see anything unusual laying on the ground. He testified further that no one passed near the vehicle while it was stopped. After two of the vehicle's occupants were removed from the passenger side of the vehicle, police found a small plastic bag containing crack cocaine on the ground next to the vehicle's passenger side. Appellants asserted that although crack cocaine was found adjacent to the car, a fingerprint analysis conducted on the bag was inconclusive and failed to associate the bag with any vehicle occupants. Further, a trained narcotics sniffing dog did not find any other controlled substances in the vehicle.

At the conclusion of the forfeiture hearing, the district court found that the vehicle at the time it was stopped "contained a sandwich bag containing nine rocks of crack cocaine * * * [with] a retail value of $180.00." The court concluded that the action had been properly initiated as an administrative forfeiture. In light of the police officer's testimony, we hold that the district court's finding that the vehicle contained illegal drugs is supported by the record and does not constitute an abuse of discretion. Further, as administrative forfeitures may be initiated for conveyance devices containing $100 or more of illegal drugs, we hold that the district court was correct in concluding that the action was appropriately initiated as an administrative forfeiture pursuant to Minn. Stat. § 609.5314.

II.

Appellants next argue that once an administrative forfeiture is contested, it becomes a judicial forfeiture procedure, and therefore they should have been permitted to plead an innocent owner defense at their forfeiture hearing. The state contends that the forfeiture statutes set out two

entirely different forfeiture mechanisms for different types of property, and that forfeitures initiated as administrative forfeitures do not incorporate the innocent owner defense. As this issue presents conflicting interpretations of the forfeiture statutes, we review it de novo. *See Wynkoop v. Carpenter*, 574 N.W.2d 422, 425 (Minn. 1998) (citing *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 375 (Minn. 1996)).

Against a backdrop of increasing drug crime, the legislature created a scheme permitting forfeitures of property used in connection with drug crimes. The framework for forfeitures of property associated with or connected to controlled substances is set out in Minn. Stat. §§ 609.531-.5319 (1998). In the legislature's own words, these forfeiture laws aim:

> (1) to enforce the law; (2) to deter crime; (3) to reduce the economic incentive to engage in criminal enterprise; (4) to increase the pecuniary loss resulting from the detection of criminal activity; and (5) to forfeit property unlawfully used or acquired and divert the property to law enforcement purposes.

Minn. Stat. § 609.531, subd. 1a. In order to achieve its goals, the legislature delineated two types of forfeiture procedures, judicial and administrative. *See* Minn. Stat. §§ 609.5313-.5314 (1998).

Both administrative and judicial forfeiture procedures may be initiated to confiscate certain properties found in proximity to controlled substances, and also "conveyance devices *containing* controlled substances with a retail value of $100 or more * * *." Minn. Stat. § 609.5314, subd. 1(a)(2) (emphasis added). Judicial forfeiture procedures may also be initiated to confiscate a conveyance device "if the retail value of the controlled substance is $25 or more and the conveyance device is *associated with* a felony-level controlled substance crime." Minn. Stat. § 609.5311, subds. 2, 3(a) (emphasis added). Importantly, all property subject to administrative forfeiture falls within the definition of property subject to judicial forfeiture.

Judicial forfeiture procedures are initiated when the county files a complaint against the property stating the basis for the forfeiture and gives notice to the owner or possessor of the property. Minn. Stat. § 609.5313. At the subsequent judicial hearing, the property is presumed forfeitable, but the county bears the burden of proof for each act or omission giving rise to the forfeiture by clear and convincing evidence. *Id.* § 609.531, subd. 6a(a).

In addition to judicial forfeiture procedures, the legislature established administrative forfeiture procedures to expedite some uncontested forfeitures. To initiate an administrative procedure, the county does not issue a complaint. Instead, the county seizes the property and gives notice to all persons known to have an ownership or possessory interest in the property, informing them that they may demand judicial review of the forfeiture. Minn. Stat. § 609.5314, subd. 2. If a claimant chooses not to contest the forfeiture, the property is forfeited in 60 days. *Id.* § 609.5314, subd. 3(a). The administrative forfeiture procedure thereby provides a streamlined process for uncontested forfeitures, avoiding unnecessary hearings when forfeitures are not challenged.

While creating an expedited process for uncontested forfeitures, the legislature retained claimants' access to the courts to challenge forfeitures of administrative origin. Specifically, the legislature provided that a claimant facing administrative forfeiture of his or her property must

upon request receive a judicial determination of the administrative forfeiture. The statute's plain language requires notice to claimants to "conspicuously" state that they have a "right to obtain judicial review" and be warned that "IF YOU DO NOT DEMAND JUDICIAL REVIEW * * *, YOU LOSE THE RIGHT TO A JUDICIAL DETERMINATION OF THIS FORFEITURE AND YOU LOSE ANY RIGHT YOU MAY HAVE TO THE ABOVE DESCRIBED PROPERTY." *Id.* § 609.5314, subd. 2(b)(3). If a claimant demands judicial review of the administrative forfeiture, a judicial forfeiture proceeding is held with the claimant as the plaintiff. *Id.* § 609.5314, subd. 3. As all property subject to administrative forfeiture is a subset of property subject to judicial forfeiture under section 609.5311, subd. 3(a), the process for a judicial forfeiture procedure set out in sections 609.531, subd. 6a, and 609.5311, governs the claimant-initiated judicial forfeiture procedure.

The dissent states that judicial forfeitures and judicial review of forfeitures initiated as administrative forfeitures follow different procedures because judicial forfeiture applies to conveyance devices "associated with" controlled substances while administrative forfeiture applies to conveyance devices "containing" controlled substances. This interpretation ignores the plain and simple fact that *all* property subject to administrative forfeiture is by definition property subject to judicial forfeiture, and so judicial forfeiture procedures must be followed once judicial review is requested.

Important to the consideration of this case are the statutory limitations on forfeitures. Limitations on forfeitures subject to judicial procedures, whether the judicial procedure is initiated as a judicial or administrative forfeiture, are set out in section 609.5311, subd. 3. The statute states that property may only be forfeited if "its owner was privy to the [unlawful] use or intended use * * *, or the unlawful use or intended use of the property otherwise occurred with the owner's knowledge or consent." *Id.* § 609.5311, subd. 3(d). The statute lists no limitation barring the innocent owner defense from being pleaded in judicial forfeiture proceedings.

This plain reading of the statutory scheme, allowing owners to plead the innocent owner defense, is supported by testimony given during a committee hearing on the proposed forfeiture laws. In response to a legislator's hypothetical concerning an innocent owner's motor vehicle, an assistant county attorney explained that in the case of a co-owned vehicle used to transport more than $250 worth of controlled substances, the county would "notice all of the people with an ownership interest [in the vehicle] and it would be up to them to show that either it wasn't used [in connection with controlled substances] or that they had no knowledge of [the illegal use]." *Hearing on S.F. 1937, H. Crime and Family Div.*, 75th Minn. Leg., March 7, 1988 (audio tape) (statement of James Appleby, Asst. Hennepin Co. Atty.). The assistant county attorney's explanation of the forfeiture scheme in response to a legislator's inquiry is consistent with a plain reading of the statute and underscores the legislature's aim to permit the innocent owner defense in all judicial forfeiture procedures.

Contrary to the dissent's and state's positions, the legislature did not set out entirely different procedures for judicial determinations of forfeitures initiated as administrative forfeitures. Rather, in addition to allowing claimants the right to a judicial determination of forfeitability, the administrative forfeiture statute states that for judicial determinations of administrative forfeitures "the appropriate agency must conduct the forfeiture under section 609.531,

subdivision 6a." Minn. Stat. § 609.5314, subd. 3(c). Subdivision 6a sets out the burdens of proof for *all* civil forfeiture hearings, stating "[t]he appropriate agency handling the forfeiture has the benefit of the evidentiary presumption of section 609.5314, subdivision 1, but otherwise bears the burden of proving the act or omission giving rise to the forfeiture by clear and convincing evidence." Minn. Stat. § 609.531, subd. 6a(a). Subdivision 6a does not set out different procedures for judicial determinations of administrative forfeitures, nor does it limit the defenses the court may hear.

At best, the failure of section 609.531, subd. 6a(a), to explicitly incorporate the innocent owner defense creates an ambiguity as to whether the defense is available in judicial determinations of forfeitures initiated as administrative forfeitures. If a statute is ambiguous, the court "must ascertain and effectuate the intent of the legislature." *Hersh Properties, LLC v. McDonald's Corp.*, 588 N.W.2d 728, 736 (Minn. 1999). Laws should be interpreted so as to make the entire statute effective. *See* Minn. Stat. § 645.17(2) (1998). We cannot reconcile the statute's detailed notice requirements with the limited judicial procedure the state requests and the dissent sets forth. By express statutory language, notice of administrative forfeiture must be given to "all persons known to have an ownership or possessory interest," including a motor vehicle's registered owner. Minn. Stat. § 609.5314, subd. 2(a). While due process requires notice to owners before a forfeiture, it is very unusual for the legislature to go to such lengths to set forth how notice is to be given and what the notice must state. *See* Minn. Stat. § 40A.122, subd. 4 (1998) (notice requirements for eminent domain actions); *id.* § 168.042, subd. 3 (1998) (notice requirements for sale of vehicles subject to impoundment order). In order to effectuate the legislature's intent, including the unusually stringent notice requirements contained in the administrative forfeiture statute, owners must be permitted to plead the innocent owner defense.

Finally, applying the forfeiture laws without recognizing the innocent owner defense for all judicial forfeiture procedures could lead to absurd results. For example, a person lends her car to a friend. The friend then gives a third person, whom the owner does not know, a ride to a store. The third person has $100 worth of illegal drugs in his pocket, but the driver of the vehicle is unaware of the drugs. If the car is stopped and the third person searched, the owner of the vehicle cannot assert an innocent owner defense. This result, advocated by the state and supported by the dissent, clearly contravenes the legislature's stated purpose when it enacted the forfeiture laws as it neither deters crime nor reduces the economic incentives to engage in criminal enterprises. *See* Minn. Stat. § 609.531, subds. 1a(2), (3).

In this case, the district court found that it had not been proven that appellant Carlos Blanche "was privy to that fact that cocaine was in the Defendant automobile, or that the possession of such cocaine occurred with Carlos Blanche's knowledge or consent." However, the innocent owner defense is an affirmative defense which must be proven by the claimant. *See United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 487 (2nd Cir. 1995); *United States v. One 1973 Rolls Royce, V.I.N. SRH-16266*, 43 F.3d 794, 804-05 (3rd Cir. 1994). We therefore remand this case for further proceedings in accordance with our decision.

As we hold that the innocent owner defense is available to a claimant who has demanded judicial determination of a forfeiture initiated as an administrative forfeiture, we need not address appellants' contention that their due process rights were violated.

Reversed and remanded.

DISSENT

STRINGER, J.

I respectfully dissent. There is no statutory support for the majority's conclusion that a demand for a judicial determination of the administrative forfeiture converts an administrative forfeiture into a judicial forfeiture where the innocent owner defense is available. The majority trespasses on legislative territory in order to achieve a result it finds more palatable.

The administrative forfeiture and the judicial forfeiture are separate and distinct schemes and remain so even after a demand for a judicial determination has been made. Both the judicial and the administrative forfeiture statutes clearly and unambiguously establish the state's right to seize property and prescribe the procedure in each type of forfeiture. The statutory language simply does not provide for transformation of an administrative forfeiture into a judicial forfeiture upon a demand for a judicial determination. In fact, the administrative forfeiture statute specifically limits the remedies available to a person who requests a judicial determination:

> If the claimant makes a timely demand for judicial determination under this subdivision, the appropriate agency must conduct the forfeiture under section *609.531, subdivision 6a.*

Minn. Stat. § 609.5314, subd. 3(c) (1998) (emphasis added). The statute referenced, Minn. Stat. § 609.531 (1998), discusses forfeitures generally, and subdivision 6a states plainly:

> The appropriate agency handling the forfeiture *has the benefit of the evidentiary presumption of section 609.5314, subdivision 1* [the administrative forfeiture statute], but *otherwise* bears the burden of proving the act or omission giving rise to the forfeiture by clear and convincing evidence * * *.

Id. (emphasis added). Likewise, the innocent owner defense found in the judicial forfeiture statute is clearly limited to that statute:

> Property is subject to forfeiture *under this section* only if its owner was privy to the use or intended use * * * or the unlawful use or intended use of the property otherwise occurred with the owner's knowledge or consent.

Minn. Stat. § 609.5311, subd. 3(d) (1998) (emphasis added). The innocent owner defense is not available in the administrative forfeiture statute and its absence can mean nothing more than the defense was not intended to be available. Neither the administrative forfeiture statute nor the judicial forfeiture statute reference each other, and the majority's conclusion that in an administrative forfeiture an owner's demand for a judicial determination converts the proceeding into a judicial forfeiture with all the defenses available is not supported by any legislative authority. [4]

What is clear is that the legislature has provided two separate and distinct proceedings for the forfeiture of property associated with a controlled substance offense - judicial forfeiture and administrative forfeiture. While both schemes serve the same legislative objective - to deter the commission of controlled substance offenses - the majority chooses to ignore the fact that the statutes materially differ with respect to both scope and procedure.

The sweep of the judicial forfeiture statute is formidable and applies to "[a]ll property, real and personal, that has been used, or is intended for use, or has in any way facilitated" a controlled substances offense - that is, any property having even a remote connection with illegal drug activity. Minn. Stat. § 609.5311, subd. 2. The breadth of the judicial forfeiture statute however is tempered by the requirement that the owner of the property was aware that the property subject to forfeiture was associated with unlawful drug-related activity. *See* Minn. Stat. § 609.5311, subd. 3(d). Thus any property having even a minimal nexus to activity involving unlawful controlled substance is subject to judicial forfeiture if the scienter requirement of subdivision 3 can be established by the state.

The administrative forfeiture statute, Minn. Stat. § 609.5314, unlike the judicial forfeiture statute, is limited to specific kinds of property and is commenced by the appropriate government agency seizing the property and giving notice of the seizure in accordance with the statute to the owner or others having a possessory interest. The administrative forfeiture statute creates a presumption of forfeitability not found in the judicial forfeiture statute and the items of property listed in the statute as subject to this presumption - money, precious metals, precious stones, conveyance devices, and firearms found in proximity to controlled substances or tools of the drug trafficking trade - are items commonly and directly related to illegal drug activity. *See* Minn. Stat. § 609.5314, subd. 1(a).

The method of commencing a proceeding and the differing burdens of proof in the two forfeiture statutes further underscores their different purposes. Judicial proceedings are initiated by filing a complaint against the property stating the basis of the forfeiture claim and notice to the owners, with the petitioning agency carrying the burden of proof of each element of the forfeiture. An administrative forfeiture, on the other hand, is commenced by seizure of the property and notice to the claimant. Only if the claimant demands a judicial determination by a complaint asserting a claim of improper seizure is there a right to a hearing at all, and the claimant bears the burden of rebutting the presumption of forfeiture. As noted above, of particular interest here is that while a judicial proceeding requires that the owner "was privy to the use or intended use described in subdivision 2, or the unlawful use or intended use of the property otherwise occurred with the owner's knowledge or consent," Minn. Stat. § 609.5311, subd. 3(d), neither the administrative procedure itself nor the proceedings for a judicial determination in an administrative proceeding provide such a limitation. *Compare* Minn. Stat. § 609.5311, subd. 3(d), *with* Minn. Stat. § 609.5314. While the administrative forfeiture statute may appear harsh, it is the legislature's determination that it be so and it is not this court's prerogative to circumvent the plain statutory language.

The majority asserts that because there is no rational reason for the distinctions between the different types of forfeiture, a person whose property is seized in an administrative forfeiture proceeding should be entitled to the innocent owner defense. I disagree. It is clear that with

respect to the administrative procedure that the legislature intended to provide a speedy process for the seizure and forfeiture of property found to be directly employed in illegal controlled substance activity.

Critical to the majority's conclusion is the assertion that administrative forfeiture proceedings were really designed for uncontested forfeitures. Once again there is no support in the plain statutory language for such a conclusion and in reaching it the majority ignores the important distinction in each type of forfeiture as to the nexus of the property seized to the illegal substance activity. It is quite reasonable to assume that the legislature intended the knowledge of the owner to be irrelevant when the property was directly implicated in such activity, and that forfeiture of the owner's property is the price society is entitled to extract for use of property in illegal drug activity, regardless of the owner's knowledge, because of the close nexus of the property to the illegal activity. The more indirect the connection between the property and the illegal activity required under the judicial proceeding justifiably raises a greater concern that the property of innocent owners could be unfairly subject to forfeiture. For that reason, the legislature provided for a proceeding *judicial* in nature with the county bearing the burden of proof as to the elements of forfeiture, including, if raised, that its owner "was privy to the use or intended use * * * or the unlawful use or intended use of the property otherwise occurred with the owner's knowledge or consent." Minn. Stat. § 609.5311, subd. 3(d). Accordingly, there is a solid rationale for the availability of the innocent owner defense in a judicial forfeiture proceeding but not in the administrative forfeiture proceeding.

Finally, turning to the majority's assertion that our reading of the statutes leads to an absurd and anomalous result because innocent owners would lose their vehicles to forfeiture, no doubt innocent owners might lose their property when it is involved in illegal substance activity. But if it is absurd, the absurdity lies on the doorstep of the legislature, for that is the result the statutory scheme prescribes. We are not legislators. If a legislative scheme leads to a harsh result, the answer is not for this court to re-write the statute, as the majority would do. We have long recognized that "[c]ourts have nothing to do with the wisdom or expediency of statutes. The remedy for unwise or inexpedient legislation is political and not judicial." *Hickok v. Margolis*, 221 Minn. 480, 485, 22 N.W.2d 850, 852 (1946). Accordingly, it is up to the legislators to make such changes as it deems appropriate.

I would conclude that the district court did not err in holding the defendant vehicle was lawfully forfeited under the administrative forfeiture statute.

Footnotes

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[1] The lower courts and appellants described the car alternately as a 1994, 1995, and 1996 Pontiac Grand Prix. However, the bill of sale and vehicle registration card show it to be a 1995.

[2] A conveyance device "includes, but is not limited to, a motor vehicle." Minn. Stat. § 609.531, subd. 1(a) (1998).

[3] There is a presumption that the registered owner of a motor vehicle is the owner of the motor vehicle for purposes of the forfeiture proceeding. Minn. Stat. § 609.531, subd. 6a(b) (1998). James Blanche is the registered owner of the respondent vehicle.

[4] The majority's assertion that any property subject to administrative forfeiture is also subject to judicial forfeiture is irrelevant. Every armed robbery is also an assault, but the legislature has chosen to treat the narrower conduct quite differently.

STATE OF MINNESOTA
IN COURT OF APPEALS
CX-99-827

State of Minnesota,
Appellant,

vs.

Kenneth Paul Herbert,
Respondent.

Filed September 21, 1999
Reversed and remanded
Lansing, Judge

Mille Lacs County District Court
File No. K498182

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Considered and decided by Lansing, Presiding Judge, Peterson, Judge, and Amundson, Judge.

S Y L L A B U S

A burglar who steals firearms after breaking into a residence possesses firearms "at the time of the offense" within the meaning of Minn. Stat. § 609.11, subd. 5(a) (1998), and is subject to the three-year minimum sentence the statute mandates.

O P I N I O N

LANSING, Judge

Kenneth Herbert was convicted of a burglary involving the theft of guns. On appeal from the sentence, the state argues Herbert possessed the firearms at the time of the offense and the district court therefore erred in declining to impose the three-year minimum sentence mandated by Minn. Stat. § 609.11, subd. 5(a) (1998). We conclude the statute applies to a burglar who comes into possession of firearms once inside the building, and we reverse and remand for resentencing.

FACTS

Kenneth Herbert pleaded guilty to second-degree burglary in violation of Minn. Stat. § 609.582, subd. 2(a) (1998). At the plea hearing, Herbert admitted breaking into a residence he knew to be unoccupied and stealing several guns. Herbert testified that when he broke in, he intended to steal the guns and either trade them for drugs or sell them for money to purchase drugs.

At the sentencing hearing, the state argued that Minn. Stat. § 609.11, subd. 5(a) (1998), required the court to impose the mandatory three-year minimum sentence because Herbert possessed the stolen guns "at the time of" the burglary. The district court concluded the statute did not apply and imposed a stayed sentence of 23 months. This appeal followed.

ISSUE

Does the three-year minimum mandatory sentence in Minn. Stat. § 609.11, subd. 5(a) (1998), apply to a burglar who comes into possession of firearms fter breaking into a residence with intent to steal?

ANALYSIS

On appeal from sentencing, this court determines "whether the sentence is inconsistent with statutory requirements." Minn. R. Crim. P. 28.05, subd. 2. Minnesota law imposes a three-year minimum mandatory sentence on defendants who possess or use firearms at the time of certain offenses. It provides that

> any defendant convicted of an offense listed in subdivision 9 in which the defendant or an accomplice, *at the time of the offense*, had in possession or used, whether by brandishing, displaying, threatening with, or otherwise employing, a firearm, shall be committed to the commissioner of corrections for not less than three years.

Minn. Stat. § 609.11, subd. 5(a) (1998) (emphasis added). Herbert does not dispute that second-degree burglary, the offense to which he pleaded, is one of the offenses enumerated in subdivision 9, or that he possessed the stolen firearms. *See* Minn. Stat. § 609.11, subd. 9 (1998) (listing burglary as an offense subject to mandatory minimum sentence). He argues instead that the statute does not apply because he did not have the guns at the time he broke into the residence and thus did not possess the guns "at the time of the offense."

The mandatory minimum sentencing statute does not define "at the time of the offense," and on its face the phrase is unambiguous. But when the phrase is applied to Herbert's second-degree burglary offense, a latent ambiguity becomes apparent. The burglary statute provides:

> Whoever enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building, * * * commits burglary in the second degree * * * :
> (a) the building is a dwelling.

Minn. Stat. § 609.582, subd. 2(a) (1998). Because Herbert completed the offense when he unlawfully entered the residence with intent to steal and did not possess a firearm at that time, an

elements-based interpretation of the phrase would compel a conclusion that he did not possess a firearm "at the time of the offense." But even though the burglary was complete when Herbert entered the residence, his illegal course of conduct continued over the time he remained in the residence, while he took possession of the guns and carried them out. Thus, under a general temporal interpretation of the phrase, Herbert was in possession of a firearm "at the time of the offense." Because the statute is susceptible to more than one reasonable interpretation, we resolve the ambiguity by attempting to ascertain and effectuate the legislature's intent. *See* Minn. Stat. § 645.16 (1998).

Minnesota law has, since 1969, provided mandatory minimum penalties for defendants who commit certain types of crimes while possessing a firearm. *See* Minn. Stat. § 609.11 (1969). The supreme court has observed that sentence enhancement statutes reflect the obvious reality that possession of a firearm while committing a predicate felony offense substantially increases the risk of violence, whether or not the offender actually uses the firearm. *State v. Royster*, 590 N.W.2d 82, 85 (Minn. 1999). The apparent purpose for mandating a minimum sentence for offenses committed when possessing a firearm is thus to deter acts that increase the risk of violence by ensuring strict and certain penalties.

This legislative purpose is best effectuated by interpreting the phrase "at the time of the offense" according to its general temporal understanding. The danger the statute seeks to address arises not only when guns are carried onto the premises by a burglar, but also when they are obtained during the course of a burglary. Restricting the phrase "at the time of the offense" to a completed-elements meaning would limit application of the statute in a manner adverse to its apparent purpose. We therefore conclude that the general temporal understanding of the phrase "at the time of the offense" is more faithful to the legislature's intent.

Herbert argues that the legislature could not have intended the mandatory minimum sentence statute to apply in this case because it leads to the absurd result that those who steal guns are punished more harshly than those who steal other items, even though the crimes are committed in the same, unarmed manner. We recognize that in construing a statute, the court may not impute capricious distinctions to the legislature and must avoid unjust and indefensible results. *Pomeroy v. National City Co.,* 209 Minn. 155, 158, 296 N.W. 513, 515 (1941). Admittedly, Herbert's sentence will be determined by the items he chose to steal. This result, however, is not unjust or indefensible. On the contrary, the disparate punishment Herbert challenges is aligned with the broad legislative purpose for the mandatory minimum.

Herbert also asserts that the statute does not apply because he never intended to use the guns and they were not in a condition to be used. He urges us to adopt the *Royster* balancing test to determine whether the circumstances of his case warrant application of the mandatory minimum. *See Royster*, 590 N.W.2d at 85 (test for determining when constructive possession triggers mandatory minimum sentence is whether presence of firearms increased the risk of violence and to what degree). But intent to use or ability to use are not required for the mandatory minimum to apply. *See State v. Johnson*, 551 N.W.2d 244, 247 (Minn. App. 1996) ("The only requirement for `use' is that a defendant have had a firearm at least `in his possession' at the time he committed the predicate offense."), *review denied* (Minn. Sept. 20, 1996). The Minnesota Supreme Court fashioned the *Royster* test to determine when the mandatory minimum should apply in cases of

constructive possession. *Royster*, 590 N.W.2d at 85. Herbert does not dispute that he was in actual possession of the firearms; thus, we decline to adopt the *Royster* analysis.

A second canon of statutory construction, in pari materia, also compels application of the mandatory minimum sentence. Statutes in pari materia are those relating to the same person or thing or having a common purpose. *State v. McKown*, 475 N.W.2d 63, 65 (Minn. 1991). Courts should construe statutes in pari materia in light of each other. *Id.* The provision of the burglary statute defining first-degree burglary, Minn. Stat. § 609.582, subd. 1(b) (1998), and the mandatory minimum sentence statute are in pari materia and should be construed in light of each other. Under Minn. Stat. § 609.582, subd. 1(b), a burglar who "possesses, when entering *or at any time while in the building* [a firearm]" is guilty of first-degree burglary. Minn. Stat. § 609.582, subd. 1(b) (emphasis added). If this court is to construe these statutes in pari materia, that is, as one systematic body [of] law," *State v. Bolsinger*, 221 Minn. 154, 156, 21 N.W.2d 480, 486 (1946), it must assign the phrase "at the time of the offense" its general temporal meaning and hold that Minn. Stat. § 609.11, subd. 5(a), applies to a burglar who enters a building unarmed and with intent to steal and comes into possession of firearms once inside the building.

Finally, our interpretation of Minn. Stat. § 609.11, subd. 5(a), is consistent with the interpretation of similar laws in a majority of other jurisdictions. *See Pardue v. State,* 571 So.2d 333, 334 (Ala. 1990) (defendant who stole firearm during burglary was "armed" within meaning of first-degree burglary statute even though he did not use or possess firearm before entering the dwelling); *People v. Loomis*, 857 P.2d 478, 481-82 (Colo. App. 1992) (same); *Williams v. State,* 517 So. 2d 681, 682 (Fla. 1988); *Jackson v. State*, 670 S.W.2d 828, 830 (Ky. 1984) (same); *State v. Luna*, 653 P.2d 1222, 1224 (N.M. App. 1982) (same); *but see State v. Eastlack*, 883 P.2d 999, 1013 (Ariz. 1994) (mere theft of weapon during burglary does not, by itself, render burglar "armed" within meaning of first-degree burglary statute).

Because we hold that Herbert's conduct triggers the application of the mandatory minimum sentence provisions of Minn. Stat. § 609.11, subd. 5(a), the trial court's sentence is inconsistent with statutory requirements.

DECISION

Herbert possessed the stolen firearms at the time of the offense and is subject to the three-year minimum sentence mandated by Minn. Stat. § 609.11, subd. 5(a). We reverse and remand for resentencing.

Reversed and remanded.