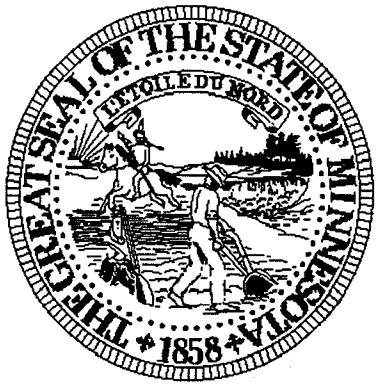
REPORT

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 1996

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December 19, 1996

The Honorable Allan Spear
President of the Senate
Room 120
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The Honorable Irv Anderson
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 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, 1994 and September 30, 1996.

Respectfully Submitted,

Harry M. Walsh
Revisor of Statutes

cc: The Honorable Carol Flynn
Chair, Senate Judiciary Committee
and Members

The Honorable Wes Skoglund
Chair, House Judiciary Committee
and Members

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REPORT OF THE REVISOR OF STATUTES

TO THE

LEGISLATURE OF THE STATE OF MINNESOTA

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT

AND COURT OF APPEALS

The Revisor of Statutes respectfully reports to the 1997 Legislature of the State of Minnesota, in accordance with Minnesota Statutes, section 3c, subdivision 3, requiring the revisor to "report to the legislature any statutory changes recommended or discussed or statutory deficiencies noted in any opinion" of the Minnesota Supreme Court or Court of Appeals. This report notes suggested statutory changes or deficiencies discussed in court opinions filed during the period beginning October 1, 1994, and ending September 30, 1996.

The opinions of the Minnesota Supreme Court and Court of Appeals included in this report are in numerical order according to the statutory section discussed in each opinion. The table of contents lists each statutory section considered in the report and its subject matter. The appendix includes a copy of the court opinions discussed in the report.

The legislature, during the 1995 Legislative Session, amended Minnesota Statutes, sections 325F.665, new motor vehicles, and 514.08, mechanics liens, which were discussed in court opinions included in the Revisor's 1994 Legislative Report.

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Minnesota Statutes, section 8.01
Attorney General

State ex rel. Graham v. Klumpp

Minnesota Supreme Court
August 25, 1995

In *State ex rel. Graham v. Klumpp,* 536 N.W.2d 613 (Minn. 1995), the court concluded that there are two possible interpretations of Minnesota Statutes, section 8.01, which permits the governor to request the attorney general to act as a special prosecutor. *Id.* at 615.

In this case, the Crow Wing county attorney did not pursue criminal complaints against two men who allegedly committed criminal sexual conduct. A delegation of citizens from Crow Wing County requested the attorney general and governor to review the cases. Following the Crow Wing County attorney's refusal to appoint the attorney general as a special prosecutor, the governor requested, in writing, that the attorney general prosecute the two cases. The attorney general honored the governor's request. The special prosecutor from the attorney general's office obtained grand jury indictments against the two men. The Crow Wing County attorney brought an action in District Court for clarification as to whether the attorney general could be appointed special prosecutor. *Id.* at 614.

The District Court concluded that section 8.01 authorized the governor to appoint the attorney general as special prosecutor. The Court of Appeals reversed the judgment of the District Court by interpreting section 8.01 as allowing the governor to appoint a special prosecutor *only if formal legal process has been commenced. Id.* (emphasis

added). Because the two men had not been charged with a crime when the governor requested that the attorney general be appointed as a special prosecutor, the Court of Appeals concluded that the governor's appointment was invalid. The Supreme Court reversed the Court of Appeals and decided that the governor's appointment was valid. *Id.* at 615-16.

Section 8.01 states in pertinent part:

> Whenever the governor shall so request, in writing, the attorney general shall prosecute any person charged with an indictable offense, and in all such cases may attend upon the grand jury and exercise the powers of a county attorney.

The Supreme Court concluded that there are at least two interpretations of section 8.01. In one interpretation the phrase "in all such cases" refers to cases where a person is charged with an indictable offense. The court stated that this interpretation would result in parties arguing whether the word "charged" should mean a person is charged only when formal legal process has been begun against that person or whether "charged" means that to charge a person also includes accusing a person of a crime as well as formally charging that person. *Id.* at 615.

The second interpretation of section 8.01, which was adopted by the Supreme Court, is that the phrase "in all such cases" means cases where the governor has made a request, in writing, to the attorney general to prosecute. *Id.* at 615. Thus, section 8.01 can be interpreted to mean that "whenever the governor shall so request, in writing, the attorney general shall prosecute any person charged with an indictable offense" is a directive requiring the attorney general to prosecute if a person is charged with an indictable offense. The second part of section 8.01, then, gives the attorney general the

discretion to go to the grand jury and exercise the powers of the county attorney whenever the governor requests in writing. *Id.* at 616.

Minnesota Statutes, section 80C.01, subdivision 4, paragraph (f)
Minnesota Franchise Act

Current Technology Concepts, Inc. v. Irie Enterprises, Inc.

Minnesota Supreme Court
April 28, 1995

In *Current Tech. Concepts, Inc. v. Irie Enter., Inc.*, 530 N.W.2d 539 (Minn. 1995), the court considered the legislative history and its understanding of the term "direct sale" to interpret the exception to the Minnesota Franchise Act under Minnesota Statutes, section 80C.01, subdivision 4, paragraph (f). *Id.* at 544.

In this case, Irie Enterprises terminated an agreement with Current Technology Concepts (CTC) which gave CTC the right to market Irie's computer software and hardware products. CTC believed that Irie terminated the agreement to usurp from CTC the market that CTC developed for Irie's products. *Id.* at 542.

Section 80C.01, subdivision 4, paragraph (a), provides that a franchise is a contract or agreement by which the franchisee is granted the right to offer or distribute goods using the franchisor's commercial symbol or other related characteristics, in which the franchisor and franchisee have a community of interest in the marketing of goods or services, and for which the franchisee pays a franchise fee. Section 80C.01, subdivision 4, paragraph (f), provides the exception that a franchise:

> does not include any contract, lease or other agreement whereby the franchisee is required to pay less than $100 on an annual basis . . . .

The court stated that "our reading of . . . [this section] leads us to conclude that it is at best ambiguous." *Id.* at 543. To resolve this ambiguity, the court considered the

legislative testimony given by Mary Brophy, from the Securities and Real Estate Division of the Commerce Department when subdivision 4, paragraph (f), was added to section 80C.01 in 1981. Brophy indicated that subdivision 4, paragraph (f), "excludes certain direct sales which were not contemplated by" the Franchise Act. *Id.* at 544. The court held that the term "direct sale" involves "the concept of selling products directly from the manufacturer to the ultimate consumer." *Id.* Thus, the court concluded that the exception to the Franchise Act under subdivision 4, paragraph (f), was not intended to apply to the type of agreement between CTC and Irie because the agreement did not contemplate Irie engaging in a direct sale of its software and hardware products to ultimate users or consumers. *Id.*

Minnesota Statutes, section 169.01, subdivision 2
Traffic Regulations - Legal Status of In-line Skates

Boschee v. Duevel

Minnesota Court of Appeals
April 25, 1995
Review denied
June 14, 1995

In *Boschee v. Duevel*, 530 N.W.2d 834 (Minn. Ct. App. 1995) the court concluded that in-line skates are a vehicle under Minnesota Statutes, chapter 169, the Highway Traffic Regulation Act, when they are being used as a means of travel upon a Minnesota public highway. *Id.* at 842.

Troy Boschee was in-line skating with two friends on the right-hand side of County Road 5 in Anoka County when he was struck by a car. Boschee died of the injuries sustained in the accident. *Id.* at 837-38. The trial court found that Boschee was not a pedestrian, but that, his in-line skates were a "vehicle" for the purposes of chapter 169. *Id.* at 838-39. The Court of Appeals affirmed the trial court. *Id.* at 842.

Section 169.01, subdivision 2, defines "vehicle" as:

> Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices used exclusively upon stationary rails or tracks.

Section 169.01, subdivision 24, defines "pedestrian" as "any person afoot or in a wheelchair."

The court stated that the broad definition given to "vehicle" shows a legislative intent to regulate any type of transportation used on Minnesota highways whether or not the particular mode of transportation was contemplated at the time the statute was

enacted. *Id.* at 839. The court believes that the best solution to this issue would be for the legislature to address the legal status of in-line skaters. *Id.* at 840.

Minnesota Statutes, section 257.66
Children - Paternity

R.B. v. C.S.

Minnesota Court of Appeals
August 29, 1995

In *R.B. v. C.S.*, 536 N.W.2d 634 (Minn. Ct. App. 1995), the court concluded that a literal application of the Minnesota Parentage Act, sections 257.51 to 257.74, could result in a child being bound by a paternity action of which the child had no notice or opportunity to be heard and that such a result would be an unconstitutional deprivation of due process. *Id.* at 638.

In this case, C.M.A. was born out of wedlock. C.M.A.'s mother was killed in an automobile accident one month after C.S. was adjudicated C.M.A.'s father. C.M.A. was not represented at the adjudication of her paternity. *Id.* at 636.

A short time later, R.B. claimed to have had relations with C.M.A.'s mother at the same time as C.S. C.M.A. requested blood tests on the grounds that it is in her best interests to know who is her biological father. The trial court rejected C.M.A.'s request for a blood test for failure to state a claim upon which relief could be granted. *Id.* at 636-37. The Court of Appeals reversed the dismissal of C.M.S.'s paternity action and request for blood tests and remanded the case back to the trial court. *Id.* at 639.

Section 257.66, subdivision 1, provides that:

> The judgment or the order of the court determining the existence or nonexistence of the parent and child relationship is determinative for all purposes.

In an effort to give the statute a constitutional interpretation, the Court of Appeals

held that a child who is not represented in an adjudication of the child's paternity may bring a subsequent paternity action pursuant to the Parentage Act and the results of the earlier adjudication are not determinative as to the child. *Id.* at 638.

The court stated that it recognizes that this could result in inconsistent judgments of paternity. The Court of Appeals pointed out that the Minnesota Supreme Court, in *Johnson v. Hunter,* suggested that the legislature "consider amending the Parentage Act's permissive language regarding joinder of children" because of concern over protection of children's interests through representation. *R.B.,* 536 N.W.2d at 638 (citing *Hunter,* 447 N.W.2d 871, 875 (Minn. 1989)). The court stated that the legislature made joinder of a child mandatory only in a few instances and none of these instances apply to this case.

Minnesota Statutes, section 259.51
Children - Paternity

Matter of Paternity of J.A.V.

Minnesota Supreme Court
May 16, 1996

In *Matter of Paternity of J.A.V.*, 547 N.W.2d 374 (Minn. 1996), the court concluded that an illegitimate father's failure to file an affidavit declaring his intention to retain parental rights with the Minnesota Department of Health within the statutory time period in Minnesota Statutes, section 259.51, subdivision 1, bars him from receiving notice of future proceedings, but not from being heard at a proceeding upon a voluntary appearance. *Id.* at 377.

Section 259.51, subdivision 1, states:

> Any person not entitled to notice under section 259.49, shall lose parental rights and not be entitled to notice at termination, adoption, or other proceedings affecting the child, unless within 90 days of the child's birth or within 60 days of the child's placement with prospective adoptive parents, whichever is sooner, that person gives to the division of vital statistics of the Minnesota department of health an affidavit stating intention to retain parental rights.

In this case, in August 1993, approximately two weeks after the birth of the baby, the mother told the illegitimate father that the baby had been born and she had given him up for adoption. The father did not file an affidavit stating his intention to retain parental rights until after the time limit required in section 259.51, subdivision 1. *Id.* at 376.

The majority concluded that if the legislature had intended to terminate parental rights for failure to file the affidavit referred to in section 259.51, the language would have

been clearer. The court found that a better reading of section 259.51 is that the only right lost to the father in failing to timely file the affidavit is the right to receive notice of future proceedings affecting the child. The court stated that after the expiration of the time frame and before the parental relationship has been terminated, the illegitimate parent still has a right to be heard in such proceedings upon a voluntary appearance but has no right to receive notice of adoption proceedings. *Id.* at 377. In section 259.49, subdivision 1:

> Notice of the hearing upon a petition to adopt a child shall be given to:
> . . .
> (2) the parent of a child if
> . . .
> (f) the person has filed an affidavit pursuant to section 259.51.

In her dissent, Justice Tomljanovich stated that the language in section 259.51, subdivision 1, is neither ambiguous nor confusing. The language establishes a time frame in which a parent may file for retention of the rights. This section also identifies the filing limits and the consequences for failing to file within these limits. She continued that if the legislature's intent of section 259.51, subdivision 1, had been just to notify the father that he would no longer have notice of proceedings, the section would not require such specific time limits.

Minnesota Statutes, section 260.015
Juvenile Court Act - Delinquent Child

Matter of Welfare of S.A.C.

Minnesota Court of Appeals
April 11, 1995

In *Matter of Welfare of S.A.C.*, 529 N.W.2d 517 (Minn. Ct. App. 1995), the court held that the definition of a delinquent child in section 260.015, subdivision 5, paragraph (a), is ambiguous because the CHIPS definition in subdivision 2a "makes the statute ambiguous with respect to the scope of the delinquency definition." *Id.* at 519.

Minnesota Statutes, section 260.015, subdivision 5, paragraph (a), states that a "delinquent child" means a child: "[w]ho has violated any state or local law . . . ." Section 260.015, subdivision 2a, defines a "child in need of protection or services" (CHIPS) as:

> A child who is need of protection or services because the child:
> . . .
> (10) has committed a delinquent act before becoming 10 years old . . . .

The court looked to the legislative history to conclude that a new category of children under ten who have committed delinquent acts was created within the CHIPS classification. The court concluded that the legislative intent was to take children under ten out of the delinquency definition and not "merely make delinquent children under ten *also* subject to the CHIPS provision." *Id.* at 519.

Minnesota Statutes, section 297A.01, subdivision 7
Use Taxes

Dahlberg Hearing Systems, Inc. v. Commissioner of Revenue

Minnesota Supreme Court
April 26, 1996

In *Dahlberg Hearing Systems, Inc. v. the Commissioner of Revenue*, 546 N.W.2d 739 (Minn. 1996), the court concluded that tangible personal property brought into Minnesota for processing and shipped elsewhere for use is excluded from the use tax pursuant to Minnesota Statutes, section 297A.01, subdivision 7, regardless of who brought the property into the state, because the statute does not require that the property be brought into Minnesota by a particular party. *Id.* at 743.

In this case, Dahlberg purchased computer equipment from Hewlett Packard to provide to its franchisees, all of whom except one were located in other states. The orders were accepted outside of Minnesota and shipped from various manufacturing facilities outside of Minnesota but were received by Dahlberg at its Minnesota facility. After software was installed and being tested, the computer equipment was reboxed and sent to Dahlberg's franchisees in 30 states. *Id.* at 740-41.

Minnesota Statutes, section 297A.01, subdivision 7, states in pertinent part:

> "Storage" and "use" do not include the keeping, retaining or exercising of any right or power over tangible personal property or tickets or admissions to places of amusement or athletic events shipped or brought into Minnesota for the purpose of subsequently being transported outside Minnesota and thereafter used solely outside Minnesota, . . . or for the purpose of being processed, fabricated or manufactured into, attached to or incorporated into other tangible personal property to be transported outside Minnesota and not thereafter returned to a point within Minnesota, except in the

course of interstate commerce.

The tax court focused on the language in subdivision 7 concerning tangible personal property "shipped or brought into Minnesota for the purpose of subsequently being transported outside Minnesota and thereafter used solely outside Minnesota." The tax court ruled that Dahlberg must pay a use tax because Hewlett Packard, not Dahlberg, brought the computer equipment into Minnesota. *Id.* at 741. The Supreme Court reversed the tax court. *Id.* at 740.

The Supreme Court stated that section 297A.01, subdivision 7, does not provide any requirement that a particular party must bring the property into the state for the processing exception to the use tax under subdivision 7 to apply. The majority continued that it "will not edit the statute to add the requirement that the tangible personal property be 'brought into Minnesota by the owner of such property,' for that task is properly left to the legislative branch." *Id.* at 743.

The majority also stated that any doubt or ambiguity in the term "brought" should be resolved in favor of the taxpayer. The majority concluded that the computer equipment was not "brought into Minnesota" when "brought" is not defined in the statute and authority establishes that doubts and ambiguities in the tax statutes are to be resolved in favor of the taxpayer. *Id.* at 743-44.

Minnesota Statutes, section 340A.311, paragraph (d)
Liquor - Brand Registration

Hornell Brewing Co., Inc., v. Minnesota Department of Public Safety, Liquor Control Division

Minnesota Court of Appeals
September 17, 1996

In *Hornell Brewing Co., Inc., v. Department of Pub. Safety,* 553 N.W.2d 713 (Minn. Ct. App. 1996), the court held that Minnesota Statutes, section 340A.311, paragraph (d), which governs the registration of a malt liquor brand label, is "impermissibly content-based" and "facially invalid" under the first amendment to the United States Constitution. *Id.* at 719.

In this case, Hornell Brewing Co., through G. Heileman Brewing Co., Inc., applied to the Liquor Control Division of the Minnesota Department of Public Safety to register the brand label for "The Original Crazy Horse Malt Liquor." The label was approved. On the label, the words "The Original Crazy Horse Malt Liquor" surround an image of an American Indian wearing a feather bonnet with the words "Dakota Hills, Ltd." displayed beneath the product name. The reverse side of the label states:

> The Black Hills of Dakota, steeped in the history of the American West, home of proud Indian nations. A land where imagination conjures up images of blue clad pony soldiers and magnificent native American warriors. . . . A land where wailful winds whisper of Sitting Bull, Crazy Horse and Custer. A land of character, of bravery, of tradition. A land that truly speaks of the spirit that is America.

The Rosebud Sioux Tribal Court appointed intervenor Seth H. Big Crow, Sr., administrator

of the estate of Ta-sunke Witko, a.k.a. Crazy Horse. The intervenor stated that G. Heileman Brewing Co. and its subsidiaries or associates took the name of Crazy Horse without the consent of the lawful holders of the right to the name. Revoking the registration, the director of the Liquor Control Division of the Department of Public Safety found that all the elements of section 340A.311(d) were met by the brand label registration for "The Original Crazy Horse Malt Liquor." *Id.*

Minnesota Statutes, section 340A.311, paragraph (d), states:

> The commissioner shall refuse to register a malt liquor brand label, and shall revoke the registration of a malt liquor brand label already registered, if the brand label states or implies in a false or misleading manner a connection with an actual living or dead American Indian leader. This paragraph does not apply to a brand label registered for the first time in Minnesota before January 1, 1992.

The court stated that section 340A.311, paragraph (d), does not prohibit commercial speech that is not simply false or misleading, but also "states or implies . . . a connection with an actual living or dead American Indian leader." The court continued that a malt liquor label that does not state or imply a connection with an American Indian leader would be acceptable under this section even if false or misleading. *Id.* at 716.

The court looked to *R.A.V. v. City of St. Paul*, 505, U.S. 377, 112 S.Ct. 2538 (1992), where the United States Supreme Court considered whether a city ordinance was impermissibly content-based and "therefor facially invalid under the first amendment of the United States Constitution." The United States Supreme Court concluded that the city ordinance was facially unconstitutional because it applied only to "specified disfavored topics" and because it went "beyond mere content discrimination, to actual viewpoint

discrimination." The Supreme Court stated that the first amendment imposes "a 'content discrimination' limitation upon a State's prohibition of proscribable speech." *Id.* at 716-17.

The Court of Appeals concluded that section 340A.311, paragraph (d), proscribes speech on the basis of two content elements: whether the content of the label is false or misleading and whether the content of the label states or implies a connection with an American Indian leader. The court stated that "[t]he basis for the content discrimination in the statute goes beyond whether the speech is false or misleading." The court continued that the Department of Public Safety did not explain why section 340A.311, paragraph (d), which prohibits only false or misleading labels that state or imply a connection with an American Indian leader is necessary to serve the state's interest in prohibiting the false, misleading, unauthorized, or unsupported appropriation of individual's names. *Id.* at 718.

Petition for review to the Minnesota Supreme Court was not filed in this case.

Minnesota Statutes, section 548.36, subdivision 1, clause (2)
Collateral Source Rule

Dean v. American Family Mutual Insurance Company

Minnesota Supreme Court
August 4, 1995

In *Dean v. American Family Mut. Ins. Co.*, 535 N.W.2d 342 (Minn.1995), the court again stated that the collateral source rule in Minnesota Statutes, section 548.36, is "poorly written" and "ambiguous." *Id.* at 345.

Section 548.36, states in pertinent part:

> Subdivision 1. **Definition.** For purposes of this section, "collateral sources" means payments related to the injury or disability in question made to the plaintiff, or on the plaintiff's behalf up to the date of the verdict, by or pursuant to:
> . . .
> (2) health, accident and sickness, or automobile accident insurance or liability insurance that provides health benefits or income disability coverage; except life insurance benefits available to the plaintiff whether purchased by the plaintiff or provided by others, payments made pursuant to the United States Social Security Act, or pension payments; . . .
>
> Subd. 2. **Motion.** In a civil action, whether based on contract or tort, w hen liability is admitted or is determined by the trier of fact, and when damages include an award to compensate the plaintiff for losses available to the date of the verdict by collateral sources, a party may file a motion within ten days of the date of entry of the verdict requesting determination of collateral sources. If the motion is filed, the party shall submit written evidence of, and the court shall determine:
> (1) amounts of collateral sources that have been paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses except those for which a subrogation right has been asserted;
> . . .
>
> Subd. 3. **Duties of the Cour**t. (a) The court shall reduce the

> award by the amounts determined under subdivision 2, clause (1), and offset any reduction in the award by the amounts determined under subdivision 2, clause (2)(2)
>
> . . .
>
> (c) In any case where the claimant is found to be at fault under section 604.01, the reduction required under paragraph (a), must be made before the claimant's damages are reduced under section 604.01, subdivision 1.

In a prior case, *Imlay v. City of Lake Crystal*, 453 N.W.2d 326 (Minn. 1990), the court stated that section 548.36, subdivision 1, clause (2), was ambiguous and could be read as providing for one, two, thee, or four different types of collateral source benefits.

The court suggested that the legislature may wish to re-examine this clause and clarify its intention. *Dean,* 535 N.W.2d at 345 (citing *Imlay*, 453 N.W.2d at 334).

Minnesota Statutes, section 550.37, subdivision 24
Exemptions - Property Exempt

Estate of Jones by Bloom v. Kvamme

Minnesota Supreme Court
April 7, 1995

In *Estate of Jones by Bloom*, 529 N.W.2d 335 (Minn. 1995), the court held that clause (1) of section 550.37, subdivision 24, violates Minnesota Constitution, article 1, section 12, because the clause allows a debtor to exempt from garnishment or attachment an unreasonable amount of property. *Id.* at 337.

Minnesota Constitution, article I, section 12, provides in pertinent part:

> A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law.

The Supreme Court has defined "reasonable amount" as follows:

> If an exemption has no limit of any kind, then it is unconstitutional. On the other hand, an exemption with a dollar, an objective, or a statutory "to the extent reasonably necessary" limit is a proper legislative determination of reasonableness.
> *Id.* at 337. (citing *In re Haggerty,* 448 N.W.2d 363, 366 (Minn. 1989)).

Section 550.37 states in pertinent part:

> Subdivision 1. The property mentioned in this section is not liable to attachment, garnishment, or sale on any final process, issued from any court.
> . . .
> Subd. 24. Employee Benefits. The debtors right to receive present or future payments, or payments received by the debtor, under a stock bonus, pension, profit sharing, annuity, individual retirement account, individual retirement annuity, simplified employee pension, or similar plan or contract on

> account of illness, disability, death, age, or length of service:
>
> (1) to the extent the plan or contract is described in section 401(a), 403, 408, or 457 of the Internal Revenue Code of 1986, as amended, or payments under the plan or contract are or will be as provided in section 402(a)(5), 403(b)(8), or 408(d)(3) of the Internal Code of 1986, as amended; or
>
> (2) to the extent of the debtor's aggregate interest under all plans and contracts up to a present value of $30,000 and additional amounts under all the plans and contracts to the extent reasonably necessary for the support of the debtor and any spouse or dependents of the debtor.

The court concluded that section 550.37, subdivision 24, clause (1), contains no limit on the amount that may be accumulated in a plan or contract and, thus, clause (1) violates Minnesota Constitution, article I, section 12. While the total amount accumulated in a plan or contract under subdivision 24, clause (1), is affected by the amount invested, it is not limited by it. The amount the account might accumulate is limited by the rate of return. Neither section 550.37, subdivision 24, clause (1), nor any section of the Internal Revenue Code referenced in clause (1) limit the rate of return an individual might achieve. Thus, there is no objective criteria which limits the total that might be accumulated. *Id.* at 338.

Section 550.37, subdivision 24, clause (2), contains a dollar amount and a "to the extent reasonably necessary" phrase, so clause (2) withstands constitutional scrutiny. The court found clause (1) to be severable from the remainder of the statute and concluded that clause (2) could remain in effect. *Id.* at 339.

Minnesota Statutes, section 609.749
Criminal Code - Stalking

State v. Paul Edward Orsello

Minnesota Supreme Court
September 12, 1996
as amended on grant of rehearing
October 3, 1996

In *State v. Orsello*, 554 N.W.2d 70 (Minn. 1996), the court concluded that the crime of stalking created by section 609.749, is a crime of "specific intent" and not a crime of "general intent." *Id.* at 77.

The court stated that the crime of stalking is a "new legislative creation," and currently there is no widely accepted legal definition for it. The court generally defined stalking as encompassing predatory behavior directed usually at a specific individual. *Id.* at 71-72. Section 609.749, the stalking statute under which Orsello was convicted, states:

> Subdivision 1. **Definition.** As used in this section, "harass" means to engage in intentional conduct in a manner that:
>
> (1) would cause a reasonable person under the circumstances to feel oppressed, persecuted, or intimidated; and
>
> (2) causes this reaction on the part of the victim.
>
> Subd. 2. **Harassment in Stalking Crimes.** A person who harasses another by committing any of the following acts is guilty of a gross misdemeanor:
>
> (1) directly or indirectly manifests a purpose or intent to injure the person, property, or rights of another by the commission of an unlawful act;
>
> (2) stalks, follows, or pursues another;
>
> (3) returns to the property of another if the actor is without claim of right to the property or consent of one with authority to consent;
>
> (4) repeatedly makes telephone calls, or induces the victims to make telephone calls to the actor, whether or not conversation ensues;

> (5) makes or causes the telephone of another repeatedly or continuously to ring;
>
> (6) repeatedly uses the mail or delivers or causes the delivery of letters, telegrams, packages, or other objects; or
>
> (7) engages in any other harassing conduct that interferes with another person or intrudes on the person's privacy or liberty.

General intent requires only that the defendant engaged intentionally in specific, prohibited conduct. Specific intent requires that the defendant acted with the intention to produce a specific result, such as in a case of premeditated murder. *Id.* at 72. In section 609.02, the legislature set forth the following guidelines as to how it would designate criminal intent:

> Subd. 9. **Mental State.** (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," were some form of the verbs "no" 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, is successful, will cause that result. In addition, except as provided in clause (6), the actor must have knowledge of those facts which are necessary to make the actors 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. . . .

The state argued in this case that none of the "specific intent" language of section 609.02, subdivision 9, is present in section 609.749, the stalking statute. The court determined that the analysis must go further because of the "peculiar drafting of the statute." The court noted "two unusual aspects of the statute." First, the statute includes

a detailed list of acts constituting stalking; and second, its definition subdivision states that "harass" means to engage in intentional conduct in a manner that . . . ." The court continued that the phrases "intentional conduct" and "in a manner that," appear to indicate an intent greater than general intent. *Id.* at 73-74.

The court found that the behaviors listed in section 609.749, subdivision 2, have a "close similarity to the definitions of other crimes, all of which clearly require specific intent." The court stated that these similarities show a legislative intent to make the criminal statutes consistent. Thus, if the court concluded that the conviction of a crime, based on identical behavior, requires one level of intent under one statutory provision and another level of intent under a second statutory provision, this would contradict the purpose of making the criminal statutes consistent. The court concluded that the acts listed in subdivision 2, which do not have parallels elsewhere in the criminal code, by their language and presence in subdivision 2, imply the requirement of specific intent. *Id.* at 75.

The court also believed that the language of subdivision 1 reinforces the conclusion that specific intent is required. The court points out that in subdivision 1 "harass means to engage in intentional conduct in a manner that . . . ." The court stated that a general intent version of the statute would not need the adjective "intentional" or the phrase "in a manner that." The majority of the court concluded that the addition of these words demonstrated that section 609.749 must require specific intent. *Id.* at 75-76.

The majority also stated that it found merit in Orsello's constitutional argument and stated that if the court were to conclude that section 609.749 required only general intent,

the statute might be void for vagueness, and thus unconstitutional. The majority did not base its decision on the resolution of the constitutional issue, but did see it as buttressing its statutory analysis. The majority stated that if the legislature intends that stalking be a general intent crime, it can clarify section 609.749 with an amendment. *Id.* at 76-77.

536 N.W.2d 613, State ex rel. Graham v. Klumpp, (Minn. 1995)

STATE of Minnesota, ex. rel. John Remington GRAHAM, Respondent,
v.
William F. KLUMPP, Jr., Appellant,
and
State of Minnesota, Appellant,
Todd Michael Davis, Anthony Carl Eklund, Respondents.

Nos. C4-94-1016, C1-94-2253 and C3-94-2254.
Supreme Court of Minnesota.
Aug. 25, 1995.

Syllabus by the Court

The governor's request for the attorney general to prosecute two individuals, who had not been formally charged with a crime at the time of the request pursuant to Minn.Stat. s 8.01 was valid.

Catharine F. Haukedahl, Sol. Gen., St. Paul, and William F. Klumpp, Jr., Asst. Atty. Gen., St. Paul, for appellant.

Donald F. Ryan, Crow Wing County Atty., Brainerd, for John Remington Graham, C4-94-1016.

Howard I. Bass, Minneapolis, for Todd Michael Davis, C1-94-2253.

Donald George Kirchner, Brainerd, for Anthony Carl Eklund, C3-94-2254.

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

OPINION

TOMLJANOVICH, Justice.

This case arises from three interrelated claims that were filed in response to the Governor of Minnesota's request pursuant to Minn.Stat. s 8.01 (1992) for the attorney general to prosecute Anthony Eklund and Todd Davis for alleged criminal sexual conduct and the Crow Wing County District Court's simultaneous appointment pursuant to Minn.Stat. s 388.12 (1992) of the attorney general to prosecute Eklund and Davis. The court of appeals concluded that under Minn.Stat. s 8.01 the governor's request for the attorney general to prosecute Eklund and Davis

was invalid. As a result, the district court dismissed the indictments which had been obtained against Eklund and Davis. We reverse, concluding that the governor's request for the attorney general to prosecute Eklund and Davis pursuant to Minn.Stat. s 8.01 was valid. Accordingly, we reinstate the indictments against Eklund and Davis.

On February 27, 1992, the Crow Wing County Attorney John Remington Graham filed a criminal complaint against Eklund alleging criminal sexual conduct. Graham later dismissed the complaint. On June 26, 1992, Graham received a police report suggesting that Davis be charged with criminal sexual conduct. Graham did not file a criminal complaint against Davis. Subsequently, a delegation of citizens from Crow Wing County including the sheriff and two county commissioners requested that the attorney general and the governor review a number of instances of alleged intra-familial sexual misconduct which the citizens felt Graham erroneously had declined to prosecute. After reviewing these cases, the attorney general asked Graham to appoint the attorney general as a special prosecutor in the Eklund and Davis cases pursuant to Minn.Stat. s 8.01. On February 2 and 4, 1993, Graham refused this request.

On February 4, 1993, pursuant to Minn.Stat. s 8.01, the governor requested, in writing, the attorney general prosecute these two cases. At the time the governor made this request, neither Eklund nor Davis had been formally charged with a crime. The attorney general in turn appointed several of his assistant attorneys general to act on his behalf in these cases. Of those assistants, appellant William F. Klumpp, Jr. took the oath of office of Special Assistant Crow Wing County Attorney. On that same day, the attorney general also moved *ex parte* for an order from the Crow Wing County District Court appointing the attorney general and the attorney general's designees to act as special prosecutor in these two cases pursuant to Minn.Stat. s 388.12. The district court granted this motion and issued an order appointing the attorney general as a special prosecutor in the Eklund and Davis cases.

Klumpp obtained grand jury indictments against Eklund and Davis. Davis filed a motion to dismiss the indictment, arguing that the governor's request was invalid under Minn.Stat. s 8.01; and the district court's appointment was invalid under Minn.Stat. s 388.12. The district court denied the motion. Graham then brought an action in the nature of *quo warranto* (FN1) or, in the alternative, for a declaratory judgment claiming that the governor's request and the district court's appointment were legally invalid and constituted usurpation of Graham's office. The district court concluded that Minn.Stat. s 8.01 authorized the governor to appoint the attorney general, and dismissed Graham's complaint for failure to state a claim for which relief could be granted. The district court did not address the relevancy or the validity of the district court's appointment of the attorney general pursuant to Minn.Stat. s 388.12.

The court of appeals reversed the judgment of the district court interpreting Minn.Stat. s 8.01 as allowing the governor to request a special prosecutor only if formal legal process has been commenced. *State ex rel. Graham v. Klumpp,* 523 N.W.2d 8, 10 (Minn.App.1994)- ***615** . Because neither Eklund nor Davis had been charged with a crime when the governor requested the attorney general to prosecute them, the court of appeals concluded the governor's action was invalid. *Id.* at 11. The court of appeals further stated: "[b]ecause of our decision, we need not review [the] issue" of the validity of the appointment of the prosecutor by the district court pursuant to section 388.12. *Id.*

Based on the court of appeals' decision, Eklund and Davis filed motions claiming the indictments Klumpp obtained against them should be dismissed, because the governor's request was invalid. On October 31, 1994, the district court dismissed both indictments and the state filed the present pre-trial appeal.

Two issues are presented on appeal: whether the governor's request for the attorney general to prosecute Eklund and Davis was valid under Minn.Stat. s 8.01, and whether the Crow Wing County District Court's appointment of the attorney general was valid under Minn.Stat. s 388.12. Resolution of these issues will determine whether the district court appropriately dismissed the indictments obtained against Eklund and Davis.

[1][2] A district court's dismissal of a complaint is reviewed *de novo. See Elzie v. Commissioner of Pub. Safety,* 298 N.W.2d 29, 32 (Minn.1980). Similarly, whether the district court properly construed a statute is reviewed *de novo. Hibbing Educ. Ass'n v. Public Employment Relations Bd.,* 369 N.W.2d 527, 529 (Minn.1985).

[3] Section 8.01 states in relevant part:

> Whenever the governor shall so request, in writing, the attorney general shall prosecute any person charged with an indictable offense, and in all such cases may attend upon the grand jury and exercise the powers of a county attorney.

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Minn.Stat. s 645.16 (1994). Where the intention of the legislature is clearly manifested by plain unambiguous language, no construction is necessary or permitted. *Lenz v. Coon Creek Watershed Dist.,* 278 Minn. 1, 153 N.W.2d 209 (1967).

[4] We conclude that at least two reasonable interpretations of section 8.01 exist. The phrase "in all such cases" creates an ambiguity because it is not clear to which cases it is referring. One interpretation is that the phrase "in all such cases" refers to cases in which a person is charged with an indictable offense. Under this interpretation the statute

reads:

> Whenever the governor shall so request, in writing, the attorney general shall prosecute any person charged with an indictable offense, and in [all cases where a person is charged with an indictable offense, the attorney general] may attend upon the grand jury and exercise the powers of a county attorney.

Based on this interpretation of the statute, the parties argue over whether the word "charged" should be defined narrowly to mean a person is charged only when formal legal process has been commenced against that individual, or whether the word "charged" should be defined broadly so that to charge a person encompasses accusing a person of a crime as well as formally charging that person with a crime.

Under another interpretation of this statute, which we believe is correct, the phrase "in all such cases" refers to cases where the governor has made a request in writing of the attorney general to prosecute. Using this interpretation, the statute reads:

> Whenever the governor shall so request, in writing, the attorney general shall prosecute any person charged with an indictable offense, and [whenever the governor shall so request, in writing, the attorney general] may attend upon the grand jury and exercise the powers of a county attorney.

Previously, we have treated the phrase "in all such cases" as referring to all such cases where the governor so requests, in writing. *See State v. Connelly,* 249 Minn. 429, 432-35, 82 N.W.2d 489, 492-93 (1957). We continue to believe that this is the appropriate reading of the statute.

***616.** Under this construction we believe that the first portion of this statute "whenever the governor shall so request, in writing, the attorney general shall prosecute any person charged with an indictable offense" is a directive mandating that the attorney general prosecute if a person is charged with an indictable offense. The second portion of the statute gives the attorney general the discretion to attend upon the grand jury and exercise the powers of a county attorney whenever the governor shall so request, in writing.

[5] In this case, neither Eklund nor Davis had been formally charged with a crime, however, each was accused of sexual abuse. The attorney general obtained a grand jury indictment against them. Had the attorney general charged them by complaint, then we would have to decide whether the word "charge" means formally charging a person or also means accusing a person. Because the attorney general decided to attend upon a grand jury, this portion of the statute is not implicated. Instead, we believe that in accordance with the statute, upon the governor

requesting, in writing, that the attorney general should prosecute Eklund and Davis, the attorney general attended upon the grand jury and obtained an indictment. Thus, we believe that the governor's request and the subsequent indictments were valid.

Having decided the governor validly requested the attorney general to prosecute Eklund and Davis pursuant to Minn.Stat. s 8.01, we decline to consider the validity of the district court's appointment of the attorney general pursuant to Minn.Stat. s 388.12. Although there may be constitutional objections to this statute, we need not resolve those considerations at this date.

Reversed.

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

FN1. An action in the nature of *quo warranto* is a "common law writ designed to test whether a person exercising power is legally entitled to do so. * * * It is intended to prevent exercises of powers that are not conferred by law * * *." *Black's Law Dictionary* 1256 (6th ed. 1990).

530 N.W.2d 539, Current Technology Concepts, Inc. v. Irie Enterprises, Inc., (Minn. 1995)

CURRENT TECHNOLOGY CONCEPTS, INC., Plaintiffs,
v.
IRIE ENTERPRISES, INC., d/b/a Irie Computer, et al., Defendants.

No. C1-94-289.
Supreme Court of Minnesota.
April 28, 1995.

****540*** *Syllabus by the Court*

1. Consideration paid for promises set forth in parties' agreement, which include defendant's promise to enter into a Reseller Agreement with plaintiff allowing plaintiff to resell defendant's software and hardware products, constitutes a franchise fee under the Minnesota Franchise Act, Minn.Stat. s 80C.01, subds. 4, 9 (1994).

2. The parties' Reseller Agreements are not excluded from the Minnesota Franchise Act's coverage under Minn.Stat. s 80C.01, subd. 4(f) (1994).

Mark J. Frenz, Margaret K. Savage, Briggs and Morgan, Minneapolis, for plaintiffs.

Robert G. Morrison, pro hac vice, Ann Arbor, MI, for defendants.

OPINION

PAGE, Justice.

This case presents certified questions from the United States District Court, District of Minnesota, which ask us to determine whether an agreement between Irie Enterprises, Inc. (Irie), a Michigan corporation, and Current Technology Concepts, Inc. (CTC), a Minnesota corporation, constitutes a franchise governed by the Minnesota Franchise Act (the Act), Minn.Stat. ss 80C.01-.30 (1994). (FN1) The claims underlying this action arose when Irie terminated an agreement between the two corporations which gave CTC the right to market Irie's computer software and hardware products. In response to Irie's termination of the agreement, CTC filed suit in the U.S. District Court, District of Minnesota, alleging, among other things, that Irie violated the Act. The court, Judge Donald Lay presiding, (FN2) concluded as

a matter of law that the Act applied to the agreement and that Irie violated the Act. A jury trial was held on the issue of damages and the jury returned a verdict of $1.3 million in CTC's favor. Irie moved for judgment as a matter of law, a new trial, or ***541** remittitur, and, as a result, Judge Lay certified, pursuant to Minn.Stat. s 480.061 (1994), four questions to this court. As we have rephrased them, (FN3) the questions we answer are:

1. Was the $125,000 payment required by the CA$H Agreement consideration for the Reseller Agreement such that the payment constitutes a "franchise fee" under the Act?

2. Are the parties' Reseller Agreements excluded from coverage under the Act by the exception to the Act found in Minn.Stat. s 80C.01, subd. 4(f), which provides that a franchise does not include any agreement whereby the franchisee is required to pay less than $100 on an annual basis?

We answer the first question in the affirmative. We answer the second question in the negative. We decline to answer the federal district court's certified questions as to: (a) whether the relationship between CTC and Irie, based on the overall evidence, constituted a franchise to be governed by the Minnesota Franchise Act; and (b) whether the damage award was too speculative, remote, or conjectural or excessive. Neither question presents an issue "as to which it appears * * * there is no controlling precedent" in our prior decisions. Minn.Stat. s 480.061, subd. 1 (1994); *In re Medill,* 119 B.R. 685 (Bankr.D.Minn.1990) (holding that certification should be confined to instances where the state supreme court has never addressed the dispositive issue or has indicated a willingness to change the substantive rule of law).

In an agreement (CA$H Agreement) dated June 22, 1989, CTC purchased from Irie a computer software program designed, for billing purposes, to track and monitor the use and distribution of a hospital's durable, reusable medical equipment. The program is called the Computerized Asset System for Hospitals (CA$H System). CTC agreed to pay Irie $125,000 for the CA$H System. As part of the consideration for the CA$H Agreement, Irie agreed to enter into a separate Reseller Agreement (Reseller Agreement) with CTC allowing CTC to resell Irie's other software and hardware products. Irie entered into this Reseller Agreement with CTC on June 22, 1989. On December 23, 1990, CTC and Irie renewed the Reseller Agreement (Renewal Agreement) for a term of 36 months. (FN4)

On April 2, 1992, Irie sent CTC a letter terminating the Renewal Agreement. Irie's stated reason for terminating the Renewal Agreement was that CTC's account was delinquent. The letter provided that CTC had 30 days to cure the alleged delinquency by paying its outstanding balance to Irie. CTC ***542** believed that Irie terminated the Renewal Agreement to

usurp from CTC the market that CTC created for Irie's products. In response to the termination letter, CTC filed this lawsuit on April 29, 1992. In its amended complaint, CTC alleged Irie: (1) breached the covenant of good faith implicit in the CA$H Agreement; (2) breached various warranties under the CA$H agreement; (3) breached the covenant of good faith implicit in the Renewal Agreement; (4) violated the Minnesota Franchise Act, Minn.Stat. ss 80C.01-.30 (1994); (5) violated the Sales Representative Agreement Act, Minn.Stat. s 325E.37 (1994); (6) engaged in defamation and trade libel; and (7) engaged in tortious interference with contract. (FN5) After discovery, the court ordered the parties to file cross-motions for partial summary judgment on whether the Act applied to the parties' relationship. The court denied Irie's motion and granted CTC's, concluding that the Act applied and that Irie had violated the Act's registration and termination-notice provisions.

A jury trial was held on the issue of CTC's damages. At that trial, CTC presented the only evidence regarding damages. That evidence projected CTC's lost profits resulting from the Renewal Agreement's termination at $1,364,109. The jury returned a verdict in CTC's favor and awarded CTC $1.3 million in damages. The trial court reduced the award by the amount the jury calculated was outstanding on CTC's account with Irie, and entered judgment for CTC in the amount of $1,277,113.27. Irie's motion for judgment as a matter of law, a new trial, or remittitur resulted in the trial court's certification of the questions we now consider.

Under Minnesota law, a franchise is an agreement: (1) by which the franchisee is granted the right to offer or distribute goods using the franchisor's commercial symbol or related characteristics; (2) in which the parties have a community of interest in the marketing of goods or services; and (3) for which the franchisee pays a franchise fee. Minn.Stat. s 80C.01, subd. 4(a) (1994). Our franchise law, however, excludes from the definition of franchise any agreement "whereby the franchisee is required to pay less than $100 on an annual basis." Minn.Stat. s 80C.01, subd. 4(f) (1994).

[1] The first certified question asks whether the $125,000 payment required by the CA$H Agreement was consideration for the Reseller Agreement such that the payment constitutes a franchise fee under the Act.

> "Franchise fee" means any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay for the right to enter into a business or to continue a business under a franchise agreement, including, but not limited to, the payment either in lump sum or by installments of an initial capital investment fee, any fee or charges based upon a percentage of gross or net sales whether or not referred to as royalty fees, any payment for goods or services, or any training fees or training school fees or charges * * *.

Minn.Stat. s 80C.01, subd. 9 (1994).

Relying on paragraph 8.0 (FN6) of the CA$H Agreement, CTC argues the $125,000 it paid for the CA$H System was also consideration for the right to enter into the business of becoming a "reseller" of Irie software and hardware products and thus constituted the payment of a franchise fee under the Act. Irie argues that when read together, paragraphs 6.1 (FN7) and 8.0 of the CA$H Agreement are in conflict and, therefore, that the agreement is ambiguous as to whether the $125,000 payment constitutes consideration solely for the CA$H System or for both the CA$H System and the Reseller Agreement. Irie ***543** further argues that because CTC was responsible for drafting the agreement, any ambiguity should be construed against CTC.

[2][3][4][5] The determination of whether a contract is ambiguous is a question of law. *Lamb Plumbing & Heating Co. v. Kraus-Anderson,* 296 N.W.2d 859, 862 (Minn.1980). In making that determination, a court must give the contract language its plain and ordinary meaning. *Employers Mut. Liab. Ins. Co. v. Eagles Lodge,* 282 Minn. 477, 479, 165 N.W.2d 554, 556 (1969). A contract must be interpreted in a way that gives all of its provisions meaning. *Independent Sch. Dist. No. 877 v. Loberg Plumbing & Heating Co.,* 266 Minn. 426, 436, 123 N.W.2d 793, 799-800 (1963). A contract is ambiguous if its language is reasonably susceptible of more than one interpretation. *Metro Office Parks Co. v. Control Data Corp.,* 295 Minn. 348, 351, 205 N.W.2d 121, 123 (1973); *Lamb,* 296 N.W.2d at 862. If a contract is ambiguous, it must be construed against its drafter. *Lowry v. Kneeland,* 263 Minn. 537, 541, 117 N.W.2d 207, 210 (1962).

We do not find paragraphs 6.1 and 8.0 of the CA$H Agreement in conflict and, therefore, we conclude that the CA$H Agreement is not ambiguous. It is well-settled that one promise may act as consideration for multiple promises. *See, e.g.,* Restatement (Second) of Contracts s 80 cmt. a (1981) ("A single performance or return promise may thus furnish consideration for any number of promises."); *Pine River State Bank v. Mettille,* 333 N.W.2d 622, 629 (Minn.1983) (citing Restatement (Second) of Contracts s 80, cmt. a (1981)). Here, the $125,000 payment from CTC was consideration for the promises contained in paragraphs 6.1 and 8.0 of the CA$H Agreement. Although it is true, as Irie argues, that paragraph 6.1 indicates CTC paid the $125,000 for the CA$H System, paragraph 6.1 does not indicate the payment was exclusively for the CA$H System. To read exclusivity into paragraph 6.1 would leave paragraph 8.0 without meaning, violating the rule that contracts are to be interpreted to give every provision meaning. Thus, we conclude that the $125,000 payment required by the CA$H Agreement for the CA$H System also served as consideration for the Reseller Agreement and, therefore, constitutes a "fee * * * that a franchisee * * * agrees to pay for the right to enter into a business" under the Act. Minn.Stat. s 80C.01, subd. 9. We answer the first certified question in the affirmative.

[6] The second certified question we consider asks whether the parties' Reseller and Renewal Agreements are excluded from the Act's coverage because of the exception to coverage found in Minn.Stat. s 80C.01, subd. 4(f) (1994). Subdivision 4(f) provides that a " '[f]ranchise' does not include any contract, lease or other agreement whereby the franchisee is required to pay less than $100 on an annual basis * * *."

[7][8][9] When interpreting a statute, our role is to effectuate the intention of the legislature. *Peterson v. Haule,* 304 Minn. 160, 170, 230 N.W.2d 51, 57 (1975). In doing so, we construe technical words according to their technical meaning and other words according to their common and approved usage and the rules of grammar. Minn.Stat. s 645.08 (1994). When the language of a statute, so construed, is not ambiguous, a court must apply its plain meaning. *McCaleb v. Jackson,* 307 Minn. 15, 17 n.2, 239 N.W.2d 187, 188 n.2 (1976). A statute is ambiguous if it is reasonably susceptible to more than one interpretation. *Tuma v. Commissioner of Economic Sec.,* 386 N.W.2d 702, 706 (Minn.1986). Our reading of Minn.Stat. s 80C.01, subd. 4(f), leads us to conclude that it is at best ambiguous.

[10] When the language of a statute is ambiguous, we apply the rules of statutory construction which allow us to examine the legislative history surrounding the statute's enactment to assist in interpreting the statute. (FN8) Minn.Stat. s 645.16 (1994). The Minnesota Franchise Act, Minn.Stat. ss 80C.01-.30, is remedial legislation. *Martin Investors, Inc. v. Vander Bie,* 269 N.W.2d 868, 874 (Minn.1978). When engaging in ***544.** statutory construction, we interpret remedial legislation broadly to better effectuate its purpose. *Harrison v. Schafer Constr. Co.,* 257 N.W.2d 336 (Minn.1977). We interpret exceptions contained within remedial legislation narrowly. *Nordling v. Ford Motor Co.,* 231 Minn. 68, 77, 42 N.W.2d 576, 582 (1950).

The language that is now subdivision 4(f) was added to the statute by the Act of July 1, 1981, ch. 165, s 1, 1981 Minn.Laws 492, 493. Mary Brophy, Commissioner of the Securities and Real Estate Division of the Commerce Department, testifying in support of the amendment before the state senate's Consumer Protection Subcommittee of the Commerce Committee, (FN9) indicated that subdivision 4(f) "excludes certain direct sales which were not contemplated by" the Act. Hearing on S.F. No. 443, *Subcomm. on Consumer Protection of the Comm. on Commerce,* 72nd Minn.Leg., March 17, 1981 (audio tape). Commissioner Brophy was the only person to offer an explanation of subdivision 4(f).

The term "direct sale" generally involves the concept of selling products directly from the manufacturer to the ultimate consumer. *See* Irving J. Shapiro, *Dictionary of Marketing Terms* 80 (1981) (defining "direct selling" and "direct marketing" as "the activity of selling to consumers or industrial users without the use of middlemen," and also referring the reader to "direct channel," defined as "[a] channel of distribution characterized

by the absence of middlemen. The maker sells directly to the user."); *Dictionary of Marketing Terms* 58-59 (Peter D. Bennett ed., 1988) (defining "direct selling" as a "[p]rocess whereby the firm responsible for production sells to the user, ultimate consumer, or retailer (FN10) without intervening middlemen"); *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 4, 81 S.Ct. 435, 437, 5 L.Ed.2d 377, 381 (1961) (noting that where the sales contract prohibited resale of natural gas by purchaser, the parties had engaged in a "direct" sale of natural gas).

Based on the legislative history of subdivision 4(f) and our understanding of the term "direct sale," we conclude that the exception to the Act found in subdivision 4(f) was not intended to apply to the Reseller and Renewal Agreements between CTC and Irie because the agreements did not contemplate Irie engaging in a direct sale of its software and hardware products to the ultimate users or consumers. Having concluded that subdivision 4(f) was not intended to apply to the Reseller and Renewal Agreements between Irie and CTC, we answer the second certified question in the negative.

In response to the first certified question, we hold that the consideration required by the CA$H Agreement for the CA$H System also served as consideration for the Reseller Agreement and, therefore, constitutes a "franchise fee" under the Act. In response to the second certified question, we hold that the Reseller and Renewal Agreements between CTC and Irie are not excluded from the Act's coverage by Minn.Stat. s 80C.01, subd. 4(f).

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

FN1. The Act provides, in relevant part:

> Subd. 4. "Franchise" means (a) a contract or agreement, either express or implied, whether oral or written, for a definite or indefinite period, between two or more persons:
>
> (1) by which a franchisee is granted the right to engage in the business of offering or distributing goods or services using the franchisor's trade name, trademark, service mark, logotype, advertising, or other commercial symbol or related characteristics;
>
> (2) in which the franchisor and franchisee have a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise; and
>
> (3) for which the franchisee pays, directly or indirectly, a franchise fee; * * *
>
> (f) "Franchise" does not include any contract, lease or other

agreement whereby the franchisee is required to pay less than $100 on an annual basis * * *.

Minn.Stat. s 80C.01, subd. 4 (1994).

FN2. Senior U.S. Circuit Judge sitting by designation as a judge for the U.S. District Court, District of Minnesota.

FN3. The certified questions provide that "the Minnesota Supreme Court should not be bound by the precise wording of the certified questions, and should feel free to rephrase the issues in light of the record in order to fully answer them." The questions originally read in relevant part as follows:

1. Under the circumstances, does the consideration set forth in the CA$H Agreement for the Reseller Agreement constitute a "franchisee fee" as provided in the Minnesota Franchise Act, Minnesota Statutes s 80C.01 *et seq.*? *See* Minn.Stat. s 80C.01, subds. 4(3) and 9 (1992).

2. The Reseller Agreement contains the terms of payment as follows: (i) payments to IRIE for demonstration copies based on a percentage (5%) of the list price of the software; (ii) payments to IRIE for hardware at prices that exceeded the bona fide wholesale price and "License Fees"; (iii) the sharing of revenue based on a percentage of IRIE's list price for the products sold by CTC; (iv) payments for an advertising program featuring and promoting IRIE's name and products; and (v) payments for the employment of sales personnel. Do any or all of the above payments and fees made by CTC constitute compliance with the $100 annual requirement of the Minnesota Franchise Act?

3. Under Minnesota law, based on the overall evidence, did the relationship between CTC and IRIE constitute a franchise to be governed by the Minnesota Franchise Act?

4. Under the evidence presented in this case, applying Minnesota law, can the verdict be sustained or should it be set aside as being (a) too speculative, remote or conjectural, or (b) excessive?

***544_** FN4. The date on the first page of the Renewal Agreement is December 23, 1990. However, Irie apparently failed to sign the contract until March 26, 1991. Because we do not believe it affects our resolution of the certified questions, we assume, without deciding, that the parties intended the 36-month period to begin on December 23, 1990.

FN5. The CA$H Agreement contains a mandatory arbitration provision. At a preliminary hearing, all of the claims subject to that arbitration provision were dismissed.

FN6. Paragraph 8.0 of the CA$H Agreement provides:

As part of the consideration for this Agreement, IRIE agrees to enter into a Reseller Agreement with CTC allowing CTC to resell other software and hardware Products of IRIE.

FN7. Paragraph 6.1 of the CA$H Agreement provides:

6.1 CTC shall pay IRIE for ownership of the CA$H System a sum not to exceed One Hundred Twenty-five Thousand Dollars ($125,000.00).

FN8. The parties did not, either in their briefs or oral argument to the court, direct our attention to the legislative history of subdivision 4(f). However, in order to determine subdivision 4(f)'s meaning, we have reviewed the legislative history sua sponte.

FN9. According to statements made at that hearing, Commissioner Brophy and her staff helped draft subdivision 4(f), which was one of a number of amendments proposed by the Commerce Department. Hearing on S.F. No. 443, *Subcomm. on Consumer Protection of the Comm. on Commerce,* 72nd Minn.Leg., March 17, 1981 (audio tape) (comments of Senator Tennessen, sponsor of the bill).

FN10. Based on the facts before us, we believe the term "retailer" contained in this definition does not apply to this case.

530 N.W.2d 834, Boschee v. Duevel, (Minn.App. 1995)

Susan M. and Robert J. BOSCHEE, co-trustees for the Next of Kin of Troy John Boschee, Decedent, Appellants,
v.
Julia Margaret DUEVEL, et al., Respondents.

No. C6-94-1745.
Court of Appeals of Minnesota.
April 25, 1995.
Review Denied June 14, 1995.

***837** Syllabus by the Court

1. In-line skates constitute a "vehicle" under Minnesota Statutes Chapter 169, Minnesota's highway traffic regulation act, when being used upon a highway.

2. A trial court does not abuse its broad discretion when it finds, after questioning and instructing the jury, that a party has not been prejudiced by an altercation occurring in the audience in the jury's presence.

3. A trial court does not abuse its discretion in denying a motion for a new trial on grounds due to a "late" legal ruling where the party fails to show it was deprived of a fair trial.

4. A trial court does not abuse its discretion in denying a motion for a new trial on grounds that cross-examination during an offer of proof exceeded proper limits where no prejudice has been proved.

5. No abuse of discretion exists when a trial court denies a new trial on grounds it erroneously failed to allow the moving party to voir dire the opposing party's expert, where the party fails to show deprivation of a fair trial.

6. A party is not entitled to a new trial on grounds of surprise when an expert opinion was disclosed in discovery.

7. A trial court does not abuse its discretion by denying a new trial motion where the verdict is not manifestly contrary to the evidence.

8. A trial court does not abuse its discretion by denying JNOV where reasonable minds could differ on the proper outcome of the case.

Randall J. Fuller, Robert F. Mannella, Babcock, Locher, Neilson & Mannella, Anoka, for appellants.

Frederick L. Grunke, Rajkowski Hansmeier, Ltd., St. Cloud, for respondents.

Considered and decided by HARTEN, P.J., HUSPENI and MINENKO, (FN*) JJ.

OPINION

EUGENE MINENKO, Judge.

Appellants, co-trustees of the heirs of decedent Troy Boschee, brought a wrongful death action against Julia and Joseph Duevel, the driver and the owner of the automobile with which Boschee had a fatal collision while in-line skating. The jury found Boschee was 85 percent causally negligent and Julia Duevel 15 percent. Appellants moved for a new trial and judgment notwithstanding the verdict (JNOV). The motions were denied and judgment for respondents was entered. Appellants appeal the denial of its motions. We affirm.

FACTS

On the evening of April 1, 1991, nineteen-year-old Troy Boschee was in-line skating with two friends, Donald Gonse and Jesse Erickson, north along County Road 5 in Anoka County. They were skating on the right-hand side of the road, in either the roadway or on the nine-foot paved shoulder. It was dark and the area was not lit by area streetlights.

A car also going north on County Road 5, driven by respondent Julia Duevel, approached the three skaters from behind. Duevel was driving approximately 40 miles per hour, below the 55 miles-per-hour speed ***838** limit, and was using her low-beam headlights. Upon perceiving Duevel's car, Gonse and Erickson crossed the road to the left shoulder; Boschee remained on the right. Duevel testified that she saw and heard Gonse and Erickson, but did not see Boschee until her car struck him. Boschee died on April 4, 1991, of injuries sustained in the accident. His parents, as co-trustees for his heirs, brought a wrongful death action against Julia Duevel and her husband, the automobile owner.

Testimony differed on the critical issue of where Boschee was when the accident occurred: whether he was in Duevel's lane of travel or whether Duevel left the roadway and struck Boschee on the shoulder. Boschee's body ultimately came to rest on the shoulder. Law enforcement officers who investigated the accident located markings indicating points where Boschee's body touched down as he tumbled following impact. Two officers testified that this evidence was insufficient to determine a point of impact. Both parties called experts to testify on this

issue. Appellants' expert testified to a specific point of impact in the shoulder, while respondents' expert indicated it was impossible to ascertain the precise point of impact. He stated, however, that the evidence was consistent with an impact within the travel lane.

To illustrate his testimony, appellants' expert prepared a videotape of a computer reenactment of the accident. The respondents objected to the videotape as lacking in foundation and prejudicial. Concerns about the expert's testimony fixing a precise point of impact and testimony about x-rays were also raised. The trial court required an offer of proof away from the jury. During the offer of proof, which took approximately half a day, respondents' counsel was permitted to cross-examine the expert as to the bases for his opinions. The trial court then ruled the testimony and videotape were admissible.

On the fourth day of trial, appellants moved for a mistrial due to an incident that occurred in the audience. An exchange of words took place between Gonse and respondent Joseph Duevel as respondents were leaving the courtroom. Several of the jurors noticed the incident and one reported it, indicating she believed some of the "younger spectators" were harassing respondents and caused them to leave. The trial court asked the jurors about what they saw and whether it would affect their impartiality. After determining no prejudice had occurred, the trial court denied appellants' mistrial motion.

Early in the trial, the trial court addressed appellants' request that it rule Boschee was not a pedestrian for purposes of Minn.Stat. Ch. 169, Highway Traffic Regulation Act. The trial court said it was unlikely it would find Boschee was a pedestrian. Later, after both parties rested, respondents requested an instruction that in-line skates are a "vehicle" be given. The trial court did so, finding it necessary to classify Boschee's legal status to put the statutory instructions in context. Written jury instructions, which distinguished "vehicles" from "motor vehicles" and the statutory requirements imposed upon each, were given to the jury to use during their deliberations.

Responding to a special verdict form, the jury found both Boschee and Duevel had been causally negligent. Damages for past and future pecuniary loss were found to be $124,000; the parties stipulated to the amount of medical and funeral expenses. Appellants were precluded from receiving damages, however, because Boschee was found more negligent (85 percent) than Duevel (15 percent). Appellants moved for a new trial or for JNOV on the liability issue. The trial court denied the motions, and this appeal followed. Respondents filed a notice of review, citing evidentiary rulings as errors.

ISSUES

1. Did the trial court err in ruling as a matter of law that in-line skates constitute a vehicle for traffic code purposes?

2. Did the trial court err in denying appellants' motions for a new trial?

3. Did the trial court err in denying appellants' motion for judgment notwithstanding the verdict?

***839** ANALYSIS

1. Boschee's Legal Status as In-Line Skater

[1] The first issue presented on appeal is the legal status of in-line skates when they are being used as a means of travel upon Minnesota public highways. This is a case of first impression in Minnesota. Because it involves the construction of statutes, it is a question of law and fully reviewable on appeal. *Hibbing Educ. Ass'n v. Public Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn.1985).

[2][3] The trial court found Boschee's in-line skates should be deemed a "vehicle" for purposes of Minn.Stat. Ch. 169. "Vehicle" is broadly defined: " 'Vehicle' means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices used exclusively upon stationary rails or tracks." Minn.Stat. s 169.01, subd. 2 (1990). Vehicles are distinguished from motor vehicles because the "motor vehicle" definition excludes vehicles moved solely by human power. *See* Minn.Stat. s 169.01, subd. 3. In-line skates fall within the definition of "vehicle": as Boschee's actions show, a person using in-line skates is capable of being transported on a highway via the skates, and does so solely by human power.

"Pedestrian" is another classification in the statutes that arguably could be applied to in-line skaters. A pedestrian is "any person afoot or in a wheelchair." Minn.Stat. s 169.01, subd. 24. Out-of-state cases dealing with persons on roller skates, foot-propelled scooters, and sleds have held that persons using such devices are pedestrians for traffic regulation purposes. *See, e.g., Pekter v. Price*, 206 N.J.Super. 355, 502 A.2d 1157, 1158-59 (App.Div.1985) (affirming determination roller-skater was pedestrian under statute defining pedestrian as " 'a person afoot' "). The rationale is that

> [w]hile it is true that a pedestrian is ordinarily understood to be one who travels on foot, nevertheless the mere circumstance, that he or she has attached to his or her feet roller skates, or ice skates, or walks on stilts, or uses crutches, or is without feet and propels himself or herself along by means of a chair, or by some other mechanical device, does not clothe him or her, in a broad and general sense, with any other character than that of a pedestrian.

Eichinger v. Krouse, 144 A. 638, 639 (N.J.Err. & App.1929). These cases suggest that an in-line skater also should be ruled a pedestrian.

Given the manner in which the in-line skates were being used here, however, as transportation on a 55 miles-per-hour highway, it is reasonable to distinguish in-line skates from roller skates, scooters, and sleds. More importantly, we question the propriety of rationalizing the use of a device, like roller skates or in-line skates, to accommodate the word "afoot" in the pedestrian statute when "vehicle" by definition encompasses in-line skates. Precedent also exists, furthermore, for concluding that persons not walking are not "afoot." *See Moon v. Weeks,* 25 Md.App. 322, 333 A.2d 635, 641-42 (1975) (interpreting similar definitions for "pedestrian" and "vehicle," and finding sled was "vehicle" when being used to transport person upon highway). Appellants cite *Terrill v. Virginia Brewing Co.,* 130 Minn. 46, 49, 153 N.W. 136, 137 (1915), in which the Minnesota Supreme Court rejected the argument that a boy's sled was a motor vehicle, as grounds for ruling that in-line skates cannot be "vehicles." This case is not controlling; the trial court here ruled that in-line skates were a vehicle, not a *motor* vehicle.

[4][5] Appellants also cite several statutes governing vehicles which cannot, by their terms, reasonably be applied to in-line skaters; they contend these provisions show the legislature did not intend to include in-line skaters within the definition of "vehicle." We believe, however, that the broad definition given to "vehicle" denotes a legislative intent to regulate any mode of transportation used on Minnesota's highways, whether or not specifically contemplated at the time the statutes were enacted. Our primary object in interpreting statutes is ascertaining and giving effect to legislative intent. *Metropolitan Sports Facilities Comm'n v. General Mills, Inc.,* 470 N.W.2d 118, 125 (Minn.1991). The definition of "vehicle" is very broad, so it ***840** is not unreasonable to include within the definition devices that, by their nature, will not be subject to all of the regulations that govern vehicles, even though no specific exemption appears.

[6] We reject appellants' contention that Boschee should simply be deemed a "person." "Person" is defined as including "every natural person, firm, copartnership, association, or corporation." Minn.Stat. s 169.01, subd. 23. As this definition suggests, "person" is used to refer to those who own or operate the devices regulated; "persons" as such are not regulated. Thus, appellants' approach leaves unregulated those using in-line skates.

[7] The best solution to this issue would be for the legislature to address the legal status of in-line skaters; but until they do, we must act within the confines of the highway traffic regulation act. Because in-line skates fit within the

"vehicle" definition, it is more appropriate to classify them as such than leave them unregulated. Ideally, in-line skaters should avoid travelling upon the highway; if, however, they must do so, they must comply with pertinent statutory provisions--particularly in regard to appropriate equipment--that are in place for their safety and the safety of other travellers. We therefore conclude the trial court did not err in ruling that in-line skates constitute a "vehicle" under chapter 169. (FN1) We note, in so holding, that the provisions of chapter 169 are limited to the operation of vehicles upon public highways (and to property owned or leased by the University of Minnesota). *See* Minn.Stat. s 169.02, subd. 1 (1994).

[8] Even if the trial court had incorrectly categorized Boschee's legal status, the error did not substantially affect appellants' rights. *See* Minn.R.Civ.P. 61 (erroneous ruling is not grounds for new trial unless inconsistent with substantial justice and affects substantial rights of the parties). Appellants' concern with the ruling involves the jury instruction that, at night, vehicles must have either lights or reflectors. As the trial court found, however, it appears likely the jury would have imposed such a duty under general negligence principles. The issues of whether Duevel could have or should have seen Boschee was heavily litigated. The jury was sufficiently aware of the issue to consider whether Boschee was negligent in not taking greater safety precautions when in-line skating on a highway at night. Furthermore, if Boschee had been ruled a pedestrian, an instruction that a pedestrian is required to walk on the left-hand side of a highway, facing oncoming traffic would have been appropriate. *See* Minn.Stat. s 169.21, subd. 5. Because Boschee was on the right, this instruction would also raise a prima facie case of negligence on Boschee's part. Therefore, the trial court did not abuse its discretion by refusing to grant a new trial based on these grounds.

2. Denial of Motion for New Trial

Appellants claim the trial court erred in denying their motion for a new trial. "[T]he granting of a new trial rests in the discretion of the trial court, and the trial court's decision will be reversed only for a clear abuse of discretion." *Klein v. Klein,* 366 N.W.2d 605, 606 (Minn.App.1985), *pet. for rev. denied* (Minn. June 27, 1985).

[9][10] Appellants first cite Minn.R.Civ.P. 59.01(a), under which a moving party is entitled to a new trial for an irregularity in the proceedings. An irregularity is a "failure to adhere to a prescribed rule or method of procedure not amounting to an error in a ruling on a matter of law." 3 Douglas D. McFarland & William J. Keppel, *Minnesota Civil Practice* s 2411 (2d ed. 1990). To establish a claim, appellants must prove (1) an irregularity occurred and (2) they were deprived of a fair trial. *Nachtsheim v. Wartnick,* 411 N.W.2d 882, 890 (Minn.App.1987), *pet. for rev. denied* (Minn. Oct. 28,

1987).

The first irregularity appellants discuss is the denial of their mistrial motion stemming from the "altercation" between Gonse and Duevel. They contend the danger of prejudice warrants a new trial because jurors seemed to attribute the misbehavior to ***841** Gonse, whose conduct in turn may have been attributed to appellants.

[11][12] Steps taken by a trial court in response to an "irregularity" can cure the potential prejudice to a party. *See Norwest Bank Midland v. Shinnick,* 402 N.W.2d 818, 824 (Minn.App.1987) (no prejudice from change in order of proof; trial court explained change to the jury); *Radloff v. Jans,* 428 N.W.2d 112, 115 (Minn.App.1988) (absent contrary evidence, court must assume jury followed judge's instructions, which cured potential prejudice), *pet. for rev. denied* (Minn. Oct. 26, 1988). The trial court's response here cured any potential prejudice to appellants. The trial court immediately questioned the jurors about whether the incident would affect their impartiality and reminded them of its earlier instruction to decide the case based on the evidence and instructions. Furthermore, the juror who reported the incident said she believed the parties had acted "admirably." The trial court found appellants were not prejudiced. Given these facts, we cannot find it clearly abused its discretion.

[13] Appellants also claim they were prejudiced by the "late" ruling that in-line skates constitute a vehicle. Even if the timing of the ruling was an irregularity, appellants have not shown that they were deprived of a fair trial. Appellants claim they would have adjusted their trial strategy to present additional proof on reflectorized materials, headlight/visibility issues, and the reflectiveness of Boschee's clothing. These issues were already litigated. Appellants have not indicated what evidence they would have introduced had the ruling been made earlier, nor did they request a continuance or to have the case reopened. The trial court did not clearly abuse its discretion in denying a new trial on this ground.

[14][15] Appellants also complain about the cross-examination of their expert during the offer of proof, contending it went beyond legitimate inquiry. It is unclear, however, that the trial court would have admitted the contested opinions had respondents' objections been handled while the expert, David Daubert, testified before the jury. The trial court indicated the technologies underlying the opinions were sufficiently novel to warrant inquiry away from the jury. It also found appellants were not prejudiced because they were able to make a full offer of proof on admissibility, allowing it to conclude an adequate foundation existed. This court usually defers to the trial court, "which 'has the feel of the trial,' " in its determinations of whether to grant new trial. *See Pomani v. Underwood,* 365 N.W.2d 286, 289-90 (Minn.App.1985) (quoting *Lamb*

v. Jordan, 333 N.W.2d 852, 856 (Minn.1983)). Appellants are not entitled to a new trial based on these grounds.

[16] Another irregularity appellants cite is the trial court's denial of their request to voir dire respondents' expert regarding previously undisclosed opinions. Appellants have not shown how they were deprived of a fair trial on these grounds. Therefore, no abuse of discretion has been established.

[17][18] Appellants also contend that grounds for a new trial existed under Minn.R.Civ.P. 59.01(c), which permits a new trial for accident or surprise. They claim respondents' expert was permitted to give opinion testimony not disclosed in discovery. Appellants' only example is that respondents did not disclose that an opinion would be given regarding where in relation to the fog line the car and Boschee's body were at impact or that the evidence was consistent with an impact in the roadway. This argument has no merit. Respondents' interrogatories answer 2(e)(5) states that the expert would render the following opinion:

> The physical evidence at the scene does not establish the exact position of decedent in relation to the fog line at the time of impact. The evidence is consistent with an impact point to the left of the fog line.

Court's Exhibit E. Furthermore, respondents did not move for a continuance, which is necessary to obtain a new trial on these grounds. *See Phelps v. Blomberg Roseville Clinic,* 253 N.W.2d 390, 394 (Minn.1977) ("failure to suppress is not an abuse of discretion where the opposing party does not seek a continuance").

***842.** Finally, appellants cite Minn.R.Civ.P. 59.01(g). This subsection permits a trial court to grant a new trial if the verdict is not justified by the evidence. However, "[t]he appellate court will substitute its judgment for that of the jury only if there is no evidence reasonably tending to sustain the verdict or if the verdict is manifestly and palpably against the weight of the evidence." *Norwest Bank Midland,* 402 N.W.2d at 825.

[19] Substantial evidence exists in the record upon which the jury could conclude Boschee had been more negligent than Duevel. The jury heard testimony that (1) Duevel remained in her lane of travel until after the accident; (2) Boschee was not wearing bright clothing or reflectorized materials, although skating along a highway at night; and (3) Boschee may have been in the roadway and not on the shoulder and, under the conditions of the accident, Duevel did not have adequate time to see and react to his presence. Although contested, this testimony appears to be credible; if believed, it would sustain the verdict finding Boschee 85 percent causally negligent. Therefore, a new trial is not warranted. *See Pomani,* 365 N.W.2d at 290 (where verdict

for either side would be supported by the evidence, case does not present circumstances demanding retrial).

3. Denial of Motion for Judgment Notwithstanding the Verdict

[20][21] Appellants also argue that the trial court erred in denying their motion for JNOV. Whether a JNOV should be granted is a question of law. *Edgewater Motels, Inc. v. Gatzke,* 277 N.W.2d 11, 14 (Minn.1979). A JNOV " 'may be granted only when the evidence is so overwhelming on one side that reasonable minds cannot differ as to the proper outcome.' " *Lamb,* 333 N.W.2d at 855 (quoting 4 D. McFarland & W. Keppel, Minnesota Civil Practice s 2402 (1979 & Supp.1982)). All the evidence must be considered and viewed in the light most favorable to the verdict. *Id.* The reviewing court cannot weigh the evidence or assess witness credibility. *Id.*

[22][23] If conflicting, credible testimony is presented on the issues of negligence and causation, a trial court does not err in denying a motion for JNOV. *Pomani,* 365 N.W.2d at 289. Where one party's testimony, if believed, would support the verdict, the conclusion that reasonable minds could not differ cannot be reached. *Lamb,* 333 N.W.2d at 855.

[24] Conflicting testimony was given by eyewitnesses and experts on issues of where, in relation to the fog line, the accident occurred or whether it was possible to make this determination and whether Boschee was wearing dark or light clothing on his upper body. Several conclusions could be reached, depending upon whose testimony is credited and whose is disbelieved. Therefore, a JNOV would not be appropriate.

Appellants emphasize their expert's testimony, arguing that Daubert's opinions, based on the laws of physics, compels the conclusion that Boschee was on the shoulder when he was struck by Duevel's car. This evidence, if believed, would have sustained a verdict for appellants. But the jury also heard expert testimony indicating the point of impact could not be definitely fixed. "Where conflicting opinions of expert witnesses have a reasonable basis in fact, it must be left to the trier of fact to decide who is right and the decision will not be overturned on appeal." *Hunt v. Estate of Hanson,* 356 N.W.2d 323, 325 (Minn.App.1984), *pet. for rev. denied* (Minn. Jan. 9, 1985). The jury could have chosen not to credit Daubert's testimony. *See Rud v. Flood,* 385 N.W.2d 357, 360 (Minn.App.1986) (jury does not have to accept an expert's testimony). Appellants are not entitled to a JNOV.

Because we affirm the decision in respondents' favor, we do not reach the issues raised in respondents' notice of review.

DECISION

The trial court did not err by ruling that in-line skates,

when used to transport a person upon a highway, constitute a "vehicle" under Minn.Stat. ch. 169. The trial court also did not err by denying appellants' motions for a new trial or JNOV.

Affirmed.

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

FN1. The jury instructions distinguished between "vehicles" and "motor vehicles," eliminating the potential for confusion regarding the requirements for equipment imposed upon each.

536 N.W.2d 634, R.B. v. C.S., (Minn.App. 1995)

R.B., Appellant (CX-95-365), Respondent (CX-95-527),
v.
C.S., Norman County Social Services Board, Respondents,
Elroy Hanson, as Guardian Ad Litem of C.M.A., a minor,
Respondent (CX-95-365), Appellant (CX-95-527).

Nos. CX-95-365, CX-95-527.
Court of Appeals of Minnesota.
Aug. 29, 1995.

***635** Syllabus by the Court

1. Putative father has no standing to assert paternity where another man has been adjudicated the father.

2. Biology alone does not give a father a constitutionally protected interest in a paternity determination.

3. Child who was not a party to the adjudication of paternity is not bound by that adjudication and may bring her own paternity action.

Galen J. Vaa, Moorhead, for R.B.

William Steven Kirschner, Fargo, ND, for C.S.

Thomas Opheim, Norman County Atty., Susan Rantala Nelson, Asst. County Atty., Ada, for Norman County Social Services Bd.

Elroy E. Hanson, Mahnomen, pro se.

Considered and decided by TOUSSAINT, C.J., and KALITOWSKI and HOLTAN (FN*), JJ.

***636** OPINION

HARVEY A. HOLTAN, Judge.

Appellant R.B. (putative father) challenges the trial court's determination that he lacks standing to bring a paternity action. Appellant C.M.A. challenges the trial court's denial of her request for blood tests under Minn.Stat. ss 257.55, 257.57, on grounds that it is in her best interests to know who her biological father is. We affirm in part, reverse in part, and remand.

FACTS

C.M.A. was born out of wedlock on October 6, 1993 in Fargo, North Dakota. Around the time of conception, respondent C.S. had sexual relations with C.M.A.'s mother. The putative father claims to have had relations with the child's mother around the same time. Both men knew the mother became pregnant.

C.S. held C.M.A. out as his own child, provided for her support, paid or submitted to insurance her medical bills, and exercised his visitation rights. The putative father did not visit C.M.A. at birth or when she had surgery. He did not know what her surgery was for or her birth date. The putative father visited the mother when she was at home and brought a stuffed animal, but it is unclear if it was for the 19-year-old mother or C.M.A. The putative father did not offer to pay hospital bills or provide child support. Furthermore, he did not object when the mother told him that C.S. was being named C.M.A.'s father.

C.S. signed a declaration of paternity on December 20, 1993, that was immediately submitted to the North Dakota registrar for vital statistics. C.S. and the mother also signed a stipulation concerning paternity, child support, custody and visitation that was approved by the court on January 3, 1994, and entered as an adjudication of paternity. Pursuant to stipulation, the trial court awarded physical custody of C.M.A. to her mother and joint legal custody to both parties subject to C.S.'s liberal rights of visitation. It appears from the limited record available to this court that C.M.A. was not made a party to the adjudication of paternity and was not represented in those proceedings.

C.M.A.'s mother was killed in a car accident on February 9, 1994, one month after C.S. was adjudicated C.M.A.'s father. C.S. took custody of C.M.A. and moved the court for sole custody. The trial court granted temporary custody and ordered that a guardian ad litem be appointed to make custody and visitation recommendations. (FN1) The guardian ad litem began investigating C.M.A.'s paternity and rumors surfaced that the child might be the beneficiary of an insurance settlement.

Shortly thereafter, in April 1994, the putative father brought this paternity action seeking blood tests to determine C.M.A.'s paternity. The guardian ad litem counter-claimed and cross-claimed, requesting blood tests under Minn.Stat. ss 257.55, 257.57 on grounds it would be in C.M.A.'s best interest to know who is her biological father. The guardian ad litem recommended that C.M.A. live with her biological father but raised no concerns with respondent's fitness as a parent.

The role and authority of the guardian ad litem is unclear. The guardian was appointed for the sole purpose of investigating issues of child custody and visitation. The guardian has, in the present action, asserted a claim to establish paternity. We are also concerned because the guardian has a prior

attorney-client relationship with appellant. The trial court should determine if the guardian is acting with authority and in the best interests of the child.

The trial court dismissed the action on summary judgment on grounds that the putative father lacked standing to bring a paternity action because C.M.A. has an adjudicated father. The trial court also rejected ***637** C.M.A.'s request for blood tests on grounds that she failed to state a claim upon which relief could be granted. The putative father and C.M.A. appeal from the summary judgment.

ANALYSIS

Interpretation of the Minnesota Parentage Act, Minn.Stat. ss 257.51-.74 (1994), is a matter of law that this court reviews de novo. *In re C.M.G.*, 516 N.W.2d 555, 558 (Minn.App.1994).

1. *Putative Father's Standing*

[1] In Minnesota, a putative father must be a presumed father in order to bring a paternity action under the parentage act. Minn.Stat. s 257.55, subd. 1. In this case, the putative father is not a presumed father because he has not taken the child into his home, has not held the child out as his own, has no blood tests establishing his paternity, and meets none of the other presumed father categories. *Id.*

[2] Furthermore, C.M.A. has an adjudicated father who is her father in the eyes of the law, Minn.Stat. ss 257.52, 257.54, and that adjudication of paternity is determinative. Minn.Stat. s 257.66, subd. 1.

[3] Finally, even if the putative father were to present the court with blood tests establishing his paternity, those tests are given no greater weight than the other presumptions listed in Minn.Stat. s 257.55. Rather, when two men alleging paternity are presumed to be fathers under the statute, the trial court is required to resolve the conflict with the "weightier considerations of policy and logic." Minn.Stat. s 257.55, subd. 2. Thus, in *C.M.G.*, this court held that blood tests were not determinative where there were competing presumptions. 516 N.W.2d at 559-60. There, the man who held the child out as his own, bonded with and supported the child, was declared to be the father notwithstanding blood tests which established another man's paternity. *Id.* at 561.

[4] Appellant argues in vague terms that the Minnesota Parentage Act is unconstitutional because it violates his due process and equal protection rights. But appellant's arguments are fundamentally flawed. The due process clause provides that the state may not deprive a person of life, liberty or property without due process of law. *Lehr v. Robertson,* 463 U.S. 248, 256, 103 S.Ct. 2985, 2990, 77 L.Ed.2d 614 (1983). Where a party

asserts parental rights, the paramount interest is in the child's welfare and "the rights of the parents are a counterpart of the responsibilities they have assumed." *Id.* at 257, 103 S.Ct. at 2991. With the child's interests in mind, a father's due process rights do not arise out of a mere biological link, *id.* at 260, 103 S.Ct. at 2992, but require the existence of an established relationship with the child. *Id.* at 260, 103 S.Ct. at 2993 (citing *Caban v. Mohammed,* 441 U.S. 380, 414, 99 S.Ct. 1760, 1779, 60 L.Ed.2d 297 (1979) (Stevens, J., dissenting)). Absent an effort by the putative father to act as a father, "the mere existence of a biological link does not merit equivalent constitutional protection." *Id.* at 261, 103 S.Ct. at 2993. Only where a father "grasps" the "opportunity" to accept responsibility for a child's future through the parent-child relationship does the Constitution require the state "to listen to his opinion of where the child's best interests lie." *Id.* at 262, 103 S.Ct. at 2993-94.

[5] Here, the putative father's parental claim to C.M.A. is based on alleged biology alone. He failed to accept any responsibility for C.M.A., expressed no interest in establishing a relationship with her, and did not object to C.S. being named the child's father. It was not until after C.M.A. was rumored to be the recipient of an insurance settlement that the putative father expressed an interest in being named her father. His interest in C.M.A. does not rise to the level of requiring Constitutional protection.

[6][7] Similarly, the putative father's equal protection argument fails. Equal protection prevents the government from making distinctions between people in the application of the law without a legitimate government interest. *Reed v. Reed,* 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971). Where a father has not carried any responsibility for the child's "daily supervision, education, ***638** protection, or care," state statutes which do not require his consent before appointing another man the child's father do not violate the Fourteenth Amendment. *Quilloin v. Walcott,* 434 U.S. 246, 256, 98 S.Ct. 549, 555, 54 L.Ed.2d 511 (1978). Where a "parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights." *Lehr,* 463 U.S. at 267-68, 103 S.Ct. at 2997 (footnotes omitted).

The putative father lacks standing to bring a paternity action because he is not a presumptive father. Nor does his interest in C.M.A. rise to the level of constitutional protection because even if he were the biological parent, he has failed to "grasp the opportunity" to establish a parent-child relationship with her.

2. *C.M.A.'s Standing*

[8] Minn.Stat. s 257.66 provides that an adjudication of

paternity is determinative of the parent-child relationship "for all purposes." But strict application of the Minnesota Parentage Act would result in C.M.A. being bound by a paternity action to which she had no notice nor opportunity to be heard. Because this would be an unconstitutional deprivation of due process, and we must presume that the statute is constitutional, *In re Haggerty,* 448 N.W.2d 363, 364 (Minn.1989), we hold that a child who is not represented in an adjudication of her paternity may bring a subsequent paternity action pursuant to the Minnesota Parentage Act and the results of the earlier adjudication are not determinative as to her.

In *Johnson v. Hunter,* 447 N.W.2d 871 (Minn.1989), the child was allowed to commence a separate paternity action where she had been unrepresented in an earlier adjudication. The supreme court held that it is more important to protect a child's interests in paternity actions through representation than to be concerned with the procedural difficulties presented with two inconsistent judgments. *Id.* at 876.

[9] Like the Minnesota Supreme Court, we realize that this could result in inconsistent judgments of paternity. In *Hunter,* the Minnesota Supreme Court suggested that the legislature "consider amending the Parentage Act's permissive language regarding joinder of children" due to concern over the protection of children's interests through representation. *Id.* at 875. The *Hunter* court also noted that the Uniform Parentage Act, from which the Minnesota Parentage Act, Minn.Stat. ss 257.51-.74, was modeled, requires a child to be made a party to all paternity actions. *Id.* at 874. But, for unknown reasons, the Minnesota legislature made joinder of a child mandatory only in a few instances, none of which apply to this case, such as where a putative father seeks to establish his paternity. (FN2)

In the six years since *Hunter,* the legislature has not acted to eliminate the possibility of inconsistent judgments where a child is unrepresented in paternity adjudications. (FN3) As a result, C.M.A.'s interests being paramount, she is entitled to be a party to an ***639.** adjudication of her paternity, notwithstanding the prior paternity action.

DECISION

The trial court's decision to deny standing to appellant putative father is affirmed. The dismissal of C.M.A.'s paternity action and request for blood tests is reversed and remanded.

Affirmed in part, reversed in part, and remanded.

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

FN1. The appointment of the guardian ad litem at this point to

make custody recommendations is troubling as a possible infringement of C.S.'s equal protection rights because it raises a question of parental fitness where none has been raised. U.S. Const. amend. XIV; Minn. Const. art. 1, s 7. Respondent, although a single father, is C.M.A.'s legal parent and must be presumed fit to the same extent other classes of parents would be under the circumstances. *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

FN2. This also raises concerns because it implies that a child must be protected when a putative father brings a paternity action to establish a relationship with his child but not when the mother seeks adjudication of paternity. As the statute recognizes and the Minnesota Supreme Court points out, a child's interests in a determination of paternity is distinct and separate from those of both her mother and her father. Minn.Stat. s 257.60; *Hunter,* 447 N.W.2d at 874. We question what legitimate state interest requires protection of a child's interests when her alleged father brings the action to declare himself a parent but not when the mother seeks to have his paternity adjudicated.

FN3. The possibility of inconsistent judgments may be resolved with a Minn.R.Civ.P. 60.02(c) or (f) motion, depending on how the facts are presented, filed simultaneously with a motion to join the original paternity action with the child's paternity action. The court in its paternity decision could vacate the first judgment if it deems that the second judgment of paternity would be inconsistent. If the results are not inconsistent, the court need only affirm the first adjudication and deny the Rule 60.02 motion. We note that after the parties filed their briefs but before oral argument, the legislature amended Minn.Stat. s 257.57, subd. 2, regarding the time limit to bring an action for declaring the nonexistence of certain father-child relationships. *See* 1995 Minn.Laws ch. 216, ss 2, 7. The parties did not address that amendment at oral argument and we decline to do so as well.

547 N.W.2d 374, Paternity of J.A.V., Matter of, (Minn. 1996)

In the Matter of the PATERNITY OF J.A.V.
Conrad HISGUN, Respondent,
v.
Denise VELASCO, Petitioner, Appellant.

No. C5-95-449.
Supreme Court of Minnesota.
May 16, 1996.

***375** Syllabus by the Court

An illegitimate father who fails to file a timely affidavit stating his intention to retain parental rights of a minor child is not barred by Minn.Stat. s 259.51, subd. 1 (1994), from bringing an action to establish his paternity.

Wright S. Walling, Gary A. Debele, Walling & Berg, P.A., Minneapolis, for Appellant Denise Velasco.

Mark D. Fiddler, Indian Child Welfare Law Center, Minneapolis, for Respondent Conrad Hisgun.

Bertram E. Hirsch, Floral Park, NY, for Respondent-Intervenor Sisseton-Wahpeton Sioux Tribe.

William R. Kennedy, Hennepin County Public Defender, Peter W. Gorman, Assistant Public Defender, Minneapolis, for amicus curiae Hennepin County Public Defender.

Sheryl Ramstad Hvass, Rider, Bennett, Egan & Arundel, Minneapolis, Penelope J. Phillips, Felhaber, Larson, Fenlon & Vogt, P.A., Minneapolis, for amici curiae Lutheran Social Service of MN, Catholic Charities of the Archdiocese of St. Paul and Minneapolis, and Children's Home Society of MN.

Judith D. Vincent, Minneapolis, for amici curiae Wellspring Adoption Agency, Inc. and Independent Adoption Resource Center, Inc.

Jill A. Pinkert, Rinke-Noonan, St. Cloud, for amicus curiae Concerned United Birthparents of MN.

Joanathan M. Bye, Lindquist & Vennum, Minneapolis, for amicus curiae Adoptive Families of America, Inc.

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

OPINION

STRINGER, Justice.

The issue here is whether an illegitimate father's (FN1) failure to file with the Minnesota Department of Health an affidavit declaring his intention to retain parental rights within the statutory time period prescribed in Minn.Stat. s 259.51, subd. 1 (1994) (FN2) of Minnesota's adoption statute bars him from bringing an action to establish paternity under Minn.Stat. ss 257.51-.74, the Parentage Act. The trial court dismissed the proceeding to establish parental rights on the basis that because respondent failed to timely file the affidavit "his parental rights do not and have never existed." The court of appeals reversed concluding that section 259.51, subd. 1 applies only to an illegitimate father's right to receive notice of an adoption hearing and does not bar his right to bring a paternity action. *In re Paternity of J.A.V.*, 536 N.W.2d 896 (Minn.App.1995). We conclude that the statutory framework in which section 259.51 is intended to be operative and prior case law of this court indicate that the statute only relates to the right to notice of future proceedings regarding the child. The statute does not itself substantively alter the illegitimate father's right to establish paternity. We therefore affirm the court of appeals.

The appellant Denise Velasco and the respondent Conrad Hisgun had a sexual relationship that lasted from September to December 1992. During that time appellant became pregnant. Sometime during her pregnancy, while respondent was incarcerated for auto theft, appellant wrote respondent a letter informing him that she was pregnant with his child and that she planned to terminate the pregnancy. She did not terminate her pregnancy, however, and J.A.V. was born on August 2, 1993. Two days later, through a Minnesota adoption agency, the appellant placed J.A.V. with a prospective adoptive family in South Dakota. J.A.V. has lived ***376** there since that time, but has not yet been adopted.

In mid August of 1993 appellant informed respondent, who was then no longer incarcerated, that she had delivered the baby and had given him up for adoption. This was when respondent first learned that appellant had given birth to J.A.V. The respondent filed an affidavit on November 15, 1993 with the Minnesota Department of Health's Division of Vital Statistics pursuant to section 259.51, subd. 1, formally acknowledging paternity of J.A.V. and declaring his intention to retain parental rights. Approximately three weeks later the Department of Health informed respondent that the appellant refused to consent to the listing of respondent as the father on J.A.V.'s birth certificate, and that without the mother's written consent his name could be listed only after an adjudication of paternity. Upon receipt of this notification, respondent commenced this paternity action

seeking joint legal and physical custody of J.A.V.

[1] [2] The sole issue raised on this appeal is whether under Minn.Stat. s 259.51, subd. 1 the respondent automatically lost his right to establish paternity of J.A.V. when he failed to timely file an affidavit acknowledging his paternity. We review a trial court's interpretation of a statute de novo. *Meister v. Western Nat'l Mut. Ins. Co.*, 479 N.W.2d 372, 376 (Minn.1992); *Hibbing Educ. Ass'n v. Public Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn.1985).

The statute at issue here provides:

> [a]ny person not entitled to notice under section 259.49, *shall lose parental rights* and not be entitled to notice at termination, adoption, or other proceedings affecting the child, unless within 90 days of the child's birth or within 60 days of the child's placement with prospective adoptive parents, whichever is sooner, that person gives to the division of vital statistics of the Minnesota department of health an affidavit stating intention to retain parental rights.

Minn.Stat. s 259.51, subd. 1 (emphasis added). Focusing on the language "shall lose parental rights," the appellant contends that in failing to timely file the affidavit declaring his intention to retain parental rights, the respondent automatically lost all rights relating to parentage of J.A.V. including the right to bring a paternity action. We believe this is too broad a reading of the statute's intended effect.

The adoption, parentage, and termination of parental rights statutes, although separate chapters in our Minnesota Statutes, are intertwined in a framework governing a most important social relationship--that between a parent and a child. The framework establishes a balance between the best interests of the child--paramount in all circumstances, *see* Minn.Stat. ss 259.20, subd. 1, 260.221, subd. 4--and others having legitimate interests in matters relating to the child. Included among the interested parties are the child's biological mother and father whether legitimate or illegitimate, *id.* s 259.51, subd. 2, grandparents with whom the child has lived, *id.* s 260.231, subd. 3, guardians, *id.* s 259.51, subd. 1, the child's adoptive parents or petitioners for adoption, *id.* s 259.35, and persons or agencies having custody of the child, *id.* s 259.57, subd. 1(b), to name just a few. Proceedings under each of these three schemes would in most cases have the effect of permanently changing a child's relationship with a parent--commencing it in some cases and ending it in others. The common thread among these statutes is that changes in these relationships affecting the child cannot occur without notice to the interested parties and a hearing where the parties can appear and be heard on what is in the best interests of the child. This is a fundamental premise upon which this statutory framework is based, and we begin our

analysis at this point.

[3] We are guided by the principle that these statutes must be applied in a manner that is internally consistent, taking all statutory provisions into account to the extent possible, and assuming that each statutory provision has a purpose. *Lenz v. Coon Creek Watershed District,* 278 Minn. 1, 11, 153 N.W.2d 209, 217 (1967); *see also McDonald v. Children's Home Soc. of Minn. (In re Zink),* 264 Minn. 500, 505, 119 N.W.2d 731, 735 (1963) (adoption laws and termination of parental rights sections of Juvenile Court Act ***377** should be construed together to effect the over-all purpose).

Focusing first on chapter 259, the adoption statute, we note the relationship between section 259.49, the statute setting forth the parties to whom notice must be given in an adoption petition, and section 259.51, the statute setting forth the steps an illegitimate father must take to protect his right to notice of an adoption proceeding. Minnesota Statutes section 259.49, subdivision 1 provides:

> notice of a hearing upon a petition to adopt a child shall be given to:
>
> (1) the child's guardian;
>
> (2) the child's parent if;
> (a) the person's name appears on the child's birth certificate as a parent, or
> (b) the person has substantially supported the child, or
> (c) the person either was married to the person designated on the birth certificate as the natural mother within 325 days before the child's birth or married that person within the ten days after the child's birth, or
> (d) the person is openly living with the child or the person designated on the birth certificate as the natural mother of the child or both, or
> (e) the person has been adjudicated the child's parent, or
> (f) *the person has filed an affidavit pursuant to section 259.51.*

(Emphasis added.) It is undisputed that the respondent does not meet any of the qualifications under this section.

Applying section 259.49 to the circumstances here, if the respondent's name had appeared on the child's birth certificate as a parent (which it didn't because appellant objected), or his paternity had been otherwise determined (the proceeding dismissed by the trial court), or if he had timely filed an affidavit pursuant to section 259.51, then by operation of section 259.49 he would be entitled to notice upon petition for adoption. Minn.Stat. s 259.49, subd. 1(f). Where the illegitimate father has failed to timely file the affidavit, as here, appellant argues that the statutory language goes beyond simply cutting off

his right to notice upon petition for adoption--appellant argues that the reference "shall lose parental rights" means the illegitimate father loses parental rights immediately upon failure to file the affidavit within the statutory filing period.

While section 259.51 is not a model of clarity, appellants' argument fails to take into account that the right to notice is the *only* matter considered in the interrelated provisions of sections 259.49 and 259.51--it is the sole subject of these two statutory provisions. Appellant's argument further fails to take into account the plain statutory language of section 259.51 referring to the point in time when parental rights are lost: " * * * *at* termination, adoption or other proceedings affecting the child"--that is, at some later date when those proceedings affecting the child occur. (Emphasis added.) If the legislature had intended to substantively terminate parental rights, *ipso facto,* for failure to file the affidavit referred to in section 259.51, it surely would have done so in language of greater clarity than we find here. The better reading of section 259.51 then, without reference to the larger statutory framework, is that the only right lost to the person failing to timely file the section 259.51 affidavit is the right to receive notice of future proceedings affecting the child.

Based on this analysis, absent the appropriate affidavit filing under section 259.51, proceedings affecting the child may go forward without notice to the illegitimate parent, and as will be discussed later, finality of termination of the relationship with the child occurs either upon adoption of the child, Minn.Stat. s 259.59, or upon a formal proceeding to terminate the parent's rights. *Id.* s 260.241. During the time between expiration of the 60 and 90 day timeframes provided in section 259.51, but before the parental relationship has been terminated, the illegitimate parent still has a sufficiently cognizable interest in the child to be heard in such proceedings upon a voluntary appearance--although the right to receive notice of adoption proceedings has been lost. *See In re Zink,* 264 Minn. at 507-08, 119 N.W.2d at 736 (illegitimate father, who was not entitled to notice, was entitled to be heard, present evidence, and participate in the adoption hearings where he appeared and acknowledged his paternity).

Testing this outcome against other provisions of these three statutory schemes, we ***378** conclude that confining the effect of section 259.51 exclusively to notice is the only result that does not conflict with other statutory provisions. As to the statutory framework for terminating parental rights in sections 260.221-.251, the extensive and explicit list of grounds for termination of parental rights in 260.221, the procedure for initiation, notice to interested parties and mandated hearing in 260.231, and, the effect of termination set forth in 260.241 all strongly suggest that this most important relationship should not be terminated simply by lapse of time. For example section 260.221, subdivision 1(7) provides that failure to file a section

259.51 affidavit is *grounds* for termination of parental rights.

> The juvenile court may upon petition, terminate the rights of a parent to a child in the following cases:
>
> * * * * * *
>
> (7) That in the case of a child born to a mother who was not married to the child's father when the child was conceived nor when the child was born the person is not entitled to notice of an adoption hearing under section 259.49 and either *the person has not filed a notice of intent to retain parental rights under section 259.51* or that the notice has been successfully challenged.
>
> Minn.Stat. s 260.221, subd. 1(7) (emphasis added).

If we were to construe failure to file the section 259.51 affidavit as *ipso facto* a termination of parental rights, when section 260.221, subd. 1(7) specifically states that it is *grounds* for termination, we would render meaningless the latter statute. Further, Minn.Stat. s 260.231, subd. 2 provides that termination shall occur "only after a hearing before the court." An interpretation of section 259.51 that would terminate parental rights, upon failure to file the affidavit, would of course contravene the important procedural safeguard provided by the hearing requirement and clearly pushes failure to comply with section 259.51 well beyond what the legislature intended.

In *Lutheran Social Services v. Stoner (In re Welfare of Larson)*, 312 Minn. 210, 251 N.W.2d 325, (1977) we considered the relationship between the parental termination statute and section 259.51. There too, the argument was made that an allegedly defective filing of the section 259.51 affidavit terminated the illegitimate father's parental rights. *Id.* at 331. This court rejected that contention concluding that the illegitimate father's acknowledgement of his paternity and appearance at the parental rights termination hearing gave him the right to be heard on his proposals for the welfare of the child. *Id.* at 331-32. Even though we held that the section 259.51 affidavit had in fact been properly filed, we recognized the illegitimate father's acknowledgement of paternity and appearance at the hearing as an independent ground for permitting him to participate in the parental rights hearing. *Id.* Implicit in the court's determination that the father had a right to be heard in the proceeding is that his parental rights had not been terminated, even if he had failed to file the affidavit.

Next, we examine the third statutory component in the framework governing the parent-child relationship--sections 257.51 to 257.74 relating to determination of paternity. This is the statutory remedy respondent invoked when he commenced the matter now before the court. Here we also find consistency with our conclusion that section 259.51 is a notice provision only.

First, the statute provides for only two circumstances having the effect of barring an action to establish a parent-child relationship: Minn.Stat. s 257.57, subd. 6, which provides that an action to determine paternity may not be brought after the child has been adopted, and Minn.Stat. s 257.58, subd. 1, which provides that an action to establish paternity may not be brought more than one year after a child has reached majority. There is no exception relating to failure to file the section 259.51 affidavit. It is a fair assumption that if failure to file the section 259.51 affidavit were intended to terminate parental rights, as appellant argues, there would have been some reference to that outcome--but there is none. Indeed, it would seem to be particularly perverse to the statutory scheme to conclude that an event occurring *prior* to the adoption hearing--the failure to file the section ***379** 259.51 affidavit--would terminate parental rights when section 257.57, subd. 6 provides that the later event, the adoption, is what bars the action.

Thus, integration of the three chapter statutory scheme clearly is best accommodated and consistency achieved by reaching the conclusion we do. Conversely, to conclude that a right to bring an action to establish parental rights is barred by failure to file the section 259.51 affidavit distorts the procedural notice provision in section 259.51 into a substantive termination of rights statute. Such a conclusion creates an incongruity between section 259.51 and the provisions relating to termination of parental rights in chapter 260, and it establishes by judicial fiat another basis for barring actions to establish parentage in addition to those set forth in chapter 257.

We are also persuaded by the historical derivation of section 259.51 and our analysis of the purpose of the statute shortly thereafter. As we noted in *Larson,* 312 Minn. at 215, 251 N.W.2d at 329, n. 3, section 259.51 was adopted by the legislature in response to a constitutional due process deficiency found by the United States Supreme Court in *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). *Stanley* presented circumstances not unlike those here, where the effect of the trial court's ruling was to cut off respondent's right to establish his paternity without a hearing. *Id.* at 646, 92 S.Ct. at 1210. In *Stanley,* the Court considered an illegitimate father's Fourteenth Amendment due process challenge to an Illinois statute that declared his children to be wards of the state upon the death of the mother. *Id.* The father and mother had lived together intermittently in an unwed state for 18 years and had three children. *Id.* The court held that "as a matter of due process of law, Stanley [the father] was entitled to a hearing on his fitness as a parent before his children were taken from him * * * ." *Id.* at 649, 92 S.Ct. at 1211. In our statutes, the necessary notice to meet this due process requirement is provided in section 259.49 as modified by section 259.51 with specific reference to respondent. To conclude that section 259.51 now goes beyond notice and operates to cut off respondent's parental rights, as the trial court held and

appellant urges upon us here, is to not only turn the purpose of section 259.51 on its head--it converts what was intended as a procedural protective shield into a substantive sword to be used against the very person it was intended to protect--the illegitimate father.

Finally, appellant argues that our decision will create uncertainty and lack of finality that will be detrimental to adoption proceedings in Minnesota. There is no question that early and permanent child placement are in the best interest of the child and delays can be severely inimical to the child's welfare. We do not see our analysis of section 259.51 here as leading to this undesirable consequence, however, as finality will still be achieved through a termination of parental rights proceeding under section 260.221. Further, while we fully recognize that the paramount interest in any proceeding relating to the parent child relationship is the welfare of the child, our focus here is to determine the rights of an illegitimate father within the framework the legislature has provided. If our analysis indeed leads to inordinate delays and expense, as appellant suggests, it is for the legislature to make such changes in the statutory scheme as it deems appropriate to address such issues, not for us.

That is not to say, however, that we don't share appellant's frustration with the length of administrative and judicial process reflected in this case. J.A.V., the child who is at the center of this case, will be nearly 3 years old by the time this opinion is released, and given the result of this appeal, his future is still uncertain. His father, the respondent, filed his affidavit of paternity some 10 weeks after the child's birth and only about 10 days after the deadline established in Minn.Stat. 259.51, subd. 1. The ensuing period, some two and one-half years, has been consumed by the legal process related to the interpretation of this single statutory provision, along with several other related legal issues. The father in this case was not late in responding to the news of this child's birth, but the legal system has been late in determining who shall be his father.

We assign no particular blame to any individual or part of the "system," but conclude ***380.** that society has failed this child, as with many like him, by our inability to resolve such controversies quickly and finally. The solution proposed by the dissenting opinion ignores the controlling statutory language, but we share completely its implicit expression of moral outrage at the long wait which is still in store for J.A.V.

Our disposition of this appeal based upon the statutory framework makes unnecessary consideration of issues raised under the Indian Child Welfare Act, 25 U.S.C. ss 1901-1931 (1994), and our disposition of the state statutory question does not require us to reach those matters.

The decision of the court of appeals is affirmed, the order of the trial court is vacated, and the case is remanded for further proceedings consistent with this opinion.

KEITH, C.J., and COYNE and TOMLJANOVICH, JJ., dissent.

TOMLJANOVICH, Justice (dissenting).

I respectfully dissent. In my view, the language of Minn.Stat. s 259.51 is clearly expressed. It establishes filing time standards in order to give permanence to the child. The statute sets out very specific time limits--90 days from the child's birth or 60 days from the child's placement. Mr. Hisgun met neither of those time limits. I believe the majority ruling would allow Mr. Hisgun an indefinite time period to file to regain custody.

The statutory language is neither ambiguous nor confusing. It establishes a time table in which to file for retention of parental rights. It expressly identifies the filing limits and the consequences for failing to file within those limits. If the legislature's intent was simply to notify the petitioner that he would no longer have notice of proceedings, the statute would not require such specific time limits.

I agree with the majority that the best interests of children is the primary concern. We are all mindful of the need for permanence in an adoptive child's life; Minn.Stat. s 259.51 is a means of accomplishing that end, while still allowing reasonable due process for the parents.

I believe the decision of the majority will create a situation for children who must wait in limbo while a parent decides whether or not life may move forward for that child.

KEITH, C.J., and COYNE, J., join in Justice TOMLJANOVICH's dissent.

FN1. The term "illegitimate" is taken from the title of subdivision 1 of Minn.Stat. s 259.51--"Notice by illegitimate parent."

FN2. The parties' briefs refer to Minn.Stat. s 259.261. The statute was renumbered in 1994 to s 259.51, and this opinion refers to the statute by its current number.

529 N.W.2d 517, Welfare of S.A.C., Matter of, (Minn.App. 1995)

In the Matter of the WELFARE OF S.A.C., a juvenile.

No. C9-94-2176.
Court of Appeals of Minnesota.
April 11, 1995.

Syllabus by the Court

A child under ten years of age cannot be a "delinquent child" under the Juvenile Court Act, Minn.Stat. ss 260.011-.57 (1994).

Susan Gaertner, Ramsey County Atty., Mark J. Ponsolle, Eric P. Johnson, Tamara L. McConkey, Asst. County Attys., St. Paul, for appellant County.

John M. Stuart, State Public Defender, Charlann E. Winking, Asst. Public Defender, Minneapolis, for respondent S.A.C.

Considered and decided by HUSPENI, P.J., and NORTON and MANSUR, JJ.

OPINION

MARTIN J. MANSUR, Judge. (FN*)

The state appeals from the district court order dismissing for lack of jurisdiction a delinquency petition brought against respondent, a nine-year-old child. We affirm.

***518** FACTS

The state filed a delinquency petition in the Juvenile Division of Ramsey County District Court against respondent S.A.C., a nine-year-old child, alleging four counts of second degree burglary. A referee dismissed the petition for lack of jurisdiction, and the state requested review of the referee's decision pursuant to Minn.R.Juv.P. 2.04. After a hearing, the district court issued a written order confirming the referee's decision, ruling that the court did not have delinquency jurisdiction over children under ten years of age. The state now appeals from the district court order dismissing the petition.

ISSUE

Can a child under ten years of age be a "delinquent child" under the Juvenile Court Act?

ANALYSIS

This case requires that we interpret provisions of the Juvenile Court Act, Minn.Stat. ss 260.011-.57 (1994). The interpretation of a statute is a question of law, which we afford a de novo review. *London Constr. Co. v. Roseville Townhomes, Inc.*, 473 N.W.2d 917, 919 (Minn.App.1991).

On appeal, the state asserts that children under ten years of age may be subject to delinquency proceedings. The statute defines "delinquent child" in relevant part as follows:

> Except as otherwise provided in paragraph (b) [not applicable here], "delinquent child" means a child: (1) who has violated any state or local law * * *.

Minn.Stat. s 260.015, subd. 5(a). "Child" is defined as "an individual under 18 years of age." *Id.*, subd. 2. The state argues that these provisions do not set a minimum age at which a child may be adjudicated delinquent; therefore, in the state's view, a juvenile court's jurisdiction is not so limited.

Respondent argues that the statute's definition of a "child in need of protection or services" (CHIPS) removes children under ten from consideration under the statute's delinquency provisions. The CHIPS definition provides:

> "Child in need of protection or services" means a child who is in need of protection or services because the child: * * * (10) has committed a delinquent act (FN1) before becoming ten years old.

Id., subd. 2a.

The state argues that the definitions are not irreconcilable because a child may be subject to the statute's CHIPS and delinquency provisions at the same time. The state notes that the classifications have different purposes and emphases. The paramount consideration in CHIPS proceedings is the best interests of the child, and the purpose of the CHIPS provision is to secure care and guidance for the child. Minn.Stat. s 260.011, subd. 2(a). The purpose of the delinquency provisions, on the other hand, is

> to promote the public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law prohibiting certain behavior and by developing individual responsibility for lawful behavior.

Id., sudb. 2(c). Possible dispositions also depend on whether a child is subject to the CHIPS or delinquency

provisions. *See* Minn.Stat. ss 260.185, 260.191. The state argues that the statute permits children under ten to be subject to both sets of provisions in order that the juvenile court may address both the child's need for care and guidance under the CHIPS provisions and the public's need for the child's accountability under the delinquency provisions. In short, the state contends that the CHIPS and delinquency classifications are not mutually exclusive.

The state also emphasizes that delinquency petitions are generally filed on a discretionary basis and that such a petition would not be filed against a child under the age of ten except in the most serious cases. The state argues that it must have the ability to hold even young children accountable for their actions.

***519** We are persuaded that the CHIPS definition makes the statute ambiguous with respect to the scope of the delinquency definition. The statute lists 13 circumstances in which children fall within the CHIPS definition; in only one of those circumstances--children under ten who have committed delinquent acts--is the delinquency definition implicated. *See* Minn.Stat. s 260.015, subd. 2a. This fact allows one reasonably to interpret the delinquency definition to exclude children under ten years of age. *See Tuma v. Commissioner of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn.1986) ("A statute is ambiguous when it can be given more than one reasonable interpretation.").

Because we hold that the statute is ambiguous, we must construe the statute in accordance with the legislative intent. *See id.* In 1988, the legislature amended the Juvenile Court Act by replacing the "dependent" and "neglected" children classifications with the CHIPS classification. The rationale behind the amendments was to create a more positive and less blaming approach to families and children with problems. *See Hearing on H.F. No. 1251 Before the House Judiciary Committee* (March 8, 1988) (statement of Rep. Pappas, author of the bill). In addition to including all children formerly within the "dependent" and "neglected" classifications, the newly-created CHIPS classification encompassed runaways and truants--status offenders formerly treated more like delinquents. A new category of children under ten who have committed delinquent acts was also created within the CHIPS classification. Before its unanimous passage in both houses of the legislature, the bill had been discussed in numerous hearings throughout the state with social workers, county attorneys, and court personnel. *See id.*

We hold that the legislature clearly intended to remove children under ten who have violated laws from delinquency jurisdiction by including them in the CHIPS definition. For instance, the amendments' preamble describes the new law as an act "*transferring* certain young alleged delinquents to the court's [CHIPS] jurisdiction." *See* 1988 Minn.Laws ch. 673 (emphasis added). This language indicates an intent to take

these children out of the delinquency definition, *not* merely to make delinquent children under ten *also* subject to the CHIPS provisions. *See Carlson v. Lilyerd,* 449 N.W.2d 185, 190-91 (Minn.App.1989) (language in preamble, though not dispositive, may be considered in construing legislative intent), *pet. for rev. denied* (Minn. Mar. 8, 1990).

The testimony on the bill by at least one witness before a House subcommittee supports this position. A representative of the Minnesota County Attorneys Association, in describing the bill's primary provisions, stated as follows:

> As the age requirement for treating these children no longer as delinquent children but children in need of protection or services, there's a minimum age of ten.

Hearing on H.F. 1251 Before the Crime and Family Law Division of the House Judiciary Committee (February 26, 1988) (statement of Joanne Vovrosky). This witness also expressed her desire that the legislature not increase beyond ten the age at which children are treated as CHIPS children "rather than delinquents." *Id.* Clearly this witness understood that the amendments would impose a minimum delinquency age.

The statute's dispositional provisions also tend to support our interpretation of the legislative intent behind the 1988 amendments. Under the new CHIPS provisions, the juvenile court could make a number of possible dispositions regarding a child under ten who had committed a delinquent act: placing the child within the child's own home under the protective supervision of the county welfare board or a social service agency; transferring legal custody to the welfare board or an agency; or ordering special physical or mental treatment. Minn.Stat. s 260.191, subd. 1(a) (1988). These dispositions, however, were already available to the court in dealing with a delinquent child. *See* Minn.Stat. s 260.185, subd. 1 (1986). It is likely, therefore, that the legislature included these children under ten in the CHIPS definition in order to eliminate the possibility of other, more stringent delinquency dispositions, such as paying a fine, making restitution, or being placed in a foster home or correctional facility. *See id.*

***520.** In addition, the state's argument that the CHIPS and delinquency provisions are not mutually exclusive is not completely accurate. It is true that a child could be subject to both sets of provisions at the same time; for instance, a runaway could steal a bicycle. Nevertheless, under the CHIPS and delinquency definitions, a child is not subject to both sets of provisions as a result of committing a *single act*--unless the state's position is adopted. The absence of any other overlap between the two definitions further evidences the legislature's intent to take these children out of a juvenile court's delinquency jurisdiction and place them within the court's CHIPS jurisdiction.

DECISION

The district court properly dismissed the delinquency petition against respondent for lack of jurisdiction because respondent was under ten years of age.

Affirmed.

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

FN1. The statute does not separately define "delinquent act." Other language in the statute, however, links this term to the "delinquent child" definition. *See* Minn.Stat. s 260.171, subd. 2 (referring to a "delinquent act as defined in section 260.015, subdivision 5").

546 N.W.2d 739, Dahlberg Hearing Systems, Inc. v. Commissioner of Revenue, (Minn. 1996)

DAHLBERG HEARING SYSTEMS, INC., Relator,
v.
COMMISSIONER OF REVENUE, Respondent.

No. C2-95-1929.
Supreme Court of Minnesota.
April 26, 1996.

***740** *Syllabus by the Court*

Bringing computer equipment into this state for the purpose of installing software, testing the computer equipment, and subsequently shipping the computer equipment to other states for its intended use, does not constitute a taxable use pursuant to Minn.Stat. s 297A.01, subd. 7 (1990).

Thomas R. Muck, Minneapolis, for appellant.

Hubert H. Humphrey, III, Barry R. Greller, Office of Atty. Gen., Tax Litigation Div., St. Paul, for respondent.

Heard, considered and decided by the court en banc.

OPINION

KEITH, Chief Justice.

Relator, Dahlberg Hearing Systems, Inc. (Dahlberg), seeks review of a Minnesota Tax Court order denying Dahlberg's claim for a refund of use taxes paid. The tax court ruled that the use tax was applicable because Dahlberg "used" computer equipment in Minnesota and because sales tax was not paid on the purchase of the computer equipment. We reverse.

The parties have stipulated to the following facts. Dahlberg is a company located in Golden Valley, Minnesota that manufactures and sells hearing aids and related devices primarily through a franchise system of independent contractor franchises. Dahlberg's franchisees maintain hearing centers at which franchisee personnel check each client's hearing and sell hearing instruments and related products. Franchisee personnel produce an audiogram and take an impression of the client's ear. The audiogram and the impression are then sent to Dahlberg at its Minnesota facility.

During the January 1, 1989 through December 31, 1991 tax periods, Dahlberg purchased ***741** certain computer equipment from Hewlett Packard to be provided to franchisees, all of whom (except one in Edina, Minnesota) were located in other states. Although Hewlett Packard had a Minnesota sales office, it maintained no inventory of the computer equipment in Minnesota. All orders were accepted outside Minnesota and shipped via interstate trucking firm from various Hewlett Packard manufacturing facilities outside of Minnesota, and were received by Dahlberg at its Minnesota facility. Although Hewlett Packard was registered to collect sales tax under Minn.Stat. ch. 297A, it did not bill or collect sales tax from Dahlberg on the computer equipment sales.

Once the computer equipment arrived at Dahlberg's facility, Dahlberg personnel unpacked the computer equipment and copied software into each computer's hard drive. Dahlberg personnel then connected the computer, printer, and a modem with cables and tested each computer for proper functioning. After being tested, the computer equipment was disconnected, reboxed and sent via interstate trucking firm to franchisees in 30 states. After the computer equipment arrived at the franchisee's location, Dahlberg personnel traveled to the franchisee's location and installed the computer equipment. Dahlberg expected that the computer equipment would remain in those other states for its useful life and would never be returned to Minnesota.

Dahlberg did not use any of the computer equipment in Minnesota, except for one set kept in Minnesota by Dahlberg to help deal with operating problems franchisees might have with the computer equipment. The franchisees used the computer equipment for customer management, advertising and operations controls, to keep track of sales prospects, to follow up on customers with post-sales correspondence, and to keep track of receivables. The computer equipment remained the property of Dahlberg and Dahlberg had the right to repossess the equipment in the event of expiration or termination of a franchise.

Although Hewlett Packard did not collect sales tax on the computer equipment transactions, Dahlberg did timely remit use taxes for the tax period in question on the purchase of the computer equipment. Because the transactions took place several years ago, Dahlberg is unable to determine why sales tax was not collected by Hewlett Packard and instead use tax was paid by Dahlberg.

Dahlberg's outside public accounting firm later determined that Dahlberg should not have paid a use tax for the processing of the computer equipment and advised Dahlberg to file a refund claim. Dahlberg filed a tax refund claim on February 11, 1992 for the use tax paid in the amount of $56,888.67, plus interest. After resolution of portions of its claim at the administrative level and by stipulation, the amount of the refund claim remaining in dispute on appeal is $47,854.48 in tax, plus

interest.

After the Commissioner denied Dahlberg's claim, Dahlberg appealed to the tax court, which affirmed. The court found that Dahlberg 'used' the computer equipment in Minnesota by exercising its rights to take possession of the equipment in Minnesota, installing software and testing the equipment in this state. The court also concluded that the sales and use taxes are complementary taxes designed to exact an equal tax based on the percentage of the purchase price of the property in question. Because the sales and use taxes are complementary, the tax court concluded that Dahlberg was required to pay a use tax since sales tax was not paid. Dahlberg then filed a petition for a writ of certiorari to this court.

I.

[1] [2] "This court's review of tax court decisions is governed by the provisions of Minn.Stat. s 271.10, subd. 1 (1994), which limits review to cases where it is argued that the tax court is without jurisdiction, the decision was not justified by the evidence or in conformity with law, or the tax court committed an error of law." *Homart Dev. Co. v. County of Hennepin,* 538 N.W.2d 907, 910 (Minn.1995). Because this case reaches this court on stipulated facts, the court is faced with a question of law which it reviews de novo. *Id.*

***742** Dahlberg argues that installing software and testing the computer equipment are processing activities that do not constitute use. Dahlberg further argues that a use tax does not apply where the intended uses of the computer equipment were to take place in other states. The tax court ruled that the use tax applies because Dahlberg "used" the computer equipment in Minnesota by exercising its rights to take possession of the equipment, installing software and testing the equipment in this state.

[3] [4] [5] Use taxes were introduced in the 1930s to counteract the tendency of consumers to shop in states with low or no sales taxes and are designed to place in-state and out-of-state sellers on the same footing. *Morton Bldgs., Inc. v. Commissioner of Revenue,* 488 N.W.2d 254, 257 (Minn.1992). If a consumer buys a product out-of-state but pays no sales tax, the use tax is imposed when the item is brought into the state for use. *Id.* Minnesota enacted its first sales and use tax statutes in 1967, as codified at Minn.Stat. s 297A.14, subd. 1 (1990):

> For the privilege of using, storing or consuming in Minnesota tangible personal property or taxable services purchased for use, storage, or consumption in this state, a use tax is imposed on every person in this state at the rate of tax imposed under section 297A.02 on the sales price of sales at retail of the items, unless the tax imposed by section 297A.02 was paid on the sales price.

Because sales tax was not paid on the computer equipment, a use tax is potentially applicable on the transactions. *See Id.* (use tax imposed for the use, storage, or consumption of personal property unless sales tax was paid). Dahlberg argues, however, that even though sales tax was not paid, a use tax is not applicable due to the processing exception to the use tax codified at Minn.Stat. s 297A.01, subd. 7 (1990), as follows:

> Subd. 7. "Storage" and "use" do not include the keeping, retaining or exercising of any right or power over tangible personal property or tickets or admissions to places of amusement or athletic events shipped or brought into Minnesota for the purpose of subsequently being transported outside Minnesota and thereafter used solely outside Minnesota, * * * or for the purpose of being processed, fabricated or manufactured into, attached to or incorporated into other tangible personal property to be transported outside Minnesota and not thereafter returned to a point within Minnesota, except in the course of interstate commerce.

Dahlberg also cites to Department of Revenue regulations that establish a processing exception to the use tax. For example, Minn.R. 8130.1300 provides, in pertinent part, that:

> "Use" does not include storing personal property to be used in the ordinary course of an owner's trade or business where such personal property is subsequently shipped or delivered to an ultimate destination outside Minnesota without being put to intermediate use in this state and thereafter not returned to Minnesota except in the course of interstate commerce. (As used herein, the term "intermediate use" does not include processing, fabricating, or manufacturing into or incorporating into other tangible personal property or testing or modifying tangible personal property but includes consuming or enjoying the beneficial use of the property.)

Dahlberg also argues that Minn. R. 8130.1400 similarly establishes a processing exception to the use tax:

> 8130.1400 Temporary Storage and Use in Minnesota
>
> Where tangible personal property or tickets of admission to places of amusement or athletic events are shipped or brought into Minnesota for the purpose of subsequently being transported outside Minnesota, and such items are not intended to be returned to Minnesota except in the course of interstate commerce, definitions of "storage and use" * * * are not applicable thereto.
>
> Similarly, where tangible personal property is shipped or brought into Minnesota for the purpose of being processed, fabricated, or manufactured into other tangible personal property, or is incorporated or attached to other tangible personal property, and thereafter transported outside

***743** Minnesota, and such property is not intended to be returned to Minnesota except in the course of interstate commerce, the definitions of storage and use are not applicable thereto.

* * * *

Example 2. Z corporation purchased equipment in Wisconsin and requested that the vendor deliver the property to Z in Minnesota for inspection and testing. Upon completion of the tests on the equipment, which proved to be satisfactory, the equipment was shipped to Z factory in California. The testing and inspecting of the equipment in Minnesota does not constitute either storage or use as defined in Minnesota Statutes, section 297A.01, subdivision 5 or 6, respectively.

We find Dahlberg's argument compelling. Dahlberg brought the computer equipment into this state in order to install software and to test the computer equipment. Such processing clearly falls within the processing exception to the use tax codified at Minn.Stat. s 297A.01, subd.7.

Despite this clear exception to the use tax, the tax court focused on the language concerning tangible personal property "*shipped or brought* into Minnesota for the purpose of subsequently being transported outside Minnesota and thereafter used solely outside Minnesota." Minn.Stat. s 297A.01, subd. 7 (emphasis added). The tax court ruled that Dahlberg must pay a use tax because Hewlett Packard, not Dahlberg, "brought" the computer equipment into Minnesota. Dahlberg counters that the statute contains no requirement that any particular party bring the property into the state, nor that the property be brought into the state by its technical owner at the time it came into the state. Rather, the statute only says "brought into Minnesota"; it does not say "brought into Minnesota by the owner of such property." *See* Minn.Stat. s 297A.01, subd. 7 (1990). (FN1)

[6] Dahlberg's argument is persuasive. The statute does not provide any requirement that a particular party bring the property into the state. We will not edit the statute to add the requirement that the tangible personal property be "brought into Minnesota by the owner of such property," for that task is properly left to the legislative branch. This court has recently spoken against such judicial tinkering with statutory language in the tax context. *See Homart,* 538 N.W.2d at 911 (refusing to engraft upon a tax statute a requirement that is contrary to the language of the statute and the intention of the legislature); *Green Giant Co. v. Commissioner of Revenue,* 534 N.W.2d 710, 712 (Minn.1995) ("We will not supply that which the legislature purposefully omits or inadvertently overlooks."). Moreover, any doubt or ambiguity in the statutory term "brought" should be resolved in favor of the taxpayer. *See Charles W. Sexton Co. v. Hatfield,* 263 Minn. 187, 195, 116 N.W.2d 574, 580

(1962) ("One well-recognized rule is that where the meaning of a taxing statute is doubtful, the doubt must be resolved in the favor of the taxpayer.").

The crux of the tax court's ruling, however, is that the sales and use tax are complementary. *See Color-Ad Packaging, Inc. v. Commissioner of Revenue,* 428 N.W.2d 806, 806-07 (Minn.1988) (sales and use taxes are mutually exclusive, but complementary, and are "designed to exact an equal tax based on a percentage of the purchase price on the property in question"); *see also Miller v. Commissioner of Revenue,* 359 N.W.2d 620, 621-22 (Minn.1985) (discussing complementary nature of sales and use taxes); *Deluxe Check Printers, Inc. v. Commissioner of Taxation,* 295 Minn. 76, 79, 203 N.W.2d 341, 343 (1972) (characterizing imposition of use tax as "in lieu" of sales tax). Based on the complementary nature of the sales and use taxes, the tax court ruled that Dahlberg must pay the use tax because Dahlberg acquired the computer equipment in a Minnesota taxable sale but did not pay sales tax.

To be sure, this court has long-recognized that the sales and use taxes are complementary. But this does not mean that each tax ***744.** serves as a substitute for the other. In this case, Hewlett-Packard is the only party upon whom direct liability for the failure to pay the sales tax falls. Dahlberg cannot be forced to pay a use tax simply because Hewlett Packard failed to pay sales tax. For tax purposes, Dahlberg is not its brother's keeper.

Dahlberg clearly brought the computer equipment into Minnesota to have it processed and then sent to other states for its intended use. We can find no way to creatively explain how Dahlberg "used" the equipment, for it is beyond dispute that Dahlberg merely processed the equipment in this state. Nor can we agree with the tax court that the computer equipment was not "brought into Minnesota," when "brought" is not defined in the statute and ample authority establishes that doubts and ambiguities in the tax statutes are to be resolved in favor of the taxpayer. The tax court's labelling of Dahlberg's processing of the computer equipment as a "use" and its conclusion that the equipment was not "brought into Minnesota" suggests a results-oriented statutory and rule interpretation designed to remedy the Department of Revenue's apparent present inability to collect sales tax from Hewlett Packard. We conclude that the use tax statute cannot be used under these facts to collect from Dahlberg the sales tax that should have been paid by Hewlett-Packard.

Reversed.

COYNE, Justice (dissenting).

I respectfully dissent. It has been my observation that the first use any purchaser knowledgeable about the operation and

employment of computers makes of his or her newly acquired computer is the installation of specialized software designed for the purchaser's particular use. On completion of that first use the purchaser's second use is testing to ascertain whether the specialized software has been properly installed and whether the new computer adequately performs the desired function.

If the purchase of the computer was accomplished in Minnesota, the purchaser was obliged to pay a sales tax. If the purchase occurred elsewhere, on the first use of the property in Minnesota the purchaser became obligated to pay a use tax. That Dahlberg Hearing Systems, Inc., turned the computers it purchased from Hewlett Packard over to Dahlberg's franchisees after installing its specialized software and testing the equipment does not, in my opinion, convert Dahlberg's use of the computers into "processing" the equipment and relieve it of the obligation to pay either a sales tax or a use tax. Therefore, it seems to me that Dahlberg, like any other purchaser who installs his or her own specialized software and tests the equipment to ascertain whether it properly performs the desired function, is liable for use tax. Consequently, I would affirm the tax court's denial of Dahlberg's refund claim.

FN1. *Cf.* Minn.Stat. s 297A.25, subd. 5 (1990) (the exemption for outstate transport or delivery), where the legislature has specified that to be exempt the property must be shipped or transported outside of Minnesota "by the purchaser."

1996 WL 523599, Contested Case of Hornell Brewing Co., Inc. v. Minnesota Department of Public Safety, Liquor Control Division Office of Administrative Hearings, In Matter of, (Minn.App. 1996)

***523599** --- N.W.2d ----

In the Matter of the Contested Case of: HORNELL BREWING CO., INC., et al., Relators,
v.
MINNESOTA DEPARTMENT OF PUBLIC SAFETY, Liquor Control Division Respondent,
OFFICE OF ADMINISTRATIVE HEARINGS, Respondent.

No. CO-95-2710.
Court of Appeals of Minnesota.
Sept. 17, 1996.

Syllabus by the Court

****1** Minn.Stat. s 340A.311(d) (1994) is facially invalid under the First Amendment to the United States Constitution because the statute's regulation of speech is impermissibly content-based.

Randall D.B. Tigue, Randall Tigue Law Office, P.A., Volunteer Attorney, MCLU, 2620 Nicollet Avenue, Minneapolis, MN 55408 (for Relator Hornell Brewing Co.)

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Robert P.W. Gough, P.O. 25, Rosebud, South Dakota 57570 (for Intervenor Estate of Tasunke Witko)

Kenneth E. Tilsen, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104-1284 (for Intervenor Estate of Tasunke Witko)

Considered and decided by AMUNDSON, Presiding Judge, NORTON, Judge, and PETERSON, Judge.

OPINION

PETERSON, Judge

This appeal is from an order of the Commissioner of Public Safety revoking the brand label registration of a malt liquor product. We reverse.

FACTS

In early 1992, relator Hornell Brewing Co., Inc., (Hornell) planned to begin selling in Minnesota a malt liquor product called "The Original Crazy Horse Malt Liquor." In March 1992, G. Heileman Brewing Company, Inc., acting on behalf of Hornell, applied to respondent Liquor Control Division of the Minnesota Department of Public Safety to register the brand label for "The Original Crazy Horse Malt Liquor." The proposed label was approved.

On the approved label, the words "The Original Crazy Horse Malt Liquor" surround an image of an American Indian wearing a feather bonnet. The words, "Dakota Hills, Ltd." are prominently displayed beneath the product name. The reverse side of the label contains the following text:

> The Black Hills of Dakota, steeped in the history of the American West, home of Proud Indian Nations. A land where imagination conjures up images of blue clad Pony Soldiers and magnificent Native American Warriors. * * * A land where wailful winds whisper of Sitting Bull, Crazy Horse and Custer. A land ofcharacter, of bravery, of tradition. A land that truly speaks of the spirit that is America.

In 1993, the Rosebud Sioux Tribal Court appointed intervenor Seth H. Big Crow, Sr., administrator of the estate of Ta-Sunke Witko, a.k.a. Crazy Horse. In an affidavit, intervenor stated that the name "Crazy Horse" is an approximate English translation of the Lakota name "Tasunke Witko," which was the name of a specific individual, now deceased, who was recognized as one of the foremost Lakota spiritual and political leaders of all time. Intervenor further stated that G. Heileman Brewing Company and its subsidiaries or associates have taken the name of Crazy Horse without the consent of the lawful holders of the right to the name and that

> ****2** the Family and the Estate denies and disavows any association, endorsement, sponsorship or affiliation with the Heileman and Hornell product bearing the name "Crazy Horse", and that any use of the name "Crazy Horse", with direct reference to the historic Lakota warrior and spiritual leader, particularly in association with the sale of alcoholic beverages, as occurs in this case, is unconsented, unpermitted, offensive, false, misleading and in violation of the lawful rights of the family and heirs of Tasunke Witko.

In 1994, the Minnesota legislature enacted a statute that requires the commissioner of the Department of Public Safety to revoke the registration of a malt liquor brand label if the

registered label states or implies in a false or misleading manner a connection with an American Indian leader. The new statute, Minn.Stat. s 340A.311(d) (1994), became effective on August 1, 1994. 1994 Minn. Laws ch. 611, ss 12, 35; Minn.Stat. s 645.02 (1994).

The Director of the Liquor Control Division of the Department of Public Safety determined that all of the elements of the new statute were met by the brand label registration for "The Original Crazy Horse Malt Liquor" and notified Heileman that the registration was revoked effective August 1, 1994, unless Heileman requested a contested case hearing. Heileman requested a hearing. Following the hearing, the Commissioner revoked the brand label registration.

ISSUE

Does Minn.Stat. s 340A.311(d) (1994) violate relator's right to freedom of speech and expression as guaranteed by the First Amendment to the United States Constitution?

ANALYSIS

Minn.Stat. s 340A.311(d) (1994) provides:

> The commissioner [of public safety] shall refuse to register a malt liquor brand label, and shall revoke the registration of a malt liquor brand label already registered, if the brand label states or implies in a false or misleading manner a connection with an actual living or dead American Indian leader. This paragraph does not apply to a brand label registered for the first time in Minnesota before January 1, 1992.

Generally, statutes "enjoy a presumption of constitutionality which remains in force until the contrary is established beyond a reasonable doubt." *State v. Casino Mktg. Group, Inc.*, 491 N.W.2d 882, 885 (Minn.1992), *cert. denied*, 507 U.S. 1006, 113 S.Ct. 1648, 123 L.Ed.2d 269 (1993). However,

> "any provision of law restricting [first amendment] rights does not bear the usual presumption of constitutionality normally accorded to legislative enactments."

Id. (alteration in original) (quoting *Johnson v. State Civil Serv. Dep't*, 280 Minn. 61, 66, 157 N.W.2d 747, 751 (1968)). This principle applies even when the speech affected is commercial speech,

> for a strong presumption in favor of the constitutionality of a statute governing commercial speech would run an unacceptable risk of chilling protected speech.

***3** *Id.* Thus, when a statute restricts commercial speech,

"the state bears the burden of establishing the statute's constitutionality." *Id.* at 886.

Respondent does not dispute that the product label is a form of commercial speech, or that Minn.Stat. s 340A.311(d) restricts commercial speech. Respondent contends that, under the test established in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), Minn.Stat. s 340A.311(d) is a valid regulation of false and misleading commercial speech.

In *Central Hudson,* the United States Supreme Court set forth the following four-part analysis to be used when determining whether a restriction on commercial speech is permitted under the First Amendment:

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.
>
> *Central Hudson,* 447 U.S. at 566, 100 S.Ct. at 2351.

Respondent contends that, by its plain language, Minn. Stat s 340A.311(d) applies only to false or misleading commercial speech, which, under the *Central Hudson* analysis, is not entitled to First Amendment protection. Therefore, respondent concludes, the statute does not violate the First Amendment.

It is true that

> there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity,

Central Hudson, 447 U.S. at 563, 100 S.Ct. at 2350. But our analysis does not end simply because Minn.Stat. s 340A.311(d) regulates only false or misleading commercial speech. The statute does not prohibit commercial speech that is just false or misleading; the statute prohibits commercial speech that is false or misleading and also "states or implies * * * a connection with an actual living or dead American Indian leader." Minn.Stat. s 340A.311(d). If a malt liquor label does not state or imply a connection with an American Indian leader, the label is not prohibited by the statute even if the label is false or misleading. Relator argues that because Minn.Stat. s 340A.311(d) prohibits only a false or misleading label that states or implies a connection with an American Indian leader, it is impermissibly content-based.

The First Amendment generally prevents government from

> proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.

***4** *R.A.V. v. City of St. Paul*, 505, U.S. 377, 382, 505 U.S. 377, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992) (citations omitted).

There are some exceptions to this general rule; restrictions on the content of speech have been permitted with regard to obscenity, defamation, and fighting words. *Id.* at 382-83, 112 S.Ct. 382-83, 112 S.Ct. 2542-43. The Court has "sometimes said that these categories of expression are not within the area of constitutionally protected speech." *Id. at 383, 112 S.Ct. at 2543.* But this means only

> that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)--not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

Id. at 383-84, 112 S.Ct. at 2543.

In *R.A.V.*, the United States Supreme Court considered whether a city ordinance was impermissibly content-based and therefore facially invalid under the First Amendment. The ordinance provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 380, 112 S.Ct. at 2541. The *R.A.V.* Court accepted the Minnesota Supreme Court's statement that the ordinance applies only to expressions that constitute "fighting words," and assumed, "arguendo, that all of the expression reached by the ordinance is proscribable under the 'fighting words' doctrine." *Id.* at 381, 112 S.Ct. at 2542. Nevertheless, the Court concluded the ordinance was facially unconstitutional because it applied only to "specified disfavored topics" and because it went "beyond mere content discrimination, to actual viewpoint discrimination." *Id.* at 391, 112 S.Ct. at 2547.

Just as respondent contends is the case with Minn.Stat. s 340A.311(d), the ordinance in *R.A.V.* restricted only speech that

is within one of a few categories of speech that can be regulated because of their constitutionally proscribable content; the statute restricts only false or misleading commercial speech and the ordinance restricted only fighting words. As in *R.A.V.*, however, the fact that the speech regulated by the statute is false or misleading does not mean that the speech is entirely invisible to the constitution.

> ****5** [J]ust as the power to proscribe particular speech on the basis of a noncontent element (e.g., noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the power to proscribe it on the basis of *one* content element (e.g., obscenity) does not entail the power to proscribe it on the basis of *other* content elements.

R.A.V., 505 U.S. at 386, 112 S.Ct. at 2544. The First Amendment imposes "a 'content discrimination' limitation upon a State's prohibition of proscribable speech." *Id.* 387, 112 S.Ct. at 2545. Thus, speech that may be regulated because it is false or misleading may not be regulated on another basis that is unrelated to its distinctively proscribable content.

The prohibition against content discrimination is not, however, absolute. *Id.*, 112 S.Ct. at 2545. One exception acknowledged by the *R.A.V.* court applies

> [w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.
>
> *Id.* at 388, 112 S.Ct. at 2545.

For example,

> the Federal Government can criminalize only those threats of violence that are directed against the President, since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. And * * * a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.
>
> *Id.* at 388-89, 112 S.Ct. at 2546 (citations omitted).

Respondent and intervenor argue that Minn.Stat. s 340A.311(d) is permitted under this exception recognized by the *R.A.V.* court. We conclude that the exception is not applicable because the basis for content discrimination in Minn.Stat. s 340A.311(d) does not consist entirely of the very reason that false or misleading commercial speech is proscribable.

The distinction between a government prohibition of threats of violence that are directed against the president and a government prohibition of threats against the president that mention the president's policy on aid to inner cities is that the latter prohibition applies only when the threat contains a certain message, while the former applies regardless of the message delivered by the threat. The government may impose the former prohibition because, in doing so, it does not sanction one message and prohibit another. In contrast, the latter prohibition may not be imposed because it applies only when a threat contains a certain message and, therefore, "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *R.A.V.*, 505 U.S. at 387, 112 S.Ct. at 2545 (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S.Ct. 501, 508, 116 L.Ed.2d 476 (1991)). For the same reason, a state may decide to regulate price advertising in one industry but not another so long as the regulation applies without regard to the message contained in any particular advertisement.

****6.** Unlike the examples of permitted content discrimination described by the court in *R.A.V.*, Minn.Stat. s 340A.311(d) proscribes speech on the basis of two content elements, not just one. Whether any particular label is prohibited by the statute can only be determined by examining the content of the label to determine both whether it is false or misleading and whether it states or implies a connection with an American Indian leader. The basis for the content discrimination in the statute goes beyond whether the speech is false or misleading.

Even though speech prohibited by a state is within a category of speech that may be totally proscribed, content discrimination within that category of speech is permitted only if

> the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.

R.A.V., 505 U.S. at 390, 112 S.Ct. at 2547.

Respondent asserts that

> [t]he State has a valid and substantial interest in prohibiting the false and misleading nature of the unauthorized or unsupported appropriation of individuals' names in connection with commercial goods and services.

Respondent argues that Minn.Stat. s 340A.311(d) validly serves to protect this state interest. But, even if this is a compelling state interest,

> the "danger of censorship" presented by a facially content-based statute requires that that weapon be employed only where it is "*necessary* to serve the asserted [compelling] interest."

R.A.V., 505 U.S. at 395, 112 S.Ct. at 2549 (alteration in original) (citations omitted).

Respondent has not explained why a statute that prohibits only false or misleading labels that state or imply a connection with an American Indian leader is necessary to serve the state's asserted interest in prohibiting the false, misleading, unauthorized, or unsupported appropriation of individuals' names. Absent any rationale for acting to protect this interest only when the name appropriated is within a narrowly described category, we cannot conclude that there is no realistic possibility that official suppression of ideas is afoot.

DECISION

Because the state has not explained why prohibiting only false or misleading commercial speech that states or implies a connection with an American Indian leader is necessary to serve its asserted interest in prohibiting the false, misleading, unauthorized, or unsupported appropriation of individuals' names, Minn.Stat. s 340A.311(d) is impermissibly content-based, and, therefore, facially invalid under the first amendment to the United States constitution.

Reversed.

535 N.W.2d 342, Dean v. American Family Mut. Ins. Co., (Minn. 1995)

Dale E. DEAN, et al., Respondents,
v.
AMERICAN FAMILY MUTUAL INSURANCE COMPANY, Petitioner, Appellant.

No. C5-94-1042.
Supreme Court of Minnesota.
Aug. 4, 1995.

Syllabus by the Court

An automobile accident liability insurance payment from an underinsured tortfeasor does not trigger the collateral source rule in a claim for underinsured motorist benefits.

***343** Joe E. Thompson, Schmidt, Thompson, Johnson & Moody, P.A., Willmar, for appellant.

Ronald H. Schneider, Schneider Law Office, Willmar, for respondents.

Heard, considered and decided by the court en banc.

OPINION

GARDEBRING, Justice.

In a claim for underinsured motorist benefits, the trial court applied the collateral source provision in Minn.Stat. s 548.36 (1994) to reduce the aggregate damage award before subtracting the amount associated with the claimant's comparative fault, as determined in an earlier jury trial. The court of appeals affirmed, and we reverse.

While driving his own car, Dale Dean, the plaintiff-respondent in this matter, was injured in a two-car collision with a vehicle driven by Nathan Sing. The passenger in Sing's car was killed, and the trustee for her heirs and next of kin brought an action against both Sing and Dean. In that action, Dean was only a party defendant and did not assert any personal injury cross-claim against Sing. The jury found Dean 10 percent at fault and Sing 90 percent at fault. Dean settled with Sing's insurer for the policy limits of $100,000 and gave proper notice to American Family Mutual Insurance Company (AFM), his underinsured motorist (UIM) carrier.

Dean then asserted a claim against AFM to collect underinsured motorist benefits. The only issue presented to the jury was the amount of damages Dean was entitled to collect. The jury awarded Dean $353,646. The trial judge initially determined that Dean's 10 percent fault should be deducted from the jury's damage award, and then the $100,000 settlement award Dean received from Sing's insurer should be subtracted. As a result, the trial court issued a judgment against AFM for $218,281.40. (FN1) However, Dean brought a timely post-trial motion requesting the court apply the collateral source statute, Minn.Stat. s 548.36, and amend the judgment by reducing the aggregate damage award by the settlement award before applying Dean's 10 percent comparative fault. The trial court applied the collateral source rule and amended the judgment against AFM to reflect a damage award in the amount of $228,281.40, a difference of $10,000. (FN2) The court of appeals upheld the amended judgment and AFM appealed.

[1] The only issue we must address is whether an automobile accident liability insurance payment from an underinsured tortfeasor triggers the collateral source rule in a claim for underinsured motorist benefits when the claimant is partially at fault. Where there is no dispute of facts, a *de novo* standard of review is applied to determine whether the lower courts erred in their application of the law. *State by Cooper v. French,* 460 N.W.2d 2 (Minn.1990).

[2] First, we turn to the relevant statutory provision known as the collateral source rule. Minn.Stat. s 548.36 (1994) provides:

> Subd. 1. For purposes of this section, "collateral sources" means payments related to the injury or disability in question made to the plaintiff, or on the plaintiff's behalf up to the date of the verdict, by or pursuant to:
>
> * * * * * *
>
> (2) health, accident and sickness, or automobile accident insurance or liability insurance
> ***344** that provides health benefits or income disability coverage; * * *
>
> Subd. 2. In a civil action, whether based on contract or tort, when liability is admitted or is determined by the trier of fact, and when damages include an award to compensate the plaintiff for losses available to the date of the verdict by collateral sources, a party may file a motion within ten days of the date of entry of the verdict requesting determination of collateral sources. If the motion is filed, the parties shall submit written evidence of, and the court shall determine:
>
> (1) amounts of collateral sources that have been paid for

the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses except those for which a subrogation right has been asserted; and

(2) amounts that have been paid, contributed, or forfeited by, or on behalf of, the plaintiff or members of the plaintiff's immediate family for the two-year period immediately before the accrual of the action to secure the right to a collateral source benefit that the plaintiff is receiving as a result of losses.

Subd. 3. (a) The court shall reduce the award by the amounts determined under subdivision 2, clause (1), and offset any reduction in the award by the amounts determined under subdivision 2, clause (2).

* * * * * *

(c) In any case where the claimant is found to be at fault under section 604.01, the reduction required under paragraph (a) must be made before the claimant's damages are reduced under section 604.01, subdivision 1.

AFM argues that if the tortfeasor, Sing, had been sufficiently covered to fully compensate Dean, then Dean would have received $318,281.40, (FN3) but by deeming Sing's $100,000 liability payment a collateral source, the amended judgment awarded Dean $10,000 more than his actual damages. We agree.

In determining the applicability of the collateral source rule under slightly different circumstances we have held:

Because the primary purpose of this statute is to prevent double recoveries, no deduction is allowed where subrogation rights are asserted "to ensure that the amount of collateral sources deducted from the award is the amount to which the plaintiff is actually entitled, and does not include amounts plaintiff must ultimately pay over to a subrogee."

Imlay v. City of Lake Crystal, 453 N.W.2d 326, 334 (Minn.1990) (*citing Buck v. Schneider,* 413 N.W.2d 569, 572 (Minn.App.1987)).

Similarly, we have consistently held that the purpose of the underinsured provisions of the No-Fault Act is to compensate injured persons without allowing for double recoveries. (FN4) *See Richards v. Milwaukee Ins. Co.,* 518 N.W.2d 26, 28 (Minn.1994); *Johnson v. American Family Mut. Ins. Co.,* 426 N.W.2d 419, 422 (Minn.1988); *Schmidt v. Clothier,* 338 N.W.2d 256, 261 (Minn.1983). In *Richards* we held:

UIM coverage is a tort based coverage designed to provide a supplemental source of recovery only when the damages that the insured is legally entitled to recover from the tortfeasor exceed the tortfeasor's liability insurance limits. The tort

judgment establishes conclusively the damages to which the claimant is legally entitled, and if these damages exceed the tortfeasor's liability insurance limits, the excess is payable by the underinsurance carrier to the extent of its coverage * * *.

Richards, 518 N.W.2d at 28. Thus, both the collateral source rule and the UIM provisions were meant to avoid double recovery. As a ***345.** result, applying the collateral source rule in this case is unwarranted because it would clearly allow Dean to recover more than the amount needed to compensate him for actual damages.

[3] Furthermore, under the facts of this case the collateral source rule is clearly inapplicable because a tortfeasor's liability insurance cannot, by definition, constitute a collateral source. In *Imlay* we said:

> Minn.Stat. s 548.36, subd. 1(2), is poorly written, ambiguous, and could conceivably be read as providing for one, two, three or four different types of collateral source benefits. Since there are grammatical and analytical problems with each of the possibilities, the legislature may wish to reexamine this subsection to clarify its intentions.

Imlay, 453 N.W.2d at 334. Despite the concerns we expressed in *Imlay,* the legislature has chosen not to clarify the statute. However, while it might not be precisely clear exactly what the legislature meant to include as a collateral source, it is patently clear that a tortfeasor's liability insurance can never be within the definition of collateral source. The *Black's Law Dictionary* definition of "collateral source rule" is helpful:

> Under this rule, if an injured person receives compensation for his injuries from *a source wholly independent of the tort-feasor,* the payment should not be deducted from the damages which he would otherwise collect from the tortfeasor. In other words, a defendant tortfeasor may not benefit from the fact that the plaintiff has received money from other sources as a result of the defendant's tort, *e.g.* sickness and health insurance.

Black's Law Dictionary, 262 (6th ed. 1990) (emphasis added) (citations omitted). Additionally, we have previously stated that one distinguishing element of a collateral source is that the money or services in reparation of plaintiff's injury is from a source other than the tortfeasor. *See Hueper v. Goodrich,* 314 N.W.2d 828 (Minn.1982); *see also* Richard C. Maxwell, *The Collateral Source Rule in the American Law of Damages,* 46 Minn.L.Rev. 669, 670-71 (1962). The analysis in *Hueper* illustrates why a tortfeasor's liability insurance payment does not trigger the collateral source rule.

The rule has been applied where the plaintiff has received

insurance proceeds, employment benefits, gifts of money or medical services, welfare benefits or tax advantages. * * * Various justifications have been given for applying the rule. Where the plaintiff has paid for the benefit such as by buying an insurance policy, the rationale is that the plaintiff should be reimbursed and the tortfeasor should not get a windfall. If the benefit is a gift from a third party, such as an employer, a relative or a charity, the argument is that the donor intended that the injured party receive the gift and not that the benefits be shifted to the tortfeasor. * * * Other reasons for applying the rule are that the wrongdoer should be punished by being made to take full responsibility for his negligence and that the plaintiff will be more fully compensated if he is allowed to recover from the tortfeasor.

Hueper, 314 N.W.2d at 830 (citations omitted). As a result, neither the language of the statute nor the underlying justifications for applying the collateral source rule warrant its application in this case.

[4] We reverse the court of appeals decision and order the reinstatement of the trial court's original judgment awarding Dean uncompensated damages totalling $218,281.40.

Reversed.

FN1. The trial court's initial computation provided:

Aggregate Damages	$353,646.00
Less Dean's Fault (10%)	$-35,364.60
Net Damages	$318,281.40
Less Liability Insurance Payment	$-100,000.00
Uncompensated Damages	$218,281.40

FN2. The trial court's amended judgment computed the damages as follows:

Aggregate Damages	$353,646.00
Less Liability Insurance Payment	$-100,000.00
Net Damages	$253,646.00
Less Dean's Fault (10%)	$-25,364.60
Uncompensated Damages	$228,281.40

FN3. Computed as follows:

Aggregate damages	$353,646.00
Less Dean's share of fault (10%)	$-35,364.60
Net Damages	$318,281.40

FN4. The relevant portion of the No-Fault Act provides:

***345_** With respect to underinsured motorist coverage, the maximum liability of an insurer is the amount of damages sustained but not recovered from the insurance policy of the driver or owner of any underinsured at fault vehicle. * * *

[I]n no event shall the underinsured motorist carrier have to pay more than the amount of its underinsured motorist limits.

Minn.Stat. s 65B.49, subd. 4a (1994).

529 N.W.2d 335, Estate of Jones by Blume v. Kvamme, (Minn. 1995)

***335** 529 N.W.2d 335

ESTATE OF Emlyn JONES, Deceased, by Lorraine J. BLUME, its Personal Representative, Petitioner, Appellant,
v.
J. Peder KVAMME, et al., Respondents.

No. CX-93-944.
Supreme Court of Minnesota.
April 7, 1995.

****336*** *Syllabus by the Court*

1. Minn.Stat. s 550.37, subd. 24(1) (1994), which exempts certain retirement accounts from garnishment or attachment, violates the "reasonable amount" requirement of Minn. Const. art. I, s 12 because it contains no objective limitation on the amount that might be exempted from garnishment or attachment.

2. Minn.Stat. s 550.37, subd. 24(2) (1994), which governs all retirement plans, including individual retirement accounts, does not violate Minn. Const. art. I, s 12 because it contains a dollar limit and an objective limit expressed by the phrase "to the extent reasonably necessary for the support of the debtor and any spouse or dependent of the debtor."

Daniel P. Taber, Minneapolis, and Kevin O'C Green, Green Law Offices, Mankato, for appellant.

Bailey W. Blethen, Kevin M. Connelly, Blethen, Gage & Krause, Mankato, for respondents.

Heard, considered and decided by the court en banc.

OPINION

TOMLJANOVICH, Justice.

In 1987, Respondent Lorraine Blume (Blume) acting as personal representative of Emlyn Jones' estate (the Estate) prevailed on a stock fraud claim against Peder Kvamme (Kvamme), resulting in a $678,367.68 judgment that included $46,000 in punitive damages. This court upheld the award with the exception of the punitive damage award. *Estate of Jones v. Kvamme,* 449 N.W.2d 428, 432 (Minn.1989). In April 1991, in an effort to collect this judgment, Blume served a garnishment notice on Dain Bosworth, Inc. (Dain), a financial institution where Kvamme had investment

accounts.

Kvamme's assets held by Dain originated from contributions made to an employer sponsored qualified profit sharing plan. In 1980, the plan was terminated after the ownership of Kvamme's employer changed. Kvamme rolled the accumulated funds over to a qualified IRA account at National Bank of Commerce/MidAmerica (NBC IRA). In 1983, a portion of this money was transferred to a qualified IRA account with Dain (Dain IRA). Kvamme's interest in the Dain IRA was approximately $47,000. On March 1, 1991, Kvamme transferred additional money to Dain from his NBC IRA and Dain purchased shares in the Franklin Fund, a qualified IRA, on Kvamme's behalf. Kvamme's interest in the Franklin Fund was $51,900.

Upon receiving the garnishment notice, Dain disclosed that it held approximately $47,000, but failed to disclose the $51,900 in ***337** the Franklin Fund. In response to the garnishment notice and following Dain's disclosure, Kvamme claimed that all funds held by Dain were exempt under Minn.Stat. s 550.37, subd. 24, and identified the exempt amount as approximately $47,000. The district court held the $47,000 in the Dain IRA did not qualify as an IRA that was exempt from garnishment or attachment under Minn.Stat. s 550.37, subd. 24(1) and granted a garnishment order on June 21, 1991. Kvamme appealed this decision.

On July 19, 1991, before the court of appeals rendered its decision, Dain amended its disclosure to include the $51,900 held in the Franklin Fund. After the amended disclosure, the total value of Kvamme's holdings with Dain was identified as approximately $104,300. The court of appeals reversed the district court's judgment and held that the Dain IRA was exempt from garnishment or attachment. *Estate of Jones v. Kvamme,* 481 N.W.2d 94, 96 (Minn.App.1992). The court of appeals did not address whether the $51,900 in the Franklin Fund was exempt since the issue was not raised in the district court. Blume petitioned this court for review of the Estate's claim that Minn.Stat. s 550.37, subd. 24(1) was unconstitutional. This court ordered the court of appeals to remand the decision for a determination of the constitutionality of the statute.

On remand, the district court held the $51,900 in the Franklin Fund was not exempt from garnishment or attachment by Blume because Minn.Stat. s 550.37, subd. 24(1) violated Minn. Const., art. I, s 12 and art. XII, s 1, and the money was not reasonably necessary for the support of Kvamme, his spouse or his dependents under Minn.Stat. s 550.37, subd. 24(2) (1990). The court of appeals reversed the district court, finding Minn.Stat. s 550.37, subd. 24 did not violate the Minnesota Constitution. *Estate of Jones v. Kvamme,* 510 N.W.2d 6, 9 (Minn.App.1993).

[1] On appeal to this court, Blume contends that clause (1) of Minn.Stat. s 550.37, subd. 24 violates Minn. Const. art. I, s 12 because it allows a debtor to exempt from garnishment or

attachment an unreasonable amount of property. We agree and reverse the judgment of the court of appeals. We hold that Blume has demonstrated beyond a reasonable doubt that Minn.Stat. s 550.37, subd. 24(1) violates the Minnesota Constitution.

[2][3][4] The constitutionality of a statute is purely a legal question; lower courts' decisions are accorded no deference. *Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868, 872 (Minn.1986). Statutes are presumptively constitutional, *In re Haggerty*, 448 N.W.2d 363, 364 (Minn.1989); *In re Tveten*, 402 N.W.2d 551, 556 (Minn.1987), and should be declared unconstitutional "only when absolutely necessary." *Haggerty*, 448 N.W.2d at 364. The party challenging the constitutionality of a statute must prove beyond a reasonable doubt that the statute is unconstitutional. *Tveten*, 402 N.W.2d at 556.

The Minnesota Constitution provides:

> A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law.

Minn. Const. art. I, s 12. We have defined "reasonable amount" in the following manner:

> If an exemption has no limit of any kind, then it is unconstitutional. On the other hand, an exemption with a dollar, an objective, or a statutory "to the extent reasonably necessary" limit is a proper legislative determination of reasonableness.

Haggerty, 448 N.W.2d at 366. *See also Tveten*, 402 N.W.2d at 558 (holding an unlimited exemption for annuities purchased from fraternal organizations violated Minn. Const. art. I, s 12 because the statute did not contain an "objective bench mark by which the 'reasonable amount' of property exemption may be ascertained"); *In re How*, 59 Minn. 415, 419, 61 N.W. 456, 457 (1894) (holding an unlimited exemption for life insurance proceeds violated Minn. Const. art. I, s 12 because the statute contained "no certain or proper measure of any kind" and thus, the amount exempted "may amount to millions"); *In re Bailey*, 84 B.R. 608, 610-12 (Bankr.D.Minn.1988) (holding unlimited personal injury right of action exemption for special ***338** damages violated Minn. Const., art. I, s 12); *In re Hilary*, 76 B.R. 683, 686 (Bankr.D.Minn.1987) (holding family musical instrument exemption violated Minn. Const., art. I, s 12 for failing to provide objective limit).

Minn.Stat. s 550.37 provides in pertinent part:

> Subd. 1 The property mentioned in this section is not liable to attachment, garnishment or sale on any final process, issued from any court.

* * * * * *

Subd. 24. Employee Benefits. The debtor's right to receive present or future payments, or payments received by the debtor, under a stock bonus, pension, profit sharing, annuity, individual retirement account, individual retirement annuity, simplified employee pension, or similar plan or contract on account of illness, disability, death, age, or length of service:

(1) to the extent the plan or contract is described in section 401(a), 403, 408, or 457 of the Internal Revenue Code of 1986, as amended, or payments under the plan or contract are or will be rolled over as provided in section 402(a)(5), 403(b)(8), or 408(d)(3) of the Internal Revenue Code of 1986, as amended; or

(2) to the extent of the debtor's aggregate interest under all plans and contracts up to a present value of $30,000 (FN1) and additional amounts under all the plans and contracts to the extent reasonably necessary for the support of the debtor and any spouse or dependent of the debtor.

Minn.Stat. s 550.37, subds. 1, 24 (1994).

Appellant contends Minn.Stat. s 550.37, subd. 24(1) is unconstitutional. No Minnesota Court has interpreted the constitutionality of Minn.Stat. s 550.37, subd. 24, (FN2) however, the Federal Bankruptcy Court for the District of Minnesota has found clause (1) constitutional insofar "as it applies to IRAs that do not include rollovers." *In re Barlage,* 121 B.R. 352, 355 (Bankr.D.Minn.1990). The *Barlage* court found clause (1) contained an objective limit by incorporating the objective criteria found in I.R.C. s 408(a)(1). The bankruptcy court stated:

s 408(a)(1) prevents unlimited contributions to an IRA. This in turn limits the amount that an individual can accumulate in an IRA. How an individual chooses to invest the money once it is in an IRA does not change this result. Admittedly, the total amount accrued will vary according to the investment, but in any case the total is limited by the amount that can be invested.

Id. at 355-56.

In the present case, the court of appeals held Minn.Stat. s 550.37, subd. 24(1) was constitutional reasoning, "[l]ike the bankruptcy court in *Barlage,* we find that the I.R.C. provisions cited in clause (1) provide objective limitation criteria which prevent unlimited contributions to qualified retirement accounts." *Kvamme,* 510 N.W.2d at 10. The *Barlage* court reached its determination that a limitation on the contribution provided an objective limit to the amount the account could accumulate by

reasoning, "[a]dmittedly, the total amount accrued will vary according to the investment, but in any case, *the total is limited to the amount that can be invested.*" *Barlage* at 356 (emphasis added). This reasoning is erroneous.

Although the total amount accumulated is affected by the amount invested, it is not limited by it. Instead, the amount the account might accumulate is limited by the rate of return. Neither the statute itself, nor any section of the Internal Revenue Code that might be incorporated into it, limit the rate of return an individual might achieve. Thus, no objective criteria exists which limit the total that might be accumulated. Accordingly, since Minn.Stat. s 550.37, subd 24(1) contains no limit on the amount that may be accumulated in an IRA, this clause violates Minn. Const. art. I, s 12.

***339** [5] Pursuant to the rules of statutory construction, clause (1) is severable from the remainder of the statute, and thus, clause (2) remains in effect. Minn.Stat. s 645.20 (1994). (FN3) Clause (2) contains a dollar amount and a "to the extent reasonably necessary" phrase. Thus, clause (2) withstands constitutional scrutiny. *Tveten,* 402 N.W.2d at 558 (holding phrase "to the extent reasonably necessary" is an objective limit). By its terms clause (2) governs all plans and contracts. Thus, under clause (2), in this case and in future cases, the sum of all plans is exempt up to an indexed $30,000, plus "additional amounts under all the plans and contracts to the extent reasonably necessary for the support of the debtor and any spouse or dependents of the debtor." Minn.Stat. s 550.37, subd. 24(2).

[6] As respondent asserts, uniform treatment of retirement accounts funded by pre-tax dollars which grow tax free until retirement is undermined by our holding today. At present, plans governed by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. s 1001 *et seq.* (1988 ed.) are exempt from garnishment or attachment without limitation irrespective of whether the debtor reasonably needs the income. *Guidry v. Sheet Metal Workers Nat'l Pension Fund,* 493 U.S. 365, 376, 110 S.Ct. 680, 687, 107 L.Ed.2d 782 (1990). Our holding today means that plans governed by ERISA will continue to be entirely exempt, whereas plans not covered by ERISA, like an IRA, will only be exempt up to an indexed $30,000, plus an amount reasonably necessary for the support of the debtor and the debtor's spouse or dependents. (FN4) We believe, however, that from a policy perspective, this approach to exempting retirement income promotes a fairer result than ERISA presently provides.

[7] The policy underlying exemption of retirement income from creditors reflects a well founded desire of the legislature to insure that debtors, despite their debts, will nevertheless have a reasonable means to support themselves and their dependents. *See Medill v. State,* 477 N.W.2d 703, 708 (Minn.1991) (quoting

Poznanovic v. Maki, 209 Minn. 379, 382, 296 N.W. 415, 417 (1941)); *Tveten,* 402 N.W.2d at 559 (quoting *Poznanovic*). ERISA precludes attachment or garnishment of the entirety of any ERISA qualified retirement plan. *Guidry,* 493 U.S. 365, 376, 110 S.Ct. 680, 687 (holding ERISA preemption "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners * * * even if that decision prevents others from securing relief for the wrongs done them."). Thus, because of the breadth of ERISA's preemption, debtors can potentially shield assets over and above those necessary to support themselves and their dependents. This allows for an exemption beyond that which the public policy underlying the exemption requires. Moreover, it unfairly precludes legitimate creditors from satisfying a judgment, even though the debtor could afford to satisfy the judgment without jeopardizing the support of the debtor or the debtor's spouse and dependents. Therefore, while the Minnesota Constitution dictates the result we have reached, for the policy reasons articulated, we also believe this result is the fairest. Although Congress has not chosen to pursue the fairest result, the Minnesota Constitution directs us to pursue it within the present statutory framework.

[8] In this case, the district court determined and the court of appeals agreed that the $51,900 contained in the Franklin Fund is not reasonably necessary for the support of Kvamme and his wife or dependents. *Kvamme,* 510 N.W.2d at 12.

> ***340.** The record shows that Kvamme earns at least $1,822.69 per month and that his unencumbered homestead is worth approximately $200,000. The record also shows that Kvamme's wife has a net worth of over one million dollars and earned $100,000 in the previous year.

Id. (footnote omitted). Thus, the district court's determination that the $51,900 in the Franklin Fund is not exempt from garnishment or attachment because it was not reasonably necessary for the support of Kvamme, his spouse or his dependents is reinstated.

Reversed.

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

> FN1. This amount is "indexed" pursuant to Minn.Stat. s 550.37, subd. 4a (1994) and is currently $48,000.

FN2. In 1989, the legislature amended Minn.Stat. s 550.37, subd. 24. 1989 Laws, ch. 284, s 1. Although this court has ruled on the constitutionality of a previous version of Minn.Stat. s 550.37, subd. 24, *Tveten,* 402 N.W.2d at 556, to date no Minnesota court has ruled on the constitutionality of the amended statute.

FN3. "If any provision of a law is found to be unconstitutional

and void, the remaining provision of the law shall remain valid * * *." Minn.Stat. s 645.20.

FN4. In our determination of this case, we have considered whether funds originating from an ERISA qualified plan that are subsequently rolled over into an IRA continue to be protected from attachment or garnishment through ERISA's anti-alienation provisions. *See* 29 U.S.C. s 1056(d)(1) (1988 ed.). We hold they do not. *See Johns v. Rozet,* 826 F.Supp. 565, 567 (D.D.C.1993) (holding an IRA "is not protected from garnishment by ERISA because funds rolled over from an employee benefit plan into an IRA are not covered by ERISA.").

1996 WL 515478, State v. Paul Edward Orsello, (Minn. 1996)

***515478** --- N.W.2d ----

STATE of Minnesota, Respondent,
v.
Paul Edward ORSELLO, Petitioner, Appellant.

No. C2-94-1435.
Supreme Court of Minnesota.
Sept. 12, 1996.

Syllabus by the Court

****1** The use of language indicative of specific, rather than general, intent and of language consistent with similar specific intent crimes, demonstrates that stalking is a specific intent crime. Minn.Stat. s 609.749 (1993). Canons of statutory construction requiring that statutes be read so that no portion of the statute is superfluous and so as to avoid any interpretation of a statute that renders it unconstitutional, further buttress our conclusion.

Heard, considered and decided by the court en banc.

OPINION

GARDEBRING, Justice.

The appellant in this case, Paul Edward Orsello, appeals from his conviction under Minnesota's "stalking" statute, Minn.Stat. s 609.749 (1993). Orsello argues that the statute is ambiguous as to the level of intent required to convict him and that the statute should be read to require specific intent. In the alternative, Orsello asserts that if the statute is construed to require only general intent, then it is unconstitutionally "void for vagueness." The court of appeals agreed with the trial court that the language of the statute required only general rather than specific intent, as an element of the crime. We conclude that conviction under the statute requires proof of specific intent and therefore reverse.

Paul and Diane Orsello were married for over nine years, but were divorced in 1992. Diane Orsello received custody of their three children. Appellant was granted visitation and the right to phone his children on certain days of the week. However, the record reflects that he continued to contact his wife and children frequently via the phone and in writing. Often appellant suggested reconciliation, or at least social contact,

with his former wife. While the tenor of these contacts was often affectionate, sometimes appellant was threatening or angry. On one occasion, appellant showed his ex-wife a gun, stating he hoped "it wouldn't go off," and later told her she could "burn in hell."

Diane Orsello sought and received a harassment restraining order in June 1992, prohibiting appellant from contact with his family in any manner other than that allowed by a previous court order. Repeated contacts with his family resulted in his conviction for violating the harassment order in 1993. His contact with his wife and children continued and, based on incidents occurring from June to October 1993, he was charged with stalking under Minn.Stat. s 609.749 (1993).

There was some confusion at trial regarding whether stalking was a specific or general intent crime. Initially, the parties and the trial court assumed that specific intent was required and, therefore, that the prosecution had to prove appellant intended to stalk his wife. The trial court thus allowed the admission of appellant's conviction for violating the harassment order, as *Spreigl* evidence on the issue of intent. (FN1) After the close of evidence, however, the trial court concluded that only general intent was required and remarked that the prosecution had failed to prove specific intent. (FN2) The trial court therefore modified the model jury instruction for the stalking statute, which stated that specific intent was an element of this crime, to require only general intent. *See* 10A Minn.Dist. Judges Ass'n, *Minnesota Practice,* CRIMJIG 24.57 (1995).

**2 On appeal, the court of appeals affirmed appellant's conviction, agreeing with the trial court on the issue of intent and relying on the canons of statutory construction and on the absence of statutory language the legislature had previously indicated it would use to designate specific intent crimes. *State v. Orsello,* 529 N.W.2d 481, 484 (Minn.App.1995); *see* Minn.Stat. s 609.02 (1994).

The crime of stalking is new and has no precise analogue in common law. Following the 1989 murder of a television actress by an obsessed fan, many state legislatures enacted statutes criminalizing stalking. However, because the crime of stalking is a new legislative creation, there is, at present, no widely accepted legal definition for it. (FN3) Generally speaking, stalking encompasses predatory behavior directed usually at a specific individual. A stalker will engage in repeated behavior, sometimes seemingly benign, sometimes threatening, which nonetheless frightens and intimidates his or her victim. Stalking statutes typically offer injunctive relief in the form of either a protective or a restraining order. In addition, many of these statutes criminalize repeated, willful, malicious conduct directed at a specific person that actually alarms, annoys, or harasses that person. (FN4)

Minnesota enacted its anti-stalking legislation in 1993 amid publicity surrounding incidents of stalking behavior which resulted in murder. *See* Cassandra Ward, Note, *Minnesota's Anti-Stalking Statute: A Durable Tool to Protect Victims from Terroristic Behavior,* 12 Law & Ineq.J. 613, 633-34 (1994) (describing the events leading up to Minnesota's adoption of the statute). The stalking statute, under which appellant was convicted, reads as follows:

> Subd 1. Definition. As used in this section, "harass" means to engage in intentional conduct in a manner that:
>
> (1) would cause a reasonable person under the circumstances to feel oppressed, persecuted, or intimidated; and
>
> (2) causes this reaction on the part of the victim.
>
> Subd. 2. Harassment and stalking crimes. A person who harasses another by committing any of the following acts is guilty of a gross misdemeanor:
>
> (1) directly or indirectly manifests a purpose or intent to injure the person, property, or rights of another by the commission of an unlawful act;
>
> (2) stalks, follows, or pursues another;
>
> (3) returns to the property of another if the actor is without claim of right to the property or consent of one with authority to consent;
>
> (4) repeatedly makes telephone calls, or induces a victim to make telephone calls to the actor, whether or not conversation ensues;
>
> (5) makes or causes the telephone of another repeatedly or continuously to ring;
>
> (6) repeatedly uses the mail or delivers or causes the delivery of letters, telegrams, packages, or other objects; or
>
> (7) engages in any other harassing conduct that interferes with another person or intrudes on the person's privacy or liberty.

****3** Minn.Stat. s 609.749 (1993).

In this case, the issue is whether the stalking statute defines a crime of "general intent" or a crime of "specific intent." The meaning of the word "intent" in criminal law is, given its use in so many similar terms, at the very least, confusing. A criminal state of mind, or a criminal intent, is, of course, a necessary element of any crime having its origin in

common law. *See* Wayne R. LaFave, *Substantive Criminal Law,* s 3.5(e) (1986). If the legislature chooses not to include an intent requirement in a statutory crime, one is implied as a matter of law. *State v. Charlton,* 338 N.W.2d 26, 30 (Minn.1983) (citing *United States v. United States Gypsum Co.,* 438 U.S. 422, 436-37, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978)).

Two types of intent exist, specific and general. General intent requires only that the defendant engaged intentionally in specific, prohibited *conduct. State v. Lindahl,* 309 N.W.2d 763, 766 (Minn.1981). 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. *Charlton,* 338 N.W.2d at 30; LaFave, *supra,* at s 3.5(a).

When legal scholars developed the Model Penal Code, they sought to ameliorate the confusion inherent in the concept of "intent" and adopted a four part delineation of intent, replacing the general intent/specific intent dichotomy. *See* Minn.Stat. s 609.02, subd. 9 (1965). The Model Penal Code divides intent into four concepts: purpose, knowledge, negligence, and recklessness. Model Penal Code s 2.02 (1962). When the Minnesota legislature drafted its current criminal code in 1963, it borrowed from the Model Penal Code when it set forth the following guidelines as to how it would henceforth designate criminal intent:

> (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, except as provided in clause (6), 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. s 609.02, subd. 9 (1994). Thus, when this court seeks to interpret a criminal statute to determine the level of intent required for culpability under the statute, we must first turn to the above statutory guide. *See, e.g., State v. Raymond,* 440 N.W.2d 425, 426 (Minn.1989).

**4 Appellant presents two arguments that Minnesota's stalking statute requires specific intent, one based on the unusual drafting of the statute and the other linked to constitutional requirements. Appellant's statutory drafting argument is twofold. First, he argues that the statutory language supports an inference that the legislature intended to make stalking a specific intent crime, although it did not use one of the exact phrases listed in section 609.02, subdivision 9. Appellant observes that the stalking statute criminalizes conduct also prohibited by other criminal statutes and that those other statutes require specific intent. Thus, argues appellant, as the legislature had previously determined conduct comprising part of the new crime of stalking to require specific intent, the stalking crime should also require specific intent.

In his second statutory argument, appellant relies on *State v. Kjeldahl*, 278 N.W.2d 58 (Minn.1979), where this court held that the legislature could criminalize an act without mention of a required intent level and thereby create a general intent crime. *Id.* at 61. Appellant notes that the legislature could have made stalking a general intent crime without any reference to intent. Because it chose to include in the statute the phrases "intentional conduct" and "in a manner that," appellant argues that the legislature must have intended the statute to require some level of intent other than general intent. *See* Minn.Stat. s 609.749 (1993). That is, in order to create a general intent crime, the legislature could simply have said that " 'harass' means to engage in * * * conduct * * * that * * *." *Id.* But it did not; moreover, it specifically added language referring to intent. Therefore, argues appellant, the stalking statute should be construed to require specific intent.

The state responds, relying principally on the absence of one of the section 609.02, subdivision 9 phrases, that the statute is clearly a general intent crime. The state argues that the legislature could have used one of these previously-designated "magic phrases," but chose not to, thus indicating its intention to require only general intent. With respect to appellant's argument that inclusion of the phrases "intentional conduct" and "in a manner that" indicates a specific intent requirement, the state offers an analogy between the stalking statute and the assault statute. The assault statute criminalizes "[t]he intentional infliction of" bodily harm; the word "intentional" in both statutes, contends the state, modifies only the word following--in the case of the stalking statute, the word "conduct"--and is present only to avoid criminalizing accidental conduct. *Compare* Minn.Stat. s 609.02, subd. 10(2) (1994) *with* Minn.Stat. s 609.749, subd. 1 (1993).

Appellant also presents a constitutional argument, contending that the statute must be read to require specific intent or it will be unconstitutionally vague. That is, a stalking statute requiring only general intent would fail to give adequate notice of the conduct it prohibits and, thus, would be constitutionally

infirm. *See Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Appellant asserts that this court must apply the rule of statutory construction requiring courts to avoid, if possible, interpreting statutes in a manner that renders them unconstitutional. Minn.Stat. s 645.17(3) (1994). Further, appellant notes that if, as here, a court is confronted by two differing possible constructions of a statute, the court must adopt the option which upholds the constitutionality of the statute. *State on Behalf of Forslund v. Bronson,* 305 N.W.2d 748, 751 (Minn.1981). Thus, the stalking statute should be construed to require specific intent. In the context of this constitutional argument, appellant also contends that, because the level of intent required by the stalking statute is ambiguous, it must be interpreted with reference to the so-called "rule of lenity," which holds that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" towards the defendant. *Rewis v. United States,* 401 U.S. 808, 812, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971); *State v. McKown,* 461 N.W.2d 720, 725 (Minn.App.1990), *aff'd* 475 N.W.2d 63 (Minn.1991), *cert. denied,* 502 U.S. 1036, 112 S.Ct. 882, 116 L.Ed.2d 786 (1992). Applying this rule here would require a determination that the statute requires specific intent as an element of the crime.

****5** The state dismisses Orsello's argument about the statute's potential unconstitutionality as quibbling over semantics, noting that the legislature need not define each and every term it uses. The state urges that stalking is a straightforward crime and that persons of common understanding will, to paraphrase Justice Stewart's aphorism about obscenity, know it when they see it. *See Jacobellis v. Ohio,* 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964).

Our goal in cases involving statutory interpretation is, of course, to give effect to the intention of the legislature in drafting the statute. *State v. District Court of Ramsey County,* 134 Minn. 131, 134-35, 158 N.W. 798, 799 (1916). We begin with a careful examination of the statutory language itself and a reference to the tools of statutory construction provided by the legislature.

As the state notes, none of the "specific intent" language of section 609.02, subdivision 9, is present in the stalking statute. However, because of the peculiar drafting of the statute, we conclude that our analysis must go further. In particular, we note two unusual aspects of the statute that have a bearing on the level of intent required. First, the statute presents a detailed list of acts constituting stalking; this list includes several types of conduct which the legislature has criminalized in other portions of the criminal code. These other statutes plainly require specific intent. Second, as mentioned above, the stalking statute's definition section states that " 'harass' means to engage in intentional conduct in a manner that * * *." Minn.Stat. s 609.749, subd. 1 (1993). The

last two phrases, "intentional conduct" and "in a manner that," appear to indicate an intent requirement greater than simple general intent.

We consider first the importance of the reference to other, specific intent crimes within the stalking statute. While not a model of clarity, part of the stalking statute is nonetheless carefully drafted. In section 609.749, subdivision 2, the legislature precisely enumerated the specific actions that would violate the statute. A person who engages in any of the following acts is in violation of the stalking statute:

> (2) stalks, follows, or pursues another;
>
> (3) returns to the property of another if the actor is without claim of right to the property or consent of one with authority to consent;
>
> (4) repeatedly makes telephone calls, or induces a victim to make telephone calls to the actor, whether or not conversation ensues;
>
> * * * *
>
> (6) repeatedly uses the mail or delivers or causes the delivery of letters, telegrams, packages, or other objects; or
>
> (7) engages in any other harassing conduct that interferes with another person or intrudes on the person's privacy or liberty.

Minn.Stat. s 609.749, subd. 2 (1993).

This listing of behaviors is notable for its close similarity to the definitions of other crimes, all of which clearly require specific intent. For example, anyone who "repeatedly uses the mail or delivers or causes the delivery of letters, telegrams, packages or other objects" has violated the stalking statute. Minn.Stat. s 609.749, subd. 2(6) (1993). It is already a crime in Minnesota to "repeatedly use[ ]the mails or deliver[ ]letters, telegrams, or packages" when done "with the intent to abuse, disturb, or cause distress." Minn.Stat. s 609.795, subd. 1(3) (1994).

****6** Another analogy is provided in the comparison of the crime of "repeatedly mak[ing] telephone calls, whether or not conversation ensues, with intent to abuse, disturb, or cause distress," Minn.Stat. s 609.79, subd. 1(1)(b) (1994), with the similar provision in the stalking statute, which criminalizes "repeatedly mak[ing] telephone calls, or induc[ing] a victim to make telephone calls to the actor, whether or not conversation ensues" Minn.Stat. s 609.749, subd. 2(4) (1993). In both cases, the language used is nearly identical, save that the intent

requirement is clearly spelled out in the former statute, but not in the stalking statute.

A final example is provided in the "trespass" provision of the statute. It is also a crime in Minnesota to enter on another's property to look through the window or other aperture of a house or dwelling "with the intent to intrude upon or interfere with the privacy of a member of the household." Minn.Stat. s 609.746, subd. 1(a) (1994). The stalking statute contains a similar provision, making it a crime to engage "in any other harassing conduct that interferes with another person or intrudes on the person's privacy or liberty." Minn.Stat. s 609.749, subd. 2(7) (1993); *see also id.* at subd. 2(3).

These similarities evince a legislative intention to make the above-mentioned criminal statutes consistent. To conclude that conviction of a crime, based on identical behavior, requires one level of intent under one statutory provision and another level of intent under a second statutory provision, contradicts this purpose. Clarity must be a hallmark of the criminal law if it is to function and, thus, we believe that the parallels between existing criminal statutes requiring specific intent and the stalking statute militate toward finding that the stalking statute also requires specific intent.

With regard to the other acts enumerated in subdivision 2, which do not have parallels elsewhere in the criminal code, we conclude by virtue of their language and their presence in the subdivision, that it is proper to infer the requirement of specific intent for them as well. We note, for example, that the first action on the list is cast in language strongly indicative of specific intent. It criminalizes the direct or indirect manifestation of "a purpose or intent to injure the person, property, or rights of another by the commission of an unlawful act." Minn.Stat. s 609.749, subd. 2(1) (1993). This language, "a purpose or intent to," is remarkably similar both to the most stringent intent requirement of the Model Penal Code, "purposely," and to the Minnesota legislature's codification of it, "with intent to." Both of the latter phrases mean that the actor fully intends the result of his or her actions. *Compare* Model Penal Code s 2.02(2)(a)(i) (1962) (a person acts "purposely * * * [when] it is his conscious object to engage in conduct of that nature or to cause such a result * * * ") *with* Minn.Stat. s 609.02, subd. 9(4) (" 'with intent to' * * * 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.").

****7** As for appellant's second argument, relating to the stalking statute's definition section, we believe that the language of subdivision 1 reinforces our conclusion that specific intent is required by the text of the stalking statute. Subdivision 1 states that: "[a]s used in this section, 'harass' means to engage in intentional conduct in a manner that: (1)

would cause a reasonable person under the circumstances to feel oppressed, persecuted, or intimidated; and (2) causes this reaction on the part of the victim." Minn.Stat. s 609.749, subd. 1 (1993). Canons of statutory construction require us to give effect to each word in the statute, to avoid any interpretation that characterizes any portion of the statute as surplusage. Minn.Stat. s 645.17(2) (1994). The legislature needed only itemize the actions to be criminalized to create a general intent crime. *See Lindahl,* 309 N.W.2d at 767-77. It did not need to qualify further the type of action required. In other words, a general intent version of this statute did not need either the adjective "intentional" or the phrase "in a manner that." *See* Minn.Stat. s 609.749, subd. 1 (1993). The addition of these words, we believe, further demonstrates that the stalking statute must require specific intent, for how does one act "in a manner that would cause a reasonable person to feel oppressed" unless one acts with at least the knowledge, if not the purpose, to cause such a reaction? To conclude otherwise would be to admit the possibility that one might be guilty of accidentally stalking and that seems inconsistent with the legislative background and intent of the statute.

We hold today that Minn.Stat. s 609.749 (1993), which defines the crime of stalking, requires specific intent. The legislature should be clear, but it need not be redundant. In subdivision 2, our legislators, having once designated certain actions as criminal when done with specific intent, were under no obligation to do so again when they included them in the stalking statute. In subdivision 1, the legislature included terms not required to produce a general intent crime, but which must still be given meaning. We hold that to read the statute as a coherent whole requires that stalking be a specific intent crime.

Although it is not necessary to our conclusion, we find merit in appellant's constitutional argument as well. Appellant asserts that interpreting the stalking statute to require general intent will render the statute unconstitutionally vague because it will not provide sufficient notice to the public of what conduct is prohibited. Appellant also asserts that a general intent stalking statute would be constitutionally infirm because it would fail to give adequate notice of the conduct prohibited and thus would be ambiguous. *See Connally v. General Construction Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Ambiguous criminal statutes, appellant contends, must be interpreted with reference to the so-called rule of lenity. In order to ensure fair public notice of what action is prohibited by the criminal statutes, this rule holds that a statute lacking a clear statement of the level of intent required must be resolved in favor of lenity: here, to require specific intent. *See Liparota v. United States,* 471 U.S. 419, 427, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985); *McKown,* 461 N.W.2d at 725.

****8** Criminal statutes must give adequate notice to the general public of what conduct is prohibited. "[T]he terms of a

penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties * * *." *Connally,* 269 U.S. at 391. The *Connally* Court held that statutes must be written in such a manner that persons of ordinary intelligence need not guess at their meaning or differ as to their application. 269 U.S. at 391. A court may understand "the gist of the legislative expression," but such understanding does not make a statute constitutionally clear. *See, e.g., Lanzetta v. New Jersey,* 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939).

The state's assumption that stalking is a straightforward crime and thus that persons of common intelligence will be able to readily discern what behavior is prohibited misses the point of the constitutional requirement of clarity. "[W]hen choice has to be made between two readings of what conduct [the legislature] has made a crime, it is appropriate, before we choose the harsher alternative, to require that [it] should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218, 221-22, 73 S.Ct. 227, 97 L.Ed. 260 (1952); *McKown,* 461 N.W.2d at 725. It may well be that people of ordinary intelligence might get the "gist" of a stalking statute. But, the confusion at appellant's trial regarding the stalking statute's intent requirement belies that assertion. At the outset, all parties involved assumed that the statute required proof of specific intent. To do so seemed to comport with common sense. Only after reading the statute carefully did confusion arise; apparently, when the attorneys and the judge first saw this case, they quickly concluded that it contained a specific intent requirement.

Thus, if we were to conclude that the stalking statute required only general intent, the statute might be void for vagueness and, thus, unconstitutional. While we do not base our decision on any resolution of this constitutional issue, it does buttress our statutory analysis. Moreover, we observe that the similar statutes of several other states have been the subject of void for vagueness challenges. *See, e.g., People v. Heilman,* 25 Cal.App.4th 391, 30 Cal.Rptr.2d 422 (Cal.Ct.App.1994), *rev. denied,* (Aug. 25, 1994); *Culbreath v. State,* 667 So.2d 156 (Ala.Crim.App.1995), *cert. denied,* (Aug. 4, 1995). While none of those statutes have had the drafting peculiarities of Minn.Stat. s 609.749, most of those that have survived have included a specific intent requirement.

The only conclusion, therefore, that both conforms to a common sense reading of the entire text of the statute and avoids the possibility of constitutional infirmity is that the statute requires specific intent. The Minnesota District Judges Association correctly defined specific intent as an element of the crime of stalking. *See* 10A Minn.Dist. Judges Ass'n, *Minnesota Practice,* CRIMJIG 24.57 (1995). If, however, the legislature truly meant for stalking to be a general intent

crime, it possesses the means to ameliorate the statute's present lack of precision by a clarifying amendment.

**9 The decision of the court of appeals is reversed and this case is remanded to the trial court. Because the case was submitted to the jury with a mistaken instruction on the question of intent, a new trial is ordered.

STRINGER, Justice (dissenting).

The majority's conclusion that Minn.Stat. s 609.749 requires proof that the defendant intended to cause the victim to feel oppressed, persecuted or intimidated, as opposed to proof that the defendant intended to engage in conduct that caused the victim's reaction, regardless of whether the defendant had the specific intent to cause the reaction, is an unwarranted rewrite of a clear and unambiguous statute. Further, it is based upon a constitutionality argument that was not raised in the lower courts and should not now be heard by the court because it is raised for the first time here. Therefore, I respectfully dissent.

My first point of departure from the majority is its characterization of Minn.Stat. s 609.749 as a product of "peculiar drafting"--apparently offered as a substitute for ambiguity as the requisite rationale for engaging in a search for legislative intent. Minn.Stat. s 645.16; *see also Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 274 (Minn.1995); *Herman & Sons v. Russell*, 535 N.W.2d 803, 806 (Minn.1995). I do not believe Minn.Stat. s 609.749 is either peculiarly drafted nor is it ambiguous. As the majority points out, the statute has none of the words we are told by the legislature to look for, by application of Minn.Stat. s 609.02, subd. 9, to guide us as to whether proof of specific intent is required in applying Minn.Stat. s 609.749. The term "intentional" is used to define "conduct" in the definition of "harass" in subdivision 1, but clearly only to prevent innocent, accidental, negligent or other kinds of unintentional activity from triggering the statute. Thus, for example, if the defendant "repeatedly" telephones another but calls a wrong number, presumably no violation of Minn.Stat. s 609.749, subd. 2(4) would occur because the defendant did not intend to telephone the one called. But if the defendant intended to call the party reached, and the calls "(1) * * * would cause a reasonable person under the circumstances to feel oppressed, persecuted or intimidated; and (2) causes this reaction on the part of the victim" a violation of Minn.Stat. s 609.749 has occurred, without any further showing that the defendant had the specific intent to cause the victim's reaction. That clearly is what the legislature has established as harassing and I see no reason for this court to inject an additional requirement of proof of specific intent to cause the victim's oppressed, intimidated or persecuted reaction. If the legislature had intended to require proof of specific intent, as the majority

concludes, it would simply have inserted the words "intentionally" or "with intent to" before the key word "causes" in subdivision 1 so that it would read:

> ****10** Subd. 1 Definition. As used in this section, "harass" means to engage in intentional conduct in a manner that:
>
> * * * *
>
> (2) *intentionally* causes this reaction on the part of the victim.

It did not do so and it is not ours to supply the omitted words. (FN1)

Ironically, the majority's reliance on "peculiar drafting" to justify a statutory rewrite to require proof of specific intent has created its own peculiar outcome, because now the state will not only be required to prove intent to oppress, persecute or intimidate; it must also prove that a hypothetical, reasonable person would so react, and that the victim did so react. But the peculiar result comes about because the court's legislative rewrite grafts proof of specific intent onto a statute that already had a protective device incorporated in it to prevent its unwarranted application--that the conduct must be of a nature to cause a reasonable person to feel oppressed. So we are left with the anomaly of our courts exonerating those stalkers who fully intend to oppress, persecute or intimidate their victims, but proof fails as to the reasonableness of the victims' reaction? Are we to protect the stalker who intends to inflict on a victim the odious consequences of the stalker's conduct in preference to the interests of the victim who may unreasonably have felt those consequences? It seems this is precisely what the legislature was avoiding when it established a clear and simple statutory framework requiring only proof of intent of conduct, coupled with proof that a reasonable person would have so reacted and the victim in fact did so respond, to establish the crime of harassment and stalking. The reasonable person standard acts as a check to insure that an actor intentionally engaging in a mild degree of conduct otherwise covered by the statute will not be caught in its scope because of another person's unreasonable reaction. The majority's rewrite of the "peculiarly drafted" statute leads to its own peculiar, puzzling and irrational result.

In finding a requirement of specific intent, the majority places heavy emphasis on the listing in subdivision 2 of Minn.Stat. s 609.749 of a number of activities that are criminalized in other statutes where specific intent is required, concluding that the legislature must have intended to require specific intent because it references other specific criminal conduct that requires specific intent proof. I find this analysis misguided. First, reference to these criminalized activities requiring specific intent, but omitting specific

intent as a requirement of proof in Minn.Stat. s 609.749, seems to cut in just the opposite direction the majority urges--that is, it once again underscores that the legislature knew exactly what it was doing when it required proof of specific intent with respect to particular conduct standing alone, without reference to a specific victim, but not where the statutory purpose is to protect a specific class of victims, i.e., targets of stalking or harassing conduct. In those cases, the legislature deemed it enough that the offensive conduct had occurred where there was proof of intent to act, coupled with proof that the conduct would have oppressed the reasonable person and it caused the victim to feel "oppressed, persecuted or intimidated."

****11** Second, the first listed offense in fact *does* require specific intent:

> A person who harasses another by committing any of the following acts is guilty of a gross misdemeanor:
>
> (1) directly or indirectly *manifests a purpose or intent to injure the person, property, or rights of another* by the commission of an unlawful act.

Minn.Stat. s 609.749, subd. 2 (emphasis added). Where the legislature employs the triggering language to require specific intent for one course of conduct but omits it for another, it seems particularly inappropriate for the court to now inject specific intent language.

Third, prohibited conduct described in paragraph (7) of Minn.Stat. s 609.749, subd. 2, clearly requires no specific intent either by its own terms or by reference to any other statute criminalizing the conduct:

> A person who harasses another by committing any of the following acts is guilty of a gross misdemeanor:
>
> * * * *
>
> (7) engages in any other harassing conduct that interferes with another person or intrudes on the person's privacy or liberty.

It is clear and unambiguous that the defendant's conduct alone triggers Minn.Stat. s 609.749 based upon the consequence of that conduct, similar to subdivision 1, without regard to whether the defendant intended to interfere with or intrude upon the victim. The majority would rewrite this provision too, presumably by adding "with the *intent* to interfere or intrude."

I also take issue with the majority's reasoning that because the legislature needed only to list the activity to be criminalized to create a general intent statute, when it required proof of intentional conduct it must have intended in addition,

to require the higher degree of proof of specific intent. I see no support for this conclusion whatsoever. Raising the specter that unless a requirement of proof of specific intent is read into the statute one could be charged with an accidental stalking, as does the majority, misses the point as to why subdivision 1 requires proof of intentional conduct in the first instance. The statutory focus clearly is on protecting the victim and it was obviously the legislature's purpose to measure the nature of the defendant's conduct, not by the defendant's intended consequences, which might frequently be difficult to prove, but by how the hypothetical reasonable person would react to the defendant's intended conduct and by the victim's response. If the hypothetical reasonable person would feel oppressed, persecuted or intimidated by the defendant's intended conduct, and in fact the victim does so react, the actor has violated Minn.Stat. s 609.749, if the conduct falls within any of the seven sections of subdivision 2. Application of the "reasonable person" test protects against criminalizing conduct that only an unreasonably sensitive or paranoid victim would find harassing, and therefore the risk of a truly innocent defendant falling within the ambit of Minn.Stat. s 609.749 is minimal. Further, stalking is a conduct of such personally intrusive nature that it seems not at all unreasonable for the legislature to deem that those who engage in such activity shall be subject to criminal prosecution because of their conduct alone, and without regard to the intended consequence. Proof that a reasonable person would feel oppressed, intimidated or persecuted by the defendant's conduct and that the victim so reacted would seem to be sufficient proof that the defendant intended that reaction.

****12.** Finally, the majority's conclusion that if it were to find only a requirement of general intent it might be unconstitutional is gratuitous and seems wholly unwarranted. No constitutional question was raised at the trial court level and on that basis the court of appeals specifically declined to provide constitutional review. We too should decline review because the constitutional issue was not raised at the trial court level and cannot be raised for the first time on appeal. *State v. Engholm,* 290 N.W.2d 780, 784 (Minn.1980). While I have grave doubts about whether a statute that so explicitly defines the required proof of the offensive conduct, as does Minn.Stat. s 609.749, is unconstitutionally vague, I would consider the issue waived by the appellant for failure to timely raise it in the trial court.

I would therefore affirm the court of appeals.

COYNE, Justice.

I join Justice Stringer's dissent.

ANDERSON, Justice.

I join Justice Stringer's dissent.

FN1. *See State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). In *Spreigl* this court established a process for admission of evidence of previous crimes or "bad acts" by the defendant. Such evidence is admissible only for certain limited purposes, one of which is the issue of intent. *See* Minn.R.Evid. 404(b) (prior crimes and/or "bad act" evidence not admissible to show defendant has a bad character, but may be admissible to show intent, identity, or motive).

FN2. We note that while the trial court remarked that the prosecution failed to prove specific intent, our review of the record suggests that there was evidence presented at trial from which specific intent could be inferred.

FN3. *See generally* Ellen F. Sohn, *Anti-Stalking Statutes: Do They Actually Protect Victims?*, 30 Crim.L.Bull. 203 (May/June 1994); M. Katherine Boychuk, Comment, *Are Stalking Statute Laws Unconstitutionally Vague or Overbroad?*, 88 Nw.U.L.Rev. 769 (1994).

FN4. Sohn, *Anti-Stalking Statutes, supra,* at 207, 210; *see also* Cal.Penal Code s 646.9(a) (West 1995).

FN1. One need go no further than the statute preceding Minn.Stat. s 609.749 to find an example of numerous criminal statutes requiring proof of specific intent in Minnesota's criminal statutes. There the crime of "harassment" is defined as follows:

> Subdivision 1. Definition. For the purposes of this section, the following terms have the meanings given them in this subdivision.
>
> (a) "Harassment" includes:
>
> (1) repeated, intrusive, or unwanted acts, words, or gestures that are *intended to adversely affect the safety, security, or privacy of another,* regardless of the relationship between the actor and the intended target * * *.
>
> Minn.Stat. s 609.748 (1994) (emphasis added).