STATE OF MINNESOTA

IN SUPREME COURT

A10-64

Ramsey County

Magnuson, C.J.
Concurring, Page, J.
Concurring, Anderson, Paul H., J.
Dissenting, Gildea, Anderson, G. Barry,
and Dietzen, JJ.

Deanna Brayton, et al.,
Respondents,
vs.

Tim Pawlenty, et al.,
Appellants.

Filed: May 5, 2010
Office of Appellate Courts

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S Y L L A B U S

The executive branch exceeded its authority under Minn. Stat. § 16A.152, subd. 4 (2008), by using that statute to balance the budget through reducing allotments before the budget-making process was completed.

Affirmed.

O P I N I O N

MAGNUSON, C.J.

This case presents questions about the authority of Minnesota's executive branch under Minn. Stat. § 16A.152, subd. 4 (2008), to reduce allotments in order to avoid deficit spending. The Ramsey County District Court held that use of the statutory "unallotment" authority to reduce funding for the Minnesota Supplemental Aid—Special Diet Program in the circumstances of this case violated separation of powers principles. We affirm, although on different grounds.

Six Minnesota residents who qualify for payments under the Minnesota Supplemental Aid—Special Diet (Special Diet) Program brought an action seeking declaratory and injunctive relief. These plaintiffs, respondents on appeal, challenge the validity of reductions made by the executive branch to unexpended allotments of appropriated funds available for payments under the Special Diet Program for the 2010-2011 biennium, which began July 1, 2009, and ends June 30, 2011. The plaintiffs assert that the reductions in allotments to the Special Diet Program violate the terms of the unallotment statute, Minn. Stat. § 16A.152, subd. 4, and are unconstitutional as a violation of separation of powers. The defendants, appellants on appeal, are Governor Tim Pawlenty and the Commissioners of the Departments of Management and Budget, Human Services, and Revenue.[1]

As part of the obligation to "manage the state's financial affairs," Minn. Stat. § 16A.055, subd. 1(a)(2) (2008), the Commissioner of Minnesota Management and Budget (MMB), is required to "prepare a forecast of state revenue and expenditures" in February and November of each year. Minn. Stat. § 16A.103, subd. 1 (2008). The Commissioner's November 2008 forecast for the 2010-2011 biennium projected a deficit of $4.847 billion, based on anticipated revenues of $31.866 billion. The Commissioner's February 2009 forecast projected a deficit of $4.57 billion, based on anticipated revenues of $30.7 billion.

In January 2009, the Governor submitted a proposed budget to the Legislature with anticipated revenues of $31.07 billion. In March 2009, after the February 2009 forecast, the Governor submitted a revised budget to the Legislature based on anticipated revenues of $29.905 billion. An April 2009 economic update from MMB showed February and March revenues as $46 million less than projected in the February forecast.

On May 9, 2009, the Governor vetoed a revenue bill that increased taxes in order to meet the anticipated revenue shortfall. The Legislature was unsuccessful in its attempt to override the veto. Between May 4 and May 18, the Legislature passed and presented to the Governor appropriation bills for the 2010-2011 biennium. These appropriation bills reduced spending below the levels projected in the February 2009 forecast so that the projected deficit of $4.57 billion was reduced to $2.7 billion. The Governor signed the appropriations bills into law, exercising a limited number of line-item vetoes not at issue here. House File 1362, the Omnibus Health and Human Services Bill, which provided funding for the Special Diet Program that is at issue in this case, became law on May 14. Act of May 14, 2009, ch. 79, 2009 Minn. Laws 690.

On May 18, 2009, the same day it was required to adjourn, the Legislature passed House File 2323, another revenue bill that would raise taxes to address the $2.7 billion projected deficit remaining after enactment of the appropriations bills. As he had done with the prior revenue enactment, the Governor vetoed the second revenue bill. Because the Legislature had adjourned by the time of the veto, the $2.7 billion projected deficit remained. The Governor did not call a special session of the Legislature.

The Minnesota Constitution allows the state to borrow money for only limited purposes. *See* Minn. Const. art. XI. As a result, the state's biennial operating budget must be balanced—that is, expenditures cannot exceed revenues for the biennium. The statute at issue in this case, Minn. Stat. § 16A.152, subd. 4 (the unallotment statute), provides the executive branch with a means to address a budget deficit, including creation of and authorization to use a budget reserve fund and, if the reserve fund is depleted, authority to reduce unexpended allotments. The statute provides:

> (a) If the commissioner determines that probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the biennium will be less than needed, the commissioner shall, with the approval of the governor, and after consulting the Legislative Advisory Commission, reduce the amount in the budget reserve account as needed to balance expenditures with revenue.
>
> (b) An additional deficit shall, with the approval of the governor and after consulting the legislative advisory commission, be made up by reducing unexpended allotments of any prior appropriation or transfer. Notwithstanding any other law to the contrary, the commissioner is empowered to defer or suspend prior statutorily created obligations which would prevent effecting such reductions.
>
> (c) If the commissioner determines that probable receipts for any other fund, appropriation, or item will be less than anticipated, and that the amount available for the remainder of the term of the appropriation or for any allotment period will be less than needed, the commissioner shall notify the agency concerned and then reduce the amount allotted or to be allotted so as to prevent a deficit.

> (d) In reducing allotments, the commissioner may consider other sources of revenue available to recipients of state appropriations and may apply allotment reductions based on all sources of revenue available.
>
> (e) In like manner, the commissioner shall reduce allotments to an agency by the amount of any saving that can be made over previous spending plans through a reduction in prices or other cause.

Minn. Stat. § 16A.152, subd. 4. An "appropriation" is the Legislature's authorization "to expend or encumber an amount in the treasury." Minn. Stat. § 16A.011, subd. 4 (2008). The executive branch "allots" the appropriated funds for spending throughout the biennium. Minn. Stat. § 16A.011, subd. 3 (2008) (" 'Allotment' means a limit placed by the commissioner on the amount to be spent or encumbered during a period of time pursuant to an appropriation.").

In a June 4, 2009, letter, the Commissioner informed the Governor that the conditions to trigger application of the unallotment statute existed and that it would be necessary to reduce allotments to avoid a deficit. In the letter, the Commissioner stated: "I have determined, as defined in Minnesota Statutes 16A.152, that 'probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the [2010-2011] biennium will be less than needed.' " The Commissioner further explained that the February 2009 forecast projected revenues for the biennium of $30.7 billion—$1.2 billion less than anticipated in the November 2008 forecast—and that based on the bills enacted by the Legislature and signed by the Governor, forecasted revenues would result in a $2.7 billion shortfall for the biennium. The Commissioner also noted that the national economy had worsened since the February forecast and that year-to-date receipts for Fiscal Year (FY) 2009 were down $70.3 million compared to the February forecast.

On June 16, 2009, in accordance with subdivision 4 of section 16A.152, the Commissioner proposed allotment reductions to the Governor. The Commissioner met twice with the Legislative Advisory Commission to report on the allotment reductions. The Governor approved proposed allotment reductions of approximately $2.5 billion on July 1, the first day of the biennium, and the Commissioner implemented the unallotments beginning that month. The Commissioner notified the legislative budget committees of the unallotments within 15 days, as required by Minn. Stat. § 16A.152, subd. 6 (2008). Some of the unallotments were effective for both the first and second years of the biennium; some were effective for only the second year of the biennium which begins on July 1, 2010. These changes were effected not only by reducing the number of dollars for specific allotments, but in some instances, by changing substantive criteria that established eligibility for payments or formulas for spending.[2] In addition to the $2.5 billion of unallotments, the Commissioner implemented $210 million in administrative savings to make up the remainder of the $2.7 billion projected deficit.

The unallotment at issue in this appeal affected funding for the Special Diet Program. The Special Diet Program is part of a broader Minnesota Supplemental Aid (MSA) program, which provides monthly cash payments to supplement federal Supplemental Security Income benefits. *See* Minn. Stat. §§ 256D.33-.54 (2008). The Special Diet Program provides for payments to qualified MSA participants on medically prescribed diets. Minn. Stat. § 256D.44, subd. 5(a).

That statute requires county agencies to pay monthly allowances to qualified individuals based on United States Department of Agriculture standards as specifically set out in the statute. *Id.* The Special Diet Program funding is included in the general appropriation to the Department of Human Services for all MSA programs. Act of May 14, 2009, ch. 79, art. 13, § 3, subd. 4(j), 2009 Minn. Laws 690, 991.

The MSA appropriation was $33.93 million for FY 2010 and $35.19 million for FY 2011. *Id.* The Commissioner reduced allotments from the MSA appropriations by $2.866 million for FY 2010 and $4.3 million for FY 2011, including allotment reductions to the Special Diet Program of $2.133 million for FY 2010 and $3.2 million for FY 2011. The effect of these unallotments was to eliminate Special Diet Program payments from November 1, 2009, through June 30, 2011, the end of the biennium.

The plaintiffs filed their complaint on November 3, 2009, in Ramsey County District Court. The plaintiffs moved for a temporary restraining order requiring the defendants to reinstate the Special Diet Program funding while the action was pending, and the defendants moved to dismiss the complaint.

In an order and memorandum filed on December 30, 2009, the district court granted plaintiffs‘ motion for a temporary restraining order. The court enjoined defendants from reducing the allotment to the Special Diet Program, retroactive to November 1, 2009, and until further order of the court.

The district court concluded that it was bound by *Rukavina v. Pawlenty*, 684 N.W.2d 525 (Minn. App. 2004), *rev. denied* (Minn. Oct. 19, 2004), a court of appeals case holding that subdivision 4 of section 16A.152 is constitutional. Nonetheless, the district court held that "[i]t was the specific manner in which the Governor exercised his unallotment authority that trod upon the constitutional power of the Legislature." The court did not expressly find that the executive branch had failed to comply with the requirements of the statute. The court concluded, however, that because the projected budget shortfall "was neither unknown nor unanticipated when the appropriation bills became law," the executive branch's use of the unallotment authority was invalid. The court stated:

> The authority of the Governor to unallot is an authority intended to save the state in times of a previously unforeseen budget crisis, it is not meant to be used as a weapon by the executive branch to break a stalemate in budget negotiations with the Legislature or to rewrite the appropriations bill.

Shortly after the temporary restraining order ruling, the parties stipulated to the denial of defendants' motion to dismiss regarding the Special Diet Program funding and to entry of final judgment under Minn. R. Civ. P. 54.02 in favor of plaintiffs on that claim. The district court entered a final partial judgment, and defendants filed a notice of appeal to the court of appeals and petitioned for accelerated review in this court. We granted accelerated review and ordered expedited briefing and oral argument.

I.

Appellants here, defendants below, argue that the district court erred in concluding that the unallotment authority in subdivision 4 of section 16A.152 can be exercised only for budget deficits unforeseen while the Legislature is in session. Appellants contend that the challenged unallotment action was consistent with the plain language of the statute, and that even if the statute is ambiguous, their interpretation that there are no temporal restrictions on the statute's triggering conditions is supported by the canons of statutory construction.

Appellants also contend that because respondents did not challenge the constitutionality of the unallotment statute in the district court, that issue is not properly before us. Appellants argue that if we reach the constitutional question, the statute does not violate separation of powers principles. Appellants assert that the statute does not confer "pure legislative power," because the validity of appropriations is not affected by unallotment. Rather, unallotment is within the authority of the executive branch to administer the laws and the budget. Finally, appellants argue that the statute fully complies with case law requirements for delegation of legislative authority to administrative agencies.

Respondents argue that under the plain language of the statute, the conditions required to trigger implementation of unallotment contain temporal limitations that precluded unallotment in the circumstances of this case. Specifically, respondents assert that the unallotment authority is intended to be exercised only in the event of unforeseen fiscal conditions that arise after the beginning of a biennium. They maintain that even if the plain language of the statute does not require their interpretation, the canons of construction compel it. Respondents further argue that if we adopt appellants' reading, the statute would allow an unconstitutional infringement on the Legislature's appropriation power because the executive branch could create a deficit situation by refusing to agree on revenue measures and then unilaterally alter spending priorities that had been enacted into law.

II.

We first address the statutory issue raised by the parties. Because we conclude the unallotment at issue here exceeded the scope of the statutory authority, and thus affirm the district court, we do not address the arguments raised concerning the constitutionality of the unallotment action or the statute. *See In re Senty-Haugen*, 583 N.W.2d 266, 269 n.3 (Minn. 1998) (we avoid a constitutional ruling if there is another basis on which we may decide a case).

Our goal when interpreting statutory provisions is to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2008); *accord Educ. Minn.-Chisholm v. Indep. Sch. Dist. No. 695*, 662 N.W.2d 139, 143 (Minn. 2003). The statutory question here is whether the Legislature intended the unallotment authority conferred on the executive branch in Minn. Stat. § 16A.152, subd. 4, to apply in the circumstances of this case. We determine legislative intent "primarily from the language of the statute itself." *Gleason v. Geary*, 214 Minn. 499, 516, 8 N.W.2d 808, 816 (1943). If the text is clear, "statutory construction is neither necessary nor permitted and [we] apply the statute's plain meaning." *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). But if a statute is ambiguous, we apply canons of construction to discern the Legislature's intent. *See* Minn. Stat. § 645.16 (2008).

The parties offer competing interpretations of the language of the unallotment statute, as outlined above. Both sides argue that the plain language of the unallotment statute supports their interpretation. Plain language controls only if the text of the statute is unambiguous, that is, if the language is susceptible to only one reasonable meaning. *Kratzer v. Welsh Cos., LLC*, 771 N.W.2d 14, 21 (Minn. 2009). The first question we address, then, is whether only one of the proffered interpretations of the statute is reasonable.

Respondents' interpretation, accepted by the district court, is a reasonable reading of the statute, particularly when the two clauses of section 16A.152, subdivision 4(a) ("probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the biennium will be less than needed") are read as a whole and the words are interpreted in accordance with their common meanings. *See* Minn. Stat. §§ 645.08, 645.16 (2008). "Remainder" is defined as "a remaining group, part, or trace." *Merriam-Webster's Collegiate Dictionary* 986 (10th ed. 1993). "Remain" is defined as "to be a part not . . . used up." *Id.* The common meaning of "remainder" is thus something less than the whole, after part of the whole has been removed or consumed. Accordingly, the requirement that the Commissioner find that "the amount available for the remainder of the biennium will be less than needed," Minn. Stat. § 16A.152, subd. 4(a), reasonably means that the triggering circumstance (amount less than needed) cannot logically be met until some of the biennium has passed, and that the unallotment process can never apply to a full biennium. Moreover, the two clauses are joined by the conjunctive "and"; when read together, the natural conclusion is that the determination about receipts being "less than anticipated" must be related to "the amount available for the remainder of the biennium."

Appellants present a more strained interpretation of Minn. Stat. § 16A.152, subd. 4(a). The meaning appellants attribute to "remainder"—that the remainder can be the entire biennium before anything is removed—does not comport with the common understanding of that word. On the other hand, appellants are correct that the probable receipts clause contains no express language dictating a timing element for the "less than anticipated" criterion, and the assertion that there is no timing limitation on this triggering condition is not unreasonable. But rather than establishing the plain meaning of that criterion, the absence of any timing definition leaves it ambiguous—subject to precisely the kind of debate about the proper baseline for "less than anticipated" that is presented in this case.

Although the competing interpretations advanced by the parties are each reasonable, that fact simply brings into focus the failure of the statutory language to clearly answer two questions: (1) probable receipts anticipated when? and (2) amount available for what purpose? Because we determine the language of the unallotment statute is ambiguous, we must employ the canons of construction to determine what the Legislature intended by the language it used.

Minnesota Statutes § 645.16 provides that when the words of a law are not explicit, we may ascertain the intention of the Legislature by considering, among other matters:

(1) the occasion and necessity for the law;
(2) the circumstances under which it was enacted;
(3) the mischief to be remedied;

(4) the objects to be attained;
(5) the former law, if any, including other laws upon the same or similar subjects;
(6) the consequences of a particular interpretation;
(7) the contemporaneous legislative history; and
(8) legislative and administrative interpretations of the statute.

In addition, the Legislature has provided that courts may be guided by certain presumptions in ascertaining legislative intent, including that "the legislature intends the entire statute to be effective and certain," Minn. Stat. § 645.17(2) (2008), and "the legislature does not intend to violate the Constitution of the United States or of this state," Minn. Stat. § 645.17(3) (2008).

The challenge to the unallotment authority is directly related to the functions of both the legislative and executive branches in establishing the state budget. Accordingly, we must interpret the statute in that context. We therefore briefly review the budget-creation process as it is constitutionally defined, and the roles of the legislative and executive branches.

As the names of the two branches suggest, the legislative branch has the responsibility and authority to legislate, that is, to make the laws, Minn. Const. art. IV, §§ 17-23, and the executive branch has the responsibility and authority to execute, that is, to carry out, the laws, Minn. Const. art. V, § 3. Under the Separation of Powers Clause, no branch can usurp or diminish the role of another branch. *See* Minn. Const. art. III, § 1. In *State ex rel. Birkeland v. Christianson*, we said:

> The three departments of state government, the legislative, executive, and judicial, are independent of each other. Neither department can control, coerce, or restrain the action or nonaction of either of the others in the exercise of any official power or duty conferred by the Constitution, or by valid law, involving the exercise of discretion. The Legislature cannot change our constitutional form of government by enacting laws which would destroy the independence of either department or permit one of the departments to coerce or control another department in the exercise of its constitutional powers.

179 Minn. 337, 339-40, 229 N.W. 313, 314 (1930).

The Legislature has the primary responsibility to establish the spending priorities for the state through the enactment of appropriation laws. Minn. Const. art. IV, § 22; *id.* art. XI, § 1. The executive branch has a limited, defined role in the budget process. The Governor may propose legislation, including a budget that includes appropriation amounts, which proposals the Legislature is free to accept or reject. But the only formal budgetary authority granted the Governor by the constitution is to approve or veto bills passed by the Legislature. *See* Minn. Const. art. IV, § 23. With respect to appropriation bills, the constitution grants the Governor the more specific line-item veto authority, through which an item of appropriation can be vetoed without striking the entire bill. *Id.* If the Governor exercises the veto power, the Legislature may

reconsider the bill or items vetoed, and if approved by a two-thirds vote, the vetoed bill or item becomes law. *Id*.

Once a bill has been passed by the Legislature and approved by the Governor (or a veto is overridden), the bill becomes law, and the constitutional responsibility of the Governor is to "take care that the laws be faithfully executed." Minn. Const. art. V, § 3. If this process of legislative passage and gubernatorial approval or veto does not succeed in producing a balanced budget within the normal legislative session, the Governor has the authority to call the Legislature into special session. *See* Minn. Const. art. IV, § 12.

After appropriations are enacted, the executive branch undertakes a process of allotment. The Commissioner approves spending plans and establishes spending allotments for segments of the biennium, thereby managing the pace at which executive branch agencies spend their appropriations. *See* Minn. Stat. § 16A.14 (2008). In normal circumstances, the allotment process functions simply as a device to manage the cash flow of the state as the funds appropriated by the Legislature are spent for the purposes intended.[3] Unallotment occurs when the prior spending authorizations are altered, or, as in this case, canceled. The question before us is whether the Legislature intended to authorize the executive branch to use the unallotment process in the circumstances presented here.

Appellants and respondents both argue that the purpose of the unallotment statute supports their favored interpretation. *See* Minn. Stat. § 645.16(1), (4) (court may consider "the occasion and necessity for the law" and "the object to be attained"). Appellants offer a broad purpose for the statute—the elimination of budget deficits—to support their view of the broad reach of the statute.[4] Respondents argue in support of their narrower reading that the statute has the limited purpose of addressing short term, unanticipated deficits.

The distinct roles and powers allocated by the constitution to the two branches in the budget-creation process inform us concerning the purpose and intent of the Legislature in enacting the unallotment statute. The general veto and the line-item veto are the specific tools provided by the constitution to the executive branch for achieving a balanced budget. *See Johnson v. Carlson*, 507 N.W.2d 232, 235 (Minn. 1993) ("The state constitution, recognizing the governor's oversight responsibilities for the state's budget, provides a gubernatorial line item veto to enable the state's chief executive officer to engage in cost-containment, subject, of course, to the possibility of the veto being overturned."). But we have recognized that the special line-item veto power the constitution confers on the Governor for appropriation bills must be construed narrowly to prevent usurpation of the Legislature's proper authority. *Inter Faculty Org. v. Carlson* (*IFO*), 478 N.W.2d 192, 194 (Minn. 1991).

In the context of this limited constitutional grant of gubernatorial authority with regard to appropriations, we cannot conclude that the Legislature intended to authorize the executive branch to use the unallotment process to balance the budget for an entire biennium when balanced spending and revenue legislation has not been initially agreed upon by the Legislature and the Governor. Instead, we conclude that the Legislature intended the unallotment authority to serve the more narrow purpose of providing a mechanism by which the executive branch could address unanticipated deficits that occur after a balanced budget has previously been enacted.[5]

Appellants' interpretation of the unallotment statute envisions a much broader role for the executive branch in the creation of biennial budgets than the process established by the constitution. Under appellants' interpretation of the unallotment statute, the executive branch has authority to modify spending decisions previously enacted into law if revenues projected (apparently at any time) for the biennium fall short of the spending authority in appropriation bills passed by the Legislature and signed by the Governor, whether the shortfall results from revenues lower than projected, a gubernatorial veto of a revenue bill, or legislative failure to pass adequate revenue legislation. The unallotment authority so construed would result in an alternative budget-creation mechanism that bypasses the constitutionally prescribed process. There is nothing to suggest that was the purpose for which the unallotment statute was enacted.[6]

On the contrary, it appears clear to us that the object to be attained, *see* Minn. Stat. § 645.16(4), was the creation of a mechanism for adjusting expenditures, to be available in the event of an unanticipated revenue shortfall after enactment of a balanced budget. This narrow purpose and interpretation is consistent with and reflected in all prior use of the statute. *See* Peter S. Wattson, *Legislative History of Unallotment Power* 4-5, 9, 11 (June 29, 2009).

The requirement of a balanced budget as a necessary precursor to the use of the unallotment authority in section 16A.152, subdivision 4, provides necessary meaning to the triggering condition of "receipts less than anticipated." The parties agree that for a current amount of receipts to be "less than anticipated," there must be some past baseline amount to which the current amount is compared. But appellants' argument that there are no temporal limitations on this requirement leaves it entirely untethered—and virtually meaningless—because the executive branch could assign any previous projection of greater revenues as the baseline. This result is contrary to the statutory presumption that "the legislature intends the entire statute to be effective *and certain*." Minn. Stat. § 645.17(2) (emphasis added). Reading the statute to require enactment of a balanced budget as a predicate to the exercise of unallotment authority provides a definite and logical reference point for measuring whether current revenues are "less than anticipated." The anticipated revenues are measured as of the date the balanced budget is enacted.

This conclusion is bolstered by consideration of the second triggering condition. The only purpose for which revenues would be logically "needed" in the context of the unallotment statute is to fully fund all appropriations. Thus, in order for "probable receipts . . . [to] be less than anticipated, and . . . the amount available for the remainder of the biennium [to] be less than needed," there must have been a point in time when anticipated revenues appeared to be adequate to fund appropriations—i.e., when a balanced budget was enacted.

The temporal limitations implicit in the common meaning of the words "less than anticipated" and "remainder of the biennium" constrain the statute's use to circumstances consistent with the distinct powers and roles conferred on the legislative and executive branches in the constitution. Those circumstances do not include use of unallotment authority to address a deficit known to exist but not resolved by the legislative and executive branches using their constitutionally specified powers to enact spending and revenue legislation. The unallotment statute provides the executive branch with authority to address an unanticipated deficit that arises after the legislative and executive branches have enacted a balanced budget. The statute does not

shift to the executive branch a broad budget-making authority allowing the executive branch to address a deficit that remains after a legislative session because the legislative and executive branches have not resolved their differences.

Because the legislative and executive branches never enacted a balanced budget for the 2010-2011 biennium, use of the unallotment power to address the unresolved deficit exceeded the authority granted to the executive branch by the statute. We therefore affirm the district court's conclusion that the unallotment of the Special Diet Program funds was unlawful and void.

Affirmed.

[1] Although the commissioners of the three departments are appellants, unless otherwise noted, references in this opinion to the Commissioner mean the Commissioner of Minnesota Management and Budget, who implements the challenged statute.

[2] For example, the other unallotment challenged in this lawsuit, but not part of this appeal, was to the renters' property tax refund program. Under this program renters are eligible for a refund of a portion of the rent they pay based on a percentage that the Legislature deems attributable to property taxes. The unallotment was accomplished by changing the portion of rent used to calculate the refund from 19% of rent paid, as set by the Legislature, to 15%. Another example is the unallotment for the Medical Assistance Program. The eligibility criteria are established in statute, including the asset limitations of $20,000 for a household of two or more people and $10,000 for a household of one person. *See* Minn. Stat. § 256B.056, subd. 3c (2008). The unallotment was accomplished by reducing those limits to $6,000 and $3,000, respectively.

[3] The parties discuss at some length the nature and scope of inherent executive spending authority, and to differing degrees, assert that these principles should guide our decision. We have not previously addressed this authority, but other state courts have. Most courts conclude that the executive branch has some inherent authority and discretion over spending, particularly to spend less than appropriated, but only within the scope of legislatively enacted spending priorities. *E.g.*, *Opinion of the Justices to the Senate*, 376 N.E.2d 1217, 1223 (Mass. 1978) ("The constitutional separation of powers and responsibilities, therefore, contemplates that the Governor be allowed some discretion to exercise his judgment not to spend money in a wasteful fashion, provided that he has determined reasonably that such a decision will not compromise the achievement of underlying legislative purposes and goals."); *Hunter v. State*, 865 A.2d 381, 390-91 (Vt. 2004) (adopting rationale of *Opinion of the Justices* in noting that although the Governor has some discretion in deciding whether to spend appropriated funds, "[i]f the Governor has a free hand to refuse to spend any appropriated funds, he or she can totally negate a legislative policy decision that lies at the core of the legislative function"); *Rios v. Symington*, 833 P.2d 20, 23, 29 (Ariz. 1992) (explaining that the Legislature "establishes state policies and priorities and, through the appropriation power, gives those policies and priorities effect" and the executive

branch then retains discretion to prevent wasteful spending while still effectuating legislative goals); *Colo. Gen. Assembly v. Lamm*, 700 P.2d 508, 520, 522 (Colo. 1985) (recognizing executive "authority to administer the budget" but holding that the authority does not extend so far as to "directly contravene major objectives or purposes sought to be achieved" in an appropriation). The inherent authority of the executive branch concerning actual spending decisions once appropriations are made is not, however, directly implicated in the issue we decide today, that is, whether Minnesota's unallotment statute was properly invoked in this case.

[4] Appellants also argue that the consequences of their interpretation, *see* Minn. Stat. § 645.16(6), and the public interest, *see* Minn. Stat. § 645.17(5), favor their view of the statute, but these arguments are essentially variations of their argument about the statute's purpose. In addition, appellants contend that the Commissioner's interpretation is entitled to deference. *See* Minn. Stat. § 645.16(8). Because the question presented is not one that invokes the expertise of the Commissioner regarding the intricacies of the state budget and his interpretation is not a longstanding one, deference is not warranted. *See Resident v. Noot*, 305 N.W.2d 311, 312 (Minn. 1981) (stating that deference to administrative interpretations of statutes is appropriate when the administrators have specialized expertise in the subject of the statute and the interpretation is of long standing).

[5] Courts in several other states have considered similar, but not identical, statutes and resolved both statutory and constitutional challenges to actions taken under those statutes. *See, e.g.*, *New England Div. of the Am. Cancer Soc'y v. Comm'r of Admin.*, 769 N.E.2d 1248, 1257-58 (Mass. 2002) (holding that the acting governor complied with terms of Massachusetts' unallotment statute and that the statute was constitutional); *Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260, 267-68 (Fla. 1991) (holding that Florida's unallotment statute was unconstitutional because it did not contain sufficient guidelines to guide the executive branch in exercising delegated authority); *Univ. of Conn. Chapter of AAUP v. Governor*, 512 A.2d 152, 159 (Conn. 1986) (upholding the constitutionality of Connecticut's unallotment statute). None of those cases, however, confronted the situation that we face—that is, use of statutory adjustments of legislative spending decisions in the absence of a duly enacted budget. *See, e.g.*, *New England*, 769 N.E.2d at 1249-50 (addressing a challenge to allotment reductions in response to decreased revenue projections that occurred months after the enactment of a budget). As a result, although we may take some guidance from those cases regarding general principles of legislative and executive authority for appropriations and spending, in the end, we can and do resolve the case before us based on our reading of the statute enacted by the Minnesota Legislature. On that point, we find the greatest guidance in our established canons of construction, and the words of the statute before us.

[6] Appellants argue that the statute does not allow the executive branch to change the actual amount appropriated, and the executive branch cannot use funds for a purpose different than they are appropriated for, Minn. Stat. § 16A.139 (2008). The result, according to appellants, is that the decisions of the Legislature are not substantively affected by unallotment. But this argument ignores the practical effect of unallotment. Although the funds from a program whose funding is cut are not technically redirected to the program whose funding is not cut, the effect of selective unallotment is the same. Under the unallotments made by the Commissioner, some programs received full funding, some received reduced funding, and some, like the MSA Special Diet

program received no funding, effectively eliminating the program which the Legislature had enacted.

C O N C U R R E N C E

PAGE, Justice (concurring).

I concur in the opinion of the court that the exercise of unallotment authority at issue in this case was not authorized by the unallotment statute, Minn. Stat. § 16A.152, subd. 4 (2008). I write separately to highlight my concern that the unallotment statute confers on the executive branch such broad and uncircumscribed authority to rewrite legislative spending decisions that it may constitute an unlawful delegation of legislative authority in violation of the separation of powers principle in our constitution.

Separation of powers is a core feature of our governmental structure, included in our state constitution based on the model of the United States Constitution.[1] The principle originates from the concern "that if all power were concentrated in one branch of government, tyranny would be the natural and probable result." *Wulff v. Tax Court of Appeals*, 288 N.W.2d 221, 222-23 (Minn. 1979). Despite the fundamental nature of the separation of powers principle, we have recognized that "there has never been an absolute division of governmental functions in this country, nor was such even intended." *Id.* at 223 (footnote omitted).

Although separation of powers does not require absolute separation of legislative and executive functions, we have long held that the separation of powers principle prohibits legislative delegation of pure legislative power, that is, the power to make the law. For example, in *State v. Great Northern Railway Co*., 100 Minn. 445, 111 N.W. 289 (1907), we struck down, on separation of powers grounds, a statute that authorized the Railroad and Warehouse Commission to approve capital stock increases for railroad corporations. *Id.* at 470-71, 111 N.W. at 290. We examined at length the necessary separation of powers distinction between permissible delegation of the power to administer a law and impermissible delegation of the power to make the law. *Id.* at 475-81, 111 N.W. at 292-94. We stated that " '[t]he true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and the conferring of authority or discretion to be exercised under and in pursuance of the law.' " *Id.* at 477, 111 N.W. at 293 (quoting *State v. Chicago, Milwaukee & St. Paul Ry. Co.*, 38 Minn. 281, 300, 37 N.W. 782, 787-88 (1888), *rev'd on other grounds,* 134 U.S. 418 (1890)). We found the statute at issue constitutionally deficient because it committed "the whole subject of the increase of capital stock by railway corporations to the judgment and discretion of the commission." *Id.* at 479, 111 N.W. at 294.

We reiterated this separation of powers principle in *Lee v. Delmont*, 228 Minn. 101, 36 N.W.2d 530 (1949). We explained that the separation of powers doctrine precludes the Legislature from delegating purely legislative power. *Id.* at 112, 36 N.W.2d at 538. We described "pure legislative power" as "the authority to make a complete law—complete as to the time it shall take effect and as to whom it shall apply—and to determine the expediency of its enactment." *Id.* at 113, 36 N.W.2d at 538.

Under our definition of pure legislative power, the sweeping discretion granted by section 16A.152, subdivision 4, to modify and negate legislative spending decisions raises serious

separation of powers concerns. The lack of direction in the Minnesota statute about how unallotment authority may be exercised once it is triggered leaves the executive branch with virtually unfettered discretion to decide which funds to cut entirely, which to reduce in some measure, and which to leave fully funded. Such decisions inevitably change the legislative priorities established in the properly enacted appropriations laws, and the grant in subdivision 4 of section 16A.152 to the executive branch of broad and uncircumscribed authority to make such changes may run afoul of the separation of powers principle. Although we need not decide that issue today, the legislative and executive branches should be aware of that potential problem

ANDERSON, Paul H., Justice (concurring).

I join in the concurrence of Justice Page.

[1] Article III, Section 1, of the Minnesota Constitution provides:

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

C O N C U R R E N C E

ANDERSON, Paul H., Justice (concurring).

> A legislative, an executive, and a judicial power comprehend the whole of what is meant and understood by government. It is by balancing each of these powers against the other two, that the efforts in human nature towards tyranny can alone be checked and restrained, and any degree of freedom preserved in the constitution.

John Adams, Letter to Richard Henry Lee (Nov. 15, 1775), *in* 4 *The Works of John Adams* 186 (Charles Francis Adams ed., 1851), *quoted in The Oxford Dictionary of American Legal Quotations* 377 (Fred R. Shapiro ed., 1993).

I join in the concurrence of Justice Page because I share his concerns regarding the balance of power between all three branches of government. That said, nothing about my joining in Justice Page's concurrence should be construed to diminish my support for the opinion of the majority, which I support without reservation.

D I S S E N T

GILDEA, Justice (dissenting)

In our constitution, the people of Minnesota restricted the ability of the state government to deficit spend. The political branches have agreed on a process in the unallotment statute for ensuring that the government meets this obligation. Whether that process is the wisest or most prudent way to avoid deficit spending is not an issue for judicial review. That question should be left to the people themselves to debate and resolve through the political process. The judiciary's "duty" is simply "to apply the law as written by the legislature." *Int'l Bhd. of Elec. Workers, Local No. 292 v. City of St. Cloud*, 765 N.W.2d 64, 68 (Minn. 2009) (Magnuson, C.J., for a unanimous court). The majority is unable to do so because the language the Legislature used in the unallotment statute leaves the majority with uncertainty and ambiguity. The majority therefore rewrites the statute to insert additional conditions, and then finds that the Commissioner of Minnesota Management and Budget (Commissioner) violated the statute because he did not comply with the conditions the majority has added.

Unlike the majority, I do not find the language the Legislature used uncertain or ambiguous as applied to the unallotment at issue in this case. I would not rewrite the statute; I would apply the language as written. Because I would hold that the executive branch complied with the plain language of the statute, and that respondents have not met their burden to prove that the statute is unconstitutional, I respectfully dissent.

Respondents challenge the decision of the Commissioner to unallot funds for the Minnesota Supplemental Aid–Special Diet Program (Special Diet Program). The unallotment was effective November 1, 2009. The Commissioner carried out the unallotment under Minn. Stat. § 16A.152, subd. 4 (2008). Respondents contend, and the district court held, that the Commissioner did not comply with the statute. Respondents also contend that the statute is unconstitutional. Because I conclude that the Commissioner properly carried out his duties under the statute and because I conclude that respondents have not met their burden to prove that the unallotment statute is unconstitutional, I would reverse.

I.

I turn first to the question of whether the Commissioner complied with the statute. The Minnesota Legislature has charged the Commissioner with "manag[ing] the state's financial affairs." Minn. Stat. § 16A.055, subd. 1(a)(2) (2008). One of the ways in which the Commissioner performs this management function is to prepare "a forecast of state revenue and expenditures" in February and again in November of each year. Minn. Stat. § 16A.103, subd. 1 (2008). In November 2008, the Commissioner anticipated that the state would receive $31.866 billion in revenue for the 2010-2011 biennium. In February 2009, the Commissioner modified this revenue forecast, and anticipated that the state would receive $30.7 billion in revenue, and that the state would have $4.57 billion less than necessary to meet its obligations in the 2010-2011 biennium. During the 2009 legislative session, spending changes were enacted into law that reduced the state's projected deficit. But, on June 4, 2009, after the legislative session ended, the Commissioner projected in a letter to the Governor that the state would still be short $2.7 billion

for the 2010-2011 biennium. Because the Commissioner determined that probable receipts would be less than anticipated and revenues were less than needed to satisfy the state's obligations for the 2010-2011 biennium, the Commissioner utilized the authority in section 16A.152, subdivision 4, to avoid deficit spending.

This statute provides:

> (a) If the commissioner determines that probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the biennium will be less than needed, the commissioner shall, with the approval of the governor, and after consulting the Legislative Advisory Commission, reduce the amount in the budget reserve account as needed to balance expenditures with revenue.

Minn. Stat. § 16A.152, subd. 4(a). There were no funds in the budget reserve account that could be used to balance the budget. Accordingly, the Commissioner unallotted under subdivision 4(b) of the statute, which provides:

> (b) An additional deficit shall, with the approval of the governor, and after consulting the legislative advisory commission, be made up by reducing unexpended allotments of any prior appropriation or transfer. Notwithstanding any other law to the contrary, the commissioner is empowered to defer or suspend prior statutorily created obligations which would prevent effecting such reductions.

Minn. Stat. § 16A.152, subd. 4(b).

There is no dispute in this case that the Commissioner sought and received the approval of the Governor, as subdivision 4(b) of the statute required, before the unallotments were made. The parties also agree that the Commissioner consulted with the Legislative Advisory Commission before making any unallotments, as the statute also mandates. But the parties dispute whether the Commissioner complied with the statute in two respects. First, respondents contend that the unallotments did not comply with the statute because, they argue, "probable receipts for the general fund" were not "less than anticipated." Minn. Stat. § 16A.152, subd. 4(a). Second, respondents argue that the unallotments violated the statute because the Commissioner did not determine that the "amount available for the remainder of the biennium will be less than needed" when he unallotted.[1] *Id.*

The parties each contend that the plain language of the statute supports their position, and, they argue in the alternative, that if we were to determine that the statute is ambiguous, principles of statutory construction counsel that we construe the statute in their favor. The majority concludes that the parties' different readings of the statute are reasonable and that therefore the statute is ambiguous. The majority uses its determination of ambiguity as an invitation to rewrite the statute to include the condition precedent of a balanced budget. Specifically, the majority divines that what the Legislature meant to say was that once a balanced budget has been enacted into law and a deficit thereafter occurs, the Commissioner may unallot

to make up that deficit. The obvious problem with this rewrite is that it is a rewrite. The Legislature chose not to include the condition precedent the majority finds necessary, and we cannot, under the guise of statutory construction, add it. *See* Minn. Stat. § 645.16 (2008) ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit."). Our task instead is to read the words and apply them as the Legislature wrote them. *Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 274 (Minn. 1995) ("Where the intention of the legislature is clearly manifested by plain unambiguous language . . . no construction is necessary or permitted."). I turn now to that task and consider the two specific provisions in the statute at issue.

A. Were Probable Receipts Less than Anticipated?

Respondents argue, and the district court held, that the Commissioner's unallotments violated the statute because the budget deficit was not "previously unforeseen." Respondents' argument is based on the fact that the budget deficit was known in February when the Commissioner prepared the forecast. Moreover, respondents contend that when the Governor signed appropriation legislation and vetoed revenue legislation, the Governor (and therefore the Commissioner) knew that the state would not have funds sufficient to satisfy the financial obligations in the appropriation legislation. Therefore, respondents argue, the budget deficit was not unanticipated.

Even assuming the factual predicates for respondents' arguments, I would hold that the Commissioner complied with the plain language of the unallotment statute. When we construe statutes, our obligation is to determine whether the statute is plain on its face. *State v. Peck*, 773 N.W.2d 768, 772 (Minn. 2009). If so, the role of the judiciary is to apply the language as it is written. *See id*. at 773 ("We have no opportunity to ignore part of the legislature's definition."); *State v. Jesmer*, 293 Minn. 442, 442, 196 N.W.2d 924, 924 (1972) ("In construing statutes, we have said that where language is unambiguous, the clearly expressed intent must be given effect and there is no room for construction." (citation omitted) (internal quotation marks omitted)).

The statute requires that the Commissioner determine that "Probable receipts . . . will be less than anticipated." Minn. Stat. § 16A.152, subd. 4(a). Plainly, the Commissioner must make this determination before he unallots. But the statute does not provide any other deadline by which the Commissioner is to make this determination. *See id.* The Legislature could have imposed temporal restrictions on the Commissioner's decision-making if that was its intention, but it chose not to do so in this statute. Specifically, the Legislature could have written into the statute the requirement that the Commissioner may unallot only where a budget deficit arises that was not projected in the most recent budget forecast. The Legislature also could have added a provision requiring the Commissioner to make the determination, within the biennium itself, that "probable receipts . . . will be less than anticipated." The Legislature did not do so, and as we have repeatedly recognized, it is not for the judiciary to insert such restrictions. *See e.g.*, *Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006) (expressly declining to read time requirements into a statute because "we will not read into a statute a provision that the legislature has omitted, either purposefully or inadvertently"); *Morrison v. Mendenhall*, 18 Minn. 232 (Gil. 212, 218-20) (1872) (declining to interpret a foreclosure statute as containing additional requirements because

the Legislature rather than the courts must be the source of any modifications to the statute as written).[2]

There likewise is no requirement in the statute that the Commissioner determine the cause of the budget deficit before he may unallot. Which of the two coordinate branches of government is responsible for the budget shortfall now facing Minnesota is the subject of many pages of debate in this litigation. The judiciary is not the venue to resolve this dispute. *See In re McConaughy*, 106 Minn. 392, 415, 119 N.W. 408, 417 (1909) ("Many questions arise which are clearly political, and not of judicial cognizance."). Moreover, even if the judicial branch were inclined to wade into this dispute, it would be irrelevant in this case because there is nothing in section 16A.152 that limits the Commissioner's authority to unallot depending upon what or who is most responsible for the budget shortfall. The judiciary cannot rewrite the statute to add such restrictions.

The unallotment statute simply requires that the Commissioner determine whether "probable receipts for the general fund will be less than anticipated." Minn. Stat. § 16A.152, subd. 4(a). This phrase is not ambiguous in my view, and I would hold that the Commissioner made the necessary determination. Specifically, he concluded, in his June 4, 2009, letter, that "[y]ear to date receipts for FY 2009 are down $70.3 million compared to the February forecast. Nearly all major revenue categories have collected less than anticipated." Respondents make no argument that these determinations were arbitrary or inaccurate in any way. *See In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001) (noting that an "agency's conclusions are not arbitrary and capricious so long as a rational connection between the facts found and the choice made has been articulated" (citation omitted) (internal quotation marks omitted)). Because the Commissioner complied with the plain language of the statute and respondents have not demonstrated that his determination was arbitrary and capricious, I would uphold the Commissioner's determination that "probable receipts for the general fund [were] less than anticipated."

B. Was the Amount Available for the Remainder of the Biennium Less than Needed?

Respondents argue that the Commissioner's unallotments violated the statute because the unallotments covered the entire biennium. Respondents contend that whether funds are available for the remainder of the biennium cannot be determined until some point after the biennium has begun. Accordingly, respondents argue, unallotments that cover the entire biennium and determinations that are made prior to the start of the biennium violate the plain language of the statute. The Commissioner contends that the "remainder of the biennium," referred to in Minn. Stat. § 16A.152, subd. 4(a), can include the entire biennium. In the alternative, the Commissioner argues that even under respondents' interpretation of "remainder," the unallotment at issue in this case—for the Special Diet Program—was not effective until November 1, 2009, well into the biennium.

The parties' disagreement as to the meaning of "remainder" in the statute appears to be the basis upon which the majority concludes that the statute is ambiguous. In my view, we need

not reach the question of whether the word "remainder" can refer to the whole biennium or refers to a period that is less than the whole.

The only question presented in this case is whether the decision to unallot funds from the Special Diet Program complies with the statute. As to the Special Diet Program, the Commissioner determined that "the amount available for the remainder of the biennium will be less than needed"; that is, the amount available, starting November 1, would be less than needed to fund the Special Diet Program for the remainder of the biennium. Further, there is no dispute that the Special Diet Program funds were not unalloted until November 1. The Commissioner's determination that there would be insufficient funds for this program was, indisputably, only with respect to a portion of the biennium and not the entire biennium. We therefore have no occasion in this case to determine whether decisions to unallot that were effective on the first day of the biennium violate the statute. Because the unallotment decision at issue in this case concerned only part of the biennium and the unallotment was not effective until several months into the biennium, the Commissioner's actions complied with the statute no matter how "remainder" is defined.

In sum, I would not reach out to decide more than the narrow question directly presented here. As applied to the unallotment at issue in this case—the unallotment from the Special Diet Program—the statute is not ambiguous, and the Commissioner complied with the plain language the Legislature wrote in the statute. *See* Minn. Stat. § 645.16 (directing that we are to look to see whether "the words of a law *in their application to an existing situation* are clear and free from all ambiguity" (emphasis added)). I would so hold.

II.

Respondents argue that if the Commissioner's unallotment from the Special Diet Program did not violate the unallotment statute, then the statute is unconstitutional as a violation of the separation of powers doctrine. Because I would conclude that the Commissioner complied with the statute, it is necessary for me to reach the constitutional issue respondents raise.

We are extremely reluctant to declare a statute unconstitutional and will do so "only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). Our precedent requires "every presumption" to be "invoked in favor of upholding [a] statute" that is challenged on constitutional grounds. *State v. Schwartz*, 628 N.W.2d 134, 138 (Minn. 2001). Because "Minnesota statutes are presumed constitutional," those who challenge the constitutionality of a statute bear a heavy burden in making this challenge. *In re Haggerty*, 448 N.W.2d at 364. In order to succeed, respondents must demonstrate "beyond a reasonable doubt that the statute is unconstitutional." *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990). I would hold that respondents have not met their heavy burden to show, beyond a reasonable doubt, that the statute is unconstitutional.

Our constitution divides the "powers of government . . . into three distinct departments: legislative, executive and judicial." Minn. Const. art. III, § 1. The constitution also prohibits any "person[] belonging to or constituting one of these departments [from] exercis[ing] any of the powers properly belonging to either of the others except in the instances expressly provided in

this constitution." *Id*. Respondents argue that the unallotment statute violates the separation of powers because in the statute, the Legislature delegated pure legislative authority to the Commissioner. I disagree.

Where one branch purports to perform completely a function assigned to one of the other branches, such encroachment violates the separation of powers principle. *See Lee v. Delmont*, 228 Minn. 101, 112-13, 36 N.W.2d 530, 538 (1949) (noting that "purely legislative power cannot be delegated" and that "[p]ure legislative power . . . is the authority to make a complete law"). We have recognized that such encroachment into the judiciary's sphere of constitutional responsibility is unconstitutional. For example, where the Legislature purports to remove from the judiciary a class of cases that the constitution vests in the judiciary, the Legislature has violated the separation of powers doctrine. *Holmberg v. Holmberg*, 588 N.W.2d 720, 726 (Minn. 1999) (holding that "[t]he administrative [child support] process violates separation of powers and is unconstitutional"); *see also Quam v. State*, 391 N.W.2d 803, 809 (Minn. 1986) (holding that the Workers' Compensation Court of Appeals "went beyond the quasi-judicial authority delegated to it to determine facts and answer questions of law as they arise under the Workers' Compensation Act and sought to assume the power to determine the validity of a duly promulgated rule of another agency" and the court "thereby exceeded the scope of adjudicative power the legislature delegated to the agency consistent with the constitutional doctrine of separation of powers").

Our separation of powers analysis therefore requires that we examine the function at issue and determine, as a threshold matter, whether the constitution assigns that function exclusively to one branch in our constitution. *See Irwin v. Surdyk's Liquor*, 599 N.W.2d 132, 141-42 (Minn. 1999) ("Legislation that prohibits this court from deviating from the precise statutory amount of awardable attorney fees impinges on the judiciary's inherent power to oversee attorneys and attorney fees by depriving this court of a final, independent review of attorney fees. This legislative delegation of attorney regulation exclusively to the executive branch of government violates the doctrine of separation of powers."). In the case before us, the function at issue is the spending of state revenue. More specifically, the function is ensuring that the state does not deficit spend because our constitution restricts deficit spending. *See* Minn. Const. art. XI, § 6 ("No certificates [of indebtedness] shall be issued in an amount which . . . will exceed the then unexpended balance of all money which will be credited to that fund during the biennium under existing laws.")

The constitution assigns the responsibility to ensure that the state does not deficit spend to both the legislative and executive branches. *See New England Div. of the Am. Cancer Soc'y v. Comm'r of Admin*., 769 N.E.2d 1248, 1256 (Mass. 2002) (recognizing that passing laws authorizing spending is a legislative function and that spending state revenue is an executive function). The constitution assigns this function in part to the Legislature because "[n]o money shall be paid out of the treasury of this state except in pursuance of an appropriation by law." Minn. Const. art. XI, § 1. And the constitution assigns this function in part to the executive branch because the executive branch "shall take care that the laws be faithfully executed." Minn. Const. art. V, § 3. As part of the faithful execution of the law, the executive branch implements the appropriation laws through the spending of state revenue. *See Bowsher v. Synar*, 478 U.S. 714, 732-33 (1986) (describing "authority to determine the budget cuts to be made" to balance

the federal budget "as plainly entailing execution of the law in constitutional terms"); *Opinion of the Justices to the Senate*, 376 N.E.2d 1217, 1222 (Mass. 1976) (noting that "the activity of spending money is essentially an executive task"). The executive branch must also faithfully execute the constitutional prohibition against deficit spending. *See* Minn. Const. art. XI, § 6. In ensuring that all laws, including appropriation laws and the constitution, are faithfully executed, the executive "is bound to apply his full energy and resources, in the exercise of his best judgment and ability, to ensure that the intended goals of legislation are effectuated." *Opinion of the Justices*, 376 N.E.2d at 1221; *see also Bowsher*, 478 U.S. at 733 ("Interpreting a law enacted by [the Legislature] to implement the legislative mandate is the very essence of 'execution' of the law.").[3]

Because the function is one that the constitution commits to both branches, the unallotment statute—which simply acknowledges this joint responsibility—does not delegate pure legislative authority to the executive branch and it does not violate separation of powers. There are many instances in the operation of government, such as the prohibition against deficit spending, where the function at issue requires responsible effort from both of the political branches. Such "cooperative ventures" do not violate the separation of powers. *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (holding that congressional creation of United States Sentencing Guidelines Commission did not violate separation of powers).

Precedent from the U.S. Supreme Court and from our court recognizes that within areas of joint responsibility—like that at issue here—the branches may seek assistance from one another without running afoul of the separation of powers. The unallotment statute recognizes that the Legislature needs assistance from the executive branch in determining how best to execute spending priorities when, because of the constitutional restriction on deficit spending, an appropriation law cannot be fully executed. The statute does not give the executive branch the authority to make or unmake the law. Instead, the statute embodies an acknowledgement of the responsibility that the legislative and executive branches share for managing our state's budget, and it provides an opportunity for the political branches to work cooperatively within the confines of our constitution.[4]

As former Chief Justice Taft explained, "[i]n determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (concluding that a statute that authorized the President to increase tariff rates on foreign products was not a delegation of legislative authority to the President in violation of separation of powers even though the Constitution vested in Congress the power to levy duties). Specifically with regard to the legislative branch seeking assistance from the executive branch, so long as "Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id*. at 409.

We have likewise recognized that "some interference between the branches does not undermine the separation of powers; rather, it gives vitality to the concept of checks and balances critical to our notion of democracy." *Wulff v. Tax Court of Appeals*, 288 N.W.2d 221, 223 (Minn.

1979) (noting that a "strict interpretation of the separation of powers doctrine would make the existence and functioning of . . . agencies nearly impossible"). And we have embraced the "intelligible principle" standard from *Hampton* in our own separation of powers jurisprudence. *See Lee v. Delmont*, 228 Minn. 101, 113 n.10, 36 N.W.2d 530, 539 n.10 (1949) (citing *Hampton*, 276 U.S. at 409).

Specifically, we have held that "the legislature may authorize others to do things (insofar as the doing involves powers which are not exclusively legislative) which it might properly, but cannot conveniently or advantageously, do itself." *Id.* at 112-13, 36 N.W.2d at 538. Such legislative authorization does not offend the separation of powers as long as the Legislature provides a sufficient check in the form of a "reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies." *Id*. at 113, 36 N.W.2d at 538. The law must "take[] effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers." *Id.* If this check exists on the executive branch's exercise of authority, the "discretionary power delegated to the [executive branch] is not legislative," and there is no separation of powers violation. *Id*. at 113, 36 N.W.2d at 538-39. We have also recognized "that what is a sufficiently definite declaration of policy and standard varies in degree according to the complexity of the subject to which the law is applicable." *Anderson v. Comm'r of Highways*, 267 Minn. 308, 309, 315, 126 N.W.2d 778, 779, 782-83 (1964) (holding that a statute that delegated authority to commissioner of highways to suspend driver's license where driver "is an habitual violator" was not an unconstitutional delegation of legislative authority). The unallotment statute satisfies the rule we applied in *Lee* and *Anderson*.

The statute sets forth the "controls" that guide the Commissioner. *Lee*, 228 Minn. at 113, 36 N.W.2d at 538. The Commissioner cannot unallot unless "probable receipts for the general fund will be less than anticipated" and "the amount available for the remainder of the biennium will be less than needed." Minn. Stat. § 16A.152, subd. 4(a). Once these determinations are made, the Commissioner must first exhaust the budget reserve account before invoking the unallotment authority. *Id*.; *see also* Minn. Stat. § 16A.152, subd. 4(b), (c). All of the determinations necessary to trigger the statute are objectively verifiable and remove the unallotment authority from the mere "whim or caprice" of the Commissioner. *Lee*, 228 Minn. at 113, 36 N.W.2d at 538.[5]

But these triggers are not the only controls on the Commissioner's discretion. To the contrary, the Legislature has restricted the scope of the Commissioner's unallotment authority in several additional and clear ways. First, the Commissioner may only unallot to the extent necessary to prevent deficit spending. *See* Minn. Stat. § 16A.152, subd. 4(b) ("An additional deficit shall . . . be made up by reducing unexpended allotments . . . ."). The unallotment itself does not impact the appropriation legislation; it merely delays incurring the obligation until revenue is in place to pay for it.

Second, before the Commissioner may unallot, the Commissioner must "consult[] the legislative advisory commission." *Id.* "Consult" means "to ask the advice or opinion of" and "to deliberate together." *Merriam-Webster's Collegiate Dictionary* 248 (10th ed. 1993). Our precedent requires that "every presumption" be "invoked in favor of upholding the statute,"

which necessarily means that we must give force to the Commissioner's obligation to seek the advice of and to deliberate with the legislative branch. *See State v. Schwartz*, 628 N.W.2d 134, 138 (Minn. 2001). Through the required consultation with the Legislative Advisory Commission, a group that includes the leaders from both houses of the Legislature,[6] the executive branch receives the benefit of guidance as to legislative priorities and concerns. *See R.E. Short Co. v. City of Minneapolis*, 269 N.W.2d 331, 337 (Minn. 1978) ("In the absence of evidence to the contrary, public officials, administrative officers, and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully . . . ." (citation omitted) (internal quotation marks omitted)). By requiring that the Commissioner ask the advice of and deliberate with the Legislative Advisory Commission *before* the Commissioner unallots, the Legislature has provided an important check on the Commissioner's decision-making.

Third, the Legislature has prioritized the areas from which the Commissioner may unallot by specifically exempting several funds from the unallotment authority. *See, e.g.*, Minn. Stat. § 16A.14, subd. 2a(1) (2008) (noting that the allotment system does not apply to appropriations for the judiciary or the Legislature); Minn. Stat. § 16A.14, subd. 2a(2) (2008) (providing exemption for unemployment benefits); Minn. Stat. § 16B.85, subd. 2(e) (2008) (providing that the risk management fund "is exempt from the provisions of section 16A.152, subdivision 4"); Minn. Stat. § 477A.011, subd. 36(y) (2009 Supp.) (providing that "[t]he payment under this paragraph is not subject to . . . any future unallotment of the city aid under section 16A.152").

Fourth, of those funds that the Legislature has directed are available for unallotment (in other words, those programs the Legislature has not exempted from unallotment), the Legislature has further constrained the executive branch. Specifically, the Legislature requires that the Commissioner "reduce allotments . . . by the amount of any saving that can be made over previous spending plans through a reduction in prices or other cause," and directs that the Commissioner "may consider other sources of revenue available to recipients of state appropriations and may apply allotment reductions based on all sources of revenue available." Minn. Stat. § 16A.152, subd. 4(d), (e). Fifth, once an unallotment has been made, the Commissioner must, within 15 days, notify four different committees of the Legislature of the decision. Minn. Stat. § 16A.152, subd. 6 (2008).

Finally, the Legislature, of course, remains free in the next legislative session to undo the unallotments as it has done in the past. *See, e.g.*, Minn. Stat. § 41A.09, subd. 3a(h) (2008) (requiring that the Commissioner "reimburse ethanol producers for any deficiency in payments . . . because of unallotment"). The fact that the Legislature retains, and has exercised, the authority to undo the Commissioner's unallotments provides an important check on the Commissioner's exercise of discretion. This check is not unlike the check we have found relevant within our own sphere in the opportunity for our review of decisions from executive branch "courts." *See, e.g.*, *Mack v. City of Minneapolis*, 333 N.W.2d 744, 753 (Minn. 1983) (finding that the "power" of the Workers' Compensation Court of Appeals, an executive branch court, "to set attorney fees is constitutionally permissible, because these awards are reviewable by this court"). *But cf. Holmberg v. Holmberg*, 588 N.W.2d 720, 725 n.36 (Minn. 1999) ("[T]he availability of judicial review alone will not provide adequate judicial supervision to protect a system against a separation of powers challenge."). If the opportunity for judicial review in our

court is a relevant check of executive branch "courts," logic dictates that a similar check in the legislative branch is likewise relevant to a separation of powers challenge to the unallotment statute.

In sum, the unallotment statute provides objectively verifiable triggers for the Commissioner's unallotment authority. It defines the scope of what the Commissioner may unallot—only funds sufficient to resolve the deficit. It prioritizes the funds from which the Commissioner may not unallot, and for those funds available, it provides further guidance as to how the Commissioner is to unallot from those funds. It requires that the Commissioner work with the Legislative Advisory Commission in exercising the unallotment function. Finally, the Legislature retains an important check through its ability to undo the unallotments. Our precedent compels the conclusion that there are sufficient standards in this statute. This is especially true if we recall that every presumption is to be invoked in favor of upholding the constitutionality of a statute. *Schwartz*, 628 N.W.2d at 138.[7]

The issues presented here are only whether the Commissioner complied with the statute, and whether the unallotment statute is constitutional. Because I would hold that the Commissioner complied with the plain language of the statute when he unallotted from the Special Diet Program, and that respondents have not met their heavy burden to prove that the unallotment statute is unconstitutional, I would reverse.

ANDERSON, G. Barry, Justice (dissenting).
I join in the dissent of Justice Gildea.

DIETZEN, Justice (dissenting).
I join in the dissent of Justice Gildea.

[1] Even though the unallotments were made under paragraph (b) of subdivision 4, the parties agree that the threshold determinations set forth in paragraph (a) ("that probable receipts for the general fund will be less than anticipated" and "that the amount available for the remainder of the biennium will be less than needed") operate to constrain the Commissioner's decision-making.

[2] *See also Greene v. Comm'r of Minn. Dep't of Human Servs.*, 755 N.W.2d 713, 722 (Minn. 2008) (noting that it is not the "proper function" of the judiciary to add "a right into the statute"); *Beardsley v. Garcia*, 753 N.W.2d 735, 740 (Minn. 2008) (declining to interpret the statute so as to "effectively rewrite" it because that prerogative belongs to the Legislature rather than to the court); *Goldman v. Greenwood*, 748 N.W.2d 279, 285 (Minn. 2008) ("The policy-based argument advanced by the dissent regarding when to measure the endangerment to the child is not without merit, but such a determination belongs to the legislature, not to this court."); *State v. Rodriguez*, 754 N.W.2d 672, 684 (Minn. 2008) (explaining that it is the province of the Legislature, not the courts, to expand an accomplice corroboration statutory requirement to jury sentencing trials); *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 703 N.W.2d 513, 524 (Minn. 2005) (explaining that, while some of the original policy considerations supporting the corporate practice of medicine may need reexamination, the Legislature, not the courts, is the appropriate forum to

enact such policy change); *Haghighi v. Russian-Am. Broad. Co.*, 577 N.W.2d 927, 930 (Minn. 1998) ("If the literal language of this statute yields an unintended result, it is up to the legislature to correct it.").

[3] In *Bowsher*, Congress passed a law that gave the Comptroller General the authority to mandate which budget cuts the President had to make in the event of a federal budget deficit. 478 U.S. at 717-18. Because Congress had the authority to remove the Comptroller General, the Supreme Court found the statute unconstitutional. *Id*. at 732-33. Specifically, the statute was unconstitutional because it vested executive authority in the hands of an office within the legislative branch. *Id.* at 733-34.

[4] This principle of cooperation is central to the budget-making and oversight process in Minnesota. Although the Legislature determines appropriations, it is the Commissioner that oversees the allotment process. An "[a]llotment" is "a limit placed by the commissioner on the amount to be spent or encumbered during a period of time pursuant to an appropriation." Minn. Stat. § 16A.011, subd. 3 (2008). The Legislature approves appropriations for agencies, but leaves the determination of the actual spending plans to the agencies. *See* Minn. Stat. § 16A.14, subd. 3 (2008). Agencies submit their spending plans to the Commissioner; those plans must certify that "the amount required for each activity is accurate and is consistent with legislative intent." *Id.* The Commissioner, not the Legislature, then reviews the spending plans to determine whether they are "within the amount and purpose of the appropriation." Minn. Stat. § 16A.14, subd. 4 (2008). The Legislature has very broadly charged the Commissioner with the task of determining whether these spending plans are within the purpose of the appropriation. The Commissioner may even "modify the spending plan and the allotment to conform with the appropriation and the future needs of the agency." *Id.* This authority to review spending plans, approve them, or modify them along with allotments, is different than unallotment, but reflects the Legislature's recognition that the Commissioner's exercise of the spending power requires the executive branch to discern and adhere to the legislative purpose in the appropriations. *See Bowsher*, 478 U.S. at 733. Stated another way, inherent in the Commissioner's authority to "allot" (i.e., place a limit on the amount of money to be spent pursuant to an appropriation) is the necessity that the Commissioner be guided by his determination of legislative priorities. The Legislature does not give the Commissioner a definitive set of guidelines in discerning legislative purpose and priorities embodied in the appropriations when the Commissioner is making allotments; rather, the Legislature gives the Commissioner broad, flexible authority in making allotments based on his identification of legislative priorities and purpose.

[5] These triggers also demonstrate that this statute is not in any way similar to the statute at issue in the case the concurrence cites, *State v. Great Northern Railway Co.*, 100 Minn. 445, 479, 111 N.W. 289, 294 (1907) (suggesting that if statute charged commission with "supervis[ion] [of] the issuance of only such stock as is authorized by law," and with "the duty of ascertaining in each case whether the proposed increase is for an authorized purpose and in accordance with the requirements of the law," the statute would have been constitutional).

[6] *See* Minn. Stat. § 3.30, subd. 2 (2008) (listing members of Legislative Advisory Commission).

[7] My conclusion that the statute is constitutional is in accord with the nearly unanimous result from jurisdictions around the country that have upheld the constitutionality of similar unallotment statutes. *See Univ. of Conn. Chapter AAUP v. Governor*, 512 A.2d 152, 156-59 (Conn. 1986); *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 926-31 (Ky. 1984); *New England Div. of the Am. Cancer Soc'y v. Comm'r of Admin*., 769 N.E.2d 1248, 1256-58 (Mass. 2002); *N.D. Council of Sch. Adm'rs v. Sinner*, 458 N.W.2d 280, 285-86 (N.D. 1990); *Hunter v. State*, 865 A.2d 381, 396 (Vt. 2004).

STATE OF MINNESOTA

IN COURT OF APPEALS

A08-1315

Larry Benjamin Johnson,
Appellant,

vs.

Brian Cletus Cummiskey, et al.,
Respondents.

Filed May 26, 2009

Affirmed

Ross, Judge

Le Sueur County District Court

File No. 40-CV-06-727

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Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

S Y L L A B U S

Minnesota's No-Fault Automobile Insurance Act does not require that motorcycle insurance policies written to provide only limited underinsured motorist coverage under a limits-less-paid structure be reformed to provide full underinsured motorist coverage under a damages-less-paid structure.

O P I N I O N

ROSS, Judge

A driver whose car had only $30,000 of liability insurance coverage struck a motorcyclist, causing the motorcyclist $134,000 in damages. The motorcyclist recovered $34,000 from the car's driver and the driver's insurer. The motorcyclist then sought the balance from his own policy's underinsured motorist (UIM) coverage. He sued his insurer after it applied the limits-less-paid clause of his policy to pay him only a portion of his remaining damages, deducting the $34,000 already paid to him. Injured motorcyclist Larry Johnson appeals from the district court's summary judgment decision dismissing his claim in favor of his insurer, Illinois Farmers Insurance Company. We are asked to decide whether the No-Fault Automobile Insurance Act invalidates the limits-less-paid clause of Johnson's policy with Illinois Farmers and instead requires Illinois Farmers to pay Johnson using the damages-less-paid method. Because we conclude that the No-Fault Act does not require a motorcycle insurance policy that provides some UIM coverage to provide all UIM coverage required of policies for other types of vehicles, we affirm.

F A C T S

The facts relevant to this appeal are undisputed. In July 2005, Brian Cummiskey's Mercury Grand Marquis collided with Larry Johnson's Harley-Davidson, causing Johnson at least $134,000 in damages. Cummiskey was 100% at fault, but he carried only $30,000 in automobile liability coverage. Johnson sued to recover his damages from Cummiskey and from Johnson's own insurance provider, Illinois Farmers Insurance Company.

Johnson settled with Cummiskey for $34,000—$4,000 from Cummiskey and $30,000 from Cummiskey's insurer—and claimed that he also was entitled to the $100,000 maximum of UIM coverage under his own policy with Illinois Farmers. But the UIM provision of Johnson's policy contains a limits-less-paid reducing clause, so Illinois Farmers agreed to pay Johnson only $66,000, calculated by subtracting from his policy's $100,000 limit the $34,000 he had already received from Cummiskey and Cummiskey's insurer. The limits-less-paid clause that Illinois Farmers relies on and which triggered this dispute states as follows:

> We will pay an insured person for unpaid damages resulting from a motor vehicle accident . . . but not more than: . . . [t]he lesser of the difference between the limit of uninsured (underinsured) motorist coverage and the amount paid to the insured person by any party held to be liable for the accident.

The district court agreed with Illinois Farmers and applied this reducing clause by its express terms, granting Illinois Farmers' motion for summary judgment and limiting Johnson's recovery for UIM coverage to $66,000.

Johnson appeals.

I S S U E

Does the No-Fault Automobile Insurance Act require a motorcycle insurance policy to be reformed to provide *full* UIM coverage using a damages-less-paid structure, which is statutorily required of policies insuring other types of vehicles, because the motorcycle policy provides *some* UIM coverage?

A N A L Y S I S

Johnson contests the district court's summary judgment decision against him. Because no factual disputes exist, we review summary judgment to determine whether the district court correctly applied the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We hold that it did.

Johnson argues that the district court based summary judgment on its erroneous understanding of Minnesota's No-Fault Automobile Insurance Act, Minn. Stat. §§ 65B.41–.71 (2008). He contends that Illinois Farmers must pay him the $100,000 maximum of his UIM policy—the amount of his total damages that Cummiskey and Cummiskey's insurer did not cover. According to Johnson, the No-Fault Act requires auto insurers to provide all vehicles with full UIM coverage when the insurer provides a motorcyclist with any UIM coverage at all.

Both parties agree that the focal point of this dispute is the coverage method that the No-Fault Act applies to UIM insurance on some types of vehicles. The disputed statute with its heading reads as follows:

> **Liability on underinsured motor vehicles.** 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. If a person is injured by two or more vehicles, underinsured motorist coverage is payable whenever any one of those vehicles meets the definition of underinsured motor vehicle in section 65B.43, subdivision 17. However, in no event shall the underinsured motorist carrier have to pay more than the amount of its underinsured motorist limits.

Minn. Stat. § 65B.49, subd. 4a. Courts have consistently interpreted this provision to hold that UIM coverage must be calculated as "damages less paid" coverage (also known as modified "add-on" coverage), which would conflict with the limits-less-paid calculation that the Johnson–Illinois Farmers policy directs. *See Dohney v. Allstate Ins. Co.*, 632 N.W.2d 598, 603 (Minn.

2001) ("[U]nder the current UIM provisions, coverage is 'damages less paid' coverage."); *Mitsch v. Am. Nat'l. Prop. & Cas. Co.*, 736 N.W.2d 355, 358 (Minn. App. 2007) ("Minnesota law mandates that all UIM coverage issued in the state be 'add-on' coverage."), *review denied* (Minn. Oct. 24, 2007); Theodore J. Smetak, *Underinsured Motorist Coverage in Minnesota: Old Precedents in a New Era*, 24 Wm. Mitchell L. Rev. 857, 873 (1998) (characterizing the No-Fault Act as requiring "damages less paid" coverage, also described as "modified 'add-on' coverage"). Johnson accurately explains that if we apply the coverage method of subdivision 4a to his claim, he would receive $100,000 from Illinois Farmers.

Illinois Farmers concedes that if the statutory method applies, Illinois Farmers could not follow the policy's express language that reduces the coverage by the amount Johnson recovered from Cummiskey. But it contends that the statutory method simply does not apply to motorcycle policies. We must therefore determine whether to apply Minn. Stat. § 65B.49, subd. 4a, the portion of the No-Fault Act that controls the method for measuring required UIM coverage, to the Johnson–Illinois Farmers policy.

We begin with a presumption that Johnson is limited to the bargained-for, limits-less-paid formula, which guaranteed that he would receive a total of no less than $100,000 from all sources if an uninsured or underinsured motorist caused him injuries of at least that amount. Minn. Const. art. I, § 11 (prohibiting laws that impair contract obligations); *Dairyland Ins. Co. v. Implement Dealers Ins. Co.*, 294 Minn. 236, 244–45, 199 N.W.2d 806, 811 (1972) (restating prior holdings that unambiguous insurance contracts are to be enforced as written). But the right to contract does not prevent judicial intervention to expand coverage beyond the parties' bargain. *Streich v. Am. Family Mut. Ins. Co.*, 358 N.W.2d 396, 399 (Minn. 1984). Judicial authority to alter private insurance contracts requires a significant basis, however, so we will disturb a bargain only when the law requires. "[A]n insurer's liability is governed by the contract between the parties only as long as coverage required by law is not omitted and policy provisions do not contravene applicable statutes." *Am. Nat'l Prop. & Cas. Co. v. Loren*, 597 N.W.2d 291, 292 (Minn. 1999) (quotation omitted).

Johnson's argument that the No-Fault Act authorizes and requires judicial reformation of the UIM coverage provision of his contract with Illinois Farmers requires us to determine the reach of section 65B.49, subdivision 4a. The correct interpretation of statutes is a question of law subject to our de novo review. *Schons v. State Farm Mut. Ins. Co.*, 621 N.W.2d 743, 745 (Minn. 2001); *Loren*, 597 N.W.2d at 292.

Illinois Farmers emphasizes that motorcycles are excluded from mandatory UIM coverage under the No-Fault Act. It maintains that the statute requiring the broader method of calculating UIM coverage is therefore irrelevant to its policy with Johnson. It is clear that the No-Fault Act does not require insurers to provide motorcycles with UIM coverage. The Act generally obliges automobile owners and insurers to meet certain minimum standards for insurance coverage to compensate accident victims. Minn. Stat. §§ 65B.41 to 65B.71. It requires that every insurance policy covering a "motor vehicle" must include coverage for basic economic loss and bodily injury, along with uninsured and UIM coverage at specified minimum levels. Minn. Stat. § 65B.49, subds. 1–3a. But "motor vehicles" are the only class of vehicle that the Act requires to be covered by UIM coverage, and motorcycles are not within the Act's definition of "motor vehicle." Minn. Stat. § 65B.43, subd. 2. This could not be more obvious, since the Act defines a "motor vehicle" as a highway-operated vehicle subject to registration requirements, "*other than a motorcycle* or other vehicle with fewer than four wheels." *Id*. (Emphasis added.) Motorcycles, like school buses, farm tractors, all-terrain vehicles, and marked patrol cars, are exempt from the No-Fault Act's generally applicable coverage requirements. *See Mut. Serv. Cas. Ins. Co. v. League of Minn. Cities Ins. Trust*, 659 N.W.2d 755, 759–60 (Minn. 2003) (listing statutory exclusions and adding marked patrol cars to the list). Motorcycles are not "motor vehicles," and, as a result, motorcycle insurance need not provide uninsured or underinsured motorist coverage at all. Minn. Stat. §§ 65B.43, subd. 2, 65B.48, subd. 5; *Loren*, 597 N.W.2d at 293.

This much is uncontested. But Johnson contends that the statute's express language excluding motorcycles from the "motor vehicle" class, for which insurance liability policies must include UIM coverage, is immaterial. He maintains that once an insurer provides *some* amount of UIM coverage—even for a motorcycle, which requires no UIM coverage at all—subdivision 4a requires the insurer to provide the *full* amount of coverage that subdivision 4a requires of "motor vehicles." Subdivision 4a does not expressly state whether it applies only to those polices that include coverage required by the No-Fault Act, as Illinois Farmers contends, or whether it applies to all insurance policies issued in Minnesota, as Johnson contends. To the extent this omission creates an ambiguity, we must resolve it to determine the coverage that Johnson is

entitled to under the Johnson–Illinois Farmers insurance policy. *See Beck v. City of St. Paul*, 304 Minn. 438, 445, 231 N.W.2d 919, 923 (1975) (explaining that when a statute is ambiguous appellate courts are to determine and give effect to legislative intent).

We recognize that section 65B.49, subdivision 4a, *might* be read to impose a standard, invariable structure to calculate coverage very generally "[w]ith respect to underinsured motorist coverage." After all, it does not expressly distinguish between UIM coverage that is required under the Act and UIM coverage that is not. On this omission, Johnson urges us to read it as applying a mandatory measure of coverage that must apply to all insurance policies issued in Minnesota that include any UIM coverage, regardless of whether the No-Fault Act requires coverage or whether the parties merely voluntarily entered into an agreement that includes UIM coverage. But the context, history, and analogous caselaw regarding the operative subdivisions in section 65B.49 lead us to conclude that courts may not rely on subdivision 4a to expand a policy's UIM coverage unless the coverage itself is required by law.

Contextual Relationship of Subdivisions 3a and 4a

We first consider the ambiguous language in its context. Section 65B.49, subdivision 3a, which requires UIM coverage only for "motor vehicles," and subdivision 4a, which immediately follows and indicates the maximum liability of an insurer that provides UIM coverage, appear to interrelate by their terms and placement. Both sit in the No-Fault Act specifically, which is only a subset of the general "Automobile Insurance" statutes, chapter 65B. Had the legislature intended subdivision 4a to apply generally and independent of the No-Fault Act, it more likely would have done so much more obviously by including it elsewhere in the chapter as its own section rather than as a subdivision within the No-Fault Act. This is precisely the legislature's approach with generally applicable obligations on auto policies. *See e.g.*, Minn. Stat. §§ 65B.1311 (requiring insurance coverage for former spouses); .132 (requiring certain student discounts); .133 (requiring certain disclosure).

The legislature not only included subdivision 4a in the No-Fault Act, it also included it in the same section and immediately following the subdivision requiring UIM coverage for some (but not all) vehicles. In substance, both subdivisions apply the phrase "underinsured motorist coverage" and they seem to work together by design. The first of these two subdivisions defines the insurer's duty to provide UIM coverage for motor vehicles, and the second defines the method to calculate the insurer's liability for the required UIM coverage. *Compare id.*, subd. 3a ("No plan . . . may be . . . issued . . . with respect to any motor vehicle . . . unless separate . . . underinsured motorist coverages are provided therein.") *with id.*, subd. 4a ("[I]n no event shall the underinsured motorist carrier have to pay more than the amount of its underinsured motorist

limits."). The proximity and context argues against Johnson's interpretation. And the background of these subdivisions demonstrates that their close proximity is not coincidental.

Historic Relationship between Requirement to Issue Coverage and Required Coverage

A look at Minnesota's brief record of regulating UIM coverage informs us that the legislature's interest in how UIM coverage is calculated relates directly to the legislature's interest in requiring insurers to include or make available UIM coverage. This 40-year history highlights the correlation between the Act's requirement in subdivision 3a that only some vehicles must have UIM coverage and its requirement in subdivision 4a that this coverage must be calculated on a damages-less-paid basis.

Before 1967, when the legislature passed its first law regarding uninsured motorist coverage, Minn. Stat. § 72A.149 (1967), Minnesota courts were not in the business of reforming terms of underinsured or uninsured motorist provisions to meet any particular public policy or system of recovery. Instead, courts relied on the parties to negotiate their own bargain. The supreme court expressly noted this in 1969:

> At the time plaintiff had her accident [before 1967], Minnesota did not have a public policy expressed by statute regarding uninsured motorist coverage. Therefore, there was nothing to require that an insurance company extend coverage beyond the terms of its insurance contract.

Farkas v. Hartford Accident & Indem. Co., 285 Minn. 324, 331, 173 N.W.2d 21, 26 (1969). That deference to the contracting parties began to change in 1971, when the legislature amended the statute regulating auto-insurance providers. The amendment required UIM coverage to be "made available" to policyholders. Minn. Stat. § 65B.25 (1971). Under that law, an insured person could not recover under her UIM provision unless the policy's UIM coverage limits exceeded the amount recovered from the insured tortfeasor. Minn. Stat. § 65B.26(d) (1971); *see also Lick v. Dairyland Ins. Co.*, 258 N.W.2d 791, 793 (Minn. 1977) (applying Minn. Stat. § 65B.26(d)). This began the courts' role in reforming UIM provisions that failed to meet minimum benchmarks established by statute. Before 1974, therefore, our courts never mentioned "underinsured motorist coverage," let alone reformed a UIM insurance provision to expand coverage to fit any particular public policy or statutory scheme.

The law remained intact until 1974, when Minnesota first adopted its No-Fault Act. 1974 Minn. Laws ch. 408, §§ 1–35, at 762–86. And since then, that law has taken on various forms to reflect policy shifts concerning whether to require UIM coverage at all and, if so, what system of calculation would govern. *See generally Dohney*, 632 N.W.2d at 600–03 (discussing changes in

UIM coverage in No-Fault Act); *see also* Smetak, *supra*, at 867–73 (outlining the evolution of UIM coverage in Minnesota's No-Fault Act). Johnson accurately asserts that before 1989, UIM liability was calculated under the same limits-less-paid approach described by the parties' insurance policy here, but that after the legislature amended the No-Fault Act in 1989, policies have either been reformed or read to expand coverage under the damages-less-paid approach. *Dohney*, 632 N.W.2d at 602–03.

The legislative policy that describes how to calculate coverage of UIM provisions is now embodied in subdivision 4a of section 65B.49, the subdivision that Johnson urges us to apply to his motorcycle policy even though the legislature has never required motorcycles to be protected by UIM coverage at all. We are not persuaded by his urging, because legislative interest in *how* UIM coverage applies has always followed its interest in *whether* UIM coverage applies. This historic legislative relationship between the operative provisions strongly suggests that subdivision 4a is not intended as a statute of general application to policies that do not require any UIM coverage under subdivision 3a. Neither the legislature nor the courts have ever expressed any policy favoring expanding UIM coverage beyond the parties' agreed-upon terms except for those insurance policies that must, as a matter of law, include UIM coverage.

There is a clear and logical legislative relationship between the requirement that some policies include UIM coverage and the requirement that this mandatory coverage be calculated using a specified standard method. This demonstrates that the legislature did not intend for us to reform UIM provisions beyond those cases where UIM coverage is mandatory. And we discern no legislatively directed interest in imposing a standard to calculate coverage on insurance policies that are not required to include any UIM coverage. In addition to the contextual arrangement and the short history of the legislature's interest in the field, the limited but analogous caselaw also argues for interpreting subdivision 4a to apply only to those insurance policies that require UIM coverage.

Analogous Caselaw

Another significant weakness in Johnson's position is that it contradicts the reasoning of analogous caselaw regarding policies that are not required to contain UIM coverage. In *Aguilar v. Texas Farmers Insurance Company*, we considered the district court's holding that a liability policy must be reformed to include add-on benefits under section 65B.49. 504 N.W.2d 791, 793 (Minn. App. 1993). That policy, like the Illinois Farmers policy we consider today, contained a UIM provision with a limits-less-paid clause that the insurer relied on to subtract paid damages from its coverage. We reversed on the following reasoning, which applies with equal force to our analysis here: "The Texas Farmers policy contained all of the statutorily-mandated coverages. Anything in addition to the statutorily-mandated coverages, such as UIM coverage, is a matter of

contract between the parties." *Id*. at 794.

Johnson would have us disregard *Aguilar* on the theory that *Aguilar* stands only for the proposition that UIM policies bought by nonresidents need not comply with Minnesota law. We

do not read *Aguilar* so narrowly. No doubt, *Aguilar* rested on the idea that Minnesota law "does not require out-of-state policies to contain UIM benefits." *Id*. That the law did not require the insurer to provide the additional coverage, however, was merely the first step of our analysis. The second step is more relevant here. We reasoned further that *because* the insurer was not required to provide UIM coverage at all, the operative provisions governing mandatory UIM motorist coverage simply did not apply, and the parties were left to the UIM coverage they had bargained for. *Id.*

Applying the logic of *Aguilar* here leads to the same result and for the same reason. It is not disputed that the Illinois Farmers policy also "contained all of the statutorily-mandated coverages." The insurers in both cases had no statutory duty to provide any UIM coverage. We are not concerned with *why* this is so, but with the fact that this is so. In *Aguilar*, the insurer had no duty to provide the coverage because, under Minnesota law, out-of-state insurance policies need not include the coverage; and in this case, the insurer had no duty to provide the coverage because, under Minnesota law, motorcycle insurance policies need not include the coverage. How the two policies get there is different, but the endpoint is the same. And from that endpoint, *Aguilar*'s reasoning provides the basis for our analysis. We therefore apply the same reasoning here. Types of coverage not mandated by statute, including optional UIM coverage with a limits-less-paid reducing clause, are a matter of contract between the parties not subject to reformation.

We are not persuaded otherwise by Johnson's argument that *Aguilar* does not provide the proper analogy. He contends that whether the UIM coverage was optional or required is irrelevant, analogizing that section 65B.49, subdivision 4a, requires that the coverage be based on an add-on formula even if the insurer purchased UIM coverage in excess of the statutory minimum coverage amount. *See* Minn. Stat. § 65B.49, subd. 3a. He asserts that if, for example, he had insured a car rather than a motorcycle with the same UIM maximum limit of $100,000, he would have been entitled to reformation under subdivision 4a using the damages-less-paid method. He cites nothing in support of his premise, but we need not address it. We have already observed the existence of a legislative relationship between the requirement that certain vehicles have UIM coverage and its interest in regulating the method of calculating that coverage. So while it might be true that UIM clauses covering "motor vehicles" using a limits-less-paid method are subject to reformation even in situations where the limits-less-paid method would satisfy the statutory minimum UIM coverage, the analogy does not carry forward to reach motorcycle coverage.

Additional Concerns

We add that interpreting the No-Fault Act as Johnson requests would lead to a rather impractical application of law. It would require us to conclude that although the legislature is content with insurers providing no UIM coverage for motorcycles, it is not content with insurers providing some UIM coverage for motorcycles. The object of the Act is to establish a standard for UIM coverage for certain vehicles. Just as it would have been ineffective to require UIM "coverage" without imposing a standard to calculate that coverage, it would be incongruous to

require a standard to calculate coverage for those vehicles for which the coverage is not required. The legislature expressly declined to require insurers to include any UIM coverage in their motorcycle policies, and in doing so, it implicitly declined to demand reformation to extend UIM coverage for motorcycles beyond what the parties bargained for.

We understand that our case of *Mitsch v. American National Property & Casualty Co.*, 736 N.W.2d 355, appears on its face to suggest a different conclusion. *Mitsch* was a case involving motorcycle UIM coverage in which this court stated broadly that "Minnesota law

mandates that *all* UIM coverage issued in the state be [damages-less-paid] 'add-on' coverage,"

which means the insurer's liability would not be reduced by amounts collected from the underinsured driver. *Id.* at 358 (emphasis added). This broad language in *Mitsch* extends beyond its analysis and its holding.

Mitsch was injured as a passenger on her husband's motorcycle, and she sought to recover from her husband's insurer. *Id.* at 357. Her husband had purchased insurance for his motorcycle, which included UIM coverage. *Id.* The *Mitsch* court refused to give effect to a clause in Mitsch's insurance policy that reduced the insurance company's liability, concluding that the clause violated the No-Fault Act—specifically section 65B.49, subdivision 4a. *Id.* at 363–64. The court concluded that the statute established a method of calculating the motorcycle insurer's liability that precluded enforcement of the reducing clause in the insurance contract. *Id.*

But the *Mitsch* court was not asked to consider the fact that UIM coverage is not required in motorcycle insurance policies under the No-Fault Act. It focused only on whether Mitsch's claim was an attempt to improperly convert first-party UIM coverage into third-party liability coverage. *Mitsch* did not address the fact that Mitsch sought to apply the No-Fault Act to a motorcycle insurance policy. And our review of the briefing in that case establishes that the issue was never raised. Although *Mitsch* states that "all" UIM coverage must be "add-on" and not "limits-less-paid," we conclude that the statement was in the form of dictum and does not control our interpretation of Minnesota's No-Fault Act. *See Naftalin v. King*, 257 Minn. 498, 503, 102 N.W.2d 301, 304 (1960) (explaining that "considered dicta" may be persuasive but do not bind future decisions when the issue is presented). *Mitsch* therefore does not constrain our analysis of whether the No-Fault Act bars "limits-less-paid" UIM coverage in motorcycle insurance policies.

To construe Minnesota Statutes section 65B.49, subdivision 4a to apply to motorcycle insurance would extend rights created by the No-Fault Act "beyond those provided by the legislature." *Mut. Serv. Cas. Ins. Co.*, 659 N.W.2d at 762. Instead, because "limits-less-paid" UIM coverage offered as part of a motorcycle liability insurance policy does not contravene Minnesota's No-Fault Act, Johnson's contract with Illinois Farmers does not merit reformation and must be enforced as written. This result is consistent with Minnesota's public policy interest in the freedom to contract. *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 215 (Minn. 1984).

Amicus Curiae Arguments

The amicus curiae presents three alternative reasons that we should nonetheless refuse to enforce the reducing clause. It argues that the insurance policy's clause violates the "reasonable expectations doctrine," that the policy provides "illusory coverage," and that a policy holder could never recover the full policy amount because Minnesota requires drivers to carry a minimum of $30,000 in liability coverage. The arguments are unavailing.

The first two arguments lack any factual basis in this appeal. The reasonable expectations doctrine applies when a policy is ambiguous or if it contains important but obscure provisions unknown to the insured. *Atwater Creamery Co. v. W. Nat. Mut. Ins. Co.*, 366 N.W.2d 271, 277 (Minn. 1985). The reducing clause in Johnson's policy appears in plain language ("We will pay . . . for damages resulting from a motor vehicle accident . . . but not more than: . . . The lesser of the difference between the limit of uninsured (underinsured) motorist coverage . . . ."), under an appropriate heading ("Limits of Liability"), and in reasonably-sized text. And Johnson has not claimed that the terms of his policy were hidden or obscure. A policy's coverage is illusory if it "turns out to be functionally nonexistent." *Jostens, Inc. v. Northfield Ins. Co.*, 527 N.W.2d 116, 119 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995). Johnson's policy guaranteed that if he were injured in an accident caused by an underinsured motorist, he would recover at least $100,000 from all sources. Coverage under Johnson's policy is obviously not "functionally nonexistent" because his dispute with Illinois Farmers regards whether he is entitled to more than the $66,000 that the policy entitles him to recover.

The argument that Johnson could never recover the full $100,000 of coverage under his policy is unpersuasive for two reasons. First, it is not relevant; the policy does not promise a $100,000 payment from the UIM insurer in every case, but that coverage is determined as $100,000 minus damages collected from the "at fault vehicle." Second, it ignores the fact that Johnson could have recovered the full $100,000 in circumstances other than this one, such as if Cummiskey's liability insurance had been paid entirely to an additional victim of the same accident.

D E C I S I O N

Because Minnesota's No-Fault Automobile Insurance Act does not require UIM provisions in motorcycle insurance policies to be reformed from a limits-less-paid structure to a damages-less-paid structure, the Johnson–Illinois Farmers insurance policy does not violate the Act, and the district court correctly constrained Johnson's right to recover to his bargained-for amount.

Affirmed.

STATE OF MINNESOTA

IN SUPREME COURT

A08-250

Court of Appeals Dietzen, J.

Nancy M. Meyer, as trustee for the heirs
of Margaret Mphosi, deceased, et al., and
Nancy M. Meyer, as guardian ad litem for
Lucas Mphosi, injured, et al.,

Appellant,

and

Bunmi Obembe, et al.,

Intervenors,

vs.

Filed: January 14, 2010
Office of Appellate Courts

Bibian Nwokedi,

Defendant,

Enterprise Rent A Car Co. of
Montana/Wyoming, d/b/a Enterprise
Rent A Car of the Dakotas/Nebraska,

Respondent.

Duane A. Lillehaug, Maring Williams Law Office, P.C., Fargo, North Dakota; Andre Mura, Center for Constitutional Litigation, P.C., Washington, D.C.; and Craig Richie, Richie & Associates, Fargo, North Dakota, for appellant.

Theodore J. Smetak, Paul E. D. Darsow, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota, for respondent.

Lori Swanson, Attorney General, John S. Garry, Assistant Attorney General, St. Paul, Minnesota, for amicus curiae State of Minnesota.

Michael L. Weiner, Yaeger, Jungbauer & Barczak, PLC, Minneapolis, Minnesota, for amicus curiae Minnesota Association for Justice.

Richard P. Schweitzer, Craig M. Cibak, Richard P. Schweitzer, PLLC, Washington, D.C., for amicus curiae Truck Renting and Leasing Association, Inc.

S Y L L A B U S

1. The Graves Amendment, 49 U.S.C. § 30106 (2006), preempts state laws that impose vicarious liability on rental-vehicle owners, but the savings clause of the Graves Amendment, 49 U.S.C. § 30106(b)(2), excludes from preemption state laws that impose liability on rental-vehicle owners for failure to meet "financial responsibility or liability insurance requirements" under state law.

2. Minnesota Statutes § 65B.49, subd. 5a(i)(2) (2006), does not impose liability on rental-vehicle owners for failure to meet "financial responsibility or liability insurance requirements" within the meaning of the section 30106(b)(2) savings clause. Therefore, appellant's vicarious liability claim, which is predicated on Minn. Stat. § 65B.49, subd. 5a(i)(2), is preempted by the Graves Amendment.

3. Minnesota Statutes § 169.09, subd. 5a (2008), does not impose liability on rental-vehicle owners for failure to meet "financial responsibility or liability insurance requirements" within the meaning of the section 30106(b)(2) savings clause of the Graves Amendment. Therefore, appellant's vicarious liability claim, which is predicated on Minn. Stat. § 169.09, subd. 5a, is preempted by the Graves Amendment.

Affirmed and remanded to the district court to implement the terms of the parties' settlement agreement.

O P I N I O N

DIETZEN, Justice.

Appellant Nancy Meyer, who is trustee of the heirs of decedents Margaret Mphosi and Joshua Mphosi and guardian ad litem for Lucas Mphosi and Jehoshophat Mphosi, commenced this action to recover damages arising out of a single-vehicle accident. The lawsuit alleged that respondent Enterprise Rent A Car Co. of Montana/Wyoming, d/b/a Enterprise Rent A Car of Dakotas/Nebraska (Enterprise), as owner of the rental vehicle involved in the accident, was vicariously liable for the driver's negligence. Enterprise moved for summary judgment arguing, among other things, that Meyer's claim for vicarious liability was barred by the Graves Amendment, 49 U.S.C. § 30106 (2006). The district court granted summary judgment in favor of Enterprise, and the court of appeals affirmed. *Meyer v. Nwokedi*, 759 N.W.2d 426, 432 (Minn. App. 2009). We granted review and affirm.

The material facts are undisputed. Maboko Mphosi (Mr. Mphosi) rented a sport utility vehicle (SUV) from Enterprise in Fargo, North Dakota, on June 4, 2004. The next day the SUV was involved in a single-vehicle accident on I-94 near Fergus Falls, Minnesota, which resulted in

the deaths of Mr. Mphosi's wife, Margaret Mphosi, and their son, Joshua Mphosi, as well as injuries to their sons, Lucas Mphosi and Jehoshophat Mphosi.[1] At the time of the accident, Bibian Nwokedi was driving the SUV with the permission of Mr. Mphosi.

Meyer was named trustee for the heirs and next of kin of the decedents Margaret Mphosi and Joshua Mphosi and guardian ad litem for the injured minors Lucas Mphosi and Jehoshophat Mphosi. Subsequently Meyer commenced this action against Nwokedi and Enterprise to recover damages arising out of the accident. Meyer's complaint alleged that Nwokedi was negligent and that Enterprise was vicariously liable for the deaths and injuries caused by the negligent operation of the rental vehicle involved in the accident. The vicarious liability claim was premised on Minn. Stat. § 65B.49, subd. 5a(i)(2) (2006), which caps vicarious liability for rental-vehicle owners, and Minn. Stat. § 169.09, subd. 5a (2008), which, in relevant part, imposes vicarious liability on rental-vehicle owners. Additionally, Meyer's complaint alleged that Enterprise negligently entrusted the rental vehicle to Mr. Mphosi and that Enterprise was negligent.

Enterprise moved for summary judgment, arguing that (1) Meyer's vicarious liability claim should be dismissed as a matter of law because the Graves Amendment, a federal statute that preempts state laws imposing vicarious liability on rental-vehicle owners, preempts Minn. Stat. §§ 65B.49, subd. 5a(i)(2), and 169.09, subd. 5a, and (2) Meyer's negligent entrustment and negligence claims should be dismissed as a matter of law because Meyer failed to produce any evidence to support those claims. Meyer and Nwokedi both opposed Enterprise's motion for summary judgment. The district court agreed with Enterprise, however, and granted summary judgment in favor of Enterprise.

Although Enterprise's motion for summary judgment was granted, the claim against Nwokedi was still pending and Enterprise acknowledged its obligation to defend and indemnify Nwokedi; therefore, the parties entered into a settlement agreement to facilitate an appeal. In the agreement, Enterprise, as self-insurer[2] of the rental vehicle involved in the accident, deposited $60,000 with the district court based on the minimum insurance liability requirements of Minn. Stat. § 65B.49, subd. 3 (2008). In exchange, Meyer agreed to dismiss with prejudice and without costs "all claims in this lawsuit" with the exception of her vicarious liability claim against Enterprise.

Meyer then appealed the district court's grant of summary judgment for Enterprise. The court of appeals affirmed, holding that the Graves Amendment preempts Minn. Stat. § 65B.49, subd. 5a(i)(2), and Minn. Stat. § 169.09, subd. 5a, insofar as both of those state laws impose vicarious liability on rental-vehicle owners. *Meyer*, 759 N.W.2d at 432.

I.

Meyer argues that the district court erred in granting Enterprise's motion for summary judgment, particularly by dismissing her vicarious liability claim on the ground that it was preempted by the Graves Amendment. Meyer concedes that her vicarious liability claim fits within the express preemption clause of the Graves Amendment, but argues that, under the

savings clause of the Graves Amendment, her vicarious liability claim is excluded from preemption.

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03. Whether federal law preempts state law is an issue of statutory interpretation, which we review de novo. *In re Estate of Barg*, 752 N.W.2d 52, 63 (Minn. 2008).

The Supremacy Clause of the United States Constitution provides that the "Constitution, and the Laws of the United States . . . made in Pursuance thereof . . . , shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. In determining if a federal law preempts a state law, "[c]ongressional purpose is 'the ultimate touchstone.' " *Barg*, 752 N.W.2d at 63 (citation omitted). Congressional intent to preempt state laws may be express or implied. *In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 250 (Minn. 2005). Preemption is generally disfavored, particularly if state laws regulating "the historic police powers of the States" are implicated. *Barg*, 752 N.W.2d at 63. Indeed, if "the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.' " *Altria Group, Inc. v. Good*, __ U.S. __, 129 S. Ct. 538, 543 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). Therefore, state laws are not preempted "unless that [is] the clear and manifest purpose of Congress." *Barg*, 752 N.W.2d at 63 (citation omitted) (internal quotation marks omitted). But when "Congress expressly preempts state action, the matter is settled." *Risdall v. Brown-Wilbert, Inc.*, 753 N.W.2d 723, 728 (Minn. 2008).

The Graves Amendment was enacted on August 10, 2005, as part of a comprehensive transportation bill known as the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (the Act), Pub. L. No. 109-59, 119 Stat. 1144 (2005). The Act deals generally with motor vehicle safety, primarily providing billions of dollars in funding allocations for transportation projects. *Id.*; *see generally* Susan Lorde Martin, *Commerce Clause Jurisprudence and the Graves Amendment: Implications for the Vicarious Liability of Car Leasing Companies*, 18 U. Fla. J.L. & Pub. Pol'y 153, 163 (2007). The Act also contains a provision, known as the Graves Amendment, which preempts state laws imposing vicarious liability on lease- or rental-vehicle owners. 49 U.S.C. § 30106.

The Graves Amendment has both an express preemption clause and a savings clause. The preemption clause states:

> An owner of a motor vehicle that rents or leases the vehicle to a person . . . shall not be liable under the law of any State . . . by reason of being the owner of the vehicle . . . for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if
>
> (1) the owner . . . is engaged in the trade or business of renting or leasing motor vehicles; and

> (2) there is no negligence or criminal wrongdoing on the part of the owner . . .

49 U.S.C. § 30106(a). It is undisputed that Meyer's vicarious liability claim fits within the scope of the express preemption clause of the Graves Amendment. Specifically, Enterprise is engaged in the business of renting motor vehicles, and did not engage in negligence or criminal wrongdoing. *See id.* Consequently, the express preemption clause of the Graves Amendment is applicable and, without more, would preempt Meyer's lawsuit.[3]

Meyer argues that her vicarious liability claim is predicated on a "financial responsibility or liability insurance requirement" of Minnesota law, and therefore is excluded from preemption under the savings clause of the Graves Amendment. The savings clause provides:

> Nothing in this section supersedes the law of any State . . .
>
> > (1) imposing financial responsibility or insurance standards on the owner of a vehicle for the privilege of registering and operating a motor vehicle; or
> >
> > (2) imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for failure to meet the financial responsibility or liability insurance requirements under State law.

49 U.S.C. § 30106(b).[4]

According to Meyer, Minn. Stat. §§ 65B.49, subd. 5a(i)(2), and 169.09, subd. 5a, impose liability on rental-vehicle owners for failure to meet "financial responsibility or liability insurance requirements" under Minnesota law, and thus are excluded from preemption under the (b)(2) savings clause. Meyer concedes that the (b)(1) savings clause does not save these statutes from preemption; rather, Meyer relies exclusively on the (b)(2) savings clause.[5] Enterprise counters that Minn. Stat. §§ 65B.49, subd. 5a(i)(2), and 169.09, subd. 5a, do not impose liability on rental-vehicle owners for failure to meet "financial responsibility or liability insurance requirements" within the meaning of the (b)(2) savings clause. Thus, we must determine the meaning of "financial responsibility or liability insurance requirements" under the (b)(2) savings clause and whether Minn. Stat. §§ 65B.49, subd. 5a(i)(2), and 169.09, subd. 5a, fit within that meaning.

A. The (b)(2) Savings Clause

When interpreting a federal statute, the court must "give effect to the plain meaning of a statute when the language is clear." *Martin v. City of Rochester*, 642 N.W.2d 1, 11 (Minn. 2002) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). "Financial responsibility," as used in the savings clause, is not defined by 49 U.S.C. § 30106(d) or 49 U.S.C. § 30102 (2006) (both providing definitions for the Graves Amendment).

In *Garcia v. Vanguard Car Rental USA, Inc.*, the United States Court of Appeals for the Eleventh Circuit interpreted the meaning of the phrase "financial responsibility" in the Graves Amendment to determine whether a Florida wrongful death action was preempted. 540 F.3d

1242 (11th Cir. 2008), *cert. denied*, __ U.S. __, 129 S. Ct. 1369 (2009). The court concluded that Congress used "financial responsibility . . . to denote state laws which impose insurance-like requirements." *Id.* at 1247-48. Relying on the pairing of the terms "financial responsibility or liability insurance requirements" and the common legal usage of the term "financial responsibility," *Garcia* defined "insurance-like requirements" as the "financial equivalent" of insurance. *Id.* at 1247-48; *see also generally* Michael K. Steenson, *Minnesota No-Fault Automobile Insurance* § 1.01 (3d ed. 2007).

The parties do not dispute that the phrase "financial responsibility" in the Graves Amendment refers to insurance-like requirements under state law. We agree with *Garcia* and conclude that "financial responsibility" refers to insurance-like requirements under state law. Additionally, the phrase "financial responsibility" appears to modify the word "requirement" in the (b)(2) savings clause, thereby supporting the conclusion that "financial responsibility" refers to insurance-like requirements.

In summary, the Graves Amendment preempts state laws that impose vicarious liability on rental-vehicle owners, but the (b)(2) savings clause excludes from preemption state laws that impose liability on rental-vehicle owners for failure to meet insurance-like requirements or liability insurance requirements under state law. *See* 49 U.S.C. § 30106. Therefore, to satisfy the (b)(2) savings clause, Meyer must establish that Minn. Stat. §§ 65B.49, subd. 5a(i)(2), and 169.09, subd. 5a, impose liability on rental-vehicle owners for failure to meet insurance-like requirements or liability insurance requirements.

B. Minnesota Statutes § 65B.49, subd. 5a(i)(2)

The goal of all statutory construction is to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2008); *see also Am. Fam. Ins. Group v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000). Every statute "shall be construed, if possible, to give effect to all its provisions." Minn. Stat. § 645.16; *see also Schroedl*, 616 N.W.2d at 277. In construing a statute, "words and phrases are construed according to rules of grammar and according to their common and approved usage." Minn. Stat. § 645.08 (2008); *see also Schroedl*, 616 N.W.2d at 277. And "courts cannot supply that which the legislature purposely omits." *Wallace v. Comm'r of Taxation*, 289 Minn. 220, 230, 184 N.W.2d 588, 594 (1971).

The crux of the dispute is whether Minn. Stat. § 65B.49, subd. 5a(i)(2), imposes liability on Enterprise for failure to meet insurance-like requirements or liability insurance requirements. Meyer and Enterprise agree that Minn. Stat. § 65B.49, subd. 3, imposes "liability insurance requirements," in the amounts of $30,000 per person and $60,000 per accident on all vehicle owners.[6] But Meyer argues that Minn. Stat. § 65B.49, subd. 5a(i)(2), imposes *higher* "liability insurance requirements" on rental-vehicle owners by requiring them to maintain residual liability insurance in the amounts of $100,000 per person and $300,000 per accident.[7] Enterprise counters that Minn. Stat. § 65B.49, subd. 5a(i)(2), does not impose higher "liability insurance requirements" on rental vehicle owners; rather, Minn. Stat. § 65B.49, subd. 5a(i)(2), provides rental-vehicle owners with a vicarious liability cap.

Minnesota Statutes § 65B.49, subd. 5a(i)(2) (2006), provides:

> Notwithstanding section 169.09, subdivision 5a, an owner of a rented motor vehicle is not vicariously liable for legal damages resulting from the operation of the rented motor vehicle in an amount greater than $100,000 because of bodily injury to one person in any one accident and . . . $300,000 because of injury to two or more persons in any one accident . . . if the owner . . . has in effect, at the time of the accident, a policy of insurance or self-insurance, as provided in section 65B.48, subdivision 3, covering losses up to at least the amounts set forth in this paragraph . . . . Nothing in this paragraph alters or affects the obligations of an owner of a rented motor vehicle to comply with the requirements of compulsory insurance through a policy of insurance as provided in section 65B.48, subdivision 2, or through self-insurance as provided in section 65B.48, subdivision 3 . . . . Nothing in this paragraph alters or affects liability, other than vicarious liability, of an owner of a rented motor vehicle.

Based on the plain language of the statute, Minn. Stat. § 65B.49, subd. 5a(i)(2), does not impose liability for failure to meet insurance-like requirements or liability insurance requirements. Instead, Minn. Stat. § 65B.49, subd. 5a(i)(2), provides rental-vehicle owners with the option of capping potential vicarious liability for legal damages resulting from the operation of a rental vehicle if the owner provides insurance coverage in the amounts of $100,000 per person and $300,000 per accident. Two reasons support our conclusion. First, the legislature uses "if . . . then . . ." language in the statute. Specifically, subdivision 5a(i)(2) provides that *if* a rental-vehicle owner has insurance "covering losses up to at least the amounts set forth in this paragraph," *then* the rental-vehicle owner "is not vicariously liable . . . in an amount greater than" $100,000 per person and $300,000 per accident. Meyer is correct that when a rental-vehicle owner does not elect to obtain coverage at the higher limits under Minn. Stat. § 65B.49, subd. 5a(i)(2), the consequence is potentially unlimited vicarious liability. But nothing in Minn. Stat. § 65B.49, subd. 5a(i)(2), *requires* rental-vehicle owners to maintain insurance in the amounts of $100,000 per person and $300,000 per accident. Meyer's proposed interpretation supplies language that the legislature did not use, such as "shall have" or "requirement." *See Wallace*, 289 Minn. at 230, 184 N.W.2d at 594 (concluding that courts cannot supply language that the legislature did not use).

Second, the last portion of subdivision 5a(i)(2) provides that "[n]othing in this paragraph alters or affects the obligations of [rental-vehicle owners] to comply with the requirements of compulsory insurance," which are set forth in Minn. Stat. § 65B.49, subd. 3, in the amounts of $30,000 per person and $60,000 per accident.[8] Meyer's proposed interpretation that subdivision 5a(i)(2) requires rental-vehicle owners to maintain higher "liability insurance requirements" renders this portion of the statute superfluous. Specifically, it would not be necessary to clarify that rental-vehicle owners are obligated to provide coverage in the amounts of $30,000 per person and $60,000 per accident if they are obligated to provide coverage for *higher* amounts. Our interpretation of Minn. Stat. § 65B.49, subd. 5a(i)(2), as a vicarious-liability cap gives effect to the entire statute, including the last portion. *See Schroedl*, 616 N.W.2d at 277 (concluding that when interpreting statutes, "no word, phrase, or sentence should be deemed superfluous, void, or insignificant").

Meyer argues that Minn. Stat. § 65B.49 generally addresses "liability insurance requirements," and therefore every provision of Minn. Stat. § 65B.49 should be construed as imposing "liability insurance requirements." Meyer points to subdivision 7, which states that "[n]othing in sections 65B.41 to 65B.71 shall be construed as preventing the insurer from offering other benefits or coverages in addition to those required to be offered under this section."

We read subdivision 7 as allowing insurers to provide extra coverage regardless of *any* provisions that impose minimum coverage requirements. The word "required" in subdivision 7 does not, *ipso facto*, mean that *every* provision of Minn. Stat. § 65B.49 imposes "liability insurance requirements." Put differently, the general language of subdivision 7 does not transform the more specific language of subdivision 5a(i)(2) into a statute that imposes liability on rental-vehicle owners for failure to meet insurance-like requirements or liability insurance requirements.

Meyer also argues that the 2007 amendments to Minn. Stat. § 65B.49, subd. 5a(i)(2), support her interpretation of the statute. Prior to the 2007 amendments, when a rental vehicle was involved in an accident, the owner's insurance policy provided primary coverage, and the permissive driver's insurance policy provided secondary coverage. *See Hertz Corp. v. State Farm Mut. Ins. Co.*, 573 N.W.2d 686, 691 (Minn. 1998). The 2007 amendments shifted responsibility for primary coverage from rental-vehicle owners to permissive drivers, with rental-vehicle owners providing secondary coverage. *See* Act of May 14, 2007, ch. 72, § 1, 2007 Minn. Laws 517, 519 (providing that a rental-vehicle owner's insurance policy "must apply whenever [a permissive driver] is not covered by" an insurance policy). According to Meyer, the 2007 amendments manifest the legislature's intent that Minn. Stat. § 65B.49, subd. 5a(i)(2), impose "liability insurance requirements."

We conclude that the 2007 amendments are not helpful to the resolution of this dispute for two reasons. First, the 2007 amendments are not applicable to this case because the amendments were not in effect when Meyer commenced her lawsuit. *See* Act of May 14, 2007, ch. 72, § 1, 2007 Minn. Laws 517, 519. Second, the 2007 amendments address priority of coverage, not whether subdivision 5a(i)(2) imposes liability on rental-vehicle owners for failure to meet "liability insurance requirements." Thus, the 2007 amendments do not address whether Minn. Stat. § 65B.49, subd. 5a(i)(2), is preempted by the Graves Amendment.

In summary, we conclude that Minn. Stat. § 65B.49, subd. 5a(i)(2), does not set forth "liability insurance requirements" applicable to rental-vehicle owners and does not impose liability on rental-vehicle owners for failure to meet insurance-like requirements or liability insurance requirements within the meaning of the (b)(2) savings clause. Rather, Minn. Stat. § 65B.49, subd. 5a(i)(2), offers rental-vehicle owners an opportunity to limit their exposure to vicarious liability claims by providing insurance in the amounts of $100,000 per person and $300,000 per accident. Therefore, Meyer's vicarious liability claim, which is predicated on Minn. Stat. § 65B.49, subd. 5a(i)(2), is preempted by the Graves Amendment.[9]

C. Minnesota Statutes § 169.09, subd. 5a

Meyer argues that Minn. Stat. § 169.09, subd. 5a, when considered in the context of the Minnesota No-Fault Act, imposes liability on rental-vehicle owners for failure to meet insurance-like requirements or liability insurance requirements, and therefore is excluded from preemption under the (b)(2) savings clause. Specifically, Meyer argues that the remedial purpose of the No-Fault Act requires that we read Minn. Stat. § 169.09, subd. 5a, in pari materia with Minn. Stat. § 65B.49, subd. 5a(i)(2). *See, e.g.,* Minn. Stat. § 65B.42(1) (2008) (the No-Fault Act is intended to "relieve the severe economic distress of uncompensated victims of automobile accidents").

We agree that the Minnesota No-Fault Act serves an important remedial purpose. But its remedial purpose is not relevant unless we conclude that Minn. Stat. § 169.09, subd. 5a, is ambiguous. Accordingly, we must first determine whether Minn. Stat. § 169.09, subd. 5a, and Minn. Stat. § 65B.49, subd. 5a(i)(2) are ambiguous as applied to the facts of this case. "A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation." *See Schroedl*, 616 N.W.2d at 277 (citation omitted).

We have previously concluded in section B, *supra*, that section 65B.49, subd. 5a(i)(2) is not ambiguous, and therefore does not fall within the reach of section (b)(2). Thus, we must examine whether Minn. Stat. § 169.09, subd. 5a is ambiguous. It provides:

> Whenever any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof.

This statute has consistently been interpreted as creating vicarious liability as to vehicle owners when none existed at common law. *See, e.g., Shuck v. Means*, 302 Minn. 93, 96, 226 N.W.2d 285, 287 (1974) (explaining that the purpose of Minn. Stat. § 170.54 (1974), now codified at Minn. Stat. § 169.09, subd. 5a, was to make vehicle owners liable when "no such liability would otherwise exist, giving . . . injured persons more certainty of recovery by encouraging owners to obtain appropriate liability insurance"); *see also Kangas v. Winquist*, 207 Minn. 315, 316-17, 291 N.W. 292, 293 (1940) (explaining that the purpose of 3 Mason Minn. St. 1938 Supp. § 2720-104, now codified at Minn. Stat. § 169.09, subd. 5a, was to impose vicarious liability on vehicle owners for the tortious acts of permissive drivers).

We conclude that there is nothing ambiguous about the statute. Minn. Stat. § 169.09, subd. 5a, is not a financial responsibility law that limits, or conditions liability of the rental-vehicle owner for failure to meet insurance-like requirements or liability insurance requirements within the meaning of the (b)(2) savings clause. Rather, vicarious liability of a rental-vehicle owner under the statute applies whether the owner complies with the financial responsibility laws of Minnesota or not. Because there are no financial responsibility laws incorporated into subdivision 5a, we conclude that the statute does not fall within the (b)(2) savings clause. Consequently, Meyer's vicarious liability claim, which is predicated on Minn. Stat. § 169.09, subd. 5a, is preempted by the Graves Amendment.

Affirmed and remanded to the district court to implement the terms of the parties' settlement agreement.

[1] Two other passengers, Bunmi and Christopher Obembe, were also injured in the accident; they intervened in Meyer's action.

[2] It is undisputed that Enterprise meets the obligations for self-insurers mandated by Minn. Stat. § 65B.48, subd. 3 (2004).

[3] The Graves Amendment applies to "any action commenced on or after the date of enactment of this section." 49 U.S.C. § 30106(c). The Graves Amendment was enacted on August 10, 2005, and Meyer commenced this action on June 2, 2006.

[4] For ease of reference, 49 U.S.C. § 30106(b)(1) is referred to as "the (b)(1) savings clause" and 49 U.S.C. § 30106(b)(2) is referred to as "the (b)(2) savings clause."

[5] Because Meyer concedes that the (b)(1) savings clause does not support her claim, that issue is not before us, and therefore we decline to examine it.

[6] Enterprise has deposited $60,000 with the district court to satisfy any obligations imposed by Minn. Stat. § 65B.49, subd. 3. Therefore, whether Minn. Stat. § 65B.49, subd. 3, is preempted by the Graves Amendment is not before us and we decline to reach that issue.

[7] These limits have been adjusted for inflation to $115,000 per person and $350,000 per accident. *See* Minn. Stat. § 65B.49, subd. 5a(i)(3) (2008).

[8] Subdivision 5a(i)(2) refers to Minn. Stat. § 65B.48, subds. 2 and 3, which apply to self-insurance and a policy of insurance. Subdivision 3 requires that self-insurers meet the applicable minimum mandatory limits set forth in Minn. Stat. § 65B.49, subd. 3.

[9] Other courts have also held that similar state laws were preempted by the Graves Amendment. *See Garcia*, 540 F.3d at 1248 (rejecting the argument that the Graves Amendment distinguishes between limited and unlimited vicarious liability statutes: "[t]he distinction Congress drew is between liability based on the companies' own negligence and that of their lessees, not between limited and unlimited vicarious liability"); *Rahaman v. Falconer*, No. FSTCV076000713, 2009 WL 1958508, at *6 (Conn. Super. Ct. June 9, 2009) (unpublished opinion) (Connecticut's vicarious-liability cap statute neither compels liability insurance nor imposes liability for failure to meet "liability insurance requirements").

STATE OF MINNESOTA

IN COURT OF APPEALS

A08-1695
A08-1702

Randy A. Vee, et al.,
Appellants (A08-1695),
Respondents (A08-1702),

vs.

Badri Abas Ibrahim, et al.,
Defendants (A08-1695),
Respondents (A08-1702),

Ernest Meyer Crouzer, et al.,
Appellants (A08-1702),
American President Lines, Ltd.,
Respondent.

Filed July 14, 2009

Affirmed

Ross, Judge

Ramsey County District Court

File No. 62-C1-07-000595

Wilbur W. Fluegel, Fluegel Law Office, 150 South Fifth Street, Suite 3475, Minneapolis, MN 55402, and

Robert L. Lazear, James R. Schwebel, Schwebel, Goetz & Sieben, P.A. 5120 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402-2246 (for appellants Vee, et al.)

Brian A. Wood, William L. Davidson, Lind, Jensen, Sullivan & Peterson, P.A., 150 South Fifth Street, Suite 1700, Minneapolis, MN 55402 (for defendants/appellants Ernest Meyer Crouzer, et al.)

John M. Bjorkman, Angela Beranek Brandt, Larson King, LLP, 30 East Seventh Street, Suite 2800, St. Paul, MN 55101-4922 (for respondent American President Lines)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

S Y L L A B U S

A semitrailer is not a "motor vehicle" for the purpose of applying the motor vehicle vicarious liability statute, Minnesota Statutes section 169.09, subdivision 5a.

O P I N I O N

ROSS, Judge

A semitruck and its trailer jackknifed after rear-ending a delivery truck, causing the trailer to swing into the oncoming lane and to strike and seriously injure motorcyclist Randy Vee. The semitruck and semitrailer are separately owned. Randy Vee sued the two truck drivers and their employers, and he sued the semitrailer's owner. The delivery truck driver's employer brought a crossclaim against the semitrailer's owner. The claims and crossclaims against the semitrailer's owner depend on the owner being vicariously liable for the semitruck driver's actions. The district court dismissed the claims against the semitrailer's owner, holding that a semitrailer is not a "motor vehicle," as that term is used in the motor vehicle vicarious liability statute, Minnesota Statutes section 169.09, subdivision 5a. Because we also hold that a semitrailer is not a motor vehicle, we affirm.

F A C T S

Randy Vee had just cleared an intersection on his motorcycle when he was struck by an oncoming semitrailer that swung into his lane. The semitrailer was being pulled by a semitruck that had rear-ended a delivery truck, causing the truck-trailer rig to jackknife. Vee sued the semitruck's driver, Badri Ibrahim, and the delivery truck's driver, Ernest Crouzer, along with their employers, Freightways Corporation and Northern Plains Dairy, respectively. Vee later amended his complaint to add American President Lines (APL) as a defendant. APL owns the semitrailer.[1] Vee sought to hold APL vicariously liable for Ibrahim's allegedly negligent driving. Crouzer amended his answer to seek indemnification or contribution from APL under the same theory.

APL moved for summary judgment, arguing that a semitrailer's owner is not vicariously liable for the actions of the semitruck's driver. The district court agreed and dismissed the claims against APL in a judgment that is appealable under Minn. R. Civ. App. P. 103.03(a) and 104.01. Vee and Crouzer filed separate appeals, which we have consolidated.

I S S U E S

I. Does the vicarious liability statute, Minnesota Statutes section 169.09, subdivision 5a (2008), incorporate the definition of "motor vehicle" as set forth in Minnesota Statutes section 169.011?

II. Is a semitrailer a motor vehicle within the meaning of the vicarious liability statute, section 169.09, subdivision 5a?

A N A L Y S I S

I

Vee and Crouzer contest the district court's summary judgment decision. We review summary judgment decisions for whether genuine issues of material fact remain, and for whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Both Vee and Crouzer contend that Minnesota Statutes section 169.09, subdivision 5a (2008), renders APL vicariously liable for accidents involving APL's trailer. The statute provides that "[w]henever any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner." Minn. Stat. § 169.09, subd. 5a. The outcome of these appeals depends on whether the trailer that struck Vee qualifies as a "motor vehicle" under this vicarious liability statute.

This court reviews matters of statutory construction de novo. *In re Kleven*, 736 N.W.2d 707, 709 (Minn. App. 2007). The first concern when construing a statute is whether it is facially clear. *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). The object of statutory construction is to give effect to the legislature's intent. *Id.* But if the language is unambiguous, no further investigation is warranted and we discern legislative intent only from the statute's plain language. *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999); *see* Minn. Stat. 645.16 (2008).

The legislature has provided a definition for "motor vehicle" that, by virtue of its language and placement, appears to apply to the vicarious liability statute. Minnesota Statutes section 169.011, subdivision 42 (2008), defines motor vehicle as "every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires," subject to exceptions not relevant here. By express description, the definitions of section 169.011 apply to chapter 169. *Id.*, subd. 1.

Despite the express relationship between sections 169.09 and 169.011, Vee and Crouzer argue that we should apply a definition of "motor vehicle" found elsewhere in the statutes. The legislature has provided a different definition of motor vehicle in Minnesota Statutes section 65B.43 (2008). Section 65B.43, which is part of the Minnesota No-Fault Automobile Insurance Act, defines a "motor vehicle" as

> every vehicle, other than a motorcycle or other vehicle with fewer than four wheels, which (a) is required to be registered pursuant to chapter 168, and (b) is designed to be self-propelled by an engine or motor for use primarily upon public roads, highways or streets in the transportation of persons or property, *and includes a trailer with one or more wheels, when the trailer is connected to or being towed by a motor vehicle*.

(Emphasis added.) But by its terms, section 65B.43 definitions apply to sections 65B.41 through 65B.71. *Id.*

The statutory arrangement strongly suggests that section 169.011's definition of motor vehicle applies to section 169.09, since both sections share the same chapter. But Vee and Crouzer contend that the statute's history leads to a different application. In 2005, the legislature instructed the revisor to renumber the vicarious liability statute. 2005 Minn. Laws ch. 163, § 88, at 1877. Before the legislature relocated the statute to chapter 169, it had been codified at section 170.54 (2004). The law instructing the change did not revise the language of the statute, only its location in the compilation of laws. And before it was relocated, this court had concluded that the definition of motor vehicle found in section 65B.43 applied to the vicarious liability statute, holding that the definition found in chapter 169 did *not* apply. *Great Am. Ins. Co. v. Golla*, 493 N.W.2d 602, 605 (Minn. App. 1992). The *Golla* court had to apply *some* definition to the term, and choosing the correct definition was not directed by statutory structure because the operative provision was in a chapter that included no definition. We reasoned that the legislature repealed an applicable definition of "motor vehicle" and simultaneously enacted the no-fault act's definition located at section 65B.43. *Id.* at 604. So despite the organizational ambiguity, this court held that the "motor vehicle" definition from 65B.43 applied to the vicarious liability statute that was codified 100 chapters later. *Id.* at 604–05.

On this background, Vee and Crouzer argue that the legislature did not intend its 2005 instruction to the revisor to cause a substantive, "radical" change to the vicarious liability statute. But we reach a different conclusion.

The statutes appearing in Minnesota Statutes are *prima facie evidence of* the law, but the enactments of the legislature *are* the law. *Granville v. Minneapolis Pub. Sch., Special Sch. Dist. No. 1*., 732 N.W.2d 201, 208 (Minn. 2007). The supreme court's treatment of a similar issue in *Granville* guides our approach here. In *Granville*, the supreme court examined the effect of a law repealing an existing law's sunset clause after the law's expiration date had passed. *Id.* at 204–06. The court reasoned that the repealing law was merely "part of a bookkeeping effort to remove obsolete provisions from the statute books." *Id.* at 205. The court noted that the act did not express any intent to substantively change the law. *Id.* It concluded that the language of the repealing law was unambiguous regarding its direct effect on the law repealed. *Id*. But the court determined that the law *was* ambiguous with respect to the "far from axiomatic," indirect effects of the repeal of a sunset provision. *Id.* at 206. In light of the ambiguity, the court considered the legislature's intent. *Id.*

The supreme court's approach in *Granville* offers a rough template for us. The legislation recodifying the statute describes itself as, among other things, "[a]n act relating to data practices"

and as designed to "amend [] Minnesota Statutes 2004, section[] . . . 169.09 . . . by adding subdivisions[.]" 2005 Minn. Laws ch. 163, at 1832. Several consecutive subdivisions of the act directly modified and added subdivisions of section 169.09. *Id*. §§ 60–75, at 1863–67. In a separate, nonconsecutive section of the act, the legislature instructed the revisor to renumber two sections of chapter 170, and it assigned them to chapter 169.09. *Id*. § 88, at 1877. Chapter 170 is now empty, every section having either been repealed or relocated.

The language plainly requires the revisor to renumber the vicarious liability statute from 170.54 to 169.09, subdivision 5a. *Id*. But whether the legislature intended the change to modify the vicarious liability law substantively is not clear from the law's language, and the law is ambiguous in that regard. *See Granville*, 732 N.W.2d at 206 (finding ambiguity regarding the indirect effect of a law repealing a sunset provision). In light of that ambiguity, we must consider whether the legislature intended the relocation to bear on which definition to apply.

To discern the legislature's intent, this court considers, among other things, the law's object, "the occasion and necessity for the law," any former law, and the consequences of an interpretation. Minn. Stat. § 645.16 (2008); *Nestell v. State*, 758 N.W.2d 610, 613 (Minn. App. 2008). When the legislature simultaneously repeals and reenacts a law, it intends for the law to remain in continuous effect. Minn. Stat. § 645.37 (2008). But in directing its placement as it did here, the legislature has relocated the law within the scope of a specifically defining statute.

The legislature was aware that "motor vehicle" was defined by section 169.011 when it relocated the vicarious liability statute to the same chapter. This is strong evidence that the legislature intended the statute to be defined accordingly. If the legislature intended for chapter 65B's motor-vehicle definition to apply to the vicarious liability statute, it had many means to indicate that inevident intention. It could have moved the statute within the expressly stated scope of the chapter 65B definitions. It could have amended the statute to expressly refer to the 65B definition. Or it could have left things as they were, tacitly acquiescing to this court's construction in *Golla*. Instead, the legislature adopted a statutory definition for "motor vehicle" where previously none existed within the chapter that assigns vicarious liability.

Vee and Crouzer contend that the legislature would have been more clear if it intended to reject the definition that the *Golla* court borrowed from chapter 65B. But we cannot imagine what more would be required of the legislature to make this intention clear. Given that relocation within the scope of chapter 169's definition so strongly suggests adoption of the chapter 169 definition, a different intention would require an express legislative statement. *See Granville*, 732 N.W.2d at 205 ("[W]e must presume that the legislature generally knows what it is doing."). Although it is not implausible that the law recodifying the vicarious liability statute was entirely a bookkeeping exercise, it does not seem that it was. The act made substantial changes to section 169.09, unlike the *Granville* repealer.

What appears after the recodification is new framework informing our interpretation of the vicarious liability statute. Before the legislature acted, no definition of "motor vehicle" clearly applied, so this court borrowed a definition from elsewhere. *Golla*, 493 N.W.2d at 604–05. As it stands now, a statute defining "motor vehicle" unambiguously applies to the vicarious liability statute. We conclude that the intent of the legislature was to abrogate *Golla* implicitly.

We hold that the definition of motor vehicle in chapter 169 applies to the vicarious liability statute.

II

Because the definition of "motor vehicle" appearing in section 169.011 applies, a semitrailer does not qualify as a motor vehicle under the vicarious liability statute. According to the definition, a motor vehicle is "self-propelled" or "powered by trolley wires." Minn. Stat. § 169.011, subd. 42. A semitrailer is neither. Our holding that a semitrailer is not a motor vehicle complements the statutory definition of "semitrailer," which is a "[vehicle] designed [to be] used in conjunction with a truck-tractor" and "includes a trailer drawn by a truck-tractor semitrailer combination." Minn. Stat. § 169.011, subd. 72. A semitrailer therefore remains merely a *vehicle* even when it is drawn by a *motor vehicle*.

Because the motor-vehicle vicarious liability statute does not impose vicarious liability on the owners of semitrailers, the district court correctly concluded that APL is not vicariously liable for Ibrahim's driving.

D E C I S I O N

When the legislature moved the vicarious liability statute to chapter 169, it effectively subjected the statute's operative provision to the definition of motor vehicle awaiting it in that chapter. Because a semitrailer does not meet the definition of motor vehicle in section 169.011, the vicarious liability statute does not provide a basis to impose vicarious liability on semitrailer owners for the actions of semitruck drivers. We therefore affirm.

Affirmed.

[1] The statute imposes vicarious liability on the "owner" of a motor vehicle. We refer to APL as an "owner" because APL does not dispute that its long-term lease renders it an "owner" for purposes of determining its liability under the statute.

STATE OF MINNESOTA

IN COURT OF APPEALS

A08-0012

State of Minnesota,
Respondent,

vs.

Donte Demarco White,
Appellant.

Filed January 27, 2009

Affirmed

Schellhas, Judge

Concurring specially, Johnson, Judge

Hennepin County District Court

File No. 27-CR-06-083190

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

Eric L. Newmark, Birrell & Newmark, Ltd., 333 South Seventh Street, Suite 3020, Minneapolis, MN 55402 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Johnson, Judge; and Crippen, Judge.*

S Y L L A B U S

Under Minn. Stat. § 169.79, subd. 7 (2006), it is illegal to cover assigned letters, numbers, and a state of origin on a license plate with any material.

O P I N I O N

SCHELLHAS, Judge

Appellant challenges the district court's pretrial order denying his motion to suppress evidence obtained as a result of a traffic stop. Appellant argues that the district court incorrectly interpreted Minn. Stat. § 169.79, subd. 7, to prohibit the use of any license plate cover, and that under a correct interpretation of the statute, his license plate cover did not violate the statute so as to justify the traffic stop. Because we conclude that the district court correctly interpreted the statute, we affirm.

F A C T S

Bloomington Police Officer Cullan McHarg stopped appellant Donte Demarco White at night, when he saw a glare from a vehicle license plate and observed that the vehicle had a clear license plate cover. Officer McHarg first testified that the cover affected the plate's visibility or reflectivity, but later testified that he could not recall if the plate's visibility or reflectivity was affected. He also testified that he could not recall if he was able to read the license plate and that uncovered license plates can also create glare. After the stop, a weapon was found in the vehicle. Appellant was arrested and charged with carrying a weapon without a permit in violation of Minn. Stat. § 624.714, subd. 1(a) (2006).

The district court concluded that Minn. Stat. § 169.79, subd. 7, prohibits the use of *any* covering over assigned letters, numbers, or the state of origin, and that the traffic stop was lawful based on an equipment violation. After the district court denied appellant's suppression motion, appellant preserved the suppression issue for appeal, waived his right to a jury trial, and proceeded with a stipulated-facts trial. The court convicted appellant of the weapons offense. This appeal follows.

I S S U E

Did the district court correctly interpret Minn. Stat. § 169.79, subd. 7, to prohibit covering letters, numbers, or the state of origin on a license plate with any material, regardless of whether the material affects the license plate's visibility or reflectivity?

A N A L Y S I S

Appellant argues that the district court erred by interpreting Minn. Stat. § 167.79, subd. 7, to ban all license plate covers. Appellant argues that the plain language of the statute allows clear covers that do not affect the license plate's visibility or reflectivity and that the district court's interpretation nullifies the effect of part of the statute. Appellant argues that the stop was not justified by an equipment violation and that the officer's mistaken interpretation of the law cannot justify the stop.

Statutory interpretation is reviewed de novo. *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 519 (Minn. 2007).

> The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions. When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

Minn. Stat. § 645.16 (2006). "When the words of a law are not explicit," courts may use a number of factors listed in the statute to ascertain intent. *Id.* These factors include, among other things, the "occasion and necessity for the law" and the law's legislative history. *Id.* But these factors are only to be used if the statute's terms are ambiguous. *Id.* "A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation." *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (quotation omitted). Finally, "[a] statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant." *Id.* (quotation omitted).

The relevant portion of Minn. Stat. § 169.79, subd. 7, reads: "It is unlawful to cover any assigned letters and numbers or the name of the state of origin of a license plate with any material whatever, including any clear or colorless material that affects the plate's visibility or reflectivity." We conclude this language is ambiguous because it is subject to more than one reasonable interpretation. The statute can be reasonably interpreted to mean that covering critical information on a license plate with "any material" is unlawful, and it can be reasonably interpreted to mean that covering critical information on a license plate with a clear covering is unlawful only if the clear covering affects "the plate's visibility or reflectivity." Because the statute is ambiguous, we consider the legislative history to ascertain the legislative intent.

Section 169.79, subd. 7, was added in 1995. 1995 Minn. Laws ch. 120, § 4, at 262. Before the 1995 addition, the statute read: "All plates shall be securely fastened so as to prevent them from swinging. The person driving the motor vehicle shall keep the plate legible and unobstructed and free from grease, dust, or other blurring material so that the lettering is plainly visible at all times." Minn. Stat. § 169.79 (1994).

The 1995 amendment added: "It is unlawful to cover any assigned letters and numbers or the name of the state of origin of a license plate with any material whatever, including any clear or colorless material that affects the plate's visibility or reflectivity." 1995 Minn. Laws ch. 120, § 4, at 262. The amendment originated in a bill that was explained at House and Senate committee meetings by Major Glenn Gramse of the Department of Public Safety, Highway Patrol Division. Hearing on H.F. No. 383 Before the House Comm. on Transp. and Transit (Feb. 10, 1995); Hearing on H.F. No. 383 Before the Senate Comm. on Transp. and Pub. Transit (Mar. 1, 1995). The amendment was offered as a "housekeeping bill" for purposes of clarifying the existing statute. Hearing on H.F. No. 383 Before the House Comm. on Transp. and Transit (Feb. 10, 1995). Gramse explained that to have an obscured license plate already was a violation of Minnesota law, and said:

> We are trying to strengthen that by again being clear that you can't cover the license plate with any kind of material that either darkens or reduces the reflective value of the license plate which then impairs the ability of not only police to see it but of citizens to report crimes . . . .

Id. An unidentified person asked Gramse at the committee meeting: "I might have seen somewhere a license plate cover that was blue . . . does that fall into your category of obscuring, plastic blue?" *Id.* Gramse answered, "Yes, it would" and explained:

> Again, we spend extra money to make sure that the plates are made of reflective material and when you put even that kind of a covering over it you get a reflection back from the license plates, which really destroys the reflective ability of the license plate to do the job that it was intended to do, so yes it would be covered under the statute.

Gramse continued:

> I believe it is already a violation to have your license plate obscured with that blue covering under the general prohibition about having plates obscured.

Id. An unidentified person said: "I think under this bill, and probably it was before even—that you can't even have clear covering over the top of the license plates so, which, uh, Mr. Gramse has stated, that causes the reflective material not to work." *Id.*

Gramse also testified before the Senate Transportation and Public Transit Committee. A full recording of the Senate Committee hearing is not available, but in the available portion Gramse explained the bill again as follows:

> It does not create new violations. These are things that are already in the statute. It merely clarifies them to make it clearer to both the public and to the law enforcement officials that they are in fact violations.

Hearing on H.F. No. 383 Before the Senate Comm. on Transp. and Pub. Transit (Mar. 1, 1995). Gramse was asked: "This language says that those clear plastic covers that are on license plates that sometimes reflect and you can't read the license plate—they are no longer allowable?" *Id.* Gramse answered:

> That is correct. Under another section of the statute it says that license plates must be legible and cannot be obscured or obstructed. Our contention is that when you put that on there and it reflects back it already is obscuring the license plate, but this just makes it clear that that is also included.

Id. Gramse continued:

> The law says you can't obscure the license plate or you can't make it illegible, which, in effect, that is what happens when you put those on. So we just want

> it very clear that people know in the statute, if they look, that they don't have to try to think "does this make my license plate illegible" when, in fact, that is what it does, if you, just kind of clarifies that you can't put those things on.

Id. The senate committee meeting tapes cut off after this testimony. *Id.*

The testimony repeatedly emphasizes that the 1995 amendment was meant to clarify existing law, not change it. The legislative history reveals that the legislature was concerned that even clear coverings can obscure plates by causing a reflection or by affecting the license plate's reflectivity. The legislature's intent to clarify the statute suggests that the language in the amendment, "including any clear or colorless material that affects the plate's visibility or reflectivity," was included to clarify that clear coverings are prohibited; the amendment was not included to limit the legislative prohibition against covering critical information on a license plate with "any material whatever."

Further, "[w]hen 'include' is utilized, it is generally improper to conclude that entities not specifically enumerated are excluded." 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 47.23, at 417 (7th ed. 2007). This court has concluded on at least two occasions that the use of the word "including" is illustrative rather than exclusive. In *Reserve Mining Co. v. VanderVeer*, we examined an unemployment-compensation statute that stated that a person was not eligible to receive benefits for any week in which he received "vacation allowance paid directly by the employer for a period of requested vacation, *including* vacation periods assigned by the employer under the provisions of a collective bargaining agreement, or uniform vacation shutdown." 368 N.W.2d 361, 363 (Minn. App. 1985) (emphasis added) (quoting Minn. Stat. § 268.08, subd. 3(2) (1982)). We explained that the phrase, "including vacation periods assigned by the employer under the provisions of a collective bargaining agreement," was "merely illustrative" of what was intended by the phrase, "requested vacation," and concluded that receipt of vacation benefits assigned under authority other than a collective-bargaining agreement resulted in ineligibility for benefits. *Id*. (quoting Minn. Stat. § 268.08, subd. 3(2)). Similarly, in *In re Paternity of B.J.H.*, we explained that where a statute defines a child's best interests as "all relevant factors," including factors listed in the statute, the use of the term "including" meant that "all relevant factors" were not limited to those identified in the statute. 573 N.W.2d 99, 102 (Minn. App. 1998).

Following the reasoning of our prior decisions, we conclude that the legislature intended to prohibit the covering of critical information on a license plate with "any material whatever," including a clear or colorless covering. The subordinate phrase, "including any clear or colorless material that affects the plate's visibility or reflectivity," is illustrative of a type of covering that is prohibited and does not mean that other types of clear or colorless covering are permissible. We recognize that our interpretation of Minn. Stat. § 169.79, subd. 7, may appear to give no effect to the subordinate phrase in the statute, "including any clear or colorless material that affects the plate's visibility or reflectivity," *see* Minn. Stat. § 645.16 ("Every law shall be construed, if possible, to give effect to all of its provisions."), but because the language in the subordinate phrase is explanatory only, our statutory interpretation does not nullify the effect of or treat the language in the subordinate phrase as surplusage.

Finally, because the statute prohibits covering assigned letters, numbers, and the state of origin with "any material," and appellant used a clear covering over this critical information, we conclude the traffic stop was justified because of the equipment violation. *See State v. Johnson*, 713 N.W.2d 64, 67 (Minn. App. 2006) (concluding that equipment violation provided reasonable, articulable suspicion to justify a traffic stop).

D E C I S I O N

The district court correctly concluded that the stop of appellant was justified by an equipment violation in the form of appellant's clear license plate cover. Under Minn. Stat. § 169.79, subd. 7 (2006), it is illegal to cover assigned letters, numbers, and a state of origin on a license plate with any material whatever.

Affirmed.

JOHNSON, Judge (concurring specially)

I concur in the opinion of the court except insofar as it reasons that the statute is ambiguous. In my view, the statute is unambiguous. The third sentence plainly states that a person may not cover the pertinent parts of a license plate "with any material whatever." This language is absolute and does not admit exceptions. "The word 'any' is given broad application in statutes, regardless of whether we consider the result reasonable." *Hyatt v. Anoka Police Dep't*, 691 N.W.2d 824, 826 (Minn. 2005) (applying plain meaning of phrase "any person" in Minn. Stat. § 347.22 (2004)); *see also In re PERA Police & Fire Plan Line of Duty Disability Benefits of Brittain*, 724 N.W.2d 512, 519 (Minn. 2006) (holding that phrase "any act of duty" in Minn. Stat. § 353.656, subd. 1 (2004), is unambiguous); *Olson v. Ford Motor Co.*, 558 N.W.2d 491, 494 (Minn. 1997) (interpreting phrase "any litigation . . . resulting from the use or operation of any motor vehicle" in Minn. Stat. § 169.685, subd. 4 (1996), by "look[ing] no further than the express language of the statute"). The final clause, which begins with the word "including," cannot reasonably be interpreted to *exclude* anything from the category of prohibited materials because the clause merely provides examples of prohibited materials. Furthermore, the statute cannot be deemed ambiguous by suggesting an alternative interpretation that is contrary to the statute's plain meaning. *See Ubel v. State*, 547 N.W.2d 366, 368 (Minn. 1996). Because the statute is unambiguous, we should not refer to or rely on its legislative history. *See Breza v. City of Minnetrista*, 725 N.W.2d 106, 114 n.13 (Minn. 2006). With these qualifications, I join in the opinion of the court.

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

STATE OF MINNESOTA

IN COURT OF APPEALS

A09-1025

Daniel Stephen Mycka,
Appellant,

vs.

2003 GMC Envoy, MN Plate RPG535,
VIN 1GKDT13S432414651,
Respondent.

Filed June 15, 2010

Reversed

Johnson, Judge

Anoka County District Court

File No. 02-CV-08-4912

Samuel A. McCloud, Carson J. Heefner, McCloud & Heefner, P.A., Shakopee, Minnesota (for appellant)

Carl J. Newquist, Sarah M. Kimball, Newquist & Herrick Law Offices, P.C., Fridley, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Hudson, Judge; and Connolly, Judge.

S Y L L A B U S

The city did not seize appellant's vehicle "incident to a lawful arrest," as that phrase is used in Minn. Stat. § 169A.63, subd. 2(b)(1) (2006), because the city seized the vehicle after appellant was released from jail and after appellant retrieved his vehicle from a private towing company.

O P I N I O N

JOHNSON, Judge

The City of Fridley seized a motor vehicle belonging to Daniel Stephen Mycka following his arrest for driving while impaired. The city seized the vehicle after Mycka was released from jail and after he retrieved the vehicle from a private towing company. Mycka commenced this action in the district court to challenge the city's seizure on the ground that, without process issued by a court, the city was not authorized to seize the vehicle from him. The district court rejected Mycka's challenge and ordered the vehicle to be forfeited. We conclude that the city improperly seized Mycka's vehicle because the seizure was not "incident to a lawful arrest," as required by the applicable statute. Therefore, we reverse the order of forfeiture.

F A C T S

On Sunday, June 15, 2008, at approximately 1:55 a.m., a Fridley police officer arrested Mycka for driving while impaired (DWI). At the time of his arrest, Mycka's driver's license was subject to a restriction that prohibited him from consuming alcoholic beverages. After Mycka was arrested, his vehicle was towed from the scene of the arrest by Shorty's Towing, a private towing company, at the city's request.

Later on Sunday, Mycka was released from the Anoka County Jail. Upon being released, he was told by someone in the sheriff's department that he could retrieve his vehicle from Shorty's Towing. Mycka did so at approximately 1:00 p.m.

On the morning of Monday, June 16, 2008, Officer Jennifer Markham of the Fridley Police Department reviewed records of arrests made during the previous weekend, including records of Mycka's arrest. Officer Markham realized that, because Mycka violated the terms of his restricted license, his vehicle was subject to forfeiture. *See* Minn. Stat. § 169A.63, subds. 1(e)(2)(ii), 6(a) (2006). Officer Markham immediately called Shorty's Towing to determine whether it still possessed Mycka's vehicle, but she learned that the vehicle had been released to Mycka. Officer Markham later testified that, according to the police department's policy, Mycka's vehicle should have been towed to the city's impound lot, rather than to Shorty's Towing, to facilitate the city's commencement of forfeiture proceedings.

At approximately noon on Monday, Officer Markham and two other officers went to Mycka's residence to seize his vehicle, a GMC Envoy, which was parked outside in his driveway. The officers parked three squad cars outside Mycka's home. Officer Markham knocked on the front door. When Mycka answered the door, Officer Markham gave him written notice of the seizure and the city's intent to forfeit the vehicle. The officers allowed Mycka to remove personal property from his vehicle. The officers then loaded the vehicle onto a flatbed truck and drove away. Mycka was not placed under arrest for a second time.

On June 27, 2008, Mycka commenced this action to challenge the seizure and forfeiture pursuant to Minn. Stat. § 169A.63, subd. 8(d) (2006). He alleged, among other things, that the city did not follow the applicable statutory procedures when seizing his vehicle because they did not obtain process from the district court and because the seizure did not occur "incident to a lawful arrest," as required by the exception to the process requirement. *See* Minn. Stat. § 169A.63, subd. 2(b)(1). In December 2008, the district court held an evidentiary hearing. In April 2009, the district court issued an order denying the relief Mycka sought. In its memorandum, the

district court reasoned that the city's seizure was performed incident to Mycka's arrest. Accordingly, the district court ordered that Mycka's vehicle be "forfeited to Fridley Police Department in accordance with Minn. Stat. § 169A.63." Mycka appeals.

I S S U E

Did the city seize Mycka's motor vehicle "incident to a lawful arrest," as that phrase is used in Minn. Stat. § 169A.63, subd. 2(b)(1)?

A N A L Y S I S

Mycka argues that the district court erred by concluding that the city's seizure of his vehicle was performed "incident to a lawful arrest." *See* Minn. Stat. § 169A.63, subd. 2 (2006). We apply a *de novo* standard of review to the issues raised by Mycka's argument, which are matters of statutory interpretation. *Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 433 (Minn. 2009).

A.

Section 169A.63 of the Minnesota Statutes concerns the forfeiture of motor vehicles used to commit alcohol-related driving offenses. Under that statute, a motor vehicle may be forfeited under section 169A.63 in either of two circumstances. First, a motor vehicle may be forfeited "if it was used in the commission of a designated offense." Minn. Stat. § 169A.63, subd. 6(a). The term "designated offense" is defined to mean the criminal offenses of first-degree DWI, second-degree DWI, driving after a driver's license has been canceled as inimical to public safety, and violating certain restrictions on a driver's license. *See* Minn. Stat. § 169A.63, subd. 1(e) (2006). Second, a motor vehicle may be forfeited if it "was used in conduct resulting in a designated license revocation." Minn. Stat. § 169A.63, subd. 6(a). The term "designated license revocation" is defined to include, among other things, a third license revocation within ten years. *See* Minn. Stat. § 169A.63, subd. 1(d) (2006).

Section 169A.63 also provides for the seizure of motor vehicles that are subject to forfeiture. As a general rule, "A motor vehicle subject to forfeiture . . . may be seized by the appropriate agency upon process issued by any court having jurisdiction over the vehicle." Minn. Stat. § 169A.63, subd. 2(a). The term "appropriate agency" is defined to mean "a law enforcement agency that has the authority to make an arrest for a violation of a designated offense or to require a test under section 169A.51." Minn. Stat. § 169A.63, subd. 1(b) (2006). If a law enforcement agency does not obtain process issued by a court, the agency may, in the alternative, seize a motor vehicle subject to forfeiture pursuant to any of three exceptions to the process requirement:

> Property may be seized without process if:
>
> (1) the seizure is incident to a lawful arrest or a lawful search;

> (2) the vehicle subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding under this section; or
>
> (3) the appropriate agency has probable cause to believe that the delay occasioned by the necessity to obtain process would result in the removal or destruction of the vehicle.

Minn. Stat. § 169A.63, subd. 2(b). If a motor vehicle is seized—whether by court process pursuant to subdivision 2(a) or administratively pursuant to subdivision 2(b)—the law enforcement agency, "within a reasonable time after seizure, . . . shall serve the driver or operator of the vehicle with a notice of the seizure and intent to forfeit the vehicle." Minn. Stat. § 169A.63, subd. 8(b) (2006).

If a motor vehicle has been seized administratively, the owner of the vehicle may, within 30 days of receiving notice of the seizure, commence an action in district court to request a judicial determination as to whether the vehicle should be forfeited. Minn. Stat. § 169A.63, subd. 8(d). If a motor vehicle has not been seized administratively, a prosecuting authority may commence a civil *in rem* action in district court to obtain a judicial determination of forfeiture of the vehicle. Minn. Stat. § 169A.63, subd. 9(a), (b) (2006). The term "prosecuting authority" is defined to mean "the attorney in the jurisdiction in which the designated offense occurred who is responsible for prosecuting violations of a designated offense." Minn. Stat. § 169A.63, subd. 1(i) (2006). Regardless how the civil action is commenced, the district court shall determine whether the vehicle should be forfeited. *See generally* Minn. Stat. § 169A.63, subd. 9 (2006).

B.

In this case, Mycka's driver's license was subject to a restriction that prohibited him from consuming alcoholic beverages. By consuming alcoholic beverages, Mycka engaged in a "designated offense." *See* Minn. Stat. § 169A.63, subd. 1(e)(2)(ii); *see also Mastakoski v. 2003 Dodge Durango*, 738 N.W.2d 411, 415 (Minn. App. 2007) (holding that driver need not "be convicted of a designated offense for the vehicle used to be subject to forfeiture"), *review denied* (Minn. Nov. 21, 2007). The city sought to effect an administrative seizure of the vehicle, without obtaining court process, pursuant to subdivision 2(b). Mycka commenced a civil action pursuant to subdivision 8(d) to challenge the administrative forfeiture and to obtain a judicial determination that the vehicle should not be forfeited. The primary issue in the district court, and the sole issue on appeal, is whether the city seized Mycka's vehicle "incident to a lawful arrest," as required by Minn. Stat. § 169A.63, subd. 2(b)(1). Mycka does not argue that the arrest was not lawful; rather, he argues that the seizure was not "incident to" the arrest.

The legislature did not define the phrase "incident to a lawful arrest" within section 169A.63. One leading dictionary defines the word "incident," in its adjectival form, to mean "naturally happening or appertaining, esp. as a subordinate or subsidiary feature," "[d]ependent on, or appertaining to, another thing," or "directly and immediately pert. to, or involved in, something else, though not an essential part of it." *Webster's New International Dictionary* 1257 (2d ed. 1946). Another dictionary defines the word "incident" to mean "[t]ending to arise or occur as a result or accompaniment" or "[r]elated to or dependent on another thing." *The*

American Heritage College Dictionary 700 (4th ed. 2007). A leading legal dictionary defines the word as "arising out of, or otherwise connected with . . . something else." *Black's Law Dictionary* 830 (9th ed. 2009). These definitions clearly connote a connection between two things in which one thing is "incident" to the other thing. Furthermore, the dictionary definitions suggest a close connection. To resolve this appeal, we must determine how close the connection must be between a person's arrest and a seizure of the person's vehicle.

The supreme court has stated that "[t]he objective of all statutory interpretation is 'to give effect to the intention of the legislature in drafting the statute' " and that "[t]he principal method of determining the legislature's intent is to rely on the plain meaning of the statute." *State v. Thompson*, 754 N.W.2d 352, 355 (Minn. 2008) (quoting *State v. Iverson*, 664 N.W.2d 346, 350 (Minn. 2003)). The language of section 169A.63, subdivision 2(b)(1), by itself, does not foreclose the conclusion that the city's seizure of the vehicle was conducted "incident to" Mycka's arrest. The city's position would be valid if the phrase "incident to" were defined so as to "extend to the outer limits of its definitional possibilities." *Abuelhawa v. United States*, 129 S. Ct. 2102, 2105 (2009) (quotation omitted). Thus, the statute is ambiguous.

Because the statute is ambiguous, we may seek to ascertain the legislature's intention by considering the provision "in context with other provisions of the same statute." *In re Welfare of J.B.*, N.W.2d _ _ _ 2010 WL 1933591, at *5 (Minn. May 14, 2010) (quotation omitted). Another provision of section 169A.63 indicates that the legislature intended the meaning of the phrase "incident to a lawful arrest" to be narrower than is urged by the city in this case. The third exception to court process permits an administrative seizure of a motor vehicle if there is "probable cause to believe that the delay occasioned by the necessity to obtain process would result in the removal or destruction of the vehicle." *Id*., subd. 2(b)(3). In this case, however, the city did not conduct the administrative seizure of Mycka's vehicle at a time or in a manner that would have prevented the removal or destruction of the vehicle. Even though the city did not seek to invoke the third exception, we should seek to interpret the first exception consistently with the third exception.

There are no other discernible clues in the text or structure of the statute as to the scope of the phrase "incident to a lawful arrest."[1] Ultimately, this case can be resolved on the simple ground that the seizure occurred so late in time. The city did not initiate the administrative seizure of Mycka's vehicle while Mycka still was under arrest. Mycka was released from detention, and he retrieved his vehicle from Shorty's Towing. Not until the following day—approximately 36 hours after his arrest and approximately 24 hours after his release from the county jail—did the city's police officers seize Mycka's vehicle from his residence. There was a clear break in time between the arrest and the seizure. These facts compel the conclusion that the city did not seize Mycka's vehicle "incident to" his arrest, as required by section 169A.63, subdivision 2(b)(1).

C.

We also must address the city's contention that its seizure of Mycka's vehicle was incident to his arrest because the seizure occurred within a reasonable time of the arrest. In support of this contention, the city relies on *Johnson v. 1996 GMC Sierra*, 606 N.W.2d 455

(Minn. App. 2000), *review denied* (Minn. Apr. 18, 2000). The district court relied on *Johnson* in rejecting Mycka's challenge, and the city's contention on appeal is largely repetitive of the district court's reasoning.

In *Johnson*, this court considered whether the driver-owner of a motor vehicle was given proper notice of the seizure of the vehicle. 606 N.W.2d at 457. The county served notice on Johnson on the day after his arrest, while he still was detained in the county jail. *Id*. This court rejected his challenge to the timeliness of the notice, reasoning that the service was "reasonably prompt."[2] *Id*. at 458. Johnson also challenged the notice on the ground that the county initially served the wrong form of notice and did not serve the proper form until almost one month later. *Id*. at 457. But we held that Johnson was not prejudiced by the defective notice. *Id*. at 458-59. In any event, the notice requirement at issue in *Johnson*, which now is governed by subdivision 8(b), is separate from the requirement that a seizure be performed "incident to a lawful arrest," which is found in subdivision 2(b)(1). *Johnson* has no bearing on the issue whether a seizure of a vehicle was "incident to a lawful arrest," as required by subdivision 2(b)(1). Thus, *Johnson* is inapplicable to this case.

In sum, the district court erred by concluding that the city's seizure of Mycka's vehicle was incident to his arrest and, consequently, by ordering Mycka's vehicle to be forfeited to the city.

D E C I S I O N

The city did not seize appellant's vehicle "incident to a lawful arrest," as that phrase is used in Minn. Stat. § 169A.63, subd. 2(b)(1). Therefore, the district court's order of forfeiture is reversed.

Reversed.

[1] We note that the language of the statute resembles language in the caselaw interpreting the Fourth Amendment to the United States Constitution, which prohibits unreasonable searches and seizures, but we nonetheless believe that the resemblance is not relevant to our interpretation of the statute. Police officers "may search a vehicle *incident to a recent occupant's arrest* . . . if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Arizona v. Gant*, 129 S. Ct. 1710, 1723 (2009) (emphasis added); *see also New York v. Belton*, 453 U.S. 454, 460, 101 S. Ct. 2860, 2864 (1981); *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 2040 (1969). We presume that the legislature had *Chimel* and *Belton* in mind when selecting the "incident to a lawful arrest" language in the bill that became section 169A.63, subdivision 2(b)(1), *see* 1992 Minn. Laws. ch. 570, art. 1, § 15, at 1953-56, because the legislature is presumed to enact statutes with full knowledge of the then-existing caselaw, *see Goodyear Tire & Rubber Co. v. Dynamic Air, Inc.*, 702 N.W.2d 237, 244 (Minn. 2005); *State v. Fleming*, 724 N.W.2d 537, 540 (Minn. App. 2006). Furthermore, when interpreting a word or phrase in an ambiguous statute, it may be appropriate to refer to the meaning given to that word or phrase by judicial decisions. *State v. Soto*, 378 N.W.2d 625, 628 (Minn. 1985). But the Fourth Amendment caselaw has

limited value in the context of this case. The *Chimel-Belton-Gant* line of cases serves a different purpose in a different context; that line of cases holds that a law enforcement officer may conduct a warrantless search of a person upon the person's arrest for the purposes of protecting the officer's safety and preserving evidence. *See Gant*, 129 S. Ct. at 1723. The statute permitting seizure of a motor vehicle "incident to a lawful arrest" of the vehicle's driver serves a different purpose. Although a statute with a "common-law term of art" generally should be interpreted according to its "established common-law meaning," term-of-art definitions should not be inserted "into contexts where they plainly do not fit." *Johnson v. United States*, 130 S. Ct. 1265, 1270 (2010) (citation and quotation omitted). The Fourth Amendment caselaw simply cannot be adapted to the context of this case.

[2] After *Johnson*, the legislature amended the statute to require notice of seizure "within a reasonable time after seizure." 2004 Minn. Laws ch. 235, § 6, at 731; *see also* Minn. Stat. § 169A.63, subd. 8(b).

STATE OF MINNESOTA

IN COURT OF APPEALS

A09-0007

In the Matter of the Risk Level Determination of G.G.

Filed August 25, 2009

Affirmed in part and reversed in part

Schellhas, Judge

Minnesota Department of Corrections

Agency File No. 4-1100-19750-2

Lori Swanson, Attorney General, Angela Helseth Kiese, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent Department of Corrections)

Marie L. Wolf, Interim Chief Appellate Public Defender, Jenneane L. Jansen, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for relator G.G.)

Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Schellhas, Judge.

S Y L L A B U S

I. Minn. Stat. § 243.166, subd. 1b(b)(2) (2008), which provides that a predatory offender who "enters this state and remains for 14 days or longer" must register, does not require that the offender's entry into Minnesota be volitional.

II. An end-of-confinement review committee has no authority under Minn. Stat. § 244.052, subd. 3(a) (2008), to assign a risk level to a predatory offender who was never incarcerated in a Minnesota correctional facility or treatment center.

O P I N I O N

SCHELLHAS, Judge

By writ of certiorari, relator challenges the determination of the Minnesota Department of Corrections (DOC) that relator is required to register as a predatory offender and that an end-of-confinement review committee (ECRC) has authority to assign relator a risk level. Because

relator entered and remained in Minnesota for more than 14 days when he was brought from a Wisconsin prison to a Minnesota jail, we conclude that relator is required to register as a predatory offender. But because relator was not "about to be released from confinement," we conclude that the ECRC had no authority to assign him a risk level.

F A C T S

In August 2006, relator G.G. and a friend stole dirt bikes and a truck in Wabasha County, Minnesota. As a result, Wabasha County charged relator with third-degree burglary, two counts of felony theft, and felony conspiracy to commit theft. At the time that relator committed the offense in Minnesota, he was serving a five-year extended-supervision term in Wisconsin for third-degree sexual assault, after having a sexual relationship with a 15-year-old girl. Relator was also required to comply with Wisconsin's Sex Offender Registry. He had previously pleaded guilty in Wisconsin to fourth-degree sexual assault after having a sexual relationship with a 17-year-old girl and impregnating her, while relator was residing with her family. And as a juvenile, relator penetrated his five-year-old cousin anally with his penis, was charged with first-degree sexual assault of a child, and was adjudicated delinquent in Wisconsin. Relator's extended supervision in Wisconsin was revoked, and he was imprisoned in Wisconsin with a provisional expiration date in 2011.

In January 2008, the Wisconsin Department of Corrections allowed relator to be transported to the Goodhue County jail in Red Wing, Minnesota, to resolve Wabasha County charges. Relator pleaded guilty to aiding and abetting third-degree burglary, and the Wabasha County District Court imposed a sentence of 33 months' imprisonment, with jail credit for 518 days of time served. The district court committed relator to the custody of the DOC and returned him to a Wisconsin prison to serve both his Minnesota and Wisconsin sentences under a dual commitment. Relator spent just over three weeks in Minnesota before he was returned to Wisconsin.

Relator was still incarcerated in Wisconsin when he became eligible for supervised release on his Minnesota prison sentence. At that time, relator met the definition of a "predatory offender" under Minnesota law because of his prior offenses. The DOC determined that relator was required to register in Minnesota as a predatory offender and receive a risk-level assignment. In April 2008, in advance of relator's supervised-release date, the ECRC at the St. Cloud correctional facility convened to determine relator's risk level. Relator appeared by telephone at this meeting, was represented by counsel, and stated that he had no plans to return to Minnesota after his release from prison in Wisconsin. Relator's counsel argued that relator was being assigned a risk level prematurely, because he was not confined to a Minnesota correctional facility. The ECRC nevertheless assigned relator a predatory-offender risk level of II.

Relator appealed the DOC's risk-level determination to an administrative-law judge (ALJ), arguing that he should not have been required to register as a predatory offender because the time he spent in jail in Goodhue County was due solely to state action and not his own volition. Relator also argued that the ECRC did not have authority to assign him a risk level because he was never incarcerated in a Minnesota correctional facility. The ALJ upheld the DOC's determination, and relator appeals by writ of certiorari.

I S S U E S

I. Is a predatory offender required to register under Minn. Stat. § 243.166, subd. 1b(b)(2), if he enters and remains in Minnesota as a result of state action rather than his own volition?

II. Does the DOC have authority under Minn. Stat. § 244.052, subd. 3(a), to assign a risk level to a predatory offender who was never confined in a Minnesota correctional facility or treatment center?

A N A L Y S I S

I

Relator argues that he was not required to register as a predatory offender under Minn. Stat. § 243.166, subd. 1b(b)(2). Questions of statutory interpretation are reviewed de novo. *In re Risk Level Determination of C.M.*, 578 N.W.2d 391, 395 (Minn. App. 1998). The object of statutory interpretation is "to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2008).

A predatory offender must register if that person "enters this state and remains for 14 days or longer." Minn. Stat. § 243.166, subd. 1b(b)(2). Here, the ALJ concluded that relator "clearly entered Minnesota and remained for more than 14 days when he was present in the Goodhue County Jail and sentenced on his Minnesota crimes." Relator argues that he did not "enter" Minnesota when he was brought to the Goodhue County jail because his presence in Minnesota at that time was the result of state action rather than his own volitional action.

Relator argues that the word "enters," as used in section 243.166, subdivision 1b(b)(2), implies volition. Section 234.166 does not define "enters." When words and phrases lack express statutory definition, they "are construed . . . according to their common and approved usage." Minn. Stat. § 645.08(1) (2008). "Enter" is defined as "[t]o come or go into." *The American Heritage Dictionary* 436 (New College Edition 1999); *see also Black's Law Dictionary* 552 (7th ed. 1999) (defining "enter" as "[t]o come or go into"). The common definition of "enter" does not necessarily include an element of volition or intent. We conclude that "enter" is ambiguous in this respect and that the best rule for interpreting the word is to examine the "subject-matter, object, and purpose of the statute." *See In re Estate of Handy*, 672 N.W.2d 214, 218 (Minn. App. 2003) (quotation omitted) (determining that the word "reside" has not gained a generally accepted meaning and that therefore the statute and subject matter must be reviewed to determine if a statutory residence requirement was met), *review denied* (Minn. Feb. 17, 2004).

The purpose of the sexual-predator registration statute has been described in consistent terms in caselaw, e.g., "to create an offender registry to assist law enforcement with investigations," *Boutin v. LaFleur*, 591 N.W.2d 711, 717 (Minn. 1999); "to monitor sex offenders released into the community," *State v. Lilleskov*, 658 N.W.2d 904, 908 (Minn. App. 2003); "to keep law enforcement informed as to a predatory offender's whereabouts," *Kaiser v. State*, 641 N.W.2d 900, 907 (Minn. 2002); and to provide "law-enforcement officials with the whereabouts of sexual offenders to assist them with investigations," *In re Welfare of C.D.N.*, 559 N.W.2d 431,

433 (Minn. App. 1997), *review denied* (Minn. May 20, 1997). To condition the requirement to register on the offender's volitional entry into Minnesota would exclude from the duty to register those offenders who come to Minnesota only to commit crimes while in Minnesota, leave the state, are apprehended, and are brought back into the state and incarcerated here against their will. We conclude that the text does not support relator's definition. Additionally, such a result would be contrary to the purpose of the registration statute. We therefore reject relator's argument that the word "enters" in section 243.166, subdivision 1b(b)(2), implies intent or volition.

II

Relator also argues that the ECRC did not have the authority under Minn. Stat. § 244.052, subd. 3(a) (2008), to assign a risk level to relator. "If an administrative agency's authority is questioned, a [reviewing] court independently reviews the enabling statute." *In re Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 353-54 (Minn. App. 2002) (quotation omitted), *review denied* (Minn. May 14, 2002). Absurd and unreasonable results are presumed to be against the legislature's intent. Minn. Stat. § 645.17(1) (2008). But "[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16; *see also Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 639 (Minn. 2006) (stating that the presumption that the legislature did not intend an absurd result cannot generally be used to override the plain language of a statute); *Hyatt v. Anoka Police Dep't*, 691 N.W.2d 824, 827-28 (Minn. 2005) ("We concluded that we could disregard a statute's plain meaning only in rare cases where the plain meaning utterly confounds a clear legislative purpose." (quotation omitted)).

Minn. Stat. § 244.052, subd. 3(a), provides that "[t]he commissioner of corrections shall establish and administer [ECRCs] at each state correctional facility and at each state treatment facility where predatory offenders are confined" and that "[t]he committees shall assess on a case-by-case basis the public risk posed by predatory offenders who are about to be released from confinement." In a recent case, this court determined that the meaning of the word "confinement" is plain when read with other provisions of section 244.052.

> "Confinement" is defined as "confinement in a state correctional facility or a state treatment facility." Minn. Stat. § 244.052, subd. 1(1) (2008). "Correctional facility," for purposes of sections 244.01 to 244.11, is defined as "any state facility under the operational authority of the commissioner of corrections." Minn. Stat. § 244.01, subds. 1, 4 (2008).

In re Risk Level Determination of M.D., 766 N.W.2d 325, 327 (Minn. App. 2009). This court further reasoned that, because "commissioner of corrections" refers to the Minnesota commissioner of corrections, "correctional facility" necessarily refers to Minnesota correctional facilities. *Id.*

In this case, although relator was confined in the Goodhue County jail, he was never confined in a Minnesota correctional facility under the operational authority of the Minnesota

commissioner of corrections. Thus, relator was never "confined" under Minn. Stat. § 244.052, subd. 1(1), nor was he "about to be released from confinement" as described in Minn. Stat. § 244.052, subd. 3(a). Because Minn. Stat. § 244.052, subd. 3(a), only grants the ECRC authority to assess the "public risk posed by predatory offenders who are about to be released from confinement," we conclude that the ECRC did not have authority to assign a risk level to relator.

We are aware that our decision will prohibit the ECRC from assigning a risk level to a predatory offender who, unlike relator, planned to return to Minnesota after his release, merely because the offender served the entirety of his sentence in another state's correctional facility and that such a result conflicts with the purpose of the registration statute. But, unlike the word "enters," the word "confinement" is clearly and unambiguously defined in the statute where it is used. Where a statute's language is clear and unambiguous, a reviewing court must give effect to the plain meaning of the statute and may not engage in any further construction. *State v. Bluhm*, 676 N.W.2d 649, 651 (Minn. 2004).

D E C I S I O N

Relator entered Minnesota and remained for more than 14 days and is therefore required to register as a predatory offender under Minn. Stat. § 243.166, subd. 1b(b)(2), regardless of the fact that he did not enter and remain in Minnesota of his own volition. But relator was not "about to be released from confinement" under Minn. Stat. § 244.052, subd. 3(a), because he was never confined in a Minnesota correctional facility or treatment center. Therefore, the ECRC had no authority to assign relator a predatory-offender risk level.

Affirmed in part and reversed in part.

STATE OF MINNESOTA

IN COURT OF APPEAL

A08-1532

In the Matter of the Risk Level Determination of D. W.

Filed June 9, 2009

Affirmed

Bjorkman, Judge

Office of Administrative Hearings
OAH Docket No. 15-1100-19563-2

Lawrence Hammerling, Chief Appellate Public Defender, F. Richard Gallo, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for relator D. W.)

Lori Swanson, Attorney General, Noah A. Cashman, Assistant Attorney General, 900 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent Minnesota Department of Corrections)

Considered and decided by Stoneburner, Presiding Judge; Bjorkman, Judge; and Muehlberg, Judge.*

S Y L L A B U S

The requirement in Minn. Stat. § 244.052 (2008) that an end-of-confinement review committee assess the public risk posed by a predatory offender who is "about to be released from confinement" permits assignment of a risk level to a civilly committed offender confined in a state treatment facility who is about to transition to a treatment phase that involves contact with the community.

O P I N I O N

BJORKMAN, Judge

In this appeal from the decision of two administrative law judges (ALJs) affirming his risk-level determination, relator argues that he is not "about to be released from confinement" within the meaning of Minn. Stat. § 244.052, and therefore may not be assigned a risk level. Because the ALJs did not err in interpreting the statute, we affirm.

F A C T S

In 1992, relator D.W. was committed to the Minnesota Department of Human Services (the DHS) as a sexual psychopathic personality. He is in the Minnesota Sex Offender Program (MSOP) in St. Peter. By September 2007, relator had reached the final inpatient phase of MSOP and was assigned to participate in the supervised integration program (MSI). MSI prepares civilly committed individuals to transition back into the community by permitting them increasingly less supervised trips outside the treatment facility, initially on the facility's campus and later in the community.

As a condition of relator's participation in MSI, the DHS asked the Minnesota Department of Corrections (the DOC) to convene an end-of-confinement review committee (ECRC) to assess relator's risk level. The ECRC assigned relator a risk level of III. Relator appealed to the Office of Administrative Hearings but did not challenge the assigned risk level. Rather, he argued that "it is contrary to law for the ECRC to assign him a risk level at this juncture," because he is still confined and "not likely to be 'released from confinement' soon." The ALJs who heard relator's appeal disagreed and affirmed the ECRC's risk-level determination. This certiorari appeal follows.

I S S U E

Does Minn. Stat. § 244.052 permit an ECRC to assess the public risk posed by a civilly committed predatory offender confined in a state treatment facility when the offender begins a stage of treatment that permits community contact outside the facility?

A N A L Y S I S

On certiorari appeal, we will affirm the decision of an ALJ unless the relator's substantial rights have been prejudiced because the decision was made upon unlawful procedure, affected by an error of law, or otherwise unsupported by substantial evidence. Minn. Stat. § 14.69 (2008); *In re Risk Level Determination of S.S.*, 726 N.W.2d 121, 124 (Minn. App. 2007), *review denied* (Minn. Mar. 28, 2007). But we review questions of statutory interpretation de novo. *In re Risk Level Determination of C.M.*, 578 N.W.2d 391, 395 (Minn. App. 1998).

"The primary objective of statutory interpretation is to ascertain and give effect to the intention of the legislature." *Greene v. Comm'r, Minn. Dep't of Human Servs.*, 755 N.W.2d 713, 721 (Minn. 2008). To do so, we first determine whether the statutory language is clear. *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 539 (Minn. 2007). "If a statute, construed according to ordinary rules of grammar, is unambiguous, this court engages in no further statutory construction and applies its plain meaning." *C.M.*, 578 N.W.2d at 395. A statute is ambiguous when the language is "reasonably susceptible to more than one interpretation." *Id.* (quotation omitted). When a statute "is silent on a precise issue, that silence may be evidence of ambiguity." *In re Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738*, 763 N.W.2d 303, 311 (Minn. 2009).

Section 244.052 provides:

> The commissioner of corrections shall establish and administer end-of-confinement review committees at each state correctional facility and at each state treatment facility where predatory offenders are confined. The committees shall assess on a case-by-case basis the public risk posed by predatory offenders who are about to be released from confinement.

Minn. Stat. § 244.052, subd. 3(a). The statute further requires that such assessments be performed "at least 90 days before a predatory offender is to be released from confinement." *Id.*, subd. 3(d)(i). Relator concedes that, because of his commitment, he qualifies as a predatory offender and is subject to the risk-assessment and community-notification provisions in section 244.052. But the parties dispute whether relator is now "about to be released from confinement" and, thus, whether it is proper to assess his risk level at this time.

Section 244.052 defines "confinement" as "confinement in a state correctional facility or a state treatment facility," but does not define "release" or the phrase "released from confinement." Minn. Stat. § 244.052, subd. 1(1). In its common usage, "release" means to "set free from confinement, restraint, or bondage." *The American Heritage Dictionary* 1524 (3d. ed. 1992). Release from confinement in a state correctional facility occurs when the offender is permitted to leave prison. *In re Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 354 (Minn. App. 2002), *review denied* (Minn. May 14, 2002). But an individual confined in a state treatment facility pursuant to a civil-commitment order may experience various degrees of release from confinement, from being released on a pass, to transfer out of a secure facility, to provisional discharge, to full discharge from the treatment facility. *See* Minn. Stat. §§ 253B.18, subds. 4a, 6-7, 15, .185, subd. 1 (2008); *see also County of Hennepin v. Levine*, 345 N.W.2d 217, 223 (Minn. 1984) (recognizing the pass program under section 253B.18, which permits absence from a facility for fixed periods of time, is "a form of partial institutionalization").

Relator argues that an offender is not "released from confinement" until the offender is discharged, living in the community, and subject to community notification. The DOC counters that an offender is released from confinement when the offender is permitted to leave the treatment facility on a pass and have contact with the community. Because both interpretations are reasonable, we conclude that the phrase "released from confinement" is ambiguous as it pertains to civilly committed offenders confined in state treatment facilities.

If a statute is ambiguous, we defer to the administrative agency charged with administering the statute. *Greene*, 755 N.W.2d at 722; *see also* Minn. Stat. § 645.16(8) (2008) (permitting consideration of administrative interpretations of a statute). The DOC establishes and administers ECRCs. Minn. Stat. § 244.052, subd. 3(a). But when an offender is confined to a state treatment facility pursuant to a civil-commitment order, the DHS is the agency primarily responsible for determining when the offender will be released. *See* Minn. Stat. §§ 253B.18, subds. 4a-15, .185, subd. 9 (describing procedures for release of one committed as a sexual psychopathic personality); *see also* Minn. Stat. § 243.166, subd. 1b(c), (d)(3) (2008) (including one committed as a sexual psychopathic personality within definition of predatory offender). And ECRCs have independent discretion to conduct risk assessments as appropriate. *R.B.P.*, 640

N.W.2d at 355. We therefore consider the policies the ECRCs follow in determining when to assess an offender's risk level.

The chair of the ECRC that assessed relator testified that the ECRC determines when to conduct risk assessments based primarily on a policy instituted by the DHS division that operates the treatment facilities where predatory offenders are confined.[1] A copy of the policy was admitted as evidence at relator's administrative review hearing. The policy defines "release from confinement" as "[a]ny supervised or unsupervised access to the campus of a . . . Treatment Facility, by a registration qualified patient to the community, or when transferred to another facility." The ECRC chair explained that the ECRC convenes to assess the risk level of offenders confined in the MSOP facility upon a request from an offender's treatment team indicating that the offender is being considered for "grounds or off grounds privileges."

Relator urges us not to defer to the DHS policy because it does not further section 244.052's community-notification purpose. But we are not persuaded that the notification purpose precludes assessment of an offender's risk level at the time the offender enters the MSI program. Although the statute does prohibit community notification while an offender lives in a residential facility such as MSOP, Minn. Stat. § 244.052, subd. 4(b); *In re Risk Level Determination of J.V.*, 741 N.W.2d 612, 615 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008), the very existence of this prohibition suggests that risk assessments are permitted and take place before an offender begins living in the community. Moreover, the DHS policy of assessing risk when an offender becomes eligible for passes from the treatment facility aligns with the earliest of the four stages of release applicable to those committed under section 253B.185, thus providing a consistent statutory scheme applicable to release of civilly committed offenders.

The DHS policy is consistent with the language and purpose of section 244.052. The fact that the community at large will not be notified of an offender's risk level until the offender is released to live in the community does not make risk assessment at the MSI treatment stage improper or superfluous. Minn. Stat. § 244.052, subd. 4(b), prohibits only community notification prior to discharge from the residential facility. It does not prohibit relevant law enforcement agencies from "maintain[ing] information regarding the offender" and "disclos[ing] the information to any victims of or witnesses to the offense committed by the offender." Minn. Stat. § 244.052, subd. 4(b); *see also* Minn. Stat. § 253B.18, subd. 5a(c) (requiring reasonable effort to notify victims before "provisionally discharging, discharging, granting pass-eligible status, approving a pass plan, or otherwise permanently or temporarily releasing a person . . . from a treatment facility"). And while section 244.052 is known as the community-notification statute, the statute was created to protect the community. *See* Minn. Stat. § 244.052, subd. 4(a) (permitting disclosure of information that law enforcement deems "relevant and necessary to protect the public"). We conclude that it is consistent with the community-protection purpose of section 244.052 for law enforcement to have information regarding an offender's risk level before the offender is permitted contact with the community through the MSI program.

D E C I S I O N

We conclude that Minn. Stat. § 244.052 permits assessment of the risk level of a civilly committed offender confined in a state treatment facility when the offender is about to begin the

transition treatment phase that involves contact with the community outside the confining facility. Because relator is in a stage of treatment where he is expected to be permitted such contact soon, the ALJs did not err in affirming the ECRC's assessment of relator's risk level at this time.

Affirmed.

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

[1] This division is known as the Minnesota Department of Human Services State Operated Services (SOS). The DOC and SOS jointly establish and administer ECRCs. SOS established the subject policy, No. 4070, on November 3, 2003.

STATE OF MINNESOTA

IN COURT OF APPEALS

A08-2243

In the Matter of the Welfare of the Child of: S. S. W.,
Parent

Filed July 7, 2009

Affirmed

Larkin, Judge

Ramsey County District Court

File No. 62-JV-08-457

Susan Gaertner, Ramsey County Attorney, Kathryn Eilers, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 560, St. Paul, MN 55102 (for appellant Ramsey County Community Human Services Department)

Robert J. Lawton, 1100 West Seventh Street, St. Paul, MN 55102 (for respondent S.S.W.)
Paul Bergstrom, 25 West Seventh Street, St. Paul, MN 55102 (for guardian ad litem)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Larkin, Judge.

S Y L L A B U S

A child does not meet the statutory definition of a "[c]hild in need of protection or services" under Minn. Stat. § 260C.007, subd. 6 (2008), unless one of the enumerated child-protection grounds exists and the child needs protection or services as a result.

O P I N I O N

LARKIN, Judge

After a trial on appellant's petition alleging that respondent's child is a child in need of protection or services, the district court held that appellant failed to prove the allegations in the petition and dismissed the petition. Appellant argues that the district court based its decision on an erroneous interpretation of the statutory definition of a "[c]hild in need of protection or services." Because the district court properly applied the law, the evidence supports the district court's findings of fact, and the findings of fact support the district court's conclusions of law, we affirm.

F A C T S

Respondent S.S.W. is the parent of S.W. born December 7, 2007. With the exception of one night in May 2008, S.W. has remained in the care of S.S.W. during this juvenile-protection proceeding. S.S.W. is also the biological parent of four other children. S.S.W.'s parental rights to these children were voluntarily terminated in 2002. In that case, the district court initially held that the children were in need of protection or services based upon the following findings: S.S.W. engaged in inappropriate sexual conduct with her children; the children had been exposed to long-term neglect including, but not limited to, their dental and physical health, inappropriate exposure to sexual behavior, homelessness, and unsafe caretakers; S.S.W. was in need of a thorough psychological/psychiatric examination, including a psychosexual evaluation; and it was in the children's best interest not to return to S.S.W.'s custody at that time.

Appellant Ramsey County Community Human Services Department (department) filed a child-in-need-of-protection-or-services (CHIPS) petition on February 1, 2008, alleging that S.W. is a child in need of protection or services. The petition alleged the following grounds in support of a finding that S.W. is a child in need of protection or services: (1) S.W. resides with a perpetrator of domestic child abuse or child abuse; (2) S.W. is without necessary food, clothing, shelter, education, or other required care for her physical or mental health or morals because S.S.W. is unable or unwilling to provide care; (3) S.W. is without proper parental care because of the emotional, mental, or physical disability, or state of immaturity of S.S.W.; and (4) S.W.'s behavior, condition, or environment is such as to be injurious or dangerous to S.W. or others. Minn. Stat. § 260C.007, subd. 6(2)-(3), (8)-(9) (2008). The district court issued a pick-up order directing that S.W. be immediately removed from S.S.W.'s physical custody. An emergency-protective-care hearing occurred on February 5, 2008, but S.W. had not been removed from S.S.W.'s care prior to the hearing. The district court ruled that the contents of the petition were insufficient to establish a prima facie showing that "releasing the child to the care of [S.S.W.] would immediately endanger the child's health, safety or welfare." The district court rescinded the pick-up order and appointed a guardian ad litem (GAL) for S.W. S.S.W. eventually signed a case plan and agreed to participate in the following services: regular psychiatric care, a parenting evaluation, a chemical-dependency assessment, and random urinalysis testing.

The department filed an amended CHIPS petition on May 21, 2008, requesting emergency protective care of S.W. S.S.W. contends that the department removed S.W. from her care on May 21 without court authorization. Our review of the record does not confirm this contention, but the department does not refute it on appeal. The district court held an emergency-protective-care hearing on May 22 and denied the department's request to place S.W. out of home. But the district court ordered S.S.W. to comply with certain requirements as a condition of S.W. remaining in S.S.W.'s physical custody. The requirements were as follows: (1) abstain from mood-altering substances, including alcohol; (2) submit to random urinalysis and breathalyzer tests; (3) complete a chemical-health assessment and follow the recommendations; (4) complete a parenting assessment and follow the recommendations; (5) participate in mental-health services and programs as recommended by the department; (6) take prescribed medications; (7) cooperate with the assigned social worker and the GAL; and (8) keep S.W. in Minnesota unless granted permission to do otherwise.

The district court held a three-day trial on the department's CHIPS petition. The district court received evidence regarding events that preceded S.W.'s birth, including evidence regarding S.S.W.'s history of (1) sexual contact with her five- and six-year-old sons; (2) assaultive behavior including a domestic assault in September 2004, an aggravated assault in January 2007, and an aggravated domestic assault in April 2007; (3) consistent diagnoses of bipolar and personality disorders; (4) failure to follow mental-health-treatment recommendations; and (5) alcohol abuse. The GAL, the assigned caseworker, and a psychologist who assessed S.S.W. during the course of the proceedings testified regarding their contacts with S.S.W. and S.W.

After the conclusion of the trial, the district court issued its findings of fact, conclusions of law and order dismissing the CHIPS petition. The district court acknowledged that S.S.W. is suspicious and resistant and that S.S.W. has a history of mental-health issues that impact her judgment and require treatment. But the district court also found that the assigned caseworker and GAL observed nothing to suggest that S.S.W. was not providing for her child's needs. The district court further found that S.W. was doing well in S.S.W.'s care. The district court therefore concluded that S.W. is not a child in need of protection or services.

Even though the district court's findings of fact do not address the majority of the evidence presented in support of its CHIPS petition, the department did not file a motion for amended findings or for a new trial. Instead, the department filed this appeal.

I S S U E S

I. What is the proper construction of the definition of a "[c]hild in need of protection or services" under Minn. Stat. § 260C.007, subd. 6?

II. Did the district court err in its application of Minn. Stat. § 260C.007, subd. 6?

A N A L Y S I S

I.

The department asserts that the district court's conclusion that it failed to prove that S.W. is a child in need of protection or services is based on an erroneous interpretation of law. At issue is the proper construction of Minn. Stat. § 260C.007, subd. 6, which defines a "[c]hild in need of protection or services" in juvenile-protection matters. Subdivision 6 states: " 'Child in need of protection or services' means a child who *is in need of protection or services because the child:* . . . ." Minn. Stat. § 260C.007, subd. 6 (emphasis added). The statute then lists 15 grounds that may support a finding that a child is in need of protection or services (child-protection grounds). *Id.* The parties disagree regarding the proper construction of the emphasized language, "is in need of protection or services because the child."

The department argues that a petitioner need only establish the existence of one of the 15 enumerated child-protection grounds to prove that a child is in need of protection or services under the statute. S.S.W. counters that proof of the existence of one of the enumerated child-

protection grounds, in and of itself, is insufficient to prove that a child is in need of protection or services. S.S.W. argues that the district court must also find that the child actually needs protection or services as a result of the established child-protection ground. In other words, S.S.W. asserts that a child does not meet the statutory definition of a "[c]hild in need of protection or services" unless one of the enumerated child-protection grounds exists and the child needs protection or services as a result.

S.S.W.'s brief frames her argument in terms of whether a child should be "adjudicated" a child in need of protection or services. The department's brief likewise references the district court's failure to "adjudicate" S.W. as a child in need of protection or services. An adjudication, or the withholding of an adjudication, is a dispositional decision that occurs *after* a child is proved to be in need of protection or services. Minn. R. Juv. Prot. P. 39.05, subd. 2 ("If the court makes a finding that the statutory grounds set forth in the petition have been proved, the court shall schedule the matter for further proceedings pursuant to Rule 40 [Adjudication]."); Minn. R. Juv. Prot. P. 40.01 (providing that "[i]f the court makes a finding that the statutory grounds set forth in a petition alleging a child to be in need of protection or services are proved, the court shall" either "adjudicate the child as in need of protection or services" or "withhold adjudication"). Here, the district court found that "[t]he facts alleged in the petition have not been prove[d]" and dismissed the CHIPS petition. *See* Minn. R. Juv. Prot. P. 39.05, subd. 1 ("The court shall dismiss the petition if the statutory grounds have not been proved.").

Because the district court ruled that the department failed to prove its petition asserting that S.W. is a child in need of protection or services, it did not consider or decide whether S.W. should be adjudicated as in need of protection or services. Thus, the issue presented on appeal concerns the showing necessary to prove that a child meets the statutory definition of a "[c]hild in need of protection or services," not the standard for determining whether to adjudicate a child as in need of protection or services after the allegations in a CHIPS petition have been proved.

If a statute's language is clear and unambiguous, a reviewing court must give effect to its plain meaning and refrain from engaging in further interpretation. *State v. Bluhm*, 676 N.W.2d 649, 651 (Minn. 2004). A statute is ambiguous if the language used in the statute is subject to more than one reasonable interpretation. *State v. Wukawitz*, 662 N.W.2d 517, 525 (Minn. 2003). The parties argue for different interpretations of section 260C.007, subdivision 6. The statutory interpretation suggested by each of the parties is reasonable.

The department advocates a bright-line rule, under which proof of the existence of any of the enumerated child-protection grounds is sufficient to establish that a child is in need of protection or services under the statutory definition, without regard to the particular circumstances of the case or the individual needs of the child. The department's position finds support in the repetitive and circular nature of subdivision 6, which states, " 'Child in need of protection or services' means a child who is in need of protection or services . . . ." This language is reasonably interpreted as nothing more than an in-artful attempt to define the term at issue. This construction also finds support in the nature of the enumerated child-protection grounds—proof of the majority of which seems to necessarily establish that a child needs protection or services. *See, e.g.*, Minn. Stat. § 260C.007, subd. 6(1) ("is abandoned or without parent, guardian, or custodian"), subd. 6(3) ("is without necessary food, clothing, shelter, education, or

other required care for the child's physical or mental health or morals because the child's parent, guardian, or custodian is unable or unwilling to provide that care").

But there is also merit to S.S.W.'s argument that, given the broad discretion entrusted to the district court when deciding juvenile-protection matters, subdivision 6 should be interpreted in a manner that allows the district court to render a decision that takes into account the particular circumstances of each case and the individual needs of children. *See In re Booth v. Hennepin County Welfare Board*, 253 Minn. 395, 400, 91 N.W.2d 921, 924 (Minn. 1958) ("The natural rights of the parents should be carefully safeguarded but not at the expense of their children. In arriving at a solution, *the trial court is vested with broad discretionary powers . . . .*" (Emphasis added)). S.S.W. argues for a construction that enables the district court to exercise discretion when deciding whether a child meets the statutory definition of a "[c]hild in need of protection or services."

For the reasons that follow, we conclude that section 260C.007, subdivision 6, requires proof that one of the enumerated child-protection grounds exists and that the subject child needs protection or services as a result.

"Every law shall be construed, if possible, to give effect to all its provisions." Minn. Stat. § 645.16 (2008); *see* Minn. Stat. § 645.17(2) (2008) (providing that "the legislature intends the entire statute to be effective"). If subdivision 6 is construed as the department suggests, the phrase "is in need of protection or services because the child" is rendered superfluous. If we instead construe the phrase to require a determination that there is a need for protection or services, in addition to a determination that one of the enumerated child-protection grounds exists, we give effect to all of the language within subdivision 6.

If the legislature had intended the construction suggested by the department, it could have simply omitted the phrase "is in need of protection or services because the child." If these words had been omitted, the statute would read, " 'Child in need of protection or services' means a child who: . . .," followed by the enumerated child-protection grounds. If the legislature had used this language, then proof of the existence of an enumerated child-protection ground, in and of itself, would clearly be sufficient to meet the statutory definition.[1] But the inclusion of the additional language "is in need of protection or services because the child" suggests that more is required.

Other canons of statutory construction indicate that the phrase "is in need of protection or services because the child" is properly construed as an independent component of the "[c]hild in need of protection or services" definition. When interpreting statutes, we presume that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable." Minn. Stat. § 645.17(1). We can readily identify several scenarios in which the department's suggested construction would yield absurd and unreasonable results.

For example, under subdivision 6(2)(i), a child may be found to be a "[c]hild in need of protection or services" if the child "has been a victim of physical or sexual abuse." Minn. Stat. § 260C.007, subd. 6(2)(i). The statutory provision is silent regarding the perpetrator of the abuse, the date of the abuse, and the location of the abuse. Thus, a child who was physically abused by a

child-care provider in a licensed child-care facility technically falls within the plain language of subdivision 6(2)(i). Under the department's construction of subdivision 6, the child would meet the statutory definition of a "[c]hild in need of protection or services" even if the child's parents removed the child from the child-care facility and provided the child with all care necessary to address the abuse. In this scenario, the child's parents in no way caused or knowingly contributed to the child's physical abuse. Nor did the parents fail to provide for the child's needs following the abuse. Even though one of the enumerated child-protection grounds is established, it would be unreasonable and absurd to conclude that this child is in need of protection or services given the particular facts of the case and the child's individual needs.

Likewise, subdivision 6(2)(ii) provides a basis for a child-protection finding when a child "resides with or has resided with a victim of . . . domestic child abuse." Minn. Stat. § 260C.007, subd. 6(2)(ii); *see* Minn. Stat. § 260C.007, subd. 13 (2008) (defining "[d]omestic child abuse" to include "any physical injury to a minor family or household member inflicted by an adult family or household member other than by accidental means"). This provision is also silent regarding the perpetrator of the abuse, the relationship between the subject child and the perpetrator, the date of the abuse, and the location of the abuse. Under the bright-line rule advanced by the department, a child would meet the definition of a "[c]hild in need of protection or services" under subdivision 6(2)(ii) if the child resides with a half-sibling who had been physically injured years earlier in another state by an adult family member who is unrelated to the child and who has no contact with the child. Absent evidence that the child actually needs protection or services as a result of the child's residence with the half-sibling, it would be absurd and unreasonable to conclude that this child is in need of protection or services.

The department contends that failure to adopt a bright-line rule will also yield an absurd and unreasonable result. The department notes that section 260C.301, subdivision 3, mandated the filing of a termination-of-parental-rights (TPR) petition concerning S.W. based on S.S.W.'s infliction of egregious harm on S.W.'s siblings. *See* Minn. Stat. § 260C.301, subd. 3 (2008) (requiring that the county attorney file a TPR petition concerning a child "determined to be the sibling of another child of the parent who was subjected to egregious harm"); *see also* Minn. Stat. § 260C.007, subd. 14 (10) (2008) (establishing that "egregious harm" includes sexual abuse of a child). But section 260C.301, subdivision 3, also provides that the requirement for a TPR petition does not apply if the county attorney instead files a CHIPS petition documenting a compelling reason why filing a TPR petition is not in the child's best interests. Minn. Stat. § 260C.301, subd. 3(b)(2).

The department's contention is as follows: it is absurd to conclude that a set of facts that requires the filing of a mandatory TPR petition could nonetheless be insufficient to sustain a CHIPS finding. We reject this argument because whether a TPR petition or a CHIPS petition is filed, the petitioner must still meet its burden of proof. A CHIPS petitioner is not entitled to a finding that its petition is proved merely because the alleged facts would have justified a mandatory TPR petition. The CHIPS petitioner must prove that the child meets the statutory definition of a "[c]hild in need of protection or services" by clear and convincing evidence. Minn. R. Juv. Prot. P. 39.04, subd. 1 ("To be proved at trial, the statutory grounds set forth in the petition must be proved by clear and convincing evidence."). Moreover, if the legislature intended to require the district court to presume that a child is in need of protection or services

when a county attorney files a CHIPS petition instead of a mandatory TPR petition under section 260C.301, subdivision 3, the legislature could have easily provided for this result. *See* Minn. Stat. § 260C.301, subd. 1(b)(4) (allowing TPR based on palpable unfitness and establishing a presumption of palpable unfitness under certain circumstances), 1(b)(5) (allowing TPR when reasonable efforts have failed to correct the conditions that led to a child's out-of-home placement and establishing a presumption that reasonable efforts have failed under certain circumstances).

In considering these examples, we are mindful of the competing rights at stake in juvenile-protection matters. *See Booth*, 253 Minn. at 400, 91 N.W.2d at 924 (stating that "[t]he paramount and primary consideration . . . is the welfare of the child and to that welfare the rights of the parents must yield" (quotation omitted)). And we in no way question the state's legitimate interest in protecting children from abuse and neglect. But we also recognize that a finding that a child is in need of protection or services may impact a parent's custodial rights. A juvenile-protection proceeding involves multiple decisions related to the temporary and permanent custody of children. Minn. Stat. § 260C.201, subds. 1(2) (providing that if the district court finds that a child is in need of protection or services the district court may transfer legal custody of the child to a child-placing agency or the responsible social services agency), 11(c)(2) (authorizing the district court to permanently transfer legal custody of a child found to be in need of protection or services to a relative) (2008). Construing subdivision 6 in a manner that allows the district court to consider the particular circumstances of each case and the unique needs of the subject child, as opposed to applying a bright-line rule, ensures that children will not be removed from their parents' custody unless a change in custody is necessary. *See* Minn. Stat. § 260C.001, subd. 2(b)(3) (2008) (stating that one of the purposes of the child-protection laws is "to preserve and strengthen the child's family ties whenever possible and in the child's best interests, removing the child from the custody of parents only when the child's welfare or safety cannot be adequately safeguarded without removal").

We next consider the best interest of the child, one of the paramount considerations in all proceedings concerning a child alleged to be in need of protection or services. Minn. Stat. § 260C.001, subd. 2(a) (2008); *see, e.g.*, *In re Welfare of J.J.B.*, 390 N.W.2d 274, 279 (Minn. 1986) (finding no basis to distinguish among the various child-placement procedures, whether temporary or permanent, and concluding that the best interest of the child is the paramount consideration). When determining a child's best interest, the district court traditionally considers the child's unique circumstances and individual needs. *See* Minn. Stat. §§ 260C.193, subd. 3(a) (stating that the policy of the state is to ensure that the best interests of children in foster care are met by requiring individualized determinations of the need of the child), .212, subd. 2 (listing eight factors that the responsible child-placing agency must consider when determining the needs of a child who is placed in foster care, including current functioning and behavior; medical, educational, and developmental needs; religious and cultural needs; and the child's interests and talents) (2008); *see also* Minn. Stat. § 518.17, subd. 1 (2008) (setting forth best-interest factors related to the child's circumstances).

The bright-line rule suggested by the department, under which a child is deemed to be in need of protection or services based solely on the existence of one of the enumerated child-protection grounds, is incompatible with traditional best-interest analysis. Conversely, construing

subdivision 6 to require a showing that the subject child actually needs protection or services as a result of the established child-protection ground allows the district court to consider the particular circumstances of the case and the individual needs of the child, as is customary in traditional best-interests analysis. This construction also provides the district court with a means of exercising the broad discretionary powers with which it is entrusted, *Booth*, 253 Minn. at 400, 91 N.W.2d at 924, unlike the proposed bright-line rule, which would significantly restrict the district court's discretion.

Finally, at oral argument, the department conceded that a child's best interest is an overriding consideration that may refute the existence of an enumerated child-protection ground. The department agreed that a district court would be within its discretion to find that a child is not in need of protection or services based on a best-interest determination, despite the existence of an enumerated child-protection ground. The department also agreed that we should not construe subdivision 6 in a manner that renders any of its provisions superfluous. The department's concessions undercut the bright-line rule that it advances.

The department's citation to *In re Welfare of J.W.*, 391 N.W.2d 791 (Minn. 1986), also undercuts its argument. The department cites *J.W.* for the proposition that a child can be adjudicated in need of protection or services without evidence that the child has suffered direct abuse or neglect. In *J.W.*, children were alleged to be in need of protection or services[2] based upon their parents' suspected infliction of a critical injury to their two-year-old nephew, who was in their care. *Id.* at 792. The nephew subsequently died. *Id.* After a CHIPS trial, the district court found that the parents' children were in need of protection or services, and the Minnesota Supreme Court held that the district court's findings were not erroneous. *Id.* at 796. The district court based its ruling on "the parents' history of violence, the unexplained homicide of [a child] for which one or both of [the parents] was deemed responsible, and [the parents'] cover-up of the circumstances surrounding [their nephew's] injury." *Id.* at 793. "*Based on these findings,* the court concluded that respondents demonstrated a lack of ability to care for their own children, [and] that [the children] were, therefore, dependent and neglected, and ordered the children kept in foster care." *Id.* (emphasis added). Thus, the district court found not only the existence of the alleged child-protection grounds, but also concluded that the children needed protection or services as a result. The district court's reasoning in *J.W.* is consistent with our interpretation of the statutory definition of a "[c]hild in need of protection or services."

Because construction of section 260C.007, subdivision 6, as a bright-line rule (1) fails to give effect to all of its provisions, (2) may yield unreasonable and absurd results, (3) is inconsistent with traditional best-interest analysis, and (4) prevents the district court from exercising its discretion in juvenile-protection matters, we decline to construe subdivision 6 in the manner suggested by the department. Instead, we hold that a child does not meet the statutory definition of a "[c]hild in need of protection or services" under section 260C.007, subdivision 6, unless one of the enumerated child-protection grounds exists and the child needs protection or services as a result.

II.

Having determined the proper construction of the statutory definition of a "[c]hild in need of protection or services," we next review the district court's application of the definition in S.W.'s case. The department contends that the district court's conclusion that S.W. is not a child in need of protection or services is based on the district court's erroneous belief that the statutory definition requires proof that S.W. suffered direct abuse or neglect.

We agree that section 260C.007, subdivision 6, does not mandate proof of current abuse or neglect unless the alleged child-protection ground requires such proof. But the district court did not require the department to prove current abuse or neglect. While the district court used the phrases "direct evidence that the child in question is being abused or neglected," and "evidence of abuse or neglect of the child in question," the district court correctly concluded, "The dispositive issue here is whether the child in question is being abused or neglected or *appears to be presently at risk*." (Emphasis added.)

The district court addressed the department's reading of section 260C.007, subdivision 6, and stated that it is too narrow, reasoning that if the district court followed the department's interpretation, "it would create a legal environment where any child that resides with a person who has ever been found to have committed child abuse at any point must be adjudicated CHIPS . . . ." The district court "decline[d] to create such a legal environment." The district court's statements indicate that it understood that the department was advocating a bright-line rule, and the district court rejected that approach. The district court's identification of the dispositive issue as "whether the child in question is being abused or neglected or appears to be presently at risk" is consistent with an inquiry regarding whether S.W. needs protection or services as a result of S.W.'s residence with a perpetrator of child abuse, or as a result of S.S.W.'s mental health, chemical dependency and behavioral issues. And that inquiry is consistent with the interpretation of subdivision 6 adopted herein. Thus, the district court did not base its decision on an erroneous interpretation or application of section 260C.007, subdivision 6.

The district court is vested with "broad discretionary powers" when deciding juvenile-protection matters. *Booth*, 235 Minn. at 400, 91 N.W.2d at 924. Typically, findings in a juvenile-protection proceeding will not be reversed unless clearly erroneous or unsupported by substantial evidence. *In re Welfare of D.N.*, 523 N.W.2d 11, 13 (Minn. App. 1994), *review denied* (Minn. Nov. 29, 1994). A close review inquires into the sufficiency of the evidence to determine whether the evidence is clear and convincing. *In re Welfare of J.M.*, 574 N.W.2d 717, 724 (Minn. 1998). "Considerable deference is due to the district court's decision because a district court is in a superior position to assess the credibility of witnesses." *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996).

But when no motion for a new trial has been made—as is the case here—the questions for review include "whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and the judgment." *In re Welfare of M.J.L.*, 582 N.W.2d 585, 588 (Minn. App. 1998); *see* Minn. R. Juv. Prot. P. 45.03 (providing that, "[u]pon motion, the [district] court may amend its findings or make additional findings, and may amend the order accordingly"); Minn. R. Juv. Prot. P. 45.04 (providing that a new trial may be granted on several

grounds); Minn. R. Juv. Prot. P. 45.06 (providing that in response to any post-trial motion, the district court may "conduct a new trial"; "reopen the proceedings and take additional testimony"; "amend the findings of fact and conclusions of law"; or "make new findings and conclusions"). Our scope of review also includes substantive legal questions not raised in post-trial motions, but properly raised during trial. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 310-11 (Minn. 2003).

The department does not claim that the district court's findings of fact are not supported by the evidence. Instead, the department argues at length that the evidence presented at trial warrants the conclusion that S.W. is a child in need of protection or services. The department cites to record evidence that indicates that (1) S.S.W. is a perpetrator of child abuse; (2) S.S.W.'s mental health issues, chemical dependency, history of sexual abuse, and "other areas of risk" impair her ability to provide proper parental care; (3) S.W.'s condition and environment are dangerous; and (4) S.W. is without other required care for her physical or mental health or morals. But we will not retry the case on appeal.

"An appellate court exceeds its proper scope of review when it bases its conclusions on its own interpretation of the evidence and, in effect tries the issues anew and substitutes its own findings for those of the trial judge." *Stiff v. Associated Sewing Supply Co.*, 436 N.W.2d 777, 779 (Minn. 1989). Our limited scope of review does not allow us to engage in additional fact-finding or to remand for different factual findings supporting different conclusions. Although the record contains evidence which, if believed, would support findings of fact more favorable to the department, because the record contains evidence to support the district court's findings of fact, and because those findings support the district court's conclusion, "we may not reverse just because we might have found the facts differently in the first instance." *Id.* at 779-80.

Moreover, when reviewing a determination whether a child is in need of protection or services, the supreme court has instructed:

> It should be kept in mind that a trial court, unlike an [appellate] court, has the opportunity to see the parties as well as their witnesses, hear their testimony, observe their actions, and weigh the evidence in light of those factors. In the absence of a clear abuse of discretion the action of the trial court must be affirmed.

Booth, 235 Minn. at 400, 91 N.W.2d at 924 (quotation omitted).[3] We are thus bound by a very deferential standard of review.

The department argues that even if a separate showing regarding S.W.'s need for protection or services is required under Minn. Stat. § 260C.007, subd. 6, the district court's findings of fact support a conclusion that S.W. needs protection or services and that the district court erred by concluding otherwise. In support of this argument, the department points to the following language within the district court's conclusions of law:

> The Court shares with [the department] deep concerns about [S.S.W.'s] CHIPS history, her mental health, and the health, safety and welfare of the

> child. . . . There is no question that [S.S.W.] and her child would benefit from services. The Court strongly urges [S.S.W.] to access any services that might be available through the agency, because such services would greatly benefit her child.

Despite its recognition that services would be beneficial, the district court concluded that it was compelled to hold petitioner to its burden of proof stating, "The fear that [S.S.W.'s] history of child abuse might be repeated is not sufficient to meet [the department's] legal burden." The district court based its conclusion on "direct evidence concerning [S.S.W.'s] care of the child, her maintenance of her home and her interactions with the child."

The district court's findings are supported by the evidence. The assigned caseworker of seven months observed nothing to suggest that S.S.W. was not providing for S.W.'s needs during the worker's 20 visits to S.S.W.'s home. During these visits, S.S.W.'s home "was always neat," and S.S.W. "behaved appropriately with the child, who appeared to be doing well." The district court also found that the assigned GAL visited S.S.W.'s home approximately 12 times, one time unannounced, and that the home was always neat and clean. The GAL also met with S.S.W. and her caseworker on three occasions. S.S.W. always cooperated with the GAL. The district court noted that the GAL believed it was likely that S.S.W.'s parenting ability may have improved since the time of her previous child-protection case and that the GAL did not conclude that S.S.W. was unfit to care for her child. The district court also noted the GAL testified that "he had seen nothing in [S.S.W.'s] home or in her interactions with the child to suggest that the child was in need of protection or services." The district court's ultimate conclusion that S.W. is not a "[c]hild in need of protection or services" indicates that the district court implicitly found the GAL's testimony credible and persuasive.

These findings support the district court's conclusion that notwithstanding S.S.W.'s past and current behavioral concerns, the department failed to prove that S.W. is a "[c]hild in need of protection or services." We do not equate the district court's stated concern regarding S.S.W. and S.W. and the district court's opinion that S.W. "would benefit from services" with a conclusion that S.W. currently *needs* protection or services. The district court recognized that failure to adjudicate S.W. as a child in need of protection or services would end the services that had been put in place during the proceedings. But regardless of the benefits of those services to S.S.W. and S.W., the district court concluded that it was compelled to hold the department to its burden of proof. This statement is reasonably interpreted as a determination that services were beneficial, but not necessary. We recognize that this is a close case and that the district court's findings could support a conclusion that S.W. is a child in need of protection or services. But, given our standard of review, we hold that the district court properly exercised its discretion by concluding that S.W. is not a "[c]hild in need of protection or services."

D E C I S I O N

Section 260C.007, subdivision 6, which defines a "[c]hild in need of protection or services," requires proof of the existence of one of the enumerated child-protection grounds and that the child needs protection or services as a result. Given the deference that must be afforded to the district court as the finder of fact in a juvenile-protection matter, we hold that the evidence

supports the district court"s findings, which in turn support the district court's conclusion that S.W. is not a "[c]hild in need of protection or services." Accordingly, we affirm.

Affirmed.

Dated:

_____

The Honorable Michelle A. Larkin

[1] This is, in fact, the very approach that the legislature utilized when prescribing the statutory grounds for termination of parental rights. The relevant statute provides that the district court, upon petition, may terminate all rights of a parent to a child, "if it finds that one or more of the following conditions exist[s]." Minn. Stat. § 260C.301, subd. 1(b) (2008). Of course, the best interests of the child must be the paramount consideration. *Id.*, subd. 7.

[2] The supreme court in *J.W.* applied a previous version of the juvenile-protection statute that used the language "dependent and neglected" rather than the current language, "[c]hild in need of protection or services." *See generally* 391 N.W.2d at 791 (applying Minn. Stat. § 260.015, subds. 6, 10 (1984)).

[3] *Booth* described the district court's ability to determine whether children are dependant or neglected as within the district court's "broad discretionary powers." *Booth*, 253 Minn. at 400, 91 N.W.2d at 924. *Booth* was interpreting the district court's discretion in the context of Minn. Stat. § 260.01 (1956), which provided a definition comparable to that within Minn. Stat. § 260C.007, subd. 6. *Id.*

STATE OF MINNESOTA

IN COURT OF APPEALS

A10-167

Skyline Village Park Association,
Appellant,

vs.

Skyline Village L. P., et al.,
Respondents.

Filed July 20, 2010

Affirmed

Larkin, Judge

Dakota County District Court

File No. 19-C2-08-006655

John Cann, Housing Preservation Project, St. Paul, Minnesota; and

Justin Bell, All Parks Alliance for Change, St. Paul, Minnesota (for appellant)

John F. Bonner, III, Thomas F. DeVincke, Bonner & Borhart LLP, Minneapolis, Minnesota (for respondents)

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

S Y L L A B U S

1. Minn. Stat. § 327C.02, subd. 2 (2008), does not impose a reasonableness requirement on manufactured-home-park-lot rent increases.

2. Minn. Stat. § 327C.05, subd. 1 (2008), which prohibits a manufactured-home-park owner from engaging in a course of conduct that is unreasonable, does not apply to manufactured-home-park-lot rent increases.

O P I N I O N

LARKIN, Judge

Appellant challenges the district court's declaratory judgment in favor of respondents, arguing that the district court's ruling is based on an erroneous interpretation of Minnesota Statutes, chapter 327C. Because the district court correctly determined that section 327C.02, subdivision 2, does not impose a reasonableness requirement on increases in manufactured-home-park-lot rental rates and that section 327C.05, subdivision 1, which prohibits a park owner from engaging in an unreasonable course of conduct, does not apply to increases in manufactured-home-park-lot rental rates, we affirm.

F A C T S

The facts in this case are undisputed. Respondent Skyline Village is a manufactured-home community located in Inver Grove Heights. Appellant Skyline Village Park Association is a resident association consisting of 268 of the 351 occupied households in the Skyline community. The dispute in this matter arises from a $25 per month rent increase imposed by Skyline Village beginning March 1, 2008.

Appellant initiated a lawsuit claiming, in part, that the proposed increase is unreasonable and therefore unenforceable under Minn. Stat. § 327C.02 (2008). Appellant argued that the increase is unreasonable because (1) it set the rent at a level substantially higher than that of other comparable parks in the region, (2) it is part of a 23% - 24% rent increase over the course of four years, and (3) requested repairs and maintenance had not been completed in the park. Appellant sought declaratory and injunctive relief.

In August 2009, the parties moved for a declaratory judgment establishing whether manufactured-home-park-lot rent increases are subject to a reasonableness requirement under Minnesota statutes, and if so, how reasonableness is to be evaluated. The district court determined that any requirement for reasonableness set forth in Minn. Stat. § 327C.02 does not apply to increases in the rental rate for a manufactured-home-park lot and in the alternative, a determination of whether a rent increase is reasonable is limited to a comparison of market-comparable rents or rent increases. The district court further declared that (1) a determination of whether a manufactured-home-park-lot rent increase is reasonable may not include consideration of the factors set out in Minn. Stat. § 327C.01, subdivision 8 (2008); (2) a determination of whether a manufactured-home-park-lot rent increase is enforceable may not include consideration of whether it is substantial pursuant to Minn. Stat. § 327C.01, subd. 11 (2008); and (3) the prohibition under Minn. Stat. § 327C.05, subd. 1, against a manufactured-home-park owner's course of conduct that is unreasonable does not apply to rent increases. The district court entered a final judgment in respondents' favor, and this appeal followed.

I S S U E S

I. Did the district court err by concluding that Minn. Stat. § 327C.02, subd. 2, does not impose a reasonableness requirement on manufactured-home-park-lot rent increases?

II. Did the district court err by concluding that the prohibition under Minn. Stat. § 327C.05, subd. 1, against a manufactured-home-park owner's course of conduct that is unreasonable does not apply to increases in lot rent?

A N A L Y S I S

I.

In this appeal, we must determine whether Minnesota statutes impose a reasonableness requirement on manufactured-home-park-lot rent increases. Our focus is on section 327C.02, subdivision 2, which provides, in relevant part, that "[a] rule adopted or amended after the resident initially enters into a rental agreement may be enforced against that resident only if the new or amended rule is reasonable and is not a substantial modification of the original agreement." Minn. Stat. § 327C.02, subd. 2. It further states: "A reasonable rent increase made in compliance with section 327C.06 is not a substantial modification of the rental agreement and is not considered to be a rule for purposes of section 327C.01, subdivision 8." *Id*. Appellant argues that we should interpret section 327C.02, subdivision 2, as imposing a reasonableness requirement on rent increases. Appellant contends that under section 327C.02, subdivision 2, an unreasonable rent increase is a rule change that must comply with the statutory requirements governing rule changes.

"On appeal from a declaratory judgment, we . . . review the [district] court's determination of questions of law de novo." *Rice Lake Contracting Corp. v. Rust Env't & Infrastructure, Inc.*, 549 N.W.2d 96, 98-99 (Minn. App. 1996), *review denied* (Minn. Aug. 20, 1996). "Statutory construction is . . . a legal issue reviewed de novo." *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007). When interpreting a statute, our object is to "ascertain and effectuate the intention of the legislature. Minn. Stat. § 645.16 (2008). "[An appellate court] first look[s] to see whether the statute's language, on its face, is clear or ambiguous. A statute is ambiguous only when the language therein is subject to more than one reasonable interpretation." *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (quotation and citations omitted). If the legislature's intent is clearly discernible from a statute's unambiguous language, appellate courts interpret the language according to its plain meaning, without resorting to other principles of statutory construction. *State v. Anderson*, 683 N.W.2d 818, 821 (Minn. 2004).

The portion of section 327C.02, subdivision 2, at issue here provides: "A reasonable rent increase made in compliance with section 327C.06 [governing rent increases] is not a substantial modification of the rental agreement and is not considered to be a rule for purposes of section 327C.01, subdivision 8 [defining a reasonable rule]." Minn. Stat. § 327C.02, subd. 2. Appellant argues that this statement suggests that an unreasonable rent increase is a substantial modification of the rental agreement and is considered to be a rule for purposes of section 327C.01, subdivision 8. Respondents counter that the word "reasonable" means nothing more than "made in compliance with section 327.06." Because both interpretations are reasonable, we conclude that the statutory language is ambiguous and that it is appropriate to apply principles of statutory construction.

"A statute should be interpreted, whenever possible, to give effect to all of its provisions; 'no word, phrase, or sentence should be deemed superfluous, void, or insignificant' " *Am. Family Ins. Group*, 616 N.W.2d at 277 (quoting *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999)) (other citation omitted). And "[appellate courts] are to read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations." *Id*. In ascertaining the legislature's intent, we may be guided by the following statutory presumptions: "the legislature intends the entire statute to be effective and certain," and "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable." Minn. Stat. § 645.17 (2008). "Every law shall be construed, if possible, to give effect to all its provisions." Minn. Stat. § 645.16.

Appellant emphasizes the need to give effect to all of the provisions in section 327C.02, subdivision 2, and argues that we must give meaning to the word "reasonable" in the phrase "reasonable rent increase made in compliance with section 327C.06." Appellant asserts that interpreting the word "reasonable" to mean nothing more than compliance with section 327C.06 renders the word superfluous. Appellant argues that we must instead give effect to the word by interpreting section 327C.02, subdivision 2, to mean that "rent increases must be reasonable and those which are not are subject to limitations in [s]ections 327C.01[,] subdivision 8 and 327C.02."

We are mindful of our statutory obligation to construe every law, if possible, to give effect to all of its provisions. *See* Minn. Stat. § 645.16. But we must also consider whether construing the word "reasonable" as imposing a reasonableness requirement on rent increases (1) is consistent with the predominant scheme in chapter 327C that distinguishes "rules" and "rule changes" from "rent" and "rent increases," (2) yields an absurd result, and (3) is consistent with the contemporaneous legislative history. *See* Minn. Stat. §§ 645.16 (listing factors that may be considered when determining the legislature's intent); .17 (providing that the legislature does not intend a result that is absurd); *Am. Family Ins. Group*, 616 N.W.2d at 277 (requiring that appellate courts construe statutes as a whole and interpret each section in light of the surrounding sections to avoid conflicting interpretations). We address each consideration in turn.

Statutory Scheme

Chapter 327C expressly and consistently differentiates between "rules" and "rule changes" and "rent" and "rent increases." A rule is defined as "any rental agreement provision, regulation, rule or policy through which a park owner controls, affects or seeks to control or affect the behavior of residents." Minn. Stat. § 327C.01, subd. 10 (2008). Unreasonable rules are prohibited. Minn. Stat. § 327C.05, subd. 1. The statute enumerates rules that are presumptively unreasonable and provides that a court may declare unreasonable any rule that fails to meet the statutory definition of a reasonable rule. Minn. Stat. § 327C.05, subds. 2, 3 (2008). The enforceability of a rule modification is governed by section 327C.02, subdivision 2, which requires that the new or amended rule be reasonable and not a substantial modification of the original agreement. Minn. Stat. § 327.02, subd. 2. Section 327.01, subdivision 8, defines "reasonable rule," and subdivision 11 defines "substantial modification."[1] Minn. Stat. § 327.01, subds. 8, 11.

"Rent" is governed by separate and distinct provisions within chapter 327C. Section 327C.03, subdivision 3, governs rent and requires, with limited exceptions, uniform rental charges throughout a manufactured-home park. Minn. Stat. § 327C.03, subd. 3 (2008). A park owner may charge a fee for delinquent rent, as part of the rent, if the fee is provided for in the rental agreement. *Id.* The inclusion of certain types of fees within rent is prohibited. *Id.* For example, a park owner may not charge a fee based on the number of people residing in the resident's home, the size of the home, or the type of personal property used or located in the home. *Id.* A park owner may charge a fee for pets owned by the resident, but the fee is capped at $4 per pet per month. *Id.*

Rent increases are governed by section 327C.06, which provides:

> Subdivision 1. Notice of rent increases required. No increase in the amount of the periodic rental payment due from a resident shall be valid unless the park owner gives the resident 60 days' written notice of the increase.
>
> Subd. 2. Prohibition. No rent increase shall be valid if its purpose is to pay, in whole or in part, any civil or criminal penalty imposed on the park owner by a court or a government agency.
>
> Subd. 3. Rent increases limited. A park owner may impose only two rent increases on a resident in any 12-month period.

Minn. Stat. § 327C.06 (2008). Additionally, a park owner may not increase rent as a penalty for a resident's good-faith complaint to the park owner, government agency or official; good-faith attempt to exercise rights or remedies under law; or joining and participating in the activities of a resident association. Minn. Stat. § 327C.12 (2008).

The distinction between "rules" and "rent" is carried forth in the provisions governing rental agreements, termination of rental agreements, and defenses to evictions. Section 327C.02, subdivision 1, requires that every agreement to rent a lot be in writing and enumerates the terms and conditions that must be contained in the agreement. Minn. Stat. § 327C.02, subd. 1. The enumeration distinguishes between "the amount of rent per month" and "all rules applicable to the resident." *Id.* Section 327C.09 lists the reasons that a park owner may recover possession of land upon which a manufactured home is situated. Minn. Stat. § 327C.09 (2008). The statute lists nonpayment of rent and rule violations as separate reasons for termination and describes termination procedures that are unique to each. *Id.*, subds. 2, 4. Lastly, section 327.10, which governs defenses to eviction, distinguishes between defenses related to failure to pay rent, failure to pay rent increases, and rule violations. Minn. Stat. § 327C.10, subds. 1-3 (2008). A renter may assert, as a defense to an eviction based on an alleged rule violation, that "the rule allegedly violated is unreasonable." *Id.*, subd. 3. But the reasonableness of a rent increase is not listed as a defense to an eviction based on nonpayment of a rent increase; instead, the listed defenses are based on the restrictions on rent increases set forth in section 327C.06. *Id.*, subd. 2.

We have implicitly recognized the statutory distinction between "rules" and "rent" when reviewing a district court's interpretation of chapter 327C. In *Sargent v. Bethel Props., Inc.*, we

determined that the addition of utility charges to existing manufactured-home-park rental agreements was a new rule that substantially modified the agreements and rendered them unenforceable as a matter of law. 653 N.W.2d 800, 803 (Minn. App. 2002). We rejected the park owner's argument that the addition of utility charges constituted a rent increase and not a rule modification, reasoning that the decision to impose separate utility charges was intended to control behavior—extraordinary water consumption—and not to increase revenue. *Id.* at 802. We also stated that the owner's provision of the notice required for a rent increase had no bearing on whether the addition of utility charges constituted a "rent increase *or* a rule modification." *Id.* at 803 (emphasis added). We concluded that the district court did not err by finding that the owner's decision to add utility charges constituted "a new rule and not a rent increase." *Id.*

Our analysis in *Sargent* recognizes that rule changes and rent increases are not synonymous, unlike our approach in *Schaff v. Hometown Am., L.L.C.*, No. A04-1778, 2005 WL 1545525 (Minn. App. July 5, 2005), *review denied* (Minn. Sept. 28, 2005), on which appellant relies. Of course, *Schaff* is not binding authority. Unpublished opinions are of persuasive value "[a]t best" and not precedential. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993); Minn. Stat. § 480A.03, subd. 3 (2008) ("Unpublished opinions of the court of appeals are not precedential."). And because the issue of whether a rent increase constitutes a rule change was not raised, analyzed, or decided, *Schaff* is not persuasive.

Schaff involved both a change to a utility-billing method and a corresponding rent increase. 2005 WL 1545525, at *2. In the facts and decision sections of our opinion in *Schaff*, we referred to the elimination of individual, metered utility billing and the corresponding implementation of a rent increase as a "rule change." 2005 WL 1545525, at *2-*4. But we also referred to the change as a "rent increase." *Id.* at *4. While we used these terms interchangeably, we never considered or determined whether the rent increase, which was imposed in conjunction with the utility-billing change, would constitute a rule change standing alone. *Id.* Thus, it cannot be said that our holding that the rent increase was "not unreasonable" as a matter of law was based on a conclusion that the rent increase constituted a rule change subject to a statutory reasonableness requirement. *Id.* at *5. While we referenced section 327C.02, subdivision 2, as one of the grounds for the underlying lawsuit, the issues on appeal were whether "the district court erred in its determination that respondent's rental increase was not retaliatory, abused its discretion in a number of evidentiary rulings, and showed bias." *Id.* at *1. We were not asked to consider or determine the reasonableness of the rent increase under section 327.02, subdivision 2.[2]

Given the statutory scheme set forth in chapter 327, we agree with respondents' assertion that "the completeness and detail with which the [l]egislature addressed rent leads one to conclude that had the [l]egislature wanted to address rent increase controls, it would have done so expressly." The legislature's failure to impose an express "reasonableness" requirement on rent increases in its enumeration of rent increase restrictions in section 327C.06 indicates that the legislature did not intend to impose a reasonableness restriction. *See Underwood Grain Co. v. Harthun*, 563 N.W.2d 278, 281 (Minn. App. 1997) ("It is a principle of statutory construction that the expression of one thing means the exclusion of others ('expressio unius est exclusio alterius').").

Absurd Result

We next consider whether appellant's proposed construction of section 327C.02, subdivision 2, yields an absurd result. Appellant argues that when the legislature excluded reasonable rent increases from the provisions prohibiting substantial modifications of a rental agreement and requiring compliance with the reasonableness standards of section 327C.01, subdivision 8, the legislature intended that any other type of rent increase (i.e., an unreasonable rent increase) is not so excluded. Under this construction, an unreasonable rent increase constitutes a rule change subject to the reasonableness standards of section 327C.01, subdivision 8.

There are two problems with this approach. First, because chapter 327C only defines "reasonable" in the context of rules, it assumes that a rule is the subject of any reasonableness determination. Appellant's argument, however, reverses this process; it would use a determination that a rent increase is unreasonable to make that rent increase a rule. Chapter 327C, however, lacks a standard for determining whether a rent increase is reasonable. *See* Minn. Stat. § 327C.01, subd. 8 (defining "reasonable rule"). Thus, if adopted, appellant's argument would put the district court in the untenable position of either (a) determining whether a rent increase is reasonable without any guidance from the legislature[3] or (b) applying the definition of a reasonable rule to a rent increase to determine whether that increase is a rule, thereby assuming the conclusion that the increase is, in fact, a rule. Neither option is judicially palatable. Moreover, adoption of standards for determining whether a rent increase is reasonable, within the regulatory structure of chapter 327C, involves policy decisions balancing the considerations of that chapter. Adoption of such standards is for the legislature, not the courts. *See, e.g., Haskin v. Northeast Airways, Inc.*, 266 Minn. 210, 216, 123 N.W.2d 81, 86 (1963) (stating that public policy considerations that might justify a change in law "are for the legislature and not [an appellate] court to evaluate").

Second, under appellant's proposed construction, if a court were to determine—apparently by some unarticulated, non-rule-based method—that a rent increase is unreasonable, the rent increase would be subject to an evaluation of reasonableness under section 327C.01, subdivision 8. But if a determination of unreasonableness is necessary to transform a rent increase into a rule change, we discern no purpose in re-evaluating the reasonableness of the resulting rule change a second time under section 327C.01, subdivision 8, particularly because different standards could produce conflicting results. Thus, appellant's proposed construction yields an illogical and absurd result.

Legislative History

Lastly, we consider the contemporaneous legislative history. "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16. The legislature's intent may be ascertained by considering several factors including the occasion and necessity for the law, the circumstances under which it was enacted, the mischief to be remedied, the object to be attained, and the contemporaneous legislative history. *Id.*

Appellant argues that the legislative purpose of chapter 327C is to protect park residents. *See Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. App. 1996) ("Minnesota has long regulated the mobile home park industry to protect park residents."), *review denied* (Minn. Oct. 29, 1996). The rationale for the special protection of manufactured-home-park residents is that residents are typically low- to moderate-income persons who have made a substantial investment in their homes that is at risk because they only rent the land on which the homes are situated. *Id.* at 284 n.2. Once on site, the homes are costly and difficult to move, putting park owners in a superior bargaining position. *Id.*

Appellant relies on a 1982 memorandum from Senator Gene Merriam that describes the legislative history of Chapter 327. The memorandum discusses the unusual status of the manufactured-home-park owner, noting that the park owner "has come to resemble a private government" and that "[p]ark rules control a wide spectrum of resident conduct, ranging from the length that grass may be allowed to grow, to whether a homemaker can earn some extra income by babysitting neighborhood children, to how many people can live in each private home." "In short," the memorandum concludes, "a park owner is like an unelected mayor of a bedroom community."

The memorandum notes that the legislature first recognized the special nature of manufactured-home-parks in 1973 when it created a law to govern landlord-tenant relations in those parks. In 1979, the legislature heard testimony regarding major abuses of power occurring through this form of "private government" and substantially amended the law in response. The amendments required that all park rules be reasonable; prohibited substantial modification of a preexisting lease; clarified and strengthened the right of a resident to sell his or her home within the park; and severely limited no-cause eviction. The memorandum also notes that while these amendments made major improvements, they also left "major" problems: no-cause evictions were still occurring and key terms, such as "reasonable" and "substantial modification" were left undefined.

The memorandum goes on to highlight the key features of the proposed 1982 amendments, which were meant to address these problems: vague and general language is clarified and made more specific; no-cause eviction is eliminated; for-cause eviction is made more efficient; rents will be required to be uniform within a park, varying only for lots with special advantages or in cases of residents with special needs; and in-park sale rights are clarified.

Noticeably absent from the memorandum is any mention of rent increases. The only restriction, control, or regulation concerning rent is the requirement that rents be uniform within a park. Moreover, reasonableness is only discussed in the context of park rules, and the rules described in the memorandum concern the regulation of "resident conduct," such as requiring residents to maintain a certain grass length on their lots. The memorandum does not suggest that a rent increase is synonymous with efforts to restrict this type of resident conduct.

While the imposition of a reasonableness requirement might be consistent with the legislature's general desire to protect manufactured-home-park residents and to limit a park owner's power in relation to the residents, the legislative history simply does not indicate intent

to impose a reasonableness requirement on rent increases. Such a policy decision must be made through the legislative process, which provides opportunity for public input, debate, and deliberation, as well as representative decision making. We therefore will not construe chapter 327C to impose a reasonableness requirement in the absence of clear legislative intent to do so. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them." (citations omitted)); *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) ("[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court."), *review denied* (Minn. Dec. 18, 1987).

In summary, construing the word "reasonable" in section 327C.02, subdivision 2, as imposing a reasonableness requirement on rent increases is inconsistent with the statutory scheme distinguishing "rules" from "rent," yields an absurd result, and is unsupported by the contemporaneous legislative history. Moreover, and of great significance, interpreting chapter 327C to impose a reasonableness requirement on rent increases is a policy determination beyond this court's authority. Thus, while we are mindful of the requirement that we construe every law, if possible, to give effect to all its provisions, we conclude that the term "reasonable" before the phrase "rent increase" in section 327C.02, subdivision 2, is superfluous.

We therefore hold that a rent increase is not a rule change for purposes of chapter 327C and affirm the district court's conclusion that any requirement for "reasonableness" set forth in section 327C.02 does not apply to increases in manufactured-home-park-lot rental rates. Accordingly, the district court correctly concluded that the provisions of section 327C.01, subdivisions 8 and 11, which by their express terms apply to rules, do not apply to rent increases. Because we determine that section 327C.02, subdivision 2, does not impose a reasonableness requirement on rent increases, we do not review the district court's determination that, to the extent such a requirement exists, a determination of reasonableness is limited to a comparison of market-comparable rents or rent increases.

II.

We next review the district court's declaration that the following prohibition does not apply to rent increases: "No park owner may engage in a course of conduct which is unreasonable in light of the criteria set forth in section 327C.01, subdivision 8." Minn. Stat. § 327C.05, subd. 1. Appellant argues that the "pattern of rent increases" instituted by respondent "is surely a 'course of conduct' and thus must be evaluated for reasonableness in light of the criteria set out in Section 327C.01, [s]ubd. 8."

But the plain language of section 327C.05 indicates that it applies to rules, not rent increases. Subdivision 1 prohibits unreasonable rules. Minn. Stat. § 327C.05, subd. 1 ("No park owner shall adopt or enforce unreasonable rules."). And the provision within subdivision 1 upon which appellant relies specifically references the criteria set forth in section 327C.01, subdivision 8, which also applies to rules. *Id.* Subdivision 2 enumerates rules that are presumptively unreasonable. *Id.*, subd. 2. Subdivision 3 provides that "a court may declare unreasonable any park rule if the courts finds that the rule fails to meet the standard of section 327C.01, subdivision 8." *Id.*, subd. 3. The last subdivision allows a park owner to adopt and enforce a

reasonable rule that limits the maximum number of persons permitted to reside in a manufactured home. *Id.*, subd. 4 (2008).

Because the language of section 327C.05 is unambiguous, we interpret it according to its plain meaning, without resorting to other principles of statutory construction. *See Anderson*, 683 N.W.2d at 821 ("When the text of a law is plain and unambiguous, we must not engage in any further construction." (Quotation omitted)). And because the language applies to rules and a rent increase is not a rule, we hold that section 327C.05, subdivision 1, does not apply to a series of rent increases.

D E C I S I O N

Because Minn. Stat. § 327C.02, subd. 2, does not impose a reasonableness requirement on manufactured-home-park-lot rent increases and because Minn. Stat. § 327C.05, subd. 1, does not apply to manufactured-home-park-lot rent increases, the district court did not err by entering declaratory judgment in respondents' favor.

Affirmed.

Dated:

_____

Judge Michelle A. Larkin

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

[1] A reasonable rule is defined as

> a park rule: (a) which is designed to promote the convenience, safety, or welfare of the residents, promote the good appearance and facilitate the efficient operation of the park, protect and preserve the park premises, or make a fair distribution of services and facilities; (b) which is reasonably related to the purpose for which it is adopted; (c) which is not retaliatory or unjustifiably discriminatory in nature; and (d) which is sufficiently explicit in prohibition, direction, or limitation of conduct to fairly inform the resident of what to do or not to do to comply.

Minn. Stat. § 327C.01, subd. 8. Substantial modification "means any change in a rule which: (a) significantly diminishes or eliminates any material obligation of the park owner; (b) significantly diminishes or eliminates any material right, privilege or freedom of action of a resident; or (c) involves a significant new expense for a resident." *Id.*, subd. 11.

[2] Appellant's reliance on *Schaff* demonstrates why it is improper to rely on unpublished opinions of this court as anything other than persuasive authority and why care must be taken when citing unpublished opinions as persuasive authority. *See Vlahos v. R&I Const. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 ("The danger of miscitation is great because unpublished decisions rarely contain a full recitation of the facts."); *Dynamic Air*, 502 N.W.2d at 801 ("We remind the bench and bar firmly that neither the trial courts nor practitioners are to rely on unpublished opinions as binding precedent."). Our holding in *Schaff* is not persuasive on the issue presented in this case.

[3] As discussed in the next section, the legislative history of chapter 327C indicates that a "major" problem with earlier versions of the legislation was the failure to define key terms such as "reasonable."

STATE OF MINNESOTA

IN COURT OF APPEALS

A08-0319

Wallboard, Inc.,
Appellant,

vs.

St. Cloud Mall, LLC,
a Delaware limited liability company, et al.,
Respondents,

Foss Drywall, Inc., et al.,
Defendants.

Filed December 16, 2008

Affirmed

Collins, Judge*

Stearns County District Court

File No. 73-C1-06-004306

Ryan J. Trucke, Matthew R. Doherty, Brutlag, Hartmann & Trucke, 3555 Plymouth Boulevard, Suite 117, Minneapolis, MN 55447 (for appellant)

Ryan J. Hatton, Gerald W. Von Korff, Rinke-Noonan, 1015 West St. Germain Street, Suite 300, St. Cloud, MN 56302 (for respondents)

Considered and decided by Chief Judge Toussaint, Presiding Judge; Halbrooks, Judge; and Collins, Judge.

S Y L L A B U S

The prelien-notice exception in Minn. Stat. § 514.011, subd. 4c (2006), does not apply to a tenant who improves leased premises of less than 5,000 usable square feet of space, even if the landord's entire property exceeds 5,000 square feet.

O P I N I O N

COLLINS, Judge

Appellant challenges the district court's grant of summary judgment to respondents, arguing that, as a matter of law, the prelien-notice exception found in Minn. Stat. § 514.011, subd. 4c (2006), applies to a tenant who leases less than 5,000 usable square feet of space to which improvements are made, if the landlord's property exceeds 5,000 total usable square feet. We affirm.

F A C T S

In April 2005, respondent Bath & Body Works, LLC (Bath & Body) leased approximately 4,375 square feet of floor space in Crossroads Center, which is owned by respondent St. Cloud Mall, LLC (collectively respondents). Bath & Body hired a general contractor to complete a build-out of its leased space. The general contractor subcontracted with Foss Drywall, Inc. (Foss) to install the drywall. Foss, in turn, engaged appellant Wallboard, Inc. to supply the drywall materials for the project for a price of $22,846.41. Wallboard delivered the materials between August 11 and September 18, 2005.

Bath & Body paid in full the general contractor and obtained an executed lien waiver of the total build-out contract price, including the payments for subcontractors and material suppliers. Foss was paid in full and executed a full lien waiver but never paid Wallboard.

On January 3, 2006, Wallboard served a copy of its verified mechanic's lien on St. Cloud Mall. Three days later, Wallboard recorded the lien. In September 2006, Wallboard sued St. Cloud Mall, Foss,[1] and Bath & Body for enforcement of the mechanic's lien. On cross-motions for summary judgment, Wallboard argued that because Crossroads Center exceeds 5,000 usable square feet of floor space, no prelien notice was required; therefore, Wallboard's mechanic's lien is valid. Conversely, respondents argued that because the floor space leased by Bath & Body, for which the improvement was made, was less than 5,000 square feet, prelien notice is required, and that absent prelein notice, Wallboard's mechanic's lien is void. After determining that the prelien-notice exception set forth in Minn. Stat. § 514.011, subd. 4c (2006), does not apply to a tenant when the leased space to which the improvement was made is less than 5,000 square feet, the district court denied Wallboard's motion and granted summary judgment to respondents. This appeal followed.

I S S U E

Does the prelien-notice exception set forth in Minn. Stat. § 514.011, subd. 4c (2006), apply to a tenant who improves leased premises of less than 5,000 usable square feet if the landlord's entire property exceeds 5,000 square feet?

A N A L Y S I S

On an appeal from summary judgment, we ask whether (1) there are any genuine issues of material fact and (2) the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). In doing so, we view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion, which we review de novo. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998).

When interpreting a statute, we must "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2006). The legislature's intent may be ascertained by considering, among other things, the need for the law, the circumstances under which it was enacted, the consequences of an interpretation, contemporaneous legislative history, other statutes concerning the same subject matter, and the object to be attained. *Id.*; *Minn. Life & Health Ins. Guar. Ass'n v. Dep't of Commerce*, 400 N.W.2d 769, 774 (Minn. App. 1987).

However, if the statute's language is unambiguous, we apply its plain meaning. Minn. Stat. § 645.16; *Molloy v. Meier*, 679 N.W.2d 711, 723 (Minn. 2004). We apply other canons of construction to discern the legislature's intent only if a statute is ambiguous. *See* Minn. Stat. §§ 645.08, .16, .17 (2006); *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 416 (Minn. 2002). Under the basic canons of construction, no word or phrase should be deemed superfluous, void, or insignificant. Minn. Stat. § 645.16 (2006); *Owens v. Federated Mut. Implement & Hardware Ins. Co.*, 328 N.W.2d 162, 164 (Minn. 1983). Moreover, each clause is to be read in context with other clauses of the same statute so as to determine the meaning of a particular provision. *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005); *see also In re Appeal of Staley*, 730 N.W.2d 289, 297 (Minn. App. 2007) ("[I]t is a cardinal rule of statutory interpretation that we read each statutory provision in reference to the whole statute.").

A mechanic's lien provides a security interest in the improved real estate to a lien claimant. Minn. Stat. § 514.01 (2006). Absent the attachment of a mechanic's lien, unpaid contractors may not be able to collect debts owed to them. Generally, prelien notice is required for a mechanic's lien to be enforceable. Minn. Stat. § 514.011, subd. 2 (2006), states:

> Every person who contributes to the improvement of real property so as to be entitled to a lien pursuant to section 514.01, except a party under direct contract with the owner must, as a necessary prerequisite to the validity of any claim or lien, cause to be given to the owner or the owner's authorized agent, either by personal delivery or by certified mail, not later than 45 days after the lien claimant has first furnished labor, skill or materials for the improvement, a written notice . . . .

But the notice requirement does not apply to "an improvement to real property which is not in agricultural use and which is wholly or partially nonresidential in use if the work or improvement . . . is an improvement to real property where the *existing property* contains more

than 5,000 total usable square feet of floor space . . . .” Minn. Stat. § 514.011, subd. 4c(b) (2006) (emphasis added). For purposes of the prelien-notice requirement, “ ‘owner’ means the owner of any legal or equitable interest in real property whose interest in the property (1) is known to one who contributes to the improvement . . . or (2) has been recorded or filed for record . . . and who enters into a contract for the improvement of the real property.” Minn. Stat. § 514.011, subd. 5 (2006).

Here, the parties agree that unless the prelien-notice exception found in section 514.011, subdivision 4c(b), applies, Wallboard’s mechanic’s lien is void. They also agree that, when determining the applicability of the exception, the statute is ambiguous as to whether the square footage of the landlord’s entire property should be considered or only the square footage leased by the tenant. Because the statute does not address this issue directly, and we have found no precedent on point, this is an issue of first impression.

Wallboard contends that the landlord’s entire property should be considered when determining whether prelien notice must be given, arguing that (1) we should be guided by analogous caselaw in interpreting this ambiguous statute; (2) the equities favor Wallboard; (3) contrary to the district court’s findings, ownership is irrelevant to determine whether prelien notice is required; and (4) because a lien claimant can record a lien only against the entirety of the property, the lien claimant must consider the entire property for the purpose of calculating the total usable square feet.

Wallboard relies on two sets of cases. First, Wallboard cites cases that address the issue of when or whether a landlord who owns a single building that is leased to a single tenant has notice of the improvements made by the tenant so as to permit the attachment of a lien to the landlord’s property interest. *See*, *e.g.*, *Master Asphalt Co. v. Voss Constr. Co., of Minneapolis*, 535 N.W.2d 349, 352 (Minn. 1995) (holding that no mechanic’s lien can attach when landlord, renting his entire property to tenant, has no actual knowledge of improvements made to property); *Nasseff v. Schoenecker*, 312 Minn. 485, 492, 253 N.W.2d 374, 378 (1977) (holding that mechanic’s lien can attach to landlord’s interest when landlord has knowledge of tenant-initiated improvements, landlord did not object, and contractor did not contract with subcontractors).

Unlike those cases, here the landlord is renting space to multiple tenants, and neither party disputes that the landlord had actual knowledge of the improvements being made to the Bath & Body store. Moreover, there is not a direct link between a contractor’s ability to attach a mechanic’s lien to a landlord’s property interest and interpreting the statute to permit the consideration of the landlord’s entire property to avoid prelien-notice requirements. While caselaw can inform courts in interpreting ambiguous statutes, given these differences, we are not persuaded that the cited cases aid our resolution of the ambiguities presented here.

Second, Wallboard points to cases standing for the proposition that mechanic’s lien statutes are construed broadly. While true, taking this single statement in isolation distorts the law. Minnesota courts have held repeatedly that mechanic’s lien statutes are to be “liberally construed to effectuate their purpose of protecting the rights of workmen and materialmen who furnish labor and material for the improvement of real estate.” *Dolder v. Griffin*, 323 N.W.2d 773, 779-80 (Minn. 1982). However, because mechanics’ liens are statutory in nature and are

intended to "protect unwary homeowners from having to pay twice for a single improvement," the prelien-notice requirement of the statute must be strictly construed. *Emison v. J. Paul Sterns Co.*, 488 N.W.2d 336, 338 (Minn. App. 1992); *see also Merle's Constr. Co. v. Berg*, 442 N.W.2d 300, 302 (Minn. 1989) ("The prelien notice is no mere technicality. Failure to give the notice defeats the mechanic's lien. There must be strict compliance with the prelien notice statutory requirements." (citation omitted)); *Polivka Logan Designers, Inc. v. Ende*, 312 Minn. 171, 173, 251 N.W.2d 851, 852 (1977) (stating that the purpose of the statute was to "alert a property owner to the risk of double liability" and that the prelien notice is a "necessary prerequisite"); *Bendiske Concrete & Masonry, Inc. v. Barthel Constr., Inc.*, 515 N.W.2d 95, 97 (Minn. App. 1994) ("The purpose of prelien notice is to remedy the unfairness of foreclosing on unsuspecting owners and therefore the notice requirements are strictly construed."). To remedy this apparent conflict, the Minnesota Supreme Court has stated:

> Mechanic's lien laws are strictly construed as to the question whether a lien attaches, but are construed liberally after the lien has been created. While the Mechanic's Lien Act is to be liberally construed as a remedial act, yet mechanics' liens exist only by virtue of the statute creating them, and such statutes must be strictly followed with reference to all requirements upon which the right to a lien depends.

Dolder, 323 N.W.2d at 780 (quoting Maurice T. Brunner, Annotation, *Who is the Owner Within Mechanic's Lien Statute Requiring Notice of Claim*, 76 A.L.R. 3d 605, 618 (1977)).

In each case cited by Wallboard the issue was not *whether* a lien attached to the property, but *to what* property the lien attached. Here, however, the issue is whether Wallboard met the statutory requirements that permit a mechanic's lien to attach. Consistent with caselaw, we strictly construe the statutory language and determine that a mechanic's lien attaches only if all statutory requirements are met. Thus, we decline to embrace Wallboard's interpretation of the statute.

Wallboard urges us to rely on equitable considerations in our interpretation of this ambiguous statutory provision. In doing so, Wallboard asserts that because respondents are not "unsophisticated businesses," they could have and should have protected themselves in other ways. Although Wallboard correctly states that one purpose of the prelien-notice requirement is to protect homeowners and small businesses from having to pay twice for the same work, such a purpose does not allow the courts to ignore, or loosely apply, explicit statutory requirements to accomplish that purpose. In fact, we have stated that examining the sophistication of owners likely hinders the achievement of the statutory purpose. *See Emison*, 488 N.W.2d at 338 ("If the courts began evaluating the relative sophistication of owners, it could eliminate the protection of the prelien notice requirement the legislature has granted to homeowners."); *see also Dolder*, 323 N.W.2d at 780 ("To begin evaluating sophistication could lead to removing the protection of the statute where owners are attorneys, laborers, materialmen, mechanics or any number of people affiliated with the housing industry.").

Adopting Wallboard's argument would have courts ignore statutory requirements; improperly engage us in an imprecise, fact-intensive, and subjective inquiry into a party's

sophistication level; and result in an ad hoc approach to enforcement of the statute. Moreover, weighing the particular equities in this case does not assist us in interpreting the statutory exception at issue. According to the plain language of the statute, whether the prelien-notice exception applies is based solely on the size of the property. Therefore, even if the equities favored Wallboard, that alone is not determinative.

Wallboard next argues that the district court erroneously focused on ownership in determining that Bath & Body was entitled to prelien notice, maintaining that the term "owner" is not used in Minn. Stat. § 514.011, subd. 4c (2006). Although the term "owner" is not used as a qualifier in any of the prelien-notice exceptions set forth in Minn. Stat. § 514.011, subd. 4c, Wallboard's argument ignores three important canons of statutory interpretation.

First, Minn. Stat. § 514.011, subd. 4c, states that "[t]he notice *required by this section* shall not be required" under certain circumstances, including when there "is an improvement to real property where the *existing property* contains more than 5,000 total usable square feet of floor space[.]" (Emphasis added.) And subdivision 2 of section 514.011 unambiguously requires that prelien notice be given to "the owner or the owner's authorized agent[.]" Minn. Stat. § 514.011, subd. 2 (2006). Thus, ownership is determinative when evaluating whether prelien notice must be given.

Second, the plain language of the phrase "existing property" necessarily implies ownership. Although not explicitly stated in the statute, the plain language of section 514.011, subdivision 4c, supports the district court's consideration of the term "ownership" when determining that the prelien-notice exception does not apply in this case. "Property" is defined as "[t]he right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel); the right of ownership . . . ." 1232 *Black's Law Dictionary* (7th ed. 1999); *see also The American Heritage College Dictionary* 993 (2nd ed. 1985) (defining property, in part, as ownership). Thus, although the term "owner" is not explicitly stated as a qualifier in Minn. Stat. § 514.011, subd. 4c, the concept of ownership is inherent in the phrase "existing property."

Third, as a practical consequence, applying the prelien-notice exception as urged by Wallboard would have a broad and far-reaching impact not only on all landlords, but also on all business owners, renters, and condominium owners. Taken to its logical end, Wallboard's position would result in any number of unjust and likely unforeseen results. For example, the tenant of a small office in a high-rise office building who hires a contractor to make improvements to the office space would not be entitled to prelien notice because the building is greater than 5,000 square feet; a person living in an apartment that is improved to create a design studio used for work would not be entitled to prelien notice if the apartment complex is greater than 5,000 square feet; and in a strip mall greater than 5,000 square feet, the small-retail-shop owner who contracts to have improvements made would not be entitled to prelien notice and could lose the business.

Finally, Wallboard argues that because a lien claimant cannot record a lien limited to a specific leasehold interest—and respondents agree that if prelien notice is required, the lien attaches to the entire mall—the usable floor space of the entire mall should be considered for the purpose of the prelien-notice exception. But Wallboard cites no legal authority, and we have

discovered none, for its position that the county recorder would reject a mechanic's lien describing only the specific lease premises. Indeed, Minn. Stat. § 514.08, subd. 2(5) (2006), requires only "a description of the premises to be charged, identifying the same with reasonable certainty." Moreover, at oral argument, Wallboard's counsel admitted that it may be possible to include a description of the specific leased premises in addition to the complete legal description when completing the mechanic's lien statement for recording.

Based on our careful review of the record, the district court correctly applied the canons of statutory interpretation when it denied Wallboard's motion and granted summary judgment to respondents.

D E C I S I O N

The district court correctly interpreted Minn. Stat. § 514.011, subd. 4c(b) (2006), to void and discharge appellant's mechanic's lien.

Affirmed.

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

[1] Foss filed for bankruptcy and was dismissed from this lawsuit without prejudice. Wallboard recovered $1,525.47 from Foss's bankruptcy estate.

STATE OF MINNESOTA

IN COURT OF APPEALS

A09-349

In re the Marriage of: Loretta Marie Angell, petitioner,
Appellant,

vs.

Gordon William Angell, Jr.,
Respondent.

Filed December 29, 2009

Affirmed in part, reversed in part, and remanded

Ross, Judge

Carlton County District Court

File No. 09-FA-07-322

Arthur M. Albertson, 101 West Second Street, Suite 204, Duluth, MN 55802-5004 (for appellant)

Peter L. Radosevich, P.O. Box 384, Esko, MN 55733 (for respondent)

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

S Y L L A B U S

1. In a dissolution proceeding, life-insurance and death-gratuity benefits received during marriage by only one spouse who is found to be the decedent's sole beneficiary are nonmarital property under Minnesota Statutes section 518.003.

2. Under the Supremacy Clause, federal anti-attachment statutes that protect military death benefits paid to a beneficiary from attachment, levy, or seizure preempt Minnesota Statutes section 518.58, subdivision 2 to the extent that the subdivision authorizes district courts to award the beneficiary's spouse a portion of those benefits as divisible nonmarital property.

O P I N I O N

ROSS, Judge

The former husband and wife in a marriage dissolution proceeding respectively challenge the district court's classification and division of death benefits paid after their son died during active military duty. The son had named only his mother as the beneficiary of his military life-insurance policy, which, by federal law, also made her his beneficiary in a federal death-gratuity program available to active-duty service members. The district court classified these funds as Loretta Angell's exclusive nonmarital property but awarded Gordon Angell a share to prevent an unfair hardship. Loretta Angell argues that this award violated federal anti-attachment statutes protecting military death benefits. Gordon Angell filed a notice of review challenging the district court's property classification. He argues that the district court should have classified the life-insurance and death-gratuity benefits as marital property because Loretta Angell did not acquire them as a gift, bequest, devise, or inheritance and because she did not overcome the presumption that property accumulated during marriage is marital property.

Because we conclude that the district court properly classified the life-insurance and death-gratuity benefits as Loretta Angell's nonmarital property, we affirm the court's classification. But we hold that federal law prohibits the district court from relying on state law to divide the benefits between the parties. We therefore affirm in part, reverse in part, and remand.

F A C T S

Gordon and Loretta Angell's 27-year marriage ended in dissolution in 2008. A life-insurance beneficiary designation by one of their five children, Levi Angell, is the focus of this appeal.

Twenty-year-old Levi was killed in April 2004 during active military service with the Marine Corps in Iraq. Levi had designated his mother, Loretta Angell, as the sole beneficiary of two funding instruments: his military life-insurance policy and a related federal death-gratuity program. In April 2004, Loretta received $100,000 from the United States government in death-gratuity benefits payable to the designated survivor of her son, a member of an armed force who died during active duty. *See* 10 U.S.C. §§ 1475–80 (2000 & Supp. IV 2004). In May 2004, she received $250,352 from Levi's Servicemembers' Group Life Insurance policy. In August 2005, she received another $150,000 in death-gratuity benefits under a law that directed an additional payment to previously paid beneficiaries. *See* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 1013(b), 119 Stat. 231, 247 (2005) (authorizing retroactive additional payment of death gratuity for deaths incurred in the theater of Operation Enduring Freedom or Operation Iraqi Freedom). These funds were never commingled with marital property. Instead, they were deposited into a separate bank account in Cleveland, Ohio, in Loretta Angell's name. Except for sums spent by Loretta Angell, at dissolution the funds remained in the Cleveland bank account.

The classification and distribution of those funds were the only issues in the dissolution proceeding. The district court originally held that the life-insurance benefits and the second payment of death-gratuity benefits, totaling $400,352, were Loretta Angell's nonmarital property, and that the first death-gratuity payment of $100,000 was a marital asset to be divided evenly. It also awarded Gordon Angell a cash settlement of $100,000 from Loretta Angell's nonmarital

property, relying on Minnesota Statutes section 518.58, subdivision 2, which allows the district court to apportion up to one half of a spouse's nonmarital property to the other to prevent an unfair hardship. The district court therefore ordered Loretta Angell to pay Gordon Angell $150,000: $100,000 from her nonmarital property and $50,000 from marital property. The district court later amended its order to find that all of the life-insurance and death-gratuity benefits, totaling $500,352, were Loretta Angell's nonmarital property. But it still awarded Gordon Angell $150,000, all to come from Loretta Angell's nonmarital property under section 518.58.

On appeal, Loretta Angell argues that the district court erred by awarding Gordon Angell any cash from her nonmarital property or, alternatively, by increasing the amount from $100,000 to $150,000. Gordon Angell filed a notice of review challenging the district court's finding that the life-insurance and death-gratuity benefits were Loretta Angell's nonmarital property.

I S S U E S

I. Did the district court err by classifying life-insurance and death-gratuity benefits as nonmarital property?

II. Do the Supremacy Clause and the federal anti-attachment provisions governing the distribution of Servicemembers' Group Life Insurance and death-gratuity benefits prohibit the district court from apportioning the benefits as divisible nonmarital property under Minnesota Statutes section 518.58, subdivision 2?

A N A L Y S I S

I

Gordon Angell challenges the district court's classification of the life-insurance and death-gratuity benefits as Loretta Angell's nonmarital property. Whether property is marital or nonmarital is a legal question, which we review de novo, but we defer to a district court's underlying fact findings unless they are clearly erroneous. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). All property, real or personal, is presumed to be marital if "acquired by the parties, or either of them . . . at any time during the existence of the marriage." Minn. Stat. § 518.003, subd. 3b (2008). This presumption may be overcome. *Id.* The operative statute does not expressly classify life-insurance or death-gratuity benefits as either marital or nonmarital, but it states that property acquired by gift, bequest, devise, or inheritance from a third party to one but not the other spouse is nonmarital property. *Id.*

In determining whether the funds are marital or nonmarital property, we see no material distinction between the death benefits paid from the military life-insurance policy and the death benefits paid as a gratuity by federal statute. The benefits under both instruments result from a servicemember's death, and both are designed to direct payment to the servicemember's designee. The federal government pays a portion of the servicemember's life-insurance premiums and fully funds the statutory death-gratuity benefit program; both are therefore partial compensation for active military service. *See* 38 U.S.C. § 1969(b) (2006) (requiring the federal government to pay part of the costs of Servicemembers' Group Life Insurance).

Gordon Angell argues that Loretta Angell offered no evidence proving that the benefits were nonmarital and that she therefore failed to overcome the presumption that the property is marital. A party seeking to overcome the presumption must demonstrate by a preponderance of the evidence that the property is nonmarital. *Pfleiderer v. Pfleiderer*, 591 N.W.2d 729, 732 (Minn. App. 1999). Loretta Angell's evidence overcomes the presumption. The evidence established that she was designated as Levi's sole beneficiary. Although the Servicemembers' Group Life Insurance Election and Certificate form that Levi completed offered spaces for up to five beneficiaries, he used only one space, naming Loretta Angell alone as his beneficiary. Levi thereby assured that his mother would receive a 100-percent share of the benefits available from both sources. *See* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 1013, 119 Stat. 231, 247 (2005) (providing a death gratuity payable to a beneficiary in proportion to the share of benefits she receives from life-insurance proceeds paid under the SGLI program). Loretta Angell testified correspondingly that all financial documents and correspondence that she received in connection with Levi's life-insurance proceeds and death benefits were addressed to her alone.

Gordon Angell contends that no evidence indicates that Levi intended to exclude him from sharing in the funds. At oral argument, his counsel asserted that it was undisputed that Loretta Angell managed the family's finances and that this requires a finding that the sole designation to his mother meant that Levi intended his parents to share the funds. But the district court made no such finding, and attempting to discern why Levi omitted his father as a designated beneficiary is not our role on appeal. *See Whitaker v. 3M Co.*, 764 N.W.2d 631, 640 n.1 (Minn. App. 2009) ("[O]ur role . . . does not extend to making factual findings in the first instance."), *review denied* (Minn. July 22, 2009). Levi designated his mother as the sole beneficiary, and we therefore accept the district court's implicit finding that Levi intended only his mother to receive the life-insurance and death-gratuity benefits. *See also Lanier v. Traub*, 934 F.2d 287, 289 (11th Cir. 1991) ("The beneficiary designation provisions of the [Servicemen's Group Life Insurance] Act are to be interpreted strictly . . . to avoid . . . disputes concerning the actual donative intent of insured servicemen.").

Gordon Angell argues that the life-insurance and death-gratuity benefits are marital property because they are not one of the types of instruments that the statute specifies as nonmarital property: gift, bequest, devise, or inheritance. *See* Minn. Stat. § 518.003, subd. 3b. He relies on the *Black's Law Dictionary* definition of each term and argues that the proceeds were not a gift because they were not a voluntary transfer from Levi and they were not a devise, bequest, or inheritance because they did not pass through a will or intestacy.

No Minnesota caselaw answers how to classify death benefits from a child's life-insurance policy that names only one parent as the beneficiary. But multiple cases from other states hold that life-insurance benefits received by one spouse as the sole beneficiary are that spouse's nonmarital property. For example, the Iowa Supreme Court so held in a case similar to ours. *See In re Marriage of Goodwin*, 606 N.W.2d 315 (Iowa 2000). In *Goodwin*, as here, a mother had received life-insurance proceeds as sole designated beneficiary of her son's policy, and the father argued that the singular designation simply reflected the mother's role as manager of the couple's money. *Id.* at 317, 319. The Iowa court rejected the father's claim that the proceeds were marital property. It held that the son's designation of his mother as the only

beneficiary supported the conclusion that the proceeds constituted a gift to or inheritance by the mother. *Id.* at 319; *see also Smith v. Smith*, 235 S.W.3d 1, 10–11 (Ky. Ct. App. 2006) (holding that life-insurance benefits directed only to the wife upon her parents' death was a gift and therefore nonmarital property); *In re Marriage of Sharp*, 823 P.2d 1387, 1388 (Colo. Ct. App. 1991) (holding that life-insurance proceeds directed to only one spouse were a gift and nonmarital property and citing cases from other jurisdictions reaching a similar holding).

Consistent with the reasoning of these cases from other jurisdictions, we conclude that the death benefits were a gift. We recognize that the benefits conveyed by the instruments at issue do not resemble the usual "gift" as the term is commonly used. But they have the essential characteristic of a gift, which is a transfer without consideration. *See Roske v. Ilykanyics*, 232 Minn. 383, 392, 45 N.W.2d 769, 775 (1951); *see also Boos v. Reynolds*, 84 F. Supp. 185, 188 (D. Minn. 1949) ("Gift[] . . . is a generic word of broad connotation, taking coloration from the context of the particular statute in which it may appear."). The required elements of a gift are "(1) delivery; (2) intention to make a gift; and (3) absolute disposition by the donor of the thing which the donor intends as a gift." *Weber v. Hvass*, 626 N.W.2d 426, 431 (Minn. App. 2001), *review denied* (Minn. June 27, 2001). Levi's intention to make a gift to his mother is supported by his beneficiary designation, and there was an absolute disbursement of the funds to her alone. That the delivery was contingent on Levi's death does not prevent these funds from being characterized as a gift, especially under a nonmarital property definition that includes gifts alongside bequests, devises, and inheritances. Like a gift, the funds were transferred without consideration; and like a devise, they were available on the decedent's death based on his specific written designation. Based on the district court's findings, we hold that the life-insurance and death-gratuity benefits were gifts to the sole designated beneficiary in this case and were therefore that beneficiary's nonmarital property.

II

Loretta Angell challenges the district court's division of her nonmarital property. After properly concluding that the life-insurance and death-gratuity benefits were Loretta Angell's nonmarital property, the district court awarded Gordon Angell $150,000 from that property under Minnesota Statutes section 518.58. That statute allows the district court to apportion up to one half of a spouse's nonmarital property to the other if it finds that the other spouse's resources or property are so inadequate that the division of only the marital property would work an unfair hardship. Minn. Stat. 518.58, subd. 2 (2008).

The district court's award of nonmarital property accords with the statute's hardship concerns. Gordon Angell is 67 years old and has no bank accounts, retirement savings, or pension. He has no vocational training and never reached high school. He has not held full-time employment since 2002, and his only source of income is monthly Supplemental Security Income payments of approximately $424. He has employment-restricting health problems and lives with his elderly mother. His only assets are a 17-year-old Ford and an entitlement to half of the proceeds from the sale of the Angell's modest home.

But despite its meeting the state statutory objectives, the apportionment of nonmarital property was subject to federal anti-attachment provisions, and this raises special concerns.

Loretta Angell argues that the district court did not have jurisdiction to direct the distribution of servicemembers' life-insurance or death-gratuity benefits because these benefits fall within the exclusive jurisdiction of the federal government. Gordon Angell claims that this issue arises for the first time on appeal. The record informs us that Loretta Angell raised the argument to the district court in her motion for amended findings and conclusions or for a new trial, and Gordon Angell had an opportunity to respond. Arguments presented for the first time in a posttrial motion are usually not considered on appeal. *See Antonson v. Ekvall*, 289 Minn. 536, 538–39, 186 N.W.2d 187, 189 (1971). However, this court "may review any matter as the interest of justice may require." Minn. R. Civ. App. P. 103.04. We will address the argument's merits.

The Servicemembers' Group Life Insurance and the death-gratuity benefits have anti-attachment provisions imposed by federal law:

> Any payments due . . . under Servicemembers' Group Life Insurance . . . made to . . . a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

38 U.S.C. § 1970(g) (2006). The anti-attachment statute for the death-gratuity benefits has identical operative language, except that it adds that the benefits "shall not be assignable except to the extent specifically authorized by law." 38 U.S.C. § 5301(a)(1) (2006). Loretta Angell argues that the district court's division of these benefits was "nothing more than a forced assignment in equity" of a portion of the life-insurance and death-gratuity benefits. She cites Article VI of the United States Constitution and appears to argue that the district court violated the Supremacy Clause by relying on Minnesota Statutes section 518.58 to award Gordon Angell a portion of her nonmarital property.

Whether federal law preempts state law is primarily an issue of statutory interpretation, which this court reviews de novo. *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 9 (Minn. 2002). The Supremacy Clause defines "the laws of the United States . . . [as] the supreme law of the land" prevailing over state laws. U.S. Const. art. VI, cl. 2. The Supreme Court has cautioned, however, that "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' " *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 516, 112 S. Ct. 2608, 2617 (1992) (quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947)). Federal preemption of state law is therefore generally disfavored. *Martin*, 642 N.W.2d at 11. And preemption of state family law is especially disfavored. State family law cannot be preempted by federal law unless "Congress has 'positively required by direct enactment' that state law be pre-empted." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S. Ct. 802, 808 (1979) (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S. Ct. 172, 176 (1904)). Whether the federal anti-attachment provisions governing the distribution of Servicemembers' Group Life Insurance and death-gratuity benefits preempt the state law allowing division of nonmarital property is an issue of first impression in Minnesota.

The anti-attachment provision of the Servicemembers' Group Life Insurance Act (SGLIA) has preempted other states' family law provisions. In *Ridgway v. Ridgway*, the Supreme Court considered a divorce decree that required an Army sergeant to keep his three children as the beneficiaries of his Servicemembers' Group Life Insurance policy. 454 U.S. 46, 48, 102 S. Ct. 49, 51 (1981). The sergeant remarried and designated his wife as his sole beneficiary. *Id.* at 48–49, 102 S. Ct. at 51–52. After the sergeant's death, a Maine court placed a constructive trust on the proceeds in favor of the children. *Id.* at 50, 102 S. Ct. at 52. The Supreme Court reversed and held that the imposition of the constructive trust was inconsistent with the "strong language" of the anti-attachment provision. *Id.* at 60–61, 102 S. Ct. at 57–58. The Court recognized that it was an "unpalatable" outcome because the divorce decree specifically obligated the servicemember to provide for his children, but it emphasized that "Congress has insulated the proceeds of SGLIA insurance from attack or seizure by *any claimant* other than the beneficiary designated by the insured." *Id.* at 62–63, 102 S. Ct. at 59 (emphasis added).

In *Hisquierdo*, the Supreme Court considered a similar statutory prohibition against attachment that protected a federal-entitlement beneficiary. *See* 439 U.S. at 573, 99 S. Ct. at 804. The case involved retirement benefits payable pursuant to the Railroad Retirement Act of 1974. The Act provided that "no annuity [under the Act] shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever." *Hisquierdo*, 439 U.S. at 576, 99 S. Ct. at 805. The California Supreme Court held that the benefits were community property under state law because they would flow in part from the husband's employment during the marriage. *Id.* at 580, 99 S. Ct. at 808. The United States Supreme Court reversed, holding that ordering the husband to pay his wife out of his benefits would deprive the husband of a portion of the benefit that Congress protected for him under the anti-attachment provision. *Id.* at 583, 99 S. Ct. at 809. The court further held that the wife could not obtain an offsetting award of other community property, which would indirectly produce the same net result. *Id.* at 588, 99 S. Ct. at 811–12.

Before *Hisquierdo*, the United States Supreme Court also held California community property law to be preempted by an anti-attachment provision in the National Service Life Insurance Act, the predecessor to SGLIA. *See Wissner v. Wissner*, 338 U.S. 655, 659, 70 S. Ct. 398, 400 (1950). In *Wissner*, a deceased Army major's life-insurance benefits were claimed by both his widow and his parents. The major had designated only his parents as beneficiaries of the policy, but his widow claimed her community share under state law. The Supreme Court reversed the state court's judgment in favor of the widow, deeming it in "flat conflict" with the anti-attachment provision that protected payments to the named beneficiary "from the claims of creditors," and from "attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." *Id*. at 659, 70 S. Ct. at 400.

We acknowledge but distinguish *Rose v. Rose*, in which the United States Supreme Court considered a conflict between state family law and 38 U.S.C. § 5301, the same anti-attachment provision that applies to the death-gratuity benefits in our case.[1] 481 U.S. 619, 630–34, 107 S. Ct. 2029, 2036–38 (1987). A state court held a disabled Vietnam veteran in contempt for failing to pay child support. His only means of satisfying the child-support obligation were his military disability benefits. He argued that the state court action was preempted by section 5301 (then 3101), which provided that veterans' benefits were not "liable to attachment, levy, or seizure by

or under any legal or equitable process whatever, either before or after receipt by the beneficiary." *Id.* at 630, 107 S. Ct. at 2036. The Supreme Court disagreed. It observed that the veterans' disability benefits were intended to provide reasonable compensation for disabled veterans *and their families*. *Id.* at 634, 107 S. Ct. at 2038. The state contempt proceeding therefore did not frustrate the purpose of the statute because it furthered the federal objective for the benefits to support the veteran and his dependents. *Id.* The court reasoned that, unlike the application of the SGLIA anti-attachment provision at issue in *Ridgway*, "Congress ha[d] not made [Rose] the exclusive beneficiary of the disability benefits." *Id.* Unlike *Rose*, the life-insurance and death-gratuity instruments at issue here have a single beneficiary by operation of federal law and Levi's designation.

"[A] state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Ridgway*, 454 U.S. at 55, 102 S. Ct. at 55. The Angells' divorce decree conflicts directly with the applicable anti-attachment provisions because it diverts funds from Levi's sole designated beneficiary. Federal law empowered Levi to freely designate the beneficiary, and " 'Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other.' " *Id.* (quoting *Wissner*, 338 U.S. at 658, 70 S. Ct. at 399). We hold that the $150,000 award to Gordon Angell was effectively a seizure of Loretta Angell's nonmarital property and that this seizure violates the federal anti-attachment provisions of 38 U.S.C. §§ 1970(g) and 5301(a)(1). Although the district court correctly held that the award meets the objectives of Minnesota law, under the Supremacy Clause, the federal statutes control and prohibit the division.

D E C I S I O N

The district court properly classified the life-insurance and death-gratuity benefits as Loretta Angell's nonmarital property because they were intended as a gift to her only, and not to Gordon Angell. But the district court's awarding of a portion of her nonmarital property to Gordon Angell under state law conflicts with the authoritatively superior federal anti-attachment provisions that protect the funds from attachment, levy, or seizure either before or after the beneficiary's receipt. We therefore reverse on that issue only and remand for the district court to make a property distribution consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

[1] The anti-attachment provision considered in *Rose* was 38 U.S.C. § 3101. This statute was later renumbered to its current designation as 38 U.S.C. § 5301. *See* Department Of Veterans Affairs Health-Care Personnel Act Of 1991, Pub. L. No. 102-40, § 402(b)(1), 105 Stat. 187, 238–39 (1991).

STATE OF MINNESOTA

IN COURT OF APPEALS

A09-151

Riverview Muir Doran, LLC,
Plaintiff,

vs.

JADT Development Group, LLC, et al.,
Appellants,

First Choice Bank,
Respondent,

Darg, Bolgrean, et al.,
Defendants,

and

First Choice Bank,
Respondent,

vs.

JADT Development Company, LLC, et al.,
Appellants,

Riverview Muir Doran, LLC, et al.,
Defendants,

and

KKE Architects, Inc.,
Plaintiff,

vs.

JADT Development Company, LLC, et al.,
Appellants,

First Choice Bank,
Respondent,

Riverview Muir Doran, LLC, et al.,
Defendants.

Filed December 8, 2009

Affirmed in part, reversed in part, and remanded

Minge, Judge

Hennepin County District Court

File Nos. 27-CV-06-21709, 27-CV-07-10834, 27-CV-07-12974

Stephen M. Harris, Meyer & Njus, P.A., 1100 U.S. Bank Plaza, 200 South Sixth Street, Minneapolis, MN 55402 (for appellants)

Stephanie A. Ball, Fryberger, Buchanan, Smith & Frederick, P.A., 700 Lonsdale Building, 302 West Superior Street, Duluth, MN 55802 (for respondent)

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

S Y L L A B U S

When a mortgage secures a multiple-advance loan, the "original principal amount secured by the mortgage" for the purpose of computing the redemption period under Minn. Stat. § 580.23, subd. 2(2) (2008), is the greatest principal balance secured by the mortgage at any time during the term of the loan.

O P I N I O N

MINGE, Judge

Appellants, a developer and its owners, challenge the district court's determinations that respondent bank was entitled to foreclose its mortgage with appellant developer, that appellant developer is limited to a six-month redemption period, and that respondent bank is entitled to an award of attorney fees and a late-payment fee. We affirm as to the district court's determination of default, a six-month redemption period, and attorney fees, but we reverse and remand as to the late-payment fee.

F A C T S

Appellant JADT Development Company, LLC, a real estate development company owned by appellants Timothy and Doris Baylor, acquired land in Minneapolis near the Mississippi River with the intent to develop it in four phases. The construction of Phase I, consisting of 29 townhomes, was completed in October 2004. On March 22, 2005, appellants entered into a Construction and Term Loan Agreement (Loan Agreement) with respondent First Choice Bank to finance development of Phases II, III, and IV of the project.

The Loan Agreement established the terms of the loan and included a provision for multiple advances up to $19,125,000. JADT executed and delivered a mortgage that secured $19,125,000 "or so much thereof as may be advanced by Lender under the Note and pursuant to the Loan Agreement." The Baylors personally guaranteed JADT's obligations. The loan was payable in March 2007. JADT received an initial advance of $3,680,813.06, smaller advances in some of the following months, and regular monthly advances to cover the previous month's interest on the loan.

In May 2006, JADT defaulted on the loan, and appellants entered into a Forbearance Agreement with respondent. The Forbearance Agreement stated that JADT was in default because it failed to start required construction within 180 days of the date of the Loan Agreement and failed to pay real estate taxes due in 2005. The Forbearance Agreement also stated that as of May 3, 2006, JADT owed $4,038,503.72, that the purpose of the Forbearance Agreement was to give JADT time to secure other funding to complete the project, and that respondent would forbear from exercising its rights and remedies unless either (1) JADT failed to repay the loan by the new maturity date of November 9, 2006; or (2) JADT otherwise defaulted or breached its contractual duties to respondent. The Forbearance Agreement further provided that respondent would advance JADT up to $107,000 to demolish a building, that respondent had no obligation to make any further advances, and that the parties reaffirmed the terms and conditions of the Loan Agreement. Finally, the Forbearance Agreement contained a general release.

JADT again defaulted on the Loan Agreement by failing to make its final payment on November 9. Respondent assessed JADT a late-payment fee of $229,708.09 and subsequently brought an action to foreclose on the mortgage, to enforce the Baylors' personal guarantee, and to recover money damages from appellants, including the amount due and owing on the loan, the late-payment fee, and attorney fees. Respondent moved for and the district court granted summary judgment. The district court found JADT in default of the Loan Agreement, authorized foreclosure of the mortgage, limited JADT to a six-month redemption period, and awarded respondent attorney fees and late charges. This appeal followed.

I S S U E S

I. Is there a genuine issue of material fact as to whether respondent breached the Loan Agreement so as to excuse JADT's default?

II. Did the district court err in concluding that JADT had only a six-month redemption period?
III. Did the district court abuse its discretion in awarding attorney fees to respondent?
IV. Did the district court err in awarding a late payment fee to respondent?

A N A L Y S I S

Summary judgment is appropriate only when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. "A material fact is one that will affect the result or outcome of the case depending on its resolution." *Musicland Group, Inc. v. Ceridian Corp.*, 508 N.W.2d 524, 531 (Minn. App. 1993), *review denied* (Minn. Jan. 27, 1994). The evidence must be viewed in the light most favorable to the nonmoving party. *Grondahl v. Bulluck*, 318 N.W.2d 240, 242 (Minn. 1982). All doubts, inferences, and credibility determinations must be made in favor of the nonmoving party. *Anderson v. Twin City Rapid Transit Co.*, 250 Minn. 167, 186, 84 N.W.2d 593, 605 (1957). The purpose of summary judgment is to determine whether or not issues of fact exist, not to resolve issues of fact. *Albright v. Henry*, 285 Minn. 452, 464, 174 N.W.2d 106, 113 (1970).

I.

Appellants do not dispute that JADT was in default on the Loan Agreement. Rather, appellants claim that summary judgment was improper because there is a factual dispute over whether respondent failed to timely advance funds to cover necessary marketing, architectural, and demolition expenses for the project, and therefore whether JADT's default was excused by respondent's own breach of the Loan Agreement. Appellants assert that "[i]t is elementary that a breach of a contract by one party excuses performance by the other." *Wasser v. W. Land Sec. Co.*, 97 Minn. 460, 466, 107 N.W. 160, 162 (1906).

Here, the Forbearance Agreement affirms JADT's default and contains a "General Release" clause stating that "in exchange for the concessions made by [respondent] under this agreement, [appellants] . . . hereby release and forever discharge [respondent] . . . from any and all claims, defenses . . . or other causes of action . . . whether arising by contract, statute, common law, or otherwise." The law encourages the settlement of disputes, and releases are generally presumed valid. *Sorenson v. Coast-to-Coast Stores, Inc.*, 353 N.W.2d 666, 669 (Minn. App. 1984), *review denied* (Minn. Nov. 7, 1984). The law also presumes that "parties to a release agreement intend what is expressed in a signed writing." *Id.* at 669-70. Appellants do not challenge the validity or the intent of the release in the Forbearance Agreement. At most, it permits appellants to pursue claims or defenses that arose after the Forbearance Agreement was executed. The disputed obligations to advance funds for architectural and marketing expenses relate to a time period prior to the date of the Forbearance Agreement.

At oral argument, appellants raised the claim that respondent failed to timely comply with the Forbearance Agreement provision requiring the advance of $107,000 to fund the demolition of a building. Because appellants raised this argument for the first time at oral arguments, it is waived. *See Melina v. Chaplin*, 327 N.W.2d 19, 20-21 (Minn. 1982) (holding that issues not

argued in briefs are waived). Regardless, appellants conceded at oral argument that respondent advanced funds for building demolition 38 days after the Forbearance Agreement was executed. The record does not present a material factual question over whether the timing of this demolition advance constituted a breach of either the Loan Agreement or the Forbearance Agreement. We conclude that the district court properly granted summary judgment determining that JADT's default was not excused and that respondent had the right to resort to its remedies under the Loan Agreement, including foreclosure.

II.

The next issue is the length of the redemption period. Appellants argue that the district court erroneously interpreted Minn. Stat. § 580.23 (2008) in concluding that JADT is limited to a six-month, as opposed to a twelve-month, redemption period after the foreclosure sale. A district court's interpretation of a statute is a question of law subject to de novo review. *Ed Herman & Sons v. Russell*, 535 N.W.2d 803, 806 (Minn. 1995). The role of a court in interpreting a statute is to discover and effectuate the legislature's intent. *Peterson v. Haule*, 304 Minn. 160, 170, 230 N.W.2d 51, 57 (1975). "The foreclosure by advertisement statutes, Minn. Stat. ch. 580, indicate the allowable periods of redemption after a foreclosure sale," even in a foreclosure by action. *Norwest Bank Hastings Nat'l Ass'n v. Franzmeier*, 355 N.W.2d 431, 433-34 (Minn. App. 1984). When real property is sold pursuant to a foreclosure, the mortgagor may redeem the property within a certain time period after the sale, by paying the amount for which the property was sold and certain other expenses. Minn. Stat. § 580.23. Section 580.23 provides that a mortgagor normally has a six-month redemption period, but is entitled to a twelve-month redemption period when the "amount claimed to be due and owing as of the date of the notice of foreclosure sale is less than 66-2/3 percent of the original principal amount secured by the mortgage."

The mortgage in this case provided that it secured repayment of the principal amount of $19,125,000, "*or so much thereof as may be advanced* by Lender under the Note and pursuant to the Loan Agreement." (Emphasis added.) Appellants dispute the district court's conclusion that the original principal amount secured by the mortgage was $4,530,307.02, the outstanding principle balance of the loan. Appellants argue instead that the original principal amount secured by the mortgage is $19,125,000.

If the intent of a statute is discernable from its plain and unambiguous language, we apply the plain meaning of the statute. *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 539 (Minn. 2007). But here, the phrase "original principal amount secured by the mortgage" is not defined by statute or case law and is broad enough to support either appellants' or the district court's interpretation. When the language of a statute is susceptible to more than one reasonable interpretation, the statute is ambiguous and this court may refer to other canons of construction to discern the legislature's intent. *Id.* Legislative intent may be ascertained by considering factors such as the occasion and necessity for the statute, the circumstances under which it was enacted, the object to be attained by the statute, the law before the statute was enacted, and the consequences of a particular interpretation. Minn. Stat. § 645.16 (2008).

This court has previously addressed the circumstances under which section 580.23 was enacted. As we noted in *Franzmeier*, prior to 1967, the statutory-redemption period was "12

months in any situation." 355 N.W.2d at 433. In 1967, the redemption period was generally lowered to six months in acknowledgment of the fact that "most mortgagors do not redeem." *Am. Nat'l Bank v. Blaeser*, 326 N.W.2d 163, 164 (Minn. 1982) (citing Note, *Proposed Changes in Minnesota Mortgage Law*, 50 Minn. L. Rev. 331, 333-38 (1965)). A law review note observed that the longer redemption period for mortgagors who owe less than "66-2/3 percent of the original principal amount secured by the mortgage," reflects a policy that "mortgagors with a large equity should have a relatively longer period to redeem." Note, 50 Minn. L. Rev. at 338-39. We conclude that the intent of section 580.23, subdivision 2(2) was to grant an extended redemption period to certain mortgagors, including those who, by virtue of having paid down their loan, could have a relatively large equity in their property and are more likely to redeem. We also note that in situations where such principal reduction has occurred, the mortgagee is more apt to recover the indebtedness owing to it in the foreclosure process.

As for determining what is the "original principal amount," we note that the loan that JADT received was a multiple-advance construction loan. In this type of lending, funds are usually advanced to pay for improvements to real estate as they are made. By contrast, in typical residential mortgage lending, all funds are advanced at closing, the amount is the same as the face amount of the mortgage, and the principal loan amount is related to the value of the property at the time that the loan is made. In the traditional, single-advance loan, the difference between the amount stated in the mortgage and the amount owing on the loan at the time of foreclosure is more apt to reflect the borrower's equity in the property. Because the construction loan secured by JADT's mortgage was intended to finance ongoing improvements to the property, the maximum amount of the loan that could be secured by the mortgage reflected an estimate of the total cost of developing the property that could be financed by respondent, not the value of the property at the time the parties closed on the loan. The funds in a multiple-advance construction loan can be made available to the developer as needed, and the developer might not draw that full amount. Here, JADT never received the full $19,125,000 before it defaulted on the loan.

We therefore hold that, in the context of a multiple-advance construction loan, the "original principal amount secured by the mortgage" for the purposes of determining a mortgagor's redemption period under Minn. Stat. § 580.23 is the greatest principal balance due at any time during the term of the loan, but not more than the maximum amount set forth in the mortgage. In this case, the "original principal amount secured by the mortgage" is $4,530,307.02, the greatest principal balance due at any time by JADT during the term of the loan. Because the amount due and owing on the loan far exceeds 66-2/3% of this amount, JADT is limited to a redemption period of six months rather than twelve months.

III.

The third issue raised by appellant is whether the district court abused its discretion in awarding attorney fees and costs. The Loan Agreement required the borrower to pay "all costs and expenses required to satisfy the conditions of this Agreement, including but not limited to . . . Lender's attorneys fees." Attorney fees are recoverable if authorized by statute or contract. *Bolander v. Bolander*, 703 N.W.2d 529, 548 (Minn. App. 2005), *review denied* (Minn. App. 2005). A district court's decision on the reasonableness of attorney fees is subject to review under

an abuse-of-discretion standard. *Giuliani v. Stuart Corp.*, 512 N.W.2d 589, 596 (Minn. App. 1994).

A.

Appellants first assert that a substantial amount of respondent's attorney fees were incurred in the process of correcting a scrivener's error in the mortgage created by respondent's attorneys. The error was in the legal description and was corrected by court order in the judicial foreclosure proceedings. Although the district court subtracted from respondent's award the fees incurred in drafting the erroneous version of the mortgage, appellants argue that the district court should have also subtracted the attorney fees that respondent incurred in correcting the error, because those fees were attributable to the original error. Undisputedly, judicial reformation of the legal description in the mortgage was part of the lawsuit. But the record indicates that reformation of the mortgage was unopposed and uncontroversial. We conclude that the attorney fees that respondent incurred in pursuing reformation of the mortgage were not substantial, and that the inclusion of these fees was at most de minimus error that does not justify a remand. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (refusing to remand for de minimis error).

B.

Appellants also claim that respondent was unsuccessful in pursuing a motion for a temporary injunction against a second mortgagee and that the district court erred in allowing respondent to recover attorney fees related to pursuing that unsuccessful motion. But when claims in a suit "involve a common core of facts or will be based on related legal theories," the district court should not attempt to distinguish between the claims when awarding attorney fees because "[m]uch of counsel's time will be devoted generally to the litigation as a whole." *Musicland*, 508 N.W.2d at 535 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S. Ct. 1933, 1940 (1983)). In *Musicland*, this court affirmed the district court's award of attorney fees despite the fact that some of the claims in the lawsuit were unsuccessful, because the legal theories "depended on proving a common core of facts" and the types of claims were related. 508 N.W.2d at 535. "In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Id.* (quoting *Hensley*, 461 U.S. at 435, 103 S. Ct. at 1940). Attorney fees spent on a settlement agreement, although unsuccessful, were properly awarded by the district court because the fees "could be considered reasonable to the action." *Id.* at 536.

Here, appellants do not dispute that the unsuccessful motion arose at least as an indirect result of appellants' default and respondent's subsequent action to recover. We conclude that these fees reasonably relate to the overall litigation and that the district court did not abuse its discretion by failing to subtract attorney fees relating to that motion.

C.

Additionally, appellants argue that the district court's award of attorney fees was improper because respondent did not produce records containing a description of each item of work performed. Respondent contends that it redacted the descriptions of work performed in

order to protect privileged information. Minn. R. Gen. Pract. 119.01 sets out a procedure for recovering attorney fees by motion. Minn. R. Gen. Pract. 119.02 provides that the motion must be accompanied by an attorney's affidavit that includes: "A description of each item of work performed, the date upon which it was performed, the amount of time spent on each item of work, the identity of the lawyer or legal assistant performing the work, and the hourly rate sought for the work performed." The 1997 Advisory Committee Comment for Minn. R. Gen. Pract. 119.04 states that in order to protect privileged information that might appear in attorney billing statements, a moving party may either submit unredacted billing statements to a district court for in camera review or, alternatively, "the court can permit submission of redacted copies, with privileged material removed from all copies."

We note that rule 119 "is not intended to limit the court's discretion, but is intended to encourage streamlined handling of fee applications." *Gully v. Gully*, 599 N.W.2d 814, 826 (Minn. 1999) (quotation omitted). When the district court is familiar with the proceedings and the work done, it is within the district court's discretion to award fees without first acquiring a detailed accounting, although we advise against this practice. *River Towers Ass'n v. McCarthy*, 482 N.W.2d 800, 805-06 (Minn. App. 1992), *review denied* (Minn. May 21, 1992). Here, because respondent submitted unredacted copies of billing statements to the district court for review in camera, we discern no violation of rule 119 and no abuse of discretion.

D.

Next, appellants argue that the district court improperly allowed respondent to continue to supplement its claims for attorney fees in the orders that the district court issued subsequent to its April 30, 2008 order. Appellant provides no legal authority stating that a district court is unable to add attorney fees that a party has continued to incur after that judgment has been entered. Moreover, because the issue of attorney fees is "collateral to the merits of the underlying litigation," a district court retains jurisdiction to consider the issue even while an appeal is pending. *Kellar v. Von Holtum*, 605 N.W.2d 696, 700 (Minn. 2000). We therefore reject this argument.

IV.

The final issue raised by appellants is whether respondent was authorized to charge JADT a late-payment fee for missing its final payment on the loan. Under the terms of the Forbearance Agreement, JADT was required to pay off the balance of the loan when the loan matured on November 9, 2006. On November 20, 2006, after JADT failed to pay off the balance of the loan, respondent charged JADT a $229,782.03 late-payment fee, which represented five percent of the loan's outstanding balance of $4,595,640.52. Respondent maintains that it was authorized to charge this late-payment fee under section 2.6 of the Loan Agreement, which states:

> In the event that any required payment of principal or interest hereunder (*other than the final payment to be made on the Maturity Date*) is not made within ten days after the due date thereof, Borrower shall pay to Lender a late payment charge equal to five percent (5%) of the amount of the overdue

> payment, for the purpose of reimbursing Lender for a portion of the expense incident to handling the overdue payment.

(Emphasis added.)

The highlighted provision of the Loan Agreement specifically exempts the final payment of the loan from the late-payment fee. Respondent does not identify any term in the Loan Agreement, Forbearance Agreement, or related documents allowing a late-payment fee for missing this final payment. But the record is not conclusive as to whether any portion of the indebtedness could be subject to a late-payment fee under this section, and the district court does not address this question. We therefore conclude that respondent has not established that it was authorized to charge this late-payment fee to JADT as a matter of law and that the record does not support an outright reversal. Accordingly, we reverse the district court's grant of summary judgment as to this portion of respondent's award and remand the late-payment fee issue for further proceedings.

D E C I S I O N

We conclude that appellants fail to raise a genuine issue of material fact as to whether the district court erred in determining that JADT's default of the Loan Agreement was not excused by any breach by respondent and that JADT was limited to a six-month redemption period. We also conclude that the district court did not abuse its discretion in its award of attorney fees to respondent. We therefore affirm summary judgment as to these issues. We also conclude that respondent has not established that it was authorized to charge JADT the late-payment fee, and we reverse and remand as to that issue.

Affirmed in part, reversed in part, and remanded.

Dated:

STATE OF MINNESOTA

IN COURT OF APPEALS

A08-1658

State of Minnesota,
Appellant,

vs.

Prodochee NMN Williams,
Respondent.

Filed March 17, 2009

Reversed

Minge, Judge

Hennepin County District Court

File No. 27-CR-08-24006

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for appellant)

Leonardo Castro, Chief Hennepin County Public Defender, Peter W. Gorman, Assistant Public Defender, 701 Fourth Avenue South, Suite 1400, Minneapolis, MN 55415 (for respondent)

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

S Y L L A B U S

The term "brother" in Minn. Stat. § 609.341, subd. 15(2) (2006), includes half-brothers or brothers of the half blood.

O P I N I O N

MINGE, Judge

Appellant prosecutor challenges the district court's determination that a "significant relationship" under Minnesota law does not include a "half-brother" in the term "brother" and the district court's resulting dismissal of a felony criminal complaint for lack of probable cause. We reverse.

F A C T S

Respondent Prodochee Williams was charged with first-degree criminal sexual conduct pursuant to Minn. Stat. §§ 609.342, subds. 1(g), 2; .101, subd. 2; .3455 (2006). The amended complaint alleged that respondent, age 31, sexually penetrated Y.P., his fifteen-year-old half-sister. Appellant prosecutor charged the case under the "significant relationship" portion of the statute. *Id.* Respondent moved to dismiss for lack of probable cause arguing that, although brother and step-brother relationships are specifically prohibited in the statute, "half-brother" is not included in the list of defined "significant relationships." Minn. Stat. § 609.341, subd. 15(2) (2006). The district court concluded that, because the half-sibling relationship between Y.P. and respondent was not included in the list of prohibited relationships in the statute, probable cause did not exist to support the charge under Minn. Stat. § 609.342, subd. 1(g). Based on this conclusion, the district court dismissed the complaint. This appeal follows.

I S S U E S

1. Has the state demonstrated that the dismissal had a critical impact on the outcome of the state's case?

2. Did the district court err when it dismissed the complaint on the basis that the term "significant relationship," as defined in Minn. Stat. § 609.341, subd. 15(2), did not include a half-brother?

A N A L Y S I S

A dismissal for lack of probable cause is appealable if it is based on a legal determination. *State v. Ciurleo*, 471 N.W.2d 119, 121 (Minn. App. 1991). Under Minn. R. Crim. P. 28.04, this court will only reverse a pretrial dismissal when the state demonstrates that (1) the district court erred in its judgment; and (2) the error will have a critical impact on the ability to prosecute the case. *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005). As a legal determination, dismissal for lack of probable cause based on statutory interpretation is reviewed de novo. *State v. Linville*, 598 N.W.2d 1, 2 (Minn. App. 1999).

I.

The first issue is whether the dismissal had a critical impact on the outcome of the state's case. Critical impact is a threshold issue. *McLeod*, 705 N.W.2d at 784. Generally, dismissal of the complaint constitutes a critical impact on the prosecutor's case. *See State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (holding suppression of evidence resulting in dismissal meets the critical impact requirement). Respondent argues that the state has not shown critical impact because the district court's order has not terminated *any* possibility of a prosecution based on the same facts,

only foreclosing the sibling-sexual-misconduct basis on which the appellant has chosen to prosecute the case. Respondent's argument fails because: (1) the pretrial order resulted in a dismissal; (2) it is not certain that appellant could successfully prosecute respondent on other bases for first-degree criminal sexual conduct; and (3) the appellant has broad discretion to determine how to charge an offense. *See State v. Richmond*, 730 N.W.2d 62, 72 (Minn. App. 2007), *review denied* (Minn. June 19, 2007).

II.

The second issue is whether the term "brother" in the criminal sexual conduct statute includes half-brother. Respondent was charged with first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(g), which states in relevant part:

> A person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists:
>
> . . . .
>
> (g) the actor has a *significant relationship* to the complainant and the complainant was under 16 years of age at the time of the sexual penetration.

(emphasis added). Minnesota statute defines a "significant relationship" as:

> a situation in which the actor is:
>
> . . . .
>
> (2) any of the following persons related to the complainant by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt[.]

Minn. Stat. § 609.341, subd. 15.

"Where the legislature's intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted and we apply the statute's plain meaning." *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 539 (Minn. 2007); *see also* Minn. Stat. § 645.16 (2006) (providing that when the language of a statute is "clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit"). In contrast, when the language of the statute is ambiguous, the intent of the legislature controls but we assume that the legislature does not intend absurd or unreasonable results. Minn. Stat. §§ 645.16, .17 (2006); *see also State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003).

Plain Meaning

Earlier editions of Black's Law Dictionary, published in 1979 and 1990 respectively, defined "brother" to include half-brother:

> Brother. One person is a brother "of the whole blood" to another, the former being a male, when both are born from the same father and mother. He is a brother "of the half blood" to that other (or half-brother) when the two are born to the same father by different mothers or by the same mother to different fathers.

Black's Law Dictionary 194 (6th ed. 1990); *Black's Law Dictionary* 175 (5th ed. 1979). The current version of Black's Law Dictionary defines brother more simply:

> brother. A male who has one parent or both parents in common with another person.

Black's Law Dictionary 206 (8th ed. 2004). "Sister" is defined identically, except for the gender designation. *Id.* at 1420. The American Heritage Dictionary defines brother as: "A male having the same parents as another or one parent in common with another." *The American Heritage Dictionary* 236 (4th ed. 2000). The Oxford English Dictionary defines the term "brother" as:

> The word applied to a male being to express his relationship to others (male or female) as the child of the same parent or parents.
> . . . .
>
> . . . The son of the same parents. But often extended to include one who has either parent in common with another (more strictly *half-brother*, or *brother of the half blood*)[.]

The Compact Edition of the Oxford English Dictionary 1132 (1987). All these definitions of brother include half-brothers or brothers of the half blood; however, the Oxford dictionary recognizes some ambiguity depending on whether terms are used strictly.

Although court decisions have rarely considered the definition of the term "brother," one Minnesota federal district court case held that "[g]enerally speaking, it is universally recognized that 'brother and sister' embraces a brother and sister of the half blood." *Modern Woodmen of America v. Barnes*, 61 F. Supp. 660, 663 (D. Minn. 1945).

Some statutes in Minnesota have used detailed definitions for "brother," separately listing half-brothers or half-siblings to make clear how they are treated in the statutory scheme. *See, e.g.,* Minn. Stat. § 256J.08, subd. 34(1) (2008) (defining a family as "the following individuals who live together: a minor child or a group of minor children related to each other as *siblings*, *half siblings*, stepsiblings, or adoptive siblings . . .") (emphasis added); Minn. Stat. § 517.03, subd. 1(a)(2) (2008) (prohibiting marriages "between a brother and a sister, *whether the relationship is by the half or the whole blood* or by adoption") (emphasis added); Minn. Stat. §

527.21 (10) (2008) (defining members of a minor's family as "the minor's parent, stepparent, spouse, grandparent, brother, sister, uncle, or aunt, *whether of the whole or half blood* or by adoption.") (emphasis added); Minn. Stat § 524.2-107 (2008) (specifying that "relatives of the half blood inherit the same share they would inherit if they were of the whole blood."). Other statutes, like the one under consideration, are silent.

Although the dictionary definitions and the *Barnes* case clearly support including half-brother within the term "brother," because some Minnesota laws have explicitly listed half-siblings in other contexts to achieve clarity, we recognize that the statutory reach of the term "brother" for purposes of Minn. Stat. § 609.342, subd. 1(g), is arguably ambiguous. Because of the seriousness of the penalties imposed by this criminal sexual conduct law and because we strive to avoid the risk of an untoward application of the statute, we conclude that in this circumstance we should consider other factors to discern legislative intent.

Legislative Intent

To ascertain the legislature's intent when the words of a statute are susceptible of more than one reasonable interpretation, this court examines several factors, including:

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

Minn. Stat. § 645.16. In determining the intent of the legislature, Minnesota law enumerates several presumptions which courts use to guide their review:

> (1) the legislature does not intend a result that is absurd, impossible of execution, or unreasonable;
>
> (2) the legislature intends the entire statute to be effective and certain[.]

Minn. Stat. § 645.17. This court construes criminal statutes strictly. *Koenig*, 666 N.W.2d at 373. However, strict construction does not require that this court assign the narrowest possible interpretation to the statute. *Koenig*, 666 N.W.2d at 373; *State v. Zacher*, 504 N.W.2d 468, 473 (Minn. 1993).

The first-degree criminal sexual conduct statute, including the definitional portion, was amended in 1985 to add the language at issue. 1985 Minn. Laws ch. 286, § 14-15. The legislative history available does not clarify the meaning of the term "brother." However, in addition to "brother," the statute defines "significant relationship" to include ". . . stepbrother, stepsister, first

cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt." Minn. Stat. § 609.341, subd. 15.

If this court were to interpret the law to exclude half-brothers, the law would then include step-brothers (with no blood relation) and cousins (genetically more distant than half-brothers) but exclude a brother related by half blood. This result would both be illogical and contrary to the overall statutory purpose of prohibiting intra-family sexual contacts.

Based on the principles of statutory construction and dictionary definitions, we conclude that a half-brother is included in the term "brother" for the purpose of a prosecution for first-degree sexual conduct under Minn. Stat. § 609.341, subds. 1(g) and 15.

Rule of Lenity

Finally, respondent argues that Minn. Stat. § 609.341 is a criminal statute and the rule of lenity should apply. "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427, 105 S. Ct. 2084, 2089 (1985). In applying the rule of lenity, this court examines the reasonableness of an interpretation in light of the purpose of the rule, which is to ensure fair public notice of what conduct is considered illegal. *State v. Larkin*, 620 N.W.2d 335, 338 (Minn. App. 2001). Here, respondent is charged with sexually penetrating a young half-sister. There is no reasonable expectation that such conduct is acceptable. There is no credible claim that respondent or others in similar circumstances would be misled or confused by the statute into expecting such conduct is permitted. Based on the list of statutorily prohibited contacts and the standards of conduct in our society, respondent had fair notice that his conduct was prohibited. We conclude that the rule of lenity does not support modification of the conclusion we otherwise have reached.

D E C I S I O N

We conclude that the district court erred in interpreting the term "brother" in Minn. Stat. § 609.341, subd. 15(2), to exclude half-brother and that the resulting dismissal has a critical impact on the state's prosecution. We therefore reverse the dismissal and remand.

Reversed and remanded.

STATE OF MINNESOTA

IN COURT OF APPEALS

A08-1754

State of Minnesota,
Appellant,

vs.

James Jay Gradishar,
Respondent.

Filed June 2, 2009

Reversed and remanded

Worke, Judge

St. Louis County District Court

File No. 69DU-CR-08-3494

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

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Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Larkin, Judge.

S Y L L A B U S

For purposes of Minn. Stat. § 624.7142, which prohibits an individual from carrying a firearm in a public place while under the influence of alcohol, "public place" includes an individual's place of business if the public have access to the place of business.

O P I N I O N

WORKE, Judge

On appeal from the pretrial dismissal of a charge of carrying a firearm in a public place while under the influence of alcohol, in violation of Minn. Stat. § 624.7142 (2006), the state argues that the district court erred in defining "public place" to exclude a place of business owned and managed by the charged person. We reverse and remand.

F A C T S

Respondent James Jay Gradishar is the owner and manager of Norshor Experience, a bar in Duluth, Minnesota. On May 2, 2008, an off-duty officer working at the bar struck up a conversation with respondent, who mentioned that he had his gun in his pocket. Respondent had a permit to carry. The officer asked respondent if he had been drinking that night, and respondent admitted that he had. The officer arrested respondent and administered an Intoxilyzer test, which indicated that respondent's alcohol concentration was .15. Respondent was charged with carrying a pistol in a public place while under the influence of alcohol, in violation of Minn. Stat. § 624.7142. Respondent moved to dismiss, arguing that his place of business is not considered a public place. The district court, in defining "public place," under section 624.7142, found that it should have the same meaning as "public place" as defined in Minn. Stat. § 624.7181, subd. 1(c) (2006), which excludes a person's place of business. The district court dismissed the charge against respondent because he was in his place of business while carrying his pistol and under the influence of alcohol. This appeal follows.

I S S U E

Did the district court err in concluding that the definition of "public place," under Minn. Stat. § 624.7142, excludes one's place of business?

A N A L Y S I S

"When the state appeals from a pretrial order dismissing a criminal charge, this court will reverse only if the state clearly and unequivocally demonstrates that the district court erred and that the error, unless reversed, will have a critical impact on the outcome of the prosecution." *State v. Lopez*, 631 N.W.2d 810, 813 (Minn. App. 2001), *review denied* (Minn. Sept. 25, 2001). Critical impact is a threshold showing that must be made in order for an appellate court to have jurisdiction. *State v. Kim*, 398 N.W.2d 544, 550 (Minn. 1987). The state satisfies the critical-impact test when the district court's order is based on an interpretation of a rule that bars further prosecution of a defendant. *State v. Whitley*, 649 N.W.2d 180, 183 (Minn. App. 2002). It is undisputed that the district court's dismissal has "a critical impact on the outcome of the prosecution." *See Lopez*, 631 N.W.2d at 813. The state must then show that the district court erred in concluding that "public place," under section 624.7142, excludes one's place of business. "Whether a statute has been properly construed is a question of law to be reviewed de novo by this court." *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996).

Respondent was charged with carrying a firearm in a public place while under the influence of alcohol. There is no dispute that respondent was at the Norshor, a business that he owns and manages. Minn. Stat. § 624.7142, subd. 1(4) provides: "A person may not carry a pistol on or about the person's clothes or person in a public place . . . when the person is under

the influence of alcohol." The statute does not define "public place." The issue here is whether "public place" includes respondent's place of business.

The state argues that under the canons of statutory construction, when the statute fails to provide a definition, this court is to look to a dictionary definition for guidance. *See State v. Hartmann*, 700 N.W.2d 449, 453-54 (Minn. 2005) (relying on dictionary definitions for guidance in defining constitutional provisions). The state contends that the definition of "public place" should be:

> A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public (*e.g.* a park or public beach). Also, a place in which the public has an interest as affecting the safety, health, morals, and welfare of the community. A place exposed to the public, and where the public gather together to pass to and fro.

Black's Law Dictionary 1230-31 (6th ed. 1990). Respondent argues that "public place" is defined in section 624.7181, subdivision 1(c), which excludes from the definition "the place of business owned or managed by the person" charged. Respondent further contends that because Minn. Stat. § 624.714, subd. 1a (2006), adopts the definition set out in section 624.7181, subdivision 1(c), it would defy logic to conclude that the phrase "public place" used in section 624.7142 would include a person's place of business.

The parties agree that "public place" under section 624.7142 is ambiguous because it is subject to more than one reasonable interpretation. Because section 624.7142 does not define the term "public place," we agree that the term is ambiguous. *See State v. Mauer*, 741 N.W.2d 107, 111 (Minn. 2007) (stating that although this matter involved the express inclusion of a scienter element in a child-pornography statute, a reviewing court may treat a statute's silence on an element as an ambiguity). "The object of statutory interpretation is to determine and effectuate legislative intent[,]" and "[t]he ambit of an ambiguous criminal law should be construed narrowly according to the rule of lenity." *State v. Zeimet*, 696 N.W.2d 791, 793-94 (Minn. 2005) (citation omitted).

We conclude that the state's argument for a broader definition is more persuasive.[1] For purposes of section 624.7142, we conclude that "public place" shall be defined as: generally an indoor or outdoor area, whether privately or publicly owned, to which the public have access by right or by invitation, expressed or implied, whether by payment of money or not.[2] Under this definition, Norshor is a public place.

We adopt this definition for the following reasons. First, the relevant section of the criminal statutes, Minn. Stat. §§ 624.031 to .74 (2006), includes a definition section, but does not define "public place." *See* Minn. Stat. § 624.712. And the legislature, in enacting the Minnesota Citizens' Personal Protection Act of 2003 (MCPPA), did not provide a definitions section. *See* Minn. Stat. §§ 624.714 to .74. If the legislature had intended for a specific definition of "public place" to be used throughout chapter 624 or throughout the MCPPA, it would have provided one.

Second, the definition that the district court used is contained in section 624.7181. But this section specifically provides that the definitions contained therein apply to only that section. *See* Minn. Stat. § 624.7181, subds. 1 (providing that "[f]or purposes of this section, the following terms have the meanings given them"), 1(c) (defining "[p]ublic place" to "not include: a person's dwelling house or premises, [or] the place of business owned or managed by the person"). Further, section 624.714, subdivision 1a, specifically adopts the definition of public place found in section 624.7181, subdivision 1(c). *See* Minn. Stat. § 624.714, subd. 1a (providing that an individual who possesses or controls a pistol without a permit in a public place, "as defined in section 624.7181, subdivision 1, paragraph (c)," is guilty of a gross misdemeanor). Section 624.7142 does not expressly adopt the definition of public place provided in section 624.7181. Thus, given the plain language of section 624.7181, that the definitions found therein do not apply elsewhere, and the fact that section 624.7142 does not expressly adopt this definition as does section 624.714, the district court erred in adopting this definition.

Third, when interpreting a law to ascertain and effectuate the intention of the legislature and the words are not explicit, we may determine legislative intent by considering "the mischief to be remedied." Minn. Stat. § 645.16 (2006). In this case, the mischief, the possession of weapons by those who are intoxicated, is discernible from the plain language of the legislation. The district court used the definition of public place adopted in section 624.714, which penalizes individuals for being in possession or controlling a pistol in a public place without a permit. But section 624.7142 penalizes an individual for carrying a pistol while under the influence of alcohol. Because section 624.7142 seeks to remedy a separate and distinct mischief, the term "public place" should be defined in a manner that best remedies that particular mischief. The definition of public place found in section 624.7181, subdivision 1(c), and adopted in section 624.714, excludes a person's home and place of business. This makes sense when considering the reasons for allowing an individual to carry a pistol without a permit—to protect one's home and business. This is not the same reason behind section 624.7142, which seeks to protect the public.

Fourth, we may consider "the object to be obtained." Minn. Stat. § 645.16. The readily apparent object of section 624.7142 is to protect individuals in public places from harm that could result from intoxicated individuals carrying firearms. But the district court's adoption of the narrow definition of public place found in section 624.7181 is inconsistent with the public-safety goal. With public safety as the ultimate goal, it is evident that the legislature would attempt to minimize the locations where a permit holder may carry a firearm while intoxicated.

Finally, we may consider "the consequences of a particular interpretation," Minn. Stat. § 645.16, and give a "reasonable and sensible construction" to the statute, presuming that the legislature did not intend an absurd result. *Murphy*, 545 N.W.2d at 916. Under the district court's definition, permit holders who carry while under the influence are not subject to criminal liability under section 624.7142 if they carry at

> the place of business owned or managed by the person, or land possessed by the person; a gun show, gun shop, or hunting or target shooting facility; or the woods, fields, or waters of this state where the person is present lawfully for

> the purpose of hunting or target shooting or other lawful activity involving firearms.

Minn. Stat. § 624.7181, subd. 1(c). The result of this interpretation compromises public safety and is, therefore, not a reasonable and sensible construction.

D E C I S I O N

Because the district court erred in defining public place under Minn. Stat. § 624.7142 to exclude respondent's place of business, the district court erred in dismissing the charge against respondent of carrying a firearm while under the influence of alcohol in a public place.

Reversed and remanded.

[1] Although we are persuaded by the state's argument to adopt a more expansive definition, we do not accept the state's proposed definition because it is too general for the purposes of section 624.7142. Additionally, the state's proposed definition is itself ambiguous. For instance, the state's definition defines "public place" as "a place which is in point of fact public rather than private." *See Black's Law Dictionary* 1230-31 (6th ed. 1990). Further, the state advocates a definition of "public place" found in *Black's Law Dictionary.* But a more recent edition of *Black's Law Dictionary* defines "public place" as "[a]ny location that the local, state, or national government maintains for the use of the public, such as a highway, park, or public building." *Black's Law Dictionary* 1267 (8th ed. 2004). This definition is overly broad and does not suit this particular statute.

[2] In settling on a definition that is suitable for section 624.7142, which is neither too broad nor too specific, we searched through several sources and crafted a definition that should be used to define "public place" for purposes of this particular statute.

STATE OF MINNESOTA

IN COURT OF APPEALS

A08-0931

State of Minnesota,
Respondent,

vs.

Sylvester McCurry, Sr.,
Appellant.

Filed August 18, 2009

Affirmed

Toussaint, Chief Judge

Washington County District Court

File No. 82-K5-07-005850

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Douglas H. Johnson, Washington County Attorney, Washington County Courthouse, 14949 62nd Street North, Stillwater, MN 55082 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Toussaint, Chief Judge; and Halbrooks, Judge.

S Y L L A B U S

Evidence is admissible under Minn. Stat. § 634.20 (2006) only when the charges being tried include a charge constituting domestic abuse.

O P I N I O N

TOUSSAINT, Chief Judge

Sylvester McCurry, Sr. was convicted of burglarizing his ex-wife's home and stealing her wallet. In this appeal from conviction, he challenges the state's introduction of relationship evidence under the domestic-abuse statute. He also argues for reversible error based on a witness's unsolicited comment about a prior incarceration and based on the prosecutor's insinuations about the absence of alibi witnesses for appellant. Because we conclude that the errors individually were harmless, we affirm.

F A C T S

While appellant's ex-wife, G.M., was getting ready for work on August 25, 2007, a man forcefully entered her Woodbury home, damaging her patio door. The intruder, after encountering G.M. and a house guest, took G.M.'s wallet from her purse and left. G.M. and her house guest identified the intruder as appellant. Appellant called G.M. later that day and arranged to meet with her at Sun Ray Shopping Center, telling her that he wanted to show her where he ditched her wallet. Appellant denies that he was at G.M.'s house that morning and says that he arranged to meet with G.M. because she was concerned about an injury he had suffered and offered to give him a ride to pick up medications. G.M. arranged for police officers to follow her to the shopping center. Seeing them, appellant fled but was apprehended with the help of two police dogs. Appellant was charged with first-degree burglary.

At trial, the parties immediately made the troubled relationship between G.M. and appellant an issue. Defense counsel mentioned it in his opening statement. G.M. was the state's first witness and testified regarding her and appellant's history. She explained that they met in 1993 and she then became pregnant with appellant's child. The prosecutor asked, "And then what happened?" and G.M. replied, "Well, then he went to prison in Stillwater for a sexual—attempted sexual assault charge." Appellant moved for a mistrial, arguing that it was prejudicial for the jury to know that he is a convicted sex offender. The prosecutor argued that the statement was unsolicited and unexpected. The court agreed and denied the mistrial, stating that the jurors would be able to follow a curative instruction because they were "fairly sophisticated."

The district court explained to the jury that G.M. "mentioned that [appellant] had apparently served time in prison for an offense not in any way related to this case." It instructed the jury "to disregard and not consider in any way any offense for which [appellant] may have previously been incarcerated." At the start of the trial, the court also told the jury: "If I instruct you during the trial to disregard some statement that a witness has made, you must disregard it." Defense counsel also asked the court to forbid G.M. from testifying about "any other criminal activity or bad acts." The state argued that evidence of G.M. and appellant's relationship was admissible under Minn. Stat. § 634.20 (2006), despite conceding that the conduct underlying appellant's charges did not qualify as domestic abuse. The district court decided to have G.M. give her testimony outside the presence of the jury, so that the court could "figure out whether [the prior acts were] similar enough under 634.20 to be relevant enough to come in."

G.M. testified that, before and throughout her five-year marriage to appellant, she endured intermittent incidents of physical abuse and sexual infidelity, although there were also periods of stability and cordialness. G.M. told the court that a physical attack in 2005, for which appellant was convicted of misdemeanor domestic abuse, led her to seek to dissolve the marriage. She also proffered testimony about her and appellant's relationship after the marriage was dissolved, which included incidents of verbal and emotional abuse. G.M. testified that, at times, she told appellant to stop calling her or stop coming to her house. G.M. retained custody of their child, and she said appellant often tried to scare G.M. by claiming that the child protection office was investigating her.

G.M. also described three incidents that occurred in August 2007 in the weeks before the burglary. In the first incident, appellant came to G.M.'s house, argued with her, pushed her, and smashed her phone when she tried to call for help. She fled the house, but appellant remained, refused to leave, damaged property, and hid out in the house until G.M. returned. In the second incident, appellant entered G.M.'s house through the kitchen window one night and stayed with her overnight. In the third incident, he called G.M. and made a veiled threat, and G.M. discovered damage to her car the next morning.

The district court concluded that, under section 634.20, prior-act evidence was not limited to cases where the current charge qualified as domestic abuse, but instead turned on whether the prior conduct was similar to the current charge and not unfairly prejudicial. The court limited G.M.'s testimony to events that occurred after the marriage dissolution, closer in time to the charged incident, and stated that G.M. could testify, generally, that she and appellant had problems and at times she had to call the police. The court allowed G.M. to testify to the three incidents she described and gave the jury an instruction explaining the purpose of the evidence. G.M. testified substantially as she had in the proffer, within the limits set by the court.
The state called other witnesses. G.M.'s houseguest the morning of the burglary testified that appellant was the burglar. A bus driver testified that she saw appellant on her bus that morning and that she dropped him off in Woodbury. A police officer testified about photographs he took of G.M.'s broken patio door. Canine officers also testified that appellant ran when he saw police with G.M. at the shopping center. Another officer testified about a statement appellant gave after being arrested, in which he avoided discussing his whereabouts that morning.

Appellant testified that the main source of stress between him and G.M. after the marriage dissolution was money that she allegedly owed him from the value of their marital home. He did not address the three incidents that took place in the weeks before the August 25 burglary. As for the burglary itself, he said he was home that morning in bed and later took the bus to the shopping center to meet a friend and buy throw pillows. He also called G.M. that morning to talk about their daughter. He said G.M. wanted to meet him at the shopping center because she was concerned about an injury he was recovering from. The injury involved bites from police dogs in a previous incident; he claimed these injuries explained why he ran when seeing canine officers with G.M. at the shopping center.

During cross-examination, the prosecutor elicited appellant's claim that an overnight guest and a downstairs neighbor saw him at home that morning. The prosecutor impliedly asked appellant why he did not call either of them as a witness. On re-direct, appellant said that he had

lost contact with both of them. The state renewed its reference to the absent witnesses in a statement during closing argument, without objection from appellant. Following additional witness testimony, the jury found appellant guilty.

I S S U E S

1. Did the district court abuse its discretion by denying appellant's motion for a mistrial following G.M.'s testimony that appellant served a sentence for a sex crime?

2. Did the district court commit reversible error by allowing evidence of appellant's prior bad acts?

3. Did the prosecutor's statements about appellant's failure to call certain witnesses constitute reversible error?

4. Is the record sufficient to determine whether appellant's trial counsel was constitutionally ineffective?

A N A L Y S I S

I.

Appellant argues that he should have been granted a mistrial after G.M. told the jury that he had spent time in prison for a sex offense. The district court's denial of a motion seeking a mistrial is reviewed for abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003).

"A mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred." *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (quotation omitted). References to a defendant's prior criminal history can be unfairly prejudicial. *See State v. Strommen*, 648 N.W.2d 681, 687-88 (Minn. 2002) (discussing testimony by officer who testified that he had prior contact with defendant and by accomplice who testified that defendant bragged about prior crimes). The prosecutor has an obligation to caution its witnesses against making prejudicial statements. *State v. Underwood*, 281 N.W.2d 337, 342 (Minn. 1979). But a district court's appropriate curative instructions may be sufficient to overcome the harm caused by inadvertent references to prior convictions. *See State v. Miller*, 573 N.W.2d 661, 675-76 (Minn. 1998) (affirming district court's denial of mistrial motion where it immediately gave curative instruction following witness's testimony that appellant "had past felonies" and took extra steps to ensure witnesses would not discuss past convictions).

The district court did not abuse its discretion by denying appellant's motion. The comment at issue here was isolated, a single reference to a prior crime. G.M. said appellant "went to prison" for an "attempted sexual assault charge." The parties do not dispute that the prosecutor did not intentionally elicit the comment, and the court counseled the prosecutor to remind all of its witnesses not to mention appellant's record. The district court also gave a

thorough instruction, without mentioning the nature of the charge, and without stating definitively whether or not appellant had in fact been to prison. It instructed them to disregard G.M.'s statement and "not consider [it] in any way." The district court had previously given a general instruction preparing the jurors for the idea that they might hear things they would have to ignore and also relied on its own sense that the members of the jury were sufficiently "sophisticated" to disregard G.M.'s statement.

Our conclusion is not altered by *State v. Huffstutler*, 269 Minn. 153, 130 N.W.2d 347 (1964). In *Huffstutler*, which also involved an inappropriate comment about irrelevant sexual behavior by the defendant, the supreme court stated that it may be unrealistic to expect a curative instruction to negate the impression such a comment might have made on jurors. *Id.* at 156, 130 N.W.2d at 349. Appellant argues that it is a "naïve assumption" or "unmitigated fiction" that prejudicial statements can be overcome with an instruction. *See State v. Caldwell*, 322 N.W.2d 574, 591 (Minn. 1982) ("The naïve assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction." (quotation omitted)). But doubts about instructions have not held sway in Minnesota courts, which in the years since *Huffstutler* have adopted a presumption that jurors follow instructions. *See State v. Hall*, _ _ _ N.W.2d _ _ _ (Minn. 2009); *see also State v. Forcier*, 420 N.W.2d 884, 885 n.1 (Minn. 1988) (stating presumption apparently for first time in Minnesota, and relying on contemporaneous U.S. Supreme Court discussion of question). Even in the *Caldwell* case cited by appellant, the court stated that giving an instruction generally "is a significant factor favoring the denial of a motion for a mistrial." *Id*. at 590 (citing *State v. Carlson*, 264 N.W.2d 639, 642 (Minn. 1978)). The court here amply and fairly instructed the jury and it was not an abuse of discretion to deny a mistrial.

II.

The district court allowed G.M. to describe, in general terms, their relationship after their marriage was dissolved and admitted evidence of three incidents from the weeks before the burglary. The district court allowed the evidence under Minn. Stat. § 634.20 (2006). The parties on appeal also argue admissibility as "general" (non-domestic-abuse) relationship evidence and as *Spreigl* evidence.

Evidentiary rulings are reviewed for abuse of discretion. *State v. Word*, 755 N.W.2d 776, 781 (Minn. App. 2008). Appellant must show prejudice by the ruling. *Id.* Construction of a statute or rule of evidence is a question of law subject to de novo review. *State v. Northway*, 588 N.W.2d 180, 181 (Minn. App. 1999).

Minn. Stat. § 634.20 states: "Evidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members, is admissible" unless it should be excluded for other, enumerated reasons. Reasons requiring exclusion include a finding that the evidence is more prejudicial than probative. *Id.* "Similar conduct" under the statute "includes, but is not limited to" domestic abuse, violation of an order for protection, violation of a harassment restraining order, violation of the harassment/stalking statute, or violation of the harassing/obscene-phone-call statute. *Id.* Domestic abuse, as included in the "similar conduct" definition, is defined by statute to include acts against a family or household member

encompassing: physical harm, bodily injury, or assault; the infliction of fear of imminent physical harm, bodily injury, or assault; terroristic threats; criminal sexual conduct; or interference with an emergency call. Minn. Stat. § 518B.01, subd. 2(a) (2006).

Respondent here conceded that the conduct underlying the charges did not amount to "domestic abuse" under section 634.20. We must therefore determine whether this statute applies to trials not involving charges of domestic abuse. The threshold question for interpretation of a statute is whether its text is ambiguous. Minn. Stat. § 645.16 (2008). A statute is ambiguous if it is susceptible of more than one reasonable interpretation. *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001).

Section 634.20 is ambiguous because it is not clear on its face whether it applies to non-domestic-abuse charges. The statute's terms do not explicitly require the current charge to be domestic abuse, and the similar-conduct evidence it allows is "not limited to" the delineated acts. On the other hand, it plainly appears to be a domestic-abuse statute, as it refers to "the victim" of domestic abuse and defines "similar conduct" in terms reasonably understood to encompass acts related to domestic violence.

Our appellate courts have not directly addressed this question but have generally presumed that the statute only applies when the charges include domestic abuse. In an opinion interpreting a different aspect of section 634.20, the supreme court stated that the statute's text means that "evidence of similar conduct *in domestic abuse trials* is relevant and admissible unless it should be excluded for the reasons listed." *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004) (emphasis added). In *State v. Copeland*, this court said "the statute applies *only in cases where a person is charged with domestic abuse* and the state intends to introduce evidence of prior domestic abuse involving the accused and the victim of the currently charged offense." 656 N.W.2d 599, 602 (Minn. App. 2003) (emphasis added).

Analysis of the statute's text favors the domestic-abuse-only interpretation. The first sentence of the statute refers to "the accused," a reference to the person defending against the current charge. It mentions "similar conduct," a phrase that is meaningless without considering what the "conduct" to be proven is "similar" to, namely, the currently charged conduct. The reference to "the victim of domestic abuse" in the same sentence is reasonably understood as a reference to the victim of the current charge. *See ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005) (requiring phrases in statute to be read in context with other phrases). The text essentially requires the similar conduct and the current charge to have three things in common: the defendant, the victim, and domestic abuse.

Closer examination of the phrase "the victim of domestic abuse" supports the same conclusion. If the phrase were meant to refer to *any* past occurrence of domestic abuse, and not specifically to the current charge, the legislature would have used the indefinite article "a" instead of the definite article "the." The definite article is more specific, and is used to "denote particular, specified persons or things." *The American Heritage Dictionary* 1859 (3d ed. 1992). Here, the person whose relationship with the accused is to be illuminated by past conduct is not just "*a* victim of domestic abuse" but "*the* victim of domestic abuse." The domestic abuse referred to must be a specific instance, namely, the current charge.

Arguments for the alternative interpretation are reasonable, but unpersuasive. The district court focused on the phrase "similar conduct," concluding that section 634.20 applies whenever the past conduct and current charge are sufficiently similar, so long as the current victim has ever been a "victim of domestic abuse." The statute does state that admissible similar conduct is "not limited to" the types of domestic violence listed.

The first problem with this argument is that the "not limited to" language is more likely meant to encompass general testimony about the relationship, including conduct that does not rise to the level of the crimes listed in the definition of "similar conduct." Such evidence was admitted in this case, when G.M. described ongoing tension, arguments, or minor spats between her and appellant. The more troublesome aspect of the district court's interpretation, however, is that rules of evidence separately exist for the introduction of evidence of prior, non-domestic-abuse crimes in a trial for a current, non-domestic-abuse crime. *See State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006) (explaining requirements for admission of *Spreigl* evidence). We see no reason to conclude that section 634.20 is meant to replace the *Spreigl* rule in cases other than those charging domestic abuse. *See McCoy*, 682 N.W.2d at 161 (stating that unique treatment of evidence under section 634.20 is "appropriate in the context of . . . domestic abuse").

Under our interpretation, if the defendant is charged both with burglary and a domestic-abuse crime, the state can utilize section 634.20. *See State v. Bell* 719 N.W.2d 635, 640-42 (Minn. 2006) (discussing statute in context of charges for burglary and violating an order for protection). But the state here conceded that the burglary incident did not qualify as domestic abuse under the statue defining it. When the state cannot charge a crime constituting domestic abuse, it may not use § 634.20 to circumvent rules of admissibility for prior bad acts. It was therefore error for the district court to rely on section 634.20 to admit the evidence of prior bad acts.

On appeal, the parties' arguments address whether the challenged testimony was alternatively admissible as general relationship evidence or *Spreigl* evidence. We agree that G.M.'s more general testimony about tensions and disagreements was admissible as relationship evidence without regard to section 634.20, and without being treated as *Spreigl* evidence. *See State v. Boyce*, 284 Minn. 242, 260, 170 N.W.2d 104, 115-16 (1969) (upholding admission of testimony, without notice, about prior "ill will or quarrels" between defendant and victim). Evidence illuminating the relationship between a defendant and victim is relevant, and appellant certainly understood that aspects of their relationship would be an issue in the case as he raised their relationship himself in his opening statement. The state was not required to provide notice that it would offer this evidence. *Id.*

But G.M.'s testimony about the three incidents described specific, prior, bad acts. Each incident constituted an uncharged crime on its own, close in time to the charged conduct. Such evidence heightens the concern that a defendant will be convicted not because of the charged conduct but "because he has escaped unpunished from other offenses." *State v. Spreigl*, 272 Minn. 488, 496, 139 N.W.2d 167, 172 (Minn. 1965). The three incidents may not fairly be deemed mere relationship evidence and must be characterized as *Spreigl* acts and subject to *Spreigl* requirements. *See Boyce*, 284 Minn. at 260, 170 N.W.2d at 115 (distinguishing evidence "bearing directly on the history of the relationship" from evidence of prior, uncharged crimes).

Spreigl evidence cannot be used unless the state gives notice. *Ness*, 707 N.W.2d at 685-86 (stating, as one of five requirements, that state must give notice of intent to offer *Spreigl* evidence). Appellant could only have fairly defended against this evidence if he had been given proper notice, which the state did not do. *See Boyce*, 284 Minn. at 260, 170 N.W.2d at 115 (stating that purpose of *Spreigl* notice "is to prevent a defendant from being taken by surprise and required to defend against charges of criminal conduct not embraced in the indictment"). Absent notice, testimony about the three incidents was inadmissible and we do not address any of the other *Spreigl* requirements.

Erroneous admission of evidence requires reversal of the conviction if there is a reasonable possibility it may have contributed to the conviction. *State v. Buchanan*, 431 N.W.2d 542, 550 (Minn. 1988). Appellant bears the burden to show that he was prejudiced by the erroneous admission. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

We conclude that appellant has failed to show that he was prejudiced by evidence of the three inadmissible incidents, for several reasons. First, the jury could only have acquitted appellant by arriving at some other explanation for the testimony of the eyewitnesses. Appellant's theory was that G.M. was trying to frame him for a random burglary committed by an unknown person, but his own testimony established that he had been trying to get money from her for his share of the value of the marital house. And, in any event, two witnesses besides G.M. testified to appellant's actions that morning. The record provides no reasonable basis for the jury to conclude that the house guest and bus driver were lying when they placed appellant in the area, and not at home in bed as he claimed. Second, appellant's own testimony that he was at home that morning was undermined by his conspicuous unwillingness to offer *any* explanation of his whereabouts when he spoke to police after being arrested. On cross-examination at trial, appellant failed to articulate any credible reason why he did not simply tell police he had been home in bed that morning. Third, appellant admitted fleeing from the police at the shopping center, which can imply a consciousness of guilt. Again, his own testimony attempting to justify the flight likely did more harm than good, as it had the tendency to portray him as someone who frequently has run-ins with police dogs. The prosecutor did nothing impermissible to create this damaging impression.

In short, the prosecutor offered credible evidence about appellant's actions on August 25, 2007, that he failed to rebut when he chose to testify. Even without reference to the three inadmissible incidents, the state's case raised questions in jurors' minds for which appellant did not provide a plausible defense. The question before us is whether he now can show a reasonable probability that the jury would have acquitted him, absent the erroneous admission of evidence. We find no such probability in this record. The erroneous admission was harmless. *See* Minn. R. Crim. P. 31.01 ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.").

III.

Appellant argues that the prosecutor committed reversible misconduct by implying that he failed to call witnesses to attest to his alibi. In his cross-examination of appellant, the prosecutor elicited the names of two people that appellant claimed saw him the morning of the

burglary. The prosecutor asked, in both instances, whether the person could have been called as an alibi witness. In closing argument, the prosecutor stated that appellant "doesn't have to prove anything," but nonetheless invited the jurors to wonder why these people were not called if, in fact, they could verify appellant's alibi.

Appellant did not object to the prosecutor's questions and statements. We therefore review for plain error. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). If the defendant establishes that an error occurred and that the error was plain, the burden shifts to the state to establish that the misconduct did not prejudice the defendant's substantial rights. *Id.* at 302. The state meets this burden if it can show that there is no reasonable likelihood that the misconduct had a significant effect on the jury's verdict. *Id.* Factors to consider in assessing whether the state has met this burden are "[1] the strength of the evidence against the defendant, [2] the pervasiveness of the improper suggestions, and [3] whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *State v. Jones*, 753 N.W.2d 677, 692-93 (Minn. 2008).

A prosecutor is not permitted to comment about the absence of a witness that the defendant might have called. *State v. Mayhorn*, 720 N.W.2d 776, 787 (Minn. 2006). Such comments undermine the fundamental notion that the defendant does not bear any burden of proof and also encourage the impermissible inference that the absent witnesses' testimony would be unfavorable. *Id.* Such comments constitute prosecutorial misconduct. *See id.* (finding error in unobjected-to question impugning defendant's failure to call an alibi witness).

Plain error has been established in this case because the prosecutor improperly commented on appellant's failure to call certain witnesses. The burden is on the state to establish that there is "no reasonable likelihood" that the impermissible references had a significant effect on the jury's verdict. We address the *Jones* factors in turn.

Under the first factor, the state had a very strong case against appellant, as discussed above. This weighs against the reasonable likelihood of a significant effect on the jury.

Under the second *Jones* factor, mentioning appellant's alibi witnesses is the only type of improper conduct by the prosecutor that appears in the record, and it did not figure prominently in respondent's case. On cross-examination of appellant, questions about his alibi consumed a significant portion, but most of the examination was proper. The questions implying appellant's failure to call two witnesses were only a small part of this line of questioning. The missing alibi witnesses were not prominently featured in the prosecutor's closing argument, receiving only one fleeting mention.

The third of the *Jones* factors also weighs in favor of harmlessness: appellant took the opportunity to address the prosecutor's improper implications on redirect. His attorney elicited statements explaining why appellant had not been able to call his alibi witnesses at trial. This bears directly on one of the concerns about this sort of misconduct by prosecutors, as it weakens the implication that the witnesses' testimony would have been unfavorable. As for the other concern—the implication that appellant bore some burden of proof—the prosecutor himself cautioned the jury on this issue, stating in closing argument that appellant did not have to prove

anything. Although this does not make the prosecutor's statement less improper, it does weigh in the consideration of harmlessness.

Based on the *Jones* factors, particularly the strength of the state's case, we conclude that the state has met its burden. There is no reasonable likelihood that the prosecutor's misconduct in referring to appellant's failure to call witnesses had a significant effect on the jury's verdict.

IV.

In his pro se brief, appellant argues that the representation provided by his trial counsel was constitutionally ineffective. Claims of ineffective trial counsel will be addressed on direct appeal only if the facts underlying the claim do not need to be developed beyond the district court record. *Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004). In support of his argument, appellant has provided a number of documents with his brief, none of which are part of the district court record in this case. As such, they cannot be considered in this appeal, because they are not among "[t]he papers filed in the trial court, exhibits, and the transcript of the proceedings." Minn. R. Civ. App. P. 110.01. We note that a claim of ineffective trial counsel that could not be addressed on direct appeal may be raised in a subsequent post-conviction petition. *Torres*, 688 N.W.2d at 572.

D E C I S I O N

Because evidence of prior incidents was not admissible under Minn. Stat. § 634.20 or otherwise, the district court erred in admitting testimony about these incidents. But this and the other claimed errors were harmless and do not require reversal. The record is insufficient to address appellant's ineffective-assistance-of-counsel claim.

Affirmed.