

NO. A05-1038

State of Minnesota
 In Supreme Court

Ted Harrison, Jr., a minor, by
 Audrey Harrison, his guardian ad litem,
 Respondent,

v.

Amy and Ted Harrison, Sr.,
 Appellants.

REPLY BRIEF OF APPELLANTS

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Table of Contents

	<u>Page</u>
Table of Contents	i
Table of Authorities	iii
Argument and Authorities	1
I. Minn. Stat. § 169.685 must be construed as a whole and the exception must be construed narrowly	2
II. Legislative history can and should be examined because the statute is ambiguous or because the broad construction given to the exception creates an absurd result.....	4
III. Respondent’s proposed interpretation impermissibly expands the exception so that it swallows the rule	9
Conclusion.....	12

Table of Authorities

<u>Cases</u>	<u>Page</u>
<i>America Tower L.P. v. City of Grant</i> , 636 N.W.2d 309 (Minn. 2001)	4
<i>Balder v. Haley</i> , 399 N.W.2d 77 (Minn. 1987)	10
<i>Germann v. F.L. Smithe Machine Co.</i> , 395 N.W.2d 922 (Minn. 1986)	10
<i>Hyatt v. Anoka Police Department</i> , 691 N.W.2d 824 (Minn. 2005)	6
 <u>Statutes and Rules</u>	
Minn. Stat. § 169.685	2, 5, 7
Minn. Stat. § 245.18	7
 <u>Other Authority</u>	
Shertzer, <i>The Elements of Grammar</i> (1986)	5

Appellants Amy Harrison and Ted Harrison, Sr. (“Appellants”) respectfully submit this brief in response to the arguments of Respondent Ted Harrison, Jr. (“Respondent”) and of Amicus Curiae Minnesota Trial Lawyers Association (“MTLA”).

ARGUMENT AND AUTHORITIES

Respondent claims in a separate action that Appellants installed and maintained a car seat negligently, which resulted in Respondent’s personal injuries in a car accident. Because this evidence falls directly under the plain language of the seat belt gag rule, it is not admissible. If the gag rule is to be given any meaning, it must apply to this case.

Respondent does not dispute that the gag rule applies to preclude introduction of evidence of installation or use of seat belts or car seats. The lower courts and Respondent concluded that the exception to the rule applies, and broadly construed the exception. Respondent, however, fails to address what meaning can be given to the gag rule if the exception is broadly construed. Respondent instead focuses only on the text of the exception. This Court should reject Respondent’s attempt to simply examine the exception essentially in a vacuum. Instead, the Court should fully consider the entire statute and the context in which the exception was enacted, an exception that by definition must be narrowly construed.

The issue before the Court is how to reconcile both the gag rule and its exception so that complete meaning is given to both and the Legislature’s purpose and intent is fulfilled. Because reasonable but conflicting interpretations can be given to the statute as a whole, it is ambiguous as applied in this case and thus the legislative history can and should be examined.

The evidence that Respondent seeks to admit in the separate negligence action against Appellants falls under the gag rule and not the exception. The statute does not allow introduction of evidence as to Appellants' negligent maintenance of the car seat or their negligent installation of the car seat (by failing to convert a seat belt harness into a proper locking mode and confirming that the car seat buckle was securely latched). The exception should not be construed so as to allow it to swallow the rule.

I. Minn. Stat. § 169.685 must be construed as a whole and the exception must be construed narrowly.

Respondent separately sued the car seat manufacturer and settled that lawsuit for alleged defects in the design and manufacture of the car seat. This separate action is for Appellants' alleged faulty or negligent installation and maintenance of the car seat.

Under the seat belt gag rule, the evidence Respondent seeks to introduce is not admissible. To give complete effect to all the language in the statute, both the gag rule and its exception need to be closely examined and read together.

The seat belt gag rule precludes all evidence of installation or failure of installation of seat belts or car seats. The exception, however, does not apply to this evidence – “proof of the installation or failure of installation of seat belts or a child passenger restraint system” is not mentioned in the exception.

The seat belt gag rule also precludes all evidence of use or failure to use seat belts or car seats. The exclusion applies, however, in certain instances to allow “the introduction of evidence pertaining to the use of a seat belt or child passenger restraint system.” This evidence of use is only allowed in an action for damages from an incident

involving a defective seat belt or car seat. The exception does not allow an action for injunctive relief, for example. As well, the exception does not allow evidence of installation of a seat belt or car seat, whether defective or not.

Importantly, the gag rule exception is narrower than Respondent contends. Respondent argues that introduction of evidence as to faulty installation and defective installation of the car seat is permitted under the exception. *E.g.* Respondent's Brief at 12 (arguing that "the statutory exception permits the introduction of evidence as to . . . the *installation* of the car seat" (emphasis added)). The exception, however, only permits the introduction of evidence pertaining to the "use" of a car seat. It makes no mention of permitting the introduction of evidence pertaining to the installation of a car seat. To the extent Respondent contends that evidence pertaining to "use" somehow encompasses evidence pertaining to "installation," Respondent has failed to articulate or support this argument. Moreover, this begs the question as to what the Legislature meant when in subd. 4(a) it references both use and installation (as well as failure of use and failure of installation), but in subd. 4(b) it singles out only use. As noted below, this is an ambiguity in the statute.

Respondent errs in equating Appellants' alleged negligent installation and negligent maintenance with defective installation. A review of the Complaint and the stipulated facts reveals that Respondent's claim against Appellants is one for negligence. or as Respondent puts it, "faulty installation." The claim against Appellants is for negligence, and is not a claim for a defective product.

Respondent argues that “defective installation” is not a term of art because it is sometimes used in contexts apart from product liability claims. Respondent cites cases involving installation of water mains and roofs, as well as heating, plumbing, electrical, and cooling systems. *See* Respondent’s Brief at 14-15. These cases involve professional installers, who are often licensed to perform installations. Appellants’ behavior was of an entirely different kind here. Moreover, in the examples Respondent cites, there was not an unambiguous statutory gag rule prohibiting the introduction of evidence of use or installation concerning the particular product. In the context of the entire statute, which specifically deals with defective products, the litany of “defectively” modified products does suggest a term of art.

II. Legislative history can and should be examined because the statute is ambiguous or because the broad construction given to the exception creates an absurd result.

Respondent contends that the statute is unambiguous and thus this Court is precluded from examining legislative intent. A review of the entire statutory scheme reveals that the statute is ambiguous in several respects. To put it mildly, when the Legislature refused repeated calls to repeal the gag rule entirely, it was less than artful in its crafting of the exception.

Respondent is correct that a statute is ambiguous if its language is subject to more than one reasonable interpretation. *See Am. Tower L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). In several respects the statute here is subject to more than one

reasonable interpretation or it also produces an absurd result, and thus this Court can and should examine the legislative intent and purpose behind the gag rule and its exception.

“an action for damages” – “one” versus “any”

Appellants contend that the exception does not permit multiple actions, but instead only permits “an action for damages” (and in such an action, permits evidence of use, but not evidence of installation, of a seat belt or car seat). In response, Respondent argues that “an” is an indefinite article, meaning “any” and thus the exception allows “a person to bring [any] action for damages . . .” Respondent’s Brief at 16. While “an” is an indefinite article, its meaning is not limited to the word “any.” As Black’s Law Dictionary notes, “an” is an indefinite article equivalent to either “one” or “any,” and seldom is used to denote plurality. Thus, another reasonable interpretation of the exception means that it allows “a person to bring [one] action for damages . . .” Given that two reasonable interpretations exist as to the exclusion – one limiting a person to “one action” and one permitting a person to bring “any action” – an ambiguity exists.

See Am. Tower, 636 N.W.2d at 312.¹

As well, the Legislature chose the word “any” in Minn. Stat. § 169.685, subd. 4(a) when referencing “any litigation” and “any motor vehicle,” yet included the word “an” in § 169.685, subd. 4(b) when referencing “an action” and “an incident.” As this Court has

¹ The word “an” also is an indefinite article used in place of the indefinite article “a” before words in which the first sound is a vowel, except long *u*, and before words beginning with silent *h*. Shertzer, *The Elements of Grammar*, at 38-39 (1986). Here, the exception used the indefinite article “an” because the next word “action” begins with a vowel sound. Substituting the indefinite article “a,” meaning singular, would make clear that a single action, *i.e.* “a lawsuit” and not multiple actions or lawsuits, is permitted under the exception.

noted recently, the word “any” is given broad application in statutes. *Hyatt v. Anoka Police Dept.*, 691 N.W.2d 824, 826 & n.1 (Minn. 2005). This distinction in the statutory language should not be ignored; “an action” should be construed as “one action” and should not be construed broadly as “any action,” particularly when different words are used in the statute.

Respondent also argues that “joinder” is not required under the common law, and thus Appellants’ “an action” argument fails. Respondent does not dispute, however, that the Legislature (and this Court) can mandate joinder and have done so. Here, the Legislature has essentially mandated “joinder” by wording the exception to the gag rule to allow only “an action for damages” and to permit the introduction of evidence pertaining to use only in such an action. The exception does not permit multiple actions.

“use” and “installation”

The statute also is ambiguous in that it is unclear as to what evidence is barred and what evidence is permitted. The gag rule broadly applies to preclude both evidence of “use” or “installation” (and failure of use and failure of installation) of certain products – seat belts and car seats. The exception, however, permits (in one action) the introduction of evidence pertaining to the “use” of a seat belt or car seat. Oddly, it makes no mention of permitting evidence pertaining to “installation.” Even when the exception applies, it does not allow the introduction of evidence pertaining to the installation of a seat belt or car seat.

To give each word in the statute meaning, both “use” and “installation” must denote different things. Respondent concedes that the two words must have different

meanings. Respondent's Brief at 19. An ambiguity exists in the statute's reference to both "use" and "installation." Because two different reasonable interpretations exist – the one Amicus Curiae Minnesota Defense Lawyers Association ("MDLA") posits and the one Respondent offers, this Court is justified in looking to the legislative history to resolve this ambiguity.²

It is troubling that the exception allows the introduction of evidence pertaining to the "use" of a product, but does not allow introduction of evidence pertaining to the "installation" of the defective products. This confusing choice of language is especially puzzling given that the exception on its face deals with a defectively installed product. This legislative shortcoming leads to the absurd result that, on the plain language of the exception, no evidence pertaining to the installation of a defectively installed car seat is permitted. Because of such an absurd result, it is proper to look to the legislative history in order to ascertain and effectuate the legislative intent.³

² Contrary to Respondent's assertion, the MDLA is correct that it is appropriate to examine federal law. Minn. Stat. § 169.685, subd. 4(a) references federal law in speaking of "a child passenger restraint system as described in subdivision 5." Minn. Stat. § 169.685, subd. 5 specifically references the requirement that child passenger restraint systems must meet federal motor vehicle safety standards. Thus, Respondent's attempt to ignore federal law and construe the gag rule and its exception in a vacuum should be rejected. *See also* Minn. Stat. § 245.18(a) (also referencing federal motor vehicle safety standards in terms of regulating child passenger restraint systems).

³ Somewhat also confusing, the gag rule only addresses the admissibility of evidence. The exception, however, speaks both of permitting an action to be brought (the right to bring an action is not affected) and of allowing the introduction of certain evidence (evidence pertaining to use). It is unclear why the exception needed to state that an action could be brought, when the gag rule does not directly prohibit the bringing of an action.

Respondent strives mightily to avoid examining the legislative history and the purpose and intent of the exception to the gag rule. Respondent attempts to dismiss Appellants' legislative history arguments, but only offers a weak rejoinder. *See* Respondent's Brief at 21-22.

First, Appellants did present comments from the House of Representatives. Representative Mary Jo McGuire authored the House version. Though she would have preferred to repeal the gag rule entirely, she agreed to sponsor the narrow exception and partial repeal to "take what you can get" regarding defective products. *See* A.51-52.

Second, Representative Stanek's referenced comment is unavailing. His statement as to his understanding of what the "bill wants to get at" is itself vague. It does not support a broad construction of the exception. It does not suggest that separate actions may be brought.

In order to reconcile the gag rule with its exception and give effect to both provisions and all words in the statute, the exception must be construed narrowly. As well, to avoid absurd results, the exception should be construed narrowly. In this case, evidence of Appellants' alleged negligent or faulty installation must not be admitted in this separate action. Construing the exception narrowly, and limiting its application to just "an action" where a true defective product claim exists, will give meaning to the entire statute and fulfill the Legislature's purpose and intent.

III. Respondent's proposed interpretation impermissibly expands the exception so that it swallows the rule.

The Court of Appeals concluded that “[w]hether the exception applies . . . depends on the nature of the incident from which the damages arose, rather than on the theory of liability.” A.8. Respondent urges this Court to adopt this ruling, *i.e.* that the exception in 4(b) applies depending on “the nature of the incident.” *See* Respondent’s Brief at 12-14. This view of the exception poses many problems as a rule of law. If a trial court must allow seat belt or car seat evidence whenever the “nature of the incident” involves a “defectively designed, manufactured, installed, or operating seat belt or child passenger restraint system,” even where defect claims are never brought, then the exception will swallow the rule. Creative lawyers who wish to introduce evidence regarding seat belt or car seat use will simply explain that the “nature of the incident” somehow involves an alleged defective condition of some kind. Because of the numerous permutations of “use,” “installation,” or failure of use or installation of seat belts or car seats (remembering of course that most car seats are attached to the vehicle through use of a seat belt), combined with any number of theories of incidents involving defectively designed, manufactured, installed, or operated seat belts or car seats, opportunities for the exception to swallow the rule will be great. Given the Legislature’s concerted effort to retain the gag rule and only partially repeal it, it would be shocked at such an interpretation that would allow the gag rule to be so easily avoided.

Consider the following examples in some ordinary motor-vehicle accident cases.

Smith's car strikes Jones' car, injuring Jones' young daughter who was not restrained by a car seat (Jones either did not have one in the car, did not latch his daughter in it, or did not properly attach the car seat with the car's seat belts properly). In the daughter's suit against Smith for her injuries, the gag rule would traditionally prevent Smith from introducing evidence of the failure to use the car seat. But, if a broad construction is given to the exception, Smith can introduce evidence pertaining to the use of the seat belt or car seat. He can assert that the daughter's action for damages arises out of an incident (the car crash) that involves a defectively designed or manufactured product (the car seat). Smith can contend – without even asserting a claim against the car seat manufacturer – that the car seat was defectively designed or manufactured because it failed to properly warn or instruct regarding its use. Failure to warn or to instruct are recognized defective design or manufacturing claims. *See, e.g. Balder v. Haley*, 399 N.W.2d 77, 81 (Minn. 1987); *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986). By merely contending that some alleged failure to warn or instruct existed, *i.e.* that the incident involved a defectively designed car seat, Smith can now introduce evidence pertaining to the use of the car seat, which would even include non-use of the seat. Remember, under Respondent's broad construction of the exception, there need not be a product-liability claim in the lawsuit. Respondent's Brief at 13. Similarly, the Court of Appeals concluded it is the "nature of the incident" that matters, and not any particular "theory of liability." A.8. If the incident can be characterized somehow as involving a defectively designed or manufactured product, then the

exception applies and permits the introduction of evidence pertaining to the use of the product.

In a similar example, Smith rear-ends Jones, who was not wearing a seat belt. Jones sues Smith for damages. Ordinarily, no evidence of Jones' failure to wear a seat belt could be admitted into evidence under the gag rule. But, under a broad construction of the exception, Smith can now claim that Jones' action for damage arises out of an incident (the rear-end car crash) that involves a defectively designed or defectively manufactured seat belt. Smith simply can contend that the car manufacturer failed to properly warn or instruct Jones to use the seat belt. By merely contending that poor warnings or instructions existed, Smith can then introduce evidence of Jones' failure to wear the seat belt because the exception does not prohibit the introduction of evidence "pertaining to the use of a seat belt." Such a broad construction of the exception leads to absurd results. It would certainly contradict the clear legislative intent and purpose to try to carve out a narrow exception while leaving the gag rule essentially in place.

The Court of Appeals erred in ignoring the effect of its ruling. The broad interpretation given to the exception will mean that the exception will swallow the gag rule. The Court of Appeals reasoned that not all litigation involving the use of a child passenger restraint system also involves a *claim* that the child passenger restraint system was defectively designed, manufactured, installed, or operated. A.9 (emphasis added). But this misses the point.

First, the exception – as Respondent emphasizes – does not require a claim, but need only involve a factual situation where damages are sought that arise out of an

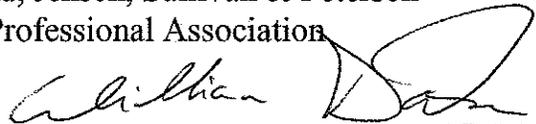
incident that involves a defectively designed, manufactured, installed, or operated product (seat belt or car seat). Second, the Court of Appeals' analysis was limited to reciting the language of the exception, without considering the likelihood that the exception could and will swallow the rule. Third, the exception will swallow the rule because under Respondent's broad construction that defective installation means faulty or negligent installation, any number of claims can be described as one arising out of an incident that involves a defective product.

CONCLUSION

Evidence of negligent or faulty installation of a car seat is not admissible in a separate negligence action under the seat belt gag rule. The exception to that rule must be narrowly construed in order to give full effect to the language of the entire statute and to effectuate the legislative intent and purpose behind both the gag rule and the exception. Accordingly, Appellants Amy Harrison and Ted Harrison, Sr. respectfully request that the Court reverse the Court of Appeals and order entry of judgment in their favor.

Respectfully submitted,

Lind, Jensen, Sullivan & Peterson
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