

**Nos. A05-2340, A05-2341, A05-2342 and A05-2343**

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State of Minnesota  
**In Court of Appeals**

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Kenneth Brown and Robert Banks, individually and on behalf  
of the State of Minnesota,

*Respondents,*

vs.

Cannon Falls Township, a political subdivision of the State of  
Minnesota; Gary Hovel, an individual;  
Lawrence D. Johnson, an individual; and  
Keith Mahoney, an individual,

*Appellants.*

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**APPELLANTS' REPLY BRIEF**

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**I. THE OPEN MEETING LAW REQUIRES THREE OR MORE SEPARATE ADJUDICATIONS BEFORE THE REMOVAL PROVISION CAN BE INVOKED.**

The object of statutory interpretation “is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (2004). The Legislature amended the Open Meeting Law to make it much more difficult to remove elected officials from office. As a result, the Legislature required findings of intentional violations in three actions, not one. Respondents misconstrue the reasons for the amendments to the Open Meeting Law, asserting, “The 1994 amendment does not require four separate adjudications, an issue explicitly in *Claude v. Collins*, 518 N.W.2d 836 (Minn. 1994).” *Resp. Brief*, p. 41. Respondents, however, ignore the fact the Open Meeting Law was amended in direct response to the outcome in *Claude*. In response to *Claude*, the Legislature required three actions to prevent elected officials from being removed in one proceeding. The only reason Respondents simultaneously filed four separate Complaints was to trigger the removal provision – the extraordinary remedy of removal from office should not hinge on a simple pleading maneuver. If Respondents were truly concerned about judicial economy, they would have filed one Complaint and asserted all violations in it. It would create an absurd result if the issue of removal from office turned on how many Complaints a lawyer could draft at the same time, involving the precise same set of facts and circumstances.

**A. The Open Meeting Law Requires Three Separate Actions before a Public Official can be Removed from Office.**

An “action” is defined as “any proceeding in any court in this state.” Minn. Stat. § 645.45(2) (2004). “Courts generally state that an action is the prosecution in a court of justice of some demand or assertion of right by one person against another.” *Muirhead v. Johnson*, 46 N.W.2d 502, 505 (Minn. 1951) (citations omitted).

The simultaneous filing of four virtually identical Complaints does not create four separate “actions” under the Open Meeting Law. The four Complaints center on the Appellants’ alleged improper interpretation of the Respondents’ March 12, 2002, request for special notice. Accordingly, the Complaints were discovered and tried as a single action. The Open Meeting Law was specifically amended to replace “violation” with “action,” which the Legislature intended to preclude the very result reached by the District Court. Regardless of the number of Complaints filed by the Respondents, this case represents one “action.” In short, the single adjudication of multiple violations of the Open Meeting Law is insufficient to satisfy the “three action” requirement. Accordingly, the District Court’s removal of Appellants Hovel and Mahoney is contrary to the plain meaning of the Open Meeting Law.

**B. The Contemporaneous Legislative History Clearly Indicates the Legislature Amended the Statute to Prevent the Very Result Reached by District Court.**

A statute is ambiguous if it has more than one reasonable interpretation. *See Tuma v. Commissioner of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986).

When “the language of a statute is ambiguous and two interpretations are possible, our role is to ascertain probable legislative intent and to give the statute a construction consistent with that intent.” *Beck v. City of St. Paul*, 231 N.W.2d 919, 923 (Minn. 1975). In interpreting a statute, “no word, phrase, or sentence should be deemed superfluous, void, or insignificant.” *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999) (citing *Owens v. Federated Mut. Implement & Hardware Ins. Co.*, 328 N.W.2d 162, 164 (Minn. 1983)); Minn. Stat. § 645.08(3) (2004).

Here, the significant change to the Open Meeting Law was the Legislature’s amendment to provide for removal from office upon the finding intentional violations “in three or more actions” as opposed to the finding of a “third violation.” Minn. Stat. § 13D.06, subd. 3(a) (2004); *Cf.* Minn. Stat. 471.705, subd. 2 (1994). The parties have proffered two competing interpretations of the Legislature’s replacement of “violations” with “actions.” Pursuant to the rules of statutory construction, the aforementioned change is neither superfluous, void nor insignificant. Accordingly, in interpreting the Open Meeting Law, it is presumed

the Legislature intended the three “action” requirement to have some substantive meaning.

An “action,” as defined by statute, is a “proceeding in any court in this state.” Minn. Stat. § 645.45(2) (2004). To properly determine Legislature’s intent it is appropriate to examine the timing, circumstances, and contemporaneous legislative history surrounding the amendment. Minn. Stat. § 645.16 (2004). The “examination of the materials that constitute legislative history is permissible if the purpose is simply to determine what the legislature intended by the language it used.” *Stearns-Hotzfield v. Farmers Ins. Exch.*, 360 N.W.2d 384, 389 (Minn. App. 1985) (citing *Reserve Mining Co. v. State*, 310 N.W.2d 487, 491 (Minn. 1981)). The contemporaneous legislative history and the timing and circumstances surrounding the 1994 amendment indicate a clear intent to prevent the removal of public officials following a single adjudication under the Open Meeting Law.<sup>1</sup>

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<sup>1</sup> Respondents appear to challenge the consideration of contemporaneous legislative history in interpreting the Open Meeting Law. *Resp. Brief*, 39. (Reference to “purported legislative history”). The inclusion and reference to contemporaneous legislative history is indeed appropriate where parties are asserting competing interpretations of the Open Meeting Law. *See Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 30 (Minn. 1989) (“However, a review of the contemporary legislative history shows this was not the legislature’s intent here.”). Appellants provided citation to the relevant House and Senate File Number, Subcommittee, and date of the subcommittee hearings relevant to the 1994 amendment to the Open Meeting Law. The original legislative history cited by the Appellants is stored, maintained and can be accessed at the Minnesota Historical Society.

Respondents suggest the three action requirement is satisfied by the simultaneous filing of four separate Complaints. Under Respondents' interpretation, the 1994 amendment was not a substantive change; rather it was a procedural change where the Legislature intended to create a scheme requiring interested parties to simultaneously file multiple Complaints rather than one comprehensive Complaint. The contemporaneous legislative history is completely devoid of any intent by the Legislature to create this type of procedural requirement.

To the contrary, the Legislators' statements and the relevant testimony clearly indicate the Legislature's intent was to prevent the stockpiling of violations and seeking the removal of elected officials in one proceeding. Consideration of legislative history requires the consideration of "occasion and necessity" and "circumstances" under which a law is enacted. Minn. Stat. § 645.16(1) and (2) (2004). Mayor Collins addressed the removal provision of the Open Meeting Law:<sup>2</sup>

I think that if the law read that you had to have three separate adjudications, that would make more sense, but it allows somebody to just wait until you have three alleged violations and then try to enforce the removal from office provision.

A-68.

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<sup>2</sup> Hibbing Mayor Collins was one of the defendants in the case resulting in the Supreme Court decision in *Claude v. Collins*, 518 N.W.2d 836 (Minn. 1994).

Mayor Collins' testimony provides the backdrop and impetus for the amendment. Indeed, Senator Beltzold specifically proposed the amendment to address "the issue from Mayor Collins." *A-71*. The subsequent discussion in the subcommittee indicates the Legislators were contemplating the appropriate language to institute the policy whereas an interested party may only seek removal of a public official following three successive adjudications. *A-70 through A-74*.

Respondents argue that because the Open Meeting Law does not specifically contain language requiring "successive" or "sequential" actions, the simultaneous filing of multiple Complaints is sufficient to trigger the removal provision. *Resp. Brief, 40*. Respondents, however, overlook the clear intention of the Legislature when it replaced "violation" with "action." Senator Beltzold, the sponsor of the amendment, proposed inserting the language "third separate adjudicated violation." *A-72 through A-73*. In response to the Subcommittee's request for language to embody its policy of a "separate third adjudication," Senate Counsel proposed the insertion of "three or more actions." *A-73*. When queried if an interested person could "combine into one action a series of violations," Senate Counsel responded "this would only cover, this would be three separate actions brought against a person." *Id.* The contemporaneous legislative history indicates the Legislature intended to enact a substantive change in the Open Meeting Law to require three or more separate actions before a public official could be removed from office.

Here, there was only one proceeding – a single adjudication of multiple violations. Appellants certainly agreed to resolve all Open Meeting Law claims in one proceeding, as they all involved common issues of fact and law. Respondents, however, suggest they could have separately and sequentially litigated each violation/Complaint and reached the same result. Respondents’ position is fatally flawed for two reasons. First, they did not separately litigate each Complaint and for good reason. If Respondents had sought to separately litigate these Complaints, Appellants would have sought to consolidate them for discovery and trial. It was unnecessary to move for consolidation, however, as the parties agreed to complete discovery and trial in a consolidated fashion. Indeed, this Court has consolidated the issues raised in this appeal.

Second, the Legislature contemplated all Open Meeting Law claims would be brought at the same time and without delay. *A-73*. (As one Legislator commented, “I know I understand the concern but I would think if there are such believed intentional violations that would be brought as quickly as possible and not let them seek and accumulate and seek forfeiture of office.”) The Legislature never envisioned a situation where an individual would wait years and then simultaneously file multiple Complaints in order to trigger the removal provision. The Legislature unequivocally amended the Open Meeting Law to prevent public officials from being removed from office following a single adjudication of

multiple Open Meeting Law violations. Accordingly, the District Court should be reversed.

## **II. THE INDIVIDUAL APPELLANTS' RELIANCE ON THE ADVICE OF THE TOWNSHIP ATTORNEY NEGATES A FINDING OF SPECIFIC INTENT.**

Respondents appear to suggest the District Court found Ojile and the individual Appellants were engaged in a "fraud." The District Court's sole rationale for dismissing the Appellants' reliance on Ojile's legal opinion was it "was not reasonable or in good faith considering Mr. Ojile's obvious conflict of interest." *A-79*. In its Memorandum attached to the Amended Findings of Fact, Conclusions of Law, and Order the District Court clarified it made no "finding as to an ethical violation;" rather, it determined Ojile's "advice was tainted." *A-99*. The District Court concluded the Appellants' actions "cannot be attributed to or mitigated by reliance in good faith on a disinterested attorney's advice." *A-100*.

Implicit in these findings is the determination Ojile was unable to fulfill his "duty to exercise independent professional judgment and render candid advice." Minn. R. Prof. Conduct 2.1. Despite the District Court's assertion to the contrary, the very acts which purportedly "tainted" Ojile's opinion are the type of conduct regulated by the Minnesota Rules of Professional Conduct. In its indirect determination Ojile failed to meet his obligation under Rule 2.1, the District Court took the logical leap of imputing Ojile's action to that of the Appellants.

As noted by the *amici*, the District Court's determination creates a set of "common sense" rules of professional responsibility and imputes these rules to the affected client. The Minnesota Supreme Court is vested with the "exclusive authority to adopt rules of Professional Conduct." *In re Panel File No. 99-42*, 621 N.W.2d 240, 244 (Minn. 2001). The District Court overstepped its authority when it determined Ojile had a conflict of interest.

Respondents correctly assert the focus of the instant case is on the actions of the individual Appellants, not Ojile. However, the District Court twists and obscures this focus by dismissing the Appellants' reliance based on Ojile's actions. In effect, the Appellants have shouldered the burden of Ojile's alleged conflict of interest.

Respondents also point out there is a statutory procedure in place where individuals can seek an opinion from the Minnesota Department of Administration. *Resp. Brief, 49*; Minn. Stat. § 13.072. Importantly, the statute was not in place in 2002 and the Appellants could not have sought the assistance of the Department of Administration at the time of the alleged violations. At the time of the alleged violations, the only resource available to the Appellants was the township attorney and clerk. Accordingly, the statute has no impact on the Appellants' reliance on Ojile's opinions.

The statute does provide a valuable resource to governmental entities; however, it does not address nor does it supplant the need for government officials to rely on the advice of their attorney. First, the statute provides the Department of Administration 20 days to respond to a request. Minn. Stat. § 13.072, subd. 1(c). Issues concerning compliance with the Open Meeting Law are not always foreseeable. For instance, if a government official wants to ensure special notice was properly provided, the official must look to the attorney and clerk. It is impractical, and indeed impossible, for a government entity to wait 20 days for the Department of Administration to confirm proper notice has been issued. Second, opinions from the Department of Administration require the governing body pay the commissioner a fee of \$200. Minn. Stat. § 13.072, subd. 1(b). Government entities, and particularly townships, should not be forced to pay the commissioner \$200 each time a government official wants to ensure compliance with the Open Meeting Law. As this court has continually noted, government official should look to their attorneys to ensure compliance with the Open Meeting Law. *See Mankato Free Press, Co. v. City of North Mankato*, 1998 WL 865714 (Minn. App. Dec. 15, 1998); *Claude*, 518 N.W.2d at 843 (“Public officials should not be permitted to frustrate the purposes of the Open Meeting Law, particularly when, as here, advice was available from the city administrator and city attorney which would have prevented the violations.”). This is exactly what the Appellants did – they sought

and received professional advice from the township attorney and clerk. Appellants should be allowed to rely on their professionals to ensure proper special notice is provided as required by the Open Meeting Law, particularly where intentional violations are alleged.

Respondents also cite to the doctrine of *in pari delicto* in an attempt to undermine the Appellants' reliance. The "doctrine is based upon judicial reluctance to intervene in disputes between parties who are both wrongdoers in equal fault." *State by Head v. AAMCO Automatic Transmissions, Inc.*, 199 N.W.2d 444, 448 (Minn. 1972). Simply put, "one party cannot recover against another when both are equally at fault." *F & H Inv. Co., Inc. v. Sackman-Gilliland Corp.*, 728 F.2d 1050, 1054 (8th Cir. 1984) (citations omitted). The doctrine is inapplicable. It applies when two adversarial parties are "equally at fault." The doctrine has no application to the ability of a public official to seek and rely upon the opinion of a municipality's attorney. Again, Respondents seek to impute the alleged conflict of interest of Ojile to the actions of Appellants, who are not lawyers or skilled in statutory interpretation.

A government official must be entitled to rely on the opinion of a municipal attorney irrespective of any alleged "common sense conflict of interest." Accordingly, the District Court's determination the Appellants acted with specific intent to violate the Open Meeting Law must be reversed.

### III. THE DISTRICT COURT ERRED WHEN IT AWARDED ATTORNEY'S FEES UNDER MINNESOTA STATUTE § 13D.06, SUBD. 4(a).

Even if the District Court's determination the Appellants possessed specific intent to violate the Open Meeting Law, the District Court erred in its award of attorney's fees. A court must "read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations." *American Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (citing *Van Asperen v. Darling Olds, Inc.*, 93 N.W.2d 690, 698 (Minn. 1958)).

Specifically, the District Court erred when it awarded \$13,000 in attorney's fees to each "party" under the Open Meeting Law.<sup>3</sup> The 1994 amendment included a provision for an award of attorney's fees for either a plaintiff or a defendant under the Open Meeting Law. This intent is clarified in subdivision 4(b) limiting

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<sup>3</sup> Whether or not there may be coverage for Appellants' attorney's fees through an insurance trust, has no bearing on the issues raised in this appeal. However, Respondents' misstatements require response. Contrary to Respondents' assertions, the Appellants' attorney's fees are not being paid by the Minnesota Association of Townships nor are they being paid by the League of Minnesota Cities. *Resp. Brief*, 52, 54 n. 33. The amicus applications were properly made and granted under Minn. R. Civ. App. P. 129.01. Moreover, "it is this court's practice to freely grant amicus applications to ensure the development of a more complete appellate record." *Breza v. City of Minnestrisa*, 706 N.W.2d 512, 515 n. 1 (Minn. App. 2005) (rejecting challenge to the independence of the amicus brief prepared by the League of Minnesota Cities), *review granted*, (Minn. Feb. 14, 2006). The significance of the issues involved in this appeal is underscored by the broad-based amicus participation by the *amici*. These organizations do not take lightly their obligations as *amicus curiae*.

an award of fees to a “defendant only if the court finds that the action under this chapter was frivolous and without merit.” Minn. Stat. 13D.06, subd. 4(b). In turn, an award of attorney’s fees against an individual official is not appropriate “unless the court finds that there was a specific intent to violate this chapter.” Minn. Stat. 13D.06, subd. 4(d). These subdivisions provide a clear framework whereas the statute is designed to apply the \$13,000 cap in fees to either plaintiff(s) or defendant(s). The reference to either “party” in subdivision (a) is a direct reference to the limitations on the award of fees provided in subsections (b) and (d).

The District Court interprets the \$13,000 fees provision in the statute as a multiplier rather than the substantive limitation intended by the Legislature. In the instant action, applying the District Court’s interpretation the Appellants could have been subjected to \$13,000 in attorney’s fees for each “action” and each “party,” a total of \$104,000. The District Court again interprets the Open Meeting Law to award procedural creativity. A public official should not be subjected to an award of fees exponentially growing based on the number of putative plaintiffs. The Legislature was concerned with putting a “bounty” on the head of elected officials and the District Court’s analysis is contrary to the Legislature’s amendment to the Open Meeting Law.

The Legislature permitted an award of attorney's fees but limited the award to a maximum of \$13,000. Accordingly, any award of attorney's fees should be limited to a maximum of \$13,000.

**CONCLUSION**

The District Court erred in its interpretation and application of the Open Meeting Law. Accordingly, Appellants respectfully request the Court of Appeals reverse the District Court.

Respectfully submitted,  
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Dated: March 13, 2006

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**CERTIFICATE OF COMPLIANCE UNDER MINN. R. APP. P. 132(3)**

Paul D. Reuvers, attorney for the Appellants, certifies that this brief complies with the type volume limitation contained in Rule 132, subd. 3 as follows:

There are less than 2,810 words in this brief, not including the table of contents and the table of citations. The word processing software used to prepare this brief was MS Word.

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