

A-06-1799

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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MARGIE KLEVEN, RELATOR

VS.

COMMISSIONER OF HUMAN SERVICES, RESPONDENT

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**RELATOR'S RESPONSIVE BRIEF**

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## ARGUMENT

### I. THE RESPONDENT'S USE OF AN UNPUBLISHED CASE SHOULD NOT BE GIVEN ANY WEIGHT IN DECIDING THIS MATTER.

On page 8 of Respondent's Brief, Respondent cites the unpublished case of Grossman v. Martin Luther Manor, 2005 WL 2850491 (Minn.App.) to support its argument as to how to properly interpret M.S.A. §625.5572. However, "unpublished opinions are of limited value in deciding an appeal." Chamberlain v. Chamberlain, 615 N.W.2d 405, 415 (FN 1) (Minn.App. 2000). At best, an unpublished opinion can be used for persuasive purposes. Dynamic Air, Inc. v. Bloch, 502 N.W.2d 796, 800-801 (Minn.App. 1993). This is for good reason, as the facts of the unpublished case may not be detailed enough for future courts to use in comparison to another case, nor may legal rulings be fully expressed. Both of these factors are present when trying to apply Grossman to this case.

In the Grossman decision, we do not know what the physical or mental capacity of the vulnerable adult at issue was, and nothing was stated as to whether the vulnerable adult was even able to understand what was being said or done to him/her. Nor was anything stated about how the vulnerable adult reacted to the abuse suffered, or was whether he/she was even capable of expressing physical pain or emotional distress. This is the essence of this present case - the vulnerable adults at issue here are completely incapable of understanding verbal language, and nothing the Relator was found to have done was determined to be in any way threatening, as was done in Grossman. I would also respectfully point out that an analysis of M.S.A. §625.5572, Subd. 2(b)(2) was not performed by the Grossman Court, nor did the Relator argue about how the statute should be interpreted, as is being done here.

**II. THE RELATOR’S INTERPRETATION DOES NOT LEAD TO POTENTIAL ABSURD OR TRAGIC RESULTS, IT DOES NOT IMPUGN THE STATE’S PUBLIC POLICY OF PROTECTING VULNERABLE ADULTS, AND IT DOES ADHERE TO THE CANONS OF STATUTORY CONSTRUCTION.**

In support of its argument, the Respondent states on page 10 of Respondent’s Brief that following our interpretation of M.S.A. §625.5572, Subd. 2(b)(2) “would allow the sexual assault of comatose patients and the physical abuse of those who could not experience pain.” It absolutely would not - both of these actions are already prohibited by Minnesota’s criminal laws.<sup>1</sup> It also would not apply to situations where the vulnerable adult was incapable of expressing emotional distress, as in those situations the vulnerable adult would still be able to comprehend what was being said to them, and unlike the present situation, it would be well known to a caregiver that the vulnerable adult in question was capable of understanding what was being said to them, even if not they could not respond. It is the vulnerable adult’s capacity to understand that they are being abused that is the issue here.

As for “egregious verbal abuse directed at anyone who could not hear (or) understand” what is being said to them, we concede this point. But that is exactly the point in this appeal - the Minnesota State Legislature, in drafting M.S.A. §625.5572, Subd. 2(b)(2), created this loophole through its failure to specifically include conduct that does not produce physical pain or

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<sup>1</sup>See M.S.A. §609.2325, which prohibits (1) sexual contact of any kind with a vulnerable adult or (2) any actions intended to produce physical or mental pain or injury to a vulnerable adult, subjects a vulnerable adult to any aversive or deprivation procedure, unreasonable confinement, or involuntary seclusion,

emotional distress in a vulnerable adult. As much as we may like to have this statute prohibit verbal abuse that does not produce emotional distress, it plainly does not, and, as stated on page 7 of our initial brief, "Courts are prohibited from adding words to a statute or reading into a statute what was either intentionally or inadvertently omitted by the legislature. Genin v. 1996 Mercury Marquis, 622 N.W.2d 114 (Minn. 2001)."

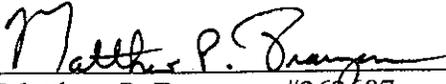
The Respondent strains in its attempt to urge this Court to follow its interpretation of the statute. While following their interpretation may be following the State's public policy in protecting vulnerable adults, and it may be in harmony with the other prohibitions contained in the statute regarding treatment of vulnerable adults, it is clearly attempting to shoehorn into the statute something that is not there. While reading this prohibition into the statute may result in good things, it is still just that - reading into the statute that which plainly and simply is not there.

### CONCLUSION

The law does not sustain the Respondent's determination that the Relator engaged in acts of abuse towards the vulnerable adults that she was licensed to provide care for. This Court should reverse the Respondent's Order dated August 17, 2006, and re-instate the Relator's license.

Respectfully submitted,

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