

A08-1408

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STATE OF MINNESOTA

IN SUPREME COURT

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James Kolby-Ralph Lund, Jr.,

Respondent,

vs.

Commissioner of Public Safety ,

Appellant.

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**APPELLANT'S BRIEF AND ADDENDUM**

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
LEGAL ISSUE.....	1
STATEMENT OF THE CASE AND FACTS.....	2
STANDARD OF REVIEW .....	4
ARGUMENT .....	4
I. UNLESS A STATUTE EXPRESSLY PROVIDES OTHERWISE, THE STATE OF MINNESOTA IS NOT SUBJECT TO TAXATION OF COSTS AND DISBURSEMENTS IN CASES WHERE THE STATE IS A PARTY IN ITS SOVEREIGN CAPACITY.....	4
II. <i>LIENHARD</i> DID NOT CHANGE THE RULE AGAINST TAXING THE STATE FOR COSTS AND DISBURSEMENTS IN NON-TORT CIVIL CASES .....	8
III. THE COURT SHOULD NOT OVERRULE LONGSTANDING PRECEDENT TO NOW MAKE THE STATE SUBJECT TO TAXATION OF COSTS AND DISBURSEMENTS IN NON-TORT CIVIL CASES .....	11
A. No Compelling Reason Exists To Abolish The State’s Immunity From Taxation Of Costs And Disbursements In Such Cases .....	12
B. No Compelling Reason Exists To Re-Interpret The Statutes And Court Rules To Now Provide For Taxing Costs And Disbursements Against The State In Such Cases .....	19
CONCLUSION .....	23
ADDENDUM	

## TABLE OF AUTHORITIES

	Page
<b>MINNESOTA STATUTES</b>	
Minn. Stat. § 3.736 (2008) .....	8
Minn. Stat. §§ 15.471-.474 (2008) .....	7
Minn. Stat. § 169A.53 (2006) .....	2
Minn. Stat. § 256B.056 (2008) .....	5
Minn. Stat. § 271.19 (2008) .....	7
Minn. Stat. § 480.062 (2008) .....	6
Minn. Stat. § 549.02 (2008) .....	1, 4, 5, 6
Minn. Stat. § 549.04 (2008) .....	1, 4, 5, 6, 21
Minn. Stat. § 607.01 (1965) .....	20
Minn. Stat. § 607.02 (1965) .....	20
Minn. Stat. § 645.27 (2008) .....	6
<b>MINNESOTA RULES</b>	
Minn. R. Civ. App. P. 139.01 .....	1, 4
Minn. R. Civ. App. P. 139.02.....	1, 4
Minn. R. Civ. App. P. 139.04.....	13
Minn. R. Civ. P. 54.04.....	1, 4, 13, 21
Supreme Court Rule XV .....	20

## MINNESOTA CASES

<i>Donovan Contracting of St. Cloud, Inc. v. Minnesota Dep't of Transp.</i> , 469 N.W.2d 718 (Minn. Ct. App. 1991), <i>rev. denied</i> (Minn. Aug. 2, 1991).....	7, 16, 19
<i>Fischer v. Town of Albin</i> , 258 Minn. 154, 104 N.W.2d 32 (1960).....	6
<i>Fleeger v. Wyeth</i> , 771 N.W.2d 524 (Minn. 2009).....	11
<i>Hamm v. State</i> , 255 Minn. 64, 95 N.W.2d 649 (1959).....	7
<i>Holmberg v. Holmberg</i> , 588 N.W.2d 720 (Minn. 1999).....	8, 22
<i>House v. Hanson</i> , 245 Minn. 466, 72 N.W.2d 874 (1955).....	21
<i>Janklow v. Minnesota Bd. of Exam'rs for Nursing Home Adm'rs</i> , 552 N.W.2d 711 (Minn. 1996).....	9, 13, 15
<i>Johnson v. State</i> , 553 N.W.2d 40 (Minn. 1996).....	4
<i>Kloos v. Soo Line R.R.</i> , 286 Minn. 172, 176 N.W.2d 274 (1970).....	20
<i>Lienhard v. State</i> , 431 N.W.2d 861 (Minn. 1988).....	passim
<i>Lund v. Commissioner of Pub. Safety</i> , 2009 WL 1587135 (Minn. Ct. App. June 9), <i>rev. denied</i> (Minn. Aug. 26, 2009)...	2
<i>Madson v. Minnesota Mining &amp; Mfg. Co.</i> , 612 N.W.2d 168 (Minn. 2000).....	4
<i>Nelson v. McKenzie-Hague Co.</i> , 192 Minn. 180, 256 N.W. 96 (1934).....	6, 21
<i>Nguyen v. State Farm Mut. Auto. Ins. Co.</i> , 558 N.W.2d 487 (Minn. 1997).....	21

<i>Nieting v. Blondell</i> , 306 Minn. 122, 235 N.W.2d 597 (1975).....	passim
<i>Peterka v. Dennis</i> , 764 N.W.2d 829 (Minn. 2009).....	15
<i>Sanitary Farm Dairies, Inc. v. Wolf</i> , 261 Minn. 166, 112 N.W.2d 42 (1961).....	20
<i>Shamrock Dev., Inc. v. Smith</i> , 754 N.W.2d 377 (Minn. 2008).....	4
<i>Spanel v. Mounds. View Sch. Dist.</i> , 264 Minn. 279, 118 N.W. 795 (1962).....	13, 15, 17
<i>State v. Anderson</i> , 251 Minn. 401, 87 N.W.2d 928 (1958).....	20
<i>State v. Bentley</i> , 224 Minn. 244, 28 N.W.2d 770 (1947).....	passim
<i>State v. Fullerton</i> , 124 Minn. 151, 144 N.W. 755 (1914).....	5
<i>State v. Holm</i> , 186 Minn. 331, 243 N.W. 133 (1932).....	passim
<i>State v. Lee</i> , 706 N.W.2d 491 (Minn. 2005).....	11
<i>State v. Martin</i> , 773 N.W.2d 89 (Minn. 2009).....	11
<i>State v. McCoy</i> , 228 Minn. 420, 38 N.W.2d 386 (1949).....	12
<i>State v. Ross</i> , 732 N.W.2d 274 (Minn. 2007).....	11
<i>State v. Village of Dover</i> , 113 Minn. 452, 130 N.W. 539 (1911).....	5, 12
<i>State Campaign Fin. &amp; Pub. Disclosure Bd. v Minnesota Democratic-Farmer-Labor Party</i> , 674 N.W.2d 894 (Minn. Ct. App. 2003) .....	9

<i>Village of Zumbrota v. Johnson</i> , 280 Minn. 390, 161 N.W.2d 626 (1968).....	8
<i>Vlahos v. R&amp;I Constr. of Bloomington, Inc.</i> , 676 N.W.2d 672 (Minn. 2004).....	4
<i>Wilson v. Commissioner of Revenue</i> , 707 N.W.2d 695 (Minn. 2006).....	1, 7, 10

**FEDERAL STATUTES**

28 U.S.C. § 2412 .....	19
------------------------	----

**FEDERAL RULES**

Fed. R. App. P. 39 .....	19
Fed. R. Civ. P. 54 .....	19

**FEDERAL CASES**

<i>Boston Chapter, NAACP, Inc. v. Beecher</i> , 504 F.2d 1017 (1st Cir. 1974), <i>cert. denied</i> , 421 U.S. 910 (1975) .....	18
<i>Fairmont Creamery Co. v. State of Minnesota</i> , 275 U.S. 70, 48 S. Ct. 97 (1927) .....	18
<i>Federal Trade Comm'n v. Kuykendall</i> , 466 F.3d 1149 (10th Cir. 2006).....	19
<i>Richards v. Government of the Virgin Islands</i> , 579 F.2d 830 (3rd Cir. 1978) .....	18
<i>State of Utah v. United States</i> , 304 F.2d 23 (10th Cir. 1962), <i>cert. denied</i> , 371 U.S. 826 (1962).....	18

**OTHER STATE CASES**

<i>Farmers Reservoir &amp; Irrigation Co. v. City of Golden</i> , 113 P.3d 119 (Colo. 2005) .....	18
------------------------------------------------------------------------------------------------------	----

*Martineau v. State Conservation Comm'n*,  
194 N.W.2d 664 (Wis. 1972) ..... 17

*State v. Chapman*,  
407 A.2d 987 (Conn. 1978)..... 17

**OTHER AUTHORITIES**

Advisory Committee Comment to Minn. R. Civ. App. P. 139.01-.02..... 20

Blackstone's Commentaries on the Laws of England..... 5

*Costs — Liability of State*, 72 A.L.R.2d 1379..... 18

3 David F. Herr & Sam Hanson, *Minnesota Practice* (2009)..... 6, 10

5A Roger S. Haydock & Peter B. Knapp, *Minnesota Practice* (2009)..... 10

## LEGAL ISSUE

Is the State of Minnesota subject to taxation of costs and disbursements in cases where the State is a party in its sovereign capacity and no statute authorizes the taxation of costs and disbursements against the State?

The Court of Appeals ruled that the State is now liable for appellate costs and disbursements in all such civil cases, based on its understanding of the Supreme Court's interpretation of the decision in *Lienhard v. State*, 431 N.W.2d 861 (Minn. 1988).

*State v. Holm*, 186 Minn. 331, 243 N.W. 133 (1932)

*State v. Bentley*, 224 Minn. 244, 28 N.W.2d 770 (1947)

*Lienhard v. State*, 431 N.W.2d 861 (Minn. 1988)

*Wilson v. Commissioner of Revenue*, 707 N.W.2d 695 (Minn. 2006)

Minn. Stat. §§ 549.02, 549.04 (2008)

Minn. R. Civ. App. P. 139.01-.02

Minn. R. Civ. P. 54.04

## STATEMENT OF THE CASE AND FACTS

Respondent James Kolby-Ralph Lund, Jr., was arrested for driving while impaired. Addendum (“A”) at A2; *Lund v. Commissioner of Pub. Safety*, 2009 WL 1587135, at \*1 (Minn. Ct. App. June 9, 2009), *rev. denied* (Minn. Aug. 26, 2009). Lund submitted to an Intoxilyzer test that reported an alcohol concentration of .15. *Id.* The Commissioner of Public Safety revoked Lund’s driver’s license under the implied-consent statute. *Id.*

Lund petitioned the Mower County District Court for judicial review of his license revocation under Minn. Stat. § 169A.53, subd. 2(a) (2006). A2. Before the hearing on his petition, Lund sought discovery of the source code for the Intoxilyzer or, alternatively, suppression of the results of the breath test. A2-A3. The district court denied Lund’s motion and, after the hearing, sustained the revocation of his license. A3.

Lund appealed the district court’s order denying his motion for discovery of the source code for the Intoxilyzer and sustaining revocation of his driver’s license. A2. The Court of Appeals reversed and remanded, concluding that the district court abused its discretion in denying the requested discovery. A1-A8.

Lund filed a notice for taxation of appellate costs and disbursements totaling \$981.68. A9-A10. The Commissioner of Public Safety filed a timely objection on the ground that the State is immune from costs and disbursements in this appeal because it is acting in its sovereign capacity in a non-tort case. A11-A16. It was undisputed that the Commissioner acts on behalf of the State in its sovereign capacity in implied-consent matters such as this. A12.

On September 2, 2009, the Court of Appeals filed an order permitting Lund's taxation of appellate costs and disbursements against the Commissioner, invoking *Lienhard v. State*, 431 N.W.2d 861, 863-64 (Minn. 1988). A17-A18. The Court of Appeals stated that "in 2006 [it] learned of the supreme court's practice of awarding appellate costs and disbursements against governmental entities [acting in their sovereign capacity], based on that court's interpretation of *Lienhard*." A17-A18. The Court of Appeals, however, identified no Supreme Court opinion or order interpreting *Lienhard* in this way or holding that the State is subject to such taxation of costs and disbursements. Judgment was issued and included the \$981.68 award of costs and disbursements. A19.

The Commissioner petitioned for review of the Court of Appeals decision that the State is now liable for appellate costs and disbursements in non-tort civil cases where the State is a party in its sovereign capacity. The petition stated that the decision conflicts with this Court's longstanding precedent holding that the State is not subject to taxation of costs and disbursements in such cases absent explicit statutory authorization. The Commissioner further noted that the State in its sovereign capacity is frequently a party to non-tort civil cases, both as plaintiff and defendant; and the Court of Appeals decision exposes the State to a new and extensive liability, with significant consequences for the State's budget and for taxpayers who would bear the burden of paying these judgments.

The Court granted the Commissioner's petition for review by order filed November 24, 2009. Pursuant to the Court's order of November 30, 2009, which noted that proceedings on the merits may go forward in the district court, the Court of Appeals issued an amended judgment without an award of costs and disbursements. A20.

## STANDARD OF REVIEW

The existence of immunity presents a question of law. *Johnson v. State*, 553 N.W.2d 40, 45 (Minn. 1996). The interpretation of the Minnesota Rules of Civil Appellate Procedure also presents a question of law. *Madson v. Minnesota Mining & Mfg. Co.*, 612 N.W.2d 168, 170 (Minn. 2000); *see also Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008) (stating the same is true of the Minnesota Rules of Civil Procedure). Statutory interpretation is likewise a question of law. *Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 679 (Minn. 2004). The Court reviews questions of law de novo. *Madson*, 612 N.W.2d at 170.

## ARGUMENT

### **I. UNLESS A STATUTE EXPRESSLY PROVIDES OTHERWISE, THE STATE OF MINNESOTA IS NOT SUBJECT TO TAXATION OF COSTS AND DISBURSEMENTS IN CASES WHERE THE STATE IS A PARTY IN ITS SOVEREIGN CAPACITY.**

This Court has long held that, unless a statute expressly provides otherwise, the State is not subject to taxation of costs and disbursements in either the district or appellate courts in cases where the State is a party in its sovereign capacity. *State v. Holm*, 186 Minn. 331, 332-33, 243 N.W. 133, 133-34 (1932); *State v. Bentley*, 224 Minn. 244, 247, 28 N.W.2d 770, 771 (1947). With exceptions that do not apply here, the statutes and corresponding court rules providing for taxation of costs and disbursements do not expressly make the State liable in such cases. Minn. Stat. §§ 549.02, 549.04 (2008); Minn. R. Civ. App. P. 139.01-.02; Minn. R. Civ. P. 54.04. Thus, longstanding law does not permit taxation of costs and disbursements against the State in this appeal.

There is no question that the State, through its Commissioner of Public Safety, is a party here in its sovereign capacity, because an action to review enforcement of the implied-consent law involves governmental authority. *See, e.g., Holm*, 186 Minn. at 331-35, 243 N.W. at 133-34 (recognizing that the Secretary of State was a party in sovereign capacity in an action challenging the validity of legislation administered by his office). The State is subject to the general provisions for taxation of costs and disbursements only in its proprietary capacity, that is, “in an ordinary action for the recovery of money or property” because such civil actions do not involve “governmental authority.” *State v. Fullerton*, 124 Minn. 151, 154, 144 N.W. 755, 756 (1914); *see also Holm*, 186 Minn. at 332, 243 N.W. at 133 (stating that the State does not “subject[] itself to the same liability for costs and disbursements as any [other] litigant” when a case involves the exercise of “governmental prerogatives”).<sup>1</sup>

Two related principles underlie the rule that the State in its sovereign capacity is not subject to taxation of costs and disbursements absent express statutory authority. The first is the common-law immunity of the sovereign, as expressed in Blackstone’s Commentaries on the Laws of England. *See State v. Village of Dover*, 113 Minn. 452, 458, 130 N.W. 539, 539 (1911) (citing 3 Blackstone, Com. 400 for result that “the state, like any other sovereign, does not pay costs unless otherwise provided by statute”).

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<sup>1</sup> Subdivision 3 of section 549.02 and subdivision 2 of section 549.04 exempt the State from liability for costs and disbursements when, under Minn. Stat. § 256B.056 (2008), it asserts the damages claim of a medical-assistance recipient against a third-party tortfeasor. This was needed because the State could be considered a litigant in a proprietary rather than governmental capacity in such cases and therefore subject to the general provisions for costs and disbursements absent an exemption.

Thus, the State is “immune” from taxation of costs and disbursements when “acting in its sovereign character.” *Holm*, 186 Minn. at 332, 243 N.W. at 133.<sup>2</sup>

The second source of the rule is the principle of statutory interpretation codified in Minn. Stat. § 645.27 (2008), which provides: “The state is not bound by the passage of a law unless named therein, or unless the words of the act are so plain, clear, and unmistakable as to leave no doubt as to the intention of the legislature.” *Id.* While related to sovereign immunity, this principle also exists for reasons apart from “common-law notions of kingly prerogative.” *Nelson v. McKenzie-Hague Co.*, 192 Minn. 180, 182, 256 N.W. 96, 97 (1934). Thus, section 645.27’s principle of interpretation is another basis for the rule that the State in its governmental capacity is not subject to the general provisions for costs and disbursements. *Bentley*, 224 Minn. at 247, 28 N.W.2d at 771.

Because these two principles otherwise shield the State from liability for costs and disbursements, the Legislature has enacted express exceptions when it wishes to subject the State to taxation of costs and disbursements in cases where the State may be a party in its sovereign capacity. One exception allows costs and disbursements to a public employee who prevails in an action “for wrongfully denied or withheld employment benefits or rights.” Minn. Stat. §§ 549.02, subd. 1, 549.04, subd. 1, 480.062 (2008).

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<sup>2</sup> Political subdivisions share in this State immunity from costs and disbursements, at least when they are considered to be performing a governmental function as an agent of the State. *See, e.g., Fischer v. Town of Albin*, 258 Minn. 154, 158-59, 104 N.W.2d 32, 35 (1960) (applying rule of immunity from taxation of costs and disbursements to town performing such a governmental function); *see also* 3 David F. Herr & Sam Hanson, *Minnesota Practice* § 139.3, at 730 (2009) (recognizing that this immunity can encompass subdivisions of the State).

The principal exception is the Minnesota Equal Access to Justice Act (MEAJA), Minn. Stat. §§ 15.471-.474 (2008). The MEAJA makes the State liable for litigation expenses, including attorney fees, of small businesses and certain other prevailing parties in non-tort civil cases brought by or against the State if the State's position was not substantially justified. *Id.* The MEAJA is recognized as a waiver of the State's immunity from payment of litigation expenses under these circumstances. *Donovan Contracting of St. Cloud, Inc. v. Minnesota Dep't of Transp.*, 469 N.W.2d 718, 720 (Minn. Ct. App. 1991), *rev. denied* (Minn. Aug. 2, 1991).

The Legislature has extended the MEAJA waiver of immunity to Tax Court proceedings by incorporating it into Minn. Stat. § 271.19 (2008), which governs costs and disbursements in Tax Court. *See Hamm v. State*, 255 Minn. 64, 72, 95 N.W.2d 649, 655 (1959) ("Since the state in levying and collecting taxes acts in its sovereign capacity, costs and disbursements cannot be taxed against it except as provided by law.") (citing *Bentley*). As this Court recently stated in applying the MEAJA waiver in section 271.19, "[i]f the taxpayer is the prevailing party in a contested tax case between the taxpayer and the Commissioner of Revenue, the taxpayer is entitled to costs and disbursements if the taxpayer shows that the position of the commissioner was not substantially justified." *Wilson v. Commissioner of Revenue*, 707 N.W.2d 695, 696 (Minn. 2006).

In sum, because the general provisions for taxing costs and disbursements do not apply under the longstanding rule set forth in *Holm* and *Bentley*, and neither the MEAJA nor any other statutory exception applies, the State is not subject to taxation of costs and disbursements in this non-tort case in which it is a party in its sovereign capacity.

## II. *LIENHARD* DID NOT CHANGE THE RULE AGAINST TAXING THE STATE FOR COSTS AND DISBURSEMENTS IN NON-TORT CIVIL CASES.

The Court of Appeals incorrectly read *Lienhard v. State*, 431 N.W.2d 861, 863-64 (Minn. 1988), as changing the longstanding law for non-tort civil cases. Contrary to the Court of Appeals ruling, *Lienhard* does not make the State liable for appellate costs and disbursements under the general taxation provisions in non-tort civil cases when the State is a party in its sovereign capacity. This Court has not retreated from the holding in *Holm* and *Bentley*, much less overturned it, whether in *Lienhard* or any other decision. See *Holmberg v. Holmberg*, 588 N.W.2d 720, 727 n.49 (Minn. 1999) (citing with approval *Bentley*'s "holding that [the] statute allowing costs on appeal did not apply to the state acting in its sovereign capacity without [a] specific indication that it applied to the state"); see also, e.g., *Village of Zumbrota v. Johnson*, 280 Minn. 390, 397, 161 N.W.2d 626, 631 (1968) (reiterating "[t]he rule is that when the state acts in its sovereign capacity[,] costs and disbursements cannot be taxe[d] against it except as otherwise provided by law").

*Lienhard* was a tort case that arose after enactment of the Tort Claims Act, codified at Minn. Stat. § 3.736 (2008). The Act was the legislative response to *Nieting v. Blondell*, 306 Minn. 122, 235 N.W.2d 597 (1975), which abolished the State's common-law immunity from tort claims, subject to appropriate action taken by the legislature. The decision in *Nieting* was expressly limited to tort cases. *Id.* at 131, 235 N.W.2d at 603.

As to costs and disbursements, *Lienhard* held only that the State can be ordered to pay a prevailing plaintiff's costs and disbursements in tort suits for which the Tort Claims

Act waives the State's sovereign immunity. *Lienhard*, 431 N.W.2d at 863-65. This waiver is a limited one, applying only to tort suits and even preserving immunity for certain types of tort claims. See *Janklow v. Minnesota Bd. of Exam'rs for Nursing Home Adm'rs*, 552 N.W.2d 711, 715-16 (Minn. 1996) (discussing the Act's waiver and exceptions).

The Court of Appeals decision misapplies *Lienhard* by quoting it out of context as follows: "Since the abolition of common-law sovereign immunity, the supreme court has held that the state is liable for costs and disbursements 'like any private person.'" A17 (quoting *Lienhard*, 431 N.W.2d at 863). *Lienhard* did not state that sovereign immunity was abolished in all civil cases, as the Court of Appeals suggests, but rather referred only to "the abolition of common law sovereign immunity *from tort liability*." 431 N.W.2d at 864 (emphasis added). Similarly, *Lienhard* used the phrase "like any private person" solely in the context of liability under the Tort Claims Act, not universally in all civil cases as the Court of Appeals misread it. *Id.* at 863.

In the twenty years since it was decided, *Lienhard* has not been understood as overturning the well-established precedent shielding the State from being subject to taxation of costs and disbursements in cases such as this. If *Lienhard* had made the State in its sovereign capacity subject to the general provisions for taxation of costs and disbursements in non-tort cases, the MEAJA would have been rendered superfluous as to those litigation expenses. The MEAJA has, however, continued to be invoked not only for attorney fees, but also costs and disbursements. See, e.g., *State Campaign Fin. & Pub. Disclosure Bd. v. Minnesota Democratic-Farmer-Labor Party*, 671 N.W.2d 894,

899-900 (Minn. Ct. App. 2003) (affirming award of both costs and attorney fees to prevailing defendant because the plaintiff state board's position was not substantially justified). Similarly, this Court would not have applied the MEAJA waiver for Tax Court proceedings as it did in *Wilson* in 2006 if *Lienhard* had made the State liable for any prevailing party's costs and disbursements in all non-tort civil cases. *See Wilson*, 707 N.W.2d at 696, 699 n.4 (requiring taxpayer to be a prevailing party *and* show that the State's position was not substantially justified in order to recover costs).

As reflected in the orders attached to the Commissioner's objection to taxation, A13-A14, the Court of Appeals also has not previously departed from the rule of *Holm* and *Bentley* in the years since the *Lienhard* decision. This longstanding rule has likewise been followed by district courts after *Lienhard*. *See, e.g.*, A21-A26 (order of Hennepin County District Court from 2005 denying taxation of costs and disbursements against the State in action the State brought for environmental remediation of landfills).

The rule has also continued to be endorsed post-*Lienhard* in the writings of authoritative commentators. *See* 3 David F. Herr & Sam Hanson, *Minnesota Practice* § 139.3, at 730 (2009) ("Costs and disbursements may not be taxed against the State (or its subdivisions) acting in its sovereign capacity unless specifically authorized by statute.") (citing *Bentley*); 5A Roger S. Haydock & Peter B. Knapp, *Minnesota Practice* § 1.104, at 120 (2007) ("Costs and disbursements may not be taxed against the State (or subdivisions) acting in its sovereign capacity unless specifically authorized by statute.").

In short, the Tort Claims Act's limited waiver of sovereign immunity for tort cases, applied in *Lienhard* to costs and disbursements, simply does not affect the State's longstanding protection from taxation of costs and disbursements in other civil cases.

**III. THE COURT SHOULD NOT OVERRULE LONGSTANDING PRECEDENT TO NOW MAKE THE STATE SUBJECT TO TAXATION OF COSTS AND DISBURSEMENTS IN NON-TORT CIVIL CASES.**

If the Court considers changing the controlling law on the issue presented, it should decline to do so. “[T]he doctrine of stare decisis directs that [the Court] adhere to former decisions in order that there might be stability in the law.” *State v. Ross*, 732 N.W.2d 274, 280 (Minn. 2007) (citation omitted); *see also Fleeger v. Wyeth*, 771 N.W.2d 524, 529 (Minn. 2009) (reiterating that “following precedent promotes stability, order, and predictability in the law”). Under the principles of stare decisis, the Court is “extremely reluctant to overrule [its] precedent.” *State v. Martin*, 773 N.W.2d 89, 98 (Minn. 2009) (quoting *State v. Lee*, 706 N.W.2d 491, 494 (Minn. 2005)). Thus, the Court “require[s] ‘a compelling reason’ to overrule precedent.” *Fleeger*, 771 N.W.2d at 529 (quoting *Lee*, 706 N.W.2d at 494).

No compelling reason exists to abolish the State's immunity from costs and disbursements in non-tort civil cases where the State is a party in its sovereign capacity. Nor is there a compelling reason to re-interpret the statutes and court rules to have them now provide for taxation of costs and disbursements against the State in such cases.

**A. No Compelling Reason Exists To Abolish The State's Immunity From Taxation Of Costs And Disbursements In Such Cases.**

This is not an appropriate case to depart from *stare decisis* for many reasons. The applicable immunity is longstanding and not difficult to administer; no immunities of the State have been abolished in the thirty-plus years since *Nieting* abolished tort immunity; the basis for the abolition of tort immunity does not apply in this context; the rationale of *Lienhard* for costs and disbursements in tort cases also does not apply; Minnesota law is consistent with the decisions of other states and the federal judiciary; and the Legislature has waived the State's immunity in the circumstances deemed proper as a policy matter.

The State's immunity from taxation of costs and disbursements in non-tort cases has been recognized for at least one hundred years. *E.g., Village of Dover*, 113 Minn. at 458, 130 N.W. at 539. In all this time, the immunity's wisdom has never previously been questioned by this Court or the Court of Appeals. Moreover, commentators have not called for the immunity's abolition but have continued to endorse it. *Supra* p. 10.

The immunity has also been straightforward to administer. Courts have experienced no difficulty in non-tort cases in distinguishing between the State as a party in its sovereign capacity (cases involving "governmental authority") and its proprietary capacity ("ordinary action[s] for the recovery of money or property"). *See supra* p. 5; *see also, e.g., State v. McCoy*, 228 Minn. 420, 425-28, 38 N.W.2d 386, 389-90 (1949) (holding that in bringing a lawsuit to claim title to bank deposits, the State was a litigant in its propriety capacity and, as such, was subject to the general provisions for taxation of costs and disbursements).

Moreover, the frequency of such disputes is minimal because the State must affirmatively assert the immunity in response to a notice of taxation. Any assertion of immunity is waived if no objection is made to the opposing party's notice of taxation of costs and disbursements. Minn. R. Civ. App. P. 139.04 ("Failure to serve and file timely written objections shall constitute a waiver."); *see also* Minn. R. Civ. P. 54.04 (requiring specific written objections).

The Court has not abolished any immunities of the State since *Nieting* abolished common-law tort immunity in 1975. The statutory immunity created by the Torts Claim Act has been allowed and common-law official immunity from tort claims has continued to be recognized. *See Janklow*, 552 N.W.2d at 715-16 (discussing these immunities). The Court has also left undisturbed legislative immunity, judicial immunity, prosecutorial immunity, and other recognized common-law immunities of the State and its officials from money judgments.

The Court in *Nieting* expressly limited its abolition of State immunity to tort claims. *Nieting*, 306 Minn. at 131, 235 N.W.2d at 603 (making clear that "we are only indicating our disfavor of the immunity rule in the tort area"); *see also Spanel v. Mounds View Sch. Dist.*, 264 Minn. 279, 292-93, 118 N.W. 795, 803 (1962) (limiting abolition of municipal immunity to tort claims). The Court emphasized in *Nieting* that "our decision should not be interpreted as imposing liability on any governmental body in the exercise of discretionary functions or legislative, judicial, quasi-legislative, and quasi-judicial functions." *Nieting*, 306 Minn. at 131, 235 N.W.2d at 603 ; *see also Spanel*, 264 Minn. at 292-93, 118 N.W. at 803 (stating same with respect to political subdivisions).

The types of cases and functions that *Nieting* specifically exempted from its abolition of immunity are the very ones at issue here — non-tort civil cases involving the State’s exercise of governmental discretion and policy, and its enforcement and defense of legislation and court decisions, i.e., non-tort civil cases in which the State is a party in its sovereign capacity. Such litigation includes, for example, implied-consent matters, suits to have statutes declared invalid, enforcement actions of regulatory agencies, and consumer protection actions brought by the Attorney General.

Abolishing the State’s existing immunity from costs and disbursements would expose the State budget to a new liability of paying litigation expenses of opposing parties in this extensive sphere of non-tort cases. Such claims for expenses could be large in individual cases, particularly at the district court level. *See, e.g.*, A21-A26 (district court order rejecting request to tax over \$80,000 in costs and disbursements against the State in action for environmental remediation of landfills). The exposure would become quite sizable in the aggregate, given the large number of non-tort cases in which the State is a party, both in the district courts and on appeal. The financial implications potentially extend to counties, cities and other local units of government, which also are parties in many non-tort cases. *See supra* p. 6, n. 2. The potential consequences for the State budget, and for taxpayers who ultimately would bear the burden of paying the money judgments for costs and disbursements, strongly counsel against abolition of the State’s longstanding immunity in this area.

The State’s exposure to this new liability would risk inhibiting governmental decision-making to avoid potential litigation expenses in non-tort cases, where monetary

liability is otherwise not at issue. Indeed, similar concerns are a basis for other existing governmental immunities from money judgments. *See, e.g., Peterka v. Dennis*, 764 N.W.2d 829, 834-36 (Minn. 2009) (explaining that a principal rationale for judicial and quasi-judicial immunities is to prevent fear of financial liability from inhibiting the exercise of discretionary judgment by court officials); *cf. Janklow*, 552 N.W.2d at 715 (stating with respect to tort claims that “[o]fficial immunity is intended to protect public officials from the fear of personal liability that might deter independent action” and that statutory immunity is intended to “prevent[] judicial second guessing of legislative or executive policy decisions”) (citations omitted).

The fairness concern that underlies the *Nieting* decision is not present here. This concern was that persons suffering personal injuries caused by tortuous conduct of the State should not be denied compensation for those injuries. *Nieting*, 306 Minn. at 127-31, 235 N.W.2d at 601-03; *see also Spanel*, 264 Minn. at 282-84, 118 N.W. at 797-99 (invoking same concern of uncompensated harm in abolishing municipal tort immunity).

The State’s immunity from costs and disbursements in non-tort cases does not deny compensation for personal injuries. As the Court stated in *Lienhard* with respect to tort claims, “costs and disbursements are not part of the claim for compensation for personal injury; they are reimbursement of the expense of litigating the claim.” 431 N.W.2d at 864 (ruling on this basis that costs and disbursements are not included in the dollar liability limits of the Tort Claims Act). Moreover, non-tort suits where the State is a defendant in its sovereign capacity typically do not seek recovery of damages, but rather involve a challenge to some exercise of governmental authority. Thus, unlike

the situation in *Nieting*, the immunity here does not deprive citizens of a remedy for personal injury caused by government negligence or similar conduct. Also, *Nieting* itself recognized that, even when an immunity is abolished, the Legislature may place appropriate limits on the scope of State liability. 306 Minn. at 132, 235 N.W.2d at 603.

Judicial intervention is also unwarranted because the Legislature has acted when it found that the State's immunity from costs and disbursements in non-tort cases produces unfair results. The most significant of these measures is the MEAJA, enacted in 1986 to allow litigants to recover their litigation expenses, including costs and disbursements, from the State when they prevail against a government position that was not substantially justified. *Donovan*, 469 N.W.2d at 719-20. As noted, *supra* pp. 6-7, the Legislature has otherwise affirmatively acted in selected areas of non-tort litigation to subject the State to costs and disbursements.

The rationale used to subject the State to costs and disbursements in *Lienhard* does not apply here. *Lienhard* allowed taxation of expenses against the State in tort cases only because the Tort Claims Act had waived the State's immunity from the underlying common-law damages claims. 431 N.W.2d at 863-64. This rationale can extend, at most, to cases in which the Legislature has created a statutory right of action to recover damages against the State. It is not available in other civil cases for which, as here, the Legislature has expressed no intention to make the State financially liable to opposing litigants.

*Lienhard* is also inapposite because, like *Nieting*, it found support in recent case law from other jurisdictions. See 431 N.W.2d at 864 n.4 (noting other jurisdictions had

concluded that general statutory provisions for recovery of costs and disbursements apply in tort cases for which the state's tort claims act had waived immunity). In abolishing Minnesota's common-law immunity from tort claims, *Nieting* relied heavily on a strong trend of decisions from other states. 306 Minn. at 128-131, 235 N.W.2d at 601-02; *see also Spanel*, 264 Minn. at 286-90, 118 N.W. at 799-802 (relying on same for abolition of municipal tort immunity in Minnesota). In contrast, there is no movement in other state or federal jurisdictions, much less a recent or strong one, to judicially abolish sovereign immunity from taxation of costs and disbursements in non-tort civil cases.

Courts from other states generally follow the same basic rule of immunity from costs and disbursements that has prevailed in Minnesota. *See, e.g., State v. Chapman*, 407 A.2d 987, 989 (Conn. 1978) ("In the absence of a specific statutory provision allowing the taxation of costs against the state, this court is required to adhere to the widely recognized principle that statutes relating to costs and authorizing the imposition of costs in various kinds of actions or proceedings, or under various prescribed circumstances, which do not in express terms mention the state, are not enough to authorize imposing costs against the state."); *Martineau v. State Conservation Comm'n*, 194 N.W.2d 664, 666 (Wis. 1972) ("This court has frequently held that costs may not be taxed against the state or an administrative agency of the state unless expressly authorized by statute.").

Indeed, a survey of other jurisdictions does not indicate that other state courts have judicially extended an abolition or waiver of tort immunity to eliminate their state's sovereign immunity from taxation of costs and disbursements in all other civil cases.

*Costs — Liability of State*, 72 A.L.R.2d 1379; see also, e.g., *Farmers Reservoir & Irrigation Co. v. City of Golden*, 113 P.3d 119, 130-32 & n.8 (Colo. 2005) (acknowledging its decision holding that state may be taxed costs in a tort action based on legislature’s waiver of tort immunity and continuing to hold that state may not be taxed costs in other cases absent a statute that clearly evinces a legislative intent to authorize such taxation).

The United States Supreme Court also recognizes that states are immune from taxation of costs and disbursements in their own courts absent a state statute waiving the immunity: “That the sovereign is not to be taxed with costs in either civil or criminal cases by rule of court without a statute is undoubtedly true.” *Fairmont Creamery Co. v. State of Minnesota*, 275 U.S. 70, 73-74, 48 S. Ct. 97, 99 (1927). Other federal courts have reiterated this principle. See *Richards v. Government of the Virgin Islands*, 579 F.2d 830, 832 (3rd Cir. 1978) (noting *Fairmont* recognizes that “absent waiver, sovereign immunity bars award of costs against state in state court action”); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1029 (1st Cir. 1974) (stating *Fairmont* “acknowledge[es] that a sovereign is immune from costs awarded by its own courts”), *cert. denied*, 421 U.S. 910 (1975); *State of Utah v. United States*, 304 F.2d 23, 27 (10th Cir. 1962) (“It is the general rule that in the absence of an authorizing constitutional or statutory provision, a state court may not tax costs against the State.”), *cert. denied*, 371 U.S. 826 (1962).

Likewise, the federal judiciary has not abolished the sovereign immunity of the United States from taxation of costs and disbursements in federal court actions, but left it

to Congress to prescribe the scope of any such liability. The Federal Rules of Civil Appellate Procedure and the Federal Rules of Civil Procedure both recognize that litigation expenses cannot be taxed against the United States, its agencies or officers unless authorized by a federal statute. Fed. R. App. P. 39(b); Fed. R. Civ. P. 54(d)(1). Congress enacted a partial waiver of this sovereign immunity in the Federal Equal Access to Justice Act, 28 U.S.C. § 2412. *See, e.g., Federal Trade Comm'n v. Kuykendall*, 466 F.3d 1149, 1154 (10th Cir. 2006) (recognizing that section 2412(a)(1) “is a limited waiver of sovereign immunity” from taxation of costs against the United States). This enactment was the model for the waiver of immunity in the Minnesota Equal Access to Justice Act. *Donovan*, 469 N.W.2d at 719 (“The legislature enacted the MEAJA in 1986, modeling the act on the federal Equal Access to Justice Act.”).

In sum, if the Court considers abolishing the State’s immunity from taxation of costs and disbursements in non-tort civil cases, it should decline to do so. No compelling reason exists to warrant overturning the venerable precedent that recognizes and applies this immunity. Legislative waiver by statutory exceptions suffices to identify the non-tort cases in which the State should not have such immunity as a matter of public policy.

**B. No Compelling Reason Exists To Re-Interpret The Statutes And Court Rules To Now Provide For Taxing Costs And Disbursements Against The State In Such Cases.**

Even if the Court abolished the State’s immunity from taxation of costs and disbursements in non-tort civil cases, the result would not change unless the general taxation provisions in statute and court rule were re-interpreted to apply against the State. There is no right to taxation of costs and disbursements unless provided by statute or

court rule. *See Lienhard*, 431 N.W. at 864 (“[c]osts and disbursements were unknown to the common law”). The court rules on costs and disbursements have always been consistent with the general statutory provisions. Those statutory provisions have, in turn, always been read as not applying against the State in its governmental capacity based on the principle of interpretation in section 645.27, which has meaning apart from immunity.

The court rules for taxation of appellate costs and disbursements have followed the statutes. Supreme Court Rule XV, which governed before adoption of the Rules of Civil Appellate Procedure in 1968, adhered to Minn. Stat. §§ 607.01 and 607.02, the general statutes providing for taxation of costs and disbursements on appeal. *See Sup. Ct. R. XV* (Minnesota Statutes (1965) at 5251) *and* Minn. Stat. §§ 607.01-.02 (1965); *Sanitary Farm Dairies, Inc. v. Wolf*, 261 Minn. 166, 177, 112 N.W.2d 42, 50 (1961) (“The right to tax costs and disbursements in this court is controlled by Minn. St. 607.01 and Supreme Court Rule XV.”). Likewise, Rules 139.01 and 139.02, which have governed appellate costs and disbursements since 1968, “are basically the same as Minn. St. 607.01, 607.02, and Supreme Court Rule XV.” *Kloos v. Soo Line R.R.*, 286 Minn. 172, 179, 176 N.W.2d 274, 279 (1970); *see also* Advisory Committee Comment to Rule 139.01-.02 (same).

Under the principle codified in section 645.27, the Court interpreted the provisions of Minn. Stat. §§ 607.01-02 (repealed in 1974) as not permitting taxation of costs and disbursements against the State in non-tort cases. *See State v. Anderson*, 251 Minn. 401, 409, 87 N.W.2d 928, 928 (1958) (“§ 607.01, providing for allowance of costs and disbursements to the prevailing party upon an appeal, is not expressly applicable to the state, and so under § 645.27 may not be applied to the state”); *Bentley*, 224 Minn. at 247,

28 N.W.2d at 771 (“The language employed in § 607.01 does not indicate an intent that it should be applicable to the state.”). Thus, Rules 139.01 and 139.02 have also been understood as not applying against the State as a governmental party in non-tort cases, since these rules were adopted to be essentially the same as Minn. Stat. §§ 607.01-.02. See *Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 490 (Minn. 1997) (“The words of a court rule, like those of a statute, must be taken and construed in the sense in which they were understood and intended at the time the rule was promulgated.”) (quoting *House v. Hanson*, 245 Minn. 466, 473, 72 N.W.2d 874, 878 (1955)).

The result is the same under the general provisions for taxation of costs and disbursements in non-tort cases in the district court. Under Minn. R. Civ. P. 54.04, costs and disbursements in the district court “shall be allowed as provided by statute.” *Id.* The statutory language allowing such taxation “[i]n every action,” Minn. Stat. § 549.04, has always been interpreted as not applying against the State as a party in its governmental capacity in non-tort cases. *E.g., Holm*, 186 Minn. at 333, 243 N.W. at 133-34.

In discussing the principle codified in section 645.27, the Court made clear in *Nelson v. McKenzie-Hague Co.*, 192 Minn. 180, 256 N.W. 96 (1934), that this rule of statutory interpretation retains force even in the absence of sovereign immunity:

While that rule was born of common-law notions of kingly prerogative, the reason for applying it in our representative government is equally cogent, for so applied it has the “same ground of expediency and public convenience.” .... In *United States v. Hoar*, 2 Mason, 311, 314, Fed. Cas. No. 15,373, Mr. Justice Story in discussing this question said: “But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the

mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.”

*Nelson*, 192 Minn. at 182, 256 N.W. at 97 (citations omitted).

The decision in *Lienhard* did not deprive section 645.27 of this independent force in non-tort cases. *Lienhard* stated that the “rationale for the rule of construction” in section 645.27 “lies in the doctrine of sovereign immunity” and thus declined to apply section 645.27 to “a statute [the Tort Claims Act] subjecting the State to liability for tort claims as if it were a private person.” 431 N.W.2d at 864. This reasoning does not extend to cases such as this where, unlike a tort suit, the underlying claims or defenses do not seek a monetary recovery from the State under a legislative waiver of immunity. The continued force of section 645.27 is shown by its use to interpret a statute in a recent case where no monetary relief was sought. *Holmberg v. Holmberg*, 588 N.W.2d 720, 727 & nn.47-49 (Minn. 1999) (applying section 645.27, with no mention of immunity, to hold in a non-tort case that a statute awarding attorney fees did not apply against the State).

In sum, even if the Court abolished the State’s immunity from taxation of costs and disbursements in non-tort civil cases, the longstanding interpretation that the existing statutes and court rules do not authorize taxation against the State in such cases should be followed. These provisions could, of course, be amended if a public policy decision were

made that the State should now be subject to payment of costs and disbursements to prevailing parties in all non-tort civil cases.

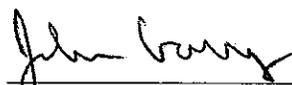
### CONCLUSION

The Court should reverse the Court of Appeals order that permitted taxation of appellate costs and disbursements against the Commissioner of Public Safety in this case.

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