

Nos. A05-1377 and A05-1378

State of Minnesota  
**In Supreme Court**

David Granville and Marlyss Granville as parents and natural guardians  
of Kailynn Granville, a minor, and Jacqueline Johnson as parent and  
natural guardian of Shanel Andrews, a minor,

*Appellants,*

vs.

Minneapolis Public Schools,  
Special School District No. 1,

*Respondent.*

**RESPONDENT'S SUPPLEMENTAL BRIEF AND ADDENDUM**

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## ARGUMENT

In 1996, the legislature repealed the expiration date to the school district immunity statute and revived its provisions. Its decision to do so is amply supported on policy grounds. For this Court to reject the plain statutory language and hold that the 1996 Act did not revive Minn. Stat. § 466.12 would nullify the only possible intent of the legislature. Because it is this Court's obligation to give effect to the legislature's intent, it should hold the repealer was effective. Should this Court give *no* effect to the legislature's repeal, it not only upsets the legislature's decision on statutory immunity but also creates uncertainty about school tort liability and the effect of repealers.

### I. LEGISLATIVE HISTORY OF SECTION 466.12 AND THE SCHOOL DISTRICT'S CERTIFICATION

The legislative history of section 466.12 has been previously outlined in the District's Brief. (Resp. Br., pp. 12-14; RA12-36.) In 1963, the legislature enacted Chapter 466 of Minnesota Statutes, including Minn. Stat. § 466.12. (RA12-19.) While Chapter 466 generally provides for municipal tort liability, school districts are treated differently. In section 466.12, the legislature excluded school districts from most of Chapter 466, generally conferred immunity on school districts, and made insurance optional. (RA17.) In 1969, the legislature amended subdivision 4, extended the section's expiration date to July 1, 1974, and enacted Minn. Stat. § 466.12, subd. 3a. (RA23-24.) Subdivision 3a requires school districts to obtain insurance if able to do so and the cost does not exceed \$1.50 per pupil. (RA23.) If, after a good faith attempt, a school district cannot obtain insurance at the statutory rate, it may seek certification from the state that insurance is unobtainable. (*Id.*) When certification is obtained, a school district is

immune pursuant to subdivisions 1 and 2. (*Id.*)

All versions of Minnesota Statutes from 1974 through 1994 contained Minn. Stat. § 466.12, subd. 3a as well as subdivision 4, the expiration date. (SA2-23.) In 1996, the legislature repealed the expiration date in section 466.12. (RA33-34.) All versions of Minnesota Statutes from 1996 through 2006 included subdivision 3a, and indicated that subdivision 4 had been repealed. (SA24-30.)

In 2001, the District sought certification under section 466.12 as a “tool to control [their] costs.” (AA51-52, 100, 104.) The Department of Commerce certified the District, citing the statute, and stated that it had made a good faith attempt to secure insurance, but confirmed that it was not able to do so for \$1.50 per pupil. (AA44.) The department consulted with a committee whose duties include finding insurance coverage and the committee confirmed that the District could not obtain insurance at the statutory rate. (*Id.*) Since that time, the District has asserted immunity under the statute in this case, as well as in others. (AA75, 77, 82.)

## **II. THE LEGISLATURE REVIVED SECTION 466.12 IN 1996 WHEN IT REPEALED THE EXPIRATION DATE**

### **A. The Plain Meaning Of The Repealer Controls**

The legislature has the power to enact, amend, and repeal statutes. *State ex rel. Bergin v. Washburn*, 224 Minn. 269, 274, 28 N.W.2d 652, 654-55 (1947). Indeed, the “efficacy of the legislature depends upon the possession of the power to repeal the existing law.” Norman J. Singer, 1A *Sutherland Statutory Construction* [hereinafter “*Sutherland*”] § 23:3 at 439 (6th ed. 2002). Like any other statute, interpretation of a

repealer begins with the plain meaning of a statute's language. Minn. Stat. § 645.16. When a statute's meaning is plain as applied to the facts of the particular case, judicial construction is neither necessary nor permitted. *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). The purpose of all interpretation and construction of laws "is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16. When a repeal is clearly stated, the courts have no authority except to apply legislative will as expressed. *Pushor v. Village of Morris*, 53 Minn. 325, 326, 55 N.W.143, 143 (1893).

The 1996 Act is plain and not ambiguous. It repeals a number of laws,<sup>1</sup> including the 1974 expiration date for section 466.12. (RA33-34.) The legislature is presumed to have understood the effect of these words, and to have intended the repealer to be effective.<sup>2</sup> Minn. Stat. §§ 645.08, 645.17(2); *Van Asperen v. Darling Olds, Inc.*, 254 Minn. 62, 74, 93 N.W.2d 690, 698 (1958).

Significant support exists for the conclusion that the legislature knew what it was doing. Section 466.12 was included in the Minnesota Statutes for over twenty years, including 1996, the year the legislature passed the repealer. (SA24.) In other words, the text of section 466.12 was in full view of the legislature at the time it repealed the

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<sup>1</sup> There is no offense to the single subject rule here. A repeal of a statute involves the statute's effect, not its subject. *State v. City of Duluth*, 238 Minn. 128, 133, 56 N.W.2d 416, 420 (1952).

<sup>2</sup> The reference to "obsolete" laws in the 1996 Act does not create an ambiguity. Using obsolete as a generic description of the laws repealed is nothing more than a judgment by the legislature that the expiration date is "out-of-date." *Black's Law Dictionary* 1107 (8th ed. 2004).

expiration date. Giving all due respect to a co-equal branch of the government, this Court must assume that the legislature understood it was repealing an expiration date and, without an expiration date, the effect was to revive section 466.12, subs. 1-3a.

The legislature has the authority to revive a law and repeal an expiration date, even after the law has expired. First, the legislature's authority to revive a former law is well recognized. *See generally 2 Sutherland* § 34.10 at 48. (“[S]overeign law-making authority can assert itself by reestablishing as law provisions which had been in effect but had been abrogated. ... [A] statute may be revived by a reference in the new statute.”) Second, the Minnesota legislature has repealed numerous expiration dates in other statutes. *See, e.g.*, Act of June 30, 2001, 1st Sp., ch. 9, art. 1, § 62, 2001 Minn. Laws 2133, 2181 (repealing June 30, 2001 expiration date in Minn. Stat. § 144.148 (2000)); Act of Apr. 18, 1988, ch. 551, § 1, 1988 Minn. Laws 507, 507 (repealing Jan. 1, 1989 expiration date in Minn. Stat. § 469.012, subd. 10 (supp. 1987)); Act of June 1, 1981, ch. 356, § 378, 1981 Minn. Laws 1770, 1790 (repealing Act of Mar. 22, 1978, ch. 510, § 10, which imposed June 30, 1981 expiration date on Act now codified and amended as Minn. Stat. § 3.9223 (2006)); Act of Mar. 4, 2002, ch. 223, § 29, 2002 Minn. Laws 179, 202 (repealing Minn. Stat. § 414.11 (2000), which set June 1, 1999 termination date).

Third, the legislature's authority to amend<sup>3</sup> an expired law in order to revive it has

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<sup>3</sup> The cited case law involves an amendment instead of a repeal, but this distinction is not material. The distinction between amendment and repeal is arbitrary and, while separate rules of construction apply to each, courts recognize that some legislative acts have both qualitative effects. 1A *Sutherland* § 23:2 at 437 (citing authorities); *See, e.g., State ex rel. Minn. Amusement Co. v. County Bd. of Ramsey County Commr's*, 255 Minn. 413,

been recognized in other jurisdictions. In *Fenolio v. Sebastian Bridge District*, 200 S.W. 501 (Ark. 1917), the Arkansas Supreme Court upheld the legislature's act that extended the expiration of a statute authorizing the construction of a bridge. The original statute authorized construction "if it is approved at any time within two years." *Id.* at 502. After that statute expired, the legislature amended it and extended the period to six years. *Id.*

[I]f the law was enacted by the Legislature it remained in force, even though the time for exercising the powers conferred expired before the amendment extending the time was enacted. The law itself was not dead, though the power conferred could no longer be exercised without further legislative action.

*Id.* at 503. The court held the statute had been revived. *Id.* See also *State ex rel. Dawes v. Bailey*, 42 P. 373, 374 (Kan. 1895) (upholding legislature's act to amend expired levy because law had "continuing force" in the collection of delinquent taxes).

Similarly, in this case, section 466.12 expired in 1974, but it had continuing force as governing law in some tort claims against school districts. See, e.g., *Larson v. Indep. Sch. Dist. No. 314*, 289 N.W.2d 112, 123 (Minn. 1979); *Faber v. Roelofs*, 311 Minn. 428, 250 N.W.2d 817 (1977). And, by analogy to *Fenolio*, while the immunity conferred in section 466.12 could not be exercised after expiration, it could be revived by further legislative act.

No suggestion should be made that it was a "mistake" to include section 466.12 in the statute books after it had expired. The statute books are a legislative act. The Revisor of Statutes publishes the Minnesota Statutes and is an arm of the legislature. See Minn.

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416, 96 N.W.2d 580, 584 (1959) (holding amendment "obliterated" portion of statute "as if repealed").

Stat. § 3C.01 (stating that Revisor serves at the pleasure of the Legislative Coordinating Commission); Minn. Stat. § 3.303, subd. 1 (stating that Legislative Coordinating Commission “coordinate[s] the legislative activities of the senate and house of representatives”); *see Washburn*, 224 Minn. at 274, 28 N.W.2d at 654-55 (holding that change in statutes as compiled by Revisor “is one of legislative sanction and action,” and court “may only apply the law as the legislature has enacted it”). The statute books as certified are prima facie evidence of what is the law. Minn. Stat. § 3C.13. (*See* SA1.)

“The responsibility for clearing dead wood out of the statute books rests with the legislatures,” not the courts. 2 *Sutherland* § 34.5 at 39. If it is the legislature’s option to clear the “dead wood,” then it is equally the legislature’s prerogative to prune a dead branch, i.e., an expiration date, and thereby revive a statute. Any other view would throw into doubt the other instances in which the legislature has repealed an expiration date. The Court’s interpretation of the 1996 repealer is not limited to the this repealer, but will affect the interpretation of other repealers and other laws in the Minnesota Statutes. Moreover, by upholding the validity and effect of the 1996 repealer, this Court would give effect to the legislature’s only possible intent, clearly expressed, to abrogate the 1974 expiration date.

**B. If The Court Finds Ambiguity, Then It Should Not Apply Section 645.36**

This Court resorts to rules of construction only if the statute is ambiguous. *Correll v. Distinctive Dental Servs., P.A.*, 607 N.W.2d 440, 445 (Minn. 2000). Language is ambiguous only when it is subject to more than one reasonable interpretation. *Am.*

*Tower*, 636 N.W.2d at 312. Rules of construction are “no more than an aid to be used in ascertaining legislative intent and it is not determinative where legislative intent is apparent.” *State v. Coolidge*, 282 N.W.2d 511, 514 (Minn. 1979). It necessarily follows that rules of construction are not substantive law. *Agassiz & Odessa Mut. Fire Ins. Co. v. Magnusson*, 272 Minn. 156, 167, 136 N.W.2d 861, 869 (1965). This Court has stated clearly that the rules of construction “do not mean that we are at liberty to put something into the statute which is not there.” *Nordling v. Ford Motor Co.*, 231 Minn. 68, 76, 42 N.W.2d 576, 581 (1950). Rules of construction “are not the masters of the courts, but merely their servants. . . .” *Northern States Power Co. v. Donovan*, 258 Minn. 125, 131, 103 N.W.2d 126, 130 (1960) (citations omitted).

In this case, appellants cited a rule of construction, Minn. Stat. § 645.36, for the first time in their reply brief and argued, also for the first time, “in repealing the repealer in subdivision 4, the legislature never intended to revive the remainder of Section 466.12.” (App. Reply, p. 18.) Minn. Stat. § 645.36 provides that “[w]hen a law is repealed which repealed a former law, the former law shall not thereby be revived, unless it is so specifically provided.” Even assuming ambiguity exists in the 1996 repealer, this rule of construction should not be applied.

Minn. Stat. § 645.36 is an abrogation of the common law. *See* 1A *Sutherland* § 23.32 at 565. The statute, therefore, is limited to its “express wording or necessary implication.” *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 703 N.W.2d 513, 521 (Minn. 2005). By either its terms or implication, section 645.36 does not apply to a repeal of an expiration date. Absent legislative direction to the contrary, this Court

should reject the application of section 645.36 in this case. If the legislature had intended this Court to not give effect to repeal of expiration dates, it would have said so.

Other courts have held that this rule of construction applies only to cases of “absolute appeal.” *Pepin Twp. v. Sage*, 129 F. 657, 662-63 (8th Cir. 1904) (citing cases) (refusing to apply rule to repeal of statute creating exception and holding repeal means law operates free of exception). Indeed, this Court has refused to apply this rule to the repeal of a suspension of statute and held that the repeal revived the statute. *Strand v. Village of Watson*, 245 Minn. 414, 420, 72 N.W.2d 609, 614 (1955) (holding statute requiring pharmacy sale of liquor “again became operative” after repeal of act suspending pharmacy statute during Prohibition).

The legislature’s repeal of an expiration date is similar to a repeal of an exception or a repeal of a suspension of statute. The expiration date works like an exception, limiting the effect of a statute; the repeal of an expiration date works like a repeal of a suspension, causing the statute to be revived. Consequently, this Court should limit the “repeal of a repeal” statute to cases of absolute repeal and decline to apply it here.

Instead, if this Court finds ambiguity in the 1996 Act, it should apply the familiar indicia of legislative intent. Minn. Stat. § 645.16. While neither party has uncovered legislative commentary or committee hearings regarding the 1996 Act, this Court may turn to contemporaneous legislative history and administrative interpretations of the statute. Undisputed record evidence shows that the school budget crisis was escalating in the mid-1990s. (RA36-41.) The revival of section 466.12 is consistent with a legislative goal to provide schools with power to control non-educational expenditures. Revival is

also consistent with a legislative response to *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993), in which this Court recognized a state constitutional right to education. Further, the Department of Commerce applied section 466.12 when the district sought certification. (AA44.) Based on a number of indicia, this Court should determine the legislature intended to revive section 466.12 by repealing its expiration date.

**III. ALTERNATIVELY, THIS COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO DECIDE WHETHER THE 1996 ACT REVIVED SECTION 466.12**

The validity of the 1996 Act was raised for the first time in appellants' reply brief. It was never raised in the district court, the court of appeals, the petition for review, or in the order granting review. Consequently, the appellants have waived the issue, and it need not be considered by this Court. Minn. R. Civ. App. P. 128.02, subd. 3; *State v. Hartmann*, 700 N.W.2d 449, 457 (Minn. 2005) ("We have repeatedly held that failure to argue an issue in a party's [opening] brief constitutes waiver of that issue.")

Nor is the effect of the 1996 repealer similar to a question of subject matter jurisdiction, which may be raised at any time. Subject matter jurisdiction goes to the authority of a court to hear a dispute; the pending issue is an attack on the validity of section 466.12, and does not affect this Court's authority to resolve the constitutional issue on which it granted review. *See generally Dead Lake Ass'n, Inc. v. Otter Tail County*, 695 N.W.2d 129, 134 (Minn. 2005) (discussing nature of subject matter jurisdiction). Appellate review falls within the ambit of this court's discretion. Minn. R. Civ. App. P. 102 & 103.04. This Court should decline review of this issue because there is no good cause or exceptional circumstance supporting review in the interests of justice.

*See, e.g., Hunt v. Regents of Univ. of Minn.*, 460 N.W.2d 28, 31 (Minn. 1990) (considering error on preemptory challenge to jury where good cause shown); *McGuire v. C & L Rest., Inc.*, 346 N.W.2d 605, 610 (Minn. 1984) (considering constitutional issue, in part, based on “interests of justice”).

To the contrary, there is good cause *not* to review this issue. The statute has been published as valid since 1996. The District has relied on it, sought certification under its terms, and depended on it to control costs. The Department of Commerce applied the statute and certified the District under its terms. The District has asserted statutory immunity approximately 4-5 times a year since it received certification. (AA75, 77, 82.) In view of these facts, it would be inequitable to review the validity of the 1996 Act where the issue was waived in dispositive motions.

### **CONCLUSION**

The 1996 repealer is not ambiguous. The legislature repealed the expiration date to section 466.12 and revived the statute. The legislature has repealed expiration dates before and it is not the same as a repeal of a repeal. Here, the legislature intended to ease the budget crisis for school districts and this Court should give effect to that intent. Any other result gives *no* effect at all to the 1996 Act and misconstrues this Court’s authority to interpret the law, making it greater than the legislature’s authority to repeal existing law and revive former law. The consequence would be to create uncertainty for repeal statutes generally and school district immunity.

Respectfully submitted,

Dated: March 23, 2007

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).