

Nos. A08-418 and A08-569

State of Minnesota  
 In Supreme Court

S.M. Hentges & Sons, Inc.,

*Appellant,*

vs.

Richard Mensing and Martha A. Mensing, husband and wife;  
 a/k/a Richard D. Mensing; Martha A. Mensing Revocable Living Trust,  
 Martha A. Mensing and Richard D. Mensing, Trustees; Short Elliott  
 Hendrickson, Inc., a Minnesota corporation; the City of Cannon Falls,

*Respondents,*

and

Land Geeks, L.L.C., a Minnesota limited liability company;  
 Michael Vincent; and the County of Goodhue,

*Defendants.*

**APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL ADDENDUM**

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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).

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**I. THE LEGISLATIVE INTENT OF SUBDIVISION 4B SHOULD BE ASCERTAINED FROM PLAIN STATUTORY LANGUAGE RATHER THAN LEGISLATIVE HISTORY.**

To support its interpretation that Minn. Stat. § 514.011, subd. 4b applies to a residential subdivision consisting of single-family lots, Respondent Short-Elliott Hendrickson, Inc. (“SEH”), like the Court of Appeals, improperly casts aside the plain statutory language in favor of legislative history and perceived legislative purpose. Such an approach, however, is inconsistent with Minnesota law.

In ascertaining legislative intent, this Court presumes the legislature’s choice of words indicate its intent. N. States Power Co. v. Comm’r of Revenue, 571 N.W.2d 573, 575 (Minn. 1997). In construing the meaning and scope of a statute, the words of the statute govern and are given their common and approved usage. Id. “When the language of a statute is unambiguous, our role is to give effect to the legislature’s will as expressed in that language. Only if we determine that the plain meaning of a statute is ambiguous will we consider the circumstances under which the law was enacted, the consequence of a particular interpretation, and the law’s legislative history.” Harrison v. Harrison, 733 N.W.2d 451, 453 (Minn. 2007).

Here, contrary to SEH’s assertion, the plain statutory language utilized by the Legislature reveals a conscious choice to limit the exception to multi-unit residential buildings:

**Exceptions; multiple dwelling.**

**The notice required by this section shall not be required to be given in connection with an improvement to real property consisting of or providing more than four family**

**units when the improvement is wholly residential in character.**

Minn. Stat. § 514.011, subd. 4b; cf. Resp. Br., p. 18 (“The language of Subdivision 4b does not, on its face, specifically reference multi-unit residential buildings[.]”).

The use of “family units” is a significant indicator of the Legislature’s intent to limit the exception to apartments, condominiums, and similar multi-unit residential buildings. If the Legislature had intended the broad interpretation proffered by SEH and adopted by the Court of Appeals, it knew how to and easily could have utilized a less labored phrase, such as family residences, homes, habitations, or lots. Both the Court of Appeals and SEH conspicuously avoided the fact that the Legislature instead selected the more specialized phrase “family units,” creating a distinction from these broader terms.

For its part, SEH argues that the Legislature’s failure to define the phrase “family units” requires broad application of the term. This argument ignores, however, the canon of statutory construction that undefined words be given their plain and ordinary meaning. Minn. Stat. § 645.08 (“words and phrases are construed according to the rules of grammar and according to their common and approved usage”); see also State v. Iverson, 664 N.W.2d 346, 351 (Minn. 2003) (“It does not follow that the legislature’s choice not to define a term indicates a preference for a broad definition. If the legislature intended the terms to be read broadly, it could have provided broad definitions.”). A “unit” by definition denotes a single thing that is a constituent of a whole, such as an apartment in a building or a condominium in a complex. Merriam-Webster Online Dictionary, Add. 1.

In contrast, the lots at issue here are each an independent piece of undivided real property that were contemplated to consist of only one single-family residence.

Similarly, the use of the term “dwelling” in the heading of the exception should not be disregarded. The plain and ordinary meaning of “dwelling” is “a shelter in which people live.” Merriam-Webster Online Dictionary, Add. 2. Here, SEH made improvements to undeveloped lots rather than dwellings. If the legislature had intended lots not containing dwellings to be included in this exception, it could have easily added the phrase “multiple lots” after “multiple dwelling.” Its decision to limit the exception to dwellings is indicative of its intent. Further, the interpretation that such lots are included in the exception requires the Court to completely disregard the use of the term “dwelling.” See Minn. Stat. § 645.16 (“Every law shall be construed, if possible, to give effect to all of its provisions.”); § 645.17 (“the legislature intends the entire statute to be effective and certain”).

SEH argues that the statutory heading referencing “multiple dwelling” should not be considered because it was added to the statute eight years after the original enactment. Resp. Br., p. 11. It is unclear how SEH can argue that this subsequent legislative act is irrelevant to the analysis, but other legislative history is determinative.<sup>1</sup> This selective use and manipulation of legislative history highlights why Minnesota law provides that

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<sup>1</sup> Even assuming that legislative history was relevant to this analysis, SEH cites to nothing that specifically addresses the import of Subdivision 4b. Rather, SEH provides only general and self-serving excerpts of legislative history that support its position. These excerpts are not necessarily representative of the entire legislative discussion on the relevant issue, but rather deal with the general concept of protecting homeowners.

legislative intent is to be ascertained from statutory language, and legislative history resorted to only on a secondary basis.

**II. THE ARGUMENT THAT SEH IS NOT REQUIRED TO PROVIDE PRELIEN NOTICE AS A RESULT OF ITS ENGINEER STATUS IS NOT PROPERLY BEFORE THE COURT.**

SEH argues that the district court erred in ruling that it was required to provide prelien notice because such notice requirements do not apply to those who provide engineering services with respect to real estate. Resp. Br., p. 30. Because SEH failed to raise this issue before the district court or petition for review of this issue, it is not properly before the Court.

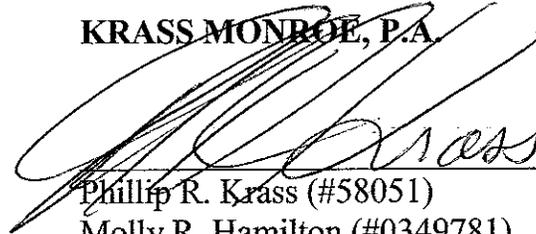
The Minnesota Supreme Court generally does not address issues that were not raised in a petition for review. In re GlaxoSmithKline PLC, 699 N.W.2d 749, 757 (Minn. 2005); Anderly v. City of Minneapolis, 552 N.W.2d 236, 239-40 (Minn. 1996) (“[T]his court may decline to hear an issue if it is not raised in either a petition for review or a conditional petition for review.”). The Court only deviates from this procedure in the interest of justice. Minn. R. Civ. P. 103.04.

Here, SEH raised the argument that it was exempt from prelien notice as an engineer for the first time before the Court of Appeals, which declined to address the issue in its decision. See Nw. Nat’l Bank SW v. Lectro Sys., Inc., 262 N.W.2d 678, 680 (Minn. 1977) (parties may not raise new issues on appeal). SEH failed to petition for review on this or any issue, and has not offered any argument that the interests of justice require consideration of this issue despite its failure seek such review. Accordingly, the Court’s review should be limited to the discrete issue raised by Petitioner.

To the extent this Court expresses an interest in this issue, which was not addressed in the Court of Appeals decision, Petitioner relies on the arguments set forth in the Mensings' brief to the Court of Appeals, in which Petitioner joined below.

Dated: June 11, 2009

**KRASS MONROE, P.A.**

A handwritten signature in black ink, appearing to read "P. R. Krass", is written over a horizontal line. The signature is fluid and cursive.

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IN SUPREME COURT

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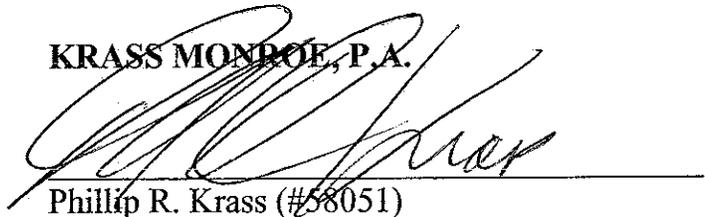
CERTIFICATION

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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 1,152 words, and the font size is 13 point. This brief was prepared using Microsoft Word 2003 software.

Dated: June 11, 2009

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