

CASE NOS.: A10-1802, A11-567

**STATE OF MINNESOTA
IN SUPREME COURT**

James R. Williams,

Respondent,

vs.

Board of Regents of the University of Minnesota
and
Orlando Henry "Tubby" Smith,

Appellants.

**BRIEF OF *AMICUS CURIAE*
LEAGUE OF MINNESOTA CITIES**

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STATEMENT OF THE LEGAL ISSUE

Minnesota law conclusively presumes that persons communicating with government agents know the actual authority of the agent with whom they are communicating and provides that absent actual authority government agents cannot bind the government and create liability that the public purse must compensate. Should an exception be created when a government entity engages in a “proprietary” activity?

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The League of Minnesota Cities (League) has a voluntary membership of 830 out of 853 Minnesota cities.¹ The League represents the common interests of Minnesota cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, policy-development, risk-management, and advocacy services. The League's mission is to promote excellence in local government through effective advocacy, expert analysis, and trusted guidance for all Minnesota cities.

The League has a public interest in this case as a representative of cities throughout Minnesota protected by this Court's long-standing law that limits government liability by conclusively presuming that persons communicating with government agents know the actual authority of the agent with whom they are communicating and by providing that absent actual authority government agents cannot bind the government and create liability that the public purse must compensate. *Jewell Belting Co. v. Village of Bertha*, 97 N.W. 424, 425 (Minn. 1903). All Minnesota cities have a public interest in ensuring that this limitation on government liability is not eviscerated by the creation of an exception exposing government entities' "proprietary" activities to liability.

¹ The League certifies under Minn. R. Civ. App. P. 129.03 that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity besides the League made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE AND FACTS

The League concurs with Appellants' statement of the case and facts.

INTRODUCTION AND SUMMARY OF LEGAL ARGUMENT

Here, in the context of a negotiation to hire an assistant men's basketball coach at the University of Minnesota, the court of appeals held for the first time—contrary to this Court's long-standing precedent—that a government entity can be liable for a government agent's representation where it was undisputed that the agent lacked actual authority to bind the government entity. The court of appeals reached this erroneous conclusion by borrowing an analytically unsound distinction adopted in a different, outdated context involving a claim of sovereign immunity.

The League sought permission to participate as *amicus curiae* because this case will have a significant, statewide impact on government entities throughout Minnesota including cities, towns, counties, and school districts. The court of appeals changed Minnesota law by adopting a new proprietary-activity exception that will expose government entities to new liability in the context of government contracts and claims of negligent misrepresentation. Indeed, it is easy to understand this case's statewide significance given the massive amount of communication occurring on a daily basis throughout Minnesota between the thousands of government agents and the public—communication that can now create liability even when government agents do not have actual authority to bind the government.

This Court should reverse the court of appeals' decision for several reasons. First, experience confirms that there is no analytically sound test for distinguishing between

governmental and proprietary activities. Second, it would be bad public policy to allow private financial interests to outweigh the public interest in protecting the public purse and in ensuring that courts do not usurp government entities' authority to determine which of their many agents may bind them. And finally, it would be bad public policy to allow courts to decide whether a challenged activity is governmental or proprietary because when courts make this decision, they will be substituting their judgment for that of the governing body of a coequal branch of government—a governing body that by choosing to engage in the challenged activity—has already made a legislative determination that it serves a governmental purpose.

LEGAL ARGUMENT

The League won't repeat Appellants' legal arguments here. Instead, this brief focuses on the statewide significance of this case and on the problems—from a broader municipal viewpoint—with attempting to distinguish between “proprietary” and “governmental” activities.

- I. **This case will have a significant, statewide impact because the court of appeals changed Minnesota law by adopting a new proprietary-activity exception that will expose government entities throughout Minnesota to new liability.**

This case is about much more than men's college basketball. In fact, it will have a significant, statewide impact on governmental entities throughout Minnesota including cities, towns, counties, and school districts because the court of appeals did not limit the new proprietary-activity exception it created to men's college basketball. Therefore, if the court of appeals' decision is not reversed, plaintiffs throughout Minnesota will have a

strong incentive to characterize a wide range of activity by a wide range of government entities as proprietary in order to avoid this Court's long-standing limitation on government liability that requires government agents to possess actual authority before they can bind the government.

The court of appeals' new proprietary-activity exception will negatively impact cities and other government entities in two ways. First, it will expose them to new liability in contexts where long-standing law has previously protected them. Second, even when government entities avoid liability by convincing a court that a challenged activity should not be characterized as proprietary, they will be forced to use public resources to defend themselves as plaintiffs push to expand the new exception's application.

There is objective support for the League's concern about this case's statewide significance. This Court itself has demonstrated that the distinction between governmental and proprietary activities has statewide significance by granting review of four appeals involving such a distinction during the past three years.² These four appeals also provide objective support for the League's concern that the recognition of a

² *Lund v. Comm'r of Pub. Safety*, 783 N.W.2d 142, 143 (Minn. 2010) (state immune from the taxation of appellate costs and disbursements when it acts in its sovereign capacity and not its proprietary capacity); *DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, 796 N.W.2d 299 (Minn. 2011) (plaintiffs entitled to use a different, more favorable takings standard because the challenged zoning regulations were designed to benefit a "government enterprise" versus the public at large); *City of Oak Park Heights v. County of Washington*, 802 N.W.2d 767 (Minn. Ct. App. 2011), *rev. granted* (Sept. 28, 2011) (considering whether there should be an exception to the certiorari requirement for appeals of local government bodies' quasi-judicial decisions when a local government body engages in a proprietary activity and not a governmental activity).

proprietary-activity exception in one context will create an incentive for plaintiffs to push to expand the exception's application into different contexts thereby compounding this case's statewide impact.

II. The court of appeals' new proprietary-activity exception should be rejected because it is bad law and bad public policy.

A. There is no analytically sound test for distinguishing between governmental and proprietary activities.

The tests that have been used (and rejected) in the past for distinguishing between governmental and proprietary activities have been criticized as creating a “troublesome dichotomy” and as “inherently unsound.” *Imlay v. City of Crystal Lake*, 453 N.W.2d 326, 330 (Minn. 1990) (refusing to resurrect the proprietary exception in the context of applicability of statutory caps on municipal liability because the Court did “not wish to reinstate this troublesome dichotomy”); *See* 2-35 Antieau on Local Gov't § 35.02 (2d ed.) (citing cases nationwide discussing the governmental-proprietary distinction and characterizing it as “inherently unsound”). In addition, this distinction has been criticized as “elusive” because of the often “dual nature” of government activity as part governmental and part proprietary. 18 McQuillin Mun. Corp. § 53.02.10 n. 17 (citing cases nationwide discussing the governmental-proprietary distinction). The tests that have tried (and failed) to articulate a distinction between governmental and proprietary activities have focused on several factors including on: whether the private sector performs the same activity; whether the activity makes a profit, whether a fee is charged for the activity, and whether the activity provides a public service.

For example, when the court of appeals recently created a new proprietary-activity exception in the context of subject matter jurisdiction over appeals of local government bodies' quasi-judicial decisions, it borrowed an outdated definition for proprietary activities that was used to analyze a claim of sovereign immunity.

[A]ctivities are considered proprietary not because the city seeks to make a profit but because the city voluntarily engages "in the same business which, when conducted by private persons, is operated for profit."

City of Oak Park Heights v. County of Washington, 802 N.W.2d. 767, 770 (Minn. Ct. App. 2011), *rev. granted* (Minn. Sept. 28, 2011) (quoting *Keever v. City of Mankato*, 113 Minn. 55, 61, 129 N.W. 158, 159 (Minn. 1910)). And here, the court of appeals again borrowed an outdated analysis from a claim of sovereign immunity noting that "[i]f the government is to enter into business ordinarily reserved to the field of private enterprise, it should be held to the same responsibilities and liabilities." *Williams v. Smith*, Nos. A10-1802, A11-567, 2011 WL 4905629 (Minn. Ct. App. Oct. 17, 2011) (quoting *Stein v. Regents of the Univ. of Minn.*, 282 N.W.2d 552 (Minn. 1979)). In *Stein*, this Court analyzed the following factors before concluding that the operation of the University of Minnesota Hospitals was a proprietary activity.

[T]he factors important in determining whether operation of a hospital by state or local government is a proprietary or a governmental activity include the following: (1) whether the primary purpose or function of the hospital is to render services to patients who lack funds to obtain care at a private institution; (2) whether the operating revenues are derived from fees for services or from public funds; (3) whether the hospital is substantially similar to or competes with private institutions; (4) whether the hospital makes a profit. None of these factors is controlling, and each case is to be decided on its own facts.

Id. at 555.

But the problem with using any of the factors from either of these outdated cases is that they will produce arbitrary results that cannot be analytically defended and that will result in uncertainty for judges, attorneys, and government entities. Consider, for example, the factor that analyzes whether the private sector also performs the challenged activity. Under this factor, the proprietary-activity “exception” would instead become the “rule” for many government entities. Indeed, almost every city service has been or could be operated by a private person for profit including animal-control, accounting, park-and-recreation, fire-fighting, engineering, land-use, public-works, refuse-collection, snow-plowing, and building-inspection services to name a few.³ Should long-standing precedent limiting government liability in the land-use context, for example, be reversed simply because the private sector also provides land-use services? *See, e.g., Jasaka Co. v. City of St. Paul*, 309 N.W.2d 40, 44 (Minn. 1981) (holding that a city was entitled to enforce its zoning ordinance even though a building official had erroneously issued a building permit for a radio tower for which construction had begun noting that “with rare exception a city is not estopped from denying the unlawful functions of its own officials”).

Further, focusing on the factor that analyzes whether the challenged activity produces a profit would produce arbitrary results. In many cities, for example, art centers and ice arenas operate at a profit, but they operate at a loss in other cities, and their

³ In fact, the “contract” at issue in *Jewell Belting Co.* was for the purchase of a fire engine—a “contract” involving the underlying activity of firefighting, an activity the private sector also performs for profit. But this Court did not indicate in *Jewell Belting Co.* that its limitation on government liability was in any way dependent on the underlying activity the government entity was performing.

operation is subsidized because a city council has made a legislative determination that these activities serve an important governmental purpose. See Mary Jane Smetanka, *Cities Weigh Services That Don't Pay Their Way*, Star Tribune (updated Nov. 7, 2011), <http://www.startribune.com/local/133411103.html>. How can it be logical to conclude that the operation of an ice arena is a governmental activity in a subsidizing city but it is a proprietary activity in a profiting city? Or consider a situation where an ice arena is profitable one year but operates at a loss the next. How can it be logical for the exact same ice arena to be characterized as a proprietary activity during one year and as a governmental activity during the next? And must a court—considering a hypothetical negligent misrepresentation claim involving a government employee's mistaken representation about the availability of an ice arena for a private, for-profit event—delay its decision until the end of the city's fiscal year so that it can determine whether the ice arena operated at a profit for the year at issue?

Likewise, focusing on the factor that analyzes whether a fee is charged for a particular activity would produce arbitrary results. In some cities, for example, a fee is charged for fire calls to respond to automobile accidents but a fee is not charged for fire calls to put out house fires. See *Minnesota Town to Bill for Fire Calls*, Government Fleet Top News (Dec. 15, 2004), <http://www.government-fleet.com/News/Story/2004/12/Minnesota-Town-to-Bill-for-Fire-Calls.aspx>. How could it be logical to conclude that the activity of firefighting in the same city by the same firefighters is sometimes a proprietary activity and sometimes a governmental activity? And should it matter when analyzing this factor that the reason a city decided to charge a

fee for a particular service was not to make a profit, but instead, was a way for a cash-strapped city to respond to cuts in local government aid without raising taxes?

And finally, consider the most relevant factor from these outdated tests—the factor that analyzes whether the challenged activity provides a public service. But use of this factor would also produce troubling results. First, whenever a court determines whether a challenged activity provides a public service, it will be substituting its judgment for that of the governing body of a coequal branch of government—a governing body that by deciding to engage in the challenged activity—has already made a legislative determination that it provides a public service.

Second, this factor simplistically fails to accommodate for the dual nature of many government activities as part proprietary and part governmental. Consider cities' park-and-recreation activities. A fee is often charged for these services (that the public sector also provides), and in some cities, they provide welcome revenue. But it can't be denied that these activities also provide an important public service, for example, they promote the health of the community; they provide positive activities for children; and they help maintain a stable tax base by offering desirable amenities that attract tax-paying residents. Or consider the numerous redevelopment projects across our state in which cities partner with the private sector to stimulate redevelopment. Redevelopment projects generally create a profit for the private-sector partner. But they also provide important public services like the creation of affordable housing and the abatement of environmentally contaminated property. And finally, consider the municipal water-and-sewer utility as issue in the case currently pending before this Court involving the city of

Oak Park Heights. *City of Oak Park Heights v. County of Washington*, 802 N.W.2d 767 (Minn. Ct. App. 2011), rev. granted (Sept. 28, 2011). A municipal water-and-sewer utility might be considered a proprietary activity based on a simplistic test that only focuses on the fact that a city charges a fee for this service. But such a conclusion ignores many additional relevant facts including: that these services are not provided to make a profit; that the provision of potable water is an essential public service; and that that this public service is overwhelmingly performed by municipalities in Minnesota.⁴ Minn. Stat. § 444.075, subd. 3 (providing that fees for municipal water-and-sewer services “shall be as nearly as possible proportionate to the cost of furnishing the service”). Important government activities like these should not be subjected to new liability simply because they can be characterized as having some proprietary characteristics. Under our constitutional separation of powers, it should be up to the elected representatives of a city and not to a judge to determine whether a particular activity provides a public service for a particular city.

In short, the court of appeals’ new proprietary-activity exception should be rejected because there is no analytically sound test for distinguishing between governmental and proprietary activities. The new exception should also be rejected because it is bad public policy.

⁴ The Minnesota Department of Health has estimated that there are 726 municipal water utilities and 244 nonmunicipal utilities in Minnesota.
<http://www.health.state.mn.us/divs/eh/water/com/index.htm>

B. Limiting government liability to require actual authority protects the public purse.

This Court's long-standing limitation on government liability that requires government agents to have actual authority before they can bind the government is good public policy because it protects the public purse. *See Imlay v. City of Crystal Lake*, 453 N.W.2d 326, 331 (Minn. 1990) (refusing to resurrect the proprietary-governmental distinction in the context of statutory caps on municipal liability and noting that limiting government liability serves a legitimate purpose "of promoting fiscal stability"). The United States Supreme Court discussed the importance of this public policy in a case involving an equitable estoppel claim against the government by a provider of home-health-care services that applied for and received Medicare reimbursements to which it was not entitled after receiving erroneous advice from a government agent. *Heckler v. Cmty. Health Servs.*, 467 U.S. 51 (1984). The Supreme Court concluded that it was not reasonable for the provider to have relied on the advice of a government agent that "only acted as a conduit" and did not have authority to "resolve policy questions." *Id.* at 64. The Court reasoned that those who deal with the government must turn "square corners" in order to protect the public fisc.

Justice Holmes wrote: "Men must turn square corners when they deal with the Government." *Rock Island, A. & L. R. Co. v. United States*, 254 U.W. 141, 143 (1920). This observation has its greatest force when a private party seeks to spend the Government's money. Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds. This is consistent with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of the Government agents contrary to the law.

Id. at 63.

Likewise, this Court has also concluded that the public interest in protecting the public purse outweighs the private financial interests in maintaining a governmental-proprietary distinction in the context of estoppel claims. *Mesaba Aviation Div. v. County of Itasca*, 258 N.W.2d 877, 880 (Minn. 1977). And because claims of negligent misrepresentation—like claims of estoppel—require proof of reasonable reliance, it is logical to conclude that a balancing of interests in this case should also be resolved in favor of the public interest in protecting the public purse.

C. Limiting government liability to require actual authority maintains the separation of powers.

This Court’s long-standing limitation on government liability is also good public policy because it maintains the constitutionally required separation of powers. Minn. Const. Art 3, § 1; *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 293 (1980) (rejecting an estoppel claim against the state government and noting that allowing the legislative decisions of another branch of government to be negated would create “serious separation of powers problems”). First, it prevents courts from usurping a government entity’s authority to determine which of its many agents has authority to make official representations for it and to enter into contracts on its behalf. Second, it prevents courts from second-guessing government entities’ legislative decisions. Indeed, if courts must decide whether a challenged activity is proprietary or governmental, they will be substituting their judgment for that of the government body of a coequal branch of government—a governing body that by choosing to engage in the activity—has already

made a legislative determination that it serves a governmental purpose. In addition, courts will be substituting their judgment for that of the state Legislature that has provided statutory authority for various activities because it has already made a legislative determination that they serve a governmental purpose. This Court summarized the separation-of-powers concern best when it rejected a claim of estoppel against the state.

We should think that a court of law and equity would hesitate to interfere in the performance by a legislative body of its political and policy decisions which, in the absence of evidence of taint or fraud, have as their primary, if not sole, objective, the general well-being of the community they are selected to represent. In our view, only the most compelling reasons and the clear necessity to avoid the most unconscionable results could, if at all, sustain the substitution by the court of its judgment for that which is committed to the discretion of the legislative organ.

Ridgewood Dev. Co. v. State, 294 N.W.2d at 293 (quoting *Hunt v. Gov't of Virgin Islands*, 382 F.2d 38, 44 (3d Cir. 1967)). The court of appeals' new proprietary-activity exception should be rejected under this reasoning because it is certainly not an "unconscionable" result to require persons who deal with the government to ensure that they understand both the law and the actual authority of the government agents with whom they are dealing.

In sum, it would be good public policy to maintain this Court's long-standing limitation on government liability that requires government agents to have actual authority before they can bind the government because it protects the public purse and prevents judges from second-guessing the legislative decisions of a coequal branch of government.

CONCLUSION

This case will have a significant, statewide impact on government entities throughout Minnesota. Minnesota law should not be changed to adopt a proprietary-activity exception in the context of government contracts and claims of negligent misrepresentation. Experience confirms that there is no analytically sound test for distinguishing between governmental and proprietary activities. Further, it would be bad public policy to allow private financial interests to outweigh the public interest in protecting the public purse and in maintaining the separation of powers.

For these reasons, the League respectfully requests that this Court reverse the court of appeals' decision.

Date: January 27, 2012

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