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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1944**

In re the Matter of:
Polzin Incorporated,
Respondent,

vs.

James W. Aust,
Appellant.

**Filed July 9, 2012
Affirmed
Huspeni, Judge*
Dissenting, Chief Judge Johnson**

Isanti County District Court
File No. 30-CV-11-151

Grant Courtland Borle, Tennis and Collins, P.A., Forest Lake, Minnesota (for respondent)

Ronald B. Sieloff, Sieloff and Associates, P.A., Eagan, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Rodenberg, Judge; and Huspeni, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HUSPENI, Judge

Polzin, Inc. (Polzin), as holder of the remainder interest in certain land, obtained from the district court a summary judgment pursuant to Minnesota Statutes section 561.17 (2010) against James Aust, the holder of an estate for years in that land. The judgment forfeited Aust's estate in, and evicted him from, the land. Aust later moved, under Minnesota Rule of Civil Procedure 60.02(a), (f), to vacate the summary judgment, and for other relief. The district court denied Aust's motion. Aust appeals. Because this record supports the summary judgment, and does not show that the district court abused its discretion by denying Aust relief under rule 60.02, we affirm.

FACTS

Prior litigation between these parties ended in March 2009 with a settlement agreement that contained two alternatives for resolving that suit, depending on whether James Aust tendered funds to reacquire certain real property from Polzin, Inc. (Polzin). Aust admits that “[t]he repurchase did not occur,” and that “Alternative No. 2” of the settlement agreement applies here. Alternative No. 2 states that if Aust did not reacquire the property, he “shall” deed the property to Polzin but “will retain an Estate for Years.” Alternative No. 2 also recites rights the parties have regarding the property.

In November 2010, Polzin served Aust, at the property, with a summons and complaint for the current action. In relevant part, the complaint sought to remove Aust from the property because Aust was “[a]llowing trash and garbage, including vehicles and tires, to accumulate; [f]ailing to repair the home's roof thereby allowing the elements

into the home; [f]ailing to have the septic and well systems inspected and maintained; and failing to control noxious weeds from growing on the property surrounding the home.” The complaint asserted that this conduct by Aust constituted waste injuring Polzin’s interest in the property. Polzin filed its complaint with the district court on February 28, 2011. Discovery disputes followed, and Aust, acting pro se, served Polzin with an answer, but did not file that answer with the district court.

On March 21, 2011, Polzin served Aust, by mail, with a motion seeking a summary judgment under Minnesota Statutes section 561.17. Under that statute, if a tenant for years commits waste on property in which the plaintiff has a remainder interest, and does so with malice, the holder of the remainder interest can obtain a judgment which forfeits the defendant’s tenancy for years and evicts the tenant for years from the property. At the April 19, 2011, hearing on Polzin’s motion, the district court noted procedural defects in the service and filing of the motion, and struck the motion.

Later that day, Polzin re-filed and re-served the motion. This second motion noted a hearing date of May 24, 2011, and the papers were served on Aust, by mail, at the address of the property. Aust did not appear at the May 24, 2011 hearing. At that hearing, Polzin’s attorney stated that Aust had not responded to discovery. Polzin’s attorney also informed the court that, while Aust had served Polzin with an answer, Aust had not filed the answer with the court. The district court, from the bench, granted Polzin summary judgment, and later issued an order dated June 6, 2011, to that effect. On June 6, 2011, the only document in the record from Aust that had been generated for this case

was his answer to the complaint, which was before the district court solely because Polzin had included it with its papers seeking summary judgment.

On June 7, 2011, the district court entered judgment on its June 6, 2011 order. The district court, on June 21, 2011, amended its judgment in a manner not relevant here. A writ of recovery of the premises issued, and was posted on the premises, on June 22 and 23, 2011, respectively.

On June 27, 2011, Aust, represented by counsel, filed multiple documents, including an amended answer to the complaint and a motion seeking to vacate, under Minnesota Rule of Civil Procedure 60.02, the judgment, the amended judgment, and the writ. Aust's affidavit states that at the April 19, 2011 hearing, the district court indicated that the rescheduled hearing would occur two months from April 19, 2011;¹ that, because he thought he had two months before the next hearing, he went to a different residence that he owned 150 miles away; and that he did not return to the premises at issue until June 1, 2011. He further alleged, among other things, that the premises at issue was his homestead, that it was exempt from creditors, and that his conduct on the property was consistent with his rights under the settlement agreement. Aust challenged factual determinations on which the summary judgment was based, asserting that he made timely responses to Polzin's requests for admissions, that his estate in the property is not an estate for years, and that Polzin failed to allege that any waste involved malice by Aust, as required by section 561.17. None of Aust's papers assert that Polzin does not own the property or otherwise put at issue the ownership of the property.

¹ The four-page transcript of the April 19, 2011 hearing reveals no such statement.

Also on June 27, 2011, the writ of recovery of the premises was executed and the property was restored to Polzin. Later, officials of the county and other organizations inspected the property. The results of those inspections included:

(a) a compliance inspection report regarding the septic system on the property stating that “this [septic] system is ‘**NON COMPLIANT**’ with the MPCA rules. **Reason for Failure:** System is saturated will not accept any sewage, tank is FULL and the system is installed too deep in the ground, will need to install a new mound system.” The associated Compliance Inspection Forms state that the septic system “is failing to protect ground water[,]” that the system causes sewage backup into the dwelling, and “new system to be installed.”

(b) a Board of Health (BOH) Notice declaring the property “a public health nuisance,” including a failure to keep garbage in insect-and rodent-proof containers, failure to provide adequate food, water, and shelter for cats on the property, “[e]xcessive accumulation of animal feces on floors and used kitty litter in non sealed containers and on the floors,” and “[n]on functional septic system and human feces and urine in non sealed plastic buckets inside the home.” The BOH notice required the nuisance to be abated within 10 days.

(c) a BOH Public Health Nuisance Complaint Investigation Record, including the following “Findings” by the investigator: “The odor inside the house was overwhelming me and Mr. Polzin and Investigator had to wear respirator masks. Of note was the lack of a clean/sanitary area for food preparation and non-functioning septic. It appears that [Aust] ha[d] been using open 5 gallon plastic buckets for human feces and urine disposal. Those buckets of human waste are sitting unsecured in the home and outside the home. . . . At this time it’s my opinion that the home not be occupied in current conditions because of health and safety issues for humans and animals.”

(d) a letter from a senior “Humane Agent” from the Animal Humane Society, stating that he found a kitten so underweight and weak that “it could not walk on its own” and that “[a]s a 20 year veteran in the animal cruelty

investigations field[,] I have to say that this is one of the worst houses I have been in to remove animals. The ammonia acid levels were extremely high and burned your eyes and throat. I did put on a respirator before reentering the house to search for cats. I could smell the odor from outside the house when I first arrived. . . . strewn about the house [were] around 100 empty whiskey bottles. . . .The ammonia acid content was certainly high enough to cause health issues for both the cats and [Aust.]”

(e) a series of videos showing the condition of the house and surrounding property.

Counsel for Polzin mailed these documents to the district court administrator, asking that they be placed in the file, and sent copies of the letter to Aust’s attorney and the district court judge.

At a July 19, 2011 hearing on Aust’s motion for relief under rule 60.02, Aust objected when Polzin’s attorney mentioned the reports submitted by letter. The district court noted that Polzin’s attorney had not objected when Aust’s attorney had referred to matters not in the record, and stated: “I understand your objection but I’m going to allow [Polzin’s attorney] to speak his piece.” The district court did not otherwise specifically address the objection, but its order, filed August 23, 2011, denied Aust’s motion for relief under rule 60.02, stating, among other things, that “given the condition of the premises and the need for immediate action to take care of the problems that are present[,] [Aust’s] explanations and reasoning for vacating the previous orders are prejudicial to [Polzin.]”

Aust appeals.

DECISION

I.

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. On appeal,

[appellate courts] review a district court’s decision to grant summary judgment to determine (1) whether any issues of material fact exist, and (2) whether the district court misapplied the law to the facts. [Appellate courts] construe the facts in the light most favorable to the party opposing summary judgment and review questions of law, including the interpretation of statutes, de novo.

Bearder v. State, 806 N.W.2d 766, 770 (Minn. 2011) (citation omitted).

Appellate courts generally address only questions that have been presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Because Aust failed to make any argument to the district court in response to Polzin’s motion for summary judgment, the only arguments properly before this court challenging the summary judgment are arguments that Aust can raise on appeal in the first instance.²

² Generally, raising an issue after a district court makes the decision being challenged on appeal does not preserve that issue for purposes of challenging the appealed decision. *See Antonson v. Ekvall*, 289 Minn. 536, 538-39 186 N.W.2d 187, 189 (1971) (stating that a claim was made “too late” when made for the first time in a motion for a new trial); *Allen v. Central Motors, Inc.*, 204 Minn. 295, 299, 283 N.W. 490, 492 (1939) (stating that an issue was raised “too late” when first raised in motion for amended findings). Therefore, arguments that Aust made in his motion seeking relief under rule 60.02 were not preserved for purposes of challenging the summary judgment.

A. Standing

Under section 561.17, a judgment for forfeiture and eviction can be given in favor of a person entitled to the reversion. Aust argues to this court that Polzin lacks standing to seek relief under section 561.17 because Polzin is not entitled to a reversion. Aust did not make this argument to the district court in the summary judgment proceedings, but an argument that a party lacks standing to seek relief cannot be waived. *Patzner v. Schaefer*, 551 N.W.2d 736, 737 (Minn. App. 1996).

Standing is acquired by a person either suffering an injury-in-fact or being the beneficiary of a legislative act granting standing. *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996). Because section 561.17 allows “the person entitled to the reversion” to obtain a judgment of forfeiture and eviction if the conditions in the statute are satisfied, the statute confers statutory standing to seek a judgment of forfeiture and eviction on persons having a reversionary interest in property.

A reversion is

[t]he interest that is left after subtracting what the transferor has parted with from what the transferor originally had; specif., a future interest in land arising by operation of law whenever an estate owner grants to another a particular estate, such as a life estate or a term of years, but does not dispose of the entire interest.

Blacks’s Law Dictionary 1434 (9th ed. 2009). Here, it is undisputed that Aust’s estate in the property allowed him to remain on the property until he was no longer able to do so, and that, with exceptions not relevant here, Polzin, before this action, lacked a right to be on the property. Inherent in this arrangement of interests in the property is the idea that

Aust's estate will eventually end, and that, when it does, Polzin, as owner of the remaining interests in the property, will succeed to the property. Therefore, as "owner of the property" that is subject to Aust's estate for years,³ Polzin holds an interest satisfying the definition of a "reversion." As the holder of that reversionary interest in the property, Polzin has standing to seek a judgment of forfeiture and eviction under Minn. Stat. § 561.17.

Citing Restatement (First) of Property § 199 (1936), Aust asserts that Polzin lacks standing to sue because standing requires the person seeking relief to have "an interest which is neither subject to a condition precedent nor defeasible," and Polzin's reversionary interest is subject to the condition precedent that Aust's estate for years end. Minnesota appellate courts have not adopted Restatement (First) of Property § 199. To apply section 199 in the manner that Aust asks would preclude holders of future interests from seeking forfeiture and eviction under Minnesota Statutes section 561.17. The nature of a *future* interest is that it is, at least in part, not *currently* enforceable; *i.e.*, future

³ Aust asserts that the summary judgment's statement that Polzin owns the property is not supported by the record. Aust's failure to raise this issue in district court precludes him from raising this question for the first time on appeal. Additionally, paragraphs four and five of the complaint, the settlement agreement, and the copy of Aust's answer to the complaint that Polzin submitted to the district court show not only that the ownership of the property was not at issue at the time of the summary judgment, but indicate that Polzin did, in fact, own the property, subject to Aust's estate for years. That Polzin owns the property is consistent with paragraph three of Aust's amended answer to the complaint, which he filed in connection with his motion for relief under rule 60.02. Moreover, while asserting that the record does not support the district court's statement that Polzin owns the property, Aust does not assert that the statement is, in fact, incorrect. Nor does Aust assert any prejudice arising from the statement. *See Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that, to prevail on appeal, a party must show both error by the district court and that the error prejudiced the complaining party).

interests are subject to the condition precedent that (some aspect of) an existing estate end. Because the plain language of section 561.17 confers on Polzin standing to sue, and because the district court made its ruling in a manner consistent with that statute, we decline to rule that Polzin lacks standing based on a reading of an unadopted provision in a restatement that would functionally eviscerate the statute. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that “[t]he function of the court of appeals is limited to identifying errors and then correcting them”).

B. Section 561.17

The holder of a reversionary interest in property, whose interest in the property is injured by waste committed by a property’s tenant for years can obtain a judgment for “forfeiture of the estate of [the tenant for years], and eviction from the property” if the injured holder of the reversionary interest shows that the waster has an estate for years and, in malice, committed the waste. Minn. Stat. § 561.17. Aust challenges the district court’s grant of summary judgment to Polzin under section 561.17.

1. Estate for years: An “estate for years” is an estate “limited for a certain time, as for a year, * * * or any greater or less period of a fixed duration.” *Seabloom v. Krier*, 219 Minn. 362, 367, 18 N.W.2d 88, 91 (1945) (quoting 1 Herbert Thorndike Tiffany and Basil Jones, *Real Property* 372 (3d ed. 1939)). We reject any argument by Aust that his estate is not one for years. Here, “Alternative No. 2” of the settlement agreement fixed the duration of Aust’s estate—ending it when he can no longer reside on the premises independently. Further, in the settlement agreement, these parties treated and labeled Aust’s interest in the property as an “Estate for Years.” To now treat these

parties as if Aust's interest was something other than an estate for years would be to rewrite the unambiguous terms of their settlement agreement. This we cannot do. *See Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 581-82 (Minn. 2010) (noting that “[a] settlement agreement is a contract,” and that “[w]hen the language [of a contract] is clear and unambiguous, [courts] enforce the agreement of the parties as expressed in the language of the contract”). Therefore, the first requirement for a judgment for forfeiture and eviction under section 561.17—estate for years—is satisfied.

2. Waste: Waste is “[p]ermanent harm to real property committed by a tenant (for life or for years) to the prejudice of the heir, the reversioner, or the remainderman.” *Black’s Law Dictionary, supra*, at 1727; *see Whitney v. Huntington*, 34 Minn. 458, 462, 26 N.W. 631, 632 (1886) (stating that “[w]aste is defined to be any unlawful act or omission of duty on the part of the tenant which results in permanent injury to the inheritance”). Here, Polzin’s requests for admissions include requests that Aust admit that the septic system had not been inspected or pumped in the two years before Polzin served the complaint, that there were inoperable vehicles and used tires on the property, that shingles were missing from the roof and that rain water leaked into the house, and that Aust had made no repairs to the house. These requests are consistent with the allegations in Randy Polzin’s affidavit supporting his (first) motion for summary judgment, in which he states that he “personally observed the accumulation of inoperable vehicles, tires, trash, noxious weeds, and at least one hole in the roof of the house [Aust] lives in[,]” that he “investigated and learned that the septic and well systems of the house . . . have not been maintained or inspected[,]” that “[b]ased upon my experience, I believe

that those systems are inoperable[,]" and that "[l]eft unchanged, these actions and inaction of [Aust] will cause the house in which [Aust] lives to lose all value." As Aust did not deny or otherwise respond to the requests for admissions, the matters are deemed admitted under Minnesota Rule of Civil Procedure 36.01. That Polzin "personally observed" and "investigated" these matters addresses Aust's assertion that Randy Polzin's affidavit is not based on personal knowledge.⁴

Aust's failure to maintain the property is consistent with what constitutes waste:

It was the duty of appellant as a life tenant not to permit waste, to make necessary and reasonable repairs, to pay current taxes, to pay the interest on the mortgage, and not to permit noxious weeds to infest the lands to the injury of the freehold. . . . Her failure to pay the taxes and make necessary and reasonable repairs of the building and fences constituted waste. . . . a life tenant commits waste by permitting farm lands to become infested with noxious weeds which do injury to the freehold. Such acts not only constitute ill husbandry but also injury to the land itself.

Beliveau v. Beliveau, 217 Minn. 235, 242-43, 14 N.W.2d 360, 364-65 (1944) (citations omitted). Therefore, the district court's determination that Aust committed waste by not maintaining the septic and well systems, accumulating inoperable vehicles and used tires on the property, allowing "shingles [to be] missing from the roof" and "[r]ain water [to] leak[] into the house[,]" and by not making "any repairs to the house[,]" is consistent

⁴ The district court, because of procedural problems, struck Polzin's first "motion" for summary judgment "for the time being," and stated that if Polzin's attorney "[went] to the counter, they can give you a new date, and you can re-serve your notices, and we'll hear [the motion] when the rules have been complied with." The affidavit of service for Polzin's reserved motion listed "Affidavit of Randy Polzin" as served with Polzin's second motion for summary judgment.

with the record existing at the time of summary judgment, and with caselaw.⁵ Because Aust failed to maintain the property, the waste requirement for a judgment for forfeiture and eviction under section 561.17 is satisfied.

3. Malice: Section 561.17 does not define “malice.” Nor, for purposes of section 561.17, does Minnesota caselaw define malice. We conclude, however, that neither malice for purposes of the First Amendment nor malice for purposes of slander of title can be the malice required by section 561.17. Those types of malice require either falsity of—or reckless disregard for the truth of—a statement. *See Britton v. Koep*, 470 N.W.2d 518, 520 (Minn. 1991) (First Amendment); *Brickner v. One Land Dev. Co.*, 742 N.W.2d 706, 711-12 (Minn. App. 2007) (slander of title), *review denied* (Minn. Mar. 18, 2008). Waste is not generally inflicted by a statement, and the waste asserted here did not involve any statements.

An opinion addressing malice in the context of official immunity states:

Malice . . . requires proof of a wrongful invasion of the rights of another. In *Rico v. State*, 472 N.W.2d 100 (Minn. 1991), we held that malice “means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right.” *Id.* at 107 (quoting *Carnes v. St. Paul Union Stockyards Co.*, 164 Minn. 457, 462, 205 N.W. 630, 631 (1925)). Malice in the context of official immunity means intentionally committing an act that the official has reason to believe is legally prohibited. *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994).

⁵ The district court also based its determination of waste on the fact that Aust “allow[ed] noxious weeds to grow on the premises.” Aust argues that the weeds on the property do not constitute waste because they do not damage the reversionary interest. Because we affirm the district court’s other determinations of waste, we need not address Aust’s argument on this point, but we note that the argument is not persuasive.

Kelly v. City of Minneapolis, 598 N.W.2d 657, 663 (Minn. 1999) (underline added). The underlined definition of malice is from *Carnes*, which, in the context of interference with contractual relationships, states that malice is “nothing more than the intentional doing of a wrongful act without legal justification or excuse, or otherwise stated the wilful violation of a known right.” 164 Minn. at 462, 205 N.W. at 631. The supreme court has noted that this definition of malice has been used in multiple contexts. *Rico*, 472 N.W.2d at 107 (citing cases using a *Carnes*-based or *Carnes*-like definition of malice in the context of grounds for punitive damages, malicious interference with contract, and malicious prosecution). In addition to defining malice as the “intentional doing of a wrongful act without legal justification[,]” *Carnes* notes that this definition of malice is objective in nature: “Whether a wrongdoer’s motive in interfering is to benefit himself, or to gratify his spite by working mischief to another, is immaterial, malice in the sense of ill-will or spite not being essential.” 164 Minn. at 462, 205 N.W. at 631-32.

The *Carnes* definition of malice has three parts: wrongful conduct, intent, and a lack of legal justification for the conduct. *See id.* Unlike the definition of malice for purposes of the First Amendment and for slander of title, each component of the *Carnes* definition of malice is viable for purposes of section 561.17. Further, the supreme court has deemed the *Carnes* definition of malice sufficiently flexible to be used in multiple settings. Therefore, we will use the *Carnes* definition of malice for purposes of section

561.17. As set out below, we conclude that, on this record, the *Carnes* definition of malice is satisfied.⁶

a. Wrongful conduct: “Wrongful conduct” is “[a]n act taken in violation of a legal duty; an act that unjustly infringes on another’s rights.” *Black’s Law Dictionary*, *supra*, at 337; *see Keiper v. Anderson*, 138 Minn. 392, 400, 165 N.W. 237, 239 (1917) (noting that “‘wrongful[]’ usually signifies a breach of legal duty, independent of contract rights”). Under *Beliveau*, a life tenant has a “duty . . . to make necessary and reasonable repairs” to the property. 217 Minn. at 242, 14 N.W.2d at 364. Therefore, a failure to satisfy that duty would constitute wrongful conduct. Here, a failure to make “necessary and reasonable repairs” to the property is the essence of Polzin’s allegations that Aust accumulated inoperable vehicles, tires, and trash on the property, and that there is at least one hole in the roof of the house, as well as his assertions that the property’s

⁶The dissent, citing *Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 506 (Minn. 1991), suggests that it is unclear whether the *Carnes* definition of malice is good law because the supreme court declined to apply it more recently. We read *Nordling* somewhat differently than the dissent. *Nordling* observes that the *Carnes* definition of malice is, “[a]s a general statement[,] . . . true enough[,]” *Nordling*, 478 N.W.2d at 506, but declined to apply the *Carnes* definition of malice because *Nordling* involved facts not present in *Carnes*. The tortious-interference-with-contract claim in *Carnes* involved a defendant who was a stranger to the contract. *Carnes* 164 Minn. at 459-60, 205 N.W. at 630-31. *Nordling* involved a plaintiff employee suing his employer and other employees of that employer where it was the job of one defendant-employee to review the performance of the plaintiff-employee, and, in that context, the supreme court chose to apply an “actual malice” standard. *Nordling*, 478 N.W.2d at 506-07. Because this case does not involve facts similar to those in *Nordling* and because *Nordling* concedes the general viability of the *Carnes* definition of malice, we are not convinced that *Nordling* undermines the continued viability of *Carnes*, nor its applicability in this case.

septic and well systems have not been maintained or inspected, and that he believed those systems to be inoperable.

b. Intent: While the district court generally stated that Aust acted with malice, the district court did not specifically state that Aust had the intent necessary to support malice. But the district court's statement that malice was present shows that the district court implicitly determined that Aust had the requisite intent. *See generally Prahll v. Prahll*, 627 N.W.2d 698, 703 (Minn. App. 2001) (noting that an appellate court "may treat statutory factors as addressed when they are implicit in the findings"). While the factual nature of intent often renders it an issue that is inappropriate for summary judgment, *see e.g. Bogatzki v. Hoffman*, 430 N.W.2d 841, 846 (Minn. App. 1988), *review denied* (Minn. Dec. 21, 1988); *Keys v. Lutheran Family & Children's Servs. of Mo.*, 668 F.2d 356, 358 (8th Cir. 1981), intent to commit a malicious act may be inferred "as a matter of law" where "the actor knows or should have known that harm was substantially certain to result, but acts with a deliberate and calculated indifference to the risk of injury[.]" *State Farm Fire and Cas. Co. v. Schwich*, 749 N.W.2d 108, 113 (Minn. App. 2008); *see also Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 614 (Minn. 2001) (stating that "to infer as a matter of law that [one party] intended to injure [another party], we must conclude that [the first party] acted with deliberate and calculated indifference to the risk of injury to [the other party]"). Neglect of the property on the scale described in this case generally, and in Randy Polzin's affidavit particularly, cannot be anything other than something that Aust "kn[e]w[] or should have known" was "substantially certain" to

harm the property. Therefore, this record supports the district court's inference that, as a matter of law, Aust had the requisite intent.

c. Lack of legal excuse: *Beliveau* recognizes a life tenant's "duty" to make "necessary and reasonable repairs" to a property. 217 Minn. at 242, 14 N.W.2d at 364. Aust, however, seems to argue that his *only* obligations regarding the property are those explicitly recited in the settlement agreement, and that his commission of any act not explicitly prohibited by the settlement agreement, as well as his failure to perform an act not explicitly required by that agreement, cannot be waste. In other words, Aust seems to be asserting a contractual right to engage in conduct that would otherwise be waste. We reject any such argument.

There is a public policy against waste. *See Gallagher v. Nelson*, 383 N.W.2d 424, 425-26 (Minn. App. 1986) (acknowledging "the policy of avoiding waste of land[,] and stating that invoking the doctrine of emblements in that case "comport[ed] with the policy of avoiding waste. "), *review denied* (Minn. May 22, 1986). While we express no opinion regarding whether parties to a contract can avoid application of the general policy against waste by including in their contract a provision explicitly allowing conduct that would otherwise constitute waste, we reject as contrary to the public policy against waste, any argument that the settlement agreement implicated here, which lacks such an explicit authorization, entitles Aust to commit what would otherwise be waste, without any remedy being afforded to Polzin as the remainderman. "A court will not directly enforce a contract or recognize it by awarding damages for its breach if it is contrary to public policy, but will leave the parties where it finds them, not out of consideration for

the rights of either, but because the contract is injurious to or contravenes some interest of society or of the state.” *Seitz v. Michel*, 148 Minn. 80, 86-87, 181 N.W. 102, 105 (1921); *see Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 725 N.W.2d 90, 93 (Minn. 2006) (addressing whether to enforce a contract that may be contrary to public policy).

4. Summary: We conclude that the record presented to the district court at the summary judgment stage of these proceedings supports the determinations required by section 561.17 that Aust had an estate for years in property for which Polzin held the reversionary interest, that Aust committed waste on that property, and that Aust committed that waste with the malice required by section 561.17.

C. Placement of burden

The order granting summary judgment states that, “[c]onsidering the record and the evidence provided, [Aust] could not support, as a matter of law, a judgment in his favor and therefore [Aust] has committed waste and therefore [Polzin] is entitled to Summary Judgment.” Aust asserts that this statement shows that the district court put the burden on him to avoid summary judgment, rather than on Polzin to show that summary judgment was proper. We disagree. Because the district court determined that the elements of section 561.17 were satisfied, it did not absolve Polzin of having to show the prerequisites for a judgment under that section. Further, to avoid summary judgment, a party “must do more than rest on mere averments.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Here, because Aust did not respond to Polzin’s motion for summary

judgment, Aust did not even rest on the mere averments that *DLH* states are insufficient to avoid summary judgment.⁷

D. Other arguments

1. Homestead exemption: Under the Minnesota Constitution, “[a] reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law.” Minn. Const. art. I, § 12. “Pursuant to this constitutional directive, the legislature enacted Minn. Stat. § 510.01,” which addresses the scope of the exemption; *Torgelson v. Real Property Known as 17138 880th Ave.*, 749 N.W.2d 24, 26 (Minn. 2008). A tenancy for years can support a claim to a homestead. *In re Emerson*, 58 Minn. 450, 453, 60 N.W. 23, 24 (1894). Citing Minnesota Statutes section 510.01 (2010), *Torgelson*, and *Emerson*, Aust argues that because the property at issue here is his homestead, it is exempt from forfeiture. Because Aust did not respond to Polzin’s motion for summary judgment, Aust did not make this argument in the summary judgment proceedings, and the argument is not properly before this court as a challenge to the summary judgment. *Thiele*, 425 N.W.2d at 582; *see In re C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981) (refusing to address

⁷ The district court stated that “[s]ummary judgment should be rendered in favor of [Polzin] if, upon considering the record, the evidence provided could not support, as a matter of law, a judgment in *his* favor.” (Emphasis added.) Aust asserts that this statement shows that the district court misapplied the law regarding summary judgment. The rest of the summary judgment shows that “his” is a typographical error and that it should say “Aust.” Therefore, we ignore this error. *C.f. State v. Briard*, 784 N.W.2d 421, 423 n.1 (Minn. App. 2010) (reading an apparent “typographical error” in a district court’s order to say what it was meant to have said rather than what it actually said).

constitutional challenges raised for the first time on appeal of a termination of parental rights).

Aust argues that, under *Ferguson v. Kumler*, 27 Minn. 156, 6 N.W. 618 (1880) and *Beigler v. Chamberlin*, 145 Minn. 104, 176 N.W. 49 (1920), he is not precluded from making a homestead-exemption argument now. We disagree. *Ferguson* involved whether a party waived a homestead exemption by not asserting it to the officer conducting a levy, rather than how to preserve a question for appeal. 27 Minn. at 157, 6 N.W. at 618. Therefore, *Ferguson* does not absolve Aust of having to properly preserve a homestead-exemption argument for appeal. See *Nadeau v. Melin*, 260 Minn. 369, 375, 110 N.W.2d 29, 34 (1961) (stating that “[a] decision must be construed in the light of the issue before the court”). *Beigler* is similar. It addresses a party’s ability to bring up, in district court, a homestead claim not previously raised, not how to preserve a question for appeal. 145 Minn. at 106-07, 176 N.W. at 50.

Nor are the merits of Aust’s homestead argument persuasive. In *Torgelson*, the supreme court, addressing whether the state constitution’s homestead provision precludes forfeiture of a homestead under the state’s drug asset forfeiture statute—section 609.5311, subdivision 2 (2006)—stated: “we hold that the Minnesota Constitution’s homestead exemption, as implemented by Minn. Stat. § 510.01 (2006), exempts homestead property from forfeiture.” 749 N.W.2d at 29. *Torgelson* is distinguishable from the current case.

The “[d]rug asset forfeiture is a civil in rem action,” and “civil in rem forfeiture is at least in part a penalty, and accordingly it should be disfavored and strictly construed.”

Torgelson, 749 N.W.2d at 26 & n.2. While an action under section 561.17 may result in a “forfeiture and eviction,” an action under that section is *not* designed to penalize the defendant, but to be in the nature of one to enforce the fiduciary duty of a trustee:

There is a community of interest between a life tenant and a remainderman which gives rise to obligations and duties as between them. By implication, a life tenant is a *quasi trustee of the property in the sense that he cannot injure or dispose of it to the injury of the remainderman*, even though a power of disposition and encroachment are annexed to the life estate.

Beliveau, 217 Minn. at 242, 14 N.W.2d at 364 (emphasis added) (citations omitted); *see In re Trust of Warner*, 263 Minn. 449, 468, 117 N.W.2d 224, 236 (1962) (stating that “it was the duty of the trustees to exercise their powers and discretion in such fashion as inheres in a fiduciary relation”). The strict construction that a court must give a penal drug forfeiture statute contrasts with the reading a court is to give the quasi-remedial section 561.17. *See generally Current Tech. Concepts, Inc. v. Irie Enters, Inc.*, 530 N.W.2d 539, 543-44 (Minn. 1995) (stating that remedial statutes are read broadly).

Further, while *Emerson* indicates that a tenancy for years can constitute a homestead, 58 Minn. at 453, 60 N.W. at 24, *Emerson* “hold[s] . . . that a tenant for years is entitled to the [homestead] exemption *when in possession during his tenancy.*” *Denzer v. Prendergast*, 267 Minn. 212, 215, 126 N.W.2d 440, 443 (1964) (emphasis added). Because Aust’s rights in the property are subject to the fiduciary duties of a trustee, and because, by running afoul of section 561.17, Aust failed to satisfy those duties, he “forfeit[ed]” his tenancy, making him subject to “eviction” under section 561.17. Moreover, the tenant in *Beliveau* who was treated as a “quasi trustee,” 217 Minn. at 242,

14 N.W.2d at 364, “took a life estate coupled with a power to sell and to use the proceeds of any sale, including the right of encroachment upon the principal, for the specified purpose of her necessary comfort and support,” *id.* at 240, 14 N.W.2d at 363. Here, Aust was not a life tenant, but a tenant for years, and he does not claim authority to sell the property. Thus, his rights in the property are less than the rights of the life tenant in *Beliveau*, whose care of the property was subject to the fiduciary standard of a “quasitrustee.”

For these reasons, even if we were to address the merits of Aust’s homestead claim, that claim would be entitled to limited weight.⁸

2. Settlement agreement: Aust makes several arguments asserting that the district court’s grant of summary judgment is based on its misreading of the settlement agreement. These arguments are not arguments seeking reversal of the summary judgment because the district court misapplied the law in granting summary judgment, but requests for reversal built on contract-based arguments that were not presented to the district court in the summary judgment proceedings. Therefore, they are not properly before this court, *see Thiele*, 425 N.W.2d at 582, and we decline to address them. We note, however, that if we addressed them, we would find each argument unpersuasive.

II.

Aust also challenges the district court’s order filed August 22, 2011, denying his motion, made under Minnesota Rule of Civil Procedure 60.02(a), (f), to vacate the

⁸ This analysis addresses Aust’s assertion that the district court “erred” by not reopening the summary judgment under rule 60.02 based on the homestead argument.

summary judgment, the order for amended findings, and the writ of recovery of the premises. Rule 60.02 allows the court to relieve a party from a final ruling, and to order a new trial, or other relief as may be just, for reasons listed in the rule, including “[m]istake, inadvertence, surprise, or excusable neglect” and “[a]ny other reason justifying relief from the operation of the judgment.” Minn. R. Civ. P. 60.02(a), (f).

When addressing whether to grant relief under rule 60.02, district courts

[apply] a four-prong test enunciated in *Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964). To obtain relief, a party must establish: (1) a reasonable defense on the merits; (2) a reasonable excuse for the failure or neglect to answer; (3) duly diligent action after notice of entry of the judgment; and (4) that no prejudice will occur to the judgment creditor.

Roehrdanz v. Brill, 682 N.W.2d 626, 632 (Minn. 2004). “All four of the *Finden* factors must be satisfied in order to justify relief under the rule[,]” *Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 490 (Minn. 1997), but “a weak showing on one [*Finden*] factor may be offset by a strong showing on the others[,]” *Reid v. Strodman*, 631 N.W.2d 414, 419 (Minn. App. 2001).

In challenging the August 22, 2011 order, Aust states that his “analysis of why he met the test of the Finden factors is set forth in [his] 6/27/11 Affidavit, and 6/27/11 Memorandum and Motion” that he submitted to the district court.⁹ Aust then asserts that

⁹ The length of a brief is measured by the number of pages in that brief, but an alternative measure of length may be used if the brief contains a certification that it meets one of the alternative measures of length in the rules. *See* Minn. R. Civ. App. P. 132.01, subd. 3. Aust’s attorney did not certify that Aust’s principal brief satisfied an alternative measure of its length. Therefore, absent a showing of “good cause” and permission of this court to file a longer brief, Aust’s principal brief could not exceed 45 pages. *Id.* Aust’s attorney

the district court erred in finding that reopening the judgment would be prejudicial to Polzin, that the district court did not make adequate findings to support the denial of his motion, and that this case involves extraordinary circumstances justifying relief under Minn. R. Civ. P. 60.02(f).

In *Midway Nat'l Bank of St. Paul v. Bollmeier*, like here, the party seeking relief under rule 60.02 did so based on arguments the party did not make in the summary judgment proceedings producing the judgment from which the party sought relief. 474 N.W.2d 335, 337-38 (Minn. 1991). The supreme court stated that “because” the party “did not argue this point during the consideration of the summary judgment motion . . .

filed a 45 page principal brief, did not attempt to show good cause for a longer brief, and did not obtain permission from this court to file a longer brief. Because Aust’s principal brief is 45 pages without reference to the arguments he attempts to incorporate by referring to the papers he submitted to the district court on June 27, 2011, his attempt to incorporate those arguments is an improper attempt to circumvent the length limit on principal briefs. In similar circumstances, the supreme court stated:

This is a novel, but nonetheless unacceptable attempt to expand the page limitation for appellate briefs set out in Rule 132.01, subd. 3 (1992) of our Rules of Civil Appellate Procedure. *To be absolutely clear, if these issues were important enough to have been reviewed, they should have been set forth with specificity within the ample page limit our rules permit.* As it is, having these issues before the court in the manner in which they were raised has not been at all helpful in reviewing [the appellant’s] petition.

Indep. Sch. Dist. No. 622 v. Keene Corp., 511 N.W.2d 728, 733-34 (Minn. 1994) (emphasis added), *overruled on other grounds by Jensen v. Walsh*, 623 N.W.2d 247 (Minn. 2001); *see Fluoroware, Inc. v. Chubb Group of Ins. Cos*, 545 N.W.2d 678, 684 (Minn. App. 1996) (noting that a brief that was at the page limit set by rule 132.01 but which included “45 single-spaced footnotes” was an “attempt to circumvent the applicable page limits” and was “improper”). Therefore, the arguments not presented in Aust’s brief are not properly before this court.

the correct standard of review is whether the trial court abused its discretion in denying [the party's] motion 'to reconsider' under Minn. R. Civ. P. 60.02." *Id.* at 338.

A. Failure to balance *Finden* factors

The district court stated that “given the condition of the premises and the need for immediate action to take care of the problems that are present[,] [Aust's] explanations and reasoning for vacating the previous orders are prejudicial to [Polzin].” This is a ruling that Aust failed to show the fourth *Finden* factor—lack of prejudice. Because a party seeking relief under rule 60.02 must satisfy all of the *Finden* factors to obtain relief, *Nguyen*, 558 N.W.2d at 490, the district court did not need to address whether Aust satisfied the other *Finden* factors. Therefore, the district court was not required to further balance those factors as Aust asserts that it should have.

On this record, we affirm the district court's determination that vacating the judgment would prejudice Polzin. After Polzin executed the writ of recovery of the premises, various officials inspected the property, and the resulting reports and videos graphically detail the property's foul condition. While Aust's attorney, at the hearing on Aust's motion for relief under rule 60.02, objected to Polzin's attorney discussing these reports, the district court did not exclude them. Nor did it otherwise address Aust's objection. It did, however, use the condition of the property in its analysis culminating in its denial of relief under rule 60.02. Further, Aust's attorney did not seek a ruling on the objection. Therefore, there is no ruling regarding admission of the reports and the video for this court to review. *See generally Frank v. Ill. Farmers Ins. Co.*, 336 N.W.2d 307, 311 (Minn. 1983) (noting that parties have the burden of bringing the lack of a ruling on

an issue to the attention of the district court and holding the the parties failure to do so by a motion for amended findings forfeits the right to appellate review of those issues); *Anderson v. Peterson's N. Branch Mill, Inc.*, 503 N.W.2d 517, 518-19 (Minn. App. 1993) (same). On this record, the district court's ruling that reopening the summary judgment would prejudice Polzin is supported by the record considered as a whole.

B. Other reasons justifying relief

The supreme court has stated:

[C]ourts may grant relief for “[a]ny other reason justifying relief from the operation of the judgment.” Minn. R. Civ. P. 60.02(f). We have emphasized that relief is available under Rule 60.02(f) only in exceptional circumstances. Further, because Rule 60.02(f) is a residual clause, parties can obtain relief under Rule 60.02(f) only where the reason for vacating the judgment does not fall under some other part of Rule 60.02.

Kern v. Janson, 800 N.W.2d 126, 133 (Minn. 2011) (quotation omitted). Here, the “exceptional circumstance[]” alleged by Aust is that he will lose his interest in his homestead. But reopening the summary judgment will not entitle Aust to keep his interest in the property, it will simply require a trial on Polzin's claim for waste under section 561.17. Therefore, it will not preclude Aust from losing what he claims to be his homestead. Moreover, the reason Aust missed the hearing set for May 24, 2011, was because he was living at another property that he owned.

On this record, we conclude that the district court did not abuse its discretion by denying Aust's motion to reopen the summary judgment.

Two final notes: First, our decision in this case has not been reached without considerable deliberation. Unquestionably—and perhaps especially—because we are affirming an award of summary judgment, an argument could be made that vacation of that judgment and remand for trial on the merits would be an appropriate action for this court to take. But we do not take that action. On the record as it existed at the time of the summary judgment motion, the district court was presented with the complaint alleging waste (to which an answer had been served but not filed); an affidavit of Randy Polzin verifying that he had personally observed the wasteful and deteriorating condition of the property; and the affidavit of Polzin’s attorney confirming that Aust had not denied or otherwise responded to the requests for admission that the septic system on the property had not been pumped in two years, that there were inoperable vehicles and used tires accumulating on the property, that the roof was missing shingles, that rainwater was leaking into the house, and that Aust had not made “any repairs to the house.” Aust was not present at the hearing, apparently having vacated the subject property at that point; he had not filed any pleadings; and he had not paid the filing fee. It was alleged by complaint that he had committed waste and Polzin’s summary judgment motion was met with no allegation of fact(s) whatsoever. On that record and presentation, the district court properly determined that there was no issue of material fact on any issue, including malice, and summarily awarded judgment to Polzin. The summary judgment was consistent with rule 56 and was consistent with the law of waste as set forth in this opinion. The district court, in the posture in which this case came before it, was not obligated to parlay Aust’s unfiled answer provided to it as a courtesy by Polzin’s attorney

into a theoretical issue of fact with respect to the malice element, and thereby deny the remainderman the protection of his interest in the property that he sought from the court. If malice in the waste context requires affirmative proof of the subjective mental state of a non-responding party, which we conclude that it does not, a remainderman seeking a malice-based judgment of forfeiture and eviction would be put in the position of being unable to protect his interest in the property in the case where a tenant for years disregards the lawsuit just as he disregards the property.

Second, given the state of this record, and the state of the subject premises, we are firmly convinced that the decision of the district court upon remand and trial would be identical to the one reached on the record before us here. *Cf. Grein v. Grien*, 364 N.W.2d 383, 387 (Minn. 1987) (declining to remand a custody dispute where doing so would not alter the result); *Gregory v. Gregory*, 408 N.W.2d 695, 698 (Minn. App. 1987) (stating that “[w]hile we could remand for a finding of likely endangerment, we decline to do so in the interests of judicial efficiency and avoiding unnecessary cost to the litigants”). The financial and emotional toll on the parties of prolonged but pointless litigation in this case would be impossible to justify.

Affirmed.

JOHNSON, Chief Judge (dissenting)

I respectfully dissent from the opinion of the court. My disagreement focuses on part I.B.3. of the opinion, which concerns the proper definition of the word “malice,” as that word is used in Minn. Stat. § 561.17. In my view, a more stringent definition of malice should apply in light of the history and purpose of section 561.17 and the important reliance interests at stake in this type of case. The statute should be interpreted to require a plaintiff to prove improper motives, such as ill will and spite, before a district court orders the forfeiture of a life estate or an estate for a term of years. If such a definition were applied, the evidence in the summary judgment record would not conclusively prove that Aust committed waste with malice.

As an initial matter, it is necessary to comment on the procedural posture of this case. Part I of the opinion of the court concerns the district court’s grant of summary judgment to Polzin. That analysis must be confined to the evidence in the summary judgment record. Evidence that Polzin later submitted in response to Aust’s motion to vacate is irrelevant to the question whether the district court erred by granting Polzin’s motion for summary judgment. Furthermore, when a plaintiff moves for summary judgment, a defendant’s failure to respond does not require a district court to grant the motion. Rather, if a non-moving party does not respond to a motion for summary judgment, the district court shall enter summary judgment only “if appropriate.” Minn. R. Civ. P. 56.05. Summary judgment is appropriate only if the moving plaintiff has established that it “is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.03. On this point, the majority opinion states that the non-moving party ““must do more than

rest on mere averments.” *Supra* at 18 (quoting *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997)). That obligation arises only “[w]hen a motion for summary judgment is made *and supported*.” Minn. R. Civ. P. 56.05 (emphasis added). In other words, “when the moving party makes out a prima facie case, the burden of producing facts that raise a genuine issue shifts to the opposing party.” *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988). Thus, even if a non-moving defendant does not submit any evidence into the summary judgment record, it remains the district court’s obligation to determine whether the moving plaintiff has submitted evidence that is capable of proving its claim. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161, 90 S. Ct. 1598, 1609-10 (1970). Sometimes a district court must deny an unopposed motion for summary judgment. This is such a case.

Resolving this appeal requires us to determine what must be proved to satisfy the malice requirement of section 561.17. The second sentence of the statute provides:

Judgment of forfeiture and eviction can only be given in favor of the person entitled to the reversion, against the tenant in possession when the injury to the estate in reversion is adjudged in the action [1] to be equal to the value of the tenant’s estate or unexpired term, or [2] *to have been done in malice*.

Minn. Stat. § 561.17 (2010) (emphasis added). As indicated by the insertion of numerals, the owner of a future interest has two alternative forms of proof if he or she wishes to obtain the forfeiture of a life estate or an estate for a term of years because of waste. The first alternative calls for an inquiry into several factual issues, such as the value of the damage to the property, the value of the tenant’s estate, and the likely duration of the

tenancy. The second alternative calls for an inquiry into a single factual issue, namely, whether the waste was done maliciously.

In this case, Polzin sought the forfeiture of Aust's interest pursuant to the second alternative. But Polzin offered only conclusory statements that waste had occurred, without even attempting to show that Aust acted with malicious intent. Polzin relies primarily on his requests for admission, which were deemed admitted because Aust did not respond. But the requests for admission are confined to the issue of waste; they do not refer to the issue of malice.¹⁰ Polzin also relies on the affidavit of Randy Polzin. Similarly, this one-page affidavit is confined to the issue of waste itself, without any relevant information as to whether Aust was motivated by malice.¹¹ At oral argument, Polzin's counsel referred to the complaint, which was verified by Jason Polzin. But the complaint's allegations concerning ejectment consist only of conclusory allegations, again without any specific statements about Aust's state of mind. If this were the extent

¹⁰The seven requests for admission consist of seven simple statements: "1. The septic system on the Property has not been inspected or pumped in the two years prior to Plaintiff's Complaint being served upon you." "2. There are inoperable vehicles on the Property." "3. There are used tires on the Property." "4. There are shingles missing from the roof." "5. Rain water leaks into the house." "6. You have not made any repairs to the house." "7. You do not presently have insurance on the house."

¹¹The body of the affidavit consists of the following four sentences: "1. I am an owner and officer of Plaintiff." "2. I have personally observed the accumulation of inoperable vehicles, tires, trash, noxious weeds, and at least one hole in the roof of the house Mr. Aust lives in." "3. I have investigated and learned that the septic and well systems of the house in which Mr. Aust lives have not been maintained or inspected. Based upon my experience, I believe that those systems are inoperable." "4. Left unchanged, these actions and inaction of Mr. Aust will cause the house in which Mr. Aust lives to lose all value."

of Polzin's evidence at trial, the factfinder could not reasonably conclude that any waste was done in malice.¹²

The majority opinion reasons that a tenant's conduct may be deemed malicious without a finding that malice actually existed, if the conduct was wrongful, intentional, and without justification. The majority states that malice may be "inferred 'as a matter of law,'" *supra* at 16, although it appears that the majority actually is reaching that conclusion by way of a presumption, not an inference. The majority finds support for its approach in cases stating that malice may exist even without evidence of ill will or spite. *See Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991) (discussing malice exception to official immunity); *Carnes v. St. Paul Union Stockyards Co.*, 164 Minn. 457, 462, 205 N.W. 630, 631-32 (1925) (discussing claim of tortious interference with contract). It is unclear whether *Carnes* remains good law because the supreme court declined to apply it in a more recent opinion involving the same type of claim. *See Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 506 (Minn. 1991).

In any event, the Minnesota caselaw defining malice is inconsistent. A more stringent definition of malice may be found in the caselaw of defamation. In that context, the law requires "actual malice," which requires proof that a false statement was "made

¹²It is debatable whether Polzin's evidence is capable even of proving waste. The caselaw requires evidence of a "permanent injury to the inheritance." *Whitney v. Huntington*, 34 Minn. 458, 462, 26 N.W. 631, 632 (1886). It appears that the forms of waste identified in the district court's order could be corrected rather easily by simply pumping the septic system, removing vehicles and tires from the property, and replacing missing shingles, thereby avoiding permanent injury. In any event, the district court's order for forfeiture and eviction is inappropriate because of the absence of proof of malice, which is required for such a remedy.

. . . from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff.” *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 920 (Minn. 2009) (quotations omitted). The supreme court made clear that malice does not exist merely because the elements of a defamation claim have been proved. *Id.* Rather, “malice may be proved by evidence ‘extrinsic’ to the statement,” such as evidence of the defendant’s “personal ill feeling,” or by evidence “‘intrinsic’ to the statement,” such as “‘exaggerated language,’ ‘the character of the language used,’ ‘the mode and extent of publication, and other matters in excess of the privilege.’” *Id.* (quoting *Friedell v. Blakely Printing Co.*, 163 Minn. 226, 231, 203 N.W. 974, 976 (1925)). The co-existence of inconsistent lines of caselaw makes the interpretative task in this case somewhat difficult.

“The objective of all statutory interpretation is ‘to give effect to the intention of the legislature in drafting the statute.’” *State v. Thompson*, 754 N.W.2d 352, 355 (Minn. 2008) (quoting *State v. Iverson*, 664 N.W.2d 346, 350 (Minn. 2003)). Furthermore, “[t]he principal method of determining the legislature’s intent is to rely on the plain meaning of the statute.” *Id.* But the malice requirement of section 561.17 does not have a plain meaning because the word “malice” may be interpreted to require proof of ill will, spite, or intent to injure, *see Bahr*, 766 N.W.2d at 920, or to not require such proof, *see Rico*, 472 N.W.2d at 107; *Carnes*, 164 Minn. at 462, 205 N.W. at 631-32. Indeed, the supreme court has acknowledged that malice “has been defined in numerous ways.” *Johnson v. Radde*, 293 Minn. 409, 410, 196 N.W.2d 478, 480 (1972). In fact, the inconsistent definitions of malice that are present today appear to have been present in the era when section 561.17 was enacted by the Minnesota Legislature. *Compare Chapman*

v. Dodd, 10 Minn. 277, 282 (1865) (requiring proof of animus for claim of malicious prosecution), *with Lynd v. Picket*, 7 Minn. 184, 201-02 (1862) (discussing requirement for exemplary damages). Thus, for purposes of the issue on appeal, section 561.17 is ambiguous.

If a statute is ambiguous, we may seek to ascertain the legislature's intention "by considering, among other matters, contemporaneous legislative history, the object to be attained, the circumstances under which it was enacted, and the occasion and necessity for the law." *Sprint Spectrum LP v. Commissioner of Revenue*, 676 N.W.2d 656, 664 (Minn. 2004) (quotation omitted). The history of section 561.17 is illuminating. The language of the statute has been in force since Minnesota attained statehood. *See* Minn. Rev. Stat. (Terr.) ch. 74, §§ 16, 17 (1851); Pub. Stat. 1858, ch. 64, §§ 16, 17. The statute is based in part on ancient English law, which authorized the forfeiture of a life estate or an estate for a term of years upon proof of waste. *Curtiss v. Livingston*, 36 Minn. 380, 382, 31 N.W. 357, 358 (1887) (citing Statute of Gloucester, 6 Edw. I, ch. 5 (1278)); *see also* Restatement (First) of Property § 198 cmt. a (1936). But the forfeiture remedy was considered quite severe, and the authorizing statute fell into disuse in England and eventually was repealed in 1879. *See id.*; Mark S. Dennison, *Remedies for Waste Committed by Tenant for Life or Years or by Other Party in Possession of Real Property*, 47 Am. Jur. 3d *Proof of Facts* 399 § 4 (1998). Accordingly, American courts generally have declined to adopt the forfeiture-for-waste remedy unless it is expressly provided by statute. *See* A.E. Korpela, Annotation, *Forfeiture of Life Estate for Waste*, 16 A.L.R. 3d 1344, § 2 (1967); Restatement (First) of Property § 198 cmt. a (1936); *see also*

Creekmore v. Redman Indus., Inc., 671 P.2d 73, 77 (Okla. Cir. App. 1983); *Worthington Motors v. Crouse*, 390 P.2d 229, 230-31 (Nev. 1964). It appears that approximately half the states have enacted statutes authorizing the forfeiture-for-waste remedy. *See* Restatement (Second) of Property: Landlord and Tenant § 12.2 statutory note (1977). Some of those states have limited the applicability of the forfeiture remedy by making proof of malice a prerequisite to forfeiture, and Minnesota is among them. *See* Minn. Stat. § 561.17; *see also, e.g.*, Ind. Code Ann. § 32-30-4-1 (LexisNexis 2002); N.D. Cent. Code § 32-17-23 (2010); Or. Rev. Stat. § 105.805 (2011); S.D. Codified Laws § 21-7-2 (2004); Wash. Rev. Code Ann. § 64.12.020 (2005). Thus, the history behind section 561.17 suggests that the legislature intended to avoid ancient English law, which allowed forfeiture to be ordered in every case of waste, by imposing a higher standard of proof for the forfeiture remedy.

The malice requirement of section 561.17 should be interpreted in a way that recognizes the severity of the forfeiture remedy, its historical disfavor, and the legislature's intent to limit the remedy so that it does not apply in every case of waste. Courts have held that statutes permitting forfeiture should be strictly construed because of the severity of the remedy. *See* Restatement (First) of Property § 198 cmt. b (1936); *see also Roby v. Newton*, 49 S.E. 694, 696 (Ga. 1905). Likewise, forfeiture is a disfavored remedy in Minnesota if a forfeiture statute is ambiguous. *See Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 439 n.10 (Minn. 2009). As stated above, section 561.17 is ambiguous because the term "malice" has been defined by caselaw in inconsistent ways. *See Johnson*, 293 Minn. at 410, 196 N.W.2d at 480. Thus, the malice requirement of

section 561.17 should be strictly construed, which requires a more stringent definition of malice.

A more stringent definition of malice also is necessary to give effect to another provision of section 561.17. Because the term “malice” is ambiguous, we may interpret that part of the statute “in context with other provisions of the same statute.” *In re Welfare of Children of J.B.*, 782 N.W.2d 535, 540 (Minn. 2010) (quotation omitted). The first alternative means of obtaining forfeiture requires proof that the tenant’s waste is “equal to the value of the tenant’s estate or unexpired term.” Minn. Stat. § 561.17. This is a relatively onerous requirement, with a legitimate economic rationale. If the owner of a future interest could obtain forfeiture under the statute’s second alternative relatively easily pursuant to a less stringent definition of malice, that party would have no reason to invoke the statute’s first alternative, which effectively would make the first alternative superfluous. In this case, the value of the waste may have been slight in comparison to the value of Aust’s estate, but Polzin avoided the issue by invoking malice. Thus, the malice requirement of section 561.17 should be interpreted in a way that requires an additional showing so that the second alternative means of obtaining forfeiture is in balance with the first alternative.

Although Aust has an estate for a term of years, section 561.17 also applies to life estates. Both the grantor and grantee of a life estate are likely to place heavy reliance on the security of that property interest. The grantee has the assurance of a place to live for the remainder of his or her life, with resulting financial benefits. The grantor often derives satisfaction from the knowledge that, after his or her death, a loved one will be so

provided for. These reliance interests are at risk if section 561.17 allows for the easy forfeiture of a life estate in practically every case of waste. We know from common experience that some people sometimes do not maintain their homes to the highest standards despite the best of intentions. We should be wary of an interpretation of section 561.17 that would permit a few missing shingles, for example, to become a reason for an impatient owner of a future interest to accelerate his or her acquisition of the property. Rather, we should insist on actual proof of malice, which was intended to ensure that the severe remedy of forfeiture was limited to appropriate cases rather than ordered in every case of waste.

For these reasons, I would reverse the entry of summary judgment and remand the case to the district court, contrary to part I of the opinion of the court. I would not reach the issue presented in part II, which I nonetheless believe is well reasoned.