TO BE OR NOT TO BE UNPUBLISHED: HOUSING LAW AND THE LOST PRECEDENT OF THE MINNESOTA COURT OF APPEALS

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I. INTRODUCTION

From this title, one can assume that this article will explore the practice of the Minnesota Court of Appeals in issuing unpublished opinions. But first, a question. What do the following recent cases have in common: (1) the 2007 *Beaumia v. Eisenbraun* decision,[1] (2) a series of decisions in 2009 concerning the Dakota County Community Development Agency,[2] and (3) the 2011 *Kleinman Realty Co. v. Talbot* decision?[3] Upon the first reading, the answer appears obvious: they all involved tenants seeking to apply state or federal law in their relationships with landlords or government agencies providing housing benefits.

But, there is more to the story. Each of these developments in housing law displayed flaws in the increased use of unpublished, non-precedential opinions: significant opinions designated as unpublished and non-precedential; inconsistent opinions; and erroneous opinions based on erroneous research. This Article will review the cases affected by the unpublished designation, the problems with the practice issuing unpublished opinions, the development of unpublished opinions in Minnesota, and what can and should be done about it.

II. ODD YEAR ODDITIES?

Oddly, each of these decisions was issued in an odd-numbered year from 2007 through 2011. Not only were the years odd, so were the decisions. One opinion made a significant but non-precedential holding on the effect of a landlord's failure to license the property on the tenant's obligation to pay rent. Several opinions in one year gave conflicting signals to agencies operating federally subsidized housing programs and the tenants served by them. Another opinion erroneously stated the law concerning the relevance of a landlord's failure to follow federal disability law in an eviction action.

A. The Minnesota Court of Appeals and Tenant Rights in 2007, 2009, and 2011

In 2007, the Minnesota Court of Appeals' *Beaumia* decision confronted for the first time the effect of a residential landlord's failure to obtain a municipally required rental license on the tenant's duty to pay rent.[4] The Alexandria City Ordinance made it unlawful to lease any residential property unless the landlord registered it with the city as a rental unit and

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[1] Beaumia v. Eisenbraun, No. A06-1482, 2007 WL 2472298 (Minn. Ct. App. Sept. 4, 2007).

[2] *See infra* Part II.A.

[3] Kleinman Realty Co. v. Talbot, No. A10-1132, 2011 WL 1938184 (Minn. Ct. App. May 23, 2011), *review denied* (Minn. Aug. 16, 2011).

[4] *See Beaumia*, 2007 WL 2472298, at *1.

paid a registration fee.[5] The landlord filed an eviction action when the tenants told the landlord they did not have the money to pay their rent.[6] The district court ruled for the landlord, concluding that failure to register the rental unit was irrelevant to whether the landlord had the right to recover possession of the property.[7]

The court of appeals reversed, first noting that a landlord's "compliance with a covenant imposed by law and a [tenant's] duty to perform under a lease agreement are mutually dependent."[8] If a tenant's duty to pay rent is excused, the eviction action must fail.[9] The court concluded that the landlord's failure to acquire the city-required certificate of occupancy eliminated the tenant's duty to pay rent and rendered the eviction improper.[10] The court held that the tenants had no rental obligation during the period in which the property was unregistered, and that the tenants could credit rent paid during that period against unpaid rent after the landlord registered the property.[11] The court added that because the credit for rent paid but not due was larger than the rent due for the period in which the landlord registered the property, the district court erred by evicting the tenants.[12]

In 2009, the court of appeals issued eleven decisions addressing Section 8 housing assistance[13] from the Dakota County Community Development Agency (Agency).[14] Six of the eleven decisions reversed the

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[5] *See id.* (citing ALEXANDRIA, MINN., CODE OF ORDINANCES § 5.08, subdivs. 3(1), 5 (2006)).

[6] *Id.*

[7] *Id.*

[8] *Id.* at *2 (citing Fritz v. Warthen, 213 N.W.2d 339, 341 (Minn. 1973)).

[9] *Id.* (citing Mac-Due Props. v. LaBresh, 392 N.W.2d 315, 316–17 (Minn. Ct. App. 1986)).

[10] *See Beaumia*, 2007 WL 2472298, at *2.

[11] *See id.*

[12] *See id.*

[13] In the Section 8 Existing Housing Choice Voucher Program, a low-income tenant can apply for a housing assistance voucher with a local government housing agency. *See* 42 U.S.C. § 1437f(o) (2006); 24 C.F.R. § 982.103 (2011). The tenant then finds a landlord willing to participate in the program, and once the agency approves the lease, the agency sends a monthly rent subsidy to the landlord and the tenant pays the remaining share of the rent. 24 C.F.R. §§ 982.302, -.451. The landlord may terminate the tenancy for serious or repeated violations of the lease, a violation of federal, state, or local law which imposes an obligation on the tenant in connection with occupancy of the unit, or other good cause. *Id.* § 982.310. Also, the housing authority can terminate the tenancy if the unit is not in compliance with its housing code, and the housing authority can terminate the housing assistance to the tenant if the tenant violates program rules. 42 U.S.C. § 1437f(o)(20); *see also* Fred Fuchs, *Overview of Public Housing, HUD Federally Subsidized Housing, and Section 8 Housing Voucher Programs*, *in* POVERTY LAW MANUAL FOR THE NEW LAWYER 109, 122–25 (2002).

[14] *See* Jones v. Dakota Cnty. Cmty. Dev. Agency, No. A08-1603, 2009 WL 2151158, at *7 (Minn. Ct. App. July 21, 2009) (affirmed); Blanchard v. Dakota Cnty. Cmty. Dev. Agency, No. A08-1801, 2009 WL 2151188, at *3 (Minn. Ct. App. July 21, 2009) (affirmed); Vann v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0362, 2009 WL 982117, at *3 (Minn. Ct. App. Apr. 14, 2009) (affirmed); Larsen v. Dakota Cnty. Cmty. Dev. Agency,

Agency termination decisions.[15] This was an unprecedented number of appellate decisions in one year concerning the Agency, which attracted the media's attention.[16] Previously, the highest number of decisions concerning the Agency in one year was three.[17] In the 2009 decisions affirming the actions of the Dakota County Community Development Agency, the court of appeals addressed issues of household composition,[18] accommodation of disabilities,[19] live-in-aids,[20] tenant disclosure of information,[21] tenant maintenance of utilities,[22] mitigating circumstances,[23] due process,[24] and sufficiency of agency findings.[25] The decisions that reversed the Agency actions dealt with similar issues, including tenant cooperation,[26] tenant

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No. A08-0371, 2009 WL 982124, at *5 (Minn. Ct. App. Apr. 14, 2009) (affirmed); Hassan v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0184, 2009 WL 749033, at *4 (Minn. Ct. App. Mar. 24, 2009) (reversed); Fyksen v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0372, 2009 WL 605663, at *3 (Minn. Ct. App. Mar. 10, 2009) (reversed); Ali v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0112, 2009 WL 511158, at *4 (Minn. Ct. App. Mar. 3, 2009) (reversed); Hassan v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0373, 2009 WL 437775, at *3 (Minn. Ct. App. Feb. 24, 2009) (reversed); Sandstrom v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0374, 2009 WL 437785, at *3 (Minn. Ct. App. Feb. 24, 2009) (affirmed); Pittman v. Dakota Cnty. Cmty. Dev. Agency, No. A07-2063, 2009 WL 112948, at *4 (Minn. Ct. App. Jan. 20, 2009) (reversed); *In re* Gorokhova, No. A08-0271, 2009 WL 66643, at *2 (Minn. Ct. App. Jan. 13, 2009) (reversed).

[15] *See Hassan*, 2009 WL 749033, at *4; *Fyksen*, 2009 WL 605663, at *3; *Ali*, 2009 WL 511158, at *4; *Hassan*, 2009 WL 437775, at *3; *Pittman*, 2009 WL 112948, at *4; *In re Gorokhova*, 2009 WL 66643, at *2.

[16] *See* Frederick Melo, *Housing Crackdown Sweeps up the Guilty—and the Innocent*, ST. PAUL PIONEER PRESS, May 30, 2009, at A1.

[17] In 2010, the court of appeals decided three Section 8 housing assistance appeals from the Dakota County Community Development Agency. *See* Welke v. Dakota Cnty. Cmty. Dev. Agency, No. A10-51, 2010 WL 2733608, at *6 (Minn. Ct. App. July 13, 2010); Pittman v. Dakota Cnty. Cmty. Dev. Agency, No. A09-1160, 2010 WL 2362527, at *8 (Minn. Ct. App. June 15, 2010); Barkhudarov v. Dakota Cnty. CDA, No. A09-1916, 2010 WL 2162595, at *3 (Minn. Ct. App. June 1, 2010). In 2007, the court also decided three such appeals. *See* Colliers v. Dakota Cnty. Dev. Agency, No. A06-1993, 2007 WL 4107906, at *3 (Minn. Ct. App. Nov. 20, 2007); Meyer v. Dakota Cnty. Cmty. Dev. Agency, No. A06-1290, 2007 WL 2703005 (Minn. Ct. App. Sept. 18, 2007); Hicks v. Dakota Cnty. Cmty. Dev. Agency, No. A06-1302, 2007 WL 2416872 (Minn. Ct. App. Aug. 28, 2007).

[18] *Jones*, 2009 WL 2151158, at *4–5.

[19] *Id.* at *7.

[20] Blanchard v. Dakota Cnty. Cmty. Dev. Agency, No. A08-1801, 2009 WL 2151188, at *2–3 (Minn. Ct. App. July 21, 2009).

[21] Vann v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0362, 2009 WL 982117, at *2 (Minn. Ct. App. Apr. 14, 2009); Larsen v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0371, 2009 WL 982124, at *3 (Minn. Ct. App. Apr. 14, 2009); Sandstrom v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0374, 2009 WL 437785, at *1 (Minn. Ct. App. Feb. 24, 2009).

[22] *Vann*, 2009 WL 982117, at *2–3.

[23] *Jones*, 2009 WL 2151158, at *5–6; *Sandstrom*, 2009 WL 437785, at *2–3.

[24] *Vann*, 2009 WL 982117, at *1–2. *See Larsen*, 2009 WL 982124, at *1–2.

[25] *Jones*, 2009 WL 2151158, at *4; *Larsen*, 2009 WL 982124, at *4.

[26] Hassan v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0184, 2009 WL 749033, at *2 (Minn. Ct. App. Mar. 24, 2009); Ali v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0112, 2009 WL 511158, at *2–3 (Minn. Ct. App. Mar. 3, 2009).

understanding of English,[27] tenant disclosure of information,[28] criminal activity,[29] substantial evidence,[30] mitigating circumstances,[31] sufficiency of findings,[32] calculation of income,[33] and effect of agency administrative plans.[34]

In 2011, in *Kleinman Realty Co. v. Talbot*, the court of appeals reversed a trial court order dismissing an eviction action.[35] The landlord filed the action alleging that the tenant remained on the property after receiving a written notice to vacate, agreeing to vacate, and "breach[ing] . . . her implied covenant to maintain her unit in a safe and sanitary condition."[36] The tenant defended that the landlord was required to reasonably accommodate her disability.[37] The district court dismissed the action, concluding that the tenant was entitled to a reasonable accommodation and that she had substantially complied with an agreement to maintain the property.[38]

The landlord appealed, claming that the district court exceeded its authority, and the court of appeals reversed. The court of appeals concluded that the district court lacked the legal grounds to treat the tenant's reasonable-accommodation argument as a valid affirmative defense to the eviction action, noting that "we are aware of, and Talbot has offered, no authority either recognizing disability-law 'reasonable accommodation' as an affirmative defense to an eviction action or authorizing the district court to enlarge the scope of eviction proceedings to consider that defense."[39] The court added that the limited scope of eviction actions prohibited the district court from addressing the tenant's substantial compliance argument for failing to completely perform the agreement with the landlord.[40] Having agreed with the landlord's arguments, the court reversed the district court's

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[27] *Hassan*, 2009 WL 749033, at *2–3; Hassan v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0373, 2009 WL 437775, at *3 (Minn. Ct. App. Feb. 24, 2009).

[28] *See* Fyksen v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0372, 2009 WL 605663, at *2–3 (Minn. Ct. App. Mar. 10, 2009); *Hassan*, 2009 WL 437775, at *2–3; Pittman v. Dakota Cnty. Cmty. Dev. Agency, No. A07-2063, 2009 WL 112948, at *2–3 (Minn. Ct. App. Jan. 20, 2009).

[29] *See Fyksen*, 2009 WL 605663, at *2–3.

[30] *See Hassan*, 2009 WL 749033, at *2–3; *Fyksen*, 2009 WL 605663, at *3; *Ali*, 2009 WL 511158, at *3; *Hassan*, 2009 WL 437775, at *1.

[31] *Fyksen*, 2009 WL 605663, at *3; *Hassan*, 2009 WL 437775, at *3; *Pittman*, 2009 WL 112948, at *4.

[32] *See Fyksen*, 2009 WL 605663, at *3; *Ali*, 2009 WL 511158, at *3; *Pittman*, 2009 WL 112948, at *3–4.

[33] *In re Gorokhova*, 2009 WL 66643, at *2.

[34] *See Ali*, 2009 WL 511158, at *2.

[35] Kleinman Realty Co. v. Talbot, No. A10–1132, 2011 WL 1938184, at *1 (Minn. Ct. App. May 23, 2011), *review denied* (Minn. Aug. 16, 2011).

[36] *See id.* at *2.

[37] *See id.*

[38] *Id.*

[39] *Id.* at *3.

[40] *See id.* at *4–5.

dismissal of the landlord's action and remanded for issuance of an eviction writ of recovery.[41]

B. Errors in Un-Publishing

What these 2007, 2009, and 2011 decisions have in common besides the application of tenant-rights law is that they are all unpublished opinions. Minnesota Statute section 480A.08 governs decisions of the court of appeals:

> Subd. 3. Decisions. (a) A decision shall be rendered in every case within 90 days after oral argument or after the final submission of briefs or memoranda by the parties, whichever is later. The chief justice or the chief judge may waive the 90-day limitation for any proceeding before the Court of Appeals for good cause shown. In every case, the decision of the court, including any written opinion containing a summary of the case and a statement of the reasons for its decision, shall be indexed and made readily available.
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> (b) The decision of the court need not include a written opinion. A statement of the decision without a written opinion must not be officially published and must not be cited as precedent, except as law of the case, res judicata, or collateral estoppel.
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> (c) The Court of Appeals may publish only those decisions that:
> (1) establish a new rule of law;
> (2) overrule a previous Court of Appeals' decision not reviewed by the Supreme Court;
> (3) provide important procedural guidelines in interpreting statutes or administrative rules;
> (4) involve a significant legal issue; or
> (5) would significantly aid in the administration of justice.
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> Unpublished opinions of the Court of Appeals are not precedential. Unpublished opinions must not be cited unless the party citing the unpublished opinion provides a full and correct copy to all other counsel at least 48 hours before its use in any pretrial conference, hearing, or trial. If cited in a brief or memorandum of law, a copy of the unpublished opinion must be provided to all other counsel at the time the brief or memorandum is served, and other counsel may

[41] *Kleinman Realty Co.*, 2011 WL 1938184, at *5.

respond.[42]

In conformity with the statute, Rule 136.01 of the Minnesota Rules of Civil Appellate Procedure provides:

> **Subdivision 1. Written Decision.**
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> (a) Each Court of Appeals disposition shall be written in the form of a published opinion, unpublished opinion, or an order opinion.
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> (b) Unpublished opinions and order opinions are not precedential except as law of the case, res judicata or collateral estoppel, and may be cited only as provided in Minn. Stat. § 480A.08, subd. 3 (1996).[43]

All of the decisions discussed above expose problems with the court of appeals' practice of deciding the vast majority of its cases with unpublished opinions which lack precedential value.[44]

1. A Significant Yet Unpublished Opinion

The 2007 *Beaumia* decision was the first Minnesota appellate decision addressing the effect of a landlord's failure to obtain a municipally required rental license on both the tenant's obligation to pay rent and on the landlord's ability to evict the tenant for failure to pay rent.[45] Over the last twenty years, many cities have enacted municipal ordinances requiring landlords to obtain rental licenses in order to rent out their properties to tenants.[46] District courts throughout the state have held that noncompliance with rental licensing ordinances relieves tenants from the obligation to pay rent.[47]

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[42] MINN. STAT. § 480A.08 (2010).

[43] MINN. R. CIV. APP. P. 136.01.

[44] There is another 2011 Minnesota Court of Appeals decision relevant to the above discussion, but it is best to save that decision for later in this article. *See infra* note 72.

[45] *See* Beaumia v. Eisenbraun, No. A06-1482, 2007 WL 2472298, at *2 (Minn. Ct. App. Sept. 4, 2007).

[46] *See* Erik Williamsen, *Summary of Hennepin County Rental License Requirements*, http://sites.google.com/site/mnhousinglaw/state-laws-and-rules/mn-landlord-tenant-laws-and-resources/summary-of-hennepin-county-rental-license-requirements (last updated Feb. 2010); s*ee also* ALEXANDRIA, MINN., CODE OF ORDINANCES § 5.08, subdivs. 3(1), 5 (2009); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 12, ch. 244, art. XVI, §§ 244.1800–.2010 (2011).

[47] *See* McGarrity v. _____, No. 27-CV-HC-08-5946, slip op. at 1 (Minn. Dist. Ct. 4th Aug. 5, 2008) (holding that landlord who failed to obtain license from the City of New Hope could not claim rent due, except for prorated amount after landlord obtained license); Tri Star Developers, LLC v. _____, No. HC 1011002522, slip op. at 2 (Minn. Dist. Ct. 4th Oct. 16, 2001) (holding that "[r]enting without a rental license requires dismissal" and securing Minneapolis license after filing the action does not purge the defect in filing without one); Niskanen v. Fiedler, C9-96-600751, slip op. at 1 (Minn. Dist. Ct. 6th May 23, 1996) (holding that landlord had entered into an illegal contract by renting unlicensed property in Duluth and could not profit from her wrongdoing); Peterson v. Pearson, UD 2951204800, slip

The district court in *Beaumia* went against this trend, concluding that failure to register the rental unit was irrelevant to whether the landlord had the right to recover possession of the property.[48] The court of appeals disagreed, and consistent with the majority of district court decisions, held for the first time that the tenants had no rental obligation during the period in which the property was unregistered, and that the tenants could credit rent paid during this period against unpaid rent after the landlord registered the property.[49]

The court of appeals issued the *Beaumia* decision as an unpublished opinion even though the decision "establish[ed] a new rule of law" and "involve[ed] a significant legal issue."[50] Recognizing a new defense to eviction actions based on the landlord's noncompliance with municipal rental licensing requirements is similar in significance to the decision in *Fritz v. Warthen* on which the *Beaumia* court relied.[51] In *Fritz*, the Minnesota Supreme Court reversed the decision of the district court to evict the tenants, and held that the Minnesota Legislature's newly enacted statutory covenants of habitability and a lease covenant for payment of rent are mutually dependent so that a breach of the statutory covenants of habitability may be asserted as a defense in an eviction action for nonpayment of rent.[52] However, a Westlaw search reveals that while the published *Fritz* decision has been cited in twenty-eight decisions in twenty-eight years as well as in twenty-six secondary sources, the unpublished *Beaumia* decision has not been cited in any reported decisions in four years.[53]

The unpublished and non-precedential status of *Beaumia* has led to inconsistent application of the lack-of-licensure defense in eviction actions. Drew Schaffer, a leading eviction law practitioner, has litigated apartment habitability and eviction cases for many years. Schaffer reports that the *Beaumia* decision had the potential to clarify the law concerning lack of licensure and tenant rent liability:

> There are multiple reported cases in Minnesota going back over 140 years holding that an obligation in a contract entered in direct, misdemeanor violation of the law is void and unenforceable in Minnesota courts.[54] Since a lease is a

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op. at 1 (Minn. Dist. Ct. 4th Feb. 12, 1996) (ordering rent abatement until landlord registered property under Brooklyn Park licensing ordinance). These unpublished district court decisions are available at http://www.projusticemn.org/ under Civil Law, Library, Housing, and Eviction Defense.

48 *Beaumia*, 2007 WL 2472298, at *2.

49 *See id.*

50 *See* MINN. STAT. § 480A.08, subdivs. 3(c)(1), (4) (2010).

51 *Beaumia*, 2007 WL 2472298, at *2 (citing Fritz v. Warthen, 213 N.W.2d 339, 341 (Minn. 1973)).

52 *See Fritz*, 213 N.W.2d at 342.

53 Westlaw search conducted Wednesday, November 7, 2011.

54 A contractual obligation obtained in violation of a statute is void and unenforceable as a matter of law. *See* Handy v. St. Paul Globe Publ'g Co., 42 N.W. 872, 873

> contract and since entering a lease in violation of a rental licensing ordinance is a misdemeanor in the municipalities out of which most of my cases arise, the analysis in the unenforceable-obligation/illegal-contract line of authority should be applied to prevent an unlicensed landlord from enforcing a rent claim in court and to provide a tenant with a claim to recover rent paid for an unlicensed rental dwelling. . . . As clear as the rules from reported illegal-contract decisions may seem from a reading of the cases, courts seem reluctant to apply those rules in housing cases involving unlicensed rental properties. . . . Beaumia is the only appellate case in which a group of appellate judges directly considered the effect of a residential landlord's non-compliance with a rental licensing ordinance in an eviction case for unpaid rent. . . . The significance of Beaumia was in its specificity with regard to the legal problem of landlords disregarding municipal licensing requirements and then using the courts to enforce claims arising out of their illegal business practices. This particular legal issue is prominent in the worlds of judicial officers, attorneys, and parties that have regular involvement in housing and eviction cases. The decision itself was unique and noteworthy in that (1) Ms.

(Minn. 1889); Bisbee v. McAllen, 39 N.W. 299, 300 (Minn. 1888); Ingersoll v. Randall, 14 Minn. 400, 405 (1869) (holding contract unenforceable because the threshing of grain was done illegally); *see also* Dworsky v. Vermes Credit Jewelry, Inc., 69 N.W.2d 118, 121–22 (Minn. 1955) (illegal contractual provisions are stricken from the contract at issue as unenforceable); Pettit Grain & Potato Co. v. N. Pac. Ry. Co., 35 N.W.2d 127, 131 (Minn. 1948) (any bargain that tends to a violation of the law is invalid and unenforceable). Contracts against public policy are also void. *See* Goodrich v. Nw. Tel. Exch. Co., 201 N.W. 290, 292 (Minn. 1924); Seitz v. Michel, 181 N.W. 102, 104 (Minn. 1921). For purposes of a public policy analysis in association with a contract, legislative enactments are the public policy of Minnesota. *See* Shank v. Fid. Mut. Life Ins. Co., 21 N.W.2d 235, 238 (Minn. 1945). These rules apply to contracts in the nature of leases. *See* Leuthold v. Stickney, 133 N.W. 856, 857 (Minn. 1911); *see also* Millier v. Pouliot, 271 N.W. 818, 819 (Minn. 1937) (violation of Minneapolis building code may be a defense to an action for rent if sufficient evidence is provided). In *Leuthold*, the landlord brought an action for rent and the tenant defended by alleging that the landlord did not provide a fire escape before commencing the tenancy, or at any time during the tenancy, in violation of a state statute and is punishable as a misdemeanor. *Leuthold*, 133 N.W. at 856. In affirming judgment for the tenant, the court held that the violation rendered the lease void and without consideration, precluding the landlord's action for rent. *Id*. at 857. Likewise, in *Niskanen v. Fiedler*, the court held that the landlord entered into an illegal contract by renting unlicensed property in Duluth and could not "profit from her wrongdoing." *See* Niskanen v. Fiedler, C9-96-600751, slip op. at 1 (Minn. Dist. Ct. May 23, 1996). The rule derived from all of the cases is that the law will not lend its support to a claim founded upon its violation. *See Goodrich*, 201 N.W. at 292. Whether the strict rule from *Handy* and *Bisbee* is applied to void the entire contract at issue, or whether the offending provision is stricken from the contract at issue and the balance of the contract enforced, as in *Dworsky*, the cases are all in agreement that the illegally obtained obligation is void as a matter of law.

> Beaumia had complied with the registration component of the applicable ordinance prior to filing the eviction case, (2) the appellate judges ruled for the Eisenbrauns based on their payment of rent prior to Ms. Beaumia's registration of the rental unit, and (3) there was no discussion of the case law on illegal contracts.
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> Not long after Beaumia was decided, it became well-known in the legal community focused on housing and eviction cases. Most people in that community consider the case to be an important decision, specific as it is to a recurring issue in housing cases. While the decision is oft-cited by practitioners advocating for tenants, there is resistance by the bench to apply the rule set out in Beaumia. Judicial officers distinguish Beaumia's rule from square application . . . because the case arose elsewhere, using the decision's unpublished status to draw the distinction. The fact, then, that the decision is "unpublished" takes on ironic significance, considering that the decision is as well-known as it is by the judicial officers and practitioners who consider and argue the points of law for which it stands.[55]

Recently, in *Mehralian v. Bell*, the Fourth District Court of Minnesota concluded in an eviction action that the landlord's lack of a Minneapolis rental license required dismissal of the complaint for nonpayment of rent.[56] Rather than cite and discuss the unpublished *Beaumia* decision, which was right on point, the court discussed *Fritz v. Warthen* to reach the same conclusion.[57] Perhaps had *Beaumia* been published, the district court and the parties could have saved the time and expense of litigating the issue.

2. Similar Yet Inconsistent Unpublished Opinions

The 2009 court of appeals decisions from the Dakota County Community Development Agency all involved determinations of Section 8 housing assistance, with six of the eleven decisions reversing the Agency's termination.[58] Taken together, the six decisions amounted to 40 pages and contained 137 citations. While all of the decisions were unpublished, eight of the eleven decisions were given West Key Number summaries of the

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[55] E-mail from Drew Schaffer, Adjunct Professor of Law, Univ. of Minn. Law Sch., to author (Aug. 26, 2011, 14:28 CST) (on file with author).

[56] Mehralian v. Bell, No. 27-CV-HC-11-5373, slip op. at 3 (Minn. Dist. Ct. Sept. 1, 2011).

[57] *See id.* at 3 (citing Fritz v. Warthen, 213 N.W.2d 339, 341 (Minn. 1973)).

[58] *See supra* note 15 and accompanying text.

holdings.[59] All of the decisions reviewed the Agency's consideration of evidence and the federal regulations governing Section 8 hearings, but several reached different conclusions even though the facts were similar.

Five of the eleven decisions involved challenges to the sufficiency of the Agency's findings, but they held the decisions to different standards. In *Carter v. Olmsted County Housing & Redevelopment Authority*, the court of appeals described the standard for reviewing Agency terminations of tenant housing assistance: the Agency decision "must be 'based on objective criteria applied to the facts and circumstances of the record at hand,'" and the Agency must explain the evidentiary basis for its decision and how that evidence is rationally related to its action.[60] Some of the 2009 court of appeals decisions were less than complete and affirmed Agency hearing orders[61] while others closely scrutinized and reversed Agency determinations.[62] Five of the appeals challenged terminations of housing assistance based in part on Agency determinations that the tenant failed to report information on household income or composition to the Agency, and

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[59] *See* Jones v. Dakota Cnty. Cmty. Dev. Agency, No. A08-1603, 2009 WL 2151158 (Minn. Ct. App. July 21, 2009); Vann v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0362, 2009 WL 982117 (Minn. Ct. App. Apr. 14, 2009); Larsen v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0371, 2009 WL 982124 (Minn. Ct. App. Apr. 14, 2009); Ali v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0112, 2009 WL 511158 (Minn. Ct. App. Mar. 3, 2009); Hassan v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0373, 2009 WL 437775 (Minn. Ct. App. Feb. 24, 2009); Sandstrom v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0374, 2009 WL 437785 (Minn. Ct. App. Feb. 24, 2009); Pittman v. Dakota Cnty. Cmty. Dev. Agency, No. A07-2063, 2009 WL 112948 (Minn. Ct. App. Jan. 20, 2009); *In re* Gorokhova, No. A08-0271, 2009 WL 66643 (Minn. Ct. App. Jan. 13, 2009).

[60] Carter v. Olmsted Cnty. Hous. & Redevelopment Auth., 574 N.W.2d 725, 729 (Minn. Ct. App. 1998) (citations omitted) (quoting *In re* Nw. Bell Tel. Co., 386 N.W.2d 723, 727 (Minn. 1986)).

[61] *See Jones*, 2009 WL 2151158, at *4 (affirming agency ruling even though "hearing officer's 'Findings of Fact' section is more of a summary of the witnesses' testimony than a true reflection of her independent factual findings based on the evidence presented at the hearing"); *Larsen*, 2009 WL 982124, at *4 (affirming agency ruling "although less comprehensively, the hearing officer did consider 'the seriousness of the case'").

[62] *See* Fyksen v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0372, 2009 WL 605663, at *3 (Minn. Ct. App. Mar. 10, 2009) ("[W]e caution hearing officers—and the agencies that rely on them—to re-examine the requirements we have articulated. Their decisions must contain sufficient factual findings and credibility determinations to facilitate our review."); *Ali*, 2009 WL 511158, at *3 (findings unsupported in the record); *Pittman*, 2009 WL 112948, at *4 ("[M]uch of the hearing officer's written decision simply lists the evidence presented at the hearing. A mere recitation of presented evidence is not equivalent to independent findings of fact." (citing Dean v. Pelton, 437 N.W.2d 762, 764 (Minn. Ct. App. 1989))); *In re Gorokhova*, 2009 WL 66643, at *2.

similarly, some of the decisions affirmed housing assistance terminations[63] while others issued reversals.[64]

Six of the eleven decisions involved the question of whether the Agency was required to consider mitigating circumstances in its determination to terminate the tenant's benefits. The regulation provides:

> The PHA [Public Housing Authority] *may* consider all relevant circumstances such as the seriousness of the case, the extent of participation or culpability of individual family members, mitigating circumstances related to the disability of a family member, and the effects of denial or termination of assistance on other family members who were not involved in the action or failure.[65]

Some of the decisions concluded that the use of the word "may" meant that the regulation was permissive, so the Agency was not required to consider mitigating circumstances.[66] In other decisions, the court of appeals reversed the Agency termination for failing to consider mitigating circumstances such as English proficiency[67] or the effect of terminating assistance on the tenant and the tenant's children.[68] In yet another decision, the court dodged the issue by noting the issue but concluding that the Agency "did not *entirely* fail to consider an important aspect of the issue. Thus, the hearing officer's decision was not arbitrary and capricious."[69] Earlier appellate decisions on appeals of Dakota County Community Development Agency determinations concluded that consideration of mitigating circumstances was mandatory.[70] None of these unpublished opinions cited

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[63] *See Vann*, 2009 WL 982117, at *2 (affirming termination where tenant failed to submit tax returns); *Larsen*, 2009 WL 982124, at *3 (affirming termination where tenant failed to report earnings); *Sandstrom*, 2009 WL 437785, at *2 (affirming termination where tenant failed to report income resulting in benefit overpayment of twenty-four dollars which tenant repaid).

[64] *See Fyksen*, 2009 WL 605663, at *2–3 (reversing termination where tenant failed to report crimes which were not violent); *Hassan*, 2009 WL 437775, at *2–3 (reversing termination where tenant attempted, albeit unsuccessfully, to submit tax information); *Pittman*, 2009 WL 112948, at *2–3 (reversing termination where tenant failed to report guests who stayed in the home temporarily and regulations did not state how long guests may stay).

[65] 24 C.F.R. § 982.552(c)(2)(i) (2011) (emphasis added).

[66] *See Jones*, 2009 WL 2151158, at *6; *Fyksen*, 2009 WL 605663, at *3; *Sandstrom*, 2009 WL 437785, at *2–3.

[67] *See Hassan*, 2009 WL 437775, at *3.

[68] *See id.*; *Pittman*, 2009 WL 112948, at *4.

[69] Larsen v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0371, 2009 WL 982124, at *2 (Minn. Ct. App. Apr. 14, 2009).

[70] *See* Hicks v. Dakota Cnty. Cmty. Dev. Agency, No. A06-1302, 2007 WL 2416872, at *4 (Minn. Ct. App. Aug. 28, 2007) ("The permissive nature of the regulation does not preclude a determination that mitigating circumstances are an important factor that must be considered in a particular case."); Alich v. Dakota Cnty. Cmty. Dev. Authority, No. C4-02-818, 2003 WL 230726, at *2 (Minn. Ct. App. Feb. 4, 2003). In one case the tenant claimed on appeal that the Agency failed to consider mitigating circumstances, but the court reversed the Agency decision because the record was insufficient to support termination of

any of the previous decisions on the issue.[71] These inconsistent conclusions on mitigating circumstances gave mixed messages to the Agency, tenants participating in the program, and attorneys advising both sides on their rights and obligations.

In 2011, the court of appeals recognized its inconsistent decisions concerning mitigating circumstances in a *published* decision involving a different housing agency in *Peterson v. Washington County Housing & Redevelopment Authority*.[72] The Agency terminated the tenant's housing assistance, concluding that the tenant failed to report income within five days of receiving it and the tenant appealed.[73] Among other issues, the tenant claimed that the Agency failed to consider mitigating circumstances.[74] The court noted the history of unpublished opinions holding inconsistently on the issue of whether consideration of mitigating circumstances was mandatory or permissive and that there was no published decision on the issue.[75] The court found the unpublished opinions holding the consideration of mitigating circumstances as permissive more persuasive and held accordingly.[76]

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benefits. *See* Meyer v. Dakota Cnty. Cmty. Dev. Agency, No. A06-1290, 2007 WL 2703005, at *1, 3 (Minn. Ct. App. Sept. 18, 2007).

[71] Every court of appeals decision reviewing Section 8 determinations of the Dakota County Community Development Agency and its predecessors has been unpublished, and as a result, are not controlling in subsequent cases. *See* Welke v. Dakota Cnty. Cmty. Dev. Agency, No. A10-51, 2010 WL 2733608 (Minn. Ct. App. July 13, 2010); Pittman v. Dakota Cnty. Cmty. Dev. Agency, No. A09-1160, 2010 WL 2362527 (Minn. Ct. App. June 15, 2010); Barkhudarov v. Dakota Cnty. CDA, No. A09-1916, 2010 WL 2162595 (Minn. Ct. App. June 1, 2010); *Jones*, 2009 WL 2151158; Blanchard v. Dakota Cnty. Cmty. Dev. Agency, No. A08-1801, 2009 WL 2151188 (Minn. Ct. App. July 21, 2009); Vann v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0362, 2009 WL 982117 (Minn. Ct. App. Apr. 14, 2009); *Larsen*, 2009 WL 982124; Hassan v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0184, 2009 WL 749033 (Minn. Ct. App. Mar. 24, 2009); *Fyksen*, 2009 WL 605663; Ali v. Dakota Cnty. Cmty. Dev. Agency, No. A08-0112, 2009 WL 511158 (Minn. Ct. App. Mar. 3, 2009); *Hassan*, 2009 WL 437775; *Sandstrom*, 2009 WL 437785; *Pittman*, 2009 WL 112948; Colliers v. Dakota Cnty. Dev, Agency, No. A06-1993, 2007 WL 4107906 (Minn. Ct. App. Nov. 20, 2007); *Meyer*, 2007 WL 2703005; *Hicks*, 2007 WL 2416872; Blumer v. Dakota Cnty. Cmty. Dev. Agency, No. A03-1702, 2005 WL 353986 (Minn. Ct. App. Feb. 15, 2005); Williams v. Dakota Cnty. Cmty. Dev. Agency, No. A04-6, 2004 WL 2340084 (Minn. Ct. App. Oct. 19, 2004); Schultz v. Dakota Cnty. Cmty. Dev. Agency, No. A03-1099, 2004 WL 2283586 (Minn. Ct. App. Oct. 12, 2004); *Alich*, 2003 WL 230726; Gayder v. Dakota Cnty. Hous. & Redevelopment Auth., No. C8-95-249, 1995 WL 711136 (Minn. Ct. App. Dec. 5, 1995).

[72] Peterson v. Washington Cnty. Hous. & Redevelopment Auth., 805 N.W.2d 558, 563–64 (Minn. Ct. App. 2011).

[73] *Id*. at 560.

[74] *Id.* at 563.

[75] *Id.* at 563–64.

[76] *Id.* at 564. The tenant requested review by the Minnesota Supreme Court, arguing that precedent holding that an administrative agency which fails entirely to take into consideration important aspect of the dispute acts arbitrarily and capriciously. Petition for Review of Court of Appeals Decision at 5, Peterson v. Washington Cnty. Hous. & Redevelopment Auth., 805 N.W.2d 558 (Minn. Ct. App. 2011) (No. A10-2053) (citing White v. Minn. Dep't of Natural Res., 567 N.W.2d 724, 730–31 (Minn. Ct. App. 1997)); Rostamkhani v. City of St. Paul, 645 N.W.2d 479, 485–86 (Minn. Ct. App. 2002)).

The fact that the court finally resolved the issue in a published decision does not alter the confusion created by the disagreement among the 2009 and earlier decisions. It was precisely that confusion that led to the published decision in *Peterson*. Had any of the earlier decisions been published, the issue would have been resolved, and all affected parties would have understood their rights and obligations. Also, the *Peterson* decision did not resolve the other inconsistent decisions of the court of appeals addressing tenant reporting requirements and sufficiency of findings.

3. An Erroneous Unpublished Opinion

The 2011 unpublished opinion *Kleinman Realty Co. v. Talbot* made one conclusion based upon incomplete research, and another conclusion based upon erroneous research.[77] While addressing the landlord's argument that a district court hearing an eviction action did not have authority to consider the tenant's defense that the landlord failed to reasonably accommodate the tenant's disability, the court noted:

> Minnesota statutes and caselaw have recognized a limited number of defenses to an eviction action. *See* Minn.Stat. § 504B.285, subd. 2 (2010) (providing retaliation as a defense to an eviction action); Minn.Stat. § 504B.315 (prohibiting eviction or non-renewal on the basis of familial status); *Fritz v. Warthen,* 298 Minn. 54, 61, 213 N.W.2d 339, 343 (1973) (holding that breach of the covenant of habitability may be asserted as a defense); *Priordale Mall Investors v. Farrington,* 411 N.W.2d 582, 584 (Minn.App.1987) (stating that landlord's waiver by acceptance of rent may be asserted as an affirmative defense).[78]

The court failed to note the many other eviction defenses authorized by statutes and case law.[79] These other eviction defenses include lack of personal jurisdiction;[80] the plaintiff is not the person entitled to possession of the building or an authorized management agent;[81] the person suing on behalf of the plaintiff is not a licensed attorney and did not file a power of authority;[82] the plaintiff is a corporation or a similar entity not represented by

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[77] *See* Kleinman Realty Co. v. Talbot, No. A10-1132, 2011 WL 1938184, at *1 (Minn. Ct. App. May 23, 2011), *review denied* (Minn. Aug. 16, 2011).

[78] *Id.* at *3.

[79] *See generally* Lawrence R. McDonough, *Wait a Minute! Residential Eviction Defense in 2009 Still is Much More than "Did You Pay the Rent?*," 35 WM. MITCHELL L. REV. 762, 780–858 (2009) (summarizing eviction defenses).

[80] *See* MINN. STAT. § 504B.331 (2010).

[81] *See* MINN. GEN. R. PRAC. 603.

[82] *See id.*; *see also* MINN. STAT. § 481.02, subdiv. 3(13) (2010) (prohibiting certain behavior by those not licensed as an attorney when "commencing, maintaining, conducting, or defending on behalf of" a party in an eviction action).

an attorney;[83] the landlord failed to disclose to the tenant the names and addresses of the authorized manager of the premises and the owner or agent authorized to accept service;[84] the complaint failed to describe the premises;[85] the landlord failed to plead in the complaint the facts which authorize the recovery of possession;[86] the tenant is a military service member or active National Guard member covered by the Servicemembers Civil Relief Act;[87] the landlord violated utility payment obligations;[88] the landlord assessed illegal late fees;[89] the landlord accepted a partial payment of rent without agreeing in writing that the payment would not waive the eviction case;[90] the tenant paid rent with money orders;[91] the landlord failed to attach a copy of the lease termination notice to the complaint;[92] the landlord failed to give proper notice to terminate the lease;[93] the landlord illegally discriminated against the tenant;[94] the landlord failed to attach a copy of the lease to the complaint;[95] the tenant did not commit a material violation of the lease;[96] the landlord failed to give the tenant a copy of the lease before filing the eviction action;[97] the lease did not contain a "right of re-entry" clause;[98] the tenant did not know or have reason to know that there was unlawful activity on the property;[99] the landlord penalized the tenant for calling the "police or emergency assistance in response to domestic abuse or

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[83] *See* Nicollet Restoration, Inc. v. Turnham, 486 N.W.2d 753, 754 (Minn. 1992); 301 Clifton Place L.L.C. v. 301 Clifton Place Condo. Ass'n., 783 N.W.2d 551, 560–61 (Minn. Ct. App. 2010); World Championship Fighting, Inc. v. Janos, 609 N.W.2d 263, 264–65 (Minn. Ct. App. 2000); *see also* Towers v. Schwan, No. A07-1311, 2008 WL 4224462, at *2 (Minn. Ct. App. Sept. 16, 2008) (holding that the district court erred in allowing a corporation to proceed in an eviction action without the representation of legal counsel, and quoting extensively from both *Nicollet Restoration* and *World Championship Fighting*).

[84] *See* MINN. STAT. § 504B.181.

[85] *See id.* § 504B.321; MINN. GEN. R. PRAC. 604(a).

[86] *See* MINN. STAT. § 504B.321; MINN. GEN. R. PRAC. 604.1; Mankato & Blue Earth Cnty. Hous. & Redevelopment Auth. v. Critzer, No. C2-94-1712, 1995 WL 130608, at *2 (Minn. Ct. App. Mar. 28, 1995); Mac-Du Props. v. LaBresh, 392 N.W.2d 315, 317 (Minn. Ct. App. 1986).

[87] *See* Servicemembers Civil Relief Act, 50 U.S.C. app. § 531 (2006).

[88] *See* MINN. STAT. § 504B.215.

[89] *See id.* § 504B.177.

[90] *See id.* § 504B.291(1)(c).

[91] *See id.* § 504B.291(1)(a).

[92] *See* MINN. GEN. R. PRAC. 604(c).

[93] *See* MINN. STAT. § 504B.135; Oesterreicher v. Robertson, 245 N.W. 825, 825–26 (Minn. 1932).

[94] *See* 42 U.S.C. § 3604 (2006); Minnesota Human Rights Act, MINN. STAT. § 363A.09 (2010); Barnes v. Weis Mgmt. Co., 347 N.W.2d 519, 522 (Minn. Ct. App. 1984).

[95] *See* MINN. GEN. R. PRAC. 604(d).

[96] *See* Cloverdale Foods of Minn., Inc. v. Pioneer Snacks, 580 N.W.2d 46, 49 (Minn. Ct. App. 1998).

[97] *See* MINN. STAT. § 504B.115.

[98] *See* Bauer v. Knoble, 53 N.W. 805, 805 (Minn. 1892).

[99] *See* MINN. STAT. § 504B.171, subdiv. 1(2).

any other conduct";[100] forfeiture would be a great injustice where the landlord's rights are adequately protected;[101] and the tenant's ability to redeem the tenancy.[102] Other defenses are available to tenants in foreclosed properties,[103] manufactured home parks,[104] and public and subsidized housing.[105]

The court went on to conclude that it was "aware of, and Talbot has offered, no authority either recognizing disability-law 'reasonable accommodation' as an affirmative defense to an eviction action or authorizing the district court to enlarge the scope of eviction proceedings to consider that defense."[106] The conclusion is wrong, as both published and unpublished court of appeals decisions have recognized the reasonable accommodation defense.

Under federal and state law, landlords have an affirmative obligation to reasonably accommodate disabled tenants.[107] In *Schuett Investment Co. v. Anderson*, the court held in a *published* decision that a tenant may raise the defense of the landlord's failure to reasonably accommodate a tenant's disability when that failure is causally related to the alleged breach of the lease.[108] In affirming the decision of the district court to dismiss the eviction action, the court of appeals joined many other jurisdictions in recognizing disability and other discrimination eviction defenses.[109] Since the holding in

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[100] *See id.* § 504B.205, subdiv. 2(a)(1).

[101] *See* 1985 Robert St. Assocs. v. Menard, Inc., 403 N.W.2d 900, 904 (Minn. Ct. App. 1987); 614 Co. v. D. H. Overmyer Co., 211 N.W.2d 891, 894 (Minn. 1973).

[102] *See* MINN. STAT. § 504B.291; *614 Co.*, 211 N.W.2d at 894.

[103] *See* Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, § 702, 123 Stat. 1632, 1660–61; MINN. STAT. § 504B.285, subdiv. 1a.

[104] *See, e.g.*, MINN. STAT. §§ 327C.10–.13; Rainbow Terrace, Inc. v. Hutchens, 557 N.W.2d 618, 621 (Minn. Ct. App. 1997) (holding, among other things, that Minnesota Statute section 327C applies in a manufactured home park even when the requisite written lease does not exist); Lea v. Pieper, 345 N.W.2d 267, 271 (Minn. Ct. App. 1984) (holding eviction improper because park owner failed to comply with the "substantial annoyance" section of Minnesota Statute section 327C.09, subdivision 5).

[105] *See* Oak Glen of Edina v. Brewington, 642 N.W.2d 481, 484 (Minn. Ct. App. 2002); Chancellor Manor v. Thibodeaux, 628 N.W.2d 193, 196 (Minn. Ct. App. 2001); RFT & Assocs. v. Smith, 419 N.W.2d 109, 111 (Minn. Ct. App. 1988); Hous. & Redevelopment Auth. of Waconia v. Chandler, 403 N.W.2d 708, 711 (Minn. Ct. App. 1987); Hoglund-Hall v. Kleinschmidt, 381 N.W.2d 889, 895 (Minn. Ct. App. 1986); *see also* Fuchs*, supra* note 13, at 124–25.

[106] Kleinman Realty Co. v. Talbot, No. A10-1132, 2011 WL 1938184, at *3 (Minn. Ct. App. May 23, 2011), *review denied* (Minn. Aug. 16, 2011).

[107] *See* Rehabilitation Act of 1973, 29 U.S.C. § 794 (2006); 42 U.S.C. § 3604(f)(3); Minnesota Human Rights Act, MINN. STAT. § 363A.10, subdiv. 1; 24 C.F.R. pts. 8, 100 (2011).

[108] *See* Schuett Inv. Co. v. Anderson, 386 N.W.2d 249, 253 (Minn. Ct. App. 1986).

[109] *See, e.g.*, *id.* (citing Am. Pub. Transit Ass'n v. Lewis, 655 F.2d 1272, 1278 (D.C. Cir. 1981); Majors v. Hous. Auth. of DeKalb, 652 F.2d 454, 457–58 (5th Cir. 1981)); *see also* Newell v. Rolling Hills Apartments, 134 F. Supp. 2d 1026, 1038 (N.D. Iowa 2001); Roe v. Housing Auth. of Boulder, 909 F. Supp. 814, 822–23 (D. Colo. 1995); Roe v. Sugar

Schuett, several unpublished court of appeals decisions reviewed application of the reasonable accommodation defense in eviction actions: some decisions ruled for the tenant and some for the landlord, but none questioned the availability of the defense.[110]

It is unclear what caused the court in *Kleinman Realty Co. v. Talbot* to misstate the law on available defenses in eviction actions in general and the reasonable accommodation defense in particular. It could have been the result of limited research since the decision was going to be unpublished, research which did not identify the unpublished opinions on point (although this would not explain not identifying the published *Schuett* decision), or poor briefing. Regardless of the cause, the court reached the wrong conclusion, came to the wrong result, and introduced confusion into an area of the law that had been settled by *Schuett* and consistently followed by all of the previous unpublished opinions.

4. The Impact of Lost Precedent

In the above examples, the precedent lost in these unpublished opinions goes far beyond an academic discussion on the merit of unpublished, non-precedential appellate decisions: it has consequences in the real world. The unpublished status of the *Beaumia* decision's conclusion, which ruled on the effect of a landlord's failure to procure a rental license on

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River Mills Assocs., 820 F. Supp. 636, 640 (D. N.H. 1993); W. Land Office, Inc. v. Cervantes, 220 Cal. Rptr. 784, 791 (Cal. Ct. App. 1985); Abstract Inv. Co. v. Hutchinson, 22 Cal. Rptr. 309, 312 (Cal. Dist. Ct. App. 1962); Boulder Meadows v. Saville, 2 P.3d 131, 137 (Colo. App. 2000); Ansonia Acquisition I. LLC v. Francis, Nos. HDSP-102429, H-1179, 1999 WL 1076142, *5 (Conn. Super. Ct. Nov. 18, 1999); Marine Park Assocs. v. Johnson, 274 N.E.2d 645, 647 (Ill. App. Ct. 1971); Stout v. Kokomo Manor Apartments, 677 N.E.2d 1060, 1065 (Ind. Ct. App. 1997); Capone v. Kenny, 646 So. 2d 510, 513 (La. Ct. App. 1994); Mascaro v. Hudson, 496 So. 2d 428, 429 (La. Ct. App. 1986); Douglas v. Kriegsfeld Corp., 884 A.2d 1109, 1129 (D.C. 2005); Hous. Auth. of Bangor v. Maheux, 748 A.2d 474, 476 (Me. 2000); City Wide Assocs. v. Penfield, 564 N.E.2d 1003, 1004–05 (Mass. 1991); Day v. Baker, No. CA2003-06-140, 2004 WL 2340656, at *2 (Ohio Ct. App. Oct. 18, 2004); Lable & Co. v. Flowers, 661 N.E.2d 782, 786 (Ohio Ct. App. 1995); Lebanon Cnty. Hous. Auth. v. Landeck, 967 A.2d 1009, 1017 (Pa. Super. Ct. 2009); Arnold Murray Constr., L.L.C. v. Hicks, 621 N.W.2d 171, 175 (S.D. 2001); Malibu Inv. Co. v. Sparks, 996 P.2d 1043, 1052 (Utah 2000); Josephinium Assocs. v. Kahli, 45 P.3d 627, 634 (Wash. Ct. App. 2002).

[110] *See* Dominium Mgmt. Servs., Inc. v. C.L., No. A03-85, 2003 WL 22890386, at *4–5 (Minn. Ct. App. Dec. 9, 2003) (affirming the ruling for the tenant); Cornwell & Taylor, LLP v. Moore, No. C8-00-1000, 2000 WL 1887528, at *1 (Minn. Ct. App. Dec. 22, 2000) (affirming the ruling for the tenant and remanding); Minneapolis Pub. Hous. Auth. v. Rozas, No. C0-95-956, 1996 WL 5780, at *2 (Minn. Ct. App. Jan. 9, 1996) (affirming the ruling for the landlord (citing *Schuett*, 386 N.W.2d at 253)); Minneapolis Pub. Hous. Auth. v. Demmings, No. C5-94-2045, 1995 WL 265061, at *3 (Minn. Ct. App. May 9, 1995) (affirming the ruling for the landlord (citing *Schuett*, 386 N.W.2d at 253)); Nicollet Towers, Inc. v. Georgiff, C5-94-1364, 1995 WL 46252, at *2 (Minn. Ct. App. Feb. 7, 1995) (reversing and holding for the tenant); Hous. & Redevelopment Auth. of Winona v. Fedorko, C4-94-884, 1994 WL 654525, at *2 (Minn. Ct. App. Nov. 22, 1994) (reversing and holding for the tenant).

the tenant's rent liability at the appellate level for the first time, has left landlords, tenants, and their counsel, as well a licensing agencies, without knowledge of whether there is an effect, what it should be, and whether it will be the same in neighboring cities and throughout the state. The court has left the responsibility to district court referees and judges to determine the issue from county to county.

The unpublished status and inconsistent conclusions on the Agency's and tenant's rights and obligations from the ten Dakota County Community Development Agency decisions in 2009, as well as the eleven other decisions since 1995, gave mixed messages to the Agency, tenants participating in the program, and attorneys advising both.[111] The Agency conducted itself similarly in each of the 2009 cases but was affirmed in only forty-five percent of the appeals and reversed in the other fifty-five percent. The lost precedent in each of the twenty-one Dakota County Community Development Agency appeals since 1995 neither guided the later decisions, nor the impacted parties.

The unpublished 2011 *Kleinman Realty* decision probably resulted from the lost precedent of the ealier reasonable accommodation of disability decisions, and it also added confusion for future cases. Had the five unpublished decisions since *Schuett* all been published, there would have been a string of six decisions all reaching the same conclusion that the reasonable accommodation of disability defense is available in eviction actions. It seems unlikely that the court would have missed all of them. While *Schuett* remains good law because of its published status, *Kleinman Realty* certainly muddies the water.

III. SO, HOW DID WE GET HERE?

> In 1982, the Minnesota Constitution was amended to provide: The legislature may establish a court of appeals and provide by law for the number of its judges, who shall not be judges of any other court, and its organization and for the review of its decisions by the supreme court. The court of appeals shall have appellate jurisdiction over all courts, except the supreme court, and other appellate jurisdiction as prescribed by law.[112]

Also in 1982, the Minnesota Legislature enacted Chapter 480A of the Minnesota Statutes to create the Minnesota Court of Appeals.[113] The court of appeals was created to relieve the burden of the Minnesota Supreme Court's caseload and administrative obligations.[114]

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[111] *See supra* notes 70–71 and accompanying text (listing unpublished cases).

[112] MINN. CONST. art. VI, § 2.

[113] Act of Mar. 22, 1982, ch. 501, 1982 Minn. Laws 569.

[114] *See* Kerri L. Klover, Comment, *"Order Opinions"—the Public's Perception of Injustice*, 21 WM. MITCHELL L. REV. 1225, 1231–33 (1996).

The original version of section 480A.08 did not provide for unpublished opinions:

> A decision shall be rendered in every case within 90 days after oral argument or after the final submission of briefs or memoranda by the parties, whichever is later. In every case, the decision of the court, including any written opinion containing a summary of the case and a statement of the reasons for its decision, shall be indexed and made readily available.[115]

In 1983, the legislature added: "The chief justice or the chief judge may waive the 90-day limitation for any proceeding before the court of appeals for good cause shown."[116]

In 1987, the statute was amended to provide for unpublished opinions:

> The court of appeals may publish only those decisions that:
> (1) establish a new rule of law;
> (2) overrule a previous court of appeals' decision not reviewed by the supreme court;
> (3) provide important procedural guidelines in interpreting statutes or administrative rules;
> (4) involve a significant legal issue; or
> (5) would significantly aid in the administration of justice.
>
> Unpublished opinions of the court of appeals are not precedential. Unpublished opinions must not be cited unless the party citing the unpublished opinion provides a full and correct copy to all other counsel at least 48 hours before its use in any pretrial conference, hearing, or trial. If cited in a brief or memorandum of law, a copy of the unpublished opinion must be provided to all other counsel at the time the brief or memorandum is served, and other counsel may respond.[117]

Finally, in 1989, the legislature amended the statute again to place the text regarding unpublished opinions in subdivision (c), while adding subdivision (b): "The decision of the court need not include a written opinion. A statement of the decision without a written opinion must not be officially published and must not be cited as precedent, except as law of the case, res judicata, or collateral estoppel."[118]

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[115] Ch. 501, sec. 10, 1982 Minn. Laws 569, 573. [Quoted additions to Minnesota Statute section 480A are reformatted for readability.]

[116] Act of June 1, 1983, ch. 247, sec. 172, 1983 Minn. Laws 852, 945.

[117] Act of June 12, 1987, ch. 404, sec.182, 1987 Minn. Laws 3490, 3622. Rule 4 of the Special Rules of Practice for the Minnesota Court of Appeals mirrors this statute. *See* SPECIAL R. PRAC. MINN. CT. APP. 4.

[118] Act of June 3, 1989, ch. 335, art. 1, sec. 256, 1989 Minn. Laws 2693, 2894.

The main purpose for allowing unpublished and non-precedential opinions was the view that the court of appeals would serve as an error-correcting appellate court on most occasions, with published opinions reserved for legally significant decisions.[119] In *Dynamic Air, Inc. v. Bloch*, the court of appeals emphasized the lack of precedent in unpublished opinions, and criticized trial court reliance on unpublished opinions:

> Finally, we note that the district court committed error in relying upon an unpublished opinion for the proposition that a restrictive covenant lacking a territorial limitation is per se unenforceable. Unpublished opinions of the Court of Appeals are not precedential. Minn.Stat. § 480A.08, subd. 3(c) (1992). At best, these opinions can be of persuasive value. For example, a party may cite to an unpublished opinion affirming a trial court's exercise of discretion to persuade a trial court to exercise discretion in the same manner. It is, however, improper to rely on unpublished opinions as binding precedent.
>
> We note also that the use of such opinions has the potential to result in profound unfairness. Attorneys who have access to computerized research systems are able to find unpublished opinions with facts apparently similar to their case. Attorneys who cannot afford these services, however, are at a disadvantage, as they are unable to find those unpublished opinions supporting their cases. Because the full fact situation is seldom set out in unpublished opinions, the danger of mis-citation is great.
>
> The legislature has unequivocally provided that unpublished opinions are not precedential. We remind the bench and bar firmly that neither the trial courts nor practitioners are to rely on unpublished opinions as binding precedent.[120]

However, counsel may have an ethical obligation to cite unpublished opinions adverse to counsel's client if that authority is the only opinion on point in the jurisdiction.[121]

The creation of unpublished, non-precedential decisions was originally opposed by the Minnesota State Bar Association and has been widely criticized by attorneys and commentators.[122] District Court Judges

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[119] *See* Klover, *supra* note 114, at 1243.

[120] Dynamic Air, Inc. v. Bloch, 502 N.W.2d 796, 800–01 (Minn. Ct. App. 1993).

[121] Marcia A. Johnson, *Advisory Opinion Service Update*, BENCH & BAR MINNESOTA, Oct. 1993, at 13, 13.

[122] *See* Klover, *supra* note 114, at 1242–43 n.80 (citing Jenny Mockenhaupt, *Assessing the Nonpublication Practice of the Minnesota Court of Appeals*, 19 WM. MITCHELL L. REV. 787, 793–94 (1993)); *see also* Chad M. Oldfather, *Other Bad Acts and the Failure of*

Henry W. McCarr and Jack S. Nordby challenged the underpinnings of unpublished opinion usage and its defense in *Dynamic Air*:

> First, while it is clear that an unpublished opinion is not "binding precedent," relatively few published opinions are either, since it is rare for a prior decision to be entirely controlling on a given point.
>
> Second, that an opinion has "persuasive value," in itself, makes it important; the point of a lawyer's argument is to persuade.
>
> Third, that some lawyers cannot afford computers, or choose not to purchase them is a strange reason to penalize those who have them. Moreover, the unpublished opinions are available to all in paper form, and computer access is widely available in libraries. This proposition would suggest that superior research is unfair, and would tend to reduce the scope of research to the lowest common denominator.
>
> Fourth, a lawyer has a duty to represent a client competently, and surely this envisions citation of any reasonable available authority, not only "precedential," but merely "persuasive" as well. At the very least, no lawyer should be condemned for such diligence, provided the proper steps are taken in giving notice of the unpublished opinion.
>
> Fifth, many unpublished opinions are very thoughtful and contain analysis superior to that in published decisions. It is indeed difficult to understand why some of these are not published.

Precedent, 28 WM. MITCHELL L. REV. 151, 178–79 n.116 (2001) (arguing that unpublished opinions receive less attention and are decided less carefully than published decisions); Jennifer K. Anderson, Comment, *The Minnesota Court of Appeals: A Court Without Precedent?*, 19 WM. MITCHELL L. REV. 743, 762 (1993) (arguing that lack of precedence makes it difficult to know what the law in an area really is); Alice S. Brommer, *Dealing Effectively with Unpublished Cases: Non-Precedential Authority May Be Persuasive*, MINN. LAW., Dec. 6, 1999, at 1 (recognizing attorneys' concerns that the decision whether to publish is not always clear); *Committee Wants Greater Use of Unpublished Cases*, MINN. LAW., Nov. 25, 2002, at 2 (noting the federal rules advisory committee's approval of citing to unpublished decisions); Michelle Lore, *Debate Exists on Use of 'Unpublished' Designation on Cases in Minn. Court of Appeals*, MINN. LAW., Nov. 24, 2008, at 1 (arguing that unpublished opinions slow the growth of precedent and noting the confusion among lawyers regarding the decision whether to publish a particular case); Jack Nordby, '*Unpublished' Opinions Another Mystery Without Any Clues*, MINN. LAW., June 12, 1998, at 2 (recognizing inconsistencies in the decisions whether to publish a case).

> Sixth, it is doubtful under the separation of powers that the legislature has the authority to dictate to the judiciary either what courts may consider as precedential, as for that matter, how or if they should decide whether opinions are to be published.[123]

The chief defenders of the practice have been court of appeals chief judges who have argued that the use of unpublished, non-precedential decisions allows the court to better handle a large caseload without sacrificing the rights of the parties or creating unnecessary precedent.[124]

Despite the criticism from the bar, the court of appeals has greatly increased its reliance on unpublished opinions. In 1988, the court issued 706 unpublished and 611 published opinions; and in 1994, the court issued 1007 unpublished opinions, 307 unpublished order opinions, and only 374 published opinions.[125] Of the 1484 opinions in 2005, 1286 were unpublished.[126] In 2010, there were 2322 appeals filed, with 1271 unpublished opinions, 128 unpublished order opinions, 727 cases disposed by unpublished dismissal or order, and 196 published opinions.[127] Over this period, the percentage of published opinions has decreased from 46% in 1988, to 22% in 1994, to 13% in 2005, to only 8% in 2010.

In 2009, of the 38 appeals concerning landlord and tenant rights, only 2, or 5%, were published. Reversals accounted for 20 of the decisions, for an astounding reversal rate of 53%, with only a slightly lower reversal rate of 50% for the unpublished landlord and tenant appeals.[128] Research

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[123] 9 HENRY W. MCCARR & JACK S. NORDBY, MINNESOTA PRACTICE SERIES, CRIMINAL LAW & PROCEDURE § 37.28 (3d ed. 2001) (footnotes omitted).

[124] *See* Peter S. Popovich, *Ten Years Later: Justice Delayed Is No More*, 19 WM. MITCHELL L. REV. 581, 585 (1993) (arguing that the use of unpublished opinions increases the court's efficiency and noting that the court has never experienced a backlog of cases); D.D. Wozniak, *A True Success Story*, 19 WM. MITCHELL L. REV. 589, 589–90 (1993) (noting that the Minnesota Court of Appeals is unique because it must hear all filed appeals and that the court's ability to avoid a backlog as the number of filings increases is partly due to its case management); Klover, *supra* note 114, at 1227–28 (noting Chief Judge Peter Popovich's attribution of the court of appeals' success to its "procedural processing rules," which include unpublished opinions); Anne V. Simonett, *Court of Appeals Is Not Secretive About Its Decisions and Opinions,* STAR TRIB., July 16, 1994, at 15A (demonstrating that all unpublished opinions of the court of appeals are publicly available and that the court of appeals is statutorily prohibited from publishing all its opinions); *see also* Sam Hanson, *The Minnesota Court of Appeals: Arguing to, and Limitations of, An Error-Correcting Court*, 35 WM. MITCHELL L. REV. 1261, 1277 (2009) (arguing that unpublished decisions are more useful than summary dispositions because the court's reasoning is available).

[125] Klover, *supra* note 114, at 1243.

[126] David F. Herr & Haley N. Schaffer, *Suggestions from the Practicing Bar: Things Practitioners Wish the Court of Appeals Would Do Differently*, 35 WM. MITCHELL L. REV. 1286, 1288–89 (2009).

[127] E-mail from Kyle Christopherson, Commc'ns Specialist, Court Info. Office, Minn. State Court Adm'r's Office, to author (Aug. 15, 2011, 17:00 CST) (on file with author).

[128] Westlaw research conducted by the author on November 8, 2011. The search contained landlord and tenant appeals, including commercial and residential disputes and appeals from subsidized housing assistance cases, but excluding zoning, tax, and property

from Professor Peter Knapp shows that in 2009, the rate of reversal for all appeals was 27%, while the rate of reversal for unpublished opinions was just slightly lower at 24%.[129]

The increased use of unpublished opinions has led to continued criticism by the bar. In 2009, William Mitchell College of Law presented a symposium titled "The Twenty-Fifth Anniversary of the Minnesota Court of Appeals" and published the articles and discussions in the *William Mitchell Law Review*. Criticism of the lack of precedent in unpublished opinions and the high percentage of unpublished opinions was a recurring topic.[130] Specific criticisms include:

1. Unpublished opinions are easy to find electronically;[131]
2. Few opinions are published;[132]
3. Important opinions are designated as unpublished;[133]
4. Litigants already need to research unpublished opinions for their persuasive value;[134]
5. District courts need more guidance in applying the law;[135]
6. The court of appeals wastes time determining how to apply the law without the aid of similar applications made in previous unpublished opinions;[136]
7. Unpublished opinions inconsistently apply the law;[137]
8. Many unpublished opinions contain significant analyses of facts worthy of publication.[138]

As part of the panel discussion, Richard Pemberton stated "[m]y investigative reporting failed to disclose anybody who liked or defended unpublished opinions, period."[139]

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condemnation appeals, as well as opinions which mentioned parties who were landlords or tenants but did not involve landlord and tenant law, such as criminal and child welfare cases.

[129] E-mail from Peter B. Knapp, Professor of Law, William Mitchell Coll. of Law, to author (Aug. 19, 2011, 18:08 CST) (on file with author). While the rate of reversal for published decisions was much higher at 48%, the much larger number of unpublished decisions had a greater impact on the overall percentage. *See id.*

[130] *See* Herr & Schaffer, *supra* note 127, at 1288–90; Panel Discussion, *The Practical Impact of the Court of Appeals: A Panel Discussion*, 35 WM. MITCHELL L. REV.1334, 1352–55 (2009); Richard L. Pemberton & Paul S. Almen, *Significant Weight: The Impact of the Minnesota Court of Appeals upon Civil Litigation*, 35 WM. MITCHELL L. REV. 1297, 1328, 1331–33 (2009).

[131] Herr & Schaffer, *supra* note 127, at 1288.

[132] *Id.*

[133] *Id.* at 1288–89.

[134] Pemberton & Almen, *supra* note 130, at 1317–18.

[135] *See id.* at 1332.

[136] *See id.* at 1332–33.

[137] *See* Panel Discussion, *supra* note 130, at 1353–54.

[138] *Id.* at 1354.

[139] *Id.* at 1355.

IV. MINNESOTA IS NOT AN ISLAND, BUT THE TIDES ARE SHIFTING

Minnesota is in the large majority of jurisdictions that authorize unpublished and non-precedential appellate opinions. However, states regulate unpublished opinions differently. Like Minnesota, many states authorize unpublished opinions and allow counsel to cite them as persuasive authority.[140] Other states provide for orders which are not precedential and cannot be cited.[141]

Despite the fact that unpublished, non-precedential opinions are so common around the country the bulk of commentary around the country, like in Minnesota, does not support their use.[142] Professor David R. Cleveland,

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[140] States include Alaska, Connecticut, Delaware, Georgia, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Tennessee, Vermont, and Wisconsin. *See Government Laws and Statutes, Unpublished Opinions*, 0095 Surveys 7 (West Feb. 2011) (providing a list of state statutes and rules governing unpublished opinions); Timothy J. Vrana, Jeffrey P. Smith & Marcia J. Oddi, *Survey of State Courts' Treatment of Their Own Not-for-Publication Appellate Opinions*, INDIANA LAW BLOG, 4–5 (Mar. 23, 2011), http://indianalawblog.com/documents/Survey%20of%20State%20Court%20Treatment%20of%20NFP.pdf. S*ee generally* Jason B. Binimow, Annotation, *Precedential Effect of Unpublished Opinions*, 105 A.L.R.5th 499 (2003) (discussing federal rules in addition to state rules regarding unpublished opinions).

[141] States include Alabama, Colorado, Idaho, Missouri, New Mexico, Oregon, Rhode Island, and Washington. *See* Jason B. Binimow, *supra* note 140.

[142] *See* Edward Cantu, *No Good Deed Goes Unpublished: Precedent-Stripping and the Need for a New Prophylactic Rule*, 48 DUQ. L. REV. 559, 562–63 (2010) (calling for a prophylactic rule to prevent precedent-stripping); Scott E. Gant, *Missing The Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705, 726–34 (2006) (arguing that judges are in a poor position at the time they render a decision to know whether the decision adds to development of the law and whether it should be published); Kenneth F. Hunt, *Saving Time or Killing Time: How the Use of Unpublished Opinions Accelerates the Drain on Federal Judicial Resources*, 61 SYRACUSE L. REV. 315, 317 (2011) (arguing that unpublished opinions counter-intuitively increase the workload for federal courts by creating uncertainty among legal consumers and resulting in litigation); Jillian R. Jones, *Bound by Precedent: Arkansas Practitioners Win the Debate over Unpublished Decisions*, 63 ARK. L. REV. 619, 643–44 (2010) (endorsing amendments to Arkansas procedural rules declaring that every opinion has precedential value); Hillel Y. Levin, Iqbal*,* Twombly*, and the Lessons of the* Celotex *Trilogy*, 14 LEWIS & CLARK L. REV. 143, 155 (2010) (praising Federal Rule of Appellate Procedure 32.1 as eliminating the "ridiculous rules prohibiting lawyers from repeating judges' own words to them"); Robert A. Mead, *Unpublished Opinions and Citation Prohibitions: Judicial Muddling of California's Developing Law of Elder and Dependent Adult Abuse Committed By Health Care Providers*, 37 WM. MITCHELL L. REV. 206, 265 (2010) (recommending that California courts amend procedural rules to allow citation to unpublished opinions as persuasive authority in order to clarify interpretation of state elder abuse law); Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 353–54 (2009) (claiming that judges use unpublished, non-precedential opinions as a means of avoidance); Shenoa L. Payne, *The Ethical Conundrums of Unpublished Opinions*, 44 WILLAMETTE L. REV. 723, 746–52 (2008) (arguing that courts should give unpublished opinions deference analogous to the deference provided to administrative decisions under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); Penelope

who has written extensively on unpublished opinions' lack of precedence,[143] lists the main criticisms in *Overturning The Last Stone: The Final Step in Returning Precedential Status to All Opinions*:[144]

> 1. There is no relevant distinction between decisions making law and those just applying law, as even decisions that apply the law to facts identical to a prior case make law;[145]

Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits' Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955, 966–67 (2009) (arguing that unpublished opinions provide judges a means to reduce their workload for personal convenience which results in unequal access to the judicial process); Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 39–40 (2007) (arguing that because unpublished opinions are often the work of clerks and staff attorneys, the resulting opinions are often incorrectly reasoned and decided); Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217 (2006) (arguing for eliminating non-precedential opinions in favor of according such opinions persuasive value); Hans Sherrer, *Non-Precedential Opinions Cause and Perpetuate Miscarriages of Justice*, 7 J. INST. JUST. & INT'L STUD. 299, 309–10 (2007) (arguing that all opinions should be deemed published and precedential to avoid unequal treatment of classes of litigants); Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L.J. 621, 642 (2009) (arguing that unpublished opinions are contrary to the doctrines of precedent and stare decisis and are therefore unconstitutional); Taylor C. Berger, *'Unpublished' Opinions in Tennessee: What Are They and What Should They Be Worth?,* TENN. B.J., July 26, 2010, at 26, 31 (arguing that courts should eliminate unpublished opinions and let the "time-tested method" of stare decisis shape the law). *But see* Caleb E. Mason, *An Aesthetic Defense of the Nonprecedential Opinion: The Easy Cases Debate in the Wake of the 2007 Amendments to the Federal Rules of Appellate Procedure*, 55 UCLA L. REV. 643, 698 (2008) (arguing that judicial decisions that merely apply established law have a different place within the common law structure than innovative decisions that establish new law, and that unpublished opinions are a way to recognize this important difference); Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, 26 MISS. C. L. REV. 185, 220–23 (2006–2007) (arguing that unpublished opinions are not as accessible as published opinions, and therefore may be more difficult to research and create ethical and malpractice problems for attorneys); Anika C. Stucky, *Building Law, Not Libraries: The Value of Unpublished Opinions and Their Effects on Precedent*, 59 OKLA. L. REV. 403, 448 (2006) (arguing that unpublished opinions in conjunction with comprehensive procedural rules governing what opinions are published is preferable to publishing all opinions).

[143] *See* William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 DUQ. L. REV. 35 (2011); David R. Cleveland, *Clear as Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations*, 65 U. MIAMI L. REV. 45 (2010); David R. Cleveland, *Local Rules in the Wake of Federal Rule of Appellate Procedure 32.1*, 11 J. APP. PRAC. & PROCESS 19 (2010) [hereinafter Cleveland, *Federal Rule of Appellate Procedure 32.1*]; David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61 (2009) [hereinafter Cleveland, *Overturning the Last Stone*]; David R. Cleveland, *Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System*, 92 MARQ. L. REV. 685 (2009).

[144] Cleveland, *Overturning the Last Stone*, *supra* note 143.

[145] *Id.* at 111.

2. Few cases are identical so that even minor factual variations matter;[146]
3. Unpublished opinions are "set outside the courts' normal range of vision," which reduces the likelihood of review and correction;[147]
4. Unpublished opinions may inconsistently apply the law;[148]
5. There is no evidence of costs savings in the creation of unpublished opinions, as they often contain the same examination of facts and law as published decisions;[149]
6. There is no cost savings in publication, with published and unpublished decisions both being made available on court websites and through computer-assisted legal research;[150]
7. Litigants and their counsel still research and cite unpublished decisions because of their availability and persuasive value;[151]
8. There are few cases which involve only dispute-resolution with no lawmaking value "[b]ecause there is a value in even the slightest changes in the law as well as repetitions of the law's application";[152]
9. No one can predict whether there will be future interest in citing a present decision;[153]
10. Many law-making cases are designated as unpublished;[154] and
11. The quality of unpublished opinions is high.[155]

In Oregon, a vocal critic of the increased use of unpublished, non-precedential opinions is David V. Brewer, Chief Judge of the Oregon Court of Appeals.[156] The Oregon Court of Appeals issues a large number of decisions affirming lower rulings without a written opinion.[157] While there is no statute or rule regarding the publishing of opinions or the precedential value of unpublished decisions, one consideration for supreme court review of a court of appeals decision is "[w]hether the Court of Appeals published a written opinion."[158] The practice was described in *Sarty v. Forney* where the

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146 *Id.* at 111–12.
147 *Id.* at 112–14.
148 *See id.* at 114–15.
149 *See id.* at 116.
150 Cleveland, *Overturning the Last Stone*, *supra* note 143, at 116.
151 *See id.* at 117, 125–28.
152 *Id.* at 120.
153 *Id.* at 120–21.
154 *Id.* at 121.
155 *See id.* at 128.
156 Telephone Interview with David V. Brewer, Chief Judge, Or. Court of Appeals (July 15, 2011).
157 *Id.*
158 OR. R. APP. PROC. 9.07(11).

court noted that detailed opinions are important to explain the rationale for the decision, to demonstrate that the appeal was thoroughly considered, and to guide the bench and bar.[159] However, detailed opinions should not be used where the disputes are primarily factual, and as in the case of child custody appeals, where those affected by the decision could be harmed by the publicity.[160] In *Bowman v. Oregon Transfer Co.*, the court noted that the increase in appeals without an increase in the number of judges required a much higher percentage of the decisions to be without opinions.[161] The court concluded that workers' compensation appeals were factual disputes, so it was appropriate to decide the cases without opinions.[162]

Chief Judge Brewer states that the case-per judge workload of the court is among the worst of appellate courts in the county with around 3500 cases for 10 judges.[163] In the 1970s, the court started affirming lower court and agency decisions without opinions.[164] These affirmances make up approximately sixty to seventy percent of the appeals, which Chief Judge Brewer believes is too high.[165] His major concern with the practice is whether decisions are well-reasoned.[166] Since the court always provides for oral argument and all judges read the briefs, his concern is somewhat mitigated.[167]

Chief Judge Brewer believes that if a decision is on the internet, it should be published.[168] He says that judges give the same time and effort to decisions with opinions, whether the opinions are designated published and precedential, or unpublished and non-precedential.[169] He notes that unpublished decisions do not save time and cost to the courts, nor to citizens, their counsel, and the trial courts adjudicating their claims, all of whom need to make themselves aware of all decisions which are relevant to their disputes.[170] He adds that the use of unpublished decisions makes the courts more vulnerable to criticism that less attention is given to the appeals decided by them.[171]

Recently a small number of states and the federal appellate courts have moved in the direction toward greater use of precedential opinions. In 2006, the Federal Rules of Appellate Procedure were amended to create Rule 32.1 to permit citation to unpublished opinions issued on or after January 1,

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159 Sarty v. Forney, 506 P.2d 535, 536 (Or. Ct. App. 1973).
160 *Id.* at 536–37.
161 Bowman v. Or. Transfer Co., 576 P.2d 27, 28–29 (Or. Ct. App. 1978).
162 *Id.* at 29.
163 Telephone Interview with David V. Brewer, *supra* note 156.
164 *Id.*
165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.*
169 Telephone Interview with David V. Brewer, *supra* note 156.
170 *Id.*
171 *Id.*

2007.[172] Rule 32.1 followed a debate which raged for many years as two federal appellate judges led the opposing camps.[173] The new rule is silent on the issue of precedent, and the circuits have adopted local rules which range from full precedent to no precedent.[174] Ohio changed its court rules in 2002 to remove any distinctions between published and unpublished opinions as to precedential value.[175] Utah amended its appellate rules in 2007 to make all

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[172] *See* FED. R. APP. P. 32.1. The rule on citing judicial dispositions states:

> (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
>
> (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
>
> (ii) issued on or after January 1, 2007.
>
> (b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

Id.

[173] Eighth Circuit Judge Richard Arnold argued that non-precedential, unpublished opinions are contrary to normal adjudication principles, bad policy, and may be unconstitutional. *See* Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir.) (remarking that a court may not disregard precedent, even in the form of an unpublished case, because it exceeds judicial power), *vacated as moot on other grounds en banc*, 235 F.3d 1054, 1056 (8th Cir. 2000); Richard S. Arnold, *Irving L. Goldberg Lecture, Southern Methodist University Dedman School of Law: The Federal Courts: Causes of Discontent*, 56 SMU L. REV. 767, 777–80 (2003) (criticizing the practice of not giving precedential weight to unpublished opinions); Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 221 (1999) (arguing that every opinion has at least some precedential value). Ninth Circuit Judge Alex Kozinski argued in favor of the practice. *See Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001) (concluding that a Ninth Circuit court rule prohibiting citation to unpublished opinions is constitutional); Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, FED. LAW., June 2004, at 36, 37 (arguing that Federal Rule of Appellate Procedure 32.1 undermines the clarity and uniformity of federal law, imposes disadvantages on poorer and weaker litigants, and creates inconsistency between federal and state procedure); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!: Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43, 44 (explaining from a judge's perspective the effort involved in drafting published opinions versus unpublished memorandum dispositions, and arguing that affording precedential value to the latter would undermine the system); *see generally* Cleveland, *Overturning the Last Stone*, *supra* note 143, at 127–44.

[174] *Compare* D.C. CIR. R. 32.1(b)(1)(B) ("Unpublished orders or judgments . . . entered on or after January 1, 2002, may be cited as precedent."), *and* 4TH CIR. LOCAL R. 32.1 (authorizing a party to cite an unpublished disposition issued prior to January 1, 2007 if the party believes it has "precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well"), w*ith* 9TH CIR. R. 36-3(a) ("Unpublished dispositions and orders . . . are not precedent . . . ."). *See generally* Cleveland, *Federal Rule of Appellate Procedure 32.1*, *supra* note 144, at 27–55.

[175] OHIO SUP. CT. R. RPT. OPINION 4. The rule states:

> "Controlling" and "Persuasive" Designations Based on Form of Publication Abolished; Use of Opinions.

unpublished decisions of the court of appeals precedential.[176] Arkansas joined the movement toward full precedent in 2009 by declaring that every supreme court and court of appeals opinion issued after July 1, 2009 shall have precedential value.[177]

V. FOUR PATHS TO A MORE PUBLISHED AND PRECEDENTIAL FUTURE

There are a variety of ways for the court of appeals to publish more decisions. For instance, the court could make a conscious effort to publish more decisions. More fundamentally, changing the relevant statute and court

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> (A) Notwithstanding the prior versions of these rules, designations of, and distinctions between, "controlling" and "persuasive" opinions of the courts of appeals based merely upon whether they have been published in the Ohio Official Reports are abolished.
>
> (B) All court of appeals opinions issued after the effective date of these rules may be cited as legal authority and weighted as deemed appropriate by the courts.
>
> (C) Unless otherwise ordered by the Supreme Court, court of appeals opinions may always be cited and relied upon for any of the following purposes:
>
> (1) Seeking certification to the Supreme Court of Ohio of a conflict question within the provisions of sections 2(B)(2)(f) and 3(B)(4) of Article IV of the Ohio Constitution;
>
> (2) Demonstrating to an appellate court that the decision, or a later decision addressing the same point of law, is of recurring importance or for other reasons warrants further judicial review;
>
> (3) Establishing *res judicata*, estoppel, double jeopardy, the law of the case, notice, or sanctionable conduct;
>
> (4) Any other proper purpose between the parties, or those otherwise directly affected by a decision.

Id.

[176] *See* UTAH R. APP. P. 30(f). The rule states:

> Published decisions of the Supreme Court and the Court of Appeals, and unpublished decisions of the Court of Appeals issued on or after October 1, 1998, may be cited as precedent in all courts of the State. Other unpublished decisions may also be cited, so long as all parties and the court are supplied with accurate copies at the time all such decisions are first cited.

Id.

[177] ARK. SUP. CT. R. 5-2(c). The rule on opinions states:

> Every Supreme Court and Court of Appeals opinion issued after July 1, 2009, is precedent and may be relied upon and cited by any party in any proceeding. Opinions of the Supreme Court and Court of Appeals issued before July 1, 2009, and not designated for publication shall not be cited, quoted, or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case).

Id.; *see also* Jones, *supra* note 142, at 631 (discussing the adoption of Arkansas Supreme Court Rule 5-2).

rule would also enable more opinions to be published. Considering the constitutionality of unpublished decisions may also force the court to publish more cases. Finally, a means of reconsidering previously unpublished decisions for published status would provide more precedent.

A. A Walk in the Park: Simply Publish More Opinions

The simplest way to increase the number of published precedential opinions is for the Minnesota Court of Appeals to publish more opinions. That was the consensus request of practitioners at the 2009 William Mitchell symposium celebrating the Minnesota Court of Appeals' twenty-fifth anniversary.[178] No change in the statutes or rules is required for the court to designate more opinions as published.[179] The court could accomplish this internally by a directive from the chief judge, a consensus of the judges, or by judges' individual actions.[180]

A review of the previously discussed unpublished court of appeals opinions supports this conclusion.[181] Under Minnesota Statute section 480A.08, subdivision 3(c), the court may only publish opinions which "(1) establish a new rule of law; (2) overrule a previous Court of Appeals' decision not reviewed by the Supreme Court; (3) provide important procedural guidelines in interpreting statutes or administrative rules; (4) involve a significant legal issue; or (5) would significantly aid in the administration of justice."[182]

The 2007 *Beaumia* decision was the first recognition by a Minnesota appellate court that a landlord's failure to acquire a city-required rental license eliminated the tenant's duty to pay rent. *Beaumia* also created a new defense to an eviction action for nonpayment of rent.[183] The decision easily fell within the ambit of Minnesota Statute section 480A.08: it established a new rule of law, provided important procedural guidelines in interpreting statutes, involved a significant legal issue, and could have significantly aided in the administration of justice.[184] Therefore, the *Beaumia* decision could have and should have been published.

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[178] *See* Herr & Schaffer, *supra* note 126, at 1288–90 (recommending that the court of appeals publish more opinions); Pemberton & Almen, *supra* note 130, at 1331–33 (calling for amendments to Minnesota Statute section 480A.08 and internal court guidelines to allow the court of appeals to publish more opinions); Panel Discussion, *supra* note 130, at 1352–55 (discussing practitioners' use of unpublished opinions).

[179] *See* Herr & Schaffer, *supra* note 126, at 1288–90 ("In the meantime, however, perhaps the court could exercise its discretion under the statute more expansively, even to the point of erring on the side of publication, when considering whether to publish a case.").

[180] *See* Pemberton & Almen, *supra* note 130, at 1332 (suggesting that the court of appeals "change the internal guidelines for publication").

[181] *See supra* text accompanying notes 4–41 (discussing unpublished Minnesota Court of Appeals decisions that might be valuable precedent if published).

[182] MINN. STAT. § 480A.08, subdiv. 3(c) (2010).

[183] *See supra* text accompanying notes 8–12 (explaining the *Beaumia* holding).

[184] *See* § 480A.08, subdiv. 3(c).

Similarly, the 2009 Dakota County Community Development Agency decisions, as well as previous decisions, could have been published. The opinions applied the Section 8 housing assistance statutes and regulations to various fact patterns and reversed the Agency in fifty-five percent of the 2009 appeals, significantly higher than the overall reversal rate in 2010, and even slightly higher than the rate of reversal for published opinions.[185] As a sign of their significance, eight of the eleven 2009 decisions were given West Key Number summaries of the holdings.[186] Some of the decisions inconsistently interpreted the regulations on consideration of mitigating circumstances, requiring the court to issue a published opinion in 2011 to settle the issue; however, other inconsistent interpretations remain unsettled.[187] Any of the opinions could have been published, and perhaps all of them should have been published, as they established new rules of law, provided important procedural guidelines in interpreting statutes, involved significant legal issues, could have significantly aided in the administration of justice, and in the case of inconsistent interpretations, overruled a previous court of appeals' decision not reviewed by the supreme court.[188]

The 2011 *Kleinman Realty* decision might not have reached the wrong legal conclusion about the existence of the reasonable accommodation of disability defense in eviction actions had the earlier opinions on the issue been published.[189] In that sense, any of the previous opinions could have and should have been published. While the decisions did not create a new rule of law, since the defense was recognized earlier in the published *Schuett* decision, they applied the law to new and different facts, and thus provided important procedural guidelines in interpreting statutes, involved significant legal issues, and could have significantly aided in the administration of justice. In spite of these opinions, had the *Kleinman Realty* court still concluded that the defense should not be available, and had the earlier opinions been published, the *Kleinman Realty* opinion would have needed to be published, as it would have overruled previous court of appeals decisions not reviewed by the supreme court.

The *Kleinman Realty* decision perhaps presents the most compelling case for increased publication of opinions, not just for publication of the *Kleinman Realty* opinion, but for publication of all of the previous decisions which it did not discuss. Professor Cleveland concluded:

> [J]udges are poorly situated at the time they write an opinion to know what value that opinion may have to future litigants.

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185 *See supra* text accompanying notes 13–34.

186 *See supra* text accompanying note 59.

187 *See supra* text accompanying notes 60–76 (explaining the numerous inconsistent unpublished decisions and the published *Peterson* decision).

188 *See* § 480A.08, subdiv. 3(c).

189 *See supra* text accompanying notes 35–41, 108 (discussing the *Kleinman Realty* decision and the court's failure to recognize the principle enunciated in *Schuett* that a landlord's failure to make a reasonable accommodation for a tenant is an affirmative defense in an eviction action).

> The value of a decision as a precedent lies in its factual similarity to a case that follows it. The present system of allowing judges to decide prospectively which of their decisions are law and which are not "starkly reverses centuries of common law tradition." The power and the duty to determine the precedential effect of a decision has traditionally rested not with the precedent-making court but with the precedent-applying court. It is only with a set of new facts in hand, to which the rule is to be applied, that a court can determine whether a prior case is or is not a valid precedent.[190]

The judges who authored the unpublished reasonable-accommodation-of-disability-defense opinions from 1994 to 2003 probably did not foresee that another panel on the court of appeals would issue another unpublished decision in 2011 that ignored their decisions as well as the published *Schuett* decision on which their decisions were based.[191] In other words, the authors of those opinions might not have understood the importance of their opinions in the maintenance and evolution of the principle of law they were interpreting.

Minnesota Court of Appeals judges should think more expansively about whether their opinions meet the statutory elements for publication, and increase the number of opinions designated for publication.

B. Hiking in the Hills: Expand Publishing by Statute

One way to increase the number of published court of appeals opinions is to amend Minnesota Statute section 480A.08, subdivision 3.[192] Amendment of the statute requires the approval of the legislature and governor, but that approval would show a consensus among the three branches of government that the change is appropriate.

Amendment of the statute could be modest or broad. Richard Pemberton and Paul Almen suggest two changes to the statute which could lead to more published opinions: (1) change subdivision 3(b) to say that a decision *should* include a written opinion, rather than it need not include one, and (2) change subdivision 3(c)(5) to state that the Court *must* publish

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[190] Cleveland, *Overturning the Last Stone*, *supra* note 143, at 120–21 (citation omitted); *see also* Herr & Schaffer, *supra* note 126, at 1290 ("[D]eciding whether an opinion would be of precedential value to future litigants at the time the court decides a case is inherently speculative.").

[191] *See supra* notes 107–110 and accompanying text (explaining how federal law, *Schuett*, and numerous unpublished decisions recognized the existence of a reasonable accommodation defense in eviction actions).

[192] *See* § 480A.08, subdiv. 3.

decisions that "would significantly aid in the understanding of the law or the administration of justice."[193]

While this would be a change in the right direction, it does not go far enough. Changing "need not" to "should," and "may" to "must" for only one element, will accomplish little. The court would not even be required to issue published opinions where the decision establishes a new rule of law, overrules a previous court of appeals decision not reviewed by the supreme court, provides important procedural guidelines in interpreting statutes or administrative rules, or involves a significant legal issue.[194] Thus, the modest expansion of publishing proposed by Pemberton and Almen would still leave a large body of legal analysis by the court of appeals unpublished and without precedential value.

David Herr and Haley Schaffer argue that the "only complete solution to this problem is probably a wholesale revisiting of the publication rules for the court," but they do not suggest what it should be.[195] Given all of the concerns with unpublished, non-precedential appellate opinions, Minnesota should join the recent movement favoring precedential opinions by amending the statute to eliminate unpublished, non-precedential opinions. Pemberton and Almen do not advocate for wholesale repeal of the statute, but do not give a reason why an overhaul is not feasible.[196] Such a change would relieve judges of trying to foresee whether their opinions should be precedential, would not increase costs to the court, practitioners, and litigants, and would likely reduce costs.[197]

One way for the court to reduce the time and cost associated with adjudicating appeals that involve only dispute-resolution but no creation of law would be to make limited use of decisions affirming the district court or

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[193] *See* Pemberton & Almen, *supra* note 130, at 1332. A revision based on these changes would amend section 480A.08, subdivision 3 as follows:

> (b) The decision of the court <u>should</u> ~~need not~~ include a written opinion. A statement of the decision without a written opinion must not be officially published and must not be cited as precedent, except as law of the case, res judicata, or collateral estoppel.
>
> (c) The Court of Appeals may publish only those decisions that:
>
> (1) establish a new rule of law;
>
> (2) overrule a previous Court of Appeals' decision not reviewed by the Supreme Court;
>
> (3) provide important procedural guidelines in interpreting statutes or administrative rules; <u>or</u>
>
> (4) involve a significant legal issue<u>.</u> ~~; or~~
>
> ~~(5)~~
>
> <u>(d) The Court of Appeals must publish decisions that</u> would significantly aid in the understanding of the law or in the administration of justice.

See § 480A.08, subdiv. 3; Pemberton & Almen, *supra* note 130, at 1322.

[194] *See supra* note 193 and accompanying text (providing the statute proposed by Pemberton and Almen).

[195] Herr & Schaffer, s*upra* note 126, at 1290.

[196] *See* Pemberton & Almen, *supra* note 130, at 1332.

[197] *See supra* text accompanying notes 149–150, 154.

agency decision without opinion, similar to Oregon.[198] In *Sarty* and *Bowman* the court adequately dealt with the dispute of the parties in a few paragraphs with minimal citations.[199] Short order opinions, however, are not without controversy. Oregon Chief Judge Brewer criticizes his own court's overuse of them.[200] In Minnesota they are called order opinions.[201] In 2010, the number of order opinions was 128, only slightly smaller than the 196 published opinions, and considerably smaller than the 1271 unpublished opinions and 727 cases disposed of by unpublished dismissal or order.[202]

In 1996, Kerri L. Klover conducted a detailed examination of order opinions in Minnesota.[203] Klover discusses the history of the practice, and weighs both the practice's justifications (for example, efficient use of limited judicial resources through deliberative but short opinions) and the criticisms (for example, opinions without evidence of detailed analysis of the facts, lack of accountability, and inconsistent application of law).[204] Klover finds merit in both arguments, and proposes reforms to maintain the practice but address the criticisms.[205] Klover recommends, inter alia: (1) rename order opinions as memorandum opinions;[206] (2) limit their use to cases that apply well-established law to routine fact scenarios where there is no reason to qualify the well-established law;[207] (3) revise the rules for use of memorandum opinions;[208] (4) require unanimous panel consent to issue a memorandum opinion;[209] and (5) limit the length of memorandum opinions.[210]

With these considerations in mind, limited use of short, unpublished memorandum opinions for decisions involving dispute-resolution with no lawmaking allows the court of appeals to spend more time on published decisions involving making or explaining the law. Memorandum opinions should be limited to unanimous panel decisions affirming the lower court or agency decision of no more than two pages in length. One way to restrict memorandum opinions to decisions that resolve disputes without creating

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198 *See supra* text accompanying notes 157–165 (explaining Oregon's procedure for affirming district court or agency decisions without written opinion).

199 *See* Bowman v. Or. Transfer Co., 576 P.2d 27 (Or. Ct. App. 1978); Sarty v. Forney, 506 P.2d 535 (Or. Ct. App. 1973).

200 *See supra* text accompanying notes 163–171 (explaining Judge Brewer's criticism of short order opinions).

201 *See* MINN. R. CIV. APP. P. 136.01, subdiv. 1(a) ("Each Court of Appeals disposition shall be written in the form of a published opinion, unpublished opinion, or an order opinion.").

202 E-mail from Kyle Christopherson, *supra* note 127.

203 *See* Klover, *supra* note 114.

204 *Id.* at 1251–83.

205 *See id.* at 1283–94.

206 *Id.* at 1284.

207 *Id.* at 1285.

208 *Id.* at 1286–89.

209 Klover, *supra* note 114, at 1288.

210 *Id.* at 1288–89. Klover also recommends creating a system for indexing opinions and providing an opportunity for reconsideration of published status. *Id.* at 1289–92.

law is to require that they do *not* involve any of the functions presently required for published opinions.[211] In other words, they *should not* "establish a new rule of law," "overrule a previous Court of Appeals' decision not reviewed by the Supreme Court," "provide important procedural guidelines in interpreting statutes or administrative rules," "involve a significant legal issue," or "significantly aid in the administration of justice."[212] They should apply only to decisions which affirm the lower court or agency.[213] Any reversal of a lower court or agency would, at a minimum, significantly aid in the administration of justice by correcting errors made in the administration of justice, and therefore should be published and precedential.[214]

Elimination of unpublished opinions and limited use of memorandum opinions could be accomplished with the following amendment to section 480A.08, subdivision 3:

> (b) Each Court of Appeals disposition shall be written in the form of a published opinion or unpublished memorandum opinion. The decision of the court need not include a written opinion. A statement of the decision without a written opinion must not be officially published and must not be cited as precedent, except as law of the case, res judicata, or collateral estoppel.
>
> (c) The Court of Appeals may issue unpublished memorandum opinions of no more than two pages in length in which the panel unanimously affirms the lower court or agency decision appealed and publish only those decisions that:
>
> (1) do not establish a new rule of law;
>
> (2) do not overrule a previous Court of Appeals' decision not reviewed by the Supreme Court;
>
> (3) do not provide important procedural guidelines in interpreting statutes or administrative rules;
>
> (4) do not involve a significant legal issue; or
>
> (5) would not significantly aid in the administration of justice.

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[211] *See* MINN. STAT. § 480A.08, subdiv. 3(c) (2010) (listing criteria for publishing opinions).

[212] *See id.*

[213] *See supra* text accompanying notes 157–165 (explaining Oregon's procedure for affirming district court or agency decision without written opinions).

[214] *See* § 480A.08, subdiv. 3(c)(5) (authorizing the court of appeals to publish opinions that "significantly aid in the administration of justice").

> Unpublished opinions of the Court of Appeals issued before [the effective date of the amendment] are not precedential. Such u~~U~~npublished opinions must not be cited unless the party citing the unpublished opinion provides a full and correct copy to all other counsel at least 48 hours before its use in any pretrial conference, hearing, or trial. If cited in a brief or memorandum of law, a copy of the unpublished opinion must be provided to all other counsel at the time the brief or memorandum is served, and other counsel may respond.[215]

Any change in the statute should be accompanied by a change in Rule 136.01 of the Minnesota Rules of Civil Appellate Procedure:

> **Subdivision 1. Written Decision.** ~~(a)~~ Each Court of Appeals disposition shall be written in the form of a published opinion~~,~~ or unpublished memorandum opinion~~, or an order opinion.~~
>
> ~~(b) Unpublished opinions and order opinions are not precedential except as law of the case, res judicata or collateral estoppel, and may be cited only~~ as provided in Minn. Stat. § 480A.08, subd. 3 (1996).
>
> **Subd. 2. Notice of Decision.** Upon the filing of a decision or order which determines the matter, the clerk of the appellate courts shall transmit a copy to the attorneys for the parties, to self-represented parties, and to the trial court. The transmittal shall constitute notice of filing.[216]

Expansive use of memorandum opinions would be much worse than overuse of unpublished opinions, since at least the latter involve significant written factual and legal analysis. But, limited use of memorandum opinions along with the elimination of unpublished, non-precedential opinions and expanded use of published, precedential opinions would allow the court to reduce the time and costs spent on less meritorious appeals, while restoring the precedent lost in overuse of unpublished opinions.

C. Another Trail in the Hills: Expand Publishing by Rule

Publishing court of appeals opinions could also be increased by amendment of Minnesota Rule of Civil Appellate Procedure 136.01 without any changes in the statute.[217] Amendment of the rule can be accomplished by the Minnesota Supreme Court without the involvement of the legislature or governor.[218] While expansion by rule beyond the statute raises the issue of

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[215] *See id.* The underlined and redacted text indicates proposed amendments by the author.

[216] *See* MINN. R. CIV. APP. P. 136.01.

[217] *See supra* text accompanying note 216.

[218] *See* § 480.05 (authorizing the supreme court to promulgate, amend, or modify rules of practice for Minnesota courts); *see also* § 480.051 ("The Supreme Court of this state

whether the court has the authority to do so, the separation of powers doctrine gives the court exactly that authority.[219] Judges McCarr and Nordby argue that "it is doubtful under the separation of powers that the legislature has the authority to dictate to the judiciary either what courts may consider as precedential, as for that matter, how or if they should decide whether opinions are to be published."[220] Article III of the Minnesota Constitution provides:

> Division of powers. The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.[221]

Article VI on the Judiciary further provides:

> The legislature may establish a court of appeals and provide by law for the number of its judges, who shall not be judges of any other court, and its organization and for the review of its decisions by the supreme court. The court of appeals shall have appellate jurisdiction over all courts, except the supreme court, and other appellate jurisdiction as prescribed by law.[222]

Nowhere in the Minnesota Constitution is the legislature authorized to regulate the functions of the court of appeals.[223] McCarr and Nordby conclude that a review of the cases shows that "all procedural statutes are ineffective in themselves and of no force unless specifically approved by the judiciary."[224]

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shall have the power to regulate the pleadings, practice, and procedure . . . by rules promulgated by it from time to time.").

[219] *But see* § 480.051 (2010) (stating that rules promulgated by the supreme court "shall not abridge, enlarge, or modify the substantive rights of any litigant.").

[220] 9 MCCARR & NORDBY, *supra* note 123, § 37.28; *see also* John Borger & Chad Oldfather, *The Uncertain Status of Unpublished Opinions*, BENCH & BAR MINNESOTA, Dec. 2000, at 36, 37 (reasoning that statutory provisions create no barrier to the judiciary's power provided in the state constitution).

[221] MINN. CONST. art. III, § 1.

[222] *Id.* art VI, § 2.

[223] *See id.* arts. III–IV.

[224] 7 HENRY W. MCCARR & JACK S. NORDBY, MINNESOTA PRACTICE, CRIMINAL LAW AND PROCEDURE § 1.4 (3d ed. 2001); *see also In re* Giem, 742 N.W.2d 422, 429–30 (Minn. 2007) (declining to construe a statute in a manner that conflicts with the district court's constitutional subject-matter jurisdiction); Nicollet Restorations, Inc. v. Turnham, 486 N.W.2d 753, 755–56 (Minn. 1992) (requiring a licensed attorney to appear on behalf of a corporation in a district court to avoid constitutional problems concerning the unlicensed practice of law); Minneapolis Star & Tribune Co. v. Hous. & Redevelopment Auth., 251 N.W.2d 620, 623 (Minn. 1976) (reemphasizing the judiciary's power to regulate the practice of law); Sharood v. Hatfield, 210 N.W.2d 275, 280 (Minn. 1973) (invalidating a statute that attempted to regulate examination of professional groups to the extent it interfered with the judiciary's constitutional power to regulate the practice of law); Bloom v. Am. Express Co., 23 N.W.2d

As the supreme court is free to adopt its own procedural rules regardless of legislation, the court should amend Rule 136.01, subdivision 1:

> Written Decision.
>
> (a) Each Court of Appeals disposition shall be written in the form of a published opinion~~,~~ or unpublished memorandum opinion~~, or an order opinion~~.
>
> (b) Unpublished opinions and order opinions are not precedential except as law of the case, res judicata or collateral estoppel, and may be cited only as provided in Minnesota Statutes, section 480A.08, subd. 3 (1996). The Court of Appeals may issue unpublished memorandum opinions no more than two pages in length in which the panel unanimously affirms the lower court or agency decision appealed and that:
>
> (1) do not establish a new rule of law;
>
> (2) do not overrule a previous Court of Appeals' decision not reviewed by the Supreme Court;
>
> (3) do not provide important procedural guidelines in interpreting statutes or administrative rules;
>
> (4) do not involve a significant legal issue; or
>
> (5) would not significantly aid in the administration of justice.
>
> (c) Unpublished opinions of the Court of Appeals issued before [the effective date of the amendment] are not precedential. Such unpublished opinions must not be cited unless the party citing the unpublished opinion provides a full and correct copy to all other counsel at least 48 hours before its use in any pretrial conference, hearing, or trial. If cited in a brief or memorandum of law, a copy of the unpublished opinion must be provided to all other counsel at the time the brief or memorandum is served, and other counsel may respond.[225]

570, 575 (Minn. 1946) (upholding a service of process statute as consistent with the constitution's grant of authority to the legislature).

[225] *See supra* text accompanying notes 206–210, 215–216 (proposing additions to Minnesota Statute section 480A.08 and Minnesota Rule of Civil Appellate Procedure 136.01).

D. Mountain Climbing: Constitutional Challenges to Unpublished Opinions

Each of the three paths discussed above involve voluntary action by the Minnesota Court of Appeals to reduce or eliminate the use of the unpublished, non-precedential opinions.[226] If the court does not act on its own, a constitutional challenge to the practice has merit, even if it might be unlikely for the court system to conclude that it is acting unconstitutionally.

One constitutional claim is that the legislature exceeds its authority in regulating the procedure of the court of appeals by limiting which decisions can be published.[227] However, Minnesota appellate courts would likely decline to invalidate the statute because they issue voluminous unpublished opinions: an implicit approval of the practice.[228]

An even more controversial constitutional claim is that the practice of issuing non-precedential opinions is unconstitutional in and of itself regardless of whether or not the practice was created by legislation. This constitutional claim became a hot topic of debate in the federal courts with Judge Richard Arnold's opinion in *Anastasoff v. United States*,[229] although he discussed the argument in his earlier scholarly writings as well.[230] Judge Arnold reviewed the United States Constitution, the writings of the Framers, the Federalists, the Anti-Federalists, and early decisions of the United States Supreme Court, and then concluded:

> [I]n the late eighteenth century, the doctrine of precedent was well-established in legal practice (despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty. The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to

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[226] *See supra* text accompanying notes 180, 192, 217 (outlining three paths to limit the use of unpublished opinions: (1) publish more opinions, (2) amend Minnesota Statute section 480A.08, or (3) amend Minnesota Rule of Civil Appellate Procedure 136.01).

[227] *See supra* text accompanying notes 219–224 (discussing judiciary and legislative authority over unpublished opinions).

[228] *See* 7A MCCARR & NORDBY, *supra* note 224, § 1.4 (explaining that courts may, as a matter of comity, adopt legislative enactments); *see also* State v. Losh, 721 N.W.2d 886, 891 (Minn. 2006) ("'[D]ue respect for coequal branches of government requires this court to exercise great restraint in considering the constitutionality of statutes particularly when the consideration involves what is a legislative function and what is a judicial function.'" (alteration in original) (quoting State v. Johnson, 514 N.W.2d 551, 554 (Minn. 1994))); State v. Breaux, 620 N.W.2d 326, 330 (Minn. Ct. App. 2001) ("'Minnesota statutes are presumed constitutional, and our power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary.'" (quoting *In re* Haggerty, 448 N.W.2d 363, 364 (Minn. 1989))).

[229] *See* Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir. 2000), *vacated as moot on other grounds en banc*, 235 F.3d 1054, 1056 (8th Cir. 2000).

[230] *See supra* note 173 and accompanying text (citing Arnold's and opposing commentators' scholarly works).

> separate it from a dangerous union with the legislative power. The statements of the Framers indicate an understanding and acceptance of these principles. We conclude therefore that, as the Framers intended, the doctrine of precedent limits the "judicial power" delegated to the courts in Article III.[231]

However, in *Hart v. Massanari*, Judge Kozinski reached the opposite conclusion:

> Unlike the *Anastasoff* court, we are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority. On the contrary, we believe that an inherent aspect of our function as Article III judges is managing precedent to develop a coherent body of circuit law to govern litigation in our court and the other courts of this circuit. We agree with *Anastasoff* that we—and all courts—must follow the law. But we do not think that this means we must also make binding law every time we issue a merits decision.[232]

In the aftermath of *Anastasoff*, John Borger and Chad Oldfather argued that the constitutional claim may apply to the use of non-precedential opinions in Minnesota under the Minnesota Constitution:

> Article 6, Section 1 of the Minnesota Constitution establishes the judicial power in terms remarkably similar to Article III of the United States Constitution, with the only differences suggesting a broader judicial power at the state level. Thus one could argue that Judge Arnold's analysis in *Anastasoff* applies with equal force to the Minnesota courts. The Minnesota Supreme Court has consistently held that the Legislature cannot encroach upon judicial territory, so the statutory provisions may create no barrier to reach this conclusion. Further, because state courts are more often involved in the sort of general, common-law decision making identified by [Sixth Circuit] Judge Boggs, the argument against non-precedential decisions may be more compelling as applied to the Minnesota courts.

Whatever the future of its holding, and whatever its practical effects, Judge Arnold's opinion stands as a challenge to all courts to accept accountability for every decision they make rather than to resign themselves

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[231] *Anastasoff*, 223 F.3d at 903; *see also* Cleveland, *Overturning the Last Stone*, *supra* note 143, at 130–37 (discussing *Anastasoff*).

[232] Hart v. Massanari, 266 F.3d 1155, 1180 (9th Cir. 2001); *see also* Cleveland, *Overturning the Last Stone*, *supra* note 143, at 138–44 (discussing *Hart*'s analysis of *Anastasoff*).

to a pessimistic view that they are grinding out decisions like sausage, with no responsibility for the consistency or longevity of their reasoning.[233]

However, the Minnesota appellate courts' approval of the use of unpublished, non-precedential opinions not only makes it likely that the courts would decline to invalidate section 480A.08, subdivision 3(c), it is probably more unlikely that the courts would hold a practice they endorse to be unconstitutional.

E. Walking Backwards: Reconsidering the Status of Previous Unpublished Opinions

The courts that recently removed the distinctions between published and unpublished opinions as to precedential value differ on whether the change should apply prospectively, as in the case of Ohio, Arkansas, and the Fourth Circuit, or retroactively, as in the case of Utah and the District of Columbia Circuit.[234] Regardless of which path the state may take, there should be a process for revisiting the status of prior unpublished, non-precedential opinions and changing the status of at least some of them to precedential.[235]

One way would be a wholesale change in status by deeming all prior unpublished opinions precedential. However, given the inconsistencies between some unpublished opinions, as demonstrated in the subsidized housing assistance and reasonable accommodation cases, a wholesale change in status would cause too many conflicts of precedent.[236]

The court should consider a process for requesting a change in status of unpublished opinions to published on a case-by-case basis. The process could involve a written request to the chief judge of the court of appeals, stating why the petitioner believes the opinion met the standards for publication in Minnesota Statute section 480A.08, subdivision 3(c): whether it established a new rule of law, provided important procedural guidelines in interpreting statutes or administrative rules, involved a significant legal issue, or if published, would significantly aid in the administration of justice.[237] The court could assign the request to remaining members of the panel that

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[233] Borger & Oldfather, *supra* note 220, at 37; *see also* Oldfather, *supra* note 122, at 180–87 (discussing the precedent doctrine).

[234] *See supra* notes 172–177 and accompanying text (citing state and federal court rules authorizing precedential status for unpublished opinions).

[235] *See, e.g.*, *supra* text accompanying note 216 (proposing a court rule for Minnesota that addresses the precedential status of opinions before and after the rule is adopted).

[236] *See supra* notes 58–76, 187 and accompanying text (citing inconsistent Minnesota Court of Appeals decisions).

[237] *See* MINN. STAT. § 480A.08, subdiv. 3(c) (2010). Since it is unlikely that an unpublished opinion would have overruled a previous court of appeals' decision not reviewed by the supreme court, this factor is probably not necessary.

first decided the case, or to a panel not involved with the decision. Whether the court should invite comment on the request or decide the issue without input, as was done when the opinion was first designated unpublished, is an open question. Such a process would help find and restore precedent lost through the overuse of unpublished opinions.

VI. CONCLUSION

The *Beaumia* and *Kleinman Realty* opinions, along with the Dakota County Community Development Agency opinions, shed light on how the practice of unpublished, non-precedential court of appeals opinions has created a period of lost precedent ranging over twenty years. Rather than saving time and cost for the courts, unpublished opinions cost more in time and expense to the courts, practitioners, and litigants, and has led to inconsistent and wrongly decided decisions. In the short-run, the court can and should increase publication of its opinions under the current statute and rule by simply issuing more opinions designated as published. In the long-run, the legislature and court should amend the statute and rule to eliminate unpublished, non-precedential opinions, greatly expand the use of published precedential opinions, and use memorandum opinions in a limited fashion for cases with only dispute-resolving but no lawmaking value. The court should also consider a process for changing significant unpublished opinions to precedential status. In the meantime, counsel should consider constitutional claims to the statute and practice without getting their hopes too high. The occurrence of any of these events will benefit the courts, the bar, and the citizenry by moving the state toward a more precedential future.