OFFICE OF
THE REVISOR
OF STATUTES

COURT OPINIONS REPORT

Submitted to the Legislature of the State of Minnesota | November 2018

Acknowledgements

The Revisor of Statutes wishes to acknowledge the efforts of the following individuals in the production of this report:

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Summary of Contents

2018 Court Opinions Report Summary

Minnesota Statutes, section 3C.04, subdivision 3, requires the Office of the Revisor of Statutes to biennially report to the legislature "any statutory changes recommended or discussed or statutory deficiencies noted in any opinion of the Supreme Court or the Court of Appeals of Minnesota." This report highlights the Minnesota Supreme Court and Minnesota Court of Appeals opinions identifying ambiguous, vague, preempted, constitutionally suspect, or otherwise deficient statutes.

The 2018 court opinions report includes 13 cases — six from the Minnesota Supreme Court and seven from the Minnesota Court of Appeals.

This report does not include Minnesota Court of Appeals cases that found statutory deficiencies but are currently being reviewed by the Minnesota Supreme Court. The following are two such cases that are now on review with the Minnesota Supreme Court: *Olson v. One 1999 Lexus MN License Plate No. 851LDV VIN: JT6HF10U6X0079461,* 910 N.W.2d 72 (Minn. App. 2018 (A17-1083) and *State v. Pakhnyuk,* 906 N.W.2d 571 (Minn. App. 2018) (A17-0474).

The report provides a case comment related to each deficiency noted by the Minnesota Supreme Court or the Minnesota Court of Appeals. Each case comment includes the text of the applicable deficient statutory provision, a statement of the deficiency, a summary of the facts of the court opinion, and a brief discussion of the court's analysis of the deficiency. Where possible, the words or phrases identified as deficient have been underlined. Additionally, the full text of each court opinion discussing the respective statutory deficiency can be found on the Office of the Revisor of Statutes' website at:

https://www.revisor.mn.gov/static/office/pubs/2018CourtOpinions.pdf

Statute Citation	Issue	Court Opinion
65B.43, subdivision 3	Meaning of "business premises"	*Castillo v. American Standard Insurance Company of Wisconsin*, 889 N.W.2d 591 (Minn. App. 2017) (A16-1002)
145.682, subdivision 2	Meaning of "after commencement of discovery"	*Firkus v. Harms*, 914 N.W.2d 414 (Minn. App. 2018) (A17-1088)
259.10, subdivision 1	Meaning of "parent"	*Matter of J.M.M.*, 890 N.W.2d 750 (Minn. App. 2017) (A16-0646)
290.01, subdivision 7b, paragraph (a), clause (2)	The constitutionality of the income tax residency classification for a trust	*Fielding v. Commissioner of Revenue,* 916 N.W.2d 323 (Minn. 2018) (A17-1177)
414.0325, subdivision 6	Is an orderly annexation agreement binding on third parties?	*In re Annexation of Certain Real Property to City of Proctor From Midway Township*, 910 N.W.2d 460 (Minn. App. 2018) (A17-1210)
554.02, subdivision 2, clauses (2) and (3)	Constitutionality of limitations on the right to trial by jury for claims at law alleging torts	*Leiendecker v. Asian Women United of Minnesota,* 895 N.W.2d 623 (Minn. 2017) (A16-0360)
590.01, subdivision 4	Constitutionality of exclusivity provision	*Reynolds v. State*, 888 N.W.2d 125 (Minn. 2016) (A14-0906)
590.11, subdivision 1, clause (1), item (i)	Constitutionality of exoneration-compensation statute as applied to certain claimants	*Back v. State*, 902 N.W.2d 23 (Minn. 2017) (A15-1637)
609.24	Meaning of "personal property"	*State v. Bowen*, 910 N.W.2d 39 (Minn. App. 2018) (A17-0331)
609.341, subdivision 15	Meaning of "significant relationship."	*State v. Reyes*, 890 N.W.2d 406 (Minn. App. 2017) (A16-0040)
609.52, subdivision 2, paragraph (a), clause (17)	Meaning of "take" in regard to taking a vehicle	*State v. Thonesavanh*, 904 N.W.2d 432 (Minn. 2017) (A15-1716)
609.72, subdivision 1, clause (2)	Constitutionality of disturbance of an assembly or meeting statute	*State v. Hensel*, 901 N.W.2d 166 (Minn. 2017) (A15-0005)
617.247, subdivision 9	Meaning of "has previously been convicted"	*State v. Overweg*, 914 N.W.2d 410 (Minn. App. 2018) (A17-1978)

Minnesota Statutes section 65B.43, subdivision 3

Subject: Insurance; no-fault benefits

Court Opinion: *Castillo v. American Standard Insurance Company of Wisconsin*, 889 N.W.2d 591 (Minn. App. 2017) (A16-1002)

Applicable text of section 65B.43, subdivision 3:

"Maintenance or use of a motor vehicle" means maintenance or use of a motor vehicle as a vehicle, including, incident to its maintenance or use as a vehicle, occupying, entering into, and alighting from it. Maintenance or use of a motor vehicle does not include (1) conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct occurs off the business premises, or (2) conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into or alighting from it.

Statutory Issue:

Meaning of the term "business premises."

Facts:

Jose Luis Estrada-Martinez died from carbon monoxide poisoning while fixing a customer's tire in the cargo bay of Estrada-Martinez's box truck. Estrada-Martinez was using a gasoline-powered generator, and despite venting the exhaust, a leak between the exhaust pipe and the generator's manifold allowed carbon monoxide to enter the cargo area.

Estrada-Martinez had a mobile auto-repair business. He would drive to customers' locations, where he performed maintenance and repairs in the rear cargo bay of his truck. He kept mounting and repairing equipment, including tools, a large compressor, and the gasoline-powered generator in the truck. Occasionally, he performed repair work at the garage of his home.

Estrada-Martinez had a family automobile policy through American Standard Insurance Company. He did not have a separate business insurance policy that covered his mobile auto-repair business.

Sandra Castillo, the personal representative of Estrada-Martinez's estate, made a claim for personal-injury-protection benefits. American Standard denied benefits, asserting that the Minnesota No-Fault Automobile Insurance Act does not cover injuries or death arising out of the business of maintaining vehicles.

The district court concluded that no-fault benefits were not recoverable because the accident did not arise out of the maintenance or use of a motor vehicle. Specifically, the injury was sustained during conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles and did not occur off the business premises. Castillo appealed.

Discussion:

The court explained that the Minnesota No-Fault Act provides for basic economic-loss benefits for losses suffered through injury "arising out of maintenance or use of a motor vehicle" pursuant to Minnesota Statutes, section 65B.46, subdivision 1. Minnesota Statutes, section 65B.43, subdivision 3, defines "maintenance or use of a motor vehicle" by excluding conduct that occurs within the course of a business

of servicing, repairing, or otherwise maintaining a motor vehicle. An exception to this exception applies if "the conduct occurs off the business premises."

The court framed the question at issue as whether Estrada-Martinez's conduct occurred on or off business premises – essentially, whether his truck qualified as "business premises."

Castillo argued that "business premises" presupposes a fixed business location on designated real property. The court cited previous Minnesota appellate decisions consistent with this understanding of the term, but the court also cited persuasive precedent that the term may have a more flexible meaning. The court determined that the term "business premises," when applied to Estrada-Martinez's situation, was ambiguous.

The court looked to the stated purposes of the No-Fault Act, including the goal of relieving severe economic distress for uncompensated victims of automobile accidents and to correct abuses and imbalances in the operation of the automobile tort liability system. The court discussed previous judicially determined exceptions to the lack of coverage for conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles. However, Estrada-Martinez did not fit within any of these exceptions. He was not an injured business customer. He was not an employee working on his own personal vehicle or at a location away from the premises where he typically conducts his business. He was a business owner, and he suffered injury while he was working on a customer's vehicle at his primary business location. Therefore, he did not fit within the category of persons meant to be protected under the No-Fault Act. Moreover, the court cited academic commentary that it would be reasonable to expect that an auto-repair-business owner would purchase another form of insurance to cover any business-related injuries.

The court concluded that "business premises" may include a cargo bay of a truck in which a mobile auto-repair business typically conducts its services and affirmed the district court decision.

The court did not recommend legislative action to address the ambiguous term. The legislature could add a definition of "business premises" to Minnesota Statutes, section 65B.43, making clear the boundaries of the term.

Minnesota Statutes, section 145.682, subdivision 2

Subject: Medical malpractice actions; expert review

Court Opinion: *Firkus v. Harms*, 914 N.W.2d 414 (Minn. App. 2018) (A17-1088)

Applicable text of section 145.682, subdivision 2:

In an action alleging malpractice, error, mistake, or failure to cure, whether based on contract or tort, against a health care provider which includes a cause of action as to which expert testimony is necessary to establish a prima facie case, the plaintiff must…

(2) serve upon defendant within 180 days after commencement of discovery under the Rules of Civil Procedure, rule 26.04(a) an affidavit as provided by subdivision 4.

Statutory Issue:

When does discovery commence under the medical malpractice expert-review statute?

Facts:

Ann Firkus served a medical malpractice complaint against Dr. Dana Harms on March 4, 2016. Harms served an answer on April 15, 2016, and within two weeks, Harms's attorney requested authorization forms from Firkus to allow for the release of medical records. Beyond this request, the parties did not hold a discovery conference, create a discovery plan, or conduct further discovery.

On November 30, 2016, Harms requested a stipulation to dismissal since Firkus had failed to comply with section 145.682 and timely serve an affidavit of expert identification within 180 days of the commencement of discovery. Firkus responded that the 180-day window had not yet begun since discovery had not formally commenced. Harms filed the case in district court on January 23, 2017 and filed a motion to dismiss on these grounds.

On February 17, 2017, Firkus served the affidavit of expert identification.

The district court granted Harms's motion to dismiss, finding that Firkus did not serve within the 180-day period following either the commencement of informal discovery in Harms's request for authorization forms, or the date when formal discovery should have commenced. Firkus appealed.

Discussion:

The court considered legislative history to determine the legislature's intent in creating the 180-day deadline to file an affidavit of expert identification in medical malpractice cases. The court found the statutory purpose of the expert-review statute was to facilitate eliminating nuisance medical malpractice cases that lacked merit.

The expert-review statute was enacted before the changes were made to the Rules of Civil Procedure requiring formal discovery procedures. Consequently, the court interpreted the statute in light of these changes with the goal of preserving the statute's original intent despite intervening changes to the discovery rules.

Before the amendment to the discovery rules, the expert-review statute required the affidavit to be served within "180 days after commencement of the suit." However, with new discovery rules that required a discovery conference before the commencement of discovery and no later than 30 days after the answer is due (see Minn. R. Civ. P. 26.06(a)), the legislature decided to amend the 180-day language

and extend the period from 180 days from the commencement of the suit to 180 days from commencement of discovery.

The court found that the legislature's intent in changing the language was to preserve the 180-day period that would otherwise have been shortened by the delay in commencing discovery with the new discovery conference requirement. The court found that Firkus's interpretation of the 180-day period beginning with the commencement of formal discovery allowed an unreasonable extension of the deadline that was not intended by the legislature.

The court therefore concluded that "after commencement of discovery" means 30 days after an answer is initially due under Minn. R. Civ. P. 26.06(a). The court did not suggest a practical remedy to the statutory deficiency noted in the court opinion. The legislature may want to consider clarifying the meaning of "after commencement of discovery" in Minnesota Statutes, section 145.682, subdivision 2.

Minnesota Statutes, section 259.10, subdivision 1

Subject: Minor name change

Court Opinion: *Matter of J.M.M.,* 890 N.W.2d 750 (Minn. App. 2017) (A16-0646)

Applicable text of section 259.10, subdivision 1:

Every person who, with intent to defraud, shall make a false statement in any such application shall be guilty of a misdemeanor provided, however, that no minor child's name may be changed without both parents having notice of the pending of the application for change of name, whenever practicable, as determined by the court.

Statutory Issue:

What does "parent" mean for purposes of the minor name change notification requirement?

Facts:

J.M.M. applied for a name change for her three minor children to change their surname, which was their biological father's name. The children's biological father was not listed on their birth certificates, there was no adjudication of paternity, and the two parents had never been married.

Under Minnesota Statutes, section 259.10, an application for a minor's name change requires "both parents" to be notified. When J.M.M. received a name change application from staff at the Hennepin County Self-Help Center, she was informed that notice to the biological father was only required if paternity had been established. J.M.M. did not provide information for the biological father on the application and did not notify the children's biological father.

After filing the application, the district court law clerk instructed J.M.M. to provide proper notice to the biological father or the application would be dismissed. In response, J.M.M. filed an affidavit stating why notice was impracticable.

The district court dismissed J.M.M.'s name change application for failure to notify the biological father, interpreting "both parents" to include both biological parents. J.M.M. appealed.

Discussion:

"Parent" is not defined under statute, so the court began by referencing *Black's Law Dictionary* for the definition of "parent." *Black's* provides several definitions, including biological parentage, adoptive parentage, and judicially-determined guardian status.

Because the ordinary definition of "parent" in *Black's* did not clarify the meaning of "both parents" under the statute, the court looked to the context of the word "both." Examining the word "both," the court stated that it did not necessarily mean "two" for several reasons. First, it was possible to have only one biological parent under Minnesota law. For example, a semen donor is not considered a biological father under the Minnesota Parentage Act. Second, in certain cases, notification of biological parents could result in notification of more than two parents—such as when adoptive parents seek a name change—causing "both" to mean more than two.

Based on this analysis, the court found the statute was ambiguous and looked to related statutes for a definition of parent. The Minnesota Parentage Act, codified in Minnesota Statutes, sections 257.51 to 257.74, defines the "parent and child relationship" as "the legal relationship between a child and the

child's biological or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." Under the act, a biological father must satisfy one of the criteria listed under Minnesota Statutes, sections 257.57 to 257.75, to be legally recognized as a child's parent.

The court found this definition compatible with the definition under the Minnesota Adoption Act, which defines "parent" as "the natural or adoptive parent of a child" in Minnesota Statutes, section 259.21, and has similar requirements for an individual to be legally recognized as a child's parent. The court reasoned that the district court's interpretation of parent as "biological" in the name-change act would lead to the illogical result that a biological parent would have greater notice rights to a name change than a biological parent would to an adoption.

The court adopted the definition of parent in the Minnesota Parentage Act, specifically the definition in Minnesota Statutes, section 257.54. Therefore, the court held that notice to a parent of a minor's name change application is only required where there is a parent-child relationship under Minnesota Statutes, section 257.54.

The court did not suggest a practical remedy to the statutory deficiency noted in the court opinion. The legislature may want to consider clarifying the meaning of "both parents" in Minnesota Statutes, section 259.10, subdivision 1.

Minnesota Statutes, section 290.01, subdivision 7b, paragraph (a), clause (2)

Subject: Income taxation; resident trust

Court Opinion: *Fielding v. Commissioner of Revenue,* 916 N.W.2d 323 (Minn. 2018) (A17-1177)

Applicable text of section 290.01, subdivision 7b, paragraph (a), clause (2):

(a) Resident trust means a trust, except a grantor type trust, which either (1) was created by a will of a decedent who at death was domiciled in this state or (2) is an irrevocable trust, the grantor of which was domiciled in this state at the time the trust became irrevocable.

Statutory Issue:

Whether the income tax residency classification for a trust violates the due process clause as applied to the taxpayer.

Facts:

This opinion relates to the taxation of four trusts in Minnesota. Each of the trusts was created in 2009 by a grantor who was a domiciliary of Minnesota at that time. The trusts were initially funded with shares of stock in Faribault Foods, Inc., (FFI) a Minnesota S corporation. For the first 30 months of the trusts' existence, the trusts were considered grantor-type trusts since the grantor retained control over the trusts' assets. During that time, the grantor was required to file Minnesota income tax returns, but the trusts were not.

In 2011, the grantor relinquished his authority to substitute assets in the trusts; therefore, the trusts became irrevocable and not grantor-type trusts. At the time the trusts became irrevocable, the grantor was a domiciliary of Minnesota, and the trusts were classified as resident trusts under Minnesota Statutes, section 290.01, subdivision 7b, paragraph (a), clause (2). The trusts continued to file Minnesota income tax returns in 2012 and 2013 without protest.

In 2014, Fielding became the trustee for the trusts and then all the trusts' FFI stock was sold, the gain of which was subject to Minnesota tax since the trusts were classified as resident trusts under Minnesota Statutes, section 290.01, subdivision 7b, paragraph (a), clause (2). The trusts filed a 2014 Minnesota income tax return under protest, claiming that the resident trust classification was unconstitutional as applied to them.

The trusts then filed an amended return seeking a refund for the portion of the tax paid attributable to what they claimed were nonresident trusts. The commissioner of revenue denied the request for the refund and the trusts appealed the commissioner's order to the Minnesota Tax Court. The tax court concluded that Minnesota did not have a sufficient basis to tax the trusts as Minnesota residents, and therefore held that Minnesota Statutes, section 290.01, subdivision 7b, paragraph (a), clause (2), as applied to the trusts, violates the due process clause of the Minnesota and United States constitutions.

The commissioner of revenue appealed the Tax Court's decision.

Discussion:

This court opinion evaluates the constitutionality of Minnesota Statutes, section 290.01, subdivision 7b, paragraph (a), clause (2), which provides a definition of resident trust, as the definition is applied to the four trusts at issue. Specifically, the residency definition is being challenged by the trusts under the due process clause.

The court explained that a tax satisfies the due process clause if "(1) there is a minimum connection between the state and the person, property, or transaction subject to the tax, and (2) the income subject to the tax is rationally related to the benefits conferred on the taxpayer by the State." Therefore, in applying these requirements, the court considered factors beyond what is required by the residency definition in Minnesota Statutes, section 290.01, subdivision 7b, paragraph (a), clause (2), i.e. the court considered whether the trusts' contacts with Minnesota are sufficient under the due process clause to permit them to be taxed as Minnesota residents.

The court concluded that the trusts' contacts with Minnesota were "either irrelevant or too attenuated to establish that Minnesota's tax on the trusts' income from sources complies with due process requirements." The court based this holding on three reasons.

First, the court explained that the trusts were their "own legal entity, with a legal existence that is separate from the grantor or the beneficiary." The grantor's connections to Minnesota, including using a Minnesota law firm to draft the trust documents, are not relevant to the "trusts' income that Minnesota seeks to tax and the protection and benefits Minnesota provided to the trusts' activities that generated the income." Rather, the relevant connection is Minnesota's connection to the trustee (the person with control over the trusts' assets), not the grantor. After 2011, the grantor no longer had any control over the trusts' assets. Further, the Minnesota residency of one of the beneficiaries is also not a minimum connection sufficient to justify taxing the trusts' income.

Second, the trusts did not own any physical property in Minnesota that could constitute a basis for taxing the trusts as residents. The commissioner argued that the trusts' ownership of FFI stock would be a sufficient basis for residency. However, the court explained that these interests were in intangible property and were held outside Minnesota. Therefore, the court found the ownership of stock alone was not sufficient to tax the trusts as residents.

Third, the court also found that contacts with Minnesota predating the tax year at issue were irrelevant. Due process requires that a taxpayer has adequate notice of a tax and allowing the state "to look to historical contacts unrelated to the tax year at issue risks leaving the taxpayers unaware of whether or when their contacts with Minnesota may justify the imposition of the tax."

The court further found that there are "extremely tenuous contacts with the trusts (or their trustees) and Minnesota during the tax year 2014." The trustees had little to no contact with Minnesota and the administration of the trusts occurred outside Minnesota. Finally, the court held that "attributing all income, regardless of source, to Minnesota for tax purposes would not bear a rational relationship with the limited benefits received by the trusts from Minnesota during the tax year at issue."

For all these reasons, the court held that Minnesota Statutes, section 290.01, subdivision 7b, paragraph (a), clause (2), is unconstitutional as applied to the trusts.

It should be noted that the court explained that in looking beyond the statutory definition of resident for purposes of taxing a trust, it was not "adding language to the statute." The court was, in its words, "not redefining a resident trust" but "simply evaluating…all relevant facts when considering whether the application of the statutory definition would be consistent with due process." The legislature may want to reevaluate the resident trust definition in light of what the due process clause requires for resident taxation considering this court opinion.

Minnesota Statutes, section 414.0325, subdivision 6

Subject: Local government; annexation agreements

Court Opinion: *In re Annexation of Certain Real Property to the City of Proctor from Midway Township*, 910 N.W.2d 460 (Minn. App. 2018) (A17-1210)

Applicable text of section 414.0325, subdivision 6:

An orderly annexation agreement is a binding contract upon all parties to the agreement and is enforceable in the district court in the county in which the unincorporated property in question is located. The provisions of an orderly annexation agreement are not preempted by any provision of this chapter unless the agreement specifically provides so. If an orderly annexation agreement provides the exclusive procedures by which the unincorporated property identified in the agreement may be annexed to the municipality, the municipality shall not annex that property by any other procedure.

Statutory Issue:

Whether an annexation agreement is binding only upon parties to the annexation agreement or whether the annexation agreement also restricts the rights of nonparties.

***Facts*:**

The city of Duluth and Midway Township entered into an orderly annexation agreement in 2013. The agreement designated certain land in Midway Township as an Orderly Annexation Area, which was divided into three parcels. Midway Township abuts both Duluth and Proctor.

In 2014, owners of real property located in Parcel II of the Orderly Annexation Area executed a petition requesting that their property be annexed by the city of Proctor, and Proctor adopted an ordinance to annex the property. Proctor was not a party to the orderly annexation agreement entered between Duluth and Midway Township.

Duluth objected to Proctor's annexation, claiming that the property was subject to the orderly annexation agreement between itself and Midway Township. But in 2016, the chief administrative law judge approved the annexation by Proctor. Duluth and Midway Township appealed to the district court, which held that when real property is subject to an orderly annexation agreement, the property cannot be annexed by ordinance. Proctor and the Appellate Office of Administrative Hearings (OAH) appealed the district court's decision.

Discussion:

Minnesota Statutes, section 414.0325, states that "[t]he provisions of an orderly annexation agreement are not preempted by any provision of … chapter [414] unless the agreement specifically provides so." Proctor and OAH argue that this preemption clause applies only to parties to an orderly annexation agreement and not to nonparties.

If the preemption clause were to apply to nonparties, the annexation agreement between Duluth and Midway Township would preempt Proctor's ability to annex the property in question by ordinance under Minnesota Statutes, section 414.033. The court determined that Minnesota Statutes, section 414.0325, subdivision 6 "is ambiguous as to whether an annexation agreement is binding only upon parties to that

agreement or whether the agreement restricts the rights of nonparties as well." If an annexation agreement is binding only upon parties to the orderly annexation agreement, then the preemption clause would prevent only a party to the agreement from annexing property by alternative means under Minnesota Statutes, chapter 414.

The court looked to legislative history to determine the purpose of the preemption clause. After reviewing the legislative history, the court determined that the purpose behind the preemption clause in Minnesota Statutes, section 414.0325, subdivision 6, "was to prevent parties to an annexation agreement from later reneging on that agreement by annexing by ordinance land that was subject to the agreement." Further, the court stated that "the legislature was concerned with ensuring that *parties* to annexation agreements could not later attempt to circumvent those agreements."

The court therefore held that Minnesota Statutes, section 414.0325, subdivision 6, "does not preclude a nonparty to an orderly annexation agreement from seeking to annex real property with the designated area by ordinance." The court did not suggest a practical remedy to the deficiency noted in the court opinion. The legislature may want to consider clarifying whether the preemption clause in Minnesota Statutes, section 414.0325, applies only to parties, or to nonparties as well.

Minnesota Statutes, section 554.02, subdivision 2, clauses (2) and (3)

Subject: Strategic Lawsuit Against Public Participation Law; Right to a Jury Trial

Court Opinion: *Leiendecker v. Asian Women United of Minnesota,* 895 N.W.2d 623 (Minn. 2017) (A16-0360)

Applicable text of section 554.02:

Subdivision 1. **Applicability.**

This section applies to any motion in a judicial proceeding to dispose of a judicial claim on the grounds that the claim materially relates to an act of the moving party that involves public participation.

Subd. 2. **Procedure.**

On the filing of any motion described in subdivision 1:

(1) discovery must be suspended pending the final disposition of the motion, including any appeal; provided that the court may, on motion and after a hearing and for good cause shown, order that specified and limited discovery be conducted;

(2) the responding party has the burden of proof, of going forward with the evidence, and of persuasion on the motion;

(3) the court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability under section 554.03; and

(4) any governmental body to which the moving party's acts were directed or the attorney general's office may intervene in, defend, or otherwise support the moving party.

Statutory Issue:

Whether Minnesota Statutes, section 554.02, subdivision 2, clauses (2) and (3), as applied to claims at law alleging torts, violates the right to a jury trial under the Minnesota Constitution.

Facts:

The Leiendeckers sued Asian Women United of Minnesota (AWUM) alleging that previous lawsuits against the Leiendeckers constituted malicious prosecution. AWUM sought immunity under Minnesota's anti-SLAPP law (Minnesota Statutes, chapter 554), which permits a party to move for dismissal of a lawsuit on the ground that a claim against the party relates to an act involving public participation. See Minnesota Statutes, section 554.02, subdivision 1.

The district court held that Minnesota Statutes, section 554.02, violated the Leiendeckers' right to a jury trial by requiring the trial judge to find facts. AWUM petitioned the Minnesota Supreme Court for accelerated review, which the court granted.

Discussion:

This court opinion involves the intersection of a malicious prosecution claim and Minnesota's anti-strategic lawsuit against public participation (anti-SLAPP) law, which is codified under Minnesota Statutes, chapter 554. The court analyzed the constitutionality of Minnesota Statutes, section 554.02, as applied to the Leiendeckers' malicious prosecution claim, under article I, section 4, of the Minnesota Constitution, which establishes the "right of trial by jury."

In the court's analysis of the right to trial by jury, the court explained that this right is "categorical, permitting no exceptions." Further, the Minnesota Constitution grants that the "right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy." Since a malicious prosecution claim is a claim at law, the court concluded that the Leiendeckers are entitled to a jury trial for that claim. Thus, the question before the court was whether Minnesota's anti-SLAPP law violates the Leiendeckers' right to a jury trial under the Minnesota Constitution for purposes of their malicious prosecution claim.

AWUM claimed that its previous lawsuits relating to its relationship with the Leiendeckers amounted to public participation under the anti-SLAPP law, Minnesota Statutes, chapter 554, and were therefore immune from liability under the malicious prosecution claim. The anti-SLAPP law, however, provides that tortious or unconstitutional conduct is not immunized under the anti-SLAPP law.

"Lawful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights." See Minnesota Statutes, section 554.03.

Thus, the Leiendeckers would meet their burden of proof to show that AWUM was not immune under Minnesota Statutes, section 554.02, subdivision 2, if the Leiendeckers could prove that AWUM's actions (its previous lawsuits against the Leiendeckers) were tortious. To prove that AWUM's conduct was tortious, the court explained that the Leiendeckers carry "the burden of proof, production, and persuasion," and are required "to produce clear and convincing evidence that [AWUM's] acts are not immune under the anti-SLAPP law." Thus, when making the immunity ruling under the anti-SLAPP law, the district court would also be making a ruling on the merits of the Leiendeckers' tort action itself.

Since Minnesota Statutes, section 554.02, subdivision 2, requires the district court to make this ruling, the court explained that Minnesota Statutes, section 554.02, subdivision 2, "clauses 2 and 3 violate the responding party's right to a jury trial in two ways as applied to actions at law alleging torts. First, they transfer the jury's fact-finding role to the district court. Second, they require the responding party to meet a higher burden of proof before trial (clear and convincing evidence) that it would have to meet at trial (preponderance of evidence)."

The court therefore concluded that Minnesota Statutes, section 554.02, "is unconstitutional when it requires a district court to make a pretrial finding that speech or conduct is not tortious under" Minnesota Statutes, section 554.03.

The court further held that Minnesota Statutes, section 554.02, subdivision 2, clauses (2) and (3) are inseparable from the remainder of the section. Therefore, the court did not sever the unconstitutional provisions from Minnesota Statutes, section 554.02. The court did not suggest a practical remedy to the constitutional deficiency noted in the court opinion.

Minnesota Statutes, section 590.01, subdivision 4

Subject: Postconviction relief; challenges to a sentence

Court Opinion: *Reynolds v. State,* 888 N.W.2d 125 (Minn. 2016) (A14-0906)

Applicable text of section 590.01, subdivision 4:

(a) No petition for postconviction relief may be filed more than two years after the later of:

(1) the entry of judgment of conviction or sentence if no direct appeal is filed; or

(2) an appellate court's disposition of petitioner's direct appeal.

Statutory Issue:

Does Minnesota Statutes, section 590.01, subdivision 4, conflict with Minnesota Rules of Criminal Procedure, rule 27.03, subdivision 9, thereby violating separation of powers principles?

Facts:

In 2008, Reynolds pleaded guilty to failing to register as a predatory offender. The district court sentenced Reynolds and then several months later, on the court's own motion, modified Reynolds's sentence to include a ten-year conditional-release term. More than four years after the court modified Reynolds's sentence, Reynolds brought a motion to correct his sentence under the Minnesota Rules of Criminal Procedure, rule 27.03, subdivision 9, which states that a court "may at any time correct a sentence not authorized by law." However, the district court determined that Reynolds's motion was a petition for postconviction relief under Minnesota Statutes, section 590.01, subdivision 4, and not a motion under rule 27.03, subdivision 9. Petitions under Minnesota Statutes, section 590.01 must be made within two years of entry of judgment of conviction. Since Reynolds's motion was made more than four years after his conviction, the district court dismissed Reynolds's claim.

The court of appeals reversed the district court's finding, holding that Reynold's motion was within the scope of rule 27.03, subdivision 9, thereby allowing the motion to be made "at any time." The state appealed.

Discussion:

The conflict between Minnesota Statutes, section 590.01, subdivision 4, and rule 27.03, subdivision 9, creates a separation of powers issue under the Minnesota Constitution. To resolve this conflict, the court first explained that "the judicial branch governs procedural matters, while the creation of substantive law is a legislative function." And, "if a statute attempts to restrict the use of a court procedural rule, the statute could impermissibly infringe on a judicial function and be unconstitutional." Thus, the question before the court was whether a correction of a sentence is procedural or substantive.

In answering this question, the court stated that Reynolds is challenging not his conviction, which is a substantive matter within purview of the legislature, but his sentence, which is within the limits of the judicial function. Further, in its analysis of rule 27.03, subdivision 9, the court held that the rule "creates a procedure to be used within an existing criminal case for the district court to correct a sentence that is not authorized by law." So, the court determined that rule 27.03, subdivision 9, is a procedural rule that relates to the judicial function of sentencing.

Thus, the court held that the application of the two-year limitation period in Minnesota Statutes, section 590.01, subdivision 4, to the motion process in rule 27.03, subdivision 9, violates the separation of powers and is therefore unconstitutional. The court did not suggest a practical remedy to the constitutional deficiency noted in the court opinion.

Minnesota Statutes, section 590.11, subdivision 1, clause (1), item (i)

Subject: Post-conviction relief; Imprisonment and Exoneration Act

Court Opinion: *Back v. State*, 902 N.W.2d 23 (Minn. 2017) (A15-1637)

Applicable text of section 590.11, subdivision 1, clause (1), item (i):

For purposes of this section, "exonerated" means that: … a court of this state: … vacated or reversed a judgment of a conviction on grounds consistent with innocence and the prosecutor dismissed the charges; or ...

Statutory Issue:

Whether a portion of the "exonerated" definition in the Imprisonment and Exoneration Act violates the Equal Protection Clause.

Facts:

In a previous case, a jury found Danna Back guilty of second-degree manslaughter. *State v. Back*, 775 N.W.2d 866 (Minn. 2009). The Minnesota Supreme Court reversed Back's conviction, holding that she was not culpably negligent because she did not have a duty to control the shooter or protect the victim. Back then filed a petition to be compensated as an exonerated individual under Minnesota Statutes, section 590.11.

Under the statute, "exonerated" applies when a court vacates or reverses a judgment of conviction and the prosecutor dismisses the charges. In this case, the prosecutor did not take any action after the court's decision to reverse Back's conviction. The state argued that Back was not exonerated under the statute because the prosecutor never dismissed the second-degree manslaughter charge and, therefore, could not be eligible for compensation. Back argued that the prosecutorial-dismissal requirement is a violation of the equal protection clause because it denies eligibility for compensation based on an irrational classification, namely, that both vacating or reversing a judgment of conviction and the prosecutorial-dismissal requirement cannot both be met.

The district court found that the prosecutorial-dismissal requirement did not violate the equal protection clause and denied Back's petition. The court of appeals reversed the district court's holding by finding that the equal protection clause was violated because the statute required a meaningless act on the part of the prosecutor. As a remedy, the court severed only the prosecutorial-dismissal requirement from the statute, leaving the language allowing a court to vacate or reverse a judgment for a claimant to qualify as exonerated.

Discussion:

The Minnesota Supreme Court first addressed whether the reversal of Back's conviction could exonerate her without the prosecutorial-dismissal requirement. The definition of exonerated as provided in Minnesota Statutes, section 590.11, subdivision 1, uses the language "and" suggesting that the prosecutorial-dismissal requirement is required in addition to a reversal of or a vacating of a judgment of

conviction. Since dismissal by the prosecutor did not occur, the court found that Back did not satisfy the statutory definition of exonerated.

Next, the court considered whether the prosecutor requirement violated the equal protection clause. The court reviewed the case under the rational-basis test, which only requires that the statute be rationally related to a legitimate state interest. Back argued that the two required acts in the statute, a court vacating or reversing a conviction and the prosecutor dismissing the charges, are legally impossible to complete together. If a court vacates or reverses a conviction, then there is nothing left for the prosecutor to dismiss. If a prosecutor dismisses the charge, there is nothing left for the court to vacate or reverse. Either act alone, however, would be insufficient under the language to qualify as exonerated. The court found that these requirements created three classes of claimants: those whose convictions were vacated or reversed, those who had their charges dismissed by a prosecutor, and those who satisfied both requirements. The court found these classifications to be irrational because the claimants were dependent on a meaningless act. For Back, the statute required a prosecutor to dismiss charges that no longer existed. In effect, the statute limited eligibility for compensation based on an irrational classification. Ultimately, the court found the exoneration-compensation statute to be unconstitutional because it required a meaningless act and was, therefore, irrational.

Last, the court considered how to remedy the constitutional violation. The majority found that the remedy to a constitutional violation is to sever as little as possible of an unconstitutional law. The court found that each requirement in the statute appeared purposefully connected and it was unclear whether the legislature would have enacted the statute without the prosecutorial-dismissal requirement. Legislative intent also indicated that the legislature preferred prosecutorial involvement in the exoneration process. As a result, the court severed Minnesota Statutes, section 590.11, subdivision 1, clause (1), item (i), thereby removing both the court reversal and prosecutorial-dismissal requirements. The court stated, "[t]o hold otherwise would allow us, under the pressure of severance, to rewrite the exoneration-compensation statute's eligibility requirements, a task that is within the Legislature's purview, not ours. Providing the Legislature with an opportunity to revise the statute is consistent with the separation of powers, a structural principle that the Minnesota Constitution explicitly safeguards."

The dissent concurred with the judgment but disagreed with the majority's remedy to the constitutional violation. The dissent argued that partially severing a portion of subdivision 1 instead of only the offending language creates a new irrational distinction between claimants, as it makes persons whose convictions have been vacated or reversed ineligible for compensation.

Minnesota Statutes section 609.24

Subject: Crimes; simple robbery

Court Opinion: *State v. Bowen,* 910 N.W.2d 39 (Minn. App. 2018) (A17-0331)

Applicable text of section 609.24:

Whoever, having knowledge of not being entitled thereto, takes personal property from the person or in the presence of another and uses or threatens the imminent use of force against any person to overcome the person's resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property is guilty of robbery and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both.

Statutory Issue:

The meaning of the term "personal property."

Facts:

John Lee Bowen entered Big Top Liquors, a retail liquor store in St. Paul. After Bowen yelled at a cashier, she refused to assist him and told him to leave the store. Bowen left, but soon returned and again yelled at the cashier, entered her workspace behind the cash register, pushed products off a shelf onto the floor, took a bottle of liquor, and punched a store manager in the face. Bowen left the store with the bottle of liquor. Upon interrogation, Bowen admitted to a police officer that he took the bottle of liquor without paying for it.

The state charged Bowen with making a threat of violence, in violation of Minnesota Statutes, section 609.713, subdivision 1, and simple robbery, in violation of Minnesota Statutes, section 609.24. Bowen argued upon closing arguments that the bottle of liquor at issue is not personal property. The district court instructed the jury to determine whether "the defendant took a bottle of liquor in the presence of employees of Big Top Liquors." Bowen objected and unsuccessfully requested an instruction that would have required the jury to determine whether "the defendant took personal property."

The jury found Bowen guilty of simple robbery and not guilty of making a threat of violence. Bowen appealed.

Discussion:

Bowen argued on appeal that the evidence was insufficient to support his conviction based on the meaning of the statute at issue. Bowen contended that "personal property" is property owned by or belonging to a person, which excludes property owned by or belonging to a business entity. The state countered that "personal property" is all property that is not real property, and it is irrelevant whether it is owned by or belonging to a human being or a business entity. The court determined that the statute was ambiguous because the term "personal property" was susceptible to at least two reasonable interpretations.

The court first used the canon of *in pari materia* – also known as the related-statutes canon – to determine the meaning of the term "personal property." The court noted that the Minnesota Supreme Court has used the canon to construe the simple robbery statute together with the theft statute. The theft statute,

Minnesota Statutes, section 609.52, subdivision 1, defines "property" to mean "all forms of tangible property, whether real or personal." The statute gives no indication that the term "personal property" means property owned by or belonging to a human being but not property owned by or belonging to a business entity. In applying the *in pari materia* canon, the court assumed that the legislature intends consistent meaning for a particular word in a given context. The court's application of this canon supported the state's position.

Next, the court applied the imputed-common-law-meaning canon, which provides that a statute that uses a common-law term, without defining it, adopts its common-law meaning. The court cited numerous Minnesota Supreme Court cases issued before the simple robbery statute was enacted that supported the state's definition of "personal property." The court also cited comments by the advisory committee that drafted and recommended language for the simple robbery statute. These comments indicate the committee understood the common-law meaning of the term "personal property" to include all property that is not real property. Finally, the court rejected Bowen's argument that the common-law understanding of the crime of robbery as the "taking and carrying away must be of the personal goods of another" referred to property owned by or belonging to a human being as opposed to property owned by or belonging to a business entity. The court's application of this canon also supported the state's position.

The court determined that the term "personal property," as used in Minnesota Statutes, section 609.24, means all property that is not real property, without regard for whether the property is owned by or belonging to a human being or a business entity.

The court also dispensed with Bowen's other arguments that the jury instruction constituted a directed verdict and that the district court violated procedural law by denying his requested jury instruction. The court affirmed the district court decision.

The court did not recommend legislative action to address the ambiguous term. No legislative action is likely needed as the term of art "personal property" is generally well understood.

Minnesota Statutes, section 609.341, subdivision 15

Subject: Second-degree criminal-sexual-conduct

Court Opinion: *State v. Reyes*, 890 N.W.2d 406 (Minn. App. 2017) (A16-0040)

Applicable text of section 609.341, subdivision 15:

"'Significant relationship' means a situation in which the actor is: … (2) any of the following persons related to the complainant by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt; …"

Statutory Issue:

Whether a relationship between a step-grandfather and a step-granddaughter constitutes a significant relationship as defined by Minnesota Statutes, section 609.341, subdivision 15, clause (2) (2010).

Facts:

Reyes, was a step-grandfather to M.C. by marriage. According to M.C., in 2009 and 2010, appellant inappropriately touched her. M.C. was a younger than 16 years old at the time of the inappropriate acts.

A jury found Reyes guilty of two charges of second-degree criminal sexual conduct for acts involving his step-granddaughter. Reyes appealed challenging whether the relationship with his step-granddaughter constituted a "significant relationship" for purposes of Minnesota Statutes, section 609.341, subdivision 15.

Discussion:

On appeal, Reyes contended that both of his second-degree criminal sexual conduct convictions should be reversed because the relationship between a step-grandfather and a step-granddaughter is not a significant relationship under Minnesota Statutes, section 609.341, subdivision 15. Reyes made three arguments in support of his appeal: (1) that the plain language of section 609.341, subdivision 15, excludes step-grandfathers, (2) that interpreting the definition to include step-grandfathers creates superfluous language, and (3) that the rule of lenity requires a ruling in his favor.

The court started its analysis by determining whether the statute was ambiguous on its face. Minnesota Statutes, section 609.341, subdivision 15, defines a significant relationship, in relevant part, as "… a situation in which the actor is: (2) any of the following persons related to the complainant by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt;…"

Reyes asserted that step-grandfathers are excluded from the definition because step-grandfather is not listed. On the other hand, the state asserted that "related to the complainant by blood, marriage, or adoption" applies to all relationships within the definition and thus, includes step-grandfathers as grandfathers related by marriage. The court found both interpretations reasonable and thus, the statute to be facially ambiguous.

Next, the court reviewed the legislative intent of Minnesota Statutes, section 609.341, subdivision 15. In 1985, the legislature merged the criminal sexual conduct and intrafamilial sexual abuse crimes and added

the phrase "significant relationship' to the statute. The court had previously decided in *State v. Williams*, 762 N.W.2d 583 (Minn. App. 2009), *rev. denied* (Minn. May 27, 2009) that half-brother was included in the definition of significant relationship because it would lead to an absurd result "to exclude half-brothers because 'the law would then include step-brothers (with no blood relation) and cousins (genetically more distant than half-brothers) but exclude a brother related by half blood.'"

In the case at hand, the court held that excluding step-grandfather from the definition of significant relationship would lead to an absurd result contrary to the statutory purpose.

Turning to Reyes's second statutory interpretation argument, the court concluded that both Reyes's and the state's interpretations create superfluous terms. "A statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant." Reyes's interpretation results in "related to the complainant by blood, marriage, or adoption" being superfluous, whereas the state's interpretation results in the terms "stepbrother" and "stepsister" being superfluous. Given that either interpretation creates superfluous language, the court concluded that the interpretation that supports the statutory intent should prevail. Consequently, the state's interpretation was deemed appropriate.

Finally, the court dismissed Reyes's final argument and held that the rule of lenity was inapplicable and ultimately concluded that step-grandfather was include in the definition of significant relationship.

The court did not offer a practical remedy to the statutory dispute. The legislature may want to consider rewriting the definition of significant relationship to clarify the included relationships.

Minnesota Statutes, section 609.52, subdivision 2, paragraph (a), clause (17)

Subject: Criminal law; motor vehicle theft

Court Opinion: *State v. Thonesavanh*, 904 N.W.2d 432 (Minn. 2017) (A15-1716)

Applicable text of section 609.52, subdivision 2:

"Whoever does any of the following commits theft…

(17) takes or drives a motor vehicle without the consent of the owner or an authorized agent of the owner, knowing or having reason to know that the owner or an authorized agent of the owner did not give consent;"

Statutory Issue:

Whether an individual commits a motor vehicle theft without moving the vehicle.

Facts:

Early in the morning, an individual referred to as J.V. started his car and left it running in his driveway. When J.V. returned to the vehicle, he found the defendant sitting in the vehicle with the doors locked. A police officer persuaded the defendant to unlock the doors and exit the vehicle. When the defendant exited the vehicle, he was arrested for motor vehicle theft. The defendant had not driven or moved the vehicle.

The district court dismissed the motor vehicle theft charge, holding that because the defendant had not carried away or moved the vehicle, he had not taken it. The court of appeals affirmed the district court, finding that the statute was ambiguous and primarily relying on the rule of lenity to conclude that the court should rule in favor of the defendant. An appeal to the supreme court followed.

Discussion:

The supreme court first addressed the issue of ambiguity. If a statute is not ambiguous, the court must apply it according to its plain meaning; if a statute is ambiguous, the court must apply canons of construction to resolve the ambiguity.

There is no definition in Minnesota's theft statutes of "takes" or "drives," so the court looked to various dictionaries "to determine the common and ordinary meanings of these terms." The court determined that dictionary definitions of the word "drives" uniformly require movement of the vehicle. The defendant clearly had not driven the vehicle, so the court focused on the definition of "takes." There are dozens of dictionary definitions of the word "takes," some that require movement and some that do not. Therefore, the court held that the motor vehicle theft statute was ambiguous.

The court applied three canons of statutory construction to resolve the ambiguity. First, the court applied the canon of surplusage, which "favors giving each word or phrase in a statute a distinct, not an identical, meaning." The court reasoned that if the definition of "takes" required movement, it would essentially mean the same thing as "drives" for the purpose of the motor vehicle theft statute. Therefore, application of this canon favored the state's position – that "takes" does not require movement.

Next, the court applied the canon of *in pari materia*, which "allows two statutes with common purposes and subject matter to be construed together to determine the meaning of ambiguous statutory language." The court looked to the crime of simple robbery, which is essentially a lesser-included offense of theft, or a lesser degree of the same crime. In previous case law, the court had held that only "adverse possession, not movement" was required to satisfy the "takes" element of the simple robbery statute, so it would stand to reason that the same interpretation should be applied to the motor vehicle theft statute. Application of this canon also favored the state's position.

Finally, the court applied the imputed-common-law-meaning canon, which means that if a statute uses a common-law term (that is, a term that existed in traditional criminal law before it was codified into statute) without defining it, the common-law meaning applies to the statute. The common-law crime of larceny has existed for hundreds of years and has the requirement of "taking and carrying away" personal property belonging to another. Under the common law definition, "taking" required possessing the property, and "carrying away" required moving the property; the two words were defined separately. The court reasoned that because the statutory crime of motor vehicle theft originated with the common law crime of larceny, the term "takes" should be defined "in accordance with its common-law meaning." Application of this canon also favored the state's position.

Because all three of the canons analyzed by the court favored the state's position, the court held that "to 'take' a motor vehicle under Minn. Stat. §609.52, subd. 2(a)(17), an individual must only adversely possess it."

Based on the court's holding, the legislature may want to consider adding a definition of "takes" to the motor vehicle theft statute, clarifying that "takes" means adversely possessing a vehicle, and does not require that the vehicle be moved.

Minnesota Statutes, section 609.72, subdivision 1, clause (2)

Subject: Criminal law; disorderly conduct

Court Opinion: *State v. Hensel,* 901 N.W.2d 166 (Minn. 2017) (A15-0005)

Applicable text of section 609.72, subdivision 1:

"Whoever does any of the following in a public or private place, including on a school bus, knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct…

(2) disturbs an assembly or meeting, not unlawful in its character…"

Statutory Issue:

Whether the part of Minnesota's disorderly conduct statute that prohibits disturbing an assembly or meeting is unconstitutional under the First Amendment.

Facts:

At a city council meeting, the defendant sat in the public gallery displaying signs that depicted dead and deformed children. The signs obstructed the view of people behind the defendant, so the city council president allowed others to move to chairs in front of the public gallery. Because of the defendant's actions, the city council had to adjourn and reschedule the meeting.

At the rescheduled city council meeting, there were no chairs placed in front of the public gallery, and the defendant took a chair from the gallery and moved it to the space in front of the gallery, where other members of the public had been allowed to sit during the previous meeting. The city council asked the defendant to move back to the public gallery, and she repeatedly refused. Eventually, a police officer escorted the defendant from the meeting, and she was charged with disorderly conduct.

The defendant moved to dismiss the charge on the grounds that the disorderly conduct statute was unconstitutionally overbroad, unconstitutionally vague, and unconstitutional as applied to this case. The district court denied the defendant's motion. A jury found the defendant guilty, and the defendant appealed. The court of appeals upheld the defendant's conviction, and the defendant appealed again to the supreme court.

Discussion:

The supreme court focused on the defendant's claim that the disturbance-of-a-meeting-or-assembly portion of the disorderly conduct statute was unconstitutionally overbroad. The defendant argued that the statute criminalizes a significant amount of constitutionally protected speech, thereby violating the First Amendment. In the first step of the overbreadth analysis, the court examined the language of the statute to determine whether it prohibited any speech or conduct that would be protected by the first amendment.

The court agreed with the defendant that the plain language of the statute is "broad and unambiguous," potentially prohibiting actions such as "wearing an offensive t-shirt, using harsh words in addressing another person, or even raising one's voice in a speech." Therefore, the court found that the statute did regulate at least some types of speech and conduct protected by the First Amendment.

The second step of the analysis was to determine "whether the statute is substantially overbroad." A statute is substantially overbroad only if a "substantial amount" of protected speech is prohibited. The court again looked to the "plain language" of the statute. First, the court examined the mens rea element of the statute, which requires that the offender "know[s], or ha[s] reasonable grounds to know" that the conduct would alarm or disturb others. Because actual knowledge is not required – "reasonable grounds to know" is sufficient – even negligent activity would be prohibited under the statute, making the statute's reach quite broad.

Additionally, the court found that "the actus reus element is even broader." Prohibited acts include any act that "disturbs" any lawful "assembly or meeting." "Disturb" encompasses a very wide range of potential actions, and "meeting" encompasses a wide range of potential settings. The court determined that these words combined create "a criminal prohibition of alarming breadth," prohibiting many different types of speech that are explicitly protected by the First Amendment. Therefore, the court determined that the statute was substantially overbroad.

Finally, the court sought to determine whether the statute could be read more narrowly to overcome the problem of overbreadth. If a narrower interpretation of the text were possible, the court would adopt that interpretation of the statute. However, "if no reasonable narrowing construction remedies the statute's overbreadth problem, then the remaining option is to invalidate the statute."

The court analyzed and rejected various possible narrowing constructions. The defendant suggested that the jury instruction should have limited the statute to prohibit only "fighting words." Although this interpretation would remedy the constitutional problem, it would require completely rewriting the statute, not merely reading it in a different light, and the court declined to apply this narrowing construction.

The state suggested that the statute be read to apply only when "the disturbance… was caused by defendant's conduct itself and not the content of the activity's expression." This option, like the defendant's suggestion, would require completely rewriting the statute, as there is currently "nothing in the statute's text to suggest such a distinction." Additionally, the court found that this interpretation would be too difficult to apply; in many cases, it would be impossible for a fact finder to determine whether the cause of a disruption was a defendant's conduct, or the message carried by the conduct. And, even if a fact finder could determine that the cause of a disruption was the conduct alone, that conduct may still be expressive and therefore likely protected by the first amendment, "opening the statute to serial as-applied challenges as new circumstances arise."

The dissenting justices suggested both "construing the word 'does' to regulate only 'conduct, not speech'" and removing the phrase "or having reasonable ground to know." The court held that this, too, "bear[s] little resemblance to the actual language of the statute that the Legislature adopted." Additionally, even if this limiting construction were applied, the statute "would still ban a considerable amount of expressive conduct."

Because the language of the disturbance-of-a-meeting-or-assembly portion of the disorderly conduct statute was substantially overbroad and no limiting construction could remedy the constitutional defect within the boundaries of the language adopted by the legislature, the court invalidated the statute and remanded the case to the district court with an instruction to vacate the defendant's conviction.

Following this decision, the disturbance-of-a-meeting-or-assembly portion of the disorderly conduct statute is invalid. If this is the legislature's intent, the legislature may consider repealing the language to avoid confusion. However, if the legislature does intend to prohibit certain conduct at public meetings, the legislature must amend the statute to narrow it and remove the overbreadth issue. The court's analysis suggests that limiting the statute to prohibit only fighting words is one way to cure the constitutional defect. Along the same lines, prohibiting only conduct that is unprotected by the constitution – for example, obscene speech, defamation, or true threats – would likely resolve the issue.

The legislature could also take a piecemeal approach to narrowing the statute, perhaps by narrowly defining "disturbs" and "meeting," clarifying that only conduct, not speech, is regulated, and removing the "having reasonable grounds to know" phrase that creates criminal liability for negligent acts. This approach may be subject to additional constitutional challenges, and a court may hold that the amended statute is still not narrow enough, but any narrowing of the statute would improve it from a constitutional perspective.

Minnesota Statutes, section 617.247, subdivision 9

Subject: Criminal convictions; Possession of Pornographic Work Involving Minors

Court Opinion: *State v. Overweg*, 914 N.W.2d 410 (Minn. App. 2018) (A17-1978)

Applicable text of section 617.247, subdivision 9:

Notwithstanding the statutory maximum sentence otherwise applicable to the offense or any provision of the sentencing guidelines, when a court commits a person to the custody of the commissioner of corrections for violating this section, the court shall provide that after the person has been released from prison, the commissioner shall place the person on conditional release for five years. If the person has previously been convicted of a violation of this section, section 609.342, 609.343, 609.344, 609.345, 609.3451, 609.3453, or 617.246, or any similar statute of the United States, this state, or any state, the commissioner shall place the person on conditional release for ten years. The terms of conditional release are governed by section 609.3455, subdivision 8.

Statutory Issue:

Does "has previously been convicted" require that the conviction occur before the commission of the present offense, or does it only require the conviction occur before the sentencing of the present offense?

Facts:

Everett Overweg committed a child pornography offense in June 2009. He was not convicted of this offense until October 9, 2012. Between the time of the 2009 offense and the 2012 conviction, Overweg committed criminal sexual conduct (CSC) – specifically on August 13, 2009. The court convicted Overweg of the CSC offense after a probation violation, stayed the imposition of sentence, and placed him on supervised probation. Then, on January 9, 2012, the court revoked probation after another violation and executed Overweg's sentence.

When Overweg was convicted and sentenced for the child pornography offence in October 2012, the court imposed a ten-year conditional-release term based on Minnesota Statutes, section 617.247, subdivision 9, which provides that if a person has been previously convicted of certain offenses, including CSC, a ten-year conditional release term is mandatory. Overweg moved the district court for a sentence correction, arguing the ten-year conditional-release term was unlawful. The court denied the motion and an appeal followed.

Discussion:

The parties agreed that Overweg committed the child-pornography offense before he committed the second-degree CSC offense. They also agreed that Overweg was convicted of the second-degree CSC offense before he was sentenced for the child-pornography offense. The parties disagree as to the meaning of the phrase "has been previously convicted."

Overweg argued that "has been previously convicted" refers to "qualifying offenses for which an offender was convicted and sentenced before the commission of the" offense for which the court is imposing a sentence. The state, on the other hand, put forth that the sentencing court must consider any qualifying

offenses that occurred before the sentencing date, even if the qualifying offense occurred after the commission of the offence for which the court is imposing a sentence.

The court sided with Overweg, reversing the district court ruling. The court started by examining the language "has previously been convicted" and determined that the plain and ordinary meaning was not ambiguous on its face. However, the phrase was temporally ambiguous, as it did not specify at what point the conviction must have occurred to satisfy the statute. The court thus concluded that each interpretation brought forth by the parties were reasonable, holding the statute ambiguous.

To resolve the ambiguity, the court employed the *in pari materia* canon, where the court analyzes an ambiguous statute by looking at statutes with common purposes and subject matter. Here, the court turned to Minnesota Statutes, section 609.3455, subdivision 1, paragraph (f), which defines "previous sex offense conviction" as a conviction where "qualifying offenses for which an offender was convicted and sentenced before the commission of the present offense."

Given that both section 617.247 and section 609.3455 "impose, for different related criminal-sexual-conduct offenses, mandatory conditional-release terms," the court applied the definition of "previous sex offense conviction" to "has previously been convicted" to resolve the ambiguity. It then sided with Overweg and held that the ten-year conditional-release term only applied if the qualifying offense occurred before the commission of the present offense.

The court did not explicitly suggest a remedy to the deficiency, other than to note that the statute did not have a definition for "has previously been convicted." However, given the lack of temporal clarity in the statute, along with the court's conclusion that it is ambiguous, the legislature may want to consider amending the statute to clarify at what point in time a qualifying conviction satisfies the clause "has been previously convicted."

Actions Taken –

The Minnesota Legislature recently responded to two statutory deficiencies raised by Minnesota appellate courts.

1. *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016) (A15-0076), *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016) (A13-0931)

   In *State v. Thompson,* the Minnesota Supreme Court held that Minnesota Statutes, section 169A.20, subdivision 2, which permits prosecution of an individual for refusing a warrantless blood or urine test, is unconstitutional under the Fourth Amendment. The legislature responded in Laws 2017, chapter 83, article 2, section 2, by requiring a search warrant for chemical testing of a person's blood or urine for intoxication.

2. *Fay v. Dep't of Emp't & Econ. Dev.*, 860 N.W.2d 385 (Minn. Ct. App. 2015) (A14-1487)

   In *Fay*, the Minnesota Court of Appeals held that the phrase "good cause" is ambiguous in Minnesota Statutes, section 268.085, subdivision 1, clause (7). The court adopted the definition of "good cause" in section 268.105. The legislature responded in Laws 2017, chapter 35, article 2, section 5, by adopting the "good cause" definition used in section 268.105: "a reason that would have prevented a reasonable person acting with due diligence from participating."