REPORT

OF

REVISOR OF STATUTES

****

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT

****

SUBMITTED TO THE LEGISLATURE OF THE STATE OF MINNESOTA

NOVEMBER 1980

Pursuant to Ms 482.09(a)
Biennial Report due 11/15 even years

MINNESOTA LEGISLATURE

REVISOR OF STATUTES
STATE CAPITOL, ROOM 3
ST. PAUL, MINNESOTA 55155
(612) 296-2868

November 15, 1980

The Honorable Edward J. Gearty
President of the Senate

and

The Honorable Fred C. Norton
Speaker of the House of Representatives

State Capitol
St. Paul, MN 55155

Gentlemen:

Minnesota Statutes, Section 482.09 (9) required the Revisor of Statutes to biennially report to the Legislature on statutory changes recommended or statutory deficiencies noted in opinions of the Supreme Court of Minnesota. I am, therefore, pleased to transmit to you our report on opinions issued by the Supreme Court between September 30, 1978 and September 30, 1980.

Respectfully submitted,

Steven C. Cross

Steven C. Cross
Revisor of Statutes

cc: Chairman and Members,
Senate Judiciary Committee

Chairman and Members,
House Judiciary Committee

REPORT OF THE REVISOR OF STATUTES

TO THE

LEGISLATURE OF THE STATE OF MINNESOTA

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT

The Revisor of Statutes respectfully reports to the Legislature of the State of Minnesota, in accordance with Minnesota Statutes, Section 482.09 (9), which provides that the Revisor of Statutes shall:

> "Report to the Legislature by November 15 of each even numbered year any statutory changes recommended or discussed or statutory deficiencies noted in any opinion of the supreme court of Minnesota filed during the two-year period immediately preceding September 30 of the year preceding the year in which the session is held, together with such comment as may be necessary to outline clearly the legislative problem reported."

The opinions of the Supreme Court of Minnesota concerning statutory changes recommended or discussed, or statutory deficiencies noted during the period beginning September 30, 1978, and ending September 30, 1980, together with a statement of the cases and the comment of the court, are set forth on the following pages, in alphabetical order.

TABLE OF CASES

ALLIED STRUCTURAL STEEL CO. v. SPANNAUS

In Allied Structural Steel Co. v. Spannaus, 98 S.Ct. 2716 (June 28, 1978) the U. S. Supreme Court was called upon to pass upon the validity of the pension funding charge imposed by Minnesota Statutes, Chapter 181B upon companies discontinuing operations in Minnesota. Under the Company pension plan, an employee was entitled to a monthly pension payable at age 65, without regard to his length of service. The Private Pension Benefits Act (M.S., Chapter 181B) required payment of a pension funding charge if the pension funds were not sufficient to cover full pensions for all employees who had worked for that employer for at least 10 years. Of the first 11 employees discharged in the process of closing, at least nine had no vested rights under the Company plan, but had worked for the Company 10 years or more. The State thus sought to impose a $181,000 pension funding charge.

The U. S. Supreme Court, upon appeal, reversed a District Court judgment upholding the constitutionality of M. S., Chapter 181B, holding that:

> "The application of the Act to appellant violates the Contract Clause of the Constitution, which provides that 'No state shall *** pass any *** law impairing the obligation of contracts.'" (U.S.Const.Art. I, Sec. 10)

The Court pointed out that the pension plan was an additional or fringe benefit provided for employees and that:

> " *** the company was free to amend or terminate the plan at any time. The company thus had no reason to anticipate that its employees' pension rights could become vested except in accordance with the terms of the plan. *** .

The effect of Minnesota's Private Pension Benefits Protection Act on this contractual obligation was severe. The company was required in 1974 to have made its contributions throughout the pre-1974 life of the plan as if employees' pension rights had vested after 10 years, instead of vesting in accordance with the terms of the plan."

Section 505.14

BATINICH v. HARVEY

Batinich v. Harvey, 277 N.W.2d 355 (March 9, 1979) was an action brought by landowners under Minnesota Statutes, Section 505.14 to vacate or alter a plat in order to void a restrictive covenant contained in a "Plan of Improvement" found in the recorded plat. The District Court entered an order voiding the covenant and other landowners appealed.

The Supreme Court reversed the order of the District Court, holding that while an action under section 505.14 was a permissible means of removing restrictions in a plat, the notice requirements contained in that section was not sufficient to comply with due process.

The Court, quoting the earlier case of Etzler v. Mondale, 266 Minn. 362, 123 N.W.2d 610, stated:

> " *** It is true that under this section provision is made for publication and posting of notice of proceedings to vacate platted areas, but under circumstances such as are presented in this case, in our opinion this method of obtaining service would fall far short of due process under the Fourteenth Amendment of the Federal Constitution as construed by the United States Supreme Court. *** ."

Sections 298.045 - 298.048

BUTLER TACONITE v. ROEMER

In Butler Taconite v. Roemer, 282 N.W.2d 867 (July 6, 1979) companies engaged in the business of mining and producing iron ore brought suit to prevent collection of occupation tax prior to May 1 of the calendar year following the year of mining or production. Article IX of the Omnibus Tax Bill of 1977 (codified as Minnesota Statutes, Sections 298.045 to 298.048) provided that the tax imposed by sections 298.01 to 298.21:

> "shall be paid in four equal installments on the 15th day of March, June, September, and December of the calendar year for which the declaration is required." (298.046, subd. 1)

Minnesota's Constitution, Article X, Section 3, provides in respect to occupation taxes on iron ores or other ores:

> "The tax is due on the first day of May in the calendar year next following the mining or producing."

Referring to the election at which the constitutional provision was adopted, the Supreme Court stated:

> "Although the date of collection of the tax may not have been an issue at the general election, we cannot ignore the presumed intention of the people of this state especially if it is expressed by clear language."

In reversing the District Court order which granted a summary judgment for the Defendant, the Supreme Court held in its syllabus:

> "Article IX of the Omnibus Tax Bill, L. 1977, c. 423, is unconstitutional insofar as it requires collection of the occupation tax prior to May 1 of the calendar year following the year of mining or production."

Laws 1978 Chapter 557

CITY OF ZUMBROTA v. STRAFFORD CO.

City of Zumbrota v. Strafford Co., ... N.W.2d ... (March 21, 1980) arose as a result of the Legislature's passage of Chapter 557 of the 1978 session which purported to grant to the City authority to sell the public square within the City which had been dedicated to public use on a plat filed in 1856.

The Supreme Court upheld the trial court's holding that the City was without authority to sell the property or otherwise terminate or interfere with its use as a public square, stating:

> "That the legislature has by special legislation authorized plaintiff to sell the public square property cannot affect the result in this case because the legislation is unconstitutional. Under Headley (v. City of Northfield, 227 Minn. 458) the public square property must be treated as belonging to the dedicator or its successors in interest. *** . In authorizing plaintiff to sell the public square property, the statute effects a taking of private property without just compensation in violation of Minn. Const. Art. I, §13."

Sections 116F.21, 116F.22

CLOVER LEAF CREAMERY CO. v. STATE

In Clover Leaf Creamery Co. v. State, 289 N.W.2d 79 (Sept. 7, 1979) plaintiffs contended that Laws 1977, c. 268 (codified as Minnesota Statutes, Sections 116F.21 and 116F.22), which declared legislative policy and banned the sale of milk in nonrefillable plastic containers, violated the equal protection clause of the Fourteenth Amendment by creating a classification in which paper containers are to be preserved while plastic nonrefillables are to be banned. The State appealed a finding of the District Court which found the statute unconstitutional.

The Supreme Court affirmed the District Court's finding in an opinion which discussed in detail evidence refuting the legislative declaration that nonrefillable milk containers present solid waste management problems, promote energy waste, and deplete natural resources, and found that:

> " *** we believe that the evidence conclusively demonstrates that the discrimination against plastic nonrefillables is not rationally related to the Acts' objectives."

The Court, with one justice dissenting, concluded its opinion by stating:

> "The evidence is conclusive that paper containers are not environmentally superior to plastic containers.
>
> We hold that the Act violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because it establishes a classification which is not rationally related to a legitimate state interest."

Section 116C.63. Subdivision 4

COOPERATIVE POWER ASS'N v. AASAND

Cooperative Power Ass'n v. Aasand, 286 N.W.2d 697 (Jan. 11, 1980) represented an appeal by the Association from a District Court decision upholding the constitutionality of Minnesota Statutes, Section 116C.63, Subdivision 4, which provides that when a utility condemns right-of-way for a high voltage transmission line:

> "the property owner shall have the option to require the utility to condemn a fee interest in any amount of contiguous land which he owns ***."

The Subdivision goes on to require that the utility

> "divest itself completely of such lands used for farming or capable of being used for farming within five years after the date of acquisition *** ."

The Supreme Court affirmed the District Court order upholding constitutionality of the law as applied "in the case at bar," stating:

> "As written §116C.63, subd. 4 is subject to a construction that could produce bizarre and unjustifiable results; landowners could compel commercially unreasonable acquisitions which, in light of the purpose of the statute, would impose an undue burden on utilities. For §116C.63, subd. 4 to survive review, a requirement of reasonableness must be read into its terms. *** .
>
> By seeking to compel the acquisition of a parcel that is commercially viable, respondents avoid one of the constitutional problems created by the act."

In reference to the divestiture provision requiring that land thus acquired be disposed of within five years, the Court observed:

> "The constitutionality of the divestiture provision is not before us at this time, and we accordingly do not pass on its constitutionality."

The Court concluded its opinion stating:

"In so holding, we alert the legislature to the problems engendered by the current enactment and urge appropriate limitations to the law as now written."

Section 117.195

COUNTY OF FREEBORN v. BRYSON

In County of Freeborn v. Bryson, 294 N.W.2d 851 (July 3, 1980) landowners successfully defended an eminent domain action in the District Court and appealed the Court's refusal to allow them costs and attorney fees under Minnesota Statutes, Section 117.195, which provides for the award of costs and attorney fees only in instances where the proceeding is dismissed by the Court for failure to pay the amount awarded within the time required or where the proceeding is discontinued by the petitioner.

The Supreme Court, in a 5 to 4 decision, affirmed the denial of costs and attorney fees, holding that:

> "Nothing in §117.195 allows for attorneys fees where the proceeding is discontinued by the Court rather than the petitioner, for a reason other than delay in payment of the award."

The Court concluded its opinion by stating:

> "Appellants express a legitimate concern over perceived unfairness in allowing attorneys fees where a condemnor itself chooses to abandon the proceeding but not where the court is the one that stops the condemnation. Such a policy does seem to place a burden on the landowner who successfully challenges a condemnation petition on the basis of the state's interest in the conservation of its natural resources. But, we cannot go beyond the clear limitations of §117.195 or ignore our caveat in Carter, where we noted that even though reform in this area is 'long overdue,' arguments for change must be directed to the legislature, not to the courts."

Section 360.0216

EWERS v. THUNDERBIRD AVIATION, INC.

In Ewers v. Thunderbird Aviation, Inc., 289 N.W.2d 94 (Sept. 7, 1979) a wrongful death action was brought against the aircraft owner for negligence of the renter-pilot which was alleged to have occurred as the plane approached the airport in Denver, Colorado on a flight which originated in Eden Prairie, Minnesota. Plaintiff's claim was based upon Minnesota Statutes, Section 360.0216 which provides:

> "When an aircraft is operated within the airspace above this state or upon the ground surface or waters of this state by a person other than the owner, with the consent of the owner, expressed or implied, the operator shall in case of accident be deemed the agent of the owner of the aircraft in its operation." (Emphasis added.)

The District Court denied Defendant's motion for summary judgment and certified to the Supreme Court the question of whether section 360.0216 imposes vicarious liability on an aircraft owner when the pilot's negligent acts and impact of the aircraft occurred in another state.

The Supreme Court upheld the decision of the District Court and remanded the case for trial, stating:

> "We believe that, contrary to defendant's assertion, the wording of §360.0216 is unclear. *** . The statute refers to the operation of the aircraft within this state, but sets no similar geographical restriction upon the phrase 'in case of accident.' The absence of a territorial limitation on the place in which the accident occurs raises an ambiguity in the statutory phraseology and, accordingly, construction of §360.0216 is proper."

The Court, citing the need for a liberal construction of the statute, then held in a 5-4 decision that:

> "an aircraft is 'operated within *** this state' within the meaning of §360.0216 if it is actually

operated in Minnesota during some point of the ill-fated flight. Since in the instant cases the aircraft in question traveled within Minnesota airspace before they eventually crashed, we affirm the decision of the district court judges and remand for trial."

Section 202A.22, Subdivision 1 (m)

FIFTH CONGRESSIONAL DISTRICT I.R. PARTY v. SPANNAUS

In Fifth Congressional District I.R. Party v. Spannaus, 295 N.W.2d 650 (Aug. 8, 1980) the Party, which had previously followed a practice of endorsing and supporting independent candidates in Minneapolis city council elections, brought an action challenging the constitutionality of Minnesota Statutes, Section 202A.22, Subdivision 1 (m) which requires primary election candidates to file an affidavit stating:

> "(m) If filing for a partisan office as an 'independent' or in any manner indicating he is unaffiliated with a political party as defined in section 10A.01, subdivision 17, that he did not seek, does not intend to seek and will not accept any party's support for his candidacy in that election." (Emphasis added.)

In an opinion affirming a District Court decision holding the statutory provision unconstitutional, the Supreme Court stated:

> "The statute challenged here has the salutary purpose of preventing subterfuge and voter confusion. This goal must be accomplished, however, without restricting the First Amendment right of a truly independent candidate to seek support wherever he or she can find it."

and concluded its opinion by stating:

> " *** the statute not only prescribes qualifications for ballot access but also seeks to control the speech, association and conduct of independent candidates and prospective supporters during the campaign. It thus unconstitutionally restricts First Amendment rights of expression and association. Enforcement of Minn.Stat. §202A.22, subd. 1 (m) is hereby enjoined."

Section 65B.51

HAUGEN v. TOWN OF WALTHAM

In Haugen v. Town of Waltham, 292 N.W.2d 737 (March 28, 1980) appellant recovered a judgment against the Town of Waltham in a negligence action. Three thousand dollars was deducted for future medical expenses pursuant to Minnesota Statutes, Section 65B.51, Subdivision 1, which provides:

> "With respect to a cause of action in negligence accruing as a result of injury arising out of the operation, ownership, maintenance or use of a motor vehicle with respect to which security has been provided as required by sections 65B.41 to 65B.71, there shall be deducted from any recovery of the value of basic or optional economic loss benefits paid or payable or which will be payable in the future, or which would be payable but for any applicable deductible." (Emphasis added.)

The Supreme Court reversed the order of the trial court and refused to allow the deduction of future medical expenses, citing Article 1, Section 8 of the Minnesota Constitution, which provides that:

> "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws."

In denying the deduction in this case and also refusing to enforce the deduction requirement in future cases, the Court concluded:

> " *** while the language of the statute comports with the stated legislative purposes of preventing double recovery, the lack of feasible, constitutionally permissible legislative enactments establishing guidelines for the effective administration of the proposed deduction preclude the courts from the literal enforcement of the statute. To allow the deduction from the verdict in this case would infringe on constitutionally protected rights of the successful litigant. Further, the lack of guidelines makes the

application of the deduction inequitable and unjust upon successful litigants. The provisions of Minn. Stat. §65B.51 as to the deduction of future economic loss benefits shall be unenforceable pending further legislative enactments relating to this subject matter."

Section 260.031, Subdivision 4

IN RE WELFARE OF M.A.P.

In Re Welfare of M.A.P., 281 N.W.2d 334, (April 27, 1979) was an appeal by the State from a decision of the Hennepin County Juvenile Court affirming a referee's recommendation that a 14 year old juvenile accused of several serious crimes not be referred for trial as an adult. The Supreme Court dismissed the appeal because it was not filed until after the 30-day period specified by law had expired.

Having disposed of the appeal on the basis that it was not timely, the Court proceeded to discuss the inability of the State to appeal to the Juvenile Court from the findings and recommendations of the referee. The Court stated:

> "We also want to express our concern respecting the state's inability to appeal to the juvenile court judge from the referee's determination. Under Minn.St.260.031, subd. 4, only the minor and certain specified others are entitled to a hearing by the juvenile court judge on the referee's recommendation; the statute does not entitle the state to such a hearing."

After discussing the merits of allowing an appeal by the State, the Court concluded by stating:

> "Given these compelling justifications, we believe the legislature should consider amending the statute."

Section 590.01

KELSEY v. STATE

Kelsey v. State, 283 N.W.2d 892 (August 3, 1979) was a habeas corpus action in which petitioner sought release primarily on the ground that the corrections board acted unlawfully in denying his parole. The District Court dismissed his petition on the grounds that a decision to grant or deny parole is a matter that rests in the discretion of the corrections board and is not subject to review by habeas corpus.

The Supreme Court reversed the District Court order, holding that:

> " *** in the absence of an amendment to the post-conviction remedy act to permit that remedy to be used for this purpose, habeas corpus is the most appropriate remedy."

The Court cited A.B.A. standards recommending that the post-conviction remedy (M.S. Chapter 590) should be:

> "unitary and comprehensive, encompassing all claims, including a claim of illegality of custody based on a judgment of conviction."

but found that:

> "The Minnesota statute, however, does not clearly provide for the availability of post-conviction relief to challenge the fairness of procedures used in denying parole."

Section 466.05 (M.S. 1971)

KOSSAK v. STALLING

In Kossak v. Stalling, 277 N.W.2d 30 (March 2, 1979)

Plaintiff sued Defendant and the City of Duluth for injuries sustained in an auto accident with a vehicle operated by Defendant and owned by Defendant's employer, the city. Minnesota Statutes 1971, Section 466.05, in effect at the time, provided that no action for damages could be maintained against a municipality unless (1) notice of claim was given within 30 days of the alleged loss, and (2) suit was commenced within one year after notice. No notice of claim was given and suit was not commenced until just over four years after the accident. Defendant city's motion to dismiss for noncompliance with section 466.05 was granted. Plaintiff appealed.

The Supreme Court reversed the dismissal, disposing of the notice requirement by holding that actual notice was substantial compliance with the statute. In regard to the 1-year limit on commencement of the suit, the court held that this requirement:

> "draws a distinction between municipal and private tortfeasors and consequently distinguishes between victims of governmental and nongovernmental wrongdoers."

The Court found that this distinction is not rationally related to any legitimate governmental function, and concluded its opinion by stating that:

> "the 1-year commencement of suit requirement contained in Minn.St.1971§466.05, is invalid as a denial of equal protection of the laws." (U.S. Const. Amend. XIV, Sec. 1)

In a footnote to the opinion the Court stated that:

> "plaintiff's negligence claim is subject to the usual 6-year limitation period provided for in Minn.St.

541.05 subd. 1(5)."

At the time Kossak was decided, the Court noted that Minnesota Statutes 1971, Section 466.05 had been amended. In fact it had been amended twice. Laws 1974, Chapter 311, Section 1 exempted actions based upon the operation of municipally owned motor vehicles from the notice requirement. Since the 1-year suit requirement was tied to the date of notice, it is possible that the 1-year suit requirement was also eliminated. Regardless of the effect of the 1974 amendment however, Laws 1976, Chapter 264, Section 5 appears to have revived defect stated in Kossak by imposing a 2-year limitation measured from the date of the accident.

Section 238.07

MINN. CABLE COMMUNICATIONS v. MINN. CABLE BOARD

In Minnesota Cable Communications Ass'n Inc. v. Minnesota Cable Communications Board, 288 N.W.2d 721 (Feb. 15, 1980) the Association challenged the constitutionality of Minnesota Statutes, Section 238.07 which provided for financing of the Board's regulatory activities by the levy of a fee against each cable communications company "according to an equitable formula."

The statute went on to provide that:

> "in no case shall the amount collected pursuant to this section diminish the amount collected by any municipality from the cable communications company."

Federal regulations prohibited combined state and municipal franchise fees in excess of five percent of gross revenue. Since six municipalities levied the maximum franchise fee, the companies operating therein were not assessed any state fee. The burden of the state fee thus fell upon the remaining 106 companies.

In reversing a District Court decision upholding the constitutionality of the law, the Court stated:

> "The legislature may legitimately seek to promote revenue-raising measures of the municipalities, but it should not do so by imposing on only some cable communications companies the cost of regulatory activities enjoyed by all."

The Court stated that by so doing, Minnesota Statutes, Section 238.07,

> "violates the uniformity of taxation requirement, Article X, §1, of the Minnesota Constitution."

In explaining its failure to apply the severability doctrine, the Court concluded:

> "Ordinarily we seek to preserve the remainder of a

statutory scheme by severing the unconstitutional part, in this case that clause of Minn.Stat.§238.07 which assures that the amount collected by the state will not diminish the amount collected by any municipality. Here, however, we find that severance is not possible on the facts and circumstances of this case, where any relief we could grant would defeat the legislative intent or violate federal law. We therefore strike down §238.07 in its entirety."

Section 15.0413, Subdivision 1

MINNESOTA-DAKOTAS RETAIL HARDWARE ASS'N. v. STATE

In Minnesota-Dakotas Retail Hardware Ass'n. v. State, 279 N.W.2d 360 (May 11, 1979) the Supreme Court upheld the validity of certain rules which had been adopted by the Consumer Services section of the Department of Commerce for the enforcement of Minnesota Statutes, Sections 325.78 and 325.79, but found that the rules did not have the force and effect of law because they were only "interpretative rules."

The rules in question were adopted pursuant to authority contained in Section 45.16, Subdivision 2, which provides that the Consumer Services section may:

> "(b) Enforce the provisions of law relating to consumer fraud and unlawful practices in connection therewith as set forth in sections 325.78 and 325.79 *** .
>
> Adopt pursuant to the administrative procedures act, rules and regulations to implement the provisions of this section."

Sections 325.78 and 325.79 contained no rule making powers.

Minnesota Statutes, Section 15.0411, subdivision 3, defines a "rule" as:

> " *** every agency statement of general applicability and future effect *** made to implement or make specific the law enforced or administered by it."

Section 15.0413, Subdivision 1, provides that:

> "Every rule approved by the attorney general and filed in the office of the secretary of state as provided in section 15.0412 shall have the force and effect of law *** ." (Emphasis added.)

The Court found that all A.P.A. procedures had been followed and that the scope of the rules were within the authority granted. However, the Court held that because the

rules were "interpretative" according to theories in other jurisdictions, they did not have the force and effect of law, thus apparently establishing two categories of rules even in view of the language of Section 15.0413, Subdivision 1.

Thus by defining two types of rules--the "legislative" rule which has the force and effect of law, and the "interpretative" rule which does not--the Court has, in effect, lent an air of uncertainty to the status of future and possibly also existing rules. The Legislature thus may wish to consider either adopting a definition of "interpretative" rules or reinforcing with appropriate language the present wording of Section 15.0413, Subdivision 1, to specify that all rules have the force and effect of law.

Section 352E.04(e)

ONDLER'S DEPENDENTS v. PEACE OFFICERS BENEFIT FUND

In Ondler's Dependents v. Peace Officers Benefit Fund, 289 N.W.2d 486 (Jan. 4, 1980) the dependents of a firefighter who died of a heart attack while fighting a fire appealed from a decision of the Workers' Compensation Court of Appeals denying benefits from the peace officers benefit fund on the basis of Minnesota Statutes, Section 352E.04(e), which provides that:

> "(e) *** . For the purpose of sections 352E.01 to 352E.045, killed in the line of duty shall not include any peace officer who dies as a result of a heart attack."

The Supreme Court reversed the decision, stating that:

> "A classification which treats one class of persons differently from another must, under even minimal judicial scrutiny, be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that similarly situated persons will be treated alike."

and concluded its opinion by holding that:

> "The only question before us is whether the classification excluding heart attack victims from the workers who will receive the additional death benefits has a rational basis. We hold that it does not. The classification, lacking a rational basis, denies equal protection under the Fourteenth Amendment of the U. S. Constitution and Article I, Section 2 of the Minnesota Constitution."

Section 210A.39

PAVLAK v. GROWE

Pavlak v. Growe, 284 N.W.2d 174 (July 13, 1979) was an original action brought before the Supreme Court in which Relator, who had been excluded from his legislative seat for a "deliberate, serious and material" election law violation, sought an order directing the Secretary of State to accept and file his affidavit of candidacy for the special election to be held to fill the vacancy created by his exclusion. The Secretary of State had refused on the basis of Minnesota Statutes, Section 210A.39, which prohibited a candidate elected to an office and whose election has been annulled or set aside for violation of specified election laws from being appointed or elected to fill any vacancy in that office during that term of office.

The Supreme Court, in granting the order sought, cited the provisions of Article VII, Section 6 of the Minnesota Constitution which provides that:

> "Every person who by the provisions of this article is entitled to vote at any election and is 21 years of age is eligible for any office elective by the people in the district wherein he has resided 30 days previous to the election, except as otherwise provided in this constitution, or the constitution and law of the United States."

The Court, after noting that Relator also met the qualifications for the office of representative set forth in Article IV, Section 6, held that:

> "It is obvious then that Mr. Pavlak possesses all of the constitutional qualifications necessary for candidacy in the special election. If he is nonetheless precluded from running by statute, it can only be because Minn.St.210A.39 creates an additional qualification for the office, i.e., that the person

otherwise qualified shall not have violated the Fair Campaign Practices Act in a prior campaign for the same term of office. It is our conclusion that this additional qualification directly contradicts the guarantee of universal eligibility found at Article VII, Section 6, and cannot stand."

Chapter 176

ROBIN v. ROYAL IMPROVEMENT COMPANY

In Robin v. Royal Improvement Company, 289 N.W.2d 76 (August 17, 1979) an employer sought apportionment of temporary total and permanent partial workers' compensation disability benefits among former employers of a worker who had spent some 18 years working for various employers as a siding applicator, resulting in his contracting the occupational disease of asbestosis.

The Supreme Court affirmed the judgment of the Workers' Compensation Court of Appeals which denied apportionment upon the grounds that inasmuch as the 1973 Legislature had seen fit to repeal Minnesota Statutes 1971, Section 176.66, Subdivision 5 which formerly authorized apportionment, neither the former statute nor the case law would permit apportionment in this case.

The Court stated that:

> "We have chosen to write an opinion primarily for the purpose of addressing a significant problem in the occupational disease area of workers' compensation."

and reiterated its statement in an earlier case of Wallace v. Hanson Silo Co., 305 Minn. 395, 235 N.W.2d 363 that:

> "In adhering to the rule that we will not apportion disabilities in the absence of statutory authority, we deem it appropriate to call to the attention of the legislature what may be a highly inequitable omission from the statute." (Emphasis added.)

Section 609.341, Subdivision 11

STATE v. TIBBETTS

In State v. Tibbetts, 281 N.W.2d 499 (July 6, 1979) Defendant was convicted of criminal sexual conduct in the fourth degree in a trial in which the Court's charge to the jury included the language of Minnesota Statutes, Section 609.341, Subdivision 11, which defined "sexual contact" as including:

> "Any of the following acts committed without the complainant's consent, if the acts can reasonably be construed as being for the purpose of satisfying the actor's sexual or aggressive impulses, except in those cases where consent is not a defense: ***
>
> (i) The intentional touching by the actor of the complainant's intimate parts, *** ." (Emphasis added.)

The Supreme Court, with three justices dissenting, reversed the conviction, stating:

> "We are of the opinion that the charge as given diluted the time-honored rule that in a criminal case the state must prove all facts beyond a reasonable doubt, and accordingly we hold that defendant was denied due process of law and is entitled to a new trial."

This case is included primarily because it represents a very rare, if not unique instance of a case wherein charging the jury in the exact words of the statute provided grounds for reversal. The Court noted that the Minnesota District Judges Association Committee was alert to the constitutional problem which might result from the use of the words "if the acts can reasonably be construed," and had omitted the statutory words from the language of its Minnesota Jury Instruction Guide, and concluded its opinion by stating:

> "The defendant is entitled to a new trial in which the jury is to be instructed that the state has the burden of proving beyond a reasonable doubt that defendant's acts were for the purpose of satisfying his sexual or

> aggressive impulses without including the offensive language to which we have referred." (Emphasis added.)

For a case in which the Court refused to strike down the statute because of the offending language, see State v. Bicknese, 285 N.W.2d 684 (Nov. 16 1979).

Section 268.09, Subdivision 1

STAWIKOWSKI v. COLLINS ELEC. CONST. CO.

In Stawikowski v. Collins Elec. Const. Co., 289 N.W.2d 390 (July 27, 1979) and two related cases consolidated upon appeal, relators were three apprentice electricians whose employment was terminated upon completion of their apprenticeship programs by reason of a seniority provision in a collective bargaining agreement between the union and the electrical contractor's association. Relators filed claims for unemployment compensation benefits, which were denied on the basis that a termination under such circumstances was a voluntary discontinuance under which an individual was disqualified for benefits by Minnesota Statutes, Section 268.09, Subdivision 1.

The Supreme Court affirmed the disqualification, based primarily upon a previous construction of the statute in Anson v. Fisher Amusement Corp., 254 Minn. 93, 93 N.W.2d 815 (1958) and the legislature's failure to act in response to the construction though reenacting the statute without change in the pertinent provisions on several subsequent occasions.

The Court expressed a clear preference for the test of voluntarieness in terminating employment expressed in a 1958 New Jersey case (Campbell Soup Co. v. Board of Review, 13 N.J. 431, 100 A2d 287) under which disqualification for benefits would be:

> "limited to separations where the decision whether to go or stay lay at the time with the worker alone and, even then, only if he left his work without good cause",

but concluded its opinion stating:

> "When a longstanding judicial decision deeply rooted in social and economic considerations is not clearly wrong, we believe our proper role is to outline the

> problem, articulate the judicial view, and refer the matter to the legislature. We therefore exhort the legislature to consider statutory changes in the definition of voluntary discontinuance of employment and provisions governing employer contributions, confident that its resolution will serve the best interests of the public."

The 1979 legislature enacted Chapter 181, Section 11, which amended Minnesota Statutes, Section 268.09, Subdivision 1 to provide, among other things that:

> "An individual shall not be disqualified under clauses (1) and (2) of this subdivision under any of the following conditions:
>
> (f) The individual is separated from employment due to the completion of an apprenticeship program, or segment thereof, approved pursuant to chapter 178."

The amendment was effective May 25, 1979, some two months prior to the decision of the Court in the Stawikowski case, but was not mentioned in the decision.

The Stawikowski case is included in this report only to illustrate the continuing pattern of alternating judicial and legislative expansion of the "constructive voluntary quit rule". For an excellent chronology of this expansion, see Loftus v. Legionville School Safety Patrol Training Center, ... N.W.2d ... (June 20, 1980). It would appear that if the legislature were to adopt a test of voluntarieness similar to the New Jersey test cited with approval in Stawikowski, the need for a host of specific provisos and exceptions in Section 268.09, Subdivision 1 might be eliminated or greatly reduced.