STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,
Plaintiff,

v.

FREEMAN ALGOT WICKLUND, et al.,
Defendant.

FILE # 96 04-2987
96 04-4022
96 04-3061
96 04-3228

ORDER

These defendants are charged with trespassing as a result of their protest at the Mall of America in support of animal rights.

I. Procedural History.

This litigation has a fair claim to having one of the most remarkable procedural histories on record. It began with a motion by the defendants to dismiss, on the theory their conduct was protected speech.

l. I denied this defense motion.

2. The state appealed.

This bears repeating, (for this is real life, not satire): I denied the defendant's motion and the state appealed (being unable, as a colleague of mine trenchantly observed, to take yes for an answer.)

3. The Court of Appeals correctly concluded that the order was not appealable, not only because the appellant had won, but because the "ruling" appealed from could have no critical impact upon the prosecution in the trial to come; it could have no effect at all.

4. I had, before denying the motion to dismiss, reflected upon the constitutional question and delivered myself of certain obiter dicta, the crux of which was the rather simple (and, at least to me, obvious and scarcely debatable) proposition that when the people of Minnesota contribute through enforced taxation a very large sum of money to enable private persons to erect a commercial property, they (the people) are entitled to expect that their Constitutional rights, more particularly their right to free speech, will be respected on that property. As it turned out the dictum was debatable. But it was nevertheless dictum, the harmless musings of a lowly district judge. The Supreme Court (otherwise so properly unwilling to decide non-issues or to promulgate advisory opinions) apparently misunderstood the nature of the dictum, (for which I, as its

apparently insufficiently lucid author, am no doubt to blame), decided these remarks were "critical" to the case, and directed the Court of Appeals to hear the appeal (no doubt to that court‘s surprise and displeasure).

The law heretofore had been that: 1) appellate courts would not issue advisory opinions, see *State v. Arens*, 586 N.W.2d. 131 (Minn.1998); or 2) consider moot issues; or 3) decide constitutional questions if they can be avoided; and 4) the state‘s pre-trial right to appeal should be strictly and narrowly construed. See *City v. Harrer*, 381 N.W.2d 499 (Minn. App. 1986). Compare *State v. Thoma*, 571 N.W.2d 773 (Minn. 1997), holding that a sentencing hearing is "pre-trial".

Now, by virtue of the present case, it appears the state may appeal from a moot pre-trial dictum, and thereby elicit an advisory constitutional opinion.

5. The Court of Appeals reversed. (What they "reversed" is not obvious. In the normal course of things, reversal of the denial of a motion to dismiss would mean that the motion should have been granted. But we are not here involved in the normal course of things.)

6. The Supreme Court granted review and a year later affirmed. (Again it is unclear, or normally would be, what is affirmed: The reversal of the denial of the motion to dismiss? No, apparently it affirmed the disapproval of my dictum.)

7. So the case now returns for trial.

The parties stipulated that the earlier record could be considered, and brief additional evidence was taken.

II. The Opinions Above.

I am naturally bound by the result reached by my superiors on the Supreme Court, and I do not propose to disobey it. But because the opinion misrepresents, both affirmatively and by omission, what I wrote, and because my unimportant dictum has now been transformed into law (contrary law, but law nevertheless), on a surpassingly important subject, as a matter of personal privilege I shall allow myself a few corrective observations.

Whether a small group of protesters (of any persuasion) have the freedom to speak at the Mall of America is in itself of singularly little importance, except to them and to some merchants. But the method by which courts, who are or should be subservient always to the Constitution, and who are joined in a partnership with two other equal branches of government, and who are the mere hired help of the people of this state -- the method by which these courts decide such a question is crucial. This is manifest here, because as I have said something very important has been made of nothing (law, Constitutional law at that, from dictum.)

It is an elementary and salutary principle of jurisprudence that appellate courts should wherever

possible avoid the decision of Constitutional questions. In *State v. Hoyt*, 304 N.W.2d 884, 888 (Minn. 1981), (a case involving a claim of free speech rights on private property!), for example, the same Supreme Court (different personnel, but the same court), refused to discuss the Constitutional question because, it said, "We do not decide constitutional questions except when necessary to do so in order to dispose of the case at bar."

Although my order expressed a Constitutional belief, and how I arrived at it, it made no ruling upon the right to free speech (and if it had, it would have been of no precedential force). The Supreme Court in this case, however, has appropriated a trial judge's unessential opinion as a vehicle to render a constitutional decision. It has, in other words, created a constitutional confrontation where no justiciable controversy existed. It has not merely disagreed with my views and scolded me for them; it has made new (constitutional) law where none was called for. (Had I granted the motion to dismiss on constitutional grounds, of course, the prosecution would have been quite justified in appealing and the Supreme Court would have had a justiciable issue before it.)

What is more, in doing this the court misrepresented my order and impugned my scholarship, leaving the impression that my reflections upon the Constitution were not only incorrect but casually, carelessly and superficially achieved. But an attack on a judge's scholarship should at least embody some honest scholarship itself, should at least reveal that careful attention was paid to what is being attacked. A reading of the opinion suggests, however, that the Supreme Court either did not read my order at all (relying perhaps on the Court of Appeals‘s opinion instead), or at best read it carelessly.

This is suggested by several lapses. It says, for example, that I attached to my findings "57 General Principles of State Constitutional Construction." This is simply wrong. Actually there were seven such principles. The other fifty numbered paragraphs were clearly labeled in capital letters – "SOME HISTORY," and "PRINCIPLES AND HISTORY APPLIED TO THE EVIDENCE”. Apparently not a single judge on the Court or a single clerk read the order with even the slight attention that would have avoided a howler such as this. Is it important in itself? Of course not; but one hopes those judges read statutes, precedents, briefs, and especially constitutions, with more care than that. It is important to me, though, because the erroneous and rather contemptuous reference to "57 General Principles" suggests that I did not look beyond mere generalities and into the history of the Constitution and the particulars of this case in arriving at my conclusions. (The opinion as reported also misspells my name.)

The Supreme Court says the Court of Appeals reversed my order "based on the patent lack of support" for my conclusion that the Minnesota free speech protection is broader than the federal. But the Court of Appeals said no such thing; this is simply the Supreme Court's gratuitous interpolated vilipendency. In fact the Court of Appeals treated my order rather respectfully, acknowledging both the support for it and criticism of the contrary view in the authorities.

The Supreme Court also says of my order: "Absent here is any rationale" for a different reading of

the different Minnesota language. On the contrary, my order consists of about fifty pages of authority-based rationale; it may have been wrong or insufficient, or unpalatable to the Supreme Court, but it is simply false to claim it is not there.

Had they read my order, the judges would have found this rationale:

l. The Minnesota framers considered and rejected the language of the federal First Amendment.

2. They deliberately chose instead language that is very different and much broader and more affirmative protection of speech. (I analyzed the constitutional debates in detail to demonstrate these points.)

3. The First Amendment merely forbids Congress to abridge speech; a negative formulation. The Minnesota version insists affirmatively that "all persons may freely speak, write and publish their sentiments on all subjects." The courts above are unable to see any difference, or any significance, in this remarkable, obvious and radical reformulation.

4. Since the Minnesota language is undeniably very different, it must mean something different, or the drafters engaged in a futile and meaningless exercise.

5. Since, furthermore, the state may grant greater but not less freedom of speech that the First Amendment does, the only possible conclusion is that this provision does precisely that. (How much greater, and in what specific circumstances, are, of course, quite other matters. But it is absurd and disingenuous to say the Minnesota clause does not provide different and greater protection.)

6. The Minnesota Constitution, as I pointed out, was drafted in the turmoil approaching the civil war, when states’s rights and individual liberties were very much an issue.

7. The Minnesota drafters were chary of the danger of using public funds for private purposes, as I also demonstrated, a concern memorialized in the many provisions of Articles X, XI and XII (as now numbered). For example: "The legislature shall pass no local or special law . . . creating private corporations, or amending, renewing or extending the charters thereof," or " granting to any private corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever, or authorizing public taxation for a private purpose." (Article XII, Section l.) Yet here we have taxation benefitting a private corporation and, the Supreme Court says, this may extend to a 100% subsidy with no constitutional consequence (in the sense at issue here, that the public contribution would carry with it the duty to respect the rights so assiduously protected elsewhere in the Constitution). (The fur trade was a particular concern to the Minnesota founders, as I also showed).

8. I examined the speech-protecting clauses of all state constitutions pre-dating Minnesota's and analyzed them to show that the Minnesota language is among the broadest and most protective.

Now, these points individually or jointly may not underlie an irresistible rationale for the conclusion I reached, but it is false and unfair to say that I offered no rationale.

Let us consider the Supreme Court's "rationale" for its conclusion that there is no difference between the very different federal and state provisions.

The Court says there is "no historical basis" for distinguishing the state from the federal constitution, and that a "brief historical journey" supports this conclusion. "Brief" is the operative word -- the "journey" is a mere unscenic paragraph or two leading not at all to the destination the court arrives at, i.e. that there is "no historical basis" for reading the state free speech provision more broadly than the federal. But there is. The less abbreviated historical review in my order covered about twenty pages.

In refusing to give the Minnesota Constitution its own meaning, the Court relies on the principle that it should not reject federal construction of "similar federal provisions" merely "because one prefers the opposite result." Of course. The whole point here, however, is that the federal provision is not at all similar. (See below for cases where that court did precisely what it condemns here: reached a different preferred result from similar language.)

A constitutional issue arises in a state court almost always in one of the following situations:

1) Under a state provision that is identical or virtually so to a federal provision.

2) Where there is a federal but no state provision at all on the point.

3) Where there is a state provision, but no federal one.

4) Where, as here, the state provision is significantly and deliberately different from the federal language.

In the first two situations the state court should naturally and properly read deferentially the federal courts's construction of the federal language and depart from it only rarely and for compelling, carefully formulated, and clearly articulated reasons. The court should place a heavy burden of persuasion upon anyone who sponsors a divergent reading, not only out of respect for the federal founders and the United States Supreme Court, but for the Minnesota founders who intentionally copied the federal language.

In the other two situations, however, the problem and the task are entirely different, indeed opposite. The state provision being different from the federal, the court should ask: Why? Why did the Minnesota drafters reject the federal version? Why did they adopt this language? Why did they choose these particular words rather than others? What did (and do) these specific, particular words mean? What in the circumstances of the drafting and the history of the state led to this eccentricity? And – most importantly – the burden is then not to show why the state version

should be read differently (for it is different), buy why it should be read the same as the different federal words.

The Minnesota Supreme Court said, not long ago, in *State v. Hamm*, 423 N.W.2d 379, 382 (Minn. 1988):

> It is important to remember that we sit today in our role as the highest court of the State of Minnesota interpreting our own constitution, framed and ratified by the people of this state. While a decision of the United States Supreme Court interpreting an identical provision of the federal Constitution may be persuasive, it should not be automatically followed or our separate constitution will be of little value.

Yes; and of no value at all if we follow federal construction of a provision that is not identical as in this case.

In my order I spent many pages seeking answers to these questions. The answers I arrived at were wrong according to the reviewing courts, and that is easy enough to accept. The anomaly is that although by definition and the operation of stare decisis the Supreme Court gave the "right" answer, it answered the wrong question. To paraphrase that splendid thinker, Walt Kelly‘s Pogo Possum, the court gave a good answer to the wrong question. *Pogo Comics*, No. 2, P. 7 (1953).

The way the question is framed is important, for it will define and distribute the burdens of persuasion and often predispose one toward a certain answer.

Indeed, and ironically, the Court then notes ("admits" is perhaps the better word) that it departed from the federal law of privacy in the *Gomez* case, (and departed with a vengeance) , finding a constitutional basis for public funding of abortions; it does not admit, though, that neither the federal nor the Minnesota Constitution even has a privacy provision. It then cites *Friedman*, where it created a remarkable "limited" right to counsel for implied-consent suspects, an extraordinary imaginative interpolation found neither in the state nor the federal constitution, but construing an identical state provision in a way radically different from the federal construction. It cites *In re E.D.J.*, where it also departed from the federal construction of identical language relating to seizures. It cites *State v. Russell*, where it departed from federal equal protection law, creating greater protection for certain accused drug offenders, even though the Minnesota Constitution has no equal protection clause, and the fourteenth federal amendment specifically applies the doctrine to the states. And so on.

The point here is not that any of these decisions is in itself right or wrong, good or bad. It is rather to suggest the lack of consistency and intellectual discipline in the court's approach to the state Constitution. On the one hand, where it "prefers opposite result" it departs from the United States Supreme Court's reading of language identical to Minnesota’s. In some cases it does so where the language is only in the federal constitution, with none in Minnesota’s. It sometimes overtly betrays its slippage from the Constitutional anchorage as when it quotes from the *Gomez* abortion

decision which it justified by this state's "long tradition of affording persons on the periphery of society a greater measure of government protection and support than may be available elsewhere." (This reads rather more like a lawyer's argument or a political speech than a judicial opinion; if it contains any guidelines useful to the decision of actual controversies they escape me. It does not document the "long tradition". But it sounds noble and good.) Each of these decisions was reached despite a "patent lack of support" for a decision unique to Minnesota. They are legislation.

Yet when (as here) the Minnesota Constitution contains language that is manifestly and deliberately different from the federal counterpart, where in fact the federal version was considered and rejected by the drafters, the court is unable to detect meaning in the discrepancy. It merely stuffs the square peg into the (smaller) round hole. Or, to modify the metaphor: confronted with (say) two superficially identical eagles the task is to illustrate their subtle differences and explain why (if we wish it) the one should have a fate different from the other; but faced with (say) one eagle and one swan, the challenge is to make a sensible case of why they are the same, if that is what we wish. It is equally wrong to begin by refusing to see the differences between the latter, as it is to ignore the similarities in the former. To do either leaves the inescapable impression of priori reasoning directed ineluctably to a pre-determined "preferred" result. The Supreme Court's opinion betrays a lack of interest in, knowledge of, and respect for the Minnesota Constitution. This is odd and unfortunate, since the preservation and protection of that document is that court‘s primary raison d'etre. Mere servility to federal construction of an inapposite and utterly different federal provision is poor jurisprudence.

The Court, apparently thinking it was meaningful (or sensing that it is the easy way out of a difficult dilemma) quoted this paragraph from the Court of Appeals opinion (emphasis in the original):

> We are aware also of the uncertainties created by the trial courts application of free speech rights to an undetermined class of properties that are privately-owned but publicly-funded, at least in cart. If the "state action" requirement is discarded, it is difficult to formulate a principled line between those privately-owned locations in which constitutional free speech guarantees should apply and those where they should not.

Now, to this, the pivotal passage in both opinions, several things must be said in reply.

First: Yes, perhaps the described task is "difficult." It is dispiriting, however, to hear these courts justifying a refusal to act because to do so might be "difficult." Now and then (or so I had imagined) the nature of a judge‘s job can be expected to involve some difficulty. Had I known that difficulty was an obstacle it should not have undertaken an analysis even I could see would not be entirely simple; and I certainly would not have made a decision that lay a "difficult" problem on the desks of my superiors.

Second: The despised difficulty here, these judges say, is in "drawing a line." But drawing lines is

precisely what judges are regularly called upon to do. Especially in construing Constitutions, which in their natures consist for the most part of terse general principles (establishment of religion, freedom of speech, peaceable assembly, redress of grievances, the right to keep and bear arms, unreasonable searches and seizures, probable cause, double jeopardy, due process, just compensation, speedy and public trial, confrontation excessive bail, excessive fines, enumerated and unenumerated rights, privileges and immunities, equal protection of the laws, freedom of conscience -- broad generalizations, every one of them), the judiciary's mission is to draw lines which tell us, when it is not obvious, what act or omission lies or does not lie within one of those grand generalities. So, too, with statutes; judges perforce spend a good deal of their time determining where the legislature meant to draw lines, (legislation too, is largely the drawing of lines), for if the line cannot be clearly discerned in the law as written judges must draw it by searching out legislative intent. For a judge to refuse to draw lines is to refuse to be a judge.

Holmes said: "The great body of the law consists in drawing such lines, yet when you realize that you are dealing with matters of degree you must realize that reasonable men may differ widely as to the place where the line should be at all." *Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1920). Frankfurter said: "In law, as in life, lines must be drawn. But the fact that a line has to be drawn somewhere does not justify its being drawn anywhere. The line must follow some direction of policy, whether rooted in logic or experience." *Pearce v. Commissioner of Internal Revenue*, 315 U.S. 354, 558 (1942). The Minnesota Supreme Court says, however, that it will not draw lines if it is "difficult" to do so.

Third: In any event, and ironically, the opinions above did draw a line. They did not draw it where l would have, but they just as surely drew it. My order said that wherever the line might be drawn in other situations, $186,000,000 of public money in a $700,000,000 commercial property, which invites the public in to make a profit, placed this shopping mall on the public side of the line for the narrow purpose of obliging the beneficiary of the public contribution to respect the constitutional rights of the taxpayers who made that donation and thus made the mall possible (and lucrative, though potentially also a complete loss to the taxpayers). The courts above simply moved the line down, or up, depending upon how one views it. They said that no amount of public funding less than 100% (or even 100%) will preserve constitutional rights. The clear import of the opinion, inescapable without craven quibbling, is that the mall would be "private" (for constitutional speech purposes) with one dollar, or for the matter of that one cent, of private money. That is the line they drew.

Fourth: The court says it finds no "state action." If this is correct their decision is more defensible (although unlike the federal constitution, the state version is not limited to proscription upon government infringement of speech). So the question properly becomes: will any degree of public financing by taxpayers‘s money, for the benefit of a private party, be considered "state action," and make the business liable to respect constitutional rights. The court says "no."

lt is, indeed, quite explicit in admitting this:

> lt is conceivable that state action could be found in a project having no public funding at all, and conversely, a project funded entirely by public funding may not sufficiently entangle the "power, property and prestige" of the government to create state action.

This remarkable proposition is alarming for two diametrically opposite reasons: On the one hand, the court says, a purely private project with no state funding may be capable of "state action" and thus subject to constitutional restraint. The court does not say how such an entity could be created or what it would look like or why it would work for the "state" without funding, and it is difficult to imagine, but there it is. On the other hand, the court says, a project funded entirely by state (i.e. public, taxpayers‘s) money may not be considered a "state" entity at all! Neither does the court say how a project created 100% from public money could be said not to entangle the "power, property and prestige" of the government, for constitutional purposes. The mind boggles at both, but it is obvious the court is protecting its flanks here so that in the future in can continue to deal with such questions on an ad hoc basis uninhibited by any troublesome constitutional absolutes, or "lines."

lf, for example, a sports franchise were to create entirely on its own property and from purely private financing a stadium in this state, the Constitution (or more accurately this court‘s current view of it) may call it "public" and extend free speech onto the playing field. If, conversely, the taxpayers were to build the same stadium entirely at public expense but entirely for the fiscal benefit of the private owners, it might be called private and subject to no such protection.

But, the court or its apologists would retort, this is absurd; the court would prevent such absurd results. No doubt it would. How? By drawing lines, of course. Unfortunately this is the very task it has confessed itself unable to do in this context.

The court leaves us and itself with these very helpful and precise standards: Is there a "symbiotic relationship" or a "sufficiently close nexus" between the government entity and the private entity so the "power, property and prestige" of the state are involved?

The court says that for a private entity to be considered capable of "state" action it must be the "alter ego" of the government. What a government "alter ego" is I do not know and the court does not say; but it has an oxymoronic (not to say ominous) ring to it. An elected government, by definition, cannot have an alter ego ("other self"), can it? (Tyrannies can and do, of course.)

The court‘s decisive passage, quoted above, simply begs the pivotal question and substitutes for a real answer the oxymoronic notion of "privately-owned but publicly-funded" entities.

Fifth: The Court says, belittling the protesters's (any protesters’s) mission, that their speech "was not to achieve some political goal such as a ballot initiative." Now there is a characterization of free speech designed to chill the heart of any citizen. Where, in the Minnesota Constitution, does it find protection restricted to "political" matters (the constitution says "all persons may freely speak, write and publish their sentiments on all subjects")? And where did the court learn that

"political" speech is limited to things "such as a ballot initiative"? If that is all that is protected, then the public-private distinction means little anyway, for only "political" speech is free of government inhibition. If that were the federal law (and, it is not) the court should be running away from it. Free speech is not absolute, but the exceptions "are certain well-defined and narrowly limited classes of speech," which may be restricted because of the clear and present dangers they pose. But the Court, accusing me of a lack of "rationale" or "historical" basis, can innocently say something like this. The speech involved here was, in any case, clearly "political" in the Constitutional sense. (That the court has no uniform devotion even to free "political" speech is revealed in the rules it has adopted to hobble the speech of candidates, and thus the chances of non-incumbents, in elections for judicial office.)

As I suggested in my order, a dispute over preservation of free speech at a publicly funded mall does not (or should not) pit left against right, liberal against conservative. It pits government against the individual. The issue arose here because of an animal rights protest, but the constitutional question would be the same if it had been a group protesting, say, an abortion clinic secreted in the recesses of the massive mall, or an office of the Communist or the Nazi party.

The opinion represents a judge-made prior restraint of breath-taking proportions.

The court did not construe the Minnesota Constitution. It amended it, a prerogative normally reserved to the voters. In this and earlier free speech decisions it repealed Article I, Section 3 and replaced it with the federal first amendment.

The public reaction to my order was at once surprising, gratifying, and irritating. I was assaulted with particular vigor by two communicators who are, I believe, properly considered conservative or libertarian spokesmen, D.J. Tice of the St. Paul Pioneer Press and Jason Lewis of KSTP radio. They were outspoken, even intemperate. They were also among the most intelligent, articulate and intellectually involved of all those whose remarks I heard, or heard of. Both displayed an understanding of (federal) constitutional principles (often different from mine, but obviously well-thought-out and clearly deserving of respect), as well as a passionate recognition of the importance of constitutional debate itself. Neither Mr. Tice nor Mr. Lewis is, so far as I know, a lawyer; yet both spoke on the subject more incisively than most lawyers and judges whose observations have come to me. (They both may be fairly suspected of having actually read the Federalist Papers.) I continue to disagree with them, of course, and to believe they both misunderstood the central point I was attempting to make. If they did, it was my fault not theirs, for it is the responsibility of one who speaks on subjects such as this to make himself understood. The central point was that it is important to attempt by vigorous research and systematic thought to determine so far as possible the meaning of a state constitutional provision which differs significantly from its federal counterpart, and what the difference meant to the persons who drafted it.

It is always, I believe, a good thing too rarely found to have intelligent and interested people other than lawyers, judges, and politicians publicly arguing questions such as this -- especially where as

here expenditure of taxpayers‘s money and limitations upon constitutional rights are implicated. These are eminently disputes that should not be left to incumbent government agents. Mr. Tice and Mr. Lewis preform a considerable service by giving these questions popular exposure.

I remain puzzled, however, that two public figures, prominent media personalities with outspoken conservative or libertarian leanings, would not be more troubled than Mr. Tice and Mr. Lewis apparently were by: 1) the enormous transfer of tax money to private parties, with the accompanying risk of loss to taxpayers, together with: 2) the restriction upon the purely political speech of those same taxpayers by the private enterprise they involuntarily financed. And I would have expected them to be more interested in the obvious and quite intentional difference between the state and federal constitutional provisions involved. Government spending, free speech, and state rights would be, I should have thought, of particular importance to them. But perhaps I understood them no better than they understood me. They treated my order, as I understood them, as if it applied to free speech on private property, but that, of course, begs the very question at issue. The question was not whether protesters‘s speech is protected on private property. The question was: Is a property so massively financed by taxpayers "private"? And, if so, why? Or, if not, why not? And, either way, what are the consequences? The debate would have benefitted from the thoughts of such thoughtful people as Mr. Tice and Mr. Lewis on these points. They are proponents of both a free market and free speech, I believe. Yet they appear unconcerned that the Supreme Court has approved a gigantic publicly-financed market place of everything but ideas.

If I continue quixotically to flog this poor horse it is only because, as an incurable optimist, I retain some hope that it is not in fact dead. (An unfortunate metaphor in a case tangentially involving animal rights, I suppose, but it is just as well to anticipate the cliches that are sure to come to mind of those, if any, who read this. See also *Aesop*.)

III. VERDICT

As to the business actually at hand:

FINDINGS OF FACT

1. I incorporate here as if set forth verbatim the stipulated facts as submitted by the parties and the facts found in my previous order.

2. Freeman Wicklund and Peter Eckholdt testified, in addition, in substance that they thought they had a right to demonstrate peacefully at the Mall at a reasonable time and place and in a reasonable manner.

3. Both, however, were "willing" to be arrested and the evidence establishes that in fact they expected to be.

CONCLUSIONS OF LAW

4. There is no right to free speech at the Mall of America. *State v. Wicklund*, 589 N.W.2d 795 (Minn. 1999).

5. The Mall has no obligation to respect on its premises the rights of persons who, on any "non-private" part of Minnesota, could "freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right."

6. There is no occasion here to decide whether the Mall must honor any other constitutional rights of persons on its premises, and the Supreme Court did not address this issue.

7. The defendants asserted and established a prima facie claim of right defense.

8. This was a plausible, good faith claim of right because: l) the language of Article I, Section 3 created a reasonable expectation that such a right existed; 2) there was, at that time, no authority directly to the contrary in Minnesota; 3) there were, on the other hand, decisions in other states recognizing an analogous right, though federal constitutional law was to the contrary.

9. The state therefore must disprove the claim beyond a reasonable doubt. The lack of a claim of right is an essential element of the offense, a prerequisite of the necessary intent. *State v. Brechon*, 352 N.W.2d 745, 750 (Minn. 1984):

> In accordance with our belief, however, that "without claim of right" is integral to the definition of criminal trespass in Minnesota, and adhering to the rule that criminal statutes are to be strictly construed, we hold that "without claim of right" is an element the state must prove beyond a reasonable doubt. Thus, in a criminal trespass case the state must present evidence from which it is reasonable to infer that the defendant has no legal claim of right to be on the premises where the trespass is alleged to have occurred . . .
>
> If the state presents evidence that defendant has no claim of right, the burden then shifts to the defendant who may offer evidence of his reasonable belief that he has a property right, such as that of an owner, tenant, lessee, licensee or invitee .... Subjective reasons not related to a claimed property right or permission are irrelevant and immaterial to the issue of claim of right.

10. A claim of right need not be a claim of title or ownership. *State v. Hoyt*, 304 N .W.2d 884,889. (Minn. 1981): "Express or implied consent -- a license -- to a person from one who has the authority to give such consent is a defense to a charge of criminal trespass."

11. Such a license, to enter the Mall, was clearly given here; the Mall, by its solicitation of customers, invited the defendants and all others onto the premises. Ibid.

12. Such a "license" or invitation can be revoked. Ibid. And here it was revoked by the Mall

security forces, after the demonstration began.

13. The license or invitation to enter the Mall was not a license or invitation to demonstrate or protest.

14. A claim of right may be valid and sufficient even though it is based upon a mistaken belief. *State v. Hoyt*, above.

15. In this case the defendants had a bona fide, good faith and plausible claim of right to be on the Mall premises, and to begin or attempt their protest. The state did not disprove this beyond a reasonable doubt.

16. After they had been informed that they were in violation of the Mall's rules and would have to stop their protest or leave, the claim of right arising from license or invitation was removed by being effectively revoked.

17. The claim of right after that point was limited therefore to the defendants's asserted belief that they had a constitutional right to engage in peaceful, political speech on property heavily subsidized by tax money.

18. The Minnesota Supreme Court has clearly indicated that in Minnesota, despite the broad language of the state constitutional provision, there is no right to free speech on property financed by the taxpayers, at least unless other factors not present here are involved.

19. Until the Supreme Court‘s decision in this case it was entirely reasonable to believe that some right to free speech extended to a commercial property subsidized to the extent this property was by taxpayer money, because of the language of the Minnesota Constitution, and decisions in other jurisdictions.

20. Once the defendants were told they must stop their speech or leave, this belief was weakened; the claim of right to the extent it was based on invitation or license was clearly revoked; the constitutional claim was partially, but not entirely, undermined by the Mall's assertion of authority to forbid the speech.

21. The ultimate question is whether I, as fact-finder in a jury-waived case, have a reasonable doubt; or, conversely stated, whether the state proved beyond a reasonable doubt that the defendants had the requisite criminal intent.

22. Whether the defendants had a constitutional right to make their demonstration (they did not, as the Supreme Court has now established), is an entirely separate question from whether they believed in good faith that they did, and therefore from whether the state proved beyond a reasonable doubt that they had a criminal intent and no claim of right at the time in question.

23. Unlike the Supreme Court, Mall security personnel and city police officers do not have authority to define the scope of a complex constitutional principle of first impression in Minnesota.

24. I find that a reasonable doubt remains as to the element of intent. See *State v. Brechon*, and *State v. Hoyt*, both above.

Not guilty.

IT IS SO ORDERED:
BY THE COURT:

Dated: January 10, 2000
/s/ Jack S. Nordby
Judge of District Court