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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0971
A17-1958

Pro-Life Action Ministries, Incorporated, et al.,
Appellants,

vs.

Regents of the University of Minnesota,
Respondent.

Filed August 20, 2018
Appeals dismissed
Rodenberg, Judge

Hennepin County District Court
File No. 27-CV-16-15359

Erick G. Kaardal, Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota (for appellants)

Douglas R. Peterson, General Counsel, Brian J. Slovut, Deputy General Counsel, Carrie Ryan Gallia, Assistant General Counsel, University of Minnesota, Minneapolis, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Peterson, Judge; and Rodenberg, Judge.

U N P U B L I S H E D   O P I N I O N

RODENBERG, Judge

Appellants challenge the district court's dismissal of their petition for a writ of quo warranto. Appellants argue that the district court erred by (1) dismissing the petition for

lack of taxpayer standing, (2) failing to hold an evidentiary hearing on the question of standing, and (3) denying appellants' rule 60.02(b) motion for relief. Because the purpose of these consolidated appeals was rendered moot by the legislature's 2017 passage of Minn. Stat. § 137.47 (Supp. 2017), we dismiss the appeals.

FACTS

Appellants Pro Life Action Ministries, Incorporated, et al., filed a petition for a writ of quo warranto in district court in October 2016. Appellants alleged that "[t]he University of Minnesota [(the university)][1] is procuring and using human fetal tissue for transplantation research which it cannot do under statutory law." Appellants alleged that the university has a policy entitled, "Procuring and Using Human Fetal Tissue for Transplantation Research," which sets forth the university's policies and procedures for procuring and using fetal tissue in research. Appellants alleged that Minn. Stat. § 145.1621 (2016) prohibits testing of fetal remains except in limited circumstances, none of which are applicable to the university's research. Appellants alleged that the university's policy and any research completed thereunder is therefore unauthorized by law and a misuse of public funds. Appellants claimed standing to pursue the writ as taxpayers challenging the use of public funds because respondent had acted illegally by authorizing the procurement of fetal tissue for research.

Appellants requested a writ of quo warranto to require respondent:

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[1] We distinguish between the university and respondent Regents of the University of Minnesota. For the purposes of this case, references to the former are to the institution of higher education, whereas references to the latter are to the party named in this appeal.

> (1) to show how the University of Minnesota has authority to implement its administrative policy for "procuring and using human fetal tissue for transplantation research" when Minnesota Statute § 145.1621 states that fetal tissue testing is limited to "laboratory tests to those necessary for the health of the woman or her future offspring or for purposes of a criminal investigation or determination of parentage prior to disposing of the remains";
> (2) [t]o show how the University of Minnesota is not violating Minnesota Statute § 145.1621;
> (3) [t]o show how the University of Minnesota's policy to allow the testing of human fetal tissue from out-of-state for transplantation research is not preempted by Minnesota Statute § 145.16[2]1; and
> (4) [t]o show why this Court should not issue a writ enjoining the University of Minnesota's administrative policy for "procuring and using human fetal tissue for transplantation research" as an ongoing violation of Minnesota Statute § 145.1621.

Appellants also requested a hearing on the petition and that the district court issue a writ enjoining the university from procuring and using fetal tissue in research.

Respondent moved to dismiss the petition, arguing that appellants lacked standing to bring a quo warranto action because they "failed to identify a specific disbursement of funds that violates [section 145.1621]" and because taxpayer standing has never been applied to money appropriated by the legislature to a university which is combined with the university's other revenue sources. Respondent also argued that a writ of quo warranto would be inappropriate because section 145.1621 does not provide a private cause of action and only provides criminal penalties, and because writs of quo warranto are not intended to be "employed to test the legality of the official action of public or corporate officers."

After a hearing, the district court granted respondent's motion to dismiss, concluding that appellants do not have standing to petition for a writ of quo warranto. Appellants appealed the dismissal of the petition.

Appellants thereafter requested reconsideration and moved for relief from the judgment, citing newly discovered evidence. The district court denied the motions, concluding that the information contained within the allegedly newly discovered emails could have been discovered earlier with due diligence. Appellants appealed the denial of the relief from judgment, which we consolidated with their earlier appeal.

D E C I S I O N

Appellants argue that the district court erred in dismissing their petition for lack of taxpayer standing. Appellants argue they alleged sufficient facts regarding illegal use of tax funds and illegal action on the part of public officials to establish standing. Appellants argue that, at a minimum, the district court should have held an evidentiary hearing to resolve factual disputes concerning standing, i.e., whether the university is currently spending taxpayer money to procure fetal tissue and whether the university is using fetal tissue in violation of section 145.1621, subdivision 4.

Section 145.1621, subdivision 4, provides,

> Hospitals, clinics, and medical facilities in which abortions are induced or occur spontaneously or accidentally and laboratories to which the remains of human fetuses are delivered must provide for the disposal of the remains by cremation, interment by burial, or in a manner directed by the commissioner of health. The hospital, clinic, medical facility, or laboratory may complete laboratory tests necessary for the health of the woman or her future offspring or for purposes of

> a criminal investigation or determination of parentage prior to disposing of the remains.

Appellants argue that this fetal-disposition statute limits any research on fetal tissue by the university to tests "necessary for the health of the woman or her future offspring or for purposes of a criminal investigation or determination of parentage."

During the pendency of this case, the legislature passed a statute concerning fetal-tissue research conducted at the university. *See* Minn. Stat. § 137.47 (2017). The statute provides:

> A researcher at the University of Minnesota must obtain approval from the [Fetal Tissue Research Committee (FTR)] before conducting research using fetal tissue. The FTR must consider whether alternatives to fetal tissue would be sufficient for the research. If the proposed research involves aborted fetal tissue, the researcher must provide a written narrative justifying the use of aborted fetal tissue and discussing whether alternatives to aborted fetal tissue, including non-aborted fetal tissue, can be used.

Minn. Stat. § 137.47, subd. 2(a). The FTR is defined as "an oversight committee at the University of Minnesota with the responsibility to oversee, review, and approve or deny research using fetal tissue." *Id.*, subd. 1(e). Respondent argues that the passage of section 137.47 renders this appeal moot because the statute permits the university to conduct research on fetal tissue if approval is granted by the FTR.

Whether an appeal is moot is a legal question subject to de novo review. *Dean v. City of Winona*, 868 N.W.2d 1, 4 (Minn. 2015). "[Appellate courts] consider only live controversies, and an appeal will be dismissed as moot when intervening events render a decision on the merits unnecessary or an award of effective relief impossible. But an appeal

is not moot when a party could be afforded effective relief." *Wayzata Nissan, LLC v. Nissan N. Am., Inc.*, 875 N.W.2d 279, 283 (Minn. 2016); *see Sprenger v. Jacobs*, 305 N.W.2d 747, 748 (Minn. 1981) ("It is well settled that if, pending an appeal, an event occurs which makes a decision unnecessary, the appeal will be dismissed as presenting a moot question."). Action by the legislature may render an appeal moot. *See Peterson v. Humphrey*, 381 N.W.2d 472, 475 (Minn. App. 1986) (holding that the legislature's repeal of an act upon which the lawsuit was based rendered the appeal moot), *review denied* (Minn. Apr. 11, 1986).

Under section 137.47, "research" is defined as "systematic investigation, including development, testing, and evaluation, designed to develop or contribute to generalizable knowledge. Research does not include a procedure or test administered to a particular patient by a physician for medical purposes." Minn. Stat. § 137.47, subd. 1(g). Respondent argues that the plain language of section 137.47 permits testing of fetal tissue, and, as the more specific statute concerning research on fetal tissue at the university, it controls over section 145.1621.

Appellants argue that section 137.47 does not render this appeal moot, because it does not "expressly state [that] research is allowed or otherwise expressly preempt or supersede the provisions of Minnesota Statute § 145.1621, subd. 4's prohibitions to 'testing' in laboratories." Appellants also argue that, because the parties continue to dispute standing and the application of the rules of civil procedure to a petition for a writ of quo warranto, the case continues to present a live controversy.

The interplay of the two statutes at issue presents a question of statutory interpretation, which is considered de novo. *Staab v. Diocese of St. Cloud*, 853 N.W.2d 713, 716 (Minn. 2014). The goal of statutory interpretation is to effectuate the intent of the legislature. Minn. Stat. § 645.16 (2016). "If the Legislature's intent is clear from the statute's plain and unambiguous language, then [appellate courts] interpret the statute according to its plain meaning without resorting to the canons of statutory construction." *Linn v. BCBSM, Inc.*, 905 N.W.2d 497, 501 (Minn. 2018) (quotation omitted).

> When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision . . . .

Minn. Stat. § 645.26, subd. 1 (2016). "When the provisions of two or more laws passed at different sessions of the legislature are irreconcilable, the law latest in date of final enactment shall prevail." *Id.*, subd. 4 (2016).

We begin by determining if the laws are in conflict and, if so, whether they may be construed in a way that gives effect to both. Section 145.1621, subdivision 4, requires "laboratories to which the remains of human fetuses are delivered" to dispose of the remains as prescribed. The laboratories may also "complete laboratory tests necessary for the health of the woman or her future offspring or for purposes of a criminal investigation or determination of parentage prior to disposing of the remains." Minn. Stat. § 145.1621, subd. 4. Section 145.1621, subdivision 4, does not explicitly permit any testing or research for other purposes to be conducted on the remains before disposal. The remains to which

the statute applies are defined as "the remains of the dead offspring of a human being that has reached a stage of development so that there are cartilaginous structures, fetal or skeletal parts." *Id.*, subd. 2.

Section 137.47, subdivision 2(a), provides that "research using fetal tissue" at the university is permitted with "approval from the FTR." "The FTR must consider whether alternatives to fetal tissue would be sufficient for the research." Minn. Stat. § 137.47, subd. 2(a). The fetal tissue can be from an elective abortion, a miscarriage, a stillbirth, or "a living unborn child." *Id.*, subd. 1(a), (f). Appellants argue that the statute does not authorize research at the university, and only pertains to reporting requirements that must be provided to the legislature. But section 137.47 clearly contemplates fetal-tissue research to be conducted by the university if certain conditions and procedures are satisfied. Subdivision 2 of the statute cannot sensibly be read as having any other purpose or meaning.

Assuming, but without deciding, that the university's procurement of fetal tissue requires a delivery of the tissue to the university's laboratories and a subsequent disposal of the tissue, the statutes are in conflict. Material that is fetal tissue under section 137.47, subdivision 1(c) could also be "fetal remains" under section 145.1621, subdivision 2, to the extent that the tissue is from an aborted or miscarried fetus that has developed cartilaginous, fetal, or skeletal parts. Under section 145.1621, subdivision 4, testing is permitted if it is "necessary" and relates to the health of the woman or her future offspring, a criminal investigation, or a parentage determination. But research, described in section 137.47, is not limited to testing in those areas described in section 145.1621,

subdivision 4, and there is no requirement under section 137.47 that the testing be "necessary." Rather, the research must be "designed to develop or contribute to generalizable knowledge." *Id.*, subd. 1(g). Therefore, to the extent that the fetal-tissue research conducted under section 137.47 involves tissue from an aborted or miscarried fetus at the stage of cartilaginous or skeletal development, section 145.1621, subdivision 4, if applicable, would limit the type of testing that may be undertaken, and excludes the research contemplated by section 137.47. Because section 137.47 permits research using the same type of fetal tissue described in section 145.1621, despite section 145.1621's limitations on the type of testing that may be completed on those remains, the statutes are in conflict.

Nevertheless, appellants argue that we can construe the two statutes to give effect to both if we construe section 137.47, concerning research conducted on tissues of aborted or miscarried fetuses, to be limited to embryonic tissue—the tissue from the pre-cartilaginous/skeletal stage of development. But section 137.47 does not limit research to the embryonic phase. Rather, fetal tissue includes any part of "an unborn human child," including tissue derived from an aborted or miscarried fetus, and section 137.47 permits research to be conducted using those tissues. *Id.*, subd. 1(b), (c), (f). To place a limit on research based on the embryonic or fetal age of tissue derived from aborted or miscarried fetuses reads an exception into section 137.47 that does not otherwise exist. "We may not add words to a statute that the Legislature has not supplied." *Johnson v. Cook County*, 786 N.W.2d 291, 295 (Minn. 2010); *see also Beardsley v. Garcia*, 753 N.W.2d 735, 740 (Minn.

2008) (declining to interpret a statute so as to "effectively rewrite" it because that prerogative belongs to the legislature).

Likewise, appellants' interpretation that "the university cannot test any type of tissue of any fetus from eight weeks to birth" or during "the *entire spectrum of the post-embryonic stages of fetal development*" based on section 145.1621 would render a portion of section 137.47 ineffective—the portion defining fetal tissue as including tissue derived from stillbirths rather than from aborted or miscarried fetuses. *See id.*, subd. 1(f). We presume that the legislature intends the entirety of a statute to be effective and certain. Minn. Stat. § 645.17(2) (2016). Here, section 137.47 specifically applies to research conducted on tissue derived from all stages of fetal development including from abortions, miscarriages, and stillbirths. Placing a fetal-age limitation on tissue derived from an abortion or miscarriage in order to effectuate section 145.1621 ignores that research still would be permitted on fetuses with skeletal and cartilaginous structures that resulted from a stillbirth. Attempting to give effect to both sections 145.1621 and 137.47 would lead to an absurd result whereby the legislature would permit research to be conducted on fetal tissue derived from stillborn fetuses with skeletal or cartilaginous structures, but would not permit research on fetal tissue derived from miscarried fetuses with the same developmental structures. *See* Minn. Stat. § 645.17(1) (2016) (indicating that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable").[2]

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[2] We note that, in 2017, members of the Minnesota House of Representatives introduced a bill to prohibit the acquisition or use of aborted fetal tissue for research, including research

Because effect cannot be given to both section 145.1621 and section 137.47 without reaching an absurd result, we must determine which statute prevails over the other. Appellants argue that section 145.1621 is more specific because it more specifically describes the fetal remains to which it applies. However, appellants' petition for a writ of quo warranto specifically challenges the university's authority to conduct fetal-tissue research. The legislature has established requirements for fetal-tissue research at the university. Therefore, as the more-specific provision concerning fetal-tissue research at the university, section 137.47 controls concerning such research instead of the more-general section 145.1621. Minn. Stat. § 645.26, subd. 1. Likewise, the legislature passed section 137.47 exactly 30 years after section 145.1621 became law. Because the statutes cannot be read to give effect to both provisions without rendering an absurd result, the newer statute prevails. *Id.*, subd. 4.

Appellants' purpose in pursuing the writ of quo warranto is to require the university to answer how the university's fetal-tissue research is legal in light of the limitations contained within section 145.1621. The legislature's passage of section 137.47 has resolved that question: fetal-tissue research is permitted at the university so long as certain conditions are met and procedures are followed. The purpose of appellants' petition has been satisfied—the legislature has expressly provided the authority whereby the university

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conducted at the university. H.F. 2814 (2017); State of Minnesota, *Journal of the House*, 90th Sess. 7048 (Feb. 20, 2018). No accompanying bill in the Minnesota Senate was introduced during the 2017 legislative session. The introduction of the bill suggests that some members of the house of representatives do not believe that section 145.1621, as currently written, acts as a bar to fetal-tissue research at the university.

may conduct fetal-tissue research. A live controversy on this issue, as framed by appellants, no longer exists. Therefore, a decision by this court concerning whether the district court erred in dismissing the petition for lack of standing or in denying relief from judgment would be unnecessary and we do not address those arguments.

Appeals dismissed.