2000

The Impact of "Exceptional" Statutes on Civil Litigation in Minnesota

Michael K. Steenson

Mitchell Hamline School of Law, mike.steenson@mitchellhamline.edu

Follow this and additional works at: http://open.mitchellhamline.edu/wmlr

Part of the Civil Procedure Commons

Recommended Citation

Available at: http://open.mitchellhamline.edu/wmlr/vol26/iss4/6
The Impact of "Exceptional" Statutes on Civil Litigation in Minnesota

Michael K. Steenson

William Mitchell College of Law, mike.steenson@wmitchell.edu

Publication Information

Repository Citation
http://open.wmitchell.edu/facsch/73

This Article is brought to you for free and open access by Mitchell Open Access. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Mitchell Open Access.
The Impact of "Exceptional" Statutes on Civil Litigation in Minnesota

Abstract
This article examines the treatment of “exceptional” statutes--statutes intended to protect a specific class of persons against their own inability to protect themselves--by the Minnesota appellate courts. After an analysis of the origins of the negligence per se doctrine in Minnesota, the article briefly examines the relationship between negligence per se and common law negligence. Then, following a brief historical background discussion of earlier cases involving exceptional statutes, the article focuses on individual cases in which the exceptional statutes are implicated. The goal of the article is to determine whether the law the supreme court developed has been consistently adhered to by the courts and, if not, whether the deviations have in fact modified the standards used to determine whether a statute will be deemed “exceptional” so as to preclude the assertion of defenses in specific cases.

Keywords
Negligence per se, Minnesota law, exceptional statutes, torts, common law duty, statutory duty, strict liability, absolute liability

Disciplines
Torts
THE IMPACT OF "EXCEPTIONAL" STATUTES ON CIVIL
LITIGATION IN MINNESOTA

Mike Steensont

I. INTRODUCTION ...............................................................865
II. THE ORIGINS OF NEGLIGENCE PER SE IN MINNESOTA ...........866
III. THE RELATIONSHIP BETWEEN COMMON LAW AND
STATUTE ..................................................................................870
IV. EXCEPTIONAL STATUTES ...................................................879
   A. Dart v. Pure Oil Co. ..........................................................884
   B. Zerby v. Warren ...............................................................895
   C. Scott v. Independent School District No. 709 ....................899
   D. Seim v. Garavalia .............................................................904
   E. Thelen v. St. Cloud Hospital ..............................................909
   F. Doe v. Brainerd International Raceway, Inc. .................913
   G. VanWagner v. Mattison ..................................................923
   H. Fahrendorff v. North Homes, Inc. .................................931
V. CONCLUSION ......................................................................934

I. INTRODUCTION

The impact of a statutory violation on civil litigation is
dependent upon several factors. In general, statutes may be
broadly divided into two categories: statutes that provide an express
remedy for their violation or imply the existence of a remedy; and
those that do not. If a statute does not expressly or impliedly
provide a remedy, the primary issue in civil litigation is whether the
statute will establish a standard for civil litigation so that the
statutory violation will be deemed negligence per se, or if the
statute is insufficiently related to a common law duty, provide
inspiration for a change in the common law.

If the statutory standard fits within accepted common law duty
concepts, the violation may be treated as negligence per se, or no
worse than evidence of negligence, if two requirements are met.

† Margaret H. and James E. Kelley Professor of Law, William Mitchell
College of Law.
First, the statute must be intended to protect a class of people of which the plaintiff is a member; and second, the plaintiff must suffer an injury the statute was intended to avoid.

Generally, in cases where the violation of a statute is negligence, the party who violates the statute may be entitled to assert various defenses, including the contributory negligence or secondary assumption of the risk of the party who is injured by the statutory violation. The violating party also may be entitled to assert other excuses or justifications as a defense. Whether the violating party is entitled to assert those defenses depends broadly on a court's perception of the legislative intent underlying the statute.

If a statute is intended to protect a specific class of persons against their own inability to protect themselves, a court may decide that the defenses of contributory negligence and assumption of risk are inconsistent with the statutory obligation of the defendant and hold that those defenses are unavailable. A violation of these so-called "exceptional" statutes, as they have been characterized by the Minnesota Supreme Court, will result in the imposition of a form of strict or absolute liability on the violating party. However, determining when a court will anoint a statute with "exceptional" status is far from clear.

The purpose of this article is to examine the treatment of these "exceptional" statutes by the Minnesota appellate courts. After an analysis of the origins of the negligence per se doctrine in Minnesota, the article briefly examines the relationship between negligence per se and common law negligence. Then, following a brief historical background discussion of earlier cases involving exceptional statutes, the article focuses on individual cases in which the exceptional statutes are implicated. The goal of the article is to determine whether the law the supreme court developed has been consistently adhered to by the courts and, if not, whether the deviations have in fact modified the standards used to determine whether a statute will be deemed "exceptional" so as to preclude the assertion of defenses in specific cases.

II. THE ORIGINS OF NEGLIGENCE PER SE IN MINNESOTA

The "negligence per se" doctrine made an early appearance in

1. See infra Parts II and III.
2. See infra Part IV.
Minnesota cases, not in connection with a statutory violation, but as part of an argument that a municipality owed an absolute and unconditional duty to guard against obstructions on streets. The term surfaced in connection with statutory violations in a series of railroad accident cases, beginning with Fleming v. The St. Paul & Duluth Railroad Co. The railroads' liability in those cases turned on their failure to meet the statutory standards requiring cattle guards and fences at wagon crossings. The effect of a statutory violation, as characterized by the court in Fleming, was to make the railroad negligent per se, and liable for all damages caused by its statutory violation. While the statute provided a remedy for its violation, the court's analysis of the statute makes it clear that the legislative intent underlying the statute is the key to determining whether it applies in a given set of circumstances.

By the time the supreme court decided Bott v. Pratt in 1885, the negligence per se concept had been sketched out. Bott was injured when an unattended and untied team of horses attached to a wagon loaded with wood ran away and collided with the plaintiff's wagon, injuring him. The trial judge in the case charged the jury based on the following St. Paul city ordinance:

It shall not hereafter be lawful for any teamster or driver or owner, or any person, having in charge any team attached to any vehicle within the city of St. Paul, to leave the same standing in or along any public street in said city without being securely hitched or fastened, or without

3. See Cleveland v. City of St. Paul, 18 Minn. 255, 261-62 (1872) (holding that the City of St. Paul was liable for injuries caused by obstructions in a prominent city street that were so "open, notorious, and dangerous" that the city officials should have known of their existence and protected travelers against them).
4. 27 Minn. 111, 113, 6 N.W. 448, 449 (1880).
5. See id. at 112-13, 6 N.W. at 448-49.
6. See id. at 114, 6 N.W. at 450. Fleming was a fireman employed by the railroad. See id. He was killed on the job. See id. The supreme court held that the legislative intent was not to include railroad employees within the scope of its protection. See id. There are several other examples. For example, in Savage v. Chicago, Milwaukee & St. Paul R.R. Co., 31 Minn. 419, 420-21, 18 N.W. 272, 272 (1884), the court said that "[t]he omission to fence is negligence per se, and the company is made 'liable for all damages sustained by any person in consequence of such failure or neglect.'"
7. See Fleming, 27 Minn. at 111, 6 N.W. at 450.
8. 33 Minn. 323, 23 N.W. 237 (1885).
9. See id. at 324, 23 N.W. at 237.
being held by some one securely. 10

The trial judge instructed the jury that if the horses were left unattended, and in consequence injured the plaintiff, the plaintiff's case against the defendant would be established. 11 The defendants argued that they should be allowed to show that the horses were gentle and had not run away before. 12 The court said the jury could consider such evidence in an ordinary negligence action, but not in this case. 13 In effect, the charge was one of negligence per se. The violation was unexcused "because, in view of the language and purpose of the charter and ordinance, it is manifestly no sufficient excuse that the horses were believed to be gentle, and not vicious, and had never been known to run away." 14

The court applied a statutory purpose analysis to determine the impact of the statute on civil litigation:

Wherever a statute creates a duty or an obligation, then, though it has not in express terms given a remedy, the remedy which is by law properly applicable to that obligation follows as an incident... But whether a liability arising from the breach of a statutory duty accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character, must depend upon the nature of the duty enjoined, and the benefits to be derived from its performance. 15

The duty imposed by the ordinance was not one owed to the public at large or to the municipality, but rather was intended for the benefit of persons traveling the streets. 16 The remedy for the violation is the right to recover for the damages flowing from the violation. 17

Four years later the supreme court, in an opinion by Justice

10. Id.
11. See id. at 325, 23 N.W. at 237-38.
12. See id. at 325, 23 N.W. at 237.
13. See id. at 325, 23 N.W. at 237-38.
14. Id. at 325, 23 N.W. at 237.
15. Id. at 326, 23 N.W. at 238.
16. See id. at 327, 23 N.W. at 239.
17. See id.
Mitchell, decided Osborne v. McMasters, 18 a wrongful death case involving the sale of deadly poison without so labeling it as required by statute by a clerk in the defendant's drugstore. 19 The court relied on Bott in its detailed explanation of the doctrine of negligence per se:

It is now well settled, certainly in this state, that where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately produced by such neglect.... Defendant contends that this is only true where a right of action for the alleged negligent act existed at common law; that no liability existed at common law for selling poison without labeling it, and therefore none exists under this statute, no right of civil action being given by it. Without stopping to consider the correctness of the assumption that selling poison without labeling it might not be actionable negligence at common law, it is sufficient to say that, in our opinion, defendant's contention proceeds upon an entire misapprehension of the nature and gist of a cause of action of this kind. The common law gives a right of action to every one sustaining injuries caused proximately by the negligence of another. The present is a common-law action, the gist of which is defendant's negligence, resulting in the death of plaintiff's intestate. Negligence is the breach of legal duty. It is immaterial whether the duty is one imposed by the rule of common law requiring the exercise of ordinary care not to injure another, or is imposed by a statute designed for the protection of others. In either case the failure to perform the duty constitutes negligence, and renders the party liable for injuries resulting from it. The only difference is that in the one case the measure of legal duty is to be determined upon common-law principles, while in the other the statute fixes it, so that the violation of the statute constitutes conclusive evidence of negligence, or, in other words, negligence per se. The action in the latter case is

18. 40 Minn. 103, 41 N.W. 543 (1889).
19. See id. at 104, 41 N.W. at 543.
not a statutory one, nor does the statute give the right of action in any other sense, except that it makes an act negligent which otherwise might not be such, or at least only evidence of negligence. All that the statute does is to establish a fixed standard by which the fact of negligence may be determined. The gist of the action is still negligence, or the nonperformance of a legal duty to the person injured.\textsuperscript{20}

_Osborne_ examined the relationship of a statutory violation to negligence law. The gist of the plaintiff's action was common law negligence.\textsuperscript{21} The defendant argued that it could not be held civilly liable because there was no parallel common law action that applied to the circumstances.\textsuperscript{22} The court responded that "[n]egligence is the breach of legal duty," and that it makes no difference "whether the duty is one imposed by the rule of common law requiring the exercise of ordinary care not to injure another, or is imposed by a statute designed for the protection of others."\textsuperscript{23} The statute fixed the standard of care in _Osborne_, but it also had an impact on the court's understanding of the defendant's "common law" obligation.

Understanding the relationship between common law and statute is critical in determining when a statutory violation will be negligence per se. The next section examines that issue in more detail as a predicate to an analysis of when a statutory violation will not only be negligence per se but will preclude the assertion of certain defenses by the defendant.

III. THE RELATIONSHIP BETWEEN COMMON LAW AND STATUTE

The rationale for much of the recent law governing the impact of statutory violations in civil litigation is based on _Bruegger v. Faribault County Sheriff's Department_,\textsuperscript{24} which involved a suit against the sheriff's department because of its failure to inform the plaintiffs of their right to claim benefits under the Crime Victims Reparations Act (CVRA).\textsuperscript{25} In deciding whether the CVRA

\begin{itemize}
  \item \textsuperscript{20} _Id._ at 104-05, 41 N.W. at 543-44.
  \item \textsuperscript{21} See _id._ at 105, 41 N.W. at 543.
  \item \textsuperscript{22} See _id_.
  \item \textsuperscript{23} _Id._ at 105, 41 N.W. at 543-44.
  \item \textsuperscript{24} 497 N.W.2d 260 (Minn. 1993).
  \item \textsuperscript{25} See _id._ at 261; see also MINN. STAT. §§ 611A.51–.68 (1988).
\end{itemize}
provided a private cause of action for the notification failure, the
supreme court tied the negligence per se doctrine to the existence
of a common law duty.26 To better understand Bruegger, it is
necessary to analyze Lorshbough v. Township of Buzzle,27 the primary
case upon which the Bruegger court relied. Lorshbough involved a
county’s failure to enforce certain state pollution control
regulations governing solid waste disposal.28 The disposal site
caught fire, causing a forest fire that destroyed the plaintiffs’
personal and real property.29 The plaintiffs’ negligence action was
based on the defendant’s violation of the statutes and regulations.30
The court first repeated the familiar refrain that “[a]n unexcused
violation of a statute that establishes a standard of care is
negligence, and liability is the consequence if proximate causation
is proved.”31 That was the critical issue on appeal.

Of course, in determining whether statutes and regulations
provide the appropriate standard of care in a negligence case, the
plaintiff must belong to the class of persons the legislature
intended to protect when it enacted the statute.32 Much of the
Lorshbough opinion was devoted to an analysis of the application
of the public duty doctrine, which precludes imposition of liability on
the basis of a statutory violation when the statute is intended for the
general public’s protection.33 The plaintiffs argued that the public
duty doctrine was inapplicable to the case because the county
officers had actual knowledge of the danger to the plaintiffs’
property.34

The court discussed the broader public duty principle, but
adopted the exception in its discussion of the case:

It may be possible to distinguish the recent cases finding a

26. See Bruegger, 497 N.W.2d at 262.
27. 258 N.W.2d 96 (Minn. 1977).
28. See id. at 97.
29. See id.
30. See id. (discussing the defendant's failure to comply with Minnesota
Statutes section 400.06 and regulations promulgated by the Pollution Control
Agency regarding solid waste disposal).
31. Id. at 98.
32. See id.
33. See id. at 99-102. See, e.g., Hoffert v. Owatonna Inn Towne Motel, Inc., 293
Minn. 220, 222-23, 199 N.W.2d 158, 160 (1972) (holding that a city was not liable
to individuals when it issued a building permit designed to protect the general
public).
34. See Lorshbough, 258 N.W.2d at 99.
governmental duty owing to individual plaintiffs, but such distinctions are too fine to persuade us to reject the principle derived from those cases. The principle is that a governmental unit owes a particular individual a duty of care when its officer or agent, in a position and with authority to act, has or should have had knowledge of a condition that violates safety standards prescribed by statute or regulation, and that presents a risk of serious harm to the individual or his property. When such serious injury is reasonably foreseeable, the governmental unit has a duty to exercise reasonable care for the individual’s safety.

We need not embrace the principle in full to decide the instant case. The county officers had actual knowledge of a condition that seriously endangered plaintiff’s property. Moreover, the condition existed on property maintained by the government in providing a service to the public. In both respects, the present circumstances impose a greater responsibility on the government than did the situation in *Hoffert*. We hold that defendants could have owed plaintiffs individually a duty of care where they had actual knowledge of a condition that violated PCA regulations, threatened a risk of serious harm to plaintiffs, and arose from property maintained by the government as a dumping site for the public.35

The court held that the regulations, although designed in part to protect the general public, were also intended to protect people living near solid waste disposal sites:

Since county officials had actual knowledge of the risk of serious harm that foreseeably threatened plaintiffs and were in a position and had the authority to abate the risk, the duty imposed by the statute and regulations was actionable.36

In *Bruegger*, a four-year-old was sexually assaulted by his cousin over a period of ten months.37 Eventually, he told his mother about

35. *Id.* at 102.
36. *Id.* at 103.
37. *See* Bruegger v. Faribault County Sheriff’s Dep’t, 497 N.W.2d 260, 260 (Minn. 1993).
the abuse, notwithstanding his cousin’s threats that the cousin
would kill the child if he told. The child’s mother scheduled an
appointment with a therapist three days after she learned of the
abuse, but the child was involved in a near-fatal car accident that
prevented him from meeting with the therapist. Faribault County
authorities were notified of the abuse three days after the mother
learned of it. Following the child’s discharge from the hospital, a
sheriff’s department employee interviewed the child about the
sexual assaults. At no time did anyone from the sheriff’s
department tell the child’s parents about the Crime Victims
Reparations Act (CVRA). The CVRA provides a means for crime
victims to obtain compensation for economic losses that result from
their injuries. The issue in the case was whether the CVRA creates
a private cause of action against law enforcement officials who fail
to inform crime victims of their rights under the Act.

The CVRA requires claims to be filed within one year of the
victim’s injury or death. The child’s family, however, did not learn
of the CVRA until more than a year after the last sexual assault.
Their claim under the CVRA was therefore denied. The claim
against the Faribault County Sheriff’s Department was based on a
statute that requires law enforcement agencies investigating crimes
to provide persons potentially eligible to file claims with the
necessary forms and to inform them of their rights under the
CVRA.

The plaintiffs based their argument on the supreme court’s
opinion in *Lorshbough* and the familiar principle that an unexcused
violation of a statute that establishes a standard of care is
negligence. The supreme court rejected the parallel, because it read “*Lorshbough* as stating that where an underlying common law
cause of action exists, a statutory enactment could establish a

38. *See id.*
40. *See id.* at 261.
41. *See id.*
42. *See id.; see also* MINN. STAT. §§ 611A.51-68 (1988).
43. *See* Bruegger, 497 N.W.2d at 261.
44. *See id.* at 260.
45. *See MINN. STAT. § 611A.53, subd. 2(d) (1988).
46. *See Bruegger*, 497 N.W.2d at 261.
47. *See id.*
49. *See Bruegger*, 497 N.W.2d at 261.
standard of care in a negligence action.\textsuperscript{50} The court coupled that theme with the statutory presumption in favor of common law supremacy where statutory intrusion threatens common law:

In \textit{Lorshbough}, absent the statute, Beltrami County would still have been subject to suit in common law negligence because of its failure to properly maintain the dump, thereby allowing the forest fire to develop. Instead of creating a new cause of action for improper maintenance of public property causing damage to neighboring plaintiffs, the statute merely established the standard of care to be applied for public bodies charged with the duty of maintaining township dumps.

In this case, no common law duty required the sheriff's department to inform the Brueggers of their potential rights of recovery under the CVRA. The requirement to inform did not arise until the enactment of the CVRA. We note that the CVRA does not provide for civil liability for a law enforcement agency's failure to inform citizens of their potential rights to recover under the act. In the absence of such civil liability, we decline to speculate as to whether the legislature intended to impose civil liability in tort under the CVRA. Principles of judicial restraint preclude us from creating a new statutory cause of action that does not exist at common law where the legislature has not either by the statute's express terms or by implication provided for civil tort liability . . . .

Here, there was no underlying common law cause of action for negligence on the part of law enforcement agencies that fail to inform crime victims of their potential rights of recovery under the CVRA. Nor does the CVRA, by its express terms or by implication, create a statutory cause of action for such failure to inform. Because there was no common law cause of action and because the legislature failed to expressly or impliedly create a statutory cause of action, we hold that no cause of action against the Faribault County Sheriff's Department exists under Minn. Stat. § 611A.66.\textsuperscript{51}

The \textit{Bruegger} court cited its earlier decision in \textit{Agassiz \& Odessa}

\begin{itemize}
\item \textsuperscript{50} \textit{Id.} at 262.
\item \textsuperscript{51} \textit{Id.} (citations omitted).
\end{itemize}
Mutual Fire Insurance Co. v. Magnusson,\textsuperscript{52} for the proposition that "[p]rinciples of judicial restraint preclude us from creating a new statutory cause of action that does not exist at common law where the legislature has not either by the statute's express terms or by implication provided for civil tort liability."\textsuperscript{53}

Agassiz involved a suit by several township mutual fire insurance companies who were licensed under Minnesota law, to enjoin the commissioner of insurance from taking any action against the plaintiffs pursuant to an order the commissioner had issued requiring the plaintiffs to terminate certain reinsurance contracts the plaintiffs had with other companies.\textsuperscript{54} The plaintiffs argued that they had "an inherent right at common law" and an "implied right" under the Minnesota statutes governing reinsurance to enter into reinsurance agreements with any reinsurance company licensed to do business in Minnesota.\textsuperscript{55} The supreme court concluded that there was no indication of a legislative intent to act in derogation of the common law:

Careful research has failed to reveal any statutory provisions . . . which manifest a legislative intent to restrict or derogate the common-law right of township mutual fire insurance companies to reinsure their risks, or to preempt the field of reinsurance with respect to these companies. Likewise, we have found nothing which would manifest a legislative intent that a foreign insurance company licensed to conduct an insurance business in Minnesota would be prohibited by statute from reinsuring the risks of township mutual fire insurance companies. Had the legislature intended such limitations or prohibitions . . . it seems certain that it would have used language therein clearly expressive of such intent. Ordinarily statutes are presumed not to alter or modify the common law unless they expressly so provide . . . .\textsuperscript{56}

The judicial canon of statutory construction that statutes in derogation of the common law will be strictly construed has two edges. One edge may be used to cut off legislative attempts to

\textsuperscript{52} 272 Minn. 156, 136 N.W.2d 861 (1965).
\textsuperscript{53} Bruegger, 497 N.W.2d at 262.
\textsuperscript{54} See Agassiz, 272 Minn. at 159, 136 N.W.2d at 864.
\textsuperscript{55} See id. at 162, 136 N.W.2d at 866.
\textsuperscript{56} Id. at 166, 136 N.W.2d at 868.
restrict prevailing common law rules. The other, if rigidly applied, may have the effect of inhibiting common law expansion by cutting off use of the statute as a factor in determining whether a common rule should be expanded, as a matter of policy.

Bruegger is now commonly cited for the proposition that a statute may not be used to support a negligence per se claim unless there is an underlying common law duty owed by the defendant to the plaintiff. The use of the second edge of the canon has become a potentially congestive factor in negligence per se analysis.

The issue that arises in understanding the relationship between common law and statute in the negligence per se context is whether a statute may impact a court’s view of common law duty rules, even if a court finds that there is no implied remedy for the statutory violation and even if the negligence per se doctrine is inapplicable. A rigid analysis of the issue might negate any expansion of the common law rule to accommodate the statutory obligation. In some respects, the rigid analysis may preclude an appropriate policy analysis that could support common law expansion of duty rules. 57

A recent Texas Supreme Court decision, Perry v. S.N., 58 applied a flexible analysis in deciding whether a violation of the Texas Family Code provisions requiring the reporting of child abuse was negligence per se in a law suit arising out of the abuse of children at a child care center. 59 The claim was made against defendants who allegedly witnessed abuse at the child care center, but failed to report it as the Texas Family Code requires. 60 Prior to the

57. The court has always been ready to expand the common law where policy justified the change. The court’s early decision in Purcell v. St. Paul City Railway Co., 48 Minn. 134, 50 N.W. 1034 (1892), adopting a zone of danger rule for emotional distress claims, was forward-looking. In Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949), the court held that a wrongful death action could be brought for the death of a stillborn child when the injury occurred after the child’s viability. In McCormack v. Hanksraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967), the court adopted strict liability in products liability cases. In Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1972), the court held that a single duty of reasonable care was owed to persons previously classified as invitees and licensees under owners and occupiers’ duties law. In Erickson v. Curtis Investment Co., 447 N.W.2d 165 (Minn. 1989), the court imposed a duty on owners or operators of parking ramps where assaults of patrons are foreseeable. There are many other decisions, of course, but the simple point is that the court has been flexible in its approach to torts cases, depending on the issue involved.

58. 973 S.W.2d 301 (Tex. 1998).

59. See id. at 302.

60. See id. The Texas Family Code reporting provision reads: “A person
enactment of the reporting provision, Texas did not require the reporting of child abuse. The law made it a misdemeanor to fail to report an offense “if the person has cause to believe that a child’s physical or mental health or welfare has been or may be adversely affected by abuse or neglect and knowingly fails to report as provided in this chapter.”

In answering the issue, the Perry court analyzed the relationship between common law and statute:

We first consider the fact that, absent a change in the common law, a negligence per se cause of action against these defendants would derive the element of duty solely from the Family Code. At common law there is generally no duty to protect another from the criminal acts of a third party or to come to the aid of another in distress. . . . Although there are exceptions to this no-duty rule, . . . this case does not fall within any of the established exceptions, and [the plaintiffs] have not asked this Court to impose on persons who are aware of child abuse a new common law duty to report it or take other protective action.

In contrast, the defendant in most negligence per se cases already owes the plaintiff a pre-existing common law duty to act as a reasonably prudent person, so that the statute’s role is merely to define more precisely what conduct breaches that duty. . . . For example, the overwhelming majority of this Court’s negligence per se cases have involved violations of traffic statutes by drivers and train operators—actors who already owed a common law duty to exercise reasonable care toward others on the road or track . . . .

When a statute criminalizes conduct that is also governed by a common law duty, as in the case of a traffic regulation, applying negligence per se causes no great change in the law because violating the statutory standard of conduct would usually also be negligence under a common law reasonableness standard. . . . But recognizing a new, purely statutory duty “can have an

having cause to believe that a child’s physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter.” TEX. FAM. CODE ANN. § 261.101(a) (West 1999).

61. TEX. FAM. CODE ANN. § 261.109 (a), (b).
extreme effect upon the common law of negligence" when it allows a cause of action where the common law would not. . . . In such a situation, applying negligence per se "bring[s] into existence a new type of tort liability. . . ." The change tends to be especially great when, as here, the statute criminalizes inaction rather than action. . . .

The Perry court also noted that the term "negligence per se" might be inapplicable in cases where there is no common law duty as a base for the claim, but the court applied a flexible analysis in determining whether to apply the negligence per se concept. The court noted several relevant factors to consider in determining whether the negligence per se concept applies: (1) whether the prohibited or required conduct is clearly defined in the statute; (2) whether applying negligence per se to the reporting requirement would result in the imposition of liability without fault; and (3) whether negligence per se would impose ruinous liability disproportionate to the seriousness of the defendant's conduct. The court also looked to the issue of whether the injury resulted directly or only indirectly from the statutory violation. Applying these factors, the court concluded that violation of the reporting statute is not negligence per se:

In summary, we have considered the following factors regarding the application of negligence per se to the Family Code's child abuse reporting provision: (1) whether the statute is the sole source of any tort duty from the defendant to the plaintiff or merely supplies a standard of conduct for an existing common law duty; (2) whether the statute puts the public on notice by clearly defining the required conduct; (3) whether the statute would impose liability without fault; (4) whether negligence per se would result in ruinous damages disproportionate to the seriousness of the statutory violation, particularly if the liability would fall on a broad and wide range of collateral wrongdoers; and (5) whether the plaintiff's injury is a direct or indirect result of the

62. Perry, 973 S.W.2d at 306 (citations omitted).
63. See id.
64. See id. at 307-08.
65. See id. at 308.
violation of the statute. Because a decision to impose negligence per se could not be limited to cases charging serious misconduct like the one at bar, but rather would impose immense potential liability under an ill-defined standard on a broad class of individuals whose relationship to the abuse was extremely indirect, we hold that it is not appropriate to adopt Family Code section 261.109(a) as establishing a duty and standard of conduct in tort.66

Perry is one example of the use of a flexible analysis to make the determination of the applicability of the statutory standard. The lack of a common law foundation for the negligence per se claim is not dispositive of the issue. While the court reached a conclusion that is at least roughly parallel to the Bruegger court's, it relied on a policy analysis that could prompt a different result in other cases, whereas a rigid analysis would not.

IV. EXCEPTIONAL STATUTES

While Osborne stated that a statutory violation such as the one involved in that case is conclusive evidence of negligence, or negligence per se, the court was not required to deal with the impact of excuses, justifications, or defenses to the statute.67 Bott stated that certain excuses were not permissible involving runaway horses, but simply in the context of stating that the defenses were inconsistent with the perceived purpose of the ordinance in that case.68 Other Minnesota Supreme Court cases, however, dealt both with the permissible excuses or justifications for a statutory violation, as well as the impact of a statutory violation on the violating party's right to assert contributory negligence and assumption of risk defenses.69

66. Id. at 300.
67. See Osborne v. McMasters, 40 Minn. 103, 105, 41 N.W. 543, 544 (1889).
68. See Bott v. Pratt, 33 Minn. 323, 323, 23 N.W. 237, 237 (1885).
69. See, e.g., Mayes v. Byers, 214 Minn. 54, 60, 7 N.W.2d 403, 406 (1943) (determining that the defendant's violation of a city ordinance prohibited the use of the contributory negligence defense); Suey v. Arrowhead Steel Prod. Co., 180 Minn. 21, 22, 230 N.W. 125, 126 (1930) (recognizing that the defense of assumption of risk is not permitted in a case involving the violation of a statute intended to protect a group of individuals); Dusha v. Virginia & Rainy Lake Co., 145 Minn. 171, 172-73, 176 N.W. 482, 482-83 (1920) (holding that the employer could not raise contributory negligence and assumption of risk as defenses against a claim brought by an underage sawmill employee).
In general, the Minnesota Supreme Court took the clear position that the doctrine of negligence per se in no way altered the defenses that would be available to a party violating the statute, even in cases involving the breach of a statute that could be interpreted as intended to protect a specific class of persons. As the court stated in *Anderson v. C.N. Nelson Lumber Co.*, the fact that a duty is imposed by statute does not change the rules of law as to contributory negligence or to assumption of risks, unless there is some provision in the statute clearly expressing or implying an intention to do so. Eight years later the plaintiff in a lumber factory accident involving a violation of a guarding statute argued for a change in the rule. The supreme court rejected the argument.

The law began to change in *Dusha v. Virginia & Rainy Lake Co.*, a 1920 Minnesota Supreme Court decision. The decedent, who was under sixteen, was working at the defendant’s sawmill, in violation of a Minnesota statute that prohibited the employment of children under that age without parental permission. Violation of the statute was a misdemeanor. The court considered not only the purpose of the statute, but also the impact of the statute on the defendant’s right to assert the contributory negligence or assumption of the risk of the child as a defense:

The purpose of the statute is to protect children in life and limb by prohibiting their employment in dangerous occupations where because of their immaturity they are likely inappreciative of risks and prone to be careless and heedless. So the statute altogether prohibits their employment and makes it a misdemeanor. A very great weight of authority establishes the doctrine that an

---

70. *See Mayes*, 214 Minn. at 60, 7 N.W.2d at 406; *Suess*, 180 Minn. at 22, 230 N.W. at 126; *Dusha*, 145 Minn. at 172-73, 176 N.W. at 482-83.
71. 67 Minn. 79, 69 N.W. 630 (1896).
72. *Id.* at 82, 69 N.W. at 632 (noting that the defendant violated statute requiring guarding of saws; plaintiff was injured while working on an unguarded saw).
74. *See id.* (stating that previous consideration of the statute in question determined that it did not change the common law rules as to contributory negligence and assumption of risk).
75. 145 Minn. 171, 176 N.W. 482 (1920).
76. *See id.*
77. *See id.*
employer who violates such a statute cannot assert contributory negligence nor the assumption of risks as a defense.

The statute makes the forbidden employment a misdemeanor. It establishes the definite policy of the state upon one phase of child labor. The employer must not employ about dangerous machinery boys under 16. We hold in harmony with the holdings elsewhere that contributory negligence and assumption of risks are not defenses open to the employer.

The law in Anderson was turned around in Suess v. Arrowhead Steel Products Co., in 1930, but not without significant changes in the legal relationship between employer and employee. Suess involved the same issue as Anderson. The plaintiff alleged that his health was damaged through his work as a superintendent and inspector of the defendant's factory. The plaintiff complained that his damages were due to the noise, dust, and vapors in the factory, in violation of a Minnesota statute requiring an employer to provide employees with properly ventilated work space. The issue was whether the plaintiff's assumption of the risk barred his recovery. The supreme court noted that the weight of authority recognized that the defense of assumption of risk is not permitted in a case involving the violation of a statute intended to protect employees.

The court noted a string of Minnesota decisions holding that assumption of risk is a permissible defense in cases involving the violation of statutes intended for the specific protection of employees. However, noting that its last case involving the issue was decided in 1909, and the intervening alterations in the legal fabric covering employer-employee relationships, the court

78. Id. at 172-73, 176 N.W. at 482-83 (citations omitted).
79. 180 Minn. 21, 230 N.W. 125 (1930).
80. See id. at 22, 230 N.W. at 126 (determining whether the doctrine of assumption of risk applies in cases involving employer violation of a statute enacted to protect employees).
81. See id.
82. See id.
83. See id.
84. See id.
85. See id. (citing Seely v. Fernhart, 104 Minn. 354, 116 N.W. 648 (1908), Swenson v. Osgood & Blodgett Mfg. Co., 91 Minn. 509, 98 N.W. 645 (1904), and Anderson v. C.N. Nelson Lumber Co., 67 Minn. 79, 69 N.W. 630 (1896)).
concluded that the rule should be changed:

Since then there have been many marked changes in industrial relations between employers and employees and in legislation governing such relations. The first Workmen's Compensation Act was passed in 1913 and abolished the defense of assumption of risk in all workmen's compensation cases based on the failure of the employer to provide and maintain safe premises and suitable appliances for employees. In 1915 the act governing liability of common carriers operating steam railways in this state, for death or injury to employees, was passed. That act, in harmony with the federal law, abolished the defense of assumption of risk in any case where the violation by the employer of any statute enacted for the safety of employees contributed to the injury or death of such employee. In addition to these acts, there has been a rapid growth and extension of laws providing for the safety and protection of employees in industrial plants and other occupations. The public policy of the state, as gathered from legislation enacted during the last twenty years and more, is to make the employer liable for injury to an employee, caused by the violation by the employer of a statute requiring him to provide and maintain safe premises and appliances for the protection of his employees, and that the defense of assumption of risk should not apply in such cases. This conclusion is in harmony with the line of decisions in this state that a violation of a statute, resulting in injury to one for whose benefit the statute was enacted, is negligence per se, or, as stated in some cases, that the question of negligence is not involved—that, if a violation of the statute is the proximate cause of injury to one for whose benefit the statute was enacted, liability follows, irrespective of any question of negligence in the ordinary sense of that word. 86

Dusha and Suess provided a partial foundation for Mayes v. Byers, 87 decided in 1943. The case involved the violation of a Minneapolis intoxicating liquor ordinance that required a licensee or "on sale" dealer to pay, to the extent of a required bond,

86. Id. at 24-25, 230 N.W. at 126-27 (citations omitted).
87. 214 Minn. 54, 7 N.W.2d 403 (1943).
damages "resulting from the violation of any provisions of law relating to the business for which such licensee has been granted a license . . . ." The same ordinance also contained detailed regulations governing bathroom facilities, including a requirement that stairways to the bathrooms be of safe and substantial construction and "well lighted." The plaintiff in the case was obviously intoxicated, yet the bar continued to serve her. According to the allegations in her complaint, plaintiff slipped and fell on her way to the basement bathroom, due to the lack of light in the stairway and the unsafe condition of the stairs.

The trial judge charged the jury that if the stairway was not well lighted or the steps were in an unsafe condition, and if those conditions were the proximate cause of the plaintiff’s injuries, the jury should find for the plaintiff. It did. As the supreme court characterized it, "[u]nder the instructions the verdict was based strictly upon the violation of the relevant statutes and ordinances as giving a cause of action to plaintiff without proof of negligence." The supreme court found the evidence sufficient to sustain the verdict.

The trial court struck the defendant’s plea of contributory negligence. The Minnesota Supreme Court held that it was appropriate to do so:

Contributory negligence is a defense in actions based on defendant’s negligence, because, as a matter of policy, it is deemed unjust and unwise to permit a plaintiff to recover for injuries to which his own negligence has contributed. That the defense, and the policy underlying it, do not extend to all actions in tort is sufficiently indicated by such actions as those based on assault and battery, trespass, and nuisance. It is a defense in many instances where the cause of action is based on the violation of a statute or ordinance made for the benefit of individuals

88. Id. at 57, 7 N.W.2d at 405.
89. See id. at 58, 7 N.W.2d at 405.
90. See id. at 56, 7 N.W.2d at 404.
91. See id.
92. See id. at 57, 7 N.W.2d at 404.
93. See id. The jury returned a verdict of $6,000 for plaintiff against each of the defendants. See id.
94. Id. at 57, 7 N.W.2d at 405.
95. See id.
96. See id. at 59, 7 N.W.2d at 406.
harmened. But it does not apply in all such instances. While such violations have been characterized as negligence per se, courts have been careful to recognize that they are not true cases of negligence, ... and that whether the defenses of the ordinary negligence action may be asserted depends upon considerations of policy and legislative intent applicable to the particular statute under consideration. 97

The court held that contributory negligence was not a defense in the case, relying on Dusha and Suess 98 and the general principle set out in section 483 of the Restatement of Torts, 99 stating that "violation of a statute intended to protect a class of persons from their inability to exercise self-protective care, a member of such class is not barred by his contributory negligence from recovery from bodily harm caused by the violation of such statute." 100

A. Dart v. Pure Oil Co.

Dusha, Suess, and Mayes provided the platform for a more sweeping examination of the issue of defenses to violations of "exceptional" statutes in Dart v. Pure Oil Co., 101 decided in 1947. Dart has become the centerpiece for any discussion of the "exceptional" statutes. The case was the subject of an article by William Prosser in the Minnesota Law Review in 1948. 102 Dart was, as Prosser put it, a "celebrated case." 103 Fifty years later, it is still implicated in any discussion of liability based on exceptional statutes. 104 The case was rebriefed and reargued to the supreme court after Justice Youngdahl left the court to become Governor of

97. Id. at 60, 7 N.W.2d at 406.
98. See id. The court also held that the defense of contributory negligence was not available because the Minneapolis ordinance made the bond a penalty bond. See id. The amount of recovery is to be measured by the actual damages to the plaintiff. See id. Recovery is not permitted on the basis of a wrong done to the plaintiff, but, rather, as a punishment to the defendant because of his violation of the law. See id. at 62, 7 N.W.2d at 407.
99. See Restatement (Second) of Torts § 483 (1965).
100. Id.
101. 223 Minn. 526, 27 N.W.2d 555 (1947).
102. See William L. Prosser, Contributory Negligence as Defense to Violation of Statute, 32 Minn. L. Rev. 105 (1948).
103. See id. at 105.
104. See, e.g., Doe v. Brainerd Int'l Raceway, Inc., 533 N.W.2d 617, 620 n.3 (Minn. 1995) (holding that on the facts of the case, neither the common law nor Minnesota Statutes section 617.246 imposed a duty upon defendants).
Minnesota. The court, taking an unusual step, also asked three members of the Minnesota bar to submit amicus briefs. The bar members were Mr. DeParcq, Mr. Mulally, and Professor Prosser. Other interested lawyers also requested permission to file amicus briefs. The court granted all requests and ultimately, eighteen individual lawyers and law firms appeared in the case.

The case arose out of the death of the plaintiff's husband caused by the illegal sale of a mixture of gasoline and kerosene. Pure Oil Company sold the kerosene-gasoline to a local grocery, where the decedent purchased it. The kerosene-gasoline mixture had a flash point that fit within the statutory definition of gasoline, and its sale as kerosene violated Minnesota law. There was also circumstantial evidence that the decedent was negligent in using the liquid to start his fire. The trial judge directed a verdict for the defendant and denied the plaintiff's motion for a new trial. The trial judge concluded that the decedent knowingly poured the mixture on an open flame. Even though the decedent believed it to be kerosene, the trial judge held him contributorily negligent as a matter of law.

On appeal, one issue was whether the statutory violations precluded the defendant from asserting the decedent's contributory negligence as a defense. The plaintiff argued that whenever a defendant's intentional act violates a statute it is a

105. See Prosser, supra note 102, at 105.
106. See id.
107. See id. at 105 n.2.
108. See id. at 105.
109. See id.
111. See id. at 528, 27 N.W.2d at 556.
112. See id. at 529, 27 N.W.2d at 556.
113. See MINN. STAT. § 296.01, subd. 3 (1945).
114. See id. § 296.05, subd. 2. There was circumstantial evidence that the defendant had violated other parts of the same statute in delivering gasoline in a container that was not painted red, not painting the gasoline pipes red, not attaching red tags to the gasoline faucets on its tankers, and pumping gasoline through pipes that were used for other petroleum products. See Prosser, supra note 102, at 106.
115. See Dart, 223 Minn. at 528, 27 N.W.2d at 556.
116. See id. at 527, 27 N.W.2d at 556.
117. See id. at 541, 27 N.W.2d at 563; see also Prosser, supra note 102, at 106.
118. See Prosser, supra note 102, at 106.
119. See Dart, at 551, 27 N.W.2d at 558.
“willful” tort barring the assertion of contributory negligence as a defense.\textsuperscript{120} It was that issue that prompted the court to ask for the submission of the amicus briefs in the case.\textsuperscript{121} As Prosser explained:

If the contention were to be upheld, it is obvious that the consequences would be sweeping. In nearly all automobile cases, in nearly all railway cases, in many street railway cases, in many cases of accidents arising out of the condition of premises or the sale of goods or fires or explosions or unusual events of any kind, the action is founded upon the defendant’s violation of a statute. In fact it is safe to say that today negligence actions are very much in the minority in which there is not some claim of violation of a statute, ordinance or regulation. Viewed in this light the contention was no less than a challenge to the entire doctrine of contributory negligence and a proposal for its abolition in the majority of negligence cases. Counsel who came to the aid of the plaintiff argued persuasively that the progress of the law, in Minnesota as elsewhere, has been in this direction, that the step had already been taken in \textit{Flaherty v. Great Northern Ry. Co}... and that the state was now ready to have the rule declared.

As the battle of the briefs developed, an additional argument was advanced on behalf of the plaintiff, to the effect that the particular statute involved was enacted for the purpose of protecting purchasers of petroleum products from their own “inability to exercise self-protective care,” and that under the rule stated by the Restatement of the Law of Torts and previously recognized by the Minnesota court, the legislature must be taken to have intended that contributory negligence should not be available as a defense. Over this contention also, much ink was shed by interested and industrious advocates on both sides.\textsuperscript{122}

The Minnesota Supreme Court rejected both contentions, instead holding that contributory negligence was a defense.\textsuperscript{123} However, because there were factual issues appropriate for jury resolution,

\textsuperscript{120} See id. at 532, 27 N.W.2d at 558.
\textsuperscript{121} See Prosser, supra note 102, at 106.
\textsuperscript{122} Id. at 106-07 (citations omitted).
\textsuperscript{123} See Dart, 223 Minn. at 541, 27 N.W.2d at 563.
the court remanded for a new trial.\textsuperscript{124}

The Minnesota Supreme Court had previously taken the position that a statutory violation did not preclude a defendant from asserting the defense of contributory negligence, "unless so worded as to leave no doubt that the Legislature intended to exclude the defense."\textsuperscript{125} The issue in \textit{Dart} was under what circumstances a statutory violation would preclude the assertion of the defense of contributory negligence.\textsuperscript{126} The court noted that there are certain "exceptional" statutes that do not permit the defense of contributory negligence.\textsuperscript{127} The basic question to be answered is whether the statute was intended for the protection of the general public, or "a limited class of persons from their inability to protect themselves."\textsuperscript{128} If, in such cases, the defendant is allowed to assert the defense of contributory negligence, the fundamental purpose of the statutes would be defeated: "The principle of these so-called exceptional statutes is to impose strict or absolute liability upon the defendant, which is greater than ordinary negligence liability, by placing upon him the entire responsibility for any injury which may result from their violation."\textsuperscript{129}

The court noted as examples: (1) child labor statutes; (2) statutes prohibiting the sale of dangerous articles to minors; and (3) statutes intended for the protection of intoxicated persons as the kinds of exceptional statutes that preclude the assertion of contributory negligence as a defense.\textsuperscript{130} Those cases provided an explanation for the basis of an "exceptional" statute analysis.

The first category was "child labor statutes."\textsuperscript{131} The case explaining it is \textit{Dusha v. Virginia and Rainy Lake Co.}\textsuperscript{132} Following the prevailing rule, the Minnesota Supreme Court held in \textit{Dusha} that the statute intended "to protect children in life and limb by prohibiting their employment in dangerous occupations where because of their immaturity they are likely inappreciative of risks and prone to be careless and heedless," precluded the violating

\begin{flushright}
124. \textit{See id.}
125. \textit{See Schutt v. Adair, 99 Minn. 7, 9, 108 N.W. 811, 812 (1906) (assuming violation of a statute requiring guarding of elevator shafts was negligence per se for purposes of discussing the defense issue).}
126. \textit{See Dart, 223 Minn. at 534, 27 N.W.2d at 559.}
127. \textit{See id.}
128. \textit{See id. at 535, 27 N.W.2d at 560.}
129. \textit{Id. at 536, 27 N.W.2d at 560.}
130. \textit{See id.}
131. \textit{See id.}
132. 145 Minn. 171, 176 N.W. 482 (1920).}
\end{flushright}
employer from asserting contributory negligence or assumption of risk as defenses.\textsuperscript{133}

The second category was "[s]tatutes prohibiting sale of dangerous articles to minors."\textsuperscript{134} The court noted as its authority \textit{Pizzo v. Wiemann},\textsuperscript{135} a 1912 Wisconsin Supreme Court case, which involved the sale of a toy pistol to a minor in violation of a Wisconsin statute.\textsuperscript{136}

The third category of cases noted in \textit{Dart} was "[s]tatutes for the protection of intoxicated persons."\textsuperscript{137} The court relied on Minnesota and Nebraska cases to illustrate the application. The Minnesota case the court relied upon was \textit{Mayes}.\textsuperscript{138} The \textit{Dart} court then noted "three important facts" in assessing the impact of the statutory violation:

In the first place, there is no evidence of an intentional or willful mixing of gasoline with kerosene as distinguished from mere negligence on the part of the company in using reasonable care to avoid the possibility of such a mixture. It does not appear from the record that the company intentionally and willfully sold to the grocery a mixture of gasoline and kerosene contrary to the statute. Second, it appears that decedent was a mature and experienced man, possessed of all his faculties immediately prior to his attempt to use what he thought

\textsuperscript{133} \textit{Id.} at 172, 176 N.W. at 482.
\textsuperscript{134} \textit{Dart}, 223 Minn. at 536, 27 N.W.2d at 560.
\textsuperscript{135} 154 N.W. 899 (Wis. 1912).
\textsuperscript{136} \textit{See id.} at 899. The court in that case held that the defenses of contributory negligence and supervening cause were irrelevant to the claim. \textit{See id.} at 900. The case was heavily criticized by the Wisconsin Court of Appeals in \textit{Olson v. Ratzel}, 278 N.W.2d 238 (Wis. Ct. App. 1979):

The case . . . discussed proximate cause only in terms of the allegations of the complaint. This case antedates the comparative negligence statute, removal of foreseeability as an element of causation in negligence cases, and the current Wisconsin negligence \textit{per se} formulations. Moreover, the case is distinguishable in that it involves an absolute prohibition. In this respect the toy gun case is analogous to cases in which strict liability for the sale of adulterated animal food was held to result from the violation of a statute prohibiting such cases. The Wisconsin Legislature and the Congress have chosen to regulate and not ban entirely the sale of handguns.

\textit{Id.} at 245-46.
\textsuperscript{137} \textit{Dart}, 223 Minn. at 536, 27 N.W.2d at 560.
\textsuperscript{138} 214 Minn. 54, 7 N.W.2d 403 (1943).
was pure kerosene as an aid in starting the fire, and was not suffering from any inability to use reasonable care for his own protection. Third, the statute involved does not, as a penalty for its violation, provide for a recovery of damages for injuries or death caused by its violation.\footnote{139}

The first fact is relevant because of past supreme court precedent indicating that contributory negligence may not be a defense in cases involving a willful and intentional violation of a statute. The court focused on two cases illustrating the exception.

*Hanson v. Hall*,\footnote{140} decided in 1936, arose out of damage to a plaintiff-owned truck. Defendant obstructed a public highway as part of the Independent Union of All Workers against Bamble Robinson Company’s strike activities in Austin, Minnesota.\footnote{141} To prevent shipments from reaching the company, the defendants were instructed to go to a location eleven miles south of Austin and search trucks that might be carrying goods to the company.\footnote{142} On appeal from a verdict in favor of the plaintiff, one issue decided was whether the plaintiff’s contributory negligence was a defense to the action.\footnote{143} The court held that it was not:

Admittedly, defendants intended to invade plaintiff’s right to the reasonable use of the highway for purposes of travel. Where an action is based on an unintentional invasion of another’s right, the contributory negligence of plaintiff is a proper offset to defendants’ liability... But where the action is based on an invasion which is both intentional and criminal, the mere negligence of the person whose rights are invaded is no adequate defense... Only if plaintiff’s fault is of a culpability equal to that of the defendant will plaintiff’s conduct contributing to the cause of his harm be a bar to defendant’s liability... No such conduct by plaintiff is either pleaded or proved in this case.\footnote{144}

The court concluded that the trial court was correct in

\begin{footnotes}
139. *Dart*, 223 Minn. at 537-38, 27 N.W.2d at 561.
140. 202 Minn. 381, 279 N.W. 227 (1938).
141. *See id.*
142. *See id.*
143. *See id.* at 383, 279 N.W. at 228.
144. *Id.* at 383-86, 279 N.W. at 229-30 (citations omitted).
\end{footnotes}
refusing to submit the issue of plaintiff's contributory negligence to
the jury.\footnote{145}

Earlier in the opinion, the \textit{Hanson} court struggled both with
the impact of a statutory violation and the definition of willful
negligence:

The right to travel upon a highway does not privilege any
person to commit, without lawful justification, any act
whereby the exercise of the public right of passage is
obstructed or rendered dangerous\ldots{} Any conduct
which has this effect is a public nuisance and is a crime
against the order and economy of this state\ldots{} Since the
purpose of this statute is to secure to everyone the
enjoyment of a public right, the violation of the statute
does not give a private individual a cause of action if the
only wrong he suffers is one common to all members of
the public, that is, if the exercise if his right of travel only
is impeded\ldots{} But if it is shown that he has suffered
some special damage, harm to his person or property,
because of the unlawful obstruction of his right, the
person violating the statute is civilly liable.

The intentional invasion of the rights of another has
been termed willful negligence. However willful such act
may be, it is in no sense negligent. The very fact that an
act is characterized as negligent indicates that harm to
another as the result of it was neither foreseen nor
intended, although a reasonable man would have
foreseen danger to others because of it and would have
adopted another course of conduct. Willful negligence
embraces conduct where the infringement of another's
right is not only intended, but also it is foreseen that the
conduct pursued will result in such invasion.\footnote{146}

The second case, \textit{Flaherty v. Great Northern Railway Co.}\footnote{147}
decided in 1944, arose out of plaintiff's personal injuries sustained
as a result of a blockage of a public street by a Great Northern
railroad car or cars, in violation of Minnesota statutes.\footnote{148} The
defendant asserted the plaintiff's contributory negligence as a

\footnotesize{145. \textit{See id.} at 386, 279 N.W. at 230.}
\footnotesize{146. \textit{Id.} at 385, 279 N.W. at 229 (citations omitted).}
\footnotesize{147. 218 Minn. 488, 16 N.W.2d 553 (1944).}
\footnotesize{148. \textit{See id.} at 489, 16 N.W.2d at 553-54.}
defense, but the court held that the defense could not be asserted:

Where injury is sustained as a result of intentional obstruction of a highway in violation of the statute, the contributory negligence of the person injured is no defense. . . . The evidence here conclusively shows that plaintiff’s injuries were sustained as the result of defendant’s intentionally obstructing the street with the train or the freight car, as the case might be, in violation of statute.

It is only where defendant’s acts constitute an intentional violation of a statute that the defense of contributory negligence is not open to him. . . . This type of case is to be distinguished from those arising under statutes declaring the effect of a violation thereof, as, for example, the highway traffic regulation act . . . .

Flaherty and Hanson presented the Dart court with problems because of the principle those cases seemed to enunciate. The cases, both of which involved public nuisances, took the position that an intentional violation of a statute precludes the violating defendant from asserting the defense of contributory negligence. That presented the court in Dart with what must have appeared to be a dilemma, but which the court readily avoided, both on the facts and the law. The court noted that those cases were public obstruction cases, and that the plaintiff in Dart made no such claim.

Other Minnesota Supreme Court cases, however, had taken the position that willful negligence on the part of a defendant would preclude that defendant from asserting the contributory negligence defense. In Mueller v. Dewey, for example, a case the court cited in Dart, the supreme court considered the impact of willful negligence on a defendant’s ability to assert the contributory negligence defense. The case arose out of an automobile accident that occurred when the defendant and plaintiff were both traveling on a public highway, and the defendant overtook the

149. Id. at 494-95, 16 N.W.2d at 556 (citations omitted).
150. See id. at 495, 16 N.W.2d at 556; see also Hanson, 202 Minn. at 385-86, 279 N.W. at 229.
151. See Dart v. Pure Oil Co., 223 Minn. 526, 539, 27 N.W.2d 555, 562 (1947).
152. 159 Minn. 173, 198 N.W. 428 (1924).
153. See id. at 176-78, 198 N.W. at 429.
plaintiff and "willfully drove his car against the plaintiff's, causing it to run off the road and into a ditch, and seriously injuring the plaintiff." The trial court noted that there was sufficient evidence of the defendant's willful negligence to instruct the jury on the issue. The court's instruction stated that willful negligence "is a reckless disregard of the safety of the person or property of another by failing, after discovery of the peril, to exercise ordinary care to prevent the impending injury." On appeal, the supreme court affirmed:

The use by the courts of the expression "willful or wanton negligence" has been criticized as a misnomer, because a negligent act is usually the result of inadvertence, whereas a willful or wanton act is one done with a consciousness of probable results but with reckless indifference to them.... But, however inappropriate it may be, the expression has become firmly imbedded in the vocabulary of judges and lawyers as a synonym for willful or wanton injury. It was used in that sense by the trial judge, and reading the charge as a whole, it seems improbable that the jury could have misunderstood it.

The doctrine of willful negligence does not admit contributory negligence as a defense. The jury were told [sic] that if defendant was not willfully negligent, contributory negligence would be a defense, and negligence in its ordinary sense and contributory negligence were defined, and the issue as to each submitted in a clear and concise charge.

Mueller raises an additional problem because of its principle that willful negligence bars the assertion of the defense of contributory negligence. In that case, although the defendant was driving at an excessive rate of speed, the court's discussion of the impact of a finding of willful negligence did not hinge on a finding of an intentional statutory violation, as it did in Hanson and Flaherty. Mueller's general application of the principle meant that

154. Id. at 174, 198 N.W. at 428.
155. See id. at 176, 198 N.W. at 429.
156. Id. at 175, 198 N.W. at 428.
157. Id. at 176-77, 198 N.W. at 429 (citations omitted).
158. See id.
159. See id. at 176-78, 198 N.W. at 429-30 (discussing evidence given to the jury
the *Dart* court had to distinguish the principle on the facts as well. That accounts for the first important fact in *Dart*, that:

there is no evidence of an intentional or willful mixing of gasoline with kerosene as distinguished from mere negligence on the part of the company in using reasonable care to avoid the possibility of such a mixture. It does not appear from the record that the company intentionally and willfully sold to the grocery a mixture of gasoline and kerosene contrary to the statute.\(^{160}\)

The finding was essential to distinguish *Mueller*, *Flaherty*, and *Hanson* on the facts. The fact that a public nuisance was not involved distinguished the latter two cases on the law.\(^{161}\)

---

regarding defendant’s conduct).


161. The entire discussion of willful negligence is somewhat interesting in light of the real basis for the doctrine, at least in cases that do not involve public nuisances. The court’s discussion of willful negligence in *Mueller* seems overbroad, given the trial court’s use of the concept. The trial judge’s instruction to the jury was based on nothing other than the discovered peril doctrine, which defines willful negligence in terms of a defendant’s failure to exercise reasonable care to prevent an injury after discovery of the peril. *See Mueller*, 159 Minn. at 175, 198 N.W. at 428. Later, in *Jacobsi v. Prax*, 290 Minn. 218, 187 N.W.2d 125 (1971), the supreme court discussed the underlying basis for the doctrine:

Thus, under the discovered-peril doctrine, this court has often held that a plaintiff may recover damages for harm caused to him while in a position of peril, notwithstanding that he is in that position as a result of his own prior negligence, if the person causing the harm actually knew that the person harmed was in such a position and had sufficient time and ability to avert the harm but failed to do so due care to do so... The discovered-peril doctrine has often been referred to throughout our opinions as the doctrine of willful and wanton negligence. Application of the doctrine does not require a showing of malice, actual intent to injure the person, or even negligence of a grosser degree than lack of ordinary care... However, it is clear that to invoke the doctrine, it must be shown that the negligence of the party harmed preceded that of the party causing the harm and the latter had knowledge of the perilous situation.

*Id.* at 222-23, 187 N.W.2d at 128 (emphasis added) (citations omitted). The discovered peril doctrine has been abolished by a 1990 amendment to the comparative fault act. *See MINN. STAT. § 604.01, subd. 1a (1998).* The doctrine was abolished in recognition that comparative fault made the doctrine, which was originally created to avoid the all-or-nothing defense of contributory negligence, irrelevant.

The discovered peril doctrine aside, there have been other indications in
While the court's problems with those cases explains the first important fact, it does not explain the remaining two. The second fact the Dart court deemed relevant concerns the decedent's capacity to understand the risk involved.\footnote{162} If relevant at all,\footnote{163} it seems so only because it reinforces the court's conclusion that the statutes involved were for the general public's protection, rather than a limited class of persons, thus taking the case out of the exceptional statute category.\footnote{164} Exceptional statutes exist for the protection of those who cannot exercise self-protective care.\footnote{165} The

Minnesota law that disparities in degrees of fault might obviate the defense of contributory negligence, or at least somehow mitigate it. In Ferguson v. Northern States Power Co., 307 Minn. 26, 34, 239 N.W.2d 190, 195 (1976), for example, a case involving a severe electrical shock to a teenager who was assisting his father in trimming trees in their yard, the court said that:

Because of the comparatively greater knowledge possessed by a utility of the extraordinary magnitude of the risk involved in the transmission of high-voltage electricity through residential neighborhoods, the risk to which it subjects the ordinary city dweller is not the equivalent of the risk the residential user subjects himself to by coming in close proximity to the overhead wires. The risks are different in degree. While we cannot hold that they are so different as to be an absolute bar to the defense of contributory negligence, we do rule that in a case such as this, involving a dangerous instrumentality and a great disparity in risks, the jury, in order to fairly and accurately apportion causal negligence, should be instructed to give special consideration to this disparity.

See id. at 34, 239 N.W.2d at 195 (citations omitted). The comparative fault act makes negligence that is any measure negligent or reckless subject to comparison, see Minnesota Statute section 604.01, subdivision 1a (1998), which means that it will be difficult to argue that disparities in degrees of culpability might void the defense of contributory negligence. The comparative fault act should therefore mean that cases such as Hanson and Flaherty are no longer good law. It should not avoid the impact of cases such as Ferguson, however, insofar as it states that the jury should be instructed to give special consideration to a disparity in knowledge.

\footnote{162}{See Dart, 223 Minn. at 537-38, 27 N.W.2d at 561.}

\footnote{163}{In 1990, in Tomfohr v. Mayo Foundation, 450 N.W.2d 121 (Minn. 1990), the Minnesota Supreme Court, in response to a certified question from the U.S. District Court for the District of Minnesota, held in a case involving a suicide by a patient who was in the defendant's locked psychiatric ward, that the patient's contributory negligence could not be taken into consideration. See id. The defendant argued that the patient's contributory negligence should be considered, although it would take into consideration his mental condition. See id. at 123. The supreme court rejected the notion of a capacity-based defense in the case because the hospital had assumed the duty to exercise care for his own well-being. See id. at 125. In Dart, the court did not seem to consider that possibility. See Dart, 223 Minn. at 526, 27 N.W.2d at 555.}

\footnote{164}{See Dart, 223 Minn. at 535-41, 127 N.W.2d at 560-63.}

\footnote{165}{See id. at 536-37, 27 N.W.2d at 560 (highlighting the child labor statutes}
examples of exceptional statutes, in particular the child labor statutes and statutes intended for the protection of intoxicated persons, are not parallel. The decedent was able to take care of himself.\textsuperscript{166}

The third important fact, that the statute did not provide a specific remedy for its violation,\textsuperscript{167} would be the only remaining way in which the statute might provide the basis for voiding the contributory negligence defense. Of course, the legislature typically does not create specific civil remedies for the violation of the criminal statutes it passes. While that will not prevent the courts from applying concepts of negligence per se for the violation of those statutes, a specific finding that a statute creates a civil cause of action might be a basis for voiding the defense of contributory negligence.\textsuperscript{168} It does serve to distinguish Mayes,\textsuperscript{169} the surety bond case the Dart court cited,\textsuperscript{170} because the statute and ordinance provided a specific cause of action for the injured plaintiff.\textsuperscript{171} The statute in Dart provided no such action.

**B. Zerby v. Warren**

*Dart* is the first Minnesota Supreme Court opinion to consider in policy terms the means of determining whether a statute is an exceptional statute. The next significant decision dealing with the impact of exceptional statutes is *Zerby v. Warren*,\textsuperscript{172} a wrongful death case that arose out of the illegal sale of toxic glue to a minor.\textsuperscript{173} Two pints of the glue, Weldwood Contact Cement, were sold to a thirteen-year-old friend of the decedent at a hardware store in Austin.\textsuperscript{174} The glue contained toluene.\textsuperscript{175} The glue was not part of a packaged kit for the construction of a model airplane,
automobile, or similar item.\textsuperscript{176} Neither the hardware store clerk nor the owner were aware that the sale violated Minnesota law.\textsuperscript{177} The applicable statute, Minnesota Statute section 145.38, which had become effective two months before the sale, provided as follows:

No person shall sell to a person under 19 years of age any glue or cement containing toluene, benzene, zylene, or other aromatic hydrocarbon solvents, or any similar substance which the state board of health has . . . declared to have potential for abuse and toxic effects on the central nervous system. This section does not apply if the glue or cement is contained in a packaged kit for the construction of a model automobile, airplane, or similar item.

No person shall openly display for sale any item prohibited in subdivision 1.\textsuperscript{178}

Section 145.39 provided as follows:

No person under 19 years of age shall use or possess any glue, cement or any other substance containing toluene, benzene, zylene, or other aromatic hydrocarbon solvents, or any similar substance which the state board of health has . . . declared to have potential for abuse and toxic effects on the central nervous system with the intent of inducing intoxication, excitement or stupefaction of the central nervous system, except under the direction and supervision of a medical doctor.

No person shall intentionally aid another in violation of subdivision 1.\textsuperscript{179}

Section 145.40 makes a violation of the statutory provisions a misdemeanor.\textsuperscript{180}

\textsuperscript{176} See id.
\textsuperscript{177} See id.
\textsuperscript{178} Minn Stat. § 145.38, subd. 1-2 (1971). As subsequently amended, the statute now provides that: “It is an affirmative defense to a charge under this subdivision if the defendant proves by a preponderance of the evidence that the defendant reasonably and in good faith relied on proof of age as described in section 340A.503, subd. 6.” Id. § 609.684, subd. 2 (1998).
\textsuperscript{179} Id. §§145.39, subd.1-2 (1971).
\textsuperscript{180} See Zerby, 297 Minn. at 138, 210 N.W.2d at 61.
Randy Reiken was the thirteen-year-old who bought the glue and participated with decedent Steven Zerby, a fourteen-year-old, in sniffing it. The boys inhaled the glue within a few hours of purchasing it. The glue had an injurious effect on Steven's central nervous system, causing him to fall into a creek and drown. Louis Zerby, Steven's father and trustee, brought a wrongful death action against the owner of the hardware store and the clerk who sold the glue. Zerby filed a third-party action against Reiken, seeking contribution, and against United States Plywood Corporation, the manufacturer of the glue. Zerby asserted claims against the third-party defendants, all of whom asserted the defenses of decedent's contributory negligence and assumption of risk.

The trial court held, in a pretrial ruling, that the trial would proceed solely on an absolute liability theory for violation of section 145.38, and that neither contributory negligence nor assumption of risk would be available defenses. As a result of those rulings, the parties waived a jury trial and submitted the case on stipulated facts. The trial court entered judgment against the hardware store owner and clerk and disallowed both third-party claims.

The appeal raised four issues: (1) whether the statute imposed absolute liability on the retailer and clerk for the illegal sale of glue; (2) whether the statute precluded assertion of the defenses of contributory negligence and assumption of risk; (3) whether a third-party claim for contribution could be asserted against the minor companion of the decedent; (4) whether a contractual indemnity claim would permit the tortfeasor to be indemnified for his statutory violation.

The threshold question concerned the nature of tort liability resulting from a section 145.38 violation. The court first concluded that the statute fit Dart's analysis establishing the conditions for determining whether a statute is "exceptional" so as

181. See id. at 135-36, 210 N.W.2d at 60.
182. See id. at 137, 210 N.W.2d at 61.
183. See id.
184. See id.
185. See id. at 135-36, 210 N.W.2d at 60.
186. See id. at 136, 210 N.W.2d at 60.
187. See id.
188. See id.
189. See id. (quoting Minn. Stat. § 145.38 (1971)).
to justify the imposition of strict or absolute liability:

The obvious legislative purpose of § 145.38 is to protect minors unable to exercise self-protective care from harm resulting from sniffing the fumes of glue. This legislative policy inherent in the statute makes one who violates its provisions entirely responsible for damages or deaths which are the direct result of the illegal sale. It is one of the types of statutes referred to by the Dart decision as "exceptional statutes" and therefore violation of its provisions creates absolute liability for resulting harm.\(^{190}\)

Having reached that conclusion, the court ruled out the contributory negligence and assumption of risk defenses, because allowing those defenses would "displace the responsibility imposed by the statute."\(^{191}\) The court bolstered its analysis by reference to Dusha,\(^{192}\) the child labor case, and Restatement (Second) of Torts section 483, which makes contributory negligence a defense to a negligence per se claim "unless the effect of the statute is to place the entire responsibility for such harm as has occurred upon the defendant."\(^{193}\)

The defendants argued that the comparative negligence statute required the decedent's negligence be compared, an argument the court rejected.\(^{194}\) The defendants argued that the exceptional statute exception to the general rule allowing the defense of contributory negligence was intended to avoid the harsh results of the all-or-nothing result the defense dictated, but that the exception is no longer necessary given the ability to compare fault under the comparative negligence statute.\(^{195}\) The court concluded that the comparative negligence statute did not create liability where none existed before: "Because there can be no contributory negligence as a matter of law when the statute is designed to protect persons from their inability to protect themselves, the adoption of comparative negligence did not alter the exclusion of

\(^{190}\) Id. at 140, 210 N.W.2d at 62.
\(^{191}\) See id.
\(^{192}\) 145 Minn. 171, 176 N.W. 482 (1920).
\(^{193}\) Zerby, 297 Minn. at 139, 210 N.W.2d at 62; see also RESTATEMENT (SECOND) OF TORTS § 483 (1965).
\(^{194}\) See Zerby, 297 Minn. at 141-42, 210 N.W.2d at 63.
\(^{195}\) See id. at 141, 210 N.W.2d at 62.
defenses. 196 The court also rejected the defendants' claim that the decedent's violation of section 145.39, which prohibits possession of glue with the intent to sniff it, should be a bar to recovery. 197 The court rejected the defense for the same reasons it rejected the contributory negligence and assumption of risk defenses. Allowance of the claim would reduce the defendants' statutory obligation. 198

The court also refused to allow the defendants' contribution claim against Rieken for the same reasons. Rieken was also a member of the limited class of persons the statute was intended to protect. 199 Finally, the court disallowed the defendants' indemnity claim against United States Plywood Corporation, even though there was an express contract for indemnity. 200 Because the court viewed the statutory obligation as absolute, the court concluded that "[a]ny agreement which relieves the defendants of the consequences of the violation of the public duty imposed by § 145.38 is against public policy." 201

C. Scott v. Independent School District No. 709

In Scott v. Independent School District No. 709, 202 the court refused to apply the exceptional statute label to a statute that required junior high school industrial arts students to wear protective safety goggles. 203 Richard Scott, a junior high student, age thirteen, was injured while in the process of drilling a hole in a plastic domino. 204 The drill stuck in the plastic, and to get it out, he held the domino in place with a wrench while turning on the press. 205 The drill bit snapped off and part of the bit became embedded in his left eye. 206 He was not wearing safety goggles. 207 At the beginning of each school year, a pair of safety goggles was assigned to each industrial

196. Id. at 141, 210 N.W.2d at 63.
197. See id. at 141-42, 210 N.W.2d at 63.
198. See id.
199. See id. at 142-43, 210 N.W.2d at 63-64.
200. See id. at 143, 210 N.W.2d at 64.
201. Id. at 144, 210 N.W.2d at 64.
202. 256 N.W.2d 485 (Minn. 1977).
203. See id. at 487.
204. See id.
205. See id.
206. See id.
207. See id.
arts student who did not already have shatterproof eyewear. The students were instructed to wear their goggles, but the rule was inconsistently enforced.

Minnesota Statutes section 126.20 requires every person in any course at any school to “wear industrial quality eye protective devices when participating in, observing or performing any function in connection with, any courses or activities taking place in eye protection areas, . . . of any school, college, university or other education institution in the state.” The statute also imposes a penalty on any student who fails to comply with the requirements: “Any student failing to comply with such requirements may be temporarily suspended from participation in said course and the registration of a student for such course may be canceled for willful, flagrant, or repeated failure to observe the above requirements.”

The trial court submitted the case to the jury on special interrogatories. The trial court held that the statute applied to the school district and that the school board was negligent as a matter of law, and that its negligence was a direct cause of Scott’s injury. The trial court also ruled that the statute applied to Scott for purposes of assessing his contributory negligence, but the court allowed the contributory negligence issue to go to the jury on the basis of the common law. The jury in its verdict found the school district 90% negligent and Richard Scott 10% negligent.

The threshold question on appeal concerned the nature of the tort liability the statute imposed. Applying standard negligence per se principles, the court held that the school district’s conduct “clearly constituted negligence per se.” However, after noting

---

208. See id.
209. See id.
211. Id. § 126.20, subd. 1.
212. Id. § 126.20, subd. 2.
213. See Scott, 256 N.W.2d at 487.
214. See id.
215. See id.
216. See id.
217. See id.
218. See id. (accepting Restatement (Second) of Torts § 286 (1965) as the appropriate statement of negligence per se, as quoted in Kronzer v. First Nat’l Bank, 305 Minn. 415, 423, 235 N.W.2d 187, 193 (1975)).
219. Id. at 488.
the kinds of cases in which the court had previously applied absolute liability for statutory breaches, the court concluded that the legislative intent did not appear to make liability absolute for breach of the statute in question:

Such a construction would place a nearly impossible burden on a school supervisor. For example, even if the supervisor instructed a student every day in the use of safety glasses, but while the instructor left the room or was working with another student a student lifted off the glasses temporarily and was injured, liability would follow. We do not think the legislature intended that the school district be strictly liable in such a situation.\(^{220}\)

While the school district's violation of the statute was negligence per se, and the evidence was sufficient to justify the trial court's conclusion that the defendant was negligent as a matter of law for violating the statute, the court concluded that the "nearly impossible burden" that would be imposed on a school supervisor justified allowing the defendant to assert the plaintiff's contributory negligence as a defense.\(^{221}\) The jury determined that the plaintiff was 10% negligent.\(^{222}\) The supreme court held the trial court was justified in submitting the issue to the jury and that the evidence supported the jury's finding of 10% contributory negligence.\(^{223}\)

Scott, at least superficially, seems to be a mainstream negligence per se case. Remembering the general rule that contributory negligence is a defense in cases involving statutory violations, absent a clear indication of legislative intent to the contrary, the court's application of negligence per se principles seems to be unexceptional.

However, the wording of Minnesota Statutes section 126.20 raises a question concerning the supreme court's initial interpretation of the statute. The defendant in the case actually argued that the plaintiff was negligent per se in violating the statute. In subdivision 1, the statute imposes the obligation to wear protective eyewear on the student.\(^{224}\) Subdivision 2 permits the

\(^{220}\) Id. at 489.
\(^{221}\) See id.
\(^{222}\) See id. at 487.
\(^{223}\) See id. at 489.
\(^{224}\) See Minn. Stat. § 126.20, subd. 1 (1976) (revised at Minn. Stat. §
imposition of a penalty on a student who fails to comply with the requirement. 225

It seems clear that the statute’s purpose is to protect students who may be exposed to eye hazards in their course work. However, given the way the statute is framed, the defendant’s argument is understandable. The statute appears to impose the duty to wear the protective eyewear on the student, not the school district. Given that construction, it could be argued that there was no statutory violation, except by the student who suffered the eye injury. Finding that negligence per se principles applied, however, means that the liability question would hinge on the single question of whether the injured student was wearing protective goggles at the time of his injury. The student’s failure to wear the goggles would be sufficient to invoke the statutory response. Then, the defendant would have to establish an excuse or justification. It is not clear from the case whether the defendant asserted excuses, such as lack of an opportunity to comply, but presumably, appropriate excuses or justifications could have been asserted.

In a sense, perhaps the justifications were asserted. The defendant was able to prove and argue the plaintiff’s contributory negligence. The court’s conclusion was that contributory negligence should be allowed as a defense, based on its judgment that precluding the defense would impose too heavy a burden on the school district. Of course, that would be a questionable policy conclusion, as illustrated by the findings in the case. The school district’s burden was reduced by 10%, which was the percentage of fault assessed against the plaintiff. The plaintiff’s contributory negligence in no way lessens the apparent obligation of the school district to ensure that students wear goggles in classes where eye injuries could potentially occur. To put it another way, finding that the school district has a duty to see that students wear goggles arguably imposes the same “impossible burden,” even if contributory negligence is a potential defense.

The court might have concluded that the statutory negligence per se standard was simply inapplicable in the case. There is a hint of that analysis, except it appears in the court’s determination that contributory negligence will be a defense to violations of the statute. However, if the statutory violation truly is negligence per se

121A.32 (1998)).
225. See id. § 126.20, subd. 2.
because the school district failed to fulfill its obligation to see that students wear goggles, there is a significant issue as to why *Dusha* and *Suess* would not compel a different conclusion on the “exceptional” status of the statute. Both involved cases where the employer was required to protect workers. The obligation to refrain from hiring child labor and the obligation to guard machines might be seen as nearly “impossible burdens,” given the possibility that the employees would circumvent statutes intended for their protection. If the statute in *Scott* is truly intended to protect a particular class of persons—students—against their own potential inability to protect themselves, it is arguable that the policy justification the court chose to downgrade the impact of the statutory violation is misplaced.

The case is important because it suggests that there may be policy reasons that will justify a decision to deny “exceptional” status to a particular statute. The same policy might also have justified a conclusion that violation of the statute should not have been negligence per se at the outset. Viewed that way, the issue concerns the analytical options available to a court when an otherwise applicable statute appears to provide an ill-fitting correlative to the common law duty the defendant owes to the class of persons the statute protects.

The problem arises in the determination that a statute, which appears to be intended to protect a specific class of persons, is deemed not to prevent the application of the contributory negligence defense because of a policy concern regarding the burden the statute would place on a school district. That analysis would perhaps be better directed to the use of the statute as a basis for the defendant’s common law duty in *Scott*, rather than to a determination that the contributory negligence defense should be allowed.

One could argue that the statute appears to place the primary responsibility on the person who failed to wear the goggles, and that the contributory negligence defense seems perfectly consistent with that obligation. However, there are other cases, including *Zerby*, where the conduct in which the person engaged was statutorily prohibited. The fact that the person, who is not in the best position to protect him or herself, is also subject to disciplinary sanctions in no way excuses the person who is required to exercise
care for that person’s safety.\textsuperscript{226}

That leaves \textit{Scott} as a potential abrasion of \textit{Zerby}. How deeply scored \textit{Zerby} is depends on the utility of \textit{Scott}'s policy in other cases involving exceptional statutes. In fact, \textit{Scott} has had little impact since it was decided, at least as authority for the proposition that an otherwise “exceptional” statute should not be followed because of the excessive burden that would be placed on the party responsible for enforcing the statute. There is no indication that the case has in any way established groundwork for a loose use of legislative intent as a means of evading the impact of the violation of ostensibly “exceptional” statutes.

D. Seim v. Garavalia

In \textit{Seim v. Garavalia},\textsuperscript{227} the issue was whether a general contributory negligence defense was available in a case involving a claim brought under Minnesota Statutes section 347.22, the Minnesota dog bite statute.\textsuperscript{228} The statute currently reads as follows:

If a dog, without provocation, attacks or injures any person who is acting peaceably in any place where the person may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained. The term “owner” includes any person harboring or keeping a dog but the owner shall be primarily liable. The term “dog” includes both male and female of the canine species.\textsuperscript{229}

The plaintiff, six years old, was visiting defendant's child.\textsuperscript{230} The plaintiff was in the backyard with defendant's dog and was bitten when she petted the dog on the head.\textsuperscript{231} Although the facts are not clear, they imply that she was bitten because the dog had

\textsuperscript{226} \textit{See} Zerby v. Warren, 297 Minn. 134, 142, 210 N.W.2d 58, 63 (“Defendants also argue that decedent’s contemporaneous violation of Minn. Stat. 145.39, which prohibits possession of glue by a minor with the intent to sniff it, should bar his recovery. They cite no cases which support this contention and we must reject it for the same reasons other defenses to the violation of these statutes are barred.”).

\textsuperscript{227} 306 N.W.2d 806 (Minn. 1981).

\textsuperscript{228} \textit{See id.} at 809.

\textsuperscript{229} \textit{Minn. Stat.} § 347.22 (1998).

\textsuperscript{230} \textit{See Seim}, 306 N.W.2d at 808.

\textsuperscript{231} \textit{See id.}
just received some table scraps. The plaintiff asked the defendant's son if his dog bit and he answered "no."

The injury occurred after the amendment of the comparative negligence act. The amendment turned the statute into a comparative fault act with a broad definition of the types of "fault" that may be compared under the statute: "Fault' includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability." The court noted that the legislature intended that violation of the dog-bite statute would result in strict liability. The issue was whether the comparative fault act required the comparative negligence defense to be available to the defendants. The court concluded that it did not, refusing to let the tail wag the dog, so to speak.

The court's analysis first twisted through the negligence per se law:

A person who is found to have violated a statute may be liable in negligence or strict liability depending upon the type of statute violated. The distinction between these two principles is often blurred. Therefore, resolution of this case requires an understanding of what types of tort liability may arise due to the violation of a statute and the defenses that may be asserted in such instances.

The court, following Prosser, characterized liability based on negligence per se as "merely ordinary negligence, whose existence is established by proof of the violation, but which once proved does not differ in its legal consequences from negligence at common law." The court then noted a second type of statutory liability, which it called statutory strict liability. The court began its statutory liability analysis by first discussing common law strict liability for abnormally dangerous activities, and then moving to a

232. See id.
233. See id.
234. See id. at 809.
235. MINN. STAT. § 604.01, subd. 1a (1998).
236. See Seim, 306 N.W.2d at 809.
237. See id. at 809-10.
238. Id. at 810.
239. Id. (citing Prosser, supra note 102, at 112).
240. See id.
discussion of strict statutory liability, presumably to give context to the statutory liability discussion:

Another form of strict liability is statutory strict liability. This is distinct from negligence per se for two reasons. First, a statutory strict liability statute purports to create a basis for recovery where none would otherwise exist while statutes forming the basis of a negligence per se action are often penal and do not expressly provide for a civil action. For example, the statute at issue in this case states that the owner of a dog is liable in damages if certain conditions exist. . . . In contrast, . . . § 624.21 merely prohibits the sale of fireworks. Although the latter statute provides for no civil liability, the legislature has established a policy that, if deviated from, may constitute negligence. Second, violation of a strict liability statute, by itself, renders the violator liable without any showing of fault. In the case of negligence per se, violation of the statute is a form of fault that may evidence negligence.  

The court was satisfied that its analysis answered the issue of what defenses would be permitted in a statutory strict liability case, and that it could be argued that the inclusion in the comparative fault of “strict tort liability” meant that the plaintiff’s contributory negligence, even if she did not provoke the dog, could be compared with the defendant’s strict liability.  However, the court introduced what it ultimately concluded was the decisive factor, the “doctrine of absolute liability.” That doctrine applies “when the legislature, by enacting a particular statute, intends to preclude certain defenses and place the entire responsibility for the injury upon the individual who violated the statute.”

The court noted that Dart had recognized the doctrine of “absolute liability,” prior to the adoption of the comparative negligence statute, when the court recognized “the existence of an exceptional class of statutes that, by legislative design, do not permit the defense of contributory negligence when it is found that the statute ‘was intended . . . for the protection of a limited class of

241. Id. at 811.
242. See id.
243. See id.
244. Id.
persons from their inability to protect themselves.\textsuperscript{245} The court also noted that it had previously found that strict liability was to be imposed under section 347.22 in indicating that the statute, as it existed in 1953, was “equivalent to absolute liability except for the statutory defenses of provocation and failure to peaceably conduct oneself in any place where one may lawfully be.”\textsuperscript{246}

The court acknowledged that the argument could be made “that both absolute liability based upon negligence per se and absolute statutory strict liability were abolished” by the comparative negligence and comparative fault statutes.\textsuperscript{247} The court, relying on the Uniform Comparative Fault Act,\textsuperscript{248} which provided the model for the amendments that turned Minnesota’s comparative negligence statute into a comparative fault act, and \textit{Zerby}, concluded the legislature in no way intended that the adoption of the comparative fault act impinge on the absolute liability doctrine:

Although section 347.22 was not enacted to protect a limited class of persons unable to protect themselves, we hold that the legislature intended to impose absolute liability upon a violator of the law for two reasons. First this court in the \textit{Lavalle} case indicated that the statute placed the entire responsibility of injury due to a dog bite upon the dog’s owner if the elements of the statute were met. Thus, except for the defenses already built into the law, recovery is insured in all cases. Because \textit{Lavalle} was decided before the enactment of the comparative negligence statutes, the statement of the \textit{Zerby} court applies in this case: “the adoption of a comparative negligence statute did not create liability where none existed before.” Second, the Uniform Comparative Fault Act indicates that those who violate statutes such as section 347.22 cannot have their liability reduced due to the negligence of the plaintiff. The comment to section 1 states that statutes that are “construed as intended to provide for recovery of full damage irrespective of contributory fault,” are not covered by the Uniform Act.

\textsuperscript{245} \textit{Id.} at 811 (quoting \textit{Dart v. Pure Oil Co.}, 223 Minn. 526, 535, 27 N.W.2d 555, 560 (1947)).
\textsuperscript{246} \textit{Id.} at 812 (citing \textit{Lavalle v. Kaupp}, 240 Minn. 360, 363, 61 N.W.2d 228, 230 (1953)).
\textsuperscript{247} \textit{Id.} at 812.
\textsuperscript{248} \textit{See Minn. Stat.} §§ 604.01-05 (1978).
The statute at issue in this case states that "the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained." The similarity of language between the comment to the Uniform Act and the statute at issue herein provides a compelling reason to conclude that section 347.22 was meant to provide absolute statutory strict liability. Our application of the absolute liability doctrine during this era of comparative fault recognizes the principle that the legislative body that enacted the comparative fault statute has the authority to carve out or preserve exceptions to the statute in the interest of public policy.249

The court left no doubt as to whether the statutory exceptions in Dart survived the comparative fault act. The question was answered affirmatively in Zerby.250 Seim emphasizes that conclusion, although the court's discussion of absolute liability seems to blur the lines between statutes used in a negligence per se analysis and statutes that provide an explicit remedy for their breach.251 The common denominator for both is the need to discern the legislative intent underlying the statutes.

In cases where there is an express cause of action, it is unnecessary to determine whether the legislature intended liability under the statute to be absolute. The issue is what defenses, if any, the legislature intended to make available for the violation.252 The absolute liability construction is used as a means to excise the dog-bite statute from the potential reach of the comparative fault act. That conclusion could have been reached without the Dart analysis, which becomes simply a parallel illustration of the court's perception of the "absolute liability" concept in statutory

249. Seim, 306 N.W.2d at 812-813 (citations omitted).
252. A parallel analysis of cases under the Civil Damage Act illustrates the point. See MINN. STAT. § 340A.801 (1990). The legislature permits recovery by the surviving spouse and next of kin for loss of means of support against a commercial vendor of alcohol that illegally sold alcohol. See id. Absent an indication of legislative intent, the court would conclude that comparative fault principles are inapplicable and that the surviving spouse and next of kin are permitted to recover, even where the voluntary intoxication of the person upon whom they were dependent was a cause of their loss. A specific legislative amendment made comparative fault principles applicable to Civil Damage Act claims. See 1978 Minn. Laws 836; see also MINN. STAT. §§ 604.01-02 (1978). It is doubtful that the court would have arrived at the same conclusion absent the amendment.
construction. The dog-bite statute is not intended to protect a specific class of persons against their own inability to protect themselves, so it is not an "exceptional" statute in that sense. The court's understanding was that the legislature intended to restrict the available defense to provocation. Thus, there are different ways to reach the conclusion that the legislature intended to impose absolute liability for certain statutory violations.

E. Thelen v. St. Cloud Hospital

In Thelen v. St. Cloud Hospital, the court of appeals held that the Vulnerable Adult Act (VAA) imposed absolute liability on a hospital based on an employee's failure to report the abuse of vulnerable adult patients in the hospital's care. The plaintiff in the case, age nineteen, was hospitalized at St. Cloud Hospital for severe depression. While there, the plaintiff met a hospital employee who was a mental health specialist. On several occasions the employee engaged in sexually touching the plaintiff, in addition to discussing sex with her several times a day. The complaint alleged that the same employee subjected two other female patients to similar misconduct, that the conduct was reported, and that no action was taken.

The plaintiff brought suit against the hospital, her psychiatrist, and a staff psychiatrist who had treated one of the other patients the employee had abused. The complaint alleged that the psychiatrists knew that the employee had abused patients. The plaintiff's complaint alleged various claims, including a violation of the VAA. The VAA requires health care professionals to report the abuse of vulnerable adult patients to appropriate authorities.

The plaintiff moved for partial summary judgment, arguing that the defendants should be precluded from asserting the defenses of contributory negligence, assumption of risk, and

---

255. See Thelen, 379 N.W.2d at 194.
256. See id. at 190.
257. See id.
258. See id.
259. See id. at 190-91.
260. See id. at 191.
261. See id.
262. See id.
263. See MINN. STAT. § 626.557, subd. 1 (1984).
proximate cause because the VAA imposed absolute liability on the defendants. For purposes of the motion, the plaintiff conceded the validity of the hospital's version of the facts, which included the assertion that the plaintiff thought that the employee was flirting with her, that she flirted back and that she did not report the employee to the relevant authorities until three to four weeks after the incidents began. The trial court held that the VAA imposed absolute liability on the defendants, which precluded the defendants from raising the contributory negligence and assumption of risk defenses. The court of appeals affirmed.

The VAA public policy reasoning is as follows:

The legislature declares that the public policy of this state is to protect adults who, because of physical or mental disability or dependency on institutional services, are particularly vulnerable to abuse or neglect; to provide safe institutional or residential services of living environments for vulnerable adults who have been abused or neglected; and to assist persons charged with the care of vulnerable adults to provide safe environments.

In addition, it is the policy of this state to require the reporting of suspected abuse or neglect of vulnerable adults, to provide for the voluntary reporting of abuse or neglect of vulnerable adults, to require the investigation of the reports, and to provide protective and counseling services in appropriate cases.

The definition of "vulnerable adult" is defined broadly to include "any person eighteen years of age or older... [w]ho receives services at or from a facility required to be licensed to serve adults pursuant to [the Public Welfare Licensing Act], except a person receiving outpatient services for treatment of chemical dependency or mental illness...." St. Cloud Hospital fit the definition of a "facility" as defined in the VAA.

The reporting provisions of the VAA imposed obligations on...
the following persons:

A professional or his delegate who is engaged in the care of vulnerable adults, education, social services, law enforcement, or any of the regulated occupations referenced [in the Act], or an employee of a rehabilitation facility . . . , or an employee of or person providing services in a facility who has knowledge of the abuse or neglect of a vulnerable adult, has reasonable cause to believe that a vulnerable adult is being or has been abused or neglected, or who has knowledge that a vulnerable adult has sustained a physical injury which is not reasonably explained . . . .

The term “abuse” is defined to include acts that constitute a violation of various criminal statutes, including fourth-degree criminal sexual conduct, and “the intentional and nontherapeutic infliction of physical pain or injury, or any persistent course of conduct intended to produce mental or emotional distress.” Subdivision 7 of the VAA, as it read at the time the case was decided, made failure to report abuse or neglect a misdemeanor. It also provided for the imposition of civil liability for negligent or intentional failure to report.

The hospital’s primary argument in the case was that a statutory violation could not result in the imposition of liability because there was no showing that the plaintiff “was unable to protect herself from the type of abuse she received.” The court of appeals, relying on Zerby, Seim, and Scott, disagreed:

Generally the tort liability resulting from violation of a statute does not differ from ordinary negligence. The only difference between a statutorily imposed duty of care and a duty of care under common law is that the duty imposed by statute is fixed, so its breach ordinarily constitutes conclusive evidence of negligence, or negligence per se, while the measure of legal duty in the absence of statute is determined under common-law

271. Id. § 626.557, subd. 3.
272. Id. § 626.557, subd. 2(d)(1), (2).
273. See id. § 626.557, subd. 7.
274. See id.
275. See Thelen, 379 N.W.2d at 192.
principles. The doctrine of absolute liability applies to preclude affirmative defenses when the legislature intends by enacting the statute to place the entire responsibility for the injury on the individual who violated it. If the legislature intended "to protect a limited class of persons from their own inexperience, lack of judgment, inability to protect themselves or to resist pressure, or tendency toward negligence," the plaintiff's contributory negligence is not a bar to recovery. Because there can be no contributory negligence as a matter of law when the statute is designed to protect persons from their inability to protect themselves, the adoption of comparative negligence did not alter the exclusion of defenses.\(^{276}\)

The court of appeals agreed with the trial court's position in its memorandum on the issue:

Minn. Stat. § 626.557, subd. 2(b) defines "vulnerable adult" as one who suffers from "impairment of mental or physical function or emotional status." It is therefore reasonable to anticipate that these people will not function at the level of other adults. Vulnerable adults, because of the disabilities which make them vulnerable, might be more likely to engage in behavior which, if engaged in by a non-vulnerable adult, would be regarded as assumption of risk or contributory negligence. If that behavior were taken into consideration in cases arising under this statute, the civil liability imposed ... would be a nullity.\(^{277}\)

The court of appeal's policy rationale followed the policy path the supreme court had previously established. The court of appeals concluded that the defendant could not assert the contributory negligence or assumption of risk defenses because allowing those defenses would defeat the statute's purpose.\(^{278}\) Relying on \textit{Zerby}, the court concluded that the legislature "must have intended that no defense would displace the responsibility imposed by the statute," and in distinguishing \textit{Scott}, that imposing absolute liability on the defendants would not place an "impossible burden" on those  

\(^{276}\) \textit{Id.} at 192-93 (citations omitted).

\(^{277}\) \textit{Id.} at 193-94.

\(^{278}\) \textit{See id.} at 194.
individuals required to report under the VAA.\textsuperscript{279}

\textit{Thelen} makes a couple of points about the route to be followed in determining whether violation of a statute will result in the imposition of absolute liability. The first step is to identify the class of persons, of which the plaintiff is a member, as a vulnerable population entitled to special protection under a particular statute. If so, violation of a statute intended to protect that vulnerable population should result in the imposition of absolute liability, meaning that the violating party cannot assert the defenses of contributory negligence or assumption of risk against the persons the statute specifically protects. The second step is to determine whether there are any policy justifications that would justify a refusal to impose absolute liability for the statutory violation. The only policy justification the \textit{Thelen} court identified was based on the supreme court’s analysis in \textit{Scott}, in which the court concluded that imposing absolute liability for failure to have high school shop students wear safety glasses would result in an “impossible burden” on those charged with administering a statute or regulation. There was no such demonstration in \textit{Thelen}.

The court of appeals worked with the established standards applicable to statutory violations in concluding that the VAA precluded the defendant from asserting the defense of contributory negligence. The case provides a solid summary of the law at that point in time.

\textbf{F. Doe v. Brainerd International Raceway, Inc.}

In \textit{Doe v. Brainerd International Raceway, Inc.},\textsuperscript{280} the plaintiff, a teenager, was a trespasser on the defendant’s property during the Quaker State Northstar National Race.\textsuperscript{281} The race was surrounded

\textsuperscript{279} See id. Two other issues arose. The plaintiff argued that the statute also precluded causation defenses. See id. The court, however, said that even if the statute was violated and the violation is negligence per se, the plaintiff would still have to show that the failure to report resulted in damage to her. See id. The second issue was whether the hospital would be absolutely liable for all damages resulting from abuse, rather than just the damage caused by failure to report. See id. The court found no legislative intent to expand recovery beyond the Act’s specific language, and therefore concluded that the Act does not impose absolute liability for all damages caused by the abuse. See id.

\textsuperscript{280} 514 N.W.2d 811 (Minn. Ct. App. 1994), rev’d, 533 N.W.2d 617 (Minn. 1995).

\textsuperscript{281} See id. at 814.
by events that were generally raucous and uncontrolled.\textsuperscript{282} The plaintiff voluntarily participated in a wet T-shirt contest but was sexually exploited as the contest degenerated.\textsuperscript{283} Brainerd International Raceway (BIR) usually obtained the security services of North Country Security, Inc. (NCS) for these sorts of events, and did so for the Quaker State Northstar National Race.\textsuperscript{284} Wet T-shirt contests had previously been held on the grounds with the knowledge of the defendants, BIR and NCS.\textsuperscript{285} A wet T-shirt contest was planned, although not by defendants, for the year in which the plaintiff participated.\textsuperscript{286} The defendants had knowledge of the contest in which the plaintiff participated.\textsuperscript{287} Plaintiff also produced evidence that the head of security for the event had approved the event.\textsuperscript{288} The crowd’s behavior at the Quaker State race was generally more boisterous than at other BIR events.\textsuperscript{289} In fact, security personnel said that they would not go into the more dangerous area of the BIR compound, a place called the “zoo,” where the wet T-shirt contest took place.\textsuperscript{290} The plaintiff participated in the contest.\textsuperscript{291} The contest degenerated into a sexual performance in which the plaintiff took her clothes off, accepted beer from the audience, and waved to the crowd.\textsuperscript{292} The sexual performance on stage between the plaintiff and a contest promoter, not an employee of either BIR or NCS, involved digital penetration and oral sex.\textsuperscript{293} The plaintiff said she was not forced into these actions and that she continued with the sexual display so she could win the contest.\textsuperscript{294} She also said that she was drunk and high on cocaine during the contest, although she was aware that she was on a stage in front of an audience.\textsuperscript{295}

The plaintiff brought suit against BIR and NCS, alleging

\begin{itemize}
\item \textsuperscript{282} See id.
\item \textsuperscript{283} See id.
\item \textsuperscript{284} See id.
\item \textsuperscript{285} See id.
\item \textsuperscript{286} See id.
\item \textsuperscript{287} See id.
\item \textsuperscript{288} See id. at 815.
\item \textsuperscript{289} See id.
\item \textsuperscript{290} See id.
\item \textsuperscript{291} See id.
\item \textsuperscript{292} See id. at 814-15.
\item \textsuperscript{293} See id. at 815; see also Doe v. Brainerd Int’l Raceway, Inc., 533 N.W.2d 617, 620 (Minn. 1995).
\item \textsuperscript{294} See Doe, 533 N.W.2d at 619.
\item \textsuperscript{295} See id. at 620.
\end{itemize}
negligence. The trial court granted summary judgment for the defendants and the court of appeals reversed, concluding that the defendants owed the plaintiff both a common law duty and a statutory duty arising out of Minnesota Statutes section 617.246. The supreme court reversed both holdings.

Plaintiff based one of her claims on the defendants’ violation of Minnesota Statutes section 617.246, which prohibits the use of minors in sexual performances: “It is unlawful for a person to promote, employ, use or permit a minor to engage in . . . any sexual performance if the person knows or has reason to know that the conduct intended is a sexual performance.”

The statute defined “sexual performance” as “[a]ny play, dance or other exhibition presented before an audience or for purposes of visual or mechanical reproduction which depicts sexual conduct as defined by clause (e).” Clause (e) defines “sexual conduct” to include “[a]n act of sexual intercourse, normal or perverted, actual or simulated, including . . . oral-genital intercourse . . . .”

The defendants’ motion for summary judgment was based on their argument that they did not owe a duty to Doe, a trespasser, to protect her from the consequences of her voluntary actions, and that they could not foresee the contest organizers’ criminal activities. The trial court granted the defendants’ summary judgment, but without considering plaintiff’s theory that section 617.246 created a standard of care to which the defendants were required to adhere. The plaintiff appealed the dismissal.

The defendants argued that the statute did not provide for a civil cause of action unless the legislature expressly provided for one, or unless there was a basis in the common law for the imposition of a duty on them. Citing Dart, the court of appeals noted that, as a general rule, courts regard statutes that lay down safety rules intended for the protection of any class or group of

296. See Doe, 514 N.W.2d at 814.
297. See id. at 815.
298. See Doe, 533 N.W.2d at 620.
300. Id. § 617.246, subd. 1(d).
301. Id. § 617.246, subd. 1(e)(i).
302. See Doe, 514 N.W.2d at 817-18.
303. See id. at 815-16.
304. See id. at 811.
305. See id. at 816-17.
individuals as negligence per se, and that the violation of such a statute is conclusive evidence of negligence, but that the defense of contributory negligence is available as a defense to a negligence per se claim, unless the legislature clearly intends to exclude it. The court concluded that section 617.246 “authorizes a civil cause of action and imposes absolute liability for its violation.” The court of appeals concluded that the statute is intended to protect a limited class of persons from their own inexperience or lack of judgment, precluding the assertion of contributory negligence as a defense. The court of appeals also concluded that the defendants owed the plaintiff a duty to prevent injury from occurring to her under the circumstances. The court rejected any claim of primary assumption of risk. In the court’s opinion, the doctrine was inapplicable to the statutory violation claim because the statute imposed absolute liability.

The defendants appealed to the Minnesota Supreme Court, which reversed the court of appeals. There are several interesting aspects of the decision. The court of appeals concluded that the trial court, on summary judgment, had “improperly viewed the evidence in this case in the light least favorable to Doe.” The court of appeals in its factual analysis focused on the knowledge that BIR and NCS possessed concerning both the wet T-shirt contest and their knowledge of the presence of trespassers on the BIR compound at this and similar events. The court of appeals noted the plaintiff’s voluntary actions in becoming intoxicated and using drugs, but concluded that primary assumption of risk was inapplicable because of her impaired state.

The supreme court’s explanation of the facts initially focused on the contest and the NCS president’s knowledge of the contest. Notwithstanding the procedural context of the case, the court’s explanation of the facts seems to conclude that the president heard

306. See id. at 817.
307. Id.
308. See id.
309. See id.
310. See id. at 821.
311. See id.
313. Doe, 514 N.W.2d at 815.
314. See id.
315. See id. at 821.
316. See Doe, 533 N.W.2d at 618-20.
about the contest on his portable radio, instructed security guards to observe the area, but by the time he was able to assemble additional security guards and get to the contest scene, it was over.\textsuperscript{317} The court focused on this explanation, even though initially the court noted that one of the contest organizers claimed that he had told the president of their intent to hold the contest and that the organizer had printed fliers with the time and location of the contest and erected scaffolding for a stage.\textsuperscript{318} The opinion sets out in detail the plaintiff’s role in the case:

At the time of the event, plaintiff was one month away from her seventeenth birthday. A couple of months earlier, in June of 1988, she had participated in a bikini contest and a wet T-shirt contest in Fountain City, Wisconsin. Neither of these contests involved any nudity. Plaintiff ran away from her home in Winona to attend the Brainerd races with three friends, arriving in Brainerd on Friday, August 19, 1988. Without paying the admission fee, she obtained a pass and entered BIR’s premises. NCS and BIR knew that it was common for people to enter the premises without paying for an admission pass.

Plaintiff spent Friday evening drinking and partying. On Saturday, plaintiff began drinking vodka and orange juice at 11 a.m. and continued drinking one drink every half hour until 7 p.m. Plaintiff also inhaled an unknown amount of cocaine throughout the day. Sometime on Saturday, plaintiff learned about a wet T-shirt contest to be held that evening on the BIR premises. She was told that winners of the contest would be awarded a trophy and cash prizes.

Plaintiff voluntarily entered the wet T-shirt contest which began with water being poured over the front of the contestants’ shirts. Within fifteen minutes contestants began stripping. At that point, most of the contestants left the stage, but the four or five women remaining on stage continued a sexual performance which included complete nudity and oral sex. The crowd, predominantly men, was estimated at more than two thousand. The contest lasted approximately one hour.

While on stage plaintiff exposed her breasts to the

\textsuperscript{317} See id. at 619.
\textsuperscript{318} See id.
crowd, lifted her dress, took her shirt off, took her skirt off and dropped her G-string. Plaintiff also accepted beer from the audience and periodically blew kisses and waved to the crowd. Peterson [one of the event organizers] lifted plaintiff into the air several times. The sexual performance on stage between Peterson and plaintiff included digital penetration and oral sex. Plaintiff testified that although she was not forced into her actions on stage, Peterson encouraged her to continue with the sexual display so that she could win the contest. She testified that she was drunk and high on cocaine during the contest, but was aware that she was on stage in front of an audience.\textsuperscript{319}

After setting out the applicable law, the court concluded that a landowner owes no duty to an entrant on land, including an invitee, of dangers that are created in part by that individual:

Thus, under the facts in the present case, plaintiff's claim must fail. Plaintiff chose to run away from home to attend the drag racing event. She chose to consume large amounts of alcohol and cocaine, and enter the wet T-shirt contest. Plaintiff does not specifically argue that defendants had a duty to ensure that a wet T-shirt contest would not take place at all. In fact, when asked whether the event should have been prevented from happening, plaintiff responded:

No, I don't really believe—if people want to have a wet T-shirt contest, then it is a wet T-shirt contest, that's their business, that's fine. And I didn't have anything against entering a wet T-shirt contest.

Furthermore, plaintiff admits that, despite being under the influence of alcohol and cocaine, she knew her actions were wrong. Nonetheless, plaintiff contends that defendants had a duty to protect or warn her from the very harm which she actively created and subjectively appreciated. We disagree. Plaintiff admits being a trespasser, she admits voluntarily entering the contest and she admits that she realized while on stage that her

\textsuperscript{319} Id. at 619-20.
actions were wrong. She could have ended her participation at any time, but chose not to do so. We are not prepared to expand the law to impose a duty on defendants to protect plaintiff from any emotional injuries which she may have incurred as a result of decisions which, in the sober light of day, she might now regret.\footnote{320}

Subdivision 5 of section 617.246 states that "[n]either consent to sexual performance by a minor or the minor's parent, guardian, or custodian nor mistake as to the minor's age is a defense to a charge of violation of this section."\footnote{321} The court of appeals noted subdivision 5 in a footnote relating to the primary assumption of risk issue:

We wish to emphasize the inapplicability of the doctrine of primary assumption of the risk to the duty toward Doe imposed on respondents by Minn. Stat. § 617.246. Under the statute, there arises no question as to whether Doe consented, not only because the doctrine of primary assumption of the risk does not apply to violations of the statute, but because the statute specifically denies the use of any consent on the part of the complainant as a defense.\footnote{322}

The supreme court's opinion does not mention the consent provision of the statute. In fact, the court skirted the statutory issue. Had it gotten as far as the consent provision, it would have had difficulty in concluding that the defendants were entitled to summary judgment. The supreme court first concluded that section 617.246 clearly imposed a criminal penalty on persons who use a minor in a sexual performance, noting, however, that BIR and NCS personnel were not charged with violating the statute.\footnote{323} Nonetheless, the court noted that the statute might be relevant in two other ways. First, the statute could create a civil cause of

\footnote{320. Id. at 621.}
\footnote{321. MINN. STAT. § 617.246 subd. 5 (1998).}
\footnote{322. Doe v. Brainerd Int'l Raceway, Inc., 514 N.W.2d 811, 821 n.5 (Minn. Ct. App. 1994), rev'd, 533 N.W.2d 617 (Minn. 1995).}
\footnote{323. See Doe v. Brainerd Int'l Raceway, Inc., 533 N.W.2d 617, 620 (Minn. 1995).}
action. The court noted the statute, by its language, did not expressly or impliedly provide a civil cause of action for violation of the statute. The 1992 amendment to the statute providing for such a cause of action bolstered the court's conclusion that the statute, as it existed in 1988 when the case arose, did not provide a civil cause of action. Notwithstanding the usual rule against retroactivity of legislative changes, the court concluded that "if the legislature had intended [Minnesota Statute section] 617.246 (1988) to create a civil cause of action, then it would not have needed to enact the subsequent statute."

Second, the court noted that a statute may be relevant if it provides the standard of care where a common law duty exists. The analysis ends there, except for a supporting footnote that reads as follows:

Under some circumstances this court has looked to a criminal statute for the standard of care to be applied in a civil negligence action. Kronzer v. First National Bank of Minneapolis, 305 Minn. 415, 235 N.W.2d 187 (1975); Zerby v. Warren, 297 Minn. 134, 210 N.W.2d 58 (1973); Dart v. Pure Oil Co., 223 Minn. 526, 27 N.W.2d 555 (1947). However, in those cases the defendants in the civil action had violated the criminal statute at issue. Here, as noted, defendants were not prosecuted for violation of the criminal statute.

Initially, the footnote reference implied that on occasion the court has looked to a criminal statute for the appropriate standard of care in civil litigation. In fact, the court does so often, and has done so since the latter part of the nineteenth century. Then, the court avoided the impact of the statute by concluding that it was inapplicable because the defendants were not prosecuted criminally for violation of the statute. The alternative, that the statute provides a standard of care only where the defendant owes a common law duty to the plaintiff, is not explored in greater detail,
although it seems clear that the statute, if applicable, would provide the standard of care by which the defendant's conduct would be measured, notwithstanding the existence of a common law duty.\footnote{331} The court's supporting footnote on the statutory violation issue cites three of the significant Minnesota Supreme Court cases on the negligence per se issue. While the footnote notes that the defendants in those cases violated criminal statutes and were prosecuted, there is no indication in the opinions that this was so.\footnote{332} Much of the briefs in Dart, for example, were devoted to the question of whether the kerosene that Pure Oil sold to the grocery was in fact improperly mixed with gasoline.\footnote{333}

In any event, it would be unlikely that the court would specifically hold that, from this point on in any case involving a statutory violation, the defendant would have to be prosecuted, and perhaps convicted, for violating the statute before the plaintiff could use it in civil litigation. The cases are legion where statutes are utilized in civil litigation when there is no criminal prosecution. The difference in burden of proof between civil and criminal litigation, and the complex factors that might lead a prosecutor not to charge a person with a violation of a criminal statute provide simple, common sense reasons why prosecution should not be a requirement for use of a criminal statute in civil litigation.

Had the Doe court applied the statute, a fact question, as to whether the defendants violated the statute (the usual question in the standard jury instructions involving a statutory violation), would have been raised along with the question of whether the statutory violation was a direct cause of the plaintiff's injury. The statute might have provided the appropriate standard of care, but it also may have been labeled an exceptional statute that precluded the assertion of the contributory negligence defense. The statute is intended to protect the plaintiff from being exploited by reason of her lack of judgment. Her knowledge of the contest's character and her voluntary participation would be irrelevant, as the court of appeals noted, because barring her recovery would reduce the defendant's statutory obligation to act for the protection of the

\footnote{331} The court's conclusion on the common law duty issue, while beyond the scope of this article, is also questionable, particularly in light of the standard, black letter Restatement provision that would govern such situations. \textit{See} \textit{Restatement (Second) of Torts} \S\ 336 (1965). If the defendant is aware of the presence of people, it makes no difference whether they are trespassers or not.\footnote{332} \textit{See Doe}, 533 N.W.2d at 620 n.3.\footnote{333} \textit{See} Dart v. Pure Oil Co., 223 Minn. 526, 540, 27 N.W.2d 555, 562 (1947).
plaintiff and others in her class, whether they were good or bad girls.\textsuperscript{334}

If the plaintiff's knowledge of the nature of the contest in which she participated and her voluntary participation in the contest should be a sufficient reason for barring her recovery, then doubt has to be cast on \textit{Dusha},\textsuperscript{335} where the plaintiff mislead his employer into believing that he was over sixteen years of age, or \textit{Zerby}, who voluntarily used glue in violation of a Minnesota statute that prohibited not only the sale but the use of toxic glue.\textsuperscript{336} But, as the supreme court stated in \textit{Doe}, "We are not prepared to expand the law to impose a duty on defendants to protect plaintiff from any emotional injuries which she may have incurred as a result of decisions which, in the sober light of day, she might now regret."\textsuperscript{337}

The strongly moral opinion does not adequately address the statutory violation issue. Perhaps the defendants would have prevailed had there been a trial on the issue of statutory violation. A jury might have concluded that the defendants did not in fact violate the statute, but that would be a question of fact. The jury also might have concluded that the defendants did violate the statute; but, again, it would have been a jury issue.

Looking at the statute from another perspective, if the plaintiff sued the contest organizers civilly, a question would arise as to whether the plaintiff would be entitled to recover. Probably, at least given the court's reasoning in footnote three, because the organizers were prosecuted.\textsuperscript{338} But if so, what about the plaintiff's voluntary conduct in engaging in the contest whose nature she understood? If the statute applied, wouldn't the court have been required to apply subdivision 5, precluding the defendants from asserting the plaintiff's voluntary conduct as a defense?

As to the court's reasoning on the trespass issue, what if the plaintiff and a friend, who was a paying customer at the races, both participated in the contest, the plaintiff as a trespasser and the other as an invitee? And what if the friend had not run away from home, and had not been drinking, but simply got carried away and participated in the contest on the spur of the moment, although


\textsuperscript{335} See \textit{Dusha} v. Virginia & Rainy Lake Co., 145 Minn. 171, 176, 176 N.W. 482, 483 (1920).


\textsuperscript{337} \textit{Doe}, 533 N.W.2d at 622.

\textsuperscript{338} See id. at 620 n.3.
she later regretted it? Would the case have been decided the same way? Or would the court’s expansive reading of *Baber v. Dill*\(^{339}\) bar her also?

If the statute applied to the contest organizers, but not to the defendants, then the only basis for the court’s opinion in the case is that the defendants were not criminally prosecuted, unless the assumption is that the plaintiff should be barred even under a negligence per se theory because of her immoral conduct. But if immoral conduct is the issue, then *Zerby* and *Dusaha* would have to be reversed because they failed to take the conduct of the children into consideration. And, if the court would categorically reject any notion that the plaintiff’s conduct is a bar in cases where the defendant has violated a criminal statute, the decision is unsupported by precedent or policy.

In *Doe*, the supreme court concluded that the statutory standard was inapplicable due to the fact that there was no equivalent common law duty owed to the plaintiff.\(^ {340} \) Had the plaintiff paid the entry fee into the raceway, an issue arises as to whether the duty would have been owed.\(^ {341} \) If the supreme court’s conclusion hinges on the fact that she was a trespasser, then the decision is subject to criticism because the duty owed to a discovered trespasser is the same as any other person in the audience. If the conclusion is that there is no correlative common law duty that supports the negligence per se claim, then the question is why there would be no common law duty to prevent injuries to a minor, in an area that presumably would be subject to some degree of control by the owner of the racetrack, where trespassers are indistinguishable from paying guests.

G. *VanWagner v. Mattison*

In *VanWagner v. Mattison*,\(^ {342} \) the plaintiff, who was under the age of twenty one, was seriously injured in a single-car accident

---

339. 531 N.W.2d 493, 496 (Minn. 1995) (holding that a landowner has no duty to warn an invitee or make safe known and obvious conditions that the invitee assisted in creating).
340. See *Doe*, 533 N.W.2d at 622.
341. See *Diker v. City of St. Louis Park*, 268 Minn. 461, 465, 130 N.W.2d 113, 116 (1964) (holding that an amusement park operator had an affirmative duty to make it reasonably safe for his patrons including supervision and control of others on his premises who may cause injury).
342. 533 N.W.2d 75 (Minn. Ct. App. 1995), review denied, (Minn. 1995).
after he left a party that defendants, the Mattisons, hosted. The parties entered into a high-low settlement agreement which allowed VanWagner to recover the higher amount if his percentage of fault did not exceed the fault of the defendants. The arbitrator decided that VanWagner’s fault was 75% and the defendants 25% at fault.

The parties then filed cross-motions for summary judgment in district court on stipulated facts. The parties agreed to be bound by the arbitrator’s allocation of fault, but they stipulated that VanWagner would recover the higher amount only if the Mattisons were held absolutely liable for his injuries. The district court granted the defendant’s motion for summary judgment, concluding that absolute liability did not apply. The court of appeals affirmed, holding that a social host is entitled to assert the contributory negligence of a person under the age of twenty-one who is knowingly provided or furnished alcohol. The supreme court denied review in the case.

In 1990, five years before VanWagner, the legislature provided for social host liability by exempting social host claims from the preemptive stranglehold of the Civil Damage Act. The legislature did not define the structure of the common law negligence action, nor mandate that one be generated by the courts, stating only that nothing in the Civil Damage Act “precludes common law tort claims against any person twenty-one years old or older who knowingly provides or furnishes alcoholic beverages to a person under the age of 21 years.”

343. See id. at 76.
344. See id.
345. See id.
346. See id.
347. See id.
348. See id.
349. See id. at 80.
351. Id. § 340.801, subd. 6. In the last session, the legislature adopted a new section, Minnesota Statute section 340A.90, intended to address the liability of persons 21 years of age or older who provide or otherwise furnish alcohol to a person under 21, or who permit consumption on premises they control. See 2000 Minn. Laws ch. 423, § 1. The new Act reads as follows:

Subdivision 1. (a) A spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss, by an intoxicated person under 21 years of age or by the intoxication of another person under 21 years of age, has for all
damages sustained a right of action in the person's own name against a person who is 21 years or older who:
(1) had control over the premises and, being in a reasonable position to prevent the consumption of alcoholic beverages by that person, knowingly or recklessly permitted that consumption and the consumption caused the intoxication of that person; or
(2) sold, bartered, furnished or gave to, or purchased for a person under the age of 21 years alcoholic beverages that caused the intoxication of that person.
This paragraph does not apply to sales licensed under this chapter.
(b) All damages recovered by a minor under this section must be paid either to the minor or to the minor's parent, guardian, or next friend as the court directs.
(c) An intoxicated person under the age of 21 years who caused the injury has no right of action under this section.

Subd. 2. There shall be no recovery by any insurance company for any subrogation claim pursuant to any subrogation clause of the uninsured, underinsured, collision, or other first-party coverages of a motor vehicle insurance policy as a result of payments made by the company to persons who have claims that arise in whole or in part under this section.

Subd. 3. (a) There shall be no coverage for liability created under this section under homeowner's insurance as defined under section 65A.27, unless:
(1) specifically covered in a policy; or
(2) covered by a rider attached to a policy.
(b) This subdivision expires on December 31, 2001.

Id. Subdivision 2 of the act limits the right of subrogation by insurers who have made payouts pursuant to first-party motor vehicle insurance coverages. Subdivision 3 limits insurance coverage for liability under the Act to cases where the insurer has specifically provided coverage. See id. That provision will be repealed as of December 31, 2001, which will give insurers time to include exclusions from coverage for the acts covered in section 340A.90 in their policies, should they wish to do so. See id.

The bill did not repeal Minnesota Statutes section 340A.801, subdivision 6, which permits social host liability in the limited circumstances where a person 21 years of age or older "knowingly provides or furnishes" alcohol to a person under the age of 21. That raises the issue of how claims for injuries to a minor will be treated under each action.

The window to liability under section 340A.801, subdivision 6, requires that the person 21 years of age or older knowingly provide or furnish alcohol to a minor. Although there has been a paucity of case law on the issue, the requirement that the person 21 or older "knowingly provides or furnishes" alcohol has not been extended to cases where the defendant simply owns property where a party takes place. See, e.g., Frisch v. Bassett, No. C9-95-2043, 1996 WL 104770 (Minn. Ct. App. Mar. 12, 1996).

The operative liability provisions in subdivision 1(a) of the new Act require a showing that the person 21 years of age or older:

(1) had control over the premises and, being in a reasonable position to
The critical issue in *VanWagner* was whether the supreme court's analysis in *Dart* would apply to preclude the defendants from asserting the plaintiff's contributory negligence in the case.\textsuperscript{352} The plaintiff relied heavily on arguing that contributory negligence should not be a defense.\textsuperscript{353} The plaintiff argued that the combination of *Dart*, *Zerby* and *Trail v. Christian*\textsuperscript{354} required the imposition of absolute liability because the statute, prohibiting the furnishing of alcohol to persons under twenty one, is an

prevent the consumption of alcoholic beverages by that person, knowingly or recklessly permitted that consumption and the consumption caused the intoxication of that person; or
(2) sold, bartered, furnished or gave to, or purchased for a person under the age of 21 years alcoholic beverages that caused the intoxication of that person.

This paragraph does not apply to sales licensed under this chapter.

2000 Minn. Laws ch. 423, subpart (2) is similar to the operative provision in subdivision 6 of section 340A.801. Subpart (2) seems broader, although it is possible that the phrase “knowingly provide or furnish” could potentially be extended to those situations.

The most significant difference in cases arising under the new Act and those arising under the social host provision of section 340A.801, subdivision 6, is in the right of the minor to recover for his or her own injuries. The supreme court has held that voluntarily intoxicated minors are not entitled to recover for their own injuries under the Civil Damage Act. See *Randall v. Village of Excelsior*, 258 Minn. 81, 84, 103 N.W.2d 131, 133-34 (1960). The court's holding in *Randall*, and its application in cases arising under the Civil Damage Act, is extended to the claim created in Minnesota Statute section 340A.90, subdivision 1, by subdivision (c), which provides that: “An intoxicated person under the age of 21 years who caused the injury has no right of action under this section.”

There is an important dichotomy, then, between the two actions. A voluntarily intoxicated minor is permitted to recover under the Civil Damage Act, as the court in *VanWagner* has indicated. The voluntarily intoxicated minor is not entitled to recover under the new Act.

Given that important distinction, it seems likely that both causes of action will be asserted in cases where the minor is injured, but survives. The minor will have a claim for his or her own injuries, and a “spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss” will also be entitled to recover. Excluding the potential for double recovery, the statute will permit members of the minor’s family to recover for the “other pecuniary loss,” including loss of the minor’s society, advice, and companionship. In death cases, the claim would be asserted under the broadest theory of recovery, which might include the new Act, given the fact that its operative liability provisions are potentially broader than under the social host liability provision of subdivision 6 of section 340A.801.

352. *See VanWagner*, 533 N.W.2d at 78.
353. *See id.* at 79.
354. 298 Minn. 101, 112, 213 N.W.2d 618, 625 (1973) (holding a tavern's sale of 3.2 beer to a minor created common law strict liability).
exceptional statute within the meaning of those decisions.\textsuperscript{355} The plaintiff also argued public policy in support of his position.\textsuperscript{356} The plaintiff argued that “the legislature intended to protect persons under the age of 21 from the dangers of drinking and driving when it enacted subdivision 6, and contends that such a policy would be undermined if anything less than absolute liability were imposed.”\textsuperscript{357} The plaintiff also argued “that a more stringent standard of liability would more adequately deter the furnishing of alcohol to persons under age 21 by persons age 21 or older.”\textsuperscript{358}

The court of appeals noted the arguments, but then essentially ignored them, accepting the defendant’s position:

The Mattison’s position is straightforward. They argue that because subdivision 6 refers to “common law tort claims” and because absolute liability is not generally imposed under the common law, the action should be subject to the comparative fault statute, Minn. Stat. § 604.01. The Mattisons also note that actions under the Civil Damage Act are subject to comparative fault. See Minn. Stat. § 340A.801, subd. 3 (1992) (actions under the Act are governed by section 604.01). They argue that, as a matter of public policy, social hosts, who serve alcohol only on occasion, should not be held to a higher standard of liability than commercial vendors, who are subject to the Act. Finally, the Mattisons argue that other jurisdictions that permit social host liability have not imposed absolute liability.\textsuperscript{359}

The court stated that the position the Mattisons took was supported by the supreme court’s decision in Jones v. Fisher,\textsuperscript{360} in which the court held that a vendor of 3.2 beer could be held liable in a common law action to the spouse of the decedent who purchased the beer, even where no action would lie under the Civil Damage Act.\textsuperscript{361} In Jones, the court relied on Trail’s conclusion that

\begin{itemize}
\item \textsuperscript{355} See VanWagner, 533 N.W.2d at 79; see also Zerby v. Warren, 297 Minn. 134, 140, 210 N.W.2d 58, 62 (1973); Dart v. Pure Oil Co., 223 Minn. 526, 537, 27 N.W.2d 555, 560 (1947).
\item \textsuperscript{356} See VanWagner, 533 N.W.2d at 79.
\item \textsuperscript{357} Id.
\item \textsuperscript{358} Id.
\item \textsuperscript{359} Id. at 79-80.
\item \textsuperscript{360} 309 N.W.2d 726 (Minn. 1981).
\item \textsuperscript{361} See id. at 733.
\end{itemize}
innocent third parties are entitled to recover from common law vendors of 3.2 beer. Because the spouse of an intoxicated person is considered an innocent third party under the Civil Damage Act, the spouse would also be an innocent person under Trail's theory. The court's conclusion was prompted in part by a desire to avoid the potential constitutional problems that would arise if two persons similarly situated were treated differently:

[T]o rule otherwise would result in an unequal treatment of two classes of plaintiffs solely on the basis of the type of liquor consumed by the intoxicated person. We are compelled by principles of constitutional construction to place 3.2 liquor vendors on the same footing as all other dram-shop violators.

The court of appeals in VanWagner concluded that a parity of reasoning justified the same conclusion: "Similarly, in the present case one could infer that the legislature, in permitting common law actions against social hosts under certain circumstances, intended that social hosts be placed on the same footing with commercial vendors, who have the benefit of comparative fault." The court concluded that subdivision 6 common law actions are subject to the comparative fault act:

In Trail, the supreme court concluded that the legislature did not intend to allow contributory negligence to displace the responsibility imposed by the statute at issue there. Since that decision, however, the legislature has explicitly made dram shop liability subject to comparative fault. . . . The legislature thereby expressed its intent to allow the defense of contributory negligence in certain actions involving violations of statutes regulating liquor, including Minn. Stat. § 340A.503. . . . The Mattison's argument that social hosts should not be subject to a higher standard of liability than commercial vendors appears sound.

We hold that the common law actions permitted under subdivision 6 do not involve absolute liability and are

362. See id. at 728.
363. Id.
364. VanWagner, 533 N.W.2d at 80.
therefore subject to comparative fault. 365

The court's conclusion in VanWagner rests primarily on its assumption that a legislative intent to treat the Civil Damage Act and common law claims the same with respect to comparative fault principles could be "inferred." 366 That conclusion seems to be a stretch. The reverse was true in Jones. 367 The supreme court in Jones construed the statute in a way that would avoid the constitutional problem that might have been created had two somewhat similar classes of cases been treated the same. 368 Unlike VanWagner, however, the issue in Jones concerned the principles applicable to commercial vendors of alcohol, one of whom sold 3.2 beer and was subject to common law liability, and the other of whom sold intoxicating liquor and was subject to liability under the Civil Damage Act. VanWagner's two classes would be commercial vendors of alcohol and social hosts twenty-one years of age or older who sold alcohol to persons under the age of twenty-one. The "constitutional" imperative to treat the classes similarly is certainly less in VanWagner than in Jones. And the legislative intent the court was willing to "infer" was based solely on what the legislature did with respect to the Civil Damage Act.

The 1990 Legislative Study Commission recommended a change to the Civil Damage Act that resulted in a limited legislative release of the limitation on common law tort claims against social hosts. 369 The intent of that recommendation, adopted verbatim by the legislature, was to create a greater degree of accountability for private persons twenty-one years of age or older who furnished or provided alcohol to persons under the age of twenty-one. 370 There was no intent to simply create a limited extension of liability according to the terms of the Civil Damage Act.

If the court of appeals was concerned about the relationship between the two statutes, then it missed the greatest anomaly,

---

365. Id.
366. See id.
367. See Jones, 309 N.W.2d at 728 (holding that innocent third parties, irrespective of the type of alcohol consumed can maintain a claim under the Civil Damage Act).
368. See id. (stating that not allowing the innocent third party's cause of action would be inconsistent with common law principles and result in unequal treatment of two classes of plaintiffs).
370. See id.
which is that voluntarily intoxicated persons who are precluded from recovering against a commercial vendor of alcohol under the Civil Damage Act are permitted to recover against social hosts, if they enter the window to common law liability in the Civil Damage Act.\textsuperscript{371}

There are other differences as well, including the damages that are recoverable in the two actions. There is no exact common law action for persons injured in their means of support, and no common law right to recovery for pecuniary loss in cases other than wrongful death cases. In short, inferring a legislative intent to subject common law tort claims to the same rules that bind Civil Damage Act claims is a stretch that does not seem justified in a constitutional democracy that purports to respect the concept of separation of powers. To achieve parity, the courts would have to further judicially legislate recoverable damages, statutes of limitations, and perhaps notice requirements to make the common law and Civil Damage Act claims parallel. And, most significantly, the courts would have to completely bar any person under the age of twenty-one from any recovery whatsoever from an adult furnishing or providing that person alcohol.

The supreme court has acknowledged the justifications for imposing liability on social hosts, suggesting that “[n]o one would seriously disagree with this, or suggest that minors should be encouraged to drink illegally, or not be protected from drinking alcohol. We incorporated that policy in both Ross and Trail, only to have their full impact nullified by legislative amendments.”\textsuperscript{372} In this case, it is the legislature itself that created the exception to the previously imposed ban on social host liability, but without making actions under the exception subject to Civil Damage Act rules.

\textit{VanWagner} illustrates the concern raised in this article’s prior discussion of \textit{Scott}.\textsuperscript{373} Legislative intent, as inferred from the wording of the statute, is important in construing statutes. Probing further in a search for legislative intent, without solid foundation, risks further abrasion of the \textit{Zerby} principle. The enabling legislation in subdivision 6 simply gives the courts the latitude to permit common law claims, free of the constraints that apply to Civil Damage Act claims against commercial vendors of alcohol.

\textsuperscript{371} See id.

\textsuperscript{372} Holmquist v. Miller, 367 N.W.2d 468, 471-72 (Minn. 1985) (holding that a common law cause of action was preempted by the Civil Damage Act).

\textsuperscript{373} See supra Part IV.C.
The point in 1990 was not to bind the courts with those constraints, but to free them to apply ordinary common law principles, including negligence per se.

Minors, of course, bear some responsibility for their own actions. However, as Zerby points out, that is irrelevant, at least on the civil side. The fact that minors may be penalized pursuant to statute, or perhaps subject to suit themselves for the harm they negligently cause, does not detract from the fact that they are persons who are owed a statutory duty by persons twenty-one and older to prevent them from harming themselves.

Statutory construction issues aside, the court of appeals in VanWagner did not deviate from Zerby’s principles. That decisional line was, in effect, ignored.

H. Fahrendorff v. North Homes, Inc.

In Fahrendorff v. North Homes, Inc., the issue was whether North Homes, a nonprofit corporation that operated a temporary crisis shelter, could be held liable for a sexual assault committed by one of the shelter employees against a shelter resident. The trial court granted summary judgment in the case, based upon the court’s conclusion that the employee was not acting in the course and scope of his employment as a matter of law. The supreme court reversed, holding that there was a fact issue as to whether he was acting in the course and scope of his employment.

The court did not address the plaintiff’s argument that North Homes should have been held strictly liable for the employee’s actions based on their violation of Minnesota Statutes section 260.011, which reads in pertinent part:

The paramount consideration in all proceedings concerning a child alleged or found to be in need of protection or services is the health, safety, and best interests of the child. . . . The purpose of the laws relating to juvenile courts is to secure for each child alleged or

---

375. 597 N.W.2d 905 (Minn. 1999).
376. See id. at 909.
377. See id. (stating that the sexual conduct was for personal satisfaction and not in furtherance of any employment duties).
378. See id. at 913.
adjudicated in need of protection or services and under the jurisdiction of the court, the care and guidance . . . as will best serve the spiritual, emotional, mental, and physical welfare of the child; . . . and, when removal from the child's own family is necessary and in the child's best interests, to secure for the child custody, care and discipline as nearly as possible equivalent to that which should have been given by the parents. 380

The plaintiff was admitted to a twenty-four hour residential program pursuant to a juvenile court order based on the court's determination that the plaintiff's removal from her family was necessary and in the plaintiff's best interests. 381 Justice Page, concurring specially, would have concluded that North Homes "had an absolute duty to protect Fahrendorff's health, safety, and best interests and to provide care 'as nearly as possible . . . to that which should have been given by [her] parents.'" 382 Because North Homes failed to protect her from the employee's sexual assault, he would have held North Homes strictly liable for any injuries the plaintiff suffered from the sexual assault. 383

Fahrendorff is an interesting test case. It could go various ways, depending on the application of precedent in the exceptional statute cases. The statutory duty is general. Perhaps the first issue would be whether the statutory standard applies if there is no common law duty. The issue would be whether a group home has a duty under the general common law to exercise reasonable care for the protection of its juvenile residents. The majority opinion focused on the issue of whether the defendant should be held vicariously liable for the criminal acts of one of its employees. 384 There appeared to be no issue of whether there would be a special relationship between the defendant and the plaintiff to impose a duty of reasonable care on the defendant. 385

However, assuming that a duty of reasonable care existed, so that there would be a sufficient common law obligation to support

380. Id.
381. See Fahrendorff, 597 N.W.2d at 913 (Page, J., concurring specially).
382. Id. at 913-14 (citing MINN. STAT. § 260.011, subd. 2(a) in support of his concurrence).
383. See id. at 914.
384. See id. at 910-11 (discussing recent case holdings dealing with employer's liability for acts of sexual misconduct by one of its employees).
385. See id. at 910 (stating that the focus of the analysis should on whether the employee's assault was related to the duties of his employment).
the application of a statutory standard as the measure of the defendant's duty, there is a question of whether the statutory standard adds to the common law obligation. Perhaps it makes the inquiry more specific. If the statute provides a specific standard of care, violation of the statute would be negligence per se. It would impose an absolute obligation on the defendant to provide for the safety of minors in its charge. The final question would be whether the statutory violation would preclude the assertion of any defenses in the case.

The plaintiff, who was fifteen, was subjected to unwanted sexual contact with the defendant's employee.\textsuperscript{386} What if questions had arisen concerning her participation, however? Would the defendant in a negligence action have been able to assert her contributory negligence as a defense? If the applicable statute is clearly intended to protect a class of persons of which the plaintiff is a member from harm of the type she suffered, then violation of the statute would be negligence per se. Furthermore, because the statute could be deemed an "exceptional" statute, the defenses of contributory negligence and secondary assumption of the risk would be precluded. Unless, that is, the plaintiff "chose" to engage in the conduct. Of course, a distinction from the Doe case is that the plaintiff quite clearly is not a trespasser. However, she did make certain choices that led to the contact.\textsuperscript{387} An additional issue concerns her lack of allegations of physical harm. She suffered emotional injury.\textsuperscript{388} Perhaps she could have been barred on that basis. In addition, nothing in the record indicates that the group home was in fact prosecuted for its violation.\textsuperscript{389}

In tandem, those conclusions would seem difficult to absorb in a case such as Fahrenkoff. The law exists to protect juveniles such as the plaintiff, even if they engage in voluntary action that is detrimental to them. Justice Page's result would be supported by all of the appellate decisions, save Doe and VanWagner.

\textsuperscript{386} See id. at 908.
\textsuperscript{387} See id. (stating that the juvenile accepted both a cigarette and a can of beer from the employee).
\textsuperscript{388} See id. at 909.
\textsuperscript{389} See id. at 908-09 (noting that the employee pled guilty to violating Minnesota Statutes, section. 641.165, subdivision 2(a) (1998) and second-degree criminal sexual conduct).
V. CONCLUSION

The law relating to "exceptional" statutes is a sub-issue of a more general question concerning the impact of statutory violations in civil litigation. Legislatures will sometimes provide a specific remedy for a statutory violation. Courts will sometimes imply the existence of a remedy. Very often, particularly in cases involving the violation of criminal statutes, the legislature is silent on the remedies issue, which leaves to the courts the issue of what impact the statutory violation will have in civil cases. Typically, if a statute that is intended to protect a specific class of persons, of which the plaintiff is a member, from the kind of injury the plaintiff sustained, violation of the statute will be negligence per se.

In cases where there is an express or implied remedy as well as cases where a statutory violation results in a finding of negligence per se, questions will arise concerning the appropriate defenses to the statutory violation. In cases involving the violation of the "exceptional" statutes, the usual consequence is that courts will preclude the assertion of the defenses of contributory negligence and secondary assumption of the risk by the defendant who violates the statute. Usually, those statutes are intended to protect vulnerable populations, or other groups deserving special protection.

Application of statutory standards to civil litigation is not automatic, however. A court may decide that statutes, even so-called "exceptional" statutes, do not present appropriate standards for civil litigation. The reasons for rejection vary. A court may reject the statutory standard because it has no parallel common law duty to support its use, or, a court may refuse to use the standard to otherwise expand a defendant's common law duty. If so, the statutory violation will have no bearing on the civil case. A court may also decide that the statutory standard applies, but choose not to find that the statute precludes the assertion of the defenses of contributory negligence and secondary assumption of the risk. The Minnesota Supreme Court did exactly that in Scott, based on the court's assumption that refusing to permit the defenses would place an excessive burden on schools required to enforce the statute.

In 1985, as the court of appeals decided the Thelen case, the picture of Minnesota law governing "exceptional" statutes was

390. See supra Part IV.E.
conventional. The court of appeals threaded its decision through the string of decisions from Zerby to Scott in concluding that the Vulnerable Adults Act was intended to protect the plaintiff, who met the statutory definition of “vulnerable adult,” and that the defenses of contributory negligence and secondary assumption of risk could not be asserted by the defendant. In refusing to apply the statute, the court considered the one policy factor the supreme court had previously seized upon in Scott, the unreasonable burden the statute would have placed on schools. The court found this policy consideration lacking as a reason not to prohibit those defenses for hospitals.

When the supreme court decided Bruegger in 1993, the court rejected the argument that a county sheriff’s office was liable for failing to fulfill its statutory obligation of informing the plaintiffs of their right to claim compensation under the Crime Victims Reparations Act, based on its conclusion that there was no common law duty that supported use of the statute as a standard of care in a common law negligence action. The court’s probing for a correlative or supporting common law duty is a mainstream judicial assessment of a statute’s impact. The rejection of the statute in that case could also be justified on various policy grounds, including the policy argument presented in Scott. It is inappropriate to impose such a broad burden on a county office, particularly where the loss that is sustained is economic.

The same analysis could be used in rejecting a statute that would otherwise be deemed “exceptional,” except that an additional step might be followed, similar to the step taken by the Texas Supreme Court in Perry, in determining whether the common law duty should in fact be modified to accommodate the statutory standard. Courts have the constitutional authority to make common law rules and to change those rules. It is a power that is exercised regularly but judiciously. Such a step was not taken in Bruegger, although it is doubtful that the result would have differed, perhaps for Perry-like reasons.

The supreme court’s decision in the Doe case and the court

391. See supra Part IV.B–C.
392. See Bruegger v. Faribault County Sheriff’s Dep’t, 497 N.W.2d 260 (Minn. 1993).
393. See id. at 262.
394. See Perry v. S.N., 973 S.W.2d 301 (Tex. 1998).
395. See supra Part IV.F.
of appeal's decision in VanWagner\textsuperscript{396} seem to turn acutely away from the legal path established at the time the court of appeals decided Thelen. The statute at issue in Doe, which prohibited the use of minors in sexual performances, is obviously intended to protect vulnerable populations. The plaintiff in Doe was a minor, even if she appeared to possess the capacity to exercise judgment and did exercise poor judgment. The point is that in some circumstances the legislature intends to protect vulnerable populations from people who might abuse or prey on them, even if they consent to the abuse. The statute at issue in Doe specifically provided that the defense of consent could not be asserted in criminal prosecutions. The usual result is that the consent provision translates to civil actions, negating any actual consent, no matter how bad the judgment is that led to the consent.

There are several parts to the court's refusal to find a common law or statutory duty in Doe. On the common law side, the court noted that the plaintiff was a trespasser, and that the defendant did not owe her a duty to disclose conditions to her that were in part her own making. The court used the lack of a common law duty to leverage its conclusion that there was no statutory duty. Opposite conclusions could have been reached. For example, under common law duty, the plaintiff's presence, along with other paid guests of BIR, would not under ordinary circumstances differentiate her from the paid guests for purposes of determining the duty of the defendants. Very simply, if both plaintiff and another sixteen-year-old paid guest had participated in the wet T-shirt contest, on the same stage at the same time, it would be difficult to conclude that the defendants owed a duty to the paying guest, but not the plaintiff.

Even if the plaintiff had paid the price of admission, it seems doubtful that the court would have arrived at a different result. There were other reasons for denying recovery. The trespass issue aside, the court concluded that the plaintiff did not assert physical symptoms arising from her emotional distress, and that no common law duty existed for those reasons. There was physical contact, however, with the plaintiff in Doe, so that under usual tort rules, the emotional injury she claimed would be an offshoot of the physical touching.

Another justification for refusing to apply the statute, that

\textsuperscript{396} See supra Part IV.G.
there was no actual prosecution of BIR, is a new and, for
negligence per se purposes, potentially devastating justification for
refusing to apply a statutory standard. Generally, the outcome of
criminal proceedings should not have an impact on civil litigation.
And, in many cases, there is no prosecution where there are
statutory violations that could be established civilly.

VanWagner did not directly address the plaintiff’s arguments
that the statutory standard precluded the defense of contributory
negligence in a case involving a statutory violation that prohibited
furnishing alcohol to a person under the age of twenty-one. Again,
the statute was intended to protect a vulnerable population from its
own judgmental failures. The court’s rationale for permitting the
defense of contributory negligence was based on an analysis that
wound through the Civil Damage Act and ended with the
assumption that the legislature’s intent in permitting limited social
host actions was that minors should be treated the same in a
common law action as in a Civil Damage Act action. The decision,
however, does focus on legislative intent, which is a critical factor in
determining how a criminal statute will apply in a civil action. If
the decision can be faulted, it is because the court of appeals
bypassed the path typically used to resolve “exceptional” statute
issues in favor of assumptions regarding the legislature’s intent to
subject claims under common law social host theory to the same
strictures as the Civil Damage Act.

Doe may perhaps be best understood as a one-act morality play
in which a vulnerable teenager made bad choices that put her in a
position to be sexually exploited, and she was required to bear the
consequences of her choices. Her perfidy overrode the law in
Dusha, Zerby and Thelen. The question is whether the override is
unique to Doe, or whether questionable moral judgment will always
be the subject of inquiry in cases involving vulnerable populations.