

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
CASE TYPE: CIVIL

Destiny Dusosky,

Court File No. _____

Plaintiff,

COMPLAINT

v.

Michelle Fischbach,

Defendant.

Plaintiff Destiny Dusosky (“Plaintiff”) for her complaint states and alleges as follows:

INTRODUCTION

On February 12, 2018, the Ramsey County District Court dismissed, without prejudice, Plaintiff’s Complaint that Lieutenant Governor Michelle Fischbach’s stated intention to retain her seat in the Minnesota Senate after ascending to the office of lieutenant governor violated the Minnesota Constitution. The Court cautioned that it had grave concerns regarding whether the Constitution allowed Lieutenant Governor Fischbach to continue to hold the legislative office but reasoned that the action was premature given that the 2018 legislative session had not yet started; that the Senate has exclusive authority to determine the eligibility of its members; and that Destiny Dusosky had not suffered a particularized injury.

Circumstances have changed in the past eight weeks. The 2018 legislative session is well underway and Lieutenant Governor Fischbach is exercising the powers and duties of the office of state senator for Senate District 13. The Senate has failed to consider whether Lieutenant Governor Fischbach can continue to hold her legislative office. And Destiny Dusosky has been, and will continue to be, deprived of representation in the Minnesota Senate unless the Court intercedes and

puts an end to Lieutenant Governor Fischbach's unconstitutional retention of the office of state senator. Plaintiff Destiny Dusosky brings this action, again, seeking an order declaring that Lieutenant Governor Fischbach is prohibited from holding the office of state senator and enjoining her from continuing to exercise the powers and duties of that office.

PARTIES AND VENUE

1. Plaintiff Destiny Dusosky resides at 1413 Second Avenue South, Sauk Rapids, MN 56376, is a Minnesota resident, and is an eligible voter residing in Minnesota Senate District 13.

2. Defendant Michelle Fischbach is a Minnesota resident, was elected to the office of senator for Minnesota Senate District 13, is the last elected presiding officer of the Minnesota Senate, and, on January 3, 2018, ascended to the office of lieutenant governor as provided in the Minnesota Constitution.

3. This Court has subject matter jurisdiction over Plaintiff's claims pursuant to Minn. Stat. §§ 484.01 & 555.01, et. seq.

4. Venue is proper in Ramsey County, Minnesota, pursuant to Minn. Stat. § 542.09, because the cause of action arose in this County.

FACTS

5. On January 2, 2018, United States Senator Al Franken resigned from the Office of United States Senator for Minnesota thus creating a vacancy in that office.

6. Minnesota Statutes Section 204D.28, subdivision 11 provides that, in the event of a vacancy in the Office of United States Senator for Minnesota, the Governor may appoint a successor to fill the vacancy until a special election is held to fill the office for the remainder of the term.

7. On January 3, 2018, Governor Mark Dayton appointed Lieutenant Governor Tina Smith to fill the vacancy created by Senator Franken's resignation. Now-United States Senator

Tina Smith resigned from the office of lieutenant governor effective at 11:59 p.m. on January 2, 2018 thus creating a vacancy in that office.

8. Minnesota Constitution Article V, Section 5 states that the “last elected presiding officer of the senate *shall become* lieutenant governor in case a vacancy occurs in that office.” (emphasis added).

9. At the time of now-United States Senator Smith’s resignation from the office of lieutenant governor, state Senator Michelle Fischbach was the President of the Minnesota Senate and, thus, the last elected presiding officer of the senate.

10. Pursuant to Minnesota Constitution Article V, Section 5, state Senator Fischbach ascended to the office of lieutenant governor to fill the vacancy created by now-United States Senator Tina Smith’s resignation.

11. Fischbach became lieutenant governor immediately upon the resignation of now-United States Senator Tina Smith.

12. Article III, Section 1 of the Minnesota Constitution provides: “The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.”

13. The Minnesota Constitution *does not* expressly provide that an individual who ascends to the executive branch office of lieutenant governor by operation of Article V, Section 5 may continue to exercise the powers properly belonging to the legislative branch office of state senator.

14. Furthermore, Article IV, Section 5 of the Minnesota Constitution states that “No senator or representative shall hold any other office under authority of the United States or the state of Minnesota, except that of postmaster or of notary public.”

15. Pursuant to both Article III, Section 1 and Article IV, Section 5, Lieutenant Governor Michelle Fischbach is prohibited from holding the office of state senator for Senate District 13.

16. On January 12, 2018, prior to the start of the 2018 legislative session, Plaintiff Destiny Dusosky commenced litigation in the Ramsey County District Court, *Dusosky v. Fischbach*, Court File No. 62-CV-18-254, seeking a declaration that the Minnesota Constitution bars Lieutenant Governor Fischbach from holding both the position of state senator and lieutenant governor and enjoining Lieutenant Governor Fischbach from continuing to hold the office of state senator for Senate District 13 and exercising the powers of such office, including voting on matters before the Minnesota Senate.

17. On February 12, 2018, Chief Judge John H. Guthmann dismissed Plaintiff Dusosky’s complaint without prejudice on the grounds that: (1) Dusosky did not suffer a particularized injury sufficient to confer standing; (2) the action was not ripe; and (3) the complaint presents a nonjusticiable political question regarding Lieutenant Governor Fischbach’s eligibility.

18. Following the February 12, 2018 Order, Lieutenant Governor Fischbach has continued to exercise the powers and duties of the office of state senator for Senate District 13; the Senate has not addressed the question of whether Lieutenant Governor Fischbach may, consistent with the Constitution, continue to hold the office of state senator; and Plaintiff Dusosky has been, and will continue to be, deprived of representation in the Minnesota Senate.

Lieutenant Governor Fischbach has continued to exercise the powers and duties of a state senator.

19. Lieutenant Governor Fischbach has taken numerous actions to exercise the powers of the office of state senator since the 2018 legislative session commenced on February 20, 2018.

20. Lieutenant Governor Fischbach serves as chair of Senate Higher Education committee and, in that role, controls the agenda for the committee and presides over committee hearings. *See* Exhibit A. Upon information and belief, Lieutenant Governor Fischbach also chairs the Senate Working Group on Harassment.

21. Lieutenant Governor Fischbach has voted on matters before the Senate, *see* Exhibit B, and has signed bills which have been passed by the Senate, *see* Exhibit C.

22. These legislative actions remove any doubt that may have existed as to whether Lieutenant Governor Fischbach will continue to exercise the powers of the office of state senator. This matter is ripe for adjudication.

The Minnesota Senate has not addressed the question of whether the Minnesota Constitution prohibits Lieutenant Governor Fischbach from continuing to hold the office of state senator for Senate District 13.

23. Article IV, Section 6 of the Minnesota Constitution provides that “[e]ach house shall be the judge of the election returns and eligibility of its own members.”

24. Upon information and belief, the Minnesota Senate has not addressed the question of whether Lieutenant Governor Fischbach continued to hold the office of state senator upon ascending to the office of lieutenant governor pursuant to Article V, Section 5 of the Minnesota Constitution.

25. Moreover, the fact that the Minnesota Senate is the judge of the eligibility of its members does not deprive the courts of the power to determine whether Lieutenant Governor

Fischbach's continued exercise of the powers of the office of state senator violates the Minnesota Constitution.

Lieutenant Governor Fischbach has deprived Plaintiff Destiny Dusosky of representation in the Minnesota Senate.

26. Plaintiff Dusosky suffered an injury which is "special or peculiar and different from damage or injury sustained by the general public." *See Channel 10, Inc. v. Ind. Sch. District No. 709*, 215 N.W.2d 814, 820 (1974).

27. As alleged more specifically below, Lieutenant Governor Fischbach ceased to hold her seat in the Senate upon ascending to the office of lieutenant governor. Nonetheless, Lieutenant Governor Fischbach continues to exercise the powers of the office of state senator for Senate District 13 in violation of Article III, Section 1 and Article V, Section 5 of the Minnesota Constitution.

28. Minnesota residents as a whole share an interest in ensuring that the Constitutionally-mandated separation of powers is maintained. However, Plaintiff Dusosky and the constituents of Senate District 13 have a special and peculiar interest in this matter because Lieutenant Governor Fischbach's unconstitutional refusal to relinquish the office of state senator has deprived them of representation in the Minnesota Senate.

29. Vacancies in legislative offices occur from time to time. Minnesota Statutes, Section 204D.17 provides for special elections to fill such vacancies promptly so as to minimize the time during which residents of the affected district are deprived of representation.

30. Lieutenant Governor Fischbach disputes that she no longer held the office of state senator for Senate District 13 after she ascended to the office of lieutenant governor.

31. Accordingly, the court must resolve the dispute as to whether there is a vacancy in the office of state senator for Senate District 13 before the procedures for filling the vacancy through a special election can be set into motion.

32. The question of whether Lieutenant Governor Fischbach violated the Minnesota Constitution by continuing to exercise the powers and duties of state senator for Senate District 13 is ripe for adjudication by this Court, and Plaintiff Destiny Dusosky has suffered a special and peculiar injury as a result of Lieutenant Governor Fischbach's actions and, thus, has standing to bring this question to the Court for resolution.

**THE MINNESOTA CONSTITUTION PROHIBITS THE LIEUTENANT GOVERNOR
FROM ALSO HOLDING THE OFFICES OF STATE SENATOR**

33. The reasoning behind the Minnesota Supreme Court's 1898 decision that a senator can continue to hold his legislative office after filling a vacancy in the office of lieutenant governor—*State ex rel. Marr v. Stearns*, 75 N.W. 210 (Minn. 1898), rev'd on other grounds sub nom., *Stearns v. State of Minn.*, 179 U.S. 223 (1900)—is no longer supported by the Minnesota Constitution.

The Lieutenant Governor's Responsibilities are no longer Legislative in Nature.

34. In *Marr*, the Court stated that the language in the Minnesota Constitution separates the three branches of government, except where expressly allowed:

The powers of the government shall be divided into three distinct departments, the legislative, executive and judicial; and no person or persons belonging to or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, ***except in the instances expressly provided in this constitution.*** Minn. Const. of 1898, art. III, § 1 (emphasis added).

35. In 1898, the position of lieutenant governor had no executive branch responsibilities. *Id.* at 213. Rather, as ex officio president of the senate, the lieutenant governor's sole constitutional duties were "to preside over the senate" and "to authenticate by his signature

the bills passed by the senate.” *Id.* at 211, 213. Thus, at the time, there was nothing incompatible about a member of the senate exercising the duties of the lieutenant governor.

36. In 1972, a constitutional amendment took the lieutenant governor out of the senate chamber. The lieutenant governor is no longer the “ex-officio president of the senate.” *See* Minn. Const., art. V, § 5. Instead, the Constitution provides that the powers and duties of the governor devolve on the lieutenant governor in the event “the governor is unable to discharge the powers and duties of his office.” Minn. Const., art. V, § 5. The Constitution no longer supports the conclusion that the lieutenant governor “belongs” to the legislative department. *See Marr* 75 N.W. at 214. Rather, the lieutenant governor’s responsibilities—to exercise the powers and duties of the office of the governor where the governor is unable to do so—now lie exclusively within the executive branch.

37. An Executive Branch Committee Report in November, 1972 confirmed that if the constitutional amendment was adopted (which it was), “the lieutenant governor would become a purely executive officer without legislative functions.” Minnesota Constitutional Study Commission, Executive Branch Committee Report at 3, <https://www.leg.state.mn.us/docs/2012/mandated/120607.pdf>. The Report further stated that “[t]he lieutenant governor would then be in a position to be a full-time member of the executive branch of state government” and “the duties of the office could be substantially increased by the legislature or by the governor through executive order. *Id.* at 5.

38. Numerous laws also assign executive branch powers and duties to the lieutenant governor. In 1973, the lieutenant governor was designated as a member of the Executive Council. 1973 Minn. Laws ch. 394, § 1, at 858 (codified as Minn. Stat. § 9.011). The other members of the Executive Council are public officials in the executive branch of government: the Governor,

Attorney General, Secretary of State, and State Auditor. Minn. Stat. § 9.011, subd. 1. In 1974, the lieutenant governor was made the chair of the Capital Area Architectural and Planning Board. 1974 Minn. Laws ch. 580, § 4m at 1442 (codified as Minn. Stat. § 15B.03).

39. The role of the lieutenant governor in the executive branch is further evidenced in a law enacted by the Legislature in 1971 which states that “[t]he governor may delegate to the lieutenant governor such powers, duties, responsibilities and functions as are prescribed by law to be performed by the governor” as long as they are not specifically imposed upon the governor by the Constitution. 1971 Minn. Laws ch. 949, § 1m at 1981 (codified as Minn. Stat. § 4.04, subd. 2).

40. Moreover, although the lieutenant governor still calls the senate to order at the beginning of each session, Minn. Stat. § 3.05, the senate now elects its own presiding officer. Minn. Const. art. IV, § 15. The lieutenant governor no longer serves as the ex officio presiding officer of the Senate.

41. The *Marr* court also found persuasive a provision in the Minnesota Constitution which prohibited the lieutenant governor from serving “as a member of the court” during an impeachment trial against the governor. *See* Minn. Const. of 1898, art. XIII, § 4. The *Marr* court reasoned that only senators can act as members of the court in an impeachment trial and that the provision would be wholly unnecessary unless the lieutenant governor could also serve as a state senator. This provision was removed from the Minnesota Constitution in 1974.

42. The Constitution’s prohibition on holding both the offices of lieutenant governor and state senator led to the 1976 resignation of the then-presiding officer of the Minnesota Senate. In 1976, Lieutenant Governor Rudy Perpich filled a vacancy in the office of the governor, and in turn, the then-presiding officer of the senate, Alec Olson, became lieutenant governor. In a

memorandum dated December 17, 1976, Senate Counsel Peter Watson advised Mr. Olson to resign from the Senate upon taking the oath of office as lieutenant governor, noting that the “rationale of [Marr] is sufficiently weak to raise serious doubts as to whether it would be adopted by the Court if the issue were presented to it again.” See Exhibit D. The Minnesota Attorney General reached a similar conclusion. See Exhibit E. Mr. Olson then resigned from his position as a state senator upon becoming lieutenant governor. Minnesota Legislative Reference Library, Minnesota Lieutenant Governors, 1858-present, <https://www.leg.state.mn.us/lrl/mngov/lrgov>.

The Minnesota Constitution Does Not Contemplate a “Temporary” Vacancy

43. In the 1898 *Marr* decision, the Court reasoned that a vacancy is “necessarily permanent or temporary” according to the facts of each case, and that a “temporary” vacancy would require that the lieutenant governor be able to return to his office as a senator. *Id.* at 213.

44. The Constitution now distinguishes between a “vacancy” (in which case the lieutenant governor becomes the governor and the last elected presiding officer of the senate becomes the lieutenant governor) and a temporary situation where the governor is unable to discharge the duties of the office (in which case the governor’s powers and duties devolve on the lieutenant governor, but the lieutenant governor **does not** ascend to the office of governor). Minn. Const. Art. V, § 5. Any “vacancy” under Article V, Section 5 is a permanent situation that does not require that the lieutenant governor be able to return to her office as a state senator.

45. Here, the vacancy in the office of lieutenant governor is not “temporary.” Governor Dayton appointed Lieutenant Governor Tina Smith to the United States Senate and now-United States Senator Smith resigned her position as lieutenant governor effective at 11:59 p.m., January 2, 2018. Her resignation created a permanent vacancy in the office of lieutenant governor for the remainder of the term which includes the entirety of the 2018 legislative session.

46. In summary, the reasoning of the *Marr* decision no longer applies. The lieutenant governor is no longer the ex officio presiding officer of the state senate. The duties of the office are no longer legislative in nature. The provision in the Minnesota Constitution prohibiting the lieutenant governor from serving on the court for any impeachment proceedings against the governor has been removed. And the Minnesota Constitution now distinguishes between a permanent vacancy and a temporary situation where the governor is unable to carry out the duties of the office.

Lieutenant Governor Fischbach has not Avoided a Constitutional Violation by Refusing to Take the Oath of Office.

47. Upon information and belief, Lieutenant Governor Fischbach has not taken the oath for the office of lieutenant governor.

48. The taking of the oath of office is not a prerequisite to ascending to the office of lieutenant governor by operation of Article V, Section 5. Rather, the taking of the oath is a prerequisite to carrying out the duties of an executive branch office. Minn. Const. Art. V, sec. 6 (“Each officer created by this article ***before entering upon his duties*** shall take an oath or affirmation to support the constitution of the United States and of this state and to discharge faithfully the duties of his office to the best of his judgment and ability.”) (emphasis added). Lieutenant Governor Fischbach holds the office of lieutenant governor but, until she takes the oath, is precluded from carrying out any of the duties of the office.

49. Lieutenant Governor Fischbach’s refusal to take the oath of office ensures that she will not violate the Minnesota Constitution by carrying out powers belonging to the executive branch while purporting to exercise the powers of the legislative branch. However, the reverse is not true. Lieutenant Governor Fischbach is a person belonging to the executive department and

her continued efforts to exercise the powers properly belonging to the legislative office of state senator violate Article III, Section 1 of the Minnesota Constitution.

50. The separation of powers provided in Article III, Section 1 requires that Lieutenant Governor Fischbach ceased holding the office of state senator upon ascending to the office of lieutenant governor.

COUNT I – DECLARATORY RELIEF

51. Plaintiff re-alleges and incorporates by reference all preceding paragraphs of this Complaint as if fully set forth herein.

52. Plaintiff is adversely affected by Lieutenant Governor Fischbach's unconstitutional exercise of the powers of the legislative office of state senator and is entitled under Minn. Stat. § 555.02 to request the Court to enter a declaration that Lieutenant Governor Fischbach is prohibited from continuing to hold the office of state senator for Senate District 13 and from continuing to exercise the powers of such office.

53. The parties disagree whether Lieutenant Governor Fischbach continues to hold the office of state senator. This Court should resolve the controversy and afford the parties relief from the uncertainty regarding continued representation of Senate District 13 in the Minnesota Senate by declaring that Lieutenant Governor Fischbach is prohibited from continuing to hold the office of state senator and from continuing to exercise the powers of such office.

COUNT II – INJUNCTIVE RELIEF

54. Plaintiff re-alleges and incorporates by reference all preceding paragraphs of this Complaint as if fully set forth herein.

55. Lieutenant Governor Fischbach is prohibited by the Minnesota Constitution from continuing to hold the office of state senator for Senate District 13 and from continuing to exercise

the powers of such office. Plaintiff requests that the Court enter an order enjoining Lieutenant Governor Fischbach from doing the same.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

1. Declaratory judgment that Lieutenant Governor Fischbach's continuing exercise of the powers of the legislative office of state senator is unconstitutional;
2. An order enjoining Lieutenant Governor Fischbach from continuing to hold the office of state senator for Senate District 13 and from continuing to exercise the powers of such office, including voting on matters before the Minnesota Senate; and
3. Such other relief as the Court deems just and equitable.

Dated: April 10, 2018

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/Charles N. Nauen

Charles N. Nauen (#121216)

David J. Zoll (#0330681)

Arielle S. Wagner (#0398332)

100 Washington Avenue South, Suite 2200

Minneapolis, MN 55401

Tel: (612) 339-6900

Fax: (612) 339-0981

cnnauen@locklaw.com

djzoll@locklaw.com

aswagner@locklaw.com

**COUNSEL FOR PLAINTIFF
DESTINY DUSOSKY**