

NO. A09-1889

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State of Minnesota  
**In Court of Appeals**

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R. James Swenson,

*Appellant,*

v.

Mark Holsten, in his official capacity as Commissioner of the  
Minnesota Department of Natural Resources;  
Thomas Provost, individually and as a Minnesota Department  
of Natural Resources Law Enforcement Supervisor; and  
Cary Shoutz, individually and as a Minnesota Department of  
Natural Resources Conservation Officer,

*Respondents.*

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**APPELLANT R. JAMES SWENSON'S REPLY BRIEF**

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Charles (CJ) Schoenwetter (#025115X)  
Michael R. Carey (#0388271)  
BOWMAN AND BROOKE LLP  
150 South Fifth Street, Suite 3000  
Minneapolis, Minnesota 55402  
Tel: (612) 339-8682  
Fax: (612) 672-3200

*Attorneys for Appellant*

Kimberly Middendorf (#0324668)  
Assistant Attorney General  
State of Minnesota  
445 Minnesota Street, Suite 900  
St. Paul, Minnesota 55101-2127  
Tel: (651) 296-9764  
Fax: (651) 297-4139

*Attorneys for Respondents*

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Appellant R. James Swenson ("Swenson") submits this reply brief in further support of his appeal.

### INTRODUCTION

Swenson and Respondents agree that Minnesota's Game and Fish Laws are intended to provide a comprehensive statutory scheme with respect to protection and preservation of the wild animals. That concern, however, would not appear to be involved under the facts of this case.

Swenson found a rotting bear carcass on his farm. There was no way to tell how it died. A local taxidermist collected the bear remains from Swenson's farm and assured Swenson he would contact the DNR to report the discovery. Several months later, when Swenson learned that the taxidermist never contacted the DNR, Swenson reported his discovery to Respondent Provost. The following day, Respondent Shoutz seized the bear's skull and hide from the taxidermist's shop. The DNR found no evidence of foul play, yet refused to return the skull and hide to Swenson. Swenson was not charged with any violation of Minnesota's Game and Fish Laws.

On appeal, this Court must decide if there is ever a point in time when the decomposing remains of "wild animals" are no longer subject to sovereign ownership under Minnesota's Game and Fish Laws. Swenson submits that the threshold term "wild animals," defined as "all *living* creatures," should control the disposition of the subject bear remains. Minn. Stat. § 97A.015, subd. 55 (emphasis added). Failing the bright line test of *living*, there must be some point when a *dead* creature is no longer in need of protection and preservation. Does it occur when the carcass turns cold and rigor sets in?

After the meat spoils? After insects and scavengers have picked the bones clean? After the elements have turned the bones to dust? Or, is there another test for determining whether to apply a statutory scheme aimed at the protection and preservation of wild animals?

If protection and preservation of bears is accomplished by confiscating the decomposing bear remains Swenson found on his farm, Respondents have failed to explain how. Minnesota's Game and Fish Laws, and in particular those that address licenses and tags for bear, do not by their express terms apply to a bear that simply dies in the woods. When read in context, each of the statutes cited by Respondents contemplate the regulation of bears that are taken—when it may be done, what may be used to take one, how it must be tagged after it is taken, where it may be transported after it is tagged, etc.

Indeed, in every instance where Minnesota's Game and Fish Laws regulate wild animals, they contemplate a scenario where the animals started out walking, swimming or flying around this state free and alive. At some point, humans interfered through a "taking." This group of animals is undeniably subject to regulation for their protection and preservation. But sure as the sun rises every morning, wild animals also expire naturally without human interference. The fate of this group of animals is different, and it does not invoke state regulation through the DNR's hunting regulations. There is simply no rational basis for such regulation by the DNR, or at least none that has been argued by Respondents.

If a jury concludes that the subject bear did *not* die from natural causes, then Swenson concedes that the State may legitimately exercise its sovereign control over the subject bear remains. But, on the other hand, if there is no evidence that the subject bear was “taken,” then the State should not be allowed to exercise rights it may otherwise possess and which were intended for protection and preservation of living animals. Most importantly, in determining whether this issue reaches a jury, Swenson’s individual rights to property and due process must be weighed against the State’s interest in the subject bear skull and hide. On balance, the States interest is minuscule.

### ARGUMENT

#### **I. THE GENERAL PROVISIONS RELATED TO OWNERSHIP OF WILD ANIMALS DO NOT REGULATE BEARS THAT EXPIRE NATRUALLY.**

Respondents cite two provisions of the Game and Fish Laws for the general rule regarding ownership of wild animals:

The ownership of wild animals of the state is in the state, in its sovereign capacity for the benefit of all the people of the state. A person may not acquire a property right in wild animals, or destroy them, unless authorized under the game and fish laws, sections 84.091 to 84.15, or sections 17.47 to 17.498.

*See* Minn. Stat. § 97A.025 (“Ownership of Wild Animals”). And:

A person may not take, buy, sell, transport, or possess a protected wild animal unless allowed by the game and fish laws. The ownership of all wild animals is in the state, unless the wild animal has been lawfully acquired under the game and fish laws. The ownership of a wild animal that is lawfully acquired reverts to the state if a law relating to sale, transportation, or possession of the wild animal is violated.

*See Id.* § 97A.501, subd. 1 (“Wild Animals; General Restrictions”).

Both general pronouncements are consistent with the common law doctrine of *fereæ naturæ*, which the Minnesota courts have interpreted and applied in *State v. Rodman*, 59 N.W. 1098 (Minn. 1884) and *Waldo v. Gould*, 206 N.W. 46 (Minn. 1925). A fair reading of those cases demonstrates that the State has a legitimate interest in regulating the taking of living wild animals, and their possession and transportation *after* they are taken. Nothing in the case law or either statute, however, explicitly or impliedly applies to the remains of an animal that has expired from natural causes. To the contrary, section 97A.025 states “[a] person may not acquire a property right in wild animals, *or destroy them*, unless authorized under the game and fish laws. . .” (emphasis added). The language “*or destroy them*” means that that the wild animals being described are alive. Thus, the general statutes governing ownership themselves demonstrates State ownership attach only to *living* wild animals.

Perhaps the strongest pronouncement of the limits of State sovereign authority is found in the definition of wild animals under the Game and Fish Laws:

‘Wild animals’ means all *living* creatures, not human, wild by nature, endowed with sensation and power of voluntary motion, and includes mammals, birds, fish, amphibians, reptiles, crustaceans, and mollusks.

*See* Minn. Stat. § 97A.015, subd. 55 (“Wild Animals”)(emphasis added). If this definition, which requires the animal to be “*living*,” is applied to sections 97A.025 and 97A.501, the bear found by Swenson does not fall into the ambit of the Game and Fish Laws. And undeniably, if these sections mean something other than what they say,

Swenson was certainly not on notice of the alternate, hidden meaning suggested by Respondents.

As yet another illustration that the Game and Fish Laws do not contemplate animals that expire naturally, the specific statute related to the burden of proof in prosecution of Game and Fish Law violations omits the very defense Swenson is arguing on appeal. Minn. Stat. § 97A.255, subd. 2(a) states:

In a prosecution that alleges animals have been taken, bought, sold, transported, or possessed in violation of the game and fish laws, the burden of establishing that the animals were domesticated, reared in a private preserve, raised in a private fish hatchery or aquatic farm, taken for scientific purposes, lawfully taken, or received as a gift, is on the defendant.

This provision of the Game and Fish Laws is presented as an exhaustive list of the available defenses to prosecution for illegal taking, purchase, sale, possession and transportation of wild animals. Indeed, no violation of the Game and Fish Laws has occurred if the subject animal was:

1. domesticated;
2. reared in a private preserve;
3. raised in a private fish hatchery or aquatic farm;
4. taken for scientific purposes;
5. lawfully taken; or
6. received as a gift.

*See* Minn. Stat. § 97A.255, subd. 2(a).

The fact that “expired of natural causes” is omitted from this list does not mean, however, that Swenson cannot avoid prosecution under the Game and Fish Laws for that reason. Rather, its absence underscores the fact that prosecution under the Game and Fish Laws is improper when an animal expires naturally—there is no violation to prosecute when the animal expires naturally. Or, at the very least, the State retains the burden of proof on this issue and judgment by the lower court was therefore improperly granted. Again, even in this specific provision related to prosecution for Game and Fish Law violations, it presupposes that a “taking” occur in order to prosecute a violation.<sup>1</sup>

Respondents have zealously argued that Minnesota’s Game and Fish Laws apply to Swenson’s bear carcass. Not finding any specific provision related to animals that expire naturally, however, Respondents are resigned to rely on the general provisions related to ownership of wild animals. The problem is that the general provisions—like the specific provisions—do not fit the facts of this case. Respondents are trying to shove a square peg into a round hole.

**II. ALTHOUGH RESPONDENTS ARGUE SWENSON COULD HAVE OBTAINED A POSSESSION TAG, THEY CANNOT CITE A PROVISION OF THE GAME AND FISH LAWS TO SUPPORT THIS CONTENTION.**

Respondents’ brief is also notable for one glaring omission: under what provision of the Game and Fish Laws do Respondents contend Swenson could have obtained a “possession tag” for the subject bear? Respondent Provost explicitly told Swenson that he could have kept the bear remains *if he had applied for a possession tag when he first*

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<sup>1</sup> The other exceptions listed in section 97A.255, subd. 2(a) involve animals that are privately owned while still alive (domesticated, reared, raised), or that are already mounted (gift), and therefore do

*found the bear carcass.* At the lower court, Respondents offered the same suggestion in their summary judgment briefing. (App-15.) When challenged to cite the statute or regulation for this so-called “possession tag” on appeal, Respondents have chosen to ignore their previous statements. The truth is that there is no “possession tag” available for decomposing carcasses of animals that expire naturally. Indeed, the State’s comprehensive statutory scheme with respect to protection and preservation of the wild animals assumes that no possession of animal can occur absent a taking or killing. Thus, although Respondents zealously argue that Swenson failed to abide by Minnesota’s Game and Fish Laws, they are unable cite this Court to such a provision.

42 U.S.C § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

The lower court dismissed Swenson’s claims for violation of substantive due process under 42 U.S.C. § 1983 (Count IV), and violation of procedural due process under 42 U.S.C. § 1983 (Count V). The issue of a possession tag for the subject bear is at the heart of Swenson’s Section 1983 claims. Specifically, Swenson argued at the lower court that there is indeed no provision of the Game and Fish Laws authorizing him to obtain a possession tag for animals that expire naturally. Respondents in turn cited to Minn. R.

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not involve the type of transportation or possession that is allegedly at issue in this appeal.

6212.1400, which applies exclusively to “individuals or institutions currently conducting research or educational programs in the fields of biology or natural history. . .” See Minn. R. 6212.1400, subp. 2. According to Respondents:

Minn. R. 6212.1400 provides for the issuance of permits for mere possession of protected wild animals. *Had [Swenson] simply applied for a possession permit*, or even alerted DNR to his discovery before taking the actions he allegedly took, DNR could have ruled out concerns that the bear had been poached and *issued a license or possession permit*.

(See App-15(emphasis added).)

Swenson, however, was not conducting research or educational programs in the fields of biology or natural history, and therefore, he could not have obtained a possession tag under this rule. What license or possession permit are Respondents referring to?

The problem with having no provision or process in the Game and Fish Laws whereby individuals may legally possess remains of animals that expire naturally is that DNR officers like Respondents Shoutz and Provost are nonetheless issuing some sort of possession tag in those very circumstances. Some individuals may obtain these unauthorized possession tags—others, like Swenson, may not. The decision is completely arbitrary and rests solely on the conservation officers’ whim—who he or she knows and likes. This *ad hoc* allocation of possession tags by DNR officers in the absence of statutory process authorizing it functioned to deprive Swenson of his constitutional rights to property and due process. Put another way, Respondents cannot argue on the one hand that Swenson may have properly obtained a possession tag for the

bear carcass he discovery, while on the other hand reserve the discretion to grant him one in the face of zero authority or legal basis for issuing the tag in the first place. Moreover, Respondents have failed to identify any legal authority where a land owner who finds the remains of a decomposing animal may apply to the State in order to keep such property.

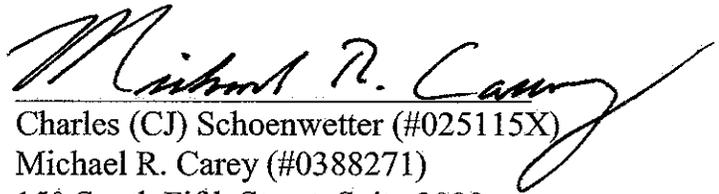
**CONCLUSION**

Based upon the facts and arguments presented above, Appellant R. James Swenson respectfully requests the Court of Appeals reverse the lower court and remand for further discovery and a trial on the merits.

Respectfully submitted,

Dated: January 4, 2010

**BOWMAN AND BROOKE LLP**



Charles (CJ) Schoenwetter (#025115X)

Michael R. Carey (#0388271)

150 South Fifth Street, Suite 3000

Minneapolis, MN 55402

Tel: (612) 339-8682 / Fax: (612) 672-3200

**ATTORNEYS FOR APPELLANT  
R. JAMES SWENSON**

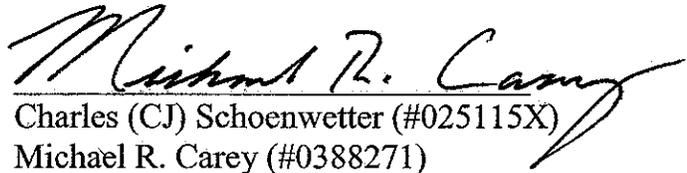
**CERTIFICATE OF COMPLIANCE**

I hereby certify this Appellants' Reply Brief was prepared using Microsoft Word, in Times Roman font, 13 point, and according to the word processing system's word count, is no more than 2,273 words, exclusive of the cover page, table of contents, table of authorities, signature block and appendix, and complies with the typeface requirements of Minn.R.Civ.App.P. 132.01.

Respectfully submitted,

Dated: January 4, 2010

**BOWMAN AND BROOKE LLP**



Charles (CJ) Schoenwetter (#025115X)

Michael R. Carey (#0388271)

150 South Fifth Street, Suite 3000

Minneapolis, MN 55402

Tel: (612) 339-8682 / Fax: (612) 672-3200

**ATTORNEYS FOR APPELLANT**

**R. JAMES SWENSON**