



NOTES & TRENDS

CIVIL LITIGATION

JUDICIAL LAW

■ **RULE 68 OFFERS OF JUDGMENT.** A recent decision from the Minnesota Supreme Court reminds practitioners to be precise when making offers of judgment pursuant to Minn. R. Civ. P. 68. Defendant made a Rule 68 offer of judgment of \$200,000 “together with any costs and disbursements allowed by the District Court.” Plaintiffs accepted the offer and subsequently applied to the district court for costs and disbursements of \$7,088, and attorneys fees of \$128,832, under Minn. Stat. §8.31. The district court disallowed the attorneys fees, and plaintiffs appealed.

Defendant argued that attorneys fees could not be included in costs and disbursements and argued that when the Rule 68 offer was conveyed, defendant’s counsel told plaintiffs’ counsel that defendant would pay “not a penny over \$200,000.” In response, plaintiffs argued the Rule 68 offer, including attorneys fees, was enforceable. In evaluating whether the Rule 68 offer was enforceable, the Minnesota Supreme Court considered whether plaintiffs qualified as “prevailing parties” under Minn. Stat. §8.31, and whether plaintiffs’ claims (false advertising, consumer fraud, and deceptive trade practices) benefited the public. Resolving those issues in favor of the plaintiffs, the Minnesota Supreme Court held that the offer of judgment of \$200,000 plus costs and disbursements was enforceable and included the award of reasonable attorneys fees. The case was remanded to the district court for a determination of reasonable attorneys fees. *Collins v. Minnesota School of Business, Inc.*, 655 N.W.2d 320 (Minn. 01/16/03).

■ **DISCOVERY ORDER REVERSED.** Defendant was promoted to general sales manager of plaintiff’s auto dealership and signed a noncompete agreement in connection with the promotion. Defendant then resigned and went to work for a competing auto dealership. Plaintiff sued for violation of the noncompete agreement. As part of discovery, plaintiff sought the names and addresses of all customers of the competing dealership after defendant began working for the competing dealership. Defendant refused to produce the records, and plaintiff brought a motion to compel discovery.

The district court denied the motion, saying it was unreasonable to assume that a customer would buy a vehicle from a dealership solely because the defendant worked there, and that disclosure of the information could lead to intrusion into the personal and private affairs of the customers. The district court then granted summary judgment to the defendants, saying the plaintiff failed to show any damages.

The Minnesota Court of Appeals reversed. The appellate court held the customer information was relevant to plaintiff’s claim of damages, and would not be unreasonably intrusive. The court also noted that a reasonable solution to the privacy concerns would be a protective order, as contemplated by Minn. R. Civ. P. 26.03. *Sonju Two Harbors LLC v. Coombe*, 2003 WL 227745 (Minn. App. 02/04/03).

■ **FORUM SELECTION CLAUSE INTERPRETED TO ALLOW LITIGATION IN MINNESOTA.** Lone Star Technologies, Inc. entered into a contract with Cargill, Inc. to purchase two facilities owned by Cargill. The contract provided that “each party hereto irrevocably agrees that the courts of the state of Delaware or the United States of America for the District of Delaware are to have jurisdiction to settle any claims, differences or disputes which may arise out of or in connection with this Agreement.” The purchase of the two facilities was never consummated and Cargill sued Lone Star in Minnesota. Lone Star moved to dismiss, arguing lack of personal jurisdiction and that pursuant to the language quoted above, Delaware was the exclusive forum for disputes arising under the agreement. The contract also provided that Delaware law applied, and the Minnesota Court of Appeals concluded that under Delaware law, the forum selection clause was permissive, not exclusive. The court focused on the language quoted above, noting that it stated Delaware courts “are to have” jurisdiction, which the court interpreted to mean that Delaware is a proper forum but not necessarily the sole forum. The court then went on to conclude it could properly exercise personal jurisdiction over Lone Star and remanded the case to the district court for further proceedings. *Cargill, Inc. v. Lone Star Technologies, Inc.*, 2003 WL 230749 (Minn. App. 02/04/03).

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CRIMINAL LAW

JUDICIAL LAW

■ **FIREARMS; FELONY MURDER; FELON IN POSSESSION; POSSESSION OF STOLEN FIREARM.** The respondent, a felon, brought a loaded shotgun to the home of an acquaintance. The respondent stated that he had stolen the gun. While at the home of the acquaintance, the respondent pointed the loaded gun at the acquaintance, at which the point the gun unintentionally discharged, killing the acquaintance. The trial court dismissed the 2nd Degree Murder charge, ruling that a felon in possession of a stolen firearm may not be a predicate to felony murder.

The Court of Appeals reversed the trial court, holding that using a totality of the circumstances approach in examination of the facts of this particular case, there was a foreseeable danger to human life, making both charges appropriate predicates for a felony murder charge. The Court of Appeals rejects the alternative approach in examining whether a felony is appropriate as a predicate for felony murder: that approach is simply whether the offense itself is inherently dangerous, and does not weigh the particular facts of the case to determine whether the predicate felony poses a special danger (the “elements test”). *State v. Jerrett Lee Anderson*, C9-02-1043 (Minn. App. 12/24/02). <http://www.lawlibrary.state.mn.us/archive/ctappub/0212/c9021043.htm>

■ **FIREARMS; POSSESSION; “FLEETING CONTROL”; JURY INSTRUCTION.** The appellant contended at trial that a gun was planted on him by his companions as police approached. The appellant ran from the police encounter, tossing the weapon over a fence. At trial the judge noted that the appellant could not be convicted if the gun was planted on him, but declined to give a “fleeting control” instruction, noting that the existing instructions allowed the appellant to argue that he did not knowingly possess the gun.

Held, it was not an abuse of discretion for the district court to exclude the specific language from the instruction regarding “fleeting control.” Such a “fleeting control” exception has not been recognized in Minnesota, although such a concept has been adopted in several other jurisdictions, including the 7th Circuit, Alaska, California, and the Model Penal Code. The Court of Appeals does agree that an instruction on fleeting control may have been appropriate, but does not find that the court’s failure to give such a specific instruction was an abuse of discretion. *State v. Verdel Lance Houston*, CX-02-371 (Minn. App. 01/07/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0301/cx02371.htm>

■ **SEARCH AND SEIZURE; GARBAGE; CURTILAGE; WARRANT.** Police received a call from a confidential informant stating that the appellant was “a heavy controlled-substance user,” and that the children may be at jeopardy. Police went to the appellant’s residence and obtained several trash bags which had been set out for collection on the street at the end of the driveway in front of the residence. These bags were examined, yielding a white powdery residue. Based on the information obtained in the trash and the statement of the confidential informant, police obtained a search warrant of the home. The subsequent search of the home yielded methamphetamine and cash.

Held, the search of the appellant’s trash was legal, and did not require a warrant. The court follows *State v. Dreyer*, 345 N.W.2d 249 (Minn. 1984) which holds that police officers may search trash set on the curb for routine pickup, without trespassing on the premises, and without a warrant. The findings of the court support the district court’s finding that the garbage was out on the curb at the end of the driveway, and not on private property; hence the search does not come within the protection of *State v. Oquist*, 327 N.W.2d 587 (Minn. 1982), which states that Minnesota citizens do maintain an expectation of privacy in garbage *on their property*. Here, there was no evidence that the garbage was still on the private property of the appellant; instead, it was on the curb. *State v. Liza Marie Goebel*, C4-02-558 (Minn. App. 12/24/02).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0212/c402558.htm>

■ **SEARCH AND SEIZURE; EVASIVE CONDUCT; GUNSHOT; SEIZURE.** Police heard what they thought was a single gunshot, or a car backfiring in a high crime area in Minneapolis. The officer stopped a person on the street to ask if he had heard the possible gunshot. The person pointed south. As officers approached that direction, they spotted three men emerging from an alley. Officers pulled alongside the three men in their squad car. Two of the men stopped, while the appellant, the third man, continued walking. As officers approached the appellant appeared nervous, and looked over his shoulder as he walked away. He grabbed the waistband of his pants in a gesture that was described as either preventing an object from falling out or preventing his pants from falling down. Officers testified that it was possible that the appellant had some sort of object in his pants, possibly including a weapon. After walking a short distance the appellant started running. At that point,

officers gave chase. During the chase, one officer saw the appellant toss what appeared to be a gun over the fence and into the yard of a house. Emergency lights were then turned on and the appellant apprehended. The appellant was charged with felon in possession.

Held, a seizure did not take place because police officers simply approached citizens to ask questions. Officers approached appellant and the two other men to ask a single question regarding the gunshot. The lights or siren of the squad car were not on, guns were not drawn, they did not physically touch the appellant or the two other men, and there is no evidence that they were threatening to arrest one of his companions, either by tone of voice or words. It was then appellant's own actions which gave the officers a reasonable basis for the stop: he reached to his waistband, ran while looking over his shoulder, and appeared to have an item in his pants. Looking at the totality of the circumstances, the appellant himself provided the officers with a reasonable basis to chase and stop him. These factors, alone, are sufficient for the stop; however, additional facts included the sound of the possible gunshot and presence in a high crime area. In summary, the appellant's actions after the police spotted him support the police officer's actions in detaining him. The court discusses, without adopting, *Illinois v. Wardlow*, 528 U.S. 119, 120 S. Ct. 673 (2000), which holds that sudden flight in a high crime area creates a reasonable, articulable suspicion of criminal conduct. The court notes that the current set of facts are in excess of those present in *Wardlow*. **State v. Verdel Lance Houston**, *supra*.

■ **JOINDER; CODEFENDANTS; ANTAGONISTIC DEFENSES; MIDTRIAL.** Appellant was joined with two other codefendants in a murder trial. The other codefendants were brothers. At a pretrial hearing, appellant's counsel moved for severance, arguing that the two other codefendants, as siblings, would be inclined to act as a family and point the finger at the appellant. At this hearing, however, counsel admitted that these individuals had said nothing to support that theory. Accordingly, the pretrial motion for severance was denied. Two midtrial motions for severance were made, each during jury selection. The first was in response to a codefendant striking a juror whom the appellant perceived as favorable. The second midtrial severance motion was made when a codefendant requested the right to proceed *pro se*. Held, the trial court correctly denied all motions for severance. The Court of Appeals notes that motions for midtrial severance require a higher standard than those made for pretrial severance. The court reviews the trial court's decision concerning these motions under the "fair determination" test involving two parts: 1) whether the trier of fact is able to distinguish the evidence and apply the law intelligently as to each defendant and 2) whether the defendants have inconsistent or antagonistic defenses. Except for a couple of questions under cross-examination by counsel for codefendants highlighting certain roles of the different defendants, no prejudicial antagonistic defenses were presented. There were, in fact, two shooters and two guns. Each codefendant cross-examined the appellant in a "passive manner," and during closing argument, all three codefendants attempted to cast doubt on the testimony of state's witnesses and did not attempt to shift blame from one defendant to another. **State v. Vernon Neal Powers**, C3-01-1478 (Minn. 01/02/03).

<http://www.lawlibrary.state.mn.us/archive/supct/0301/c3011478.htm>

■ **ASSAULT; INTENT; JURY INSTRUCTION.** In a charge of 1st Degree Assault on a correctional employee, the trial court instructed the jury concerning "deadly force," meaning that the actor uses force with the purpose of causing, or which the actor should reasonably know creates, a substantial risk of death or great bodily harm. The final statement of the instructions stated: it is not necessary for the state to prove that the defendant intended to inflict great bodily harm, but only that defendant intended the assault. The Court of Appeals finds that this last sentence, inspired by *Johnson v. State*, 421 N.W.2d 327 (Minn. App. 1998), and as used in CRIMJIG 13.04 (1st Degree Assault) was misleading because it emphasized what was not required of the state, instead of explaining what the state had to prove to establish guilt. However, the opinion goes on to state that under the circumstances, instructing the jury that it did not need to find actual intent to inflict great bodily harm was "not incorrect," and was offset by the part of the instruction that defined deadly force. This opinion concludes that the jury instruction given "may have been plain error" by emphasizing a lower threshold of proof of mental state, but did not adversely affect the appellant's substantial substantive rights given the severe beating which was inflicted by the appellant on the victims. **State v. Charles Edward Lindsey**, C5-02-195 (Minn. App. 12/27/02). <http://www.lawlibrary.state.mn.us/archive/ctappub/0212/c502195.htm>

■ **JURY INSTRUCTIONS; PROOF BEYOND A REASONABLE DOUBT; "SPECULATION."** Departing from CRIMJIG 3.03, the trial court judge instructed the jury as follows: "proof beyond a reasonable doubt is simply that amount of proof that ordinary men and women rely upon in making their most important decisions. You have a reasonable doubt if your doubts are based upon reason and common sense. You do not have a reasonable doubt if your doubts are based upon speculation or irrelevant details."

Held, it was error for the trial court judge to substitute the word “speculation” for “fanciful” and “capricious.” Although the judge believed that the term “speculation” is more commonly used, meanings of these terms diverge markedly. “Speculation” is generally defined as meditating, reflecting or contemplating. On the other hand, the words “fanciful” and “capricious” imply invention, whimsy, and impulsivity. Substitution of the term “speculation” for the terms “fanciful” and “capricious” could lead a jury to reject doubt based on reasonable speculation. The court concludes that the use of the word “speculation” diluted the beyond a reasonable doubt standard and was reversible error, even though it was not objected to at trial. **State v. Eric Smith**, C3-02-96 (Minn. App. 01/07/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0301/c30296.htm>

■ **DWI/IMPLIED CONSENT; RIGHT TO COUNSEL; IMPLIED CONSENT; WAIVER BY MISCONDUCT.** Upon her arrest for DWI, the appellant immediately invoked her right to counsel. These invocations came during three separate stages: immediately after the PBT had been administered, in the squad car en route to jail, and during the reading of the Implied Consent Advisory. During all three stages, the appellant threatened to accuse officers of raping her, and attempted to run away. Once at the jail, the appellant became hysterical, and would not listen to the Advisory. Instead, she screamed, swore, insisted that she would not listen and tried to leave the booking room. At this point, she was physically restrained and placed in a holding cell. The arresting officer testified that because he was unable to read the appellant the Implied Consent Advisory, he recorded it as a test refusal. At no time were the appellant’s requests for an attorney granted.

Held, the appellant’s right to counsel was not violated. First, there is no post-PBT right to counsel: this is not a critical stage. Second, appellant’s right to counsel was not violated while she was seated in the back of a squad car, citing *Busch v. Commissioner of Public Safety*, 614 N.W.2d 258 (Minn. App. 2000), which holds, similarly, that an implied consent right to counsel is not violated when invoked from the back seat of a patrol car where no telephone is readily available. Finally, the appellant’s obstreperous behavior frustrated the administration of an Implied Consent Advisory and amounted to a retraction of her request to contact an attorney. **State v. Jessica Marie Collins**, C1-02-405 (Minn. App. 01/14/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0301/c102405.htm>

■ **DWI/IMPLIED CONSENT; ENHANCEMENT; UNCOUNSELED OUT-OF-STATE DWI CONVICTION.** The appellant pleaded guilty in 1995 to a DWI in Wisconsin, without appearance, and without advice of counsel. Subsequently, her Minnesota driver’s license was revoked for a DWI conviction in another state, pursuant to Minn. Stat. §171.17, subd. 9(1). The appellant’s affidavit stated that she was informed that the offense would be considered a civil fine.

The Court of Appeals upholds the district court’s decision that the charges against the appellant may be enhanced because of the prior license revocation, apart from *Nordstrom* considerations concerning the Wisconsin conviction. The court cites *State v. Dumas*, 587 N.W.2d 299, 302 (Minn. App. 1998), which holds that enhancement based on a license revocation because of uncounseled finding of violation of implied consent law does not violate due process. **State v. Paulla Ann McLellan**, C4-02-723 (Minn. App. 01/17/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0301/c402723.htm>

■ **DWI/IMPLIED CONSENT; REFUSAL; INDEPENDENT TEST; DUE PROCESS.** Affirming the Court of Appeals, the Supreme Court holds that under the Implied Consent statute, a DWI suspect has the right to an independent blood alcohol test only after submitting to the police-administered blood alcohol test. Furthermore, a driver’s constitutional due process rights are not violated when the police deny an opportunity to obtain independent blood testing to those who refuse the police administered blood alcohol test. **State v. Michael Larivee**, C2-01-1942 (Minn. 01/30/03).

<http://www.lawlibrary.state.mn.us/archive/supct/0301/c2011942.htm>

■ **JUVENILE; ADULT TRAFFIC OFFENSE; JURISDICTION; SENTENCE.** The appellant was charged with DWI, Disorderly Conduct, and Obstruction of Legal Process. She was 17 at the time of the offenses, but 18 at the time of sentence. She was sentenced by district court, not juvenile court, for all of the convictions. Her sentence was an adult sentence, and not a juvenile disposition.

Held, even though appellant was 17 at the time of the DWI (deemed to be an “adult traffic offense” under Minn. Stat. §260B.225, subd. 3), she was appropriately sentenced as an adult, because she was not a juvenile at the time of the conviction, citing Minn. Stat. §260B.225, subd. 8(b). The court notes, however, that adjudication and disposition of the Disorderly Conduct and Obstruction of Legal Process charges should have been transferred to juvenile court, because they are not “adult traffic court offenses” under the definition of Minn. Stat. §260B.225, subd. 3. **State v. Jessica Marie Collins**, *supra*.

■ **CRIMINAL PROCEDURE; 36 HOUR RULE; SUPPRESSION.** Defendant was a murder suspect. After being taken into custody, he was given *Miranda* warnings, and he agreed to speak with officers.

Appellant gave a total of four statements, the fourth of which was solicited by the appellant. The appellant was taken into custody on December 7th; the court granted an extension of the 36-hour rule on December 8th, for arraignment no later than December 12th; on December 11th, during the fourth interview, the appellant confessed.

The state claimed that its application for an extension of the 36-hour "prompt appearance rule," under Minnesota Rule of Criminal Procedure 4.02, subd. 5, was necessary to reformat a surveillance videotape, take measurements at the scene, further analyze physical evidence, obtain and execute search warrants, and interview witnesses without interference.

Held, although the state may seek relief from Rule 4.03 pursuant to Rule 34.02, and obtain an extension of the 36-hour rule, in this case, the state provided insufficient reasons as to why the appellant could not have been presented to a court within 36 hours following his arrest. However, state courts are not bound by the *McNabb/Mallory* exclusionary rule for violation of a 36-hour rule under the modification of that rule in *Gallegos v. Nebraska*, 342 U.S. 55, 63ⁿ4 (1951). Suppression for violation of the 36-hour rule is analyzed under the four factors set forth in *State v. Wiberg*, 296 N.W.2d 388 (Minn. 1980) including reliability of the evidence, whether the delay was intentional, whether the delay compounded the effects of other police misconduct, and the length of the delay. "While the facts presented take us to the outside edges of Minn. R. Crim. P. 4.02, subd. 5(1), we cannot conclude on the record before us that the failure to promptly arraign Waddell warrants exclusion of his confession." ***State v. Raymond Maurice Waddell***, C4-01-1330 (Minn.

01/30/03). <http://www.lawlibrary.state.mn.us/archive/supct/0301/c4011330.htm>

■ **SENTENCE; PLEA NEGOTIATION; MISQUADACE; VACATION OF PLEA ON REMAND.** The Supreme Court upholds the Court of Appeals in holding that the rule of *Misquadace* does not apply retroactively, but to pending and future cases. The Supreme Court agrees with the respondent's interpretation of "pending" to include cases on direct at the time *Misquadace* was decided. However, the Supreme Court reverses the Court of Appeals' decision that a defendant covered by *Misquadace* need not withdraw completely from the plea agreement, and need only stand trial on the charges which have not been dropped. Hence, the Supreme Court agrees with the state's argument that the district court should be free to consider the effect that the changes in the sentence have on the entire plea agreement, and that the court should be free to entertain motions to vacate the conviction and plea agreement. In reaching this decision, however, the Supreme Court notes that a motion to vacate the conviction and the plea agreement may raise double jeopardy concerns, issues not raised in the instant case. ***State v. Erwin Lanell Lewis***, C7-01-1788 (Minn. 01/30/03).

<http://www.lawlibrary.state.mn.us/archive/supct/0301/c7011788.htm>

■ **EVIDENCE; HEARSAY ACCUSATION; CONTRADICTORY HEARSAY EVIDENCE.** During the state's case the jury heard that one Joseph Miles, present during a gun transaction, identified appellant as the seller. This evidence came first through a deputy sheriff, who testified to the hearsay accusation without objection. A second detective then recited double hearsay, testifying that another person had told her that Miles had told the first deputy that appellant had sold the gun. Defense counsel did not object to these statements, which hence became substantive evidence.

Appellant attempted to introduce testimony from Miles' fellow jail inmates, Stanley, Dickson, and Borgen, that he had falsely accused the appellant, and it was, in fact, he who had sold the gun. The trial court judge recognized that this was a declaration against interest, and could qualify as an exception to the hearsay rule, but also found that the statement was not "credible," because it was "jailbirds talking." The Court of Appeals, however, finds that the statement had multiple circumstances of trustworthiness, and should have been allowed into evidence to contradict the state's hearsay accusation. Miles' statement should also have come in as a way to impeach the credibility of the hearsay accusation. In a case such as this where credibility was "fragile and determinative," the statement should have been allowed under both theories of admissibility. ***State v. Thomas Ray Jackson***, C6-02-335 (Minn. App. 1/28/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0301/c602335.htm>

■ **INDECENT CONDUCT; 5TH DEGREE CRIMINAL SEXUAL CONDUCT; INTENT.** Minn. Stat. §609.3451, subd. 1, defines 5th Degree Criminal Sexual Conduct, in part, as engagement in masturbation or lewd exhibition of genitalia "in the presence of a minor," knowing or having reason to know the minor is present. The Supreme Court construes this statute, interpreting "in the presence of a minor" to mean "reasonably capable of being viewed by a minor," rather than actual viewing by a minor. Next, it is not the expectation of privacy of the actor that is determinative in the public place/indecency question, but, rather, whether the conduct was so likely to be observed that it must be reasonably presumed that it was intended to be witnessed." ***State v. Kerry Dean Stevenson***, C8-01-505

(Minn. 02/06/03). <http://www.lawlibrary.state.mn.us/archive/supct/0302/c801505.htm>

■ **SELF-DEFENSE; DISORDERLY CONDUCT.** In this case of first impression, the Court of Appeals holds that self-defense is applicable to a charge of Disorderly Conduct where the behavior forming the basis of the offense presents the threat of bodily harm. In this case, appellant was grabbed by the back of his coat, and then turned to face his assailant, swinging his fists, and the two men simultaneously punched each other in the face, and continued the fight for several minutes. Both men were charged with Disorderly Conduct. From these facts alone, the appellant was entitled to raise the defense of self-defense, meeting his burden of going forward under *State v. Graham*, 371 N.W.2d 204 (Minn. 1985). The trial court's ruling that self-defense was applicable to disorderly conduct was in error. However, the error was harmless because the facts on the record support the conviction for disorderly conduct. *State v. Philip Leighton Soukup*, C8-02-885 (Minn. App. 02/11/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0302/c802885.htm>

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **SEX HARASSMENT.** Four recent cases decided by the 8th Circuit Court of Appeals addressed sex harassment and discrimination issues.

In *Duncan v. General Motors Corp.*, 300 F.3d 928 (8th Cir. 2002), the 8th Circuit, in a rare reversal, set aside a \$1,040,000 jury verdict of sex harassment. The woman claimant asserted she was subjected to a hostile workplace by her supervisor. The court deemed the lewd jokes, crude remarks, and other misbehavior "not so severe or pervasive" as to violate the law.

The appellate court also reversed a smaller \$48,000 verdict to a woman probationary police officer, who was fired after she became romantically involved with a superior in *Mercer v. City of Cedar Rapids*, 308 F.3d 840 (8th Cir. 2002). The court held that she was terminated for poor performance and was not entitled to recover for slander due to remarks made by the police chief to a news reporter denigrating her skills.

The court upheld dismissal of a harassment lawsuit against a labor union in *Thorn v. Amalgamated Transit Union*, 305 F.3d 826 (8th Cir. 2002). Affirming a ruling of the federal district court in Minnesota, the appellate court held that a union of a woman bus driver was not liable for any harassment committed by other employees because it has no "affirmative duty" to investigate and remedy workplace harassment.

But the court sustained a "same sex" harassment claim in *Beach v. Yellow Freight Systems, Inc.*, 312 F.3d 391 (8th Cir. 2002). The federal court in Minnesota awarded \$37,000 to a male employee due to sexually derogatory graffiti in the workplace based on the "frequent and persistent appearance" of the offensive workplace writings.

■ **DISABILITY DISCRIMINATION.** An employer did not violate the disability discrimination provision of the Human Rights Act in its treatment of an employee who had sensitivity to exposure to fluorescent lighting, following a redesigned office lighting plan. In *Danielson v. AT&T Corp.*, 2003 Minn. App. LEXIS 110 (unpublished), the Court of Appeals held that the employee's requested accommodation to deal with the light-induced medical impairment was not reasonable, and the employer acted properly to deal with the problem. By first granting a leave of absence and then considering a number of "alternative accommodations," the employer carried out its obligation to provide a reasonable accommodation to the employee.

■ **CONTRACT CLAIM.** An executive whose job duties were changed after one of two interrelated businesses he worked for was sold was not subject to a "material change" in his job duties sufficient to warrant resignation or justify his claim for severance. In *Ryan v. ColorSpan Corp.*, 2003 Minn. App. LEXIS 108 (Minn. App. 2003) (unpublished), the appellate court affirmed a jury verdict that the employee had not been wrongfully given a "material change" in his job duties since the contract specifically stated that the employee would perform "such services and duties as may be assigned or delegated to [him] from time to time." This language required the employee to perform the duties assigned by the employer, rather than entitling him to perform the same duties throughout the entire employment relationship.

■ **UNEMPLOYMENT COMPENSATION.** An employee who claimed she quit because she was asked to notarize documents illegally was denied unemployment compensation benefits in *Kruger v. New Era Financial Group, Inc.*, 2003 Minn. App. LEXIS 132 (Minn. App. 2003) (unpublished). While the

employee was required to notarize documents not signed in her presence, the employer closed the practice three weeks before she quit. Since the employer “corrected” the illegal practice, it did not constitute “good reason” to quit. Thus, she is disqualified from benefits.

An employee who received a 15 percent reduction in salary and benefits was not entitled to unemployment benefits because she quit for other reasons in *DeNio v. Interchange, Inc.*, 2003 Minn. App. LEXIS 137 (Minn. App. 2003) (unpublished). The court upheld the determination of the commissioner of economic security, who had reversed the unemployment compensation judge, that the employee resigned because of a temporary suspension of paid time-off benefits and increase in employee contributions to fringe benefits. Although the cut in salary and benefits constituted “sound reason” to quit, since she resigned for other reasons, the employee was ineligible for unemployment compensation.

An employee who continued to drive employer’s vehicles after her driver’s license was suspended was not entitled to unemployment compensation benefits in *Dawson v. Minnegasco*, 2003 Minn. App. LEXIS 103 (Minn. App. 2003) (unpublished). The employee, who knew that continued driving violated company policy, attempted to mislead the employer when asked about the status of a driver’s license. Her behavior constituted “misconduct,” which justified denial of unemployment benefits.

An employee who improperly handled computers by participating in, or allowing, improper access to data, was disqualified for unemployment compensation benefits in *Pepin v. Minnesota Department of Administration*, 2003 Minn. App. LEXIS 114 (Minn. App. 2003) (unpublished). The employee, whose job included maintenance of computers, deliberately downloaded emails of his supervisors to view their communications about a claim the employee had made for overtime compensation, accessed and disseminated personal emails between other employees, and allowed another supervisor to access the email of an employee without prior authorization. This behavior breached the employer’s policies and warranted to disqualify the employee from receiving unemployment compensation benefits.

An employee who was demoted due to poor performance was denied unemployment compensation benefits despite a claim that his demotion was due to a speech impediment in *Howard v. Merit Printing, Inc.*, 2003 Minn. App. LEXIS 104 (Minn. App. 2003) (unpublished). The employee quit after he was demoted for unsatisfactory performance, although his pay, hours, and benefits were not changed. The employee claimed that his demotion was due to a speech impediment and, therefore, justified his resignation. But his record of unsatisfactory performance warranted his demotion, which negated “good reason” to resign and, therefore, made him ineligible for unemployment benefits.

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FAMILY LAW

JUDICIAL LAW

■ **CUSTODY AND PARENTING TIME.** In this case, involving an eight-year-old child, appellant mother and the child’s father never married but the three lived together, in various locations, for 17 months following the child’s birth. The parties had a stormy relationship filled with nearly constant emotional and physical conflict. The child was present during many of these fights and on occasion, even though only a toddler, would attempt to physically separate his parents as they fought. The child continued to live with mother after the parties separated. In December 1995, mother contacted respondent paternal grandparents; told them the stress of caring for the child was overwhelming, and asked them to care for him. In March 1996, grandparents successfully petitioned for guardianship of the child. Although the district court granted custody to father in December 1998, the child continued to live with his paternal grandparents, who were eventually granted custody. Mother challenged the district court order granting permanent custody of her child to the child’s paternal grandparents and denying her any contact with the child, argued that the evidence presented at trial did not support the district court’s findings, and sought a new trial.

The Court of Appeals remanded, noting that, until recently, mother had exhibited substantial instability, including holding a series of jobs that included employment with a carnival, traveling outside Minnesota on an extended tour. However, mother had since obtained steady employment through her community college and was also working part-time at a local restaurant. The court also noted that mother had had a series of romantic attachments after grandparents assumed custody of the child. While the record presented conflicting testimony concerning the nature and dangerous circumstances of these relationships, for the past 18 months mother had been in a stable, and apparently healthy, relationship. Mother enrolled in school and was currently working toward obtaining a criminal justice degree and becoming a probation officer.

In remanding the custody issue, the court held that the district court’s order did not clearly show

that the district court had relied on the appropriate standards of the best interests of the child and the “grave and weighty” reasons supporting the denial of parental custody. The district court’s order was lengthy and demonstrated “considerable thought,” but only addressed the best interests of the child. When determining that a parent is no longer entitled to custody, the court must also find that there are “grave and weighty” reasons supporting a separation of the child from his or her natural parent. Citing *In re N.A.K.*, 649 N.W.2d 166 (Minn. 2002), the Court of Appeals held that the district court could not disregard the “grave and weighty” standard, even though the parties had stipulated to the application of the best-interests standard. While the court concluded that the record contained evidence that very well could provide “grave and weighty” reasons, the district court must show that it considered this standard, even if these specific terms were not applied.

The court also remanded the issue of visitation, holding that the district court could not order mother’s therapist to decide whether and when visitation is appropriate. Rather, the court must conduct a review hearing and make that determination itself if it awards custody to the paternal grandparents. Remanded. *In Re: M.A.L.-B.*, CX-02-578 (Minn. App. 02/18/03) (unpublished).
<http://www.lawlibrary.state.mn.us/archive/ctapun/0302/578.htm>

— STEPHEN R. ARNOTT
Past Chair, Family Law Section, MSBA

FEDERAL PRACTICE

JUDICIAL LAW

■ **PSLRA; PLEADING SCIENTER.** The 8th Circuit continues to refine the requirements for pleading securities fraud under the PSLRA. In *Kushner v. Beverly Enterprises, Inc.*, plaintiffs filed a securities fraud suit, alleging that Beverly Enterprises and a number of its directors had violated §§10(b) and 20(a) of the 1934 act by engaging in a fraudulent scheme to inflate earnings. The district court dismissed plaintiff’s complaint for failure to state a claim, and plaintiffs appealed.

On appeal, plaintiffs argued that they had properly alleged scienter. The 8th Circuit found that plaintiffs’ allegations did not raise a “strong inference” of scienter, because the complaint lacked “allegations of particular facts demonstrating how defendants knew of the scheme,” while noting that “rote allegations” of scienter “fail to satisfy the heightened pleading standard” of the PSLRA.

In addition, 8th Circuit found no error in the district court’s refusal to take judicial notice of documents plaintiffs offered for the truth of the matters contained therein. Acknowledging its prior caselaw permitting courts to consider SEC filings offered for their content (rather than the truth of the matters contained therein), the 8th Circuit declined to extend that rule to encompass the documents offered by the plaintiffs. *Kushner v. Beverly Enterprises, Inc.*, 317 F.3d 820 (8th Cir. 2003).

■ **MOTIONS TO RECONSIDER; LOCAL RULE 7.1(G).** After defendant’s motion to dismiss or transfer was denied, defendant requested leave to file a motion for reconsideration under Local Rule 7.1(g), arguing that the denial of its motion was premised on erroneous findings of fact.

Judge Tunheim denied defendant’s request, noting that motions for reconsideration require “compelling circumstances” and that “Defendant’s letter brief simply restated arguments” previously made to the Court, and did not present the “compelling circumstances” Local Rule 7.1(g) requires.

Judge Tunheim’s decision is not surprising, as requests for leave to file a motion for reconsideration are rarely granted in the district, and are usually nonstarters when parties seeking leave to make a motion for reconsideration can offer nothing beyond arguments the court has already rejected. *Same Day Surgery Centers, L.L.C. v. Montana Regional Orthopedics, L.L.C.*, 2003 WL 328035 (D. Minn. 02/10/03).

■ **OTHER NOTEWORTHY DECISIONS.** Judge Tunheim denied defendants’ motion to stay an action in favor of a pending California state court action, suggesting that the so-called “first-filed rule” is inapplicable unless both cases are pending in the federal courts, and finding that defendants could not establish the factors necessary to warrant *Colorado River* abstention. *Pragmatic C Software Corp. v. Antrim Design Systems, Inc.*, 2003 WL 244804 (D. Minn. 01/28/03).

Judge Magnuson awarded class counsel attorneys fees of \$24,420,000, totaling 30 percent of the settlement fund, but only after first appointing a Special Master to review counsels’ bills and calculate the amount counsel would have been entitled to under a lodestar analysis. *In Re Monosodium Glutamate Antitrust Lit.*, 2003 WL 297276 (D. Minn. 02/06/03).

Judge Tunheim affirmed an order by Magistrate Judge Noel ordering the defendant to produce 13 personnel files, including the personnel files of defendant’s CEO and several in-house attorneys. In February, 2003, this column noted a similar affirmance by Judge Tunheim of a discovery order by

Magistrate Judge Noel. *Cardenas v. Prudential Ins. Co.*, 2003 WL 244640 (D. Minn. 01/29/03).

Judge Tunheim denied defendant's request for attorney's fees and sanctions under both fee-shifting statutes and 28 U.S.C. §1927, finding that plaintiff's case "was not so deficient as to make his case frivolous, unreasonable, or groundless." *Anderson v. Indep. School Dist. No. 97*, 2003 WL 328043 (D. Minn. 02/10/03).

— JOSH JACOBSON
Law Office of Josh Jacobson, PA

INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **PATENTS; MEANS-PLUS-FUNCTION CLAIM LIMITATIONS.** In a recent Minnesota case, Judge Frank construed a number of means-plus-function claim limitations in two patents directed to a vest for loosening lung secretions. But the court refused to apply a component-by-component analysis in doing so. ARI alleged vests manufactured by Electromed infringed ARI's patents. A number of elements in the claims were drafted in means-plus-function form, which provides that an element in a claim expressed as a means for performing a function without recital of structure must be construed to cover the corresponding structure described in the specification and its equivalents. Among the elements at issue were two "feedback and control means" for maintaining the frequency of the airflow generator and the pressure generated by the generator. Electromed asserted a component-by-component construction of the structure of the two feedback and control means. Relying on *Odetics, Inc. v. Storage Technology Corp.*, 185 F.3d 1259 (Fed. Cir. 1999), the court held that a component-by-component analysis to construe the structure of the means clause is not required. The individual components of an overall structure corresponding to the claimed function do not limit the claim. Rather, the claim limitation is the overall structure corresponding to the claimed function. *Advanced Respiratory, Inc. v. Electromed, Inc.*, Civ. No. 00-2646 (D. Minn. 01/10/03)

■ **COPYRIGHT; SCÈNES À FAIRE DOCTRINE.** Ruling on an appeal from the District of Minnesota, the 8th Circuit Court of Appeals affirmed a preliminary injunction enjoining Four Seasons from using six greeting card designs that allegedly infringed Taylor's copyrighted card designs. (See "Notes & Trends," February 2002 *Bench & Bar*, for discussion of the underlying decision.) In the appeal, Four Seasons contended proper application of the *scènes à faire* doctrine requires a holding of no copyright infringement because the similarities between the greeting cards were similarities between unprotectable stock elements of the card designs. The doctrine, most frequently applied in film, television, and video contexts, provides that incidents, characters, or settings considered standard or indispensable in the treatment of a given topic cannot furnish the basis for a finding of substantial similarity, a required element in copyright infringement. "Labeling certain stock elements as *scènes à faire* does not imply they are uncopyrightable; it merely states that similarity between plaintiff's and defendant's works that are limited to hackneyed elements cannot furnish the basis for finding substantial similarity." Noting the devil is in the details, the court approved of the district court's finding of substantial similarity, which included a descriptive catalog of numerous similarities in objects depicted, proportion, color and lettering, that would not have been different if the cards were analyzed under *scènes à faire* doctrine. *Taylor Corp. v. Four Seasons Greetings*, 2003 U.S. App. LEXIS 530 (8th Cir. 2003)

■ **PATENTS; INFRINGEMENT; FAILURE TO RESPOND.** Ruling in a recent Minnesota case, Judge Davis granted Mobil's motion in limine to exclude Knopik's evidence of infringement and damages because Knopik failed to respond to contention interrogatories. The court had previously granted Mobil's motion for summary judgment of noninfringement with respect to one of four Mobil sites employing exhaust systems allegedly infringing Knopik's patents. Prior to the present motion, Knopik had not identified an infringement theory for any of the three remaining Mobil sites and failed to respond to contention interrogatories regarding infringement and damages. In reliance upon the court's previous order and Knopik's subsequent inaction, Mobil did not hire independent experts on infringement or damages, and did not hire an expert to assist with invalidity defenses. In granting Mobil's motion, the court stated that permitting Knopik to proceed with additional theories of infringement would be prejudicial and unfair to Mobil. *Knopik v. Amoco, et al.* Civ. No. 97-1134 (D. Minn. 01/23/03)

— TONY R. ZEULI
— ERIC DEMASTER
Merchant & Gould

JUVENILE LAW

JUDICIAL LAW

■ **MIRANDA; INTERROGATION AT SCHOOL.** Three recent Minnesota cases have addressed the right of juveniles to be “Mirandized” prior to being interrogated at school. Minnesota courts considered the questions inherent in such situations in *In re Welfare of R.J.E.*, 630 N.W.2d 457 (Minn.App.2001), *rev'd on other grounds*, 642 N.W.2d 708 (Minn.2002), and *In re Welfare of G.S.P.*, 610 N.W.2d 651 (Minn.App.2000). In the instant case, *In re D.J.B.*, the Court of Appeals has extended its analysis to consider a so-called “soft *Miranda*” warning.

In the two previous cases, the accused were minor boys who were escorted from class by uniformed personnel and taken to a school office where they were interrogated by a police officer. Neither boy was familiar with the criminal process, neither boy was told that he was free to leave, that he could talk to his parents or that he could talk to an attorney, and the interrogations were tape-recorded. The Court of Appeals focused on these facts when they ruled, in both cases, that the situations were custodial and required the *Miranda* warning.

In *D.J.B.*, the accused was a minor boy who was escorted from class and interrogated by a police officer in a school conference room about alleged criminal sexual conduct. However, the case is distinguishable from *R.J.E.* and *G.S.P.* because the boy was informed that he was free to leave and free to not answer questions. He was not informed that he had the right to counsel or to have his parents present, or that anything he said could be used against him. The state ultimately argued that the interrogation was not custodial because *D.J.B.* was given a “soft *Miranda*” warning.

The Court of Appeals disagreed, stating that previous caselaw “does not stand for the proposition that telling a suspect he is free to leave or free to not answer questions precludes a finding of custody.” The court went on to examine the totality of the circumstances surrounding the interrogation and the “soft *Miranda*” was only part of the court’s analysis. Among other things, the court recognized that *D.J.B.* was inexperienced with the criminal justice system, that he was in an unfamiliar, confined environment, and that the interrogation was tape-recorded. The court concluded that the factors in the case were such that a reasonable person would have felt he was in custody. The court held that *D.J.B.* had indeed been in custody and had not been given a proper *Miranda* warning. Thus, *D.J.B.*’s statement was suppressed. *In re Welfare of D.J.B.*, 2003 WL 175546 (Minn. App. 01/17/03)(unpublished).

— KIMBERLY A. WEINACHT
Walling & Berg, PA

REAL PROPERTY

JUDICIAL LAW

■ **CONDEMNATION.** Chenoweths own land where they operate a flower business and reside. The city established tax-increment financing districts to encourage development of neighboring property. The city acquired a parcel of land adjacent to the Chenoweths by condemnation, sold the land to IEG for development on favorable terms, and paid for some public improvements. IEG submitted its plans to build a warehouse on the land to the city for approval. Chenoweth brought an inverse condemnation action against the city. The Court of Appeals held that by providing tax-increment financing, funding, and regulatory control the city did not convert a private development project into a state action, which is necessary to support an action for inverse condemnation. Consequently, the court did not address the issue of whether the loss sustained by the Chenoweths was a compensable taking. *Chenoweth, et al. vs. City of New Brighton*, C0-02-945 (Minn. App. 01/28/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0301/c002945.htm>

■ **CARTWAYS.** Daniel owned land adjacent to real estate owned by Schoch. Daniel’s only access to his land was via Lake Vermillion. Daniel petitioned the county Board of Commissioners for a cartway over the Schoch land. The board granted the request. The district court and Court of Appeals affirmed the board decision finding that lake-only access is insufficient under Minn. Stat. §164.08, subd. 2(a). The Minnesota Supreme Court reversed the Court of Appeals, holding that to disregard access to land merely because access is through a waterway and not a roadway without any further consideration is improper. *In the Matter of Thomas Daniel for the Establishment of a Cartway*, CX-01-1820 (Minn. 02/20/03). <http://www.lawlibrary.state.mn.us/archive/supct/0302/cx011820.htm>

— MELISSA BAER
Moss & Barnett

TAX

JUDICIAL LAW

■ **FSC WITH NO PROPERTY OR PAYROLL IN U.S. QUALIFIED AS FOC.** A wholly owned subsidiary foreign sales corporation (FSC) qualified as a foreign operating corporation (FOC) and its income was not subject to Minnesota corporate franchise (income) tax apportionment provisions because it had no property or payroll in the United States. Even though the subsidiary had less than 20 percent of its property and payroll assignable to the United States, there was no requirement that an FSC have genuine or substantial foreign operations to qualify as an FOC. Thus, the subsidiary's income was not subject to apportionment and was excluded from the parent corporation's combined group and treated as a dividend received by the unitary parent. *Hutchinson Technology Inc. v. Commissioner*, No. 7398-R, 2003 WL 223405 (Minn. T. Ct. 01/02/03).

■ **MANAGEMENT FEES FROM MINNESOTA MUTUAL FUND PROPERLY ALLOCATED.** The Minnesota Supreme Court held, under Minn. Stat. §290.191, subd. 5(j), the "consumer" of the benefits of management services provided to a mutual fund is the mutual fund, not its ultimate investors. Therefore, the fees collected for those services are properly allocated for Minnesota corporate franchise (income) tax purposes to the state where the mutual fund is located. *Lutheran Brotherhood Research Corp. v. Commissioner*, No. CX-02-1097, 2003 WL 255549 (Minn. 02/06/03).

■ **SALES AND USE TAX — VENDING MACHINE SALES.** The Ramsey County District Court upheld the constitutionality of the sales taxation of vending machine food sales. The issue was whether the subjection to sales tax of all food sold through vending machines, pursuant to Minn. Stat. §297A.61(3(d)) (Supp. 2001), is violative of the Equal Protection Clause of the United States Constitution and the Uniformity Clause of the Minnesota Constitution. The case has been appealed to the Minnesota Court of Appeals. *Minnesota Automatic Merchandising Council et al. v. Commissioner of Revenue et al.*, Ramsey Ct. File No. 62-C3-02-001129.

■ **BILLING RECORDS NOT PROTECTED BY PRIVILEGE OR WORK PRODUCT DOCTRINE.** The Minnesota Court of Appeals held that billing records of a law firm for representation of private entities and the state of Minnesota were not protected per se by the attorney-client privilege or by the work-product doctrine. Rather, the court must conduct an in camera review to determine the privileged portions, if any. The case involved an interpretation of the Minnesota Government Data Practices Act (Minn. Stat. §13.01, et al.), the attorney-client privilege found in Minn. Stat. §595.02(1)(b), and the work-product doctrine as codified in Minn. R. Civ. P. 26.02(c). *City Pages v. State of Minnesota, et al and Blue Cross and Blue Shield of Minnesota*, 655 N.W. 2d 839 (Minn. App., 2003).

■ **"PERSONAL LIABILITY" OF OFFICER FOR EMPLOYMENT TAXES.** The Minnesota Commissioner of Revenue's personal assessment against a corporate officer for the total amount of a corporate employee's delinquent taxes, based on the corporate employer's failure to honor a wage levy that amounted to a small fraction of the personal assessment, was a "punishment" subject to the Excessive Fines Clause of the U.S. and State constitutions. *Wilson v. Commissioner*, 656 N.W. 2d 547, (Minn., 2003).

■ **FEDERAL PAYMENTS MADE TO HMO CONSIDERED INSURANCE PREMIUMS FOR MCHA ASSESSMENT.** The Minnesota Court of Appeals held that payments made for health care by the federal Health Care Finance Administration to HealthPartners under Medicare cost contracts for HMOs were payments received by HealthPartners "for coverage" of insurance under Minn. Stat. §62E.02(23), such that the payments were includable in HealthPartners' total accident and health insurance premiums, for purposes of determining its members' Minnesota Comprehensive Health Association assessment. The court rejected HealthPartners assertion that the statutory phrase "for coverage" was defined as payments received in exchange for some assumption of insurance risk, which occurs with an insurance premium, and that the payments made by HCEA were pure cost reimbursements for treating of patients. *HealthPartners, Inc. v. Commissioner of the Minnesota Department of Commerce, et al.*, 655 N.W.2d 357, (Minn. App., 2003).

■ **CFO HELD LIABLE FOR UNPAID PAYROLL TAXES AND DENIED CONTRIBUTION FROM BOARD CHAIRMAN.** Temporary staffing service's recruit assigned to work as a chief financial officer for a client company was held personally liable for the company's unpaid payroll taxes. He was also not entitled to contribution from the company's board chairman, under IRC §6672(d), since he was not involved in the company's day-to-day operations. *Spade v. Star Bank*, 90 AFTR 2d 2002-7762 (E.D. Pa. 12/19/02).

■ **TAXPAYERS HELD ENTITLED TO REFUND BASED ON FILING OF INFORMAL CLAIM.** Taxpayers made a sufficient informal claim for refund and timely filed their refund suit, thereby becoming enti-

tled to a refund that was properly applied to taxpayers' liability for succeeding tax years. The court refused to follow 1971 Revenue Ruling 71-57 that held that IRS cannot extend the two-year statute of limitations for bringing a refund suit once the two-year period has expired. **Kaffenberger v. United States**, No. 91 AFTR 2d 2003-374 (8th Cir. 01/03/03).

■ **REFUND CLAIMS RENDERED MOOT BY IRS ADOPTION OF "MAILBOX RULE"**. Refund claims of taxpayers based on contention that IRS unconstitutionally deprived them of their tax refunds by refusing to apply the "mailbox rule" became moot when IRS, shortly after filing of taxpayer's action, changed its position and adopted the mailbox rule. The decision in *Weisbart v. United States*, 222 F.3d 93 (2d Cir. 2000), holding that the rule applies to tax refund claims, was subsequently adopted by the IRS and therefore that a refund claim is deemed filed on the date it was postmarked. **Spiroff v. United States**, 91 AFTR 2d 2003-593 (E.D. Mich. 01/03/03).

■ **GROSS INCOME; INTEREST; POST-DIVORCE INSTALLMENT PAYMENTS**. The U.S. Tax Court properly determined that portions of installment payments denominated as interest that taxpayer-IRS employee received from exspouse pursuant to property settlement were taxable interest income. The payments clearly compensated taxpayer for delay in receipt of marital assets due her and were consistent with 5.5 percent interest rate specified in settlement agreement and the fact that the rate was below market wasn't dispositive. **Cipriano v. Comm.**, No. 02-1055, 19 AFTR 2d 2003-608 (3rd Cir. 2003).

■ **CONSTITUTIONALITY OF HIGHER IOWA WAGERING TAX ON RACETRACKS**. The U.S. Supreme Court agreed to review an Iowa Supreme Court decision which held that slot machines on riverboats and at racetracks cannot be taxed differently. The state Supreme Court found that the legislation, which significantly increased the gambling tax rates on gross receipts of racetracks but not on riverboats, was unconstitutional because there was no rational basis for the differential tax treatment imposed on racetracks. The Iowa Court determined that a mere difference in location was not sufficient to uphold the constitutionality of the tax. **Fitzgerald v. Racing Association of Central Iowa, et al.**, 648 N.W.2d 555 (2002), cert. granted U.S. S. Ct., Dkt. No. 02-695 (01/17/03).

■ **FOOTBALL CLUB NOT TAXABLE ON PAYMENTS CONSTITUTING LOANS FROM COLISEUM ENTITY**. Payments received by Raiders football club from the Los Angeles Memorial Coliseum Commission, pursuant to a memorandum of agreement, constituted bona fide loans and were therefore excludable from income in the year received. Because the Raiders had a nonillusory, unconditional obligation to repay the LAMCC loan, the payments from the LAMCC were properly treated as loans and were excludable from income in the year in which they were received. **Milenbach v. Commissioner**, No. 97-70123, 91 AFTR 2d 2003-818 (9th Cir. 02/06/03).

■ **DECEDENT'S TRANSFER TO TRUST FOR SPOUSE COMPLETE DESPITE LACK OF DONATIVE INTENT**. Decedent's transfer of funds to a lifetime trust for the benefit of her spouse was a completed gift subject to the federal gift tax, notwithstanding the absence of a donative intent, which is a required element for a completed gift under state law. The District Court's opinion was reviewed because it looked to state law and its subjective donative intent test rather than to federal law. **Wells Fargo Bank, New Mexico N.A. v. United States**, 91 AFTR 2d 2003-857 (10th Cir. 02/11/03).

■ **VEBA CONTRIBUTIONS FOR RETIREE MEDICAL BENEFITS DIDN'T EXCEED STATUTORY LIMITS**. The U.S. Tax Court held that a taxpayer's method for computing its contribution to a voluntary employees beneficiary association (VEBA) trust for postretirement benefits for retirees did not result in a contribution that exceeded the account limit for a reserve under IRS §419A(c)(2). Because of employees, who are retired when the reserve is created, the present value of their projected benefits may be allocated to the year the reserve is created. **Wells Fargo & Company (f.k.a. Norwest Corporation) and Subsidiaries**, 120 T.C. No. 5 (2003).

■ **TAX RETURN MAILING DATE DIDN'T AFFECT TIMELINESS OF IRS COMPLIANCE ACTION**. A district court rebuffed a taxpayer's attempt to use an argument based on the mailbox rule, which ensures that a return mailed before its due date will be considered timely even if received after the due date, to argue that a deficiency action by IRS was not timely. The court held that the date IRS actually received the return, not the date it was mailed, was the operative date for determining whether IRS acted in a timely fashion, where the return was both mailed and received before its due date. **Natalie Holdings Ltd. v. U.S.**, 91 AFTR 2d 2003-616 (D.C. Tx. 02/15/03).

■ **FEES PAID UNDER CONTINGENCY AGREEMENT SHOULD BE EXCLUDED FROM CLIENT'S INCOME**. Fees paid directly to attorneys under contingency fee agreement should be excluded from client's gross income. **Raymond v. United States**, 91 AFTR 2d 2003-535 (D.C. Vt. 12/17/02)

■ **TAXPAYER'S PROFIT MOTIVE FOR INVESTMENT NEGATES LIABILITY FOR ENHANCED INTEREST**. Taxpayer invested in a partnership with a profit motive and thus was not liable for enhanced interest

on his tax liability resulting from disallowance of partnership losses that IRS characterized as a sham transaction. *Weiner v. United States*, No. H-00-1297, 91 AFTR 2d 2003-510 (S.D. Tex. 12/31/02).

■ **U.S. TAX COURT HAS JURISDICTION TO REVIEW COMMISSIONER'S USE OF JEOPARDY LEVY.** Tax Court's jurisdiction to review commissioner's levy determinations includes jurisdiction to review commissioner's determination that a jeopardy levy was appropriate. *Dorn v. Commissioner*, 119 T.C. No. 22 (12/30/02).

■ **REAL PROPERTY CLASSIFICATION: FAILURE TO TIMELY FILE DECLARATION FOR RESORT AND RECREATION PURPOSES EXCUSED.** The Minnesota Tax Court held that the failure to timely file a declaration for resort and recreational classification by the statutory date of January 15 was excused since the statutory language of Minn. Stat. §273.13(25)(d)(1) was directory rather than mandatory. The taxpayer's untimeliness was due to his failure to receive his mail. *Lewis Mohawk v. County of Mille Lacs*, No. C9-02-393, 2003 WL 245635 (Minn. T. Ct. 01/31/03).

■ **TAXPAYER'S IDENTITY MAY BE PROTECTED BY "COMMUNICATION PRIVILEGE."** A district court held that the confidentiality privilege for taxpayer communications under IRC §7545 may prevent the disclosure of a taxpayer's name in certain narrowly defined circumstances if it would lead to the disclosure of taxpayer's motive in seeking the advice of a tax practitioner. *U.S. v. BDO Seidman, LLP*, 91 AFTR 2d 2003-487 (D.C. N.D. Ill. 02/04/03).

■ **COURT UPHOLDS RULE ON R&D ALLOCATION BETWEEN PARENT AND DISC, FSC SUBSIDIARY.** The U.S. Supreme Court upheld a Treasury regulation governing the allocation of research and development expenses between a parent corporation and its export sales subsidiary for purposes of determining the portion of export sales income that is eligible for favorable tax treatment provided by Congress for entities known as DISCs and FSCs. *Boeing Co. v. United States*, U.S., No. 01-1209 (U.S. 03/04/03)

■ **IRS ADMINISTRATIVE OFFSET OF TAX REFUND ALLOWED FOR SAME TAX, TAXPAYER, AND YEAR.** IRS can recover an erroneous overpayment to taxpayer arising from excess calculation of interest on taxpayer's tax overpayment through administrative offset against another refund subsequently requested by taxpayer with respect to the same tax year. *Pacific Gas and Electric Co. v. United States*, 91 AFTR 2d 2003-1035 (Fed. Cl. 02/20/03).

ADMINISTRATIVE DEVELOPMENTS

■ **SEC APPROVES AUDITOR INDEPENDENCE RULES.** Accounting firms that both audit and offer tax advisory services won a key vote from the Securities and Exchange Commission when the SEC agreed that the firms can perform both functions but will leave close calls up to the audit committee. That is, accountants will be able to provide tax compliance, tax planning, and tax advice to audit clients, subject to audit committee pre-approval requirements. Representing an audit client in Tax Court or other situations involving public advocacy is prohibited. *Tax Notes*, 01/27/03, pp. 471-480.

■ **IRS PUBLISHES FINAL REGS ON STOCK REDEMPTIONS DURING DIVORCE OR SEPARATION.** The IRS published final and temporary regulations on the tax treatment of redemptions, during marriage or incident to divorce, of stock in a corporation owned by a spouse or former spouse. T.D. 9035; 68 FR. 1534-1537 (01/13/03).

■ **NO DISCOUNT FOR LACK OF MARKETABILITY ON SERIES E BONDS.** The Service has ruled in technical advice that in determining the fair market value of bonds for estate tax purposes, an estate shouldn't calculate a discount for lack of marketability for the income taxes due on the interest that accrued on the bonds to the date of maturity. TAM 200303010 (09/19/02).

■ **IRS UNVEILS VOLUNTARY COMPLIANCE INITIATIVE FOR OFFSHORE CREDIT CARD USERS AND ACCOUNTS.** The IRS in January, 2003 announced the Offshore Voluntary Compliance Initiative — a major voluntary compliance effort designed to bring users of offshore credit cards back into the tax system. Revenue Procedure 2003-11.

■ **HELPFUL HINTS FOR TAX PRACTITIONERS.** "2003 Tax Hints — The Practitioner's Guide to the Filing Season" is full of information to help make your job easier. This 62-page guide is available at http://www.irs.gov/pub/irs-utl/2003b_taxhints_pub.pdf

■ **IRS NEWSWIRE.** For the first time, IRS new releases and fact sheets will be available to anyone as soon as the IRS publicly issues them. Previously, only the news media received instant delivery of new releases by email. Now, through the IRS Newswire, anyone who wants to receive copies can sign up for electronic delivery. <http://www.irs.gov/newsroom/content/0,,id=105771,00.html>

■ **ENRON USED RANGE OF SCHEMES TO AVOID \$2 BILLION IN TAXES, JCT CONCLUDES.** The JCT's 2,700-page, three-volume report was released in February, 2003 in conjunction with a Finance Committee hearing on tax policy issues raised in the aftermath of the collapse of the Enron Corp. Text

of JCT's written testimony on the report (JCX-10-03) is in Volumes I, II, and III of the JCT's report, "Report of Investigation of Enron Corporation and Related Entities Regarding Federal Tax and Compensation Issues, and Policy Recommendations (JCS-3-03), and can be accessed at <http://www.house.gov/jct/>

■ **REPORT REVEALS TAX ENFORCEMENT ACTIVITIES A SUCCESS.** The DOR was appropriated approximately \$10 million by the Minnesota Legislature to fund new enforcement initiatives, with the expectation that the initiatives would generate an additional \$60 million in the 2002-03 biennium. The DOR has collected \$64 million as of December 31, 2002. The report was based on data collected from July 1, 2001 through November 30, 2002.

■ **IRS REFUNDS.** The IRS encourages individuals to use its "Where's My Refund?" section at the IRS's website to check the status of their refunds. Taxpayers without web access can get refund information by calling the automated refund service at (800) 829-4477 or by using the new IRS refund hotline at (800) 829-1954. IR-2003-14 (02/10/03). The IRS also announced that time is running out for thousands of Minnesotans who may be due refunds but have not yet filed 1999 federal income tax returns. Unclaimed refunds are awaiting an estimated 25,700 Minnesotans who failed to file a 1999 tax return. However, in order to collect the money, a return must be filed with an IRS office no later than Tuesday, April 15, 2003. By law, money that is not refunded within three years generally becomes the property of the U.S. Treasury.

■ **TEMPORARY REGULATIONS LIBERALIZE AND CLARIFY STATUTORY MERGERS INVOLVING DISREGARDED ENTITIES.** IRS issued temporary and proposed regulations that define a statutory merger or consolidation under IRC §368(a)(1)(A) and further clarify a number of issues related to use of disregarded entities in mergers and consolidations. Disregarded entities are certain business entities with only one owner, such as a single member LLC that doesn't elect to be taxed as a corporation, a qualified REIT subsidiary, or a qualified subchapter S subsidiary (QSub). TD 9038; Reg. §1.368-2T ; REG-126485-01; Prop Reg §1.368-2.

LEGISLATION

■ **FEDERAL LAW BARS FEES ON INTERSTATE "PRE-ARRANGED TRANSPORTATION."** President Bush signed the Real Interstate Driver Equity Act of 2002 prohibiting a state, locality, or interstate agency from imposing any license or fee on account of the fact that a motor vehicle is providing prearranged ground transportation service if the motor carrier providing the service:

- meets the registration requirements under 49 U.S.C. Ch. 139 for the interstate transportation of passengers;
- meets all applicable vehicle and intrastate passenger licensing requirements of the state or states in which the motor carrier is domiciled or registered to do business; and
- is providing service pursuant to a contract for (a) travel from one state, including intermediate stops, to a destination in another state, or (b) travel from one state, including intermediate stops in another state, to a destination in the original state.

"Pre-arranged ground transportation" is defined as transportation of passengers that is arranged in advance, or operated on a regular route or between specified points, and that is provided in a motor vehicle with a seating capacity not exceeding 15 passengers, including the driver.

■ **ADMINISTRATION ROLLS OUT PLAN TO BOOST ROTH IRA APPEAL, SIMPLIFY PENSIONS.** The Administration introduced legislation to recast Roth individual retirement accounts with contribution limits more than doubled and income limits eliminated, and significantly simplify the tax treatment of defined contribution pension plans like 401(k)s. The proposal would rename Roth IRAs "Retirement Savings Accounts" (RSAs) and increase contribution limits in least to \$7,500. On top of the new RSAs, the proposal would create new "Lifetime Savings Accounts" (LSAs), with the same \$7,500 contribution limit, that could be used for any type of saving. U.S. Treasury (See <http://www.treas.gov> for additional details).

■ **CHARITY TAX RELIEF BILL WITH CORPORATE TAX SHELTER LIMITS CLEARS SENATE FINANCE.** The Finance Committee approved a \$10.2 billion charitable giving tax relief bill with a series of curbs on corporate tax shelters to offset the cost. Among its nearly dozen measures aimed at curtailing corporate tax shelters, the bill includes a provision to clarify and enhance the economic substance doctrine and related penalty provisions. S. 256, S. 283, and S. 287; See also JCT Descriptions (JCX-7-03; JCX-8-03) of "CARE Act of 2003".

■ **ARMED FORCES TAX FAIRNESS ACT OF 2003 APPROVED BY SENATE FINANCE COMMITTEE.** The Senate Finance Committee unanimously approved the Armed Forces Tax Fairness Act of 2003

(Fairness Act), to improve tax equity for military personnel. The bill would be paid for by extending IRS user fees, allowing installment agreements to provide for partial payments, and imposing a mark-to-market tax on individuals who expatriate. Joint Committee on Taxation, Description of the "Armed Forces Tax Fairness Act of 2003;" JCX-2-03.

■ **CONGRESSIONAL BILLS INTRODUCED TO PERMANENTLY EXTEND INTERNET TAX BAN.** Identical legislation (H.R. 49, S. 52) to permanently extend an existing ban on taxation of Internet access and certain forms of electronic commerce that is set to expire in November, 2003 was introduced in the Congress.

■ **GOVERNOR'S "UNALLOTMENT" AUTHORITY.** On Friday, February 7, 2003, when the House and Senate conferees were unable to reach agreement on emergency budget cuts to rectify the state's immediate \$356 million deficit, the Governor used his power under Minn. Stat. §16A.152 and its "unallotment" authority to distribute by lot or in an arbitrary manner apportion the spending to balance the books. The statute allows the commissioner of finance, with the approval of the governor and after consulting with the Legislative Advisory Commission, to reduce unspent allotments if a deficit would otherwise occur. The commissioner may do so only after the Budget Reserve is used to balance expenditures in revenues.

LOOKING AHEAD

■ **GOVERNOR'S BUDGET RECOMMENDATIONS.** The major work of the 2003 legislative session got unofficially underway February 18, when Governor Tim Pawlenty handed lawmakers a sweeping budget proposal that on one hand represents the state's largest budget and on the other eliminates the state's largest-ever projected deficit.

Keeping good on a promise not to raise taxes, the governor presented a budget plan for fiscal years 2004-05 that would raise K-12 education spending, use the state's tobacco endowment, freeze wages for public employees, cut funding for most state agencies and programs, and dramatically change the way the state gives aid to local governments.

— JERRY GEIS
Briggs & Morgan

TORTS & INSURANCE

JUDICIAL LAW

■ **INVASION OF PRIVACY; PUBLICATION OF PRIVATE FACTS.** Plaintiff was seeking financing from a lender for the purchase of a house. When he did not hear about the status of his loan, he gave the seller permission to telephone the lender to inquire. The lender told the seller that the loan had been rejected due to plaintiff's credit history and other factors. Plaintiff was present when the seller made the telephone call and told her more about his credit problems, within earshot of his fellow employees. The seller admitted to relaying the information to other people.

Plaintiff brought a claim for invasion of privacy by publication of private facts against the lender. The district court granted summary judgment, finding that a single alleged communication was insufficient as a matter of law to constitute a publication and that plaintiff failed to prove any damages.

The Court of Appeals affirmed, holding that the disclosure of a private fact to a single person as a matter of law does not constitute "publicity," even when that single person discloses the private fact to a larger group. The court also found it significant that the plaintiff played an active role in the dissemination. *Robins v. Conseco Finance Loan Co.*, C8-02-1017 (Minn. App. 02/04/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0302/c8021017.htm>

■ **LEGAL MALPRACTICE; STATUTE OF LIMITATIONS.** A legal malpractice cause of action based on a claim of negligence by defense counsel in a criminal prosecution does not accrue, and the statute of limitations does not begin to run, until the convicted defendant obtains relief from the conviction. *Noske v. Friedberg*, C7-02-1073 (Minn. App. 02/05/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0302/c7021073.htm>

■ **INSURANCE; "BUSINESS PURPOSES"; EXCLUSION.** Plaintiff purchased a homeowner's policy for her home and outbuildings on her property, including two pole barns. The policy excluded coverage for structures "used in whole or in part for business purposes" or "rented ... unless used solely as a private garage." Unbeknownst to her insurer, plaintiff rented both pole barns to a marina to store boats for the winter. The marina provided its own insurance for the boats and released plaintiff from any liability. In February 2001, snow and ice caused one barn to collapse. Plaintiff submitted a claim to her insurer for the loss of the barn. Her insurer denied the claim based on the business and rental exclusions.

Plaintiff brought suit seeking coverage under the policy. The district court held that because the barn was being used as a private garage, plaintiff was entitled to coverage under the “private garage exception” to the rental exclusion. The insurer appealed, arguing that the general business exclusion applied. The Court of Appeals reversed, holding that the more general “business purposes” exclusion applied rather than the narrower rental exclusion. Because plaintiff had created business risks and liabilities not contemplated by her homeowner’s policy, the loss was not covered. **Smith v. State Farm Fire and Casualty Co.**, C8-02-997 (Minn. App. 02/11/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0302/c802997.htm>

■ **STATUTE OF LIMITATIONS; PROVIDING ALCOHOL TO A MINOR.** A common-law action for injuries resulting from negligently providing alcohol to a minor is governed by a six-year limitations period.

Wollan v. Jahnz, C4-02-1127 (Minn. App. 02/11/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0302/c4021127.htm>

■ **PROFESSIONAL NEGLIGENCE; PROOF OF STANDARD OF CARE.** Defendant law firm represented plaintiffs in a shareholder litigation alleging a breach of fiduciary duties and misuse of company assets. After the case was settled, plaintiffs sued the defendant law firm, alleging that defendant failed to advise plaintiffs of the value of some of their claims and therefore plaintiffs received less in settlement than they should have. The district court granted defendant’s motion for summary judgment, ruling that plaintiffs’ expert evidence lacked foundation and was legally insufficient to establish that the attorneys breached the standard of care.

The Court of Appeals affirmed, holding that plaintiffs had failed to demonstrate the existence of a genuine issue of material fact with respect to the standard of care accepted in the profession or breach thereof. The standard of care ordinarily must be shown through expert evidence. Evidence offered in opposition to summary judgment must be admissible at trial. Because plaintiffs’ expert opinion was based on evidence that would be inadmissible at trial, summary judgment was appropriate. **Diebold v. Nelson Oyen & Torvik, PLLP**, C7-02-781 (Minn. App. 02/11/03)(unpublished).

<http://www.lawlibrary.state.mn.us/archive/ctapun/0302/781.htm>

[The author’s law firm, Bassford, Lockhart, Truesdell & Briggs, PA, successfully represented the law firm in this appeal.]

— MICHAEL KLUTHO
Bassford, Lockhart, Truesdell & Briggs, PA