



## NOTES & TRENDS

### ADMINISTRATIVE LAW

#### JUDICIAL LAW

■ **EXEMPT RULES.** Rules relating to proof of identity for drivers' licenses adopted by the Department of Public Safety (DPS) under an exempt rulemaking process were declared invalid by the Court of Appeals. The exempt process does not require written justification of the rules or the opportunity for a public hearing. The court found that DPS had demonstrated a serious and immediate threat due to terrorism in the United States, but had not demonstrated that the normal rulemaking process was "unnecessary, impracticable or contrary to the public interest" as the rulemaking statute requires. An administrative law judge had determined that DPS had not justified use of the exempt process, but the Chief ALJ found that the proposed rules were appropriate for the good cause exemption process and approved their adoption. The court noted that exempt rulemaking is an exceptional procedure and is reserved for emergencies. It held that DPS had failed to qualify delay under normal rulemaking, or show with particularity how the delay will harm the public interest, or show how exempt rulemaking better serves the public interest. ***Jewish Community Action v. Commissioner of Public Safety***, CX-02-1214 and C4-02-1290, (Minn. App. 03/11/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0303/op021214-311.htm>

■ **DISQUALIFICATION.** The Court of Appeals has held that the commissioner of human services cannot reverse the set-aside of a disqualification. Malloy was disqualified for providing direct care services at a daycare center due to a misdemeanor theft conviction. He asked the commissioner to reconsider and the disqualification was set aside. Malloy later was found "culpable for maltreatment" when he allowed a child to leave the daycare center with someone other than the child's parents and the commissioner then reversed the earlier set-aside and again disqualified Malloy. The court found that this action exceeded the commissioner's statutory authority because the statute did not contemplate disqualification for someone found "culpable for maltreatment." ***Malloy v. Commissioner of Human Services***, C2-02-1336, (Minn. App. 03/18/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0303/op021336-318.htm>

#### LEGISLATION

As this report goes to press, the Legislature is still in session and a number of bills of interest are pending. Stay tuned for the next edition (*August Bench & Bar*) for a post-2003 session report on legislation.

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### CRIMINAL LAW

#### JUDICIAL LAW

■ **BAIL AND BOND; REINSTATEMENT; FACTORS; BAD FAITH:** The defendant failed to appear at two felony appearances, resulting in forfeiture of the bail bond. The surety (bonding company) promptly commenced efforts to apprehend the defendant, and successfully returned him to police custody approximately eight weeks after the last missed court appearance. In doing so, the surety incurred \$1,200 in expenses.

Held, the district court abused its discretion when it found that the defendant's bad faith controlled the decision regarding reinstatement. The controlling case regarding reinstatement, *Shetsky v. Hennepin County*, 60 N.W.2d 40 (1953) establishes four factors that a court shall consider when determining whether the district court abused its discretion in denying a motion to reinstate a forfeited bond: (1) the purpose of bail, the civil nature of the proceedings, and the cause,

purpose and length of the defendant's absence (2) the good faith of the surety as measured by the fault or willfulness of the defendant (3) the good faith efforts of the surety to apprehend and produce the defendant and (4) any prejudice to the state in the administration of justice. Here, the district court found that the surety acted in good faith in properly apprehending the defendant, and also found that the defendant's absence did not result in prejudice to the state. The court, however, focused on the fact that the defendant acted in bad faith which, in effect, trumped the other factors.

In holding that *Shetsky* never meant the bad faith conduct of the defendant to have this type of preeminence among the *Shetsky* factors, the Supreme Court notes that to do so would undermine and frustrate the purposes of encouraging the surety to voluntarily surrender the bond amount, and would provide no incentive for sureties to locate, arrest and return defendants who have absconded. ***State v. Storkamp and Bartsh Bail Bonds***, CX-01-1462, (Minn. 02/20/03). <http://www.lawlibrary.state.mn.us/archive/supct/0302/cx011462.htm>

■ **SENTENCE; DANGEROUS OFFENDER; DURATIONAL DEPARTURE; SEVERE AGGRAVATING FACTORS; EXCESSIVE AND UNREASONABLE.** Appellant was convicted of armed robbery and kidnapping. In brandishing a gun, he confined a clerk to a back room for a period of approximately ten minutes after binding her hands with plastic and covering her face with masking tape. Another clerk was then beaten and threatened during the robbery. The appellant was convicted of two counts of aggravated robbery against the two victims, and one count of kidnapping. The district court sentenced the appellant to a total of 576 months in prison: 480 months, the statutory maximum, for kidnapping, and 96 months, a double durational departure, for the aggravated robbery, consecutive to the kidnapping. Both sentences were imposed pursuant to the dangerous offender statute, Minn. Stat §609.152.

In review of the sentence, the Supreme Court makes four holdings: first, the court's failure to specifically find that the appellant is a "danger to public safety," as required by the dangerous offender statute does not, by itself, invalidate the sentence. The court's findings concerning the appellant's long criminal history and his frequent criminal activity provide the basis for such a conclusion. In the future, however, courts should comply with the specific mandates of the statute. Second, under the dangerous offender statute, courts need not make a finding of severe aggravating factors in order to impose a more than double durational departure. The dangerous offender statute is a sentencing statute that permits durational departures not otherwise authorized by the sentencing guidelines and is exempt from the usual rule that sentences greater than a double durational departure must be supported by severe aggravating factors. *State v. Glaraton*, 425 N.W.2d 831 (Minn. 1988). Third, in order to avoid disproportionate sentences, courts should "use caution" when imposing sentences under the dangerous offender statute which approach or reach the statutory maximum sentence. Fourth, the sentence in this case is found to be excessive and unreasonable. Appellate courts have the authority to review the sentences with such defects under Minn. Stat. §244.11 subd. 2(b). Appellate courts also have discretion to modify a sentence in the interest of fairness and uniformity. In this case, the acts supporting a kidnapping conviction, in comparison to other cases, are somewhat minimal, and the 480-month statutory maximum sentence is not commensurate with the gravity of the crime in comparison to other published cases. ***Howard Neal v. State of Minnesota***, C5-01-848, (Minn. 02/20/03). <http://www.lawlibrary.state.mn.us/archive/supct/0302/c501848.htm>

■ **SENTENCING; CONDITIONAL RELEASE; CRIMINAL SEXUAL CONDUCT; SECOND OR SUBSEQUENT TIME; DEFINITION.** Under Minn. Stat. §609.109, subd. 7(a), a person convicted for violation of one of the criminal sexual conduct statutes "a second or subsequent time" shall be placed on conditional release for ten years. Minnesota law defines "second or subsequent violation or offense" to mean "prior to the commission of the violation or offense, the actor has been adjudicated guilty of a specified similar violation or offense." In this case, on July 23, 2001, the appellant was convicted of eight counts of criminal sexual conduct for 1995 offenses. Subsequently, on January 16, 2002, the appellant pleaded guilty to criminal sexual conduct offenses for offenses committed from 1995 through 1997 against one A.J. The appellant could not, therefore, be given ten years conditional release because his commission of sexual acts against A.J. occurred years before he was convicted of similar criminal sexual conduct in the first trial. In other words, prior to 1995 through 1997, the time of the acts complained of in the second conviction, the appellant had not been convicted of a

similar criminal sexual conduct violation. Hence, the ten year conditional release must be vacated. **State v. Bruce Norman Noggle**, C1-02-629, C8-02-630, (Minn. App. 03/18/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0303/op020629-318.htm>

■ **SENTENCING; STAY OF ADJUDICATION; ABUSE OF PROSECUTORIAL DISCRETION; PROFESSIONAL CAREER FACT.** The district court erred by staying adjudication for a \$27 theft from Target Store where the defendant had no criminal record and had tendered a plea of guilty, but was concerned that a theft conviction would prevent her from attending nursing school. There were no special circumstances to justify the court's stay of adjudication. The Court of Appeals notes that *State v. Lattimer*, 624 N.W.2d 284 (Minn. App. 2001), *rev. denied*, 05/15/01 is "in conflict" with the Supreme Court's decisions in *Krotzer* and *Foss*, where the court expressly limited the district court's power to stay adjudication to cases where there is a clear abuse of prosecutorial discretion in charging. A concurring opinion by Judge Anderson expresses a concern that there may be no effective check on the exercise of prosecutorial discretion. **State v. Leann Marie Colby**, C1-02-1795, (Minn. App. 03/18/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0303/op021795-318.htm>

■ **SENTENCING; APPRENDI; CONDITIONAL RELEASE; SEX OFFENDERS.** Following convictions for two counts of third-degree criminal sexual conduct involving two separate victims, the appellant was sentenced to a stay of execution on the first count; on the second count, the court sentenced the appellant to the statutory maximum prison sentence, 15 years, by utilizing the patterned predatory sex offender statute, Minn. Stat. §609.108 subd. 1. The court also imposed ten years conditional release.

The Supreme Court notes that the appellant had no prior sex offense convictions, and therefore was subject only to a five-year conditional release term. The Court then holds that the imposition of the five-year conditional release term does not violate *Apprendi* because it is authorized on the basis of the jury verdict, and does not require any additional findings of fact to be made by the district court. Minn. Stat. §609.109 subd. 7 provides that this five-year conditional release is to be imposed "notwithstanding the statutory maximum sentence." As such, it is a mandatory aspect of a sentence.

While concluding that the conditional release is constitutionally significant for purposes of *Apprendi*, the Supreme Court remands to the Court of Appeals for imposition of a five-year conditional release term. **State v. Jela DeShaun Jones**, CX-01-1431, (Minn. 04/17/03). <http://www.lawlibrary.state.mn.us/archive/supct/0304/op011431-0417.htm>

■ **SENTENCING; E.J.J.; PROBATION VIOLATION; AUSTIN FACTORS.** Before revoking an E.J.J. sentence, the court must consider the *Austin* factors: (1) designate the specific condition that was violated; (2) find that the violation was intentional and inexcusable and (3) find that the need for confinement outweighs the policies favoring probation. In this case of first impression, the Minnesota Supreme Court directs the Supreme Court Advisory Committee to incorporate into the rules of juvenile procedure the *Austin* factors.

Next, curfew violations by the juvenile present an insufficient reason to revoke the stay. In this case, the court's original dispositional order did not contain curfew restrictions as part of the disposition. Instead, curfew requirements were implemented by the probation officer as time passed. The Court holds that because the curfew was not part of the dispositional order, the juvenile's admission to violating his curfew cannot be the basis for executing his sentence, even under Rule 19.09, irrespective of the *Austin* requirements: "While probation officers have discretion in establishing the terms of probation, ultimately the court is responsible for the sentence or disposition." **State v. B.Y.**, C7-01-897, (Minn. 04/24/03). <http://www.lawlibrary.state.mn.us/archive/supct/0304/op010897-0424.htm>

■ **SENTENCING; AIDING AND ABETTING; ACCOMPLICE AFTER THE FACT; VACATION OF SENTENCE.** An accomplice-after-the-fact conviction must be vacated where the person aiding the offender is also convicted as a principal to the offense. **State v. Tina DeAnn Leja**, C9-02-863, (Minn. App. 05/06/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0305/op02863-0506.htm>

■ **DNA; PCR-STR DNA TESTING.** The Minnesota Supreme Court agrees with the district court that PCR-STR DNA testing (polymerase chain reaction - short tandem repeats) is generally accepted in the relevant scientific community and, hence, satisfies the first prong of the *Frye-Mack* test. Secondly, the district court did not abuse its discretion in concluding that the appropriate stan-

dards currently in effect are the DNA Advisory Board standards, and that the Bureau of Criminal Apprehension in this case complied with those standards. Finally, a defendant's due process rights to a fair trial are not violated by denying to the defense disclosure of the validation studies and primer sequences used by Perkins-Elmer, a private company in the DNA methodology. The BCA used a testing kit developed and manufactured by the Perkins-Elmer Corporation. **State v. Raymond Joseph Traylor**, C6-01-244, (Minn. 02/24/03).

<http://www.lawlibrary.state.mn.us/archive/supct/0302/c601244.htm>.

■ **ARSON; LESSER INCLUDED OFFENSE; "MULTIPLE UNIT RESIDENTIAL BUILDING"; DUPLEX.** The appellant admitted that she intentionally set fire to a couch located in the basement of Oxford House, a residence for people recovering from alcohol and chemical dependency. The facility is a side-by-side duplex. One side of the duplex houses male residents, and the other side houses female residents. Appellant testified that she intended only to make a couch smolder and create smoke, but not to damage the building. Appellant was convicted of first-degree arson, which criminalizes the intentional destruction or damage to a building that is used as a residence at the time the act is committed. At trial, the appellant requested, but was denied, an instruction for fourth-degree arson, which criminalizes the intentional setting of a fire to burn personal property in a "multiple unit residential building." The district court denied the request for the lesser included offense.

Held, the district court abused its discretion to decline to instruct the jury on fourth-degree arson. The trial court found that a duplex was not a "multiple unit residential building"; however, the statutory definition of that term, under Minn. Stat. §462.12, includes two-unit buildings, and does not exclude duplexes. Oxford House met the definition of a multiple unit residential building. The Court of Appeals finds that the failure to give this lesser included instruction is grounds for reversal because the defendant was prejudiced by its absence. **State v. Cynthia Lue Davis**, C7-02-215 (Minn. App. 02/25/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0302/c702215.htm>

■ **EVIDENCE; SPREIGL; PRIOR ACTS OF DOMESTIC ABUSE; "STRAINED RELATIONSHIP."** Appellant had been charged, in the original complaint, with acts of assault against two victims: Washington, his girlfriend, and Allen. On the first day of trial, the district court dismissed the two counts of assault involving Washington. During the trial, however, the district court granted the state's motion to admit evidence of prior domestic abuse involving Washington and the appellant. The district court concluded that the "strained relationship" doctrine (to establish motive and intent, see *State v. Mills*, 562 N.W.2d 276, 285 (Minn. 1997) and Minn. Stat. §634.20) apply to a material witness who is not the victim of the charged offense.

The Court of Appeals holds that Minn. Stat. §634.20 does not apply to allow admission of prior acts of domestic abuse because Washington was not the victim of the charged offense. Secondly, the "strained relationship" doctrine does not apply to any person other than the victim of a charged offense. This error of the district court is found to be harmless, however, because the evidence, although extrinsic, could have been otherwise admissible under Minnesota Rule of Evidence 616, to show the witness' bias in favor of the appellant due to her fear of him. **State v. John Michael Copeland**, C6-01-2253, (Minn. App. 02/25/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0302/c6012253.htm>

■ **EVIDENCE; IMPEACHMENT; POLICE OFFICER; UNTRUE STATEMENT USED AS TACTIC.** While interrogating appellant, a police officer misrepresented the number of buys that the police had made from the appellant in order to gain his cooperation. The district court granted the appellant's motion to suppress the appellant's response to the questioning using an untrue statement on the basis that it was overly coercive by threatening incarceration or suggesting favorable treatment. Appellant attempted at trial to impeach the police officer's credibility by use of the false statement.

Held, the district court was correct to disallow impeachment of the police officer by use of the deceptive statement. There is no authority to state that the use of a deceptive tactic implicates an officer's credibility; hence, impeachment by reference to such a false statement is not relevant to a determination of the officer's character for truthfulness. Additionally, because the state was precluded from introducing context evidence for the deceptive statement (involuntary statements cannot be used for any purpose at trial: *State v. Sutherland*, 396 N.W.2d 238, 243 (Minn. 1986))

additional use of the untrue statement to impeach the officer's credibility would have resulted in unfair prejudice to the state and would outweigh any probative value). **State v. Lauro Balleza Martinez**, C2-02-333, (Minn. App. 03/4/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0303/c202333.htm>

■ **EVIDENCE; FEIGNED LACK OF MEMORY; PRIOR INCONSISTENT STATEMENT; HEARSAY.** A father and son were tried separately for a drive-by shooting. Witness Moe testified at the son's trial, stating that she had seen the defendant's car behind a certain residence, the son was present in the vehicle, and she identified a seized weapon as belonging to the son. Two weeks later, at the father's trial, the appellant, Moe, recalled a dispute, but nothing further about the shooting incident, stating that she was confused and emotional. Over the appellant's objection, the court found that Moe was feigning a lack of memory and allowed the use of her prior statement by the state as inconsistent statements under Minnesota Rule of Evidence 801(d)(1)(a).

In this case of first impression, the Minnesota Supreme Court holds that Minnesota should follow the federal law in certain states which allow courts discretion to admit an unwilling witness' prior testimony as inconsistent with the witness' purported lack of memory at trial, under Rule 801(d)(1)(a), if the witness testifies and is subject to cross-examination concerning the prior sworn testimony, as was the case here. Also, it was proper for the trial court to conclude, under the facts of this case, that Moe was feigning a lack of memory, given that the prior testimony was merely two weeks before the appellant's trial. **State v. Robin Keith Amos, Sr.**, C1-01-1172, (Minn.. 03/27/03). <http://www.lawlibrary.state.mn.us/archive/supct/0303/OP011172-0327.htm>

■ **EVIDENCE; THIRD PARTY COMMISSION OF CRIME; FOUNDATION.** The trial court did not abuse its discretion when it excluded proffered evidence that a third party committed the murder with which the defendant was charged. A criminal defendant may introduce evidence that a third party committed the crime of which the defendant is accused. *Woodruff v. State*, 608 N.W.2d 881, 885 (Minn. 2000) However, before such evidence may be introduced, the defendant must lay a foundation of additional evidence sufficient to connect the alleged third-party perpetrator with the commission of the crime, and that evidence must be clear and convincing, citing *State v. Johnson*, 516 N.W.2d 426, 433 (Minn. 1997). **State v. Areece Devon Manley**, C8-01-1833, (Minn. 04/03/03). <http://www.lawlibrary.state.mn.us/archive/supct/0304/OP011833-0403.htm>

■ **GRAND JURY; INDICTMENT; PROBABLE CAUSE; MOTION TO DISMISS.** In this case, the state contended that the respondent may not challenge a grand jury indictment, at the district court level, based on lack of probable cause. Although the Rules of Criminal Procedure do not describe this type of challenge, Rule 17.06, subd. 2(1)(a) allows motions where the "evidence admissible for the grand jury was not sufficient . . ." Although this rule does not, in so many words, provide for a probable cause challenge to dismiss an indictment, the language is equivalent. Hence, the trial court did not err by hearing the respondent's probable cause challenge to grand jury indictment. **State v. Mary E. Flicek, et al.**, C2-02-1269, C9-02-1270 (Minn. App. 03/04/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0303/c2021269.htm>

■ **THEFT BY SWINDLE; ACT OF OMISSION; DELINQUENT UTILITY ACCOUNTS;; MISCONDUCT OF PUBLIC OFFICER.** The defendants were a clerk treasurer and city council member. Each year the clerk would prepare lists of delinquent utility accounts. Under the city ordinance, the preparation of this list was permissive, and not mandatory. From this list, the city then certified the delinquent accounts to the auditor for property tax assessment, making collection easier. The defendants, friends and neighbors, acted together in omitting both of their names from the delinquent account list, avoiding the property tax obligations.

Held, the district appropriately dismissed the indictments. Theft by swindle, under Minn. Stat. §609.52, subd. 2(4) requires a showing of an affirmative, fraudulent or deceitful act. The respondent's failure to disclose the utility accounts as delinquent was an omission and, while arguably dishonest, was not fraudulent. Neither defendant received utility services by affirmatively misrepresenting anything, and did not obtain services by deceit. Here, there were no words or actions which defrauded another person by an intentional misrepresentation or scheme.

Furthermore, there was no misconduct of a public official under Minn. Stat. §609.43(4), which states that no public official shall make any official report or other like document having knowledge that it is false in any material respect. Here, there was no requirement nor expectation that the list of

delinquent accounts be complete. *State v. Flicek*, *supra*.

■ **BOATING; PERSONAL WATERCRAFT; EQUAL PROTECTION; VAGUENESS.** Minn. Stat. §86B.313, which prohibits the operation of a personal water craft between one hour before sunset and 9:30 a.m. is not void for vagueness and does not violate the equal protection clause of the state or federal constitutions. *State v. Michael G. Gresser*, C7-02-912, (Minn. App. 03/11/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0303/op020912-311.htm>

■ **RESPONSIBLE CORPORATE OFFICER DOCTRINE; STRICT LIABILITY; PUBLIC WELFARE STATUTES.** The appellant was the CEO, president and sole shareholder of Carriage Homes, which was a general contractor/Minnesota corporation developing condominiums in Austin. Appellant received a series of seven letters concerning the fact that the elevations of some of the units were lower than permitted under the state building code, contrary to Minn. Stat. §16B.69. Appellant gave the letters to his project managers, who failed to resolve the problems. Appellant and the corporation, Carriage Homes, were charged with violation of the state building code, a misdemeanor. The corporation pleaded guilty, but the appellant pleaded not guilty, discerning that he could not be held criminally responsible for the violation.

Held, the state building code is a public welfare statute. Because it is only a misdemeanor, there is no presumption that it requires proof of *mens rea* to establish liability. While strict liability statutes are generally disfavored, application of common law doctrines inferring *mens rea* have been limited to felony or gross misdemeanor penalties. Because a violation of §16B.69 is only a misdemeanor, the policy disfavoring strict liability statutes is not implicated. Hence, the district court did not err by determining that the state building code is a strict liability statute.

Next, the appellant may be found criminally liable under the responsible-corporate-officer doctrine, which may be imposed upon a corporate officer for a corporation's violation under the strict liability public welfare statute. The United States Supreme Court has determined that it is sufficient for liability to attach where the corporate officer, by virtue of his relationship to the corporation, has the power to prevent the act complained of. In this case, there was sufficient evidence that the appellant possessed such power: his corporation was the general contractor, of which he was the CEO, president and sole shareholder. Hence, the appellant had a duty to either prevent or correct the code violations. Finally, the liability is further established by the fact the appellant received a series of letters from the city development director requesting that the low elevations be corrected. *State v. John Arkell*, C1-02-856, (Minn. App. 03/14/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0303/op020856-314.htm>

■ **RIGHT TO COUNSEL; INVOCATION; REINITIATION OF INTERROGATION BY DEFENDANT; WAIVER OF PRIOR INVOKED RIGHT; MIRANDA INSUFFICIENT.** The appellant made a series of five tape-recorded statements. Between the fourth and the fifth statement, the appellant was found to have unequivocally invoked his right to counsel. While in custody, the appellant requested to speak to one of the investigators. The essence of this conversation was to inquire about how long the 36-hour hold was extended, about when the appellant could take a shower, and when he could call his mother. Subsequent to this brief discussion, investigators approached appellant, gave a *Miranda* warning, and obtained a fifth statement from the appellant.

Held, the state failed to meet its burden of proving that the appellant reinitiated a substantive conversation about the investigation. He merely asked questions about his processing. Also, the state failed to meet its burden of proving that the appellant waived his previously invoked right to counsel. Even though investigators gave a *Miranda* warning before recording the fifth statement, there was no discussion with the appellant concerning his previously invoked right to counsel. "The state must show the suspect affirmatively acknowledges that he or she is revoking a previously invoked right to counsel . . . the state cannot rely solely on the *Miranda* Warning to establish waiver." *State v. Mark Owen Staats*, C8-02-174, (Minn. 03/27/03).

<http://www.lawlibrary.state.mn.us/archive/supct/0303/OP020174-0327.htm>

■ **RIGHT TO COUNSEL; EQUIVOCAL INVOCATION; CONTINUED QUESTIONING; REVERSAL.** While in custody on suspicion of first-degree murder, the appellant was interviewed by two Minneapolis police officers. Shortly after the appellant agreed to speak with police, he stated: "then get me a public defender down here because you're kind of getting upset and you want to act like you want to try take this shit out on me, like I've got to lie." After this statement, the

police stated that because of the invocation of counsel, they had to leave and honor the request, but they were hoping to talk about some things so they could make a decision about “what the best thing for you would be. We can’t do that unless you clearly say . . . I don’t want to have a public defender here, I am willing to continue the conversation.” After that final inducement by police, the appellant continued with his statement, at first denying his presence at the scene of the murder, but then admitting he was present, but continuing to deny any involvement in the shooting. At trial, the state used these repeated denials, followed by admissions, to argue that an innocent person would not have lied repeatedly to the police.

Held, appellant’s request for counsel was clear and unequivocal. It was misconduct for the police to continue to engage in an impermissible effort to persuade the appellant to withdraw his request for counsel. The admission of testimony following his invocation of counsel was error. Furthermore, because the state relied heavily on those post-invocation statements to challenge the credibility of the appellant and infer his guilt, admission of the statements was not harmless beyond a reasonable doubt. Apart from appellant’s statements, the state’s case was weak. **State v. Secundus Arie Ray**, C0-00-228, (Minn. 04/17/03). <http://www.lawlibrary.state.mn.us/archive/supct/0304/op00228-0417.htm>

■ **CONTROLLED SUBSTANCE; INTENT TO SELL; “RIP-OFF”; INCONSISTENT VERDICTS.** The appellant met with a confidential informant (CI), after receiving a call from the CI attempting to locate methamphetamine. The appellant agreed over the phone to sell the CI one quarter ounce of meth for \$500. The parties agreed to meet behind a Wal-Mart store at 12:30 a.m. At 12:45 a.m., the appellant and the CI met and discussed the price and quantity. The CI was wired, and carried \$500 in serialized bills given to her by the police. The CI gave the appellant the money, and appellant told the CI to wait while she went into an apartment to get the drugs. The appellant also asked if she could get a ride home after the exchange. By one hour later, the appellant had not returned. The CI and one of the officers went to find her but could not. She was not arrested until more than two month later. Using the *Lothenbach* procedure, the appellant was convicted of second-degree controlled substance sale and theft by swindle

Held, Minn. Stat. §152.01 subd. 15 (a) is unambiguous. It states that offering to sell is equivalent to selling, therefore, the appellant could properly be convicted. Even if the court were to accept the appellant’s argument that an intent element should be read into the statute, her actions and words support an inference of intent.

Finally, the court notes that it is legally inconsistent for the appellant to have been convicted of both controlled substance sale and theft by swindle. The intent to swindle would negate the intent for drug sale. Recognizing that tension, the Court of Appeals dismisses, pursuant to the state’s suggestion, the conviction for theft, and affirms the conviction for controlled substance sale. The Court of Appeals also suggests that prosecutors should treat situations like this in the future as “either/or,” rather than attempting to convict someone in the appellant’s position of both crimes. **State v. Loralee Lorsung**, C2-02-610, (Minn. App. 03/25/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0303/op020610-325.htm>

■ **FIRST-DEGREE MURDER; PAST PATTERN OF DOMESTIC ABUSE; JURY INSTRUCTIONS; REASONABLE DOUBT.** Minn. Stat. §609.185(a)(6), Minnesota’s domestic abuse murder statute, does not require the trial court to instruct the jury that each act making up the past pattern of domestic abuse must be proven beyond a reasonable doubt. The court follows *State v. Kelbel*, 648 N.W.2d 690 (Minn. 2002), cert. denied 123 S.Ct. 1001 (2003), which states that in a child abuse murder case, each predicate act of the past patterned child abuse need not be proven beyond a reasonable doubt. Also, the Supreme Court notes that *Richardson v. United States*, 526 U.S. 813 (1999) explicitly distinguishes sex abuse statutes under the continuing criminal enterprise statute because the underlying criminal acts are difficult to prove. **State v. Manley**, *supra*.

■ **SEARCH AND SEIZURE; SHORT-TERM SOCIAL GUEST; EXPECTATION OF PRIVACY; UNDERAGE DRINKING; EXIGENT CIRCUMSTANCES.** The Minnesota Supreme Court finds that under both the federal Fourth Amendment and Article I Section 10 of the Minnesota Constitution, short-term social guests have a reasonable expectation of privacy in the host’s home and can therefore claim standing to challenge the search. In this case, the appellant attended an underage drinking party at a private home hosted by B.A.O., who lived there with his mother and stepfather. At the time, B.A.O.’s parents were out of town, and did not authorize the party. The appellant was not specifically brought to the party or invited by B.A.O.; however, B.A.O. testified that the appellant was a friend of his and was allowed to stay at the party. The party was essentially broken up by a mother

who arrived at about 11:00 p.m. Most of the guests had left, leaving the appellant, the owner, and two other teenagers. When deputies approached at about midnight, the appellant and the others hid in the basement. Without obtaining a warrant, police entered the home, after looking through windows and seeing evidence of alcohol consumption. Deputies also knew that there were guns in the home because of a prior burglary incident. The appellant was found by deputies, and admitted under questioning that he had consumed alcohol.

Held, under these facts, the appellant was a short term social guest in B.A.O.'s home. The court's analysis focuses on the appellant's status from the time the party ended until the deputies found him in the home. Upon the conclusion of the party, the appellant engaged in social interaction with the host, indicating a social connection between the parties.

The Supreme Court distinguishes *Minnesota v. Olson*, 495 U.S. 91 (1990) which states that overnight guests have an expectation of privacy in a host's home. The Court notes that the key analysis in *Olson* centers on whether overnight visits serve a "long standing social custom." The Minnesota Supreme Court finds that entering the home of another for a short-term social visit is also a "long standing social custom."

The Supreme Court further distinguishes *Minnesota v. Carter*, 525 U.S. 83 (1998) which declined Fourth Amendment protection to short-term guests dividing cocaine: in that case, the expectation of privacy analysis focused on the commercial nature of the guest's presence.

Finally, there were not sufficient exigent circumstances, either under the single factor analysis, or the totality of the circumstances analysis, to justify a warrantless entry into the home. ***In re B.R.K.***, C7-01-1466, (Minn. 03/03/03). <http://www.lawlibrary.state.mn.us/archive/supct/0304/OP011466-0403.htm>

■ **SEARCH AND SEIZURE; RENTED STORAGE UNIT; CONSENT TO SEARCH; ACTUAL AUTHORITY; PARENT AUTHORITY; COTENANTS.** The appellant, accused of killing his wife, rented a storage unit with his wife. During the search process, investigators learned of the cotenancy, and met with the manager of the storage units. Police learned that the appellant was sole person on the lease, and that the manager had a right to enter the storage shed, according to the terms of the lease, at all reasonable times, for purposes of inspection, cleaning, and improvement; also, the lease contained a relocation clause which allowed the lessor the right to relocate the lessee.

Held, the appellant had a reasonable expectation of privacy in the storage unit as to all persons other than the cotenant. Next, the landlord or manager did not have actual authority to consent to a warrantless police search; however, the Supreme Court remands this issue to district court for determination of whether the relocation clause would impact on the question of actual authority. Furthermore, no apparent authority existed, because it was not objectively reasonable for the police to believe that the manager could go into the appellant's storage unit whenever she wanted: the manager asserted only rights of access and did not claim to have mutual use. Finally, the case is remanded for determination of the independent source exception to the warrant requirement: separately from the search of the storage unit, investigators learned the appellant had been caught using the decedent's credit cards, when he was detained by an off duty police officer. Subsequent to that arrest, the appellant was found carrying keys to the storage unit, the decedent's credit cards, and was wearing blood-stained clothing. ***State v. Craig Robert Licari***, C2-01-290, (Minn. 04/17/03). <http://www.lawlibrary.state.mn.us/archive/supct/0304/op010290-0417.htm>

■ **SEARCH AND SEIZURE; CANINE SNIFF; REASONABLE SUSPICION; SQUAD CAR INTERROGATION; MIRANDA.** Based on a citizen tip, the vehicle in which the respondent was a passenger was pulled over. The chief of police had ordered officers to pull over the vehicle if they could find any legal reason to do so. An informant had notified police that methamphetamine was being dealt from a certain home. Once surveillance had been established, police saw the two men in the truck leaving the target home in a pick-up truck.

According to officers, the respondent, as passenger, was incoherent, did not pay attention when spoken to, did not respond to questions, and had glassy eyes. The chief of police ordered an officer to use a drug detection dog, which hit on the vehicle, which resulted in drugs being found that were attributed to the respondent. The respondent was handcuffed and placed in the back of a police car. The chief started a conversation with the respondent, during which the respondent made incriminating statements. The chief specifically asked if a certain person brought drugs to him or did he go into the house to get them.

Held, the drugs were properly suppressed by district court. Police did not have a reasonable artic-

ulable suspicion to conduct the dog sniff subsequent to the stop of the vehicle for an equipment violation. *State v. Wiegand*, 645 N.W.2d 125 (Minn. 2002).

While handcuffed and placed in a squad car, the respondent was in custody, and the questions by the chief were a custodial interrogation. Because no *Miranda* warning was given, those statements were properly suppressed. *State v. Earl Harold Miller*, C6-02-1582, (Minn.App. 04/15/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op021582-0415.htm>

■ **SEARCH AND SEIZURE; AUTOMOBILE; FLASHING LIGHTS CONSTITUTES SEIZURE; ARTICULABLE SUSPICION; METHAMPHETAMINE INGREDIENTS.** Police were alerted by a hardware store merchant, who informed them that appellant had just purchased acetone and rubber tubing, commonly sold items which can be used to manufacture methamphetamine. Police attempted to pull over appellant by activating flashing red lights; there was no moving violation. Approximately one mile beyond the point where the flashing lights were activated, appellant stopped his vehicle, exited, and ran. During the subsequent foot chase, police were able to restrain appellant, and found on his person red phosphorous, a substance also used in the manufacture of methamphetamine. In the vehicle, police discovered other items used in the manufacture of methamphetamine by looking through the window; a subsequent warrant for the vehicle yielded a handgun and methamphetamine.

Held, "where Bergerson's vehicle was directly in front of Deputy Carlson's squad car with its red lights flashing, we conclude that Bergerson was seized." This holding derives from *E.D.J.*, 507 N.W.2d 779 (Minn. 1993), which holds that a seizure has occurred at the point where police directed E.D.J. to stop (departing from *Hodari*, which finds a seizure only where physical force is used or a person submits to a show of authority, 499 U.S. 621 (1991)). This decision is apparently the first time where the use of flashing lights, without more, is held to be an actual seizure.

Additionally, the seizure was not supported by reasonable and articulable suspicion because at the time the flashing lights were employed, police knew only that the appellant had purchased acetone and rubber tubing. Absent other activity, the mere purchase of two generic items, which have legitimate uses, from a hardware store does not create unreasonable suspicion.

Finally, the appellant's flight in a vehicle does not amount to an intervening circumstance. The Court of Appeals concludes that the appellant's flight was merely an abandonment of evidence, and does not purge the taint of the illegal stop. *State v. Daniel Bergerson*, C2-02-932, (Minn. App. 04/15/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op020932-0415.htm>

<http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op020932-0415.htm>

■ **SEARCH AND SEIZURE; AUTOMOBILE; TRAFFIC STOP; CONSENT TO SEARCH; BEYOND THE SCOPE.** Appellant, an 18-year-old African-American male, was a passenger in a car stopped by two Minneapolis police officers for speeding and having a cracked windshield. Officers testified that the stop occurred in North Minneapolis, a "high drug" area. Both officers were in a marked squad, holding flashlights and holding guns, mace, radios, and handcuffs. After determining that neither the driver nor the appellant had a valid driver's license, officers decided to tow the vehicle. Appellant had been asked to exit the vehicle and was escorted to the police squad car. The officer testified at the suppression hearing that he had intended to offer the appellant a ride home, although he never informed appellant of this intent. While at the squad car, the officer questioned him about drugs and weapons, asked him if there were any in the vehicle, asked if he had any on him, and finally asked if the appellant minded if he were searched. During the search, which was in the nature of a pat-down, the officer found drugs in the appellant's pockets.

Held, appellant was seized under the meaning of Article I, section 10 of the Minnesota Constitution, at the time the officer questioned him regarding the presence of narcotics and weapons. An objectively reasonable person would not feel free to disregard the police officer's questions or terminate the encounter, given the circumstances. The purpose of the traffic stop was simply to process violations for speeding and a cracked windshield, and there was no further reasonable articulable suspicion of any other crime. Therefore, the investigative questioning, consent inquiry, and subsequent search went beyond the scope of the traffic stop and were unsupported by any reasonable articulable suspicion. Furthermore, the appellant was not told that he had a right to refuse the search request, or that he was free to leave without being searched. *State v. Mustafaa Naji Fort*, C2-01-1732, (Minn. 05/01/03). <http://www.lawlibrary.state.mn.us/archive/supct/0305/OP011732-0501.htm>

■ **PROSECUTORIAL MISCONDUCT; REVERSAL NOT REQUIRED; OVERWHELMING EVIDENCE.** The prosecutor in this case committed serious prosecutorial misconduct in the following ways: by asking the victim's mother if she believed the allegations of abuse, by not preparing witnesses against releasing evidence suppressed by the trial court, by appealing to the sympathy of the jurors in noting that the victim was "not a virgin any more," and by alluding to the fact that the defendant was victimizing the child "all over again" by having a trial. However, the evidence against the appellant was so overwhelming that reversal is not required. **State v. Christopher Henry McNeil**, C0-02-542, (Minn. App. 04/01/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op020542-0401.htm>

[lawlibrary.state.mn.us/archive/ctappub/0304/op020542-0401.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op020542-0401.htm)

■ **PROSECUTORIAL MISCONDUCT; RACIAL INNUENDO; MINORITY COMMUNITY.** It was reversible prosecutorial misconduct for the prosecutor to compare the neighborhood of the appellant, a black male from North Minneapolis, to Edina or Minnetonka. The prosecutor reminded jurors that the defendant's world was different from that of a business person from Edina, Pope John Paul, and Mother Theresa. The prosecutor stated that the entire occurrence was one "involving three young black males in the hood of North Minneapolis," a world outside their own. These statements were an invitation to the jury to apply racial and socioeconomic considerations which denied the defendant a fair trial. The conviction is reversed. **State v. Secundus Arie Ray**, *supra*.

■ **POST CONVICTION; HABEAS WRIT; NECESSITY TO ATTACH TRANSCRIPT; SUPERVISED RELEASE VIOLATION.** A petition for writ of habeas corpus need not attach transcripts of the arraignment and sentencing proceedings when the confinement results from a supervised release violation. The statute, §589.04(a) literally states that such transcripts are necessary if the confinement "results from conviction." In this case, the appellant's confinement resulted from a supervised release violation (possessing Internet capability without permission). The statute should be construed liberally in favor of the citizen. **Norman Scott Allen v. Joan Fabian**, C0-03-17, (Minn. App. 04/08/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op030017-0408.htm>

■ **CRIMINAL SEXUAL CONDUCT; SEX OFFENDER REGISTRATION; JUVENILES; EX POST FACTO EFFECT.** Minn. Stat. §243.166, subd. 1(1), which requires sex offender registration of juveniles, is a statute which, as originally enacted with a clearly stated retroactive effect, applies to juveniles who committed qualifying offenses before the effective date of the amendment. Although the 1994 amendment at issue does not specifically state its retroactive effect, the 1991 law, which it amended, did provide that it applied retroactively. Furthermore, the law can hardly be understood except as applied retroactively. **State v. Todd LaVerne Lilleskov et al.**, C3-02-1698, C8-02-1700, (Minn. App. 04/08/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op021698-0408.htm>

[lawlibrary.state.mn.us/archive/ctappub/0304/op021698-0408.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op021698-0408.htm)

■ **EXTRADITION; WISCONSIN DEFERRED JUDGMENT; UNPAID RESTITUTION.** In 1999, appellant pleaded guilty to a burglary offense under a deferred judgment agreement in Wisconsin. The agreement provided that entry of judgment of conviction would be withheld in return for the appellant's payment of restitution. Following restitution, the charge would be dismissed. Appellant failed to pay restitution, and a court hearing was scheduled in Wisconsin for entry of judgment of conviction. When appellant failed to appear, a bench warrant was issued for his arrest. Subsequently, appellant was arrested in Minnesota, and faced an extradition warrant. Held, the extradition documents were in order, and appellant has been "charged with crime in a demanding state." The case in Wisconsin was still pending and awaiting adjudication because entry of the judgment of conviction was deferred. The appellant was not convicted of the burglary because of the deferral of judgment. Without entry of judgment, the guilty plea alone does not transform the charge into a conviction. Hence, appellant remains "charged with a crime." Additionally, extradition for the purpose of collecting restitution in criminal court is not an improper purpose of extradition. **Kenneth Gene Engel v. Robert Fletcher, Ramsey County Sheriff**, C1-02-1778, (Minn. App. 04/15/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op021778-0415.htm>

■ **DISCOVERY; DATA PRIVACY ACT; VIDEOTAPES OF CHILDREN; SEXUAL ABUSE.** In the context of a request for discovery in a criminal case, the Minnesota Data Practices Act, section 13.03, which grants special protection to videotapes of child victims, does not apply. Hence, the data privacy act does not require a court order for release of a videotape of an alleged child sexual abuse victim when

the request for a videotape is part of the normal criminal discovery. The court may, however, under Rule 9.03, subd. 5, conclude that a concern for privacy of the children is sufficient to constitute cause for a protective order. Such an order may restrict the use of the videotape by the defense team. **State v. Mitchell Logan Johnson**, C8-02-1860, (Minn. App. 04/23/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op021860-0422.htm>

■ **APPELLATE PROCEDURE; WAIVER RULE; NEW THEORIES ON APPEAL.** Rule 29.04 of the Minnesota Rules of Criminal Procedure is an exception to the waiver rule. Parties may, without filing a cross appeal, defend a decision or judgment on any ground that the law would permit, provided that the record supports such a theory. In this case, the district court upheld a search based on a theory of public safety. On appeal, for the first time in writing, the state raised the issue of apparent authority. The theory of apparent authority had been mentioned orally at the district court level, but not in its written briefs. The Supreme Court concludes that a respondent can raise alternative arguments on appeal in defense of the underlying decision when there are sufficient facts in the record for the appellate court to consider the alternative theories, there is legal support for the arguments, and the alternative grounds do not expand the relief previously requested. **State v. Brad Grunig**, CO-01-1101, (Minn. 05/01/03).

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## EMPLOYMENT & LABOR LAW

### JUDICIAL LAW

■ **LAW ENFORCEMENT PERSONNEL.** The 8th Circuit Court of Appeals recently addressed a pair of cases involving constitutional rights of law enforcement personnel. In **Hawkins v. Holloway**, 2003 U.S. App. LEXIS 639 (8th Cir. 2003), the court held that a group of employees of a county sheriff's department could assert due process claims arising out of abusive behavior of the sheriff, including pointing a loaded handgun at them as a disciplinary measure and inappropriate sexual remarks and physical touching of a woman employee. The claims were actionable as a violation of the employees' "clearly established substantive due process rights."

A fired police officer did not assert any cognizable due process rights or state law defamation and tort claim in **Eddings v. City of Hot Springs**, 2003 U.S. App. LEXIS 4246 (8th Cir. 2003). Since he was an at-will employee, he lacked any protected property interest in his job, and there was no evidence of disparaging statements made about him by the police chief.

■ **INDEPENDENT CONTRACTORS.** Professional musicians who freelanced with an orchestra were deemed independent contractors and, thus, not entitled to pursue discrimination claims under Title VII of the Federal Civil Rights Act or disability claims under the Americans with Disabilities Act in **Lerohl v. Friends of Minnesota Sinfonia**, 2003 U.S. App. LEXIS 3919 (8th Cir. 2003). Since the musicians unilaterally select which concert series they will perform or so long as they arrange for suitable substitutes, and the orchestra does not withhold taxes and provides no benefits other than contributions to an independent union pension fund, the musicians are "independent contractors" and not employees covered by those laws.

■ **UNEMPLOYMENT COMPENSATION.** A trio of employees who quit their jobs were denied unemployment benefits by the Court of Appeals. In **Kruger v. New Era Financial Group, Inc.**, 2003 Minn. App. LEXIS 132 (Minn. App. 2003) (unpublished), an employee who resigned after she was forced to notarize signatures she had not personally witnessed, lost her claim for benefits. The notarization policy was changed before she resigned due to job performance criticism, and because the company "corrected" the improper notary practices, she lacked "good cause" to quit.

Two employees dissatisfied with their compensation also were denied benefits. In **DeNio v. Interchange, Inc.**, 2003 Minn. App. LEXIS 137 (Minn. App. 2003) (unpublished) an employee who quit after compensation and benefits were slashed, following a failed attempt to buy-out the owners, lost her claim because she resigned due to a change in employee benefits that affected all employees and which did not constitute "good cause" to warrant unemployment benefits. Similarly, in **Renstrom v. Kieger Enterprise**, 2003 Minn. App. LEXIS 270 (Minn. App. 2003) (unpublished), an employee was disqualified from benefits despite his claim that he justifiably quit because of harassment. His resignation was due to his dissatisfaction with his rate of pay, not employer misconduct.

Two other unemployment compensation claimants recently prevailed before the Minnesota Court of Appeals. In **Lins v. Imani Sports, L.L.C.**, 2002 Minn. App. LEXIS 1331 (Minn. App. 2002)

(unpublished), an employee whose compensation was changed from a salary arrangement to a straight commission system, which resulted in less pay, was entitled to quit his job and receive unemployment benefits. The court reasoned that the employee had “good reason” to quit, which entitled him to unemployment benefits, because the change in compensation was not explicitly contemplated or stated in his employment contract.

But an employee who quit, fearing that he was about to be fired, did not receive unemployment benefits in *Donovan v. Prometric, Inc.*, 2002 Minn. App. LEXIS 1367 (Minn. App. 2002) (unpublished). The employee’s belief that he would be discharged for nonperformance did not constitute “good reason” to resign.

Unemployment compensation benefits were awarded to an employee in *Frank v. D.C. Group, Inc.*, C5-02-679 (Minn. App. 2002) (unpublished). The employee was fired after he was unable to perform the work adequately. The employer’s contention that the employee should be disqualified for “misconduct” because he intentionally misled the employer by his qualifications and ability to perform the work was rejected. The court agreed with the commissioner of economic security that the employee was discharged because of an inability to perform the work, not because he intentionally misled the employer or intentionally failed to do his best.

■ **SEX HARASSMENT.** In a rare reversal, the 8th Circuit Court of Appeals set aside a jury verdict of sex harassment in *Duncan v. General Motors Corp.*, 300 F.3d 928 (8th Cir. 2002), finding the conduct complained about to be insufficient to be actionable as a matter of law.

The case was brought by a woman technical trainer who was subjected to inappropriate behavior by a supervisor at the facility, including crude, rude and lewd jokes and teasing, as well as overtures and unwanted physical touching. After she resigned, she sued for constructive termination and sexual harassment under Title VII of the federal Civil Rights Act. A jury awarded her \$1,004,600.

But the 8th Circuit, in a 2-1 decision, reversed, holding that while the claimant had experienced harassment and boorish behavior, it did not rise to the level of actionability. She could not “clear the high threshold of actionable harm,” because the coworker’s activities were “not so severe or pervasive as to alter a term, condition or privilege” of her employment.

The 8th Circuit reversed a small verdict to a female probationary police officer who sued for sex discrimination and slander in *Mercer v. City of Cedar Rapids*, 308 F.3d 840 (8th Cir. 2002). Fired after she became romantically involved with a superior who was reassigned, the woman’s discrimination claim was dismissed, but she was awarded \$48,000 on a slander claim due to the chief’s remark to a news reporter denigrating her skills. But the 8th Circuit reversed the slander award, while upholding dismissal of the discrimination claim. The chief’s comment that the claimant was discharged because she did not satisfy “department standards” did not constitute the type of stigmatization that harms the reputation. The discrimination case was not actionable because there were performance-related reasons for the termination.

A “same-sex” federal court ruling in Minnesota was recently sustained by the 8th Circuit in *Beach v. Yellow Freight Systems*, 312 F.3d 391 (8th Cir. 2002). Magistrate Judge Jonathan Lebedoff found in favor of a male employee under the Minnesota Human Rights Act in a case removed by the employer from state court to federal court. The ruling was affirmed by Senior Judge Paul Magnuson. The gravamen was numerous graffiti at the workplace referring to a male employee in a sexually derogatory way. The trial court judge awarded the employee \$37,000 in damages plus attorney fees and costs. The 8th Circuit upheld the ruling, holding that the graffiti, which the company admitted were inappropriate, were sufficiently “severe or pervasive” to be actionable. The “frequent and persistent appearance” of the offensive language was actionable.

A labor union’s duty with respect to sex harassment was delineated narrowly by the 8th Circuit in *Thorn v. Amalgamated Transit Union*, 305 F.3d 826 (8th Cir. 2002). The case was brought by a Twin Cities female bus driver, who sued her employer and her union alleging sexual harassment by coworkers and supervisors at the bus garage and reprisal discrimination in violation of the federal Civil Rights Act and the Minnesota Human Rights Act.

After settling with the employer, the bus driver continued to pursue her claim against the union, maintaining that it failed to take appropriate action to prevent the harassment. U.S. District Judge Ann Montgomery dismissed her claims, and she appealed to the 8th Circuit, which affirmed. The union’s claimed malfeasance was its “passive acquiescence” in the employer’s failure to prevent harassment. But since the claim did not involve the plaintiff’s membership in the union or participation in its activities, the organization was not liable as a matter of law.

Federal and state statutes do not require unions to carry out “an affirmative duty” to investigate

and take steps to remedy employer discrimination. Therefore, none of the claims against the union could be maintained.

■ **NONCOMPETE CONTRACTS.** For the second time in a two-month span, the Court of Appeals refused to enforce a noncompete contract on grounds that it was not reasonably necessary to protect the employer's interest. In *Alpine Glass, Inc. v. Adams*, 2002 Minn. App. LEXIS 1392 (Minn. App. 2002), the court held that telemarketers who make cold calls for automobile repairs may not be prevented from working for a competitor despite noncompete agreements on grounds that Minnesota courts disfavor restraints on individuals' abilities to make a living. Furthermore, the court explained that as a telemarketer the employee did not develop the requisite special business relationship with the employer's customers, and the employer did not train the telemarketers enough to create a cognizable employer interest to be compromised. The ruling followed a decision last fall refusing to enjoin an automobile mechanic from joining a competitor on grounds that the employee was not a competitive risk to his former employer in *Ultra Lube, Inc. v. Dave Peterson Monticello Ford Mercury, Inc.*, 2002 WL 31302981 (Minn. App. 10/15/02).

■ **WORKERS COMPENSATION.** Minnesota courts cannot pass upon workers compensation issues arising in other states. In *Hale v. Viking Trucking, Co.*, 654 N.W.2d 119 (Minn. 2002), the Supreme Court refused to allow a Minnesota worker compensation court to determine whether a compensation carrier is entitled to a reimbursement for benefits mistakenly paid in Colorado. The state courts do not have jurisdiction to hear such matters, and the refusal to do so does not abridge Minnesota court trial rights of the insurer, who can have the claim heard in the proper forum.

#### LEGISLATION

Senate Minority Leader Tom Daschle (D-S.D.) has introduced the Equal Rights and Equal Dignity for Americans Act of 2003. The act would prohibit employment discrimination on the basis of sexual orientation or genetic information and would increase remedies for gender-based wage inequities. The act would amend the Equal Pay Act to allow prevailing plaintiffs to recover compensatory and punitive damages. In addition, the bill calls for 5 percent increases in federal agency budgets charged with enforcing civil rights laws, including the Equal Employment Opportunity Commission.

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### ENVIRONMENTAL LAW

#### JUDICIAL LAW

■ **CLEAN AIR ACT; ATTORNEY FEE AWARDS.** Following the settlement of a lawsuit by environmental groups against the Environmental Protection Agency ("EPA"), in which the environmental groups challenged the EPA's authority to extend EPA's interim approval of state operating permit programs under the Clean Air Act, the U.S. Court of Appeals for the D.C. Circuit awarded attorneys' fees to the environmental groups based upon the so-called "catalyst theory." The catalyst theory allows awards of attorneys' fees to a plaintiff who achieves a voluntary change in the defendant's conduct without court-ordered relief. Section 307(f) of the Clean Air Act allows a court to award attorneys' fees "whenever it determines that such award is appropriate." In this respect, the court distinguished the Clean Air Act from federal statutes that authorize an award of fees to "prevailing parties" only, and held that the legislative history of Section 307(f) makes clear that Congress intended to extend fee awards beyond parties who obtain court-order relief and to authorize awards to catalysts — plaintiffs whose claim was colorable, whose lawsuit was a substantial cause of the defendant's change in conduct, and whose threat of victory, rather than threat of expense, motivated the defendant to change its conduct. *Sierra Club v. Environmental Protection Agency*, 322 F.3d 718 (D.C. Cir. 2003).

#### RULEMAKING

■ **CLEAN AIR ACT; NEW SOURCE REVIEW.** Exemptions to the new source review requirements of the Clean Air Act, which the EPA published in a final rule on December 31, 2002, will now be applied to the 11 "delegated" states that operate their new source review programs under federal implementation plans as opposed to state implementation plans. The delegated states include Minnesota. The final rule creating the exemptions had failed to apply the revisions to the delegated states. For additional information, see "Approval and Promulgation of Implementation

Plans; Prevention of Significant Deterioration,” 68 Fed. Reg. 11316 (2003).

■ **CERCLA; LIABILITY.** After receiving comments from an industry group, the EPA withdrew a final rule clarifying how parties seeking to avoid liability under the Comprehensive Environmental Response, Compensation and Liability Act should conduct environmental site assessments to satisfy the “all appropriate inquiry” requirement. The rule was withdrawn on March 25, 2003, the date the rule was to become effective. The withdrawn rule would have clarified that assessments conducted in accordance with the American Society for Testing and Materials’ (“ASTM”) Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process (E1527-2000) would satisfy the interim standard established by Congress in 42 U.S.C. §9601(35)(B)(iv). The statute provides that until EPA promulgates a different standard, assessments conducted in accordance with the 1997 version of the ASTM practice would satisfy the “all appropriate inquiry” requirement. For additional information, see “Clarification to Interim Standards and Practices for All Appropriate Inquiry Under CERCLA and Notice of Future Rulemaking Action,” 68 Fed. Reg. 140,339 (2003).

■ **CLEAN WATER ACT; SPCC PLANS.** On April 17, 2003, the EPA published a final rule extending the time for facilities that store large quantities of oil to comply with July 2002 changes to the Spill Prevention Control and Countermeasure (“SPCC”) requirements under the Clean Water Act. Under the new rule, facilities have until August 17, 2004, to amend their SPCC plans, and until Feb. 18, 2005, to implement those plans. The amended SPCC requirements apply to facilities with above-ground storage capacity of more than 1,320 gallons or more than 660 gallons in a single container. Facilities with an underground storage capacity of more than 42,000 gallons are also subject to the new requirements. The changes require applicable facilities to implement certain spill prevention measures and also containment and other countermeasures that would prevent oil spills from reaching navigable waters. For additional information, see “Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities,” 68 Fed. Reg. 18,890 (2003).

#### LEGISLATION

■ **SUPERFUND; CLEAN-UP TAX.** A measure that would have reinstated a tax on the oil and chemical industries to help pay for Superfund cleanups was defeated in the U.S. Senate on March 25. The tax, which expired in 1995, would have generated about \$300 million for the Superfund program in fiscal year 2004. Before 1995, revenues from the tax were used to pay for cleanups at sites with no known or viable responsible party. For additional information, see 108 Cong. Rec. S4361-62 (daily ed. March 25, 2003).

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### FEDERAL PRACTICE

#### JUDICIAL LAW

■ **PUNITIVE DAMAGES; DUE PROCESS.** In a recent decision, the Supreme Court further limited the availability of punitive damages.

Plaintiffs were awarded \$2.6 million in compensatory damages and \$145 million in punitive damages by a jury in a bad faith action against their insurer. The damage awards were reduced to \$1 million and \$25 million respectively by the trial court, but the Utah Supreme Court reinstated the jury’s punitive damage award. The insurer petitioned for certiorari, arguing that the punitive damage award violated the Due Process Clause.

Building on the “guideposts” established in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996), the Supreme Court found that the award of punitive damages was excessive, and that case was “neither close nor difficult.” Finding that “punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages is so reprehensible as to warrant the imposition of further sanctions,” the Court again declined to impose a “bright-line” limitation on the permissible ratio between compensatory and punitive damages, while noting that “few awards exceeding a single-digit ratio” could satisfy due process.

Dissenting, Justice Ginsburg suggested that the “flexible guides” established in *BMW v. Gore* have become “instructions that begin to resemble marching orders.” *State Farm Mutual Automobile Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003).

■ **PEREMPTORY CHALLENGES; BATSON.** A recent 8th Circuit decision involved a relatively rare *Batson* challenge in a civil case.

In litigation arising out of a serious car-truck accident, one defendant attempted to use a peremp-

tory strike to remove the sole remaining African-American from the jury panel. Counsel for one plaintiff, also African-American, challenged the strike under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986).

The defendant attempted to defend its strike by arguing that the stricken juror had a medical background, and that it did not want persons with medical backgrounds on the jury. The problem for the defendant was that it failed to strike three white members of the jury panel with similar medical backgrounds. This was enough for the trial court to find the defendant's justification for the strike was pretext and to deny the strike.

Reviewing the trial court's decision under the deferential "clear error" standard, the 8th Circuit affirmed the trial court's ruling. *U.S. Xpress Enterprises, Inc. v. J.B. Hunt Transport, Inc.*, 320 F.3d 809 (8th Cir. 2003).

**OTHER NOTEWORTHY DECISIONS:** The 8th Circuit held that the failure to make a recusal motion in the district court does not waive an argument for recusal on appeal, but that if the recusal issue is not raised in the trial court, it will be reviewed only for plain error on appeal. *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661 (8th Cir. 2003).

The 8th Circuit affirmed an award of attorney's fees to a plaintiff in a Section 1983 action despite the fact that the plaintiff was awarded only one dollar in damages by the jury. *Murray v. City of Onawa*, 323 F.3d 616 (8th Cir. 2003).

Judge Kyle denied a motion to modify a protective order to unseal a portion of a previous opinion and order in the case, finding that it is "presumptively unfair" to modify protective orders and that the plaintiff had established neither "an extraordinary circumstance" nor a "compelling need." *Medtronic, Inc. v. Boston Scientific Corp.*, 2003 WL 352467 (D. Minn. 02/14/03).

Judge Magnuson granted a motion to dismiss and denied plaintiff's cross-motion to amend his complaint in an attempt to cure the pleading deficiencies because the plaintiff had failed to submit a proposed amended complaint with his motion, and the court was "reluctant to blindly allow" the plaintiff leave to amend. *Neudecker v. Boisclair Corp.*, 2003 WL 544439 (D. Minn. 02/21/03).

Judge Frank rejected defendant's appeal of Magistrate Judge Boylan's order permitting the plaintiff to amend his complaint to add a claim for punitive damages against Marilyn Manson, finding that the magistrate judge's order was neither "clearly erroneous" nor "contrary to law." *Diaz v. Warner*, 2003 WL 1610780 (D. Minn. 03/04/03).

On both parties' appeal from the clerk's cost judgment, Judge Tunheim addressed a number of infrequently litigated cost-related issues, including the recovery of costs for service fees, witness fees, expert witness fees, translation fees, and court reporter costs. Prevailing litigants might want to review this summary of recoverable (and nonrecoverable) costs before submitting their own bill of costs. *Shimek v. Michael Weining AG*, 2003 WL 328038 (D. Minn. 02/10/03).

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## INTELLECTUAL PROPERTY

### JUDICIAL LAW

■ **TRADEMARK; ACTUAL DILUTION.** Ruling for a Kentucky shop owner sued by catalogue giant Victoria's Secret, the U.S. Supreme Court held that the Federal Trademark Dilution Act (FTDA) requires that *actual dilution* be established. This new standard resolved a conflict between circuits as to whether objective proof of actual injury was required or merely a presumption of harm arising from a subjective "likelihood of dilution." Adopting an *actual dilution* test, the Supreme Court split the baby. So what is actual dilution? The Court gave little guidance. Where the marks are not identical, the mere fact that consumers mentally associate the alleged infringing mark with the famous mark is not sufficient to establish actual dilution. The new test should be easier, however, when the marks at issue are identical. *Moseley et al., d/b/a Victor's Little Secret v. V Secret Catalogue, Inc., et al.*, 123 S.Ct. 1115 (03/04/03)

■ **TRADEMARK; BAD FAITH REGISTRATION.** In the Minnesota District, Judge Kyle enjoined defendants who registered trademarks in bad faith. Plaintiff, a nonprofit, organized in 1938 under the name "Minnesota State Archery Association." Since 1938, plaintiff used the marks MINNESOTA STATE ARCHERY ASSOCIATION and MSA in connection with services pertaining to organized archery. In 2002, the Minnesota Secretary of State dissolved plaintiff because of its failure to file a renewal certificate. One month later, the secretary of state reactivated plaintiff's registration, albeit under its current name. This is because within weeks of the dissolution, defendant Stephen Helland, a mem-

ber of the plaintiff's organization, incorporated a for-profit corporation using plaintiff's original name. When defendants demanded plaintiff cease and desist use of the marks it had used since 1938, plaintiff filed suit. Judge Kyle agreed with plaintiff that Helland registered the name to extort money from plaintiff. Importantly, the court held there was no evidence that the marks were abandoned during the dissolution. **Minnesota State Archery Association I, Inc. v. Minnesota State Archery Association, Inc., et al.**, 2003 WL 1589868 (D. Minn. 03/20/03)

■ **DESIGN PATENTS; MULTIPLE EMBODIMENTS.** Judge Davis refused to combine separate embodiments of a design patent and granted plaintiff's motion for summary judgment of noninfringement. Four embodiments of the claimed dog-toy design were shown in the patent. Contrary to Farnam's contention, Judge Davis held that multiple embodiments disclosed in a design patent are not construed together to represent a single inventive concept. It is merely a claim covering several appearances. Judge Davis found that "no matter how many embodiments are shown, the patent is still limited to what is shown in the drawings." **Mann Design, Ltd. v. Farnam Companies, Inc.**, 2003 WL 1572008 (D. Minn. 03/19/03),

■ **PATENTS; DISTRICT COURT CLAIM CONSTRUCTIONS; COLLATERAL ESTOPPEL.** Finally, some guidance from the Court of Appeals for the Federal Circuit on the question of whether district court claim constructions invoke collateral estoppel. In the instant case, RFD sued Pacific on two patents. RFD had previously asserted the same two patents against a different alleged infringer in Virginia. A federal court in Virginia construed the very same patent terms in dispute in the second case. After claim construction and summary judgment of some infringement issues, the parties settled. Pacific argued that RFD was bound by the earlier claim construction. The Court of Appeals disagreed, finding persuasive the following facts: (1) no final judgment was entered in the Virginia case before the parties settled, despite summary judgment of no literal infringement; (2) an evidentiary hearing was not conducted to construe the claims; and (3) the Virginia court did not put the parties on notice that the orders could have preclusive effect. Describing the earlier action, the Court of Appeals said "[t]he orders granting partial summary judgment were not sufficiently firm to have preclusive effect." **RF Delaware, Inc. v. Pacific Keystone Technologies, Inc., et al.**, 2003 WL 1906785 (Fed. Cir. 04/21/03)

— TONY ZEULI  
— BILL MCINTYRE  
Merchant & Gould

## PROBATE AND TRUST LAW

### JUDICIAL LAW

■ **ESTABLISHING PARENTAGE FOR INTESTATE SUCCESSION; PARENTAGE ACT.** Decedent pleaded guilty in 1959 to the charge of illegitimacy in the birth of Michael Smith, and Smith's birth certificate was revised to indicate that decedent was the father of Smith. Although decedent never acknowledged paternity of Smith to his wife or closest friend, he did maintain a relationship with Smith including participating in Smith's wedding as father of the groom. The parent-child relationship between decedent and Smith was never established under the Parentage Act.

The Supreme Court examined the language of Minnesota Statutes §524.2-114 that for the purposes of intestate succession, "the parent and child relationship may be established under the Parentage Act." It held that the district court and the Court of Appeals were correct in interpreting that section as permitting but not requiring that parentage in probate proceedings be established under the Parentage Act. Accordingly, the district court correctly heard evidence and found that Smith had established by clear and convincing evidence the existence of a parent-child relationship. **Estate of James A. Palmer**, C7-02-182 (Minn. 03/20/03).

<http://www.lawlibrary.state.mn.us/archive/supct/0303/OPC7020182-0320.htm>

■ **DEVISE OF DECEDENT'S PROPERTY; FAMILY ARRANGEMENT; LACK OF CONSIDERATION.** Decedent's will devised lake property to her four sisters in equal shares. On the day of decedent's funeral three of her sisters signed a document consenting to ownership of the property by the fourth sister, Osteyee. Under the signatures of the three sisters, Osteyee wrote, "The use of the cottage on this property will remain as it always has been." She signed below this sentence and gave each of her sisters keys to the cabin.

The Court of Appeals affirmed the district court's finding that the document failed for lack of consideration. The court held that both at common law and under Minnesota Statutes §524.3-912, a family arrangement for disposition of a decedent's property is enforceable only if supported by con-

sideration. *Estate of Dagny Aure*, C5-02-1072 (Minn. App. 03/04/03)(unpublished). <http://www.lawlibrary.state.mn.us/archive/ctapun/0303/1072.htm>

— CURT STINE  
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## REAL PROPERTY

### JUDICIAL LAW

■ **ZONING.** Kueker applied to Watonwan County for a conditional use permit (CUP) to build three hog-confinement facilities. Schwardt opposed the application on various grounds including that his wife and her two adult children suffer from health conditions related to hog exposure. The county board approved the CUP subject to more conditions and the Schwardts appealed. The Supreme Court affirmed the Court of Appeals decision to affirm the grant of the CUP, but reversed the Court of Appeals remand for further proceeding. The Supreme Court reviewed the decision on whether there was a reasonable basis for the decision or whether the county acted arbitrarily or capriciously. Upon its careful review of the evidence, the Supreme Court concluded that there was sufficient evidence to support the decision of the board which was, therefore, affirmed. The case is significant because it affirmed the standard of review as “arbitrary and capricious.”

*Schwardt v. Kueker*, C8-01-1136 (Minn. 02/13/03). <http://www.lawlibrary.state.mn.us/archive/supct/0302/c8011136.htm>

■ **CONSTRUCTION STATUTE OF LIMITATIONS.** The Hernicks hired Verhasselt to build the Hernick’s home, and Verhasselt subcontracted Olson Construction to apply stucco to the exterior of the home. Upon completion of the construction work in December 1993, the Hernicks noticed a number of construction defects, including stucco problems. Between October 1994 and January 1997, the Hernicks and Verhasselt exchanged a series of letters regarding construction problems. Subsequently, in November, 1998, Verhasselt and Hernicks executed a settlement agreement which provided, *inter alia*, that the stucco problems would be remedied. When the stucco repairs were not completed, the Hernicks commenced a lawsuit alleging breach of the settlement agreement. Verhasselt filed a third-party claim against Olson and both Verhasselt and Olson moved for summary judgment, arguing that the two-year statute of limitations, Minn. Stat. §541.051, barred the Hernicks’ claim. The district court granted summary judgment in favor of Verhasselt/Olson and this appeal followed. The appellate court reversed, concluding that an action for breach of the promise to repair construction defects was subject to the six-year statute of limitations under §541.05, and not the two-year statute of limitation contemplated by Minn. Stat. §541.051 and the settlement agreement was supported by consideration. *Hernick v. Verhasselt Construction, Inc.*, CX-02-1424 and CO-02-1478 (Minn. App. 04/08/03) (unpublished).

<http://www.lawlibrary.state.mn.us/archive/ctapun/0304/1424.htm>

■ **ZONING.** By writ of certiorari, PTL appealed from the Chisago County Board denial of its preliminary plat application, arguing that it is entitled to approval as a matter of right because its preliminary plat satisfies the requirements of the zoning and subdivision ordinances. PTL applied for preliminary plat approval of 14 five-acre lots to be used for residential housing, which is a permitted use. The county board denied the preliminary plat on a split vote, reasoning that although the plat appeared perfectly legal, dimensionally speaking, it was poorly designed and incompatible with surrounding land uses and, therefore, inconsistent with the comprehensive plan. On appeal, the appellate court concluded that the board lacked the legal authority to reject the application for preliminary plat approval of a permitted use on the basis that it failed to implement the rules and policies of the comprehensive plan. Therefore, it reversed the decision of the board to deny the application for preliminary plat. *PTL, LLC v. Chisago Co. Bd. of Comm.*, C5-02-1170 (Minn. App., 02/18/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0302/c5021170.htm>

— CHRIS DIETZEN  
Larkin Hoffman Daly & Lindgren Ltd.

## TAX

### JUDICIAL LAW

■ **FULL FAITH AND CREDIT; SOVEREIGN IMMUNITY.** The U.S. Supreme Court, in a unanimous opinion, affirmed the Nevada Supreme Court, holding that the U.S. Constitution Full Faith and Credit Clause does not require Nevada to give full faith and credit to a California statute that pro-

ffects California's tax agency, the California Franchise Tax Board (CFTB), with immunity from suit. Taxpayer filed suit in Nevada against CFTB alleging tortious conduct during CFTB's audit while taxpayer resided in Nevada. The Court noted that the Constitution does not confer sovereign immunity of one state in the courts of another state. Moreover, a state is not compelled by the Full Faith and Credit Clause to substitute its own legislation with that of another state when dealing with subject matter that it is competent to legislate. *Franchise Tax Bd. of Cal. v. Hyatt, et al.*, No. 02-42, 2003 WL 1916238 (U.S. 04/23/03).

■ **TORT CLAIMS ACT; REPLACEMENT REFUND CHECK.** Taxpayer sued the United States, invoking a provision of the Federal Tort Claims Act (FTCA), alleging that the IRS tortiously refused to issue a replacement tax refund check after a member of taxpayer's family stole the original check and cashed it. Sometime after the district court decision, taxpayer received a replacement refund check for the full amount of his 1998 tax refund. Taxpayer, on appeal, argued that the government remained liable for damages for the year and a half taxpayer waited for the replacement check. The 7th Circuit affirmed the district court's earlier ruling, dismissing taxpayer's claim for damages for lack of subject matter jurisdiction. Taxpayer's allegations against the government did not implicate any state tort law and thus the FTCA provides no basis for taxpayer's claim. *Clark v. U.S.*, No. 02-3049, 2003 U.S. App. LEXIS 7500 (7th Cir. 04/22/03).

■ **IRS-PREPARED SUBSTITUTE RETURNS: NOT RETURNS UNDER CODE SECTION 6020(B).** IRS refused to accept taxpayer's returns as valid, returns filed with all lines showing zero, and prepared substitute returns. Tax Court found that the substitutes for returns (SFR) prepared by the IRS along with a revenue agent's explanatory report did not qualify as returns under Code section 6020(b). A valid substitute return, per Code section 6020(b), must contain taxpayer's name, address, social security number, and must be accompanied by further documentation supporting the proposed tax due. Taxpayer received substitute return separate from the agent's report. Since the substitute return was not a valid return for 6020(b) purposes, taxpayer was not liable for penalty for failure to pay tax showed on the return under Code section 6651(a)(2). *Cabirac v. Comm'r of Internal Revenue*, No. 4068-02 (T.C. 04/22/03).

■ **INNOCENT SPOUSE RELIEF; HARDSHIP; KNOWLEDGE.** Tax Court found IRS abused its discretion in denying equitable relief under code section 6015(g). Married taxpayers filed jointly in 1989 and divorced in 1997. IRS found two factors weighing in petitioner's favor: taxpayer is now divorced and liability is attributable to her former spouse. Court disagreed with the IRS with regard to economic hardship and knowledge factors. It found taxpayer received no assets upon divorce, does not own a home, does not own an automobile, receives no spousal or child support, is the sole provider for two dependent children, and receives wages that are substantially below the poverty level. Economic hardship thereby also weighs in favor of granting relief. With regard to the knowledge element, the court noted even "assuming arguendo" that petitioner had reason to know that liability would not be paid, other factors in favor of granting equitable relief are unusually strong and compel the grant of equitable relief. *Washington v. Comm'r of Internal Revenue*, No. 1828-01 (T.C. 04/21/03).

■ **"MARRIED" FOR TAX PURPOSES.** Taxpayers married in 1994 and shortly thereafter, in 1996, sought annulment. IRS issued notices of deficiency asserting that taxpayers incorrectly filed returns with a single filing status. IRS asserted the correct filing status was married filing separately. Tax Court found taxpayers married for tax purposes. Tax Court reported it is bound by interpretations of state law only as announced by the highest court in the state. Tax Court will not follow the state court annulment due to unusual circumstances in this case. Taxpayers held themselves out as married after the annulment, sought the annulment to insulate one spouse from the other's creditors, and committed a fraud upon the state court during annulment proceedings when one spouse falsely claimed that previous divorce in another state was not final at the time of the marriage at issue. *Rinehart, et al. v. Comm'r of Internal Revenue*, T.C. Memo 2003-109 (T.C. 04/18/03).

■ **NO DEDUCTION FOR ESTIMATED SALVAGE RECOVERABLE.**

The 5th Circuit, affirming the Tax Court, determined Blue Cross & Blue Shield of Texas not eligible for special deductions for estimated salvage recoverable on coordination of benefits savings. The Tax Court agreed with IRS arguments that Blue Cross is not entitled to a deduction where on the date of injury Blue Cross had no expectation to pay the full amount of claim arising from injury and never acquired a fixed, genuine right of recovery and salvage. The court also rejected Blue Cross' argument that it qualified for safe harbor relief. *Blue Cross and Blue Shield of Tex.*,

*Inc., et al. v. Comm'r of Internal Revenue*, No. 02-60118, 2003 WL 1883598 (5th Cir. 04/16/03).

■ **EXECUTION OF SETTLEMENT AGREEMENT — FORM 870, SUBSEQUENT REFUND ACTION.**

Married taxpayers executed Form 870 and in consideration relinquished their rights to file a prepayment action in Tax Court. The IRS, in return, gave up its right to assess higher penalties. Form 870 says nothing however with regard to actions for refund. Therefore, the court held taxpayers were not barred, by execution of Form 870, from challenging their liability for IRS assessment of penalties and interest on income tax underpayments. *Smith v. United States*, No. 02-20640, 2003 WL 1879209 (5th Cir. 04/16/03).

■ **LAW SCHOOL EXPENSES NOT DEDUCTIBLE FOR LAW LIBRARIAN.** In an unpublished opinion, the 8th Circuit affirmed the Tax Court denying education expense deductions for a taxpayer who obtained a law degree while working as a law librarian. Following the Tax Court's reasoning, the 8th Circuit denied deductions finding that employer did not require taxpayer to hold a law degree and legal education entitled taxpayer to seek admission to the bar and enter the practice of law, a new trade or business for taxpayer, even if taxpayer didn't intend to pursue the practice of law. *GALLIGAN V. COMM'R OF INTERNAL REVENUE*, No. 02-3734, 2003 WL 1877174 (8th Cir. 04/16/03).

■ **SETTLEMENT ON REFUND ANTICIPATED LOANS.** Litigation arose out of refund anticipated loans made by Beneficial National Bank and H&R Block. Judge Bucklo concluded that plaintiffs' representatives failed to conduct sufficient discovery to justify the settlement amount, as they had not sufficiently compared the amount to likelihood of successful litigation. Additionally, the court held settlement counsel would no longer be allowed to represent the class. *Cheryl Reynolds, et al. v. Beneficial Nat'l Bank, et al.*, Nos. 98 C 2178, 98 C 2550, 2003 WL 1877416 (N.D. Ill 04/15/03).

■ **H&R BLOCK SETTLES WITH 42 STATE ATTORNEYS GENERAL; FACES SUIT.** H&R Block reached a \$3.3 million dollar settlement with 42 state attorneys general over H&R Block's \$22 extra fee for its Peace of Mind guarantee in 2001. As part of the settlement, H&R Block is required to establish a \$1 million restitution fund and reimburse states for investigation costs of \$2.3 million. Tax Analysts Tax Notes Today, 04/25/03. H&R Block also faces litigation from Simplification LLC, which is suing for patent infringement in U.S. District Court, Delaware. Tax Analysts Tax Notes Today, 04/25/03.

■ **FORCED SALE OF RESIDENTIAL PROPERTY OWNED BY INNOCENT THIRD PARTY.** In 1993 Michael McNeal's aging mother transferred to Corey O'Tool, Mary Dieter's son, title to her residential property to compensate Michael McNeal and Mary Dieter for services rendered in caring for her. Court concluded that title to the property was transferred to Corey O'Tool to avoid income tax consequences. As such, O'Tool was merely a nominee for Dieter and McNeal and taxable income was attributable to Dieter. Court determined that the United States is entitled to a judgment lien for income tax owed, lien is valid and attaches to the residential property now owned by an innocent third party, and United States is entitled to a forced sale of the property to satisfy the lien. *U.S. v. Dieter*, No. 01-1435 (DWF/AJB), 2003 WL 1903395 (D. Minn. 04/11/03).

■ **SETTLEMENT AMOUNT OVER STOCK BUYBACK NOT DEDUCTIBLE AS INTEREST EXPENSE.** Tax Court held that amount corporation paid, above the amount agreed upon in satisfaction of stock buyback agreement between corporation and its former president, does not qualify for an interest expense deduction. Tax Court did not impose accuracy-related penalties. *Indeck Energy Services, Inc., et al. v. Comm'r of Internal Revenue*, T.C. Memo. 2003-101 (T.C. 04/11/03).

■ **HEALTH PLANS DENIED TAX-EXEMPT STATUS.** The 10th Circuit affirmed the decision of the Tax Court holding IHC Health Plans, HMOs affiliated with a nonprofit hospital corporation, did not qualify for tax-exempt status. IHC plans failed to meet the community benefit test in that they offered health plans only to employers with more than 100 employees, provided no charity care for low-income persons, did not offer free or reduced cost medical care, and did not own or operate medical facilities or employ physicians. Promotion of health for the benefit of the community is a charitable purpose but a health-care provider must make services available to all in the community and provide some additional public benefit. Thus, the court likened IHC Health Plans to the operations of mutual insurance companies, they arrange for health care services in exchange for a fee but do not offer the requisite community benefit. *Health Plans, Inc., et al. v. Comm'r of Internal Revenue*, Nos. 01-9013, 01-9014, 01-9015, 2003 WL 1827806 (10th Cir. 04/09/03).

■ **BROWNING ARMS DENIED EXCISE TAX REFUND.** Code section 6416(a) requires that excise tax not be passed on to ultimate buyers of a product in order for taxpayer to receive a refund for overpayment of excise tax. Browning Arms sought a refund of excise tax overpayment arguing that they mis-

takenly included the sale of exempt parts and accessories in the calculation of excise taxes paid. Plaintiff's claim for refund was denied. Trial court did not reach the issue of whether the products sold inter-company to the 100 percent parent were exempt from excise tax. Court held Browning failed to carry its burden of proof with regard to showing that the cost excise tax paid was not passed on to the ultimate consumer. **Browning Arms Co. v. U.S.**, No. 97-252T, 2003 WL 1868980 (Fed. Cl. 04/07/03).

■ **OIL COMPANY "UNITARY BUSINESS" STANDARD; MINNESOTA CORPORATE FRANCHISE TAX.** Amoco Corporation and eight of its fully owned subsidiaries challenged the Minnesota Commissioner of Revenue's determination that Amoco was a unitary business, engaged in exploration, production, refining, and marketing, such that the entire income of the unitary business was apportionable to Minnesota corporate franchise tax. The Minnesota Supreme Court announced the applicable standard to determine whether an oil company's operations are part of a unitary business, under Minn. Stat. §290.17, subd. 4(b) (1990), turns on whether the exploration and production operations "are of mutual benefit, dependent upon, or contributory to" that company's refining and marketing operations. **Amoco Corp. and Affiliates v. Comm'r of Internal Revenue**, Nos. C1-02-680, C3-02-681, 658 N.W.2d 859 (Minn. 2003). The Court followed standards set forth in *Skelly Oil Co. v. Comm'r of Taxation*, 131 N.W.2d 632 (Minn. 1964) and rejected factors included in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983).

■ **COLI PLAN DEDUCTION IMPROPERLY DENIED.** Dow's 1989-1991 returns claimed deductions for interest payment loans from life insurance policies and consultant fees for the administration of the policies. Dow argued that expenses in developing the plans were deductible as ordinary and necessary business expenses. U.S. District Court agreed with Dow rejecting IRS arguments that the plans lacked economic substance, were circular transactions with no real economic benefit other than to create tax deductions. **Dow Chemical Co. and Subsidiary v. U.S.**, No. 00-10331-BC, 2003 WL 1701524 (E.D. Mich. 04/03/03).

■ **DISCLAIMER OF INTEREST; FEDERAL TAX LIEN; LIEN ATTACHED TO INDIVIDUAL'S BENEFICIAL INTEREST.** Plaintiff sought, in an interpleader case, a determination as to the appropriate disposition of annuity funds held in escrow. Defendants, son and stepmother, were beneficiaries of annuity proceeds to which the son disclaimed his interest. The Internal Revenue Service held federal tax liens against the son and thereby claimed an interest in the annuity proceeds. The government argued that the tax lien attached to the entire value of the annuity at the time of the father's death and was not defeated by the son's disclaimer of interest. The son argued that his disclaimer restored the status quo leaving the property in his father's hands to be carried out as his father wished. The district court rejected the son's argument, holding that the son, at the time of his father's death, held a beneficial interest in the annuity proceeds constituting a right to property to which the federal tax lien attached. The court granted the government's motion for summary judgment. **Choate v. Tubbs**, No. 01-1288-T, 2003 U.S. Dist. LEXIS 5896 (W.D. Tenn 04/04/03).

■ **PENSION CONTRIBUTION DEDUCTION DENIED.** Contributions to a qualified pension plans are only deductible in the year when paid unless Code section 404(a)(6) grace period applies. Grace period was not applicable to payments made by Vons as payments claimed as deductions were not made "on account of" the tax year at issue but rather for work performed in later tax years. **Vons Companies, Inc. v. U.S.**, 55 Fed.Cl. 709 (2003).

#### ADMINISTRATIVE LAW

■ **RETENTION OF SUBSTANTIAL RIGHT IN PATENT INVALIDATES GIFT OF LICENSE.** The IRS has ruled that contribution to a qualified charity of a patent subject to a conditional reversion or contribution to a qualified charity of a license to use a patent while retaining any substantial right in the patent are not deductible under Section 170(a) of the Internal Revenue Code. It also ruled that a contribution to a qualified charity of a patent subject to a license or transfer restriction is deductible but only at the fair market value of the patent at the time of the transfer in light of the restriction placed on it. Rev. Rul. 2003-28 (03/17/03).

■ **PROCEDURE: INDUSTRY ISSUE RESOLUTION PROGRAM.** The IRS has issued a Revenue Procedure that describes procedures for business taxpayers, industry associations, and other interested parties to submit issues for consideration under the Internal Revenue Service's Industry Issue Resolution (IIR) Program. The objective of the IIR Program is to identify frequently disputed or burdensome tax issues that are common to a significant number of business taxpayers that may be resolved through pub-

lished or other administrative guidance. Resolving issues through pre-filing guidance rather than post-filing examination is a goal of the Internal Revenue Service and the Office of Chief Counsel. Rev. Proc. 2003-36 (04/18/03).

■ **EARNED INCOME TAX CREDIT VERIFICATION INITIATIVE.** The IRS is directing efforts to increase taxpayer and tax preparer compliance with the EITC law through a balance of research, outreach, education, assistance and enforcement activities. Beginning July 2003, the IRS will ask approximately 45,000 EITC claimants to provide more information on their relationship to and/or residency status of the qualifying children listed on their return. The qualifying child verification process will assure that each EITC filer claims a child that meets the EITC qualifying child eligibility requirement before receiving EITC benefits. During the 2004 filing season, 5,000 EITC claimants will be asked to provide proof of their filing status. In 2004, approximately 175,000 taxpayers who have potentially misreported income in prior years will be asked to verify their income. Once in place, the verification program will allow the IRS to use data to exempt larger segments of EITC claimants from the initiative. 2003 TNT 71-91 (04/10/03).

■ **IRS ENFORCEMENT AUTHORITY; OVERSEAS ACCOUNTS.** The IRS announced that the Financial Crimes Enforcement Network signed an agreement delegating enforcement authority for Foreign Bank and Financial Account reporting to the IRS. The agreement is the latest step since the Offshore Voluntary Compliance Initiative to seek out people with undisclosed accounts overseas. For more than two years, IRS investigators have been focused on the use of offshore bank payment cards to avoid reporting income. Since the Offshore Voluntary Compliance Initiative was announced, the IRS has already collected millions of dollars from the compliance project. IR-2003-48 (04/10/03).

■ **TAX SCAM LIST UPDATED.** The IRS has updated its annual consumer alert notifying taxpayers of common tax avoidance scams. The new ranking lists several new scams including offshore banking and identity theft schemes. The IRS warns taxpayers that “there is no secret way to get out of paying taxes.” For more information about the latest tax scams visit the IRS website at [www.irs.gov](http://www.irs.gov). IR2003-18 (02/19/03).

■ **CREATION OF WEBSITE IS EXPANSION, NOT CREATION OF NEW BUSINESS.** The IRS has ruled that if a retail business creates a website that draws upon the business experience and know-how of the current business such action will be considered an expansion rather than the creation of a new trade or business for purposes of Section 355 of the Internal Revenue Code. The ruling assumes that the website takes advantage of the name recognition, customer loyalty, and other elements of goodwill associated with the original business. Thus, the nonrecognition provisions of Section 355 will apply because such action would constitute an expansion of the retail shoe store business rather than the acquisition of a new or different business under §1.355-3(b)(3)(ii). Rev. Rul. 2003-38 (04/04/03).

■ **NEW PROCEDURES FOR STANDING PRETRIAL ORDER.** The United States Tax Court has announced that it has adopted changes to the format for the standing pretrial order used in connection with notices setting cases for trial. The Tax Court commencing with the Fall 2003 trial sessions will use this new format. The new standing pretrial order incorporates many of the procedures in the current standing pretrial order. There are some changes including: a requirement that all documents or materials which a party expects to utilize at trial, but which are not stipulated, shall be identified in writing and exchanged by the parties at least 14 days before the first day of the trial session instead of 15 days as provided in the current standing pretrial order. Other changes have also occurred. See [www.ustaxcourt.gov](http://www.ustaxcourt.gov) for a copy of the new order. IR 2003-011 (03/31/03).

■ **FUEL COST AND ENERGY CONSERVATION COST OVER RECOVERIES.** The Service will treat as excludable from gross income fuel cost and energy conservation cost over recoveries (customer payments in excess of actual fuel and energy conservation costs) in cases involving facts substantially similar to *Houston Industries Inc. v. United States*, 32 Fed. Cl. 202 (1994), and *Florida Progress Corp. v. Commissioner*, 114 T.C. 587 (2000). Rev. Rul. 2003-39 (04/02/03).

■ **EDUCATIONAL GRANTS NOT TAXABLE EXPENDITURES.** The IRS has ruled that educational grants awarded by a private foundation to employees or children of employees who are victims of a qualified disaster are treated as scholarships under Section 117 and are not taxable expenditures under Section 4945. Provided that the program satisfies the seven conditions in §§4.01 through 4.07 and the percentage test described in §4.08 of Rev. Proc. 76-47. Rev. Rul. 2003-32 (04/07/03).

■ **DEPRECIATION EXPENSE; “ROTABLE” SPARE PARTS.** The IRS ruled that a company is allowed to deduct depreciation expenses on rotatable [sic] spare parts as long as they are used to provide services to

customers under its computer maintenance contracts. For example, if a taxpayer manufactures and sells computers and related products, and provides maintenance and repair services under its product warranties and maintenance agreements, the taxpayer can maintain a pool of "rotable spare parts" obtained from its manufacturing facility and claim depreciation. The taxpayer's repair technicians can use this supply of rotatable spare parts to diagnose problems in the customer's equipment. A customer's part that has been identified as the probable cause of the malfunction is replaced with the identical functioning part from the taxpayer's rotatable spare parts pool. The malfunctioning part removed from the customer's equipment would then be repaired and returned to the taxpayer's rotatable spare parts pool for continued use in the maintenance business. Rev. Rul. 2003-37 (04/14/03).

■ **ESOPs REQUIRED TO ADJUST BASIS IN S CORPORATION STOCK.** Stock of an S corporation held by an ESOP is subject to the same basis adjustments under §1367(a) as stock held by any other S corporation shareholder. The ESOP is required to adjust its basis in S corporation stock under §1367(a) for the ESOP's pro rata share of the corporation's items. Rev. Rul. 2003-27 (03/17/03).

#### LEGISLATION

■ **TAX-RELATED BILLS AWAIT CONGRESSIONAL ACTION.** The Jobs and Growth Act of 2003, formed around President Bush's budget recommendations, will prove to be the major piece of tax legislation to come out of the 108th Congress this year. In addition, there are several bills pending as of early April 2003 that propose to add or revise the tax law in ways which, cumulatively, would add up to significant tax legislation. These bills are: the Armed Forces Tax Fairness Bill of 2003 (H.R. 1307; S. 351); the Energy Tax Policy Bill of 2003 (H.R. 1531); the Charity, Aid, Recovery and Empowerment (CARE) Bill of 2003 (S. 476); the Taxpayer Protection and IRS Accountability Bill of 2003 (H.R. 1528); and the Tax Court Modernization Bill (S. 753). CCH Tax Briefing, 04/25/03.

■ **MINNESOTA STATE CONTRACTS WITH CORPORATIONS INCORPORATED IN TAX HAVENS.** Legislation, S.F. 914, introduced to the Minnesota House on March 17, 2003, would prohibit state agencies from entering or renewing contracts with publicly traded corporation if such corporation is incorporated in a tax haven country and the United States is the principal market for public trading of the corporation's stock. CCH Today's Tax News, 04/11/03.

■ **STREAMLINED SALES AND USE TAX AGREEMENT.** Legislation introduced to finalize conforming of state laws to the Streamlined Sales and Use Tax Agreement effective July 1, 2003. See H.B. 1463, introduced April 3, 2003. CCH Today's Tax News, 04/07/03. The Streamlined Sales Tax Project "was chosen as the most important issue involving the jurisdiction of tax facing U.S. companies, according to a survey of 130 tax executives." CCH Today's Tax News, 03/21/03.

■ **EXTENSION OF ITFA CONTEMPLATED.** Current moratorium on state and local taxes of Internet access, first enacted in 1998 under the Internet Tax Freedom Act, is set to expire on November 1, 2003. Participants in congressional hearing on April 1 urged enactment of legislation that would make the current moratorium permanent. Bill introduced March 27, 2003, would extend the moratorium to November 1, 2008 (H.R. 1481). See H.R. 49. CCH Today's Tax News, 04/03/03.

#### LOOKING AHEAD

■ **Nationwide Tax Forums.** Hosted by irs, forums feature basic and advanced seminars with the goal to provide tax practitioners with the up-to-date and complete information on irs programs, practices, and policies. Locations for this year's forums include Atlantic City, Orlando, Atlanta, St. Louis, San Antonio, and Las Vegas. Go to [www.irs.gov](http://www.irs.gov) for more information, keyword: tax forum. cch Today's Tax News, 04/22/03.

■ **Aidinoff Receives 2003 Distinguished Service Award.** On May 10, 2003 the aba Section of Taxation presented its 2003 Distinguished Service Award to New York attorney M. Bernard Aidinoff in recognition of his outstanding contribution to the tax system and tax education in this country. Aidinoff is a retired partner of Sullivan & Cromwell. Tax Notes Today, 04/24/03.

— MARK ASTLING

— JENNY RYAN

— KATHRYN SEDO

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## TORTS & INSURANCE

### JUDICIAL LAW

■ **IMMUNITY ON SNOWMOBILE TRAILS.** Nelson and Kastner were injured in separate snowmobile accidents on the Star Trail in Washington County. The lawsuits were joined against Star Trails Association. The association moved for summary judgment arguing municipal immunity and recreational-use immunity. The district court denied this relief.

The association is a nonprofit organization composed of various Washington County snowmobile clubs, organized to build a county-wide trail. It has an agreement with Washington County to acquire, construct and maintain this public trail, knowing it will be reimbursed by the state of Minnesota later.

The Minnesota Court of Appeals reversed. It found immunity under the recreational-use-immunity statute. **Kastner, et al. v. Star Trails Association**, C3-01-1157, C4-01-1165, (Minn. App. 04/08/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op011157-0408.htm>

■ **INTENTIONAL ACT EXCLUSION.** Murrer, insured by Prudential Property and Casualty Insurance Company ("Prudential"), sold a house to Henderson, who was insured by American Family Insurance Company ("American Family"). After moving in, Henderson tried to light the pilot light in the gas stove, and a repairman opened the valve, causing damage to the house.

American Family paid Henderson and brought a subrogation action against Murrer, the repairman, and others. American Family asserted Murrer negligently sold the house without disclosing the uncapped gas line and this caused the explosion. Prudential denied a duty to indemnify or defend, claiming negligent misrepresentation did not trigger coverage and cross-claims are not covered because the policy excluded intentional acts.

The district court granted summary judgment to Prudential. The Minnesota Court of Appeals reversed and remanded. It found the negligent misrepresentation did not cause the damage, that it was the explosion. Also, coverage under the cross-claim was triggered by negligence, not an intentional act. **Murrer v Prudential Property and Casualty Company, et al.**, C0-02-1772, (Minn. App. 04/15/03) (unpublished). <http://www.lawlibrary.state.mn.us/archive/ctapun/0304/1772.htm>

■ **RES IPSA LOQUITUR.** The Minnesota Court of Appeals reversed a trial court's decision not to provide a res ipsa loquitur instruction in a personal injury action.

There are three things a plaintiff must establish with regard to an injury-causing event before he or she may submit a claim to the jury on a theory of res ipsa loquitur. They are:

1. The event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
2. It must be caused by an agency or instrumentality within the exclusive control of the defendant;
3. It must not have been due to any voluntary action or contribution on the part of the plaintiff.

If a litigant makes a prima facie case that these three elements exist, he or she is entitled to have the instruction given.

The Court of Appeals determined that plaintiff in this case had made out a prima facie case and it was fundamental error for the district court to refuse to give the instruction. **Stelter v. Chiquita Processed Foods, LLC, et al.**, C7-02-1302 (Minn. App. 04/01/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op021302-0401.htm>

■ **1ST AMENDMENT; CLAIMS AGAINST CHURCH.** Respondent J.M. sued her pastor, her church, and the church council on various claims arising out of a sexual relationship between her and the pastor that developed while she was counseling with the pastor.

The court divided the plaintiff's claims between claims related to the hiring of the pastor, and those not related to the hiring.

Claims related to the hiring of the pastor are precluded by the Establishment Clause of the 1st Amendment to the United States Constitution, which provides that "Congress shall make no law respecting an establishment of religion ...". The 1st Amendment applies to judicial power as well as Congress. Government action is not prohibited by the Establishment Clause if it: a) has a secular purpose; b) neither inhibits nor advances religion as its primary effect; and c) does not create an excessive entanglement between church and state. At issue in this case was the entanglement

prong, which has been interpreted by case law to prevent inquiry into or review of the internal decision-making or governance of a religious institution.

The Court of Appeals found that inquiry into and a claim based upon the pastor's hiring implicates core, fundamental church doctrines and is thus precluded by the Establishment Clause of the 1st Amendment. Claims not related to the pastor's hiring were allowed to go forward. The Establishment Clause is not implicated where neutral principles of law, developed and applied without particular regard to religious doctrines, establish the applicable standard of care. The claim based on the church's liability for negligent retention of the pastor involved evaluating only what the church knew or should have known about the pastor's propensity to sexually violate parishioners with whom he was counseling, and if there was such knowledge, whether the church's actions were reasonable considering the problem. The evaluation of the negligent retention claim can be accomplished by using neutral standards, without regard to religious doctrines. As such, the district court has jurisdiction to hear the claim. **J.M. v. The Minnesota District Council of the Assemblies of God, et al.**, C4-02-1533, CX-02-1584, (Minn. App. 03/25/03).  
<http://www.lawlibrary.state.mn.us/archive/ctappub/0303/op021533-325.htm>

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