



## N O T E S & T R E N D S

### ADMINISTRATIVE LAW

#### JUDICIAL LAW

■ **LICENSING CONSTITUTIONAL.** In *State v. Hartmann*, A03-1674, 681 N.W. 2d 690 (Minn. App. 06/22/04) the Hartmanns were convicted criminally of selling meat without a license. The Hartmanns argued that the license law violated a provision of the Minnesota Constitution that provides that “[a]ny person may sell or peddle the products of the farm or garden occupied and cultivated by him without obtaining a license therefor.” The Court of Appeals decided that the Hartmanns were not peddlers since they did not sell door-to-door and that meat products are not “cultivated” within the meaning of the constitutional language. The court also found that the Hartmanns had not supported their argument that they were entitled to an administrative hearing upon receipt of an administrative order to stop the unlicensed sale of custom-processed meat. [www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031674-0622.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031674-0622.htm)

#### LEGISLATIVE LAW

■ **CAMPAIGN LAW VIOLATIONS TOSSED TO OAH.** While several administrative law bills were debated, proposed or adopted in either the Minnesota House or the Senate, in the end very little was enacted. The only bill worthy of note was Chapter 277 which is an entirely new law creating an administrative process for the quick handling of election law complaints. Prior law mandated that county attorneys investigate any and all campaign and election law violations. This new process requires a complaint be filed with the Office of Administrative Hearings and a preliminary determination be made by an ALJ within three days. During campaign season very short deadlines are set to try to resolve the complaints. For example, if there is a finding that the complaint sets forth a *prima facie* violation, a probable cause hearing must be scheduled within three days. After the probable cause hearing either the complaint is dismissed or set for an evidentiary hearing by a panel of ALJs. This panel in turn is required to hold a hearing as soon as ten days after assignment. The new process sets forth other procedural and substantive rights such as appeals to the Chief ALJ as well as discretionary levying of costs and respondents attorneys fees for frivolous complaints. The law is effective July 1 2004.

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### CIVIL LITIGATION

#### JUDICIAL LAW

■ **PERSONAL JURISDICTION.** In separate cases during the past month, both the Court of Appeals and the Supreme Court have found insufficient contacts for Minnesota courts to assert personal jurisdiction.

In *Lorix v. Crompton Corporation*, 680 N.W. 2d 574 (Minn. App. 2004), the Court of Appeals reversed the district court’s denial of defendants’ motion to dismiss for lack of personal jurisdiction. The class action complaint alleged that several defendants had conspired to fix the prices of rubber-processing products. Suit was brought in Minnesota District Court on behalf of a class of all persons who purchased tires in the state of Minnesota that were manufactured using the rubber-processing chemicals that defendants sold. The affiliated defendants were not licensed to do business in Minnesota, nor did they have any employees, sales agents, or business operations in Minnesota. The defendants moved to dismiss plaintiffs’ claim on the ground that the Minnesota District Court lacked personal jurisdiction over defendants. The district court denied defendants’ motion and defendants appealed.

In explaining Minnesota’s use of the five-factor test to determine whether the exercise of personal jurisdiction is proper, the court noted a distinction between specific and general personal jurisdiction, but found that the district court did not indicate which type of jurisdiction it found applicable. Specific jurisdiction may exist when the cause of action arises out of or is actually related to the defendants’ contacts with the forum and may be the result of a single contact. General jurisdiction exists when a defendant has “continuous and systematic” contacts with the forum. The Court of Appeals held that plaintiff did not show that defendants’ out-of-state sales to tire manufacturers showed any intent or purpose to serve the Minnesota market. Finally, the Court of Appeals explained that there may be jurisdiction over a defendant even for causes of action unrelated to the defendants’ contacts with the forum state if the contacts are so substantial and of such a nature as to justify suit against it. However, defendants’ sales to companies in Minnesota were not substantial enough, nor were defendants’ Web site contacts sufficient to find “continuous and systematic” contacts with Minnesota to form the basis for exercise of general jurisdiction.

In *Juelich v. Yamazaki Mazak Optonics Corporation*, A03-174, A03-228 (Minn. 06/24/04), the Supreme Court affirmed the Court of Appeals, 670 N.W. 2d 11 (Minn. App. 2003), which had affirmed the district court’s granting of defendants’ motion to dismiss for lack of personal jurisdiction.

Plaintiff was injured when he was maintaining a scissor-lift table manufactured by defendant Meikikou. Plaintiff sued Meikikou and other manufacturers and distributors that had incorporated the scissor-lift table into a laser-cutting machine, which was then sold. The facts established that Meikikou, a Japanese corporation, manufactured the table at its factory in Japan and sold the table to its distributor. The evidence further established that the laser-cutting machine was also manufactured in Japan, but was eventually sold to a distributor in Illinois, which eventually sold the system to a Minnesota supplier and eventually to plaintiff's employer. Finally, the evidence established that 122 of these laser-cutting machines had been delivered to the United States, with 17 of them ending up in Minnesota. The evidence was that defendant Meikikou knew that the systems would be marketed to the United States. Therefore, defendant Meikikou provided English warning labels, its operations manual was translated into English, and it maintained an English language Web site.

The Supreme Court analyzed the defendant's contacts by use of the five-factor test:

1. The quantity of contacts with the forum state;
2. The nature and quality of those contacts;
3. The connection of the cause of action with these contacts;
4. The interest of the state providing a forum; and
5. The convenience of the parties.

With respect to each factor the Court found that the contacts did not weigh significantly in favor of exercising jurisdiction.

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## CRIMINAL LAW

### JUDICIAL LAW

■ **EVIDENCE; SPREIGL; MULTIPLE WITNESS TESTIMONY; PREJUDICE; JIG v. 8TH CIRCUIT INSTRUCTION.** In a trial for first-degree murder, the state introduced 24 *Spreigl* witnesses, taking up three of the 12 trial days. The *Spreigl* evidence concerned a prior rape and murder by the defendant, and the district court admitted this evidence for purposes of identity, and to illustrate the defendant's intent and *modus operandi*.

Held, because the appellant did not object to the number of witnesses who testified regarding the *Spreigl* murder, nor did he object to specific witnesses who may have presented unduly prejudicial testimony, the Supreme Court is "reluctant to second-guess the court's sound discretion." The Supreme Court agrees that the three-day presentation of 24 witnesses was "highly prejudicial" and was practically a retrial of the prior case; however, without a contemporaneous objection, the decision of the trial court is affirmed.

At trial, appellant requested use of the 8th Circuit model instruction 2.09, rather than Crim. JIG. 3.16. The federal instruction, however, is more appropriate for a situation where identity alone is the purpose of the *Spreigl* evidence, not for a situation as in the current case, where the *Spreigl* murder was not necessarily admitted solely for the purpose of proving identity. The Minnesota instruction "leaves it to the attorneys to argue to the jury the possible inferences that can be drawn from the evidence." **Joseph Donald Ture, Jr. v. State of Minnesota**, A03-1457 (Minn. 06/03/04). [www.lawlibrary.state.mn.us/archive/supct/0406/opa031457-0603.htm](http://www.lawlibrary.state.mn.us/archive/supct/0406/opa031457-0603.htm)

■ **EVIDENCE; DOMESTIC ABUSE STATUTE; STATUTORY VERSUS 404(B); NO NEED FOR CLEAR AND CONVINCING STANDARD.** Under Minn. Stat. §634.20 (2002) the state may introduce evidence of similar conduct of domestic abuse against the defendant, without a showing by clear and convincing evidence that the prior abuse occurred. The statute is unambiguous. Because the heightened evidentiary standard of 404(b) does not implicate a "fundamental right," the interest of justice is best served by allowing introduction of evidence of similar acts by the accused against the alleged victim of domestic assault without first requiring that such prior abuse be established by clear and convincing evidence." **State v. Tyrone S. McCoy**, C4-02-1788 (Minn. 07/01/04). [www.lawlibrary.state.mn.us/archive/supct/0407/op021788-0701.htm](http://www.lawlibrary.state.mn.us/archive/supct/0407/op021788-0701.htm)

■ **EVIDENCE; CONFESSION; PLEA NEGOTIATION; WAIVER BY PRESS RELEASE.** On the same day as the appellant gave a statement to police confessing to abduction and murder, appellant's defense counsel met with media and announced that the appellant made such admissions. Although the appellant acknowledged, in a post-conviction petition, that he had requested his counsel to make media appearances and give press conferences "quite a few times," he specifically denied any general consent for his defense counsel to make any statements to the media on September 8<sup>th</sup>, and denied specific consent to tell the media that he had killed the victim. Appellant's defense counsel testified to the contrary at a post-conviction hearing, and the Supreme Court found this testimony credible. Accordingly, the appellant waived the protections of Rule 410 of the Minnesota Rules of Evidence, which prohibit the use of evidence of any statements made in connection with plea negotiations. **State v. Donald Albin Blom**, C2-00-1994, C3-02-1829 (Minn. 07/01/04). [www.lawlibrary.state.mn.us/archive/supct/0407/op001994-0701.htm](http://www.lawlibrary.state.mn.us/archive/supct/0407/op001994-0701.htm)

■ **EVIDENCE; ACCOMPLICE TESTIMONY; SUBSTANTIVE EVIDENCE VERSUS IMPEACHMENT.** The district court properly admitted the statement of an accomplice who later recanted. The prior statement was inculpatory to the defendant, while the live testimony of the accomplice exonerated the defendant. However, under Rule 803 (24), such prior statements may be admitted under the

four-point analysis of *State v. Ortlepp*, 363 N.W.2d 39 (Minn. 1985). The prosecution did not violate *State v. Dexter*, 269 N.W.2d 721 (Minn. 1978), which prohibits a prosecutor from calling a witness solely for the purpose of impeaching the witness with a prior unsworn statement. Here, the accomplice's prior statement to the police was admissible as substantive evidence, and the *Dexter* problem is not present. ***State v. Dennis Edward Tate***, A03-485 (Minn. App. 06/29/04). [www.lawlibrary.state.mn.us/archive/ctappub/0406/opa030485-0629.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0406/opa030485-0629.htm)

■ **SPEEDY TRIAL; INTERPRETER UNAVAILABILITY.** Following a 23-month delay between the date of the incident and the trial date, the court, on its own motion, dismissed the case against the defendant. The defendant had been charged with assault and DWI. On multiple occasions, the Anuak interpreter was unavailable or failed to appear in court. There was conflicting evidence as to the respondent's ability to speak and comprehend English; nonetheless, the court appointed an interpreter to assist in communication, rather than to necessarily translate every word.

Using a *de novo* standard of review, the Court of Appeals finds that the trial court erred in not applying the *Barker v. Wingo* factors in determining that the respondent's constitutional right to a speedy trial was violated. Next, using an abuse of discretion standard, the Court of Appeals holds that courts have broad discretion, based on first-hand view of the individual's needs, to arrange for an interpreter. In this case, the Court of Appeals finds no violation of defendant's right to speedy trial and deferring to the discretion of the trial court, affirms the appointment of the interpreter to assist. Complaint reinstated and remanded. ***State v. Mark Ajaak Cham***, A03-1239 (Minn. App. 06/01/04). [www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031239-0601.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031239-0601.htm)

■ **CONTROLLED SUBSTANCE; DESTRUCTION OF EVIDENCE BY DEFENDANT; NON-SCIENTIFIC TESTIMONY RE: IDENTITY.** In a drug-bust-gone-bad, the appellant fled the scene and, in doing so, threw a purported pound of methamphetamine out of his car window. The substance was never found. When the respondent was subsequently arrested on an unrelated matter, he confessed to arranging the sale of one pound of methamphetamine, admitted disposing of the drug, and attempted to recover the substance. Later, the accomplice of the respondent similarly confessed. At trial, the undercover police officer testified as to the appearance, weight, smell and feel of the substance. There were also discussions about the price of the substance being "ten for one," meaning, presumably, \$10,000 for one pound.

Held, the Court of Appeals is reversed. Although direct evidence was no longer available, a conviction based on circumstantial evidence is entitled to the same weight as any other evidence, provided that the circumstances are consistent with a hypothesis of guilt and inconsistent with any rational hypothesis except that of guilt. Although no scientific evidence was presented at trial, including qualitative or quantitative testing, the police officer's observations and the circumstances of the sale were sufficient for the jury to evaluate as evidence supporting the guilty verdict. ***State v. Alan George Olhausen***, C1-02-1361 (Minn. 6/10/04). [www.lawlibrary.state.mn.us/archive/supct/0406/op021361-0610.htm](http://www.lawlibrary.state.mn.us/archive/supct/0406/op021361-0610.htm)

■ **SEARCH & SEIZURE; TRAFFIC STOP; CONFINEMENT IN SQUAD CAR; REASON TO SUPPORT INCREMENTAL INTRUSIONS.** Appellant was pulled over for failing to obey a stop sign. After making the stop, the officer learned that the appellant did not have a driver's license. The officer asked the appellant to get out of his van, conducted a pat search, and then confined appellant to the backseat of the squad car. By using his computer, the officer determined that the appellant's driver's license had been revoked. The officer advised the appellant that he would be issuing citations for failing to obey the stop sign and for driving after revocation. At some point, while the appellant was in the backseat of the squad car, the officer requested consent to search the van, to which the appellant orally consented. While the appellant's vehicle was being searched, appellant remained confined in the backseat of the squad car and presumably stashed methamphetamine under the backseat of the squad car. Police did not find the drugs in the squad car until after the appellant had been released from the scene with the citation for the traffic violation and driving after revocation.

Held, rejecting *Atwater*, 532 U.S. 318 (2001), the Minnesota Supreme Court disagrees that police may arrest an individual for even a "very minor" criminal offense committed in their presence. Rather, Art. 1 §10 of the Minnesota Constitution provides additional protections such that the state is required to justify the confinement in a squad car of a driver stopped for a minor traffic violation under the reasonableness requirements of *Terry*. The confinement may be justified if it is reasonably related to the initial lawful basis for the stop, reasonably related to the investigation of an offense discovered or suspected during the stop, or a threat to officer safety. The officer's confinement of the appellant in the squad was not reasonably related to the minor moving violation, nor was it reasonably related or necessary to the officer's investigation of the appellant's statement that he did not have a driver's license. Further, there was no objectively reasonable threat to officer safety. Under the circumstances, a reasonable person in the appellant's position would not conclude that confinement of the appellant in the squad car was necessary either to effectuate the original purposes of the stop or for officer safety.

The methamphetamine is suppressed. The Supreme Court rejects the state's claim that the appellant abandoned the substance because the appellant was scared that the police would find the drug. Because the abandonment of the amphetamine is the result of an illegal seizure, it must be suppressed. Finally, appellant's consent to the search violated *Fort*, because it was an unlawful extension of the duration of the stop beyond the time necessary to effectuate the purposes of the stop. ***State v. Askerooth***, C6-02-318 (Minn. 06/17/04). [www.lawlibrary.state.mn.us/archive/supct/0406/op020318-0617.htm](http://www.lawlibrary.state.mn.us/archive/supct/0406/op020318-0617.htm)

■ **SPECIFIC INTENT DEFENSES; RELIANCE ON ADVICE OF COUNSEL; RELIANCE ON OFFICIAL INTERPRETATION OF LAW; DUE PROCESS.** In a prosecution for conspiracy to commit voting fraud, appellant presented to the court an affidavit that he had relied upon advice of his attorney that it was appropriate to register strippers at their place of employment, rather than at their homes. In the course of receiving such advice, the appellant had also reviewed a letter from an assistant Dakota County attorney stating

that it was not a violation of voting laws for police officers to list, as their address, their place of employment rather than their home address.

In answering two certified questions, the Court of Appeals holds that reliance on the advice of counsel is a recognized defense when intent is an element of the charged crime. Second, good faith reliance on an official interpretation (the opinion letter of the assistant Dakota County attorney) of the law is an available defense when intent is an element of the charged crime. Furthermore, the trial court's conclusion that the defendant's reliance on advice of counsel and the official interpretation of law was unreasonable was an order, which was speculative and premature. Defendant met his burden of production and relevancy, and a trial court ruling cannot be had until the testimony is proffered. Finally, the defendant has a due process right to explain his conduct, even if the evidence proffered is not an absolute defense, but tends to negate intent, depending upon how the jury views the testimony. **State v. Richard Joseph Jacobson**, A03-1782 (Minn. App. 06/15/04). [www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031782-0615.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031782-0615.htm)

■ **SENTENCE; CREDIT; I.N.S. HOLD.** The trial court did not err in granting the appellant credit for time he spent in I.N.S. custody because such custodial time was served "in connection with" the Minnesota offense. In this case of first impression, the court rejects the "solely in connection with" test in favor of the "in connection with" test. In this case, the appellant posted bail before sentencing; thereafter, and prior to sentencing, I.N.S. took him into custody. **State v. Henok Hagdu**, A03-739, A03-1002 (Minn. App. 06/15/04). [www.lawlibrary.state.mn.us/archive/ctappub/0406/opa030739-0615.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0406/opa030739-0615.htm)

■ **SENTENCE; AGGRAVATING FACTOR; ASSAULT VICTIM; PRIOR FELONY CONVICTION INVOLVING SAME VICTIM; GROSS MISDEMEANOR NOT PERMISSIBLE FACTOR.** The appellant was convicted for first-degree assault. He had two prior gross misdemeanor convictions, each of which involved the same victim as the current felony. Minnesota Sentencing Guideline SII.D.2.b. (3) states that if the defendant's conviction is of an offense in which the victim was injured, and there is a prior felony conviction for an offense in which the same victim was injured, the prior conviction is an aggravating factor supporting a departure.

Held, the court's use of the gross misdemeanors as aggravating factors is unjustified by the sentencing guidelines, and was an abuse of discretion to support an upward durational departure. **State v. Chad Allen Rourke**, A03-1254 (Minn. App. 06/15/04). [www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031254-0615.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031254-0615.htm)

■ **SENTENCE; JUDICIAL PROMISE; AGREEMENT BY DEFENSE; APPEAL TO WITHDRAW PLEA.** The appellant pleaded guilty to all three counts of an assault complaint, in a straight plea to the court with the "understanding" that the court would give him a sentence of 210 months in prison. The court specifically promised this sentence to the defense on the record, which was the sentence the appellant requested. The prosecution objected to any disposition other than 240 months in prison. The appellant did not object to the district court's promise of a 210 months sentence.

Held, the appellant's conviction is reversed, and the case remanded for reassignment to a different district court judge to allow appellant the opportunity to withdraw his guilty plea. By participating in the plea negotiation to such a direct extent, the court abandoned its role as an independent examiner. A guilty plea is *per se* invalid when the district court impermissibly injects itself into plea negotiations. **State v. Richard Anyanwu**, A03-1418 (Minn. App. 06/22/04). [www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031418-0622.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031418-0622.htm)

■ **SENTENCE; PRIOR FELONY; CRIMINAL HISTORY; SENTENCE DATE DETERMINATIVE.** In April, 2002, the appellant was arrested and charged in Minnesota for second-degree controlled substance. Five months later, the appellant was arrested for two felony offenses committed in North Dakota, to which he pleaded guilty in February of 2003, and was sentenced at that time. The sentencing court in North Dakota did not consider the pending Minnesota charges when determining the length of the North Dakota sentence. In August 2003, the appellant pleaded guilty to second-degree controlled substance in Minnesota, and was later sentenced for the Minnesota offense under the sentencing guidelines, which included two points for the North Dakota felony convictions.

Held, the Minnesota court correctly calculated the criminal history score by including points for the North Dakota offenses. Sentencing Guideline II.B.1 states that for each felony conviction "for which a felony sentence was stayed or imposed before the current sentencing," the offender is assigned a designated number of points. Even though the North Dakota offense occurred after the Minnesota offense, the plain language of the guidelines requires computation of the criminal history to include the North Dakota felony points. **State v. David Mondry**, A03-1643 (Minn. App. 06/29/04). [www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031643-0629.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031643-0629.htm)

■ **CHILD PORNOGRAPHY; POSSESSION PLUS KNOWLEDGE OF CONTENT; PROSECUTOR MISCONDUCT IN CLOSING ARGUMENT.** The Court of Appeals reverses the conviction of the appellant for possession of pictorial representations of minors under Minn. Stat. §617.247. The evidence was insufficient to show that the appellant downloaded the items in question and that he knew of their content. First, the access code to the computer was the same for all teachers, and hundreds of people, including students, could have accessed the Internet through the computer. There was no eye-witness account that the appellant was seen viewing the illegal material, nor any confession. Furthermore, the state's witness testified that there are any number of ways that images or text can be stored to "unallocated space," including pop-up advertisements, unsolicited emails, banner advertisements, or pornographic material appearing at the end of a website which had not been completely scrolled down by the viewer.

Also, it was improper for the prosecuting attorney to argue, in closing, that for every pornographic image, there had to be a kid who was either sexually abused, or required to perform sex acts. It was similarly improper to argue that once an image of a child reaches the Internet, the child is victimized again and again every time the image is viewed. These statements are irrele-

vant to the facts of the case, and are highly inflammatory. *State v. Brian Victor Myrland*, A03-1646 (Minn. App. 06/22/04). [www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031646-0622.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031646-0622.htm)

■ **PROCEDURE; JURY ROOM VISIT BY JUDGE; REVERSIBLE ERROR.** On at least three separate occasions, the judge entered the jury room, with permission of counsel, to discuss adjournment and substantive questions concerning jury instructions. Although counsel indicated that the defendant had waived his right to be present, there was no indication, on the record, that the defendant personally waived his right to be present, or consented to such a waiver by counsel. Second, the judge violated the rule that all communications with the deliberating jury be in open court. Third, the judge may have failed to place all communications on the record, because there was some ambiguity as to whether there was a fourth visit, off the record. Finally, the judge improperly entered the jury room after deliberations, which the Minnesota Supreme Court has held, by itself, to constitute reversible error not subject to a harmless error analysis. Such a visit offends the integrity of the proceedings, and violates the sanctity of the jury room. *Trevor Anthony Brown v. State of Minnesota*, A03-1588 (Minn. 07/01/04). [www.lawlibrary.state.mn.us/archive/supct/0407/opa031588-0701.htm](http://www.lawlibrary.state.mn.us/archive/supct/0407/opa031588-0701.htm)

■ **1ST AMENDMENT; JURY TRIAL; CROSS DISPLAY.** It was in error for the district court to not conduct an inquiry into the substance and sincerity of the appellant's religious beliefs before forbidding him from openly wearing a cross during his trial. However, because the district court's order did not affect a fundamental right guaranteed in a criminal trial, the error was not presumptively prejudicial and does not require a new trial. There was no articulable prejudice. *State v. Tate*, *supra*.

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## EMPLOYMENT & LABOR LAW

### JUDICIAL LAW

■ **COMPENSATION CASES.** The Minnesota statute prohibiting set-offs from wages applies to compensation owed to an officer, director or shareholder of a closely-held corporation. In *Brekke v. Pham BioMedical, Inc.*, C8-03-199 (Minn. 07/01/04), the Minnesota Supreme Court held that the statutory prohibition bars a company from deducting from the salary of one of its principals a debt owed by the individual to the company. However, the company is entitled to raise affirmative defenses of waiver and estoppel, which warranted remand of the case. [www.lawlibrary.state.mn.us/archive/supct/0407/op030119-0701.htm](http://www.lawlibrary.state.mn.us/archive/supct/0407/op030119-0701.htm)

An employee who violated terms of an employment agreement was liable for damages, as modified by the appellate court, and could not pursue a counterclaim in *Production Resource Group, LLC v. Van Hercke*, A03-1584 (Minn. App. 06/29/04) (Unpublished). The employee breached an agreement by negotiating a contract outside the scope of his authority, which warranted damages for his employer consisting of salary and benefits paid to the employee after he breached the contract. But the employee's counterclaim for severance was unwarranted because there was insufficient evidence of any "meeting of the minds" regarding a severance arrangement. A demotion or diminution of authority imposed upon the employee did not constitute a viable counterclaim under the employment agreement. Similarly, he was not entitled to pursue a counterclaim for "unfairly prejudicial" conduct under Minn. Stat. §302A.751 because his employer's conduct did not impede any "reasonable expectation that he had as a shareholder in the company." [www.lawlibrary.state.mn.us/archive/ctapun/0406/opa031584-0629.htm](http://www.lawlibrary.state.mn.us/archive/ctapun/0406/opa031584-0629.htm)

■ **LABOR RELATIONS.** The statutory requirement that a public sector employer pay insurance premiums for a retired employee supersedes a contrary statutory restriction that limits public sector collective bargaining provisions and requires payment indefinitely of the insurance benefits for a retiree. In *Norman v. Housing & Redevelopment Authority of Chisholm*, A03-1613 (Minn. App. 05/25/04), the Court of Appeals held that a public sector employer is required indefinitely to pay the health insurance premiums of a retiree, pursuant to Minn. Stat. §471.61, Subd. 2b, which requires public sector employers to pay insurance premiums for a retired employee if the collective bargaining agreement in effect at the time the employee retires provides for such payments indefinitely. That statutory provision prevails over a restriction in Minn. Stat. §179A.20, Subd. 2a, which states that a personnel policy adopted by a public sector employer may not obligate the employer to fund "all or part of health care benefits for a former employee beyond the duration of that policy." [www.lawlibrary.state.mn.us/archive/ctappub/0405/opa031613-0525.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0405/opa031613-0525.htm)

■ **DEFAMATION.** Employees of the University of Minnesota investigating an internal charge of sex harassment are entitled to absolute immunity from defamation. In *Woolley v. Panek*, A03-1610 (Minn. App. 06/29/04) (Unpublished), the appellate court held that two University administrators who were investigating a sex harassment charge against a University employee cannot be sued for defamation under the doctrine of absolute immunity for statements made during the course and scope of their internal investigation, which is deemed to be a "quasi-judicial" function. Similarly, the complaining party also is entitled to absolute immunity for statements made during the course of the investigation. [www.lawlibrary.state.mn.us/archive/ctapun/0406/opa031610-0629.htm](http://www.lawlibrary.state.mn.us/archive/ctapun/0406/opa031610-0629.htm)

■ **DISCRIMINATION.** A rare claim of "reverse" gender discrimination was rejected by the 8th Circuit Court of Appeals in *Woods v. GSA*, No. 03-2975 (8<sup>th</sup> Cir. 2004). The claimant, a male employee, asserted that a woman coworker was promoted instead of him due to discrimination based upon gender. His claim, however, failed because the female candidate exhibited greater leadership skills and abilities, which refuted that her promotion was a "pretext" for reverse sex discrimination. <http://caselaw.lp.findlaw.com/data2/circs/8th/032975p.pdf>

A woman sex discrimination claimant prevailed with substantial damage and punitive damages in *MacGregor v. Mallinckordt*,

*Inc.*, 204 WL 1459399 (8<sup>th</sup> Cir. 2004). Affirming a ruling of U.S. District Court Judge David Doty, the 8th Circuit upheld an award of \$1 million in damages for the woman, who claimed that she was discriminated against because of her gender, when she was passed over for promotions in favor of male coworkers. The trial court award of punitive damages in the amount of \$300,000, which is a statutory cap under the Civil Rights Act of 1991 and which constituted a reduction from punitive damages of more than \$800,000 awarded by a jury, was proper and not excessive under the statute.

■ **UNEMPLOYMENT COMPENSATION.** Unsatisfactory work performance by an employee does not constitute “misconduct” to disqualify an employee from receiving unemployment compensation benefits. In *Bray v. Dog & Cats, Ltd.*, A03-1413 (Minn. App. 05/11/04), the appellate court ruled that the statutory definition of “misconduct” does not extend to mere “unsatisfactory” performance but must be more severe under Minn. Stat. §26A.095, which specifies a high level of impropriety on the job. [www.lawlibrary.state.mn.us/archive/ctap-pub/0405/opa031413-0511.htm](http://www.lawlibrary.state.mn.us/archive/ctap-pub/0405/opa031413-0511.htm)

■ **WORKERS COMPENSATION.** The adoption verbatim of the proposed findings and order proffered by an employer and insurer constitutes reversible error in a workers compensation proceeding. In *Peterson v. Camilia Rose Convalescent Center*, A04-653 (Minn. 06/29/04), the Supreme Court held that the compensation judge should have made independent determinations and not adopted the totality of the post-hearing submission made by the employer and insurer.

The obligation of employees who are receiving workers compensation to mitigate damages does not require injured employees to seek jobs outside the communities in which they live. In *Schmidt v. Arrowhead Electric*, A04-604 (Minn. 06/29/04), the Supreme Court held that conducting a job search outside of an employee’s community is not a prerequisite in order to obtain retraining under the Worker’s Compensation Statute. [www.lawlibrary.state.mn.us/archive/supct/0407/ora040604-0630.htm](http://www.lawlibrary.state.mn.us/archive/supct/0407/ora040604-0630.htm)

#### LEGISLATION

The Minnesota Legislature, after several unsuccessful attempts in recent years, enacted a law during the past session restricting defamation claims arising out of job references. Under Chapter 137, a lawsuit for defamation may not be maintained against an employer by an employee or former employee for disclosing information about that employee to a prospective employer, unless the employee establishes, by clear and convincing evidence, that the information was false and defamatory and that the employer knew, or should have known, that it was false and acted with malicious intent to injure the subject of the reference. The limitation applies to a disclosure by a private sector employer, in response to a request for information, regarding the dates of employment; compensation and wage history; job description and duty; training and education provided by the employer; and any acts of violence, theft, harassment or illegal conduct documented in the personnel file that resulted in either disciplinary action or resignation by the employee, together with any written response by the employee to the accusation. The restriction on liability also may apply to disclosures by a private employer if the current or former employee has given written authorization to furnish copies to a prospective future employer of written employee evaluations and any employee response; written disciplinary warnings and disciplinary actions taken in the five years prior to the date of the authorization, coupled with any employee responses; and written reasons for the employee’s separation from employment.

The law contains a special provision applicable to schools, which requires school administrators to disclose to requests from other school administrators any private personnel data on employees related to acts of violence or sexual conduct with a student if the information is documented by an investigation and led to the employee’s resignation.

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### ENVIRONMENTAL LAW

#### JUDICIAL LAW

■ **ENFORCEMENT; AGENCY LIABILITY FOR ATTORNEYS’ FEES.** The state of Minnesota recently paid more than \$111,000 in attorneys’ fees and costs awarded to a Minnesota businessman who prevailed against the Minnesota Pollution Control Agency (MPCA) in an environmental enforcement action.

In 2000, Alfred Schumann drained a temporary pond on his residential development. After a neighbor complained, the MPCA inspected the site and determined that Schumann had violated state regulations. The MPCA ordered Schumann to immediately construct a storm water pond and, after rejecting Schumann’s proposals for a pond, ordered Schumann to pay a penalty to help fund a regional storm water pond. Schumann petitioned for judicial review of the MPCA’s orders.

On review, the district court for the 3rd Judicial District of Minnesota held that Schumann had not violated the law and that the MPCA’s actions were without a reasonable basis in law or fact and, thus, without substantial justification. The court rescinded the MPCA’s orders and, upon Schumann’s petition under the Minnesota Equal Access to Justice Act, Minn. Stat. §§15.471-.474, the court awarded Schumann reimbursement of his attorneys’ fees and expenses. The state paid the award on July 6, 2004. *Schumann v. Corrigan*, D.C. File No. C9-02-1632 (3<sup>rd</sup> Jud. Dist. Minn., 04/29/04); Moss & Barnett, Press Release, “State Pays Record Attorney Fees Award in Precedent Setting Environmental Case,” July 6, 2004.

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## FEDERAL PRACTICE

### JUDICIAL LAW

■ **DISTRICT COURT'S APPLICATION OF FEDERAL RULES OF EVIDENCE; STANDARD OF REVIEW.** A recent 8th Circuit decision in a criminal case may well have a significant impact on federal civil appellate practice as well.

Reviewing a number of evidentiary rulings in a sexual abuse case, the 8th Circuit noted "some confusion" as to "the proper standard of review with respect to evidentiary issues." While acknowledging that evidentiary rulings are often reviewed using an abuse of discretion standard, particularly when a "balancing" of factors is involved as with Fed. R. Evid. 403, the panel held that "a district court's interpretation and application of most rules of evidence are matters of law," and that while "an error of law can always be characterized as an abuse of discretion," the standard of review in cases that do not involve a balancing of interests "is more accurately characterized as *de novo*."

Judge Hansen dissented in part, noting his "disagreement with the standard of review that the majority adopts for this first time in this case," and asserting that the majority had "disregard[ed] a long line of cases from this circuit hold[ing] that such determinations are reviewed only for an abuse of discretion."

The creation of this less deferential standard for review of evidentiary rulings is likely to open many new avenues for both civil and criminal appellants. ***United States v. Blue Bird***, 372 F.3d 989 (8th Cir. 2004).

■ **PUNITIVE DAMAGES; RATIO TO COMPENSATORY DAMAGES; DUE PROCESS.** Plaintiff was awarded \$2.1 million in compensatory damages and \$17.875 million in punitive damages on its commercial fraud claims. After the district court reduced the punitive damage award to \$10 million the defendant appealed, arguing that the punitive damage award was excessive, and the plaintiff cross-appealed, arguing that the original punitive damage award should not have been reduced at all.

Applying the factors most recently set forth in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003), the 8th Circuit found that the defendant's conduct was sufficiently "egregious" to support a punitive damage ratio of "slightly more than 4.5:1," but that any award of punitive damages greater than \$10 million "would run afoul of the due process principles" established in recent Supreme Court cases. Accordingly, both parties' challenges were rejected, and the judgment was affirmed.

This is the first 8th Circuit decision affirming a punitive damage ratio greater than 3:1 since *State Farm* was decided. Only time will tell whether the 8th Circuit has established a *de facto* compensatory/punitive ratio ceiling of 4.5:1, or whether a greater ratio might pass muster given the right set of facts. ***Eden Elec., Ltd. v. Amana Co.***, 370 F.3d 824 (8th Cir. 2004).

■ **OTHER NOTEWORTHY DECISIONS.** The 8th Circuit reversed a jury verdict for the plaintiff in a product liability case, finding that the absence of a limiting instruction may have tainted the jury's verdict. ***Harrell v. Madison County Mississippi Mote Co.***, 370 F.3d 760 (8th Cir. 2004).

Judge Magnuson granted the defendants' Fed. R. Civ. P. 12(b)(6) motion, acknowledging that while he had to "accept as true the well-pleaded facts" of the complaint, "the court need not, and indeed should not, accept as true the legal conclusions the [complaint] draws from the facts." ***In Re Northwest Airlines Privacy Lit.***, 2004 WL 1278459 (D. Minn. 06/06/04).

The 8th Circuit vacated an award of summary judgment to the defendant and remanded the claims of one plaintiff to the district court, where the plaintiff had died while the case was pending in the trial court and neither party had complied with Fed. R. Civ. P. 25(a)(1). ***Younts v. Fremont County***, 370 F.3d 748 (8th Cir. 2004).

Refusing to adopt the "cumulative finality" doctrine, the 8th Circuit held that it lacked jurisdiction in an appeal by the plaintiff from an award of summary judgment to the defendant on his claims, where the defendant's counterclaims were not resolved until after the plaintiff's notice of appeal was filed. ***Miller v. Special Weapons, L.L.C.***, 369 F.3d 1033 (8th Cir. 2004).

Judge Frank found that he lacked jurisdiction to enforce a settlement agreement where the settlement agreement did not expressly provide that the district court would retain jurisdiction. ***Burum v. Mankato State Univ.***, 2004 WL 1305711 (D. Minn. 06/09/04).

Judge Frank relied on the substantially discounted rate negotiated between the plaintiff and its counsel rather than prevailing market rates in awarding fees under 42 U.S.C. §1988, finding that reliance on market rates would provide a "windfall" to the plaintiff's counsel. ***Clear Channel Outdoor, Inc. v. City of St. Paul***, 2004 WL 1151539 (D. Minn. 05/18/04).

In an unpublished decision, the 8th Circuit affirmed an order by Judge Rosenbaum awarding attorneys fees under 28 U.S.C. §1447(c) for an improper removal. ***Wells Fargo Bank West, N.A. v. Burns***, 2004 WL 1253281 (8th Cir. 06/09/04).

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## INTELLECTUAL PROPERTY

### JUDICIAL LAW

■ **PATENTS; PROSECUTION HISTORY ESTOPPEL; REWRITING DEPENDENT CLAIMS.** Rewriting dependent patent claims into independent form, coupled with the cancellation of the original independent claim, creates a presumption of no equivalents for the limitation(s) in the original dependent claim, held the Court of Appeals for the Federal Circuit *en banc*. Dependent claims in a patent are a short form of the independent claim from which they depend with at least one additional limitation. Dependent claims stand on their own; in other words, they are separately patented inventions.

Simply rewriting a dependent claim into independent form now constitutes a narrowing amendment that may give rise to an estoppel of no equivalents, according to a majority of the Court of Appeals. The majority reasoned that even if the scope of the rewritten dependent claim remains unchanged, rewriting it in independent form is a narrowing amendment if the scope of the subject matter claimed in the

original independent claim was broader. Therefore, the inclusion of an additional claim limitation not found in the canceled independent claim is a narrowing amendment — which may bar equivalents as to that claim limitation.

The dissent is worth reading because it makes a compelling argument that simply rewriting a dependent claim into its independent form is not a narrowing amendment and, therefore, equivalents should be available. To paraphrase the dissent, nothing was given up by rewriting the dependent claim into independent form — it was always there just in abbreviated form — so there cannot be an estoppel.

Here is an example: Independent patent claim 1 states “A widget including A, B and C. Dependent claim 2 is “The widget of claim 1 also including D.” Claim 2 is a shortened form of “A widget including A, B, C and D.” The Court of Appeals now holds that if the patentee cannot get claim 1 allowed but claim 2 is patentable, by rewriting the claim in independent form, which is required, there may be no equivalents for limitation D. The dissent argues, persuasively, that D was always part of claim 2 and was not changed or narrowed in any way so equivalents of D should not be precluded as a matter of law. Had claim 2 been written out in independent form all along, argues the dissent, there would be no estoppel argument. Watch for a case upcoming where equivalents are limited because a broader independent claim was canceled but a narrower independent claim was allowed. *Honeywell Int’l Inc. v. Hamilton Sundstrand Corp.*, 02-1005, -1082 (Fed. Cir. 06/02/04)

■ **PATENTS; CLAIM CONSTRUCTION; ORDINARY MEANINGS.** Despite noting the “heavy presumption” that claim terms carry their ordinary and customary meaning, Judge Magnuson rejected the dictionary definition of the word “polymer” when construing “polymeric material.” Alleged infringer Barton Nelson argued that cellulose, a primary component of paper, was a polymer, and paper was therefore a “polymeric material.” The court rejected this argument for three reasons. First, this interpretation would mean the phrase “polymeric material,” and therefore the patent, would encompass nearly all materials. Second, other evidence submitted by Barton Nelson indicated that those skilled in the art would not interpret polymeric materials to include paper. Finally, the prosecution history and plain language of the patent supported a construction excluding paper. *3M Innovative Properties Co. v. Barton Nelson, Inc.*, Civ. No. 02-3591 (PAM/RLE) (D. Minn. 06/06/04)

■ **LANHAM ACT; PUFFERY; CONSUMER SURVEYS.** The Court of Appeals for the 8th Circuit found the phrase “America’s Favorite Pasta,” standing alone, to be puffery and therefore not actionable under the Lanham Act. The advertising phrase was not a specific, measurable claim and could not be reasonably interpreted as an objective fact. The context in which the phrase was used did not transform it into a statement of fact either because coupling it with measurable claims did not render the phrase verifiable. The 8th Circuit also rejected the use of consumer surveys to assign a different meaning to a phrase. It agreed with the Court of Appeals for the 7th Circuit that allowing the use of such surveys would subject ads and promotional statements to numerous and often unpredictable variables. This unpredictability would cause uncertainty in the marketplace and chill commercial speech. *Am. Italian Pasta Co. v. New World Pasta Co.*, No. 03-2065, (8<sup>th</sup> Cir. 06/07/04)

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— ELIZABETH WRIGHT  
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## JUVENILE LAW

### JUDICIAL LAW

■ **INDIAN CHILD WELFARE ACT; CONTEMPT OF COURT PROCEEDING.** In an unpublished Minnesota Court of Appeals decision, an Indian child challenged the district court’s ruling that the Indian Child Welfare Act (“ICWA”) does not apply in a contempt of court proceeding, and that the county’s failure to notify the child’s tribe that out-of-home placement was being contemplated did not violate ICWA. This case involved both a juvenile delinquency proceeding and a CHIPS proceeding. The minor child had repeatedly violated court orders in the underlying CHIPS proceeding. The court and the county specifically warned her that any further violation would result in contempt of court charges being filed against her. She subsequently violated another court order, and the county filed a delinquency petition charging her with misdemeanor contempt of court under Minn. Stat. §588.20, subdivision 2(4)(2002). She was placed in a juvenile facility in connection with the delinquency petition.

The trial court reasoned, and the Court of Appeals affirmed that this out-of-home placement was part of a delinquency proceeding as it was based on an act that would have been a crime if committed by an adult. The rule of law applied by the district court and the Court of Appeals is that ICWA does not apply to out-of-home placements that arise from delinquency proceedings.

The minor also argued that the underlying CHIPS petition was faulty because of the failure to notify the minor’s tribe, and that the flaw in the CHIPS action invalidated the subsequent delinquency proceeding. The Court of Appeals disagreed. It reasoned that contempt of court actions are separate from, and collateral to the underlying CHIPS matter. While the appellant may be correct that her tribe should have been notified under ICWA when the CHIPS action was commenced, she neither raised that issue during the CHIPS proceeding nor brought an appeal from any of the orders issued in the CHIPS proceeding. Moreover, the out-of-home placement that is the subject of this appeal arose from a delinquency petition charging her with contempt of court, an act which would be a crime if committed by an adult. Thus, the Court of Appeals concluded that because the out-of-home placement in question arose out of the delinquency proceedings, it was not subject to the notice requirements of ICWA. *In the Matter of the Welfare of: A.M.F.-G.*, A03-1461 (Minn. App. 06/08/04). (Unpublished)

[www.lawlibrary.state.mn.us/archive/ctapun/0406/opa031461-0608.htm](http://www.lawlibrary.state.mn.us/archive/ctapun/0406/opa031461-0608.htm)

■ **DELINQUENCY; CRIMINAL SEXUAL CONDUCT; CONSENT; SELF-INCRIMINATION.** In an unpublished juvenile delinquency decision, the Court of Appeals addressed an appeal by a minor who was adjudicated delinquent on two counts of fifth-degree criminal

sexual conduct. He argued that the admission of a police officer's testimony violated his 5th Amendment right against self-incrimination and that the state failed to prove lack of consent. The alleged sexual conduct was directed towards a 16-year-old female who had been diagnosed as being mildly mentally impaired and functioned at a first or second grade level. Testimony indicated that she was fairly limited in her ability to communicate. The complainant identified the appellant when reviewing a school directory containing his photograph. A liaison officer at the school interviewed the victim, and after talking to her, the officer interviewed the appellant at the school. A minority liaison was present at the interview, and the officer testified that the minor had a "calm — matter of fact" demeanor during the interview. The appellant told the officer that he knew the complainant because he knew her brother, but he denied having any contact with her. The investigating officer characterized this interview as "noncustodial."

While the appellant was not provided with a *Miranda* warning or told during his interview that he was free to leave or that he could call his parents, he did not raise these issues before the district court. However, because of the serious nature of appellant's claim, in the interests of justice, the Court of Appeals agreed to address the argument on its merits.

The Court of Appeals concluded that, even assuming the appellant was in custody and the statements were erroneously admitted at trial, any error was harmless beyond a reasonable doubt. The only corroborating evidence obtained from the interview was the appellant's statement that he knew who the complainant was and that they lived in the same apartment complex. This statement, at most, corroborated evidence of opportunity for some of the violations, which was not necessary for the conviction. His other statements were found to not corroborate motive, mode, opportunity, or time. Furthermore, the court found the victim to be credible; it is not necessary for the victim's testimony to be corroborated in prosecution for criminal sexual conduct.

The state was found to have presented ample evidence to corroborate the necessary facts for conviction through testimony from other witnesses. Likewise, the Court of Appeals found that under circumstances of the case, even though it was not clear as to when the victim told the appellant "no," the record supports the finding that no reasonable person would believe the victim desired that particular sexual contact. Furthermore, there is no authority to support the appellant's argument that a different standard to measure effectiveness of communication should apply to juveniles, and the Court of Appeals rejected such an assertion. ***In the Matter of the Welfare of: A.H.J., child***, A03-1085 (Minn. App. 06/29/04). (Unpublished)

[www.lawlibrary.state.mn.us/archive/ctapun/0406/opa031085-0629.htm](http://www.lawlibrary.state.mn.us/archive/ctapun/0406/opa031085-0629.htm)

■ **DELINQUENCY; DISPOSITION ORDER; ADEQUACY OF FINDINGS.** In another unpublished juvenile delinquency case, the Court of Appeals reviewed an appeal by a minor where he was adjudicated delinquent for recklessly discharging a firearm after he shot his friend with a BB gun. The minor challenged the district court's disposition order requiring him to live in a group home. He argued that the record did not support the district court's disposition and that the district court did not make the necessary findings for its disposition.

The Court of Appeals agreed with the appellant and reversed and remanded the matter. The court found that the district court failed to make written findings. A district court's disposition order must contain written findings of fact to support the disposition ordered and must set forth in writing why public safety and the best interest of the child are served by the disposition ordered, what alternative dispositions were recommended to the court, and why such recommendations were not ordered. Further, if the district court's disposition changes the custody of the child, the court must make written findings of fact that explain why public safety and the best interest of the child are not served by preserving the child's present custody, and the suitability of the placement, taking into account the program of the placement facility and the assessment of the child's actual needs. Here district court failed to make these necessary written findings, requiring the Court of Appeals to reverse and remand. ***In the Matter of the Welfare of: D.K.***, A03-1687 (Minn. App. 06/29/04). (Unpublished) [www.lawlibrary.state.mn.us/archive/ctapun/0406/opa031687-0629.htm](http://www.lawlibrary.state.mn.us/archive/ctapun/0406/opa031687-0629.htm)

■ **EVIDENCE; CHILD WITNESS'S STATEMENT; RIGHT OF CONFRONTATION; CRAWFORD V. WASHINGTON.** In a 37-page published Court of Appeals decision, Judge R.A. (Jim) Randall of the Minnesota Court of Appeals ruled that a man convicted of assaulting his former girl friend will receive a new trial because a tape-recorded statement between a child witness and a child protection officer was admitted at the trial in violation of the recent United States Supreme Court case of *Crawford vs. Washington*, 124 S.Ct.1354 (2004) and this violated the defendant's right of confrontation. The appellant also received a new trial on a separate charge of assaulting a police officer because the assault against the girlfriend was offered in the second trial as *Spreigl* evidence. Although a conviction in the case involving the girlfriend was not required to omit the evidence, its use in the other case was impermissibly tainted, according to Judge Randall.

The *Crawford* rule of law that was applied was that testimonial statements may be omitted as evidence against the criminal defendant only if the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford* did not define a "testimonial" except to include police interrogations prior to testimony. The Court of Appeals concluded that the daughter's statement to the child protection worker was testimonial because the interview was for the purpose of developing the case against the defendant. It also excluded the evidence because the daughter was available for trial and the defendant did not have an opportunity to cross-examine her. Judge Randall ultimately declined to find the omission of the evidence harmless, noting that it corroborated the recanted statements by the alleged victim and made it more likely that the jury would find her trial testimony false. The court also noted that the *Crawford* decision was silent on the application of harmless error analysis to such violations. ***State v. Courtney***, A03-790; A03-791 (Minn. App. 07/06/04).

[www.lawlibrary.state.mn.us/archive/ctappub/0407/opa030790-0706.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0407/opa030790-0706.htm)

■ **ASSISTED REPRODUCTIVE TECHNOLOGY; PARENT PREDECEASED CONCEPTION; CHILDREN'S SOCIAL SECURITY INSURANCE.** In a rather unusual case coming out of the United States Court of Appeals for the 9th Circuit, that court was faced with a situation where ten months after a father died, his wife conceived twin children using sperm that he had deposited before undergoing chemotherapy for cancer. The federal district court held that these two children were not eligible for children's insurance benefits under the Social Security Act because they were not considered by the court to be dependent on the father at the time of his death. The 9th Circuit Court of Appeals reversed that trial court decision, holding that because the children were legitimate children of the sperm donor father under Arizona law, they were therefore deemed dependent on him for children's insurance benefits. **Rhonda Gillett-Netting, on her own behalf and on behalf of her minor children vs. Jo Anne Barnhart, commissioner of Social Security**, No. 03-15442 (9<sup>th</sup> Cir. 06/09/04). (Unpublished)

#### LEGISLATION

The Minnesota Legislature last session passed legislation, codified as Chapter 177, called "Vanessa's Law." The law is named in memory of a 15-year-old girl killed when riding as a passenger in a vehicle driven by an unlicensed 15-year-old who lost control of the vehicle. Effective immediately, a young person whose provisional license is revoked due to an alcohol related driving offense or a crash related to a moving violation cannot regain a license until age 18, and then only if the driver completes a formal driving instruction course and documents additional driving experience. Any person under 18 who is driving without a permit or license when convicted of these same offenses will be denied a provisional license or instructional permit, and must take certain steps to receive a regular license after turning 18.

#### LOOKING AHEAD

A Minnesota Supreme Court project known as the Children's Justice Initiative (CJI) has now been expanded from a pilot project to encompass cases throughout the state. The project, which is sponsored by the Minnesota Supreme Court and the Minnesota Department of Human Services, has as its goal making the juvenile court system more effective in finding a permanent home for neglected children, either with their families of origin or elsewhere. The goal of the project is for court processes to succeed at seeing the cases through the eyes of a child.

The project is structured so that each county has a team serving under a lead judge to implement the initiative. The remaining members of the team are left to the discretion of the county judge. Most counties have included personnel from court administration, guardians ad litem, social workers, county attorneys, and public defenders.

The project has focused on such important matters as appropriately scheduling cases when more than one county is involved, curtailing continuances, and scheduling matters for a time certain rather than having all cases scheduled for the same time. Ultimately, the goal of the project is to vigorously implement the Minnesota permanency guidelines, which are based on federal statutory mandates requiring that final decisions be made for children in the child protection system within vigorously enforced and relatively short timelines. Meeting these timelines has been a significant challenge for juvenile courts across the state, and it is the hope of CJI that certain administrative and practice changes can be implemented so that the spirit of the state and federal permanency guidelines can better be complied with.

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### REAL PROPERTY

#### JUDICIAL LAW

■ **APPLICATION OF SALES RATIOS.** The Minnesota Supreme Court has recently addressed the proper method for equalizing property taxation in cases where a particular property is assessed unequally in comparison to other properties in the taxing district. Property owner Harris petitioned to challenge the taxes assessed on his property. The parties did not dispute that the sales ratio study in effect for the area in which the property was located established that Harris' property was unequally assessed. By statute, Harris was entitled to a percentage reduction in the value of his property. The issue before the court was whether this reduction should be applied to the fair market value of the property or the limited market value of the property, *i.e.*, the value upon which the assessment is ultimately based. The Minnesota Tax Court found in favor of Harris and concluded that the equalization reduction should be taken from the limited market value of the property. The Supreme Court reversed and held that the reduction must be applied to the fair market value of the property. In so holding, the Court observed that the purpose of the sales ratio equalization process was to ensure that all property owners be assessed at a percentage of fair market value that is similar to other tax payers in the same area. Because equally valued properties may well have different limited market values for a variety of reasons, the purpose of the equalization would not be served by applying it to the limited market value. **Harris v. County of Hennepin**, A03-108 (Minn. 05/27/04).

[www.lawlibrary.state.mn.us/archive/supct/0405/opa031108-0527.htm](http://www.lawlibrary.state.mn.us/archive/supct/0405/opa031108-0527.htm)

■ **STATUTE OF LIMITATIONS.** Jensen-Re purchased a condominium unit in a resort with a homeowners' association ("Association"). Subsequently, Jensen Re discovered that the unit had a significant slope in the floor, which had been caused by settling of the building. The Association undertook to repair the settling problem, but refused to repair Jensen Re's unit. Jensen Re brought suit against the Association for breach of contract and breach of duties under the Uniform Condominium Act. Because the settling occurred

many years before the suit was commenced, the district court ruled that the suit was barred by the two-year statute of limitations found in Minn. Stat. §541.051, subd. 1(a). The Court of Appeals reversed, holding that the statute of limitations did not apply to a suit against the Association. The Court of Appeals observed that Minn. Stat. §541.051 imposes a two-year statute of limitations on actions arising out of defective and unsafe conditions of improvements to real property if brought against those providing the design, planning, supervision, materials, construction, or against the owner of the property. At issue was whether the Association was considered “an owner” of the property. The Court of Appeals noted that under both the governing statute and the condominium declaration, the foundation at issue was a common element, owned proportionately by the owner of each unit. The court further noted that the Association was not one of the types of entities that the statute was designed to protect, namely “architects, designers and contractors who have completed the work, turned the improvements to real property over to the owners, and no longer have any interest or control in it.” *Jensen Re Partnership v. Superior Shores Lakehome Association*, A03-1681 (Minn. App. 06/15/04). [www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031681-0615.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031681-0615.htm)

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## TAX

### JUDICIAL LAW

■ **SALES TAX ON VENDING MACHINES.** The Minnesota Supreme Court recently affirmed a judgment of the lower courts in holding that a sales tax on food sold through vending machines does not violate the Equal Protection Clause of the 14th Amendment of the United States Constitution or the Uniformity Clause of the Minnesota Constitution. In so holding the Court upheld the classification of food sales into two groups; restaurant-type sales and grocery-type sales and concluded that food sold in vending machines is properly classified as restaurant-type sales. *Minnesota Automatic Merchandising Council v. Commissioner of the Minnesota Department of Revenue*. 2004 WL 1404501 (Minn. 2004)

■ **PROPERTY TAX RELIEF CALCULATED USING PROPERTY’S ACTUAL MARKET VALUE.** When a taxpayer qualifies for equalization relief under Minn. Stat. §278.05, subd. 4 and limited market value relief under Minn. Stat. §273.11, subd. 1a, “the taxpayer’s equalization reduction must first be applied to the property’s actual market value before its limited market value is determined.” *Harris v. County of Hennepin*, 679 N.W.2d 729 (Minn. 2004).

■ **JURISDICTION LACKING IN PRE-LEVY DETERMINATION REVIEW.** The Tax Court lacked jurisdiction to consider the taxpayer’s request for sanctions against the IRS as part of the review of a pre-levy Collection Due Process hearing determination. *Chocallo v. Comm’r*, T.C. M. 2004-152 (2004).

■ **NO SANCTION FOR FRIVOLOUS ARGUMENT.** A taxpayer who advanced tax protestor-type arguments was not held liable for sanctions. The taxpayer conceded his deficiency and promptly signed a stipulation in settlement of his liability. *Sides v. Comm’r*, T.C. M. 2004-141 (2004).

■ **EMPLOYMENT DISCRIMINATION DAMAGES FULLY TAXABLE.** The taxpayer received a lump-sum payment in settlement of an employment discrimination suit filed against the state of California. Because the taxpayer could not produce evidence of incurred medical costs to treat his emotional distress, no portion of his damages could be excluded from income. *Kidd v. Comm’r*, T.C. M. 2004-135 (2004).

■ **FAILURE TO ABATE INTEREST ON TAX LIABILITIES NOT ABUSE.** A taxpayer asserted that the issuance of a deficiency notice for fraud penalties was improperly delayed. The IRS’s reasoning that the delay was attributable to the investigation of the taxpayer’s case and accompanying criminal proceedings was deemed adequate and thus did not constitute an improper delay. *Kemp v. Comm’r*, T.C. M. 2004-139 (2004).

■ **SUBSTANTIAL COMPLIANCE DOCTRINE DOES NOT APPLY TO WAIVE STATUTORY PREREQUISITE.** A taxpayer could not exclude distributions from his IRA that he failed to roll over within 60 days. The taxpayer asserted that he intended to comply with the 60-day rule and ultimately deposited the distributed amount into an IRA account and thus substantially complied with the statutory requirements. However, this argument was rejected. The substantial compliance doctrine cannot be applied to waive a clear statutory prerequisite. *Dirks v. Comm’r*, T.C. M. 2004-138, 2004 WL 1277976.

■ **FRAUD PENALTIES APPLY TO HABITUAL NONFILER.** A taxpayer was held liable for back taxes and fraud penalties. He agreed with the income amounts and asserted only protestor-type arguments. In addition, the taxpayer engaged in asset concealment and displayed other “badges of fraud.” The court held that he was aware of his filing obligations and imposed fraud penalties in addition to a penalty for pursuing frivolous arguments. *Chase v. Comm’r*, T.C. M. 2004-142, 2004 WL 1354118.

■ **TAX EVASION NOT PROVEN.** A sole shareholder of an S corporation was previously convicted of filing false tax returns. The IRS failed to establish that the taxpayer had intended to evade tax. The IRS was required to prove the taxpayer’s intention with clear and convincing evidence and the typical signs of fraud were not present in this case. Furthermore, the IRS could not rely on his previous conviction to establish fraud in order to extend the limitations period to collect its assessments. *McGowan v. Comm’r*, T.C. M. 2004-146 (2004).

■ **JURISDICTION; REFUSAL TO ABATE INTEREST.** The Tax Court did have jurisdiction to determine taxpayers’ liability for additional interest that accrued on their deficiency from the time that the tax was due until the deficiency was eliminated. The interest was assessed after the taxpayers signed a form 4549-CG, “Income Tax Examination Changes.” The Tax Court has jurisdiction over inter-

est assessments in cases that either challenge the underlying deficiency or an IRS refusal to abate the interest. Taxpayer's administrative appeal and Tax Court petition were interpreted respectively as a request for abatement of interest and a challenge to the IRS's refusal to do so. The court also had jurisdiction to make a *de novo* determination as to whether the taxpayers were liable for the interest. The court held that the taxpayers were liable for the interest and that the IRS's refusal to abate the interest was not an abuse of discretion. **Urbano v. Comm'r.**, 122 T.C. No. 22 (2004).

■ **DISCHARGE OF INDEBTEDNESS EXCLUDABLE FROM GROSS INCOME.** General partner's liability for partnership debt was discharged under a Chapter 11 bankruptcy proceeding and thus triggered the exception under §108(d)(6) of the I.R.C. Thus the discharge of indebtedness was excludable from gross income. **Gracia v. Comm'r.**, T.C. M. 2004-147 (2004).

■ **JURISDICTION; CONTINUING WAGE LEVY.** The Tax Court recently held that it did not have jurisdiction to review the IRS's continuing wage levy on an individual's severance pay. The collection action was commenced before the January 19, 1999 effective date of § 6330 of the Code and although collection action continued currently, the continuing wage levy was served before the effective date and thus the Tax Court did not have jurisdiction. **Meehan v. Comm'r.**, 122 T.C. No. 23 (2004).

■ **CONSTRUCTIVE RECEIPT OF YEAR END VALUE ADDED PAYMENTS.** An individual constructively received year-end, value-added payments in the years his agent received those payments. The taxpayer's only limitations to receipt were self-imposed and thus inadequate to attain a deferral of income. **Scherbart v. Comm'r.**, T.C. M. 2004-143 (2004).

■ **GAMBLING INCOME; EARNED INCOME CREDIT.** An individual's Earned Income Credit was partially phased out resulting in a tax deficiency because the inclusion of gambling income caused her "modified adjusted gross income" to exceed the statutorily prescribed amount. **Petty v. Comm'r.**, T.C. M. 2004-144 (2004).

■ **EARNED INCOME CREDIT; DEFINITION OF MARRIED.** A taxpayer who was precluded from filing jointly because his wife was a non-resident alien unable to obtain a Social Security number and who was treated as unmarried for purposes of head of household filing status was also precluded from claiming the EIC without evidence that his wife had not been a member of his household during the last six months of the year. For filing status and for purposes of the EIC, "married" is defined differently. **Diaz v. Comm'r.**, T.C. M. 2004-145 (2004).

■ **HOMESTEAD EXEMPTION; JOINT TENANCY.** The Minnesota Supreme Court recently held that a judgment debtor's homestead property, held in joint tenancy with his spouse, cannot be unilaterally severed through an execution sale in order to satisfy the judgment. Under Minn. Stat. §520.02, the homestead exemption can be fully claimed individually or jointly by either spouse. It is not reduced in half if only one spouse faces a need to use the exemption. The Court emphasized that the property interest of the taxpayer's nonparty spouse was not protected. The Court further agreed with the 8th Circuit holding in *O'Hagan v. United States* that a judgment creditor cannot acquire more property rights in a particular piece of property than those already held by the debtor. The Court also concluded that in the alternative, "a judgment debtor also may not increase the reach of the judgment lien beyond property owned by the judgment debtor." **Kip v. Sweno**, 2004 WL 1404518 (Minn. 2004)

#### ADMINISTRATIVE MATTERS

■ **AMENDED DISABILITY BENEFIT PLAN; INCLUSION OF BENEFITS IN GROSS INCOME.** Revenue Ruling 2004-55 holds that under an amended disability benefit plan, disability benefits received by an employee who has irrevocably elected to have the coverage paid by the employer on an after-tax basis for the plan year in which the employee becomes disabled and make the election prior to the beginning of the plan year are attributable solely to after-tax employee contributions and are excludable from gross income. In contrast, long-term disability benefits received by an employee whose coverage is paid by the employer on a pretax basis for the plan year in which the employee become disabled are attributable solely to pretax employer contributions and are thus includible in the employee's gross income. The relevant code sections are 104(a)(3) and 105(a).

■ **WAIVER OF RETIREE HEALTH BENEFITS EMPLOYER-INITIATED.** Revenue Ruling 2004-65 indicates that when a retiree waives health benefits in exchange for enhanced pension benefits, the waiver constitutes an employer-initiated reduction in retiree health coverage. This classification is for purposes of ascertaining if the employer significantly reduced health coverage during the cost maintenance period. Section 420(c)(3)(E) of the Code is meant to prevent employers who significantly reduce coverage during the cost maintenance period described in §420(c)(3)(D) from being treated as satisfying the minimum cost requirement set forth in §420(c)(3). An employer's failure to meet the minimum cost requirement prevents the transfer of excess benefits from meeting the standards of a qualified transfer.

■ **REQUIRED MINIMUM DISTRIBUTIONS FOR BENEFIT PLANS.** Final regulations issued for the required minimum distribution rules for defined benefit plans and annuity contracts set forth in §401(a)(9) have been issued by the IRS. A key feature of the final regulations is increased flexibility in annuity payment terms. TDNR JS-1721.

■ **TRANSITIONAL RELIEF FOR HEALTH SAVINGS ACCOUNTS.** The IRS is providing transitional relief to allow individuals residing in states in which high-deductible health plans are not available an opportunity to establish health savings accounts. Notice 2004-43.

■ **GOVERNMENTAL PLAN TRUST ASSETS; POOLING WITH GROUP TRUST ASSETS.** Revenue Ruling 2004-67 allows that governmental plan trust assets may be pooled with certain group trust assets without affecting the tax status of the trusts. The IRS sets out five criteria that must be met in order for the governmental plan trust to merge its assets in a group trust without affecting the tax status of any of the individual trusts or the group trust. The five criteria are: 1) the group trust must be adopted as part of each adopting employer's plan or each adopting IRA; 2) the group trust must limit participation to specified entities; 3) the group trust must prohibit any of its

amount or income that belongs to any adopting entity from being used for or diverted to any purpose other than for the exclusive benefit of the employees and the individuals who hold IRAs and their beneficiaries; 4) the group trust must prohibit assignment by an adopting entity of any part of its equity or interest; and 5) the group must be created/organized in the U.S. and maintained as a domestic U.S. trust at all times.

■ **MACRS DEPRECIATION REGULATIONS FINALIZED.** Final regulations that provide guidance on how to depreciate Modified Cost Accelerated Depreciation System property when the use of the property changes in the hands of the same taxpayer, have been issued by the IRS. A change in use includes a conversion of property from or to personal use, a change in use that results in a different recovery period or depreciation method, or both. T.D. 9132.

■ **CASH BALANCE CONVERSION REGS.** Following Congressional opposition, Treasury and the IRS have withdrawn cash balance pension regulations. Both Treasury and IRS have indicated that the new regulations will not be issued until Congress has considered the issue. However, the IRS is maintaining its five-year moratorium on determination letter requests for conversions to cash balance plans. Congressional action earlier this year intended to block the proposed regulations included the Consolidated Appropriations Act of 2004 which prohibited funding to be used for any rule or regulation that would implement the proposed regulations or any regulations that would achieve a similar result. Criticism of the proposed regulations noted that conversions from a defined benefit to a cash balance had the potential to harm "older employees who have more seniority than younger hires." TDNR JS-1724 Announcement 2004-57.

■ **WAIVERS OF LOW-INCOME HOUSING RECERTIFICATION.** In Rev. Proc. 2004-38, the IRS revised the requirements for owners of qualified low-income housing projects to obtain a waiver of the required annual recertification of tenant income. The waiver of recertification applies to buildings where 100 percent of the occupants are low-income tenants, as defined by §42 of the Code. The owner may obtain a waiver by filing a Form 8877. The waiver takes effect when approved by the IRS and remains in place for the statute's 15-year compliance period unless it is revoked. The waiver can be revoked with immediate effect if the building is no longer a 100 percent low income building or if the owner has violated §42 of the Code in a serious manner. The owner must still be able to document its compliance with §42 if audited.

■ **WITHHOLDING TAX TREATMENT OF CROSS BORDER PENSION DISTRIBUTIONS.** Revenue Procedure 2004-37 provides guidance on the treatment of pension distributions made by a U.S. qualified plan to a nonresident alien individual. In particular the revenue procedure provides guidance for determining the tax-withholding obligations of individuals who are responsible for making payments from a U.S. defined benefit pension plan to a foreign person. The revenue procedure offers apportionment guidance including rules for determining the U.S.-source portion of a pension distribution where the employee has worked in both the U.S. and abroad, a method for apportioning a lump-sum distribution or straight life annuity between employer contributions and earnings and between services performed in the U.S. and abroad. Finally, the revenue procedure provides guidance on appropriate assumptions that may be used in distribution apportionment between sources both within and outside of the U.S.

■ **U.S.-JAPAN INCOME TAX TREATY.** The IRS issued guidance on the application of the new U.S.-Japan treaty pertaining to withholding taxes on dividends, interest and royalties in both countries. Pursuant to Article 30, the treaty is generally applicable to withholding taxes on July 1, 2004. More specifically, in the U.S. the treaty is applicable for amounts paid or credited on or after July 1st, and in Japan the treaty is applicable to amounts taxable on or after July 1st. IR-2004-82

#### LOOKING AHEAD

■ **HOUSE PASSES ETI/CORPORATE TAX BILL.** On June 17, 2004, the House approved the American Jobs Creation Bill of 2004, H.R. 4520. The Senate must act on H.R. 4520 before the bill can be reconciled with its Senate counterpart, Jump Start Our Business Strength (JOBS) Bill (Sen. 1637). Key provisions of the American Jobs Creation Bill of 2004 include but are not limited to:

- Tax breaks for the repatriation of earnings.
- Starting in 2005, a phase out of the extraterritorial income (ETI) provisions of the code.
- Exclusion of stock options from employee wages.
- A deduction of state sales taxes for individuals.
- A phased-in top marginal income tax rate cut of three percentage points for the manufacturing activities of C corporations.
- Elimination of tax-free inversions.
- A package of tax shelter provisions.
- Special depreciation periods for leasehold improvements.
- Reduction in the number of foreign tax credit baskets from nine to two.

The House and Senate bills contain several similarities. However, the Senate's \$170 billion in tax relief is fully paid for while the House's \$155 billion in tax incentives is set off by only \$34 billion in revenue raisers. In addition, both the Senate and the House have included provisions to attract votes. These provisions included \$10 billion in tobacco farmer buyouts in the American Jobs Creation Bill of 2004.

■ **FREEDOM OF INFORMATION ACT SUIT FILED FOR NONDISCLOSED CHIEF COUNSEL ADVICE.** Tax Analysts has filed a Freedom of Information Act complaint seeking disclosure of chief counsel advice, a category of published guidance under §6110, in the district court for the District of Columbia. The IRS revised its procedures for processing chief counsel advice last summer and has denied requests filed by

Tax Analysts for chief counsel advice pursuant to those revisions. The revisions allow for the possibility that such advice can be withheld in full from public disclosure. 2004 TNT 124-2.

■ **RETIREMENT SAVINGS ACCOUNT BILL INTRODUCED IN HOUSE.** The Retirement Savings Bill (H.R. 4714) was introduced into the House on June 25, 2004, and a similar bill could be introduced in the Senate as early as July. The Retirement Savings Account Bill would merge existing IRAs into a Retirement Security Account (RSA). Key features of the bill would eliminate income limits on participation, allow married persons to roll funds from their RSA to their spouse's RSA, allow taxpayers to make a single yearly after-tax contribution of up to \$5,000 per year (\$5,000 cap slated for 2008), allow earnings to accumulate tax-free, and allow taxpayers to make tax-free distributions after the age of 58. TDNR JS-1751

■ **PROPOSED REGULATIONS ADDRESS BUILT-IN GAIN.** The IRS has issued proposed regulations that refine the maximum amount of built-in gain that an S corporation will have to recognize at the corporate level when it disposes of certain property. The qualified property is property that was acquired from a C corporation or that it owned at the time it converted from C corporation to S corporation status. The proposed rules would allow the S corporation to adjust its net unrealized gain to any pool of assets that included the stock of the C corporation. This adjustment would be allowed if the C corporation later transfers assets to the S corporation in a transaction that results in cancellation of the C corporation's stock. This is to prevent an S corporation from being subject to built-in gains tax based on the appreciated value of subsidiary stock if it later acquires the assets of the subsidiary and in that transaction is also subject to built-in gains tax. NPMR REG-131486-03.

■ **SUPREME COURT ACCEPTS CERT IN INDIAN TAX CASE.** The United States Supreme Court accepted certiorari in a case where the question is whether reservation lands are subject to state and local taxation. *Sherrill, N.Y. v. Oneida Indian Nation of N.Y.* (No. 03-855).

■ **NEW PROCEDURE FOR U.S. TAX CERTIFICATION.** The IRS will introduce a new tax form, Form 8802, that will make it easier for U.S. businesses and individuals to show that they are entitled to lower foreign tax rates under U.S. income tax treaties. Beginning July 5, taxpayers who need proof of U.S. residence to qualify for lower treaty rates while working or investing overseas must use Form 8802. The IRS will then issue a letter that confirms the tax status of the taxpayer for purposes of claiming treaty benefits. IR-2004-78.

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## TORTS & INSURANCE

### JUDICIAL LAW

■ **NO-FAULT; ARBITRATION; JURISDICTIONAL LIMIT; INTEREST ON OVERDUE BENEFIT PAYMENTS.** Minnesota Statute §65B.525, subd. 1 (2002), provides that the American Arbitration Association has jurisdiction to arbitrate no-fault disputes only "where the claim at the commencement of arbitration is in the amount of \$10,000 or less". Respondent filed an arbitration petition asserting a claim for \$10,000, which was reduced from his actual medical expenses in order to meet the jurisdictional limit. He later amended his petition to add a claim for \$7,125 in interest as provided for by Minn. Stat. §65B.45, subs. 1, 2. The insurer, American Family Insurance Group, argued that the AAA lacked jurisdiction because the claim exceeded the \$10,000 jurisdictional limit. The Court of Appeals addressed, as a matter of first impression, whether or not interest on overdue benefit payments must be included in calculating the \$10,000 jurisdictional limit.

The Court of Appeals reasoned that interest under the statute has both a compensatory purpose, to compensate the consumer, and a penal purpose, to encourage prompt payment of benefits. Recognizing that neither purpose is served by requiring claimants to include interest in the claim calculation for purposes of determining the jurisdictional limit, the Court of Appeals held that interest is not to be included in the calculation of benefits claimed for the purpose of statutory jurisdiction.

The Court of Appeals also held that a blanket denial of further benefits is not sufficient to start interest accruing on a subsequent claim where the insurer has no actual knowledge of the medical procedure and expense giving rise to the claim. In other words, even though an insurer has issued a blanket denial, if you expect to get interest on a claim for medical expenses incurred after the denial, you must give the insurer notice of the procedure and the expense incurred. *American Family Insurance Group, Petitioner vs. Mark Kiess*, A03-1764 (Minn. App. 06/01/04). [www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031764-0601.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0406/opa031764-0601.htm)

■ **NEGLIGENCE AND CAUSATION "CLOSELY RELATED."** Doris Clifford died from complications allegedly caused by a medication. Her physician prescribed a decongestant, Liquibid, but her pharmacy dispensed Lithobid, a drug containing lithium used to treat bipolar disorder. Her trustee sued Geritom Med, Inc., the pharmacy which dispensed the medicine. Geritom filed a third-party complaint against the prescribing physician, his nurse and the physicians who later treated Mrs. Clifford. At the first trial, the jury found Geritom was not negligent. A second jury trial found Geritom liable. Geritom appealed.

After the second trial, the jury found Geritom was a direct cause of Clifford's harm. Geritom appealed, and the Minnesota Court of Appeals reinstated the first jury's verdict, concluding the court abused its discretion in granting a new trial.

On appeal, reversing the intermediate court, the Minnesota Supreme Court held the district court properly granted Clifford's motion for new trial. The district court believed that the jury was acting under a "mistaken belief" as the jury found none of the parties on the special verdict form was the direct cause of Clifford's death. Moreover, there was no evidence as to the applicable standard of care of two other potential tortfeasors, Clifford's physician and the nurse placing the order for drugs to the pharmacy.

The Minnesota Supreme Court concluded the jury's finding of no negligence by Geritom was not justified by the evidence because "negligence and causation in this case are so closely related" and there were inconsistent findings on negligence and causation as to the doctor and nurse. The Court therefore found no abuse of discretion by the district court in ordering a new trial. Other unaddressed issues raised by Geritom at the Court of Appeals remained; thus the case was remanded to the Minnesota Court of Appeals. **Clifford v. Geritom Med, Inc., et al.**, CX-02-2041 (Minn. 06/24/04). [www.lawlibrary.state.mn.us/archive/supct/0406/op022041-0624.htm](http://www.lawlibrary.state.mn.us/archive/supct/0406/op022041-0624.htm)

■ **APPLICABILITY OF SCHMIDT V. CLOTHIER IN FIRST PARTY PROPERTY DISPUTE OUTSIDE PI CONTEXT.** The Garden Court Apartments in Winnebago, Minnesota were damaged in heavy rainfall. The owner of the building ("Owner") withheld payment to the roofing contractor and filed a claim with its property insurance carrier, AMCO Insurance Company ("AMCO"). Eight months later, AMCO denied coverage. The roofing contractor brought a mechanic's lien for payment and Owner brought a third-party claim against AMCO for the loss.

The contractor and defendant-roofing consultant finally made a Rule 68 offer of judgment to Owner for \$800,000, less than the liability limits of their respective policies. Owner gave AMCO oral notice of its intent to accept the offer and demanded that AMCO substitute its payment of \$800,000 if it wished to preserve its subrogation rights, presumably consistent with *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983). AMCO refused in writing, objected to the \$800,000 payment, and refused to substitute checks.

AMCO next moved for summary judgment against Owner on the grounds that Owner had breached its obligation to protect AMCO's subrogation rights. The district court denied AMCO's motion for summary judgment and certified the question of the applicability of *Schmidt* to Owner's dispute with AMCO under its first-party property insurance. The Minnesota Supreme Court concluded *Schmidt* did not apply as first party insurance disputes are not based on the public policy concerns underlying the No-Fault Act, but are governed by the contractual terms between the parties. The Minnesota Supreme Court also concluded that Owner's acceptance of the Rule 68 offer of judgment was not a breach of its obligation to protect AMCO's subrogation rights. **Schwickert, Inc. v. Winnebago Senior's Ltd., et al.**, C8-02-1972, C4-02-2083 (Minn. 05/27/04).

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