



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

ADMINISTRATIVE LAW

JUDICIAL LAW

■ **DATA PRACTICES.** Business owners the Westrom family sued the Department of Labor and Industry for damages under the Data Practices Act because the Department released penalty orders issued to the Westrom family companies, and written objections to those orders (filed by the Westroms), to the news media. The orders alleged that the Westrom companies had failed to obtain compulsory workers compensation insurance. A petition for a hearing with the Office of Administrative Hearings had not yet been filed. The Supreme Court decided that the orders and objections fell within a provision of the Data Practices Act (Minn. Stat. §13.39) that makes data collected by agencies, as part of an active investigation leading to a civil legal action, confidential as to data on individuals, and nonpublic as to data not on individuals. The Court reasoned that orders were “data collected” because they were based upon data collected in the prior investigation, that the objections were data collected because they were not voluntary, and that the investigation was still active because the Department amended its order after the initial release of the orders to the news media. The Court also held that §13.39 overrides the definitions of nonpublic and confidential data that describe such data as that which is inaccessible to the subject of the data. It further determined that the Data Practices Act governed over provisions of the Workers’ Compensation Act that make the Department’s records and documents public. In dissent, Justice Page noted that the data in question was the names of the employers, the time periods when they didn’t carry insurance, and their explanations — data that was already public when collected. **Westrom v. Minnesota Department of Labor and Industry**, C9-03-128, CO-03-129, 686 N.W. 2d 27 (Minn. 09/02/04). www.lawlibrary.state.mn.us/archive/supct/0409/op030128-0902.htm

■ **RELOCATION BENEFITS.** Under the Minnesota Uniform Relocation Act, a city must provide relocation costs to homeowners and businesses that are displaced by public acquisition of their property for redevelopment. In September, the Court of Appeals decided that the City of Richfield Housing and Redevelopment Authority (HRA) undertook the acquisition of property belonging to one Mr. Wren for a redevelopment, even though the HRA had entered into a contract with a private developer to acquire the land. The Court concluded that the history of the HRA’s involvement in the redevelopment, including initiating and financing the project, regularly communicating with property owners (including encouraging negotiation with the developer), contracting with the developer to acquire property, and agreeing to exercise its power of eminent domain, if necessary, was significant enough involvement to constitute undertaking acquisition of Wren’s property. Wren was therefore entitled to relocation benefits. **In Re Kenneth Wren Residential Relocation Claim**, A04-207, 685 N.W. 2d 721 (Minn. App. 09/07/04). www.lawlibrary.state.mn.us/archive/ctappub/0409/opa040207-0907.htm

■ **FEDERAL PREEMPTION.** With the encouragement of a union, a union electrician applied for a job with a nonunion contractor and did not disclose his past employment with union contractors on his application. When his union affiliation was discovered, the employer fired him for falsifying his application. The employer then sued the electrician and the union in state court seeking damages and an injunction against the union. The Court of Appeals held that the National Labor Relations Act preempted the employer’s claims by operation of the Supremacy Clause, since the employee demonstrated that falsifying an application by omitting reference to a union employer was arguably protected by the NLRA. The state district court was directed to defer to the exclusive competence of the NLRA. The court also held that the preemption claim was not estopped by the NLRA general counsel’s refusal to file a charge against the employer, nor by a prior NLRA and 8th Circuit Court of Appeals decision. **Wright Electric v. Ouellette**, A03-1683, 686 N.W. 2d 313 (Minn. App. 09/14/04). www.lawlibrary.state.mn.us/archive/ctappub/0409/opa031683-0914.htm

■ **ADEQUATE FINDINGS.** The Court of Appeals addressed the adequacy of hearing officer findings in another September ruling. Appellant Cole’s Section 8 housing assistance was terminated on the grounds she violated her lease and she was ordered evicted by a court. The appellate court held that a default court-ordered eviction, in which the landlord alleged Cole damaged the apartment and used crack cocaine, was sufficient to terminate assistance. The Court of Appeals noted that under federal regulations a recipient of assistance is entitled to a written decision from a hearing officer that briefly states the reasons for the determination. The decision must be based on objective criteria applied to the facts and circumstances of the record. Cole argued that the hearing officer’s findings were insufficient because there were no findings on the landlord’s credibility. Cole had claimed the landlord was not credible because he had altered the complaint and filed the eviction for retaliatory reasons. The court observed that although the findings were somewhat vague, they were sufficient to infer that the credibility allegations had been rejected and to permit meaningful appellate review. **Cole v. Metropolitan Council HRA**, A04-261, 686 N.W. 2d 334 (Minn. App. 09/14/04). www.lawlibrary.state.mn.us/archive/ctappub/0409/opa040261-0914.htm

■ **ARBITRARY AND CAPRICIOUS.** When Carver County determined that the Rocheleau’s septic system had the potential to immediately threaten public health or safety and required its replacement, the Rocheleaus appealed. A hearing before an administrative law judge, with expert testimony, ensued. The ALJ was persuaded by the county’s expert testimony and the County Board adopted his recommended

decision requiring replacement of the septic system. As against a claim of an arbitrary decision, the court noted that the ALJ had made extensive factual findings and carefully weighed the conflicting evidence. The court stated it gives substantial judicial deference to an administrative board's fact-finding process and found that the board's decision was not unreasonable or arbitrary. The court also held that the county sewage treatment ordinance was not preempted by state law, and that the applicable state statute or rules were not unconstitutional on the grounds of vagueness or creating conclusive presumptions of law or fact. **In Re Appeal of Robert and Julie Rocheleau**, A03-2046, 686 N.W. 2d 882 (Minn. App. 09/28/04). www.lawlibrary.state.mn.us/archive/ctappub/0409/opa032046-0928.htm

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CRIMINAL LAW

JUDICIAL LAW

■ **EXTRADITION; INTERSTATE AGREEMENT ON DETAINERS; TOLLING OF SIX-MONTH PERIOD.** The IAD compact, which requires trials to begin within 180 days following a speedy dismissal request, is tolled by the 25 days reasonably needed, in this case, to consider the appellant's motion to dismiss. The additional 25-day period allows the trial court to retain jurisdiction over the appellant. **State v. Kevin Paul Kurz**, A03-1747 (Minn. App. 08/17/04). www.lawlibrary.state.mn.us/archive/ctappub/0408/opa031747-0817.htm

■ **CRIMINAL SEXUAL CONDUCT; CONSENT; "REASONABLE JUVENILE" STANDARD.** Appellant and several juveniles were driving around in a vehicle. The complainant was flashing individuals in the car and other motorists by lifting up her shirt and exposing her breasts. Appellant grabbed and pinched her breasts, and was repeatedly told to stop doing so. Photographs introduced at trial showed bruises and red marks. The defense argued that the state should be required to prove that the complainant had communicated refusal in such terms that a reasonable juvenile would have understood that no consent existed.

Held, the Court of Appeals refuses to apply a reasonable juvenile standard to the element of consent in a criminal sexual conduct case. Such a standard has been recognized in only two particular situations: custodial interrogations and culpable negligence. There exists no case law or statutory authority to extend the reasonable juvenile standard to the consent element of a criminal sexual conduct case. "Flashing may be wild behavior; yet it is not consent to harsh grabbing of a girl's breasts." **In Re A.A.M.**, A03-1793 (Minn. App. 08/17/04). www.lawlibrary.state.mn.us/archive/ctappub/0408/opa031793-0817.htm

■ **MIRANDA VIOLATION; USE FOR IMPEACHMENT BY OMISSION.** It was not error for the prosecution to use a statement, which may have been taken in violation of *Miranda*, against the appellant for impeachment purposes. Further, it was appropriate for the prosecution to impeach by omission: the appellant, in his statement to police, failed to discuss such issues of the complaint as fatigue as well as use of controlled substances. It was within the trial court's discretion to conclude that the appellant's omission of these details had sufficient impeachment value to warrant the use of cross-examination. **State v. Saye Lawrence Whittle**, A03-1111 (Minn. App. 08/17/04). www.lawlibrary.state.mn.us/archive/ctappub/0408/opa031111-0817.htm

■ **NEXUS INFERRED FROM CIRCUMSTANCES: OFF-PREMISES ARREST.** Law enforcement agents obtained a search warrant for Unit 12, based upon drug-dealing information which had been obtained from Unit 3. Appellants had just moved from Unit 3 to Unit 12 four days prior to the date of the issuance of the warrant.

Held, the totality of the circumstances of this case permit an inference that the items to be seized would be found in Unit 12 even though no one directly observed evidence of criminal activity in Unit 12. First, it is reasonable to assume that drug dealers keep evidence of their alleged crime in their place of residence. Second, one appellant had an extensive record for drug dealing. Third, people had observed large numbers of people engaged in apparent drug trafficking.

While executing the warrant on Unit 12, police retrieved another appellant, who was on the golf course a half-mile away. The state argues that such a seizure was incident to the search, and justified by the limited authority to detain an implied search warrant pursuant to *Michigan v. Summers*, 453 U.S. 692 (1981). In this case, however, the factors in *Summers* are not present. While *Summers* does not specify geographic distances by which to measure the intrusiveness of an off-premises detention, such an arrest would likely be unreasonable where the suspect is not detained in close proximity to the search. First, appellant's detention would not have prevented flight because she was not aware of the search. Second, her detention would not have minimized harm to officers because there was no evidence that she was armed or dangerous. Third, there was no evidence that appellant could have assisted officers in conducting a search. Hence, the arrest of one appellant was unconstitutional. **State v. Wayne Lawrence Ruoho and Jacqueline Francis Knutson**, A03-2015, A03-2016 (Minn. App. 08/17/04). www.lawlibrary.state.mn.us/archive/ctappub/0408/opa032015-0817.htm

■ **DWI/IMPLIED CONSENT; UNDERAGE DRINKING; MINN. STAT §169A.03, SUBD. 3; AMENDMENT EFFECTIVE DATE.** Held, the 2003 amendment to Minn. Stat. §169A.03, subd. 3, which excludes license suspension for "not a drop" violations from the definitions of "prior impaired driver's-related loss of license" does not apply to a driving-while-impaired violation that occurred before August 1, 2003. When the Legislature enacts a statutory amendment, which mitigates punishment for a criminal offense, the Legislature states that the amendment applies to violations that occur on or after the effective date of the amendment. The amendment should not be applied to mitigate the punishment for a violation that occurred before the effective date of the amendment even though the conviction for the violation was not final when the amendment became effective. **State v. Eric James McDonnell and Daniel A. Wall**, A03-1358, A03-1512 (Minn. App. 08/24/04). www.lawlibrary.state.mn.us/archive/ctappub/0408/opa031358-0824.htm

■ **BATTERED WOMEN’S SYNDROME; IMPEACHMENT UNNECESSARY; EXPERT TESTIMONY.** Appellant was charged and convicted of second-degree assault and various counts of criminal sexual conduct. The victim had told police and paramedics horrendous facts supporting the charges. At trial, however, the victim recanted, stating that the sex was consensual and that she could not remember details of an assault or how she received her injuries. She admitted that she did not want to testify, and further admitted that appellant had put pressure on her to recant. The victim further testified that reviewing statements and photographs did not refresh her recollection. Neither the state nor the defense attempted to directly impeach the victim. The state, however, called a clinical psychologist and expert on battered women’s syndrome to testify about the common characteristics of the syndrome.

Held, where the alleged victim’s testimony is an issue, the district court may admit testimony on battered women’s syndrome, during the prosecution’s case in chief, even if neither party directly attacks the victim’s credibility. This holding is an extension of *State v. Grecinger*, 569 N.W.2d 189 (Minn. 1987), which states that such expert evidence is admissible “if it is introduced after the victim’s credibility has been attacked by the defense.” Finding this statement to be dictum, the Court of Appeals notes that the victim’s credibility is already at issue, regardless of whether formal impeachment takes place. *State v. Elton Perez Vance*, A03-1632 (Minn. App. 08/31/04). www.lawlibrary.state.mn.us/archive/ctappub/0408/opa031632-0831.htm

■ **SENTENCE; BLAKELY; APPRENDI.** Appellant was convicted of murder and given two consecutive sentences subsequent to *Apprendi*. *Blakely*-type issues were not raised on appeal. In a post-conviction motion, appellant claimed the violation of his 5th and 6th amendment rights under *Apprendi* because the factors to support the decision to impose consecutive sentences were not determined by a jury, beyond a reasonable doubt, but by a judge.

Held, the appellant is procedurally barred from raising *Blakely* issues under both *Knaffla*, 243 N.W.2d 737 (1976), which states that issues which are known at the time must be raised on direct appeal. Although *Blakely* was decided subsequent to briefing in this case, it “does not provide a basis to avoid the procedural bar of *Knaffla* because *Blakely* applies *Apprendi* and, like *Apprendi*, it does not specifically address consecutive sentencing.” Furthermore, “... because *Apprendi* was decided before the appellant’s direct appeal, the appellant cannot argue that it provides the basis for a novel legal claim.” *Vernon Neal Powers v. State of Minnesota*, A04-31 (Minn. 10/14/04). www.lawlibrary.state.mn.us/archive/supct/0410/opa040031-1014.htm

■ **SENTENCE; BLAKELY; CAREER OFFENDER ENHANCEMENT.** Pending appellant’s appeal, *Blakely* was decided. Accordingly, appellant modified his challenge on direct appeal, and provided supplemental briefing to address the impact of *Blakely*. Following trial, appellant was convicted of felony theft, where the presumptive sentence of the guidelines was 21 months’ imprisonment. The district court imposed a sentence, however, of 42 months, finding that the appellant was a career offender, under Minn. Stat. §609.1095. This sentence was a finding by the judge that the appellant had five or more prior felony convictions and that the present offense was committed as part of a pattern of criminal conduct.

The Court of Appeals notes that this decision does not affect the Minnesota Sentencing Guidelines, because the double sentence was not for an enhancement on an aggravating factor of the guidelines, but is a statutorily created ground for departure. Departing from *Apprendi*, which finds a prior conviction to be a mere “recidivist factor,” the Court of Appeals concludes that the Career Offender statute’s requirement of a finding of “pattern of criminal conduct” is beyond the scope of the recidivism exception to *Apprendi*, and that the court’s imposition of upward departure under the Career Offender statute based on judicial findings violates the appellant’s 6th Amendment right to a jury determination of all facts essential to his punishment. *State v. Michael Wallace Mitchell*, A03-110 (Minn. App. 10/12/04). www.lawlibrary.state.mn.us/archive/ctappub/0410/opa030110-1012.htm

■ **SENTENCE; BLAKELY; UPWARD DISPOSITIONAL DEPARTURE; NEED NOT BE MADE BY JURY.** Appellant received a dispositional upward departure for felony DWI test refusal. The appellant had a zero criminal history score and the guidelines assigned a presumptive sentence of 36 months with a stay of execution. The district court, however, departed dispositionally, and sent the appellant to prison because of his numerous failures in treatment, his three prior DWI s within ten years, and his posing a threat to public safety. In summary, a trial court judge concluded that the appellant was a “poor candidate” for probation.

Appellant contests the upward dispositional departure, arguing that the reasons for prison ought to have been found by a jury by proof beyond a reasonable doubt, following *Blakely*. The Court of Appeals disagrees, and holds that upward dispositional departures under the Minnesota Sentencing Guidelines are not subject to *Blakely*. The Court of Appeals first analyzes the Minnesota Sentencing Guidelines grid and finds it to be almost identical to the scheme in Washington which *Blakely* examines. First, Minnesota guidelines are not purely “advisory,” but are “in some sense binding,” based upon Minn. Stat. §244.099, subd. 5, which provides that a sentencing court “shall follow” the guideline procedures when pronouncing sentences in a felony case. Second, Minnesota guideline determinations rely on a sentencing grid, which employs a criminal history score. Third, Minnesota, like Washington, is not *required* to depart from the presumptive sentence if an aggravating factor is found.

Hence, “Therefore, although we do not decide that issue, there appears to be no easy way to distinguish *Blakely* based on unique factors in the Minnesota Sentencing Guidelines, and we must address the narrow issue of the application of *Blakely* to Minnesota disposition departures.”

The Court of Appeals holds that upward dispositional departures are not subject to *Blakely*. In other words, factors supporting an upward dispositional departure need not be proven beyond a reasonable doubt and so found by a jury. The Court of Appeals notes that dispositional departures have not typically been governed by offense-related factors, but rather by offender-related issues including social and economic factors that the guidelines normally prohibit. Factors supporting dispositional departures have strayed so far from the offense-related factors listed in the guidelines that dispositional departures are, in essence, like the judicial sentencing judgments made by judges in indeterminate sentencing schemes, the validity of which is conceded in *Blakely*. The court also notes

that dispositional departures were unknown at the time the 6th Amendment was ratified. *State v. Arthur Thomas Hanf*, A04-1058 (Minn. App. 10/19/04). www.lawlibrary.state.mn.us/archive/ctappub/0410/opa041058-1019.htm

■ **SENTENCE; BLAKELY; GUILTY PLEA; AGGRAVATING FACTORS MUST BE ADMITTED BY DEFENDANT.** On a plea to murder, the district court sentenced appellant to a 420-month prison term, which is a 114-month upward durational departure from the presumptive sentence of 306 months. The court grounded its departure on aggravating factors including: particular vulnerability, particular cruelty, abandonment without medical care, and conscious concealment of the body. In the transcript of the defendant's guilty plea, only one of the aggravated factors cited by district court was admitted by the appellant (abandonment). Hence, the sentence is reversed and remanded to district court for resentencing. The Court of Appeals directs the district court that any reliance on a basis for departure must be based "solely on facts admitted by the appellant in his guilty plea." The court follows *Blakely* in requiring any upward departure from the presumptive guideline sentence to be supported by facts proven beyond a reasonable doubt in front of a jury, or by defendant's admission. The court also notes that the Minnesota Sentencing Guidelines are not entirely "advisory," citing Minn. Stat. §244.099, subd. 5. *State v. Kenneth Conrad Conger, Jr.*, A03-1771 (Minn. App. 10/12/04). www.lawlibrary.state.mn.us/archive/ctappub/0410/opa031771-1012.htm

■ **SENTENCE; BLAKELY; WAIVER OF JURY TRIAL; NOT WAIVER OF BLAKELY; DANGEROUS OFFENDER STATUTE.** Appellant waived his right to a jury trial, and was given an upward durational departure based on aggravating factors; in addition, the court applied the dangerous offender provisions of Minn. Stat. §609.1095. The Court of Appeals vacated and remanded the court sentence with the following holdings: (1) the dangerous offender provisions of Minn. Stat. §609.1095, subd. 2 are legislative and were not stipulated and must be examined under *Blakely*; (2) the appellant's waiver of his right to a jury trial does not extend to the sentencing proceeding. It does not constitute a waiver for sentencing enhancement purposes, and nothing in the record supports the appellant's waiver of a jury determination of the facts supporting the imposition of an aggravating sentence; (3) even though the appellant did not argue *Blakely* at trial, the rule was established by the Supreme Court during the direct appeal, and therefore appellant is entitled to benefit from that new rule, citing *O'Meara v. State*, 679 N.W.2d 334 (Minn. 2004). *State v. Bruce Ray Fairbanks*, A04-983 (Minn. App. 11/02/04). www.lawlibrary.state.mn.us/archive/ctappub/0411/opa040983-1102.htm

■ **SENTENCE; BLAKELY; JOINT DISPOSITIONAL AND DURATIONAL UPWARD DEPARTURE; SEVERANCE; DURATION UNCONSTITUTIONAL.** Appellant was convicted of third-degree assault, but acquitted of aiding and abetting second-degree intentional and felony murder, and second-degree unintentional felony murder and first-degree assault. The presumptive sentence, given the computations under the guidelines for third-degree assault, was a stayed sentence of one year and a day. However, the district court imposed an upward durational departure of 60 months, and executed the sentence, constituting a quintuple upward durational departure, as well as a dispositional departure requiring a present commit.

Held, the upward durational departure violated *Blakely*. While not expressly holding, the court discusses the appellant's argument that the sentence negated the jury's verdict: "The jury could not have served that [circuit breaker] function in this case if its verdict of acquittal on the two greater offenses could be effectively negated by a sentence based on judicial findings." The durational departure, based upon particular cruelty and victim vulnerability, is reversed, and sentence remanded. The dispositional departure, however, is upheld, citing *State v. Hanf, supra* (Minn. App. 10/19/2004). The court notes that dispositional departures in Minnesota have not been governed by the mitigating and aggravating factors listed in the guidelines, and are in the nature of indeterminate sentences which may consider whether the defendant is unamenable to probation. *State v. Ross Adams Saue*, A03-1182 (Minn. App. 11/02/04). www.lawlibrary.state.mn.us/archive/ctappub/0411/opa031182-1102.htm

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **DISCRIMINATION CLAIMS.** The 8th Circuit Court of Appeals rejected a pair of race discrimination claims. In one, the court upheld dismissal of a claim by an African-American firefighter that he had been subjected to racial discrimination. Three instances of discipline were justified by "anger and disrespect" he exhibited to his supervisors, and he was not retaliated against because he first complained of discrimination after he was informed of the discipline. This post-disciplinary complaint by the employee constituted "an abuse of the anti-retaliation remedy." *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004).

In a second race discrimination case, the Court upheld dismissal of a wrongful termination claim and a jury verdict for the employer on a failure to promote claim by an Asian-American school administrator. The employee had a number of undisputed performance problems, and the evidence did not show that the employer's decisions were "a pretext for racial discrimination." *Riggs v. Kansas City Public School District*, 385 F.3d 1164 (8th Cir. 2004).

A religious organization was held to be exempt from Minnesota's statutory provision barring discrimination due to sexual orientation. The Minnesota Court of Appeals held that the exemption under Minn. Stat. §363A.26(2) applies to a nonprofit group exclusively employed in evangelical activities after it fired a lesbian employee on grounds that her "lifestyle" was inconsistent with the group's mission. *Thorson v. Billy Graham Evangelistic Ass'n.*, 687 N.W.2d 652 (Minn. App. 2004).

■ **UNEMPLOYMENT COMPENSATION.** The Minnesota Court of Appeals recently rejected four claims for unemployment compensation by employees who quit their jobs without good reason.

In the employee quit after being told by her employer that because of poor attendance, she would be terminated at an undetermined future date, but that she could continue working until her replacement was hired. She then quit, but was held ineligible for unemployment benefits under Minn. Stat.

§ 268.09 Subd. 2(b), which imposes eligibility upon an employee “who chooses to end the employment” while employment “is still available.” Since she could have continued working until the date of her termination, she did not have good cause to quit and, therefore, was disqualified from benefits. *Wickstrom v AquaSeal LLC*, 2004 WL 2283486 (Minn. App. 10/12/04),

An employee who resigned when changes in his construction job site increased his commuting time also was found ineligible for benefits. He was denied unemployment benefits because “an average reasonable worker” would not have quit because of modest increases in commuting time, and he never complained to the employer about the commuting issue before he quit. *Zwakman v Quality Carpentry of Cedar Inc.*, 2004 WL 2283448 (Minn. App. 10/12/04).

An employee who quit her job after receiving criticisms from her boss about her work performance was barred from receiving benefits despite the employee’s claim that her problems stemmed from discrimination due to a disability from illness. The employee’s resignation was attributable to her “poor relationship” with her supervisors, performance problems, and her desire to discontinue her current work schedule, which failed to establish “good cause” for resignation that would allow her to receive benefits. *Schnettler v College of St. Benedict*, 2004 WL 2283501 (Minn. App. 10/12/04),

An employee who quit due to alleged harassment by his supervisor after his request for a pay raise and reduction of hours was denied was also denied unemployment benefits. The evidence reflected that management made “legitimate inquiries” into his work conduct and, furthermore, he never informed the company of the claimed harassment before he resigned. *Larson v. Northeast Entrepreneur Fund, Inc.*, 2004 WL 2340133 (Minn. App. 10/19/04).

The 2003 amendments to the unemployment compensation law were recently addressed, more than a year after they went into effect, by the Court of Appeals. The court held that the modification in the standard for disqualification “applies at the time of the discharge, rather than at the earlier time of the underlying conduct giving rise to the termination.” Deeming an employee ineligible for unemployment compensation benefits, the court held that the change in Minn. Stat. §268.095, which lowers the threshold for discharge, applied to an employee who was fired for borrowing money from other employees after being advised several times by management not to do so. The offending incidents occurred before the statute was changed, and the discharge occurred four days later. The court applied the new definition, as of the date of discharge, to ensure a “clear and definitive” time period for application of the new standard. *Brown v. National American University*, 686 N.W.2d 329 (Minn. App. 2004).

Another statutory change, the reintroduction of the “hot-headed” exception to disqualification, was addressed by the appellate court in September. The court ruled that an employee was not disqualified from unemployment benefits because of a verbal fracas with her boss, which fell within the “single incident” exemption provision of Minn. Stat. §268.095. The so-called “isolated incident” exception, originally a product of common law, had been excluded from consideration by the Legislature in 1998. But the Legislature in 2003 inserted the provision in the statute, and the appellate court applied it to the employee because she was not “disruptive” and the incident was the only occasion of its type during her ten-year tenure. *Grivna v. Riverside Family Dental PA*, 2004 WL 2049996 (Minn. App. 09/14/04).

LEGISLATION

■ **UNEMPLOYMENT COMPENSATION.** Several other changes recently have been made in the Minnesota unemployment compensation laws. Under Minn. §268.085, an employee who voluntarily takes a leave of absence will not be eligible for unemployment compensation benefits. But a medical leave of absence shall not be presumed to be voluntary. Employees on involuntary leave of absence are not covered by this prohibition.

Beginning in 2005, corporate officers and those owning more than 25 percent of a limited liability company will not be eligible for unemployment compensation benefits if they leave their employment. Under Minn. §268.035, the 25 percent threshold that has been applicable to other companies will now be applied to limited liability companies.

The statutory definition for “good reason caused by the employer” to allow the employee to be eligible despite his status in employment has been changed. Under Minn. Stat. §268.095, “good reason” that would allow the receipt of benefits previously was defined as a reason that was directly related to employment for which the employer was responsible and was so significant that it would compel an “average reasonable” employee to quit rather than staying in the employment relationship. The statute also stated that substantial adverse change in wages, hours, or other terms of employment would be considered “good reason to quit”, provided that the change was not brought about because of misconduct by the employee. Under the new provisions, a change in wages may still be considered “good reason” to quit and receive unemployment benefits. However, the legislation deleted the former language describing the change as “significant,” which leaves unresolved whether the new statutory language will be beneficial to employees or employers in resignation-related to disputes

The Minnesota statute governing access by employees to their personnel files has been changed to grant former employees greater rights to their materials. Under Minnesota §181.961, employees may now request to see their personnel files once each year from the end of their employment for an indefinite period. The former statute restricted employees to review their employee records once only and only within a year from the time of their termination.

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ENVIRONMENTAL LAW

JUDICIAL LAW

■ **LOCAL REGULATION OF SEPTIC SYSTEMS; ENFORCEMENT.** The Minnesota Court of Appeals recently held that Minn. Stat. §115.55, which regulates septic systems, does not preempt more stringent local regulations and does not violate the constitutional separation of powers and due process requirements.

In May 2001, Carver County received an anonymous complaint that Robert and Julie Rocheleau were discharging sewage from their septic system into nearby Smith Lake. Carver County Environmental Services inspected the property and asked the Rocheleaus to provide more information about the system. The Rocheleaus' hired a licensed inspector who concluded that the septic system was failing and posed an imminent threat to public health under both state law and a Carver County ordinance. Environmental Services ordered the Rocheleaus to bring their system into compliance within ten months. The Rocheleaus then submitted a design for a new system. Environmental Services rejected this design on grounds that it would not have adequate separation from the seasonal high water table and would not work. Environmental Services told the Rocheleaus to install an at-grade or above-ground system, which would cost \$4,000 to \$7,000 more than the Rocheleaus' proposal. The Rocheleaus then attempted to remedy the problem by modifying the existing system. The Rocheleaus's engineer concluded that the modified system was still failing under applicable regulations, but no longer posed an imminent threat to public health. Environmental Services disagreed and again ordered the Rocheleaus to submit a design for a new system. After several appeals and hearings, the Carver County Board of Commissioners adopted the recommendation of an administrative law judge that Environmental Services' decision be affirmed.

On appeal to the Minnesota Court of Appeals, the Rocheleaus argued, among other things, that Minn. Stat. §115.55 preempts the county ordinance and is unconstitutional because it vests quasijudicial authority in inspector determinations without judicial review, thereby violating the separation of powers requirement, and violates due process by creating irrebuttable presumptions. The court rejected all of the Rocheleaus' arguments. The court held that §115.55 does not preempt local regulation because it expressly provides for local regulation of septic systems and does not express a legislative intent to occupy the field of septic system regulation. The court also held that the statute satisfies the separation of powers and due process requirements because it establishes criteria, rather than creating irrebuttable presumptions, and expressly provides for a hearing and judicial review. *In re Appeal of Rocheleau*, 686 N.W.2d 882 (Minn. App. 2004)

LOOKING AHEAD

■ **CERCLA; CONTRIBUTION ACTIONS.** On October 6, 2004, the U.S. Supreme Court heard oral arguments on the issue of whether a potentially responsible party (PRP) may bring a contribution action against another PRP under Section 113 of the Comprehensive, Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §103, *et seq.*, in the absence of a prior civil action against the PRP who is seeking contribution.

In 1981, Aviall Services bought Cooper Industries' aircraft maintenance operations in Dallas, Texas. Aviall later discovered contamination on the site. Although never sued under CERCLA, Aviall was ordered by the Texas Natural Resource Conservation Commission to clean up the contamination. Aviall Services spent \$5 million to comply with the commission's order. Aviall then brought an action for contribution against Cooper Industries under Section 113 of CERCLA.

Cooper Industries argued that a PRP may not bring a Section 113 contribution action unless and until a civil action has been brought against that PRP. In support of its argument, Cooper points to the first sentence of Section 113(f), which states that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section [107(a)] of this title, during or following any civil action under section [106] of this title or section [107(a)] of this title." [emphasis added] Aviall, on the other hand, points to the last sentence of Section 113(f), which states that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [106] of this title or section [107] of this title."

The case reached the Supreme Court after the U.S. Court of Appeals for the 5th Circuit, sitting *en banc*, reversed an earlier panel decision and held (10-3) for Aviall Services. *Aviall Services v. Cooper Industries*, 278 F.3d 416 (5th Cir. 2001), *rev'd* by 312 F.3d 677 (5th Cir. 2002). The 5th Circuit Court of Appeals found support for its decision in the fact that the 2nd, 3rd, 4th, 6th, 7th, 8th, 9th, and 10th circuits have all allowed contribution claims to go forward in the absence of civil actions against the parties seeking contribution. *Cooper Industries Inc. v. Aviall Services, Inc.*, U.S., No. 02-1192. A decision is expected later this Term.

— ROBERT DEVOLVE
Leonard Street and Deinard

FEDERAL PRACTICE

JUDICIAL LAW

■ **NOTEWORTHY DECISIONS.** The 8th Circuit held that the Supreme Court's *Desert Palace* decision (*Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148 (2003)) does not affect the use of the all-too-familiar *McDonnell Douglas* burden-shifting in response to a summary judgment motion in a Title VII case. Judge Magnuson, sitting by designation, wrote a lengthy concurrence arguing that the 1991 amendments to the Civil Rights Acts had eliminated any need for courts to rely on *McDonnell Douglas*. (The nonprocedural elements of this case are addressed at greater length under the "Employment Law" heading, *supra*.) *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004).

Chief Judge Rosenbaum denied plaintiffs' Fed. R. Civ. P. 59(e) motion, describing it as a "knowing sophistry" and an attempt to circumvent the limitations on motions to reconsider under Local Rule 7.1(g), and further noted that plaintiffs' prior attempt to seek leave to amend their Complaint failed to comply with Local Rule 15.1. *In Re Nash Finch Co. Sec. Lit.*, 338 F. Supp. 2d 1037 (D. Minn. 2004).

Despite the wishes of both parties, Judge Kyle declined to exercise supplemental jurisdiction over the plaintiff's state law claims following the grant of summary judgment on the plaintiff's federal claims. *Plante v. Foster Klima & Co.*, 2004 WL 2222318 (D. Minn. 09/30/04).

Judge Davis denied numerous plaintiffs' motions to dismiss without prejudice, finding that the defendants would be "clearly prejudiced," as they would "lose the beneficial effects of many legal rulings made thus far," and that plaintiffs' explanation for seeking dismissal was "questionable." *In Re Baycol Products Lit.*, 2004 WL 2296817 (D. Minn. 10/07/04).

Judge Kyle denied the plaintiff's motion to remand following the defendant's removal on the basis of diversity jurisdiction, finding that the amount in controversy was greater than \$75,000 where the plaintiff sought potential future benefits under a disability insurance policy. *Stengrim v. Northwestern Mut. Life Ins. Co.*, 2004 WL 2390070 (D. Minn. 10/25/04).

LOOKING AHEAD

■ **SUPPLEMENTAL JURISDICTION; GRANT OF CERTIORARI.** On more than one occasion, this column has discussed the impact of 28 U.S.C. §1367 on claims by plaintiffs in diversity class actions who are unable to meet the jurisdictional threshold. The Supreme Court has now granted certiorari in two cases involving the scope of supplemental jurisdiction under 28 U.S.C. §1367, with the cases consolidated for oral argument.

In the 1st Circuit case, the primary plaintiff was a nine-year old child who sustained serious injuries after cutting her finger on a can of tuna fish, and subsequently filed a diversity action in the District of Puerto Rico. Relatives also sued for past and future medical expenses (said to be approximately \$30,000) and emotional distress damages. The trial court found that none of the plaintiffs met the \$75,000 jurisdictional threshold and dismissed the case. However, the 1st Circuit found that the physical injuries of the primary plaintiff were serious enough to meet the amount in controversy requirement, which then required it to decide whether 28 U.S.C. §1367 permits supplemental or pendent-party jurisdiction over claims by plaintiffs who cannot independently meet the jurisdictional requirements of 28 U.S.C. §1332. Examining the text of the statute at length, and touching on the legislative history as well, a majority of the 1st Circuit panel held that 28 U.S.C. §1367 did not authorize pendent-party jurisdiction.

In the 11th Circuit case, a Florida district court certified for interlocutory review its decision to exercise supplemental jurisdiction in a diversity class action over claims by class members who could not meet the jurisdictional minimum. The 11th Circuit found that 28 U.S.C. §1367 "clearly and unambiguously" had overruled the Supreme Court's decision in *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 94 S. Ct. 505 (1973), which required all class plaintiffs to meet the jurisdictional threshold.

As of this writing, the 4th, 5th, 7th, 9th and 11th circuits have found that 28 U.S.C. §1367 allows supplemental jurisdiction over claims by pendent plaintiffs and/or overruled *Zahn*, while the 1st, 3d, 8th and 10th circuits have held otherwise. A previous grant of certiorari by the Supreme Court in *Free v. Abbott Labs, Inc.*, 529 U.S. 333, 120 S. Ct. 1578 (2000), resulted in an affirmance without opinion following a 4-4 split.

Ortega v. Star-Kist Foods, Inc., 370 F.3d 124 (1st Cir.), cert. granted, 125 S. Ct. 314 (2004); *Allapattah Services, Inc. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003), cert. granted, 125 S. Ct. 317 (2004).

— JOSH JACOBSON
Law Offices of Josh Jacobson

INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **COPYRIGHT INFRINGEMENT; SUBSTANTIAL SIMILARITY; RIGHT TO PREPARE DERIVATIVE WORK.** The 8th Circuit Court of Appeals discussed an important nuance between the substantial similarity element of copyright infringement and the exclusive right to prepare a derivative work based on another's copyrighted work. In reversing the district court's grant of summary judgment of infringement, the appellate court held that there were issues of fact as to whether appellant Mulcahy's copyright was invalid because it was a derivative work of another's copyrighted work. Mulcahy's copyrighted work was based on the copyrighted work of a third party, PMI's PMBOK. In other words, if Mulcahy's copyrighted work was a derivative work, itself an infringement of PMI's exclusive right to prepare derivative works, Mulcahy's copyright would be invalid.

The test for whether something is a derivative work is essentially the same as whether there has been copyright infringement — substantial similarity between the works. However, the appellate court noted that while copyright infringement occurs only when the total concept and feel of the works are substantially similar, a derivative work turns on the qualitative nature of the taking. A work may be derivative even if it has a different overall concept and feel from the original work but there was a qualitative taking. The appellate court remanded, despite a different overall look and feel between Mulcahy's work and that of PMI's, for a determination of the qualitative nature of the taking from PMI by Mulcahy. *Mulcahy v. Cheetah Learning LLC*, No. 03-3112, 2004 U.S. App. LEXIS 21639 (8th Cir. 05/10/04).

■ **WILLFUL PATENT INFRINGEMENT; DUTY OF CARE; OPINION OF COUNSEL.** The Court of Appeals for the Federal Circuit, *en banc*, overruled longstanding willful-patent-infringement precedent that provided for an adverse inference when a defendant accused of patent

infringement did not either obtain or produce an opinion of counsel. A duty of care not to infringe a patent arises when one becomes aware of another's patent. This duty is often satisfied by obtaining an opinion from a qualified patent lawyer that the patent is invalid or not infringed, or both. Dana Corporation and Haldex were aware of Knorr-Bremse's patents. Dana obtained an opinion of counsel and Haldex relied on Dana's opinion. After being sued for patent infringement, however, both refused to produce the opinion. The district court inferred from their refusal that the opinion was unfavorable. The district court gave an instruction that an adverse inference could be drawn and willful infringement was found.

The appellate court overruled and remanded for a new determination of willful infringement. The appellate court held that no adverse inference arises when (1) a party asserts the attorney-client privilege and declines to produce an opinion of counsel or (2) when a party chooses not to obtain an opinion of counsel. The appellate court explained that the adverse-inference rule had come to distort the attorney-client relationship by eroding full and open communication between a client and an attorney. The court also noted the expense and burden of having to obtain an opinion for every known potentially adverse patent. **Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH. v. Dana Corp.**, No. 01-1357, 2004 U.S. App. LEXIS 19185 (Fed. Cir. 09/13/04).

■ **PATENTS; ASSIGNOR ESTOPPEL.** Judge Magnuson applied the equitable doctrine of assignor estoppel to prevent Ameritek from challenging the validity of the plaintiff's patents. The doctrine of assignor estoppel prevents one who sells his patent (assignor) from later claiming it is of no value (invalid). The theory is simple: he who benefits from assigning something for value should not be able to later claim it had no value.

Dane sued Ameritek claiming that Ameritek's cart retrievers infringe two patents invented by Dominquez and assigned to Dane. Dominquez had gone to work for Ameritek, however, and was now willing to say that the patents bearing his name were invalid despite his previous assignment to Dane. The court estopped Ameritek from challenging the validity of the patents, however, by invoking the doctrine of assignor estoppel which not only bars the assignor (Dominquez) from challenging validity but also those in privity with the assignor — in this case Ameritek who hired Dominquez as its chief engineer to compete with Dane. **Dane Industries, Inc. v. Ameritek Industries, LLC**, No. 03-3488, 2004 U.S. Dist. LEXIS 21035 (D. Minn. 09/30/04).

— TONY ZEULI
— TOM LEACH
Merchant & Gould PC

JUVENILE LAW

JUDICIAL LAW

■ **CHILD CUSTODY; UNRELATED RESPONDENTS; CHILD PROTECTION PROCEEDING.** Where an appellant father challenged a district court's denial of his motion to vacate an order awarding custody of his child to unrelated respondents in the context of a juvenile court child protection proceeding, the Minnesota Court of Appeals, in an unpublished decision, reversed the district court's denial of the motion and remanded for the district court to address appellant's rights concerning the child.

The case was commenced by the county as a CHIPS proceeding. The mother and county stipulated to a transfer of custody to friends of the mother. Although the father was given notice of and was represented at the CHIPS hearings, he was not served or provided with notice of the custody hearings or any subsequent court orders. The mother contacted him and told him only that the county had taken custody of their child, had placed their child in foster care, and provided him with the name and phone number of the county social worker. Throughout this time, the father and his family had attempted to obtain information on the child, while the mother and her family refused to cooperate.

The father and his family were ultimately unsuccessful in obtaining information from the county. When the father contacted the county social worker, he was told that he had not signed either the child's birth certificate or recognition of parentage. When the father informed her that she was mistaken, she informed him that until he provided her with originals of the papers, she could not release information regarding the child to him.

After the father was formally adjudicated as the father of the child, he filed a motion to intervene in the custody proceedings, requesting that the district court vacate the prior custody ruling. The district court allowed the father to intervene, but denied his motion to vacate the custody order, finding that he failed to timely make the motion and that the lack of notice did not deprive him of his constitutional rights.

On appeal, the Court of Appeals concluded that whether the "reasonable inquiry" standard required under the Juvenile Protection Rules was complied with is a factual determination made on a case-by-case basis. Reviewing the record, the Court of Appeals agreed that the county and the third parties failed to make a reasonable inquiry to locate father's address and to provide it to the district court. The Court of Appeals then reversed the district court's denial of the father's motion and remanded the matter to the district court to address the father's rights regarding the child. The Court of Appeals found it appropriate to have the father's rights to the child adjudicated so as to avoid future custody litigation.

The court also set forth the standard applicable to this custody proceeding on remand, concluding that the third-party custody standard set forth in *Wallin v. Wallin*, 187 N.W.2d 627, 629-30 (1971) was more appropriate in this case than the "endangerment standard" found in Minn. Stat. §518.18. The *Wallin* standard provides that a biological parent would be entitled as a matter of law to custody of his or her minor child unless there has been established on the biological parent's part neglect, abandonment, incapacity, moral delinquency, instability of character, or inability to furnish the child with needed care, or unless it has been established that such custody oth-

erwise would not be in the best welfare and interest of the child. 187 N.W.2d at 630. *In re the Welfare of the Minor Child E.P.K.*, No. A03-2017 (Minn. App. 09/28/04).

■ **INDIAN CHILD WELFARE ACT; TERMINATION OF RIGHTS; NOTIFICATION; EVIDENCE OF TRIBAL MEMBERSHIP.** Given that there are currently several legislative initiatives underway regarding the federal Indian Child Welfare Act (“ICWA”) and its impact in juvenile court proceedings, a recent case from the California Court of Appeal, 4th District, has significant analysis. A juvenile court in a state-initiated action for the involuntary termination of a couple’s parental rights was held to not have erred by proceeding without notice pursuant to ICWA. Although the parents had given conflicting statements regarding their own Indian heritage, neither parent complied with social services workers’ frequent requests for specific information regarding any Native American lineage that the child might have. The trial court thus ruled that notification provisions of ICWA, (25 U.S.C. §1912) were inapplicable and it went ahead and terminated the parents’ rights.

The appellate court stated that while California courts have held that a duty to give notice to a tribe under ICWA in a termination proceeding can arise even in the absence of evidence that the child or parent is a tribal member, in this case the father affirmatively stated that he was not a member of any tribe. The court found that this in fact disproved membership. The court reasoned that at some point, one simply has to take a parent’s word for these things. While the mother said she thought there was some Indian lineage in her family, she never responded to the social worker’s request for more information. She also, in a previous proceeding, had said that she did not have any Indian heritage. The court found that she was impeached by that prior statement, and that the trial court had no principled way to prefer her statement that she might have Indian heritage over her statement that she did not.

Riverside County, Department of Public Social Services v. R.W., No. E035622 (Cal. Ct. App. 4th, 09/15/04).

LEGISLATION

On October 5, 2004, the United States House of Representatives approved by voice vote the **Safe and Timely Interstate Placement of Foster Children Act of 2004** (HR4504), designed to facilitate the placement of children across state lines for foster care and adoption. The bill stipulates time requirements for the completion of home studies for children placed across state lines and revises some of the timeframes from the original bill introduced in June by House Majority Leader, Tom Delay (R-TX). The companion measure in the Senate (S2779) was referred to the Senate Committee on Finance, where it is currently delayed as a result of a provision that allows states to opt out of the federally mandated background check requirements for prospective foster and adoptive parents. To read the full text of the House bill, go to <http://thomas.loc.gov/> and search for HR4504 in the bill number field.

The United States Senate passed the **Indian Child Protection and Family Violence Prevention Reauthorization Act of 2004** (S1601), which requires the recognition of tribal licensing or approval of guardianships, foster or adoptive homes, or institutions by an Indian tribe as equivalent to state licensing and approval. The legislation, passed last month, was sponsored by Senator Bill Nighthorse Campbell (R-CO) and cosponsored by Senators Tom Daschle (D-SD), Pete Domenici (R-NM), Orrin Hatch (R-UT), Daniel Inouye (D-HI), and Tim Johnson (D-SD) and was passed by unanimous consent. In the House, the legislation is being considered by the Judiciary Committee. To read the text, go to <http://thomas.loc.gov/> and search for S1601 in the bill number field.

COURT RULES

■ **RULES OF ADOPTION PROCEDURE, GUARDIANS AD LITEM.** By order dated September 30, 2004, the Minnesota Supreme Court has now promulgated stand-alone Rules of Adoption Procedure that will govern all adoptions commenced in Minnesota effective January 1, 2005. The Rules of Adoption Procedure are quite comprehensive. They set out the scope and purpose of the rules, include definitions, and discuss how these rules will interact with other procedural rules and statutes. The rules are designed to govern all adoptions in the state of Minnesota, from simple uncontested adoptions to contested adoptions where there are competing adoption petitions pending. The rules set forth requirements for discovery, motion practice, party status, intervention, rights to representation, the roles of the guardian ad litem, commencement of actions, discussion of the various types of adoption proceedings, requirements of petitions, how trials are to be conducted, post-trial procedures, and appeals.

The Juvenile Protection Rules Committee was also asked to recommend certain amendments to various rules affecting guardians ad litem in family and juvenile court proceedings. Such rules are found in the Minnesota Rules of Guardian ad Litem Procedure, the Minnesota Rules of Civil Procedure, the Minnesota General Rules of Practice — Rules Governing Civil Actions, the Minnesota General Rules of Practice — Rules of Family Court Procedure, the Minnesota Juvenile Delinquency Rules, and the Minnesota Rules of Juvenile Protection Procedure. The amendments govern all actions in which a guardian ad litem is appointed in Minnesota’s juvenile and family courts after 12:00 a.m. on January 1, 2005.

In general, the purpose of these amendments to the rules was to streamline rules governing guardians ad litem in juvenile court and family court. Several of the rules are a response to the transition that occurred several years ago to a uniform system in which all 56 of the state’s guardian ad litem programs were consolidated into one centralized state-run program.

Training and supervision procedures are now no longer in the Rules of Procedure. Guardians will now be selected by district managers rather than by judges. There is now a “suspension” option for addressing inappropriate guardian actions, and judicial discretion in removing guardians now has new limitations. The rules also clearly distinguish between the generic use of the term “guardian ad litem,” and the guardians who work in juvenile and family court under the jurisdiction of these new rules. Guardians working outside of juvenile and family court do not come under these rules.

With regard to the qualification, recruitment, screening, training, selection, supervision, and evaluation of guardians ad litem, the administration and oversight of these issues is now the responsibility of the Office of State Court Administrator. These matters will be provided for in a separate standards manual. There is, however, a remaining statement of the minimum of qualifications a guardian ad litem must possess contained within the procedural rules. The committee had initially planned to delete this rule and include it in the standards manual, but public comments convinced the Supreme Court to keep it in the procedural rules.

Under the new rules, the judge now orders the appointment of a guardian ad litem, while the guardian ad litem manager picks the individual person to serve as the guardian. The judge could still reject someone that the program puts forward, but could not hand select a guardian for the case at hand. The rules also limit the judge's discretion in deciding whether or not to remove a guardian ad litem from a particular matter. Removal used to be at the discretion of the judge who appointed the guardian ad litem. Now, under some circumstances, the guardian must be removed. Also, guardians ad litem may be suspended rather than removed from a matter. Suspension would occur generally for some instances of minor error that the guardian ad litem may commit that would just need remedial action, such as additional training in a particular area. This would allow for a corrective action rather than a complete discharge. The complaint procedure is now a separate document that will eventually be incorporated into the policy manual.

LOOKING AHEAD

■ **ADOPTION BY GAYS AND LESBIANS; FLORIDA LAW CHALLENGED.** The American Civil Liberties Union has asked the United States Supreme Court to hear an appeal in a case challenging the Florida law barring gays and lesbians from adopting, the only such explicit prohibition in the country. The ACLU's request on October 1st came after the 11th U.S. Circuit Court of Appeals, in a 6-6 ruling (previously discussed in this column), declined this summer to reconsider the January decision in the *Lofton* case. Although gays and lesbians are excluded from adopting in Florida, the state permits them to be foster parents. The United States Supreme Court is expected to decide by early January whether to hear the case, which involves four gay men who are raising six foster children.

■ **ADOPTION BY SAME SEX COUPLES; BIRTH CERTIFICATES.** Lambda Legal filed a brief with the Virginia Supreme Court on October 25, 2004, seeking birth certificates for children who were born in Virginia and adopted by same-sex couples in other states. The case involves two families from Washington D.C., and one from New York. In February of this year, a lower court ruled that the state was not required to issue new birth certificates with the names of both children's adoptive parents, stating that such an action would conflict with Virginia's policy prohibiting joint adoption by unmarried couples. The brief contends that birth certificates should be reissued since such adoptions are allowed in other states and thus should be honored.

— GARY A. DEBELE
Walling, Berg & Debele PA

REAL PROPERTY

JUDICIAL LAW

■ **LANDLORD'S LIENS.** Michael Boswell (Boswell) entered into an installment contract with Conseco Loan Finance Company (Conseco) for the purchase of a manufactured home. In connection with the transaction, Conseco acquired a personal property security interest in the manufactured home. Boswell also leased a lot in a manufactured home park from Uniprop Homes (Uniprop). Boswell subsequently defaulted under the terms of both the contract and the lease agreement. Boswell abandoned the home on the leased premises where it was stored by Uniprop. Claiming storage and preservation costs, Uniprop published notice of a sale of the manufactured home. The county sheriff held an execution sale of the manufactured home at which sale Uniprop bought the home. Conseco then brought an action contending that its security interest held priority over Uniprop's interest. The district court granted summary judgment in favor of Conseco and the Court of Appeals affirmed. Uniprop contended that it held a lien against the home by virtue of Minn. Stat. §504B.365, which gives a landlord a lien for the costs of removing and storing a tenant's property and which could be enforced regardless of Conseco's security interest. The Court of Appeals held that the statute allows a lien only if the property is removed from the leased premises by the landlord. Because Uniprop stored the home on the leased premises, it did not have a lien against the home, but rather merely had a claim against Boswell for the storage costs. Accordingly, Conseco's security interest was superior to any interest held by Uniprop. Affirmed. *Conseco Loan Finance Co. v. Boswell*, A04-161 (Minn. App. 10/19/04). www.lawlibrary.state.mn.us/archive/ctappub/0410/opa040161-1019.htm

■ **NONCONFORMING USES.** Clear Channel entered into a lease with the St. Louis Park post of the VFW to maintain a billboard sign on the VFW building. Subsequently, the city of St. Louis Park (city) adopted an ordinance that rendered the sign a nonconforming use. During the term of the lease, the VFW sold the property to Premier Equity Investments (Premier), which intended to turn the second floor of the building into office space. The city granted a conditional use permit (CUP) for the use, but required that the property be made conforming, which included a requirement that the sign be removed. Clear Channel contended that the requirement constituted a taking of its leasehold interest and that the city was required to pay just compensation for the taking. The district court granted summary judgment in favor of the city and the Court of Appeals affirmed in part and remanded. The critical inquiry on appeal was whether the city's actions altered the terms of the lease. If that were the case, the city could be required to compensate Clear Channel. The Court of Appeals concluded that the city's actions had not altered the terms of the lease, because the sign could have remained if the property owner opted to forgo its development plans. Moreover, the city's decision did not deprive Clear Channel of any rights under the lease. For example, if the removal of the sign would constitute a breach of the lease agreement, Clear Channel retained all remedies available

in the event of such a breach. Accordingly, the city was not required to compensate Clear Channel. The Court of Appeals nevertheless remanded the case because the district court had not made sufficient findings to allow review of the court's grant of summary judgment on other claims asserted by Clear Channel. Affirmed in part and remanded. **St. Louis Park Post No. 5632 v. City of St. Louis Park**, A04-500 (Minn. App. 10/12/04). www.lawlibrary.state.mn.us/archive/ctappub/0410/opa040500-1012.htm

— C.J. DEIKE
Edina Realty Home Services

TAX

ADMINISTRATIVE ACTIONS

- **GUIDANCE ON REPORTING DIVIDENDS FROM FOREIGN CORPORATIONS.** The Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA) sets out special rules applicable to foreign dividends. If a dividend satisfies those rules, it is eligible for a reduced tax rate. The Treasury Department and the IRS have extended the simplified procedures previously delineated in Notice 2003-79 regarding information reporting of dividends received from either a domestic or "qualified foreign" corporation that may be eligible for the reduced rates. The previous procedures allowed an individual to identify the amounts of dividends eligible for the reduced rate in a separate box on Form 1099-DIV. Notice 2004-71 extends those procedures for information reporting of foreign dividends to 2004. TDNR JS-2051; Notice 2004-71.
- **FINAL REGULATIONS: INFORMATION REPORTING OF DISCHARGE OF INDEBTEDNESS:** The IRS has adopted final regulations relating to information reporting requirements for discharges of indebtedness by organizations for which lending money is a significant trade or business. The final regulations are applicable to discharges of indebtedness occurring on or after January 1, 2005, and include amendments to existing regulations that address applicable entities such as executive, judicial and legislative agencies. The final rules provide a definition of "gross income from the lending of money" which includes income from interest, gains on the sale or other disposition of indebtedness, penalties related to indebtedness and fees related to the indebtedness. In addition, the final rules state that money lending includes acquiring indebtedness from a prior holder of indebtedness, in addition to acquiring indebtedness from the debtor when the debt originated. Finally, the new regulations provide that lending money is a significant trade or business of an organization in a calendar year if the organization lends money on a regular and continuing basis during the calendar year. T.D. 9160.
- **IRAQ; SPECIAL FOREIGN TAX CREDIT RESTRICTIONS:** The Treasury Department has announced that the foreign tax credit restriction no longer applies to income and taxes attributable to Iraq. The IRS has updated Rev. Rul. 95-63 which lists countries subject to the foreign tax credit rules and other restrictions by adding an ending date of June 27, 2004 for Iraq. As of that date, Code Sec. 901(j) restrictions do not apply to that country. Special rules in Code Secs. 901(j) and 952(a)(5) generally deny foreign tax credits and impose other restrictions in the case of income attributable to nations which have been identified as supporters of international terrorism or with which the United States does not conduct diplomatic relations. TDNR JS-2045; Rev. Rul. 2004-103
- **U.S. — SRI LANKA TAX TREATY RATIFIED.** The IRS has announced that the United States and Sri Lanka have recently exchanged instruments of ratification for a new income tax treaty. Treaty provisions relating to withholding tax at the source are effective for amounts paid or credited on or after September 1, 2004, and provisions relating to all other taxes are effective for tax periods beginning on or after January 1, 2004. Announcement 2004-81.
- **CORRECTIONS TO FINAL REGULATIONS ADDRESSING STOCK OPTIONS:** A corrective amendment to final regulations, effective August 3, 2004, has been issued by the IRS with regard to regulations addressing certain taxpayers who participate in the transfer of stock pursuant to the exercise of incentive stock options and the exercise of options granted pursuant to an employee stock option plan. T.D. 9144.
- **GUIDANCE ON TREATMENT OF FOREIGN CORPORATION DISTRIBUTIONS:** The IRS has issued guidance addressing the treatment as qualified dividend income of distributions, inclusion, and other amounts received by or included in the income of individual shareholders as ordinary income from foreign corporations, subject to certain anti-deferral regimes. Distributions of earnings and profits from a controlled foreign corporation to an individual that were not previously taxed are qualified dividend income if the controlled foreign corporation is a qualified foreign corporation. However, inclusions from a CFC and deemed or actual distributions from a foreign personal holding company, a foreign investment company, or a passive foreign investment company are not qualified dividend income. The determination of whether a corporation is a passive foreign investment company is made on a shareholder-by-shareholder basis. The guidance also describes the rules for determining whether income is qualified dividend income and generally outlines the anti-deferral regimes applicable to controlled foreign corporations. Notice 2004-70.
- **GUIDANCE REGARDING FOREIGN ENTITIES TREATED AS CORPORATIONS.** The Treasury Department and the IRS have issued guidance regarding the classification of certain European business entities for U.S. tax purposes. Notice 2004-68 updates the list of entities that are now classified as "per se" corporations for U.S. tax purposes. The new list includes Societas Europaea (SE), a new kind of public limited liability company in the European Union, and public limited liability companies formed under the laws of Estonia, Latvia, Liechtenstein, Lithuania and Slovenia. TDNR JS-1997; Notice 2004-68.
- **GUIDANCE REGARDING CORPORATE REDEMPTIONS OF STOCK HELD BY ESOP.** The Chief Counsel's Office has issued guidance for its attorneys regarding deductions claimed by corporate taxpayers for redemptions of stock held by employee stock ownership plans (ESOP). According to Chief Counsel, Code Secs. 162(k), 302 and 402(k) properly disallow deductions for payments made to redeem stock held by an ESOP which are then used to make distributions to terminating participants. The notice addresses the primary arguments

for disallowing deductions for stock redemption payments to an ESOP found in Rev. Rul. 2001-6 and also addresses the 9th Circuit Court of Appeals decision in *Boise Cascade*, which held that such payments are deductible. Chief Counsel Notice CC-2004-038.

■ **REIMBURSEMENT FOR EMPLOYER-PROVIDED PARKING NOT EXCLUDABLE FROM EMPLOYEES' INCOME:** The IRS found that payments made pursuant to arrangements in which employers reduced their employees' salaries in exchange for a nontaxable benefit and then "reimbursed" their employees for some or all of the cost of that benefit were not excludable from the employees' gross income under Code Sec. 132(a)(5). The payments deemed "reimbursements" were not excludable because the employees did not incur any actual reimbursable expenses. TDNR JS-1974; Rev Rul. 2004-98.

■ **FINAL DRAFT OF SCHEDULE M-3.** The IRS and the Treasury Department have released the final draft version of Schedule M-3, Net Income (Loss) Reconciliation for Corporations with total assets of \$10 million or more. This schedule is generally used by companies filing Form 1120 and reporting total assets of \$10 million or more. There are no further changes anticipated to the schedule and the final version will likely be released in December of 2004. TDNR JS-2058

■ **MINNESOTA INTEREST RATE REMAINS AT 4 PERCENT.** The interest rate on unpaid Minnesota taxes and refunds will remain at 4 percent for 2005. This interest rate, retained from 2004, is the lowest rate imposed on delinquent Minnesota tax payments since the 1950s. MNDOR News Release 10/20/04.

JUDICIAL LAW

■ **FRAUD PENALTY APPLIED TO CASH-BASED ENTREPRENEUR.** A Haitian entrepreneur failed to report significant amounts of income from his Florida tax preparation and immigration services businesses. He was found liable for the civil fraud penalty under Code Sec. 6663. The taxpayer voluntarily reported less than 10 percent of his taxable income for the year in question. The Tax Court relied on five badges of fraud to find that the fraud penalty applied to the entire understatement of income. The badges of fraud included an understatement of a substantial portion of the taxpayer's income, failure to keep adequate books and records and denying the existence of those records even though they were later produced by the taxpayer's accountant, implausible and inconsistent behavior, failure to cooperate with examiners, and conducting a business entirely in cash, thus creating an opportunity to conceal income. *Valbrun v. Comm'r*, TC Memo 2004-242 (2004).

■ **EX-SPOUSE WITH REASON TO KNOW OF UNDERSTATEMENT NOT ELIGIBLE FOR INNOCENT SPOUSE RELIEF.** Although a taxpayer and her husband separated in the year in question, they still filed a joint return for that particular year. The taxpayer's husband prepared the return which omitted approximately \$30,000 of income. The taxpayer did not review the return before she signed it. However, because she knew or had reason to know of the understatement and the amount of such understatement, she was not eligible for relief under Code Sec. 6015(b). Furthermore, she was not eligible for relief under Code Sec. 6015(c) which provides for allocation of tax liability among filers because *her* omitted income gave rise to the deficiency. Finally, because the unpaid liability is not allocable to the nonrequesting spouse, she was not eligible for relief under Code Sec. 6015(f). *Giles v. Comm'r*, T.C. Summary Opinion 2004-145 (2004).

■ **TAXPAYER ENTITLED TO HEAD OF HOUSEHOLD STATUS.** A married taxpayer qualified for head of household status because he proved that his wife did not live with him during the last six months of the year. In addition, the taxpayer qualified for the child care expense credit. He was not, however, entitled to deductions for various trade or business expense as "other" expenses on Schedule C because he was unable to substantiate the amounts in question. Furthermore, the taxpayer's itemized deduction for home mortgage interest was disallowed because he could not substantiate that he paid the amounts claimed or that he actually owned any property. Finally, he was denied most of his charitable deductions due to a lack of substantiation and because the deductions accounted for 22 percent of his adjusted gross income for the year in question. *Hubbard v. Comm'r*, T.C. Summary Opinion 2004-148 (2004).

■ **NO PROOF OF DELIVERY FOR NOTICE OF DEFICIENCY.** The IRS had the burden of showing that a taxpayer received a notice of deficiency or otherwise had the opportunity to dispute the deficiency and failed to do so. Specifically, the IRS failed to introduce any evidence that the notice of deficiency addressed to the taxpayer was actually submitted to the United States Postal Service for delivery or that the Postal Service attempted delivery of the notice. In addition, the taxpayer's attorney did not forward the notice to him, discuss it with him, or file a Tax Court petition on his behalf despite the fact that the taxpayer relied on his attorney to handle matters for him before the IRS. Therefore, the taxpayer was entitled to contest his underlying tax liability at a Collection Due Process hearing. *Calderone v. Comm'r*, T.C. Memo. 2004-240 (2004)

■ **TAXPAYERS FAIL TO MEET BURDEN OF PROOF.** A dentist and his wife who failed to report any income or taxes were not relieved of the burden of proof regarding unreported income. The taxpayers did not testify, call any witnesses, or otherwise introduce any credible evidence to show error in the IRS's reconstruction of their income. In addition, the taxpayers failed to cooperate with the IRS's numerous requests for documents, records and information. *Rinn v. Comm'r*, T.C. Memo. 2004-246 (2004).

■ **RES JUDICATA BARS INNOCENT SPOUSE RELIEF.** A divorced taxpayer was prevented from claiming equitable innocent spouse relief under Code Sec. 6015(f) by the doctrine of *res judicata*. The court determined that the doctrine, outlined in Code Sec. 6015(g), applies equally to all claims for relief under Code Secs. 6015(b), (c) and (f). A judgment had previously been entered against the taxpayer and his wife for a deficiency which the taxpayer failed to appeal. In addition the court found that he had meaningfully participated in a prior proceeding regarding a notice of deficiency for the tax year at issue and, although he was put on notice of his right to claim innocent spouse relief, failed to do so during that proceeding. *Noons v. Comm'r*, T.C. Memo. 2004-243 (2004).

■ **TEN PERCENT EARLY WITHDRAWAL PENALTY APPLIED TO LUMP SUM DISTRIBUTION.** A taxpayer was liable for the 10 percent

additional tax on early distributions from a qualified plan. The taxpayer retired from the New Orleans Police Department at age 50 and received the balance of his plan as a lump-sum distribution or one-time payment. The exception from the early withdrawal penalty applied to funds received as a series of equal periodic payment and thus did not apply to a one-time payment. *Smith v. Comm'r*, T.C. Summary Opinion 2004-146 (2004).

■ **OFFER IN COMPROMISE PROPERLY REJECTED.** The IRS did not abuse its discretion by failing to abate interest with respect to a married couple's liability nor did it abuse its discretion in rejecting the taxpayers' offer in compromise. Abatement of interest between the date the taxpayers filed their return and the date the IRS commenced the audit is not permitted under Code Sec. 6404(e). The participation of several IRS officers in the audit did not establish delay or error on behalf of the IRS and the IRS's decisions on how to proceed during the audit required the exercise of judgment and were not ministerial acts. Finally, the taxpayers' short-term debts, the expenses of deterred maintenance on their home, and their need to fund their retirement savings did not rise to the level of economic hardship outlined in Reg. Sec. 301.6343-1(b)(4). *Eberhardt v. Comm'r*, T.C. Summary Opinion 2004-147 (2004).

■ **TAXPAYER NOT ALLOWED TO RAISE TAX LIABILITY ON APPEAL.** A taxpayer was precluded from raising his underlying tax liability during an appeal of an adverse notice of determination following a Collection Due Process hearing by Code Sec. 6330(c)(2)(B). The taxpayer did not challenge the appropriateness of the collection action or raise any collection alternatives in his petition. Instead, he only challenged his underlying tax liabilities. The notice was sent to the taxpayer's last known address which was the same address indicated on his petition challenging the IRS's collection action. Furthermore, the taxpayer did not claim that he did not receive the notice and there was no evidence that the notice was returned as unclaimed or undeliverable. *Nguyen v. Comm'r*, T.C. Summary Opinion 2004-144 (2004).

■ **ASSIGNMENT OF LOTTERY WINNINGS DID NOT WARRANT CAPITAL GAINS TREATMENT.** A taxpayer assigned a right to receive future annual lottery payments in exchange for a lump sum payment. This assignment did not convert the character of the income from ordinary income to capital gains income from the sale of a capital asset. The taxpayer had no underlying investment of capital and there was no asset appreciation. Therefore, the payment was properly treated as ordinary income. *Watkins v. Comm'r*, T.C. Memo. 2004-244 (2004).

■ **IRS ABUSE OF DISCRETION; "UNTIMELY" REQUEST FOR INNOCENT SPOUSE RELIEF.** A taxpayer's request for innocent spouse relief was denied because, according to the IRS's argument, under Rev. Proc. 2000-15 the taxpayer had to make her Code Sec 6015(f) request for equitable relief within two years of the first collection activity. The IRS sent her a letter notifying her of the offset but failed to notify her of her innocent spouse rights, contrary to section 3501 of the Internal Revenue Service Restructuring and Reform Act of 1998. The IRS argued that no notice was required because the offset was not a collection-related activity. Thus, the IRS argued that for purposes of the limitations period, the offset was a collection activity, but for the purposes of an obligation to inform the taxpayer, it was not a collection activity. The court ruled that the notice of the offset was a collection-related notice and that it should have informed the taxpayer of her rights. The court noted the untenable nature of the IRS's incongruity and held that because the IRS failed to inform the taxpayer of her rights, the offset did not commence the two-year period and the IRS's contrary interpretation of Rev. Proc. 2000-15 was an abuse of discretion. *McGee v. Comm'r*, 123 T.C. No. 19 (2004).

■ **INMATE NOT ENTITLED TO EARNED INCOME CREDIT.** Code Sec. 32(c)(2)(B)(iv) excludes wages earned while an individual is an inmate at a correctional facility from the definition of earned income for the purposes of the earned income credit. Therefore, a taxpayer who was incarcerated at the time that she earned wages for the year in question was not eligible for the earned income credit. *Rogers v. Comm'r*, T.C. Memo. 2004-245 (2004).

■ **C.O.D. INCOME FROM FARM INCLUDABLE IN GROSS INCOME.** Married taxpayers' cancellation of debt (COD) income resulting from the foreclosure and sale of farm property that they had not farmed in over eight years was includable in their gross income in the year of the sale. The COD income may have been excludable under Code Sec. 108(a) either on the basis of insolvency at the time of the debt discharge or under the farm indebtedness exclusion. However, since their assets exceeded their liability when the debt was discharged and they had no income from farming during the three years prior to the discharge, the taxpayers failed to show that their COD income could be excluded. *Ngatuvai v. Comm'r* T.C. Summary Opinion 2004-143 (2004).

■ **INNOCENT SPOUSE RELIEF DENIED TO SPOUSE OF TAX SHELTER INVESTOR.** A taxpayer, who is the spouse of a tax shelter investor, was denied innocent spouse relief because she had "reason to know of the understatement" of the joint tax liability. The taxpayer did not participate in the preparation of the returns and did not read the returns before signing them. However, the court found that the circumstances were such that a reasonably prudent person would have at least looked at the returns before signing them. Furthermore, the taxpayer did not provide evidence of her financial situation that could support her allegation of financial hardship and she enjoyed a significant benefit from the understatement because she and her husband had considerably more disposable income than they would have had without the reported losses that generated the understatement of income. *Albin v. Comm'r*, T.C. Memo. 2004-230 (2004).

■ **SAILBOAT CHARTER BUSINESS LOSSES WERE PASSIVE ACTIVITY LOSSES.** Taxpayers incurred losses in their sailboat charter business. Because the charter business was a rental activity, and because the taxpayers failed to establish that any of the exceptions under Temporary Reg. Sec. 1.469-1T(e)(ii)(A) through (C) applied, the losses were characterized as passive activity losses under Code Sec. 469. The seven-day and 30-day exceptions did not apply because the average rental period was one year. In addition, the services that the taxpayers contributed to their sailboat charter business were not extraordinary services under the extraordinary services exception because the use of the sailboat by the yacht club and customers was not incidental to the receipt of the taxpayers' personal services. *White v. Comm'r*, T.C. Summary Opinion 2004-139 (2004).

■ **IRA DISTRIBUTION WAS TAXABLE INCOME FOR TAXPAYER, NOT EX-HUSBAND.** A distribution from a taxpayer's individual retirement account (IRA) constituted taxable income to the taxpayer and not to the taxpayer's ex-husband because the ex-husband's initial transfer of the funds to the taxpayer's IRA from his IRA satisfied the requirements for a tax-free rollover under Code Sec. 408(d)(6). As a result, the taxpayer had a zero basis in the amount transferred into the account and the entire distribution was taxable income. In addition, because the distribution was properly defined as taxable income and no exceptions applied, the taxpayer was liable for the 10 percent additional tax on the early distribution under Code Sec. 72(t)(1). Furthermore, the taxpayer was liable for an accuracy-related penalty under Code Sec. 6662(c). *Cohen v. Comm'r*, T.C. Memo. 2004-227 (2004).

■ **CDP HEARING MUST BE OFFERED AT IRS OFFICE CLOSEST TO TAXPAYER.** The IRS was required to provide the taxpayer with an opportunity for a Collection Due Process hearing at the IRS Appeals office closest to the taxpayer's residence and failed to do so. In addition, the taxpayer did not waive his right to a hearing by virtue of having a telephone conference with the IRS rather than attending a hearing scheduled at a distant IRS office. The court held that because there is nothing on Form 12153 informing taxpayers of their right to request a hearing at an IRS appeals office, the taxpayer's submission of the form itself constituted a request for a hearing at an appeals office. Furthermore, if a taxpayer requests a hearing at an appeals office, he must be offered the opportunity for a hearing at the appeals office closest to the his residence. *Parker v. Comm'r*, T.C. Memo. 2004-226 (2004).

■ **PASSIVE REAL ESTATE LOSSES NOT DEDUCTIBLE.** The real estate activities of married taxpayers, including both trade or business and rental activity, generated only passive losses that were not deductible. The taxpayers owned four hotel condominiums that served as units in a hotel managed on a day-to-day basis by a hotel management company. Because the taxpayers failed to establish material participation in the trade or business of the condominium units, their activity involving them was found to be passive. In addition, the time that the taxpayers spent studying and tracking their investments was considered investment activity and did not count toward material participation. Thus, the taxpayers did not fall within the safe harbor outlined in Temporary Reg. Secs. 1.469-5T(a)(1), 1.469-5T(a)(3) or 1.469-5T(a)(4) which require participation in the activity for a predetermined number of hours. *Lapid v. Comm'r*, T.C. Memo. 2004-222 (2004).

■ **INDIVIDUAL LIABLE FOR CORPORATION'S TAX DEFICIENCIES INCLUDING FRAUD PENALTIES.** The Court of Appeals for the 8th Circuit affirmed the Tax Court's judgment with regard to an appellant who was the president, general manager, and minority shareholder of a waste disposal company. The corporation participated in two schemes that led to the omission of gross receipts from the corporation's income tax returns and the taking of fictitious deductions. Soon after, the corporation entered into an agreement with another company and sold all of the corporation's assets to that company. The Tax Court found the corporation liable for tax deficiencies and fraud penalties for three tax years. The Tax Court found a fraudulent intent for purposes of fraud penalties under Code Sec. 6663. The 8th Circuit agreed with the Tax Court's finding and further found that the commissioner's method of using check receipts was a reliable gauge of the income that the corporation collected from the scheme. *McGraw v. Comm'r*, 384 F.3d 965 (8th Cir. 2004).

■ **9TH CIRCUIT AFFIRMS DISALLOWANCE OF UNPAID INTEREST DEDUCTIONS.** The U.S. Court of Appeals for the 9th Circuit affirmed a lower decision when it denied the deduction of interest expenses claimed by an accrual-basis taxpayer. The taxpayer's sole shareholder, a cash-basis taxpayer, had loaned it money and then assigned the note to an unrelated party and claimed a capital loss based on the adjustment in his 1994 return. The taxpayer and its shareholder are "related parties" under Code Sec. 267(b). In its 1994 return, the taxpayer reported a deduction for unpaid interest on the note and claimed a net operating loss which it sought to carry back to 1991 and 1992. When the IRS disallowed the deduction, the taxpayer contended that as of the end of 1994, it and the note's assignee were unrelated parties under Code Sec. 267(b) and therefore, all of the accrued interest on the note was deductible by the taxpayer in the year that the assignee acquired the note. The government's assertion was that once Code Sec. 267 is applicable to a certain tax year, it continues to apply to that tax year and is not retroactively eliminated because the creditor/debtor relationship no longer triggers Code Sec. 267. *Ronald Moran Cadillac, Inc. v. United States* (9th Cir., 10/12/04) 2004 U.S. App. LEXIS 21172.

■ **NOTICE OF DETERMINATION FOR FRIVOLOUS RETURNS IS VALID.** A taxpayer alleged that the notice of determination he received following a Collection Due Process hearing was invalid because the hearing officer had not allowed him to record the hearing and because the IRS did not supply the taxpayer with specific documents at his request. The taxpayer had requested that the IRS disclose the identities of the particular employees who assessed penalties against him. In addition he requested documentation of the delegation of authority empowering those employees to assess the penalties and the approval of the assessment by the employees' supervisor. The court held that the IRS was not required to provide the requested documentation. Furthermore, although the hearing officer had erred in not allowing the taxpayer to record the hearing, the error was determined to be harmless because the taxpayer's arguments supporting his zero-earnings amended return were frivolous. *Borchardt v. Comm'r*, Civ. No. 03-5543 2004, U.S. Dist. LEXIS 20481. (10/12/04)

■ **TAXABLE VALUE OF AUTO-PARTS STORE PROPERLY DETERMINED UNDER COST APPROACH.** The taxable value of an owner-occupied, single-user, single-story automotive retail parts sales and service facility was properly determined using a cost approach to valuation. Key factors in determining the taxable value under the cost approach included the physical deterioration of the subject property; functional obsolescence, a loss in value due to defects in design or changes that, over time, made some part of the structure obsolete by current standards; and external obsolescence, a loss in value caused by negative influences outside the property itself, such as general economic conditions, availability of financing, or inharmonious property uses. *The Pep Boys v. County of Anoka* (Minn. T. Ct. 10/26/04).

LOOKING AHEAD

■ **TAX TREATY BETWEEN THE U.S. AND BANGLADESH.** The Treasury Department has announced that an income tax treaty between the United States and the People's Republic of Bangladesh has been signed. The proposed treaty will be sent to the Senate for advice and ratification and if passed, will be the first tax treaty in force between the two nations. TDNR JS-1959.

■ **WAIVER OF FOREIGN TAX CREDIT WITH RESPECT TO LIBYA.** President Bush has announced his intention to grant a waiver of the application for Code Sec. 901(j)(1) with respect to Libya. The president has determined that pursuant to the requirements of Code Sec. 901(j)(5)(A), the allowance of the foreign tax credit for taxes paid to Libya is in the best interests of the U.S. and would expand trade and investment opportunities for U.S. companies in Libya. Presidential Determination 2004-48.

MISCELLANEOUS

■ **IRS CERTIFIES 2005 TOYOTA PRIUS FOR CLEAN FUEL DEDUCTION.** The IRS has certified the 2005 Toyota Prius as an eligible vehicle for the clean-burning fuel deduction under Code Sec. 179A. Taxpayers who buy this vehicle may claim a tax deduction of up to \$2,000 on Form 1040. Itemization is not necessary in order to claim this deduction. The clean-burning fuel deduction may be up to \$2,000 for certified vehicles first put into service in 2004 and 2005. The deduction is limited to \$500 for vehicles first put into service in 2006 and is unavailable after that year. The deduction is a one-time deduction and must be taken in the year that the vehicle is originally used and may only be taken by the original owner. IR-2004-125.

■ **EARNED INCOME CREDIT TAX TOOL.** The IRS has introduced a new tool to help tax professionals determine whether their clients are eligible for the earned income tax credit. The tool, named the EITC Assistant is available in both Spanish and English and will help determine eligibility for the credit, proper filing status and whether the taxpayer's children are qualifying children for EITC purposes. Beginning in 2005, tax professionals will also be able to use the Assistant to calculate the amount of the expected credit. IR-2004-122.

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JUDICIAL LAW

■ **DUTY TO PROTECT BAR PATRON.** Plaintiff claimed a bar was negligent in failing to protect him from a violent patron. The jury returned a verdict in plaintiff's favor for \$1.9 million. The trial court granted JNOV, reasoning that the bar lacked notice of the violent patron. Plaintiff appealed.

The Minnesota Court of Appeals reversed the JNOV. An innkeeper's duty requires a bar to take reasonable care to protect its patrons from other violent or dangerous patrons. A bar is not liable unless an injury to a patron is foreseeable. Whereas in ordinary negligent actions foreseeability is used to determine proximate cause, a factual issue, here foreseeability is used to define the scope of the innkeeper's duty, which is a legal issue. Based upon the facts, the Court of Appeals held that the bar had actual notice of the violent propensities of certain patrons, thus as a matter of law the injury was foreseeable, giving rise to a duty to protect the plaintiff.

The Court of Appeals affirmed the trial court's denial of defendant's Motion for Remittitur. Even though the plaintiff's diminished earning capacity (\$750,000 as found by the jury) was not proved with arithmetic precision, if the injury itself is severe (as it was in this case), the jury can infer some negative effect. *Roy v. Banana Joe's of Minnesota, Inc.*, A04-54 (Minn. App., 10/05/04) (unpublished). www.lawlibrary.state.mn.us/archive/ctapun/0410/opa040054-1005.htm

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