



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

CIVIL LITIGATION

JUDICIAL LAW

■ **SERVICE ON LLCs; NO ROOM FOR “SUBSTANTIAL COMPLIANCE.”** The Minnesota Court of Appeals recently gave civil litigators another reason not to bump up against the end of the limitations period. The court, interpreting Minn. Stat. §322B.876, subd. 1, held that leaving a copy of a summons and complaint with the daughter of the chief manager of a limited liability company *did not* constitute effective personal service on the LLC. Having filed suit to foreclose a mechanic’s lien one day before expiration of the statute of limitations, the plaintiff immediately sent a process server to the registered office of the defendant LLC. When neither principal was at the office, the process server called the LLC’s chief manager on his cellular phone. The chief manager told him to call back at 5:00 p.m. The chief manager did not respond to the subsequent call. The next night, after a second failed service attempt at the office — and still not having spoken to the chief manager — the process server tried twice to serve the chief manager at his home, finally leaving the summons and complaint at the residence with the chief manager’s 16-year-old daughter. The defendant moved to dismiss for lack of personal jurisdiction based on the plaintiff’s failure to comply with Minn. Stat. §322B.876, subd. 1, which requires personal service on a registered agent, a manager, or the secretary of state. The district court granted the defendant’s motion and the Court of Appeals affirmed, noting that “because there is specific statutory direction as to what constitutes proper service on a limited liability company, appellant will be held to serving process in compliance with that explicitly stated method.” The plaintiff argued that its failure to comply was excused by the defendant’s intentional avoidance of personal service and because misleading information about the defendant’s official name prevented proper service on the secretary of state. The court was not persuaded that the failure to return a single telephone call was intentional avoidance of service, and found that the plaintiff possessed sufficient information and time to serve the secretary of state. Finally, the court refused to apply a substantial compliance exception to the statute, observing that the Minnesota cases applying a substantial compliance standard are limited to attempted service on individuals; there is no authority for the application of such a standard to attempted service on an LLC. ***Keystone Building Systems, Inc. v. Skarphol Constr. Group, Inc. et al.***, A03-1649 (Minn. App. 05/18/04) (unpublished).

■ **AGREEMENT PLACED ON RECORD IN OPEN COURT SATISFIES STATUTE OF FRAUDS.** The Minnesota Court of Appeals recently enforced an oral agreement involving a conveyance of real property. In a settlement conference in the district court, the parties resolved an acrimonious dispute over the sale of several commercial properties. The parties informed the judge of the agreement and one of the attorneys stated for the record the key terms of the agreement, including payments of earnest money, the purchase price, and closing dates. None of the parties objected to the recitation of the terms. The parties intended to put their agreement in writing at a later date but never finalized a draft. Later, one of the parties sought to invalidate the agreement arguing, among other things, that the agreement violated the statute of frauds set forth in Minn. Stat. §513.04, which requires transfers of real property to occur “by act or operation of law, or by deed or conveyance in writing.” The Court of Appeals affirmed the enforcement of the agreement, holding that “by making a record of the agreement in open court, the safeguards of the statute of frauds have been satisfied.” In other words, by solemnly placing the terms of the agreement in the record, the requirements of the statute have been met “by act or operation of law.” The fact that the parties were later to draft settlement documents did not invalidate the oral agreement, as it was clear from the record that the parties intended to be bound immediately. Counsel should take care to resolve each and every important issue involved in a settlement before reading any agreement into the record. ***TNT Properties, Ltd. v. Tri-Star Developers, LLC et al.***, A03-1186 (Minn. App. 03/23/04).

■ **NO AFFIRMATIVE RELIEF TO NON-MOVING PARTY.** In the much-publicized case brought by Minnesota Attorney General Hatch in 2000 to force Allina Health System to disclose certain documents and information, the Minnesota Court of Appeals recently reiterated the basic requirement of notice pleading. In April 2003, Medica, which was spun off from Allina under terms of a 2001 consent decree with the state, brought a motion to dismiss for lack of subject matter jurisdiction or for summary judgment. In response, the state criticized Medica’s billing practices and attacked the performance of special administrators who were appointed to Medica’s board as part of the consent decree. The state did not, however, bring its own motion in conjunction with its opposition. The district court denied Medica’s motions and issued an order granting the attorney general broad supervisory authority over Medica, including the authority to appoint new special administrators to serve as unelected board members. The Minnesota Court of Appeals reversed, stating that the district court “granted relief as if both parties had moved for summary judgment, even though respondent [the state] made no formal motion for affirmative relief.” The Court of Appeals found that in granting affirmative relief to the state, the district court impermissibly weighed evidence and made credibility determinations. The Court of Appeals also reversed for lack of notice to Medica. It noted that Medica had no notice of the state’s claim for relief by way of motion, complaint, or any other pleading because the original complaint “requested only an order directing Allina to disclose information, or other relief associated with the disclosure or the information, and for ‘such further relief as the [c]ourt deems necessary.’” Even the 2001 consent decree “fail[ed] to outline or give a hint of the sweeping relief granted by the district court.” Accordingly, counsel who wish to obtain affirmative relief when opposing counsel brings a motion should

be sure to bring a counter motion. Likewise, counsel should raise new claims for relief by amending their pleadings, by motion or otherwise, in order to ensure sufficient notice to the opposing party of the new relief sought. *State of Minnesota v. Allina Health System*, A03-1274 (Minn. App. 05/18/04).

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CRIMINAL LAW
JUDICIAL LAW

■ **POST-CONVICTION RELIEF; RECANTATIONS; PROSECUTORIAL MISCONDUCT; EVIDENTIARY HEARING.** The trial court abused its discretion by not granting an evidentiary hearing regarding allegations that prosecution witnesses recanted and of prosecutorial misconduct. Although Minnesota follows the three-prong test set forth in *Larrison v. United States*, 24 F.2d. 82 (7th Cir. 1978) in determining whether to grant a new trial based on recantation, the showing required for a petitioner to receive an evidentiary hearing is lower: Minn. Stat. §590.04, subd. 1 mandates that the post-conviction court hold an evidentiary hearing and make findings of fact; furthermore, the files and records of the proceeding must conclusively show that a petitioner is entitled to no relief. The court abused its discretion in denying an evidentiary hearing on both issues of witness recantation and prosecutorial misconduct. *Darby Jon Opsahl v. State of Minnesota*, A03-298 (Minn. 04/08/04). www.lawlibrary.state.mn.us/archive/supct/0404/opa030298-0408.htm

■ **CONTROLLED SUBSTANCE; SCHOOL ZONE; EQUAL PROTECTION; SPECIFIC INTENT.** The Minnesota Supreme Court affirms that Minn. Stat. §152.023, subd. 2(4), which enhances the crime of possession of a controlled substance from 5th degree to 3rd degree if the possession occurs within a school zone, does not violate the equal protection guarantee of the Minnesota Constitution. Moreover, the state is not required to prove that the defendant knew that he was in the school zone. The defendant can reasonably be expected to assume the risk that he might enter a location that will make the consequences of his crime more severe. Hence, the district court correctly ruled that the state was not required to prove that the defendant knew that he was in the school zone or intended to commit the crime in a school zone at the time of the offense. *State v. Steven Benniefeld*, C1-02-1991 (Minn. 04/22/04). www.lawlibrary.state.mn.us/archive/supct/0404/op021991-0422.htm

■ **CONTROLLED SUBSTANCE; RELIGIOUS USE; FREEDOM OF CONSCIENCE; MINNESOTA CONSTITUTION.** Appellant, stopped for speeding, was found to possess 529 grams of marijuana. In a trial on stipulated facts, appellant contended that the marijuana was necessary for medical purposes and, moreover, was used as part of her religious beliefs, as a Messianic Jew. Both a medical doctor and a minister testified on behalf of the appellant. Interpreting Article I, Section 16 of the Minnesota Constitution (the Freedom of Conscience Clause), the district court found that the appellant's use of marijuana was not truly connected with her religious beliefs; rather, it was a personal preference. The district court could not find that there was a connection between the appellant's use of marijuana and her communal, as opposed to personal, religious beliefs. The decision of the trial court is upheld because the appellant failed to establish that she had a "sincerely held religious belief" in a medicinal use of marijuana, and she could not articulate or establish a connection between her use of marijuana and the practices of essential tenets of her religion. *State v. Ariel Suzette Pedersen*, A03-249 (Minn. App. 05/18/04). www.lawlibrary.state.mn.us/archive/ctappub/0405/opa030249-0518.htm

■ **EVIDENCE; HEARSAY; EXCULPATORY STATEMENTS; CATCHALL EXCEPTION.** It was not error for the judge to exclude the statement of an eyewitness to the defense given to an inhouse defense investigator four months after the incident. The investigator did not take a verbatim statement, but rather summarized it in a report. The witness did not sign the statement. At the time of trial, the witness was unavailable to testify. The court notes that the issue involves double hearsay, and that the statement lacked circumstantial guarantee to trustworthiness sufficient to bring it within the ambit of the catchall exception under 804(b). The Court of Appeals agrees that the circumstances under which the statement was taken do not qualify it as sufficiently reliable. *State v. Jason Lee Bernardi*, A03-608 (Minn. App. 04/27/04). www.lawlibrary.state.mn.us/archive/ctappub/0404/opa030608-0427.htm

■ **EVIDENCE; HEARSAY; CONFRONTATION CLAUSE; PROCUREMENT EXCEPTION TO CRAWFORD.** The district court did not err in admitting the grand jury testimony of a witness whom the appellant had intimidated from testifying at trial. While the witness' statements and his grand jury testimony were not subject to cross-examination, if a witness is available because of the defendant's unlawful procurement, *Crawford v. Washington*, 124 S.Ct. 1354 (2004) does not apply. *State v. Victor Donnell Fields*, C0-03-163 (Minn. 05/20/04). www.lawlibrary.state.mn.us/archive/supct/0405/op030163-0520.htm

■ **EVIDENCE; LASER GUN; JUDICIAL NOTICE; ADMISSIBILITY; VISUAL OBSERVATION.** In a case of first impression, the Minnesota Court of Appeals holds that speed analysis results from a laser device are admissible under Minn. Stat. §169.14 subd. 10 (a) where the record demonstrates that the testifying officer is trained in the device, and the device is routinely tested for accuracy by reliable internal and external methods. Additionally, the court holds that it would be proper for a trial court to take judicial notice of the reliability of a laser-based speed measuring device, providing there is evidence that the device has been tested for accuracy, and that officers using the device has been trained in its use. Next, the court rules that certificates of laser accuracy, based upon internal processes, are admissible in evidence under the business record exception. Minn. Stat. §169.14 subd. 10, regulating the admissibility of speed-measuring devices, does not violate the separation of powers doctrine because it is consistent with the rules of evidence. Finally, the court holds that, given the officer's training and observations, a visual estimate alone is enough to establish a speeding violation. *State v. Noor Mohamed Ali*, A03-806 (Minn. App. 05/11/04). www.lawlibrary.state.mn.us/archive/ctappub/0405/opa030806-0511.htm

■ **PROCEDURE; FAILURE TO CALL WITNESS; WITNESS LIST; DEFENSE USE OF WITNESS.** It was not error for the trial court to prohibit defense counsel from arguing, during closing statement, the state's failure to call witnesses who had been listed on the state's witness list but had not been called by the state in its case in chief. Defense counsel called these witnesses, and wished to comment on the implicit reason that the state decided not to call them because they would be helpful. The court's ruling on the state's motion *in limine* to prevent defense counsel from arguing this adverse inference was not in error. *State v. Bernardi, supra.*

■ **PROCEDURE; RETROACTIVITY OF NEW RULE; DEFINITION OF PENDING CASE.** The Supreme Court announces a new rule for the state of Minnesota in determining when a new rule of federal or constitutional criminal procedure is retroactive: if a case is pending on direct review when a new rule of federal constitutional criminal procedure is announced, a criminal defendant is entitled to benefit from that new rule. "Pending" is defined as persisting until such time as the availability or direct appeal has been exhausted, the time for a petition for certiorari has elapsed, or a petition for certiorari with the United States Supreme Court has been filed and finally denied. In this case, the appellant was sentenced in violation of *Apprendi*, based on the pattern sex offender law, but failed to appeal. The appellant's appeal period expired on August 6, 2000, while *Apprendi* was decided on June 26, 2000. Although appellant failed to take advantage of an appeal, when the *Apprendi* decision was handed down, his time to appeal had not expired, and he is entitled, by due process, to application of *Apprendi*. Hence, his sentence is reduced from two 40-year consecutive sentences, under the pattern sex offender law, Minn.Stat. 609.1087 subd.2, to the two statutory maximum consecutive sentence periods of 25 years. *Timothy John O'Meara v. State of Minnesota*, C0-02-1982 (Minn. 05/13/04). www.lawlibrary.state.mn.us/archive/supct/0405/op021982-0513.htm

■ **PROCEDURE; JURY TRIAL; STIPULATION TO ONE ELEMENT.** In a jury trial setting, counsel for appellant and the state agreed to stipulate that the appellant was more than 36 months older than the victim in a prosecution for first-degree criminal sexual conduct. Appellant testified in his own defense.

While it was error for the court to accept the stipulation to proof of one element of the offense without the appellant's consent in writing, or on the record, the error was not prejudicial. The effect of the stipulation was to minimize the age difference; also, the jury had the opportunity to view the appellant during his testimony and make its own determination as to the age difference. *State v. Lorenzo Lamont Wright*, A03-589 (Minn. App. 05/18/04). www.lawlibrary.state.mn.us/archive/ctappub/0405/opa030589-0518.htm

■ **CRIMINAL VEHICULAR HOMICIDE; INTENT; ACCIDENT RESULTING IN INJURY OR DEATH; JURY INSTRUCTIONS.** The district court erred by asserting, in response to a jury question, that the appellant need not have known that he was involved in an accident in order for him to be convicted. In this case, the appellant thought he had heard a sound, which in reality turned out to be his car hitting a person changing a flat tire. Several miles down the road, appellant noticed that his headlights were out, and made some changes to his vehicle. Police then arrested him. The jury asked questions as to whether a person needed to be aware that an accident had occurred, and the court repeatedly responded in the negative, to which the appellant objected. Because of the severity of the penalties, criminal intent is a necessary element of the crime, and will be implied as a matter of law if it is not specifically included in the statute. Here, the offense of criminal vehicular homicide is not simply a public welfare or regulatory offense, but is an offense carrying a severe penalty. *State v. Mohammed Gazizamil Al-Naseer*, A03-634 (Minn. App. 04/27/04). www.lawlibrary.state.mn.us/archive/ctappub/0404/opa030634-0427.htm

■ **SENTENCE; GROSS MISDEMEANOR CONSECUTIVE TO FELONY; PRESENT COMMIT.** The sentencing court may commit a person to the commissioner of corrections for a gross misdemeanor when the sentence is served consecutively to a felony sentence. Here, in a single behavioral incident, the appellant was convicted of first-degree refusal to submit to testing, open bottle, transportation of firearms, and driving after cancellation. The judge imposed an executed sentence of 66 months for the first-degree failure to submit, and an executed consecutive sentence of 12 months for the driving after cancellation, with concurrent sentences for the rest.

Held, the court was within its authority by committing him to the custody of the commissioner of corrections for a 12-month sentence, consecutive to the felony DWI-type sentence. Minn. Stat. §609.15 plainly allows this result. Although the sentencing guidelines do not apply, the court could have given a sentence from 0-12 months, presumptive commit, consecutive to the felony DWI-type offense. *State v. John Frederick Kier*, A03-643 (Minn. App. 04/27/04). www.lawlibrary.state.mn.us/archive/ctappub/0404/opa030643-0427.htm

■ **SENTENCE; MODIFICATION; LETTER OF COURT; EXPIRATION OF SENTENCE.** In 1994, the appellant pleaded guilty to second-degree criminal sexual conduct in exchange for being allowed to serve his 54-month sentence concurrent to a 1991 unexecuted 88-month sentence. The judge did not specifically impose a ten-year period or conditional release. Two years later, the DOC contacted the judge inquiring whether conditional release had been added to the sentence, in response to which the judge wrote a letter to the DOC stating that the appellant's sentence should include a ten-year conditional release. The appellant did not receive a copy of this letter, nor was it filed in court. In July 2001, the appellant's 88-month sentence for the 1991 conviction expired. On April 25, 2000, the district court issued amended sentencing orders, adding the conditional release terms. No hearing was held, and appellant testified that he did not receive the amended orders.

Held, the 1996 letter cannot be construed as an order amending the appellant's sentence. To be an effective sentencing order, it must be part of the official record, whether by transcript or document. Furthermore, there must be an exchange to which the defendant is privy; here, because the defendant received no notice of the imposition of the conditional release, there was a violation of the fundamental right of due process. Furthermore, because the sentence has now expired, conditional release cannot now be imposed as an officially amended order. *Lee Thomas Martinek v. State*, A03-1033 (Minn. App. 05/04/04). www.lawlibrary.state.mn.us/archive/ctappub/0405/opa031033-0504.htm

■ **PROBATION VIOLATION; HEARSAY; 4TH AMENDMENT; DISMISSED CRIMINAL CHARGE:** The appellant was on probation for DWI when he was arrested for a new one. The original probation violation alleged that appellant had violated in four ways: use of alcohol, violation

of law, failure to complete treatment, and no attendance at a MADD victim impact panel. The new charge was dismissed by another county judge, finding that articulable suspicion did not exist for the stop. At the probation hearing, the district court did not accept the new DWI complaint as substantive evidence, but did admit police officers testimony concerning slurred speech, odor of alcohol, and a possible admission. Also, the district court allowed, as substantive evidence, a letter from a probation officer with respect to the appellant's failure to complete treatment and the impact panel.

Held, the confrontation clause is not necessarily implicated in a probation violation hearing by the use of hearsay. Rule 1101(b)(3) provides that the rules of evidence are suspended for proceedings revoking probation. This is an issue of first impression in Minnesota, and the Court of Appeals follows other jurisdictions in concluding that, where the defendant has had ample opportunity to present evidence in a probation violation hearing, the rules of evidence do not preclude the admission of hearsay evidence.

Next, following prior Minnesota law and *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357, 118 S. Ct. 2014 (1998), the Court of Appeals holds that the 4th Amendment exclusionary rules on illegal search and seizure are inapplicable to probation violation hearings, in addition to parole violation hearings. **State v. Lance Howard Johnson**, A03-1385 (Minn. App. 05/04/04). www.lawlibrary.state.mn.us/archive/ctappub/0405/opa031385-0504.htm

■ **SEARCH AND SEIZURE; GARAGE; PRIVACY EXPECTATION.** Police received a citizen tip that a vehicle traveling on the road had crossed the center line several times; a license plate was given, and police traced the plate to the residence of the appellant. Without activating his emergency lights, the officer parked his car and walked to the open garage and stood at the threshold, waiting for the appellant to emerge from his vehicle. While the officer was waiting, the appellant closed the garage door, at which point the officer interrupted the closing by using his leg to trip the sensor. The officer then entered the garage, where he observed indicia of intoxication, and arrested the appellant.

Held, the petitioner did not abandon his reasonable expectation of privacy in his garage by opening the garage door to gain entry. The Minnesota Supreme Court has explicitly recognized that the garage is part of the protective curtilage entitled to the same expectation of privacy as a home. This case is distinguishable from *Tracht v. Commissioner*, 519 N.W. 2d 863 (Minn. App. 1999), *review denied* (Minn. 07/28/98) in the following three ways: (1) the appellant did not leave his garage door open; (2) the officer accomplished entry by interrupting the closing of the door and, hence, was not in a position expected of an ordinary visitor; and (3) the officer did not enter the garage to gain access to another door, but to investigate whether the appellant was driving while impaired. Finally, this driving offense, though serious, did not supply exigent circumstances to justify a warrantless entry into a constitutionally protected area. **Chad Haase v. Commissioner of Public Safety**, A03-1595 (Minn. App. 05/25/04). www.lawlibrary.state.mn.us/archive/ctappub/0405/opa031595-0525.htm

■ **BURGLARY; 1ST DEGREE BURGLARY; ROOM WITHIN AN APARTMENT.** Appellant was a guest within an apartment. During a "party," he asked whether he could go into a bedroom where his alleged rape victim was sleeping, in order to say goodnight to her. He did so, and in that room, assaulted a cotenant. Based on this incident, appellant was charged with first-degree burglary.

Held, the charge of first-degree burglary cannot stand. This was not a situation where the bedroom was separately rented out, nor was it a self-contained unit. As such, it did not constitute a separate "building" for purposes of the burglary statute. **State v. Frank Edward Johnson**, A03-469 (Minn. App. 05/18/04). www.lawlibrary.state.mn.us/archive/ctappub/0405/opa030469-0518.htm

■ **DWI/IMPLIED CONSENT; ENHANCEMENT; OUT-OF-STATE CONVICTION OR REVOCATION; RIGHT TO COUNSEL.** An out-of-state conviction or revocation may not be used to enhance a Minnesota DWI to a more serious level. In this case, the appellant had been convicted of a Colorado DWI. Colorado does not afford motorists a right to assistance of counsel prior to testing. On the other hand, Minnesota affords motorists a limited constitutional right to counsel prior to taking a chemical test.

Held, the denial of an opportunity to secure the pre-test assistance of counsel in Colorado, in a prior DWI, violates the Minnesota Constitution, and test results may not be used to enhance a subsequent charge. A Colorado driver's license revocation resulting from an uncounseled blood alcohol test similarly violates the Minnesota Constitution. A stipulation between counsel, that Colorado law does not permit pre-test right to counsel, satisfies the appellant's burden of production of evidence to show that he was denied assistance of counsel. Hence, neither a prior civil revocation, nor a criminal conviction, from a state which does not afford pre-test right to counsel, will support the basis for an enhanced violation in Minnesota. **State v. Darryl Lewis Bergh**, A03-1577 (Minn. App. 05/18/04). www.lawlibrary.state.mn.us/archive/ctappub/0405/opa031577-0518.htm

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **COMPENSATION CASES.** A trio of sales personnel were entitled to \$586,000 in penalties and attorney's fees because their commissions were considered "earned" at the time of the sales, even though they were no longer working at the time the sales closed. The Minnesota Court of Appeals held that the "prompt payment" statute for wages, Minn. Stat. §181.13 (2002) requires payment of the post-termination commissions since all of the commissions were "earned" at the time the sales were made, regardless of subsequent developments. **Galbraith v. U.S. Premise Networking Services, Inc.**, 2004 WL 1049042 (Minn. App. 2004) (unpublished).

But an employee entitled to \$24,000 severance under an ambiguous employment agreement was not granted statutory penalties under §181.13 in a separate case. These particular severance benefits did not fall within the statute, and because the employer "legitimately dis-

puted” whether severance was owed, the penalty provision did not apply since the penalty arises when an employer withholds compensation that is “unquestionably owed.” *Cole v. Holland Neway Int’l, Inc.*, 2004 WL 503751 (Minn. App. 2004) (unpublished).

■ **ARBITRATION AGREEMENT.** A clause in an arbitration agreement in an employment contract that the parties would split the arbitration fee was deemed enforceable by the 8th Circuit Court of Appeals. Reversing the lower court, the appellate tribunal held that requiring the employee to pay half of the arbitration costs in an age discrimination proceeding was not *per se* unconscionable and remanded for determination whether the clause “unconscionably prevents [claimant’s] access to the arbitral forum.” *Faber v. Menard, Inc.*, 2004 WL 1124431 (8th Cir. 2004).

A seven-year noncompete agreement in connection with the sale of a business was not enforced by the 8th Circuit. Applying the doctrine that covenants not to compete generally are “disfavored,” the court held that a lease of property by the seller to a competitor of the buyer was not enforceable because the sales agreement had no “explicit bar to the lease arrangement.” *Hardesty Co. v. Williams*, 2004 WL 1151973 (8th Cir. 2004).

■ **DRUG TESTING.** An employee who was unable, during a three-hour period, to provide a urine specimen for a random drug test was deemed to have refused to test. Upholding the revocation of an airline mechanic’s certificate, the 8th Circuit held that the employee’s failure, without medical justification, to produce a specimen warranted a conclusion that he refused to be tested under drug testing regulations of the Federal Aviation Administration. The refusal constituted grounds for revocation, and the agency’s action was not unreasonable, arbitrary, or capricious. *King v. Nat’l Transp. Safety Bd.*, 362 F.3d 439 (8th Cir. 2004).

■ **DISCRIMINATION.** The exemption from the Minnesota Human Rights Act of religious organizations for action based on sexual orientation barred a discrimination claim by a discharged church music director. Fired after calling a congregant “homophobic,” the music director sued for discrimination due to sexual orientation. But the Court of Appeals held the claim is not actionable due to the statutory exemption applicable for religious bodies, which was not “clearly and unequivocally waived” by the church’s personnel manuals. *Egan v. Hamline United Methodist Church*, 2004 WL 771461 (Minn. App. 2004).

■ **OPEN MEETING LAW.** The Board of County Commissioners could not close a meeting to discuss a discrimination charge by an employee without specifying the subject of the discussion. The appellate court reversed the lower court and remanded a challenge to the closure because the County Board did not adequately specify the reasons for the closure and the subject to be discussed beyond a blanket invocation of the “attorney-client” exemption for “pending litigation.” *Free Press v. County of Blue Earth*, 677 N.W.2d 471 (Minn. App. 2004).

■ **UNEMPLOYMENT COMPENSATION.** Poor performance by an employee does not warrant disqualification from receiving unemployment compensation benefits absent some type of “misconduct.” The appellate court held that a pet store manager was entitled to unemployment compensation benefits even though the employee performed the work poorly. The employee’s deficiencies, which included late paperwork, failure to correct personnel problems, and poor performance in managing the store, did not rise to the level of “misconduct,” which consists of intentional wrongdoing or indifference to the rights or interests of the employer. *Bray v. Dogs & Cats Limited*, 679 N.W.2d 182 (Minn. App. 2004).

The failure to furnish the employee with materials submitted by the employer to an unemployment benefits judge after the compensation hearing and not permitting the employee to respond constituted grounds for reversal of a denial of benefits. The employer, who fired the employee for repeated absences and tardiness, was allowed to furnish the employee’s timecards after the hearing concluded. The determination disallowing benefits was reversed because the claimant was not given copies of the records or allowed to respond to them, as required under Minn. Rules §3310.2912. *Peterson v. Landmark Community Bank*, 2004 WL 727594 (Minn. App. 2004) (unpublished).

A college student who refused to accept a new position from his employer because it conflicted with his school schedule was not entitled to unemployment compensation benefits. The applicant was not “available for suitable employment” as required under Minn. Stat. §268.085, subd. 1(2), when he said he was “[p]robably not” willing to unconditionally take a different position, often a demotion, because he was attending school half-time. *Solie v. Wal-Mart Assocs., Inc.*, 2004 WL 835725 (Minn. App. 2004) (unpublished).

LOOKING AHEAD

The U.S. Supreme Court recently agreed to hear and to resolve two important employment discrimination issues in its upcoming term beginning next fall. In *Smith v. City of Jackson*, 124 S.Ct. 1724 (2004), the High Court will determine whether intent to discriminate is a necessary predicate for a claim under the Age Discrimination in Employment Act (ADEA). The case was brought by a group of 30 police officers in Jackson, Mississippi, who contended that a new wage scale that provided an increase in salary for younger employees, aimed at recruiting newer officers, has a “disparate impact” adverse to older employees and, thus, violates the ADEA regardless of the absence of any provable intentional bias on the part of the municipality. The case was dismissed by the trial court and the 5th Circuit. *Smith v. City of Jackson*, 351 F.3d 183 (5th Cir. 2003).

The High Court had the opportunity to address the doctrine of “disparate impact” under the ADEA years ago, but after granting certiorari, it dismissed the case because of unresolved factual issues over whether a company’s severance policy was unfairly tilted against older workers. *Adams v. Florida Power Corp.*, 535 U.S. 228 (2002).

In *Pennsylvania State Police v. Suders*, 124 S.Ct. 1629 (2004), the justices will decide whether the doctrine of “constructive termination” applies in sex harassment claims under Title VII of the Federal Civil Rights Act. The case centers on a woman who quit her job, claiming that she was subject to undue harassment because of her gender. Under existing Title VII law, a claimant must show a “tangible” adverse employment impact. But the federal circuits have split whether an employee satisfies the standard by virtue of resigning a job. The case comes to the High Court from the 3rd Circuit, which allowed the claim to proceed. *Suders v. Easton*, 325 F.

3d 432 (3rd Cir. 2003). The 8th Circuit is among the courts that have held that the “constructive termination” doctrine applies under Title VII, along with several other circuits, while several other circuits have ruled to the contrary. The outcomes of both the *Smith* and *Suders* cases are likely to have an impact in Minnesota, where courts tend to interpret the state Human Rights Act by following the interpretations of federal law.

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ENVIRONMENTAL LAW JUDICIAL LAW

■ **CLEAN WATER ACT; CITIZEN SUIT DISMISSED FOR LACK OF STANDING, MOOTNESS.** The 6th Circuit Court of Appeals affirmed a district court’s dismissal of a citizen’s suit over past municipal raw sewage discharges. The city of Maynardville, Tennessee owns and operates a sewage treatment plant along Bull Run Creek in Union County, Tennessee. Plaintiffs Harry Ailor and Betty Lynch are past and present owners, respectively, of property located to the south of the plant along Bull Creek Run. The city violated its National Pollutant Discharge Elimination System (NPDES) permit on a number of occasions in the early 1990s. These violations included instances when the city’s treatment plant overflowed and discharged sewage and other pollutants into Bull Run Creek.

The state of Tennessee initiated enforcement proceedings against the city regarding the city’s NPDES violations in 1993. In July 1995, the state issued an “Agreed Order” that required the city to pay a civil penalty and to develop a corrective action plan to address the problems at the treatment plant. The city placed a new wastewater treatment system on line in November 2000, at a cost of approximately \$1.7 million.

Plaintiffs gave the city notice in February 2001 of their intent to file suit under the citizen suit provisions of the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA), 33 U.S.C. §1365(b) and 42 U.S.C. §6972(b), respectively. Three months later, plaintiffs filed suit in federal court under the CWA, RCRA and state law. Plaintiffs sought remedial relief, compensatory damages, punitive damages and litigation costs, including reasonable attorneys’ fees, in relation to the city’s sewage discharges to Bull Run Creek. The city moved for summary judgment on plaintiffs’ claims in September 2001. The district court found plaintiffs’ claims to be moot and granted the city’s motion in November 2001.

The Court of Appeals upheld the district court’s dismissal. The Court of Appeals began its analysis by examining the standing of each plaintiff. Plaintiff Ailor had sold his property several months before commencing his lawsuit against the city. The court held that Ailor therefore lacked standing because he was not suffering an “injury in fact” that was “actual or imminent” at the time he filed suit, as required under the citizen suit provisions of both the CWA and RCRA. On the other hand, the Court found Lynch, the current property owner, alleged just enough in the complaint to suggest the possibility of ongoing violations so as to survive dismissal on this ground.

While Lynch’s allegations were enough to assert standing, however, they were not enough to survive dismissal on mootness grounds. The court found that the city had met its “heavy burden” of proving that the alleged violations were unlikely to recur, in light of the city’s construction of a new treatment plant pursuant to the state’s order. Indeed, the court noted that the city had completed the final stage of its required corrective action months before the plaintiffs gave notice of their intent to sue. Conversely, Lynch did nothing to establish a reasonable prospect of recurring NPDES permit violations by the city. Furthermore, the court found that it would undermine the very purpose of the CWA and RCRA citizen suits to award Lynch the relief she sought, such as payment of her expert and attorneys’ fees, when all of the corrections undertaken by the city were done entirely as a result of the state’s enforcement efforts. Thus, the court affirmed dismissal of the plaintiffs’ suit. *Ailor v. City of Maynardville*, 368 F.3d 587, 2004 WL 1087330 (6th Cir. 2004).

— BILL HEFNER
Greene Espel

FEDERAL PRACTICE JUDICIAL LAW

■ **DIVERSITY JURISDICTION; DEFECT CURED PRIOR TO ENTRY OF JUDGMENT.** In December, 2003, this column noted the Supreme Court’s grant of certiorari to review a 5th Circuit decision which held that certain defects in diversity jurisdiction may be cured prior to the entry of judgment.

Atlas, a Texas limited partnership which included two Mexican citizens as partners, commenced a purported diversity action against Dataflux, a Mexican corporation. Sometime prior to trial, the Mexican citizens were removed as Atlas partners. After a jury trial, Atlas was awarded \$750,000 in damages. Only then did Dataflux move to dismiss the action based on the earlier absence of diversity jurisdiction. The district court granted Dataflux’s motion, but the 5th Circuit reversed, finding that under *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S. Ct. 467 (1996), the judgment would be allowed to stand because the jurisdictional defect had been cured prior to entry of the judgment.

Distinguishing *Caterpillar, Inc.* on the basis that it involved the dismissal of a nondiverse party rather than a change in that party’s citizenship, the Supreme Court “decline[d] to endorse a new exception to a time-of-filing rule” in effect for “two centuries,” and held that a post-filing change of citizenship of one of the parties did not provide the federal courts with diversity jurisdiction that did not otherwise exist at the time the case was filed.

Justice Ginsburg, writing for the four dissenting justices, argued that the result in this case was dictated by *Caterpillar, Inc.*, and decried the “waste” that would result from the dismissal of the action well after a jury verdict. ***Grupo Dataflux v. Atlas Global Group, L.P.***, 124 S. Ct. 1920 (2004).

■ **SUMMARY JUDGMENT; OBLIGATION TO CITE TO THE RECORD.** When deciding defendants’ motions for summary judgment in a personal injury case, Judge Kyle dropped an important footnote criticizing the parties’ submissions:

Although each side has offered thousands of pages of exhibits, only a fraction have been cited in the briefs. The Court has not independently reviewed material not cited and this Order is based on a review of those documents specifically cited. The Court reminds the parties that it is not required to speculate on which portion of the record they rely, nor is it obligated to wade through and search the entire record for some specific facts that might support their claim.

This statement should be more than sufficient to place litigants on notice of their obligations when faced with summary judgment motions before Judge Kyle. ***Solo v. Trus Joist MacMillan***, 2004 WL 524898 (D. Minn. 03/15/04).

■ **OTHER NOTEWORTHY DECISIONS.** Reversing an Iowa district court, the 8th Circuit held that a fee-splitting provision in an employment-related arbitration agreement does not render the agreement unenforceable as a matter of law, but noted that such a provision may be unenforceable if “the circumstances indicate that fees are cost-prohibitive and preclude vindication of statutory rights” in arbitration. ***Faber v. Menard, Inc.***, 367 F.3d 1048 (8th Cir. 2004).

Finding that the plaintiff had failed to adequately preserve a fire scene, thereby prejudicing the defendant, Judge Magnuson imposed spoliation sanctions which prohibited the plaintiff from relying on evidence obtained from the fire scene or the opinions of the Minnesota Fire Marshal, finding that this was “the only sanction that truly levels the playing field in this instance.” ***Fischer v. Rheem Manufacturing Co.***, 2004 WL 1088328 (D. Minn. 05/13/04).

Judge Kyle denied the defendants’ motion to transfer pursuant to 28 U.S.C. §1404(a), finding that while Texas might be a more convenient forum for the parties, the defendants had not met their burden to establish that the convenience of the witnesses or the interest of justice warranted a transfer. ***Birmingham Fire Ins. Co. v. Up North Plastics, Inc.***, 2004 WL 838169 (D. Minn. 04/19/04).

Judge Davis granted the defendant’s Rule 9(b) motion, finding that the allegations in the complaint did plead fraud with particularity. ***United States v. Henderson***, 2004 WL 540278 (D. Minn. 03/16/04).

Finding that rare “extraordinary” or “exceptional” case, Judge Magnuson abstained from hearing the plaintiff’s claims under the *Colorado River* abstention doctrine because the plaintiff was a party to an action raising similar claims which was already pending in the Minnesota courts. ***Mason v. Messerli & Kramer, P.A.***, 2004 WL 898273 (D. Minn. 04/14/04).

Judge Kyle granted a motion to dismiss under the first-filed rule, finding no “compelling circumstances” to overcome the presumption that the first court to acquire jurisdiction has priority to decide the case. ***AEI Income & Growth Fund 23 LLC v. Razzoo’s LP***, 2004 WL 547226 (D. Minn. 03/17/04).

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INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **PATENTS; OBVIOUSNESS; LATER-DEVELOPED EVIDENCE.** Should evidence developed after a patent is granted be used to determine whether the invention was obvious at the time the patent application was filed? The Court of Appeals for the Federal Circuit addressed this issue in a recent decision and held that such later developed evidence is permissible. Obviousness is the legal test that determines whether the invention would have been obvious to a skilled artisan at the time of invention. If so, the invention is not patentable — the claims are invalid. The district court held that the patent was invalid due to obviousness, but refused to consider evidence of unexpected benefits because this evidence was developed *after* the patent had issued. The Federal Circuit reversed, reasoning that the full scope of a patent could not always be understood at the time of filing. The Court of Appeals said “[i]t is not improper to obtain additional support consistent with the patented invention, to respond to attacks on validity.” ***Knoll Pharm. Co., Inc. v. Teva Pharm. USA, Inc.***, 367 F.3d 1381, 03-1300 (Fed. Cir. 05/19/04).

■ **PATENTS; OBVIOUSNESS; INVENTIVE CONTRIBUTION MINIMAL.** Obviousness was also at issue in a recent patent infringement case heard by Judge Montgomery. The court held the patent claims invalid due to obviousness where the inventive contribution, if any, over the prior art was minimal. The patent was for a vitamin supplement formula combining folic acid and vitamin B₁₂, but excluding antioxidants that would reduce the efficacy of the formulation. Similar combinations had already been disclosed in two prior art references: a U.S. patent and a European patent — both being effective combinations. Neither reference specifically excluded antioxidants, however, from the formulation. In fact, the U.S. patent made no mention of antioxidants and the European patent suggested that antioxidants were “optional.” The court, in finding the exclusion of antioxidants obvious, reasoned that antioxidants were unnecessary for full efficacy of the formulation. ***Upsher-Smith Laboratories, Inc. v. Pan American Laboratories, Inc.***, Civ. No. 01-352 (D. Minn. 04/26/04).

■ **PATENT CLAIM CONSTRUCTION; ORDINARY AND CUSTOMARY MEANING.** Judge Frank’s recent decision in a patent claim construction proceeding illustrates the importance of understanding the ordinary and customary meaning of terms used in patents. The patent in this case was for a portable machine that stored and automatically dispensed specific amounts of agricultural chemicals, such as fertilizer. The parties disputed several terms in the claims, including the term “density.” Although the ordinary and customary

meaning of density is “a value that represents the mass of the particulate material per unit volume,” the patentee argued that the term should be defined as a calibration factor used to control the amount of chemical dispensed by the machine. This definition was not expressly used in the patent claims or specification, however, and the term had not been defined during prosecution of the patent before the Patent Office. Accordingly, the Court gave “density” its ordinary and customary meaning, because the patentee had not rebutted the presumption that patent claim terms receive their ordinary and customary meaning. *Rosen’s, Inc. v. Van Diest Supply Co.*, Civ. No. 03-3206 (D. Minn. 03/30/04).

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JUVENILE LAW JUDICIAL LAW

■ **TERMINATION OF PARENTAL RIGHTS; UNFITNESS; VOLUNTARY AND INVOLUNTARY TERMINATION.** Where father contested involuntary termination of his parental rights to a child on grounds that earlier termination of his rights to another child was voluntary and that he was fit to parent, the Court of Appeals found that admitting to the allegations in a petition to terminate parental rights does not convert the proceeding into a voluntary termination of parental rights. To voluntarily terminate parental rights the parent must affirmatively demonstrate a desire to terminate the parent-child relationship for good cause

The proceeding the father claimed was a voluntary termination of parental rights involved his waiving his right to trial and admitting that all of the allegations contained in the termination petition as to his child were true. The parties executed a settlement agreement, and the trial court stayed the termination of his parental rights to this child for 90 days on the condition that he comply with the terms of the settlement agreement. When he failed to meet the conditions of the stay, the trial court vacated its order staying execution of the termination of parental rights and terminated his rights to his child.

The Court of Appeals in its analysis noted that case law makes it clear that circumstances that justify involuntary termination do not necessarily justify voluntary termination. Thus, because in many cases the involuntary petition will not establish good cause for a voluntary termination, the Court declined to apply a blanket rule that an admission to an involuntary termination petition converts the petition into a voluntary termination. Rather, “good cause under the voluntary termination statute exists under a variety of circumstances.”

There are at least two procedures parents can utilize to convert an involuntary termination petition into a voluntary one. Parents can file a new petition supported by a factual basis articulating “good cause” under the statute as the statutory authority for the petition, or, they can formally amend the original petition to cite the “good cause” provision of the statute. This father did not avail himself of either procedure or take any other affirmative steps to indicate that he was voluntarily terminating his rights to the child.

On this record, the Court of Appeals concluded that the father’s admission to the allegations in the petition did not convert the county’s termination petition to a voluntary termination. Accordingly, the trial court did not err by presuming the father palpably unfit to parent the child. The Court of Appeals further found that there was more than sufficient evidence to find that the mother failed to rebut the presumption that she was palpably unfit, as was the father, and that there was no evidence indicating the terminations were not in the best interests of the child. *In the Matter of the Welfare of the Child of: W.L.P. and T.J.S, Parents*, A03-1593 and A03-1603 (Minn. App. 05/04/04).

■ **GENETIC TESTING; WRONGFUL CONCEPTION; ACCRUAL.** The Minnesota Supreme Court found that a physician who undertakes to test for and diagnose genetic disorder in an existing child owes a duty of care to the biological parents of the child when it is reasonably foreseeable that the parents would be injured if the testing and diagnosis were negligently performed. In this case, these parents claimed that if the diagnosis of Fragile X had been properly made, a tubal ligation would have been performed and conception avoided. They argued that damage occurred at the point of conception and the cause of action then accrued.

The Supreme Court found that Minn. Stat. §145.424, which prohibits causes of action for wrongful birth and wrongful life, did not prohibit parents from bringing an action alleging that they would not have conceived a subsequent child if they had been informed of the diagnosis of a genetic disorder in an existing child.

Given the increasing use of assisted reproductive technology services and given that genetic testing is often a significant part of those procedures, this case has the potential to affect that burgeoning area of medical practice and to affect families who are building their families through such medical processes. *Molloy v. Meier*, C9-02-1821 and C2-02-1837 (Minn. 05/20/04).

■ **JUVENILE DELINQUENCY; SENTENCING; SUPERVISED RELEASE.** Where a juvenile appealed from a sentence imposed after revocation of his probation, he argued that the district court erred by relying on an amendment to 18 U.S.C. §5037, which was enacted after his original act of juvenile delinquency, as authority to impose a period of “juvenile delinquent supervision” following the revocation of probation. The 8th Circuit Court of Appeals agreed with that argument. It specifically concluded that the amendment to §5037 authorizing juvenile delinquent supervision does not apply to acts of delinquency committed prior to November 2, 2002. Since the juvenile’s act occurred prior to that date, that section should not have been applied to him and the court erred in imposing a sentence of supervised release. *U.S. v. J.W.T.*, No. 03-3221 (8th Cir. 05/21/04).

■ **FOSTER HOME PLACEMENT; DUTY OF CARE; SEXUAL ABUSE; CIVIL RIGHTS.** County social workers in the state of Missouri were sued civilly by plaintiff family members who claimed that the social workers’ failure to conduct a background check prior to the placement of children and their failure to act promptly to remove the children from foster parents’ home despite receiving allegations of sexual abuse, violated the family’s substantive due process rights under the 14th Amendment. The 8th Circuit held that the Missouri Division of Family

Services employees were entitled to immunity on claims that their failure to conduct a background check or act to remove children following allegations of sexual abuse violated the plaintiff's civil rights.

The Court of Appeals found that the agency never had custody or control of the children and that the danger to the children was created by the family when they made the custodial arrangements which placed the children. The court observed that the Division of Family Services' role in this case was to help the family obtain legal recognition of the custody arrangements the family had already made, and to recommend to the juvenile officer the placement agreed to by the family. This was not sufficient to create a duty to protect the children while they were in the placement.

Under the circumstances, the court held that the defendant's failure to investigate the allegations of abuse was not so outrageous or egregious that it shocks the conscience and amounts to a violation of the plaintiff's substantive due process rights. Furthermore, failure to conduct a home study was no more than negligence and could not serve as the basis for a claim that constitutional rights were violated. Even if the plaintiffs had shown a constitutional violation, these defendants were entitled to qualified immunity because the alleged rights were not clearly established in 1985 when the complained of conduct occurred. **Heather Burton v. Patricia Richmond**, No. 03-2487 (8th Cir. 06/02/04).

■ **JUVENILE DELINQUENCY; EVIDENCE; HEARSAY; RULE 807.** This case involved abusive sexual contact with a ten-year-old girl. The district court allowed a forensic interviewer who conducted the initial interviews with the victim to testify regarding the child's descriptions of the abuse. The 8th Circuit held that in cases involving the admissibility of a sexually abused child's hearsay statements under Rule 807, the court must assess the trustworthiness and reliability of the out-of-court statement in light of the circumstances at the time of the declaration and the credibility of the declarant. In this case, the court found that several circumstantial guarantees were present: proximity in time; experience of the interviewer; and the age of the child. As a result, the statements were found admissible. **U.S. v. Bruce Thunder Horse**, No. 03-3064 (8th Cir. 06/04/04).

■ **ASSISTED REPRODUCTIVE TECHNOLOGY; UNIFORM PARENTAGE ACT; CALIFORNIA.** An intermediate court of appeals in California recently issued its ruling in a case involving assisted reproductive technology that has caused quite a significant amount of discussion, if not concern, across the nation. In this case, the appellant donated her eggs so that her lesbian partner could bear a child through in vitro fertilization. The couple orally agreed that only the recipient would be the legal parent unless and until there was a formal adoption. The recipient gave birth to twins and both women took on parental responsibilities. Adoption proceedings, however, were never initiated. While the donor does not dispute that the recipient birth mother qualifies as the children's parent, the donor argues that as the genetic mother, she too should qualify as a parent entitled to custody and visitation. The appellate court disagreed.

The court stated that because it believed that the "intention" test set out in the case of *Johnson v. Calvert*, 5 Cal. 4th 84, 93 (Cal. 1993) governs, and because substantial evidence supports the trial court's factual finding that only the recipient intended to bring about the birth of the child, whom she intended to raise as her own, the donor does not qualify as a parent under the Uniform Parentage Act. **K.M. v. E.G.**, No. A1-01-754 (Cal. App., 1st App. Dist., Div. 5, 05/10/04).

While many have expressed alarm at this decision and what it does to assisted reproductive technology agreements, in fact, it follows what appears to be the majority trend across the country that the intentions of the parties govern the legal relationships between the parents and the children resulting from these procedures. Furthermore, the case reaffirms that in these situations drafting comprehensive contracts and then following through with court proceedings to ratify the agreements is critical to the ultimate legal result.

PROCEDURAL RULES

■ **RULES OF JUVENILE PROCEDURE.** The Minnesota Supreme Court issued an order dated April 23, 2004, promulgating amendments to the Minnesota Rules of Juvenile Procedure, also referred to as the "Juvenile Delinquency Rules." Among the more substantive topics addressed in these new rules was clear language added stating that a court may revoke the probationer's extended jurisdiction juvenile (EJ) status, and upon such revocation, the court shall treat the offender as an adult and order various sanctions. The court is also required to make written findings that one or more conditions of probation were violated, the violation was intentional or inexcusable, and a need for confinement outweighs the policies favoring probation. Notice to remove judicial officer provisions were modified to state that such notice shall be served and filed within seven days after the child's counsel or the prosecuting attorney (rather than the party) receives written notice or oral notice of which judge is to preside. Language was also added stating that references in these rules to "child's counsel" also includes the child who is proceeding *pro se*. The remaining modifications were rather non-substantive in nature.

LOOKING AHEAD

Because Minnesota is currently considering changes to the statutes affecting access to birth information by adopted persons, it is instructive to note that a New Hampshire statute was recently enacted that allows adoptive persons aged 18 years or older access to their original birth certificates. This new law permits adult adoptees access to their original birth certificates on request. The open records law in New Hampshire takes effect January 1, 2005, and replaces a prior law that permitted the release of identifying information to adoptees aged 21 or older only if the court has found "good cause" or if the birth parents have filed a release with the child placement agency and have "been contacted, if possible, by the agency, and reaffirmed their desire to be contacted." This definitely appears to be the trend across the nation of making such records more easily accessible to adopted persons, and perhaps this law, like several others, will be considered by those persons involved in drafting modifications to Minnesota's adoption records statute. See *Evan B. Donald Adoption Institute News Letter*, Saturday, May 29, 2004.

The federal government has recently and substantially weighed in regarding the whole issue of "embryo adoption." In April of 2004, the Department of Health and Human Services announced the availability of \$950,000 in fiscal 2004 funds for the development and implementation of "embryo adoption public awareness campaigns." The announcement defined embryo adoption as "the donation of

frozen embryos from one party to a recipient who wishes to bear and raise a child or children.” It is anticipated that there will be three to four new one-year projects of \$200,000 to \$250,000 each. The Department requires applicants to “demonstrate experience with embryo adoption programs that conform with professionally recognized standards governing embryo adoption and other applicable federal or state requirements. To see the notice, review the April 12, 2004 *Federal Register*, pages 19185 to 19191.

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TAX JUDICIAL LAW

■ **HUTCHINSON: RECEIPT OF “FEES” QUALIFIES FOR 80% DEDUCTION PAID BY FOREIGN OPERATING CORPORATION.** The Minnesota Tax Court held that payments received from a foreign operating corporation (“FOC”) were “fees” for the purposes of Minn. Stat. §290.01 (19)(d)(11). This is the third aspect of *Hutchinson*. The first case considered whether a foreign sales corporation (“FSC”) could be an FOC and the court concluded affirmatively that the statute should be read within its plain meaning and therefore, *Hutchinson* qualified. The second case related to whether an FSC qualifying as an FOC could take the dividend-received deduction. On this aspect, the court ruled in the negative. The court held that the dividend-received deduction was not allowable to an FSC that qualified as an FOC. *Hutchinson* then raised the third issue of whether certain payments made from the FOC were “fees” and that was ruled on favorably for *Hutchinson* by the court. ***Hutchinson Technology, Inc. v. Commissioner of Revenue*** No. 7398-R and 7504-R, 2004 Minn. Tax Lexis 30 (Minn. T. Ct. 05/10/04).

■ **SALES TAX: CAPITAL EQUIPMENT —SERVICE BUSINESS.** The Minnesota Supreme Court overturned the Tax Court’s decision in *Sprint Spectrum, LP v. Commissioner of Revenue*, No. 7299-R, 7308-R, 7309-R, 2003 WL 21246600 (Minn. T. Ct. 05/23/03) and held that the purchase of telecommunications equipment that produces electronic signals that have physical characteristics is exempt from sales tax as “capital equipment” used for manufacturing “tangible personal property” to be “sold ultimately at retail” under Minn. Stat. §297A.01(16a). This decision will also control the case of *XO Communications, Inc. v. Commissioner of Revenue*, Nos. 7430-R; 7442-R, 2003 WL 22038358 (Minn. T. Ct. 08/27/03). *XO* is also in the Supreme Court but was stayed until the decision in the *Sprint* case. *XO* is a case in which the Minnesota Tax Court held that the equipment purchased for use in providing telecommunication services before August 1, 2001 was not eligible for the capital equipment exemption under Minn. Stat. §297A.01(16a) and Minn. Stat. §297A.25(42). ***Sprint Spectrum, LP v. Commissioner of Revenue***, 676 N.W.2d 656 (Minn. 2004).

■ **PROPERTY TAX: “60-DAY RULE” VIOLATED.** Where the property owner failed to comply with sufficient business and financial information required under Minn. Stat. §278.05(6), also known as the “60 day rule,” the Minnesota Tax Court ruled the appeal must be dismissed. Taxpayer’s argument that the property was not income-producing because the lease was between related parties and the rent only provided payment of debt service was rejected. *1100 Nicollet Mall, LLP v. County of Hennepin*, No. TC-29591, 2004 WL 612757 (Minn. T. Ct. 03/25/04).

■ **REAL PROPERTY: DISMISSAL FOR FAILURE TO FOLLOW “60 DAY RULE.”** Where property was owned by one entity, occupied by the protesting taxpayer, and the taxpayer transferred valuable consideration to its related parent through management fees, the Tax Court found that the property was income-producing property. Therefore, when the taxpayer failed to provide financial and economic data on the management fee, the court granted the county’s motion to dismiss for failure to comply with the “60 Day Rule” in Minn. Stat. §278.05(6)(a). ***KinderCare Learning Centers, Inc. v. County of Hennepin***, No. 30795, 2004 WL 895633 (Minn. T. Ct. 04/06/04),

■ **REAL PROPERTY: CHALLENGES IN A DELINQUENT-TAX PROCEEDING.** The Minnesota Court of Appeals held that in a delinquent-tax proceeding contesting the validity of taxes assessed against the taxpayer’s realty, the taxpayer had to allege three defenses: whether property was exempt from taxes; whether taxes had been paid; and whether there are jurisdictional objections to the delinquent-tax proceedings. Since the taxpayer failed to raise any of the three defenses set forth in Minn. Stat. §279.15 and construed in the case of *State v. Elam*, 250 Minn. 274, 84 N.W.2d 227 (Minn. 1957), the court affirmed the lower court. ***County of Steele v. Phillip Brase***, A03-1218, 2004 WL 887185 (Minn. App. 04/27/04),

■ **PROCEDURE: WHO CAN REPRESENT A CORPORATION IN TAX CASE?** The Minnesota Tax Court dismissed an appeal filed by an officer of a corporation and a 90 percent owner of the corporation because the officer was neither authorized to sign the appeal nor qualified to represent the corporation under Minnesota law. See Minn. Stat. §481.02(1 and 2); *Nicollet Restoration, Inc. v. Turnham*, 486 N.W.2d 753 (Minn. 1992); *In re the Conservatorship of Joanne Marie Riebel*, 625 N.W.2d 480 (Minn. 2001) (corporations must be represented by a licensed attorney in court proceedings except where the officer is the sole owner of the corporation). ***Robert E. Hoffman v. Commissioner of Revenue***, No. 7600-R, 2004 Minn. Tax Lexis 23 (Minn. T. Ct. 03/19/04),

■ **PROCEDURE: APPEALABLE ORDER.** The Minnesota Tax Court dismissed a taxpayer’s Notice of Appeal since it did not constitute an appealable order but related to a billing statement based on an expired order. Accordingly, the action was dismissed by the court for lack of jurisdiction. ***Eugene E. and Gwendolyn E. Wiebesick v. Commissioner of Revenue***, No. 7629-R, 2004 Minn. Tax Lexis 26 (Minn. T. Ct. 04/07/04).

■ **PROCEDURE: COSTS AND DISBURSEMENTS IN PROPERTY TAX CLAIM.** The Minnesota Supreme Court affirmed the Tax Court and dismissed the taxpayer’s motion for costs and disbursements because it was not filed within the 90-day filing requirement found in Rule 8610.0150, Minn. R. Civ. P. 68, and Minn. Stat. §278.05(5). ***Kenneth N. Raisanen v. County of Hennepin***, No. A03-1699, 2004 WL 964115 (Minn. 2004),

■ **TIMELY FILING; INTENTIONAL DISREGARD OF FILING REQUIREMENT; SUFFICIENCY OF REGULAR MAIL.** The Bankruptcy Court held that the taxpayer's mailing of its Forms W-2 by regular mail did not prove that the returns were timely filed because they were not mailed by certified or registered mail. However, regular mail was sufficient to avoid the increased penalty for intentional disregard of the filing requirement, amounting to the greater of \$100 per return or 10 percent of the amount required to be reported under IRC Section 6721(e). *Flanary and Sons Trucking, Inc.*, No. 02-20553, 93 AFTR 2d 2004-1078 (Bkrpty. DC Tenn., 2004),

■ **ASSIGNMENT OF ANNUITIES AS COLLATERAL FOR LOAN A TAXABLE DISTRIBUTION.** The IRS could properly treat the taxpayer's assignment of annuities as collateral for a loan a taxable event under IRC sections 72(p)(f). *Larry Armstrong v. United States*, No. 03-2662, 93 AFTR 2d 2004-2098 (8th Cir. 2004).

■ **EXISTING TAX LIENS NOT EXTINGUISHED BY PERSONAL DISCHARGE IN BANKRUPTCY.** Existing federal tax lien that attached to the taxpayer's property when he filed his bankruptcy petition was not extinguished as a result of his bankruptcy discharge. See IRC Section 6332. Bankruptcy law 11 U.S.C. §522(c)(2)(B) specifically provides that federal tax liens are not extinguished by personal discharge in bankruptcy. *Iannone v. Commissioner*, 122 T.C. No. 16 (2004).

■ **IRS SUMMONSES HELD ISSUED IN "GOOD FAITH" AND ENFORCED DESPITE EX PARTE COMMUNICATIONS.** Third party summonses issued by IRS in connection with its investigation into taxpayer's gift tax liabilities are enforced, despite improper *ex parte* communications between IRS appeals officer and IRS examining agent in violation of Revenue Procedure 2001-43. Since Congress did not specifically legislate a limitation on the IRS as a remedy for violation of the *ex parte* restrictions, the summons was enforced. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 68 (charges the commissioner with the duty to provide an independent appeals office and prohibit *ex parte* communication that appears to compromise the independence of the Appeals Office). *Robert v. United States*, 364 F.3d 988 (8th Cir. 2004).

■ **RELATED PARTY EXCEPTION; NO PARTNERSHIP LIABILITY ALLOCATION TO S CORPORATION PARTNER.** The Tax Court ruled that a partnership's recourse liability was not allocable to an S corporation partner under the Reg. §1.752-4(b)(2)(iii) "related-party" exception. The recourse loan was guaranteed by the other individual partner, who wholly owned the S corporation partner, and by another non-partner's S corporation that was partially owned by the individual partner. The court said that the related-party exception applied only to the partners. The S corporation partner and the S corporation non-partner guarantor were not related through their common ownership by the individual partner. *IPO II*, 122 T.C. No. 17 (2004).

■ **TAX DELINQUENCY PENALTIES NOT EXCUSED BY AGREEMENT WITH LENDER.** Temporary employment agency may not claim "reasonable cause" to excuse penalties under IRC Section 6651 and IRC Section 6656 for its failure to report and pay employment taxes based on an agreement it had with a lender under which the lender agreed to file, deposit, and pay the agency's employment taxes. The employment agency was not advised on a matter of law nor were there any "objective standards," *i.e.*, circumstances beyond its control, which rendered it incapable of meeting the criteria of "ordinary business care and prudence." *Nesse v. IRS*, No. RTW 03-CV-2223, 93 AFTR 2d 2004-1022 (D. Md. 02/19/04).

■ **"ERRONEOUS REFUND" LIMITATIONS STARTING DATE.** The district court held that the limitations period for initiating a suit to recover an erroneous refund under IRC Section 7405 and IRC Section 6532(b) begins on the date the check clears the Federal Reserve Bank. There are a variety of interpretations as to when the statute of limitations begins for the IRS use of the "erroneous refund" statute to enable the IRS to recover a refund:

1. The date on the refund check.
2. The date the refund check was mailed.
3. The date the refund check was received by the taxpayer.
4. The date the refund check was deposited in the taxpayer's bank account.
5. The date the check was honored by the Treasury, *i.e.*, the date the check clears the Federal Reserve.

This court held the proper date is the date the check is honored by the Treasury, *i.e.*, the date the check clears the Federal Reserve Bank. The court indicated this was the best date to begin the limitations period because that date is certain and would not lead to disputes as the other dates in this case had. *United States v. Greene-Thapedi*, No. 01C9129, 93 AFTR 2d 2003-6127 (DC Ill. 2003).

■ **CONSOLIDATING FILING ON RESTRUCTURING BY DOWNSTREAM MERGER.** Restructuring of an affiliated group of corporations, through a downstream merger, to enable them to elect Subchapter S status and thereby avoid unfavorable tax treatment, should be treated as a single transaction that terminated the group and its taxable year and rendered the corporations ineligible to file a consolidated tax return. The Court held that the taxpayer was not entitled to rely in the exception set out in Reg. §1.1502-75(d)(2) under the facts of the case cite. *Falconwood Corp. v. United States*, No. 95-479T, 93 AFTR 2d 2004-1906 (Fed. Cl. 2004).

■ **SUBSEQUENT YEARS' FINANCIALS; VALUING GIFTED SHARES OF COMPANY.** Tax Court did not err in excluding financial statements for subsequent years in determining fair market value of shares of small business gifted by taxpayer to his children. Whether evidence relating to subsequent events is admissible in determining the fair market value of property on an earlier date is an issue of relevance. Based on the taxpayer's offer of proof, the 1993 and 1994 unaudited financial statements were not relevant. *Polack v. Commissioner*, No. 03-1295, 2004 WL 936685 (8th Cir. 05/03/04).

- **SALES TAX: GUIDANCE ON “CAMP FEES.”** In Minnesota Department of Revenue Notice No. 04-03 (03/29/04), the commissioner issued guidance on the taxability of camp fees. In 2003, Minn. Stat. §297A.70(16) was amended to expand the types of camps that qualify for sales tax camp fee exemption by eliminating age restrictions on campers. Exempt camp fees now include fees to camps providing services primarily for children including fees for adults accompanying children, camps for persons with disabilities, and camps providing educational or religious activities if the facility is owned and operated by an IRC 501(c)(3) entity. The department’s position is that the exemption applies to the amounts paid to camps or recreational facilities for the privilege of attending the camp or for participating in recreational, educational or religious training or programming.
- **SALES TAX: DISTINGUISHING REAL PROPERTY FROM PERSONAL PROPERTY.** In Minnesota Department of Revenue Notice No. 04-04 (03/29/04), the commissioner stated its position as to how to determine what is real property and tangible personal property for sales tax purposes when the property is *not* subject to an *ad valorem* tax. The revenue notice provides a list of some examples showing what the commissioner believes is real property and what is tangible personal property. This revenue notice applies only to sales and use tax.
- **SALES TAX ON SOFT WATER PRODUCTS AND DEALERS.** In 28 S.R. 1180 (03/29/04), the commissioner requested comments on possible amendments to the rules governing sales and use tax on soft water products and dealers in Minnesota Rule, Part 8130.9000.
- **SALES TAX GUIDANCE ON “LAWN CARE”.** In Minnesota Department of Revenue Notice No. 04-05 (05/24/04), the commissioner issued a revenue notice explaining the application of the sales tax to lawn care services by defining “lawn” and the phrase “lawn care service.” Examples of taxable services include garden tilling and soil preparation; dethatching; and reseeding lawns. Examples of nontaxable services include snow plowing; initial seeding of lawn; and moving trees or shrubs from one location to another.
- **PROCEDURE: REIMBURSEMENTS FOR COSTS OF FURNISHING SUBPOENAED RECORDS.** In Minnesota Department of Revenue Notice No. 04-06 (05/24/04), the commissioner stated its position on the requirement contained in various laws such as Minn. Stat. §289A.36 that the commissioner pay the reasonable costs of producing records he has subpoenaed from a third party. The reimbursement rate for subpoenas will be \$10 per hour for search costs and 25¢ per page on copying. If the estimated reimbursement costs exceed \$250 prior consent of the commissioner must be obtained. After approval by the commissioner, a separately stated itemization of costs is required.
- **CONVERSIONS OF PARTNERSHIPS TO CORPORATIONS UNDER “FORMLESS” STATE LAW.** In Revenue Ruling 2004-59, the IRS addressed conversions to state law corporations of unincorporated state law entities classified as partnerships for federal tax purposes. If those conversions occur under a state law formless conversion statute — one that does not require the actual transfer of the partnership’s assets or interests — the transaction will be treated in the same way as a partnership election to be treated as an association. The entity would be deemed to have contributed all its assets and liabilities to the corporation in exchange for stock in that corporation. Immediately thereafter, the partnership would be deemed to liquidate and distribute the stock of the corporation to its partners. As part of its reasoning, the IRS stated that Rev. Rule 84-111 does *not* apply to partnership conversions under a state-law formless conversion statute. If an entity wants the tax treatment in Rev. Rule 84-111, it will be required to actually transfer the assets for federal tax purposes.
- **NOTICE REQUIREMENT; COLLECTING DAMAGES-FOR-DELAY PENALTY.** The Chief Counsel’s Office stated, in CCA 200407019, that the notice and right to hearing provisions of IRC Section 6330 must be provided before serving a levy to collect an IRC Section 6673(a)(1) penalty for making frivolous arguments before the Tax Court. The Chief Counsel’s Office reasoned that, because the IRC Section 6673(a)(1) penalty is collected in the same manner as a tax, notice and a right to a hearing must be given to the taxpayer in the same manner as required by IRC Section 6330(a)(1) and (3) when the IRS intends to levy to collect an unpaid tax. See IRC Section 6671(a) (penalties and liabilities provided for by subchapter B are to be assessed and collected in the same manner as taxes).
- **ENTITY MEMBERS, OWNERS; LIABILITY FOR LLC’S EMPLOYMENT TAXES.** In Rev. Rul. 2004-41, 2004-18 IRB, the IRS held that a limited liability company’s (“LLC”) members are not liable for its unpaid employment taxes in their capacity as owners of the entity. Although the LLC was classified as a partnership for federal tax purposes, where general partners are liable for the entity’s obligations, the members weren’t liable under state law for the entity’s debt. However, they may be liable for the unpaid employment taxes under the IRC Section 6672 trust fund penalty tax rules. The result would have been different if the LLC was owned by a single member. See Chief Counsel Advice 200235023.
- **MERGER OF PARTNERSHIPS.** IRS released Revenue Ruling 2004-43, 2004-18 IRB 842 describing the consequences of certain assets-over partnership mergers. The ruling addresses two issues. The first is whether IRC section 704(c)(1)(B) applies to IRC section 704(c) gain or loss that is created in an assets-over partnership merger. The second is whether, for purposes of IRC section 737(b), net pre-contribution gains include IRC section 704(c) gain or loss that is created in an assets-over partnership merger.
- **DEDUCTIBLE MEALS AND ENTERTAINMENT EXPENSE.** Businesses will be able to use a statistical sampling methodology to establish the amount of substantiated meal and entertainment expenses deductible under IRC section 274(n). Revenue Procedure 2004-29.
- **WEB RESOURCES FOR SMALL BUSINESS OWNERS.** IRS in two news releases highlights numerous Web-based resources available to help small business owners answer tax questions and take advantage of IRS services. The first release (IR-2004-68) stated the IRS Web site offers resources and services for starting and operating a small business, including checklists and information on how business taxes apply to various expenses. The second release (IR-2004-69) announced a variety of retirement plan “check-ups” and an employer newsletter intended to help small businesses keep their retirement plans complaint. 95 *Daily Tax Report*, BNA at G-1 (05/18/04).

LEGISLATION

- **MINNESOTA BUSINESS CORPORATION ACT.** There are a number of amendments to the Minnesota Business Corporation Act (“MBCA”) that

will take effect on July 1, 2004. These are found in H.F. 1824, S.F. 1803, and Chapter 199. In addition to amendments of a more technical nature, the principal amendments from a tax aspect are:

1. Corporate/LLC Conversion. A number of states have enacted statutes that allow a corporation to convert directly into a limited liability company and vice versa. The amendment creates new section 302A.681, which authorizes conversions between domestic corporations and domestic limited liability companies.

2. Annual Corporate Registration. An amendment sponsored by the Minnesota Secretary of State, effective retroactively to January 1, 2004, makes a number of changes to the requirement in section 302A.821 that corporations file an annual corporate registration. First, the text of the annual reminder-to-file notice sent to corporations is changed to indicate that the filing may be made via the secretary of state's Internet site. Second, the failure to file an annual registration for two years, down from three years, will trigger administrative dissolution of a corporation. Finally, a corporation that has been administratively dissolved for failure to file annual reports may be reinstated with retroactive effect by making a filing with and paying a fee to the secretary of state.

■ **UNEMPLOYMENT INSURANCE.** Effective January 1, 2005, the 2004 bill changed the definition of employment to include service performed by a member of a limited liability company ("LLC"), regardless of how much of the company the member owns. Under current law, work done by LLC members who owned 25 percent or more of a company cannot be considered employment.

In addition, the definition of non-covered employment of a corporate officer or of a member of an LLC, if the person owns at least 25 percent of the corporation or LLC, has been amended with the effect of making unemployment insurance on those employees *voluntary* for the employer. The impact of the law now permits any type of entity, as long as 25 percent or more is owned of the entity, say between a husband and wife, to escape paying any unemployment compensation payments. This eliminates the previous discrimination among entities and specifically LLCs. These provisions are found in H.F. 2235, S.F. 2243, and Chapter 183.

■ **GOVERNOR'S BUDGET CUTS.** On May 17, 2004, the governor acted on his own to erase the state's \$160 million projected deficit after the Legislature was unable to finish a budget before adjourning on May 16. On May 15, the governor had previously described \$97 million in cuts he would favor to balance the budget. He added another \$63 million in cuts on May 17. He wiped out the shortfall by using reserve health care funds, delaying construction projects, stepping-up efforts to catch tax cheats, and ordering state agencies to reduce administrative costs. The following details the cuts in question:

- Health Care Access reserve funds: \$110 million
- State agency administrative reductions: \$17 million (cutting state agency budgets by 3%)
- Savings in debt service with no bonding bill passes: \$8 million
- Delay or freeze bond sale for projects already authorized: \$18 million
- Divert Department of Revenue cuts to beef-up and use for more aggressive tax compliance efforts: \$7 million

With no legislative budget agreement and tax bill, there were no significant business tax increases and no major business tax policy changes in 2004.

- No progress was made moving to a sales-only apportionment formula for the corporate franchise and income tax.
- The Senate's increase in the statewide property tax was not enacted, saving businesses \$336 million over three years.
- The Senate's foreign operating corporation ("FOC") provision was not changed and the foreign royalty deduction was not repealed saving businesses \$172 million over 3 years. (The House also had an FOC provision but its budget impact could not be estimated.)
- The Senate's "throwback rule" for the corporate franchise and income tax was not implemented, saving businesses \$55 million over three years.
- The phase-out of limited market value remained in place, which will eliminate a property tax shift from homes, cabins and farms onto business property.

If the governor calls a Special Session, all of these issues will be back in play. If there is no Special Session, these issues will likely be debated again in the Session 2005.

■ **MINNESOTA'S RED INK.** Minnesota faces a potentially bigger shortfall in the next two-year budget (fiscal 2006-2007) than in the current one (fiscal year 2005). The size of the next shortfall depends in part on whether inflation — the increased cost of providing services — is taken into account: \$441 million without inflation and \$1.1 billion with inflation.

■ **PENSION FUNDING RATES; NEW INTEREST RATE TABLE.** The president signed a bill (H.R. 3108 P.L. 218) that lowered required employer contributions to traditional pension plans for two years and gave airlines and steel manufacturers relief from contributions required for underfunded plans. The Pension Fund Stability Act of 2004 replaced the 30-year Treasury bond interest rate with a higher composite corporate bond rate as the benchmark for plan funding calculations; allowed certain companies to postpone deficit reduction contributions; and allowed certain multiemployer plans to temporarily delay the amortization of specified losses. IRS, in Notice 2004-34, issued the new interest rate in the form of a table listing the composite corporate bond rates for each month from January 2000 through March 2004. IRS also issued Announcement 2004-38 to describe the process for electing an alternative deficit reduction contribution as provided under the bill for airlines and steel manufacturers.

■ **INTERNET ACCESS TAXES.** The House passed in H.R. 49 a permanent ban on the taxation of Internet access charges and included a broad definition of Internet access taxes. In contrast, the Senate in S. 150 passed a four-year moratorium on Internet access taxes. Apart from the length of the moratorium, however, there are sharp contrasts between the House and Senate bills. The Senate version of the bill contains a narrower definition of Internet access taxes than does the House measure. Unlike H.R. 49, S. 150 also has a carve-out providing the moratorium does not apply to telephone calls using Voice over Internet Protocol (VOIP) technology, as well as protections for existing Internet access and digital subscriber line taxes. With the different versions in the bills, a Conference Committee is needed. Because 2004 is an election year, there is uncertainty whether anything will be enacted in 2004 before Congress adjourns to campaign.

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TORTS & INSURANCE

■ **PARTNERSHIP/NEGLIGENCE; WORK WITHIN SCOPE OF PARTNERSHIP.** Plaintiff's minor child was injured in an accident at Jax Restaurant while his mother, one of the Jax partners, worked in the kitchen. The minor's father commenced a negligence action against the partnership, which then commenced a third-party action against the minor's mother, arguing the partnership was entitled to indemnity or contribution. The district court granted summary judgment in favor of the partner, holding she had no obligation to indemnify the partnership because the injury occurred while she was engaged in ordinary business conduct.

The Court of Appeals affirmed, looking to the Minnesota Uniform Partnership Act of 1994 and concluding that a partner has a right to indemnity from the partnership, but a partnership's claim of indemnity from a partner is not authorized or required. The partnership argued that because the partner brought her son to work with her she was acting in her role as a mother and not in the course of partnership business. The court rejected this argument and held that acts can further both personal and business purposes and still occur in the ordinary scope of partnership business. Although the partner in this case had her child with her, the court held she was nevertheless engaged in work for the partnership at the time of the accident. *Moren v. Jax Restaurant*, A03-1653, (Minn. App. 04/27/04). www.lawlibrary.state.mn.us/archive/ctappub/0404/opa031653-0427.htm

■ **INSURANCE COVERAGE; RESERVATION OF RIGHTS.** Defendant developer notified its insurer of demands made against it by condominium owners for water damage to the units caused by a faulty mechanical system, and also informed the insurer that it was negotiating with a contractor to repair the damage. Defendant then entered into a repair agreement with the contractor, after which the insurer responded by letter that the claims likely were not covered. Defendant subsequently entered into separate repair agreements with the condominium association and individual unit owners.

Three unit owners then commenced a lawsuit against defendant, which tendered the lawsuit to its insurer for defense and indemnity. The insurer denied coverage. Defendant settled with the unit owners. Because the coverage issues were still in dispute, the insurer commenced a declaratory judgment action to determine the coverage issues. The district court granted summary judgment in favor of defendant insured, holding that defendant did not breach the cooperation clause by entering into the repair agreements because the insurer had denied coverage in its first letter, and because none of the policy exclusions were applicable.

The Court of Appeals affirmed, explaining that when an insurance company completely denies coverage, the insured may independently enter into a settlement agreement in order to extricate itself.

Moreover, the court concluded that neither the contractual liability exclusion nor the business risk exclusions applied to bar coverage. The contractual liability exclusion did not apply because of the exception to that exclusion for liability the insured would have incurred in the absence of the contract or agreement. The court explained that notwithstanding the repair agreements, defendant was legally liable for the damage to the condo units. Finally, the business risk exclusions did not apply to bar coverage because the condominium unit or "project" was defendant's "work." *Auto-Owners Ins. Co. v. New Mech Companies Inc.*, A03-1062, (Minn. App. 04/27/04). www.lawlibrary.state.mn.us/archive/ctappub/0404/opa031062-0427.htm

■ **INSURANCE COVERAGE; BUSINESS RISK; PROPERTY DAMAGE EXCLUSION.** Plaintiff, the general contractor on a swimming pool construction project, incurred costs to replace coping stones manufactured by another entity. It then brought a declaratory judgment action against defendant insurer for indemnity under its comprehensive general liability insurance policy. The district court granted summary judgment for defendant, holding that two policy exclusions applied — the exclusions precluding coverage for damage to "your property" and "your work." The Court of Appeals reversed, holding that the subcontractor exception to the "your work" exclusion applied.

The Supreme Court affirmed, noting that neither the business-risk doctrine nor the Court's previous decisions on that subject were controlling because the extent to which a CGL policy covers an insured's business risk must be determined by the specific terms of the contract. Therefore, the Court analyzed the particular terms or exclusions at issue — the "your product" and "your work" exclusions — and held that neither one applied to preclude coverage.

The Court explained that the "real property" exception to the "your product" exclusion applied because the coping stones were a component of the swimming pool. The swimming pool fit the general definition of "real property" because it was attached to and/or erected upon the land. Consequently, because the "real property" exception applied, the "your product" exclusion did not.

The Court next considered whether the manufacturer of the coping stones was a “subcontractor.” Because the term subcontractor was undefined, the Court found it was ambiguous and therefore construed it liberally in favor of coverage. The Court ruled that where a supplier custom fabricates materials to the owner’s specifications and provides on-site services in connection with the installation, the supplier meets the definition of subcontractor under the exception to the “your work” exclusion. Hence, the “your work” exclusion did not apply in this case. **Wanzek Construction, Inc. v. Employers Insurance of Wausau**, C4-03-165 (Minn. 04/29/04).

www.lawlibrary.state.mn.us/archive/supct/0404/op030165-0429.htm

■ **NO-FAULT INDEMNITY; STATUTE OF LIMITATIONS.** State Farm provided no-fault insurance coverage for three children who were injured, one fatally, when the school bus in which they were riding was struck by a tractor-trailer owned by a business to which Liberty Mutual provided liability insurance. When State Farm sought indemnification from Liberty Mutual, the arbitrator dismissed the claim related to the deceased, reasoning that the wrongful death statute of limitations had already run. On review, the district court vacated the portion of the arbitrator’s award that found the claim was time-barred.

The Court of Appeals affirmed, explaining that the claim was subject to the six-year statute of limitations applicable to rights created by statute, rather than the three-year statute of limitations applicable to wrongful death claims. The court distinguished the statutory indemnification claim, which is available only to the insurer, from claims that would have been available only to the decedent and reasoned that it would be inappropriate to apply the same statute of limitations to both. **State Farm v. Liberty Mut. Ins. Co.**, A03-1205 (Minn. App. 05/04/04). www.lawlibrary.state.mn.us/archive/ctappub/0405/opa031205-0504.htm

■ **INSURANCE CONTRACT; ARBITRATION CLAUSE.** Defendant’s insurance policy issued to plaintiff included a two-year limitations period for commencement of any “suit” to recover for property claims. The policy also included an arbitration clause outlining procedures for resolving disagreements over appraisals of loss. When plaintiff reported property damage three years after its discovery, defendant refused to honor the claim due to expiration of the period of limitations. Defendant also declined to cooperate when plaintiff demanded arbitration, asserting the clause merely provided a formula for appraising a loss.

The Court of Appeals affirmed the district court’s ruling directing arbitration. The court noted that a “suit” is defined as: “[a]ny proceeding by a party or parties against another in a court of law.” Arbitration is an adjudicative process carried out outside the established tribunals of justice. The court also held that a reasonable person in the insured’s position would read a clause labeled “arbitration,” which would ultimately grant an “award,” as an arbitration clause. **Vaubel Farms, Inc. v. North Star Mut. Ins. Co.**, A03-1607 (Minn. App. 05/18/04). www.lawlibrary.state.mn.us/archive/ctappub/0405/opa031607-0518.htm

■ **MEDICAL MALPRACTICE; GENETIC TESTING; DUTY OF CARE; ACCRUAL OF ACTION; WRONGFUL CONCEPTION.** Parents of S.F. brought a medical malpractice action against three physicians claiming that their negligence in failing to diagnose genetic disorder, Fragile X, caused the conception of another child with the same genetic disorder. The first physician consulted intended to order certain genetic testing, but due to a “system breakdown” one specific test never occurred. The parents were told the genetic testing was normal. Relying on the erroneous assumption that S.F. had undergone all genetic testing, two other physicians failed to test for and diagnose Fragile X.

The district court denied the physicians’ motion for summary judgment, holding that they owed a duty to the biological parents; that the cause of action was not barred by the four-year statute of limitations; and that claims for wrongful conception are permitted in Minnesota. Both the Court of Appeals and the Supreme Court held: (1) that the physicians owed a duty of care to the biological parents of S.F. because it was foreseeable that negligence in testing for, diagnosing, and reporting S.F.’s genetic disorder to her parents could result in the birth of another child with the same disorder, (2) that the statute of limitations begins to run in a parents’ medical negligence claim such as this at the time of the subsequent child’s conception, the point at which the parent could establish damages and a viable cause of action in tort, and (3) that Minnesota law permits actions for wrongful conception, as long as there is no claim that but for a doctor’s negligence, the child would have been aborted. **Molloy v. Meier**, C9-02-1821 and C2-02-1837 (Minn.

05/20/04). www.lawlibrary.state.mn.us/archive/supct/0405/op021821-0520.htm

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