



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

CIVIL LITIGATION

JUDICIAL LAW

■ **AFFIDAVIT WITHOUT DOCUMENTARY SUPPORT; SUMMARY JUDGMENT.** When you are faced with a motion for summary judgment, do not assume that your client's affidavit will be sufficient to create a material fact issue. The Minnesota Court of Appeals recently reviewed a grant of summary judgment in a case involving the alleged breach of a lease agreement. In support of its motion for summary judgment, the plaintiff presented the court with a copy of the lease agreement as well as an affidavit stating the amount owed and attaching a balance summary of the lease account. In response, the defendant submitted an affidavit stating that (1) the plaintiff failed to credit payments the defendant had made, and (2) the defendant had made a written request to exercise an option to purchase the leased equipment. The defendant did not attach any documents to support these assertions, nor did he provide any such documents in response to the plaintiff's discovery requests. In affirming the grant of summary judgment, the Court of Appeals noted that "[t]his is a case that will be proved or disproved largely, if not entirely, by documentary evidence." Thus, to permit the defendant to go to trial would mean that "in such a case a party can defend against summary judgment merely by submitting an affidavit denying the moving party's claims without offering any documentary support." An affidavit is not a magic bullet against Rule 56 — be sure to include as much documentary support as possible. **Sunrise International Leasing Corporation v. Dedicated Media et al.**, A04-111 (Minn. App. 10/01/04) (unpublished).

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CRIMINAL LAW

JUDICIAL LAW

■ **VOIR DIRE; BATSON; APPELLATE REVIEW.** The Supreme Court articulates the new standard for review of a district court's determination that a *prima facie* showing of racial discrimination has not been made. In noting that federal courts have given "great deference" to district court decisions, Minnesota adopts a "clearly erroneous" standard for review of a district court's determination under step one of the *Batson* process. **State v. Tyrone James White**, A03-502 (08/06/04). www.lawlibrary.state.mn.us/archive/supct/0408/opa030502-0806.htm

■ **EVIDENCE; DESTRUCTION; METH LAB CLEAN UP; EXCULPATORY VALUE.** In a bust of a clandestine methamphetamine lab, a police team searched, inventoried, and later designated for destruction certain items which it believed were contaminated. The defendant argued, on appeal, that the conviction should be reversed because of the intentional and selective destruction of potentially exculpatory evidence.

Held, the defendant offered no proof that police destroyed evidence knowing it had exculpatory value. In such a situation, where the spoliated evidence may have been exculpatory, the defendant must show bad faith on the part of the state in order to establish a due process violation. Because there was no showing that the officers acted in bad faith, the trial court properly denied the appellant's motion to dismiss. . **State v. Mark Anthony Heath**, A03-737 (Minn. App. 08/10/04). www.lawlibrary.state.mn.us/archive/ctappub/0408/opa030737-0810.htm

■ **SENTENCE; BLAKELY.** The trial court imposed a 50 percent upward durational departure based on several aggravating factors, including major controlled substance violation and the presence of children. The court noted that after the parties submitted initial briefs, the United States Supreme Court filed *Blakely*. Because this case, like *Blakely*, involved facts found by the judge and applied to enhance *Heath's* sentence beyond that recommended in the guidelines, the appellate court remanded the case to the district court with instruction to consider the applicability of *Blakely* to the sentence. **State v. Heath**, *supra*.

■ **ACCOMPLICE TESTIMONY; JURY INSTRUCTION; TESTIMONY OF ACCOMPLICE.** At trial, several witnesses testified that the appellant did not possess a gun, and was not a felon in possession. Only one witness, appellant's brother, consistently testified that he gave the gun to the appellant; however, he was awaiting sentencing, a "highly vulnerable position" because it was unclear whether appellant's brother was an accomplice. As a matter of law, the issue should have been submitted to the jury. The accomplice testimony instruction should have been given for the jury's use. Therefore, the trial court abused its discretion in denying appellant's request for the accomplice instructions (JIG 3.18F). **State v. Walter Davis**, A03-1426 (Minn. App. 08/17/04). www.lawlibrary.state.mn.us/archive/ctappub/0408/opa031426-0817.htm

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **RACIAL DISCRIMINATION.** In an extremely rare reversal, the 8th Circuit Court of Appeals, on a petition for rehearing, overturned a panel's decision that had upheld dismissal of a race discrimination case. An African-American employee claimed that he was subjected to a racially hostile environment because of racial slurs and graffiti by his coworkers and supervisor. The 8th Circuit initially affirmed summary judgment for the employer, reasoning that the wrongdoing was not sufficiently egregious to warrant a claim under Title VII of the Federal Civil Rights Act. On a petition for rehearing, however, the court changed its mind, and remanded the case to the trial court. The reversal and remand occurred after it was pointed out to the court that the racially-degrading graffiti in the workplace referred to the claimant. In addition to remanding for assessment of whether there was a "hostile environment," the appellate court charged the trial court to determine whether the employer knew about the wrongdoing, as would be necessary in order for the claim to be actionable. *Jackson v. Flint Ink – North American Corp.*, 370 F.3d 791 (8th Cir. 2004).

A \$6 million punitive award for an African-American man who claimed racial discrimination was reversed by the 8th Circuit. Because the employee was awarded compensatory damages of \$600,000, the ratio of 10:1 of punitive damages to compensatory damages far exceeded the "outer limits" permissible for punitive damages under the case law of the U.S. Supreme Court. *Williams v. Con Agra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004).

■ **DATA PRACTICES.** The names of "finalists" for the position of president of the University of Minnesota must be disclosed to the media under the Minnesota Government Data Practices Act, Minn. Stat. §13.01, *et seq.* and Minnesota Open Meeting Law. The Minnesota Supreme Court, affirming the ruling of the appellate court, which upheld a decision by the Hennepin County District Court, ruled that the names of all "finalists" for the position are "public" data under the act. The Court rejected the University's claim that making the names of "finalists" public might deter candidates from applying for the position, along with the University's argument that its "autonomy under the Minnesota State Constitution barred application of the statutes" to the institution's selection of a president. *Star Tribune Co. v. University of Minnesota*, 683 N.W.2d 274 (Minn. 2004).

■ **WORKERS COMPENSATION.** An arrangement between an employer and labor union for Alternative Dispute Resolution (ADR) for work-related injuries was invalid to the extent it barred an injured employee's attorney from participating in the early stage of the ADR process. The Supreme Court held that the exclusion of counsel from the "facilitation" process violates the ADR enabling provision, Minn. Stat. §176.1812, subd. 4. *Kline v. Berg Drywall, Inc.*, 685 N.W.2d 12 (Minn. 2004)

The actions and inactions of personnel of the Minnesota Vikings were not "grossly negligent" in connection with the death of Viking player Corey Stringer, who died of heat exhaustion in summer training camp in 2001. The Court of Appeals affirmed a Hennepin County District Court dismissing the family's wrongful death action on grounds that the immunity provision of the workers compensation law for conduct of coemployees banned the lawsuit and that the exception for "gross negligence" did not apply. Even though the action of Viking medical and other personnel may have reflected "poor judgment or reasonable care," their behavior did not satisfy the high standard of "willful and intentional" wrongdoing to trigger the "gross negligence" exception. *Stringer v. Vikings Football Club, LLC*, 686 N.W.2d 545 (Minn. App. 2004),

■ **UNEMPLOYMENT COMPENSATION.** An employee who accepted a job in response to an advertisement promising wages at a certain level and then quit the job after the wages did not meet the advertised level was disqualified from receiving unemployment compensation benefits. The advertisement did not constitute a contract, and the employee did not have "good reason" to quit the position. *Melrose v. Quicksilver Express Courier*, 2004 WL 2093960 (Minn. App. 2004) (unpublished).

An employee who quit his job because he could not perform the lifting requirements due to a back injury was disqualified from receiving benefits. The claim was barred because he accepted the position knowing that the lifting requirements exceeded his doctor's recommendations, and he never sought an accommodation from the employer. *Frishberg v. Best Cleaners, Inc.*, 2004 WL 2093962 (Minn. App. 2004) (unpublished).

LOOKING AHEAD

The U.S. Supreme Court will decide this term whether disparate impact cases may be pursued under the federal Age Discrimination in Employment Act (ADEA). In *Smith v. City of Jackson*, No. 03-1160, the high court will determine whether police officers may sue because their salaries and benefits were retrenched in order to accommodate higher salaries and benefits for newer employees. The federal circuit courts are split on the question whether lawsuits based on discriminatory impact, without proof of intent to discriminate, may be pursued under the ADEA. The 8th Circuit has ruled that such claims can be brought under the statute. *Leftwich v. Harriet Stowe State College*, 702 F.3d 686 (8th Cir. 1983).

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ENVIRONMENTAL LAW

JUDICIAL LAW

■ **CERCLA: PRO TANTO APPROACH TO APPLICATION OF SETTLEMENT PROCEEDS.** The United States District Court for the District of Minnesota granted a third-party defendant's motion for dismissal from a lawsuit over remediation costs. In the process, the court ordered that the amount paid by the third-party defendant under a previous settlement be applied on a *pro tanto* basis to any damages the

plaintiff may recover at trial. The plaintiff, Hidden Lakes Development (“HLD”), purchased property from defendant Allina Health System (“Allina”) and third-party defendant Transitional Hospital Corporation (“THC”). Allina had previously owned the parcel that THC sold to HLD. In the 1970s, Allina had filled a large ravine on that parcel known as the “Central Valley” using, among other things, construction debris supplied by defendant Park Construction Company (“Park”). HLD later discovered asbestos contaminated materials (“ACM”) in and a deposit of naphthalene near, the Central Valley when it began developing the property for residential housing. After contacting the Minnesota Pollution Control Agency (“MPCA”) and piling the ACM fill on the property for a period of time, HLD eventually reburied the fill on another part of the property. It also placed a deed restriction on the property at the direction of the MPCA.

HLD filed a lawsuit against Allina and Park to recover its costs that asserted CERCLA, MERLA, breach of contract, misrepresentation, nuisance and common law contribution claims. Allina and Park filed cross-claims against THC seeking contribution for any costs for which they might be found liable. The parties eventually filed cross-motions for summary judgments on the above claims.

Two of the motions sought rulings on issues on which the 8th Circuit Court of Appeals has yet to decide. The first was Park’s motion to dismiss HLD’s common-law contribution claim because CERCLA preempts such common-law claims. Park relied for its motion on a 2nd Circuit Court of Appeals decision, *Bedford Affiliates v. Sills*, 156 F.3d 416 (2nd Cir. 1998), which held that state law remedies of restitution and indemnification undermined CERCLA’s “carefully crafted settlement system.” Although the 8th Circuit has yet to adopt it, the district court was nonetheless persuaded by the 2nd Circuit’s reasoning in *Bedford Affiliates* and dismissed HLD’s common-law contribution claim.

The second motion involved THC’s motion for dismissal of Allina and Park’s cross-claims against it. THC had entered into a settlement agreement and release with HLD that included a *Pierringer* release in which, in exchange for payment of a settlement amount, HLD agreed to indemnify and defend THC against future actions relating to CERCLA and MERLA claims. THC moved to have Allina and Park’s cross-claims against it dismissed on the basis of its agreement with HLD.

The Court granted THC’s motion for a cross-claim bar, but not before determining how it was that the proceeds from the agreement between HLD and THC would be applied against any future damages HLD might recover. Allina and Park argued that THC’s payment should be applied on a *pro tanto* basis, meaning that the payment would set off any eventual damages received by HLD on a dollar-for-dollar basis. HLD argued that the court should apply the proportionate credit rule, in which the court would determine the percentage fault of all parties, including the settling party. The amount paid by the settling party (THC, in this case) would then be credited as payment for its percentage, regardless of whether or not the amount paid represented an accurate reflection of that percentage. The remaining parties would then be required to pay their allotted percentage of the damages. Neither the 8th Circuit Court of Appeals nor the district court, prior to this decision, had addressed the issue of the proper credit rule to be applied in CERCLA cases brought by private parties.

The court ultimately decided to apply the *pro tanto* approach. HLD’s expert estimated the total remediation costs to be only \$500,000 more than that which THC had already paid. The expert also estimated THC’s liability to be under 10 percent of the total remediation cost. The court decided to apply the proportionate rule, reasoning that to do otherwise would be to grant a windfall to HLD and decrease the likelihood of settlement between the remaining parties.

The court also denied and granted a number of other motions made by HLD, Allina and Park. The Court rejected HLD’s CERCLA section 107 claim because it was a potentially responsible party that knew of some, if not all, of the on-site contamination prior to its purchase of the property and because it contributed to the property’s contamination. The court dismissed HLD’s breach of contract claim because there was no evidence in the record that Allina violated the part of the purchase agreement in which it stated that none of its officers above a certain level knew of the contamination before the sale. It also rejected HLD’s nuisance and misrepresentation claims on legal grounds. The court, however, denied Allina and Park’s efforts to have HLD’s CERCLA section 113 and MERLA claims dismissed, citing unresolved factual issues involved with both. ***Hidden Lakes Development, LP v. Allina Health System and Park Construction Co.***, 2004 WL 2203406 (D. Minn. 09/27/04).

■ **INDIVIDUAL SEWAGE TREATMENT SYSTEMS: ISTS STATUTE AND RULES.** The Minnesota Court of Appeals recently rejected an appeal brought by homeowners in Carver County that claimed the county’s enforcement of its individual sewage treatment system (“ISTS”) ordinance was unconstitutional. Carver County adopted its ISTS ordinance pursuant to Minn. Stat. §§115.55, .56 and Minn. Stat. Ch. 145A. Members of the county’s Environmental Services Division inspected the ISTS on relators Robert and Julie Rocheleau’s property in 2001. The County determined the Rocheleau’s ISTS to be an imminent public health threat and ordered that it be brought into compliance within ten months, pursuant to the county’s ordinance. After a series of ISTS plan submittals and rejections, and disputes between the Rocheleau’s consultants and the county, the county again ordered the submittal of a new ISTS design by a date certain. The Rocheleau’s requested an administrative hearing to review the county’s requirements before the county’s assistant environmental services director. They then appealed the assistant director’s affirmation of the original order to an administrative law judge (“ALJ”) appointed by the county, who recommended that the assistant director’s determination be upheld. The Carver County Board of Commissioners adopted the ALJ’s recommendation and extended the Rocheleaus’ date for compliance with the county’s ISTS ordinance. The Rocheleau’s appealed the board’s decision to the Court of Appeals, in which they charged that: (1) the county’s ordinance was preempted by state law; (2) the board’s decision was unreasonable, oppressive, arbitrary, without evidentiary support and based on an erroneous theory of law; (3) Minn. Stat. §115.55, subs. 5, 5a violated the separation-of-powers doctrine by vesting quasijudicial authority in county executive branch employees with no judicial review mechanism; (4) Minn. Stat. §115.55, subd. 5a violated the due-process clauses of the state and federal constitutions by creating an irrebuttable presumption; and (5) Minn. R. 7080.0060, subp. 3 (2003) was void for vagueness and created an irrebuttable presumption.

The Court of Appeals rejected each one of the Rocheleaus’ challenges. It first rejected the Rocheleaus’ preemption argument by point-

ing out that Minn. Stat. §115.55 requires counties to adopt ISTS ordinances and requires individuals to comply with “all applicable requirements,” including county ISTS ordinances. The Court of Appeals found that the ALJ had made careful and thoughtful determinations, which were backed by evidence on the record. Thus, it rejected the Rocheleaus’ argument that the board’s decision adopting the ALJ’s recommendations was unreasonable, oppressive, arbitrary, without evidentiary support and based on an erroneous theory of law. The Court of Appeals next noted the many opportunities for appeal of the original county Environmental Services staff decision that the Rocheleaus had available to them (and took advantage of) and the fact that the only binding decision in all this was that of the County Board in rejecting the argument that the county staff’s “quasi-judicial executive branch authority” violated the separation-of-powers doctrine. It next rejected the argument that Minn. Stat. §115.55, subd. 5a, violated due process when it created an irrebuttable presumption that the mere possibility of an imminent public health threat was alone enough to classify an ISTS as a imminent public health threat. The Court of Appeals held that the Rocheleaus inappropriately focused on a single criterion amongst many within the statute. Furthermore, the many avenues by which they could appeal the initial staff determination of compliance provided ample due process. Finally, the Court of Appeals rejected the argument that the definitions in the Minnesota rules incorporated into the county ordinance were vague and created an irrebuttable presumption by suggesting a particular feature as the most important in determining the existence of saturated soil. It found that the Rocheleaus failed to meet their heavy burden of showing that a person of reasonable intelligence would have to guess at their meaning. It also rejected the irrebuttable presumption argument regarding the rules at issue because the rules themselves envision more than the proffered criterion in determining the existence of saturated soil. In the end, the Court of Appeals upheld every aspect of the County Board’s decision to adopt the ALJ’s recommendation and to extend the deadline for compliance. ***In the Matter of the Appeal of Robert and Julie Rocheleau of a Decision of the Carver County Environmental Services***, 2004 WL 2165872 (Minn. App. 2004).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **DISQUALIFICATION OF CLASS COUNSEL; MULTIPLE RULE VIOLATIONS.** Judge Frank took the unusual step of disqualifying counsel for the plaintiffs in a putative class action based upon a finding of multiple violations of the Minnesota Rules of Professional Conduct.

The allegations leveled against plaintiffs’ counsel were many and varied, and far too complicated to be addressed in detail in this column. Suffice it to say that Judge Frank found a violation of Minn. R. Prof. Conduct 4.1 based upon counsel’s false statements of law to a witness, a violation of Minn. R. Prof. Conduct 4.4 based upon counsel’s inducing a breach of a privilege, a violation of Minn. R. Prof. Conduct 4.2 based upon counsel’s communication with a former employee of the defendant who had possession of many privileged documents, and Judge Frank further criticized counsel for retaining those privileged documents for a period of 18 months, and then allowing many of those privileged documents to be destroyed.

Denying defendant’s motion to dismiss the entire action as a sanction for counsel’s conduct, Judge Frank found that the only “appropriate remedy” for these multiple ethical violations was disqualification of plaintiffs’ counsel. While recognizing the “difficult and complicated position” the plaintiffs would be left in, Judge Frank held that those concerns “must yield to the ethical considerations presented here, which implicate the integrity of the judicial process.” ***Arnold v. Cargill Inc.***, 2004 WL 2203410 (D. Minn. 09/24/04).

■ **OTHER NOTEWORTHY DECISIONS.** The 8th Circuit criticized both parties for Fed. R. App. P. 28(j) submissions that failed to comply with that rule, noting that Rule 28(j) letters are to be used only to draw “attention to significant authorities unknown to the parties pre-argument,” and that those authorities should be limited to “intervening decisions or new developments.” ***Davis v. U.S. Bancorp***, 383 F.3d 761 (8th Cir. 2004).

While noting a split of authority within the District of Minnesota, Judge Tunheim affirmed an order by Magistrate Judge Noel finding that the defendant’s right to conduct *ex parte* interviews with plaintiffs’ physicians was governed by Minnesota law rather than federal law. ***Lillebo v. Zimmer, Inc.***, 2004 WL 2066772 (D. Minn. 08/30/04).

Judge Frank found that he was “unable to rule on” a motion to dismiss for lack of personal jurisdiction where the parties had yet to resolve disputes relating to jurisdictional discovery, and criticized both parties for “failing to approach the magistrate judge to resolve their differences” prior to the filing of motions to dismiss. ***QA1 Precision Products, Inc. v. Impro Industries USA, Inc.***, 2004 WL 2186401 (D. Minn. 09/23/04).

Judge Tunheim affirmed an order by Magistrate Judge Noel compelling the defendant to respond to broad discovery in an employment discrimination action and denying the defendant’s motion to extend the deposition of the plaintiff pursuant to Fed. R. Civ. P. 30(d)(2). ***Jensen v. AstraZeneca LP***, 2004 WL 2066837 (D. Minn. 08/30/04).

Judge Tunheim denied plaintiffs’ request for a stay of a preliminary injunction pending final resolution of their appeal, but granted a temporary stay in order to allow the plaintiffs to seek a stay from the 8th Circuit. ***Cellco Partnership v. Hatch***, 2004 WL 2066768 (D. Minn. 09/10/04).

Judge Tunheim reversed an order by Magistrate Judge Mayeron striking defendant’s accident reconstruction expert in an insurance bad faith action, finding that the expert would assist the jury in determining whether the insurer acted in good faith, but that the expert would not be permitted to testify regarding whether the insured was “clearly” liable. ***Ille v. American Family Mut. Ins. Co.***, 2004 WL 2066843 (D. Minn. 08/31/04).

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JUVENILE LAW

JUDICIAL LAW

■ **DELINQUENCY; MISDEMEANOR THEFT; PRIOR ADJUDICATION.** The Minnesota Court of Appeals in a published decision addressed the impact of a juvenile's prior misdemeanor adjudication on a subsequent defense. Here the appellant was adjudged delinquent on one count of misdemeanor theft after admitting that he had stolen an earring valued at \$15 or less. The juvenile court designated the theft as a misdemeanor because the minor had a prior misdemeanor contempt of court adjudication. As a result, the court ordered out-of-home placement for 7-11 days and stayed the disposition pending appeal. The minor challenged the disposition order, claiming that it was invalid because the underlying offense was improperly enhanced on the basis of a void delinquency adjudication and that the court failed to make sufficient findings to support the disposition.

The Court of Appeals affirmed the lower court, finding that criminal contempt is an exception to non-traffic misdemeanor level offenses that are considered juvenile petty offenses, and hence, the theft is not a juvenile petty offense, but was rather properly treated as a misdemeanor.

The minor also argued that the prior adjudication of delinquency was void and could not be used as a basis to enhance the petty theft to misdemeanor theft. However, the appeals court determined that the record showed that the minor was under the continuing jurisdiction of the court because he was on probation for truancy, which is a status offense and is not categorized as a delinquent act or a juvenile petty offense. Thus, he should not have been adjudged delinquent solely on the basis of contempt of court. However, the juvenile court was found to have correctly held that because the minor failed to appeal the initial adjudication of delinquency, it became law of the case. Furthermore, the juvenile court did not use the adjudication of delinquency to enhance the theft offense to a misdemeanor. Rather, the minor had a prior misdemeanor and therefore was properly charged with a misdemeanor rather than a juvenile petty offense. *In the Matter of the Welfare of D.T.P.*, A03-2057 (Minn. App. 08/31/04).

■ **DISPOSITION MODIFICATION; WAIVER OF RIGHT TO EVIDENTIARY HEARING.** In an unpublished decision, the Court of Appeals reviewed a situation where a social worker asked the juvenile court to review the minor's case because of continued bad behavior, which included gang-related activity while at the county home school. At the hearing, the juvenile court stated that the modification of disposition was necessary and informed the minor of his right to demand a contested evidentiary hearing. The court twice continued the hearing to give the minor time to discuss options with his attorney and to obtain evidence in response to the social worker's allegations. At the beginning of the final hearing, the minor waived his right to an evidentiary hearing and informed the court that he was not contesting the disposition modification. As a result, the juvenile court modified the disposition, placing the minor in a more restrictive juvenile setting. When the minor appealed, the Court of Appeals concluded that the minor voluntarily and knowingly waived his right to an evidentiary hearing and agreed to a disposition modification, even though at the final hearing the minor made a personal statement that he wanted to stay at the county home school or be released. The Court of Appeals found that the juvenile court did not coerce the minor into agreeing to the modification when it informed the minor that the court would have the option of revoking the minor's probation depending on what it heard at an evidentiary hearing. *In the matter of the Welfare of A.G.*, A03-1732 (Minn. App. 08/31/04).

■ **TERMINATION OF RIGHTS; NOTICE, DUE DILIGENCE.** In an unpublished decision, the Court of Appeals took the somewhat unusual step of vacating a default termination of parental rights decision, even though the mother failed to appear at the hearing where her rights were terminated. The Court of Appeals found that the juvenile court erred in denying the mother's motion to vacate the resulting order where the county failed to exercise due diligence to either ascertain the mother's whereabouts in order to effectuate personal service before obtaining service by publication or to give the mother actual notice that her parental rights were about to be terminated. The court went on to note that the omissions in the social worker's affidavit regarding the county's ability to contact the mother "border on misrepresentations or other misconduct that might justify relief under Minn. R. Juv. Protec. P. 46.02 (c)." Although the mother had not kept the county informed of her current address, the court did have a current telephone number that it had successfully used several times to reach the mother. At a minimum, the court observed, the county should have attempted to phone the mother to give her actual notice or to obtain an address for personal service rather than relying on service by publication. *In the Matter of the Child of N.L.O. and D.V.H.*, A04-544 (Minn. App. 09/07/04).

■ **ADOPTION; COMMISSIONER'S CONSENT; COURT REVIEW.** In an unpublished adoption decision, the Court of Appeals held that where foster parents and grandparents both petition to adopt a child, and where the commissioner of human services consented to the foster parents adopting the child, when the juvenile court granted the grandparents' petition to adopt the child, the court found that the juvenile court had the authority to review whether the commissioner's withholding consent to an adoption was reasonable. According to the Court of Appeals, the commissioner's consent is not entitled to great deference by the courts, and because the commissioner lacked a complete record when it made its consent decision, the juvenile court did not abuse its discretion in rejecting the commissioner's decision and granting the petition of the grandparents. *In the Matter of the Welfare of P.L.F.*, A03-1840, (Minn. App. 09/14/04).

■ **ICWA; TERMINATION OF RIGHTS; EXPERT TESTIMONY; GUARDIAN AD LITEM.** In a case involving the Indian Child Welfare Act ("ICWA"), the Guardian ad Litem challenged the district court's order terminating its jurisdiction over a petition to terminate parental rights and ordering the immediate reunification of the mother with her four children. The district court had dismissed the action because the Department of Human Services failed to provide expert testimony as required under the ICWA. The juvenile court also concluded that there should be deference given to the Rosebud Sioux Tribe's resolution supporting reunification of the mother with her children. The Court of Appeals, however, held that the lower court erred by failing to order a brief continuance either to review the GAL's qualifications and determine if she qualified as an expert under ICWA, or, to allow the Department to present a new expert witness. The Court of Appeals vacated the order terminating the lower court's jurisdiction and remanded the matter to the juvenile court to address the ICWA expert witness issue

and to hold a termination of parental rights hearing. *In the Matter of the Children of M.T.*, A04-461 (Minn. App. 09/14/04).

■ **EVIDENCE; CRIMINAL SEXUAL CONDUCT; PROSECUTORIAL REVIEW MEMO; HEARSAY.** In a rather unusual family court case with implications for juvenile law, the Court of Appeals reviewed a situation where a county attorney stated in a prosecutorial review memorandum that he agreed with the police department's conclusions that there was insufficient support for criminal sexual conduct charges against the father. At the evidentiary hearing in family court on custody, a portion of that memorandum was admitted without objection. The GAL later testified to the child's statements to her that had triggered the police investigation and her belief that child's statements were natural and spontaneous. As a result, the father moved to admit another portion of the prosecutorial review memorandum that concluded that the child's statements were coached or contrived. The Court of Appeals concluded that the family court did not abuse its discretion in admitting the additional portion of the memorandum of rebuttal evidence because the assistant county attorney had the training and experience to provide an expert opinion on why a case had not been charged, and the court limited the rebuttal evidence to hearsay that rebutted the GAL's hearsay statements. Ultimately, the Court of Appeals affirmed the lower court's determination that the father should have physical custody of the children. *Diver v. Diver*, A03-1837 (Minn. App. 09/14/04).

■ **THIRD-PARTY CUSTODY; BEST INTERESTS; PARENTAL FITNESS; EXTRAORDINARY CIRCUMSTANCES.** In another unpublished decision, the Minnesota Court of Appeals reversed a juvenile court transfer of sole custody of a nine-year-old child to his mother from his grandmother. This child had lived with his grandmother from the time he was six months of age with the consent of both his mother and his father. The juvenile court held an evidentiary hearing on the custody dispute between the mother and the grandmother and held that the 13 best interest factors of Minn. Stat. §518.17 came out strongly in the grandmother's favor. However, the court found that the grandmother failed to rebut the presumption favoring the natural parent. The Court of Appeals reversed and remanded, holding that the juvenile court abused its discretion by awarding custody to the mother when it failed to consider the "extraordinary circumstances" of the 8 1/2 years the child resided and flourished in the grandmother's home, and because the best interest factors strongly favored the grandmother. The court reasoned that the extraordinary circumstances factor should be considered as a distinct element apart from the natural mother's fitness. The lower court failed to do that because it focused instead on the mother's fitness. This case is another important development by the appellate courts in this state in looking at third-party custody in light of the recent statutory and case law developments. *In re the Custody of D.M.P.*, A03-1950 (Minn. App. 09/21/04).

■ **TRANSFER OF CUSTODY TO THIRD PARTIES; INQUIRY TO LOCATE BIOLOGICAL FATHER.** In another unpublished decision, the Court of Appeals considered a situation that began in juvenile court as a CHIPS proceeding and concluded when the county and third parties petitioned to transfer permanent custody of the child to third parties under Minn. Stat. §260C.201, subd. 11(c). The Court of Appeals observed that the county and third parties seeking the transfer of custody were required under the Juvenile Protection Rules to make a reasonable inquiry to locate the father and provide his address to the court. The court found that in this case, a reasonable inquiry was not made where the father contacted county social workers on several occasions, but the county made no effort to involve him in the matter. The court also observed that the third parties were able to locate and serve the father in a subsequent action for child support, but failed to do so in the juvenile court custody proceeding. The Court of Appeals remanded the matter for a custody determination between the third-party petitioners in juvenile court and the biological father, with the court specifically directing the court hearing the custody matter to apply the third-party custody standard set forth in *Wallin v. Wallin*, 187 N.W.2d, 627 (1971). *In re the Welfare of the Minor Child of E.P.K.*, A03-2017 (Minn. App. 09/28/04).

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REAL PROPERTY

JUDICIAL LAW

■ **MINNESOTA UNIFORM RELOCATION ACT.** After years of planning the redevelopment of a city block, the Richfield Housing and Redevelopment Authority ("HRA") entered into a contract in 1999 with a developer to perform the work. As the redevelopment work got underway, Mr. Wren purchased a house in this block, consequently the city regularly notified Mr. Wren on the status of the redevelopment project. In August 2002, the HRA approved another developer to complete the project. The contract between HRA and the new developer provided that the new developer would be responsible for all costs to acquire the remaining tracts of land and any expenses connected with the relocation of displaced persons. Mr. Wren and the new developer entered into a purchase agreement concerning the sale of his property. This agreement stated that neither the city nor the new developer shall be obligated to provide Mr. Wren with relocation services or pay for any related costs. Mr. Wren moved out of his house and submitted a claim for relocation expenses, which the HRA and new developer denied. An administrative law judge ordered the HRA to pay for Mr. Wren's relocation expenses as required by the Minnesota Uniform Relocation Act. The ALJ also found that the terms of the purchase agreement limiting Mr. Wren's right to such costs were invalid because the language did not comply with Minn. Stat. §117.521. The HRA appealed the award of relocation benefits. The Minnesota Court of Appeals agreed that Mr. Wren was entitled to relocation benefits. The court held that the relocation act requires an "acquiring authority" to pay relocation benefits to "displaced person[s]" for "all acquisitions undertaken" by that authority. The court determined that the HRA was an acquiring authority because it has the power of eminent domain, that the HRA undertook the acquisition of Mr. Wren's house as it had significant involvement with this project and the purchase of Mr. Wren's property, and that Mr. Wren would be considered a "displaced person" within the meaning of the relocation act. *In the Matter of the Kenneth Wren Residential Relocation Claim*, A04-207 (Minn. App. 09/07/04).

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TAX

JUDICIAL LAW

■ **INCOME TAX: UNTIMELY FILED REFUND CLAIMS; STATUTE OF LIMITATIONS.** The Minnesota Tax Court granted the commissioner's motion to dismiss taxpayer's refund claims since they were untimely filed under Minn. Stat. §289A.40(1). The refund statute was amended in 1995 to change from the "two-year-from-payment" rule to one year from the date of an order assessing tax upon payment in full of the tax, penalties, and interest shown on the order to timely file a refund claim. The taxpayer was less than a month delinquent under the one-year rule, but timely under the two-year rule. The court rejected the argument that the failure of the commissioner to explain the refund procedures pursuant to Minn. Stat. §270.0602, commonly known as the "The Taxpayer's Bill of Rights Act," required that the statute of limitations be tolled until the proper refund disclosures were complied with. Lastly, the court rejected the taxpayer's arguments that the 1995 amendments were unconstitutional as a violation of due process since they retroactively restricted the refund claim rights of MBNA by reducing the period of the refund limitations from two years to one. Moreover, the court held that the "informal claim" doctrine had no application in the case. *MBNA America Bank, N.A., & Affiliates v. Commissioner of Revenue*, No. 7589-R, 2004 Minn. Tax LEXIS 37 Minn. T. Ct. 07/27/04).

■ **INCOME TAX: UNTIMELY APPEAL OF ORDER; DISMISSAL.** The Minnesota Tax Court dismissed an individual taxpayer's Notice of Appeal to the Minnesota Tax Court as being untimely and not within the 60 days from the order date. The taxpayer was issued an order on September 30, 2003, but did not appeal to the Minnesota Tax Court until December 10, 2003, pleading ignorance of the 60-day statutory period to appeal and the understanding that the commissioner would issue a revised order. The court indicated that the requirements of the statute to file a Notice of Appeal on or before December 1, 2003, was an indispensable prerequisite to the court's acquiring jurisdiction. Failure to file an appeal within the 60 days of filing of an order by the commissioner deprived the court of jurisdiction unless the court by written order extended the time for appealing. *Patrick Scherling v. Commissioner of Revenue*, No. 7632-R, 2004 WL 1936492 (Minn. T. Ct. 09/02/04).

■ **INCOME TAX; SALES TAX; CASH ADVANCES TO BUSINESS NOT "RECEIPTS"; LEASE/SALE AGREEMENT TAXED AS LEASE.** The Minnesota Tax Court held that certain deposits and advances to a business account were not loans since the taxpayer failed to establish any intent to repay the funds as a loan and there was no documentary evidence of loan agreements, and therefore, the cash advances did not qualify as receipts for the purposes of the commissioner's Cash Expenditures Indirect Audit method. In addition, the court held that the transaction between the parties was a rental/lease agreement for sales tax purposes rather than a sale of equipment. The commissioner contended that the plain language of the transactional documents between the parties established that the equipment was to be leased for two years followed by a purchase. Since the sale price for the equipment could not be determined until expiration of the two-year period set out in the lease/sale agreement, the taxpayer failed to satisfy the requirement for the occasional sale exemption, which requires that a sale of business assets must take place within a 12-month period as required by Minn. Stat. §297A.25 (12c(3)) (1996). *Robert Wayne Stoeckmann and Cindy Stoeckmann v. Commissioner of Revenue*, Nos. 7438 and 7439, 2004 WL 1936302 (Minn. T. Ct. 08/19/04).

■ **COUNTY ASSESSMENTS REQUIRE INCREASED ADJUSTMENTS IN PROPERTY TAX VALUE.** The Minnesota Tax Court held that the real property values should be increased based on the appraisals of the county. The assessed value of the property in January 2, 2001 and January 2, 2002 was approximately \$6.7 million. At the trial, the county's expert valued the property as of those years at \$9.3 million, and the taxpayer's appraisal put the value at \$2.6 million for each of the years. The court found that the value was \$8.8 million for 2001 and \$9.0 million in 2002. The subject property was a manufacturing facility zoned for heavy industrial use by the taxpayer, who was a large manufacturer of Ready-Mix trucks and compact trucks used for waste management. The facility was located in Dodge Center near Rochester. Since the property was not income-producing, both experts used a sales and cost approach, principally relying on sales. The court indicated that it did not accept comparables from outside Minnesota unless the circumstances warrant and unless differences in the markets and tax rates are explained, which the taxpayer's appraiser did not do. The court also approved of the county's expert use of recent sales of warehouses as being comparable to sales of manufacturing plants such as the subject property. *McNeilus Truck & Manufacturing Inc. v. County of Dodge*, C4-03-287 and C5-02-241, 2004 WL 1843041 (Minn. T. Ct. 08/06/04).

■ **PROPERTY TAX: 60-DAY RULE VIOLATED.** The Minnesota Tax Court held that the property tax owner failed to timely supply sufficient business and financial information required under Minn. Stat. §278.05 (6), also known as the "60-day rule," therefore, the appeal was dismissed. The court rejected the taxpayer's argument that the financial information was unavailable due to his wife's illness and subsequent death. Even though there was a dispute as to whether the taxpayer had knowledge of the location of the information, the court found the financial information was in the taxpayer's possession and available. *Andrejs Vape v. County of Hennepin*, No. 30550 and 30549, 2004 WL 1843008 (Minn. T. Ct. 08/09/04).

■ **PROPERTY TAX: 60-DAY RULE VIOLATED.** The Minnesota Tax Court held that the taxpayer failed to submit financial information within 60 days of filing of his Notice of Appeal as required under Minn. Stat. §278.05(6), and therefore, the appeal was dismissed. The court dismissed the taxpayer's contention that his responses to a survey from the County Assessor's Office to rental property owners requesting summary information and the like prior to the filing of the action satisfied the 60-Day Rule. *Long Lake Villa, LP v. County of Washington*, C4-04-2262 (Minn. T. Ct. 09/08/04).

■ **REAL PROPERTY: TEST FOR SPECIAL ASSESSMENT CHALLENGE.** The Minnesota Court of Appeals stated the test to challenge a special assessment under Minn. Stat. §429.081 is limited to three conditions: (1) the land must receive a special benefit from the improvement being constructed; (2) the assessment must be uniform upon the same class of property; and (3) the assessment may not exceed the special benefit. See *Carlson Lang Realty Co. vs. City of Winona*, 307 Minn. 368, 369, 240 N.W.2d 517, 519 (1976). The

court affirmed and reversed the district court's determinations on the special assessment challenge. **David E. McNally Development Corporation vs. City of Winona**, A03-1785, 2004 WL 2094368 (Minn. App. 09/21/04),

■ **PROCEDURE: VENUE IN REAL ESTATE APPEALS AND TAXPAYER'S ELECTION.** The Minnesota Tax Court held that in a real property petition venue is mandatory in the county where the real estate is located under Minn. Stat. §271.04(1). On the other hand, in nonproperty tax cases (commissioner orders), the taxpayer has the election of proceeding on venue in Ramsey County District Court or in the county in which the taxpayer resides and, if it is a nonresident taxpayer, shall be in Ramsey County. **American Crystal Sugar Company v. County of Clay**, C1-03-766, 2004 Minn. Tax LEXIS 39 (Minn. T. Ct. 07/28/04). A similar result was reached in the parallel case of **Kmart Corporation v. County of Clay**, C8-03-764, 2004 WL 1713799 (Minn. T. Ct. 07/28/04).

■ **PROCEDURE: CONSOLIDATION OF REAL PROPERTY ACTIONS.** The Minnesota Tax Court granted consolidation of two real estate appeals for tax years 2003 and 2004 over the objection of the county, who claimed that the addition of parking spaces in 2004 caused a significant change. The court consolidated the cases because of identical issues, petitioners, attorneys, witnesses, and similar facts, which served the interests of judicial economy and saved both parties time and expense under Minn. R. Civ. P. 42.02. **Rockwood Place Apartments LP v. County of Ramsey**, C7-03-4285 and C0-04-4879, 2002 WL 1853716 (Minn. T. Ct. 08/11/04).

■ **PROCEDURE: STANDING REQUIRED TO BRING CONSTITUTIONAL CHALLENGE.** The Minnesota Court of Appeals in an unpublished decision rejected a taxpayer's challenge to Minn. Stat. §611A.31-.375, which provides for grants of appropriate funds to local programs that offer services for victims of domestic abuse, on the grounds that the statute was unconstitutional on Equal Protection grounds or discriminated on the basis of sex. The court held that a taxpayer's general status as a qua "taxpayer" does not allow him to challenge the constitutionality of a statute unless he is a party, who is one who has suffered "injury in fact." The court specifically held that to have standing to challenge any Minnesota statute providing for the expenditure of state funds, a taxpayer must show that he or she has been injured, or that the taxpayer's interest is different from that of citizens generally. **Hageman v. Stanek**, A03-2045, 2004 WL 1563276 (Minn. App. 07/13/04). See also **Tom Rukavina, et al. and Range Association of Municipalities and School Districts vs. Tim Pawlenty**, A03-1709, 684 N.W.2d 525 (Minn. App. 2004) (determining that the commissioner of finance's \$49 million reduction in allotments to the Minnesota Minerals 21st Century Fund and transfer of that amount to the general fund to address the deficit in 2003 was authorized under Minn. Stat. §16A.152(4)(b), and did not violate the separation-of-powers doctrine; and holding that taxpayers consisting of individuals such as laid-off employees of the mining industry and elected legislators did not have standing but the Range Association of Municipalities and Schools did).

■ **PROCEDURE: NOTICE OF APPEAL TIMELY WHEN "RECEIVED" BY DISTRICT COURT.** The Minnesota Court of Appeals held that a document is filed with the district court when it is delivered to or received by the office where it is required to be filed, even though the document may not be stamped "filed" until sometime later. Additionally, the court found that the joinder of additional property owners as parties in an assessment appeal concerning benefits and damages was inappropriate because each appeal necessarily involved different facts relevant only to the individual piece of property. Minn. Stat. §429.081, Subd. 1, allows property owners to file a challenge to tax assessments with the city clerk within 30 days of the adoption of the assessment. The law calls for challengers to then file a notice of appeal with the district court ten days later. The taxpayer filed an appeal with the city on June 9, 2003, and on the same day delivered his challenge to the district court. The court clerk stamped the taxpayer's filing June 9, 2003, but did not officially file the paperwork with a "filed" stamp until June 24, 2003. The court reversed the district court as to the taxpayer's challenge but threw out additional property owners who tried to join in the taxpayer's appeal. **Allan G. Cederberg vs. City of Inver Grove Heights**, A04-214, 2004 WL 2093623 (Minn. App. 09/21/04).

■ **EXCISE TAX: RECEIPTS MADE TO OUT-OF-STATE SERVICE PROVIDERS; COMMERCE CLAUSE.** The Minnesota Tax Court held that payments made by Mayo to an out-of-state customer for laboratory services were subject to the MinnCare tax and did not violate the Commerce Clause, even though there was an exclusion for in-state payments made for the same services. The court held that the Commerce Clause was implicated because the payments were made to parties across state lines but did not violate the fair-apportionment and nondiscrimination portions of the Commerce Clause. When applying the "internal consistency" test only intrastate commerce was discriminated against. Minnesota was not taxing the same health care services by the same taxpayer on its revenues more than once. Minnesota was taxing lab services rendered in Minnesota whereas the state where the customer/provider and patient were located was taxing health care services rendered in that state, but in different service transactions. Lastly, the court held that the MinnCare exclusion did not facially discriminate against interstate commerce. **Mayo Collaborative Services, Inc. v. Commissioner of Revenue**, No. 7605 (Minn. T. Ct. 09/21/04).

■ **ALIMONY DEDUCTION; OBLIGATION TO MAKE SUBSTITUTE PAYMENTS AFTER SPOUSE'S DEATH.** The Tax Court held that none of the payments to a former spouse under a divorce decree qualified as alimony. The alimony deduction was denied because the decree provided that amounts were payable after the former spouse's death (some for their children's education, others for the former spouse's attorney). Since the post-death payments constituted "substitute payments," none of the payments (before or after the wife's death) qualified. **John R. Okerson**, 123 TC No. 14 (2004).

■ **OHIO INVESTMENT TAX CREDIT INCENTIVES; COMMERCE CLAUSE.** An Ohio municipality's agreement to give an automobile manufacturer a 13.5 percent investment tax credit against the state corporate franchise tax in return for the construction of a new assembly plant violated the federal Commerce Clause by favoring in-state economic activity at the expense of out-of-state activity. A ten-year, 100 percent personal property tax exemption, part of the City of Toledo's \$280 million incentives package, was valid as it did not reduce any existing tax liabilities. **Cuno, et al. v. Daimler-Chrysler Inc., et al.**, No. 01-3960 (6th Cir. 09/02/04).

■ **IRS DISCRETION; OFFER IN COMPROMISE.** IRS did not abuse its discretion when it rejected any offer in compromise of \$5,000 to settle \$118,179.99 tax obligation. Taxpayer offered no evidence of his current income or any other financial documents to suggest that the IRS offi-

cer inaccurately assessed the value of his assets. **Splawn v. United States**, No. 1:03-cv-108, 94 AFTR 2d ¶ 2004-5628 (E.D. Tenn. 08/03/04).

■ **LONG TERM CAPITAL HOLDINGS CASE; RELIANCE ON LEGAL OPINIONS.** A federal district court upheld the IRS's denial of a well-known hedge fund's \$106 million claim of capital losses. The court found that Long Term Capital Management's tax shelter lacked economic substance and questioned the manner in which the fund obtained legal opinions on which it ultimately relied. **Long Term Capital Holdings v. United States**, No. 3:10CV1290, 94 AFTR 2d ¶ 2004-5666 (D. Conn. 08/27/04).

■ **"VALID RETURN" ANALYSIS; FOUR-PART TEST.** IRS Chief Counsel attorneys should continue to analyze whether a document is a valid return for purposes of IRC section 6654 (estimated tax penalty) using the four-part analysis in the 1986 case *Beard v. Commissioner*, 82 T.C. 766, affirmed, 793 F.2d 39 (6th Cir. 1986), notwithstanding the recent Tax Court decision in *Mendes v. Commissioner*, 121 T.C. 308 (2003). The four-part test set forth in *Beard v. Commissioner* is widely accepted as the analysis for determining what constitutes a return for purposes of the Internal Revenue Code. For a document to be considered a valid return under *Beard*, the document must: (1) purport to be a return; (2) be executed under penalty of perjury; (3) contain sufficient data to allow calculation of tax; and (4) represent an honest and reasonable attempt to satisfy the requirements of the tax law. See, e.g., *In re Hatton*, 220 F.3d 1057, 1060-61 (9th Cir. 2000) (citing *Beard*). CC 2004-032.

■ **CODE SECTION 357: TRANSFER TO CONTROLLED CORPORATIONS, ASSUMPTION OF CONTINGENT LIABILITIES IN EXCESS OF BASIS.** IRS was denied summary judgment on its IRC Section 357 argument for reducing by amount of transferred contingent liabilities/employee healthcare claims the basis in stock that taxpayer received in a Section 351 exchange from new/controlled healthcare company and then sold to third party at a drastically reduced price. IRS's interpretation of IRC Section 357(c)(3)(A) to allow for exclusion of transferred liabilities only when considered deductible expense of transferee (new corporation), rather than a taxpayer's expense, was not supported by statute's language, legislative history, or historical focus on transferor deductibility. **Black Decker Corporation v. U.S.**, No. WDQ-02-2070, 94 AFTR 2d ¶ 2004-5620 (Md. 08/03/04).

■ **INTEREST FOR TAX-MOTIVATED TRANSACTION.** Penalty interest for a tax-motivated transaction was timely assessed under a now-repealed tax code provision in IRC Section 6621 against taxpayers who invested in a tax shelter partnership, along with the underlying tax. **Field v. United States**, No. 03-6246-CV, 94 AFTR 2d ¶ 2004-5588 (2nd Cir. 08/24/04).

■ **LEVY NOTICE UPHELD.** Taxpayers were afforded a fair hearing on their appeal of IRS's determination to levy on their property. IRS did not abuse its discretion by issuing notices of levy following taxpayers' failure to submit requested documents in support of offer in compromise by the designated deadline. **AllGlass Systems Inc. v. Commissioner**, No. 03-4772, 94 AFTR 2d ¶ 2004-5600 (E.D. Pa. 08/17/04).

■ **CHALLENGE OF IRS'S REFUSAL OF ARBITRATION ON STOCK VALUE.** Anti-Injunction Act does not bar taxpayer's suit seeking judicial review of IRS decision to deny arbitration of a stock valuation dispute and requesting rescission of the notices of deficiency. The taxpayer's action did not restrain the assessment or collection of any tax and therefore the court will take time to consider taxpayers' claims. **Investec Inc. v. United States**, No. 04-2425, 94 AFTR 2d ¶ 2004-5243 (E.D. Pa. July 8, 2004).

■ **FICA COVERAGE OF TEACHERS' EARLY RETIREMENT INCENTIVE PAY, MICHIGAN.** Payments made to retired public school teachers, who were tenured under state law, and who retired under early retirement incentive that paid them in exchange for giving-up their tenure rights, did not receive "wages" subject to federal employment tax. **Klender v. U.S.**, No. 02-10082-BC, 94 AFTR 2d ¶ 2004-5433 (E.D. Mich. 08/02/04). Only a few weeks earlier, another U.S. District Court for the Western District of Michigan ruled to the contrary on the same issue. That court held that the payments constituted "wages" subject to FICA withholding. **Appoloni v. United States**, No. 5:02-CV-176, 94 AFTR 2d ¶ 2004-5356 (W.D. Mich. 07/21/04). In both cases the parties relied heavily on the case of *North Dakota State University v. United States*, 255 F.3d 599 (8th Cir. 2001), *nonacq. Doc 2002-278*. In *NDSU*, the 8th Circuit held that the university's early retirement payments to tenured faculty members were not subject to FICA withholding.

■ **LEASE DOCUMENTS; PRIVILEGE.** In a case involving a commercial aircraft leasing partnership, which IRS believed was a sham with no purpose other than to avoid payment of taxes, the court found some transaction documents were not privileged but needed further facts before ruling on privilege issues raised by other documents. **TIFD III-E Inc. v. United States**, No. 3:01CV1839 (SRU), 94 AFTR 2d ¶ 2004-5655 (D. Conn. 07/04/04).

■ **ESTATE; ASSETS TRANSFERRED TO FAMILY LIMITED PARTNERSHIP.** The 3rd Circuit Court of Appeals held that the estate of an individual, who transferred \$2.8 million in securities and other assets to two family limited partnerships in exchange for pro-rata partnership interests, had to include the full date-of-death value of the transferred assets under IRC Section 2036. **Betsy T. Turner, Executrix of the Estate of Theodore Thompson**, No. 03-3173, 94 AFTR 2d ¶ 2004-5216 (3rd Cir., 09/01/04).

■ **REFUND ACTIONS; ADMINISTRATIVE REFUND CLAIMS; INFORMAL CLAIMS.** IRS acquiesced in 8th Circuit's holding that under informal refund claim theory, taxpayer in *Kaffenberger, Edward J. v. U.S.*, 314 F.3d 944, 93 AFTR 2d 2003-374 (8th Cir. 2003) properly used Form 4868 and put IRS on notice of elements of refund claim. However, outside the 8th Circuit, the IRS won't acquiesce in court's decision to ignore 1971 revenue ruling and holding that although extension of time had already expired, Form 907 was sufficient to create further extension. Action on Decision 2004-004, 90/01/2004.

■ **"AMT"; WAGE EXPENSE SUBJECT TO JOBS CREDIT.** Affirming the Court of Federal Claims, the Federal Circuit held that a company seeking to use the targeted jobs tax credit to reduce regular taxes must incorporate the IRC Section 280C(a) wage-deduction limitation in its AMT computation. The court rejected the taxpayer's argument that because the targeted jobs tax credit is not available when calculating AMT liability, the IRC Section 280C(a) disallowance should not apply. **Ventas Inc. v. United States**, No. 03-5171, 94 AFTR 2d ¶ 2004-5185 (Fed. Cir. 08/24/04).

■ **BURDEN OF PRODUCTION ON PENALTY FOR FRIVOLOUS PETITION.** IRS Commissioner is not obliged to produce evidence in support

of an addition to tax (accuracy related penalty) determined in the Notice of Deficiency, since the taxpayer's petition, by asserting nothing but frivolous arguments, fails to state a justiciable claim for relief. **Funk v. Commissioner**, 123 T.C. No. 11 (2004).

■ **COMMON LAW "MAILBOX RULE."** The timely mailing/timely filing provisions of IRC Section 7502 did not entirely supplant the common law "mailbox rule." While production of a registered, certified, or electronic mail receipt is not the only means by which a taxpayer may establish delivery, a taxpayer must offer proof of an actual postmark or dated receipt, not just his self-serving testimony, in order for a presumption to arise that tax documents allegedly mailed to IRS were in fact received. **Sorrentino v. IRS**, No. 02-1114, 94 AFTR 2d 2004 XXXX (10th Cir. 09/14/04). See also Proposed Regulations under IRC Section 7502 issued by the IRS that would provide that, other than direct proof of actual delivery, a registered or certified mail receipt would be the only *prima facie* evidence of delivery of tax documents under the timely mailing as timely filing rule. The proposed regulations would affect taxpayers who mail documents to IRS or U.S. Tax Court. The IRS maintains that the regulations would be consistent with IRC Section 7502(c). The IRS also requested comments on whether it should (as it is permitted to do under IRC Section 7502(f)(3)) extend the *prima facie* evidence of delivery rule to a service by a private delivery service. Proposed Regulations §301.7502-1(e)(1); Proposed Regulations §301.7502-1(g)(4).

ADMINISTRATIVE

■ **INCOME TAX: ALTERNATIVE ALLOCATION METHOD PETITION FORM.** In Minnesota Department of Revenue Notice No. 04-07 (08/16/04), the commissioner published a new form, Form ALT, Application for Alternative Methods of Allocation, to assist taxpayers to comply with Minn. Stat. §290.20(1a). The form is for those taxpayers who select to petition for another method of allocation of income. Use of this form and filing the information required on such form will meet the requirements for filing a petition under Minn. Stat. §290.20. The procedure set forth in the form ensures that the taxpayer substantially complies with the requirements of Minn. R. §8020.0100 and provides notice of the petition to the commissioner.

■ **SALES TAX: MODIFICATION OF GAME FARMS REVENUE NOTICE.** In Minnesota Department of Revenue Notice No. 02-13 (09/07/04), the commissioner modified Revenue Notice No. 02-13 on the sales tax applicable to game farms, shooting preserves, and hunting clubs. The updated notice takes the position that game release charges are a part of the fees paid for admission to an amusement or recreational area but that up to 75 percent of the amount billed as game release charges may be exempt from sales tax as the sale of an exempt food item if the birds or animals are intended for consumption. To be exempt from sales tax, the portion of the charge allocated to the sale of food must be stated separately from game release charges on the invoice to the customer. If the charge for the sale of the exempt food is not separately stated, the entire game release charge to the customer is taxable. The notice also exempts certain feeds, medicines, and other consumable materials and supplies used in raising and/or maintaining the birds.

■ **PROCEDURE: REVOCATION OF REVENUE NOTICE NO. 99-04 ON COMPROMISE AGREEMENTS.** In Minnesota Department of Revenue Notice No. 04-08 (09/07/04) the commissioner revoked his prior Revenue Notice No. 1999-04 on compromise agreements. The procedures of the Commission on offers in compromise and compromise agreements are now set forth in the guideline entitled, "Compromise Procedures — Questions and Answers," last revised in April, 2004. The published guidelines can be found on the Internet on the Department of Revenue Web site, Collection Division Web page, at: <http://www.taxes.state.mn.us/taxes/collection/index.shtml>. A paper copy of the guidelines can be obtained from the Collection Division.

■ **HELP FROM IRS IN UNCOVERING DECEDENT'S ASSETS.** Individuals who inherit from a relative who dies intestate, *i.e.*, without a will, may have a difficult time locating or discovering other assets held by the decedent. A new revenue ruling can help such intestate takers to locate the decedent's assets by allowing them to look at the decedent's previously filed income tax returns under the conditions described in the ruling, as explained below. Rev Rule 2004-68, 2004-21 IRB 118.

■ **CORPORATION AND ITS DISREGARDED ENTITY CAN'T BE PARTNERSHIP.** In a new revenue ruling, IRS held that an eligible entity owned by a corporation and the corporation's disregarded entity cannot be classified as a partnership because the eligible entity had only one owner for tax purposes. Rev Rul 2004-77, 2004-31 IRB 119.

■ **DISREGARDED PARTNER CAUSED LOSS OF EXCEPTION TO UNIFIED AUDIT RULES BUT COULD BE TAX MATTERS PARTNER.** In a new revenue ruling, a disregarded entity partner prevented the partnership from qualifying for the "small partnership" exception to the partnership unified audit rules under TEFRA. However, the disregarded entity partner could be the TMP of the partnership. Rev Rul 2004-88, 2004-32 IRB 165.

■ **NEW ONLINE SYSTEM TO SATISFY TAX TRANSCRIPT REQUESTS.** Tax practitioners now can request transcripts of their clients' tax records and receive them much faster through the new Transcript Delivery System, made available through the IRS's Business Systems Modernization (BSM) program. Authorized tax practitioners can use the new tool to order the tax account, tax return transcripts, and other tax information for their business and individual clients. IR-2004-114.

■ **NEW EMAIL NOTIFICATION SERVICE FOR TECHNICAL GUIDANCE ON AGENCY WEB SITE.** The IRS is making a new service available to tax professionals allowing them to get email notification when certain types of guidance are posted on the IRS Web site. The new IRS GuideWire list server will send notifications when the IRS has posted announcements, notices, revenue procedures, and revenue rulings on its site, in advance of publication in the Internal Revenue Bulletin. IR-2004-105. To subscribe to the GuideWire service, individuals should request being added to the list server by going to <http://www.irs.gov>, clicking on "The Newsroom" and "e-News Subscriptions," then choosing "IRS GuideWire." The GuideWire subscription page can be directly accessed at <http://www.irs.gov/newsroom/page/0,,id=123315,00.html>.

■ **IRS TO SEEK ACCRUAL WORKPAPERS.** IRS issued interim guidance to examiners stressing that requests for tax accrual workpapers are mandatory when a taxpayer claims the benefit of a prohibited listed tax shelter on any return filed on or after July 2, 2002, and for some returns filed before that date. Revenue agents will issue an Information Document Request (IDR) for tax accrual workpapers as soon as it is

determined the taxpayer is involved in a listed transaction. The IRS also unveiled a new section of the Internal Revenue Manual to deal with this issue. *Daily Tax Report*, G-8 (BNA 08/10/04) and IRM Part 4.10.20, "Requesting Audit, Tax Accrual, or Tax Reconciliation Papers."

■ **CORPORATION IN ANY JURISDICTION IS CORPORATION IN ALL.** The IRS issued guidance making clear that when an entity is organized in more than one jurisdiction, it will be treated as a corporation for tax purposes if it takes a corporate form in any jurisdiction. Under the new proposed and final and temporary rules, when a business entity is organized both in the United States and in a foreign jurisdiction, it will be treated as a domestic entity for federal tax purposes. REG-124872-04, T.D. 9153.

■ **SMALL BUSINESS TAXPAYERS MAY EXPENSE UP TO \$100,000 OF SOFTWARE AND OTHER PROPERTY.** The IRS issued proposed (REG-152549-03) and a final and temporary regulation (T.D. 9146) that generally let small business taxpayers elect to deduct up to \$100,000 of certain tangible property and computer software. The election applies to qualifying property purchased and placed in service in a taxable year beginning after 2002 and before 2006, reflecting changes made by the Jobs and Growth Tax Relief Reconciliation Act of 2003 in IRC Section 179 bonus depreciation.

■ **PRODUCT CLASSIFICATION SYSTEMS FOR LIKE-KIND EXCHANGES CHANGE.** The IRS is replacing the Standard Industrial Classification (SIC) system with the North American Industry Classification (NAIC) system for determining when properties are like-kind properties. When like-kind property is exchanged, taxpayers generally recognize no gain or loss. Property may be within the same general asset class or within the same product class. Rev. Proc. 87-56 details the general asset classes, some of which are incorporated into the like-kind regulations. The same product classes are derived from product classes in the *SIC Manual*. In 1997, the Department of Commerce replaced the SIC system with the NAIC system. Now, the IRS is following the Commerce Department's lead. The NAIC system will be used in lieu of the SIC system. One immediate difference taxpayers will notice is the number of digits in product class codes. NAIC uses six digit codes rather than SIC's four digit codes. Properties within the same product class under the four-digit SIC system generally will be of the same product class under the six-digit NAIC system. T.D. 9151, NPRM REG-116265-04.

■ **DISREGARDED ENTITY STATUS PLAYS KEY ROLE IN DETERMINING PARTNER'S RISK OF ECONOMIC LOSS.** The IRS released new regulations outlining when a partner bears the economic risk of loss for partnership liabilities based on the obligations of a disregarded entity. This represents a change in the IRS view. The owner may not be obligated to satisfy payment obligations undertaken by the disregarded entity. Under current regulations (Reg. §1.752-2), a partner's bearing of economic risk of loss generally must take into account these limitations. Proposed regulations highlight the importance of determining the disregarded entity's net value, which may characterize a debt as nonrecourse rather than recourse. Now payment obligations of a disregarded entity will be taken into account only to the extent of the net value of the disregarded entity when determining a partner's risk of economic loss. NPRM REG-128767-04.

LOOKING AHEAD

■ **STATES TARGET OCTOBER 1, 2005, FOR COLLECTIONS UNDER NEW STREAMLINED SALES TAX SYSTEM.** The Streamlined Sales Tax Conforming States Committee approved a timeline that will permit collections under a new streamlined sales and use tax system to begin in conforming states October 1, 2005. On a related front, the committee approved proposed bylaws for the creation of the "Streamlined Sales Tax Governing Board Inc." This is the organization into which the Committee of Conforming States will evolve on October 1, 2005. The governing board's primary purpose would be to administer and operate the Streamlined Sales and Use Tax Agreement. *Daily Tax Report*, H-2 (BNA, 08/09/04).

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TORTS & INSURANCE

JUDICIAL LAW

■ **FINALITY OF JUDGMENTS; RES JUDICATA; COLLATERAL ESTOPPEL.** Plaintiff represents a class of stakeholders in a stock association ("WPSA") at West Publishing. In multiple years excess distributions were made from the stock association to all employees regardless of their contribution to the fund. After a 1996 distribution, West was acquired by another company. In 1998, outside counsel advised the West and WPSA boards that such a method of distribution violated then current state and federal regulations. In 1999, a class action was filed and ultimately resolved. In 2002, a new putative class action was commenced with plaintiffs now asserting the board should have acted prior to the expiration of the statute of limitations. The trial court granted defendants summary judgment based on collateral estoppel and *res judicata* because of the earlier 1999 action. The Court of Appeals reversed.

The Supreme Court affirmed the Court of Appeals' reversal of summary judgment. Collateral estoppel is not appropriate here because the two cases do not present the same issue. The claim in the present suit is for a failure to act in a timely manner after recognizing improper distributions, while the claim in the first suit was for the improper distributions themselves. *Res judicata* is not applicable because the "claims" in each lawsuit are distinct. The present claim for failure to act did not arise until the statute of limitations determination was decided. In certain circumstances a board of directors may be sued separately for their bad act and then for their failure to protect their fiduciaries from that bad act. *Hauschildt v. Beckingham*, A03-218 (Minn. 09/16/04).

■ **INSURANCE; UNDERINSURED MOTORIST COVERAGE; NONRESIDENTS.** Plaintiff, a resident of North Dakota, was injured in a motor-vehicle accident in Minnesota. The other driver's limits were \$50,000; his insurer offered to settle plaintiff's claims for \$45,000. Plaintiff notified defendant, his insurer, as ostensibly required by *Schmidt v. Clothier*, to preserve any UIM benefits. Defendant responded that it believed that North Dakota law applied and therefore the other driver's limits would need to be entirely exhausted before UIM

benefits would be available. Plaintiff nonetheless settled with the other driver and commenced suit against defendant. The district court held that Minnesota law applied and certified the following question to the Court of Appeals: Is a foreign insurance company, licensed in Minnesota, that issues a UIM policy requiring exhaustion of liability pursuant to another state's statute to a nonresident injured in an accident in Minnesota bound by a properly executed *Schmidt v. Clothier* agreement?

The Court of Appeals answered in the negative, citing *Warthan v. Am. Family Mut. Ins. Co.* (holding that under the No-Fault Act, insurers licensed to do business in Minnesota are required to provide *nonresident* insureds with only basic economic loss and residual liability coverages, not UIM coverage.) According to the court, the *Schmidt* principles are limited to claims arising under the Minnesota No-Fault Act and therefore do not apply to plaintiff's claim. *Ziegelmann v. National Farmers Union Property and Casualty Companies*, A04-412 (Minn. App. 09/21/04).

■ **WORKERS' COMPENSATION ACT; CO-EMPLOYEE IMMUNITY; DIRECT ACTION DUTY.** Plaintiff brought a wrongful death action against the Minnesota Vikings and several of its employees, including the team trainers and physician, after her husband died from heat exhaustion. The trainers and the physician treated the decedent for his condition. The district court granted summary judgment, holding that under the Workers' Compensation Act the employees had no personal duty to the decedent and, alternatively, the employees' actions were not grossly negligent. Noting that the employer's liability was not an issue in this appeal, the Court of Appeals affirmed summary judgment, but based its decision on slightly different grounds. According to the court, plaintiff's claim was not based entirely on workplace hazards that would give rise to immunity for all co-employees under the Workers' Compensation Act. Rather, the court ruled that the provision of medical treatment to the decedent by some of the defendants equated to an affirmative personal duty to provide due care. Finding a personal duty, the court then looked to whether the care provided was grossly negligent. The court defined gross negligence as "action without even scant care but not with such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong." Based on this definition, the defendants could not be found grossly negligent because they had rendered first aid in the form of water, ice, treatment for hyperventilation, and arrangement of transportation to the hospital. *Stringer v. Minnesota Vikings Football Club, LLC*, A03-1635, A04-205 (Minn. App. 09/21/04).

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