



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

ALTERNATIVE DISPUTE RESOLUTION

JUDICIAL LAW

■ **STATE STATUTE DOES NOT TRUMP ARBITRATION CLAUSE.** Where a sales-representative's agreement contains a valid arbitration provision, the Minnesota Termination of Sales Representatives Act (MTSRA) does not give the sales representative the option to bring its claims in district court.

The MTSRA allows a sales representative to "submit a matter to arbitration" or, in the alternative, bring claims "in a court of law." Minn. Stat. §363A.04 (Supp. 2003). The Minnesota Court of Appeals held that the statutory language applied only where there was no "written agreement to arbitrate." Moreover, MTSRA did not specifically preclude arbitration of certain types of claims. The appellate court determined that the parties' arbitration agreement functioned as a waiver of A.J. Lights' right to elect litigation under the MTSRA and compelled arbitration. *A.J. Lights v. Synergy Design Group, Inc.*, 690 N.W.2d 567 (Minn. App. 2005).

■ **CONTRACT DISPUTE WITHIN SCOPE OF ARBITRATION AGREEMENT.** Where two electronics-communications businesses entered into two agreements containing identical arbitration provisions requiring the parties to engage in binding arbitration in Minnesota for any claim arising out of the agreements, a request for relief on the merits of a breach of contract claim must be submitted to arbitration. The U.S. District Court for the District of Minnesota held that a dispute between Airtel Wireless, a Minnesota LLC, and Montana Electronics Company, a Montana corporation, over a breach of contract claim was precisely the type of claim that the parties intended to settle through arbitration, and granted Airtel's motion to compel arbitration. *Airtel Wireless, LLC v. Montana Electronics Co., Inc.*, 2005 WL 44748 (D. Minn. 01/07/05).

— DARIN T. ALLEN
National Arbitration Forum

CIVIL LITIGATION

JUDICIAL LAW

■ **RULE 68 OFFER OF JUDGMENT.** The Supreme Court affirmed a district court decision that a successful offeror is entitled to recover costs and disbursements incurred from the beginning of the lawsuit.

Appellants urged the Court to conclude that when the net verdict is less favorable to the offeree than the pretrial Offer of Judgment, Rule 68 allows the offeror to recover only those costs and disbursements incurred after the Offer of Judgment was made. The Court acknowledged that the uncertainty regarding the amount of costs recoverable arises from amendments made to the rule in 1985 in which, among other things, the following language, from the pre-1985 rule, was deleted: "The offeree must pay the costs and disbursements incurred *after the making of the offer.*" (Emphasis added.) The Court notes that there are no advisory committee comments specifically regarding this deletion, and there are other advisory committee comments suggesting that the amendments are meant to make the Minnesota rule identical with the federal rule (which limits costs recoverable to those incurred after the making of the offer).

The Court concludes that the plain language of the rule does not limit recoverable costs to those incurred after the making of the offer. Therefore, the offeree must pay the offeror's total costs and disbursements incurred from the beginning of the lawsuit. *Vandenhuevel v. Wagner*, A03-324, 690 N.W.2d 753, 755-56 (Minn. 2005). www.lawlibrary.state.mn.us/archive/supct/0501/opa030324-0120.htm

■ **WORKERS COMPENSATION SUBROGATION.** State Fund Mutual, the workers compensation carrier, moved to intervene in this civil case to prevent plaintiff's proposed settlement with the third-party tortfeasor and his insurer, at least until such time as the workers compensation carrier could conduct discovery to determine whether there were additional assets beyond the liability insurance policy. The district court denied State Fund's motion to intervene, but the Court of Appeals reversed and remanded with instructions that State Fund be permitted to intervene in order to protect its subrogation interest before the district court ruled on plaintiff's settlement motion.

The Court of Appeals relies heavily upon the Supreme Court's discussion of Minn. Stat. §176.061 Subd. 8a in *Jackson v. Zurich American Insurance Company*, 542 N.W. 2d 621, 623 (Minn. 1996). The court holds that the clear intent of the workers compensation provisions is that an employer must consent if the employee is attempting to settle the entire action, including the employer's subrogation interest. In the present case the proposed settlement would compromise the subrogation interest of State Fund, so the court holds that the workers compensation insurer is entitled to intervene. *State Fund Mutual Insurance Company v. Mead*, A04-561 691 N.W.2d 495 (Minn. App. 02/01/05). www.lawlibrary.state.mn.us/archive/ctappub/0502/opa040561-0201.htm

— STEVEN J. KIRSCH
— ANDREW T. SHERN
Murnane, Conlin, White & Brandt

CRIMINAL LAW

JUDICIAL LAW

■ **JUVENILE: EJJ SENTENCE; ACQUITTAL OF PRESUMPTIVE COMMIT OFFENSE; JUVENILE DISPOSITION ONLY.** The state moved to certify the appellant as an adult on two charges: first-degree and second-degree assault. Following a hearing and briefing, the trial court denied certification, which triggers the automatic designation by the court as an EJJ prosecution. Following a jury trial, the appellant was acquitted of first-degree assault, but found guilty of third-degree assault.

Section 260B.130, subd. 4(b) states that if a child is convicted as an EJJ of an offense for which the Sentencing Guidelines and applicable statutes do not presume commitment to prison, then the court shall order only a juvenile disposition. This subpart contains a phrase “After designation by the prosecutor in the delinquency petition,” which the trial court read as requiring an adult sentence, because it was the court, and not the prosecution, who designated the EJJ process.

Held, to the extent that §260B.130, Subd. 4(a) sentences identically situated juveniles in an unequal manner, it is a manifest and arbitrary distinction, without a rational basis, and is unconstitutional. *In Re T.C.J.*, A04-202 (Minn. App. 12/14/04).

www.lawlibrary.state.mn.us/archive/ctappub/0412/opa040202-1214.htm

■ **CRAWFORD: CHILD VICTIM VIDEO STATEMENT; CHILD PROTECTION WORKER.** The trial court erred in admitting a three-year-old sex assault victim’s statement to a child protection worker, and finds a violation under *Crawford v. Washington*. Several days after the three-year-old child had disclosed sexual abuse to his mother, a child protection worker, in the presence of a police detective, conducted a videotaped interview of the child at the Kandiyohi County Law Enforcement Center. The interview contained a fairly complete description by the child, with drawings, of the alleged penetration. The trial court conducted a competency hearing, and concluded that the three-year-old was not competent to testify at trial. While the United States Supreme Court did not specifically include videotaped statements to child protection workers as “testimonial” in the *Crawford* case, the Minnesota Court of Appeals has previously examined the issue in *State v. Courtney*, 682 N.W.2d 185, 196 (Minn. App. 2004), *rev. granted* (Minn. 09/29/04). The circumstances in this case clearly indicate that the interview was conducted for purposes of developing a case against the appellant; therefore the answers elicited were testimonial in nature. While the court notes the presence of a detective, the focus of the decision appears to be the purpose of the interview. Because the appellant was denied his 6th Amendment right to confront the witness under *Crawford*, he is entitled to a new trial. The court also notes that it was an abuse of discretion for the trial court to allow the child protection worker to describe the “contents” of that interview. *State v. Orlando Manuel Bobadilla*, A03-1891 (Minn. App. 12/21/04). www.lawlibrary.state.mn.us/archive/ctappub/0412/opa031891-1221.htm

■ **CRAWFORD: CHILD VICTIM STATEMENTS TO NURSE NOT TESTIMONIAL.** A three-year-old victim of child abuse was taken to a children’s hospital where she was examined by a nurse practitioner. The nurse testified that she examined the child for the purpose of making a diagnosis of abuse, but that she did not provide continuing care. The interview was taped, but no police officer was present. During the interview, the child made statements that the defendant, by name, had penetrated her. The child did not testify at trial, nor did the defendant have an opportunity prior to trial to cross-examine her. The nurse, however, testified as to the child’s out-of-court statements incriminating the appellant.

Held, the child’s out-of-court’s statements to a nurse practitioner, made in a hospital while the nurse examined the child for purposes of medical diagnosis, were not testimonial, and their admission did not violate the appellant’s right to confrontation. Under *Crawford*, these types of statements are not testimonial. The child made the statements for the purpose of medical diagnosis. The nurse was not working on behalf of, or in conjunction with, investigating police officers, or with any other governmental officials for the purposes of building a case against the defendant. *State v. Anthony Phillip Scacchetti*, A03-301 (Minn. App. 01/04/05).

www.lawlibrary.state.mn.us/archive/ctappub/0501/opa030301-0104.htm

■ **GRAND JURY: MOTION TO DISMISS INDICTMENT; PROBABLE CAUSE; EXTRINSIC EVIDENCE.** The state appealed the dismissal by the district court of the grand jury indictment alleging campaign law violations. After summarily rejecting the respondent’s arguments with respect to jurisdiction and venue, the Court of Appeals examines the district court’s dismissal of the indictment. The grand jury had heard evidence, both direct and indirect, concerning prohibited corporate contributions to the Republican Party of Minnesota by a corporate/insurance business organization. The respondent moved the court to dismiss for lack of probable cause and the court conducted a *Florence*-type hearing, at which the respondent introduced testimony of election law counsel for the Republican National Committee and its accounting system to monitor corporate donations. The district court relied on this individual’s “uncontested testimony” and documentary evidence presented through this individual, to grant the respondent’s motion to dismiss the indictment.

Held, it was error for the district court to consider evidence that was not presented to the grand jury. There exists no procedural rule allowing the court to receive extrinsic evidence when ruling on a motion attacking the sufficiency of the evidence to indict. While extrinsic evidence is permissible in a hearing on a motion to dismiss a complaint (an accusation by an adverse party), no such evidence is allowed to challenge an indictment which is brought by independent, neutral fact finders: the grand jury.

Giving great deference to grand jury determinations, the Court of Appeals concludes that the direct and circumstantial evidence before that body was sufficient to establish probable cause. *State v. Ronald E. Eibensteiner*, A04-792 (Minn. App. 12/28/04).

www.lawlibrary.state.mn.us/archive/ctappub/0412/opa040792-1228.htm

■ **DWI/IMPLIED CONSENT: ALCOHOL CONCENTRATION; SAMPLE TAKEN LATER THAN TWO HOURS AFTER DRIVING.** The appellant was involved in a car accident at 1:16 a.m. At 3:30 a.m., two hours and 14 minutes after the accident, appellant blew a .17 percent on the Intoxilyzer. For purposes of the appeal, the state stipulated that it cannot prove beyond a reasonable doubt that the appellant’s alcohol

concentration was .10 percent or more at the time he was driving. Appellant, in turn, stipulated that the state could prove his alcohol concentration was greater than .10 percent one hour and 59 minutes after driving. The issue is whether §169A.20, subd. 1(5), which criminalizes having an alcohol concentration of .10 percent or greater “as measured within two hours of ... driving,” may use, in evidence, a test taken greater than two hours beyond driving time.

Held, the statute, although ambiguous, does allow the use of a breath test sample obtained more than two hours after driving to measure and determine that a driver’s alcohol concentration exceeded the legal limit within two hours of driving. The court notes that §169A.45 dealing, generally, with evidence in driving while impaired offenses, discusses “other competent evidence,” and states that none of the preceding provisions in §169A limits the introduction of any other evidence bearing on the question of whether the person violated DWI laws “including tests obtained more than two hours after the alleged violation.” The court also broadly construes the term “as measured within two hours of the time of driving” to include not only the testing itself within two hours, but also to allow scientific/computational measurement such as retrograde extrapolation. **State v. Jeremy Q. Banken**, (Minn. App. 12/28/04).

■ **THEFT TOOL AS FELONY V THEFT ITSELF AS GROSS MISDEMEANOR; EQUAL PROTECTION.** Appellant possessed a cutting tool to remove a jacket from a department store rack and attempted to take the jacket from the premises. Following a jury verdict, he was convicted of possession of a theft tool, a felony, and the underlying attempted theft, classified a gross misdemeanor.

Held, under both the federal and state constitutions, the rational basis test is met to support the severity classifications. A more severe penalty for the possession of theft tools will reduce theft by reducing the ongoing occasions to engage in theft for those carrying the tool to accomplish it. The court notes the “irony” in the priority given to the possession charge, because the theft tool in this case was a common pocket device with many lawful uses, having criminal significance only when employed for a criminal act. **State v. LaRon Brown**, A04-60 (Minn. App. 12/21/04). www.lawlibrary.state.mn.us/archive/ctappub/0412/opa040060-1221.htm

■ **SENTENCING: BLAKELY; MINNESOTA GUIDELINE DEPARTURES UNCONSTITUTIONAL.** In a *per curiam* order, the Minnesota Supreme Court agrees that the presumptive sentence under the Guidelines is the maximum penalty authorized solely by the jury’s verdict for purposes of *Apprendi*, noting that the imposition of the presumptive sentence is mandatory absent additional judicial findings under the legislative Minnesota Sentencing Guidelines regime. Because the Guidelines permit the district court to durationally depart upward from a presumptive sentence after finding aggravating factors not considered by a jury, they unconstitutionally usurp the role and undermine the function of the jury. “A full opinion will follow” for which the Court ordered supplemental briefing on these four issues:

1. Whether the portions of the Sentencing Guidelines that unconstitutionally allow the district court to impose an upward durational departure based on facts not reflected in the jury’s verdict or admitted by the defendant are severable from the remainder of the Guidelines;
2. If the unconstitutional portions of the Guidelines properly may be severed, whether this court has the inherent authority to authorize the use of sentencing juries and the bifurcated trial process;
3. Whether a sentencing jury or bifurcated trial process implicates double jeopardy concerns;
4. In the present case, what specific remedy is appropriate? In particular, does the fact that district court denied appellant’s request to place before the jury aggravating factors that would, if found, justify sentencing enhancement, affect the disposition of this matter?

Dissent by Justice Page, stating that a simple remand for the presumptive sentence is appropriate in this case: “Any responsibility for fixing the ‘Blakely problem’ lies with the legislature and not this court.” **State v. Robert Allen Shattuck**, C6-03-362 (Minn. 12/23/04). www.lawlibrary.state.mn.us/archive/supct/0412/orc030362-1223.htm

■ **SENTENCING: BLAKELY; ADMISSION TO UPWARD DURATIONAL DEPARTURE REQUIRES WAIVER OF JURY TRIAL.** Appellant pled guilty to first-degree criminal sexual conduct in March 2002. The plea petition allowed the appellant to argue for a downward dispositional departure. There was no agreement as to sentence. It was understood that the district court would be open to considering a departure, depending upon the results of the PSI. At the sentencing hearing, the appellant’s attorney admitted there were “some very aggravating factors,” and the appellant acknowledged that his crime would have longstanding effects on the victim. The court sentenced the appellant to 216 months, an upward departure from the presumptive sentence of 144 months, noting the horrendous facts.

Held, the sentence is vacated and remanded, in light of *Blakely*. While the United States Supreme Court did not attempt to define the “admission exception,” the court notes that the effect of a defendant’s admission to an aggravating factor is, essentially, to waive the defendant’s constitutional rights to a jury trial on that sentencing issue. Waivers must be knowing, voluntary and intelligent. Citing *State v. Wright*, 679 N.W.2d 186 (Minn. App. 2004), *rev. den.* 06/29/04, such admissions, like stipulations to essential elements of an offense, must be accomplished with a full scale, on the record, oral or written waiver. The court finds no basis on which to distinguish a stipulation to an aggravating sentencing factor from a stipulation regarding an element of the offense: “The *Blakely* court has effectively dismantled the distinction between offense elements and sentencing factors.” The sentence is remanded for the “appropriate remedy” to be determined “in the first instance by the district court,” rejecting the appellant’s argument that he is automatically entitled, on remand, to a reduction of his sentence to the presumptive sentence. **State v. Charles Conrad Hagen**, C0-02-1318 (Minn. App. 12/28/04). www.lawlibrary.state.mn.us/archive/ctappub/0412/op021318-1228.htm

■ **SENTENCING: BLAKELY; CUSTODY STATUS POINT, NO JURY VIOLATION.** “We conclude that the determination of appellant’s criminal history score, including notice of a custody status point, is analogous to *Blakely*’s exception for the “fact of a prior conviction”: “Like the

fact of a prior conviction, custody status points are established by the court's own records. In addition, custody status points are based on the fact that a person has one or more prior convictions. Moreover, the concept of a 'presumptive sentence' is meaningless without a criminal history score, which includes status points and a jury's verdict does not determine that score." *State v. David Lee Brooks*, A03-2050 (Minn. App. 12/28/04). www.lawlibrary.state.mn.us/archive/ctappub/0412/opa032050-1228.htm

■ **ALCOHOL SALE TO MINOR; DECOY PURCHASER; DUE PROCESS; SEARCH AND SEIZURE.** Law enforcement used a 19-year-old decoy, wearing a hat which said "Blue Earth County Sheriff's Office Alcohol Compliance Team" to buy a 12-pack of beer in a wired transaction. On two previous occasions, the particular retailer had been a problem spot by failing two compliance checks. The state admitted, however, there was no articulable suspicion of criminal activity for this particular decoy check.

Held, this type of compliance check using an undercover underage person does not violate due process under the "government over-involvement" doctrine. The four factors specified in *State v. James*, 44 N.W.2d 799 (Minn. App. 1992) were not met. Next, the Court of Appeals holds that there was no legislative intent to prohibit the purchase of alcoholic beverages by minors for purposes of law enforcement. Finally, with respect to the lack of articulable suspicion or probable cause to conduct the search: "... there is no authority to suggest that search and seizure jurisprudence is relevant to cases in which the government has encouraged the defendant to commit a crime."

State v. Karen Kay Fitzpatrick, A03-1480 (Minn. App. 12/28/04). www.lawlibrary.state.mn.us/archive/ctappub/0412/opa031480-1228.htm

■ **SEARCH AND SEIZURE; EXECUTION OF WARRANT; STALENESS; KNOCK AND ANNOUNCE; REASONABLE TIME.** Seven days after obtaining a warrant, police knocked on the door of a suspected drug dealer involved in ongoing sales. After knocking on the door, and stating "Police, search warrant" police waited for 5-10 seconds, and then broke down the door and entered the apartment. After the knock, a male voice had stated, "Who is it," to which the response: "Police, search warrant" was given. Police waited during that period for someone to answer the door but did not hear any noise sounding like someone was approaching the door. A ram was then used to gain entry, where drugs were found.

Held, the warrant was not stale. Minn. Stat. §616.15(a) provides that absent circumstances not present in this case, a search warrant must be executed and returned to the court which issued it within ten days after its date. There was no evidence in this case that the six-day delay was unreasonable, especially viewing facts in the affidavit which show that the defendant was engaged in an ongoing business of selling drugs. Next, the court holds that the 5-10 second delay before obtaining forcible entry was not unreasonable. The court notes the language in *United States v. Banks*, 124 S.Ct. 521 (2003), in which the Court notes that a 15-20 second delay is a "close call." The Court of Appeals states, however, that the United States Supreme Court did not hold that waiting for a lesser period was *per se* unreasonable. There are also factors in this case which were not present in *Banks* suggesting an exigency in the nature of the destruction of evidence and that it would be futile for police to continue to wait. *State v. Jessie King, Jr.*, A04-292 (Minn. App. 01/04/05). www.lawlibrary.state.mn.us/archive/ctappub/0501/opa040292-0104.htm

■ **FIREARMS; FELON IN POSSESSION; LACK OF NOTIFICATION IN PROBATION DISCHARGE ORDER.** In 1992, appellant was convicted of a nonviolent felony and sentenced to probation. Appellant signed the probation agreement stating that he cannot lawfully possess a firearm until the conviction is expunged, set aside, pardoned, or "until civil rights are restored." In 1997, appellant was discharged from probation. The district court stated that appellant was "discharged from probation and restored to all civil rights and to full citizenship with full right to vote and to hold office the same as if said conviction had not taken place." The order was on a standard preprinted form, which had two provisions with a check box beside each for the court to check if applicable. Neither box was checked. One of the boxes states that: "You are not entitled to ship, transport, possess or receive a firearm until ten years have elapsed since you have been restored to civil rights and during that time you are not to have been convicted of any other crime of violence." In 2000, appellant pleaded guilty to the charge of unlawful possession of firearms under Minn. Stat. §624.713.

The court finds an exception to the *Knaffla* rule, and allows consideration of this post-conviction claim even though the claim was known, but not raised, in appellant's first petition for post-conviction relief. The court states that such a claim ought to be heard for reasons of fundamental fairness in this case because the government may not inform an individual that certain conduct is permitted and then prosecute the individual for engaging in the same conduct. Due process prohibits the government from informing a felon that all of his civil rights are restored and then prosecuting him for an act that would have been legal if all of his civil rights had indeed been restored. *U.S. v. Erwin*, 90 2d 510 (7th Cir. 1990), *cert denied* 498 U.S. 859 (1990). The Court of Appeals disagrees with the district court's conclusion that the court's failure to check the box was "a clerical mistake." *Harold Christopher Whitten v. State of Minnesota*, A04-793 (Minn. App. 01/11/05). www.lawlibrary.state.mn.us/archive/ctappub/0501/opa040793-0111.htm

■ **CRIMINAL VEHICULAR HOMICIDE; LESSER INCLUDED OFFENSE; JURY INSTRUCTION DENIAL; ABUSE OF DISCRETION.** Appellant had been charged with criminal vehicular homicide involving a situation where he apparently had very little sleep, and drifted to the side of the road, killing a motorist who was changing a tire. The trial court judge denied a request to submit a jury instruction for careless driving as a lesser-included offense of criminal vehicular homicide/gross negligence. On appeal, both the appellant and the state agreed, as does the Supreme Court, that careless driving is a lesser-included offense. The issue is whether the evidence provided a rational basis for the jury to convict the appellant of careless driving and to acquit him of criminal vehicular homicide/gross negligence.

"We have never held that falling asleep at the wheel is, as a matter of law, gross negligence and we decline to do so on the facts presented here." In the context of careless driving, carelessness is synonymous with ordinary negligence. This is in distinction to gross negligence, which has historically been described as "very great negligence, or the absence of slight diligence, or the want of even scant care." The Court notes that it is the conduct which led to the appellant's falling asleep at the wheel and not the conduct that takes place while he was asleep, which should be the basis for ordinary or gross negligence. The Court goes further in rejecting the suggestion that the

results of this conduct (in this case, death) should play a role in determining whether the conduct constitutes gross or ordinary negligence. Because the jury was not given a jury instruction as to the type of negligence to consider, the error is reversible. **State v. Mohammed Gazizamil Al-Naseer**, A03-634 (Minn. 01/20/05). www.lawlibrary.state.mn.us/archive/supct/0501/opa030634-0120.htm

— FREDERIC BRUNO
Frederic Bruno & Associates

EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **DISABILITY DISCRIMINATION.** An impaired employee who was able to type only ten words per minute did not have sufficient job qualifications for a position that required a “proficient typist” and, therefore, could not pursue a disability discrimination claim under the Minnesota Human Rights Act. The phrase requires minimal typing skills of 40 words per minute. Because the claimant could not meet the “minimum qualifications of the job,” he did not establish a *prima facie* case of discrimination because of disabilities. **Pauly v. Burlington Northern Santa Fe Railways** 2004 WL 2857604 (Minn. App. 2004) (unpublished).

A teacher at a nondenominational Christian school whose contract was terminated after she took medical leave was entitled to pursue an age discrimination claim under the Human Rights Act, but not a claim for disability discrimination. Judicial review was barred by the Freedom of Religion provision under the 1st Amendment of the U.S. Constitution or the parallel but broader “Freedom of Conscience provision” under Article I, Sec. 16 of the Minnesota State Constitution because there was no showing that “judicial consideration of ... [discrimination] claims would foster excessive governmental entanglement with religion.” On the merits, the trial court’s refusal to dismiss the age discrimination claim on summary judgment was affirmed, but dismissal of the claim of disability discrimination was upheld because there was insufficient evidence that the ex-teacher had a “disability” within the meaning of the statute. Her diabetic condition was not the type that “materially limits her ability to work” and the taking of a medical leave of absence does not constitute a “material impairment” of any “major life activities,” which is necessary for a disability claim under Minn. Stat. §363.01 subd. 13. **Rohland v. St. Cloud Christian School**, 2004 WL 2940889 (Minn. App. 2004) (unpublished).

■ **UNEMPLOYMENT COMPENSATION.** Employees who knowingly violated policies of employers were disqualified from unemployment compensation benefits in a pair of cases.

In the first of these, an employee who was serving alcohol at a catered event was disqualified from receiving unemployment compensation benefits because he knowingly violated his employer’s policy against consuming alcohol while on duty. This knowing violation of the policy constituted the type of intentional disregard for the interests of the employer that constitutes “misconduct.” **Critzer v. Annie’s Restaurants, L.L.C.**, 2004 WL 2988213 (Minn. App. 2004) (unpublished).

In a second case, an employee who violated the employer’s policy limiting employees to seven “occurrences” within a six-month period was denied unemployment compensation benefits. The employee was absent on four occasions and was late or left early on six other occasions in violation of the policy. Although the employee may have had some medical reasons for the absences or these incidents, she failed to make up the lost time or seek a leave under the Family & Medical Leave Act (FMLA), as the employer suggested. Under these circumstances, the employee exhibited a “substantial lack of concern for her employment” that constitutes disqualifying “misconduct.” **Almlie v. United Healthcare Services, Inc.**, 2004 WL 2984440 (Minn. App. 2004) (unpublished).

But an employee who was fired for refusing to sign a “final warning” document from the employer was granted unemployment compensation benefits. Reversing the determination of the commissioner of employment and economic development, the appellate court concluded that the evidence did not show that the employer’s request that the document be signed was solely for acknowledging receipt, rather than an admission of the underlying allegations, which the employee disputed. Under these circumstances, the refusal to sign the warning document did not constitute “misconduct” for denial of unemployment benefits. **Fischer v. PAL Management, Inc.**, 2004 WL 2986743 (Minn. App. 2004) (unpublished).

An employee’s failure to attend anger management classes at the employer’s expense after a series of inappropriate incidents in the workplace constituted a disqualifying “misconduct” for denial of benefits. The employer testified that the employee had several outbursts with other employees and customers and refused to attend an anger management course requested by the employer. The employee maintained that he was discharged because of retaliation or racial discrimination. Deferring to the commissioner’s determination and credibility, the appellate court upheld that the employer’s reasoning was more credible and that the requirement that the employee attend anger management class “did not pose an unreasonable burden” on him. His failure to do so, therefore, constituted a “misconduct,” which justified denial of benefits. **Abdel-Ghani v. Walser Burnsville Mazda**, 2004 WL 2940804 (Minn. App. 2004) (unpublished).

■ **VETERAN’S PREFERENCE.** A municipal employee was not entitled to a Veteran’s Preference hearing after he called his supervisor to report that he would miss work for a few days due to illness and actually was convicted and incarcerated and unable to work. The city maintained that the subsequent termination of the employee did not violate the requirements and notice of hearing under the Veteran’s Preference Act, Minn. Stat. §197.46, because the employee had abandoned his position for more than three days, which constitutes a resignation under the applicable civil service rules. **Schluter v. City of Minneapolis Com’s of Veterans Affairs**, 2004 WL 2987158 (Minn. App. 2004) (unpublished).

The determination to terminate a firefighter recruit who failed a number of examinations was appropriate under the Veteran’s Preference Act. The recruit’s failure on five required tests constitutes “just cause” for terminating the employment under the statute. **Brown v. St. Paul Department of Fire & Safety Services**, 2004 WL 2940873 (Minn. App. 2004) (unpublished).

■ **NON-COMPETE CONTRACT.** A distributor of office supplies was not entitled to an injunction barring former employees from working for a new employer under noncompete contracts which included a six-month liquidated damage clause equal to six months of salary. The

existence of the liquidated damage clause means that monetary relief can be obtained and, therefore, there is no irrevocable harm that would warrant injunctive relief. Additionally, the nature of the business does not reflect that equitable relief is necessary to protect confidentiality or a customer base. *Bromen Office 1, Inc. v. Coens*, 2004 WL 2984374 (Minn. App. 2004) (unpublished).

■ **DATA PRACTICES.** The determination by an arbitrator sustaining a grievance by a discharged police officer and reinstating him to a position constitutes “final disposition” and, therefore, is “public data” under the Minnesota Government Data Practices Act. The appellate court held that the arbitrator’s determination constitutes “public data” and is accessible to the media under the personnel section of the act, Minn. Stat. §13.43 subd. 2(a)(5) because it represents the “final disposition” of the employee’s status under §13.43 subd. 2(b). *City of Duluth v. Duluth Police Local*, 2004 WL 2984572 (Minn. App. 2004) (unpublished),

■ **WORKERS’ COMPENSATION.** A third-party tortfeasor sued by an employer’s workers compensation insurance carrier is entitled to a jury trial on all issues, but is subject to potential liability for all compensation benefits paid. The appellate court held that a workers’ compensation insurer-subrogee is not automatically entitled to full recovery of benefits paid and payable unless it establishes both liability and damages as a third-party tortfeasor.

The tortfeasor against whom subrogation was sought is entitled to a trial by jury on these issues. However, the potential recovery is not limited by any common law or statutory restrictions, and the compensation carrier is entitled to recover all benefits that have been paid or paid in the future, unrestricted by any common law or statutory limitations.

The existence of disputed facts precludes determination on summary judgment whether the sexually motivated behavior falls within the “assault” exception to the Workers Compensation Act under Minn. Stat. §176.011 subd. 16. The claim is not subject to the “exclusivity” provision of the workers compensation statute without determination by a trier-of-fact whether the sexual behavior was motivated by “personal animosity ... wholly unconnected with the unemployment,” which would invoke the exception to the statute and allow recovery in tort. *Zurich American Insurance Co. v. Bjelland*, 2004 WL 2984336 (Minn. App. 2004).

— MARSHALL H. TANICK
Mansfield, Tanick & Cohen, PA

ENVIRONMENTAL LAW

JUDICIAL LAW

■ **ENVIRONMENTAL REVIEW; NEED FOR ENVIRONMENTAL IMPACT STATEMENT.** On January 11, 2005, the Minnesota Court of Appeals reversed a district court ruling that the Kandiyohi County Board of Commissioners (county) must require environmental impact statements (EISS) before granting conditional use permits for two proposed gravel pits. The court held that the county’s negative declarations were neither arbitrary nor capricious, and were supported by substantial evidence.

The suit arose when, based on environmental assessment worksheets, the county determined that EISS were not required before issuing permits for gravel pits proposed by Duinick Brothers, Inc. in Dovre Township and Green Lake Township. Citizens Advocating Responsible Development (Citizens) appealed the county’s decision and sought a district court order requiring the EISS. Citizens is a non-profit organization comprised of landowners who own property in the vicinity of the proposed gravel pits. Citizens argued that the county’s decision not to require EISS was arbitrary and capricious because the record lacked information concerning the size of the projects and the cumulative effects of past, present and anticipated future projects, and the county completely failed to consider these factors. The district court granted summary judgment to Citizens and required the county to order EISS.

In reversing the district court ruling, the Court of Appeals began by setting out the standard for reviewing an agency’s decision that an EIS is not required. According to the court, the agency’s decision will be reversed if the decision is not supported by substantial evidence in the record as submitted, or if it was arbitrary or capricious. Citing *Pope County Mothers v. Minn. Pollution Control Agency*, 594 N.W.2d 233 (Minn. App. 1999), the court stated that an agency’s decision is arbitrary and capricious if the agency relied on factors the Legislature never intended it to consider, if it failed to consider an important aspect of the problem, if its explanation of the decision runs counter to the evidence, or if the decision is so implausible that it could not be ascribed to a difference in view or the result of agency expertise.

The Court of Appeals found that the record upon which the county’s decision was based contained ample information regarding the size of the proposed projects and their relationship to other gravel pits in the area, and that the county specifically considered the potential for adverse cumulative effects. The court also reviewed four specific areas of dispute concerning potential environmental impacts and in each case held that the county’s determination was supported by substantial evidence in the record. Finally, the court held that the county was entitled to rely on enforcement of existing regulations and permits to mitigate any environmental impacts and to prevent adverse effects from becoming significant. *Citizens Advocating Responsible Development v. Kandiyohi County Board of Commissioners*, Nos. A04-886, A04-890, 2005 WL 44823 (Minn. App. 01/11/05)

— ROBERT DEVOLVE
Leonard Street and Deinard

FEDERAL PRACTICE

JUDICIAL LAW

■ **AMOUNT IN CONTROVERSY; SUA SPONTE DISMISSAL.** Plaintiff filed suit in the Nebraska state courts, alleging that the defendant trespassed on its farmland by placing an air monitoring device and groundwater well six feet inside its property line. While the plaintiff’s complaint did not specify the amount of damages it was seeking, the plaintiff had previously sought \$275,000 in damages in a related proceeding. The defendant removed on the basis of diversity jurisdiction, and was subsequently awarded summary judgment on the basis that

no trespass had occurred, or alternatively, that the plaintiff's damages were no more than \$22.50, an amount insufficient to support a trespass claim under Nebraska law. Plaintiff appealed.

On appeal, the 8th Circuit *sua sponte* questioned whether the amount in controversy was sufficient to support diversity jurisdiction, and ordered supplemental briefing on the issue, placing the burden on the defendant, as the party invoking diversity jurisdiction, to prove the required amount in controversy by a preponderance of the evidence. Finding it "undisputed" that the plaintiff's damages for the loss of use of its land were "at most" \$22.50, and rejecting the defendant's argument that the amount in controversy was inextricably intertwined with the merits of the dispute, the 8th Circuit found that it lacked subject matter jurisdiction, and while it expressed "practical misgivings" about the remand of "such a trivial matter" to the Nebraska courts, it found that it had "no choice" but to do just that.

This decision illustrates the importance of a focus on actual damages, rather than pie-in-the-sky claim when commencing or removing a diversity action. *James Neff Kramper Family Farm Partnership v. IBP, Inc.*, 393 F.3d 828 (8th Cir. 2005).

■ **DAUBERT; MULTIPLE CASES.** January, 2005 brought a flurry of *Daubert*-related decisions.

The 8th Circuit affirmed summary judgment for the defendant-manufacturer in a product liability case, finding that Judge Doty had not abused his discretion in excluding the testimony of plaintiff's expert, and noting that "an expert proposing safety modifications must demonstrate by some means that they would work to protect the machine operators but would not interfere with the machine's utility." *Unrein v. Timesavers, Inc.*, 394 F.3d 1008 (8th Cir. 2005).

Two days later, the 8th Circuit affirmed a second decision by Judge Doty striking the proposed testimony of purported fire experts, finding that testimony to be unreliable, and agreeing with Judge Doty that this testimony also was likely to confuse the jury. *Fireman's Fund Ins. Co. v. Canon U.S.A., Inc.*, 394 F.3d 1054 (8th Cir. 2005).

That same week Judge Kyle granted defendants' *Daubert* motion seeking to exclude the testimony of the plaintiffs' proposed expert, following two 5th Circuit opinions and finding that there was no credible scientific evidence that one plaintiff's fibromyalgia had been caused by a car accident. *Maras v. Avis Rent A Car System, Inc.*, 2005 WL 83828 (D. Minn. 01/14/05).

■ **OTHER NOTEWORTHY DECISIONS.** The 8th Circuit found that an award of \$15 million in punitive damages in a tobacco liability case was excessive under *State Farm* and *Gore* in light of the jury's award of just over \$4 million in compensatory damages. The court offered the plaintiff a choice between a remittitur to \$5 million in punitive damages or a new trial on the punitive damages claim. Judge Bye concurred in the result, disagreeing that the award was excessive under *State Farm* and *Gore*, but finding that a remittitur was required due to an error in the jury instructions governing punitive damages. *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005).

The 8th Circuit affirmed a decision by Judge Kyle dismissing the plaintiff's securities fraud claims under the PSLRA, finding that the complaint failed to allege that the defendant acted with the requisite scienter. *Ferris, Baker Watts, Inc. v. Ernst & Young, LLP*, 395 F.3d 851 (8th Cir. 2005).

— JOSH JACOBSON
Law Office of Josh Jacobson

INTELLECTUAL PROPERTY

Judicial Law

■ **PATENTS; CLAIM CONSTRUCTION; TEXAS DIGITAL METHOD.** Ruling in a case involving the oil refining industry, Judge Kyle construed a host of patent claim terms using what has become known as the two-step method to claim construction. The two steps, first articulated in *Texas Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193 (Fed. Cir. 2002), are (1) determining the ordinary and customary meaning of the disputed term as understood by those skilled in the relevant art and (2) making sure that the patent and file history do not use the disputed term inconsistently (broader or narrower). For example, the court construed the term "in order to." The court determined that the ordinary and customary meaning to those in the field of oil refining is "for the purpose of," and then confirmed that "nothing in the specification or prosecution history rebuts this presumption."

The court also applied a claim-construction principle that arose in the wake of *Texas Digital*: using the patent and file history to select or reject definitions when multiple dictionary definitions exist. As another example, the court construed the term "determine." Recognizing that multiple dictionary definitions exist, the court looked to the patent and file history and rejected one proposed definition but selected an alternative definition that "is more consistent with the patentee's intended use." *Intercat, Inc. v. Nol-Tec Systems, Inc., et al.*, Civ. No. 03-4886 (D. Minn. 01/07/05).

Nothing is straightforward in patent law, however, especially claim construction. In a separate case, a panel of the Court of Appeals for the Federal Circuit rejected appellants' argument that the district court erred by not using the *Texas Digital* methodology. The panel emphasized that "a long line of cases indicates that the [patent and file history are] the primary source[s] for determining claim meaning." The panel took head on the *Texas Digital* two-step methodology and criticized it: "Language in some of our recent cases, however, suggests that the [patent and file history], except for claims, should be consulted only after the ordinary and customary meaning of claim terms to persons skilled in the pertinent art is determined. ... Bard cites these cases in a failed attempt to contend that dictionary definitions somehow trump or override the [patent and file history] in determining the meaning of a claim term." *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858 (Fed. Cir. 2004),

The Court of Appeals for the Federal Circuit will soon issue its *en banc* decision in *Phillips v. AWH Corp.*, which should address a number of claim construction issues including methodology and the role, if any, of dictionaries in claim construction.

— ANTHONY R. ZEULI
Merchant & Gould

JUVENILE LAW

JUDICIAL LAW

■ **TERMINATION OF PARENTAL RIGHTS; BEST INTERESTS; FOSTER CARE ALTERNATIVE.** The Minnesota Court of Appeals in an unpublished decision affirmed a district court's termination of a mother's parental rights to her three youngest children, who were ages 11, 10, and 9 at the time of trial. She asked the Court of Appeals to reverse the termination of parental rights (TPR) decision and remand for entry of an order placing the children in long-term foster care.

First, the mother argued that there was no evidence in the petition that a TPR would serve the children's best interests and that it was unfair for the county to proceed, having delayed until the children were no longer adoptable. The Court of Appeals affirmed the trial court's ruling that the petition made a prima facie showing to support the statutory grounds pled and found that it was unnecessary to show that TPR was in the children's best interests.

This mother also argued on appeal that the district court erred when it accepted a limited waiver of trial rights she had granted. The Court of Appeals was satisfied that the trial provided an adequate forum for consideration of arguments favoring long-term foster care rather than TPR. The district court's failure to question the mother more thoroughly on her admissions was held to be harmless error.

The mother also alleged that the district court erred in focusing on stale evidence and past conditions, arguing that the court's TPR decision was meant to redress past inaction by the county and court rather than deal with the children's present needs and conditions. The Court of Appeals found that the mother's lengthy history with the county was relevant to issues involving whether the children could be returned to her care and whether long-term foster care placement was in the children's best interest. Thus, the Court of Appeals concluded that the district court did not err in focusing on past conditions.

The Court of Appeals refused to consider the mother's argument, raised for the first time on appeal, that the long-term foster care statute violated equal protection standards by treating similarly situated children differently based on their age. The Court of Appeals noted that the district court was not required to make findings on the adoptability, or lack thereof, of the children before terminating parental rights. Similarly, the Court of Appeals rejected the mother's argument that the district court should have ordered long-term foster care as a matter of equitable relief. The district court's determination that long-term foster care was not in the best interest of the children and that termination of parental rights was appropriate was affirmed in all regards. *In the Matter of the Welfare of the Children of D.G. Parent*, A04-642 (Minn. App. 11/16/04) (unpublished). www.lawlibrary.state.mn.us/archive/ctapun/0411/opa040642-1116.htm

■ **TERMINATION OF PARENTAL RIGHTS; MOTION FOR CONTINUANCE; COMPETENCE TO PROCEED.** In another decision addressing a termination of parental rights, the Minnesota Court of Appeals reversed the district court judge in part and remanded the matter for further proceedings. The mother requested a continuance to ascertain the impact of a recently prescribed medication on her competence to proceed, offering in support a letter from her psychiatrist. The county opposed the motion, stating that it was the mother's burden to show she was not competent to proceed. The juvenile court denied the mother's motion but permitted her to solicit another competency-related opinion from her psychiatrist.

On appeal, the mother challenged the denial of her motion for a continuance. The county argued that the mother failed to preserve this issue for appeal by not moving for a new trial. The Court of Appeals held that to the extent that denial of the motion was a pretrial ruling, a new trial motion was not required to preserve it for appeal. Pretrial orders are reviewable only on appeal from a final judgment.

The Court of Appeals further noted that a juvenile court may continue a permanency trial "for accumulation or presentation of evidence or witnesses." Here the mother requested a continuance to acquire information about whether the new prescription would allow her to complete her case plan. The court observed that the propriety of terminating parental rights depends to a great extent upon the projected permanency of the parent's inability to care for his or her child. This record demonstrated that the mother made significant progress on her case plan when her mood was stable. Under the unique facts of this record and since the continuance would have allowed acquisition and presentation of evidence having a significant possibility of advancing the best interests of the children, the Court of Appeals concluded that the juvenile court abused its discretion by denying the continuance and remanded the matter for the juvenile court to consider evidence on the impact of the medication on the mother's ability to parent.

Having remanded the continuance question, the Court of Appeals declined to address both parents' contentions that the court improperly relied solely on the mother's mental illness to terminate her parental rights, and placed too much emphasis on past events in its decision to terminate both parent's rights. The Court of Appeals noted, however, that absent a resolution of the remand favorable to the mother, termination of the mother's parental rights would be appropriate. The court also noted that if the decision on remand favored the mother, she might retain parental rights while the father's rights were terminated; the panel found nothing in the record to support the father's issues on appeal. *In the Matter of the Welfare of the Children of S.O. and R.J.S, Parents*, A04-830 (Minn. App. 12/14/04) (unpublished). www.lawlibrary.state.mn.us/archive/ctapun/0412/opa040830-1214.htm

■ **FOSTER CARE PAYMENTS; CHILD PROTECTION ASSESSMENT; ATTORNEYS FEES.** After appellant Hennepin County Human Services Department (HCHS) denied respondent Robin Forsberg's claim for foster care payments, Forsberg requested an administrative hearing from the Appeals Department of the Minnesota Department of Human Services (Appeals Department). The Appeals Department held that it lacked authority to hear the claim. The district court reversed and ordered foster care payments and attorney fees. On appeal, HCHS asserted that the district court erred in relevant part because (1) the Appeals Department lacked statutory authority to hear Forsberg's claim; (2) the district court considered issues not preserved on appeal; (3) the district court's award of certain foster care payments was contrary to law and unsupported by the evidence; and (4) the district court relied on 42 U.S.C. §1988(b) (2000) to award attorney fees

without legal authority to do so. Reversed and remanded. **Robin Forsberg vs. Hennepin County Human Services Department and the Commissioner of Human Services**, A04-238_(Minn. App. 12/28/04) (unpublished). www.lawlibrary.state.mn.us/archive/ctapun/0412/opa040238-1228.htm

OTHER JURISDICTIONS

■ **MALPRACTICE IMMUNITY; COURT-ORDERED RECOMMENDATION; MASSACHUSETTS.** The Massachusetts Court of Appeals held that where a lawyer was appointed to represent the interest of a child in a custody and support case, that lawyer is entitled to immunity in a malpractice suit filed by the child and his father arising from the recommendations to the court that the attorney was ordered to make. The court explained because the recommendations, which the father and child claimed led to financial hardships, were of the kind usually required of a guardian ad litem, the lawyer should have the same quasijudicial immunity as that afforded to guardians ad litem. **Sarkisian vs. Benjamin**, 03-P-1265 (Mass. App. Ct. 01/07/05).

■ **INTERSTATE COMPACT ON PLACEMENT OF CHILDREN; UNBORN CHILD; UTAH.** The Utah Court of Appeals held that the Interstate Compact on the Placement of Children (“ICPC”) does not apply to the unborn children of expectant mothers who come to Utah to give birth and place their children for adoption. This decision contradicted an advisory opinion issued by the Association of ICPC Administrators stating that such a situation should be viewed as an interstate placement. The Court of Appeals in Utah reasoned that the usual definition of the word “child” and the Compact’s requirement of a subject child name, birth date, and place of birth lead to the conclusion that the ICPC applies only to children already in being. **Alternative Options and Services for Children vs. Chapman**, 20030186 (Utah Ct. App. 12/30/04).

■ **ASSISTED REPRODUCTION; SAME SEX CIVIL UNION; STATUS AS PARENT.** A woman whose partner bore a child with her encouragement by artificial insemination during their civil union was held to be the legal parent of the child by a Vermont trial judge. That judge made that decision after deciding that the parties to a marriage or a civil union who so conceive a child should be presumed to be the child’s parents. A Virginia trial judge disagreed with that in a case concerning the same child. The Virginia judge held that since Virginia law deems civil unions null and void, the mother’s expartner has no rights respecting the child, and the Virginia court does not have to recognize the Vermont court’s prior exercise of jurisdiction over the child’s custody. Stay tuned for whether this case will rise to the appellate court level and address the increasingly difficult issue of full faith and credit in the area of assisted reproduction technology in same sex relationships and children born of those relationships. **Miller-Jenkins vs. Miller-Jenkins**, 454-11-03 (Vt. Fam. Ct. 11/17/03); **Miller-Jenkins vs. Miller-Jenkins**, CH 04-280, (Va. Cir. Ct. 10/15/04).

■ **ASSISTED REPRODUCTION; SAME SEX CIVIL UNION; STATUS AS PARENT.** The Indiana Court of Appeals held that two women are the legal parents of a child conceived by one of them by artificial insemination during their relationship. The court stressed that the now estranged partners jointly decided to bring the child into the world and raise her together. The court urged state lawmakers to enact measures to protect children who, “through no fault of their own, find themselves born into unconventional family’s settings.” **King vs. S.B.**, 53A01-0407-JV-284 (Ind. Ct. App. 11/24/04).

— GARY A. DEBELE
Walling, Berg & Debele PA

REAL PROPERTY

JUDICIAL LAW

■ **STATUTE OF LIMITATIONS FOR ACTION ON DEED.** Roth purchased property on a contract for deed. In 1992, Roth paid off the contract, but did not receive a deed from the vendors. Ultimately, in 1996, the vendors executed a warranty deed in favor of Roth, which was filed with the county recorder by June 21, 1996. Despite the existence of a mortgage against the property, the warranty deed stated that there were no encumbrances on the property. In 2001, the mortgagee successfully foreclosed on the mortgage. Then, on June 27, 2002, some six years and six days after the deed had been filed with the county recorder, Roth commenced an action against the vendors, which included a claim for breach of warranties contained in the deed. The district court granted summary judgment in favor of the vendors, ruling that the suit was barred by the six-year statute of limitations found in Minn. Stat. §541.05, subd. 1. The Court of Appeals reversed. The court held that the limitations period for breach of warranty in a deed does not commence when the deed is delivered, as the contract for deed vendors had argued. Rather, the period starts when a third party successfully asserts an interest in the property contrary to the interest of the party receiving the deed. Because Roth’s action was commenced approximately a year after the mortgagee’s successful foreclosure action, Roth’s suit was well within the limitations period. Reversed and remanded. **Roth v. Weir**, A04-885 (Minn. App. 01/04/05). www.lawlibrary.state.mn.us/archive/ctappub/0501/opa040885-0104.htm

■ **STATUTE OF LIMITATIONS FOR IMPROVEMENT TO REAL PROPERTY.** In January 2005, the Minnesota Court of Appeals addressed on three separate occasions what constitutes an “improvement to real property” for purposes of making applicable the two-year statute of limitations found in Minn. Stat. §541.051. In each case, the district court granted summary judgment in favor of the defendants, ruling that the action had been commenced outside of the two-year limitations period and, in each case, the Court of Appeals affirmed. In its opinions, the Court of Appeals repeatedly relied on the definition of an “improvement” as “a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.” With that definition in mind, the court held that the replacement of roof covering was an improvement to real property rather than an ordinary repair. In another case, the court held that the installation of a water purifica-

tion system constituted an improvement even though the system was removable and did not add to the capital value of the property. In so holding, the court observed that the system was integrated into the building's plumbing and made the building more useful. Finally, the court held that the two-year statute of limitations applied where damage was caused by the installation of a utility pole anchor. **Merritt v. Mendel**, A04-1236 (Minn. App. 01/18/05) (roof covering). www.lawlibrary.state.mn.us/archive/ctappub/0501/opa041236-0118.htm

Allianz Ins. Co. v. PM Services, A04-898 (Minn. App. 01/18/05) (water purification system). www.lawlibrary.state.mn.us/archive/ctappub/0501/opa040898-0118.htm

Lietz v. Northern States Power Co., A04-901 (Minn. App. 01/11/05) (unpublished) (utility pole anchor). www.lawlibrary.state.mn.us/archive/ctapun/0501/opa040901-0111.htm

STATUTORY LAW

The Minnesota Legislature will be considering a number of bills related to real property in the upcoming year. Items of interest include:

■ **METHAMPHETAMINE LABS.** A proposal would mandate that the applicable authority (county, local) issue an order prohibiting the sale, lease, or use of property that has been found to have been used as a methamphetamine lab and contaminated as a result of that use. The bill would further require that the authority record against the title to the property an affidavit noting the existence of the lab on the property and that the use of the property may be restricted. The authority must record an additional affidavit vacating the order once the property is assessed and remediated. The bill also seeks to impose a duty on property owners who know or should know of the existence of a lab to record a similar affidavit prior to transferring ownership. Senate File No. 423.

■ **CANCELLATION OF RESIDENTIAL PURCHASE AGREEMENTS.** The Real Property Section of the MSBA has proposed a number of amendments to the newly enacted statutory cancellation procedure applicable to residential purchase agreements. Among other changes, the bill would limit the use of the new Declaratory Cancellation to cases where an unfulfilled condition exists (as opposed to a default), change the cancellation notice to include notice of the other party's ability to protect its rights to recover earnest money by commencing its own cancellation, and make discretionary (as opposed to mandatory) an award of attorney fees to the prevailing party in an action to enjoin the cancellation. Senate File No. 391.

— C.J. DEIKE
Edina Realty Home Services

TAX

JUDICIAL LAW

■ **ATTORNEY'S CONTINGENT FEE INCLUDABLE IN PLAINTIFF'S GROSS INCOME.** Two successful litigants were required to include in gross income the total amount of their settlement funds. In addition, they were required to include in those amounts sums paid out of their settlements to their attorneys pursuant to contingent-fee agreements. In so deciding, the Supreme Court applied the anticipatory assignment of income doctrine. This doctrine prevents a taxpayer from excluding economic gain from income by assigning that gain in advance to another person. **Comm'r v. Banks**, 2005 U.S. LEXIS 1370 (S. Ct. 2005).

■ **TAXES PRIORITY ADMINISTRATIVE EXPENSE AFTER BANKRUPTCY CONVERSION.** A taxpayer accrued federal employment taxes during Chapter 11 bankruptcy proceedings that were classified as administrative expenses. When the taxpayer's bankruptcy was converted to Chapter 13, the taxes retained their administrative expense status and thus the tax liability and the accrued interest remained a first-priority expense. **United States v. Fowler**, 2005 U.S. App. LEXIS 481.

■ **PENSION FUND; PROHIBITED TRANSACTION; DISQUALIFICATION.** A pension fund engaged in a prohibited transaction by violating the "exclusive benefit rule" as determined by the IRS. However the IRS entered into a closing agreement that stipulated that the pension fund would be not be disqualified in favor of an alternative remedy, despite its acknowledgment of the prohibited transfers. Further, the IRS was not required to revoke the pension fund's tax exemption because the reviewing federal district court determined that it did not have jurisdiction to require a revocation. **Borelli v. The Secretary of the Treasury**, D.C. N.Y. 2005-1 USTC.

■ **ROLLOVER FUNDS NOT ELIGIBLE FOR WITHDRAWAL:** A taxpayer rolled over funds from a 401(k) plan into an individual retirement account (IRA) and argued for a refund based upon his interpretation that the rolled over funds were nondeductible contributions free from taxation upon later withdrawal. The taxpayer's argument was unsupported by the Internal Revenue Code and the regulations. Further, the district court ruling that such funds are subject to taxation upon withdrawal was affirmed by the 2nd Circuit Court of Appeals. **Sternberg v. IRS**, 2005 U.S. App. LEXIS 859 (2nd Cir 2005).

■ **OFFER IN COMPROMISE: CHAPTER 13 DEBTOR.** Though the IRS has a published policy of not considering offers in compromise from taxpayers who have filed for bankruptcy, it is not required by the Tax Code or the Treasury Regulations and is merely an internal procedural guide. Thus, the Bankruptcy Court ordered the IRS to process and consider an offer in compromise submitted by a debtor in Chapter 13 bankruptcy. Further, the IRS determination to not consider offers in compromise from those in bankruptcy is not exempt from judicial review as an agency action. **In the matter of C. Peterson**, 317 B.R. 532 (2004)

■ **DISABILITY PAYMENTS; CALCULATING PORTION INCLUDABLE IN INCOME.** A teacher was receiving disability payments from a state teacher's retirement system (STRS). In calculating his excludable income, the taxpayer disregarded the ratio provided on Form 1099-R and instead excluded 40 percent of his gross income. Because the taxpayer did not prove that the ratio that he used met the requirements of Code Sec. 72(b) and because he failed to establish the portion of the benefits that were funded by his employee contribution, the taxpayer was required to use the proper provided ratio to determine the portion of the disability payments that were includable in income. **Wright**

v. *Comm'r*, T.C. Memo 2005-5 (01/13/05)

■ **FEDERAL TAX LIEN; PRIORITY OVER JUDGMENT CREDITOR'S UNRECORDED LIEN.** Federal law determines the priority among federal tax liens and other liens. In the case at hand, the applicable state was West Virginia which does not indicate whether recording is necessary to perfect a lien as against other claimants. Nonetheless, state courts have interpreted the applicable provision to require recording. Therefore, because the judgment creditor's lien was not perfected until recorded, and was recorded later than the federal tax lien, the tax lien was granted priority. *Collier v. United States (In re Charco Inc.)*, 2004 U.S. Dist. LEXIS 23160; 94 A.F.T.R. 2d (RIA) 6804.

■ **FORECLOSURE; PROPERTY SHARED WITH SON.** A taxpayer and his third-party son were joint owners of farm properties. The son failed to show why a forced sale would be inequitable. First, the son was not a bona fide purchaser of the properties and had conspired to put the properties in his name after his father, the taxpayer, had purchased the properties with community funds during the course of his marriage. Thus he lacked a legal expectation that the properties would not be subject to a forced sale. Second, since the son did not live on the properties, he would not face undue hardship as a result of their sale. Finally, the son held a fee interest in the property, not an interest contingent on the taxpayer's death. There was no complication regarding the allocation of the proceeds and no inequality based upon the son's interest. Thus the IRS was permitted to foreclose on the property. *United States v. Padilla*, 2004 U.S. Dist. LEXIS 23112; 94 A.F.T.R. 2d (RIA) 6811.

■ **CHALLENGED CDP HEARING VALID DUE TO INSUFFICIENT SERVICE.** A taxpayer's complaint was subject to dismissal without prejudice because the suit challenging the validity of a Collection Due Process Hearing was served on the U.S. Attorney's office rather than the IRS. Further, even if the IRS had been properly served the CDP hearing would still be valid. The administrative files demonstrated that the taxpayer had received a notice and demand letter for payment of the penalty, thus invalidating the taxpayer's lack of notice claim. Finally, the appeals officer provided the taxpayer with transcripts showing the assessment of a frivolous return penalty even though he was not required to do so. *Blankenship v. United States*, 2004 U.S. Dist. LEXIS 22784.

■ **STOCK'S VALUE BEST DEMONSTRATED IN POST-DEATH SALE:** A decedent's interest in the stock of a closely held bank was properly determined using the actual sales price of the stock in a transaction that occurred approximately one year after the decedent's death. Prior to the decedent's death, there had been two other stock sales. However, these sales were not accurate representations of the stock's fair market value because the sellers were not knowledgeable and sold the shares for much less than their fair market value and because the 17 shares sold in the previous sales were not comparable to the 116 shares held by the decedent. Because the sale occurring after the descendant's death was an arms-length transaction completed by unrelated parties, it was the best measure of the stock's fair market value. *Noble Est. V. Comm'r*, T.C. Memo 2005-2.

■ **MEDICAL RESIDENTS NOT EXEMPT FROM FICA.** According to a Florida federal district court, medical residents are not students exempt from Social Security (FICA) taxation. Code Sec. 3121(b)(10) provides the student exemption for services rendered for a school, college or university by a student who is enrolled and regularly attending classes at the school, college or university. According to the court, this exemption does not apply to medical residents. The court reviewed the history of the Social Security Act and determined that the history of amendments made clear that while interns were granted a separate exemption, the coverage did not apply to residents. *United States v. Mount Sinai Medical Center of Florida*, 2005 U.S. Dist. LEXIS 909.

■ **JURISDICTION LACKING OVER INNOCENT SPOUSE REQUEST.** A taxpayer paid tax liabilities incurred during her marriage before the effective date of Code Sec. 6015. The taxpayer requested the relief independent of any other proceeding, and the former law (Code Sec. 6013(e)) does not grant the Tax Court jurisdiction to review a stand-alone request for relief from joint and several liability. Tax Court held it does not have jurisdiction to grant the taxpayer innocent spouse relief for those particular years. *Jones v. Comm'r*, T.C. Summary Opinion 2005-9.

■ **ABUSIVE TAX SHELTER PROMOTER ENJOINED.** Code Sec. 6700 sets out four criteria for its penalty for tax shelter promoters. An abusive tax scheme set up as a religion-based entity that purported to offer tax advantages to participants and the individual who marketed the scheme met all four criteria for the penalty and the individual was enjoined from marketing the scheme. To begin with, the scheme qualified as a plan or agreement. Further, the marketer knew that her statements about the scheme were false and fraudulent and she had reason to know that her statements were false. Finally, the false statements related to the exclusion of income and pertained to material matters. *United States v. Harkins*, 2004 U.S. Dist. LEXIS 26575.

■ **INTEREST PASSING TO SPOUSE NOT MARITAL DEDUCTION.** A decedent's surviving spouse did not have complete control over trust income for the purposes of Code Sec. 2056(b)(7). Thus, the estate was not entitled to a marital deduction for property that passed to the trust. Under the terms of the trust, the surviving spouse was limited to the amount of income that would be proper for the maintenance of her health, comfort, support, welfare and education in harmony with the manner to which she was accustomed to living. However, there was no language indicating the decedent's intent to allow the interest passing to his spouse to qualify for a marital deduction as qualified terminable interest property. *Davis v. Comm'r*, 2005 U.S. App. LEXIS 1149.

■ **LIABILITY FOR EARLY WITHDRAWAL PENALTY; FINANCIAL HARDSHIP.** An unemployed engineer facing financial hardship was not relieved of the early distribution penalty on withdrawals from his pension plans. Financial hardship was not one of the exceptions to the penalty listed in the statute and on Form 5329. Furthermore, the penalty was not discharged due to the taxpayer's bankruptcy because he filed his return for the year at issue less than three years before his bankruptcy petition, thus falling within the three-year look-back period. Finally, the taxpayer was subject to the negligence portion of the penalty because he did not make a sufficient effort to determine his correct tax liability. *Reimann v. Comm'r*, T.C. Summary Opinion. 2005-10

■ **COST RECOVERY DENIED IN SUCCESSFUL DEFENSE AGAINST ASSESSMENT.** A taxpayer successfully defended himself against the im-

sition of a personal assessment for his failure to honor a wage levy made to recover an employee's Minnesota personal income tax. However, the taxpayer was denied recovery of costs and the motion was denied without issuance of an opinion. *Wilson v. South Carolina Comm'r of Revenue*, (Minn. T. Court No. 691-R)

■ **VALUATION OF MANUFACTURING PLANT; COMPARABLE VALUATIONS.** In determining the proper valuation of the petitioner's manufacturing plant, the court rejected the petitioner's out-of-state comparable values and denied its motion for amended findings of fact and conclusions of law. In so finding, the court noted that the Tax Court's valuation need not adhere to the valuation of any particular expert as long as it remains within permissible limits and has meaningful and adequate evidentiary support. *McNeilus Truck & Manufacturing Inc. v. County of Dodge*, (Minn. T. Court 01/03/05)

ADMINISTRATIVE MATTERS

■ **90-DAY NOTICE REQUIREMENT FOR PLAN AMENDMENTS.** The IRS has finalized a regulation, effective January 25, 2005, that does away with the 90-day participant advance notice requirement for plan amendments that change the availability of optional benefit payment forms. Before the change, the regulation required a plan to provide notice to participants thus delaying the effective date of plan amendments restricting optional forms of benefits until 90 days after the participant was provided with a summary indicating the amendment, or the first day of the second plan year following the year in which the change was adopted, whichever was earlier. Under the revised rule, a plan amendment may restrict or eliminate an optional form of benefit and may take effect on distributions with annuity starting dates after the date the amendment is adopted without a 90-day waiting period. T.D 9176

■ **LEVY ON GENERAL PARTNERS' PROPERTY TO COLLECT PARTNERSHIP'S DEBTS:** In *A.C. Galetti*, 2004-1 USTC, the Supreme Court held that a proper tax assessment against a partnership extends the limitations period on collection against both the partnership and the general partners who are liable for partnership debts under state law. However, the Court did not address whether the assessment against a partnership was adequate for the IRS to collect the partnership debt by lien or by levy against the general partners' property. Though the Court did not address this issue, the IRS has established a legal position that it can enforce a tax lien and levy against general partners' property based on a valid assessment and notice and demand made against the partnership. Further, general partners are derivatively liable for partnership debts under applicable state law. Therefore, a general partner is a person liable to pay the tax within the meaning of Code Sec. 6321 and Code Sec. 6331. In this way, the Office of Chief Counsel has clarified that the Court's decision in *Galett* does not change the IRS's position that it may collect partnerships' employment taxes from general partners based on their derivative liability under state law by lien or levy. Chief Counsel Notice CC-2005-003.

■ **CHARGES FOR QUALIFIED ADDITIONAL BENEFITS; EXPENSE CHARGE RULE.** Charges for qualified additional benefits (QAABs) should be taken into account under the expense charge rule of Code Sec. 7702(c)(3) rather than the mortality charge rule of Code Sec. 7702A(b) for purposes of deciding whether a contract qualifies as a life insurance contract under Code Sec. 7702 or as a modified endowment contract (MEC) under Code Sec. 7702A. The ruling is effective February 7, 2005. Rev. Rule 2005-6.

■ **INTERIM GUIDANCE FOR NEW TAX SHELTER DISCLOSURE PENALTIES.** Two new penalty provisions relating to "reportable transactions" have been enacted under the American Jobs Creation Act of 2004 (Jobs Act). The Code Sec. 6707A penalty applies to taxpayers who are required to disclose reportable transactions. The penalties under Code Secs. 6662 and 6662A relate to understating a tax liability relating to reportable transactions and the amendments to Code Sec. 6664, which provides a defense to the penalty under Code Sec. 6662A if the taxpayer acted with reasonable cause and in good faith. Both the Treasury and the IRS have issued interim guidance on these provisions. Under Notice 2005-11 the IRS will impose the Code Sec. 6706A penalty for each failure to properly disclose a reportable transaction. In this way a taxpayer will be subject to the penalty for failure to attach a reportable transaction disclosure statement to an original or amended return or failure to provide a required copy of such statement to the Office of Tax Shelter Analysis (OSTA). Under Notice 2005-12, a taxpayer has sufficiently disclosed a reportable transaction for purposes of Code Sec. 6662A and Code Sec. 6664 if the taxpayer properly filed a disclosure statement as required by Code Sec 6011 or was deemed to have satisfied its disclosure obligations under Rev. Proc 2004-45. Notice 2005-11; Notice 2005-12.

■ **GUIDANCE ON DOMESTIC PRODUCTION DEDUCTION.** The Code Sec. 199 deductions related to domestic production activities have been clarified via comprehensive guidelines. Sec. 199 provides taxpayer-employers with a deduction equal to the lesser of a phased-in percentage of taxable income or qualified production activities income. The guidelines are intended to assist taxpayer-employers in implementing the new provision pending the issuance of regulations. The IRS intends to provide rules in future guidance on information reporting by pass-through entities. TDNR JS-2201; Treasury Fact Sheet; Notice 2005-14.

■ **GUIDANCE ON REPATRIATION OF DIVIDENDS:** Code Sec. 965, a repatriation of dividends provision added by the American Jobs Creation Act of 2004 (Jobs Act), generally provides that the U.S. corporate shareholder of a controlled foreign corporation (CFC) may choose for one tax year an 85-percent dividends-received deduction for the cash distributions it receives from the CFC. The dividend must be invested in the U.S. pursuant to a domestic reinvestment plan. Guidance issued by the Treasury and the IRS centers on the definition of cash dividends, domestic reinvestment plans, permitted and non-permitted investments in the U.S., and reporting and administrative requirements. Forthcoming guidance will address the foreign tax credit and expense allocation rules for adjusting the computation of base period amounts taken into account in mergers, acquisitions and spin-offs and rules regarding controlled groups. TDNR JS-2195; Notice 2005-10.

■ **GUIDANCE ON NEW AUTOMATIC ROLLOVER PROVISION.** The automatic rollover rule for qualified retirement plans is set out in Code Sec. 401(a)(31)(B). The rule requires that mandatory distributions of more than \$1,000 from a qualified retirement plan be paid in a direct rollover to an individual retirement plan unless the distributee chooses to have the amount rolled over to a different retirement plan or to

receive the distribution directly. The guidance issued by the IRS defines a mandatory distribution as one that is made without the participant's consent and that is made to a participant before he or she reaches the later age of 62 or normal retirement age. The IRS further clarifies that distribution to a surviving spouse or alternate payee is not a mandatory distribution for purposes of the automatic rollover requirements. In addition, through the application of a compliance rule, governmental and church plans fall under the automatic rollover requirement. Finally, plans have until the close of 2005 to set up administrative procedures for processing the automatic rollovers. TDNR JS-2170

LEGISLATION

■ **PROPOSED MINNESOTA TAX BILLS.** Changes to a variety of Minnesota tax laws were proposed recently in the technical/policy bills proposed by the Department of Revenue. The proposed changes cover such areas as collections, corporate tax, individual income tax, property taxes, and miscellaneous issues such as sin taxes, state death taxes, and taxes related to insurance issues. Notable provisions include the proposed recodification of Chapter 270 which is intended to increase the usability of the administrative provisions that apply to all taxes and fees administered by the MNDOR, and the introduction of an allowable deduction for death taxes paid to the state beginning with deaths occurring in 2005. Further provisions range from increases in efficiency such as increased email communications for certain notifications when agreed to by the taxpayer to citation corrections in particular Minnesota statutes.

LOOKING AHEAD

■ **PROPOSED REGS LIMITING EVIDENCE OF DELIVERY:** Proposed regulations discussed at a January 11, 2005 hearing would change the timely mailing treated as timely filing under Reg. 301.7502-1(e). Under the proposed regulations, the only prima facie evidence of delivery to the IRS would be direct evidence of actual delivery or a registered or certified mail receipt. The proposed regulations are meant to settle a split in the federal appeals courts regarding whether a taxpayer can prove timely delivery only by demonstrating proof of registered or certified mail. Criticism centered on the way the proposed rule unfairly limits mailing alternatives available to the taxpayers, such as other types of postal service receipts or private delivery services including UPS and FedEx, without regard to the security or dependability of the delivery service. Andrew Maschas, Federal 2005 TaxDay (01/12/05)

■ **FORTHCOMING REGS TO ADDRESS PARTNERSHIP PROPERTY DISTRIBUTIONS AFTER MERGER:** The IRS has announced its intention to issue regulations that will focus on the income tax consequences of distributions of property following partnership mergers. These anti-mixing bowl regulations would be effective for distributions occurring after January 19, 2005. The upcoming regulations will implement the rule announced in Rev. Rul 2004-43 though the revenue ruling itself will be officially revoked. Rev. Rul. 2005-10 Notice 2005-15.

MISCELLANEOUS

■ **FEDERAL ADJUSTMENTS FOR CORPORATE INCOME TAX.** Minnesota defines "net income" for corporate franchise income tax purposes according to the Internal Revenue Code as amended through June 15, 2003. Thus recent federal legislation such as the Working Families Tax Relief Act of 2004 and the American Jobs Creation Act of 2004 are not yet reflected in Minnesota law. In its fact sheet, the MNDOR outlines federal provisions that may require an income adjustment to properly ascertain Minnesota corporation franchise income tax for 2004. Corporate Income Tax Fact Sheet No. 1, Minnesota Department of Revenue.

■ **TRIBAL CONCERN OVER PROPOSED FUEL EXCISE TAX REGS:** The IRS recently held hearings on proposed regulations aimed at levying excise taxes on the entry of taxable fuel into the U.S. The regulations would create joint and several liability under Code Sec. 4081 for importers of record that are not listed as enterer in order to prevent avoidance of the excise tax. Recent opposition to the proposed regulations originates primarily from Native American groups and, more specifically, from the Mohawk tribes of New York state. For these tribes, much of their land sits on the U.S.-Canadian border and a significant portion of their income is derived from fuel importation. The finalization of the proposed regulations could pose significant economic harm to the tribes. The tribes' opposition is also related to their position that the IRS violated Executive Order 13175, which compels federal agencies to consult with tribes before circulating any regulations with tribal implications. John Flanagan, Federal, 2005 Tax Day (01/13/05).

■ **TAX LAW COMPLEXITY CITED AS TAXPAYER'S LARGEST PROBLEM:** The National Taxpayer Advocate announced in her January 11, 2005 annual report that the "overwhelming complexity of the tax code" is the largest source of compliance burdens for both taxpayers and the IRS. The complexity of the code is demonstrated in the provisions for the Earned Income Tax Credit (EITC), the alternative minimum tax (AMT) and the education and retirement savings programs. The Taxpayer Advocate stressed the importance of "safety valves" such as collection due process proceedings, the Taxpayer Advocate Service, and independent Office of Appeals, and the offer in compromise program. IR-2005-7.

■ **U.S. AND SWITZERLAND AGREE TO QUALIFICATION FOR TREATY BENEFITS.** The competent authorities of Switzerland and the United States have reached a mutual agreement on the qualification of particular U.S. and Swiss pensions for treaty benefits under the U.S.-Switzerland income tax treaty. The procedures for claiming treaty benefits and the methods used in each country to grant such benefits are outlined in the agreement. Ann. 2005-3

■ **NEW U.S.-BARBADOS PROTOCOL.** On December 20, 2004, the U.S. and Barbados exchanged instruments of ratification for the protocol amending the income tax treaty between the two countries. The protocol modifies the existing treaty and was designed to prevent "treaty shopping" by U.S. corporations. TDNR JS-2161.

— KATHRYN SEDO
— TALIA KOLLURI

University of Minnesota Law School

TORTS & INSURANCE

JUDICIAL LAW

■ **LEGAL MALPRACTICE; USE OF UNPUBLISHED OPINIONS.** Jerry's Enterprises, Inc. (Jerry's) sought to purchase commercial real estate from Bruggeman. An Option to Purchase was signed which included the provision that if Jerry's failed to develop the parcel within two years after exercising the purchase option, Bruggeman had the right to repurchase the land. A formula for calculating the repurchase price of the property was also included, which factored in, among other things, the cost of improvements made to the property. Jerry's exercised the purchase option and the deal closed. Jerry's began improving the property by doing grading and installing utilities.

Two years and three days after the closing, Jerry's received notice from Bruggeman that it was exercising its repurchase option. Without researching the matter, Jerry's counsel responded, stating that (1) the repurchase option merged into the deed; and (2) improvements had been started. Bruggeman sued seeking specific performance. The district court granted Jerry's motion for summary judgment, but the Court of Appeals reversed. The Minnesota Supreme Court affirmed the Court of Appeals and remanded for further findings, acknowledging that it had not "squarely addressed, until now, whether agreements to perform acts subsequent to closing are governed by the merger doctrine". The Court concluded that no presumption of merger existed in this situation. Later, a settlement was reached between Jerry's and Bruggeman. Jerry's then sued its attorneys (Larkin) for legal malpractice.

Jerry's argued that its attorneys were negligent for failing to tell them that the repurchase option was a cloud on the title. Larkin argued that they had no duty to research whether a repurchase option would survive closing or to warn Jerry's of the possibility that it might do so because "no attorney could predict that the Supreme Court would create a new exception to the merger doctrine." The district court granted a directed verdict for Larkin, finding that attorneys had no duty to predict changes in the law, and there was no persuasive evidence that Larkin breached the applicable standard of care.

The Court of Appeals reversed, finding there were genuine issues of material fact as to the applicable standard of care and whether the standard was breached. A usual case of legal malpractice, such as when an attorney misses the statute of limitations deadline, requires four elements: (1) the existence of an attorney-client relationship; (2) acts by the attorney amounting to negligence or breach of a contract; (3) that the attorney's acts were the proximate cause of the plaintiff's damages; and (4) that but for the attorney's conduct, the plaintiff would have been successful in the action. However, in a "transactional matter" (not involving the destruction of a cause of action), the fourth element is inapplicable. The "but for" analysis of factor four is replaced with the proximate cause analysis. Therefore, the district court erred by applying the "but for" analysis in what was a "transactional matter." The district court further noted that while attorneys are not required to predict changes in the law, and are not responsible for making errors in predicting the course of unsettled law, an attorney must exercise some legal judgment. Because Larkin admitted it had not researched the issue created by the repurchase agreement, it was not immune from liability.

The use of unpublished opinions is also discussed in the opinion. Jerry's wanted its experts, when testifying as to the standard of care, to address how unpublished opinions of the Court of Appeals influenced their view of the law. The district court did not allow it, but did allow witnesses to testify how cases from other jurisdictions and CLE materials inform their understanding of the law.

The Court of Appeals noted that the other materials carried no more precedential weight than the unpublished opinions, and therefore the district court erred when excluding testimony of how unpublished opinions might inform attorneys of trends in the law. *Jerry's Enterprises, Inc., v. Larkin, Hoffman, Daly & Lindgren, Ltd., et al.*, A04-188 (Minn. App. 01/24/05).

www.lawlibrary.state.mn.us/archive/ctappub/0501/opa040188-0124.htm

■ **CLAIMS AGAINST IME DOCTOR DISMISSED.** Pugh was injured in an auto accident on July 7, 2002. Her insurer, Metropolitan Casualty Insurance Company (MetLife) paid benefits and set an "independent medical examination" (IME) with CDMI. CDMI contracted with Gilbert Westreich, M.D. to perform the IME. Westreich concluded Pugh needed no more treatment and MetLife refused to pay for further treatment.

Pugh sued Westreich and CDMI, claiming Westreich "always" concluded further medical treatment is unnecessary. Pugh also claimed Westreich has no private patients and always claims no treatment is necessary so insurers will utilize his services. She claimed MetLife and Westreich conspired to discontinue her benefits and defeat her claim for underinsurance benefits.

The district court dismissed her complaint for failure to state a claim under Minn.R.Civ.P. 12.02(e). The claims were fraud, the Minnesota Consumer Fraud Act (MCFA), tortious interference with contract, and civil conspiracy. The Minnesota Court of Appeals affirmed. It found CDMI had no fiduciary relationship with Pugh, Pugh did not allege a legally sufficient claim for fraud, could not sue under the MCFA, and failed to allege a breach of contract, thus there would be no claim for conspiracy. *Pugh v. Westreich, et al.*, A04-657 (Minn. App. 01/04/05) (unpublished).

■ **NONCOMPLIANCE WITH MEDICAL MALPRACTICE AFFIDAVIT PRACTICE AND MINN. STAT. §145.682 (2004).** Broehm brought a medical malpractice action against the Mayo Clinic. The district court dismissed the case, ruling that Broehm failed to comply with the expert witness disclosure requirements of Minn. Stat. §145.682 (2004). That statute has since been amended. The Court of Appeals affirmed. The relevant expert witness disclosure was signed by Linda Wick, R.N., C.N.P.

The Minnesota Supreme Court reversed and remanded the case for further proceedings. It affirmed that Wick, a certified geriatric nurse practitioner, did not have the training and experience to offer expert opinions on "specialty care." It reversed, however, and remanded the nursing malpractice claim for further proceedings. Justice Paul H. Anderson wrote an extensive special concurrence suggesting the decision gave insufficient direction to the parties on remand. *Broehm v. Mayo Clinic Rochester*, C0-02-959 (Minn. 01/20/05).

www.lawlibrary.state.mn.us/archive/supct/0501/op020959-0120.htm

■ **PRETRIAL OFFER OF JUDGMENT, NET VERDICT, AND M.R.CIV.P. 68.** The Vandenhuevels sued Wagner for an auto accident. Wagner made a Rule 68 offer of judgment of \$25,000 one month prior to trial. At trial, the jury awarded \$30,000 in past medical expenses, \$1,000 in past pain and suffering, \$90 for past loss of earnings, and \$1,000 for a loss of consortium claim. Vandenhuevel's no-fault carrier paid \$20,000 in medical expenses and the \$90 in lost earnings.

The district court concluded that, because the net judgment did not exceed the \$25,000 offer of judgment, Wagner was entitled to have his costs and disbursements of \$8,022.71 paid by Vandenhuevels.

The Minnesota Supreme Court affirmed the lower courts, concluding that Minn.R.Civ.P. 68 did not limit the recoverable costs and disbursements to those incurred after the making of the offer. *Vandenhuevel, et al. v. Wagner*, A03-324 (Minn. 01/20/05). www.lawlibrary.state.mn.us/archive/supct/0501/opa030324-0120.htm

■ **NO OFFICIAL IMMUNITY FOR POLICE OFFICER.** Officer Schmid drove a Minneapolis Police Department detox van with passenger Officer Blackey. While driving down Nicollet Avenue in downtown Minneapolis, they saw a Ford Bronco driven by Litz run a red traffic light on Fourth Street directly in front of them. It was decided to stop the Bronco, and the detox van's emergency lights and sirens were activated. At that point, Litz began to pick up speed and drive erratically, running more red lights. The officers followed Litz, but deactivated the detox van's lights and siren except when going through intersections. Both officers testified that they did not consider themselves to be "in pursuit" of Litz.

At the intersection of Fourth Avenue and Seventh Street, Litz ran a red light and struck Thompson, a pedestrian in the crosswalk. Schmid arrived at the intersection a short time later. Thompson sued Schmid, Blackey, and the City of Minneapolis, alleging that the detox van negligently violated police department policy. The district court granted summary judgment in favor of the officers, ruling they were protected by official immunity and the city in turn was protected by vicarious unofficial immunity.

The Minnesota Court of Appeals reversed and remanded. Minneapolis Police Pursuit Policy states that officers *shall* use red lights and siren in a continuous manner. The issue became whether the officers were engaged in a vehicular pursuit. The court found the officers were in pursuit of the vehicle. Because the officers violated the policy, the district court erred in granting summary judgment. In addition, where officials are not entitled to official immunity, vicarious official immunity will not protect the city. Thus, the case was reversed and remanded for further proceedings. *Thompson v. City of Minneapolis, et al.*, A04-1050 (Minn. App. 01/18/05) (unpublished). www.lawlibrary.state.mn.us/archive/ctapun/0501/opa041050-0118.htm

— THOMAS C. BAUDLER
— LEE A. BJORNDALE
Baudler, Baudler, Maus & Blahnik