

APPELLATE PRACTICE NEWS

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INTRODUCTION

By Larry Hammerling, Editor

This issue of Appellate Practice News will report briefly on the Appellate Section's recent CLE program, presented by Judges Barry Anderson and Wilhelmina Wright of the Minnesota Court of Appeals. The judges discussed developments at the court and summarized significant recent opinions. This issue also presents an update on the Appellate Section's pro bono program and other news.

APPELLATE PRACTICE CLE

January 23, 2004

The Minnesota Court of Appeals

Judge Anderson and Judge Wright, continuing what has become an Appellate Section tradition, presented an institutional update on the Court of Appeals, and a discussion of significant opinions issued by the court during the last year. The program was coordinated by section member **Mary R. Vasaly**, a partner with Maslon Edelman Borman..

Acknowledgement of Pro Bono Project

Judge Anderson began the presentation by conveying his appreciation for the work of the appellate section's pro bono project. He said that the advocacy skills of those who had taken cases made an enormous difference both for their client and the development of the law.

Impact of Budget Cuts is Delay

The budget problems experienced by the state have also effected the court, forcing staff reductions. Judge Anderson said that the court has resisted limiting oral argument and putting pressure on lawyers to resolve cases through settlement. For the practitioner, the most notable affect of the court's budget problems will be an increase in the time between briefing and oral argument – perhaps by as much as three to four months.

Case Filing Trends

Judge Anderson said that filings in the court have remained relatively flat during the last five years. There has been a modest increase in criminal cases and a modest reduction in civil filings during this period. The most recent reporting year was 2002 when 670 civil, 649 criminal, and 300 family cases were filed. He noted that toward the end of the statistical period, there had been a significant spike in economic security

cases, assumedly reflecting the state of economy.

Getting an Opinion Published

The decision on publication is made by the panel. There has been virtually no change in the percentage of published, unpublished and order opinions during the last five years. Judge Anderson suggested that if a practitioner wanted a published opinion, they should feel comfortable stating this to the court at oral argument, or in briefing, explaining why publication would be useful - that the issue is one of first impression or that conflicting opinions exist, for example.

Significant Cases

Judges Anderson and Wright discussed the cases decided during the last year that they thought were most significant.

Guzman v. U.S. West, 667 N.W.2d 489 (Minn. App. 2003), *rev. denied* (Minn. Oct 21, 2003). Mom of injured child assigned to state “rights to medical support and third party payments” as a condition of eligibility for medical assistance. Defendant ultimately settled with state and sought dismissal of child’s claim for future medical expenses. The court ruled that this assignment included claims for future medical benefits and that this result reflected legislative intent. The court noted concerns about fairness of this outcome to child, but concluded that any remedy was in hands of legislature.

Carlstrom Co. v. German Evangelical Lutheran Congregation, 662 N.W.2d 168 (Minn. App. 2003). Construction contract for work on church roof. Unknown problems with roof discovered

by contractor, which gave oral notice of this. Court ruled that written notice of an unknown or concealed condition is not required by the standard American Institute of Architecture’s construction contract.

Peterson v. BASF, 657 N.W.2d 853 (Minn. App. 2003), *rev. granted* (Minn. May 20, 2003). Class action certification based on a New Jersey consumer fraud statute one of several issues addressed by court. Court ruled that its prior decision concerning certification was the law of the case and not subject to additional challenge. In a concurring opinion, Judge Anderson stated that case was “poster child for national class action reform.” Review has been granted in this case and it was argued in the Supreme Court in October, 2003.

Swenson v. Waseca Mut. Ins. Co., 653 N.W.2d 794 (Minn. App. 2002). Good Samaritan law issue arose after driver, taking person hurt in snowmobile accident to hospital, has auto accident. The court ruled that even where driver takes an indirect route to the facility or makes a brief stop on the way to the facility, driver is acting at the scene of an emergency and meets the requirements for protection from liability as provided by Minnesota’s Good Samaritan law, Minn. Stat. § 604A.01 subd. 2.

Molloy v. Meier, 660 N.W.2d 444 (Minn. App. 2003), *rev. granted* (Minn. July 15, 2003). Medical malpractice suit brought after child born with genetically determined abnormality. Court ruled that a physician patient relationship existed between parent of minor child being treated by physician creating duty to advise parent of the existence of a

genetically inheritable condition. Court also ruled that limitation period for wrongful conception claim commenced at point of conception, not at point of genetic testing. Review has been granted in this case and argument in the Supreme Court occurred in November, 2003.

Odenthal v. Minn. Conference of Seventh-Day Adventists, 657 N.W.2d 569 (Minn. App. 2003), *rev. denied* (Minn. March 18, 2003). Negligence action against minister and church conference, alleging that minister engaged in improprieties in counseling member's wife. The court ruled that the district court had subject-matter jurisdiction over claims against a church employer for negligent retention and supervision and vicarious liability based on the allegedly negligent secular counseling by its pastor when the claims can be adjudicated using neutral principles of law.

State v. Manypenny, 662 N.W.2d 183, (Minn. App. 2003). The defendant challenged conviction for fourth-degree assault of a tribal peace officer on White Earth tribal land asserting that the officer did not have the authority to effectuate a valid arrest of a tribal member on the White Earth reservation. In affirming the conviction, the court held that the state did not have to formally retrocede jurisdiction in order to enter cooperative agreements with tribal authorities to provide law-enforcement services on the reservation.

Risk v. Eastside Beverage, 664 N.W.2d 16 (Minn. App. 2003). Unemployment benefits case where claimant was terminated for driving company vehicle under influence of alcohol during

working hours. The court ruled that this constituted employee misconduct.

Guercio v. Prod. Automation Corp., 664 N.W.2d 379 (Minn. 2003). Ex-employee brought action making variety of claims against ex-employer. The court ruled that when an employee continues employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. By staying on the job when free to leave, the employee supplies the necessary consideration for the offer made by the employer. The court also held that independent consideration must exist to validate a non-compete agreement entered into after the original employment contract.

Kastner v. Star Trails, 658 N.W.2d 890 (Minn. App. 2003), *rev. denied* (Minn. June 30, 2003). Snowmobilers brought personal injury actions against nonprofit association that built and maintained the trail where injury occurred but which obtained funding for development of trail through state trail assistance program. The court held that a trail-user organization that contracts with a local government to acquire, construct, and maintain a snowmobile trail under the Minnesota Trails Assistance Program is immune from tort claims by users of the trail under the Municipal Tort Liability Act, Minn.Stat. § 466.03, subd. 6e (2002) and is an "owner" that is entitled to immunity from claims by the trail's users under the Recreational Use Immunity Statute, Minn.Stat. § 604A.20-25 (2002).

State Dept. of Natural Res. v. Hess, 665 N.W.2d 560 (Minn. App. 2003), *rev. granted* (Minn. Oct. 21, 2003). After landowners blocked state trail, DNR

brought quiet title action to determine status of title to strip of land formerly used as a railroad corridor and currently designated as part of state trail. The court ruled that the 1898 deed conveyed an easement in the property rather than a fee simple determinable, and that the railroad abandoned its easement in the property before the sale of its interest to the state for a public recreational trail. Oral argument in the Supreme Court is scheduled in February 2004.

Semler Const. Inc. v. City of Hanover, 667 N.W.2d 457 (Minn. App. 2003), *rev. denied* (Minn. Oct. 29 2003). Developer sought judicial review of city's denial of final plat approval for a subdivision that was previously given preliminary approval and sought damages. In reversing summary judgment, the court held that city that gives approval to a preliminary plat for a period of eight years under Minn.Stat. § 462.358, subd. 3c (2002) may not deny final plat approval based on the theory that the approval was for only one year. The court also held that city's moratorium on development does not apply to a development that has already received preliminary plat approval from the city.

Star Trib. v. City of St. Paul, 660 N.W.2d 821 (Minn. App. 2003). Newspaper brought action against city under the Data Practices Act seeking access to names of individual police officers who conducted traffic stops as part of the city police department's study regarding racial profiling during traffic stops. The court concluded that the data at issue was private personnel data because it was collected to evaluate the performance of individual officers. As such, it was not subject to disclosure

under the Minnesota Government Data Practices Act.

City Pages v. State, 655 N.W.2d 839 (Minn. App. 2003), *rev. denied* (Minn. April 15, 2003). Newspaper sought release of attorney billing records related to tobacco litigation. The court concluded that a law firm's billing records of work done jointly for the state and another client are accessible by the public pursuant to the Minnesota Government Data Practices Act, Minn.Stat. ch. 13 (2000), and that neither the attorney-client privilege or the work-product doctrine protected in their entirety a law firm's billing records of work done jointly for the state and another client. The case was remanded for the district court in camera review of those portions of the billing records claimed to be protected.

Star Trib. v. U. of M. Bd. of Regents, 667 N.W.2d 447 (Minn. App. 2003), *rev. granted* (Minn. Oct. 21, 2003). News organizations brought action against board of regents, alleging that procedure for selecting new university president violated state Open Meeting Law and Government Data Practices Act, seeking order to compel disclosure of data on unsuccessful candidates, and to enjoin board from conducting closed meetings. The court determined that both the Minnesota Data Practices Act, Minn. Stat. §§ 13.01- .90 (2002), and the Open Meeting Law, Minn. Stat. §§ 13D.01-.07 (2002), apply to the procedure followed by Board of Regents in selecting a university president. It also held that the Minnesota Constitution did not preclude the application of these laws to that procedure. Oral argument in the Supreme Court will occur in February 2004.

Conservatorship of Smith, 655 N.W.2d 814 (Minn. App. 2003). Daughter petitioned for appointment of an independent, non-family, conservator for her elderly mother and a discovery issue arose. The court of appeals ruled that conservatorship proceedings are governed by the Rules of Civil Procedure, except where those rules are inconsistent with the probate statutes.

Welfare of Children of S.C., 656 N.W.2d 580 (Minn. App. 2003). Mother challenged termination of parental rights based on improper service of termination order. The court held that challenge was barred because mother did not file her motion to vacate the judgment within the 90 days required by Minn. R. Juv. P. 81.02.

Welfare of D.L.R.D., 656 N.W.2d 247 (Minn. App. 2003), *rev. denied* (Minn. May 20, 2003). Mother challenged termination of parental rights. The court ruled Minn.Stat. § 260C.301, subd. 1(b) (4) created a rebuttable, presumption that parent who had rights to other children involuntarily terminated was palpably unfit. In that circumstance, county was not required to develop case-plan to reunite her with child.

In re P.T., 657 N.W.2d 577 (Minn. App. 2003), *rev. denied* (Minn. April 15, 2003). Mother asserted that presumption of palpable unfitness based on prior involuntary termination of parental rights was unconstitutional. The court determined that the statutory presumption of palpable unfitness in Minn.Stat. § 260C.301, subd. 1(b)(4) did not violate due process and equal protection rights.

Munoz v. Kihlgren, 661 N.W.2d 301 (Minn. App. 2003), *rev. denied* (Minn.

Aug. 5, 2003). Uninsured automobile accident victim brought action against insured driver and owner. The court ruled that under the Minnesota No-Fault Automobile Insurance Act, an uninsured motorist may sue an insured tortfeasor for economic-loss damages.

State v. Lilleskov, 658 N.W.2d 904 (Minn. App. 2003), *rev. denied* (Minn. June 25, 2003). Defendant moved to dismiss charge of violating predatory-offender-registration statute arguing that statute at issue was amended to cover juveniles after the adjudication in his case. The court held that though the 1994 amendment to Minn.Stat. § 243.166, subd. 1, at issue did not contain a clear statement that it was to be applied retroactively, the statute that it amended did so provide. Because the amendment merely extended the scope of the statute, thereby clarifying the legislature's intent, the 1994 amendment is also retroactive.

Meemken v. State, 662 N.W.2d 146 (Minn. App. 2003). Defendant was sentenced as a "patterned sex offender," which enabled court to impose a sentence longer than the maximum sentence for his offense. Defendant asserted that *Apprendi v. New Jersey*, a U.S. Supreme Ct. case holding that facts relied upon by court to sentence beyond maximum for crime must be found by jury beyond reasonable doubt. Court held that *Apprendi* does not retroactively apply in collateral review of conviction.

State v. Riley, 667 N.W.2d 153 (Minn. App. 2003), *rev. denied* (Minn. Oct. 21, 2003). Defendant agreed to trial on stipulated facts and then sought to appeal sufficiency of evidence. On appeal, court distinguished between stipulation per Minn. R. Crim. P. 26.01, subd. 3

(appeal of sufficiency permitted) and per *State v. Lothenbach*, a case permitting trial on stipulated facts (appeal of sufficiency not permitted). Because the

defendant had stipulated the facts per *Lothenbach*, rather than the rule, appeal of sufficiency of the evidence was not permitted.

April 8 CLE on Appellate Motion Practice.

At noon on April 8, 2004, the Appellate Practice Section will present a CLE on appellate motion practice. The program will be at the MSBA office in Minneapolis and lunch will be provided. The presenters will be the Chief Judge of the Court of Appeals, the Honorable Edward Touissant, Jr., Chief Staff Attorney Cynthia Lehr, and **Bruce Jones**, a partner at Faegre & Benson LLP. More information about registering for this program will be provided in the next several weeks.

PRO BONO SUCCESS!

As reflected in the remarks of Judge Anderson, the Pro Bono Pilot Program has been a great success. The program is coordinated by section member **Tom Boyd**, a partner with Winthrop & Weinstine. The program was commenced for the purpose of developing procedures and gathering data on how to efficiently and effectively provide pro bono representation in Minnesota's appellate court system. The program began with a pilot group of 25 cases that were initiated by employees who had appealed from the denial of unemployment compensation benefits. The relators in those cases were offered the opportunity to meet with a volunteer lawyer from the appellate section to discuss their case and possibly receive representation on a pro bono basis.

From those 25 cases, 8 relators sought assistance. Arrangements were made by the pilot program for volunteer lawyers to meet with all 8 of these individuals to

review and discuss their cases. In 5 of those instances, the volunteer lawyers agreed to take on the case. Of those 5 cases, the denial of benefits was reversed in 3 cases, affirmed in 1 case, and 1 case was dismissed as a result of a satisfactory settlement.

The volunteer attorneys who were involved in this initial pilot group included **Mary Vasaly, Elizabeth Snyder Poeschel, Jennifer Frank, Ryan Murphy, Elliot Olsen, Kate MacKinnon, Matt Spohn, and Karl Robinson.**

As a result of this initial pilot group, word has gotten out and the program continues to receive requests from relators who are interested in the prospect of pro bono representation. The program has been able to accommodate these requests with the help of additional volunteers who have included **Aimee Dayhoff, Beth DeCourcy, Mike Obermueller, Allen Blair, John Baker, Jill Frieders, and Deborah Dewalt.**