



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

PERSPECTIVES ON THE LAW

Read what your colleagues have to say about emergent issues and trends in case law and legislation. "Notes & Trends" goes beyond the docket numbers and the official texts, analyzing developments and presenting material that you need to practice more effectively.

CRIMINAL LAW

JUDICIAL LAW

■ **TRIBAL JURISDICTION; DRIVING AFTER CANCELLATION.** Reversing the Court of Appeals, the Supreme Court holds that Minn. Stat. § 171.24, subd. 5, driving after cancellation as inimical to public safety, is criminal/prohibitory, and Minnesota courts do have jurisdiction to enforce the statute against a tribal member who commits the offense on his Indian reservation. The Court of Appeals had held that it was inappropriate to look for the reason behind the cancellation/revocation in determining whether an offense was civil/regulatory or criminal/prohibitory. The Supreme Court focuses on the specific offense behavior which is prohibited, rather than the broader behavior of driving. In doing so, the Supreme Court concludes that the offense of driving after cancellation as inimical to public safety presents substantially different or heightened public policy concerns than the concerns addressed in driving without insurance or driving after revocation. Driving after cancellation is inextricably linked to repeated DWI offenses, and allows for no exceptions. *State v. Myran Joseph Busse, Jr.*, C1-00-481, (Minn. 5/16/02).

■ **INTERFERENCE WITH PRIVACY; HIDDEN CAMERA; SURREPTITIOUS GAZING; CLOTHING.** The appellant positioned a video camera inside a black bag and was

using the device to video tape up the skirts of females in a retail store. Held, the appellant's conduct violated Minn. Stat. § 609.746 subd 1(d), because it was a gazing through "an aperture" (camera lens), and was peering into a "place where a reasonable person would have an expectation of privacy," *i.e.*, under one's skirts. Although the statute does provide for exemptions in commercial establishments for owners to provide surveillance, if notices are posted, that exception does not apply to the appellant because he was not the business owner or an employee engaged in surveillance acts. *State v. Tony O. Morris*, CX-01-1753, (Minn. App. 5/14/02).

■ **JOINDER; ANTAGONISTIC DEFENSES; STANDARDS OF REVIEW.** The district court erred in denying both the appellant's pretrial and mid-trial severance motions. The codefendants presented antagonistic defenses during the entire pretrial process, each accusing the other of shooting the gun. At trial, the codefendant changed his theory, stating that he did do the shooting but that he did not have the intent to kill. The codefendant then aligned with the prosecution concerning the appellant's role as aiding and abetting.

This case makes several holdings which are of first impression in Minnesota concerning joinder and severance standards. First, Minnesota has separate standards for pretrial and mid-trial severance under Rule 17.03. Second, the severance rule takes

precedence over Minn. Stat. § 631.035 concerning standards for joinder and severance. Third, the trial court erred in requiring a heightened standard for the appellant's offer of proof by requiring that the appellant's reasons for severance be made in a "judicially admissible setting," rather than an attorney simply informing the court about the proposed testimony. Fourth, the district court inappropriately used the federal severance standards in analyzing Rule 17.03: federal standards vary significantly from Minnesota rules by carrying a presumption of joinder, while Rule 17.03 is neutral. Fifth, mid-trial severance is required in this case where the defenses were antagonistic throughout the pretrial stages and where, at trial, the codefendant changed his theory, aligned himself with the prosecution, and caused the appellant to be faced with "two prosecutors."

Edward Santiago, III., v. State of Minnesota, C7-00-307, (Minn. 5/23/02).

■ **MARITAL PRIVILEGE; SHAM MARRIAGE; JOINT CRIMINAL PARTICIPATION.**

Appellant and his wife staged a robbery on January 27, 1997. On February 14, 1997, following a 17-month courtship, they married. There is a discrepancy to the record regarding the motivation for the marriage: the appellant stated that only part of his reason for marrying the codefendant was to avoid adverse testimony, but also that he married her for love, having adopted one of her children, attended premarital classes,

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and had a child with her. His codefendant wife, on the other hand, stated that the marriage was a complete sham, and testified against him in a murder trial. The trial court found that the marriage was a sham and that because of the joint participation exception, allowed the wife's testimony.

Held, it was an abuse of discretion for the trial court judge to rule that the appellant's marriage was a sham. Unlike federal law, Minnesota's marital privilege law is both statutory and common law in nature, while the concept of a sham marriage is a federal concept. While the Minnesota Supreme Court has at least implicitly recognized the legitimacy of the marriage as a factor in determining whether to allow the marital privilege, the court finds that the marriage here is not so clearly a sham and that the privilege should be denied. The privilege rests with the appellant, and his motivations do include genuine affection.

Second, the Supreme Court declines to adopt the so called "joint participation exception," as used in the federal jurisprudence. *State v. Michael Sean Gianakos*, C6-00-1691, (Minn. 5/23/02).

■ **VOIR DIRE; PEREMPTORY STRIKE BY DEFENDANT; MCCOLLUM CHALLENGE; BURDEN SHIFT.** The appellant was on trial for a racially motivated assault: the State alleged that he hit a Hispanic individual for speaking Spanish. The second juror was an African-American woman, who stated that her father had been a police officer and that she had trained at the police academy and considered becoming a police officer. Appellant used a peremptory strike to remove this juror. In response to a *McCollum* challenge, appellant stated that he intended to significantly challenge the motives and actions of police officers who arrested the appellant. The trial court denied the peremptory challenge, claiming that the reasons for striking the juror were pretextual because she stated that she could be fair.

Held, the trial court erroneously applied a challenge for cause standard in analyzing the appellant's peremptory challenge. The only inquiry was whether the reason is valid and race neutral. The burden never shifts to the user of the peremptory strike. Furthermore, the denial of a peremptory challenge requires automatic reversal without a requirement of a showing of prejudice. *State v. Cecil John Reiners*, C7-01-1001, (Minn. App. 5/21/02).

■ **DWI/IMPLIED CONSENT; RIGHT TO COUNSEL; PRELIMINARY BREATH TEST.** Appellant was stopped for speeding when the police officer noted the smell of alcohol and discovered a "no alcohol restriction" (B card). The police officer advised the appel-

lant that he was going to administer a preliminary breath test (PBT), and did so without reading the Implied Consent Advisory. The result was used to charge the appellant with a violation of his "no alcohol" restriction, a misdemeanor under Minn. Stat. § 171.09 (2000). Appellant contends that he was at a critical stage when asked to submit to the PBT, and should have had the benefit of counsel, since the result would be used directly to charge the appellant with a violation of the B card offense.

Held, no Implied Consent Advisory is required and a limited right to counsel does not attach when someone is offered a PBT test for the purpose of determining the presence of alcohol. Appellant was not at a critical stage: there is no criminal penalty for refusing to submit to a PBT, as opposed to refusing a chemical test. The legislative or judicial extension of the *Friedman* right to counsel "rests for another day." *State v. Daniel Arthur Stoskopf*, C4-01-1473, Minn. App. 5/28/02).

■ **CRIMINAL SEXUAL CONDUCT; CONDITIONAL RELEASE; STAY OF IMPOSITION.** The appellant pled guilty to criminal sexual conduct, and received a stay of imposition of sentence. At the time of the original sentence, the judge did not articulate the presumptive prison commitment under the guidelines, nor did anyone mention the five-year conditional release, which would follow a prison commitment. The appellant's attorneys simply inquired of the defendant whether he knew that the maximum prison term was 25 years. After repeated probation violations, the appellant was given 26 months in prison and a five-year conditional release. The appellant also violated the terms of the conditional release and was returned to prison. In a post-conviction petition, the appellant claimed that because he was not informed of the conditional release at the time of the original plea, the plea was not accurate, voluntary and intelligent.

Held, the fact that the conditional release was not mentioned to the appellant at the time of the original plea is not, in itself, enough to demonstrate that his plea was not accurate, voluntary and intelligent. Appellant understood that he could receive up to 25 years in prison. There was no mention of any amount of prison time. The benefit of the bargain to the appellant was simply the stay of imposition. *State v. Jerad Blake Christopherson*, C1-01-1561, (Minn. App. 5/28/02).

■ **CRIMINAL SEXUAL CONDUCT; CONDITIONAL RELEASE; PLEA AGREEMENT; MAXIMUM PRISON; EXTENSION BY CONDITIONAL RELEASE.**

Appellant originally pleaded guilty in 1998, with a bargain for an executed prison term of 140 months. The mandatory conditional release was not discussed during the plea negotiations, nor at sentencing. In 2000, the district court issued an order amending its sentence, and imposing an additional five-year conditional release. The Court of Appeals reversed, with instructions to see whether the plea agreement was induced by the prosecutor's agreement to a maximum executed term. After remand, the district court found that the plea had been induced by a "cap" of 140 months. The district court then amended the appellant's sentence so that the conditional release term was concurrent and coterminous with the 140-month sentence.

Held, the district court's decision to impose the conditional release term of "up to five years" that was concurrent and coterminous with the 140-month sentence was proper. Although the conditional release in this case will last only approximately 46 and 2/3 months, nothing in the law requires the conditional release to be exactly five years. *State v. Thomas Robert Wukawitz Jr.*, C6-02-30, (Minn. App. 6/04/02).

■ **CRIMINAL SEXUAL CONDUCT; SEX OFFENDER REGISTRATION; LIFETIME; JUVENILES.** The appellant committed an act of "attempted murder" by placing his two-week-old stepsister in a freezer, some time before his tenth birthday, resulting in the parents admitting a CHIPS petition. In addition, the juvenile record included a plea of guilty to an amended charge of fifth-degree criminal sexual conduct. The final adjudication was by admission to third-degree criminal sexual conduct.

The appellant argued that sex offender registration under Minn. Stat. § 243.166 should not apply to him as a lifetime obligation, because it is inconsistent with the goal of juvenile rehabilitation and it is inconsistent with the certification statute under § 260B.125, which treats juveniles as adults only if they are over the age of 14.

Held, the plain language of the certification statute requires appellant to register for the rest of his life as a predatory sex offender because the plain language of the registration statute does not allow any exceptions for juveniles under the age of 14. *In the Matter of the Welfare of J.R.Z.*, C4-01-1358, (Minn. App. 6/18/02).

■ **SEARCH AND SEIZURE; AUTOMOBILE; SPECIAL PLATES.** The appellant was pulled over by police solely for the reason that the car bore the special series license plate number WZ1066. This type of plate signals police officers that the operator's license of the owner/driver of the vehicle has been

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revoked. Appellant challenges the constitutionality of the stop based solely upon the special plates.

Held, Minn. Stat. § 168.0422 (1998), allowing a stop based solely on special plates, is constitutional under both federal and state constitutions. The appellant's reliance on *State v. Greyeagle*, 541 N.W.2d (Minn. App. 1995) is misplaced, because the statute at question has been amended since then. In *Greyeagle*, the statute did not authorize stops based solely on the special plates, something that the newly amended statute does allow. The Court of Appeals finds that the presence of the special tabs does constitute a specific and articulable fact from which police officers could reasonably infer that there is a substantial possibility that the driver of the vehicle did not possess a valid license.

Secondly, when an applicant applies for special series license plates, he or she implicitly consents to vehicle stops based on those plates. Additionally, citizens of Minnesota are presumed to know the law. *State v. Joel Robert Henning*, C9-01-1985, (Minn. App. 5/28/02).

■ **SEARCH AND SEIZURE; DOG SNIFF; DRUGS; ARTICULABLE SUSPICION; AUTOMOBILE.** Appellant's vehicle was stopped for a burned out headlight. The officer noted that the driver had slow and quiet speech, was nervous and shaking, and had glassy eyes. Appellant also looked down and was not talking in the officer's direction. On cross examination, the officer testified that he did not suspect that the appellant was under the influence of drugs, but simply concluded that the appellant was acting "suspiciously." The officer asked the appellant and passenger if there were any narcotics in the car, and each responded that there were not. The officer then requested permission to search the car, which was denied. The officer determined not to issue a citation for the equipment violation, but only a warning. During the time the assisting officer was writing the warning, the other officer retrieved his drug-sniffing dog, which was already at the scene in his patrol car. The dog hit on narcotics in the vehicle, which were seized. The appellant was placed under arrest, and more drugs were found on the appellant's person.

The Court of Appeals is reversed. Although agreeing with the Court of Appeals that a drug sniff of a vehicle in a public place is not a search requiring probable cause, the Supreme Court nonetheless determines that an officer cannot conduct a narcotics detection dog sniff around a motor vehicle stopped for a routine equipment violation without some level of suspicion of illegal activity, *i.e.*, articulable suspicion

(the *Terry* standard). Here, once the police officer determined that a ticket for the equipment violation was not necessary, the scope (as opposed to duration) of the search was exceeded, because there was no indication that the appellant was transporting drugs. Thus, in order to lawfully conduct a narcotics detection dog sniff around the exterior of a motor vehicle stopped for a routine equipment violation, a law enforcement officer must have a reasonable, articulable suspicion of drug related criminal activity. "We believe this is the appropriate application of a search and seizure limitation in the federal and state constitutions to the facts of the case before us." *State v. Rolan Wiegand, et al*, C2-00-1137;C4-00-1138; C6-00-1139, (Minn. 6/13/02).

■ **SEARCH AND SEIZURE; DRIVER'S LICENSE/STATE I.D.; WARRANT CHECK.** Appellant was a passenger in the back seat of a vehicle stopped for a broken brake light. The driver produced only a learner's permit, which requires that a licensed driver over 18 years old be in the vehicle. The police officer asked the female passenger if she had a driver's license or insurance, and she responded in the negative to both questions. Police then asked the appellant if he had an I.D. or driver's license, at which point he produced a Minnesota identification card. Appellant did not tell officers that he had a Minnesota driver's license. For three to five minutes, police ran a warrant check, and discovered that the appellant had a misdemeanor warrant for driving after revocation. Appellant was removed from the vehicle, handcuffed, and during a pat down, it was discovered that he had a loaded gun in his waistband. The appellant was charged with being a felon in possession of a weapon.

Held, the appellant was seized for 4th Amendment purposes when police took his state identification and ran a warrants check. Under the *Mendenhall Royer* standard, the appellant had a reasonable belief that he was neither free to disregard police questions or to terminate the encounter. It is unreasonable to expect a person to walk away while police have possession of one's driver's license or state identification card. Furthermore, the stop occurred with flashing lights, a marked car and uniformed police.

The court further holds that the seizure of the appellant was not supported by a reasonable articulable suspicion, because there was no evidence that he was doing anything wrong. *State v. Jwan Orlando Johnson*, C9-01-1193, (Minn. App. 6/11/02).

■ **EVIDENCE; GANG AFFILIATION; EXPERTS; REBUTTAL EVIDENCE.** In a first-degree murder prosecution, the appel-

lant took the stand and claimed that his shotgun went off by accident. The appellant's rationale for being at the scene of the murder was that if he did not participate in this plan, a Mr. Lee, a gang member, would kill him, and the appellant testified that he was afraid of Mr. Lee and his gang members. On cross examination, the state inquired into the appellant's own gang affiliations. As a rebuttal witness, the prosecution presented an alleged expert from a gang strike force, who testified that he believed the appellant was a member of the Crazy Bloods gang.

Held, the district court did not abuse its discretion when allowing the state to cross examine the defendant regarding his gang affiliation. Character evidence from the expert on gangs was probably erroneous, but was harmless beyond a reasonable doubt. *State v. Steven Yang*, C6-01-1362, (Minn. 6/06/02).

■ **EVIDENCE; GANG MEMBERSHIP; TEN-POINT GANG IDENTIFICATION CRITERIA.** Appellant was convicted of trafficking for the benefit of a gang. During testimony, a special investigator testified as to his methodology and data used to identify whether a person is a gang member. Although the Court of Appeals finds that such testimony is not scientific, the court applies the same *Frye* type reasoning in reviewing the reliability of the gang criteria. The court holds that Minnesota's Ten-Point Gang Identification Criteria, as also articulated in Minn. Stat. § 299A.64, subd. 2(b) (2000), comprise a reliable standard that an expert may utilize in giving an opinion that an individual is a member of a gang. The court also declines to equate the gang I.D. criteria with the drug courier profile which was rejected in *State v. Williams*, 525 N.W.2d 538 (Minn. 1994). *State v. Montell Andre DeShay*, C9-01-1128, (Minn. App. 6/11/02).

■ **CHILD PORNOGRAPHY; CONSTITUTIONALITY; AFFIRMATIVE DEFENSE; MENS REA; OVERBREADTH.** Held, Minn. Stat. § 617.247, subd. 8 (2000) does not unconstitutionally shift the burden of proof to the defendant. That statute criminalizes the knowing possession of child pornographic work, but also allows an affirmative defense that the images were produced only by persons over 18 years of age. The affirmative defense is held to be constitutional, because it requires only the lesser standard of "burden of production" on the defendant, necessary to disprove and negate an element of the crime. Unlike a burden of persuasion, the defendant need only make a prima facie showing

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that the age of individuals in the images is at issue, at which point the burden of persuasion reverts to the state. The Court of Appeals also finds that the United States Supreme Court's concerns in *Ashcroft v. Free Speech Coalition*, 122 S.Ct.1389, 1404 (2002), concerning affirmative defenses is met because it does not impose a burden of proof, but merely a burden of production. **State v. Brian Victor Myrland, et al.**, C8-01-2223; CX-01-2238, (Minn. App. 6/04/02).

■ **BURGLARY; FIRST DEGREE; OFF VIOLATION.** In violation of an order for protection, the appellant entered his ex-wife's residence, and watched television and drank a beer. There was not forced entry, and when a 15-year-old who was staying with the ex-wife returned to the home, and found the appellant inside, she asked him to leave, which he did. Appellant was charged with first-degree burglary, with the underlying crime being the OFF violation.

Held, violation of a no entry provision of an OFF, like trespass, is excluded from the crimes that can form the basis for the independent crime element of first-degree burglary. The original OFF specified four ways that the appellant could have violated its terms. The district court, however, on stipulated facts, found only that the appellant had violated the no entry provision of the OFF, and no other terms, such as having contact. Under those narrow findings, the no entry provision, like trespass, cannot form the basis for the felony burglary charge. See *State v. Larson*, 358 N.W.2d 668, 670 (Minn. 1984). **State v. Peter Alan Colvin**, C4-00-1365, (Minn. 6/13/02).

■ **JURY TRIAL; JUROR QUESTIONING; ERROR.** District courts shall not permit jurors to question witnesses during criminal trials. The error that results from doing so is not subject to the harmless error analysis, and requires reversal and remand. The Court of Appeals had allowed the practice under the court's "inherent trial management power." This case, accordingly, reverses the Court of Appeals. The Supreme Court finds that allowing jurors to formulate questions affects juror neutrality: "the inherent risks [are] so significant that the practice must be proscribed." In exercising its supervisory power, the Court holds that no court shall permit juror questions in criminal cases, and that, because the effect is not quantifiable, new trials are required. **State v. Gerard J. Costello**, C7-00-436, (Minn. 6/13/02).

■ **BAIL AND BOND; FORFEITURE; NOTICE TO SURETY.** The defendant originally posted a \$50,000 bail bond which was forfeited for non-appearance. The surety, appellants,

were never notified of the forfeiture of this \$50,000 bond. Two days following the forfeiture, the defendant was arrested and brought before a different judge who reinstated the \$50,000 bond and increased the defendant's bail to \$75,000. Appellants were not present in court during this second court proceeding, and were not notified that the bond was reinstated. The defendant then contacted the appellants to secure the additional \$25,000 bond, without notifying appellants about the forfeiture or reinstatement. Appellants therefore issued the \$25,000 bond without knowing that the original \$50,000 bond had been forfeited and reinstated. Subsequently, the defendant failed to appear for jury trial, at which time the judge forfeited both bonds. Approximately two weeks later, appellants first became aware of any forfeiture, when they learned the results of the trial date forfeiture. Appellants brought a motion to reinstate and discharge both bonds, which was denied.

Held, the district court abused its discretion when it denied the appellant's motion for reinstatement and discharge because it failed to adequately consider the lack of notice to the appellants and any prejudice that resulted from this lack of notice. The district court's decision to deny the motion is reversed and remanded for further proceedings. **State v. Jesse Salvador Rosillo**, C3-01-1979, (Minn. App. 6/18/02).

■ **POST-CONVICTION RELIEF; WITHDRAWAL OF GUILTY PLEA; INADEQUATE FACTUAL BASIS.** Appellant filed a petition for post-conviction relief on the grounds that his plea to a prior controlled substance violation was not knowingly and voluntarily made, and lacked the required factual basis. Appellant had been charged in one complaint with two offenses, the first taking place on June 1, 1999, and the second on June 21, 1999. Both counts were originally charged as second degree, with the dosage units being 50 or more. Subsequently, the complaint was amended to make the June 1st violation third degree, because the BCA determined that there were only 37 dosage units.

At the plea hearing, all parties consistently referred to the June 1st violation, yet all parties discussed dosage units of 50 or more. The presentence report also discussed more than 50 dosage units, which would be the June 21st incident.

Held, it was an abuse of discretion for the trial court to deny the appellant's petition for post-conviction relief without affording the appellant an opportunity to withdraw his plea to the second-degree con-

trolled substance crime. The record discloses that the guilty plea lacked a proper factual basis and was inaccurate. The appellant was questioned only about the charge that was dismissed, and not about the charge to which he believed he was pleading guilty. **Steven Bolinger v. State of Minnesota**, C9-01-2134, (Minn. App. 6/18/02).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **TEACHER TERMINATIONS.** The Minnesota Court of Appeals recently ruled against public school teachers in four education-related cases. In **Savre v. Ind. School Dist. No. 283** 642 N.W.2d 467 (Minn. App. 2002), the court ruled that a non-tenured teacher could have her contract non-renewed even though the school district did not comply with the statutory requirement under Minn. Stat. §122A.40 subd.5 of furnishing annual evaluations to her. If reasoned that since the district had "discretion" to not renew her contract for any reason, the evaluations would not have "affected" the decision making process.

In **Strege v. Ind. Sch. Dist. No. 482**, 2002 WL 859292 (Minn. App. 2002) (unpublished), the court held that a curriculum director in Little Falls who was wrongfully terminated from her position was not entitled to back pay because she failed to satisfy her duty to mitigate by turning down suitable offers of reemployment within the school district.

A tenured teacher who was laid off was not entitled to reinstatement even though the school district hired a teacher with less seniority in **Henderson v. Ind. Sch. Dist. No. 706**, 2002 WL 857886 (Minn. App. 2002) (unpublished). Hiring back the teacher would have required the district to realign other positions and put teachers into positions for which they were not licensed, which a school district is not obligated to do.

In **Wohlwend v. Duluth Teachers Retiree Fund**, 2002 WL 1463620 (Minn. App. 2002) (unpublished), the court upheld denial of additional retirement service credits to a teacher because he earlier had received a refund from his retirement fund before he was called back to work. His failure to inform the retirement fund of his return to work constituted a "self-created" error that precluded later relief.

■ **COLLATERAL ESTOPPEL.** The doctrine of collateral estoppel was invoked with varying results before the appellate court in two recent cases. In **Nova Consulting Group, Inc. v. Weston, Inc.**, 2002 WL

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418205 (Minn. App. 2002) (unpublished), the court held that prior determination by a federal court in Illinois that diversity jurisdiction was lacking constituted a ruling on the merits and, therefore, was *res judicata* when identical issues were raised in a subsequent suit in Minnesota. The case concerned a consulting contract, which contained a limitation clause limiting liability to the amount of fees paid to the consultant. A Minnesota company that hired the consultant sued for negligence in consulting in federal court in Illinois, but the court ruled that the limitation clause restricted damages to the amount of the fee paid to the consultant, which was \$34,000, less than the \$75,000 jurisdictional predicate. When the consultant later sued in Minnesota for attorney's fees, the Minnesota company counterclaimed. The court, however, ruled that the counterclaim was barred by *res judicata* since the federal court effectively passed upon the merits in upholding the limitation of liability clause. In the alternative, the court held that the limitation clause satisfied the two-prong standard for exculpation clauses under Minnesota law.

An adverse ruling in a unemployment compensation hearing does not collaterally estop a subsequent lawsuit by an employee for obstruction of workers compensation benefits, according to an appellate court ruling in *Schmidgall v. FilmTech Corp.*, 2002 WL 655680 (Minn. App. 2002) (unpublished). The prior determination by the appellate court that the employee violated the company's "same shift" requirement for reporting injuries did not constitute collateral estoppel to the employee's subsequent claim for obstruction of workers compensation benefits and reprisal under Minn. Stat. § 176.827 subd.1 because the issues were not identical in the two proceedings. Additionally, Minn. Stat. § 268.105 subd.5(a) bars unemployment compensation proceedings from being admissible in any other proceeding. Meanwhile, the Supreme Court affirmed the denial of benefits, 644 N.W.2d 801 (Minn. 2002). It held that the employer's "same shift" working rule constituted a legitimate policy to encourage workplace safety, and the employee's failure to promptly report injuries on three occasions constituted "misconduct" disqualifying her from benefits.

■ **REPRISAL RULINGS.** A pair of other recent reprisal claimants experienced mixed results. In *Hobson v. Willamette Industries*, 2002 WL 338216 (Minn. App. 2002) (unpublished), the court rejected a reprisal claim under the workers compensation statute by an employee who failed

under a "last chance" agreement. The employee's continued absences, after the "last chance agreement" warranted discharge and did not transgress the statute.

In *Petrovic v. Ridgeview Country Club*, 2002 WL 765490 (Minn. App. 2002) (unpublished), the court upheld dismissal of a whistleblower retaliation claim by an employee of a country club who claimed she was wrongfully forced to serve food at gambling parties where sexual activities occurred. Her retaliation claim was not actionable because she did not identify any violations of law by her boss. She was allowed to proceed with a harassment claim under the Human Rights Act.

■ **DISABILITY INSURANCE** The insurance industry practice of limiting long-term disability to two years for mental health claimants was held valid by the Supreme Court in *Kolton v. County of Anoka*, 628 N.W.2d 643 (Minn. 2002). Reversing a ruling of the appellate court, the Supreme Court held that the two-year cut off unless the insured is institutionalized, does not violate the disability discrimination provision of the state Human Rights Act. The Court followed the "essentially unanimous" view of federal courts that have upheld similar restrictions under the ADA. It reasoned that the similar language of the federal and state measures warrants identical treatment.

LEGISLATION

Additional protection for federal employees who are whistleblowers is going into effect as a result of the enactment of the Notification and Federal Anti-Discrimination and Retaliation Act, Pub. L. No. 107 174, 116 Stat. 566 (2002). Known as the NO FEAR law, the measure increases the rights of federal whistleblowers who work for the federal government as well as requires any settlements or judgments to be paid by their respective agencies, which has a tendency to achieve greater accountability in handling whistleblower claims.

Congress is considering a measure to add affectional preference to the protected classifications under Title VII of the Federal Civil Rights Act. The measure would, if enacted, bar employers from suing individuals because of their affectional preferences. The Minnesota Human Rights Act contains a similar provision. Minnesota is one of approximately a dozen jurisdictions that bar discrimination against gays and lesbians.

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FEDERAL PRACTICE

JUDICIAL LAW

■ **GRANT OF CERTIORARI; PUNITIVE**

DAMAGES. Issues relating to punitive damages, including the constitutional limitations on the ratio of compensatory to punitive damages, have appeared with some regularity on the Supreme Court's docket over the past decade. In 1991, the Supreme Court suggested that an award of punitive damages more than four times the amount of compensatory damages was "close to the line." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23, 111 S. Ct. 1032, 1046 (1991). Yet two years later, the Court refused to overturn an award of punitive damages which was 526 times the amount of compensatory damages. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462, 113 S. Ct. 2711, 2722 23 (1993). In the years since these decisions, the 8th Circuit has upheld awards of punitive damages as large as 99 times the amount of compensatory damages. *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir.), cert. denied, 531 U.S. 825, 121 S. Ct. 70 (2000).

Recently the Supreme Court granted certiorari to review a decision by the Utah Supreme Court reinstating a punitive damages verdict of \$145 million, which was 145 times the amount of the compensatory damages awarded. What remains to be seen is whether the Supreme Court will continue to consider a multitude of factors when reviewing large awards of punitive damages, or whether it will finally adopt a bright line test as to their constitutionality. *State Farm Mut. Auto Ins. Co. v. Campbell*, 2001 WL 1246676 (Utah 10/19/01), cert. granted, 122 S. Ct. 2326 (2002).

■ **WELL-PLEADED COMPLAINT RULE; PATENT LAW COUNTERCLAIM.** Plaintiff sought a declaratory judgment that it was not infringing defendant's trade dress, and defendant asserted a compulsory counterclaim alleging patent infringement. After the plaintiff prevailed in the district court, the defendant appealed to the Federal Circuit, relying on 28 U.S.C. § 1295(a)(1), which vests the Federal Circuit with exclusive appellate jurisdiction over appeals from cases "arising under" patent law. The plaintiff appellee unsuccessfully challenged the Federal Circuit's jurisdiction over the appeal. After the Federal Circuit vacated and remanded the district court's judgment, the plaintiff sought certiorari on the issue of the Federal Circuit's jurisdiction.

Noting that the well-pleaded complaint rule has "long governed" whether a case "arises under" federal law for purposes of 28 U.S.C. § 1331, the Supreme Court had little trouble applying the same standards to the issue of the Federal Circuit's appellate

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jurisdiction. Because it was “undisputed” that the complaint “did not assert any claim arising under federal patent law,” the Supreme Court found that the Federal Circuit had erred in exercising appellate jurisdiction over the appeal. *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S. Ct. 1889 (2002).

■ **OTHER NOTEWORTHY DECISIONS** Judge Tunheim denied a motion to transfer venue to the Northern District of Georgia pursuant to 28 U.S.C. § 1404(a), finding that the balance of factors did not “strongly weigh” in favor of the transfer. *Schmidt Printing, Inc. v. Impact Publishing Inc.*, 2002 WL 1285113 (D. Minn. 6/05/02).

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INTELLECTUAL PROPERTY LAW

JUDICIAL LAW

■ **MISAPPROPRIATION OF TRADE SECRETS; “SECRET”**. In June the 8th Circuit affirmed Judge Doty’s holding that commissioned market classification questions were not trade secrets. Strategic Directions Group (SDG) sued Bristol Myers for misappropriation of trade secrets. The trial court granted Bristol Myers’ motion for summary judgment on the trade secret issue, holding that the classification questions were not secret. The 8th Circuit affirmed.

Bristol Myers commissioned SDG to write market classification questions for use in classifying people who called a toll-free number for information about the Bristol Myers drug Pravachol. Bristol Myers used the questions in the toll-free number calls and also used some of the questions in a follow-up survey of the callers. SDG claimed that the use of the questions in the follow-up survey was a misappropriation of trade secrets. The 8th Circuit disagreed and held that the questions were not trade secrets because they were not secret. SDG had included them in their own publications and seminars; besides, the questions were available to anyone who called the toll-free number. “Thus, not only did SDG fail to make a reasonable effort to keep the questions secret, it repeatedly placed them in the public domain.” *Strategic Directions Group, Inc. v. Bristol Myers Squibb Co.*, 00-3802 (8th Cir. 06/12/02).

■ **MISAPPROPRIATION OF TRADE SECRETS; FOREIGN SOVEREIGN IMMUNITY**. In another recent trade secrets case, the 8th Circuit reversed the trial court and held that disclosure of trade secrets to engineering firms in the United States was sufficient commercial activity to overcome sovereign immunity. BP sued Sopo and others for misappropriation of

trade secrets and other claims. The district court dismissed the action for lack of subject matter jurisdiction because the government of The Peoples Republic of China owns Sopo. The district court held that Sopo was a “foreign sovereign” and therefore immune to suit in the U.S. The 8th Circuit reversed and remanded for further proceedings, holding that at least one of BP’s claims was “based on” Sopo’s commercial activity in the United States and that was sufficient to destroy Sopo’s immunity. BP owned trade secrets concerning special design features and exotic metals used in the methanol carbonylation process for making acetic acid. BP became aware that a St. Louis vendor was commissioned by Sopo to build parts consistent with BP’s trade secrets for an acetic acid plant in China. Further investigation revealed other U.S. vendors were asked to make parts for the Chinese plant. BP filed a misappropriation claim stating that Sopo had violated the Missouri Uniform Trade Secret Act by disclosing BP’s trade secrets. The 8th Circuit reasoned that because one element of one claim — disclosure of the alleged misappropriated trade secrets — occurred in the United States, the exception destroying sovereign immunity existed. “Since only one claim or element of a claim need concern commercial activity in the U.S. to erode Sopo’s presumptive immunity,” subject matter jurisdiction existed. *BP Chemicals Ltd. v. Jiangsu Sopo Corporation Ltd. et al.*, 01-2894 (8th Cir. 04/03/02)

■ **TRADEMARK; INCLUSION IN BANKRUPTCY ESTATE**. The 8th Circuit Court of Appeals reversed the district court and remanded, suggesting “strongly” that a trademark assigned less than one year before a bankruptcy filing belongs in the bankruptcy estate. Just Brakes assigned its only valuable asset, a registered trademark, less than one year before it filed for bankruptcy protection. The trademark was assigned to a shareholder of Just Brakes. Two creditors sued to enforce prior judgments and a state court awarded them the proceeds of the sale of the trademark.

The bankruptcy court concluded that the trustee was entitled to the sale proceeds of the trademark. The district court disagreed and awarded the proceeds to the two creditors who had sued in state court. The appellate court reversed the district court and remanded, instructing the lower court to determine whether the bankruptcy estate is entitled to the sale proceeds. The appellate court said, “the equities strongly favor placing the trademark sale proceeds in the bankruptcy estate, for the benefit of all

creditors.” *In re Just Brakes Corp. Sys., Inc.*, 01-2852 (8th Cir. 6/12/02)

—TONY ZEULI
—JOHNATHAN MADDOX
MERCHANT & GOULD, PLC

PROBATE AND TRUST LAW

JUDICIAL LAW

■ **ESTABLISHING PARENT-CHILD RELATIONSHIP FOR INTESTATE SUCCESSION; EXPIRED STATUTE OF LIMITATIONS**. The intestate decedent, James Palmer, had fathered a son out of wedlock in 1957, and was convicted of the then-existing crime of illegitimacy. During Palmer’s lifetime, he and his son maintained a close relationship and referred to each other as father and son. When Palmer died intestate in 1999, the son claimed a remainder interest in Palmer’s homestead following the statutory life estate granted to Palmer’s widow. The widow claimed a fee interest in the homestead asserting that the son had failed to establish the parent-child relationship within one year of attaining majority, the time period required by the Parentage Act, Minn. Stat. § 257.58.

The court held that the parent-child relationship can be established for purposes of intestate succession without regard to the time limit imposed by the Parentage Act. It noted that Minn. Stat. § 524.114(2) says that for purposes of intestate succession the parent and child relationship may be established under the Parentage Act, but does not require that it be so established. Following the reasoning of the New Jersey Supreme Court it also noted that the rights of a person to take as an heir under the intestacy statutes accrue only on the death of the intestate. To force an heir to establish the relationship within the period of the Parentage Act might terminate rights of inheritance before they accrue. *In re Estate of Palmer*, C7-02-182 (Minn. App. 6/4/02).

■ **SHORT FORM POWER OF ATTORNEY; RIGHTS OF PRINCIPAL; CHANGE OF INSURANCE BENEFICIARY**. After appointing his grandson his attorney-in-fact under a Statutory Short Form Power of Attorney, Thomas Kipka established an IRA account naming his grandson as beneficiary and a checking account in his grandson’s name. He also changed the beneficiary designation on three annuity policies naming his grandson beneficiary of each. When he signed beneficiary forms, no witnesses were present. He submitted the forms to his agent’s office and an employee there signed on the witness line and forwarded the forms to the company which accepted

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the forms and changed the beneficiary.

The Court of Appeals held that the execution of a Statutory Short Form Power of Attorney under Minn. Stat. Chapter 523 did not prevent the principal from continuing to act in his own behalf in performing legal acts. Therefore, he could establish the accounts and change the beneficiary designations. It determined that the statute did not preclude his naming his attorney-in-fact as beneficiary of the IRA account or the annuity policies. The fact that not all the requirements for changing the beneficiary on the annuity policies had been complied with did not prevent the changes from being effective, particularly where the insurance company had made the changes. On the other hand, the grandson's admission that the bank account his grandfather had opened in his name was for use solely for his grandfather defeated the grandson's claim of ownership after grandfather's death. The account became an asset of grandfather's estate. *In re the Will and Estate of Thomas J. Kipke*, C5-01-1966 (Minn. App. 6/4/02).

■ **DETERMINING TESTATOR'S INTENT; EXTRINSIC EVIDENCE.** Julia Proctor devised her "house property" to her grandson but defined that term with a legal description that described only one of two parcels that she used for housing purposes. The will did not contain a residuary clause. Her heirs claimed that they were entitled to the real estate not specifically described in the will, but the grandson offered evidence purporting to show that she meant to include all of her real property in the devise to him.

The Court of Appeals held that the district court was correct in determining that surrounding circumstances demonstrated an ambiguity in the will and that the court properly admitted extrinsic evidence to resolve the ambiguity. It further held that the district court's determination that the testator intended to devise all of her real estate to her grandson was not in error. *Estate of Proctor*, C0-01-2040 (Minn. App. 6/25/02)(unpublished).

— CURT STINE

WILLIAM MITCHELL COLLEGE OF LAW

REAL PROPERTY

JUDICIAL LAW

■ **PRESCRIPTIVE EASEMENT.** Heuer and predecessors have owned lakeshore property in Aitkin County since 1957 that has an access road across four parcels of land acquired by the county in 1937, 1952, 1972, and 1994. Heuer brought a declaratory judgment action to establish a prescriptive easement for the road. The dis-

trict court granted summary judgment for the county holding that Minn. Stat. § 541.02 which prohibits the acquisition of title to public lands by adverse possession applied equally to the establishment of prescriptive easement, that there was no evidence that the proposed easement crossed anything other than public land, and that the county had owned a majority of the land at all relevant times. On appeal, the appellate court, relying on case law and public policy, concluded that Minn. Stat. § 541.01 prohibits the establishment of a prescriptive easement in land dedicated to public use. Secondly, the appellate court concluded that material issues of fact remained as to whether Heuer could establish a prescriptive easement on two of the parcels that were not contiguous to the land benefited.

Affirmed in part, reversed in part and remanded. *Heuer v. County of Aitkin*, C0-01-2121 (Minn. App. 6/25/02).

■ **LANDLORD/TENANT.** Gradjelicks brought a negligence action against Hances for injuries arising out of an apartment building fire based on Hances' alleged knowledge of building and fire code violations and unsafe conditions. Hances brought a motion for summary judgment arguing that they had no actual or constructive knowledge of any fire conditions. The district court granted Hances' motion and dismissed the action on the grounds that Hances relied upon an official building inspection report. Gradjelicks appealed and the Minnesota Court of Appeals affirmed, concluding that a landowner relying on an official inspection lacks constructive knowledge of code violations and, therefore, cannot be liable in an ordinary negligence action or in an action based on negligence per se. On appeal, the Supreme Court reversed concluding that negligence per se and ordinary common law negligence are both available in landlord liability cases where uniform building code violations are alleged. Therefore, the district court erred because it analyzed only whether Gradjelicks were able to satisfy the elements of negligence per se on building code violations but not under common law negligence law theories. Because there were genuine issues of material fact precluding summary judgment, the Supreme Court reversed and remanded. *Gradjelick v. Hance*, C4-00-2161 (Minn. 6/27/02).

■ **MUNICIPAL LAW/CONSTRUCTION LAW.** Dakota County hired BWBR Architects to design the Eastern Administration Building and M. A. Mortenson to act as the construction manager for the project. The construction was completed in 1990 and the

county occupied the building in February 1991. Beginning in 1992, the county noticed leaks in the building which it attempted to repair. In 1994, the county sent a letter identifying four areas of concern and demanded that repair must be completed by BWBR and Mortenson. BWBR and Mortenson denied liability. In 1996, the county hired an expert who completed a report in 1997, which concluded that \$1 million in repair was necessary to correct the defects. In 1998, the county sued for defects to real property arising out of the construction of the project. The district court granted summary judgment in favor of defendants concluding that the county's claim was barred by the two-year statute of limitations, Minn. Stat. § 541.051, subd. 1 (2000). Additionally, the district court held that because any misrepresentations relied on by Dakota County occurred prior to discovery of an actionable injury, neither fraud nor misrepresentation tolled the statute of limitations. On appeal, the appellate court agreed, concluding that the county failed to act within a timely manner, *i.e.*, within two years after it should have been aware of an actionable injury. Also, the court rejected claims of estoppel and fraud because there were no assurances of repair by defendants and any misrepresentations or fraudulent concealment by defendants of defective construction occurred prior to when the county should reasonably have discovered an actionable injury. Therefore, the defendants are not estopped from raising the statute of limitations as a defense, nor is the statute of limitations tolled beyond the point of discovery. Affirmed. *Dakota County v. BWBR Architects, Inc, et al*, C5-01-2194 (Minn. App. 6/04/02).

■ **EMINENT DOMAIN.** In July 1997 the HRA of Saint Paul (HRA) condemned land in downtown Saint Paul, which included a building in which Shannon Kelly's (Kelly's) operated a bar/restaurant. In October 1997, Kelly's and Hoyt Development entered into a written agreement to lease the property from Hoyt for five years and in February 1998, Kelly's entered into an agreement with the HRA whereby Kelly's received \$100,000 in consideration of its interest in the fixtures and leasehold improvements. The next day the court approved the condemnation petition. In July 1999, the condemnation commissioners entered an award which was appealed by both parties. Subsequently, the district court granted HRA's motion for partial summary judgment. After a jury verdict, both parties appealed. Kelly's argued that the district court erred in concluding that Minn. Stat. § 117.155 (2000) authorized

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the return of the \$100,000 advance to the HRA. The appellate court agreed, concluding that the statute provided for recovery of an overpayment. Secondly, the HRA argued that the district court erred in concluding that the HRA was not entitled to prejudgment interest on the \$100,000 award. The appellate court disagreed based on its interpretation of Minn. Stat. § 117.195. Finally, Kelly's asserted that the district court erred in dismissing its claim for going concern damages as a matter of law because Kelly's did not satisfy the two-part test set forth in *City of Minneapolis v. Schutt*, 246 N.W.2d 260. The appellate court concluded that there were genuine issues of material fact as to whether the two-part *Schutt* test was satisfied. It concluded that whether the location of Kelly's is unique or transferable is a question for the trier of fact. In doing so, it rejected the HRA defenses that the lease precluded a condemnation award to Kelly's and rejected the HRA affirmative defense of estoppel, *i.e.*, it would be inconsistent to claim eligibility for relocation benefits and also claim loss of going concern value.

This is an important case because it determined that a loss of going concern claim may present genuine issues of material fact that preclude summary judgment and require a jury trial. Affirmed in part, reversed in part, and remanded. **Housing and Redevelopment Authority of the City of Saint Paul v. Lambrecht**, C7-01-1919 (Minn. App. 5/21/02).

■ **60-DAY RULE.** Kramer applied for a conditional use permit and requested preliminary approval of the plat for a shorefront resort development. A petition for an EAW was filed by certain individuals to determine if an EIS was necessary. After examining the completed EAW, the County Planning Commission found that an EIS was not necessary and on May 23, 2000, the County Board declared that the EIS was not needed. The County Planning Commission met on August 9, 2000, and recommended denying respondent's plat which recommendation was adopted by the County Board on August 15, 2000. Kramer sought a writ of mandamus in the district court arguing that failure to act within 60 days after the EIS was determined unnecessary required that the application be granted under Minn. Stat. § 15.99 (2000). The district court agreed and this appeal followed. On appeal, the appellate court held that the 30-day appeal period granted by Minn. Stat. § 116D.04, subd. 10 to review the county decision of whether an EIS was required runs concurrently with the 60-day time limit granted by Minn. Stat. § 15.99, subd. 2 and, therefore, the county was mandated to grant respondent's application

for approval of the preliminary plat. Secondly, the appellate court concluded that mandamus was an appropriate remedy because a writ of certiorari was not an adequate remedy. **Kramer v. Otter Tail County Board of Commissioners**, C5-01-2082 (Minn. App. 6/18/02).

— CHRIS DIETZEN
LARKIN, HOFFMAN, DALY & LINDGREN

TAX LAW
JUDICIAL LAW

■ **CONSISTENT SETTLEMENT OF PARTNERSHIP ITEMS.** The 2nd Circuit held that disqualification of an inconsistent settlement agreement with other partners was precluded by a temporary Treasury regulation providing that an original settlement between the Commissioner of Internal Revenue and a taxpayer partner with respect to partnership items could serve as a basis for consistent settlement terms as to other partners only if the agreement was "self-contained" and "comprehensive" and did not require the identification of a direct or specific trade of a partnership item for a non-partnership item. The tax court did not enter findings as to whether partnership items were traded for non-partnership items in the agreement. **Cinema '84 v. Commissioner of Internal Revenue**, 2002 WL 1020741 (2nd Cir. 6/03/02).

■ **UNFILED "LAST DAY TO FILE" BOX.** The taxpayer filed a petition approximately 140 days after the mailing date of his notice of deficiency. The Court of Appeals for the 5th Circuit held that the failure to fill in the "Last Day to File" box on the taxpayer's notice of deficiency did not, by itself, render the petition timely, as the notice stated the mailing date, that the last day to file was 90 days after the mailing date, and the taxpayer had legal training. **Rochelle v. Commissioner of Internal Revenue**, 2002 WL 1164155 (5th Cir. 6/06/02).

■ **RECAPTURE OF SUBSIDIARIES' LIFO INVENTORY RESERVES.** The 11th Circuit Court of Appeals held that Florida holding company for subsidiaries which held inventories maintained under the last-in first-out (LIFO) method of accounting did not incur tax liability for recapture of the subsidiaries' LIFO inventory reserves when it elected S corporation status. The recapture statute's plain language applies only when the electing company actually held inventory. **Coggin Automotive Corp. v. Commissioner of Internal Revenue**, 2002 WL 1231509 (11th Cir. 6/07/02).

■ **VALUATION OF FAMILY PARTNERSHIP INTERESTS FOR GIFT TAX PURPOSES.** The 5th Circuit Court of Appeals held that liquidation restrictions in family limited partner-

ship agreements were not removable by the family after the transfer of partnership interests due to the presence of a non-family limited partner; thus these restrictions could not be disregarded when valuing transferred interests for gift tax purposes. **Kerr v. Commissioner of Internal Revenue**, 2002 WL 1041044 (5th Cir. 6/10/02).

■ **PAYMENT OF ATTORNEYS' FEES AS INCOME.** The Supreme Court denied certiorari and let stand a 9th Circuit decision regarding the payment of attorney's fees for the legal services rendered to a taxpayer in the taxpayer's Age Discrimination in Employment Act action as part of a settlement, despite a split of authority in the circuit courts. The 9th Circuit held that these fees constituted income to the taxpayer, as the opposing party's satisfaction of the taxpayer's obligation was a constructive receipt of the amount of the attorney's fees by the taxpayer. **Sinyard v. Commissioner of Internal Revenue**, 268 F.3d 756 (9th Cir. 2001), certiorari denied 2002 WL 458843 (6/14/02).

■ **AGGREGATE METHOD FOR DETERMINING FICA LIABILITY.** The United States Supreme Court, led by Justice Breyer, reversed the 9th Circuit Court of Appeals and held that the IRS can use the "aggregate estimation" method to determine an employer's FICA liability on employee tips, which is an estimate based upon all the tips that the restaurant's customers paid to employees. The taxpayer restaurant argued that the IRS should determine FICA liability for employee tips by first estimating each employee's tip income separately, and then adding the estimates together. The Court held that the IRS was entitled to a presumption of correctness, and stated that although the definitional section of the code, § 3121(q) uses the singular when referring to employees, § 3111(a) and (b), which impose the tax, use the plural. The Court also pointed out that this decision does not restrict a taxpayer from challenging a particular calculation under the aggregate method as inaccurate. Justice Souter, joined by Justices Scalia and Thomas, dissented. **U.S. v. Fior D'Italia, Inc.**, 2002 WL 1305728, 536 U.S. ____ (6/17/02), reversing *Fior D'Italia, Inc. v. U.S.*, 242 F.3d 844 (9th Cir. 2001).

■ **LAW ENFORCEMENT MATERIALS UNDER THE FOIA.** The D.C. Circuit held that the IRS did not have to show that information concerns investigations which focus on specific illegal acts or illegal acts of particularly identified officials in order to claim the Freedom of Information Act exemption for materials kept for law enforcement purposes. The materials may relate simply to general

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guidelines, techniques, and procedures for law enforcement. *Tax Analysts v. I.R.S.*, 2002 WL 1300028 (D.C. Cir. 6/19/02).

■ **IGNORANCE OF THE LAW & INNOCENT SPOUSE.** The taxpayer had "reason to know" that her husband had erroneously reported his retirement distribution as an excluded rollover on their joint return, and thus could not claim innocent spouse relief from the assessed deficiency. She knew every fact necessary to determine that the distribution was taxable, even though she was not aware of its tax consequences. *Mitchell v. Commissioner of Internal Revenue*, 2002 WL 1300017 (D.C. Cir. 6/21/02).

■ **INSOLVENCY EXCEPTION TO DISCHARGE OF INDEBTEDNESS INCOME.** Even though the taxpayer's Collection Information Statement indicated a positive net worth, the taxpayer demonstrated that he was insolvent at the time his corporation discharged a loan that he owed to the corporation. Thus his realization of income from the discharge of indebtedness was limited to the extent that his assets exceeded his liabilities after the debt cancellation. *Toberman v. Commissioner of Internal Revenue*, 2002 WL 1339109 (8th Cir. 6/24/02).

■ **DENIAL OF EQUITABLE INNOCENT SPOUSE RELIEF.** Taxpayer and her former spouse entered into a property settlement where he agreed to take responsibility for the couple's joint 1993 tax liability. Taxpayer applied for innocent spouse relief but was denied. The Tax Court then determined she was not entitled to equitable relief because she failed to establish that she had no knowledge that the tax would not be paid, that economic hardship was present, and that she didn't benefit from the unpaid liability. *Castle v. Commissioner of Internal Revenue*, T.C. Memo 2002 142 (6/06/02).

■ **WRONGFUL COLLECTION ACTION.** Taxpayer's wrongful collection claim was dismissed, in part because the IRS's general statements to the press did not constitute an illegal tax return disclosure under § 6103. *Ronald G. Harris, et ux. v. United States*, 01 20543 (5th Cir. 4/17/02).

■ **ATTORNEY'S FEES AS ALIMONY.** The 10th Circuit affirmed the Tax Court and ruled that, because of the nature of the payment, an individual could not deduct payment of his former wife's attorney's fees as alimony. The taxpayer had paid the attorney's fees incurred by his wife during their divorce proceedings as ordered by the state court. *Berry v. Commissioner of Internal Revenue*, 01 9007 (10th Cir. 6/07/02).

■ **DISCLOSURE OF CRIMINAL NATURE OF INVESTIGATION.** Individual asked that the IRS be barred from disclosing the criminal

nature of its investigation of his tax liabilities. The U.S. District Court for the District of Kansas ruled that it did not have subject matter jurisdiction to consider the individual's request for an injunction pursuant to § 7431, on the grounds that his reliance on this section was misplaced, and that he had not shown a waiver of sovereign immunity. *Pflum v. United States*, 99 4170 SAC (D. Kan. 5/15/02).

■ **PROPERTY HELD FOR PRODUCTION OF INCOME.** Taxpayers were not entitled to real estate-related losses when they moved out of their home of many years, listed it for sale, and rented it out during the time it was on the market in order to alleviate the financial burden. The court, however, declined to impose an accuracy related penalty for this real estate loss deduction. *Saunders v. Commissioner of Internal Revenue*, T.C. Memo 2002 143, (6/10/02).

■ **EXEMPT STATUS FOR HEALTH CARE.** The District Court for the Western District of Texas granted summary judgment and held that a nonprofit health care system's partnership with a for-profit health care company did not interfere with its ability to operate for exempt purposes. *St. David's Health Care System v. United States*, Civ. No. A 01 CA 046 JN (D. W. Tex. 6/07/02).

■ **DISGORGEMENT OF ILLEGAL INCOME.** The 9th Circuit held that a taxpayer who sold insider information may not carry back the unused portion of his disgorgement deduction, because his illegal activities were not part of his "trade or business." *Wang v. Commissioner of Internal Revenue*, 99 70642 (9th Cir. 5/24/02).

■ **CONSTRUCTIVE DIVIDENDS.** The Tax Court ruled that funds an individual diverted from his own corporation were subject to tax at the corporate level as constructive dividends, and were not taxable as ordinary income because the IRS failed to show which corporation the funds belonged to. *Han v. Commissioner*, T.C. Memo 2002 148 (6/12/02).

■ **TAX COURT LACKS JURISDICTION OVER PENALTIES.** The Tax Court held that it has no jurisdiction over an individual's penalties for fraudulent failure to timely file, because the additions are not attributable to a deficiency. The court also lacked jurisdiction to consider a penalty for failure to pay estimated taxes, because the individual filed the returns. *Wilson v. Commissioner*, 118 T.C. 33 (6/12/02).

■ **TAX EVASION CONVICTIONS AFFIRMED.** The 9th Circuit affirmed the convictions and sentences of two men for conspiring to defraud the IRS and for attempted tax evasion. Judge Goodwin

held that reliance on their accountant that they could report income as officer loans did not defeat the requirement of willfulness because the men failed to disclose all facts to their accountant.

United States v. Bishop, et al., 01 50195, 01 50266 (9th Cir. 5/30/02).

■ **DEDUCTION OF LAW SCHOOL EXPENSES.** The Tax Court held that a law librarian who attended law school and passed the bar could not deduct her legal education expenses, because this education was part of a program that qualified her for a new trade or business. *Galligan, et ux. v. Commissioner of Internal Revenue* T.C. Memo 2002 150 (6/13/02).

■ **DELAYS PRECLUDE AWARD OF LITIGATION COSTS.** The Tax Court held that significant delays caused by the taxpayers precluded them from obtaining an award of litigation costs, even though the IRS eventually conceded most of the tax adjustments it made in their return. *Hampton, et ux. v. Commissioner of Internal Revenue*, T.C. Memo 2002 151 (6/13/02).

■ **TAX COURT DENIAL OF LEAVE TO AMEND REVERSED.** The 5th Circuit reversed the Tax Court's denial of the IRS's request for leave to amend their complaint to include a § 2036 claim. The 5th Circuit noted the brevity of the Tax Court's reasons for denial and that the motion to amend was filed two months before the trial, thus there was no obvious reason for denial of leave to amend. It affirmed the Tax Court on other substantive issues and remanded the cause for consideration of the § 2036 claim. *Gulig v. Commissioner of Internal Revenue*, 01-60538 (5th Cir. 6/17/02).

■ **SUPPORT PAYMENT DEDUCTIBILITY.** The 10th Circuit affirmed the Tax Court and held that, since it was not clear that the spousal and child support payments made by the taxpayer were to terminate upon his wife's death, the payments were not deductible as alimony. There was no state (Colorado) law addressing the topic and the temporary support orders did not specify this either. The burden was thus on the taxpayer to prove that the payments would terminate upon his wife's death, which he failed to do. *Lovejoy v. Commissioner of Internal Revenue*, 00-9031 (10th Cir. 6/18/02).

■ **HANDWRITING EVIDENCE.** The 10th Circuit, affirming an individual's conviction and sentence for fraudulent claims, held that the district court did not abuse its discretion in allowing testimony by a handwriting expert on similarities between the individual's writing and that on the false tax returns. *United States v.*

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Hernandez, 01-1194 (10th Cir. 6/19/02).

■ **TOO EARLY IS UNTIMELY.** The Tax Court held that a taxpayer was not entitled to administrative costs on the ground that he filed his claim for costs with the IRS before the IRS mailed him the final decision on his liabilities. *Salazar v. Commissioner of Internal Revenue*, T.C. Memo 2002 157 (6/20/02).

■ **HARASSING PHONE CALLS OBSTRUCT TAX ADMINISTRATION.** An individual convicted of obstruction of tax administration under § 7212 for making repeated harassing and threatening phone calls to the Richmond, Virginia IRS office and then the Treasury Inspector General for Tax Administration (TIGTA) had his appeal denied by the 4th Circuit. Judge Williams stated that although the district court erred in instructing the jury that the IRS agent was acting in his official capacity under Title 26, since that is a decision that the jury should make, under the harmless error standard the government had provided enough evidence to prove that the IRS agent was acting in his official capacity. He was sentenced to time served and a \$25 assessment. *United States v. Lovern*, 01-4728 (4th Cir. 6/14/02).

■ **NO CAPITAL GAINS FOR LOTTERY WINNINGS.** A couple who won the Oregon lottery and received a few of the annual payments, then assigned the rest of their payments to a third party in exchange for a \$3.95 million lump sum, and filed an amended return claiming that this amount was long-term capital gain and seeking a refund. The district court held that the couple was not entitled to treat the payments as capital gains because no asset appreciated; the assignment to a third party did not alter the essential nature of the money as gambling winnings that should be treated as ordinary income. *United States v. Maginnis, et ux*, 01-368-KI (D. Oreg. 5/28/02).

■ **COURT ORDERS PRODUCTION OF TAX RETURNS.** Pursuant to a dissolution proceeding, the Minnesota Court of Appeals held that the district court did not abuse its discretion when it required a father to produce documentation including tax returns that he had filed with his new wife. The tax information could not be withheld simply because his new wife's name appears on it. *Boeck v. Boeck*, C8-01-1704 (Minn. App. 6/18/02).

■ **NONMARITAL PROPERTY NOT TRANSFORMED INTO MARITAL PROPERTY.** The Minnesota Court of Appeals held that a trust that paid its own taxes could not be transformed into marital property during a dissolution proceeding. The trust could only become marital property if the taxpayers paid taxes on it in their joint

returns. *Garretson v. Garretson*, C5-01-1501, C9-01-2165 (Minn. App. 6/11/02).

■ **SOVEREIGN IMMUNITY MUST BE WAIVED FOR DAMAGES.** A taxpayer brought a third-party action for damages against two IRS agents in connection with the forced sale of his home. The district court dismissed for lack of jurisdiction because the taxpayer failed to show that the government had waived its sovereign immunity, and the 9th Circuit affirmed. *Anderson v. Kahre*, 2002 2 USTC ¶ 50,477 (9th Cir. 6/25/02).

■ **SUBSTITUTE RETURNS ARE NOT FILED RETURNS.** Affirming the Bankruptcy Court, the district court held that an individual who filed for bankruptcy was not entitled to discharge his tax deficiencies that arose more than three years before filing for bankruptcy because he had failed to file returns for those years. The court held that substituted returns filed by the IRS did not constitute the required returns. *Walsh*, 2002 2 USTC ¶ 50,478 (D.C. Minn. 6/25/02).

ADMINISTRATIVE MATTERS

■ **APPEALS MEDIATION PROCEDURE.** Mediation is no longer limited to issues involving adjustments over \$1 million. Mediation is now available for any qualifying issues that are already in the Appeals administrative process. The goal of the procedure is to use the services of a neutral third party to help Appeals and the taxpayer reach their own negotiated settlement. Revenue Procedure 2002 44.

■ **MERGER INTO PROFIT SHARING PLAN DOESN'T TERMINATE MONEY PURCHASE PLAN.** IRS ruled that a merger or conversion of a money purchase plan into a profit sharing plan would not result in a partial termination of the money purchase plan. Revenue Ruling 2002 42.

■ **DEATH BENEFITS EXCLUDABLE FROM GROSS ESTATE FOR NEW YORK CITY FIREFIGHTERS AND POLICE OFFICERS.** IRS ruled that any accidental death benefits payable to specified beneficiaries under New York City and New York State laws are not includible in the decedent's gross estate if: (1) the decedent was a New York City firefighter or police officer, and (2) the decedent died in the line of duty. This ruling does not apply to the extent the benefits represent a return of the decedent's contributions to the pension fund. Revenue Ruling 2002 39.

■ **REGULATION WOULD REQUIRE REPORTING OF DISCHARGE OF INDEBTEDNESS INCOME.** IRS proposes a regulation that would require organizations in the trade or business of lending money to report discharge of indebtedness

under section 6050P. The proposed regulation also provides three safe harbors under which organizations will not be deemed to be in the trade or business of lending money. REG 107524 00.

■ **DATE ON WHICH GAIN OR LOSS IS REALIZED FOR SHORT SALE OF STOCK.** When a taxpayer closes a short sale and his or her position has depreciated, the loss is recognized when the stock is delivered to close the short sale pursuant to section 1.1233 1(a)(1). When a taxpayer's position has appreciated with a short sale, the gain is recognized when the same or substantially identical stock is purchased because the acquisition is considered a constructive sale transaction under the provisions of section 1259(b) and (c). Revenue Ruling 2002 44.

■ **METHODOLOGY FOR VALUING STOCK OPTIONS FOR PURPOSES OF SECTIONS 280G AND 4999.** Irs modified the methodology provided in Revenue Procedure 2002 13 for valuing stock options for purposes of sections 280G and 4999. A compensatory stock option will be considered properly valued if such value is determined in accordance with Rev. Proc. 98 34, with the safe harbor valuation method in section 4 of Rev. Proc. 2002 13, or with the valuation method that is consistent with generally accepted accounting principles and that takes into account the factors provided in section 1.280G 1, Q/A 13 of both the 1989 and 2002 proposed regulations. Revenue Procedure 2002 45.

■ **CHANGE IN IRS LITIGATING POSITION; APPLICATION OF THE DOCTRINE OF ELECTION.** IRS will no longer argue that the doctrine of election precludes a taxpayer from apportioning interest expense under Temporary Treasury Regulation 1.861 9T(g) by retroactively electing to value assets according to their fair market values. CC 2002 027.

■ **REGULATIONS WOULD EXCLUDE LOW INCOME TAXPAYER CLINICS FROM THE DEFINITION OF INCOME TAX PREPARER.** IRS proposed regulations would exclude qualified low-income taxpayer clinics (LITCs) from the definition of income tax return preparer under section 7701(a)(36). The regulations also exclude certain persons who are employed by, or volunteer for, such clinics if two conditions are met: first, any return preparation assistance must be directly related to a controversy with the IRS, or an ancillary part of an LITC's ESL outreach program; second, the LITC cannot charge a separate fee based on whether the LITC provides assistance, or charge more than a nominal fee for its services. REG 115285 01.

■ **PAYMENTS TO EMPLOYEES FOR PURCHASED EQUIPMENT AS CONDITION OF**

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EMPLOYMENT; WAGES FOR FEDERAL TAX PURPOSES. IRS ruling analyzing two different fact scenarios concludes that amounts paid to employees for providing equipment for use in performing services as an employee are wages subject to the withholding and payment of income and employment taxes unless paid under an accountable plan. Revenue Ruling 2002 35.

TRANSFERRED EMPLOYEES; EXCLUSION OF SALARY REDUCTION AMOUNTS AND MEDICAL EXPENSES REIMBURSEMENTS.

In an asset sale, transferred employees who have elected to participate in health FSAs under seller's cafeteria plan may continue to exclude the salary reduction amounts and medical expense reimbursements from gross income without interruption and at the same level of coverage after becoming employees of buyer either when seller agrees to continue its existing health FSAs for the transferred employees or when buyer agrees to adopt a continuation of seller's health FSAs for the transferred employees. Revenue Ruling 2002 32.

PARTNERSHIP STRADDLE TAX SHELTERS. The IRS has notified the public that tax benefits from partnership straddle tax shelters are not allowable for federal tax purposes. It further stated that certain responsibilities may arise in connection with participation in these schemes, such as penalties under § 6707 for failure to provide tax shelter information. Notice 2002 50.

LEGISLATION

SUPERFUND TAX. Senate tax writer Robert G. Torricelli, d-nj, stated on June 6, 2002, that he will try to attach a proposal to reinstate the Superfund tax on businesses that contribute to toxic waste sites to every tax bill moving through the Senate Finance Committee. He believes that election-year concerns will prevent tax writers from trying to convince taxpayers that they, rather than the polluters, should pay for cleanup of Superfund sites. See 2002 tnt 110-4.

PERMANENT DEATH TAX REPEAL ACT FAILS. On June 6, 2002, the House of Representatives voted 256 171 to pass the Permanent Death Tax Repeal Act of 2002. However, the Act was struck down in the Senate on June 12, 2002, by a vote of 54-44. Sixty votes were needed for the bill to clear the chamber. The Senate also voted down two Democratic alternatives to the bill that attempted to maximize the benefits of the current law without eliminating the tax altogether. The failure of the bill has been criticized by U.S. Chamber of Commerce President Thomas Donahue as a missed opportunity to provide relief to small businesses and farmers.

RENOUNCEMENT OF CITIZENSHIP. A new bill introduced by Charles B. Rangel, D-NY, on June 10, 2002, would prevent the use of U.S. citizenship renunciation as a device to avoid paying U.S. taxes. H.R. 4880. On June 18, 2002, Representative Lloyd Doggett, D-Texas, filed the "No Tax Breaks for Corporations Renouncing America Act of 2002," which aims to prevent companies from avoiding U.S. taxes on U.S. income by renouncing their U.S. citizenship.

SUPERMAJORITY FOR TAX HIKES. On June 12, 2002, the House killed a resolution (H.J. Res. 96) to create a constitutional amendment requiring a two-thirds supermajority for tax hikes. The Center on Budget and Policy Priorities found that this amendment would likely lead to higher deficits and economic harm while protecting special interest tax breaks for the rich.

TAX CREDIT FOR SINGLE FAMILY HOMES. President Bush is campaigning strongly for a \$15.3 billion ten-year tax credit that would promote the construction of single-family homes in low-income areas. Democrats are skeptical, calling the effort "all fanfare and no substance." Lawmakers in the House Financial Services Subcommittee on Housing and Community Opportunity have adopted a manager's amendment to H.R. 3995, the "Housing Affordability for America Act," which would require periodic reviews of housing rentals that have been allocated a low-income housing tax credit.

HEALTH CARE TAX INCENTIVES. The Ways and Means Committee cleared H.R. 4946 on June 19, 2002. The bill would provide tax incentives for health care and long-term care insurance.

WAIVER OF FICA TAXES. Representative Ron Paul, r Texas, has introduced the "Cancer and Terminal Illness Patient Health Care Act of 2002," H.R. 4875, which would waive the employee portion of Social Security taxes on individuals diagnosed as having cancer or a terminal disease. For the self-employed, FICA taxes would be reduced by half.

TREATMENT OF INDIAN TRIBES. Philip M. Crane introduced H.R. 4887 on June 6, 2002. This bill proposes to treat Indian tribes the same as state governments for the purposes of taxes on gambling.

TAX SHELTER TRANSPARENCY ACT. The *New York Times* wrote an article on June 20 describing various tax avoidance plans developed by major accounting firms that help wealthy individuals and corporations dramatically reduce their tax burden by hiding income through complex layers of tax avoidance devices. Charles E. Grassley (R Iowa) and Max Baucus (D

Mont.) say that these are the sorts of plans that would be "reined in" by the Tax Shelter Transparency Act, S. 2498. The bill would impose penalties on accounting and law firms that fail to disclose deals like the ones described in the *New York Times*.

STADIUM BILL. Minnesota H.F. 2214 was signed into law as Chapter 397 on May 22, 2002, and provides financing for the construction of a new major league baseball stadium through local taxes. The bill also exempts the stadium from property taxation, and exempts the construction materials from sales taxation.

CALCULATION OF MOTOR VEHICLE BASE. Minnesota S.F. 2422 was signed into law as Chapter 388. It requires the registrar to calculate property tax on new vehicles by using base value information available to dealers at the time the application for registration is submitted.

— MARK ASTLING

— KATHRYN SEDO

— LIZ STUVA

UNIVERSITY OF MINNESOTA TAX CLINIC

TORTS & INSURANCE

JUDICIAL LAW

PUNITIVE DAMAGES AWARDED FOR TRESPASSING. Brantner trespassed on Garner's property. Despite having the property surveyed, Brantner still believed he owned the plot of property and seeded it. Garner claimed that this trespass destroyed two years of a crop.

The court granted Garner's motion to include a claim for punitive damages. The case went to trial. The trial court found \$819 in compensatory damages and punitive damages in the amount of \$50,000.

Brantner appealed. The Minnesota Court of Appeals affirmed. It found that the punitive damages award was not unconstitutional and was reasonably related to the actual harm caused and the infringement upon the true owner's rights. *Brantner Farms, Inc., et al v. Garner*, C6-01-1572, (Minn. App. 6/04/02).

PREMISES LIABILITY — OPEN AND OBVIOUS DANGER? Cameron visited her parents' home. While speaking with her mother, her stepfather placed some fencing where no fencing had been before. Cameron later caught her left foot on the fence and sustained injury.

The district court granted summary judgment against Cameron, concluding the fence and its risk were open and obvious and the injuries were unforeseen. This was because when dangers are known or obvious, the landlord is not liable for the resulting harm unless the landowner should anticipate the harm despite its obviousness.

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The district court concluded the fence and its dangers were obvious. The application of the rule involves a two-step test: 1) was the activity known or obvious to the injured person; and 2) even if it were known or obvious, should the landowner still have anticipated the harm, citing *Loius v. Loius*, 636 N.W.2d 314, 322 (Minn. 2001).

The Minnesota Court of Appeals reversed and remanded. It found that the facts and the record were such that the stepfather should have anticipated she might fail to see the fence and be injured by it. The finding was limited to reversing on the issue of no duty and the matter is remanded for trial for findings on the issues of breach of duty, causation, and apportionment of negligence. ***Cameron v. Manners***, C2 01 1908, (Minn. App. 6/04/02).

■ **DEFAMATION AND THE FREE FLOW OF INFORMATION ACT.** Wally Wakefield gathered information for the *Maplewood Review*, a newspaper, on the school district's decision not to retain Richard Weinberger as the head football coach at Tartan High School. The article appeared in the *Maplewood Review* in January of 1997 and contained quotations from and information attributed to named and unnamed sources. Weinberger sued in defamation.

Weinberger issued a subpoena ordering Wakefield to appear for deposition and to bring notes related to the interviews. When informed that Wakefield did not respond, Weinberger moved to compel Wakefield's deposition. The district court granted Weinberger's motion to compel Wakefield to identify the source of six specific segments. The *Maplewood Review* and Wakefield appealed. The Minnesota Court of Appeals reversed and remanded to the district court because the Order lacked Findings of Fact required by statute in case law and to address other issues under *Bauer v. Gannett Co. Inc.*, 557 N.W.2d 608 (Minn. App. 1997).

After rehearing, the district court ordered Wakefield to identify by written interrogatory who made what statements. This appeal followed.

The Minnesota Court of Appeals analyzed the Free Flow of Information Act, Minnesota Statute § 595.021 .025 (2000). It reversed the trial court and found that under the "unique facts and posture of this case," Weinberger had not demonstrated he was entitled to compel Wakefield to disclose who made what statements. This was because the primary purpose of disclosure was not relevant to obtaining evidence of actual malice, but rather to make the reporter a witness against defendants. ***Weinberger, et al v. Maplewood Review, et al***, C7-01-2021, (Minn. App. 6/18/02).

■ **FORSEEABILITY OF SEXUAL ABUSE IN THE DAYCARE INDUSTRY.** Children and parents of children who were abused by their daycare teacher, Tom Karlson, appealed the dismissal of their claims of *respondeat superior* for the negligent hiring, supervision and retention against Karlson's employer, New Horizon Enterprises, Inc. (New Horizon). The district court concluded the appellants failed to provide the court with evidence that sexual misconduct was a foreseeable risk and granted the daycare provider's motion for summary judgment on the claim of *respondeat superior*. However, an affidavit submitted by an expert created genuine issues of material facts such that summary judgment on that claim was reversed.

The Minnesota Court of Appeals affirmed judgment on the negligent hiring and negligent retention because the evidence failed to establish the employer knew or should have known of Karlson's past sexual abuse of children. A motion to amend the complaint to add a claim of punitive damages will be addressed by the district court on remand. ***L.M., a minor by her parents, et al v. Karlson, et al.***, CX-01-1672, (Minn. App. 6/18/02).

■ **MEDICAL MALPRACTICE STATUTE OF LIMITATIONS.** Reversing the Court of Appeals and the district court, the Minnesota Supreme Court held that the four-year statute of limitations, established under Minnesota Statute § 541.076 (2000) that governs medical malpractice actions commenced on or after August 1, 1999, applies retroactively to revive a medical malpractice claim that accrued on July 23, 1996, and was time-barred prior to August 1, 1999. ***Gomon v. Northland Family Physicians, Ltd.***, C8-00-1465, (Minn. 6/13/02).

■ **WINDFALL TO THE INSURED.** Defendant Stout was a pedestrian involved in a collision involving an automobile. Stout's medical bills were paid by the insurance covering the vehicle, AMCO.

Stout's health insurer paid the bills in the first instance, and Stout sought reimbursement under the No-Fault Act. The narrow legal issue presented to the Minnesota Supreme Court in this case was whether discounts obtained by Stout's health insurer are included in the amount of Stout's loss.

The Supreme Court held that under the Minnesota No-Fault Act, the loss accrued by an injured person is the amount reflected on the injured person's medical bills, and not the amount paid by the insured person's health insurance in satisfaction of the medical bills. A no-fault insurer cannot reduce the amount of basic economic loss benefits payable to an injured person when the injured person's health insurer pays the med-

ical bills at a discounted rate. While recognizing that health insurance companies are able to obtain significant discounts from medical service providers, and that such discounts are becoming common, the Supreme Court left it up to the Legislature to decide whether this area of law would benefit from its attention. If there is a windfall to be had, between an insurer and an insured, the windfall should go to the insured. ***Stout v. AMCO Insurance Company, et al.***, CX-01-246, (Minn. 6/13/02).

■ **SEXUAL ABUSE STATUTE OF LIMITATIONS.** Appellant DMS was sexually abused as a 13-year-old in August or September of 1992 after he was placed in a foster home supervised by the Professional Association of Treatment Homes (PATH). Approximately five months after being placed, in February of 1993, DMS was removed from the foster home after DMS informed Hennepin County that he felt uncomfortable in the defendant's home, that the defendant was sleeping with boys in his bedroom.

On June 8, 1999, approximately nine months after DMS's 19th birthday, and more than six years after DMS alleged that PATH negligently retained Barber as a foster parent, DMS commenced an action against PATH. The district court granted PATH's motion for summary judgment on the grounds that the statute of limitations had run on the claims. The Court of Appeals affirmed the district court, and DMS petitioned for further review to the Supreme Court.

The Minnesota Supreme Court reversed, finding that under the delayed discovery statute, Minn. Stat. § 541.073 (2000), the time to commence suit does not begin to run until the victim of sexual abuse reaches the age of majority. As a matter of law, the Court held that children are incapable of understanding that they have been sexually abused. This period of limitations applies to both a direct cause of action and a *respondeat superior* claim against the employer.

Two justices dissented. Writing for the dissenters, Justice Stringer found that the Court's holding ignored the plain language of the delayed discovery statute, which provides that it "does not effect the suspension of the statute of limitations period of disability under section 541.15". Minnesota Statute § 541.15, the minority tolling statute, has been interpreted for nearly a century to read that a minor has until the age of 18, plus one year, to commence a suit for a cause of action that arose during his or her infancy. ***DMS v. Kennedy Barber, et al.***, C8-00-2227, (Minn. 6/13/02).

— THOMAS BAUDLER

— LEE BJORNALD

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