



NOTES & TRENDS

ADMINISTRATIVE LAW

JUDICIAL LAW

■ **DATA PRACTICES.** In a recent case involving the release of data by the Department of Labor and Industry to the press, the Court of Appeals found that the data were not public data under the Minnesota Data Practices Act. The department had issued orders to the appellants and their companies assessing monetary penalties for not maintaining workers' compensation insurance. The appellants then filed objections to the orders. The department released the orders and the objections in response to a media request. One of the appellants was running for reelection as a state representative at the time. In reversing the district court, the Court of Appeals held that the data were either active civil investigative data or data retained in anticipation of a pending civil legal action, both of which are classified as confidential data. The department argued that its investigation had been completed so that the active investigation provision did not apply and that the legislative intent could not be to make this data confidential because it could not then be released to the subject of the data. The decision may have implications for the release by an agency of any allegations prior to initiation of an administrative or judicial proceeding. ***Westrom v. Minnesota Dept. of Labor and Industry***, C9-03-128 and CO-03-129, 667 N.W.2d 148 (Minn. App. 2003). <http://www.lawlibrary.state.mn.us/archive/ctappub/0308/op030128-0811.htm>

■ **ARBITRARY AND CAPRICIOUS.** The Court of Appeals affirmed a determination by the Minnesota Pollution Control Agency ("PCA") that a berm constructed of shredder fluff containing PCBs constituted the disposal of solid and hazardous waste. The court reviewed a six-month deadline for removal of the berm under the arbitrary and capricious standard and deferred to the agency due to its expertise. A request for a contested case hearing by Schwartzman was found to be untimely and not required, according to a PCA rule, because only legal issues were involved. ***In Re Max Schwartzman & Sons***, C4-03-389, A03-224, 2003 WL 22434351 (Minn. App. 10/28/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0310/op030389-1028.htm>

LEGISLATION

The 2003 legislative session is scheduled to begin February 2, 2004. Barring major budget woes, this session is expected to be rather short (estimate 8-10 weeks). Due to the late start and a relatively limited agenda of "must pass" items, major new initiatives are likely to be deferred. At this point, we are not aware of any proposed new administrative law initiatives.

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CIVIL LITIGATION

JUDICIAL LAW

■ **CHOICE OF LAW.** The Minnesota Court of Appeals reversed a district court dismissal of plaintiff's claim on the grounds that it was barred by the applicable statute of limitations and the doctrine of *forum non conveniens*. The appellate court determined that the trial court should have applied Minnesota's statute of limitations and that Minnesota had sufficient ties to the case to provide a forum.

Plaintiff is a Minnesota resident who operates a contracting business in Minnesota for part of each year. He spends approximately one half of each year traveling in a motor home in the southern United States. While in Texas he bought a stepladder from defendant Camping World. A few months later, while using the stepladder in Arizona he fell and injured his foot. Plaintiff returned the ladder to the store in Texas, claiming that it was defective. Plaintiff received medical treatment for his injuries in both Minnesota and Arizona. He did not fully recover from his injuries, and when he determined that both the manufacturer and distributor of the ladder had gone out of business, he

brought suit against Camping World in Minnesota. Although Camping World has its principal office in Kentucky, it has stores in many states including Texas and Minnesota and it has a registered agent for service of process in Minnesota. Plaintiff contended that he had visited the Minnesota store and that is why he patronized the Camping World store in Texas.

The plaintiff was injured on February 13, 2000, but did not commence this action until after February 13, 2002. Because the statutes of limitation in Texas and Arizona are two years, those statutes had already run, but the applicable statute of limitations in Minnesota is six years.

Defendant Camping World moved to dismiss plaintiff's claim as barred by the applicable statutes of limitation of either Texas or Arizona, and on *forum non conveniens* grounds. The trial court granted defendant's motion for summary judgment on both grounds.

Although the appellate court finds some ambiguity as to whether Minnesota follows the substantive or procedural distinction, it finds some support for the principle that statutes of limitation are procedural and that Minnesota's statute of limitations should apply in this case. It also reviews the choice-influencing-consideration approach recognized by the Restatement. Using that analysis, the court states that the predictability-of-result factor doesn't favor any one forum over the other in this case; similarly with respect to maintenance of interstate order and simplification of judicial task. The overriding Minnesota interest is in compensating tort victims. Thus, Minnesota's interests favor application of the Minnesota statute of limitations. The court also finds that compensating tort victims is the better rule of law.

Finally, the appellate court finds that there is no ideal forum for this case. Both Minnesota and Texas, neither of which is predominant, have some legitimate ties to the case. Therefore, the court holds that it was an abuse of discretion for the district court to dismiss plaintiff's claim on the ground of *forum non conveniens*. *Danielson v. National Supply Company d/b/a Camping World*, 670 N.W.2d 1 (Minn. App. 2003).

MINIMUM CONTACTS. In a filing on the same day as *Danielson*, the Court of Appeals affirmed a trial court's dismissal on the grounds of insufficient contacts for personal jurisdiction.

In this case, plaintiff suffered a work-related injury while working on a scissor-lift table which collapsed on his arm. The table was manufactured by Meikikou Corporation, a foreign corporation with its principal place of business in Japan. The table was incorporated as a component part of a system that also included a laser-cutting machine manufactured by Yamazaki Mazak Optonics Corporation (YMO), another Japanese corporation. An Illinois corporation, Mazak Nissho Iwai (MANI), is the international distributor of the system which was purchased by plaintiff's employer, a Minnesota company.

Meikikou manufactured the scissor-lift table at its factory in Japan and sold the table to a Japanese distributor. Meikikou understood that the table would eventually be delivered to YMO to become a component part of the laser-cutting machine. YMO integrated the table into its laser-cutting machine and sold the system to MANI, the Illinois distributor. YMO eventually assembled the laser-cutting machine, but not the scissor-lift table. YMO did provide a copy of the operating manual for the scissor-lift table to MANI, which supplied it to the employer. Meikikou employees also met with representatives of YMO in Japan to discuss anticipated sales of the systems in the United States. Meikikou provided English warning labels for the tables to be placed on the tables once installed. Meikikou also provided an operation manual in Japanese that was to be used in preparing an English manual for the system, but was not involved with the final manual.

On appeal from the dismissal of its action, plaintiff contends that Meikikou consented to the district court's jurisdiction by filing a crossclaim against codefendants and by stipulating to allowing crossclaims against itself and others, and by delaying its motion for dismissal until over one year after the action was commenced. The court observes that participation in the litigation, standing alone, does not constitute a waiver of its jurisdictional defense. The court finds that the delay in pursuing dismissal was not a waiver of the defense.

Most of the court's analysis focuses upon whether the facts show sufficient minimum contacts for Minnesota to exercise personal jurisdiction over Meikikou. The court observes that Meikikou had knowledge that its scissor-lift table would be placed in the stream of commerce eventually resulting in the machine being used in the United States. However, no facts were established indicating that Meikikou had knowledge that the scissor-lift would be sold specifically in Minnesota, and there were no facts supporting any conduct on Meikikou's part to target Minnesota with its product.

Therefore, the court concludes that there are no contacts with Minnesota, and therefore no due process basis for personal jurisdiction. *Juelich v. Yamazaki Mazak Optonics Corporation*, 670 N.W.2d 11 (Minn. App. 2003).

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CRIMINAL LAW

JUDICIAL LAW

■ **CONTROLLED SUBSTANCE; IDENTITY OF SUBSTANCE; SCIENTIFIC TESTING OF WEIGHT.** Appellant and a coconspirator arranged a drug sale of a pound of methamphetamine to an undercover officer. During the transaction, the undercover officer handled the package, which appeared to be approximately one pound of methamphetamine by color and size. The undercover agent noticed that the package had a slimy or greasy covering, and smelled of cinnamon, but not the characteristic odor of methamphetamine. The undercover agent testified at trial that he had done three or four hundred undercover buys, and was convinced that the substance shown by the appellant was methamphetamine; however he could not say with 100 percent certainty that the packaged substance was methamphetamine. The sale went awry and the appellant sped off in a vehicle, tossing the package from the window of his vehicle. The package was never recovered. During the subsequent arrest process, the appellant did admit that he had planned to sell a pound of methamphetamine.

Held, the conviction is reversed because the evidence is legally insufficient to identify the contents of the package as methamphetamine, and because the package was not scientifically tested to ascertain its weight. *State v. Robinson*, 517 N.W.2d 336 (Minn. 1994) has held that the state must establish the requisite weight through scientific testing. The Court of Appeals holds that where weight is an element of the drug offense, such scientific testing is required to establish the requisite weight. Finally, the court holds that the appellant's belief that the controlled substance is what he represented it to be is not, without more, legally sufficient to establish the identity of the substance as methamphetamine. There was no evidence in the record that the appellant independently tested the substance obtained from his source. ***State v. Alan George Olhausen, Jr.***, C1-02-1361 (Minn. App. 09/30/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0309/op021361-0930.htm>

■ **EXPERT; GANG EXPERT; IMPUTED KNOWLEDGE.** The appellant was in a motor vehicle with several passengers who were members of a gang known as the True Asian Bloods. The appellant was a member of a more prestigious gang known as the Tiny Men Crew ("TMC"). A gang expert testified that because of the authority structure of the gang world, the appellant, a member of the TMC, would have been the most powerful person in the vehicle and would have been able to tell the others what to do. The expert further testified that given the appellant's position, he would have been aware of what was going on in the car and what activity his passengers were involved in. Appellant testified that he thought the passengers were going to buy marijuana, but he had no idea they planned to rob a motel. The gang expert's testimony was submitted to corroborate the accomplice testimony and was used by the state to establish that the appellant was in charge of his passengers, had the authority to direct the activities, and had been aware of everything happening.

The Court of Appeals concludes that such corroborating evidence confirmed the truth of the testimony of the accomplices, and was properly admitted. ***State v. Na Her***, C5-03-28 (Minn. App. 09/30/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0309/op030028-0930.htm>

■ **EXPERT; GANG EXPERT; IMPUTED KNOWLEDGE; PROBATIVE VERSUS PREJUDICIAL VALUE.** Appellant was charged with and convicted of first-degree murder, committed for the benefit of a gang. Testimony at trial included actual evidence from other Latin King gang members and associates who had agreed to testify. These witnesses provided numerous pieces of information about the appellant's gang affiliation. However, the trial court allowed a gang expert to testify about the history of several Hispanic gangs, and it was his opinion that the appellant was a member of a gang.

Held, if the admission of the gang expert's testimony was error, and "beyond the margin of what we deem acceptable," there was little, if any, value to this expert testimony, especially when considered in light of its probative versus prejudicial value. Testimony that a person is a member of a gang comes close to being testimony as to the mental state of a defendant, which is excludable as expert testimony. However, in this case, the error was harmless, given the testimony of the other witnesses. ***State v. Roberto Lopez-Rios***, C9-01-1372 (Minn. 10/09/03).

■ **EXPERT; GANG EXPERT; IMPUTED KNOWLEDGE; ERROR TO ADMIT.** In a controlled-substance sale case, the state called a member of the Minnesota Gang Strike Force (MGSF) to testify as an expert witness regarding gangs in general and the gang in which the state suspected appellant was a member. The gang expert testified about the MGSF's ten-point gang identification criteria, and applied these directly to the defendant and others, concluding that he was a member of the New Breed-Black Gangsters gang. This expert testimony came subsequent to several witnesses called by the state who testified to the appellant's gang-related activities.

Held, the admission of the gang expert's testimony was error: the expert's testimony was not in any

way helpful to the jury to make specific factual determinations which were ultimately at issue. The gang expert's testimony in this case was not necessary, given that the case was about a simple drug conspiracy and the expert's testimony was duplicative of evidence given by those with first-hand knowledge that the appellant was associated with a gang. It was neither helpful, nor relevant, to the fact issues before the jury to have expert testimony concerning the general activities of gangs, including the gamut of crimes typically committed by gangs. Citing *U.S. v. Lombardozi*, 2003 WL 1956290 (S.D.N.Y. 2003), "The allegation that a defendant is in the mob is not a shibboleth, the mere incantation of which opens the door to extensive expert evidence in resolving factual issues." However, the admission of such expert testimony was harmless, given the testimony of the other witnesses. **State v. Montell Andre DeShay**, C9-01-1128 (Minn. 10/09/03). <http://www.lawlibrary.state.mn.us/archive/supct/0310/op011128-1009.htm>

■ **EXPERT; GLOBAL POSITIONING SYSTEM TECHNOLOGY; FRYE-MACK.** The record indicates that the trial court did not abuse its discretion in admitting GPS technology. The GPS system has existed for many years, and has been used in the agricultural community since 1992. The court does not find persuasive the appellant's argument that since the federal government does not recognize the old data using GPS type monitors for purposes of crop insurance, such expert testimony was not reliable or helpful to the jury. **State v. David Charles Pirsig**, C0-02-1688 (Minn. App. 10/28/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0310/op021688-1028.htm>

■ **PROCEDURE; LOTHENBACH; ON-RECORD WAIVER OF JURY TRIAL.** Because the appellant did not properly waive his right to a jury trial on the record before proceeding with a *Lothenbach* procedure, the conviction is reversed and remanded for a new trial. There must be an inquiry on the record of the appellant's understanding that he was waiving his right to a jury trial. **State v. Gregory John Bunce**, C0-02-1433 (Minn. App. 09/30/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0309/op021433-0930.htm>

■ **PROCEDURE; ALTERNATE JUROR; SUBSTITUTION FOLLOWING DISCHARGE; PRESENCE OF DEFENDANT.** Following the final jury instruction, the trial court judge discharged three alternate jurors. One of the 12 principal jurors became ill almost immediately, and needed medical assistance. The record clearly indicates that the 12 principal jurors had not yet begun deliberations when one of them became ill. The trial judge recalled the first alternate juror, who stated under questioning that she had not discussed the case with the alternates or anyone else following her discharge. The defendant authorized his attorney to consent to the substitution, but contended he was not physically present in the courtroom to personally state his consent. The record is not clear whether the defendant was present in the courtroom when the district court questioned and substituted the alternate juror.

Held, the district court did not err. The defendant may waive his right to be present when an alternate juror is substituted if the defendant has delegated to his attorney such authority to agree to the substitution. There is no rule requiring a defendant to be physically present upon juror substitution. The only requirement is that the defendant has personally consented to the alternate juror substitution. **State v. David Charles Pirsig**, *supra*.

■ **PROCEDURE; RIGHT TO COUNSEL; WAIVER; PRO SE.** The trial court abused its discretion by failing to obtain a written waiver of the right to counsel, or making a record of the defendant's declination of counsel at trial. The appellant had been charged with misdemeanor assault and disorderly conduct. During a colloquy at bench, the trial court was told that the appellant had made \$69,000 in the first 11 months of the calendar year. Upon hearing this, the trial court determined that he did not qualify for the appointment of a public defender. The appellant moved for a continuance, which was denied. There was no written waiver or other waiver of counsel by appellant, on the record. Following trial, the jury convicted the appellant of disorderly conduct and one count of fifth-degree assault.

Held, the appellant was entitled to a new trial because the district court violated his right to counsel by not obtaining an on-the-record or written waiver of counsel by the appellant, and the district court did not make a record that demonstrates that the appellant refused counsel. **State v. Mark Thomas Hawanchak**, CX-02-2217 (Minn. App. 10/21/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0310/op022217-1021.htm>

■ **SEARCH AND SEIZURE; AUTOMOBILE STOP; CITIZEN TIP.** An on-duty police officer received a tip from an identified private citizen that the appellant had almost run him off the road, was driving a red Acura Integra, was 45-50 years old, there was a woman in the front seat, and the driver was "driving like a maniac," weaving in and out on both sides of the road. The citizen said the Acura was driving west on a particular road approaching a particular intersection. The 911 operator sent the dispatch, which was received by an on-duty Chaska police officer, who stopped the appellant outside the Chaska

city limits. The police officer's stop was based entirely on the citizen report, and the officer did not personally observe any moving violation.

Held, the stop was appropriate. Both Minn. Stat. §629.40 and *State v. Tileskjoer*, 491 N.W.2d 893 (Minn. 1992) allow out-of-jurisdiction arrests. The Court of Appeals rejects the defense argument that the statute and case apply only to arrests and not investigatory stops. Next, the Court of Appeals upholds the stop, finding that the citizen tip was reliable because it contained a factually specific report of unlawful driving. The informer believed the driver was driving illegally. The court rejects the defense position that the citizen tip should be linked to possible alcohol-impaired driving. The law does not require the citizen to provide a reason for the illegal driving conduct, but merely an objective, factually specific description. The court notes that it has previously rejected the suggestion that the mere conclusion of an informant that a driver was "possibly intoxicated" would be a sufficient factual basis for a traffic stop, citing *Rose v. Commissioner of Public Safety*, 637 N.W.2d 326 (Minn. App. 2001), review denied (Minn. 03/19/02). **Danny Edward Yoraway v. Commissioner of Public Safety**, C5-03-241 (Minn. App. 10/07/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0310/op030241-1007.htm>

■ **SEARCH AND SEIZURE; PROTECTIVE SWEEP; ADJOINING AREA; PROXIMATE AREAS.** In this case of first impression in Minnesota, the Court of Appeals holds that law enforcement officers may conduct, as a precautionary measure, protective sweep searches of areas immediately adjoining the place of arrest without probable cause or reasonable suspicion to believe criminal conduct is occurring. In addition, the Court of Appeals also holds that officers may conduct such a protective sweep of the areas near, but not immediately adjacent to, the place of arrest if articulable facts and rational inferences from those facts warrant a reasonable suspicion that the area to be searched harbors one or more individuals who threaten the safety of officers and others at the scene, following *Maryland v. Buie*, 494 U.S. 325 (1990). In this case, police officers were executing a warrant for the arrest of the appellant at his home. In approaching the driveway, they saw a detached pole barn with the garage-style door raised approximately four feet from the ground. They saw individuals from the waist down standing near a vehicle, announced their presence, and one John Hanson emerged. Hanson gave evasive answers, but ultimately admitted that the appellant was inside the barn. Officers shouted for appellant, who exited the pole barn and was arrested. Deputies then searched the interior of the barn, where they found no other persons, but observed evidence indicative of methamphetamine manufacturing, which was later used to convict the appellant.

The Court of Appeals upholds the search of the nonadjacent pole barn, finding that the appellant's potential for violence, Hanson's evasive answers, and the evidence of methamphetamine manufacturing supported a conclusion that the deputies had a reasonable suspicion that another individual who posed a danger to the deputies' safety was inside the pole barn. **State v. Daniel James Bergerson**, A03-112 (Minn. App. 10/28/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0310/opa030112-1028.htm>

■ **FORFEITURE; EXCESSIVE PUNISHMENT; CONSTITUTIONALITY.** Appellant's vehicle, forfeited following a conviction for first-degree driving while impaired, was worth approximately \$16,000. Appellant was unemployed, collected unemployment benefits, and was able to afford the vehicle only after receiving a severance package worth \$79,200 from her employment. The district court had held that due to the appellant's financial circumstances, any forfeiture of the vehicle in excess of \$1,000 would violate the excessive fines clause of the United States and Minnesota constitutions.

Applying the *Solem* factors in examining whether the forfeiture was grossly disproportional, the Supreme Court holds that the forfeiture of the vehicle was not grossly disproportionate to the gravity of the offense, and the forfeiture does not violate the excessive fines clauses of either the United States or Minnesota constitutions. The Supreme Court discusses, without adopting, the theory that the extent that harshness of the forfeiture can be measured by a defendant's unique financial circumstances. **Debra Jane Miller v. One 2000 Pontiac Aztek**, C8-02-613 (Minn. 10/16/03). <http://www.lawlibrary.state.mn.us/archive/supct/0310/OP0206131016.htm>

■ **FORFEITURE; BONA FIDE SECURITY INTEREST; PRIVATE LOAN.** Appellant's vehicle was forfeited pursuant to her conviction for an under-the-influence violation under Minn. Stat. §169A.20. Appellant claimed that the forfeited vehicle was subject to a private security interest because her mother had lent her money to purchase the vehicle, but the mother had not been served with a notice of forfeiture. The mother testified that she paid \$9,500 toward the purchase price of the vehicle, and that she and the appellant had orally agreed that the money was a loan and would be repaid at a 6 percent annual interest rate. A copy of the payment schedule was placed in evidence as were four canceled checks with the mother as payee, each with a memo that the payment was for the car loan. The mother testified that she was

unaware that she had to file a security interest with the state of Minnesota. The mother's name does not appear on the title. In light of the above, the state did not have notice of the mother's security interest.

Held, the evidence is insufficient to support a conclusion that the mother has a bona fide security interest in the vehicle. While a "perfected" security interest is not required under *Stanton v. 2000 Mazda*, 660 N.W.2d 137 (Minn. App. 2003), the mother did not guarantee the loan with her savings account, the appellant did not write a letter pledging the motor vehicle as collateral for the loan, and neither party presented any evidence that the appellant's vehicle was collateral for the loan. Hence, the Supreme Court declines to expand *Stanton*, and declines to find that the mother had a "bona fide security interest."

Sharon Lynn Blackwell v. 2002 Kia 4 Door, CX-03-395 (Minn. App. 10/14/03). Dissent by Judge Randall. <http://www.lawlibrary.state.mn.us/archive/ctappub/0310/op030395-1014.htm>

■ **JUVENILE; EJJ; PROBATION REVOCATION PROCEEDING; MOTION TO DEPART** Appellant entered a plea to first-degree criminal sexual conduct, and was given a 144-month stay of execution, and placed on juvenile probation pursuant to EJJ procedures. At a probation revocation hearing, based upon a new act of criminal sexual conduct, the appellant argued that the court should have considered a durational or dispositional departure in the original sentence. Held, in any EJJ proceeding, the statute mandates that the initial disposition of the adult sentence is a stay of execution. Minn. Stat. §260B.130, subd 4 (2) (2002). Hence, the district court lacks the discretion to impose a different disposition. This result is in contradistinction to *State v. Fields*, 416 N.W.2d 734 (1987), in which the Supreme Court held that a district court could consider a defendant's argument, raised for the first time in an adult probation revocation hearing, that the sentencing court had not given adequate reasons when it imposed an upward durational departure in sentencing. **State v. Steven Joe Bollin**, A03-603 (Minn. App. 10/24/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0310/opa030603-024.htm>

■ **EVIDENCE; REVERSE SPREIGL V. THIRD PARTY PERPETRATOR EVIDENCE; STANDARDS FOR ADMISSION.** This case contains a detailed discussion, primarily in the concurring and dissenting opinions, of the distinction between reverse *Spreigl* evidence and third party perpetrator evidence. **State v. Jamie Glenn**

Richardson, C9-02-815 (Minn. 10/23/03). <http://www.lawlibrary.state.mn.us/archive/supct/0310/op020815-1023.htm>

■ **EVIDENCE; COMPETENCE; HEARING.** The trial court abused its discretion when it determined that a child victim of sexual abuse was incompetent to testify without conducting an examination of the four-year-old's ability to understand the obligation of the oath, and her ability to narrate events that she would be called to testify about. Although the Court of Appeals finds no legal authority that explicitly requires the district court to examine the proposed witness personally, "this is the customary procedure." **State v. David Scott Sime**, A03-279 (Minn. App. 10/21/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0310/opa030279-1021.htm>

■ **MENTAL ILLNESS DEFENSE; AUTOPSY PHOTOS; RELEVANCE.** The district court did not abuse its discretion when, after carefully weighing the probative value against any prejudicial effect, it admitted selected crime scene and autopsy photographs during the mental illness phase of the appellant's trial. The procedural status presented the Supreme Court with a unique issue. Here, the guilt phase was before a judge, with the mental illness phase before a jury. The district court correctly determined that the photographs were relevant to the question of whether the appellant knew the nature and consequences of his acts, and rejected the defense argument that autopsy diagrams, rather than photos, were sufficient. **State v. Lawrence Scott Dame**, C8-02-1597 (Minn. 10/23/03). <http://www.lawlibrary.state.mn.us/archive/supct/0310/op021597-1023.htm>

■ **SALE OF LIQUOR TO MINORS; VICARIOUS "CORPORATE" LIABILITY.** Minn. Stat. §340A.503, subd. 1 (a) (1), which makes it a misdemeanor for a retail liquor licensee to permit any person under the age of 21 to drink alcoholic beverages, requires proof beyond a reasonable doubt that the licensee had knowledge of, authorized, or tolerated, or ratified the allegations. The statute simply states that it is a misdemeanor for an establishment to "permit" any person under the age of 21 to drink alcoholic beverages on the premises of the licensee. The parties stipulated that the appellant in this case "asserts," and the state has no evidence to dispute, that it had not authorized or directed the waiter to sell, serve, allow or permit consumption of alcoholic beverages by underage persons in the bar, and that it had specifically trained and instructed its employees, including the particular waiter, not to do so. In this case, the waiter served two 20-year-old patrons without asking either of them to produce identification. One of the patrons was later involved in a fatal car accident.

The holding of this case concludes that the meaning of the word "permit" requires a clear element of knowledge of the violation by the licensee. **State v. Wohlsol, Inc.**, A03-521 (Minn. 10/21/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0310/opa030521-1021.htm>

■ **SENTENCE; ATTEMPTED MURDER OF UNBORN CHILD; CONSECUTIVE SENTENCE.** Appellant attempted to kill his girlfriend, who was pregnant with his child. In doing so, he stated: "I'm going to kill you" The mother was taken to a hospital, telling doctors that she was just over one month pregnant. While the unborn child was apparently unharmed, the mother underwent surgery which, she was advised, could cause a miscarriage or birth defects. While the mother elected to proceed with the surgery, she also elected to terminate the pregnancy about one month after she was shot. At trial, the presiding judge gave the standard Crim. JIG 1.33, and 11.34, which states that the attempted murder of an unborn child may encompass an attempt to effect the death of either the unborn child or "another person." Held, the use of the instruction was within the trial court's broad discretion in instructing a jury. Additionally, the sentencing court did not abuse its discretion by declining to consider the lack of direct harm to, or nonviability of, the unborn child when it imposed consecutive sentences. **State v. Larry Roosevelt Noble**, CX-02-1990 (Minn. App. 10/21/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0310/op0219901021.htm>

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **COMMISSIONS.** Real estate agents, who were independent contractors, were not entitled to receive commissions on properties they had sold when the closings of the properties occurred after they had terminated their business relationship prior to the closings. The Court of Appeals held that the agents were not entitled to payment of contested commissions under Minn. Stat. §181.145, subd. 1, which requires "prompt payment" of wages after employment ends. However, the court upheld a lower court ruling that the agents were entitled to payment on grounds of unjust enrichment. **Evenson v. Hanson**, 2003 Minn. App. LEXIS 1239 (Minn. App. 2003) (unpublished).

■ **UNEMPLOYMENT COMPENSATION.** A plan to begin a competing business and recruit other employees constitutes "misconduct" to disqualify employees from receiving unemployment compensation benefits when the employees are parties to a contract providing a "breach-of-loyalty" clause. The appellate court rejected the claims of two employees for benefits on grounds that their effort to engage in competitive activities constituted "misconduct" in light of a clause in their employment agreements allowing termination for "substantial material breach of loyalty to the corporation." **Hamman & Warner v. Transportation Center for Excellence, Inc.**, 2003 Minn. App. LEXIS 1242 (Minn. App. 2003) (unpublished).

In a separate case, an employee, who refused to discuss with her supervisor her prospective return to work following an illness, was directed by the chairman of the board to be disqualified from receiving unemployment compensation benefits. The employee's refusal to comply with the instruction from the board chairman to discuss her job status with her supervisor or take other steps to return to work constituted "misconduct," notwithstanding the employee's claim that her doctor advised that she be excused from work until she could meet with the board to discuss her situation. A dissenting opinion would have permitted unemployment compensation benefits on grounds that the employee had a "good-faith belief" that she had a medical excuse and an understanding that she would be contacted by the board to discuss her job status before she returned to work. **Lindsay v. White Earth Land Recovery Project**, 2003 Minn. App. LEXIS 1228 (Minn. App. 2003) (unpublished).

An employee at a gambling casino who lost her gaming license due to an unrelated felony conviction for providing false information to the police was disqualified from receiving unemployment benefits in another unpublished decision of the Court of Appeals. The loss of the gaming license constituted "misconduct" even though the offense was not work-related, therefore disqualifying the employee from benefits. **Theisen v. Fond du Lac Management, Inc.**, 2003 Minn. App. LEXIS 1277 (Minn. App. 2003) (unpublished).

An executive director who quit because management was unable to resolve workplace conflicts between her and a coworker was not entitled to benefits where she did not have "good reason" to quit because management tried to remedy the situation and encouraged her to keep working. **Malinsky v. Caryn**, 2003 Minn. App. LEXIS 1281 (Minn. App. 2003) (unpublished).

■ **DISCRIMINATION.** An employee was properly denied a promotion because of low interview scores, coupled with concerns by a supervisor about the employee's leadership and decision-making abilities. The 8th

Circuit Court of Appeals rejected the claim of the employee, who was an African-American, that he was discriminated against because of race, since his evidence consisted of “subjective assertions that did not demonstrate that the employer’s decision was pretextual.” *Brooks v. Ameren UE*, 2003 U.S. App. LEXIS 20434 (8th Cir. 2003).

An employee who violated a second “last chance agreement” not to use alcohol, leading to his conviction for DWI, could not sue for disability discrimination under the Americans with Disabilities Act (ADA). The 8th Circuit Court of Appeals, affirming a ruling of the Federal District Court in Minnesota, held that the terms of the agreement did not violate the ADA or parallel disability discrimination provision of the Minnesota Human Rights Act. *Longen v. Waterous Company*, 2003 U.S. App. LEXIS 21190 (8th Cir. 2003).

The 8th Circuit reversed dismissal of a racial discrimination claim by an African-American truck driver who was not hired after submitting an allegedly incomplete job application form. The employee’s claim that he was not hired after a supervisor told him not to list ten years of his employment history on his job application form could lead a jury to conclude that the employer’s reason for not hiring him — that his application form was incomplete — was pretextual. *Kenney v. Swift Transportation, Inc.*, 2003 U.S. App. LEXIS 21047 (8th Cir. 2003).

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ENVIRONMENTAL LAW

JUDICIAL LAW

■ **ENVIRONMENTAL LIABILITY; RELEASES.** The United States District Court for the District of Minnesota recently held that a general but broad release of environmental liability does not cover claims for groundwater contamination unknown to the parties at the time the release was executed, absent evidence that the parties contemplated groundwater contamination and intended to include it in the scope of the release.

In 1981 and 1982, Vopak, Inc.’s corporate predecessor, McKesson Chemicals, spilled trichloroethylene (“TCE”) on the ground at Jostens’ facility in Princeton, Illinois. McKesson admitted to the spills and, in 1982, reimbursed Jostens for cleaning up the contaminated soil. At McKesson’s request, one of Jostens’ employees signed a release that purported to release McKesson from all liability, whether known or unknown, arising from the TCE spills. According to the release, Jostens released McKesson from liability for “any matter arising out of or resulting from or in connection with” the TCE spill or sale of TCE to Jostens. Ten years later, TCE was discovered in groundwater and Jostens sued Vopak to recover some of Jostens’ cleanup costs. Vopak asserted that Jostens’ release in 1982 barred Jostens’ claim.

Applying Illinois law, the court concluded that the release, despite its broad language, did not extend to liability for groundwater contamination because there was no indication that the parties contemplated such contamination at the time they executed the release. According to the court, there was no evidence that the parties discussed the possibility of groundwater contamination or anything other than the contaminated topsoil that Josten’s removed in 1982. In dicta, the court also noted that Jostens’ employee probably did not have authority to sign the release on Jostens’ behalf. *Jostens, Inc. v. Vopak, Inc.*, Civ. No. 02-3761 (DWF/JSM), 2003 U.S. Dist. LEXIS 6 (D. Minn. 10/23/03).

■ **CLEAN AIR ACT; NEW SOURCE REVIEW.** Thirteen states and more than 20 cities have filed federal lawsuits claiming that the new rules promulgated by the EPA under the Clean Air Act’s New Source Review Program violate the act. The new rules allow companies to upgrade their facilities without installing additional pollution controls if the annual cost of the upgrades does not exceed 20 percent of a plant’s value. Geoff Dutton, “Analysis of U.S. EPA Data: Power Plants in Ohio Emit Most Pollution,” *The Columbus Dispatch*, 10/29/03 at 01C.

RULEMAKING

■ **HAZARDOUS WASTE; IDENTIFICATION NUMBERS.** On September 24, 2003, the EPA stopped issuing waste ID numbers for companies that generate and transport hazardous waste. Waste ID numbers for Minnesota facilities may now be obtained from the Minnesota Pollution Control Agency. For more information, see <http://www.pca.state.mn.us/publications/w-hw0-11.pdf>.

■ **ABOVE-GROUND STORAGE TANKS; UPGRADING REQUIREMENTS.** The deadline for compliance with certain upgrading requirements for above-ground storage tanks in Minnesota, such as installation of corrosion and overfill protection equipment, was November 1, 2003. Facilities with covered

tanks were required to upgrade the tanks, or empty and close or remove them. Minn. R. 7151.6600, subpt. 6; 7151.6700, subpt. 3 (2001).

— ROBERT F. DEVOLVE
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FEDERAL PRACTICE

JUDICIAL LAW

■ **CERTIORARI GRANTED; DIVERSITY JURISDICTION; DEFECT CURED PRIOR TO ENTRY OF JUDGMENT.** The Supreme Court has granted *certiorari* to review a 5th Circuit decision addressing whether defects in diversity jurisdiction may be cured prior to the entry of judgment.

Atlas, a Texas limited partnership which included two Mexican citizens as partners, commenced a purported diversity action against Dataflux, a Mexican corporation. Sometime prior to trial, the Mexican citizens were removed as Atlas partners. After a jury trial, Atlas was awarded \$750,000 in damages. Only then did Dataflux move to dismiss the action based on the earlier absence of diversity jurisdiction. The district court granted Dataflux's motion, and Atlas then appealed to the 5th Circuit.

On appeal, the parties agreed that diversity was lacking when the case was filed, and that diversity was present by the time the case went to trial. Not surprisingly, Dataflux argued that the initial defect could not be cured, while Atlas argued that jurisdiction was proper where the jurisdictional defect had been remedied prior to trial. The 5th Circuit noted several "exceptions" to the "general principle" that federal jurisdiction "ordinarily depends on the facts as they exist when the complaint is filed," and held that one of these "exceptions," adopted by the Supreme Court in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S. Ct. 467 (1996), would allow a jury verdict to stand in a situation where neither the parties nor the judge raises the jurisdictional issue until after a jury verdict has been rendered or the court has issued a dispositive ruling, and the jurisdictional defect had been cured prior to the ruling or verdict. Accordingly, the 5th Circuit reversed the district court and remanded the case with instructions to enter judgment in favor of Atlas.

In a vigorous dissent, Circuit Judge Garza argued that the majority had crafted a "new exception" that "threatens to swallow the [diversity] rule" and would encourage parties to "waste many more judicial resources." *Atlas Global Group, L.P. v. Grupo Dataflux*, 312 F.3d 168 (5th Cir. 2002), *cert. granted*, 72 USLW 3266 (2003).

■ **OTHER NOTEWORTHY DECISIONS.** The 8th Circuit reversed an award of Rule 11 sanctions, finding that the district court abused its discretion in imposing sanctions where the defendant requested sanctions but failed to give the plaintiff the 21-day "safe harbor" required by Fed. R. Civ. P. 11(c)(1)(A) and also failed to file its motion separately as required by that rule. *Gordon v. Unifund CCR Partners*, 345 F.3d 1028 (8th Cir. 2003).

In another Rule 11 case, the 8th Circuit reversed Judge Ericksen's denial of the defendant's motion for Rule 11 sanctions, finding that the court had abused its discretion in refusing to sanction plaintiff's counsel for attempting to relitigate claims that were barred by "well-settled" law. *Professional Management Associates, Inc. Employee's Profit Sharing Plan v. KPMG, LLP*, 345 F.3d 1030 (8th Cir. 2003).

Judge Frank granted a defendant's motion to transfer to the Southern District of Iowa under 28 U.S.C. §1404(a), finding that a plaintiff's choice of forum is entitled to "substantially less weight" if the "operative events" underlying the litigation took place in some other judicial district, and that the "convenience of the parties" also weighed in favor of the transfer. *Road Machinery & Supplies Co. v. Federal Signal Corp.*, 2003 WL 22326577 (D. Minn. 10/07/03).

The 8th Circuit affirmed the dismissal of plaintiffs' claims as a discovery sanction, finding that plaintiffs' history of *ex parte* communications, obstruction of discovery, failure to pay sanctions previously imposed, and their own baseless motions for sanctions more than justified the dismissal of their claims. *Good Stewardship Christian Center v. Empire Bank*, 341 F.3d 794 (8th Cir. 2003).

Judge Tunheim granted plaintiffs' motion for a temporary restraining order conditioned on their posting a \$5,000 bond, but subsequently reduced the bond requirement to \$1,000 on the basis that the plaintiffs were "pursuing a public purpose" and were "not seeking compensatory damages." *Masterman v. Goodno*, 2003 WL 22283368 (D. Minn. 09/16/03) and 2003 WL 22283375 (D. Minn. 09/25/03).

Judge Tunheim reversed the Clerk's taxation of costs against the plaintiffs in a ERISA case, finding that the specific ERISA provision relating to the assessment of costs trumped the general costs provisions of Fed. R. Civ. P. 54(d)(1). *Harley v. Minnesota Mining and Manufacturing Co.*, 2003 WL 22283345 (D. Minn. 09/23/03).

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INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **PATENTS; PROSECUTION HISTORY ESTOPPEL; EQUIVALENTS.** It just keeps going and going and going. The latest appellate opinion in *Festo v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, No. 95-1006 (Fed. Cir. 09/26/03) (**Festo IX**) has some very important new law relating to prosecution history estoppel and the doctrine of equivalents. Prosecution history estoppel is a doctrine that bars the patent owner from reclaiming as an equivalent that which was given up during the prosecution of the patent application (prosecution history), given up by amending the original patent claims or making arguments about them to the Patent and Trademark Office.

The new law has two aspects: the procedure to be followed in a prosecution history estoppel inquiry and the roles of the judge and jury. The new procedure requires stepping through a series of three questions. The first question is whether an amendment filed in the PTO has narrowed the literal scope of a claim. If not, prosecution history estoppel does not apply. If the accused infringer establishes that the amendment narrowed the scope of the claim, however, then the second question is whether the reason for that amendment was one relating to patentability. A presumption that the amendment was related to patentability arises when the prosecution history reveals no reason for the narrowing amendment. If the patentee can rebut the presumption, however, the estoppel does not apply. If not, another presumption arises — that the patentee surrendered all territory between the original claim and the amended claim. The third question is whether the patentee can rebut this final presumption (the *Festo* presumption) by demonstrating that it did not surrender the particular equivalent at issue. If so, prosecution history does not apply.

The *Festo* presumption can be overcome by: (1) showing that the equivalent in question was unforeseeable at the time the narrowing amendment was made (unforeseeability); (2) demonstrating that the narrowing amendment bore only a tangential relationship to the equivalent in question (tangential relationship); or (3) where some other reason prevented the patentee from the equivalent in question during prosecution (some other reason). Overcoming the presumption will be determined by the judge based on restricted evidence.

Whether the presumption is overcome is an issue of law — one for the court, not the jury, to decide. The evidence on which the court may rely is limited. In determining the unforeseeability question, the court may look at objective criteria and may use evidence outside the prosecution history, such as experts. On both the other presumption issues, tangential relationship and “some other reason,” the court is limited to the evidence found in the prosecution history, except to the extent that other evidence is necessary to interpret that history.

So, the bottom line: if a narrowing amendment is made during prosecution, a patentee must overcome the presumption of surrender in one of the above three ways. If the patentee is unable to overcome this presumption, the range of equivalents under the doctrine of equivalents is narrowed by the scope of the surrender. The Court of Appeals already applied this new law in *Deering Precision Inst. v. Vector Dist. Sys. Inc.*, 02-1013, 1197 (Fed. Cir. 10/17/03).

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JUVENILE LAW

JUDICIAL LAW

■ **EXTENDED JURISDICTION-JUVENILE.** There have been several unpublished decisions recently involving Extended Jurisdiction-Juvenile (EJJ). In a case involving a juvenile who received a stayed 58-month adult sentence after being designated EJJ, the Minnesota Court of Appeals held that jail credit should not be given for time served in juvenile custody resulting from a probation violation committed after a Minnesota statute was amended.

Minn. Stat 260B.130, subd. 5 was amended in 2002 to add language that no credit would be given for time served in a juvenile custody facility prior to a summary hearing. The appellant in this case argued that because his initial offense took place in 1999 and the effective date of the amendment was August 2000, the application of the amendment to him would be *ex post facto* and denying his jail credit under the amendment would violate the constitutional prohibition of *ex post facto* laws.

Appellant was ordered to complete a program at MCF-Red Wing as a result of his first probation violation, which occurred after the effective date of the amendment, August 1, 2000. The court held that when a punitive provision of a statute applies only to acts committed after the statute becomes effective, “it is not retroactive and does not violate the *ex post facto* clause.” *State of*

Minnesota v. Garcia, A03-483 (Minn. App. 10/21/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0310/opa030483-1021.htm>

In another EJJ case the Court of Appeals upheld the district court's decision to revoke a juvenile's probation and not consider a dispositional durational departure from a 144-month adult sentence he received for a criminal sexual conduct conviction. The juvenile had been diagnosed as mildly mentally retarded. While on probation, the juvenile committed a similar offense and the sentence was imposed. Appellant argued that the district court should have considered the juvenile's mental retardation as a mitigating factor. However, pursuant to the *Austin* factors as provided in *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980), the court found that there was ample evidence supporting revocation of the juvenile's probation. **State of Minnesota v. Bollin**, A03-603 (Minn. App. 10/24/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0310/opa030603-1024.htm>

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REAL PROPERTY

JUDICIAL LAW

■ **ZONING.** Jackel sued Brower and Steele County (county) asserting numerous claims arising out of Brower's construction of hog confinement barns, including a claim that the facility built in 1996 violated the county set-back requirement and asked the court to enforce the set-back requirement. The district court granted summary judgment and issued an injunction compelling the county to enforce the set-back requirement and compelling Brower to abate the violation. Brower appealed. On appeal the appellate court concluded that the district court abused its discretion by summarily granting injunctive relief absent a finding that there is no adequate legal remedy and that an injunction is necessary to prevent great and irreparable injury. **Jackel, et al. v. Brower, Co. of Steele, et al.**, C2-03-231 (Minn. App. 09/16/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0309/op030231-0916.htm>

■ **MECHANIC'S LIEN.** Phenix acquired a site for its manufacturing plant and commenced construction in December 1996. In the spring of 1997 it ran into financial problems and by April the construction virtually halted except for projects to secure the building. Phenix negotiated a new loan with Rabobank (bank). When Phenix defaulted on its repayment obligations, one of the contractors filed a lien and commenced this action. Subsequently, PBL was formed, and Central Mechanical assigned its lien rights to PBL. After a bifurcated trial, the district court held that the project had been abandoned in April of 1997 and thus, the bank's mortgage was prior to the mechanic's liens. On appeal, the appellate court concluded that where there is an abandonment of the project and the subsequent recommencement of work, mechanic's liens arising from the new work do not relate back to the original start of construction. The physical, visible condition of the property, to be determined from an inspection of the premises, is an essential element of whether a project has been abandoned. Affirmed. **Langford Tool & Drill Co. v. Phenix Biocomposites, LLC, et al.**, C2-02-2146 (Minn. App. 09/09/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0309/op022146-0909.htm>

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TAX

JUDICIAL LAW

■ **SHAM TRUSTS FOR FEDERAL TAX PURPOSES.** The Tax Court held that the taxpayers' trusts were sham trusts for federal income tax purposes because the taxpayer maintained unfettered control over the trust. Taxpayer who was the settler and trustee of the trust maintained powers of disposition and beneficial control of the trust, paid personal expenses from the trust, and had signatory authority over the trust. **Carey v. Comm'r**, T.C.M. 2003-281 (2003)

■ **PERSONAL PHYSICAL INJURY EXCLUSION FROM INCOME.** Taxpayer was a guard at a juvenile correctional facility and was injured on the job. He recovered front and back pay damage awards under the ADA. The Court of Appeals held that front and back pay awarded in an employment discrimination suit filed under the ADA did not meet the "personal physical injuries" exclusion from income under the Internal Revenue Code. **Johnson v. U.S.**, 92 AFTR2d 2003-5969 (D. Co. 2003).

■ **TRUST FUND RECOVERY PENALTY.** A person who briefly served as an unpaid president of a nonprofit social club did not qualify as a responsible person who willfully failed to submit payroll taxes to the IRS. He was found not to be liable for the trust fund recovery penalty. **In re Lartz**, No.

1-00-01864, 91 AFTR2d 2003-2410 (Bankr. M.D.Pa. 2003).

■ **INCOME FROM PERSONAL INJURY EXCLUSION.** Taxpayer received proceeds in a settlement of a pre-1991 discrimination claim against a state education department under Title VII of the Civil Rights Act. The Court of Appeals held that the proceeds were not excludable from gross income, that contingent fees were not includable in gross income, and the concept of duty of consistency for deductibility for alimony payments was misapplied. The court found that the income was not “on account of personal injuries.” Contingency fees paid to an attorney out of a legal settlement are excludable from the client’s taxable income regardless of how the governing state law characterizes a lawyer’s interest in a client’s successful claims. The court rejected the IRS’s view that contingency fees may be viewed as income under the “anticipatory assignment of income” doctrine. *Banks v. Comm’r.*, 345 F.3d 373 (6th Cir. 2003).

■ **EQUITABLE SPOUSE RELIEF DENIED.** The IRS had denied equitable spouse relief against a wife in a situation where the husband filed a joint return without the wife’s knowledge. The Tax Court held that taxpayer was not entitled to equitable spouse relief. The court relied on the facts that taxpayer would not suffer economic hardship by denying equitable innocent spouse relief, taxpayer’s income was sole basis for deficiency, and that taxpayer knew that her earned income was not included on joint return. Taxpayer’s income would not have been taxed had she filed separately, and by opening the mail with the refund check, taxpayer had knowledge that joint return had been filed and that her income had been omitted. *Ziegler v. Comm’r.*, T.C.M. (RIA) 2003-282 (2003).

■ **INTEREST ABATEMENT; 20-YEAR-OLD TAX LIABILITY.** In 1998 the IRS determined a tax deficiency from 1982 denying research and experimental deductions. Taxpayer paid the deficiency but taxpayer’s attempt to abate the interest was denied. The court held that §6404(g)(1) did not apply to abatement applications prior to July 22, 1998, and the IRS did not abuse its discretion in denying the abatement. *Hunt v. Comm’r.*, T.C.M. (RIA) 2003-283 (2003).

■ **PROFIT OBJECTIVE FOUND IN CATTLE-BREEDING ACTIVITY.** A physician and his wife took part in a cattle-breeding venture. The court, in its analysis, separated his motive for the breeding venture from his motive for holding the farmland. The court found that the venture was operated in a businesslike manner, the taxpayers had expertise in the area by previous experience, the taxpayers expended time and effort by hiring a full-time employee, the fact that the herd grew confirmed an expectation of asset appreciation, taxpayer had success in other activities, and, despite the fact they had losses in all years, the losses were consistent with startup costs in the industry. Overall, the court held that the activity was conducted with an actual and honest profit objective. *Burrus v. Comm’r.*, T.C.M. (RIA) 2003-285 (2003).

■ **DEDUCTIONS DENIED FOR ATTORNEY.** Taxpayer was not entitled to certain Schedule C deductions related to his law practice, since little or no evidence was offered with respect to parking, car and truck, travel, meals, and entertainment expenses that would satisfy stringent substantiation requirements, and no evidence of taxpayer’s membership expenses was submitted. Petitioner’s spouse did not elect to itemize deductions on her original return, nor did she consent to itemization when petitioner amended his return. Therefore, petitioner was not entitled to claim deductions on his Schedule A. *Boyd v. Comm’r.*, T.C.M. (RIA) 2003-286 (2003).

■ **EQUITABLE ESTOPPEL.** In order to estop the government, a party must first establish that the government engaged in affirmative misconduct. In the instant case, the 8th Circuit held that equitable estoppel does not apply when a taxpayer relied on statements, both written and oral, by a Revenue Officer that tax from 1983 would be abated and the taxpayer subsequently entered into an installment agreement for 1981 and 1982. However, the taxpayer’s bankruptcy proceeding did allow the IRS to retain the right to collect the 1983 liability from any assets that were exempt from the bankruptcy estate. *Morgan v. Comm’r.*, 345 F.3d 563 (8th Cir. 2003).

■ **TAXPAYER AND CORPORATION BOUND BY STIPULATIONS.** Where the petitioner entered into a Stipulation to Be Bound and a Stipulation of Settled Issues, the stipulations were interpreted by the Tax Court to mean that all of the remaining issues in these cases shall be resolved on the same basis as those issues are finally resolved in the declaratory judgment. Petitioner then challenged the declaratory judgment granted by the Tax Court on the issues in question. The 8th Circuit held that a stipulation is binding on the parties to the extent of its scope, and the court shall not permit a party to a stipulation to qualify, change or contradict a stipulation in whole or in part, except in cases where justice so requires. *Clendenen v. Comm’r.*, 345 F.3d 568 (8th Cir. 2003)

■ **SHAREHOLDER DEDUCTION DISALLOWED; ECONOMIC PERFORMANCE TEST.** Taxpayer was the majority shareholder in related S and C corporations. The S corporation paid service fees to the C corporation pursuant to a deferred compensation plan. The court held that the S corporation failed to satisfy the economic performance requirements pursuant to I.R.C. §461(h). The taxpayer could not prove that both corpora-

tions met the “all events” test of an accrual corporation because the C corporation was on the cash method while the S corporation was on the accrual method. *Weaver v. Comm’r.*, 121 T.C. No. 14, 2003 WL 22300497 (2003),

■ **IRS COLLECTION ACTIVITY; STATUTE OF LIMITATIONS.** An IRS appeals officer did not abuse his discretion in determining that the IRS could proceed with collection of late taxes and penalties. Taxpayer contended that the statute of limitations on assessment should not have been tolled when he lacked knowledge and consent to his attorney’s filing of a petition to the Tax Court and the notice of deficiency accompanying the petition was his wife’s and not his. The court relied on the fact that he met all of the filing requirements and the attorney represented him in other matters during the time period in question. *Martin v. Comm’r.*, T.C.M. (RIA) 2003-288 (2003),

■ **GOLDEN PARACHUTE PAYMENTS NOT DEDUCTIBLE.** A successor company made payments to executives that were retained after the corporate acquisition. The payments were made according to an agreement entered into after the acquisition; however they were received pursuant to a change in ownership or control that happened at the time the corporation was acquired. The court held that the golden parachute payments were not deductible as compensation because the executives were able to obtain key terms in their employment agreement due to the terms of their agreement with their former employer, which would have been triggered by a change in control. The court found that the payments would not have been made but for the contingency clause in the earlier agreement and the bargaining power the clause gave to the executives when control changed. *Square D Co. v. Comm’r.*, 121 T.C. No. 11, 2003 WL 22221166 (2003). N.B.: The IRS has also corrected its final regulations concerning Golden Parachutes and I.R.C. §280G in T.D. 9083.

■ **LACK OF JURISDICTION OVER RESTRAINING ORDER AND PRELIMINARY INJUNCTION UPHELD.** The 4th Circuit Court of Appeals affirmed the district court’s determination that jurisdiction was lacking over a taxpayer’s attempt to obtain a temporary restraining order and preliminary injunction to prevent the IRS from levying his wages. *Follum v. U.S.*, 92 AFTR2d 2003-6386 (4th Cir. 2003)

■ **PROOF OF PHYSICAL CUSTODY.** Taxpayer and his exwife had joint custody over their daughter, but the wife was given primary custody. However, taxpayer kept a diary of time spent with his daughter and claimed that she was in his physical custody for more than half of the year. The Tax Court held that taxpayer had more than 50 percent physical custody of his daughter for 1998; therefore he was entitled to a dependency exemption, head-of-household filing status, and a child tax credit. *McCullar v. Comm’r.*, T.C.M. (RIA) 2003-272 (2003).

■ **IRC SECTION 83(H) DEDUCTION; COMPENSATION BY PROPERTY TRANSFER IN LIEU OF MONEY.** Where taxpayers, sole shareholders in a group of affiliated S corporations, differed with COO regarding the value of property transferred to him as compensation because the lower valuation reported on his return diminished their business deductions, the Federal Circuit Court of Appeals found that the case turned on whether the §83(h) word “included” meant what was actually reported or what should have been included on the COO’s return. The court found for the shareholders and said “included” means what should have been included on the return. *Robinson et al. v. U.S.*, 335 F.3d 1365 (Fed. Cir. 2003).

■ **OFFER IN COMPROMISE; CHAPTER 11 BANKRUPTCY.** Taxpayer presented an offer in compromise during a Chapter 11 proceeding and the IRS refused to consider it. The court ordered the IRS to receive and consider the offer since the congressional intent of Chapter 11 proceedings was in favor of offers in compromise. *In re Holmes*, 298 B.R. 477 (Bankr. M.D. Ga. 2003).

■ **EARLY PLAN DISTRIBUTION; PROPERTY SETTLEMENT; TAX LIABILITY.** The Tax Court held that a divorced husband who paid a judgment to his exwife from a premature plan distribution was liable for the additional tax on the early distribution. The court rejected the argument that his wife was an “alternate payee” under the divorce decree because she was not listed as an alternate payee. *Simpson v. Comm’r.*, T.C.M. (RIA) 2003-294 (2003).

■ **RECAPTURE OF INVESTMENT TAX CREDITS REQUIRED.** Corporation that transferred property to a member of its consolidated group as a part of a tax-free reorganization was required to recapture investment tax credits. *Aeroquip-Vickers, Inc. v. Comm’r.*, 2003 WL 22382576 (6th Cir. 2003).

■ **EIC DENIED; SOCIAL SECURITY CARD “NOT VALID FOR EMPLOYMENT.”** In a Summary Opinion the Tax Court denied an Earned Income Credit to a taxpayer because the qualifying child’s social security card was marked “not valid for employment,” thus making the child’s social security number not valid as a taxpayer identification number. *Cisse v. Comm’r.*, T.C.Summ.Op. 2003-143 (2003).

■ **FORMER TAX EXEMPT ENTITY; AMORTIZATION DEDUCTIONS.** Taxpayer was exempt from income tax in 1983 and 1984. Under the Deficit Reduction Act of 1984 it became non-tax exempt in 1985. During

1983 and 1984 taxpayer incurred costs related to its trade name and trademark. In 1985 taxpayer elected to amortize its 1983 and 1984 expenditures. The court held that taxpayer was not allowed to amortize its 1983 and 1984 expenditures pursuant to I.R.C. §177(a) because of its tax exempt status in those years.

Federal Home Mortg. Corp. v. Comm'r., T.C.M. 2003-298 (2003).

■ **LOSS OF TAXPAYER'S RETURNS; INTEREST ABATEMENT.** The Tax Court held that the IRS's losing taxpayer's amended returns was a ministerial act and that it was an abuse of discretion to refuse to abate interest during the time the tax returns were lost. It was not an abuse of discretion to refuse to abate interest that accrued when the amended tax returns were not lost. **Palihnich v. Comm'r.**, T.C.M. (RIA) 2003-297 (2003).

ADMINISTRATIVE LAW

■ **AUTOMOBILE DEPRECIATION DEDUCTIONS.** Revenue Procedure 2003-75 provides tables for limitations on depreciation deductions for vehicles placed in service during 2003. It also gives the amounts to be included in income for vehicles first leased during 2003 and the maximum allowable value of employer-provided passenger automobiles first made available to employees for personal use in calendar year 2003 for which the vehicle cents-per-mile valuation rule provided under §1.61-21(e) of the Income Tax Regulations may be applicable.

■ **OPTIONAL STANDARD MILEAGE RATES FOR 2004.** The IRS has released the optional standard mileage rates to be used by employees, self-employed individuals, and other taxpayers in computing the deductible costs of operating automobiles for business, charity, medical, or moving expenses. The new rate is 37.5 cents per mile for business purposes; in 2003 the rate was 36 cents per mile. For moving or medical expenses the amount is 14 cents a mile up from 12 cents in 2003. The amount for charitable organizations is also 14 cents a mile. The complete listing of rates is available in Rev. Proc. 2003-76. The rates take effect on January 1, 2004. Rev. Proc. 2003-76.

In addition, taxpayers that use four or fewer vehicles are now eligible to use the standard mileage rate in 2004. The purpose is to reduce record-keeping burdens by making 800,000 more businesses eligible to use the standard rate. In the past taxpayers had to keep actual expenses for each vehicle, which they may still elect to do under the new system. IR-2003-121.

■ **INNOCENT SPOUSE RELIEF; JOINT AND SEVERAL LIABILITY.** The IRS has released Revenue Procedure 2003-61 to replace Revenue Procedure 2000-15. The new procedure adds a threshold requirement, changes the weight accorded to certain factors in determining whether a taxpayer had knowledge or reason to know, and expands availability of refunds in successful equitable relief cases.

■ **FEDERAL TAX LIEN PRIORITY.** A purchaser, holder of a security interest, mechanic's lien creditor, or judgment lien creditor is protected against a statutory tax lien for which a notice of federal tax lien has not been filed, unless the lien holder has actual knowledge of the statutory tax lien. Rev. Rul. 2003-108.

■ **PENSION PLAN LIMITATIONS FOR 2004.** The IRS has announced the cost-of-living adjustments for 2004. Some of the limitations were scheduled to increase under the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) while others have met the thresholds that trigger adjustments. IR-2003-122.

■ **WORK OPPORTUNITY TAX CREDIT.** Rev. Rul. 2003-112 sets forth information on eligibility requirements for the Work Opportunity Tax Credit. Employers who hire members of certain groups may be eligible for a tax credit of 40 percent of first-year wages for eligible employees of up to \$6,000. The most an employer will then receive is a \$2,400 credit. Available at <http://www.irs.gov/pub/irs-drop/rr-030112.pdf>

An individual whose family receives Temporary Assistance for Needy Families (TANF) satisfies the requirements to be a qualified IV-A recipient pursuant to I.R.C. §51(d)(2)(A) if the individual is included on the grant for some portion of the specified time period. Rev. Rul. 2003-112.

■ **QUALIFIED TREATIES FOR REDUCED DIVIDEND RATES.** Revenue Notice 2003-69 and 2003-71 sets forth the list of current U.S. Income Tax Treaties that meet I.R.C. §1(h)(11)(C)(i)(II) requirements to receive reduced tax rates on dividends. The tax rates are at the level of certain capital gains. See also 2003-43 IRB.

■ **NEW TAX RATES FOR INCOME UNDER NEW TAX CONVENTIONS.** Tax rates for various types of tax under income tax treaties and conventions are available. See Announcement 2003-62 and I.R.B. 2003-41.

■ **APPROVED NONBANK TRUSTEES OR CUSTODIANS.** Announcement 2003-54 contains a list of entities that have been approved by the IRS to serve as nonbank trustees or custodians for Archer MSAs, §401 pension accounts, IRAs, Roth IRAs, and Coverdell Education Savings Accounts.

■ **CLEAN-BURNING FUEL DEDUCTION.** The IRS has certified the 2004 Toyota Prius as being eligible for the clean-burning fuel deduction. The deduction can be up to \$2,000 when claimed on Form 1040. News Release IR-2003-114.

■ **SALES AND USE TAX ON GRAVEL REVOKED.** The Minnesota Department of Revenue has issued a Minnesota sales and use tax Revenue Notice No. 03-11 that revokes Revenue Notice No. 95-08, Revenue Notice No. 02-17, and Revenue Notice No. 02-12.

■ **MINNESOTA SALES TAX ON BUNDLED GOODS AND SERVICES.** When nontaxable goods and services are bundled with taxable goods and services, sellers may deduct separately stated charges at the time of sale to the purchaser. Revenue Notice No. 2003-12.

■ **STATE SALES TAX ON PARKING SERVICES.** Revenue Notice 2003-13 states that sales tax applies to nonresidential parking services and defines what is considered "residential" and "nonresidential."

■ **2004 INTEREST RATES ON UNPAID STATE TAXES.** The new interest rate on unpaid Minnesota taxes and refunds is 4 percent; in 2003 the rate was 5 percent. News Release, Minnesota Department of Revenue, 10/13/03.

■ **INCOME ATTRIBUTABLE TO SHORT TAX YEARS.** The IRS has released Rev. Proc. 2003-79 to provide procedures for a partner or S corporation shareholder of such a partnership or S corporation to elect to take into account ratably over four taxable years the partner's or S corporation shareholder's share of income from the partnership or S corporation that is attributable to the short taxable year ending on or after May 10, 2002, but before June 1, 2004.

■ **TREATY EXEMPTION TO FOREIGN INSURANCE EXCISE TAX.** Rev. Proc. 2003-78 provides instructions for establishing exemption from the section 4371 excise tax on insurance premiums paid to a foreign insurer or reinsurer when the exemption is based on the provisions of an income tax treaty to which the United States is a party.

■ **CREDIT COUNSELING ORGANIZATIONS; TAX-EXEMPT STATUS.** In order to protect consumers of credit counseling from being taken advantage of by organizations that enjoy tax-exempt status and are exempt from consumer protections, the IRS is going to enforce that the organizations both counsel and educate consumers. Each organization that applies for tax-exempt status will undergo a full review of its marketing materials and more organizations will be examined by recently retrained officials. FS-2003-17.

The IRS has also issued a consumer alert for persons seeking assistance from tax-exempt credit counseling organizations to protect them from organizations engaging in questionable activities. The news release contains things the consumer should watch out for and places to consult before choosing a credit counseling organization. IR-2003-120, 2003 WL 22384908.

■ **PASSENGER VEHICLE DEPRECIATION DEDUCTIONS.** Rev. Proc. 2003-75 has been revised. The revised text is in sections 2.02 and 2.03 and it clarifies an issue concerning what property is eligible for the 50 percent bonus depreciation when the taxpayer has elected to use the 30 percent additional first-year depreciation.

■ **PER DIEM RULES ON EMPLOYEE TRAVEL EXPENSES.** Rev. Proc. 2003-80 has superseded Rev. Proc. 2002-63. It updates the rules on using per diem allowances in substantiating employees' travel expenses. There are optional methods that a taxpayer may use to compute incidental expenses and business meal expenses or the taxpayer may use actual allowable expenses with adequate record keeping.

■ **ELECTRONIC REPORTING; TRAVEL AND ENTERTAINMENT EXPENSES.** Revenue Ruling 2003-106 specifies when an employer can use electronic expense reporting for travel and entertainment expense procedures to satisfy plan requirements.

■ **RELIEF FOR CALIFORNIA WILDFIRE VICTIMS.** The disaster area counties of Los Angeles, San Bernardino, San Diego and Ventura have been awarded an FTD penalty waiver period for employment and excise tax deposits from October 21 through November 7, 2003; an extension period for returns and other tax payments is October 21 through December 29, 2003; and the disaster designation is "CA Wildfires" which taxpayers are to indicate on certain relief-related forms. The affected taxpayers are individuals and businesses located in the disaster area, those whose tax records are located in the area, and relief workers. Interest will be abated and any late filing or late payment penalties will not occur during the period. The extension does not apply to information returns or to employment and excise tax deposits. Casualty losses are also available to certain taxpayers and may be claimed on an amended last years return for quicker relief. IR-2003-126.

PRACTICE TIPS

■ **NEW FAX GUIDELINES.** New facsimile guidelines will make it easier for taxpayers and practitioners

to correspond with the IRS. The list of documents and information the IRS will accept through fax will expand. The new guidelines apply only to taxpayers and their representatives who are engaged in an on-going contact with the IRS and the fax can only take place after a discussion with an IRS employee who is requesting information. The guidelines cover operations related to income tax, employment tax, excise tax, estate tax, gift tax, and generation-skipping tax. Some forms that may be transmitted are: Requests for Innocent Spouse Relief (Form 9957); Injured Spouse Relief (Form 8379); Taxpayer Statement About a Refund (Form 3911); Installment Agreements (Form 433-D); Collection Information Statement — Wage Earner (Form 433-A); Collection Information Statement — Business (Form 433-B); and Requests for Collection Due Process Hearings (Form 12153). The complete list and guidelines are available at *irs.gov* under the heading "Tax Professional."

■ **PENSION PLAN COMPLIANCE MATERIALS.** The IRS has new free materials available to explain the programs available to help navigate pension plan tax laws. The materials include explanations on how to correct errors in plans. These materials are available at <http://www.irs.gov/newsroom/article/0,,id=114317,00.html>

■ **USER FEES FOR OFFERS IN COMPROMISE.** Effective November 1, 2003, a \$150 user fee is required for taxpayers submitting an offer in compromise to the IRS. The fee is not required of certain low-income taxpayers and taxpayers whose offers are based solely on doubt as to liability. The fee is to be credited against the amount paid for accepted offers.

■ **SMALL BUSINESS TAX WORKSHOP MATERIALS.** Materials for small business workshops are available for classroom learning, self-directed online learning, and self-directed off-line learning. See <http://www.irs.gov/businesses/small/article/0,,id=114689,00.html>

■ **FORMS AND INSTRUCTIONS.** Forms and instructions relating to political organizations, unreimbursed employee business expenses, fuel tax credits, certification of residential rental projects, retirement savings contributions, forest activities, individual income taxes, and depreciations and amortization are available at *www.irs.gov*.

■ The IRS is standing behind its decision to include "confidential transactions" among the six categories of potentially abusive tax shelters that must be disclosed to the government. However, a list of exclusions that do not set off the trigger may be set forth in the future. The list would probably include specific types of routine business transactions in which confidentiality is essential and settlements of litigation and employment disputes. BNA Highlights, 10/07/03, ISSN 1522-4317.

LEGISLATION

■ **AMERICAN JOBS CREATION ACT.** The American Jobs Creation Act, H.R. 2896, also referred to as the Thomas ETI bill, has been approved by the House Ways and Means Committee. The bill includes: a reduced corporate income tax rate for small corporations; an extended period of increased expensing for small businesses; a one-year extension on bonus depreciation; a five-year carryback on certain net operating losses; S corporation reforms; a reduction of double taxation on corporate earnings; tax shelter provisions; and a wide variety of new tax changes.

■ **TREASURY APPROPRIATIONS BILL.** S. 1859, appropriating funding for the IRS to be used for tax enforcement, processing, assistance and management programs, has been approved by the Senate.

■ **HIGHWAY TRUST FUNDS.** Congress has passed a law that would extend the Department of Transportation's highway, transit and research and development programs until March 1, 2004. However, the Internal Revenue Code controls the dates and purposes for these programs the funds can be spent.

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TORTS & INSURANCE

JUDICIAL LAW

■ **RECREATIONAL USE IMMUNITY; TRESPASS.** A six-year old boy was killed on the Mille Lacs County Fairgrounds when he fell from a tractor used to transport visitors within the fairgrounds. His parents brought a wrongful death action against the fair board and others. The fair board and its agents argued they were protected from liability under the recreational-use immunity statute, Minn. Stat. §466.03, subd. 6e (2002). The district court concluded that recreational-use immunity did not

cover injuries from personalty such as a tractor-trailer, but that it only addressed claims regarding the real property itself or items intricately connected to realty. The Court of Appeals rejected this argument, finding that recreational-use immunity covers claims arising from alleged negligence based upon the provision of recreational services and unrelated to the condition of the property.

However, the Court of Appeals noted that immunity through the recreational-use statute does not completely absolve the fair board and its agents from liability. It merely enables the fair board to treat visitors, in the tort context, as trespassers rather than licensees or invitees. The case was remanded to the district court to determine whether there was liability under the trespasser standard, as embodied in Restatement (Second) of Torts, §339. *Habeck v. Owerson and Mille Lacs County Agricultural Society, et al.*, C1-02-2154, (Minn. App. 10/14/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0310/op022154-1014.htm>

■ **INSURANCE COVERAGE; RELATIVES OF POLICYHOLDER.** Plaintiff sued defendant for injuries sustained in a car crash. Defendant was the driver of a car owned by codefendant. Defendant did not have insurance in his own name, but the issue arose as to whether an insurance policy issued to defendant's grandmother, with whom defendant lived, provided coverage. Grandmother's insurance extended coverage only if defendant did not own an automobile.

The key issue was whether defendant owned an automobile. Extrinsic evidence revealed that defendant was buying a car from his father, but title had not been transferred. There was also evidence that defendant was listed as the owner of a GMC Jimmy vehicle which had been totaled and was inoperable.

Under the Motor Vehicle Certification of Title Act, Minn. Stat. §168A.10, having a person's name on the title creates a presumption of ownership. This presumption can be rebutted by extrinsic evidence in only two circumstances: for purposes of vicarious liability under the Motor Vehicle Act and liability under the No Fault Act.

Since the evidence that defendant was buying a car from his father did not fall within either exception, it was not considered by the trial court and the presumption of ownership under the Motor Vehicle Act controlled.

As to whether the defendant owned a motor vehicle by having his name on the title of the totaled GMC Jimmy vehicle, the Court of Appeals remanded to determine whether the Jimmy was a "motor vehicle," and for further evidence on whether the motor vehicle was in fact registered in defendant's name at the time of the accident. *Auto-Owners Insurance Company vs. Forstrom, Heath, et al.*, C8-03-296, (Minn. App. 10/07/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0310/op030296-1007.htm>

■ **NONOWNER LIABILITY FOR INJURY ON LAND; RESTATEMENT (2ND) OF TORTS, §386.** Plaintiff sued defendants after plaintiff stepped into a hole alleged to have been created by defendants on land owned by a third person. Although noting that Section 386 of the Restatement (2nd) of Torts has not been explicitly adopted in Minnesota, the court found that it applied in this case.

Section 386 states: "Any person, except the possessor of land or a member of his household or one acting on his behalf, who creates or maintains upon the land a structure or other artificial condition which he should recognize as involving an unreasonable risk of physical harm to others upon or outside the land is subject to liability for physical harm thereby caused to them, irrespective of whether they are lawfully upon the land, by the consent of the possessor otherwise, or are trespassers as between themselves and the possessor."

The court found Section 386 to be consistent with the underlying theory of negligence that "every person in the conduct of his affairs is under a legal duty to act with care and forethought; and, if injury results to another from his failure to do so, he may be held accountable in an action at law". Citing *Roadman v. C.E. Johnson Motor Sales*, 210 Minn. 59, 63, 297 N.W. 166, 169 (1941).

The district court therefore erred by determining that the defendants, as neither owners nor possessors of land at the time of the injury, did not owe a legal duty to the plaintiff. *Bundy v. Holmquist, et al.*, A03-314, (Minn. App. 10/07/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0310/opa0303141007.htm>

■ **INSURANCE; DEFAULT JUDGMENT; GARNISHMENT ACTION.** Anthony and Tamara Parr entered into a contract with Midwest Cedar Timberroof ("Midwest") to replace the roof on their home. Midwest hired Gonzalez as subcontractor on the project. Zurich American Insurance Company ("Zurich") issued a one-year CGL policy to Gonzalez. Because Gonzalez failed to make the payments on the policy, the policy was canceled on July 31, 1999.

Gonzalez performed work on the Parrs' roof while the policy was in effect. After Gonzalez finished the work, appellants noticed that the vent cap on the roof was damaged. Appellants called a salesman from

Midwest and asked him to replace the damaged vent cap. The salesman replaced the damaged cap, but used the wrong size cap, which resulted in blockage of the vent pipe.

In December 1999, appellants discovered large amounts of mold behind the walls, resulting in massive damage, and brought a cause of action for negligence against Midwest, its salesman, and Gonzalez. The Parrs also sent letters to Zurich and its agents informing Zurich of the claim against Gonzalez and their intent to seek default judgment. After failing to hear from either Gonzalez or his insurer, the Parrs brought a motion for default judgment against Gonzalez, which was entered in the amount of \$600,000. The Parrs then brought a supplemental garnishment complaint against Zurich.

Zurich brought a summary judgment motion in the garnishment action, denying coverage and arguing that the CGL policy was not triggered by Gonzalez's action. The Parrs also brought a motion for summary judgment. The district court found that the default judgment established liability against Gonzalez, rejected Zurich's coverage defenses, and concluded that the property damage to appellant's home was caused by the subsequent repair by the Midwest salesman, not Gonzalez. Because Zurich's policy did not provide coverage for the salesman's actions, the district court granted Zurich's motion for summary judgment.

On appeal, the Court of Appeals determined that the default judgment in the underlying action, which the insured chose not to defend, established the insured's liability and that the insurer was not permitted to raise defenses going to the merits of the negligence claim in the garnishment proceeding. As such, the case was remanded to the district court to allow the garnishment of the policy proceedings to satisfy the judgment against Gonzalez.

In Minnesota, a default judgment entered against an insured does not automatically establish coverage for the claim because critical coverage issues may not be resolved in actions underlying the insured's liability for a judgment. Because it would be improper to impose coverage liability upon an insurer for risks not specifically undertaken by the insurer and not paid for by the insured, an insurer is permitted to raise coverage defenses that were not resolved in the underlying judgment. Zurich argued that its policy was not triggered because the CGL policy stated that Zurich will pay for property damage only if the property damage occurs during the policy period. Zurich argued that the mold that resulted from the obstructed vent pipe could not have formed until after the parties began operating their furnace after the policy expired. The Court of Appeals rejected this argument, stating that when damages arise from discrete and identifiable events that occur within a policy period, the actual-injury trigger theory allows those policies on the risk at the point of initial damage to pay for all the damages that follow. Although Zurich attempted to argue that the negligent repair, and not the initial damage to the vent pipe caused the massive property damage, this was a causation defense, which is a defense that goes to the merits of the underlying claim for negligence. Since Zurich elected not to defend the underlying action against its insured, it was precluded from raising this defense.

The appellate court also found that Zurich had reasonable opportunity to defend the claim and had notice of the claim and of the application for default judgment. The failure of Gonzalez to cooperate did not justify Zurich's inaction in the matter. *Parr, et al. v. Gonzalez and Zurich American Insurance Company*, A03-72, (Minn. App. 09/30/03). <http://www.lawlibrary.state.mn.us/archive/ctapub/0309/opa030072-0930.htm>

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