NOTES & TRENDS

CIVIL LITIGATION

JUDICIAL LAW

■ **MEDICAL MALPRACTICE; STATUTE OF LIMITATIONS**. The Minnesota Court of Appeals reversed the trial court, which had granted defendants' Motion for Summary Judgment on the ground that the medical-malpractice statute of limitations barred the wrongful-death action. The trial court had concluded that the cause of action arose at the time of the alleged failure to provide proper treatment, which also corresponded with the last date of treatment.

The decedent died at age 39 after suffering cardiac arrest while playing racquetball. While he was a teenager, the decedent had been diagnosed with a specific type of heart defect. Later he was diagnosed with a different type of heart-muscle disease. In 1992 and 1993 the decedent was seen by defendants for examinations, screening laboratory studies, and an echocardiogram. Following the echocardiogram he was told by defendant physician that the echocardiogram was satisfactory and that there was no need to restrict any of his activities. Defendant physician simply recommended that decedent be seen for blood tests and a review every few years to make sure that he was stable. The decedent did not return to defendants, nor seek any other medical care. On September 5, 2000 he suffered cardiac arrest and died a few weeks later.

The decedent's widow commenced the medical malpractice, wrongful-death action approximately one and one-half years after her husband's death. Defendants' moved for summary judgment, contending that the claim was barred by the statute of limitations.

On the surviving spouse's appeal from the grant of summary judgment, the Court of Appeals first reviewed the various amendments to the medical malpractice and wrongful-death limitations periods, and concluded that the provisions in effect at the time this action was initiated set a time limit of four years from the date of the cause of action accruing, or three years from the date of death.

The principal issue in the case was whether the cause of action accrued in 1993, when the decedent ended his treatment with defendants, or accrued when decedent suffered cardiac arrest in September, 2000. The court then reviewed the general rule that a cause of action arises when the negligent act or omission causes injury for which the party could maintain an action. Usually a cause of action accrues at the time of injury which most often coincides with the act which causes the injury. There have been equitable exceptions created by Minnesota courts, each of which, however, presupposes the existence of an injury. But in this case no injury occurred until the decedent's cardiac arrest. Thus, the court distinguishes the failure to diagnose or inform cases where the plaintiff's injury or illness progressed after the initial negligence occurred, and, therefore, the progression of illness triggered the running of the statute of limitations. Although defendants contend that the court in effect adopts a "discovery rule" which was previously rejected by the Minnesota Supreme Court, the Court of Appeals finds this case distinguishable, arguing that no injury existed until the decedent suffered his cardiac arrest and that the analysis does require an objective standard rather than the subjective measure of plaintiff's personal knowledge. ***Broek v. Park Nicollet Health Services***, 660 N.W.2d 439 (Minn. App. 2003).

■ **MEDICAL MALPRACTICE; LEGAL DUTY**. The Minnesota Court of Appeals affirmed the trial court's denial of defendants' motions for summary judgment. Claimants consulted with defendants to determine whether the source of their child's developmental abnormalities might be genetic. Although defendants ordered a number of genetic tests, a test for the specific condition known as "Fragile X Syndrome" was not conducted. Defendants reported to claimants that the tests which were conducted were normal. Several years later, claimants gave birth to another child who was eventually diagnosed with "Fragile X Syndrome". Subsequent testing of the older child and the mother revealed that the child also suffered from the syndrome and the mother was a carrier.

Although the trial court refused to grant defendants' motions for summary judgment, it did agree to certify questions to the Court of Appeals:

1. Does a physician who fails to test for and diagnose a genetic disorder in a child owe a legal duty to

that child's parents who have a subsequent child who also has that disorder? The court holds that if the patient is an adult, the duty does not extend beyond the patient. However, where the patient is a minor, the physician must notify a biological parent. The court further holds that the duty does not extend to a nonbiological parent where no physician-patient relationship exists.

2. When does a cause of action accrue for a medical malpractice claim alleging failure to test for and diagnose a genetic disorder in a child, when a subsequent child is born with the same disorder? Relying upon its earlier opinion in *Peterson v. St. Cloud Hospital* and the Minnesota Supreme Court's analysis in *Sherlock v. Stillwater Clinic*, the court concludes that the injury here was sustained when the child was conceived.

3. Do the statutory prohibitions against wrongful life and wrongful birth actions prohibit this claim by parents who allege they would not have conceived the subsequent child? The wrongful life action prohibition set forth at Subdivision 1 of Minn. Stat. §145.42 does not apply because this is not a claim by a child to recover damages. The claimants contend that the wrongful birth action prohibition does not apply either because their claim is one for wrongful conception. Again, the leading case is *Sherlock v. Stillwater Clinic*. As in *Sherlock*, the court here concludes that this is a wrongful-conception claim because it alleges that the conception would have been avoided had the negligence not occurred. ***Molloy v. Meier, M.D., et al.***, 660 N.W. 2d 444 (Minn. App. 2003).

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CRIMINAL LAW

JUDICIAL LAW

■ **DWI/IMPLIED CONSENT; RIGHT TO COUNSEL; ACCESS DENIED.** The appellant was given approximately 38 minutes to contact an attorney following his arrest for DWI. After being warned that his time was nearing the end, the appellant made five or six phone calls, including to a friend, a sister, and an attorney. He left a message with the attorney's answering service. An attorney attempted to call the police station twice, but was told both times by dispatch that the appellant's time had ended and that he would not be allowed to speak with the appellant. The arresting officer testified that no one from dispatch contacted him, or asked him whether the appellant's time was up.

Held, the appellant's right to counsel was not vindicated. Because the appellant's attorney was denied access to the appellant, and the state failed to provide a reasonable explanation for this denial, the revocation is rescinded. There was no evidence that dispatch ever contacted the arresting officer. Under these facts, the burden of production shifts to the state to provide a reasonable explanation why the dispatcher, not involved in the testing process and not in contact with the arresting officer, decided to deny the attorney access. ***Jason Thomas Jones v. Commissioner of Public Safety***, C4-02-1936 (Minn. App. 05/13/03). *http://www.lawlibrary.state.mn.us/archive/ctappub/0305/op021936-0513.htm*

■ **DWI/IMPLIED CONSENT; PRE-1998 IMPLIED CONSENT; AGGRAVATING FACTOR; NO PAST JUDICIAL REVIEW.** The appellant was convicted of first-degree DWI in 2001. Appellant had two prior implied consent revocations from 1994 and 1999; however, the criminal charges related to those revocations were dismissed. The appellant had not sought judicial review of the 1999 revocation.

Held, an implied consent revocation which did not undergo judicial review by a defendant may be used as an aggravating factor. Due process merely requires that judicial review be available, not exercised. Also, implied consent revocations prior to 1998 may be used as aggravating factors, notwithstanding the fact that prior to that date, such civil revocations were not aggravating factors. ***State v. Juan Alexander Coleman***,C0-02-797 (Minn. App. 05/20/03).
http://www.lawlibrary.state.mn.us/archive/ctappub/0305/op020797-0520.htm

■ **FIREARMS; FELON IN POSSESSION; JUVENILE ADJUDICATION; *EX POST FACTO* APPLICATION.** In 1993, the appellant was adjudicated delinquent for felony theft of a motor vehicle. At that time, the offense was not classified as a "crime of violence" under Minn. Stat §624.712, subd. 5. Effective in 1995, that same statute was amended to include juveniles adjudicated delinquent for their commission of certain violent crimes. Also subsequent to 1993, this same statute was amended to include felony auto theft in the list of violent crimes. In 2000, less than ten years following his discharge from juvenile probation, the appellant was found in possession of a pistol.

Held, both the application and reclassification of Minn. Stat. §624.713 were not *ex post facto* applications of the law. The statute merely subjected him to punishment for subsequent conduct, and did not punish him. A statute can be based on prior conduct so long as it applies to, and is triggered by,

conduct occurring after its enactment. ***State v. Mario Gerald Grillo***, C5-02-858 (Minn. App. 05/20/03). *http://www.lawlibrary.state.mn.us/archive/ctappub/0305/op020858-0520.htm*

■ **SEARCH AND SEIZURE; AUTO STOP; CONSENT TO SEARCH.** Police stopped the appellant with a broken right rear tail light. A woman sitting in the front passenger seat appeared nervous and frequently looked at the floorboards. Appellant responded in the negative when asked if there was anything illegal in the vehicle. The officer asked the appellant if he would consent to a search of the vehicle, and the appellant agreed. Police discovered methamphetamine in the car.

Held, requesting consent to search the vehicle was an unreasonable expansion of the scope of the stop. The police officer lacked the requisite reasonable suspicion to ask for consent: nervousness alone is not an objective fact supporting reasonable suspicion by a police officer. Because the continued detention was illegal, the consent was a product of the illegal detention, and evidence subsequently discovered must be suppressed. (Citing *State v. Fort*, C2-01-1732 (Minn. 05/01/03)). ***State v. Lon Syhavong***, C0-02-1996 (Minn. App. 05/20/03). *http://www.lawlibrary.state.mn.us/archive/ctappub/0305/op021996-0520.htm*

■ **SENTENCE; CRIMINAL SEXUAL CONDUCT; CONDITIONAL RELEASE; PLEA BARGAINS.** In those few cases where a defendant is sentenced pursuant to a plea bargain for a certain term of prison, and the district court judge does not impose conditional release, the defendant has no "absolute" right to withdraw his or her plea. However, if the imposition of the conditional release term after sentencing would violate the plea agreement, the district court "may" allow the defendant to withdraw his plea. If a plea withdrawal would unduly prejudice the state, however, the district court may impose a conditional release term, commencing after the defendant is released from prison, which is less that five or ten years in order to not exceed the total bargained for amount of prison time in the plea agreement. ***State v. Thomas Robert Wukawitz, Jr.***, C6-02-30 (Minn. 05/29/03).
http://www.lawlibrary.state.mn.us/archive/supct/0305/OP020030-0529.htm

■ **SENTENCE; CORRECTION OF SENTENCE; CONSECUTIVE PROBATION VIOLATION; "UNAUTHORIZED."** The district court originally imposed a 30-month presumptive sentence, but did not state whether the 30 months would be served consecutively or concurrently with the appellant's probation sentence resulting from his violation of supervised release. After being notified by a corrections officer that the sentencing guidelines "presumed" consecutive sentencing under these circumstances, the district court vacated the original sentence as a downward departure not supported or authorized by Minn. R. Crim. P. 27.03. The district court then resentenced the appellant to a 30-month consecutive sentence.

Held, appellant is correct in his assertion that the original sentence was not "unauthorized." No statute or case law forbids a district court from imposing concurrent sentences under these circumstances. Although the district court was mistaken about the presumptive sentence, and it may have amounted to a downward departure that the court did not wish to grant, this "accidental departure" does not mean the sentence is unauthorized within the meaning of the rule. To allow the court to correct its error in judgment would violate the appellant's right to due process. ***State v. Casey Borrego***, C8-02-1664 (Minn. App. 05/27/03). *http://www.lawlibrary.state.mn.us/archive/ctappub/0305/op021664-0527.htm*

■ **JURY; *SCHWARTZ* HEARING; CROSS SECTION INQUIRY.** Appellant raised the issue of judicial misconduct, by stating that the trial court judge had *ex parte* communications with the jurors. On remand from the Supreme Court, the chief judge of the district conducted a *Schwartz* hearing, choosing at random six of the 12 jurors. All six jurors testified that the judge's conduct was essentially innocuous, having to do with scheduling, coffee, the role of the juror, and lunch. After hearing from these six jurors, the chief judge considered this to be a fair cross-section, and granted the prosecution's motion to preclude any further testimony from the remaining six jurors.

Held, it was not an abuse of discretion for the district court to conduct a *Schwartz* hearing in this manner. ***State v. Ronald Lewis Greer***, C9-02-1382 (Minn. 05/29/03).
http://www.lawlibrary.state.mn.us/archive/supct/0305/OP021382-0529.htm

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **LABOR LAW.** A government-prescribed ratio of no more than two apprentices working with each licensed electrician is upheld by the 8th Circuit Court of Appeals in ***Wright Electric v. Board of Electricity***, 322 F.3d 1025 (8th Cir. 2003). The ratio — established by the Minnesota Board of

Electricity, was not preempted by ERISA under the prior ruling of the 8th Circuit in *Boise Cascade Corp. v. Peterson*, 939 F.2d 632 (8th Cir. 1991), which held that a similar state-mandated ratio for pipefitters was preempted by ERISA. Subsequent Supreme Court cases have narrowed the preemption doctrine, including *New York State Conference of Blue Cross & Blue Shield Plan v. Travelers Insurance Co.*, 514 U.S. 645 (1995). As a result, the prior ruling by the 8th Circuit that state-prescribed apprentice ratios are preempted by ERISA is no longer viable and the 2:1 ratio in the electrical industry is valid.

Unlicensed community specialists who work for schools are not "teachers" under the Public Employee Labor Relations Act (PELRA) Minn. Stat. §179A.03 subd. 18(1). In ***Education Minnesota v. Intermediate Sch. Dist. 917***, 660 N.W.2d 467 (Minn. App. 2003), the Minnesota Court of Appeals held that the unlicensed personnel are not part of the teachers' collective bargaining units.

■ **NONSOLICITATION CLAUSES.** A temporary injunction for breach of a nonsolicitation class was reversed where the solicitation did not cause irreparable harm to the former employer. In ***Al's Cabinets, Inc. v. Thurk***, 2003 WL 891419 (Minn. App. 2003) (unpublished), the Minnesota Court of Appeals held that the nonsolicitation clause did not warrant injunctive relief when the former employee's solicitation was directed to a third party who already had decided not to do business with the former employer due to a prior dispute. Any harm suffered by the former employer can be resolved through damages at trial, negating the need for injunctive relief.

But direct solicitation of former customers by the seller of a business violates a noncompete provision in a contract for the sale of the business in ***Fung v. Riemenschneider***, 2003 WL 21005539 (Minn. App. 2003)(unpublished). The appellate court upheld a verdict against a dentist who solicited patients after agreeing to a noncompete clause in the sale of his practice. Although the agreement lacked a specific nonsolicitation clause and the selling dentist did not violate the provisions of a five-mile noncompete clause, the solicitation breached an implied duty not to solicit patients.

■ **PARENTING LEAVE.** The rarely litigated state Parenting Leave Law, Minn. Stat. §181.941, is not violated unless an employer refuses a request for a leave of absence by an employee. In ***Schramm v. Village Chevrolet Co.***, 2003 WL 1874753 (Minn. App. 2003) (unpublished), an employee who was fired claimed that she was subject to illegal retaliation under the statute, which requires unpaid leave of absence for a birth or adoption of a child. However, while the employee was pregnant, she had not requested a leave of absence or given the employer any notice that she had planned to leave after her child was born. The appellate court rejected her claim, holding that mere knowledge by the employer of the employee's pregnancy and the likelihood of a future leave of absence is not actionable, absent a specific leave request. Her discharge claim was not viable under the statute because requesting or obtaining leave is a "prerequisite to protection" under the law.

■ **UNEMPLOYMENT COMPENSATION.** The denial of unemployment compensation benefits was reversed in ***Thompson v. Hennepin County***, 660 N.W.2d 151 (Minn. App. 2003) when two key witnesses that the employee sought to testify did not appear at a contested hearing. Citing "scanty" evidence as why they did not appear, the court remanded the case to give the claimant a "full and fair hearing."

In another rare reversal involving determination of ineligibility by the Department of Economic Security, an employee who was terminated for sending a rude, intemperate email to his boss was deemed entitled to unemployment compensation benefits in ***Lueck v. Grand Casino Hinckley***, 2003 WL 1701905 (Minn. App. 2003). The employee, a computer systems operator, was fired for failing to warn of problems with the software system and making a rude communication to his boss. The appellate court reversed the determination of ineligibility on grounds that his action was not "deliberate and calculated" to cause harm to the employer, which is required for a determination of qualifying "misconduct" under the Unemployment Compensation Statute, Minn. Stat. §268.095, subd. 4. Although the email was "offensive and cynical," it was not confrontational and, therefore, not sufficiently egregious to warrant ineligibility for compensation benefits.

But a "rude and short-tempered" property manager was properly denied unemployment compensation benefits in ***Lara v. Commonbond Housing Corp.***, 2003 WL 1701977 (Minn. App. 2003) (unpublished). The employee's behavior, coupled with dilatory performance, was "so pervasive, so grave, and no obviously likely to harm" the employer that he was not entitled to unemployment compensation benefits for his incivility on the job.

LOOKING AHEAD

■ **AGE DISCRIMINATION.** The U.S. Supreme Court will decide soon whether the Federal Age Discrimination in Employment Act (ADEA) permits pension plan provisions that favor older employees. In ***General Dynamics Land Systems, Inc. v. Clines***, No. 02-1080, the High Court will review a 6th

Circuit ruling that a pension plan that favored older employees constituted impermissible "reverse" age discrimination under the ADEA, 296 F.3d 466 (6th Cir. 2002). The ruling, expected to be issued during the Court's term next fall, could have minor impact not only on the ADEA, which protects workers over 40, but also state laws, such as the Human Rights Act, which do not contain any explicit age thresholds.

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ENVIRONMENTAL LAW

JUDICIAL LAW

■ **CLEAN WATER ACT; STORM WATER GENERAL PERMITS.** The Minnesota Court of Appeals held that the Minnesota Pollution Control Agency (MPCA) must revise the general permit it intended to issue to smaller municipalities regarding their storm water discharges. Minnesota Center for Environmental Advocacy (MCEA) challenged both the MPCA'S decision to forgo individual permits in a favor of a general permit and the permit terms themselves on a number of grounds.

The court first upheld the use of a general permit in this situation because the small municipalities are all the "same or substantially similar," both in terms of their discharges and the standards they were required to meet. It also deferred to the MPCA'S determination that it was not technically feasible to impose specific numeric effluent limitations for each pollutant discharged by the municipalities. Instead, the general permit could instead require management measures to control the discharges without violating the requirements of Minn. R. 7001.1080. Finally, the court upheld the MPCA'S determination that the general permit need not contain the monitoring requirements discussed in Minn. R. 7001.0150 because those requirements were not "applicable" to the "circumstances" of small municipality storm water discharges.

Nevertheless, the court remanded the general permit to the MPCA to address a number of issues raised by MCEA. As part of the process of obtaining coverage under the general permit, each municipality was required to submit a Storm Water Pollution Prevention Programs (SWPP). The SWPP, among other things, was to detail it how the municipality would control its pollutant discharges. The court found that because the SWPPs were not subject to public review and comment, the general permit violated the public participation requirement of the Clean Water Act. The MPCA also failed to make a determination, as required under the federal nondegradation rule, 40 CFR 131.12, as to whether additional control measures were necessary to control pollutants discharged by the municipalities. Finally, the court ordered the MPCA to replace the requirement in the general permit that the covered municipalities "minimize" their pollutant discharges with the Clean Water Act standard that the municipal storm sewers "reduce" their pollutant discharges.

The Court of Appeals remanded the general permit to the MPCA for further proceedings consistent with the court's findings. The Clean Water Act requires that all small municipalities obtain storm sewer discharge permits by the end of this year. ***Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency***, 660 N.W.2d 427 (Minn. App. 2003).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **MAGISTRATE JUDGES; "CONSENT OF THE PARTIES" UNDER 28 U.S.C. §636(C)(1).** The Supreme Court has resolved a Circuit split as to whether a party can impliedly consent to a magistrate judge presiding over a case under 28 U.S.C. §636(c)(1).

Plaintiff commenced a *pro se* Section 1983 action against a number of defendants, and gave his written consent to have his case heard by a magistrate judge. Only one defendant consented to have the magistrate judge hear the case, but the matter was referred to the magistrate anyway. Subsequently, the magistrate judge dismissed some claims, and other claims were tried to a jury, which found for the defendants. After the plaintiff appealed the verdict, the 5th Circuit *sua sponte* questioned whether all parties had consented to have the magistrate hear the case, and remanded the matter for a determination as to whether the necessary consents had been obtained. On remand, the remaining defendants finally provided their consent, but the magistrate issued a Report and Recommendation (and the District Court agreed) that the defendants' post-judgment consents did not cure the underlying jurisdictional defect. The 5th Circuit affirmed, finding that the plain language of 28 U.S.C. §636(c) requires express consent *before* trial or judgment.

The Supreme Court reversed. While noting that both 28 U.S.C. §636(c)(2) and Fed. R. Civ. P. 73(b) anticipate parties' "advance, written consent" to a magistrate presiding over cases, the Court found that the "text and structure" of 28 U.S.C. §636 merely required "voluntary consent," and that the "better rule" was to "accept implied consent where . . . the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the magistrate judge."

Justice Thomas, writing for four dissenters, argued that the majority's position was contrary to the plain language of 28 U.S.C. §636, and that the lack of proper consent was also a jurisdictional defect. ***Roell v. Withrow***, 123 S. Ct. 1696 (2003).

■ **OTHER NOTEWORTHY DECISIONS.** In two sanctions-related decisions, the 8th Circuit affirmed a rare award of attorney's fees to a defendant in a Title VII action, finding that the plaintiff's version of the facts had included "material contradictions." However, the court declined to award the defendant additional attorney's fees on appeal. ***Meriwether v. Caraustar Packaging Co.***, 326 F.3d 990 (8th Cir. 2003).

In the second case, the 8th Circuit affirmed the trial court's *sua sponte* imposition of $25,000 in Rule 11 sanctions. ***MHC Investment Co. v. Racom Corp.***, 323 F.3d 620 (8th Cir. 2003).

The 8th Circuit found that Judge Magnuson did not abuse his discretion in excluding the testimony of plaintiffs' expert witness as a Rule 37 sanction, where the expert reinterviewed each of the plaintiffs during a one-week trial recess, the expert elicited new facts not included in prior expert reports, and plaintiffs did not disclose the existence of the new interviews or the expert's notes from those interviews until the evening before the expert was scheduled to testify. ***Mems v. City of St. Paul***, 327 F.3d 771 (8th Cir. 2003).

The 8th Circuit found that Magistrate Judge Erickson erred in finding that a class member who previously had opted-out of a plaintiff class in writing had verbally requested to opt back into the class. ***Snell v. Allianz Life Ins. Co.***, 327 F.R.D. 665 (8th Cir. 2003).

Judge Montgomery enjoined a frequent *pro se* plaintiff from filing any further actions in the District of Minnesota without leave of a magistrate judge unless represented by counsel. ***Hettler v. Kahn***, 2002 WL 31777804 (D. Minn. 12/10/02).

Judge Tunheim denied a defendant's request to certify for interlocutory appeal under 28 U.S.C. §1292(b) the denial of a motion to transfer venue, finding that the appeal would not involve a "controlling question of law" and that there was no "substantial ground for difference of opinion." Judge Tunheim had previously denied a request to file a motion for reconsideration of the order denying the motion to transfer. ***Same Day Surgery Centers, L.L.C. v. Montana Regional Orthopedics, L.L.C.***, 2003 WL 1565942 (D. Minn. 03/04/03).

Despite "clumsy lawyering" on both sides, which included an untimely removal and plaintiff's filing of an "Objection to Removal" rather than a timely motion to remand, Judge Frank granted the plaintiff's late-filed motion to remand and returned the diversity action to the Minnesota courts. ***Jambor v. Selective Ins. Co.***, 2003 WL 1903923 (D. Minn. 04/11/03).

Judge Magnuson also granted a motion to remand, finding that even if punitive damages and attorney's fees were included in calculating the amount in controversy, the defendant had not met its burden of demonstrating that each plaintiff's claims exceeded $75,000 in value. ***Krahn v. Cross Country Bank***, 2003 WL 21005295 (D. Minn. 04/23/03).

Judge Davis granted a motion for permissive intervention brought by the *New York Times* Company for purposes of seeking modification of the parties' stipulated protective order. ***In Re Baycol Products Lit.***, 2003 WL 1990430 (D. Minn. 2003).

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INTELLECTUAL PROPERTY

JUDICIAL LAW.

■ **PATENTS; CORROBORATION; ORAL TESTIMONY.** The Court of Appeals for the Federal Circuit has affirmed a finding that cross-corroboration of oral testimony by interested witnesses is insufficient corroboration. McKechnie and Hayes sought to prove Lacks' patent invalid as a defense to infringement. Three Hayes employees provided oral testimony of prior public use and sales of the invention as evidence of invalidity. Citing a series of cases back to 1882, the court held that oral testimony by interested parties alone is insufficient to prove invalidity; documentary evidence is necessary for corroboration. "[C]ourts have consistently required documentary corroboration of oral testimony by interested parties to invalidate a patent." What result if the three witnesses were not "interested"? ***Lacks***

Industries, Inc. v. McKechnie Vehicle Components, Inc., and Hayes Wheel International, Inc., 322 F.3d 1335 (Fed. Cir. 2003)

■ **PATENTS; CORROBORATION; CONCEPTION DATE.** Judge Ericksen found that issues of fact precluded summary judgment of patent invalidity where documents allegedly corroborated the inventor's oral testimony of earlier conception. A patent may be invalid if a challenger shows that another invented the invention before the patent's filing date — called the "constructive" date of invention. The patentee can avoid invalidity if he can "swear behind" - prove he conceived of the invention before the date of the prior art and diligently reduced it to practice. Giter, the patentee, relied on oral testimony to show that he had conceived the invention of his patent before the date of the prior art. Oral testimony, without corroboration, however, is not sufficient to establish a conception date. Applying the "rule of reason" test, the court found that undated documents were not adequate to corroborate Giter's conception date. A dated bill of materials for supplies, however, sufficiently corroborated Giter's oral testimony. The court said: "None of [the undated] evidence corroborates Giter's statement that he conceived of the invention in October 1992 .... It does, however, support that proposition that he conceived of the invention no later than ... the date of the bill of material." ***Volovik v. Bayer Corp.***, 01-CV-1426 (D. Minn. 05/12/03),

■ **PATENTS; INVALIDITY; OBVIOUSNESS.** Judge Frank found that an issue of fact precluded summary judgment of invalidity in a recent case because Electromed failed to demonstrate the patent's obviousness. A patent can be proven invalid if it is established that the differences between the challenged patent and another's invention would have been obvious to a person of ordinary skill in the field at the time of the invention. Electromed relied on oral testimony to establish that the challenged patent's novelty was well-known and available commercially. The court rejected this evidence because the witness testified only that the novelty of ARI'S patent "could have" been purchased commercially. The "testimony merely raised the possibility that, in hindsight, [the inventor] could have envisioned the use," said the court. Clear and convincing evidence, the standard for invalidity, requires more than mere possibility. ***Advanced Respiratory, Inc. v. Electromed Inc.***, 00-CV-2646 (D. Minn. 05/09/03),

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JUVENILE LAW

AUTHORS' NOTE

As the new authors of this column, we have decided to expand the coverage to not only continue to provide updates on important Minnesota judicial decisions and legislation in juvenile law, but also to include discussions of national developments that affect children and the law. We will continue to cover developments in juvenile delinquency, child protection matters, and adoption, but we will also discuss the rights of children, legal representation of children, and decisions coming out of family court and probate court as they affect children and their rights. We invite comments and suggestions for future topics. Please email us at the addresses stated below.

JUDICIAL LAW

■ **TERMINATION OF PARENTAL RIGHTS; DUE PROCESS.** The Minnesota Court of Appeals reviewed a challenge by parents whose parental rights as to their first four children were involuntarily terminated for child neglect in Wisconsin in 2001 and terminated as to their fifth child in Minnesota based on the Wisconsin actions The parents appealed the TPR as to the fifth child on a variety of constitutional grounds.

The Court of Appeals held that judicial review of an agency's reasonable efforts at rehabilitation and reunification in a TPR case is not a constitutionally guaranteed right. Therefore, the Legislature's elimination of this requirement when there has been a prior involuntary termination of parental rights does not violate the Minnesota Constitution. In some circumstances, reasonable efforts may be futile and it is properly left to the Legislature to determine when reasonable efforts are required prior to termination of parental rights. The Court of Appeals found that these parents were afforded a meaningful adversarial hearing and hence, there was no violation of procedural due process. The Court found a compelling state interest in shielding children from parental abuse, that the statute is narrowly tailored to meet the state's compelling state interest, and that this presumption of palpable unfitness only applies in those cases where parents have previously had their parental rights terminated involuntarily.

There was no violation of substantive due process. Because the Court of Appeals concluded that parents who voluntarily terminate their parental rights are not similarly situated to parents whose rights have been terminated involuntarily, there was also no equal protection violation. ***In the Matter of the Child of P.T. and A.T., Parents***, C5-02-1508 (Minn. App. 03/04/03).
http://www.lawlibrary.state.mn.us/archive/ctappub/0303/c5021508.htm

■ **CUSTODIAL INTERROGATION; *MIRANDA*.** The Minnesota appellate courts have issued two decisions affecting procedural rights in juvenile delinquency cases. In one, the Court of Appeals concluded that advising a juvenile during police questioning that he may refuse to answer questions and is free to leave is not solely determinative in deciding whether the juvenile has been subjected to custodial interrogation for determining whether the *Miranda* warning must be given. The court held that circumstances to consider in determining whether a juvenile is in custody include the age, intelligence, and education of the child, the child's prior experience with law enforcement, the surroundings during questioning, the presence of one of more uniformed officers, whether the child was given the option of having a parent or attorney present, and whether the interview was tape recorded. ***In the Matter of the Welfare of T.J.C., Child,*** C3-02-1622 (Minn. App. 06/03/03). *http://www.lawlibrary.state.mn.us/archive/ctappub/0306/op021622-0603.htm*

■ **EXTENDED JURISDICTION JUVENILE; PROBATION VIOLATION; DETERMINING SANCTION.** In another delinquency case, the Minnesota Supreme Court held that Minn. Stat. §260B.130, Subd. 5 requires that the age of the offender at the time of the underlying offense be considered in determining the sanction for violating extended jurisdiction juvenile probation. If the court finds upon clear and convincing evidence that any provisions of the disposition order were violated, or if the probationer admits the violation, and the extended jurisdiction juvenile conviction was for an offense with a presumptive prison sentence or the probationer used a firearm, the court is required to order the execution of the sentence or make written finding indicating the mitigating factors that justify continuing the stay. Further, the Supreme Court indicated that the factors set forth in *State v. Austin* (before probation be revoked, court must designate the specific condition or conditions that were violated, find that the violation was intentional or inexcusable, and find that the need for confinement outweighs the policies favoring probation) must be considered and applied by the trial court when determining whether reasons exist to revoke the stay of execution of sentence. ***State v. B.Y.***, C7-01-897 (Minn. 04/24/03).
http://www.lawlibrary.state.mn.us/archive/supct/0304/op010897-0424.htm

■ **CHILD WITNESSES; CRIMINAL PROCEEDINGS.** Appellate courts in Minnesota and the 8th Circuit Court of Appeals all addressed issues involving child witnesses in criminal proceedings. The Minnesota Supreme Court held that in a domestic abuse murder case, the trial court's determination that the victim's children were competent to testify was not error, and allowing the victim's children to testify out of the presence of the defendant by a closed circuit television was also not error. ***State v. Areece Devon Manley***, C8-01-1833 (Minn. 04/03/03).
http://www.lawlibrary.state.mn.us/archive/supct/0304/OP011833-0403.htm

The Minnesota Court of Appeals held that the Minnesota Rules of Criminal Procedure governed discovery in a criminal proceeding involving a videotaped interview of an alleged child victim describing acts of sexual abuse. Held, the state may seek a protective order under Minn. R. Crim. P. 9.03, subd. 5, restricting distribution and use of the taped interview of an alleged child victim describing sexual abuse. Concern for a child's privacy interest is sufficient cause for issuance of a protective order without indicating intent by those entitled to discovery to misuse the tape. ***State v. Mitchell Logan Johnson***, C8-02-1860 (Minn. App. 04/22/03).
http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op021860-0422.htm

The 8th Circuit Court of Appeals reviewed a case originating in federal district court in Iowa where a state prisoner appealing a district court's denial of *habeas corpus* relief alleged violation of his 6th Amendment confrontation rights based on the use of sequestered and closed circuit testimony from two children who are the victims of his sexual abuse. The court considered the inmate's challenge under the deferential standard of the Antiterrorism and Effective Death Penalty Act of 1996 and the United States Supreme Court case of *Maryland v. Craig*. Based on this federal statute and this case, a defendant may be deprived of an opportunity to confront a child witness face-to-face if there is a case-specific finding that the use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify, that the child witness would be traumatized (not by the courtroom generally, but by the presence of the defendant), and that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, (*i.e.*, more than mere nervousness or excitement or some reluctance to testify). ***Mark Edward Lomholt v. State***, No. 02-2236 (8th

Circuit, 04/29/03). *http://caselaw.lp.findlaw.com/data2/circs/8th/022236p.pdf*

■ **PROCEDURE; ADMISSIBILITY OF THERAPIST REPORTS; JUVENILE PROTECTION.** The Minnesota Court of Appeals in a published decision addressed the recurring problem of foundation concerns in the admissibility of therapist reports in juvenile protection proceedings. The court held that a therapist's report containing an opinion on an ultimate issue is admissible under the business records exception to the hearsay rule only if the proper foundation is laid and the witness offering the opinion is available for cross-examination. ***In the Matter of the Child of Michael Simon, Parent***, CX-02-2024 (Minn. App. 06/03/03). *http://www.lawlibrary.state.mn.us/archive/ctappub/0306/op022024-0603.htm*

TRENDS & DEVELOPMENTS

A recent report was issued by the federal General Accounting Office (GAO)indicating that over 30 states are reporting that the difficulty many parents have in accessing mental health services for their children is causing some parents to choose to voluntarily place their children in the child welfare or juvenile justice systems in order to obtain the services they need. The GAO concluded that the numbers of such children have increased dramatically and that federal agencies could play a stronger role in helping states reduce these numbers of children placed solely to obtain mental health services. While the report was short on suggestions to address the issue, it does point out an important development which we may be seeing in Minnesota, accompanied by a rise in the numbers of private CHIPS petitions being filed when parents, desperate for services for their children, are turned down by a social services agency and are forced to bring a private petition asking the court to order such services. *See, Report of GAO-03-397* at *www.gao.gov/new.items/d03397.pdf* : "Child Welfare in Juvenile Justice: Federal Agencies Can Play a Stronger Role in Helping States Reduce the Number of Children Placed Solely to Obtain Mental Health Services," April 21, 2003.

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REAL PROPERTY

JUDICIAL LAW

■ **CONTRACT FOR DEED**. In 1993, sellers sold farmland to son and his wife by contract for deed. The contract for deed required buyers to obtain sellers' consent to "sell, transfer or assign" the property. In 1997 and 1998, buyers obtained loans from lender and mortgaged their interest in the property. Buyers also assigned the contract for deed to the lender. Sellers did not consent to the mortgages or the assignment. In 2001, the lender commenced a mortgage foreclosure action. Sellers served buyers with a notice of cancellation and the lender brought an injunction and declaratory judgment action. The Court of Appeals held that the contract for deed expressly precluded buyers from assigning their interest to the lender without sellers' consent and therefore the assignment is unenforceable. On the other hand, the court reversed the district court decision that the contract for deed also prevented buyers from mortgaging without sellers' approval. The court found that a mortgage is not deemed a transfer or conveyance; therefore, buyers did not breach the contract for deed by giving the mortgages. The court did not invalidate the mortgages. ***Bank Midwest, Minnesota, Iowa, N.A. vs. Lipetzky, et al***., C1-02-1747 (Minn. App. 05/20/03). *http://www.lawlibrary.state.mn.us/archive/ctappub/0305/op021747-0520.htm*

■ **STATUTE OF LIMITATIONS**. In June 1990, a general contractor entered into a contract with owners to build a house. In August 1991, the house was completed. As a result of water damage throughout the house, owners replaced a large section of the ceiling, flooring and a beam of the house. Additionally, each spring owners recaulked portions of the house to prevent water penetration. Vlahos purchased the house from owners in March 2000. Before selling the house, owners disclosed the water damage to Vlahos and an inspection report identified water damage. Minn. Stat. §541.051 provides that a person is barred from bringing an action against a person who provided the design, planning or supervision of the construction of an improvement to real estate out of which arises a defective and unsafe condition of the improvement more than two years after discovering the damage, unless fraud is involved. The Court of Appeals found that owners acknowledged the numerous, ongoing water problems and discussed the problems with the general contractor and subcontractors. The court held that Vlahos's claims were barred under the statute of limitations because owners' notice of water damage was imputed to Vlahos. Furthermore, the court held that the damage occurring after completion of the house did

not constitute a "major construction defect" as contemplated by Minn. Stat. §327A.01. ***Vlahos et al. vs. R&I Construction of Bloomington, Inc. et al.***, C7-02-1428 (Minn. App. 04/09/03). *http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op021428-0409.htm*

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TAX LAW

JUDICIAL LAW

■ **SALES TAX — INTERSTATE WATS LINES.** The Minnesota Tax Court granted a refund to the taxpayer for the Interstate WATS Lines exemption in Minn. Stat. §297A.25, Subd. 36. That section provides an exemption from tax on long-distance telephone gross receipts to "qualified providers of telemarketing services." A "qualified provider of telemarketing services" is a telemarketing firm that derives at least 80 percent of its revenues from soliciting sales or receiving orders by means of the telephone. The issue concerned a taxpayer whose business activities involved its own products as well as goods and services of others. The court rejected the commissioner's argument that the exemption should be interpreted narrowly. Reading the plain language of the statute, the court dismissed the commissioner's argument that a telemarketing firm is a firm which exclusively sells the products of others and not their own products. ***Asset Marketing Services v. Commissioner of Revenue***, No. 7420, 2003 WL 21129877 (Minn. T. Ct. 04/30/03).

■ **FAILURE TO TIMELY FILE NOTICE OF APPEAL.** The Tax Court held that the taxpayer did not timely file a Notice of Appeal within the 60-day period of Minn. Stat. §271.06, Subd. 2. A taxpayer needs to actually file (accomplish actual receipt by the Tax Court) the Notice of Appeal with Affidavit of Service along with the filing fee, and have both accomplished within 60 days of the Tax Order. There is no "mailbox" rule similar to that found in Minn. Stat. §270.271, nor is Minnesota Tax Court Rule 6810.0070, specifying time limits for motion practice, applicable. ***Brad J. and Terri L. Montagne v. Commissioner of Revenue***, No. 7529-R, 2003 WL 1878072 (Minn. T. Ct. 03/31/03). *See also* ***Richard Reiss v. Commissioner of Revenue***, No. 7552-R, 2003 WL 21246369 (Minn. T. Ct. 05/28/03) (the act of filing requires actual receipt of the appeal, along with proof of service, and a filing fee with the Tax Court either on or before 60 days or 90 days with an extension that was timely requested).

■ **REAL ESTATE PETITION DISMISSED FOR FAILURE TO PERMIT INSPECTION OF REAL ESTATE.** The Minnesota Tax Court dismissed a real property petition of appeal as a sanction for failure to allow an inspection of the property after two continuances had already been granted. The county claimed that it would be prejudiced in its ability to prepare for trial if not allowed to inspect and a further continuance of the trial date would violate the Minnesota Tax Court policy, which allows for only two continuances. Therefore, dismissal of the petition under Minn. R. Civ. P. 37 was warranted. ***T. S. Montgomery v. County of Hennepin***, No. 28688, 2003 WL 1877339 (Minn. T. Ct. 04/08/03).

■ **MINNESOTA TAX COURT RECLASSIFIES AGRICULTURAL LAND FOR ASSESSMENT PURPOSES.** The Minnesota Tax Court determined that 43 acres of agricultural land was to be reclassified as green acres for valuation and assessment purposes, after the county agreed at trial that the property was eligible for green acres classification. ***Raisanen v. County of Hennepin***, No. 29104, 2003 WL 1877346 (Minn. T. Ct. 04/11/03).

■ **FACILITY NOT BUILT IN 1991 QUALIFIED FOR LIMITED PROPERTY TAX EXEMPTION.** The Minnesota Tax Court held that the limited statutory exemption under Minn. Stat. §272.02, Subd. 26 applied to structures built after 1991. The statutory reference to the year 1991 levy was ambiguous, and therefore, the court looked at legislative history to determine the intent of the Legislature. After examining the intent and the language of the statute, the court concluded that the limited exemption could apply to buildings constructed after 1991. ***ILHC of Eagan, d/b/a The Commons on Marice v. County of Dakota***, No. CO-01-7361 and CX-02-7460, 2003 WL 21108385 (Minn. T. Ct. 05/01/03).

■ **TAX COURT FINDS FRIVOLOUS-RETURN FILING PENALTY WARRANTED.** The Minnesota Tax Court upheld the imposition of a frivolous-return penalty against a taxpayer, who claimed zero taxable income based on a deduction of fiduciary fees. In 2000, the taxpayer earned taxable income but on his Minnesota individual income tax return claimed no tax liability and claimed a refund. The commissioner audited and issued an assessment along with a $500 frivolous-return filing penalty. The taxpayer argued that his taxable income was zero due to a deduction for fiduciary fees related to a trust and that he did not have to pay income taxes because neither Congress nor the Minnesota Legislature had authority to impose an unapportioned tax. The court dismissed both arguments as without merit. The court also found the taxpayer's argument was factually incorrect, when he alleged that his return was

clearly not frivolous, because it was accepted by the commissioner by issuing a tax refund. The imposition of tax, interest, and the frivolous-filing penalty was upheld. ***Timothy P. Brintnall v. Commissioner of Revenue***, No. 7495-R, 2003 WL 1877239 (Minn. T. Ct. 04/08/03).

■ **SALES TAX; CAPITAL EQUIPMENT; SERVICE BUSINESS.** The Minnesota Tax Court found that Sprint was ineligible for the capital equipment refund since it was not engaged in the "manufacturing, fabricating, or refining" of "tangible personal property." ***Sprint Spectrum LP v. Commissioner of Revenue***, No. 7299-R, 7308-R, 7309-R, 2003 WL 21246600 (Minn. T. Ct. 05/23/03).

■ **COVENANT NOT TO COMPETE THAT IS PART OF STOCK REDEMPTION AGREEMENT IS IRC SECTION 197 INTANGIBLE.** The 9th Circuit, affirming the Tax Court, held that a noncompete covenant entered into as part of a stock redemption agreement had to be amortized over 15 years under IRC Section 197. The 15-year amortization rule applied even though the taxpayer continued operating its own business after the redemption. ***Frontier Chevrolet Co. v. Com.***, 91 AFTR 2d 2003-884 (9th Cir. 05/28/03).

■ **BONUSES PAID BY CORPORATION TO OFFICERS RULED UNREASONABLE.** Bonuses paid by tax corporation during years at issue to two of its officers were not reasonable within meaning of IRC Section 162(a)(1). ***Haffner's Service Stations Inc. v. Commissioner***, No. 02-1761, 91 AFTR 2d 2003-1461 (1st Cir. 03/31/03).

■ **FEDERAL "EITC," SIMILAR MINNESOTA CREDIT LAW EXEMPT FROM BANKRUPTCY CLAIMS.** Federal earned income tax credit and Minnesota working family credit are excluded from debtor's bankruptcy estate under Minnesota statute exempting "all relief based on need" from the claims of creditors in Minn. Stat. §550.37, Subd. 14. ***In re Tomczyk***, No. 02-55534, 2003 WL 1786853 (Bankr. D. Minn. 04/02/03).

■ **COURT LOOKS TO TRUST'S PARTICIPATION AS ENTITY, DECIDES AGAINST TREATING LOSSES AS PASSIVE.** The "material participation" that is relevant in determining whether losses are passive activity losses when the taxpayer in question is a trust is not that of the trustee alone in his capacity as such, but rather that of the trust as an entity, including its fiduciaries, employees, and agents. ***Mattie K. Carter Trust v. United States***, No. 4:02-CV-154-A 91, AFTR 2d 2003-1946 (N.D. Tex. 04/11/03).

■ **COURT DETERMINES PROFESSIONAL FEES DEDUCTIBLE BY DEBTORS UNDER SECTION 162.** Bankruptcy Court determines what professional fees were deductible by debtors pursuant to IRC Section 162 for tax years covering period from May 31, 1992, through and including fiscal year that ended May 31, 1994. ***Hillsborough Holdings Corp. v. United States (In re Hillsborough Holdings Corp.),*** Adv. Pro. No. 91-313, 2003 WL ____ (Bankr. M.D. Fla. 03/20/03).

■ **TRUST'S INVESTMENT ADVICE FEES SUBJECT TO 2 PERCENT FLOOR FOR MISCELLANEOUS ITEMS.** Investment advice fees incurred by trust are not fully deductible, but are subject to the 2 percent floor for miscellaneous itemized deductions. The court, following the Federal Circuit in *Mellon Bank N.A. v. United States*, 265 F.3d 1275 (Fed. Cir. 2001), noted that its decision is at odds with the 6th Circuit's in *O'Neill v. Commissioner*, 994 F.2d 302 (6th Cir. 1993). ***Scott v. United States***, No. 02-1464 (4th Cir. 05/01/03).

■ **COURT STRIKES DOWN PORTIONS OF CAMPAIGN FINANCE REFORM LAW.** A U.S. District Court held that portions of a new federal law designed to reform the way political campaigns are financed are unconstitutional. Ruling on the Bipartisan Campaign Reform Act of 2002 ("BCRA"), a three-judge panel overturned a provision that prohibits corporations, nonprofit corporations, and labor unions from paying for electioneering communications based on the law's definition of electioneering communication. The court also overturned the ban on Massachusetts Citizens for Life-type organizations (typically, section 501(c)(4)) organizations established to express political ideas) making electioneering communications, and struck down the ban on national, state, and local parties soliciting money for, or making contributions to, exempt organizations that spend funds in connection with federal elections. Finally, the court overturned the provision of BCRA that prohibits national, state, and local parties from raising and spending soft money. It upheld the ban only as it applies to spending soft money on public communications that refer to a candidate for federal office and that oppose or support the candidate. ***Senator Mitch McConnell, et al. v. Federal Election Commissioner, et al.***, No. 02-582 (CKK, KLH, RJL) (D. D.C. 05/01/03).

■ **SUMMER HOME SOLD BY TAXPAYERS HELD NOT THEIR PRINCIPAL RESIDENCE**. One of three homes that taxpayers owned during the five-year period prior to its sale was not the taxpayers' principal residence because they did not use it a majority of the time during each of those five years, and thus the gain realized from the sale is not eligible for federal exclusion under IRC Section 121. ***Guinan v. United States***, No. CV 02-0261-PHX-PGR, 91 AFTR 2d 2003-2174 (D. Ariz. 04/10/03).

COURT VALUES PARTNERSHIP INTERESTS ASSIGNED BY TAXPAYERS AS GIFTS. Taxpayers who assigned their interests in a partnership as gifts to their children and certain charitable organizations assigned only economic rights with respect to the partnership without conferring partner status on the assignees, and the value of the assigned interests is determined for purposes of the gift tax after taking into account the partnership's net asset value and discounts for lack of control and marketability. ***McCord v. Commissioner***, 120 T.C. No. 13 (05/14/03).

EMPLOYMENT TAXES; "SAFE HARBOR RELIEF"; FAILURE TO TIMELY FILE RETURNS. Solely owned emergency medical services corporation was entitled to Revenue Act 1978 Section 530 "safe harbor relief" from employment tax liability with respect to contract physicians/reclassified employees. Taxpayer's failure to *timely* file Forms 1099 and 1096 didn't prevent it from satisfying Section 530(a)(1)(B) where it did ultimately file returns. The business did so on a basis consistent with its nonemployee treatment of physicians, and indisputably had reasonable basis for such nonemployee treatment. IRS's attempt to read timely filing requirement into statute on basis of pervasive "Code wide" timely filing requirement wasn't supported by statute's plain language, which required only that filing be made and be consistent with taxpayer's treatment of subject workers. A different interpretation would impose a disproportionate penalty, in contravention of statute's purpose to *protect* taxpayers from having to legislate each employee's status. Also, Rev Proc 85-18, 1985-1 CB 518 wasn't persuasive or entitled to due deference, where it failed to articulate IRS's reasoning. ***Medical Emergency Care Associates, S.C. v. Commissioner***, 120 TC No. 15 (2003).

JOINT RETURNS; INNOCENT SPOUSE RELIEF; REFUNDS; AMOUNTS REMAINING UNPAID. IRC Section 6015(g)'s refund provision *potentially* encompassed all amounts taxpayer paid both before and after statute's effective date toward joint liability for which she was given IRC Section 6015(f) relief. This was based on case law and statute's context, legislative history, and overall goal of providing expanded relief. IRC Section 6015(g)(1)'s reference to pre-1998 amounts "remaining unpaid" as of statute's effective date was interpreted to mean refunds were potentially available for entire amount of pre-1998 liabilities just so long as some amount remained unpaid as of statute's effective date, but not to restrict refund to only those remaining amounts. ***Connie A. WA v. Commissioner***, 120 TC No. 9 (2003).

ADMINISTRATIVE MATTERS

MINNESOTA EXTENDS AMT DEDUCTION FOR CONTRIBUTIONS TO NON-MINNESOTA CHARITIES TO PRE-2002 YEARS. In response to a recent Minnesota Supreme Court decision, the Minnesota Department of Revenue ("COR") announced that it will allow an alternative minimum tax ("AMT") deduction for contributions to non-Minnesota charities in tax years that begin before January 1, 2002. Revenue Notice 03-03 (05/03/03). As a result of *Chapman v. Commission*, 651 N.W.2d 825 (Minn. 08/29/02) DOR will allow an individual AMT deduction for charitable contributions made to non-Minnesota charities in tax years beginning before January 1, 2002. Individual taxpayers who have paid the Minnesota individual AMT for such tax years may file an amended return on which they claim a refund generated by the deduction for contributions to non-Minnesota charities, if they file the amended return within the three and a half year period contained in Minn. Stat. §289A.40. Consider which of your clients paid Minnesota AMT for open pre-2002 tax years and may have had enough in contributions to non-Minnesota charities in those years to make filing amended returns worth the time and fees involved.

PROPERTY TAX: SUSTAINABLE FOREST INCENTIVE ACT AND VIOLATION OF CONDITIONS OF ENROLLMENT. In Minnesota Department of Revenue Notice No. 03-02 (05/21/03), the commissioner explained his position on violations of the condition of enrollment in the Sustainable Forest Incentive Program under Minn. Stat. §290C.11(a). This Revenue Notice provides guidance in determining what constitutes a violation of the Timber Harvesting Forest Management Guidelines adopted by the Minnesota Forest Resources Council. The guidance was necessary since the underlying statute does not indicate what activities or omissions constitute a violation of the Guidelines.

MINNESOTA TAXES; REPEAL OF OBSOLETE REVENUE NOTICES. In Minnesota Department of Revenue Notice No. 03-04 (05/19/03), the commissioner repealed various Revenue Notices as obsolete because either the law was repealed or the period of time for taxpayer action expired under the statute.

MINNESOTA COURT FILING FEES WILL INCREASE. The filing fee for filing a Notice of Appeal in the tax court or an action in the district court will increase to $235 from $135. The fee for filing of an action in the small claims division of the Minnesota Tax Court or Conciliation Court will increase from $25 to $150. All fee increases are effective on or after July 1, 2003. First Special Session 2003 Senate File 2 amending Minn. Stat. §271.06, Subd. 4 and Minn. Stat. §357.021, Subd. 2.

■ **CHIEF COUNSEL EXPLAINS PROCEDURES FOR OBTAINING TAX ACCRUAL WORKPAPERS.** The IRS set out procedures to implement its policy for requesting access to tax accrual and other financial audit workpapers on the tax reserve for deferred tax liabilities and to footnotes disclosing contingent tax liabilities appearing on audited financial statements. The notice follows up on Announcement 2002-63, 2002-27 IRB 72, applying to returns filed on or after July 1, 2002, which provides that the IRS may request tax accrual workpapers with respect to tax benefits arising from listed transactions. For tax returns filed prior to July 1, 2002, the IRS will only request tax accrual workpapers if the taxpayer had an obligation to disclose a listed transaction and failed to do so. Chief Counsel Notice 2003-012 (04/09/03).

■ **IRS PUBLISHES GUIDANCE ON EXPANDED ONLINE TIN-MATCHING PROGRAM.** The IRS established an online TIN Matching Program, which expands upon the preexisting Federal Agency TIN Matching Program established by Rev. Proc. 97-31. Rev. Proc. 2003-9 will become effective upon the IRS issuing a Notice announcing the availability of E-Services. Rev. Proc. 2003-9, 2003-8 I.R.B. 516.

■ **IRS CLARIFIES REPORTING AND DISCLOSURE FOR TAX-EXEMPT POLITICAL ORGANIZATIONS.** IRS issued a Revenue Ruling clarifying the reporting and disclosure requirements for tax-exempt political organizations described in tax IRC Section 527. The ruling provides guidance on notice of status requirements, periodic reports of contributions and expenditures, and annual returns. Revenue Ruling is set up in a question-and-answer format to address 58 reporting and disclosure issues. Rev. Rule 2003-49.

■ **IRS ISSUES GUIDELINES FOR PARTICIPATION IN INDUSTRY ISSUE RESOLUTION PROGRAM.** The IRS issued new procedures for taxpayers to use in submitting frequently disputed or burdensome business tax issues for consideration under the agency's industry issue resolution (IIR) program. Revenue Procedure 2003-36.

■ **IRS ISSUES TWO REORGANIZATION RULINGS IN EFFORT TO REDUCE PRIVATE LETTER RULINGS.** The IRS issued Revenue Ruling 2003-52 and Revenue Ruling 2003-55 to clarify certain corporate reorganization scenarios and help reduce the need for private letter rulings for such reorganizations. The rulings describe situations that satisfy the "business purpose" requirement of IRC Section 355, which provides when a corporation can distribute stock and securities in a corporation it controls to its shareholders in a nontaxable transaction.

■ **NEW RULINGS "OK" DEDUCTIONS FOR CORRECTIVE SURGERY AND NONPRESCRIPTION MEDICAL SUPPLIES.** Two new rulings clarify the medical expense rules by permitting deductions for some types of corrective surgery and for nonprescription medical supplies. Rev Rul 2003-57 permits taxpayers to claim as a medical expense deduction the unreimbursed cost of breast reconstruction surgery following a mastectomy that removed a breast as part of the treatment for cancer. The reconstructive surgery qualifies as medical care because it ameliorates a deformity directly related to a disease. The cost of laser eye surgery (*e.g.*, LASIK, radial keratotomy) to correct myopia, which is a bodily defect is also qualified. However, that a taxpayer's unreimbursed cost of paying a dentist to whiten teeth discolored as a result of age isn't a medical expense because it doesn't treat a disease or promote the proper function of the body. Rather, the teeth-whitening is directed at improving the taxpayer's appearance. Rev. Rul. 2003-58 is addressed to a taxpayer who buys crutches to enhance mobility while his injured leg is healing and buys bandages to cover torn skin on the leg. He also has diabetes and buys a blood sugar test kit to monitor his blood sugar level. The taxpayer's doctor recommends that he take aspirin to treat pain in his injured leg. IRS concludes that the cost of the aspirin isn't a medical expense even if a doctor recommends its use because it isn't a prescribed drug. However, IRS points out that the IRC Section 213(b) restriction applies only to nonprescription drugs, not to nonprescription supplies. As a result, the taxpayer's unreimbursed cost of items such as crutches and bandages, and diagnostic devices such as blood sugar kits, are deductible medical care items, subject to the limitations of IRC Section 213.

■ **IRS RELEASES PUBLICATION ON PREPARING AN INFORMATION COLLECTION STATEMENT FOR OFFER AND COMPROMISE PROGRAM.** The IRS released Publication 1854 (Rev. January 2003), "How to Prepare a Collection Information Statement (Form 433-A)."

■ **PROPERTY TAX: MORE TAXPAYERS MAY QUALIFY FOR "SPECIAL" TAX REFUNDS.** While taxpayers have May 15 property tax payments on their minds, the Minnesota Department of Revenue urges homeowners and renters to think about their 2002 property tax refunds. The 2002 Property Tax Refund Form is due by Aug. 15, 2003. More homeowners may qualify for the Minnesota "special" property tax refund, which provides tax relief to homeowners whose property taxes increased by more than 12 percent *and* at least $100 from 2002 to 2003. There is no income limitation to qualify for the "special" property tax refund (the regular property tax refund has income limits) and the taxpayer must

have owned and lived in his or her home on January 2, 2002, and on January 2, 2003. Taxpayers may order forms and instructions at *www.taxes.state.mn.us* or through an automated system by calling (651) 296-4444, and those with questions may reach the Department at (651) 296-3781. Notice, Minnesota Department of Revenue, 05/15/03.

LEGISLATION

■ **FEDERAL JOBS AND GROWTH TAX RELIEF RECONCILIATION ACT OF 2003**. The Jobs and Growth Tax Relief Reconciliation Act of 2003 ("JGTRRA") provides a total of $330 billion in federal tax cuts, including: a reduction in taxes on capital gains and dividends and the temporary elimination of such income taxes for lower income taxpayers; an increase in small business expensing; expansion and extension of a depreciation "bonus" established under a 2002 economic stimulus bill; and an acceleration of marginal rate reductions and other individual tax cuts called for under a 2001 law. The new law also provides $20 billion in fiscal relief for states.

The new law makes the following significant changes:

■ **Capital Gains and Dividends:** The highest tax rate on capital gains and dividends was lowered to 15 percent for 2003-08 with taxpayers in lower income brackets paying 5 percent on capital gains and dividends in 2003-07, and no taxes on such income in 2008. The capital gains relief is effective as of May 6, 2003, while the dividend provision is effective as of Jan. 1, 2003. Both are scheduled to expire at the end of 2008;

■ **Small Business Expensing:** IRC Section 179 small business expensing was increased from $25,000 to $100,000 with the phase-out threshold level raised from $200,000 to $400,000 for property in service in taxable years beginning in 2003, 2004, and 2005.

■ **Depreciation Bonus:** The depreciation bonus established under the Job Creation and Workers Assistance Act of 2002 was extended and increased to 50 percent from 30 percent for property that was acquired after May 5, 2003, and before Jan. 1, 2005.

■ **Child Tax Credit:** The child tax credit was increased to $1,000 in 2003 and 2004. This increase includes advance rebates of up to $400 per eligible child in 2003. The checks will be mailed out to eligible taxpayers beginning in July, 2003.

■ **10 Percent Income Bracket:** An already approved increase in the 10 percent income tax bracket was accelerated, making it effective in 2003 and 2004.

■ **Marginal Rate Reductions:** Marginal rate reductions scheduled under a 2001 law to take place in 2004 and 2006 were accelerated to 2003.

■ **Marriage Tax Relief:** Marriage tax relief called for under a 2001 law, including an increase in the standard deduction, and an expansion of the 15 percent income bracket, effective for 2003-04, was accelerated to 2003.

■ **Alternative Minimum Tax:** The alternative minimum tax exemption amount was increased to $58,000 for married couples filing joint returns, and to $40,250 for single filers, for taxable years beginning in 2003 and 2004.

■ **Corporate Estimated Taxes:** For corporate estimated taxes due on 09/15/03, 25 percent can be deferred to 10/01/03. This affects only when the payment is made, not the amount of the payment. H.R.2.

■ **MINNESOTA UPDATES TO JGTRRA OF 2003.** The Omnibus Tax Bill in H.F. 7, the First Special Session, updated Minnesota's tax law references to pick-up the JGTRRA of Internal Revenue Code 2003 changes. The changes were effective at the same time as the federal law. The impact of the JGTRRA of 2003 is a state revenue loss of $103 million. Minnesota's conformity update is contingent in federal approval of state spending plan for the federal aid and assistance coming from Washington.

Several provisions of the JGTRRA of 2003 will directly impact revenues in Minnesota by conformity:

■ **Dividend and Capital Gain.** The reduced rate on dividends will *not* flow through to Minnesota since it will require all income to be reported. The federal change simply subjects different types of income to different tax rates, much the same as is done for capital gains under current federal law. Therefore, there is no impact in Minnesota.

■ **Small Business Expensing.** The increased expensing allowance for small businesses will flow through to nearly all state business tax systems that conform to federal taxable income as Minnesota does. Earlier Joint Committee on Taxation Revenue estimates had projected a $2-3 billion annual federal revenue impact from this provision for all states.

■ **Depreciation Bonus.** Minnesota decoupled from the 2002 federal depreciation law and the same approach was used with the JGTRRA of 2003. Taxpayer currently can add back 80 percent of the bonus

depreciation in the year of acquisition and then write-off the retricted depreciation evenly over the succeeding five years. Minnesota extends the current law to the additional 20 percent bonus depreciation allowed under the JGTRRA of 2003.

■ **Marriage Penalty Provisions.** The marriage penalty relief provisions (increased standard deduction) will affect a state like Minnesota that conforms to federal taxable income as a starting point for state taxation.

■ **Federal Aid.** The JGTRRA of 2003 grants $20 billion in fiscal relief for all state and local governments including Minnesota's portion thereof ($10 billion in each of FYs 2003 and 2004). One half of the federal aid is dedicated to helping finance additional Medicaid costs by increasing the federal proportion of total program costs in each state by 2.95 percentage points for the last two quarters of federal FY 2003 and the first three quarters of FY 2004. The other $10 billion is flexible aid provided to states to assist in funding "essential government services" and unfunded federal mandates. The funds will be distributed among states on the basis of population from the 2000 census, provided that no state will receive less than 1/2 of 1 percent of the total ($50 million over two years). One-half of the flexible aid is to be distributed within 45 days of enactment and the remainder on October 1, 2003.

LOOKING AHEAD

■ **BILLS INTRODUCED WHICH WOULD REQUIRE PARITY FOR SUBSTANCE ABUSE BENEFITS IN HEALTH PLANS.** Ways and Means Committee member Rep. Jim Ramstad introduced H.R. 2256, and Sen. Norm Coleman introduced S.F. 1138, which would prevent group health plans covering substance abuse treatments from imposing treatment limits or financial requirements that only apply to medical and surgical benefits. The bills are called the Help Expand Access to Recovery and Treatment ("HEART") Act of 2003.

■ **SENATE "OKS" $10 BILLION BILL TO ACCELERATE CHILD CREDIT REFUNDABILITY.** On June 6, 2003, the Senate passed the Relief for Working Families Tax Act of 2003 (H.R. 1308) that would accelerate to 2003 an increase in the refundability of the child tax credit and raise the income level at which the credit begins to phase out for married couples. The Senate-passed bill would:

■ increase the refundable portion of the child tax credit to 15 percent of a taxpayer's earned income in excess of $10,500 starting in 2003, instead of in 2005 as called for under current law, at a cost of $3.49 billion;

■ reduce a marriage penalty that exists with regard to the child tax credit by increasing the income phase-out level for married couples filing joint returns from the current $110,000 to $115,000 in 2008 and 2009, and to $150,000 (twice the phase-out threshold provided to single head of households) in 2010, at a cost of $4.8 billion;

■ establish a uniform definition of a child for several income tax purposes, including determinations under the dependency exemption, the child tax credit, the earned income tax credit, the dependent care credit, and the head of household filing status, beginning in 2004, at a cost of $1.43 billion; and

■ allow for refundability of the child tax credit for families of soldiers in combat zones, even though combat wages are not taxed, at a cost of $34 million.

The cost of these tax relief provisions would be more than offset through the extension through March 31, 2010 of two U.S. customs user fees. Look for the House to pass a similar version before the end of summer.

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JUDICIAL LAW

■ **NO-FAULT — ARBITRATOR MAY DECIDE LEGAL QUESTIONS.** Plaintiff suffered back injuries in an automobile accident. Her chiropractor prescribed a quality firm mattress. She purchased one and submitted the claim to her no-fault insurer. Her insurer denied the claim and she filed a petition for no-fault arbitration. The arbitrator found that plaintiff was entitled to reimbursement because the mattress was reasonably and medically necessary and benefited plaintiff's recovery. Auto-Owners brought a motion to vacate the award in district court on the grounds that the arbitrator had exceeded his authority by deciding a legal issue. The district court denied the motion.

The Court of Appeals reversed the district court and vacated the arbitration award. The court held that the arbitrator did *not* exceed his authority by deciding a legal issue, but that the decision was legally incorrect. An arbitrator may decide legal questions and apply facts to those determinations, but legal questions are subject to *de novo* review by the district court and the Court of Appeals. The court held

that a mattress is neither a service nor a prosthetic device; it therefore need not be reimbursed under the No-Fault Act. ***Gilder v. Auto-Owners Ins. Co.***, C4-02-1466 (Minn. App. 04/15/03).
http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op021466-0415.htm

■ **NO-FAULT — ARBITRATOR EXCEEDS AUTHORITY BY NOT DECIDING ALL ISSUES PROPERLY RAISED.** Plaintiff filed a no-fault claim after her knee was injured in an automobile accident. She presented inconclusive evidence on whether her knee injury was related to the accident, so the arbitrator issued a decision that allowed the claimant to re-file if and when she could obtain evidence. The decision neither granted nor denied the medical claim. Plaintiff filed a second petition for arbitration after she obtained more evidence. Auto-Owners filed a motion to dismiss, arguing that a second arbitration was barred by collateral estoppel and *res judicata*.

The district court vacated the original award on the grounds that the arbitrator exceeded her authority by not deciding an issue properly before her, and remanded the arbitration for resolution. The arbitrator's second award granted benefits related to plaintiff's knee injury. The district court confirmed the second award, and Auto-Owners appealed.

The Court of Appeals affirmed on several grounds. It first affirmed the district court's decision to vacate the original award on the grounds that the arbitrator exceeded her authority by issuing an unresponsive award. Next, the court affirmed that the arbitrator had the discretion to hold open an arbitration proceeding to allow the parties to submit necessary evidence. Finally, the court held that collateral estoppel did not bar the second arbitration because there had been no final judgment on the merits. ***Olson v. Auto-Owners Ins. Co.***, CX-02-1634 (Minn. App. 04/15/03).
http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op021634-0415.htm

■ **NO-FAULT — NO RECOVERY AGAINST A MUNICIPALITY.** A police officer driving a marked patrol car struck a pedestrian causing injuries that resulted in over $33,000 in medical expenses. The pedestrian's insurer brought a declaratory judgment action against the city's insurer seeking payment on the first $20,000 of no-fault benefits, claiming that the city's insurer had first priority coverage. The district court granted summary judgment to the city's insurer based on its conclusion that a marked patrol car is not a "motor vehicle."

The Supreme Court held that a marked patrol car is not a "motor vehicle" because under the act, marked patrol cars are not required to be registered (licensed) and thus do not fit the definition as decided by the Legislature. Therefore an injured pedestrian does not have the right to recover basic economic loss benefits from the city under the act. ***Mutual Service Casualty Ins. Co. v. League of Minnesota's Cities Ins. Trust***, CX-01-1929 (Minn. 04/24/03).
http://www.lawlibrary.state.mn.us/archive/supct/0304/op011929-0424.htm

■ **ARBITRATION — STATUTE OF LIMITATIONS.** Plaintiff and defendant entered into a contract for the installation of a heat pump system in plaintiff's new school building. The contract provided that all disputes would be resolved by arbitration, and specifically stated that no demand for arbitration could be made after the date when such a claim would be barred by the applicable statute of limitations for litigating claims. Shortly after installation, and over a three-year period, problems with the heat pumps necessitated repairs. The plaintiff hired a consultant who said the problems resulted from defendant's negligent installation. Plaintiff served defendant with a demand for arbitration more than two years after receiving notice of the system failure.

Defendant moved to dismiss the arbitration as untimely. In granting the motion, the district court found that the two-year statute of limitations for improvements to real property applied, and that plaintiff had discovered an actual injury more than two years prior to the demand for arbitration.

The Court of Appeals affirmed, holding that where an arbitration clause adopts a statute of limitations applicable to litigating claims, the triggering event (in this case, the discovery of an actionable injury) controls. The fact that the parties incorporated arbitration rules requiring more specificity in a demand for arbitration than that required for a lawsuit did not alter the result. ***Indep. Sch. Dist. No. 775 v. Holm Bros. Plumbing & Heating, Inc.***, C3-02-1278 (Minn. App. 04/29/03). *http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op021701-0429.htm*

■ **COLLATERAL-SOURCE RULE — APPLICABILITY TO PROPERTY DAMAGE CASES.** Plaintiffs, commercial building owners, sued defendant, a welder, for fire damage to its building. Following a bench trial on the issue of damages, and the trial court's order for judgment, defendant brought a post-trial motion to reduce the judgment by the amount his insurer had reimbursed plaintiffs' insurer for payments previously made to the plaintiffs. The trial court granted the motion and reduced the judgment accordingly.

The Court of Appeals affirmed, holding initially that collateral source issues are properly considered by post-trial motion, and that the common law collateral-source rule, as opposed to the collateral source statute, applied in property damage cases.

Applying the collateral-source rule, the court held that, in general, compensation received from a third-party does not diminish recovery against a wrongdoer. But the rule applies only to payments that come from sources other than the tortfeasor or someone acting for the tortfeasor. Where a tortfeasor's insurer makes a payment directly or indirectly to the injured party, that payment will offset the tortfeasor's liability to the insured. ***VanLandschoot v. Walsh***, C3-02-1278 (Minn. App. 04/29/03). *http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op021278-0429.htm*

■ **MEDICAL MALPRACTICE — ACCRUAL OF CAUSE OF ACTION.** As a teenager, decedent was diagnosed with a congenital heart defect. In 1993, he treated with defendants, who informed him that his test results were satisfactory, showed nothing alarming, and that he did not need to restrict any of his activities. Seven years later, in September of 2000, decedent suffered cardiac arrest while playing racquetball and died a short time later.

Decedent's widow sued defendants for medical malpractice in 2002, alleging that failure to restrict decedent's activities given his heart condition was malpractice, and that decedent suffered no injury or damage resulting from the negligence until his collapse in September 2000. The district court granted summary judgment in favor of defendants, holding that the physician-patient relationship terminated in 1993, at which time the cause of action accrued and the four-year statute of limitations began to run. Thus, the court held plaintiff's action was time barred.

The Court of Appeals reversed, explaining that the statute of limitations cannot begin to run until the cause of action accrues. A cause of action accrues when it may be brought and maintained against the allegedly negligent party. However, the element of damage must exist before an action may be brought; otherwise the action will be subject to dismissal for failure to state a claim. In this case, the court found, there was no evidence that decedent's heart condition worsened or deteriorated, or that he suffered any compensable injury whatsoever that could be attributable to defendants' alleged negligence before his collapse in 2000.

The court stressed that its decision did not rest on decedent's failure to discover a medical injury that may have been attributable to defendants' negligence, but rather on the proposition that no injury existed until decedent suffered cardiac arrest in 2000. Therefore, the analysis was based on an objective (ascertainable evidence of injury), rather than a subjective (plaintiff's personal knowledge of injury) standard. ***Broek v. Park Nicollet Health Services***, C9-02-1611 (Minn. App. 05/06/03). *http://www.lawlibrary.state.mn.us/archive/ctappub/0305/op021611-0506.htm*

■ **STATUTE OF LIMITATIONS; CONVERSION; FRAUDULENT CONCEALMENT.** In 2001, plaintiff filed suit for conversion of jewelry from a safe in a home she sold to the defendant in 1987. In response to questions from police and the plaintiff, defendant denied any knowledge of the missing jewelry. However, several years after the investigation, plaintiff discovered defendant had possession of the jewelry, and immediately filed suit.

The Court of Appeals held that the defendant's fraudulent concealment tolled the statute of limitations. If the person taking the property fraudulently hides the conversion, then the statute of limitations does not begin to run until the plaintiff has, or should have, reasonable knowledge of the act. The court limited this holding to situations where fraudulent concealment is present. To prove fraudulent concealment the plaintiff must prove there was an affirmative act or statement to conceal the potential claim. ***Williamson v. Prasciunas***, CX-02-1830 (Minn. App. 05/20/03). *http://www.lawlibrary.state.mn.us/archive/ctappub/0305/op021830-0520.htm*

■ **NO FAULT — UNINSURED MOTORIST CAN BRING NEGLIGENCE ACTION.** Plaintiff suffered injuries in an automobile collision. The negligent driver of the other vehicle was insured, but the plaintiff was not. Plaintiff brought a tort action to recover economic damages under the no-fault statute. While the defendant did not dispute his own fault, he challenged the ability of an uninsured motorist to sue for negligence under the Minnesota No-Fault Insurance Act. The trial court dismissed plaintiff's claim, holding that an uninsured motorist could not recover no-fault benefits in a tort action.

The Court of Appeals reversed, citing a statutory provision that allows a party to bring a negligence action for economic loss benefits through the assigned claims plan due to "any lack of insurance." The court interpreted Minn. Stat. §65B.51 to allow an injured person to bring an action for economic damages even if he is uninsured. The court noted the existence of other deterrents, including criminal penalties, to encourage drivers to procure insurance.***Munoz v. Kihlgren***, CX-02-1908 (Minn. App. 05/20/03). *http://www.lawlibrary.state.mn.us/archive/ctappub/0305/op021908-0520.htm*

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