



NOTES & TRENDS

ADMINISTRATIVE LAW

JUDICIAL LAW

■ **SUBPOENAS REDUX.** In May of 2003 the Court of Appeals reversed an unemployment decision when two subpoenaed supervisors of the employee failed to appear at the hearing. In December of last year, the court did it again. The employee subpoenaed documents from the employer that were not produced and he subpoenaed a coworker who did not appear at the hearing. The unemployment law judge refused to continue the hearing observing that “[T]here isn’t any reason to stretch things out.” The court cited its prior decision and stated that parties are required to comply with subpoenas, and ULJ’s are required to either enforce those subpoenas or state on the record legally sufficient reasons for declining to do so. The court also noted that ULJ’s are required by rule to assist unrepresented parties in the presentation of evidence to ensure a fair hearing. *Ntamere v. DecisionOne Cooperation*, A03-355, 673 N.W. 2d 179 (Minn. App. 12/30/03).

■ **RIGHT TO A HEARING.** The Minnesota Center for Environmental Advocacy (MCEA) challenged the reissuance of permits by the Minnesota Pollution Control Agency (PCA) to waste water treatment plants in Owatonna and Faribault. A PCA rule requires phosphorus removal to a level of one milligram per liter if the discharge is directly to or affects a lake. Both facilities discharge indirectly to a lake and exceed the phosphorus discharge level in the rule. The court found that expert disagreement on the effect of the phosphorus discharge by the plants created a material issue of fact and that (as required by an agency rule) a hearing would aid the agency in making a decision. Underlying the decision was the court’s recognition of “danger signs” suggesting that the board’s decision may not be reasoned and reflected its will rather than its judgment. The court cited comments by board members concerning the economic impact on the plants, and comments on the inclusion of a management plan in the permits, as suggesting reliance on factors outside of the phosphorus rule. The court also noted that a “phosphorus strategy” developed by the PCA cannot contravene the plain meaning of the phosphorus rule nor can enforcement of the rule be ignored by the adoption of a strategy. *In Re The City of Owatonna’s NPDES/SDS Proposed Permit Reissuance*, A03-331, A03-333, 672 N.W. 2d 921 (Minn. App. 01/06/04).

■ **WRIT OF CERTIORARI; SERVICE OF PETITION.** After the denial of her unemployment benefit claim was affirmed by the commissioner of employment and economic development, the claimant filed a certiorari appeal with the Court of Appeals and served a copy of the petition for the writ on the commissioner and the employer’s attorney. The employer argued that service was ineffective because the unemployment appeal statute requires service on any “involved party.” The Court of Appeals found that the method of service was governed by Minn. R. Civ. App. P. 125.02 that requires service on a party represented by counsel to be made upon the attorney. The court distinguished prior unemployment and human rights appeals that seemed to suggest service on the party itself might be required, and noted that service on the attorney general has been held to be effective service on a state agency. *Sorenson v. Life Style, Inc.*, A03-1505, 674 N.W. 2d 439 (Minn. App. 02/13/04).

LEGISLATION

At one month into the 2004 Legislative Session, significant administrative law/APA developments are nowhere to be seen. However, by the time of our next column, current betting suggests there will be changes — stay tuned.

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CIVIL LITIGATION

JUDICIAL LAW

■ **RULE 68 OFFERS OF JUDGMENT.** You are a plaintiff and have just received an offer of judgment. You reject it. At trial, your net recovery is less than the offer of judgment. So, how many of the opponent’s costs and disbursements will you be responsible for? Just those incurred after the offer? Or *all* of them? The answer is, “All of them ... maybe.” According to the Minnesota Court of Appeals, the issue of “the date from which the offeree’s liability for costs and disbursements begins in the context of Rule 68” is an issue “we now confront, for the first time.” The court held that an offeree, whose net recovery is less than the Rule 68 offer of judgment, will have to pay *all* of the offeror’s costs and disbursements for the entire case. A dissent by Judge Klaphake suggests that the majority’s interpretation is contrary to the

Minnesota Supreme Court's own interpretation of its rule, as stated in *Bucko v. First Minn. Sav. Bank, F.B.S.*, 471 N.W.2d 95 (Minn. 1991) (interpreting the same version of Rule 68). The majority disagreed that *Bucko* was controlling, as a different issue was presented by that case. The majority discussed subsequent case law from the Minnesota Supreme Court and noted that those cases have not suggested that costs and disbursements would be limited to those incurred after the offer. *Vandenheuvel v. Wagner*, 673 N.W.2d 524, A03-324 (Minn. App. 01/16/04).

■ **SERVICE OF PETITION FOR WRIT OF CERTIORARI CHALLENGING ADMINISTRATIVE DENIAL.** (See "Administrative Law," *supra*. *Ed.*) *Sorenson v. Life Style, Inc.*, 674 N.W.2d 439, A03-1505 (Minn. App. 02/13/04)

■ **CIVJIG 91.40; APPORTIONMENT OF DAMAGES; PERSONAL INJURY.** The Minnesota Court of Appeals has held that the current use note of CIVJIG 91.40 (*i.e.*, 4A *Minnesota Practice*, CIVJIG 91.40 use note (Supp. 2004)) misstates the law of apportionment of damages caused by a single at-fault defendant and those caused by a preexisting condition or disability. In the case at hand, the plaintiff's car was struck from behind by another car. Plaintiff experienced a headache and a sore neck, so visited her chiropractor. About five months later, an MRI revealed that she had a herniated disc. The issue of a preexisting condition came up because plaintiff had experience generalized neck, shoulder, and back pain for years and, just two months before the accident, had begun receiving chiropractic treatments three times a week. Therefore, a jury instruction on aggravation of a preexisting condition was appropriate. Damages in such cases, however, are limited to those results that are over and above the results that would have normally followed from the preexisting condition.

After noting that it would be an exceptional case in which there is no reasonable basis for apportionment of damages, the court said that the current working of the statute: "if you [the jurors] cannot separate damages caused by the preexisting disability or medical condition from those caused by the accident, the defendant is liable for all the damages" fails to state that the defendant is liable for all damages *only* if no reasonable apportionment can be made. The court found that

a jury may encounter a number of reasons why they cannot separate the damages that would not necessarily be caused by the fact that no reasonable causal apportionment exists. These reasons could include failure of proof, confusing or conflicting testimony, juror indecision, or juror disagreement. While other instruction may weigh against relying on those reasons, the aggravation instruction would appear to override those instructions and permit this type of consideration.

In the case at hand, because the Court could not reasonably determine whether the erroneous instruction influenced the jury's damages determination, it reversed and remanded for a new trial. *Rowe v. Munye*, 674 N.W.2d 761, A03-465 (Minn. App. 02/17/04)

LEGISLATION

■ **PROPOSED NEW BOND REQUIREMENT AND FEE-SHIFTING FOR SUMMARY JUDGMENT MOTIONS.** Two bills were introduced at the 83rd Legislative Session on February 9, 2004. The first, H.F. No. 1949, was introduced by Representatives Joe Opatz and Jeff Johnson. They propose that a plaintiff must post a bond — up to \$5,000 — before serving a summons. The full text of the bill is as follows:

In any action begun in district court by a plaintiff, the plaintiff shall file a bond to the court administrator, before the service of summons, in a sum equal to 10 percent of the amount stated in the claim for relief, not exceeding \$5,000. The bond must be conditioned for the payment of all judgments awarded against the plaintiff.

The statute number would be 549.175, and the bill has been referred to the Committee on Civil Law. The second bill, H.F. No. 1953, was also introduced by Representatives Joe Opatz and Jeff Johnson. It proposes that a prevailing party on a summary judgment motion may recover its attorneys' fees. A cap, equal to the value of the losing party's "legal services" is placed on the amount of attorneys' fees the losing party must pay. The full text of the bill is as follows:

The court shall award the prevailing party on a motion for summary judgment that party's reasonable costs and disbursements paid or incurred, including reasonable attorney fees and fees and mileage paid for service of process by the sheriff or by a private person. The party required to pay reasonable attorney fees under this section is not required to pay more than the cost or value of its own legal services in the action. This section supersedes any inconsistent provision of law.

The statute number for the bill, if it passes, would be 549.025. This bill has also been referred to the Committee on Civil Law. The committee is chaired by Representative Mary Liz Holberg. Comments should be forwarded to your representative or the committee.

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CRIMINAL LAW

JUDICIAL LAW

■ **ACCEPTANCE OF PLEA TO LESSER OFFENSE; OBJECTION OF PROSECUTION; “MANIFEST INJUSTICE”.** Respondent was charged with criminal vehicular operation in a one-car accident involving injuries to her husband after she drove with a .17 percent blood alcohol concentration. The husband and the entire family vehemently opposed prosecution and, in fact, withdrew the medical releases given to the state trooper. Over the prosecution's objection, the district court granted the defense motion to accept a guilty plea from respondent to two lesser included gross misdemeanor charges. The district court noted that although there was evidence to proceed on the felony charges, to do so would cause a manifest injustice for the following five reasons: (1) the victim did not want his wife to have a felony conviction; (2) the defendant's family would be harmed by the conviction because of the loss of her employment and income; (3) public policy concerns and deterrence and punishment would be met by conviction of the two gross misdemeanors; (4) the offense was not an intended consequence of an intentional act, and (5) the respondent had accepted responsibility for her actions.

Held, the collateral consequences of the felony charge identified by the court do not constitute a “manifest injustice.” Instead, the term “manifest injustice” is defined, for the first time under Rule 15.07, as an abuse of prosecutorial discretion to proceed on the original charges. The court notes concerns with the separation of powers doctrine, and equates the manifest injustice definition under Rule 15.05 (allowing her to withdraw a guilty plea) to the instant “cram down plea” provision of Rule 15.07. Special concurrence by Justice Paul Anderson, questioning whether the original felony charges were appropriate, given the state's role as “minister of justice.” *State v. Kathryn Lorraine Streiff*, C8-02-1857 (Minn. 01/29/04). <http://www.lawlibrary.state.mn.us/archive/supct/0401/op0218570129.htm>

■ **ESCAPE; SUPERVISED RELEASE; ELECTRONIC HOME MONITORING; PAROLE EXCEPTION.** Following execution of his sentence, appellant was released early under the intensive supervised release program from St. Cloud Correctional Facility. He was placed in a motel room, where he was given a bracelet for electronic monitoring. A probation officer went to the hotel room, found that he had left the hotel room, and had cut his bracelet. Appellant was charged with and convicted of escape from custody.

Minn. Stat. 609.485, subd. 2 defines escape as including absconding from electronic monitoring or absconding after removing electronic monitoring device from the person. However, another subdivision of the same escape statute declares that the statute does not apply to a person who is free on bail, on parole or probation, or subject to a state sentence.

Held, absconding from electronic home monitoring constitutes escape from lawful custody, the conflict in the statute notwithstanding. Although appellant is correct in citing authority which declares that supervised release is the same as parole, the more specific provision of the statute governs the more general provision. Also, the electronic home monitoring statute was enacted much later than the parole exception. Although the two provisions are irreconcilable, the more specific phrase concerning electronic home monitoring governs. *State v. Lance Phillip Wickner*, C4-03-215 (Minn. App. 01/27/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0401/op0302150127.htm>

■ **KIDNAPPING; INCIDENTAL CONFINEMENT; CRIMINAL SEXUAL CONDUCT.** Appellant approached victim in a secluded area of a public park while she was walking her six-month-old child in a stroller. After some arguable sexual conversation, appellant threw victim to the ground, and she responded by spraying him in the face with a can of mace. While the victim was lying face up on the ground and the man was straddling her, he slammed both her hand and head against the concrete sidewalk, and began to choke her. After being kicked, he stood up and fled. Based upon a line-up, appellant was charged with criminal sexual conduct and kidnapping. In convicting the appellant of criminal sexual conduct and kidnapping, the presiding judge at the court trial took into consideration three prior incidents which were introduced under *Spreigl*. Appellant was given 150 months statutory minimum for attempted second-degree criminal sexual conduct and a consecutive 45 months for kidnapping (appellant qualifies as a patterned sex offender under Minn. Stat. §609.108).

Held, the kidnapping sentence is vacated. Although the appellant did not argue this on appeal, the Supreme Court notes that where the confinement which forms the basis of the kidnapping is the very force and coercion that supports the attempted second-degree criminal sexual conduct, there is no kidnapping, and the conviction is reversed, and the sentence vacated. *State v. Gregory Alexander Welch*, C9-01-1095 (Minn. 02/05/04). <http://www.lawlibrary.state.mn.us/archive/supct/0402/op011095-0205.htm>

■ **SENTENCE; CONDITIONAL RELEASE; UNTIMELY CHALLENGE.** Appellant was given a stayed 36-month sentence for a second offense criminal sexual conduct conviction. After he violated his probation, the district court revoked the stay and sentenced him to 36 months in prison, with a consecutive ten-year conditional release term at the end of his incarceration. More than three years after the revocation the judge revoked the stayed sentence, and more than five years after the appellant pleaded guilty, he made a motion to either withdraw his guilty plea or modify the sentence to eliminate the conditional release requirement.

Held, appellant's motion to withdraw his guilty plea to modify the sentence was untimely. The Court of Appeals notes that public policy considerations militate against the timeliness of such a motion, as required by Minn. R. Crim. P. 15.05. Although no certain time period is specified in the rule, public policy considerations include prejudice to the state in retrying a case, and an expectation of finality. **Brian James v. State**, A03-489 (Minn. App. 02/03/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0402/opa030489-0203.htm>

■ **SENTENCE; PROBATION VIOLATION; CONDITION MUST BE IMPOSED BY COURT.** Appellant was on probation for criminal sexual conduct. In staying a 48-month prison term, the district court imposed various conditions in writing, one of which included that he was subject to all rules and regulations of the Department of Corrections; another was that he follow recommendations of the sex offender evaluation including all aftercare. After a couple of technical violations for consuming alcohol, appellant was convicted of a firearms gross misdemeanor, on which charge he was ordered to have no unsupervised contact with minors. With respect to the third-degree criminal sexual conduct charge, the court, at that time, simply reinstated probation on the same terms and conditions that were previously imposed. Subsequently, the appellant had contact with a 16-year-old. His probation was violated, on the basis of no contact with minors, on the criminal sexual conduct charge, and he was sent to prison.

Held, because "no contact with minors" was not stated as a condition of probation at the time of the appellant's initial sentencing hearing on the criminal sexual conduct charge, and was never added as an additional condition of probation at any subsequent revocation hearing, the no contact provision was not imposed as a condition of probation, and there can be no probation violation. The court warns that: "if non-criminal conduct could result in revocation, the trial court should advise the defendant so that the defendant can be reasonably able to tell what lawful acts are prohibited." The court notes that the imposition of conditions of probation are "exclusively a judicial function that can not be delegated to executive agencies," citing *State v. Henderson*, 527 N.W.2d 827, 829 (Minn. 1995). **State v. Francisco Ornelas**, C4-02-1693 (Minn. 02/26/04). <http://www.lawlibrary.state.mn.us/archive/supct/0402/op021693-0226.htm>

■ **SEARCH & SEIZURE; DOG SNIFF; IMPOUNDED VEHICLE; ARTICULABLE SUSPICION UNNECESSARY.** Appellant was pulled over for illegally tinted windows. Once stopped, appellant was found to have a driver's license which was canceled as inimical to public safety. Appellant appeared overly concerned about his vehicle, and the trooper noted that his record included a 1984 conviction for controlled substances. The next day, the trooper explained his suspicions to his superior, and asked that a dog sniff the exterior of the vehicle. No illegal substances had been found during a roadside search, nor had the appellant exhibited any indicia of intoxication or drug use. While the vehicle was legally impounded, a police dog hit on the driver's door of the vehicle. A search warrant was obtained based on the dog sniff, the respondent's mood swings, his prior drug conviction, and his inquiries concerning the release of the vehicle. Drugs were found in the vehicle.

Police need not have a reasonable and articulable suspicion of criminal activity before conducting a dog sniff of the exterior of a legally impounded vehicle. The Court of Appeals follows the 1st Circuit, and makes the distinction between vehicles which are legally impounded, versus those which are in a public place (*Compare State v. Wiegand*, 645 N.W.2d 125 (Minn. 2002)). **State v. Ralland Isadore Kolb**, A03-931 (Minn. App. 02/03/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0402/opa0309310203.htm>

■ **SEARCH & SEIZURE; CHILD PORN; SEARCH WARRANT; WORK-HOME NEXUS; LAPTOP.** Appellant was found to have possessed child pornography on a laptop computer which he had been assigned at work. An employer/technician turned the computer over to the Edina Police Department, which examined the laptop and found multiple images of child porn. Appellant admitted to the police that he had stored images of child porn on his work computer. Police then applied for a search warrant for the appellant's house, stating that, in the affiant's training experience, those who view child porn have a tendency to view such material in other forms of media and frequently keep such materials in their home where it is safe to observe without the interference of law enforcement.

Held, the search warrant application contained sufficient probable cause to connect the activity at work to the appellant's home. While Minnesota courts have historically required a direct connection, or nexus, between the alleged crime and the particular place to be searched, in this case, the issuing magistrate had a substantial basis for concluding that probable cause existed to search the home. The Court of Appeals cites five factors in reaching this conclusion, including the nature of the crime, the fact that child porn is typically viewed in secret, laptops are easily transported, the fact that the appellant viewed the material at work, and the 8th Circuit has held as much. **State v. Ron Martin Brennan**, A03-429 (Minn. App. 02/03/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0402/opa030429-0203.htm>

■ **SEARCH & SEIZURE; FLEEING OFFICERS ON FOOT; PETTY MISDEMEANOR STOP; UNREASONABLE SUSPICION.** The appellant was stopped in his vehicle by police officers because of a loud muffler and a back end which bounced up and down. After police activated the emergency lights, the appellant, the driver of the suspect vehicle, made a right turn into a parking lot, exited his vehicle, and ran from the police through a grassy area in the park. The officers pursued the

appellant in the squad with lights and siren activated, and then continued with a foot chase. During the chase, the appellant reached into his waistband and threw something on the ground, and then reached back again and pointed a gun at officers, one of whom fired his gun toward the appellant. After further chasing, officers apprehended the appellant.

Held, when officers stop a person based upon reasonable suspicion of a petty misdemeanor equipment violation, and then a suspect flees on foot, officers pursuing him in a squad car with lights and siren have reasonable suspicion for a seizure. **State v. Joshua Lee Beardemphl**, A03-449 (Minn. App. 02/10/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0402/opa030449-0210.htm>

■ **FIREARMS; JURY INSTRUCTION; CONSTRUCTIVE POSSESSION; AUTHORITY, DOMINION AND CONTROL.** The appellant had been charged with possession of controlled substance and being a felon in possession, contrary to Minn. Stat. §624.714 subd. 1(b)2. With respect to the firearms charge, the court modified CRIMJIG 20.20, which states that the defendant must knowingly exercise “dominion and control” to an instruction which was a modified version of CRIMJIG 32.21, stating that “the defendant must knowingly have exercised authority, dominion or control” over the firearm.

Held, this modification of the CRIMJIG was a material misstatement of the law. By using the disjunctive “or” in the firearm possession instruction, the court described a standard for finding constructive possession different than that required under *State v. Florine*, 226 N.W.2d 609 (1975). **State v. Michael Montgomery Porter**, C3-03-223 (Minn. App. 02/04/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0402/op030223-0204.htm>

[mn.us/archive/ctappub/0402/op030223-0204.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0402/op030223-0204.htm)

■ **RIGHT TO COUNSEL; MANDATORY COPAYMENT; UNCONSTITUTIONAL.** The copayment requirement under Minn. Stat. §611.17 subd. 1 (c) (Supp. 2003) violates an indigent defendant’s right to counsel under the United States and Minnesota constitutions. The Supreme Court upholds the district court’s decision finding the statute unconstitutional and enjoining further collection of copayments. **State v. Shawnatee Marie Tennin**, A03-1281 (Minn. 02/12/04). <http://www.lawlibrary.state.mn.us/archive/supct/0402/opa031281-0212.htm>

<http://www.lawlibrary.state.mn.us/archive/supct/0402/opa031281-0212.htm>

■ **JURY INSTRUCTION; REASONABLE DOUBT; EXCLUDING “SPECULATION” NOT PLAIN ERROR.** The Supreme Court reverses the Court of Appeals decision in *State v. Smith*, 655 N.W.2d 347 (Minn. App. 2003) which held that the trial court diluted the reasonable doubts standard in departing from CRIMJIG 3.03 by adding the phrase: “you do not have a reasonable doubt if your doubts are based on speculation or irrelevant details.” The use of this sentence was not objected to at trial by the defendant. The use of the phrase was essentially a substitution for the CRIMJIG phrase excluding from reasonable doubt those doubts which are “fanciful or capricious.”

Held, it was not plain error for the trial court to have substituted the term “speculation” for “fanciful or capricious doubt.” The instruction, viewed as a whole, conceptualized reasonable doubt in an adequate way and the term “speculation” cannot be viewed by itself, but must be read in the context of the instructions as a whole. The court notes, however, that “modification or departures from the CRIMJIGs in criminal cases must be done with considerable care.” **State v. Eric Smith**, C3-02-96 (Minn. 02/12/04). <http://www.lawlibrary.state.mn.us/archive/supct/0402/op020096-0212.htm>

■ **POST-CONVICTION; KNAFFLA BAN; INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.** Petitioner, after being convicted of first-degree murder, filed a first petition for post-conviction review in which he raised the ineffective assistance of appellate counsel. In this second petition alleging the same claim, petitioner is barred by *Knaffla*, 243 N.W.2d 737 (1976) from raising an issue which was previously brought before the court. Additionally, the Supreme Court finds no basis in the record, nor sufficient allegations that, if proved, would entitle him to release. **William Jeffrey McDonnough v. State of Minnesota**, A03-876 (Minn. 02/19/04). <http://www.lawlibrary.state.mn.us/archive/supct/0402/opa030876-0219.htm>

<http://www.lawlibrary.state.mn.us/archive/supct/0402/opa030876-0219.htm>

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **SEXUAL HARASSMENT.** A jury verdict of \$242,000 for hostile work environment due to gender, reduced to \$52,000 by the trial judge, was affirmed by the 8th Circuit Court of Appeals. The employee, who was a law enforcement official at a state university, had been subjected to numerous sexual innuendos and unwelcome contact over a seven-year period, which was sufficiently severe or pervasive to constitute a hostile work environment. **Eich v. Board of Regents for Central Missouri State University**, 350 F.3d 752 (8th Cir. 2003).

In a second case, the 8th Circuit reduced a \$215,000 verdict to \$115,000 based on a sexual assault by an employee at the home of a coworker. The appellate court ruled that \$100,000 compensatory and punitive damage awards for both assault and battery were duplicative and should be combined as part of the overall damage award. **Sellers v. Miretta**, 350 F.3d 706 (8th Cir. 2003).

A \$750,000 judgment for sexual harassment was upheld by the Minnesota Court of Appeals, but without any additional award of attorney’s fees. The affirmance was based upon “repeated unwelcome sexually offensive conduct,” which

was testified to by the claimant and corroborated by former employees. But the claimant was not entitled to an additional award of attorney's fees on grounds that the contingency retainer agreement between the claimant and her counsel provided for a 40 percent fee, and the resulting \$300,000 attorney's fees was "reasonable" and not "an abuse of discretion." *Devane v. Sears Home Improvement Products, Inc.*, 2003 WL 22999363 (Minn. App. 2003) (unpublished).

■ **DISABILITY ISSUES.** A public sector employee was not entitled to total and permanent disability benefits after resuming substantial gainful employment. In this unpublished case, an educational assistant who had received total and permanent disability benefits as a member of the Public Employees Retirement Association (PERA) was disqualified from receiving benefits after she returned to work on a part-time basis. Because she was working part-time, coupled with her physician's statement that she was not totally disabled, the disability board properly cut-off her disability benefits. Although her earnings were reduced due to her part-time work, her entitlement to disability benefits depended upon her medical condition, rather than simply a discrepancy in earnings. Since her doctor affirmed her eligibility to work, she could not continue to receive benefits for total and permanent disability. *Harting v. Public Employees Retirement Association of Minnesota*, 2003 WL 22890079 (Minn. App. 2003) (unpublished).

An employer cannot be sued for disability discrimination under the State Human Rights Act, Minn. Stat. §363.01, subd. 13, if the employee does not establish proof of disability and the employer is not aware of any claimed disability. The appellate court upheld dismissal of a lawsuit by an employee who claimed her employer did not reasonably accommodate her "Sick Building Syndrome," an intolerance to mold and vaporous chemical substances in the workplace. The claim was not actionable because the employee failed to show that she had a "permanent or a long-term impairment," which is required to establish "disability" under the statute and there was no evidence that the employer regarded her as being disabled. *Cramer v. Allina Health Systems*, 2003 WL 22952381 (Minn. App. 2003) (unpublished).

A corrections officer did not suffer from "job-related" disability to warrant duty-related retirement benefits from the Minnesota State Retirement System (MSRS). The employee claimed that high blood pressure, anxiety and depression were due to long-term racial harassment by supervisors and coworkers. While the court did in "no way condone racial discrimination," it found insufficient evidence that the maladies were attributable to her claimed "pervasive coworker harassment." The court expressly declined to decide whether such conduct can give rise to a "duty-related" disability claim. *Burgess v. Bergstrom*, 2004 WL 77766 (Minn. App. 2004) (unpublished).

■ **WORKERS COMPENSATION.** Employees for attorneys can recover their fees against a party held liable on a dispute primarily between lawyers and insurers under the workers compensation statute in addition to the statutory contingency fee. The Supreme Court held that an attorney fee award may be made to a lawyer for a compensation claimant for work performed in a dispute that is primarily between the employees or insurers concerning their respective apportionment of liability. The award, pursuant to Minn. Stat. §176.191 subd. 1, may be made in addition to the recovery of statutory fees under the workers compensation formula for legal fees, pursuant to Minn. Stat. §176.081. *Banken v. Lac Qui Parle Coop Oil*, 672 N.W. 2d 203 (Minn. 2003).

An employee who was injured when subjected to a "spanking" as a prank on his birthday by coemployees at work may not sue the employer and employees in tort for battery in the absence of evidence of intent to inflict injury. The Court of Appeals held that the exclusivity provisions of the workers compensation statute, Minn. Stat. §176.031, is appealable, and the only remedy is through a workers' compensation proceeding. *Meinstma v. Loram Maintenance of Way, Inc.*, 672 N.W. 2d 224 (Minn. App. 2003).

■ **LABOR UNION; COLLECTIVE BARGAINING.** Registered nurses who work for school districts should not be included in the bargaining unit made up of teachers. The Court of Appeals upheld a determination by the Bureau of Mediation Services that registered nurses are not appropriately placed in bargaining units for teachers because the "plain language" of the relevant statutes requires that members of teacher bargaining units be licensed as teachers. Since registered nurses are not licensed as teachers, they do not belong in bargaining units for teachers. The court rejected a contention that because the job duties of the registered nurses are substantially the same as licensed school nurses, who are in bargaining units of teachers, the registered nurses should also be in the teacher's unit. The court reasoned that the Public Employee Labor Relations Act, Minn. Stat. §179A.03, subd. 18(1) requires that members of teacher bargaining units be licensed teachers, regardless of the "job duties" of the affected individuals. *Petition for clarification of an appropriate unit Anoka-Hennepin Education Minnesota v. Independent School District No. 11*, 2003 WL 22999129 (Minn. App. 2003) (unpublished).

A school district may not unilaterally impose a freeze on wages and benefits during collective bargaining negotiations with a union prior to reaching an impasse. The Court of Appeals held that a district committed an unfair labor practice under the Public Employment Labor Relations Act (PELRA), Minn. Stat. §179A.01, et seq. by freezing salaries and health insurance contributions without satisfying the statutory duty to "meet and negotiate" and having unilateral changes in terms and conditions of employment. *Education Minnesota - Greenway Local 1330 v. Ind. Sch. Dist. No. 316*, 673 N.W.2d. 843 (Minn. App. 2004).

■ **UNEMPLOYMENT COMPENSATION.** The state law banning an unemployment claimant from receiving benefits if the claimant files or receives Social Security disability benefits is invalid because it conflicts with the Americans with

Disabilities Act (ADA). The Court of Appeals ruled that the irrefutable presumption of Minn. Stat. §268.085, subd. 4(c) contravenes the ADA, and claimants must be permitted to refute that they are unavailable or unable to work in order to obtain workers compensation benefits. *Huston v. Commissioner of Employment and Economic Development*, 672 N.W.2d 606 (Minn. App. 2003).

Legally valid subpoenas must be honored in unemployment compensation proceedings. The appellate court reversed a denial of benefits and remanded the case because the employer and a current employee both refused to comply with subpoenas properly issued on behalf of the claimant. The unemployment judge erred in refusing to enforce the subpoenas or state acceptable reasons for refusing to do so. (See also *Administrative Law, supra. Ed.*) *Ntamere v. Decision One Corp.*, 2003 WL 23024141 (Minn. App. 2003).

An employee's refusal to participate in a feasible performance/improvement plan devised by the employer may be disqualified from receiving unemployment compensation benefits. The appellate court held that the recalcitrant employee committed "misconduct," warranting denial of benefits. But it contended that performance plans that cannot realistically be satisfied should not "be used by employees as a pretext to disqualify employees from receipt of benefits." *Vargas v. Northwest Area Foundation*, 673 N.W.2d 200 (Minn. App. 2004).

An employee who violated the employer's time card policy, requiring employees to punch out when taking breaks, was disqualified from unemployment compensation benefits. By repeatedly violating the policy, the employee committed statutory "misconduct," which disqualifies the employee from receiving unemployment compensation benefits. *Williams v. Archives Corp.*, 2003 WL 22890080 (Minn. App. 2003) (unpublished).

Another employee who was late for work more than 90 times in a year was disqualified from benefits even though some of the tardiness was due to medical conditions. The five warnings he received were sufficient to invoke the "misconduct" provision. *Bauer v. One Call Concepts, Inc.*, 2003 WL 23024448 (Minn. App. 2003) (unpublished).

An employee who engaged in abusive language directed to other employees and customers was disqualified from receiving unemployment compensation benefits on grounds of "misconduct." The employee's failure to follow up the employer's request that the worker participate in an "anger management" program, due to a series of angry outbursts, coupled with continued misbehavior, justified the employee's disqualification from receiving benefits. *Volk v. EAH Schmidt & Associates*, 2003 WL 22890074 (Minn. App. 2003) (unpublished).

An employee for a temporary agency who refused to work for the agency again was disqualified from receiving unemployment compensation benefits because of her failure to accept a "suitable" offer of employment. The appellate court held that the unemployment compensation claimant, who became upset when removed from an assignment at the client's request because of poor performance and told her boss that she never wanted to work for the agency in the future, was disqualified from future unemployment benefits. *Julius v. Temp Force, LP*, 2004 WL 193193 (Minn. App. 2004) (unpublished).

An employee who quit because he claimed to be unable to perform the physically demanding requirements of the job was not entitled to unemployment benefits. The employee's contention that he quit because he was not physically able to do heavy lifting was rejected because the employers had notified the employee of the lifting requirements and he performed the work for a month, which eliminated any "good reason" for him to resign. *Paquette v. Exterior Systems, Inc.*, 2004 WL 292047 (Minn. App. 2004) (unpublished).

An employee who misrepresented the current status of his employment was disqualified on grounds of "misconduct" from receiving unemployment benefits. The employee was fired after the employer discovered that the employee had misrepresented that he was currently employed when he initially sought employment even though the claimant had not been working for the previous three years. This constituted a material intentional misrepresentation that disqualified the employee from receiving unemployment compensation benefits. *Thom v. Bailey Nurseries Services, Inc.*, 2004 WL 193224 (Minn. App. 2004) (unpublished).

■ **ERISA.** The 8th Circuit Court of Appeals recently issued several rulings favorable to employees in fringe benefit cases under the Employment Retirement Income Security Act (ERISA).

An individual owner of a company is individually liable for benefits owing to employees under ERISA after having signed a collective bargaining agreement with the union in the name of his sole proprietorship and then having payroll functions handled by his own closely held corporation. The 8th Circuit here reversed a ruling of the U.S. District Court in Minnesota, which found that only the corporation was liable and not the individual signatory on the "alter ego" theory. While corporate officers generally do not have personal liability under ERISA for fringe benefit payments, in this case the individual should be liable because he did not sign the labor agreement in a corporate capacity but only as a sole proprietor. *Minnesota Laborers Health and Welfare Fund v. Scanlan*, 2004 WL 235203 (8th Cir. 2004).

An ERISA claim may be brought even after the three-year time period prescribed by the statute if the underlying state law allows a longer limitations period. The 8th Circuit in this case also reversed a lower court determination that barred an ERISA claim for denial of health benefits that was brought seven years after the plan administrator turned down the requested benefits. Although the plan provided for suit to be brought within three years, it also included a provision allowing any claim to be pursued in "such longer a period as required by applicable state laws." This suit, which arose in Missouri, was not

untimely because Missouri has a ten-year statute of limitation for the enforcement of a written promise for the payment of money. Using the doctrine of “borrowing” from state law, the ten-year statute is applicable. Although parties cannot agree to apply state law principles to ERISA plans, they may “specifically” choose to incorporate state law regarding time limitations, and such provisions are valid and enforceable. **Harris v. Epoch Group**, 357 F.3d 822 (8th Cir. 2004).

An employee who was killed when he crashed his motorcycle while intoxicated, was found entitled to “double indemnity” benefits under his ERISA health plan. The appellate court, reversing a ruling by the federal district court in Minnesota, held that the death fell within the “accidental bodily injury” clause of the employer’s group life insurance policy. **King v. Hartford Life and Accident Ins. Co.** 357 F.3d 840 (8th Cir. 2004).

■ **EDUCATION.** The University of Minnesota did not commit an unfair labor practice when it reassigned a high-level employee to different work. This longstanding litigation between a former associate vice president and the University concerned the employee’s claim that the school violated the Public Employee Labor Relations Act (PELRA) by demoting her. The Minnesota Court of Appeals rejected the claim, noting that her position was renewable at the discretion of the appointing authority and the PELRA claim was not viable because there was no allegation of University interference, restraint or coercion. Further, the employee’s complaint about faulty fiscal controls by the University did not constitute protected activity under the statute. Nor does the statute require an employer to meet with an individual employee who was not represented by a union, to negotiate terms and conditions of employment. Therefore, none of the PELRA claims may be pursued against the regents by the reassigned employee. **Stephens v. Board of Regents of the University of Minnesota**, 2004 WL 237386 (Minn. App. 2004) (unpublished).

A collective bargaining agreement between a school district and a union representing service employees was not subject to reformation. The appellate court held that an ambiguous contractual provision calling for the school district to pay the health insurance premiums capped at 85 percent of the prior year’s costs should not be changed to a 100 percent cap, as in the teacher’s contract because “no evidence” evinced such an intent. **District 318 Service Employees Ass’n v. Ind. Sch. Dist. No. 318**, 2004 WL 292067 (Minn. App. 2004) (unpublished).

■ **DEFAMATION, DISPARAGEMENT & DATA.** The Minnesota Court of Appeals recently rejected a pair of workplace related defamation cases based on the proclivities that employers have for making negative statements about employees in connection with their work. In an unpublished case, negative statements made about an employee in a performance review, at a meeting with employees, and to human resources personnel were protected from defamation by the qualified privilege and there was no showing of actual malice to overcome the privilege. **Mercure v. West Publishing Corp.**, 2003 WL 23024519 (Minn. App. 2003) (unpublished).

Similarly, the statement by a supervisor that an employee was sleeping on the job, which was one of the reasons for her termination, was not actionable because it was protected by the qualified privilege, which applies to statements made for a proper purpose, on a proper occasion, and without malice. **Watson v. Ceridian Corp.**, 2003 WL 23024525 (Minn. App. 2003) (unpublished).

A Duluth bus driver, who was suspended for not participating in a drug testing program, was not entitled to pursue defamation and Data Practices claims. The bus driver, who worked for the Duluth school district, refused to furnish a second sample for a random drug test after the first test showed a negative result. But the district claimed that the sample amount was insufficient and required a follow-up test. A suspension letter, stating that he was disciplined for refusing to participate in a drug test, was not defamatory because there was no evidence that any employee told anyone else that the claimant tested positive as a drug user, and the letter itself was substantially true because federal regulations, under which the testing was conducted, treated an inadequate sample as an equivalent refusal to be tested. The district did violate the Minnesota Government Data Practices Act when the driver’s boss told the predecessor that the claimant had refused to take a drug test. However, there was no evidence that the employee suffered any harm to reputation or other financial damages, which negated his claim under the statute. **Anderson v. Independent School District No. 97**, 2003 WL 23094950 (8th Cir. 2003).

Clauses in an employment contract requiring “cooperation” and “non-disparagement” were not violated by a company officer as a matter of law when the employee furnished a statement to another employee for use in a lawsuit by that employee against the company. The appellate court reversed a lower court ruling of summary judgment and remanded the case because the clause mandating “cooperation” was “not unambiguous.” The clause was subject to two “equally plausible” interpretations whether the corporate officer had an “affirmative duty” to apprise the company of the request for a statement before submitting it to the adverse litigant or merely was to “acquiesce” in any requests to the company. **Winthrop Resources Corp. v. Mackenzie**, 2004 WL 77873 (Minn. App. 2004) (unpublished).

LOOKING AHEAD

The Minnesota Supreme Court will soon decide whether an award of front pay may be doubled under the Human Rights Act. In **Ray v. Miller Meester Advertising, Inc.**, C3-02-1605, the Court is considering the propriety of the doubling of a front pay award from \$123,004 to \$246,008 under Minn. Stat. §363.071, subd. 2, which permits trial courts to avoid treble damages for violations of the statute. The doubling was affirmed by the Court of Appeals, 664

N.W.2d 355 (Minn. App. 2003) and argued before the Supreme Court in January.

Another case before the High Court involves whether a commissioned salesperson is entitled to commissions from his former employer for sales made by the employee before he left but which did not close until after termination of his employment. In *Rosenberg v. Heritage Revocations, Inc.*, C7-03-94, the Court heard arguments recently on the recurring issue of the rights and obligations of employers and employees for post-termination commissions on sales that occurred during the employment relationship but were not finalized until after the employee left.

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ENVIRONMENTAL LAW

JUDICIAL LAW

■ **CLEAN AIR ACT; EPA AUTHORITY TO INVALIDATE STATE-ISSUED PSD.** In a 5-4 decision, the United States Supreme Court upheld the Environmental Protection Agency's ability to issue orders that had the effect of invalidating a Prevention of Significant Deterioration (PSD) permit issued by a state agency. Teck Cominco Alaska, Inc. ("Cominco") operated a zinc concentrate mine in northwest Alaska. The mine was considered a "major emitting facility" under Section 165 of the Clean Air Act, 42 U.S.C. §7475. The original PSD permit issued to Cominco in 1988 by the Alaska Department of Environmental Conservation ("ADEC") authorized the use of five diesel generators, subject to certain operating restrictions. A second PSD permit, issued in 1994, allowed the use of a sixth generator. In 1996, Cominco applied for yet another PSD permit that would allow it to increase electricity production from one of the existing generators in conjunction with an expanded mining production plan. Cominco proposed selective catalytic reduction ("SCR") as its best available control technology ("BACT") to reduce by 90 percent the increased nitrogen oxide ("NOX") that would result from the increased electricity production. Cominco later amended its PSD application to include an additional generator and to change its proposed BACT to "Low NOX," an alternative control technology that would reduce the nitrogen oxide emissions by 30 percent.

ADEC, in its first draft PSD permit and preliminary technical analysis report, identified SCR as the most stringent technology then technically and economically feasible. Nevertheless, ADEC endorsed Cominco's suggested use of Low NOX as BACT on the existing and proposed generators because ADEC believed it would achieve the same level of reduction and would be logistically and economically less burdensome on Cominco. The EPA objected to ADEC's allowing Low NOX as BACT when it found SCR to be the best control technology.

ADEC responded with a second draft PSD permit that again endorsed Low NOX as BACT. ADEC dropped from the second draft its argument regarding equivalent emission offsets. ADEC also contradicted its earlier finding regarding the feasibility of SCR by concluding that it imposed a "disproportionate cost" on the mine. It conceded, however, that it had received no financial data from Cominco to justify that conclusion. When the EPA suggested that ADEC include an analysis of the financial impact of SCR on Cominco, Cominco refused to provide ADEC with the requested financial data, citing privacy concerns. ADEC nevertheless issued a final PSD permit and technical analysis report approving Low NOX as BACT. It again justified its decision on the basis of the potential financial effect requiring SCR as BACT would have on Cominco, despite the fact that it, again, conceded that it had no evidence to support that judgment.

The EPA issued three orders under Sections 113(a)(5) and 167 of the act, 42 U.S.C. §§7413(a)(5) and 7477, in response. The first order prohibited ADEC from issuing a PSD permit to Cominco unless ADEC satisfactorily documented why SCR was not BACT. The second and third orders prohibited Cominco from beginning construction or modification activities at the mine, with some limited exceptions. The 9th Circuit, in response to ADEC and Cominco's challenges to the EPA's orders, held that the EPA had the authority under the above statutes to determine the reasonableness or adequacy of ADEC's justification for the BACT decision and to halt Cominco's expansion activities.

The Supreme Court first held that the EPA's orders together constituted a reviewable "final agency action" under Section 307(b)(1) of the act, 42 U.S.C. §7607(b)(1), because the orders amounted to the "consummation" of the EPA's decision-making process. It then held that the EPA had the authority under Sections 113(a)(5) and 167 to issue a stop construction order if a state permitting authority's BACT selection was not reasonable. The EPA, the Supreme Court held, correctly viewed proper application of BACT by the state permitting authority to amount to a preconstruction requirement under the PSD program. When ADEC, in this case, failed to abide by the act's strictures regarding BACT, the EPA had the authority to prohibit construction until the deficiencies were addressed. Finally, the Supreme Court held that the EPA had properly determined that ADEC's acceptance of Low NOX as BACT lacked evidentiary support. It found no support in the record for ADEC's switch from finding SCR to be BACT in May 1999 to finding it to be economically infeasible just seven months later. An acknowledgment of the important contributions Cominco and its operations made to the region, for instance, were insufficient to justify ADEC's changed position. The majority opinion concluded with the observation that ADEC could still revisit its decision, including the possible justification of Low NOX over SCR, if the evidence supported such a change. *Alaska Dept. of Environmental Conservation v. Environmental Protection Agency*, 124 S.Ct. 983 (2004).

■ **CIVIL PENALTIES; EPA INFLATIONARY ADJUSTMENTS.** The Environmental Protection Agency (“EPA”), on February 13, 2004, announced its Final Rule with regard to its “Civil Monetary Penalty Inflation Adjustment Rule.” The adjustment was mandated by the Debt Collection Improvement Act of 1996, which requires the EPA to adjust its civil monetary penalties for inflation on a periodic basis. 40 C.F.R. §19.4, Table 1 contains a summary of all the statutes under which the EPA may assess civil penalties, along with the maximum penalty amount available under each. Under the Final Rule, each maximum penalty included in Table 1 was increased by 17.23 percent. 69 *Fed.Reg.* 7121 (02/13/04) (to be codified at 40 C.F.R. §19.4, Table 1).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **DIVERSITY JURISDICTION; LIMITED LIABILITY COMPANIES.** Plaintiff, a New York limited liability company, brought a diversity action against a Delaware corporation with its principal place of business in Arkansas. The district court entered partial summary judgment for the defendant, and the jury found for the defendant on the remaining claims. Represented by new counsel, plaintiff appealed, and argued for the first time that diversity of citizenship did not exist because it was a limited liability company.

Noting that “The citizenship of an LLC for purposes of diversity jurisdiction is an issue of first impression in our circuit,” the 8th Circuit joined the overwhelming majority of federal courts in holding that the citizenship of a limited liability company is determined by the citizenship of its members. However, because the issue had not been raised in the district court and the record was less than clear, the matter was remanded to the district court for a determination as to whether diversity was in fact present. *GMAC Commercial Credit LLC v. Dillard Department Stores, Inc.* 357 F.3d 827 (8th Cir. 2004).

■ **SANCTIONS; FAILURE TO CONSENT TO REQUEST FOR EXTENSION.** Defendant was served with plaintiff’s complaint on June 26, 2003, but the papers were not received by the defendant’s Minnesota counsel until July 9, 2003. Defendant’s counsel attempted to obtain an extension of time to answer or respond, but counsel for the plaintiff refused the request for an extension. Defendant’s counsel then moved for an Enlargement of Time to Answer, Move or Respond, and plaintiff’s counsel failed to file any opposition to that motion.

When contacted by Magistrate Judge Noel’s staff, plaintiff’s counsel indicated that he did not intend to file any opposition to the motion, but he did not want the motion to be granted in any event. Shortly before a scheduled hearing on the motion, plaintiff’s counsel agreed to the requested extension. Magistrate Judge Noel then *sua sponte* ordered plaintiff’s counsel to show cause why he should not have to pay the defendant’s attorney’s fees and costs for having brought the motion. Plaintiff’s counsel responded to the show cause order, but Magistrate Judge Noel rejected his arguments, and awarded \$985.70 in fees and costs pursuant to 28 U.S.C. §1927. Plaintiff’s counsel then appealed that order to Judge Tunheim.

While noting that whether the imposition of sanctions under 28 U.S.C. §1927 requires “an explicit finding of bad faith ... is not clear,” Judge Tunheim found that it was clear from Magistrate Judge Noel’s order that plaintiff’s counsel’s conduct had been “unreasonable and vexatious,” which was sufficient to satisfy “the plain language of the statute.” Finding that the Magistrate Judge’s order was neither “clearly erroneous” nor “contrary to law,” Judge Tunheim affirmed the sanctions order. *Schaffhausen v. Bank of America*, 2004 WL 234400 (D. Minn. 02/02/04).

■ **OTHER NOTEWORTHY DECISIONS.** Judge Tunheim granted the defendant’s motion to transfer to the District of Nevada under 28 U.S.C. §1404(a), thereby declining to enforce a consent to jurisdiction and venue provision in the underlying contract through which the defendant had consented to suit in Minnesota. *Lyon Financial Services, Inc. v. Reno Sparks Association of Realtors*, 2004 WL 234405 (D. Minn. 02/04/04).

Despite finding that plaintiff’s conduct during discovery, including her use of computer hard drive “scrubbing” software “defies the bounds of reason,” Judge Montgomery denied defendants’ motion to dismiss based on plaintiff’s discovery violations and destruction of evidence. However, Judge Montgomery did find because the plaintiff had “intentionally destroyed evidence” and “attempted to suppress the truth,” that it was appropriate to give an adverse inference instruction at trial. *Anderson v. Crossroads Capital Partners, L.L.C.*, 2004 WL 256512 (D. Minn. 02/10/04).

The 8th Circuit found reversible error in the district court’s refusal to allow the introduction of impeachment evidence against the plaintiff in an employment discrimination case. *Weyers v. Lear Operations Corp.*, __ F.3d __ (8th Cir. 2004).

The 8th Circuit affirmed a decision by Judge Tunheim which refused to recognize a claim raised for the first time in opposition to a summary judgment motion, finding that the pleading requirements of the Federal Rules of Civil Procedure, while “relatively permissive ... do not entitle parties to manufacture claims, which were not pled, late into litigation for the purpose of avoiding summary judgment.” *Northern States Power Co. v. Federal Transit Administration*, 358 F.3d 1050 (8th Cir. 2004).

The 8th Circuit affirmed an injunction prohibiting a class member who did not opt out from a class action settlement from pursuing claims against the defendant in a subsequent New Mexico state court action. *In Re General American Life Ins. Co. Sales Practices Lit.*, 357 F.3d 800 (8th Cir. 2004).

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INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **PATENTS; SPECIFICITY OF DISCLOSURE; DEDICATION TO PUBLIC.** The Court of Appeals for the Federal Circuit addressed for the first time the specificity required of a disclosure in a patent that results in a dedication to the public. When a patentee discloses more of her invention in the patent but does not claim it all, that unclaimed part is considered dedicated to the public, *i.e.*, not covered by the patent literally or equivalently. The court held for the first time that only “specific” disclosures result in dedication to the public, while “general” disclosures do not. So what is the difference? This court held that plaintiff PSC’s disclosure of plastic for use as a resilient clip or strap was specific — and therefore dedicated to the public because the inventor claimed only a metal strap. In contrast, this court found that PSC’s disclosure of “other resilient materials” was too general to dedicate to the public all resilient strap materials other than metal. The Federal Circuit reaffirmed the “Disclosure-Dedication Rule” stating that “a patent applicant who discloses but does not claim subject matter has dedicated that matter to the public and cannot reclaim the disclosed matter under the doctrine of equivalents.” *PSC Computer Prods., Inc. v. Foxconn Int’l, Inc.*, 355 F.3d 1353 (Fed. Cir. 2004).

■ **PATENT INFRINGEMENT; STANDING.** The Federal Circuit again navigates the treacherous waters of standing as it relates to patent infringement lawsuits. To have standing in an action for patent infringement, the “party must be either a patentee, a successor in title, or an exclusive licensee.” But an exclusive licensee must demonstrate possession of “all substantial rights in the patent.” Holding that the license agreement in this case did not convey “all” rights to the exclusive licensee, and thus standing existed, the court found significant omissions in the license. The license did not address the licensee’s right to enforce the patent against infringers or the licensor’s right to practice the invention. The case was remanded to the trial court to determine if standing could be cured. If it cannot be, the case will be dismissed with prejudice. *Fieldturf, Inc. v. Southwest Rec. Indus., Inc.*, 2004 U.S. App. LEXIS 1642 (Fed. Cir. 2004).

■ **PATENT INFRINGEMENT DEFENSE; TEMPORARY PRESENCE IN U.S.** The Federal Circuit looked here at a rarely used patent-infringement defense — temporary presence in the U.S. Dependent upon specific conditions, 35 U.S.C. §272 (Temporary Presence in the United States) allows “the use of an invention in a vehicle” to enter the U.S. temporarily without being an infringement. National Steel Car (NSC) sought to enforce its patent on railway cars that Canadian Pacific Railway (CPR) used to haul lumber from Canada to the U.S. CPR did not contest use of the invention, but argued instead that under section 272 there could be no liability because its cars are only in the U.S. “temporarily.” The undisputed evidence revealed that the CPR cars were present in the U.S. about 56 percent of the time they were in operation. Nevertheless, the Federal Circuit held that the CPR rail cars may be eligible for the defense if CPR can prove that its cars are “entering the United States for a limited period of time for the sole purpose of engaging in international commerce.” Significantly, the meaning of “limited period of time” was broadly interpreted as a “finite period of time,” apparently any amount of time other than permanent. The court remanded, however, for a determination of whether CPR’s use of the rail cars was “solely” for use in international commerce. Stay tuned for a ruling on the meaning of that seemingly unambiguous word.

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JUVENILE LAW

JUDICIAL LAW

■ **TERMINATION OF PARENTAL RIGHTS; DRUG ABUSE; ADEQUACY OF SERVICES.** The Minnesota Court of Appeals in an unpublished decision affirmed the termination of an appellant mother’s parental rights. The mother had given birth to a child who tested positive for methamphetamine at birth and had subsequently had recurrent problems with drugs, including failure to attend an outpatient treatment program and failure to complete an inpatient chemical dependency program. She also suffered from mental health problems, including a bipolar disorder, and had at least two felony charges against her.

In affirming the termination of parental rights, the Court of Appeals observed that the county had made reasonable efforts to rehabilitate the mother and to reunite the family, including providing a host of services. Any failure to improve her condition resulted from her own failure to accept the services made available to her rather than a lack of appropriate services. The court found there was ample evidence to support the finding that the children were neglected and in foster care, and that the mother had failed to make reasonable efforts to address the problems preventing the children’s return. The mother was also found to be palpably unfit to parent the children. Furthermore, the mother was

found to be living with the parents of her methamphetamine provider and could not provide a home for the children. ***In re the Children of A.M.W. and T.R.***, A03-985 (Minn. App. 02/03/04).

■ **TERMINATION OF PARENTAL RIGHTS; MENTAL ILLNESS; ADEQUACY OF SERVICES.** In another unpublished decision where the Court of Appeals affirmed the termination of a mother's parental rights, the mother had been diagnosed with mild mental retardation, major depressive disorder, recurrent schizophrenia disorganized type, alcohol abuse, and psychosocial stress factors. The child who was the subject of the proceeding also had significant developmental delays. The mother had five older children who had previously been placed in the child protection system in Illinois.

The county provided services that included The Parent Support Project which began assisting the mother with basic self-care skills, personal psychological and physical development interpersonal skills, and child care skills. The Community Involvement Program also became involved. When the worker with this program filed a report of suspected child maltreatment citing the mother's lack of control over the child, safety and hygiene issues, and failure to seek medical attention for the child, the mother refused to cooperate with the investigator, fired the program workers who had been assisting her, and refused to send her child back to special education classes.

The district court terminated the mother's parental rights. On appeal, the Court of Appeals affirmed the termination, finding that the district court did not rely solely on the mother's limited intellectual functioning nor did it rely solely on her depression and sleep disorder problems (for which she refused to accept treatment.) The Court of Appeals found that the county had used reasonable and personalized efforts to help the mother correct the problems but to no apparent effect. ***In re the Child of: B.K. and C.G.***, A03-1214 (Minn. App. 02/17/04).

■ **DELINQUENCY; EVIDENCE; MIRANDA; REQUEST FOR COUNSEL.** In another unpublished decision, a minor appealed from a delinquency adjudication arguing that the evidence was insufficient to support the adjudication of aiding and abetting attempted simple robbery. He also asserted that the court erred by admitting statements that he made without first receiving a *Miranda* warning, and erred in admitting the statements that he made after receiving a *Miranda* warning because the warning that was given was defective, that his request for counsel was ignored, and that his waiver was not voluntary, knowing, and intelligent. The Court of Appeals affirmed the adjudication.

Regarding appellant's statements made before he was read a *Miranda* warning, although the appellant was in custody and had been told he was not free to leave, because the officers did not make any statements intended to elicit incriminating statements, his statements were voluntary and therefore admissible. As the Court of Appeals noted, a volunteered statement made by a suspect not in response to interrogation, is not barred by the 5th Amendment and is admissible with or without the giving of *Miranda* warnings.

With regard to the admission of statements appellant made during the subsequent interrogation, the Court of Appeals stated the long-held rule that if police fully advise a suspect of his *Miranda* rights, and the suspect indicates that he understands these rights and nonetheless gives an incriminating statement, the state is deemed to have met its burden. In determining whether a juvenile has voluntarily waived his right to remain silent, a court must further evaluate the totality of the circumstances. Here, the factors considered included the child's age, maturity, intelligence, education, prior criminal experience, the length and legality of the detention, the nature of the interrogation, the lack of or adequacy of warnings, and the presence or absence of parents.

Appellant argued that the *Miranda* warning given by police was defective because the officer told the appellant that anything he said would be used "for or against" him in court. The use of the term "for or against" in the warning has been disapproved in several jurisdictions. However, under Minnesota case law, there is no requirement that *Miranda* warnings take a rigid form so long as they are correct in substance. The Court of Appeals found that the warning given by the police officer was correct in substance.

Appellant also argued that he requested counsel, and that the officer ignored the request. In the context of the exchange between the officer and appellant regarding his right to an attorney, the appellant asked the question of whether he was getting an attorney. The Court of Appeals agreed with the district court that appellant's question to the officer whether he was getting an attorney was not a request for counsel. Appellant's inquiry did not suggest that he wanted to discontinue the interrogation or that he would continue only with the aid of counsel.

Ultimately, the Court of Appeals concluded that in the totality of circumstances, the state had demonstrated by a preponderance of the evidence that appellant's waiver of his *Miranda* rights was knowing, intelligent, and voluntary. ***In the Matter of the Welfare of J.E.R.***, A03-236 (Minn. App. 02/10/04).

■ **SCHOOLS; EXPULSION; DUE PROCESS.** In a published decision, the Minnesota Court of Appeals addressed whether expulsion proceedings from school that are initiated within a reasonable period after the alleged misconduct and that do not commence suspension for more than 15 days thereafter (the statutory maximum) violate a student's due process rights.

Here the minor was involved in a fist fight at the school. On the day of the fight, the minor was suspended for five days. After the five days ran, the school district notified the minor's parents that it was suspending the minor for a second five-day period and recommending expulsion. An attorney for the school district reviewed the minor's options with the minor's parents during the second five-day suspension and the minor's mother expressed her intent to proceed with

an agreement in lieu of expulsion. The school district faxed a copy of the agreement to the minor's mother several days thereafter and did not commence expulsion proceedings. When contacted by the school district approximately 14 days after the agreement was faxed, the minor's mother advised the school that she wanted to confer with an attorney regarding the agreement. Approximately a week later, the minor's attorney served a temporary restraining order on the school and indicated that the minor and her parents declined to enter into an agreement in lieu of expulsion.

Upon receipt of the temporary restraining order, the school initiated expulsion proceedings and suspended the minor for another five-day period. Two days later, the school served notice of intent to expel the minor for 12 months. An independent hearing officer conducted an expulsion hearing and several days later, the school board adopted the hearing officer's recommendation to expel the minor for 12 months. The minor appealed the decision and the Minnesota Department of Education affirmed the expulsion and the appeal followed.

The Court of Appeals in determining whether the procedures used by the school district risked the erroneous deprivation of the minor's right to an education, concluded that the delay was directly attributable to the minor's notification of an intent to settle in lieu of expulsion and request to confer with an attorney. Under the circumstances, procedural safeguards requiring the school district to initiate the expulsion hearing notwithstanding a request for time to confer regarding a settlement offer were found to pose the risk of both interfering with the minor's ability to seek the advice of counsel regarding her rights and alternatives to the expulsion and unnecessarily hindering the possibility of settlement. Accordingly, the Court of Appeals concluded that the 29-day period between the minor's initial suspension and the initiation of expulsion proceedings was not an unreasonable delay in violation of the minor's federal procedural due process rights. *In re the Matter of the Expulsion of I.A.L. from Osseo Area Schools, Independent School District #279*, A03-762 (Minn. App. 02/17/04).

LOOKING AHEAD

■ **RELATIVE FOSTER PARENT BENEFITS; CALIFORNIA.** Following remand from the 9th Circuit, a United States District Court judge determined that the state of California, some California counties, and the federal government owe over \$80 million to relative foster parents who were denied benefits since 1997. The original dispute between California and the United States centered on a law interpreted by the Department of Health and Human Services that excluded relatives, such as grandparents, from access to benefits afforded foster parents without kinship ties. Enedina Rosales, a party to the state's case, appealed the dismissal by the district court after the state dropped the case. The 9th Circuit Court of Appeals reversed and remanded the case for the determination of relief for relative foster parents. The relief ordered by the 9th Circuit is retroactive, a decision that was strongly criticized by California's attorney general and an official from the California Department of Social Services. The Attorney General's Office noted the unavailability of state funds for retroactive damages, and said that the state would be forced to "tap other state welfare funds" in order to pay for court-ordered reimbursements. Given that many states have these same disparities in support of foster parents depending on relative status, the case could have some ramifications across the country. (Reported in *The Sacramento Bee*, 02/13/04)

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REAL PROPERTY

JUDICIAL LAW

■ **ZONING.** The advertiser owns three rooftop advertising signs in St. Paul ("city"). These signs consist of a tower structure and display surface and are considered "legal nonconforming" under current zoning ordinances. After a severe storm significantly damaged the display surface of the signs, the advertiser applied for building permits to repair the damage. The zoning administrator denied the application, reasoning that because each "sign face" was more than 51 percent damaged, the signs could not be restored to their original condition. The zoning administrator interpreted the pertinent ordinances as prohibiting the repair of a legal nonconforming sign if either the sign surface or the sign structure sustain more than 51 percent damage. The planning commission upheld this decision. Thereafter, the city council affirmed the decision of the planning commission. The advertiser then brought this declaratory judgment action alleging that the city's denial of its application was unreasonable, arbitrary and capricious. The district court granted the city's summary judgment motion and denied the motion for summary judgment made by the advertiser on its declaratory judgment action. The district court also certified the following question to the Court of Appeals "where damage to a billboard in legal nonconforming use is less than 51 percent of the aggregate replacement costs of the sign and sign structure, did the city act lawfully in denying permits to [advertiser] for repairs to its signs by applying a standard that prohibits repair where the damage exceeds 51 percent of the replacement costs of the sign face?" The Court of Appeals found that the "two-hurdle test" created by the city is in contravention of the plain meaning and underlying policy goals of the zoning ordinances. Consequently, the court reversed the district court's decision finding that the city's denial of the advertiser's application to obtain building permits to repair its legal nonconforming signs was arbitrary and not reasonably related to the language or purpose of the ordinances. *Clear Channel Outdoor Advertising, Inc. vs. City of St. Paul*, A03-1013

(Minn. App. 03/02/04).

■ **MORTGAGES.** During the 1980s, Will Selbak formed a limited partnership (“LP”) for the purpose of owning and developing land for an assisted living residence. Selbak was the sole officer, director and shareholder of the general partner, Carefree Living of America (“CLA”). Investors are the LP’s limited partners. In 1991, Selbak executed a quit claim deed conveying the property from the LP to himself. Then Selbak conveyed the property to CLA in 1995. Selbak did not record either deed. That same year, Selbak obtained a loan from the lender and gave a mortgage on the property to secure the loan. The lender recorded the mortgage. Investors sued CLA to obtain ownership of the property on behalf of the LP and in 1997 the district court imposed a constructive trust on the property. In December 1999, investors commenced this quiet title action to invalidate the mortgage. Even though the lender purchased the property at a foreclosure sale in July 2001, the district court awarded the property to the investors subject to the mortgage. The lender assigned its interest in the property to an assignee who moved for summary judgment on the basis that the mortgage is valid. The district court granted the assignee’s motion. The Court of Appeals upheld the district court decision finding that the assignee had standing, that the constructive trust did not void the mortgage, that the lender had no actual or constructive knowledge of Selbak’s fraud or investors’ rights and that the investors were estopped from denying the mortgage because, upon their initial investment in the LP, Selbak informed investors that the property would be mortgaged. Lastly, the court held that investors would be unjustly enriched if they were allowed to take title to the property without being subject to the mortgage. *O’Leary et al. vs. Miller & Schroeder Invest. Corp.* A03-1003 (Minn. App. 02/10/04).

— MELISSA BAER
Moss & Barnett

TAX

JUDICIAL LAW

■ **PROPERTY TAX: QUALIFICATION FOR PUBLIC CHARITY EXEMPTION.** The Minnesota Tax Court held that a nonprofit corporation was exempt from real estate taxes as an institution of public charity under Minn. Stat. §272.02(1)(6). The issue in the case was whether a movie theater operated by a nonprofit corporation in Mora, Minnesota was being used for charitable purposes. The theater charged \$3.00 for children and \$5.00 for adults to attend the theater, gave free movie tickets during the holidays, and let local organizations use the theater for their live performances. Factors indicating charitable status were: the nonprofit was supported by donations and gifts; although recipients were required to pay something for the assistance received, the charges were “very cheap”; although the gifts, donations, and charges for events produced a profit on the books, it was minimal, and the profit was used to support the ongoing operations and maintenance of the theater; and lastly the burdens of government were lessened by “get[ting] the kids off the street” and the theater provided a wholesome place of entertainment for children and adults. Therefore, the nonprofit was exempt from real property taxes for taxes payable in 2003. *Paradise Community Center Association, Inc. v. County of Kanabec*, C1-03-189, 2004 WL 192978 (Minn. T. Ct. 01/20/04).

■ **REAL PROPERTY: MEMBER OF INDIAN TRIBE; REAL PROPERTY TAXATION ON MANUFACTURED HOME.** The Minnesota Tax Court held that members of the Indian tribe, who own fee-patented real estate on which a manufactured home and other items of property exist, are real property and subject to taxation by the county. The issues in the case were: (1) whether the state could assess real property taxes on a manufactured home of a member of the Indian tribe living within the boundaries of the Indian reservation; and (2) whether the structures on the property were classified as improvements to real estate subject to real estate tax. Minn. Stat. §273.125(8) and Minn. Stat. §272.03(1)(a) provide the property criteria for determining whether the property was real or personal. The determining factor under Minn. Stat. §273.125(8) in deciding whether a manufactured home is real or personal property turns on whether the owner of the unit holds title to the land upon which it is situated. Since it was undisputed that the property was owned by the member of the Indian tribe, the manufactured home was considered real property under Minnesota law, and the taxpayer was liable to the county for real estate taxes assessed. Since the determinative factor is what the unit owner’s interest in the land is, it was not necessary to address the remaining two criteria, identical in both Subd. 8(b) and 8(c), namely, how the unit is affixed to the land and whether the unit is connected to utilities, has a septic system, or is serviced by water and sewer (even if these criteria were applied, the property would still be considered real property). Minnesota law in Minn. Stat. §273.125(8)(f) provides, whether the items were movable or not, that a “storage shed, deck or similar improvement constructed on property ... is taxable as real estate if it is owned by the owner of the site.” Minn. Stat. §272.03(1)(a) states that for taxation purposes, “real property includes the land itself ... and all buildings, structures and improvements or other fixtures on it.” Subd. 1(b) also states that “a building or structure shall include the building or structure itself, together with all improvements or fixtures affixed to the building or structure.” *Cogger v. County of Becker*, C3-02-1625, 2004 WL 22038357 (Minn. T. Ct. 02/03/04).

■ **PROCEDURE: COSTS AND DISBURSEMENTS IN GENERAL.** The Minnesota Court of Appeals held that when an offer of judgment is made under Minnesota Rules of Civil Procedure Rule 68 and rejected, and the net judgment is less favorable to rejecting party than the offer, the rejecting party must pay all of the requesting party’s costs and disbursements,

not only those costs and disbursements incurred after the offer was made. Interpreting Rule 68 to impose liability for all of the offering party's costs and disbursements, not for some of those costs and disbursements after the time of the rejected offer, is consistent with the intent of the Rule to create incentives for parties to settle disputes. **D. Scott Vandenhuevel, et al. v. Virgil A. Wagner**, A03-324, 2004 WL 77811 (Minn. App. 01/16/04).

■ **FAILURE TO TIMELY FILE NOTICE OF APPEAL WITHIN 60 DAYS.** The Tax Court dismissed the taxpayer's appeal as untimely when an order was issued by the commissioner on January 23, 2002 and the taxpayer filed his notice of appeal on January 21, 2003 without excuse or requesting a 30-day extension of time to file the appeal. The notice of appeal procedures found in Minn. Stat. §271.06 need to be strictly followed with an appeal filed within the 60-day statutory period. **Kevin Morse v. Commissioner**, No. 7544, 2004 WL 97651 (Minn. T. Ct. 01/07/04).

■ **REAL PROPERTY VALUATION: UNEQUAL ASSESSMENT.** The Minnesota Tax Court held that the motel valuation of \$2.4 million for January 2, 2001 should be reduced to \$1.8 million or by 21.2 percent because of discriminatory and unequal valuation under the Sales Ratio studies provided for in Minn. Stat. §278.05(4) (95% less 73.8% equals 21.2% — the reduction equal to the difference between 95% and the median ratio). The court has consistently determined that the appropriate taxing district is the smallest taxing district with a sufficient number of samples in the Sales Ratio studies and the court considers six or more sales for validity of the study. Here, there were only two 2001 sales in the north Mankato nine-month study. Therefore, the court relied on the countywide ratio for nine months since the county failed on its burden of proof of excluding four of the sales as being unreliable. **DDD Motel Corporation v. County of Nicollet**, No. CX-02-88, 2004 WL _____) (Minn. T. Ct. 01/28/04).

■ **REFUND CLAIM; TIMELY FILING.** The statute of limitations on plaintiff's tax refund claim began to run on September 15, 1998, the date on which her 1994 tax return was filed, and because she submitted her request for refund on December 4, 2000, less than three years after the 1994 return was filed, her claim was not time-barred. Based on the plain language of IRC §6511(a), refund claim is timely if it is filed within three years of the filing date of the applicable tax return, regardless of the due date of the return. **Hannigill v. United States**, No. 3:03-CV-367BN, 93 AFTR 2d 2004-638 (S.D. Miss. 01/20/04).

■ **EARNED INCOME CREDIT REFUND CLAIMS; LOOKBACK LIMITATIONS PERIOD.** Amounts refunded by operation of the earned income credit are deemed paid under IRC §6513(b)(1) on April 15 of the year following the tax year in question, and thus refund claims filed more than three years following such deemed payment are barred by the statute of limitations under IRC §6511. **Israel v. United States**, No. 03-6112, 356 F.3d 221 (2nd Cir. 2004).

■ **CONSIDERATION OF RELIEF NOT LIMITED BY ADMINISTRATIVE RECORD.** Tax Court's determination of whether a taxpayer is entitled to equitable relief from joint liability under IRC §6015(f) is made in a trial *de novo* and may consider matters raised at trial but not in the administrative record. **Ewing v. Commissioner**, 122 T.C. No. 2 (01/28/04).

■ **PAYMENT FOR JUDGMENT ON LIABILITY ASSUMED WITH PURCHASE OF ASSETS NONDEDUCTIBLE.** A court judgment paid by the taxpayer resulting from an adverse jury verdict in a patent infringement lawsuit, which taxpayer assumed from the seller when it acquired the assets of the seller's subsidiary, is a nondeductible capital expenditure. As in **David R. Webb Co. v. Commissioner**, 708 F.2d 1254 (7th Cir. 1983), when an obligation is assumed in connection with the purchase of capital assets, payments satisfying the obligation are generally nondeductible capital expenditures. **Illinois Tool Works Inc. v. Commissioner**, No. 02-1239, 94 AFTR 2d 2004-548 (7th Cir. 01/21/04).

■ **CHALLENGING LIABILITY SHOWN ON RETURN.** Taxpayers may challenge under IRC §6330(c)(2)(B) the existence or amount of the unpaid tax liability reported on their original income tax return, if they have not received a notice of deficiency and have not otherwise had an opportunity to dispute the tax liability in question. **Montgomery v. Commissioner**, 122 T.C. No. 1 (01/22/04).

■ **S COMPANY'S SOLE SHAREHOLDER AND PRESIDENT CLASSIFIED AS EMPLOYEE.** Commissioner properly classified the sole shareholder and president of a Subchapter S home improvement company as an employee for federal employment tax purposes under IRC §3121(d)(1) based on the substantial services that he performed for the company. **Nu-Look Design Inc. v. Commissioner**, No. 03-2754, 93 AFTR 2d 2004-608 (3rd Cir. 01/26/04).

■ **REDETERMINATION OF UNDERLYING LIABILITY; DENIAL.** IRS Appeals Officer did not abuse his discretion by denying taxpayer's request in a collection due process hearing for a redetermination of his underlying liability for a trust fund recovery penalty under IRS §6672. Taxpayer's payment allocation argument did not fall within the definition of "offers of collection alternatives" as outlined in IRS §6330. **Mendez v. United States**, No. 02-60857-CIV-HURLEY/LYNCH, 93 AFTR 2d 2004-704 (S.D. Fla. 12/14/03).

■ **IOWA; GAMBLING; RIVERBOATS VS. RACETRACKS.** The Iowa Supreme Court reaffirmed its earlier decision that legislation which significantly increased the gambling tax rates on gross receipts of racetracks but not on riverboats was unconstitutional and violated the Equal Protection Clause of the Iowa Constitution, as there was no rational basis for the differential tax treatment imposed on racetracks. The Court said a mere difference in location was not sufficient to uphold the constitutionality of the tax under the Equal Protection Clause of the State Constitution. **Racing Association of Central Iowa, et al. v. Fitzgerald**, Dkt. No. 104/01-0011 (Ia. 2004).

■ **FORMER PARTNER'S REPAYMENT OF LOAN WAS PARTNERSHIP INCOME.** A payment made by a former limited part-

ner to satisfy a partnership's loan was income to the limited partnership, not a capital contribution. The partnership owned and operated two office buildings in Clearwater, Florida. To fund the construction of its second building, it borrowed \$14.5 million from a bank. The loan was a recourse loan, which meant that its sole general partner could be held personally liable for repayment of the loan in the event the bank foreclosed on the loan and the value of the mortgaged property was insufficient to cover the debt. Additionally, the bank required the sole limited partner to execute two guarantee agreements. The first required the limited partner to repay \$2.5 million of the principal when the office building was completed. Under the second, the limited partner guaranteed all interest payments for the life of the loan. Subsequently, the limited partner sought to divest itself of its interest in the partnership. Its agreement to guarantee the interest payments, however, made it difficult to withdraw from the partnership. After failing to reach an agreement with the bank for terminating the agreement, the limited partner orchestrated a plan under which the office building would be sold, the proceeds would be credited toward the balance of the loan, and the limited partner would pay the bank the outstanding balance on the loan after the property was sold. The limited partner abandoned its partnership interest on December 28, 1994. The next day, the property was sold for \$4.1 million, and the proceeds went to the bank to pay down the loan. The limited partner also paid the bank the balance of the loan, nearly \$8.4 million. Although a partner's obligations to a partnership may continue after it abandons its interest, the limited partnership in this case was not obligated to make the \$8.4 million payment. The court pointed out that the general partner was personally liable for the loan, not the limited partner, which only guaranteed the interest payments. The 10th Circuit in a similar case (*Twenty Mile Joint Venture, PND, Ltd.*, 84 AFTR 2d 99-7464, 200 F.3d 1268 (CA-10, 1999)), decided that a departing partner's forgiveness of a loan to a partnership was a discharge of debt income to the partnership rather than a capital contribution. **MAS One Limited Partnership**, No. C2-01-87, 92 AFTR 2d 2003-5516 (D.C. Ohio, 2003).

■ **COMBINING UNRELATED BUSINESS LOSSES DISALLOWED ON ILLINOIS RETURN.** The 7th Circuit in a state tax case held that a company that owns several subsidiaries that make food packaging materials and several others that make steel cannot offset losses incurred by steel subsidiaries against income of food packaging subsidiaries on a consolidated Illinois state income tax return. The losses were incurred outside of the state of Illinois and the businesses were therefore not unitary. **In re Envirodyne Industries Inc.**, No. 02-1632, 354 F.3d 646 (7th Cir. 2004).

■ **DEFERRAL OF GAIN ON STOCK SALE TO ESOP LOST DUE TO INVALID ELECTION.** The U.S. Tax Court held that a taxpayer who sold shares in a closely held corporation to the issuing corporation's employee stock ownership plan (ESOP) failed to make the proper election to defer gain recognition under IRC §1042. As a result, the taxpayer had to report long-term capital gain on the stock sale. Taxpayer instead filed an amended return referring to the sale after IRS had commenced an examination. **Estate of Clause**, 122 T.C. No. 5 (02/09/04).

■ **CIRCULAR LOAN TRANSACTIONS PRODUCE NO BASIS INCREASE IN S CORPORATIONS.** Loans made by taxpayers to two of their S corporations out of funds that were, in turn, lent to them by a third S corporation, to which the two corporations, in turn, made loans of the same amount were not "actual economic outlays." The loans did not allow the taxpayers to increase their basis in the borrower corporations so as to enable them to deduct the corporations' losses. **Oren v. Commissioner**, No. 03 1448, 93 AFTR 2d 2004-XXXX (8th Cir. 02/12/04).

■ **ACCEPTANCE OF QUALIFIED OFFER BARS REDUCTION OF STATED AMOUNTS BY NET OPERATING LOSSES ("NOLS").** Commissioner's acceptance of taxpayers' qualified offer, pursuant to IRC §7430, precludes taxpayers from reducing the amounts stated in the qualified offer for the years at issue by the amount of NOLS sustained in other years. **Johnston v. Commissioner**, 122 T.C. No. 6 (02/11/04).

■ **OFFER IN COMPROMISE BARS RELIEF FROM JOINT AND SEVERAL LIABILITY.** Taxpayer is barred from seeking relief from joint and several liability under IRC §6015(c) by virtue of his offer in compromise that was accepted by the commissioner. **Dutton v. Commissioner**, 122 T.C. No. 7 (02/11/04).

■ **PENALTY FOR PAYING PAYROLL TAXES OTHER THAN ELECTRONICALLY.** Employer is liable for 10 percent tax penalty under IRC §6656 for remitting payroll taxes other than by electronic funds transfer pursuant to IRS's Electronic Federal Tax Payment System under IRC §6302(h). **F.E. Schumacher Co. v. United States**, No. 1:01CV097, 93 AFTR 2d 2004-829 (N.D. Ohio 01/23/04).

■ **TAXPAYERS WHO SETTLED NOT ENTITLED TO COST AWARD.** Taxpayers who, after protesting the commissioner's proposed adjustments to IRS Appeals Office, settled their case without the commissioner issuing a notice of deficiency or the Appeals Office issuing a notice of decision, and are not entitled to an award of administrative costs under IRC §7430. The commissioner never took a position in the administrative proceeding. **Florida Country Clubs Inc. v. Commissioner**, 122 T.C. No. 3 (02/03/04).

■ **U.S. TAX COURT JURISDICTION OVER CLAIM FOR OVERPAYMENT INTEREST.** U.S. Tax Court has jurisdiction to consider taxpayer's claims for overpayment to the extent that the claims involve overpayment interest. The issue raised by taxpayer's motion is whether the court lacked jurisdiction under IRC §6512(b) to consider petitioner's claims for overpayment to the extent that they involve overpayment of interest. The case was controlled by the court's view in *Opinion in Estate of Baumgardner v. Commissioner*, 85 T.C. 445 (1985). **Sunoco Inc. v. Commissioner**, 122 T.C. No. 4. (02/04/04).

■ **APPRAISALS PROTECTED FROM MINNESOTA DISCOVERY.** The former property owner appealed from the commissioner's award in a condemnation proceeding. The state had obtained certain appraisals for the purpose of acquiring land through purchase or condemnation after the property owner had rejected the state's direct purchase offer and the state did not rely on these appraisals in the litigation. The Minnesota Court of Appeals held that the district court did not abuse its discretion in granting an order protecting these appraisals from discovery. Minn. R. Civ. P. 26.02(d)(2) prohibits discovery of opinions held by an expert unless done in anticipation of litigation and the expert will testify. In addition, Minn. Stat. §13.44 (3)(a) (2002) states that the appraised value of real estate for the purpose of acquiring land through purchase or condemnation is protected nonpublic data. *State of Minnesota, Mike Hatch v. KQRS, Inc. et al.*, A03-426, 2004 WL 117558 (Minn. App. 01/27/04).

■ **LATE-FILED INCOME TAX RETURNS DON'T QUALIFY AS RETURNS.** The 4th Circuit, affirming a district court, held that an individual's late-filed income tax returns (after taxpayer filed amended returns for commissioner-filed returns) did not qualify as returns and that his prebankruptcy taxes weren't discharged in bankruptcy since under 11 U.S.C. 523(a)(1)(B)(1) no "return" was filed. The court looked to the 6th Circuit's decision in *In re Hindenlang*, 164 F.3d 1029 (6th Cir. 1999), in which a test was adopted to determine what is a tax return under the bankruptcy code. *Michael J. Moroney v. United States, et al. (In re: Michael J. Moroney)*, 02-2417, 92 AFTR 2d 2003-7381 (4th Cir. 12/19/03).

ADMINISTRATIVE MATTERS

■ **GUIDANCE ON INSURANCE — NEGATIVE NET BALANCE REFUNDS.** In Department of Revenue, Revenue Notice 04-01 (January 20, 2004), the commissioner clarified the refund procedure applicable to negative net balance reported on insurance tax returns. Taxpayers are required to pay taxes or surcharges on gross premiums received during reporting periods, less premiums returned during the same period. If a taxpayer's return premiums exceed the gross premiums received during a reporting period and the taxpayer files a tax return showing a negative balance, the commissioner will issue a refund to the taxpayer equal to the negative amount multiplied by the applicable tax or surcharge rate, subject to the requirements of the statutory provisions governing refunds codified at Minn. Stat. §2971.60 and Minn. Stat. §2971.70.

■ **COMMENT: PERSONAL PROPERTY RULES.** In 28 S.R. 750 (December 8, 2003), the commissioner requested comments or questions on the amendment of the rules governing the application of valuation and assessment of the property of utility companies found in Chapter 8100.

■ **COMMENT: CHAPTER 296A AND MINNESOTA RULES FOR SALES TAX.** In 28 S.R. 909 (Jan. 20, 2004), the commissioner requested comments or questions on the possible amendment of the Minnesota Rule, Part 8130.5300, on petroleum products and the exemption found in Minn. Stat. §297A.68(19), which provides an exemption from the sales tax for "products upon which a tax has been imposed and paid under Minn. Statutes, chapter 296A and for which no refund has been or will be allowed."

■ **PROPOSED NEW SCHEDULE FOR LARGE-CORPORATION RETURNS.** IRS released a proposed draft of Schedule M-3, "Net Income (Loss) Reconciliation for Corporations with Total Assets of \$10 Million or More," to be used by large corporate taxpayers that file Form 1120. The proposed Sch. M-3 replaces Sch. M1 for corporate tax payers and "increase[s] the transparency of corporate tax return filings." IRS expects the form to be finalized for use with federal income tax returns for tax years ending on or after December 31, 2004. IR 21004-14.

■ **DEFINITION OF "TAX ACCRUAL WORKPAPERS".** An IRS Office of Chief Counsel Notice 2004-10 clarifies the definition of "tax accrual workpapers" that IRS may request in limited circumstances from taxpayers under examination and supplements Chief Counsel Notice 2003-12. Tax accrual workpapers are financial audit workpapers used to assess tax liabilities in connection with a taxpayer's disclosure of its financial condition to third parties (e.g., shareholders). These workpapers are not privileged communications generated in connection with seeking legal or tax advice. For returns filed before July 1, 2002, that claim any tax benefit arising out of a listed transaction, IRS may request tax accrual workpapers related to that transaction if the taxpayer had an obligation to disclose it under Reg. §1.6011-4, and failed to do so: (1) on the return; (2) under Rev Proc 94-69, 1994-2 CB 804, if applicable; or (3) under Ann. 2002-2, 2002-2 IRB 304 Ann. 2002-63. According to Chief Counsel Notice 2003-12, where Ann. 2002-63 is not applicable (i.e., where a tax benefit from a listed transaction is not claimed on a return), examiners normally request audit and tax accrual workpapers only in unusual circumstances and where factual data needed to support the return is not in the taxpayer's records. If a request for these workpapers is made, IRS will only request workpapers that are material and relevant to the inquiry.

■ **"OFFER IN COMPROMISE" CLAIMS.** The IRS issued a consumer alert advising taxpayers to beware of promoters' claims that tax debts can be settled for "pennies on the dollar" through the offer in compromise ("OIC") program. Taxpayers requiring the assistance of a tax professional to prepare and submit an OIC "may contact local or state tax professional associations for enrolled agents, CPAs or attorneys to locate someone in their geographic area that has the education and experience to assist them." News Release IR-2004-17.

■ **ABUSIVE TAX AVOIDANCE TRANSACTIONS.** The IRS has started sharing leads on more than 20,000 taxpayers

engaged in abusive tax avoidance with tax agencies in 45 states, the District of Columbia, and New York City under the terms of the Abusive Tax Avoidance Transactions ("ATAT") memorandum of understanding developed by the IRS, the Federation of Tax Administrators, and several state tax agencies. The initial leads transferred to states involved scams using offshore transactions, abusive trusts, employee leasing, home-based businesses, employment taxes, and other tax-avoidance schemes. The IRS, the states, and the cities will share information on any resulting tax adjustments from the audits, thereby allowing the agencies to leverage their resources. News Release, IRS, IR-2004-19 (02/10/04).

■ **DETERMINING EXISTENCE OF UNITARY BUSINESSES.** The Multistate Tax Commission adopted a revised regulation that recommends guidelines for states to use in determining the existence of unitary businesses for corporation income tax purposes. MTC Reg. IV.(b), as revised, effective Jan. 15, 2004.

■ **MINNESOTA LOCAL SALES AND USE TAXES.** Dan Salomone, commissioner of revenue, on February 10, 2004, issued a Department of Revenue study on local sales and use taxes for the Legislature's review. The report includes the history of sales taxation in Minnesota, the policy implications of local sales taxes, and the process that should be used when granting authority for local sales taxes. The full study is available under the heading "Research Reports" from the Department's website: www.taxes.state.mn.us/taxes/legal_policy.

■ **IMPACT OF FEDERAL CHANGES RELATING TO MILITARY PERSONNEL.** Recent federal tax changes and how they affect the 2003 Minnesota tax for military personnel were covered in a Minnesota Department of Revenue Notice issued in February, 2004. Federal changes enacted in the Military Family Tax Relief Act of 2003 and the Service Members Civil Relief Act affect how military personnel must complete their 2003 federal returns. The changes you will need to make to correctly determine the 2003 Minnesota tax for nonresident military personnel are discussed on the DOR's website at: www.taxes.state.mn.us/taxes/individ/instructions/fed_military_changes.pdf

■ **TAXPAYER ADVOCATE'S 2003 REPORT.** The National Taxpayer Advocate in January, 2004 released the "National Taxpayer Advocate 2003 Annual Report to Congress" and called on lawmakers and the IRS to address the most serious problems that confront taxpayers and threaten voluntary compliance under the tax system. The report put the AMT, confidentiality, and self-employment compliance as the IRS top issues. The report spotlighted other serious problems that taxpayers face, including IRS's earned income tax credit compliance strategy, the collection due process program, the offer-in-compromise program, taxpayer assistance centers, and the continuing difficulty for taxpayers and practitioners to communicate and navigate within the IRS. The full Taxpayer Advocate's Annual Report is available at: www.irs.gov/pub/irs-utl/nta_2003_annual_report2.pdf.

LEGISLATION

■ **SERVICEMEMBERS CIVIL RELIEF ACT.** The Servicemembers Civil Relief Act was signed into law in December, 2003. This law serves to update a similar law passed in 1940 and smoothes out inconsistencies created by more than 60 years of history. The law also includes a preemption of state taxing authority that may complicate the upcoming income tax-filing season for the 2003 tax year individual income tax returns. Please note that the preemption appears to have the potential to affect any open cases under appeal or dispute. The new law prohibits a procedure used in approximately 19 states with graduated income tax rates, including Minnesota. The procedure, known commonly as "the California method," considers a servicemember's total household income when determining the tax rate to be applied against the portion of household income that may be taxed by that state. The California method calculates the taxable income of a nonresident taxpayer, whether military or civilian, as if the taxpayer were a fulltime resident. The total tax is then apportioned by the proportion of income that the state may lawfully tax. The method was put in place to apply graduated tax rates in the same manner to all taxpayers. The other approach used in the remaining states is to apportion the income as to resident and nonresident before determining the tax due. See "Impact of Federal Changes Relating to Military Personnel," *supra*. Section 411 (Residence for Tax Purposes) restates that residence and domicile for tax purposes do not change because of a servicemember's posting to another jurisdiction. Likewise, the new law affirms the existing law that prohibits a state from taxing the income of a servicemember whose domicile is in another state. And finally, a subsection included requires personal property tax relief be granted, whether or not the servicemember does not pay the tax to his or her state of domicile. The law in its entirety is available at: <http://thomas.loc.gov>.

LOOKING AHEAD

■ **LEASE-BACKS AND OTHER SHELTER PROVISIONS TARGETED.** The Administration in February 2004 unveiled formal details on proposals to crack down on a range of abusive corporate tax shelters, attack promoters, and close loopholes in the tax code as part of its fiscal year 2005 budget. Abuses involving leasing transactions, foreign tax credits, and tax-exempt casualty insurance companies are key targets of the shelter proposals. The Administration also is pushing provisions to force promoters to register abusive transactions and disclose the identities of their investors, among other actions. *Daily Tax Report* CG-1, L-1 (01/14/04). Similar legislation has been introduced in Minnesota: H.F. 2263. The

federal and state legislation is taking special aim at deals in which companies reap billions of dollars in tax breaks by buying public works like subways and sewer systems from cities and states and then leasing them back.

■ **SSTP LAUNCH DELAYED.** Although it appears to have been crossed earlier this year, the threshold of ten states representing 20 percent of the total population adopting legislation conforming their sales tax laws to the Streamlined Sales and Use Tax Administration appears to be sliding as states reevaluate their laws. The launch date for the nationwide uniform sales tax system is likely to be pushed back six months — to January 1, 2005 — as states review legislation intended to bring them into compliance with the streamlining agreement. *Daily Tax Report* S.36 (01/01/04).

■ **CONTROVERSIAL BUY-SELL ACCOUNTING RULE.** The new accounting rule proposed by the Financial Accounting Standards Board (FAS Statement 150) was fortunately delayed for a year for private companies, allowing additional time to study its ramifications. The rule, as initially offered, would have required companies to reclassify mandatory buy-sell agreements as a liability on the company's balance sheet, for tax years beginning after December 15, 2003. In many cases, showing this as an obligation could destroy a healthy company's balance sheet and impede its ability to obtain financing and attract customers, suppliers, loans or investors. The reaction against this proposal was quick and significant. A rule issued by this board must be followed to be in compliance with generally accepted accounting principles, and to receive an unqualified audit opinion from your certified public accountant. This development needs to be closely monitored.

— JERRY GEIS
Briggs & Morgan

TORTS & INSURANCE

JUDICIAL LAW

■ **JOINT TORTFEASORS — CIVJIG 91.40.** Plaintiff was injured in two separate automobile accidents, five months apart; both occurred during the scope of his employment. He sued his insurer and the alleged tortfeasor of the second accident for damages arising from both accidents. The district court severed the claims, holding the two accidents to be factually different and separate occurrences. In the trial relating to the second accident, plaintiff claimed the district court erred in failing to give a jury instruction stating that if damages could not be separated from a preexisting disability, then defendant is liable for all damages. Plaintiff also asserted collateral estoppel, claiming the issues had been resolved in a prior workers' compensation hearing.

The Court of Appeals found the preexisting injury instruction did not apply because the alleged tortfeasors in the two accidents were not jointly and severally liable and plaintiff did not suffer a single indivisible injury from the accidents. The court reasoned the accidents were separated in time and the later accident aggravated earlier injuries, which does not give rise to joint and several liability. Although the court acknowledged principles of *res judicata* may sometimes apply to workers' compensation hearings, it found the issues here were not identical. The court also noted collateral estoppel was not applicable because plaintiff did not have an opportunity to be fully heard in the prior hearing.

Heine v. Simon, A03-710 (Minn. App. 01/27/04). www.lawlibrary.state.mn.us/archive/ctappub/0401/opa0307100127.htm

■ **EVIDENCE; EXPERT WITNESS; FOUNDATION; CAUSATION.** Six days after she was diagnosed with degenerative disc disease in her back, plaintiff was involved in a low-speed automobile accident. Her long-time treating physician, who testified as an expert in the resulting personal injury action, admitted that he based his opinion regarding causation on plaintiff's statement that she felt a sharp pain in her low back upon impact. The physician also admitted it was possible the injuries resulted from a natural progression of the degenerative back disease.

The district court granted summary judgment concluding (1) the physician's testimony was not based on an adequate factual foundation and (2) the plaintiff's theory was based on speculation and conjecture and was not demonstrably more probable than defendant's theory that it was a natural progression.

The Court of Appeals reversed, concluding that even when a physician admits that the sole basis for his conclusion that the injury was caused by the accident was plaintiff's statement, there is adequate foundation. The court reasoned that under Minn. R. Evid. 703, the issue is whether the facts and data are of a type typically relied upon by experts in the field, and whether the expert's reliance is reasonable. The court presumed that the physician relied not only on the statements, but also on his education, training and experience as a practitioner in formulating the opinion. The court also pointed out that the district court had improperly denied the jury its opportunity to weigh two reasonably plausible theories on causation. *Ingram v. Syverson*, A03-967, (Minn. App. 02/03/04). www.lawlibrary.state.mn.us/archive/ctappub/0402/opa030967-0203.htm

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