



NOTES & TRENDS

CIVIL LITIGATION

JUDICIAL LAW

■ **STATUTE OF REPOSE.** In two recent decisions, decided by different three-judge panels, the Minnesota Court of Appeals analyzed provisions of the improvement to real property statute of repose, Minn. Stat. §541.051. In both cases the appellate panels found that the statutory provisions did not bar the claims.

In *Taney v. Independent School District 624*, 673 N.W. 2d 497 (Minn. 2004), plaintiff brought a negligence action for personal injuries which she suffered when she stepped off what turned out to be a nine-inch drop-off from a doorway to an outdoor courtyard. The school building was constructed in 1958 and remodeled in 1992, with a certificate of occupancy issued the following year. The accident occurred in 1998.

The school district's testimony in support of the applicability of the ten-year statute of repose was that the remodeling in 1992 did not in any way alter the drop-off in elevation between the interior hallway and the outdoor courtyard. Plaintiff's evidence regarding the 1992 remodeling established that, in several respects, the door leading from the interior hallway to the courtyard was changed, and the Court of Appeals agreed with the trial court that the substantial remodeling of the real property in the direct vicinity of the accident constituted an improvement, rather than a repair, so that the statute of repose began to run anew in 1992.

The school district also appealed the trial court's refusal to instruct the jury that they should not consider a violation of the Uniform Building Code as evidence of negligence. The appellate court found that the trial court's instructions as a whole were fair and a correct statement of the duties of a landowner, as well as on the law of negligence. The appellate court affirmed the trial court's denial of the school district's motions for JNOV or a new trial.

In *Olmanson v. LeSueur County*, 673 N.W. 2d 506 (Minn. 2004), the appellate court reversed the district court and remanded the case for trial.

The plaintiff was injured while snowmobiling at night when he collided with the side of a cement culvert installed by the golf course beneath a county road to allow golfers to travel safely from one side of the road to the other. The culvert had been constructed before 1989 and the accident occurred in February, 2000.

The appellate court found that the exception set forth at subdivision 1(c) of Minn. Stat. §541.051 imposed a continuing duty upon the golf course and the county to warn of dangerous or unsafe conditions on the premises.

The appellate court also held that the county failed to produce evidence entitling it to the discretionary immunity exception of the Tort Claims Act, Minn. Stat. §466.03, subd. 6. The county was unable to provide evidence of how and when it had made any policy decision, or what facts it had considered in any type of deliberative process which led to the establishment of a policy with respect to warnings regarding culverts such as involved in this case.

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CRIMINAL LAW

JUDICIAL LAW

■ **PROCEDURE; JURY TRIAL; JUDICIAL COMMUNICATION; DEFENDANT ABSENT.** After the jury retired, both attorneys left telephone numbers and the court advised the attorneys that before it did anything it would talk to everyone. Before the end of the day, the court contacted both attorneys to see if they wished to be present when the court dismissed the jury for the day and both attorneys

waived their presence. The defendant never personally waived this right. Before leaving, the judge and the jury discussed issues of unanimity, rereading of testimony, conflicts in the testimony, and whether deliberations would continue into further days. The judge attempted to be neutral; however, the trial court, in fact, did respond to questions on substantive matters.

Held, the trial court's response to questions regarding substantive matters is reversible error. The court's responses are too easily interpreted as providing additional instructions. In addition, the judge's comment to "keep working" could have been interpreted to mean that the jury *must* reach a verdict. Also, the court's response that the jurors' request for hearing testimony is "unworkable" might have implied that the jury is not entitled to have any testimony reread. Conviction reversed. **Walter Barton Peterson, Jr. v. State**, C9-02-2987 (Minn. App. 12/30/03).
www.lawlibrary.state.mn.us/archive/ctappub/0312/op022287-1230.htm

■ **SENTENCE; JAIL CREDIT; EJJ; JUVENILE FACILITY; EQUAL PROTECTION.** The district court was correct in denying credit for the appellant's time spent in Red Wing against a later imposed prison term for violation of a state sentence as an extended juvenile jurisdiction (EJ) offender. Minn. Stat. §260B.130, subd. 5 proscribes giving jail credit for any time served in the "juvenile facility custody." Red Wing is such a facility. Hence, the judge properly denied jail credit.

Next, the Court of Appeals rejects the appellant's position that the EJ rules violate equal protection: a juvenile certified as an adult receives custody credit for time served in a juvenile facility, while an EJ offender whose adult sentence is executed does not.

Held, the EJ jail credit restriction has a reasonable connection between the actual effect of the EJ classification and the statutory goal: juveniles ought to understand the "one last chance" concept of the EJ system. **State v. Jesus Serena**, A03-362 (Minn. App. 12/30/03).
www.lawlibrary.state.mn.us/archive/ctappub/0312/opa030362-1230.htm

■ **BUILD CODE VIOLATION; RESPONSIBLE CORPORATE OFFICER DOCTRINE; STRICT LIABILITY; PUBLIC WELFARE LAWS.** The appellant was CEO, president and shareholder of the contracting firm which subcontracted excavation work. The subcontractors' work violated the Uniform Building Code, as enacted under Minn. Stat. §16B.69. Appellant had no involvement or ownership in the subcontracting entities, no education or experience in engineering, and apparently no knowledge of the violations.

Held, the Uniform Building Code should not be classified as a "public welfare" offense. As such, strict liability is not applied. Strict liability statutes are generally disfavored, should be construed according to the rule of lenity, and the legislative intent to impose strict liability must be clear. Because of the court's holding that Minn. Stat. §16B.69 is not a public welfare statute, the court does not address the issue of the appellant's liability under the responsible corporate officer doctrine. Conviction reversed. **State v. John Arkell**, C1-02-856 (Minn. 12/31/03).
www.lawlibrary.state.mn.us/archive/supct/0312/op020856-1231.htm

■ **SEARCH & SEIZURE; EXCLUSIONARY RULE; ERRONEOUS COURT ORDER; DNA SAMPLE ORDER.** DNA evidence seized pursuant to a court order under Minn. Stat. §609.3461, an order later determined by the Court of Appeals to have misconstrued the meaning of the statute, shall not be suppressed by virtue of the exclusionary rule. Also, the state is allowed to argue the exclusionary rule on appeal, although it did not do so at the post-conviction court, because the procedural posture of the case provided little opportunity for the state to address the issue at the post-conviction level.

In 1992, a 17-year-old individual was sexually assaulted at knife point. The authorities obtained a DNA sample from the victim, but were unable, at the time, to locate a suspect. Approximately seven years later, the BCA linked the DNA sample to the respondent. The sample linking the respondent was taken in 1998 pursuant to a court order issued as a condition of probation for the respondent's conviction in a 1997 crime. That 1997 crime was initially charged as first- and third-degree criminal sexual conduct, but was later pled to by the defendant as a reduced charge of promoting prostitution by fraud. In connection with the guilty plea, the trial court ordered respondent to register as a predatory sex offender, pursuant to Minn. Stat. §243.166, and to provide a DNA sample under Minn. Stat. §609.3461.

Respondent later moved to withdraw his guilty plea in the prostitution case, arguing that his attorney was ineffective by not informing him of his duty to register as a sex offender. Although the district court, in a post-conviction motion, disagreed, the Court of Appeals reversed, holding that the crime of promoting prostitution by fraud did not "arise out of the same set of circumstances" as the original charge, and therefore Johnson could not be required to register as a sex offender.

In the 1992 sex assault case, respondent failed to object to admission of the 1998 DNA sample taken pursuant to the erroneous district court order. Respondent pleaded guilty, but later moved to stay the sentence in order to pursue post-conviction relief, now arguing that he was deprived effective assistance of counsel by failure of his attorney to file a motion to suppress the DNA sample that was obtained based on his conviction for promotion of prostitution by fraud.

The Supreme Court does not address the constitutionality of 609.3461 as an unreasonable search and seizure, nor does it adopt or agree with the conclusion of the Court of Appeals that Johnson's conviction for promoting prostitution by fraud did not "arise out of the same set of circumstances" as criminal sexual conduct. However, assuming such an order was erroneous, the Supreme Court holds that the exclusionary rule does not apply to the admission of DNA evidence seized pursuant to a court order later found to be erroneous. Such a court order was not intended to prevent police from obtaining the whereabouts of criminal suspects, does not serve the goal of preventing police misconduct, and was an error caused solely by the magistrate. Because the exclusionary rule does not apply, the Supreme Court concludes that the respondent did not suffer actual prejudice from his attorney's failure to move for suppression of the DNA evidence, and his conviction is reinstated. **Kevin Johnson v. State**, C8-02-790 (Minn. 01/15/04).

www.lawlibrary.state.mn.us/archive/supct/0401/op020790-0115.htm

■ **DWI/IMPLIED CONSENT; ENHANCEMENT; CIVIL REVOCATION; CHARGE VERSUS SENTENCE.** Minn. Stat. §169A.24 subd. 1 (1) is not ambiguous: a prosecutor may use prior civil impaired-driving incidents for enhancement purposes while preserving one or more prior criminal impaired-driving incidents for use in calculating criminal history score. In this case, the appellant had six qualified prior impaired-driving incidents, four criminal and two civil. The prosecution used two of the civil impaired-driving incidents and one criminal incident for enhancement purposes, preserving for criminal history score calculation three of the four prior criminal impaired-driving incidents. As a result of the application of these various criminal and civil incidents, the appellant's criminal history score was increased by one point, and his presumptive sentence increased from 66 to 72 months. This was a proper use of prosecutorial discretion. **State v. Robert S. Zeimet**, A03-273 (Minn. App. 01/13/04). www.lawlibrary.state.mn.us/archive/ctappub/0401/opa030273-0113.htm

■ **JURY INSTRUCTIONS; PROOF BEYOND REASONABLE DOUBT; PRESUMPTION OF INNOCENCE; ELIMINATION FROM ORAL CHARGE VERSUS WRITTEN INSTRUCTIONS.** Shortly after the jury was impaneled, the judge provided the jury with a written copy of the instructions, and read to them this preliminary version which consisted only of the statutory definition of the offenses charged, the elements of each offense, instructions that each offense must be proven beyond a reasonable doubt, and additional instructions. Prior to closing argument, the court proceeded with the final charge to the jurors. These final oral instructions did not repeat the presumption of innocence nor contain a definition of proof beyond a reasonable doubt; nor did the oral instructions state, for four of the six offenses, that each element must be proved beyond a reasonable doubt.

Held, the omission of the above fundamental rights from the court's final oral jury instruction was a constitutional defect requiring automatic reversal. The final charge delivered orally obscured and diluted the state's burden of proving all elements of each charge beyond a reasonable doubt; hence, the appellant was denied due process of law and is entitled to a new trial. The court notes that written instructions are not a substitute for the oral charge: "... in our view, such instructions are not intended to replace oral delivery of instructions on 'all matters of law which are necessary for the jury's information in rendering a verdict.'" **State v. Dwane David Peterson**, C7-02-487 (Minn. 01/22/04). www.lawlibrary.state.mn.us/archive/supct/0401/op020487-0122.htm

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **DISCRIMINATION AND 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 suffi-

ciently 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).

■ **DISABILITY ISSUES.** A \$750,000 judgment for sexual harassment was upheld by the 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.).

An educational assistant who was receiving 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, and her physician stated 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 is 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).

■ **WORKERS COMPENSATION.** Attorneys can recover their fees against a party held liable on dispute primarily between employers 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 employers 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 fellow employees 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, was controlling 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.** 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).

■ **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. **Ntamere v. Decision One Corp.**, 2003 WL 23024141 (Minn. App. 2003).

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. Onecall 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 direction 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).

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.

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ENVIRONMENTAL LAW

JUDICIAL LAW

■ **CERCLA; SUCCESSOR LIABILITY.** The U.S. Court of Appeals for the 2nd Circuit recently held that, after *United States v. Bestfoods*, 524 U.S. 51 (1998), the substantial continuity doctrine cannot be applied to determine successor liability under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).

In 1978, Serv-All Uniform Rental Corporation arranged for disposal of liquid waste containing perchloroethylene (PCE) at a landfill in New York. The State of New York incurred more than \$10 million to clean up and close the landfill. In 1988, National Service Industries, Inc. (NSI) purchased all of Serv-All's assets, including rights to the Serv-All name and customer contracts. NSI employed all of Serv-All's employees and used Serv-All's letterhead for company correspondence. The State of New York sued NSI to recover its costs, arguing that NSI was the successor to Serv-All for purposes of CERCLA liability. The district court granted the state's motion for summary judgment based on the substantial continuity test articulated in *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996).

The Court of Appeals vacated and remanded the district court's decision, holding that after *Bestfoods*, *Betkoski* is no longer good law. According to the Court of Appeals, *Bestfoods* requires the application of common law principles of corporate law and prohibits the creation of CERCLA-specific rules. The court concluded that the substantial continuity test articulated in *Betkoski* departs from common law principles and can no longer be used to determine successor liability. **New York v. National Service Industries, Inc.**, 352 F.3d 682 (2d Cir 2003).

■ **CLEAN WATER ACT; OIL POLLUTION ACT; FEDERAL JURISDICTION.** The U.S. Court of Appeals for the 5th Circuit recently rejected the federal government's assertion that its regulatory definition of "navigable waters" (which includes in 40 C.F.R. §300.5(d) (2003) all "tributaries" of navigable-in-fact waters) covers tributaries that are neither navigable themselves nor truly adjacent to navigable waters. According to the court, this definition is unsustainable under *Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC").

At issue in the case was the liability of persons under the Oil Pollution Act, 33 U.S.C. §§2701-2720 (2000), for costs incurred by the U.S. Coast Guard in connection with cleaning up an oil spill. The oil spill was caused when an employee of the defendants pumped oil from a containment basin into an adjacent drainage ditch that eventually flows into the Gulf of Mexico. The Oil Pollution Act imposes strict liability on persons who discharge oil into "navigable waters," a term whose statutory definition is coextensive with the definition found in the Clean Water Act, 33 U.S.C. §1362(7) (2000). The United States government argued that the ditch was a navigable water, citing 40 C.F.R. §300.5(d) (2003).

The Court of Appeals reversed the lower court's finding of no liability, based on facts that did not require the court to determine whether the ditch was a navigable water. However, in what appears to be dicta, the Court of Appeals rejected the government's assertion that navigable waters under the Oil Pollution Act and Clean Water Act covers "tributaries" that are neither navigable themselves nor truly adjacent to navigable waters. In the 5th Circuit, according to the court, "the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like" Citing *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), the court declared that under SWANCC, a body of water is subject to regulation ... if the body of water is actually navigable or adjacent to an open body of navigable water." The court expressly rejected the contrary holdings of the appellate courts for the 4th and 6th circuits in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003) and *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003), respectively. ***United States v. Needham***, 2003 WL 22953383 (5th Cir. 2003).

■ **CLEAN WATER ACT; NPDES PERMITS.** The Minnesota Court of Appeals recently held that the Minnesota Pollution Control Agency (MPCA) was not justified in reissuing National Pollutant Discharge Elimination System (NPDES) permits for wastewater treatment plants in Faribault and Owatonna without contested case hearings.

The Minnesota Center for Environmental Advocacy (MCEA) requested contested case hearings after the MPCA announced its intent to reissue NPDES permits for the wastewater treatment facilities without requiring phosphorus discharge reductions. MCEA argued that the "phosphorous rule" set out in Minn. R. 7050.0211, subp. 1a, mandated a phosphorous limit of one mg/L at both facilities because discharges from these facilities would have an adverse effect on Lake Byllesby. In support of its argument, MCEA pointed to modeling by the MPCA which showed that phosphorous reductions to one mg/L at the Owatonna and Faribault facilities would reduce phosphorous in Lake Byllesby by approximately 9 percent and 16 percent, respectively. The MPCA's modeling also showed that such reductions would reduce chlorophyll-a in Lake Byllesby by 4 percent and 7 percent, respectively.

The MPCA argued that the reductions predicted by its modeling were within the model's statistical margin of error. MCEA, on the other hand, contended that the model had a high margin of error and that actual reductions in chlorophyll-a could be higher than predicted. MCEA also challenged the MPCA's model as inadequate for predicting changes in chlorophyll-a and water transparency. The MPCA board denied MCEA's request for contested case hearings on grounds that none of the evidence relied on by MCEA demonstrated that effluent from the facilities would have measurable effects on Lake Byllesby and that MCEA had failed to show that contested case hearings would aid the MPCA in resolving the matter. The MPCA reissued the permits and MCEA appealed.

The Court of Appeals reversed the MPCA's issuance of the permits and remanded the matter for contested case hearings. The court concluded that MCEA's experts had introduced evidence concerning disputed material facts and raised a genuine question concerning whether the MPCA adequately addressed those disputed facts. According to the court, presentation of those issues to a neutral administrative law judge would, in fact, aid the MPCA in resolving the disputed facts and making a final decision. ***In Re City of Owatonna's NPDES/SDS Proposed Permit Reissuance***, 2004 WL 26579 (Minn. App.).

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FEDERAL PRACTICE

JUDICIAL LAW

■ EVIDENCE SPOILIATION; OPPORTUNITY TO REBUT INFERENCE; BAD FAITH REQUIREMENT.

Plaintiff brought a personal injury and wrongful death action arising out of an automobile collision with a train. The defendant railroad destroyed evidence both prior to and during the litigation. At trial, the district court sanctioned the railroad by giving the jury an adverse inference instruction, refused to allow testimony to rebut the inference, and awarded attorney's fees. The plaintiff was awarded damages by the jury, and the defendant railroad appealed.

On appeal, the 8th Circuit affirmed most (but not all) of the district court's findings that evidence had been destroyed in bad faith, but was more concerned about the district court's refusal to allow the railroad to rebut the inference. Noting that a permissive inference is usually "subject to reasonable rebuttal," the 8th Circuit held that "unfair prejudice should be avoided by permitting the defendant to put on some evidence ... as an innocent explanation for its conduct." In the 8th Circuit's view, in the absence of such an opportunity "the jury is deprived of sufficient information on which to apply the adverse inference, and an otherwise permissive inference easily becomes an irrebuttable presumption." The case was remanded to the district court for a new trial.

This decision is also important because it clarifies the standard for the imposition of an adverse inference. While previous 8th Circuit decisions suggested that an adverse inference might be appropriate even in the case of a negligent destruction of evidence, the 8th Circuit panel stated that the 8th Circuit "had never approved of giving an adverse inference instruction on the basis of prelitigation destruction of evidence through a routine document retention policy on the basis of negligence alone," and made clear that "there must be some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth in order to impose the sanction of an adverse inference instruction." *Stevenson v. Union Pacific Railroad Co.*, 354 F.3d 739(8th Cir. 2004).

■ OTHER NOTEWORTHY DECISIONS. Judge Magnuson granted the defendant's petition to enforce an arbitration panel's pre-hearing subpoena for production of documents under the Federal Arbitration Act, but declined to enforce that portion of the subpoena which purported to compel the pre-hearing deposition of non-party witnesses. *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, 2004 WL 67647 (D. Minn. 01/09/04).

The 8th Circuit affirmed summary judgment for the defendant in a Title VII case, finding that the plaintiff had failed to "designate specific facts creating a triable controversy" when he opposed the defendant's summary judgment motion by attaching six complete deposition transcripts to his opposition to the motion without identifying the specific facts in dispute. *Crossley v. Georgia-Pacific Corp.*, 355 F.3d 1112 (8th Cir. 2004).

Judge Montgomery stayed a second-filed action in order to allow the court in the first-filed declaratory judgment action to determine which of the two actions would be allowed to proceed. *Federal Cartridge Co. v. Remington Arms Co.*, 2003 WL 23101805 (D. Minn. 12/31/03).

Judge Davis denied a post-judgment motion to intervene as of right under Fed. R. Civ. P. 24(a)(2), finding that the movant was unable to meet any part of the applicable three-part test, and that it also failed to establish that it had standing or that its motion was timely. *Vonage Holding Corp. v. Minnesota Public Utilities Commission*, 2004 WL 114983 (D. Minn. 01/14/04).

The 8th Circuit reversed a district court's *sua sponte* award of more than \$10,000 in attorney's fees under Fed. R. Civ. P. 11, finding that Rule 11 permits an award of attorney's fees only in response to a Rule 11 motion brought by an opposing party. *Norsyn, Inc. v. Desai*, 351 F.3d 825 (8th Cir. 2003).

Judge Tunheim granted the plaintiff's motion for the entry of partial judgment under Fed. R. Civ. P. 54(b), finding that both "judicial administrative interests" and equities weighed in favor of the motion. *Pacific Ins. Co. v. Burnet Title, Inc.*, 2003 WL 22768232 (D. Minn. 11/21/03).

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INTELLECTUAL PROPERTY LAW

JUDICIAL LAW

■ LANHAM ACT; MISLEADING ADVERTISING; FOOD DRUG & COSMETIC ACT; PREEMPTION.

Judge Frank addressed whether claims under the Lanham Act and state law for false and misleading

advertising of an alleged “generic” drug are preempted by the Food, Drug and Cosmetic Act (FDCA). Plaintiff Solvay asserted that defendants Global and Impax misled consumers by marketing their drug as a “generic,” “comparable,” “alternative,” or “equivalent” to Solvay’s own drug, Creon. Defendants argued Solvay was using the Lanham Act and state law to assert private violations of the FDCA. In denying defendants’ motion to dismiss the claims, the court found the difference between assertions of FDA approval versus advertisements of equivalency controlling. The court stated: “Plaintiff’s claims here do not relate to or allege false assertions of FDA approval. Thus, the court does not run the risks ... of usurping the FDA’s approval or encroaching upon FDA jurisdiction when no FDA regulatory approval over the substitution is either alleged or in effect.” **Solvay Pharmaceuticals, Inc. v. Global Pharmaceuticals and Impax Laboratories, Inc.**, Civ. No. 03-2854 (D. Minn. 01/09/04). <http://www.mnd.uscourts.gov/>

■ **FORUM PRIORITY; FIRST-FILED RULE.** Judge Montgomery held that filing, not service, controls the determination of which forum has priority under the first-filed rule. The court also held that the first-filed forum should assess whether compelling circumstances exist to allow the second-filed forum to proceed instead. Remington and RA Brands filed suit first in North Carolina but did not serve the Complaint until after Federal Cartridge and Alliant had both filed and served their Complaint in Minnesota. Federal Cartridge and Alliant filed a motion in Minnesota to enjoin the North Carolina case. The court in Minnesota denied the motion holding that North Carolina was the first filed forum based on the filing dates of the Complaint and that North Carolina, not Minnesota, should decide whether circumstances exist such that the Minnesota action is the proper location for the resolution of this dispute despite being the second-filed forum. **Federal Cartridge Company and Alliant Techsystems, Inc. v. Remington Arms Company, Inc. and RA Brands, LLC**, Civ. No. 03-6105 (D. Minn. 12/31/03). <http://www.mnd.uscourts.gov/>

■ **PATENT; TITLE TRANSFER; PRESENT INTENTION.** Judge Ericksen held that a written agreement to “sell, assign, transfer and convey” title to a patent as of the “effective date” of the agreement was not, as a matter of law, a present intention to transfer title, where the last installment was paid 18 months later. Under the Patent Act a successor in interest can gain legal title to a patent only by way of a written agreement that expresses a patent owner’s present intention to transfer title. Bayer asserted Volovik lacked standing to sue on the patent because Volovik was not the owner. Volovik moved for summary judgment on the ownership issues. The court focused on whether there was a present sense transfer in a written agreement for sale. In concluding there may not have been, the court compared Volovik’s agreement to an agreement where the language “to grant and does hereby grant[s] all rights to inventions” did constitute a present sense transfer. The court ultimately found that a reasonable fact finder could conclude that title had not been transferred to Volovik under the agreement. **Dimitri Volovik v. Bayer**, Civ. No. 01-1426 (D. Minn. 01/07/04).

■ **PATENTS; CLAIM CONSTRUCTION.** A district court in Nevada has found all asserted claims in 14 key Lemelson patents unenforceable for prosecution laches, invalid for lack of enablement, and not infringed based on the court’s detailed claim construction. **Symbol Technologies v. Lemelson Medical**, CV-S-01-701-PMP (D. Nev. 01/23/04).

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Merchant & Gould

JUVENILE LAW

JUDICIAL LAW

■ **CHILD CUSTODY; INDIAN CHILD WELFARE ACT; UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT.** The Minnesota Court of Appeals issued a published decision regarding the applicability of the Indian Child Welfare Act (“ICWA”) to third party custody disputes venued in state court. This dispute was between the appellant grandmother and the respondent father of a four-year-old child. The child’s biological mother, who was a member of the Red Lake Band of Chippewa Indians, had this child placed in foster care in February of 2000. A CHIPS petition was filed in district court, and after reunification efforts failed, the county placed the minor child with her maternal grandmother in September of 2000. The maternal grandmother was also a member of the Red Lake Band of Chippewa Indians and she and the child lived on the Red Lake Indian Reservation after placement of the child with her.

The child’s father had become involved in the child’s life in March of 2001 after he was contact-

ed by the county. The maternal grandmother subsequently brought a motion in the CHIPS proceeding in district court for permanent custody of the child, and in July of 2001, the district court granted permanent sole legal and sole physical custody of the child to the maternal grandmother.

In March of 2003, the father filed a motion in district court for a modification of custody, seeking sole legal and sole physical custody of his child. An evidentiary hearing was held, and the maternal grandmother did not appear. In July 2003, the district court granted the father some parenting time with the minor child — but not custody at that time.

The Red Lake Tribal Court subsequently issued an order stating that the maternal grandmother had custody under the district court's July 2003 order, and the tribal court also recognized the permanent custody placement decision of the district court. However, the tribal court also determined that it had current exclusive jurisdiction over all present and future issues relating to the minor child's custody, care, and parental access.

The district court issued the decision which is the subject of this appellate court decision, namely, that ICWA did not apply where a non-Indian biological father sought custody of his own child and the district court in this case was found to have continuing exclusive jurisdiction under Minnesota Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The maternal grandmother challenged the district court's determination that ICWA did not apply and that the district court had exclusive continuing jurisdiction.

While the Court of Appeals acknowledged at least one prior appellate court decision that found that ICWA applied to third party custody cases — even those in which one of the participants was a biological parent — in this decision, the Court of Appeals reached a different result. The Court of Appeals began its analysis by reviewing the history and purposes of the ICWA. It noted that in determining whether ICWA applies, it must first be established that the Indian child is the subject of a “child custody proceeding” as defined in ICWA. According to the Court of Appeals, under ICWA, a child custody proceeding is limited to foster care placement, terminations of parental rights, pre-adoptive placements, and adoptive placements.

The maternal grandmother argued that this custody dispute between herself and the child's biological father involved, in effect, a foster care placement, and therefore, ICWA applied. In responding to her argument, the Court of Appeals distinguished its earlier case of *In re the Custody of A.K.H.*, 502 N.W.2d 790 (Minn. App. 1993) *rev. denied* (Minn. 08/24/93) which held that ICWA applied to intrafamily custody proceedings.

In the case at hand, the Court of Appeals stated that ICWA did not apply because, unlike *A.K.H.*, there was no “child custody proceeding” as that term is defined in ICWA. The case did not involve a temporary placement in a foster home or institution or the home of a guardian or conservator. Here, the placement involved the return of the child to the custody of her parent — not a temporary placement in a foster home or institution or the home of a guardian or conservator as defined in ICWA.

The Court of Appeals observed that Congress' purpose enacting ICWA was to insure that children being placed for adoption be placed with Indian families so as “to preserve the Indian tribe and family.” As a result, the Court of Appeals held that it could not conclude that ICWA was enacted to apply to a case where a non-Indian biological parent was seeking to regain custody from an Indian custodian. Further, because the case did not involve a foster care placement, the Indian child could not be the subject of a child custody proceeding as defined in ICWA, and therefore, ICWA did not apply.

The case is significant in that there certainly have been third party custody disputes in family court in Minnesota where the preferences and provisions of ICWA have been applied. Furthermore, the Court of Appeals' analysis of the underlying policies of ICWA used as a basis for its decision alludes to language that has been used to bolster the “existing Indian family doctrine” — a policy that has been applied in some states to exclude the applicability of ICWA where the child who is the subject of the proceeding has had very few ties with an Indian tribe or Indian family. Given this apparent departure from prior appellate precedent, this case is one that practitioners and courts should review carefully as it will undoubtedly receive further citation in the years to come, both in Minnesota and elsewhere.

The applicability of the UCCJEA in the case is also significant, as it appears to be the first case in Minnesota construing a new provision of the UCCJEA that instructs Minnesota courts to treat Indian tribes as if they were a state of the United States for purposes of applying provisions of UCCJEA.

Practitioners and courts should expect this case to be cited frequently in jurisdictional disputes involving custody matters where state and tribal courts dispute jurisdiction, both with respect to the ICWA and the recently enacted UCCJEA. **Gerber v. Eastman**, AO3-813 (Minn. App. 01/20/04). ■ **CALIFORNIA; EQUITABLE ADOPTION.** The California Supreme Court recently issued a long-anticipated and landmark decision regarding the doctrine of equitable adoption. According to the California Supreme Court, a person claiming to be an intestate decedent's equitably adopted child for inheritance purposes must show that the deceased's statements and conduct clearly and convincingly demonstrated an intent to adopt. Acknowledging that this is a relatively narrow view of the equitable adoption doctrine, the California Supreme Court said that a lesser standard would lead to confusion and would overlook the fact that in California, the doctrine rests on contract principles. The decision is also a timely one that will be watched closely as a national board is currently considering whether probate laws should be updated to take into consideration informal parent/child relationships that are being established through juvenile and family courts, but which have so far not made a significant inroad in probate court matters.

The case involved a foster child who was never adopted by his foster parents, but resided with them from the age of 2 until 21, and thereafter maintained a relationship with the couple similar to that between parents and children. His foster father died without a will, and a niece and a nephew claimed the \$600,000 estate. The trial court ruled in 2001 that the foster child did not prove his claim because he had not shown intent by the couple to adopt him, notwithstanding the special relationship they shared. The trial court took a very technical approach in analyzing the appropriate factors, and much criticism was leveled against the trial court for stating that its analysis did not "fit with the real human facts of these cases." The California Supreme Court affirmed the trial court's decision. **Estate of Ford (Bean v. Ford)**, No. S105508 (Cal. 01/15/04).

■ **FLORIDA; ADOPTION BY HOMOSEXUALS.** The 11th Circuit Court of Appeals recently upheld the state of Florida's prohibition on adoption by homosexuals, which remains the only such blanket ban in the country. This federal appeals court rejected constitutional challenges in its decision that was rendered on January 28, 2004. In the analysis of the issue, the court adopted the lower court's determination that adoption is a privilege and not a right, and also held that a state has broad discretion to regulate adoption. In applying the lowest level of review to the sweeping prohibition, the 11th Circuit dismissed the equal protection claim and accepted the state's asserted rationale, that children should be adopted by families composed of married mothers and fathers. The court also rejected the due process argument that foster parents and children have a right to family integrity. **Lofton, et al. vs. Department of Children and Family Services**, No. 01-16723 (11th Cir. 01/28/04).

■ **MICHIGAN; JURISDICTION; "DIVORCE FROM PARENTS."** In an interesting case coming out of the Michigan Court of Appeals, if for no other reason than it certainly reflects creative lawyering in the area of family and juvenile court issues, a state trial court was held to lack subject matter jurisdiction to hear a teenage girl's "complaint for divorce from parents." Stressing that the claim was unrecognized in the state, the Michigan Court of Appeals pointed out that the trial court's jurisdiction over divorce cases is strictly statutory, and that the law covers only married couples — not parents and child. It also said that the court action on a child's complaint for divorce from his or her presumptively fit parents would constitute unjustified state interference with family integrity. **Ryan v. Ryan**, No. 24095 (Mich. Ct. App. 01/15/04).

■ **RHODE ISLAND; ADOPTION; UNMARRIED PETITIONERS.** In a case of interest to persons supporting adoption by more than one person where the petitioners are not married to each other, according to the Rhode Island Supreme Court, a woman and her father, with whom she and her nonmarital child reside, may seek to jointly adopt her child. The Court determined that the laws of Rhode Island provide that a child's grandparent or custodial parent's spouse may file an adoption petition with the consent of the custodial parent. The state statute at issue provides that certain persons may file an adoption petition "when the petitioners are one of the natural parents of the child and his or her spouse or one of the grandparents and the child is residing, at the time the petition is filed, with the petitioners." The Rhode Island Supreme Court found that the statutory provision clearly envisions two parties, one of whom is the child's custodial parent, joining in the filing of an adoption petition.

This case indicates some support for adoptions by unmarried persons, whether they are residing together in a romantic relationship, or are two unrelated and uninvolved persons, such as a parent

and a grandparent. While Minnesota does not have an identical statute, there are always questions that arise in adoption practice as to whether only a single person or a married couple is allowed to adopt a child. Absent specific statutory authority, such as exists in Rhode Island, and given Minnesota appellate case law which suggests that adoption is very clearly a creature of statute, it is questionable whether a court in the state of Minnesota would take this approach at this time. **In re Abby D.**, No. 2003-0021 (R.I. 01/14/04).

■ **ARIZONA; FOSTER CHILD; SUBSTANTIVE DUE PROCESS; SECTION 1983.** The Supreme Court of Arizona affirmed in part, and reversed in part, an appellate court's ruling with respect to the circumstances under which a child placed in foster care may bring an action based upon 42 U.S.C. §1983 against individual state workers for violating the foster child's substantive due process rights. The Court concluded that a foster child can establish §1983 liability against a state official by showing that "the official, without justification, acted with deliberate indifference by placing a child in foster care or by maintaining a placement when the official knew that the placement exposed the child to danger or would have known of the danger but for the government's deliberate interference." Applying this standard, the Court found that the trial court's grant of summary judgment in favor of the state worker was not proper under 42 U.S.C. §1983, because there was a genuine issue of material fact as to whether the social workers acted with deliberate indifference in their placement and monitoring of the child. **Weatherford v. State**, No. CV-02-0369-PR, (Ariz. 12/17/03).

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REAL PROPERTY

JUDICIAL LAW

■ **ZONING/ADMINISTRATIVE LAW.** The City of Lake Elmo (City) appealed from the Metropolitan Council's (the Council) adoption of a resolution requiring the City to modify its proposed 1998 Comprehensive Plan Amendment. Pursuant to the Metropolitan Land Use Planning Act (MLUPA), Minn. Stat. §473.858, the City submitted its Comprehensive Plan Amendment showing its land-use planning and projections. The Council concluded that the City's plan had a substantial impact on and contained a substantial departure from the Council's system plans especially regarding the City's plan to maintain and expand individual sewage treatment systems rather than use the Council's planned regional sewer service. The City argued that the Council lacked authority to dictate the future population density of the City and that the City's decision to remain independent would not harm the regional systems. The main issue on appeal was whether the Council exceeded its statutory authority by requiring the City to conform to the Council's plan. The Court of Appeals reviewed the requirements of Minn. Stat. §473.858 and concluded that the standard of review was the preponderance of evidence standard. Applying that standard the court concluded that the Council acted within its statutory authority by requiring the City to conform to the Council's plan because the City's plan would have a substantial impact on or contained a substantial departure from the Council's plan. Affirmed. **City of Lake Elmo v. Metropolitan Council**, A03458 (Minn. App. 12/16/03).

■ **REAL PROPERTY.** James and Tamara Lipetzky (James) entered into a contract for deed with James' parents, Jerome and Marion Lipetzky (Jerome) for the purchase of a portion of the family farm. The contract contains a consent clause which states "Buyer agrees they cannot sell, transfer or assign this property without written permission or consent of seller." Later Jerome conveyed fee title to respective revocable trusts (Trusts) and James granted a mortgage and assigned rights in the contract for deed to Bank Midwest (Bank). No written consent was obtained from Jerome or the Trusts who denied any knowledge of these transactions. When James defaulted, the bank commenced foreclosure proceedings and the Trusts served a notice of cancellation on James and the Bank. The district court ruled that the consent clause prohibited the grant of the mortgage and the assignment without the consent of Jerome, making them invalid. The Court of Appeals affirmed in part and reversed in part holding that the consent clause prohibited the assignment but not the mortgage. On review, the Supreme Court concluded that the consent clause was not ambiguous and that the requirement of consent for "transfer" includes the grant of a mortgage. The Court rejected the bank's argument that the mortgage was not a transfer because it does not produce an immediate change in possession. Accordingly, the Court concluded that the grant of the mortgage to the bank was a breach of the consent clause. The Court concluded that the bank took the mortgage with constructive knowledge of the consent clause because the contract for deed was recorded. Reversed. **Bank Midwest, Minnesota, Iowa, N.A. v. Jerome Lipetzky, et al.**, C1-02-1747 (Minn. 01/15/04).

■ **EMINENT DOMAIN.** KQRS appealed from a variety of evidentiary, discovery, and instruction rulings by the district court in connection with its challenge to the determination of value made by the commissioners in the condemnation action. The state of Minnesota (state) had taken part of the property owned by KQRS for its radio station. The district court refused to permit discovery of appraisals the state had commissioned on the property and refused to permit KQRS to present evidence of its severance damages for the partial taking. The Court of Appeals held that the district court did not abuse its discretion in failing to order the production of appraisals that were not going to be used at trial. The court also held that it was proper to exclude evidence of KQRS's own demand for the use of the property in considering the market value of the property. The Court of Appeals also affirmed the district court's determination that the radio station was not a special use property. Finally, the court held that the so-called "project rule" did not preclude the state from presenting evidence of its offers to purchase the property. Affirmed. *State of Minnesota v. KQRS, Inc.*, A03-426 (Minn. App. 01/27/04).

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TAX

JUDICIAL LAW

■ **ATTORNEY'S FEE PAID NOT EXCLUDABLE FROM GROSS INCOME.** Taxpayers treated attorney's fees paid from a settlement of a wrongful termination action as an adjustment to gross income, namely, as a reimbursed employee expense. The court found in favor of the IRS and required the transaction to be treated as a miscellaneous itemized deduction. *Biehl v. Comm'r*, 351 F.3d 982 (9th Cir. 2003).

■ **CONTINGENCY FEES PAID DIRECTLY TO ATTORNEYS.** The portion of a wrongful termination recovery paid directly to the attorney under a contingency agreement was includible in taxpayer's gross income. Vermont law did not create a property interest in a wrongful termination recovery in favor of the taxpayer's attorneys. State law determines the nature of legal interests in property while federal law then determines tax consequences of the property transaction. A minority of jurisdictions find a sufficient property interest for attorneys in contingency fee arrangements. *Raymond v. U.S.*, 355 F.3d 107, 2004 WL 51836 (2d Cir. 2004)

■ **FLORIDA LIEN VALID AGAINST PENSION PLAN.** The Florida court held that a lien was valid against Florida resident taxpayer's pension plan for purposes of a levy. *Fusaro v. Comm'r*, T.C.M. (RIA) 2003-345 (2003).

■ **REJECTION OF OFFER IN COMPROMISE.** Appeals officer properly rejected taxpayer's inadequate offer in compromise. Appeals Officer did not abuse his discretion by only considering the information submitted by the taxpayer. *Van Vlaenderen v. Comm'r*, T.C.M. (RIA) 2003-346 (2003).

■ **VALUING DECEDENT'S ESTATE.** Estate tax was not allocable to a bequest to the charitable organization and the generations skipping tax was allocable. In addition, unlisted bank corporation stock was valued by applying a 17 percent minority interest discount and a 35 percent discount for lack of marketability. *Estate of Green*, T.C.M. (RIA) 2003-348 (2003).

■ **CIVIL SERVICE DISABILITY PAYMENTS.** A Navy civil service employee, who retired on disability, received disability payments from the Civil Service Retirement Disability (CSRS) Fund. The court held that the payments were not excludable under I.R.C. §104(a)(4). *Jeanmarie v. Comm'r*, T.C.M. (RIA) 2003-337 (2003).

■ **LIABILITY; NOTICE OF DEFICIENCIES.** Taxpayer stipulated he received the unreported income at issue. The court rejected and found frivolous his argument that the notices of deficiency were invalid because the person who mailed them to him lacked the delegated authority to send the notices. *Israel v. Comm'r*, T.C.M. (RIA) 2003-338 (2003).

■ **SETTLEMENT AWARD PAYMENTS; DEFAMATION.** Taxpayer, a talent agent, received four payments upon settlement of a lawsuit for defamation and breach of contract. The Tax Court held that taxpayer had to include three of the payments in his gross income. *Polone v. Comm'r*, T.C.M. (RIA) 2003-339 (2003).

■ **PREPAID FUNERAL EXPENSES; ACCRUAL METHOD ACCOUNTING.** An accrual-method taxpayer funeral home that enters into contracts and receives payments in advance of death for goods and services to be provided later is required to include the payments in gross income upon the provision of the goods and services, not as income when received. *Perry Funeral Home, Inc., v. Comm'r*, T.C.M. (RIA) 2003-340 (2003).

■ **UNSUBSTANTIATED CARRY FORWARD LOSSES.** Taxpayers were not permitted to carry forward net operating losses for six years. The losses were generated when banks had foreclosed on property taxpayers were developing for commercial use. The losses were not allowed because they were unsubstantiated by tax returns, financial documentation, or credible witnesses. *Hoopengartner v. Comm'r*, T.C.M. (RIA) 2003-343 (2003).

■ **ACCURACY RELATED PENALTY.** The Tax Court approved of an accuracy related penalty of over \$1 million for a substantial understatement of over \$5 million on corporate taxpayer's return that was attributable to foreign tax credits claimed in circular transactions. *InterTAN v. Comm'r*, T.C.M. (RIA) 2004-1 (2004).

■ **UNAUTHORIZED USE OF COMPANY CHECKS.** Taxpayer was found to have unreported income when he used company checks, from a closely held business in which he was an officer and director, for personal uses. *Thompson v. Comm'r*, T.C.M. (RIA) 2004-2 (2004).

■ **CLAIMED BUSINESS EXPENSES AND LOSSES FOR YACHT.** Business expenses and losses incurred in doctor's and wife's (taxpayers') yacht-chartering activities and the sale of the yacht were not allowed to be deducted as ordinary losses. The yacht chartering activities did not constitute a trade or business because taxpayers did not have good-faith profit objective. *Magassy v. Comm'r*, T.C.M. (RIA) 2004-4 (2004).

■ **DISTRIBUTIVE SHARE OF PARTNERSHIP INCOME IN SALE.** Taxpayer, who retained his interest in the partnership until the closing date of a purchase agreement selling his interest to the other partners, was held responsible for his distributive share of the partnership income until the closing date of the sale. *Life Care Communities of America, Ltd. v. Comm'r*, T.C.M. (RIA) 2004-5 (2004).

■ **DISCLOSURE REQUIREMENTS; POLITICAL ORGANIZATION; CODE SECTION 527(J).** Plaintiff sought a declaration that I.R.C. §527(j) establishing strict disclosure requirements for any political organization seeking tax-exempt treatment for campaign-related income was unconstitutional. The Court of Appeals reversed the district court. It held that the provision only imposes a condition upon the receipt of a voluntary tax subsidy. *Mobile Republican Assembly v. U.S.*, 353 F.3d 1359, 2003 WL 23005184 (11th Cir. 2003).

■ **VALUE-ADDED PAYMENTS FROM COOPERATIVE; SELF-EMPLOYMENT INCOME.** Taxpayers were retired farmers and members of an agricultural cooperative that processed and sold corn. Taxpayers were required to include value-added payments from the cooperative's sale of the corn in the calculation of their net earnings from self-employment for purposes of determining their self-employment tax liability. *Bot v. Comm'r*, 353 F.3d 595, 2003 WL 22990113 (8th Cir. 2003).

■ **IRS ORDERED TO CONSIDER TAXPAYER'S OFFER DURING BANKRUPTCY.** District court held that the bankruptcy court had authority to direct the IRS to at least consider taxpayer's offer to compromise priority tax claim that debtor made as part of his proposed bankruptcy plan. The IRS has a policy of not considering any offers during bankruptcy. *In re Macher*, ___ F.Supp.2d ___, 2003 WL 23138454 (W.D.Va. 2003).

■ **FAILURE TO PAY TRUST FUND TAXES.** An officer of a bankrupt corporation failed to pay withholding taxes because of the corporation's distressed relationship with its bank. The court held that an agreement with a lender does not constitute an encumbrance that relieved taxpayer from paying all of the corporation's unpaid trust fund taxes. The trust fund recovery penalty was also assessed. *Bell v. U.S.*, 355 F.3d 387, 2004 WL 35553 (6th Cir. 2004).

■ **INNOCENT SPOUSE RELIEF DENIED, TAXPAYER NOT AN "INDIVIDUAL."** Deceased wife's estate petitioned for innocent spouse relief. The Tax Court denied recovery and held that neither the decedent wife or the estate qualified as an "individual" within the meaning of the tax code that requires that an individual be no longer married to or separated from the other person. *Jonson v. Comm'r*, 353 F.3d 1181, 2003 WL 23093728 (10th Cir. 2003).

■ **GAS PIPELINE SYSTEM WAS PRODUCTION ASSET THUS ENTITLED TO SEVEN-YEAR DEPRECIATION.** The Court of Appeals reversed the Tax Court and held that natural gas gathering pipeline systems were production assets and not transportation assets and thus subject to a seven-year depreciation period pursuant to I.R.C. §167(m)(1). *Clajon Gas Co., L.P. v. Comm'r*, 354 F.3d 786, 2004 WL 47216 (8th Cir. 2004).

■ **CAMPGROUND; HIGHEST AND BEST USE.** The Minnesota Tax Court determined that the fair market value of a campground located on an island should be reduced for property tax purposes because the campground had unique features that precluded rezoning to residential property. *Swaggert v. County of Hubbard*, 2003 WL 23094712 (Minn. Tax Ct. 12/16/03).

- **TRUCK STOP; DEPRECIATION.** Taxpayer's multibuilding truck stops were determined to be retail convenience stores and not retail motor fuels outlets for tax purposes. The Court applied the gross revenue test. However, the variance doctrine does allow the taxpayers to raise the argument that the stores qualify for more favorable depreciation treatment by using the floor-space test. *IA 80 Group, Inc. v. U.S.*, 347 F.3d 1067 (8th Cir. 2003).
- **JUDGMENT AGAINST ACQUIRED COMPANY A CAPITAL EXPENSE.** Corporation deducted expenses of a lawsuit resulting from an asset acquisition of a company that was engaged in a patent infringement suit. The court held that the taxpayer's payment of judgment was a capital expense and not a deductible ordinary and necessary business expense. *Illinois Tool Works, Inc. v. Comm'r*, 355 F.3d 997, 2004 WL 94037 (7th Cir. 2004).
- **EITC REFUND CLAIM BARRED BY STATUTE OF LIMITATIONS.** Taxpayers brought a refund action for their EITC five years after the due date. The court held that the EITC was deemed paid on April 15 following the applicable tax year. Thus, taxpayers were ineligible for the refund because it was not paid within three years of the refund claim. *Israel v. U.S.*, 356 F.3d 221, 2004 WL 99163 (2d Cir. 2004).
- **CORPORATE OFFICER EMPLOYEE FOR EMPLOYMENT TAX PURPOSES.** Taxpayer, an S Corporation, challenged the IRS's determination that its officer and sole-shareholder was its employee and thus subject to employment taxes. The court held that the officer was an employee subject to employment taxes. *Nu-Look Design, Inc. v. Comm'r*, 356 F.3d 290, 2004 WL 113151 (3rd Cir. 2004).
- **DISKS CONTAINING INFORMATION ARE TANGIBLE PERSONAL PROPERTY.** Digital claimed it should not have had to pay sales taxes on the sale of digital files, located on disks, to customers who then use the files for computer generation of visual displays. The claim was that the sale involved the sale of information and not tangible personal property. The court held that the disks and diskettes were tangible personal property. It applied early case law distinguishing between whether the medium for the information was essential or necessary to the purchase or not. If it is essential then the property is tangible. If it is only incidental to the reason for purchase then the property is intangible. *Dynamic Digital Design, Inc. v. Commissioner of Revenue*, Tax Ct. No. 7380-R (01/14/04).
- **REFUND FOR CAPITAL EQUIPMENT; ELIGIBLE CLAIMANT.** Vendor AT&T, in a sale of communications equipment from AT&T to US West, attempted recovery of sales and use tax under the Capital Equipment refund exemption. The court disallowed the claim because the statute requires that the claim be made by the purchaser and not the vendor. *AT&T Corp. v. Commissioner of Revenue*, Minn. Tax Ct. No. 7472-R (01/07/04).
- **OFF-SITE CATERING WAGES; SALES TAX ON RETAIL SALE OF TAXABLE FOOD.** D'Amico Catering has claimed that the wages they pay servers for off-site catering is not subject to sales tax because it is not part of the retail sale of taxable food. The wages were listed as a separate expense on catering receipts. The Minnesota Tax Court held that the wages are not part of the retail sale of taxable food and, therefore, not subject to sales tax. A key factor in the decision is that the caterers supplied by D'Amico were optional. *D'Amico Catering, Inc. v. Commissioner of Revenue*, Tax Ct. No. 7488-R (01/20/04).

ADMINISTRATIVE

- **RULES TO STOP ABUSIVE TAX AVOIDANCE; RAISE ETHICAL STANDARDS.** Four items of guidance were issued to meet these goals. First, proposed changes to Circular 230 will set out clear and specific requirements for tax opinions by attorneys and accountants. They would obligate tax advisors to inform clients about the extent of protections that the opinion provides to the client. The IRS is simultaneously working with professional groups to set self-regulation standards. Second, final regulations will increase the cost of failing to disclose abusive tax-avoidance transactions. Taxpayers will have to disclose items on returns that are based on the position that a Treasury regulation is invalid. Third, final regulations clarify that the disclosure of confidential transactions on a return is limited to transactions for which a promoter has imposed confidentiality on a taxpayer to protect the promoter's tax strategies from disclosure and not on transactions for which confidentiality is required for non-tax reasons. Fourth, proposed Form 8858 requires information reporting by U.S. persons that own foreign entities that are disregarded for U.S. tax purposes. IR-2003-147. See also Ann. 2004-4.
- **ORGANIZATIONS CLASSIFIED AS PRIVATE FOUNDATIONS.** The IRS has released a list of organiza-

tions that have not established or have lost their status as public charities or operating foundations. These organizations cannot now take advantage of I.R.C. §508(b), but they still may be eligible for I.R.C. §501(c)(3) status. Ann. 2003-89.

■ **AWARDS OF ATTORNEYS' FEES AND COSTS FOR QUALIFIED OFFERS.** The IRS has released final regulations regarding recovery of reasonable administrative and litigation costs for administrative and court proceedings if they relate to the determination or refund of any tax, interest, or penalty under I.R.C. §7430(g). T.D. 9106.

■ **REPORTING CHANGES FOR PAYMENTS IN LIEU OF DIVIDENDS; JGTRRA.** Final regulations have been issued regarding reporting payment in lieu of dividends as a result of the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA). Brokers must file information returns and furnish information statements reporting substitute payments in lieu of dividends to individuals who receive substitute payments in lieu of dividends on or after January 1, 2003. T.D. 9103.

■ **COMPUTING DEPRECIATION OR AMORTIZATION.** Revenue Procedure 2004-11 addresses changes in accounting periods and methods for depreciable or amortizable property after its disposition. It waives the two-year rule set out in Rev. Rule 90-38.

■ **FINAL RESEARCH CREDIT REGULATIONS.** The regulations determine which research activities are eligible for the qualified research credit pursuant to §41(d). T.D. 9104.

■ **DEDUCTION AND CAPITALIZATION OF EXPENDITURES TO ACQUIRE INTANGIBLES; SAFE HARBOR FOR INTANGIBLES; DEDUCTION OF DEBT ISSUANCE COSTS.** The regulations apply to the amounts paid to acquire or create intangibles. In addition, the regulations explain the I.R.C. § 67 safe harbor provision for amortization of certain intangibles. T.D. 9107

■ **LOW-INCOME HOUSING TAX CREDIT REGULATIONS.** The regulations apply to owners of low-income housing projects claiming the credit and the housing agencies that administer the credit. Each building in a multibuilding project does not need meet the 10 percent basis requirement separately pursuant to I.R.C. §42(h)(1)(F); it can now be met on a single project basis. T.D. 9110.

■ **ROTH IRA ABUSES.** The IRS is aiming efforts at stopping abuses of Roth IRAs in situations where a Roth IRA and a business owned by a taxpayer are transacting but not at fair value. The notice is intended to stop transfers of value to Roth IRA corporations instead of a regular contribution to a Roth IRA. Notice 2004-8.

■ **DEDUCTIONS DENIED FOR TRUSTS WHEN TRUST IS QUALIFIED CONSERVATION CONTRIBUTION.** A trust is not allowed a charitable deduction under §642(c) and is not allowed a distribution deduction under §661(a)(2) when a contribution to charity of trust principal meets the requirements of a qualified conservation contribution under §170(h). Rev. Rul. 2004-5.

■ **VEHICLE DONATIONS TO CHARITIES.** The IRS urges caution when making donations of vehicles to charities. Taxpayers should ask many questions and be aware of how much of the proceeds of the vehicle will go to the charity. Traditionally, charities receive much less in value from a car donation than the equivalent amount in cash. IR-2003-139.

■ **CHANGES TO ITIN APPLICATIONS.** The IRS has strengthened controls over issuing Individual Taxpayer Identification Numbers (ITINs). The reason for the change is to ensure that the ITINs are being used for tax purposes and not for personal identification. Notice 2004-1.

■ **IMPROPER DEDUCTIONS FOR CHARITABLE CONTRIBUTIONS OF PATENTS AND INTELLECTUAL PROPERTY.** Notice 2004-7 states the IRS's intent to disallow improper charitable deductions for contributions of patents and other intellectual property. Taxpayers could be required to pay penalties. The IRS will also be reviewing promotion of these transactions. Issues taxpayers should look for are: transfer of nondeductible partial interest in intellectual property; receipt of benefits in exchange for the transfer; inadequate substantiation of the contribution; and overvaluation of the intellectual property.

■ **GAMING INDUSTRY; VOLUNTARY TIP COMPLIANCE AGREEMENTS.** The IRS and the gaming industry employer will set a tip rate specific to the establishment and the employer will recruit employees to voluntarily participate. The employer will then withhold taxes from employees based on the rates. The arrangement will make recordkeeping easier for employers and make employees eligible for more government benefits and help them qualify for loans. IR-2003-145.

■ **PUBLIC ADVOCACY; §501(C) ORGANIZATIONS .** The IRS has released Revenue Rule 2004-6 to remind tax-exempt §501(c) organizations that their public advocacy activity must adhere to tax rules and campaign finance laws.

LEGISLATION

- **PRESIDENT SIGNS OMNIBUS SPENDING BILL.** On January 23 the Senate approved the spending bill and it was signed by the president. The bill includes appropriations of \$11.196 billion to the Treasury Department of which \$10.264 billion funds the IRS.
- **2005 BUDGET PROPOSALS.** The budget includes over \$300 million for compliance efforts and the overall budget would increase by 4.8 percent.
- **SALES AND USE TAX EXEMPTION.** Minnesota has proposed legislation on the table to amend the Minnesota sales and use tax exemption for capital equipment by making the exemption an up-front exemption. The change would be effective starting in July 2004. Current law states that tax must be imposed and collected and then the taxpayer must file a refund claim.
- **INCOME TAX EXCLUSION FOR AMBULANCE SERVICE.** A bill has been introduced to the Minnesota House proposing an income tax exclusion for ambulance service. H.F. 1689.
- **SECTION 179 EXPENSING.** The I.R.C. §179 expense deduction has been increased to \$100,000 but is reduced by the amount of §179 property placed in service that exceeds \$400,000. Also, shelf computer software is now eligible for this deduction. FS-2004-02.
- **TAX RELIEF FOR SERVICE MEMBERS.** President Bush signed legislation providing state and federal relief for service members. It defers tax collection without penalties or interest applying if a service member's ability to pay the tax is materially affected by military service. P.L. 108-189.
- **MINNESOTA TECHNICAL AMENDMENTS BILL FOR 2004.** The bill includes changes in sales and use taxes, taxes on special industries, property taxes, and tax-related penalties.

LOOKING AHEAD

- **SALES AND USE TAX WORKSHOPS.** The State of Minnesota has announced sales and use tax workshops through the Minnesota Business Tax Education Program. Schedules can be found at www.taxes.state.mn.us.
- **EITC ELIGIBILITY FOR 2003.** The IRS has released a fact sheet for easy guidance to determine whether a taxpayer is eligible for the Earned Income Tax Credit. FS-2004-08.
- **DEBUT OF 1040 CENTRAL.** Many forms and quick, easy answers are available at 1040 Central at irs.gov. It also has updates on the new tax bracket and child credit amounts as well as relief for military families and other law changes.
- **NATIONAL TAXPAYER ADVOCATE REPORT TO CONGRESS.** The National Taxpayer Advocate identified the Alternative Minimum tax (AMT) and sole proprietor tax noncompliance as the top two problems for taxpayers. The AMT will soon largely grow in scope of the number of taxpayers it affects as it will begin to encompass the middle class. IR-2004-8.

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■ **DEAD STORAGE OR BARELY BREATHING?** Slater purchased a 1985 truck in need of general repair. Slater began making repairs on the truck at his home and raised the cab of the truck in order to complete repairs. During a visit to Slater's home, appellant Pierce was injured when the cab fell on her. Pierce sued Slater who sought coverage for the damages arising from the accident under his homeowner's policy with Minnesota Property Insurance. Minnesota Property Insurance declined coverage, claiming that under the policy language, if the injury occurred while the truck was undergoing maintenance, the homeowner's policy did not provide coverage unless the "dead storage" exception applied.

The district court entered summary judgment in favor of Minnesota Property Insurance, concluding that two policy exclusions applied.

The Minnesota Court of Appeals affirmed. The truck was undergoing maintenance and thus was not in dead storage. The Minnesota Court of Appeals further held that the business-pursuits exclusion in the insurance policy applied to prevent coverage. Since the truck was used by Slater in his dumping business, and there was no evidence that the maintenance of the vehicle was incidental to a nonbusiness pursuit, the exclusion of coverage for bodily injury arising out of or in connection with a "business" applied. *Minnesota Property Insurance v. William Slater, et al*, A03-556, (Minn. App. 01/20/04).

■ **SHOW ME THE EVIDENCE!** Appellant Schafer challenged the district court's grant of summary judgment in favor of Perkins Restaurant, et al. The undisputed facts were that appellant ordered a pumpkin muffin while dining at Perkins Restaurant, swallowed a bit of it, and felt a sharp pain and choking sensation in her throat. She was diagnosed with a scratch on her throat, but no object was observed or retrieved. Two days later she was hospitalized because of a throat infection.

The district court granted summary judgment to Perkins, concluding that proof of the identity of the harmful object was required to prevail. Since Schafer could not identify the harm-producing object, she could not prevail.

Judge Minge dissented, and would have allowed the case to go to the jury. As pointed out by the judge, "[r]eaching the trier of fact should not depend on whether invasive or probing procedures to locate the foreign object are taken before or shortly after the end of the digestive cycle". Judge Minge also noted that this result is in accord with strict liability developments that recognize reasonable consumer expectations, quoting Steenson, "A Comparative Analysis of Minnesota Products Liability Law and the Restatement (Third) of Torts: Products Liability," 24 *Wm. Mitchell L. Rev.* 1 (1998). *Schafer vs. JLC Food Systems, Inc. d/b/a Perkins Family Restaurant*, A03-779, (Minn. App. 01/20/04).

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