

APPELLATE PRACTICE NEWS

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INTRODUCTION

By Bradley G. Clary, Editor

This issue of Appellate Practice News will report briefly on the Section's recent two CLE programs. In the first program, Chief Judge Edward Toussaint and Judge Barry Anderson of the Minnesota Court of Appeals provided information regarding the workings of the court and summarized significant recent opinions. In the second program, United States District Judge John Tunheim and attorneys David Herr, Kirk Kolbo and Charles Bird presented insights into United States Supreme Court practice strategies based upon their own experiences before the Court.

APPELLATE PRACTICE CLE
MARCH 13, 2003
The Minnesota Court of Appeals

Chief Judge Toussaint gave the audience helpful insights into the workings of the Court: Eight of the judges on the Court of Appeals are from Minnesota's eight Congressional districts, respectively. The rest of the judges on the Court are appointed on a "statewide" basis.

The Court is experiencing an increase in both civil and criminal filings. In each of the years from 1995 through 1999, the Court received over 2000 filings.

Currently, the Court hears oral argument in over 70% of its cases. The Court's current average time from oral argument to decision is 65 days.

In 2001, the Court issued 285 published opinions; 1,164 unpublished opinions; and 61 order opinions. Each individual panel decides whether a given one of its opinions should be

published. [Practitioner's note: Counsel should tell the Court if you think a case should be published.]

A panel of the Court (the Chief and two other judges) considers dispositive motions in a special term review every Tuesday. Three recent special term matters of interest are:

Kastner v. Star Trails, 646 N.W.2d 235 (Minn. 2002). In this case, the Court of Appeals had denied interim appeal to the defendant from the district court's denial of summary judgment on an immunity defense, but the Supreme Court embraced the collateral order doctrine, permitting the appeal. [Editor's note: The Court of Appeals on remand decided on the merits that the defendant was entitled to summary judgment, and the Minnesota Supreme Court denied further review. 658 N.W.2d 890 (Minn. App. 2003), *review denied* (Minn. June 30, 2003).]

Gordon v. Microsoft Corp., 645 N.W.2d 393 (Minn. 2002). In this case, the Supreme Court established the standard of review for petitions for discretionary review in the Court of Appeals on class certification issues: Will review resolve an important legal issue? Does a trial court ruling against plaintiff signal the death knell of plaintiff's case? Does a trial court ruling against defendant place undue pressure on the defendant to settle the case?

Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership, 638 N.W.2d 214 (Minn. App.), *review denied* (Minn. Feb. 4, 2002). In this case, the Court upheld the grant of a temporary injunction prohibiting the Twins from getting out of their Metrodome lease. The Court determined that damages might not be full compensation for the breach of a public sports stadium lease by a professional team.

Chief Judge Toussaint and Judge Anderson made available to the CLE audience a compilation of case summaries entitled, "Minnesota Court of Appeals Significant Decisions September 2001-August 2002." Judge Anderson singled out eight of the cases for comment during the CLE. The summaries of these cases in the compilation are reprinted below:

Pine Island Farmers Coop. v. Erstad & Riemer, P.A., (C1-01-670) 636 N.W.2d 604 (Minn. App. 2001), *aff'd* 649 N.W.2d 444 (Minn. 2002).

1. When an insurance company retains defense attorneys for the insured, the insured is the sole client of the defense attorneys and the attorney-client relationship does not extend to the insurer.
2. The doctrine of equitable subrogation does not apply in this case to give standing to the insurer to sue defense attorneys for malpractice

in their representation of the insured in the underlying suit.

Fraser v. Fraser, (C6-01-812, C8-01-813) 642 N.W.2d 34 (Minn. App. 2002).

1. Because a marital dissolution action does not qualify as "an action arising under or in relation to" a contract for deed under Minn. Stat. §559.211 (2000), the district court does not have authority, in a marital dissolution action, to enjoin a third party from canceling a contract for deed conveying the marital homestead.

2. Because of the summary nature of an eviction action, the district court should not entertain in an eviction action equitable claims and defenses that can be litigated in an alternate civil action.

Ludwigson v. Ludwigson, (C0-01-1616) 642 N.W.2d 441 (Minn. App. 2002).

1. The determination of income for child support purposes is a matter of fact, which must be affirmed unless it is clearly erroneous. In determining the award, the question of adjustments to the award for time spent with a noncustodial parent is a matter of law.

2. Under pertinent general court rules, a child support magistrate's authority includes the power to determine whether the proceedings call for an attorney-fee award based either on a party contributing unreasonably to the length of the proceedings or on the need of one party to participate in the proceedings.

3. The trial court has broad discretion to interpret and clarify language of a divorce judgment declaring that when a party is "employed" they are entitled to a tax-dependency exemption.

Fear v. Independent School District No. 911, (C8-01-486) 634 N.W.2d 204 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001)

1. A school district's claim of statutory

immunity requires evidence, rather than mere assertions, that a planning level decision took place.

2. The appropriate standard to apply to a school district's assertion of recreational immunity for alleged negligent acts involving a child on a school playground is the child trespasser standard under Restatement (Second) of Torts §339 (1965).

3. Ministerial acts by school district employees are not entitled to official immunity.

Cincinnati Insurance Co. v. Franck, (C4-01-1666) 644 N.W.2d 471 (Minn. App. 2002), *review granted* (Minn. Aug. 6, 2002).

Where an insured is covered by both primary and umbrella insurance policies, an injured party, the insured, and the primary carrier may settle below the limits of the primary policy and then invoke coverage under the umbrella policy, where the injured party agrees to absorb the gap between the settlement amount and the primary policy limits.

In Re Welfare of J.R.Z., (C4-01-1358) 648 N.W.2d 241 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

1. A district court has broad discretion in determining whether to continue an adjudication in a delinquency proceeding and may continue the adjudication if it is in the best interests of the child and the protection of the public to do so and the child has admitted the allegations contained in the petition.

2. The plain language of Minn. Stat. §243.166 (2000) precludes any exception from lifetime predatory sex-offender registration for juveniles under the age of 14.

In Re Application for Relocation Benefits of James Bros. Furniture, (C6-01-1359) 642 N.W.2d 91 (Minn. App. 2002), *review denied* (Minn. June 18, 2002).

1. Under the Minnesota Uniform Relocation Act (MURA), the final administrative decision is the decision of a hearing officer or other appointed agency official reviewing an

acquiring authority's initial decision regarding relocation benefits.

2. Under MURA, a relocation-benefits applicant is displaced if forced to move from real property, or forced to move personal property from real property, as a result of an acquisition by an acquiring authority, even if displacement occurs after an acquiring authority has allowed the tenant-applicant to remain, without the benefit of a long-term lease, following an acquisition.

3. Under MURA, extraordinary advertising and other administrative costs incurred during an inventory-liquidation sale are costs incurred in attempting to sell an item that is not to be relocated.

Mohler v. City of St. Louis Park, (C9-01-1534, C9-01-1887) 643 N.W.2d 623 (Minn. App. 2002), *review denied* (Minn. July 16, 2002).

1. The city's decision that an error by city staff constituted hardship within the meaning of Minn. Stat. §462.357, subd. 6(2000), and permitted the city to grant a variance was unreasonable.

2. When the record contains no legally sufficient basis for granting a variance under Minn. Stat. §462.357, subd. 6, summary judgment for the party challenging the grant of the variance is appropriate.

3. Adjacent property owners injured by a permit issued in violation of the city ordinance are entitled to injunctive relief.

4. Property owners challenging the grant of a variance on adjacent property owners' land have not been deprived of a protectible property interest for purposes of maintaining a 42 U.S.C. §1983 claim.

5. A city cannot be estopped from correctly enforcing its ordinances even if the property owners relied to their detriment on the city's earlier erroneous representations.

6. When the city erroneously misinterprets a height requirement under the city's zoning ordinance for a property owner requesting a building permit, the city's action constitutes a

misrepresentation of law, which is not actionable.

APPELLATE PRACTICE CLE
JUNE 19, 2003
United States Supreme Court Practice

Kirk Kolbo and David Herr of the Maslon Edelman firm in Minneapolis recently handled the *Grutter v. Bollinger* and *Gratz v. Bollinger* cases in the U.S. Supreme Court. Judge John Tunheim, when he was Chief Deputy Attorney General, handled the *Perpich v. Department of Defense*, *Hodgson v. Minnesota* and *Grove v. Emison* cases in the Court. Charles Bird of Bird & Jacobsen in Rochester handled *Klehr v. A.O. Smith Corporation* in the Court. At the CLE, they shared insights into the strategy of Supreme Court practice.

David Herr and Kirk Kolbo began by reminding the audience that many of the principles for Supreme Court practice are the same as for any appellate case. For example, create a thorough record in the trial court. They also offered specific suggestions on various topics:

Do not try the case in the media, but do not ignore the press. Be accessible. Return calls right away. Conduct informal discovery of the reporters concerning what the other side is saying about the case. Test themes.

In positioning your case for Supreme Court review, do not be afraid to make unconventional tactical decisions if they appear appropriate and make sense. For example, in *Grutter* and *Gratz*, Herr and Kolbo asked for en banc review right from the start in the Sixth Circuit and thus were able to obtain a single, definitive decision much earlier than in a multi-step review. Similarly, Herr and Kolbo asked for review of both cases by the Supreme Court

even though the Sixth Circuit had only decided one.

In a *certiorari* petition, raise one or two questions. Raise them in a flexible way, so that some justices can vote to grant *certiorari* to approach the problem in X way while others can vote to grant *certiorari* to approach the problem in Y way, and yet all of those justices can conclude that the question on which they have granted *certiorari* review encompasses what petitioning counsel want to talk about.

Consult resources such as “Landmark Briefs and Arguments in the Supreme Court,” the compact disc of “The Supreme Court’s Greatest Hits,” and David Fredericks’ book on “Supreme Court and Appellate Advocacy.”

Keep your theme of the case firmly in mind. Do not say something just to get a swing vote if you will not be true to your theme.

In preparing for the oral argument, moot court sessions in front of a wide variety of experienced advocates are highly valuable.

Answer questions yes or no if you can, and then explain. Avoid attempts at humor. Do not just answer hard hypotheticals by saying, “Those are not our facts.”

In the Supreme court, cite Supreme Court cases. In the lower courts, you might be arguing precedent. But in the Supreme Court you are arguing policy and reasoning.

Judge Tunheim added a number of additional useful pointers for counsel:

Amicus briefs can be quite helpful in adding perspectives. Of course, you as counsel still want to frame the discussion in your own terms.

In planning the oral argument, think carefully about why the Court likely took the case. Read recent transcripts that illustrate the kinds of questions the

Justices have been asking. Know the individual views of the Justices in the subject area of your case.

Compress your oral argument outline into a single sheet of paper. You will have written out hard questions and answers in preparation, but don't even bother taking all of those to the actual argument. Think about the argument in terms of a series of windows into specific sub-topics.

In agreement with Herr and Kolbo, mock argument practices are helpful. Conduct several of them. Invite experienced practitioners and law professionals to serve as mock judges.

The Solicitor General's Office can be quite helpful if it supports your view of the case.

In agreement with attorneys Herr and Kolbo, never forget that you are in a policy-setting Court. The country needs to be a better place as a result of the relief you want from the Court.

Charles Bird also added a number of useful pointers:

In the trial court, think about the record you will need on the specific questions that will likely go up to the Court.

In agreement with David Herr and Kirk Kolbo, frame the issue broadly as petitioner. On the other hand, frame the issue narrowly as a respondent. Make sure in either case that you frame the issue in such a way that the arguments you want to make are within the ambit of the *certiorari* grant.

Amicus briefs are now submitted in 80-90% of Supreme Court cases. The petitioner wants amici even at the petitioning stage. The respondent on the other hand wants amici lined up to present their views if certiorari is granted. In either case you want amici who can present independent perspectives in an appropriate neutral tone.

It can be helpful to argue to a swing voter in an appropriate case where other Justices have well-defined views that are not likely to change during oral argument.

When the red light comes on, sit down. The Supreme Court is not a court that permits counsel extra time.

ELECTION OF OFFICERS

The following persons have been elected as the Section's officers for 2003-04.

Chair—Jenneane Jansen

Vice Chair – Larry Hammerling

Secretary/Treasurer – Tom Boyd

Ken White will fill the slot in the Section's Governing Council vacated by Tom Boyd.

Appellate Practice Section Website

Section members may want to visit the Section's website, which is accessible through practicelaw.org, the MSBA's latest online tool. After you enter the website through www.practicelaw.org, click on the appellate practice file and obtain a variety of helpful insights regarding appellate practice and procedure.

You should also be aware that the Minnesota Civil Appellate Rules are now available in full text online through the Minnesota Court website. This is accessible at www.courts.state.mn.us. Once you enter the website, click on the "court rules" file.
