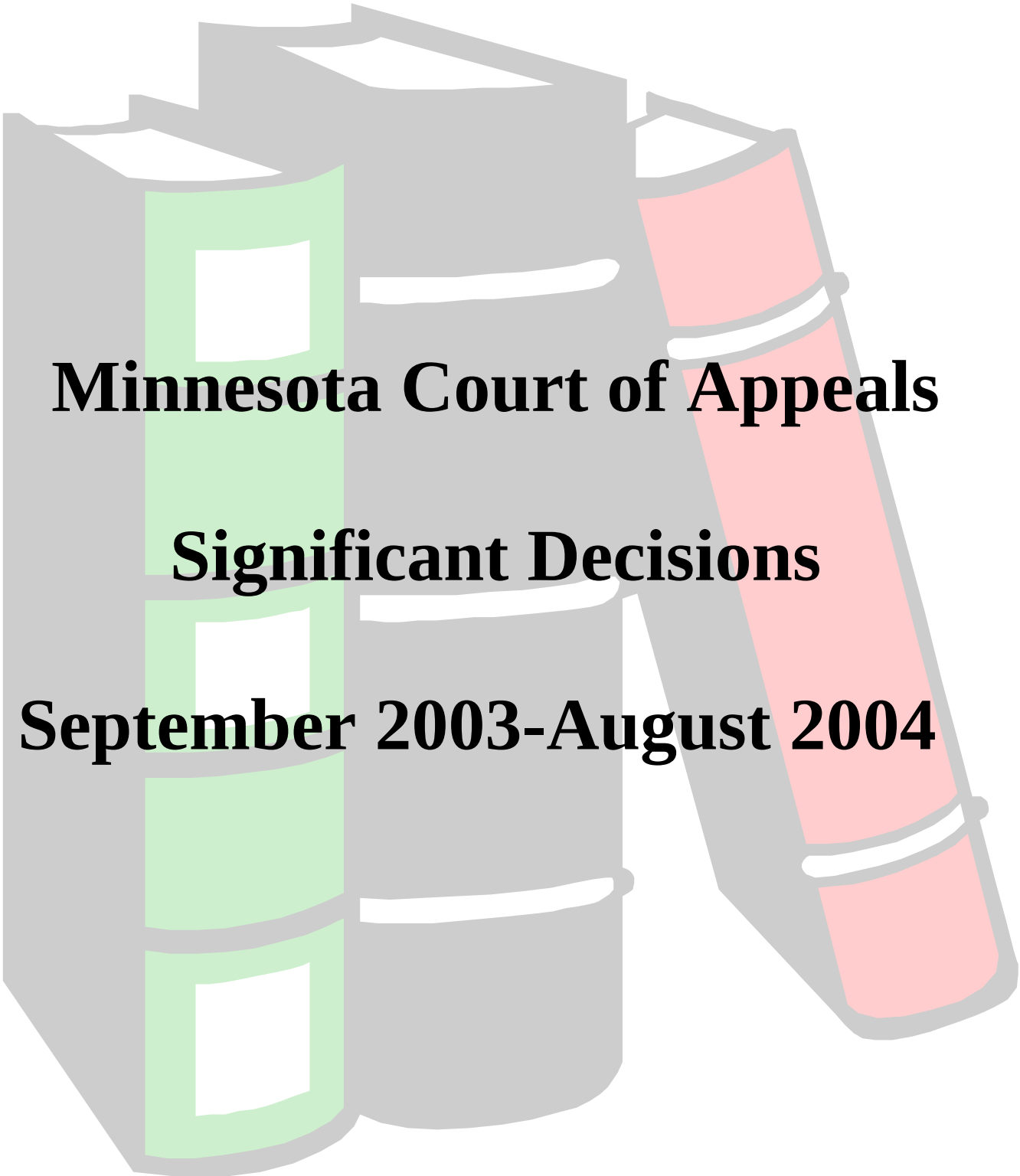

Minnesota Court of Appeals

Significant Decisions

September 2003-August 2004

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2. The courts have jurisdiction to consider a declaratory judgment action to review quasi-legislative agency action if neither a writ of certiorari nor other forms of review are available to the parties and if the moving party is not the subject of any current, active agency proceeding.

3. In administering the Minnesota Prevailing Wage Law (MnPWL), the Minnesota Department of Labor and Industry (DOLI) has discretion to either establish a separate classification for workers with unique responsibilities or to determine that such workers are members of and included within an existing classification.

4. The MnPWL and regulations adopted by DOLI require DOLI to engage in a rulemaking proceeding to define categories of work in the Master Job Classification and to modify those classifications.

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1. Relator generally complied with an earlier decision issued by respondent when he accepted a gift from a lobbyist principal on behalf of the City of St. Paul and used the gift for a public purpose.

2. Relator did not violate Minn. Stat. § 10A.071 (2002) where prior acceptance by the St. Paul City Council was not possible and the city council, as soon as practicable thereafter, accepted the gift and appropriated use of the gift to relator pursuant to Minn. Stat. § 465.03 (2002).

In re Qwest's Wholesale Serv. Quality Standards, (A03-1409) 678 N.W.2d 58 (Minn. App. 2004), *review granted* (Minn. June 15, 2004).

1. The Minnesota Public Utilities Commission has the authority to impose benchmark wholesale service quality standards on an incumbent local exchange carrier.

2. The Minnesota Public Utilities Commission has the authority to impose an enforcement mechanism for benchmark wholesale service quality standards on an incumbent local exchange carrier.

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An order of the Minneapolis Civil Service Commission denying a request to reopen a civil service procedure must be reversed and a new hiring procedure conducted where (1) a municipality explicitly required and emphasized a specific educational requirement but then waived that requirement after applications were submitted and (2) there were inconsistencies in the method of point calculation of the applications.

City of Lake Elmo v. Metro. Council, (A03-458) 674 N.W.2d 191 (Minn. App. 2003), *aff'd*, 685 N.W.2d 1 (Minn. 2004).

1. The proper standard of review for an appeal from a final decision of the Metropolitan Council under Minn. Stat. § 473.866 (2002) is that the court shall give deference to the administrative agency, but shall not give preference to either the administrative law judge's record and report or to the findings, conclusions, and final decision of the council.

2. On review of a final decision of the Metropolitan Council under Minn. Stat. § 473.866, this court shall not examine evidence that the administrative law judge

excluded from the record, but shall base its decision upon a preponderance of the evidence as contained in the record on appeal.

3. When the Metropolitan Council determines that a city's plan will have a substantial impact on or contains a substantial departure from the council's plan, the council does not exceed its statutory authority by requiring the city to conform to the council's plan, even when conformity necessarily requires an action on the part of a city otherwise beyond the authority of the council to require.
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In re City of Owatonna's NPDES/SDS Proposed Permit Reissuance, (A03-331, A03-333) 672 N.W.2d 921 (Minn. App. 2004).

Relator Minnesota Center for Environmental Advocacy (MCEA) has raised disputed material issues of fact concerning application of Minn. R. 7050.0211, subp. 1a (2001) (the phosphorus rule) to the National Pollutant Discharge Elimination System permits for the cities of Faribault and Owatonna, such that contested case hearings would aid the Minnesota Pollution Control Agency (MPCA) in making a final decision on these permits. And because we are unable to determine whether (1) the MPCA has genuinely engaged in reasoned decision-making; or (2) the MPCA's decision not to apply the phosphorus rule is supported by substantial evidence, MCEA is entitled to contested case hearings.

In re Max Schwartzman & Sons, Inc., (C4-03-389, A03-224) 670 N.W.2d 746 (Minn. App. 2003).

1. Shredder fluff is solid waste under Minn. Stat. § 116.06, subd. 22 (2002), and, depending on its composition, may also be hazardous waste under Minn. Stat. § 116.06, subd. 11 (2002).

2. The use of shredder fluff to construct an earthen berm on property constitutes the disposal of solid or hazardous waste.

3. When a request for a contested-case hearing is made after the comment period and the issuance of an administrative order, the request is untimely under Minn. R. 7000.1900, subp. 1 (2001) because there is no matter pending before the agency.

4. An agency does not err in denying a request for a contested-case hearing under Minn. R. 7000.1900, subp. 1, where there is no material issue of genuine fact in dispute.

Data Practices

WDSI, Inc. v. County of Steele, (A03-680) 672 N.W.2d 617 (Minn. App. 2003).

1. For purposes of Minn. Stat. § 13.05, subd. 11 (2002), a subdivision of the Minnesota Government Data Practices Act, constructing a jail, including developing qualifications and requirements for the bidding process, is a governmental function.

2. If a private party fails to comply with the Minnesota Government Data Practices Act, which provides that a private party under contract with a governmental

entity to perform governmental functions has a duty to provide the public with governmental data, the remedy is against the private party.

3. The Minnesota Government Data Practices Act does not provide that a governmental entity has a duty to obtain governmental data from a private person with whom it has contracted to perform governmental functions.

Human Services

Johnson v. Comm'r of Health, (A03-353) 671 N.W.2d 921 (Minn. App. 2003).

A decision on reconsideration of a disqualification under Minn. Stat. § 245A.04, subd. 3b (2002), must include written findings on the statutory factors.

MPCA/Environmental Quality

In re City of Owatonna's NPDES/SDS Proposed Permit Reissuance, (A03-331, A03-333) 672 N.W.2d 921 (Minn. App. 2004).

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Open Meetings

Free Press v. County of Blue Earth, (A03-1152) 677 N.W.2d 471 (Minn. App. 2004).

1. The requirement in the Minnesota Open Meeting Law, Minn. Stat. § 13D.01, subd. 3 (2002), that a public body describe the "subject to be discussed" before closing a meeting, contemplates more than a statement asserting an attorney-client privilege to discuss "pending litigation." The public body must specifically describe the matter to be discussed at the closed meeting, subject only to relevant privacy and confidentiality protections under state and federal law.

2. An injunction that restrains a public body from closing a meeting under the Minnesota Open Meeting Law without describing the "subject to be discussed" must be narrowly tailored to inform the public body of the specific information it must disclose before closing the meeting.

Primary Jurisdiction

Pomrenke v. Comm'r of Commerce, (A03-497) 677 N.W.2d 85 (Minn. App. 2004), *review denied* (Minn. May 26, 2004).

1. Under the Minnesota Residential Originator and Servicer Licensing Act (Act), the Department of Commerce has jurisdiction over an employee of a licensee who performs mortgage origination services but who is exempt from the Act's licensure requirement.

2. The Department of Commerce does not infringe on an individual's property interest in private employment by prohibiting an individual found to have violated the Act from engaging in mortgage origination/servicing.

In re Appeal of Selection Process for Position of Electrician (Exam #000200), (A03-785) 674 N.W.2d 242 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004).

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Standing

Alliance for Metro. Stability v. Metro. Council, (A03-457) 671 N.W.2d 905 (Minn. App. 2003).

1. When a state political subdivision's implementation of a policy substantially interferes with an organization's mission and causes the organization to divert resources from activities it would otherwise undertake, making it more difficult to participate in its normal activities, the organization has suffered an injury-in-fact sufficient for standing.

2. When an organization seeks a declaratory judgment as to the interpretation and application of a statute that regulates a state political subdivision, the organization must have an independent, underlying cause of action based on a common law or statutory right; the organization cannot base jurisdiction solely on the Uniform Declaratory Judgments Act.

3. When a state political subdivision has discretion with respect to how it fulfills its statutory responsibilities and when it revises its policies relating to those responsibilities in a good faith belief that it is reflecting the legislative intent of new regulating legislation, it has acted neither unreasonably, arbitrarily, nor capriciously.

Statutes/Rules

In re Qwest's Wholesale Serv. Quality Standards, (A03-1409) 678 N.W.2d 58 (Minn. App. 2004), *review granted* (Minn. June 15, 2004).

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Utilities

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1. The Minnesota Public Utilities Commission has the authority to impose benchmark wholesale service quality standards on an incumbent local exchange carrier.

2. The Minnesota Public Utilities Commission has the authority to impose an enforcement mechanism for benchmark wholesale service quality standards on an incumbent local exchange carrier.

ANIMALS

Hyatt v. Anoka Police Dep't, (A03-1707) 680 N.W.2d 115 (Minn. App. 2004), *review granted* (Minn. July 20, 2004).

1. Where imposition of the plain language of a statute would lead to contradictory and absurd results, a court may look beyond the literal language to ascertain the intent of the legislature.

2. The legislature did not intend Minn. Stat. § 347.22 (2002), which imposes strict liability upon the owner of a dog for injuries caused to a person, to apply to police dogs.

APPELLATE PROCEDURE

Jurisdiction

Cepek v. Cepek, (A04-197) 684 N.W.2d 521 (Minn. App. 2004).

1. A custody evaluator who is designated a party to a custody proceeding is not authorized to act as an advocate for the child and therefore cannot be an "adverse" party in an appeal of the custody determination.

2. Because a custody evaluator cannot be an "adverse" party, failure to timely serve the notice of appeal on the custody evaluator is not a jurisdictional defect requiring dismissal of the appeal.

Hickman v. Comm'r of Human Servs., (A04-523) 682 N.W.2d 697 (Minn. App. 2004).

An individual who has been disqualified from holding positions involving direct contact with persons served by programs or entities identified in Minn. Stat. § 245C.03 (Supp. 2003) may request reconsideration of the decision under Minn. Stat. § 245C.21, subd. 1 (Supp. 2003). But a motion to reconsider the Commissioner of Human Services' decision refusing to set aside the disqualification is not authorized, and such a motion does not extend the time to appeal.

Sorenson v. Life Style, Inc., (A03-1505) 674 N.W.2d 439 (Minn. App. 2004).

In an unemployment benefits appeal, the petition for writ of certiorari is properly served on counsel representing the employer.

ARBITRATION

Abd Alla v. Mourssi, (A03-1736) 680 N.W.2d 569 (Minn. App. 2004).

When a party moves the district court to confirm an arbitration award under Minn. Stat. § 572.18 (2002), the district court's jurisdiction is limited to confirmation of the award unless an application to vacate or modify the award is filed within the time limits prescribed by Minn. Stat., ch. 572.

Allen v. Hennepin County, (A03-1752) 680 N.W.2d 560 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004).

The 90-day statute of limitations for vacating an arbitration award under the Uniform Arbitration Act applies to employees' claims against their employers and unions for wrongful discharge and breach of the duty of fair representation under the Public Employment Labor Relations Act.

Vaubel Farms, Inc. v. Shelby Farmers Mut., (A03-1607) 679 N.W.2d 407 (Minn. App. 2004).

A "suit" refers to any proceeding by a party or parties against another in a court of general jurisdiction; it does not include arbitration.

Klinefelter v. Crum & Forster Ins. Co., (A03-895) 675 N.W.2d 330 (Minn. App. 2004).

1. Under the No-Fault Act, workers' compensation insurance is primary. But a denial of workers' compensation benefits does not preclude, through res judicata or collateral estoppel, the arbitration and recovery of no-fault benefits.

2. There is no authority that a no-fault insurer's coverage is conditioned on an opportunity to obtain reimbursement for benefits paid to the insured.

Illinois Farmers Ins. Co. v. Glass Serv. Co., (A03-109) 669 N.W.2d 420 (Minn. App. 2003), *aff'd in part, rev'd in part*, 683 N.W.2d 792 (Minn. 2004).

1. An assignee of an insured whose claim is covered by no-fault insurance is subject to the mandatory arbitration provisions of the No-Fault Act, Minn. Stat. § 65B.525 (2002).

2. Under the No-Fault Act, separate claims assigned to the same assignee may not be consolidated so as to exceed the maximum limit for mandatory arbitration.

3. There is no authority to order one panel of arbitrators to consider all of the arbitrations that arise when the insureds assign their claims to the same assignee.

ATTORNEY FEES

Trial

Indep. Sch. Dist. No. 404 v. Castor, (C3-03-139) 670 N.W.2d 758 (Minn. App. 2003).

1. Minn. Stat. § 466.07 (2002) is not ambiguous and on its face does not limit an employee's claim for attorney fees to the context of indemnification of a third-party claim.

2. Under *Queen v. Minneapolis Pub. Sch. Dist.*, 481 N.W.2d 66, 68 (Minn. 1992), and Minn. Stat. § 123B.25(b) (2002), Minn. Stat. § 466.07 must be interpreted to relieve a school district of its duty to defend a teacher under Minn. Stat. § 123B.25 (2002) when the teacher is found to have acted in bad faith.

3. There is no conversion where the property is determined to be compensation to the party who allegedly converted it.

BUSINESS ORGANIZATIONS

Birch Publ'ns, Inc. v. RMZ of St. Cloud, Inc., (A03-1913) 683 N.W.2d 869 (Minn. App. 2004), *review denied* (Minn. Oct. 19, 2004).

1. A trademark is abandoned when its use has been discontinued with intent not to resume such use.

2. Having "intent to resume" use of a trademark requires the trademark owner to have plans to resume commercial use of the trademark.

3. A party claiming that a trademark has been abandoned must show non-use of the name by the legal owner and no intent by that person or entity to resume use in the reasonably foreseeable future.

4. A trademark owner cannot protect a trademark by merely having "an intent not to abandon," which would allow a trademark owner to protect a trademark with neither commercial use nor plans to resume commercial use.

Corporations

Save Our Creeks v. City of Brooklyn Park, (A03-1794) 682 N.W.2d 639 (Minn. App. 2004), *review granted* (Minn. Sept. 29, 2004).

1. A complaint signed by a nonlawyer on behalf of a corporation may be amended to add an attorney's signature when the corporation acts without knowledge that the omission of an attorney's signature is improper, the corporation diligently corrects the mistake by obtaining counsel, the nonlawyer's participation in the legal proceeding is minimal, and the complaint duly notifies the adverse party of the corporation's claims.

2. An amendment to cure the initial omission of an attorney's signature on a complaint that is timely filed and sets forth a legally sufficient claim relates back to the original pleading.

Haley v. Forcelle, (A03-182) 669 N.W.2d 48 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003).

1. When a minority shareholder is a guarantor of company debt and a co-founder, director, officer, and employee of a company, and the majority shareholder is aware of the minority shareholder's financial position and removes the minority shareholder from the board of directors and terminates the minority shareholder's employment in an effort to force the minority shareholder to sell his shares, the minority shareholder suffers irreparable harm.

2. A minority shareholder has a reasonable expectation of continued employment where the minority shareholder is a co-founder, employee, and a guarantor of company debt and there is evidence that the founders of the company contemplated continued employment for the minority shareholder.

3. A minority shareholder who has a reasonable expectation of continued employment and has his employment terminated by a majority shareholder for reasons other than incompetence or the inability to perform his duties has been treated in a

manner that is unfairly prejudicial and is likely to prevail on the merits of a claim under Minn. Stat. § 302A.751, subd. 1(b)(3) (2002).

Partnerships

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Under Minnesota law dealing with the negligence of a partner, the partnership is liable to the injured party and is also liable to indemnify the acting partner. This liability is declared by statute for all conduct occurring in the ordinary course of business, even if this conduct also partly serves the partner's personal interests.

Maus v. Galic, (C2-03-195) 669 N.W.2d 38 (Minn. App. 2003).

A partnership is dissolved by mutual consent and the express will of the partners upon an exchange of pleadings alleging dissolution of the partnership by the express will of a partner.

CIVIL PROCEDURE

Save Our Creeks v. City of Brooklyn Park, (A03-1794) 682 N.W.2d 639 (Minn. App. 2004), *review granted* (Minn. Sept. 29, 2004).

1. A complaint signed by a nonlawyer on behalf of a corporation may be amended to add an attorney's signature when the corporation acts without knowledge that the omission of an attorney's signature is improper, the corporation diligently corrects the mistake by obtaining counsel, the nonlawyer's participation in the legal proceeding is minimal, and the complaint duly notifies the adverse party of the corporation's claims.

2. An amendment to cure the initial omission of an attorney's signature on a complaint that is timely filed and sets forth a legally sufficient claim relates back to the original pleading.

Hernandez by Hernandez v. State, (A03-1433, A03-1445) 680 N.W.2d 108 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004).

1. The Federal Railroad Safety Act, 49 U.S.C. § 20101 (2000), in conjunction with the Federal Highway Administration's regulations for the adequacy of warning devices, 23 C.F.R. §§ 646.214(b)(3), (4) (2004), preempts a state-law negligence claim for failure to maintain adequate warning devices at a grade crossing if the devices have been installed with the participation of federal funds and have been approved by the Federal Highway Administration.

2. A state-law negligence claim against the State of Minnesota and the City of Marshall for allegedly failing to timely install warning devices in addition to those determined adequate by the FHWA is preempted by federal regulation; the state and the city have no common law duty which could be violated by failing timely to install additional warning devices.

TNT Props., Ltd. v. Tri-Star Developers, LLC, (A03-1186) 677 N.W.2d 94 (Minn. App. 2004).

When the parties to a real estate transaction orally recite the terms of a settlement agreement on the record in open court and expressly assent to be bound by the agreement, the writing and subscription requirements of the statute of frauds, Minn. Stat. § 513.04 (2002), are satisfied.

Maudsley v. Pederson, (A03-915) 676 N.W.2d 8 (Minn. App. 2004).

Minn. Stat. § 145.682 (2002) encourages parties to bring motions to dismiss medical-malpractice actions early in the proceedings, either to eliminate frivolous lawsuits or to give plaintiffs an opportunity to cure any defects prior to trial. Thus, to challenge the sufficiency of a plaintiff's expert affidavit, the defendant should file a timely motion to dismiss pursuant to Minn. Stat. § 145.682, subd. 6 (2002).

Taney v. Indep. Sch. Dist. No. 624, (A03-370) 673 N.W.2d 497 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004).

1. In a negligence action, the substantial remodeling of real property in the direct vicinity of an accident constitutes an improvement to that property and therefore the statute of repose, Minn. Stat. § 541.051, runs from the date of that remodeling rather than the date of original construction of the real property.

2. In a negligence action, so long as the jury instructions are a fair and correct statement of the law, the district court does not err when it refuses to issue an instruction that the jury may not consider violations of the Uniform Building Code in determining negligence.

Pemberton v. Theis, (C4-03-313) 668 N.W.2d 692 (Minn. App. 2003).

1. A plaintiff's release, for consideration, of the right to collect no-fault benefits pursuant to Minn. Stat. § 65B.51 (2002) does not bar an action to recover future health care expenses as damages arising from the accident.

2. An award of future medical expenses in a negligence action for injuries sustained in an accident arising out of the use of a motor vehicle constitutes economic loss under Minn. Stat. § 65B.51, subd. 2 (2002), rather than noneconomic loss, and thus the award is not subject to the tort threshold under Minn. Stat. § 65B.51, subd. 3 (2002), of the Minnesota No-Fault Act.

3. The trial court did not err in deducting the amount received by the plaintiff in a settlement with her no-fault insurer from a jury's award of future medical expenses.

Collateral Estoppel

Pope County Bd. of Comm'rs v. Pryzmus, (A03-1634) 682 N.W.2d 666 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004).

When a party has previously litigated the applicability of a local zoning ordinance in an action, collateral estoppel precludes further litigation of the same issue in a subsequent proceeding.

Klinefelter v. Crum & Forster Ins. Co., (A03-895) 675 N.W.2d 330 (Minn. App. 2004).

1. Under the No-Fault Act, workers' compensation insurance is primary. But a denial of workers' compensation benefits does not preclude, through res judicata or collateral estoppel, the arbitration and recovery of no-fault benefits.

2. There is no authority that a no-fault insurer's coverage is conditioned on an opportunity to obtain reimbursement for benefits paid to the insured.

In re Trusteeship of Trust Created Under Trust Agreement Dated Dec. 31, 1974, (A03-454) 674 N.W.2d 222 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004), *cert. denied*, 125 S. Ct. 312, 345 (Oct. 12, 2004).

Minn. Stat. § 501B.16(3), (4) (2002), which authorizes trustees to petition the district court for an order determining trust beneficiaries and interpret trust terms, does not authorize trustees to mount a collateral attack on a beneficiary's previously determined paternity without regard for the standing and timeliness requirements of applicable parentage laws.

Indep. Sch. Dist. No. 404 v. Castor, (C3-03-139) 670 N.W.2d 758 (Minn. App. 2003).

1. Minn. Stat. § 466.07 (2002) is not ambiguous and on its face does not limit an employee's claim for attorney fees to the context of indemnification of a third-party claim.

2. Under *Queen v. Minneapolis Pub. Sch. Dist.*, 481 N.W.2d 66, 68 (Minn. 1992), and Minn. Stat. § 123B.25(b) (2002), Minn. Stat. § 466.07 must be interpreted to relieve a school district of its duty to defend a teacher under Minn. Stat. § 123B.25 (2002) when the teacher is found to have acted in bad faith.

3. There is no conversion where the property is determined to be compensation to the party who allegedly converted it.

Costs and Disbursements

Duxbury v. Spex Feeds, Inc., (A03-1456) 681 N.W.2d 380 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004).

1. Statutory regulation of grain banks under Minn. Stat. ch. 236 does not abrogate actions for warranty under the Uniform Commercial Code or for products liability.

2. Calculation of prejudgment interest, an issue determined by the district court, not the jury, is governed by Minn. Stat. § 549.09.

Olson v. Alexandria Indep. Sch. Dist. No. 206, (A03-1104) 680 N.W.2d 583 (Minn. App. 2004).

This court must affirm a trial court's exercise of its broad discretion in reconciling inconsistent jury answers when the court reasonably assesses the indications of jury intentions and the reconciliation is consistent with fair inferences of the evidence.

Vandenheuvel v. Wagner, (A03-324) 673 N.W.2d 524 (Minn. App. 2004), *review granted* (Minn. Mar. 30, 2004).

When an offer of judgment is made and rejected by the offeree, and the net judgment is less favorable to the offeree than the offer, the offeree must pay all of the offeror's costs and disbursements, not only those costs and disbursements incurred after the offer was made.

Indep. Sch. Dist. No. 404 v. Castor, (C3-03-139) 670 N.W.2d 758 (Minn. App. 2003).

1. Minn. Stat. § 466.07 (2002) is not ambiguous and on its face does not limit an employee's claim for attorney fees to the context of indemnification of a third-party claim.

2. Under *Queen v. Minneapolis Pub. Sch. Dist.*, 481 N.W.2d 66, 68 (Minn. 1992), and Minn. Stat. § 123B.25(b) (2002), Minn. Stat. § 466.07 must be interpreted to relieve a school district of its duty to defend a teacher under Minn. Stat. § 123B.25 (2002) when the teacher is found to have acted in bad faith.

3. There is no conversion where the property is determined to be compensation to the party who allegedly converted it.

Discovery

In re Trusteeship of Trust Created Under Trust Agreement Dated Dec. 31, 1974, (A03-454) 674 N.W.2d 222 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004), *cert. denied,* 125 S. Ct. 312, 345 (Oct. 12, 2004).

Minn. Stat. § 501B.16(3), (4) (2002), which authorizes trustees to petition the district court for an order determining trust beneficiaries and interpret trust terms, does not authorize trustees to mount a collateral attack on a beneficiary's previously determined paternity without regard for the standing and timeliness requirements of applicable parentage laws.

Findings

Kush v. Mathison, (A03-1686) 683 N.W.2d 841 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004).

A district court may still make a finding of harassment if such conduct has, or is intended to have, a substantial adverse effect on the safety, security or privacy of the average, reasonable individual, even if the intended victim shows resilience to the harasser's ongoing conduct.

Unbank Co. v. Merwin Drug Co., (A03-1029) 677 N.W.2d 105 (Minn. App. 2004).

A Minnesota state administrative agency must be joined in a declaratory judgment action interpreting the agency's licensing power and affecting licensing determinations subject to the agency's authority.

Jurisdiction

Johnson v. Wright, (A03-1511) 682 N.W.2d 671 (Minn. App. 2004), *review granted* (Minn. Oct. 19, 2004).

1. An agreement is champertous when a person without interest in another's lawsuit undertakes to carry it on at his or her own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation.

2. A loan agreement wherein a third party financially assists a litigant throughout the litigation process is valid if the third party has an expectation of reimbursement for the expenses paid regardless of the outcome of the litigation.

3. Jurisdiction by Minnesota courts is proper where there is nothing to suggest that exercise of such jurisdiction would interfere with or infringe on a Native American tribe's self-government, government functions, laws, or customs.

Lorix v. Crompton Corp., (A03-1518) 680 N.W.2d 574 (Minn. App. 2004), *review denied* (Minn. Sept. 21, 2004).

An out-of-state corporation's simple commercial contacts, unrelated to the plaintiff's claims, do not, standing alone, constitute continuous and systematic business contacts in Minnesota that form a basis for personal jurisdiction.

Hyatt v. Anoka Police Dep't, (A03-1707) 680 N.W.2d 115 (Minn. App. 2004), *review granted* (Minn. July 20, 2004).

1. Where imposition of the plain language of a statute would lead to contradictory and absurd results, a court may look beyond the literal language to ascertain the intent of the legislature.

2. The legislature did not intend Minn. Stat. § 347.22 (2002), which imposes strict liability upon the owner of a dog for injuries caused to a person, to apply to police dogs.

State ex rel. Jarvela v. Burke, (A03-1232) 678 N.W.2d 68 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

The adjudicator must consider an obligor's subsequent children when modifying and extending a child support obligation indefinitely for adults statutorily defined as "children."

Unbank Co. v. Merwin Drug Co., (A03-1029) 677 N.W.2d 105 (Minn. App. 2004).

A Minnesota state administrative agency must be joined in a declaratory judgment action interpreting the agency's licensing power and affecting licensing determinations subject to the agency's authority.

Porro v. Porro, (A03-1086) 675 N.W.2d 82 (Minn. App. 2004).

1. Evidence of actual arrearages is not necessary for effective registration of a foreign child-support order for enforcement in Minnesota when the obligor fails to contest the registration of the order in a timely manner.

2. Minnesota courts lack subject-matter jurisdiction to modify a foreign child-support order when the petitioner is a Minnesota resident and the other parent lives elsewhere, unless the parties have filed written consents in the issuing tribunal for Minnesota courts to modify the order and assume continuing, exclusive jurisdiction over the order.

In re Appeal of Selection Process for Position of Electrician (Exam #000200), (A03-785) 674 N.W.2d 242 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004).

An order of the Minneapolis Civil Service Commission denying a request to reopen a civil service procedure must be reversed and a new hiring procedure conducted where (1) a municipality explicitly required and emphasized a specific educational requirement but then waived that requirement after applications were submitted and (2) there were inconsistencies in the method of point calculation of the applications.

Gerber v. Eastman, (A03-811) 673 N.W.2d 854 (Minn. App. 2004), *review denied* (Minn. Mar. 16, 2004).

The Indian Child Welfare Act does not apply where a non-Indian father seeks permanent sole legal and physical custody of his biological child after the state district court has granted permanent sole legal and physical custody to the child's Indian maternal grandmother who resides with the child on the reservation.

Kloncz v. Kloncz, (A03-549) 670 N.W.2d 618 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004).

Where notice of filing is served by facsimile and by mail on the same day, the period for response does not include the three additional days that would have been included under Minn. R. Civ. P. 6.05 had service been completed only by mail.

Wick v. Wick, (A03-74) 670 N.W.2d 599 (Minn. App. 2003).

1. A plaintiff must invoke the district court's personal jurisdiction over a defendant by a method (a) that is consistent with due process and (b) that complies with those portions of the Minnesota Rules of Civil Procedure that govern the commencement of civil actions and the service of process.

2. Neither Minn. Stat. § 518.6111 (2002) nor Minn. Stat. § 518.615 (2002) provides a basis for the exercise of personal jurisdiction by the district court for purposes beyond the pursuit of a contempt proceeding under Minn. Stat. § 518.615, subd. 2.

Juelich v. Yamazaki Mazak Optonics Corp., (A03-174, A03-228) 670 N.W.2d 11 (Minn. App. 2003), *aff'd on other grounds*, 682 N.W.2d 565 (Minn. 2004).

1. Minnesota's five-factor test for determining personal jurisdiction continues to provide an appropriate analytical framework for due process issues after the United States Supreme Court's decision in Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 107 S. Ct. 1026, 94 L.Ed.2d 92 (1987).

2. Notions of fair play and substantial justice would be offended by asserting jurisdiction over a Japanese component part manufacturer whose product was manufactured and sold in Japan to a Japanese finished product manufacturer where the only remaining claims to be tried are cross-claims for indemnity brought by the Japanese finished product manufacturer and its Illinois distribution subsidiary.

Danielson v. Nat'l Supply Co., (A03-325) 670 N.W.2d 1 (Minn. App. 2003), *review denied* (Minn. Dec. 16, 2003).

1. Minnesota, as the forum, applies this state's statute of limitations to damage claims of Minnesota residents for injuries that arise in other states both because the choice-influencing considerations approach indicates application of this state's law and because traditionally Minnesota has considered statutes of limitations as procedural.

2. Forum non conveniens does not support dismissing a claim brought by a Minnesota resident for injuries occurring in another state due to failure of a product purchased in a third state when it does not appear that any witnesses would be required from the other state with jurisdiction.

Eisenschenk v. Eisenschenk, (C2-03-343) 668 N.W.2d 235 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003).

1. The existence of a IV-D case on behalf of a party to a child-support dispute from whom support is sought is sufficient to confer jurisdiction on the expedited child-support process under Minn. Stat. §§ 484.702, subd. 1(b), (f), and 518.54, subd. 14 (2002).

2. Income may be imputed to or estimated for a child-support obligor either because the support obligor is voluntarily unemployed or underemployed under Minn. Stat. § 518.551, subd. 5b (2002), or because it is impracticable to determine the obligor's actual income.

3. Where a child-support obligation is reserved and set at a later date, it is generally inappropriate to make the reserved obligation retroactively effective to the date of the ruling reserving the obligation, and the fact that support was not required to be paid by the order reserving the obligation is not a sufficient reason to decline to apply the general rule.

Jury Instructions

Rowe v. Munye, (A03-465) 674 N.W.2d 761 (Minn. App. 2004), *review granted* (Minn. Apr. 28, 2004).

1. Under Minnesota law, a person who has a pre-existing disability or pre-existing medical condition at the time of an accident is entitled to damages for any aggravation of that pre-existing condition, even though the particular results would not have followed if the injured person had not been subject to the pre-existing condition. Damages are limited, however, to those results that are over and above the results that would have normally followed from the pre-existing condition, had there been no accident.

2. The jury instruction for aggravation of personal damage provided in CIVJIG 91.40 which instructs the jury that "[i]f you cannot separate damages caused by the pre-existing disability or medical condition from those caused by the accident, then (defendant) is liable for all the damages," misstates Minnesota law, and, when this instruction is given in a case that involves both a new injury and a pre-existing disability or medical condition, it constitutes prejudicial error.

New Trial

Dostal v. Curran, (A03-1483) 679 N.W.2d 192 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

Posttrial expert affidavits contradicting the unrecanted testimony of an expert witness who testified at trial are not "[m]aterial evidence newly discovered" within the meaning of Minn. R. Civ. P. 59.01(d).

Kloncz v. Kloncz, (A03-549) 670 N.W.2d 618 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004).

Where notice of filing is served by facsimile and by mail on the same day, the period for response does not include the three additional days that would have been included under Minn. R. Civ. P. 6.05 had service been completed only by mail.

Res Judicata

In re Trusteeship of Trust Created Under Trust Agreement Dated Dec. 31, 1974, (A03-454) 674 N.W.2d 222 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004), *cert. denied,* 125 S. Ct. 312, 345 (Oct. 12, 2004).

Minn. Stat. § 501B.16(3), (4) (2002), which authorizes trustees to petition the district court for an order determining trust beneficiaries and interpret trust terms, does not authorize trustees to mount a collateral attack on a beneficiary's previously determined paternity without regard for the standing and timeliness requirements of applicable parentage laws.

Service

Kloncz v. Kloncz, (A03-549) 670 N.W.2d 618 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004).

Where notice of filing is served by facsimile and by mail on the same day, the period for response does not include the three additional days that would have been included under Minn. R. Civ. P. 6.05 had service been completed only by mail.

Wick v. Wick, (A03-74) 670 N.W.2d 599 (Minn. App. 2003).

1. A plaintiff must invoke the district court's personal jurisdiction over a defendant by a method (1) that is consistent with due process and (2) that complies with those portions of the Minnesota Rules of Civil Procedure that govern the commencement of civil actions and the service of process.

2. Neither Minn. Stat. § 518.6111 (2002) nor Minn. Stat. § 518.615 (2002) provides a basis for the exercise of personal jurisdiction by the district court for purposes beyond the pursuit of a contempt proceeding under Minn. Stat. § 518.615, subd. 2.

Summary Judgment

Oldakowski v. M.P. Barrett Trucking, Inc., (A03-1557) 680 N.W.2d 590 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004).

The liability of a carrier who leases equipment for the conduct of its owner/operator extends to the negligence of the owner/operator in operating the equipment or in other conduct within the scope of the agreement to provide hauling services. Genuine fact issues on the scope of the agreement must be resolved in trial proceedings.

Ingram v. Syverson, (A03-967) 674 N.W.2d 233 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004).

1. Physicians testifying as expert witnesses in a personal-injury action, because of their training and experience, may rely on a patient's statement made about the patient's symptoms to formulate opinions concerning causation.

2. Where two theories of causation are reasonably plausible in a personal-injury action, a court may not circumvent the jury's authority to determine which theory is more probable by granting summary judgment.

In re Trusteeship of Trust Created Under Trust Agreement Dated Dec. 31, 1974, (A03-454) 674 N.W.2d 222 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004), *cert. denied*, 125 S. Ct. 312, 345 (Oct. 12, 2004).

Minn. Stat. § 501B.16(3), (4) (2002), which authorizes trustees to petition the district court for an order determining trust beneficiaries and interpret trust terms, does not authorize trustees to mount a collateral attack on a beneficiary's previously determined paternity without regard for the standing and timeliness requirements of applicable parentage laws.

Olmanson v. Le Sueur County, (A03-629) 673 N.W.2d 506 (Minn. App. 2004), *review granted* (Minn. Mar. 30, 2004).

1. As a statute of repose, Minn. Stat. § 541.051, subd. 1(a) (2002), provides that no action may accrue more than ten years after substantial completion of the construction in question. But subdivision 1(c) of the statute exempts actions for negligent maintenance, operation, and inspection. Thus, an action for failure to warn of a dangerous condition on a property-owner's land is not time-barred by subdivision 1(a).

2. A county is not protected by discretionary immunity under Minn. Stat. § 466.03, subd. 6 (2002), when it does not provide evidence of specific facts showing that the county established its policy through a deliberative decision-making process.

WDSI, Inc. v. County of Steele, (A03-680) 672 N.W.2d 617 (Minn. App. 2003).

1. For purposes of Minn. Stat. § 13.05, subd. 11 (2002), a subdivision of the Minnesota Government Data Practices Act, constructing a jail, including developing qualifications and requirements for the bidding process, is a governmental function.

2. If a private party fails to comply with the Minnesota Government Data Practices Act, which provides that a private party under contract with a governmental entity to perform governmental functions has a duty to provide the public with governmental data, the remedy is against the private party.

3. The Minnesota Government Data Practices Act does not provide that a governmental entity has a duty to obtain governmental data from a private person with whom it has contracted to perform governmental functions.

Auto-Owners Ins. Co. v. Forstrom, (C8-03-296) 669 N.W.2d 617 (Minn. App. 2003), *aff'd* , 684 N.W.2d 494 (Minn. 2004).

Extrinsic evidence may be introduced to rebut the presumption of vehicle ownership that is established by the certificate of title only to avoid vicarious liability or to avoid responsibility under the no-fault act.

COMMERCIAL LAW

Duxbury v. Spex Feeds, Inc., (A03-1456) 681 N.W.2d 380 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004).

1. Statutory regulation of grain banks under Minn. Stat. ch. 236 does not abrogate actions for warranty under the Uniform Commercial Code or for products liability.

2. Calculation of prejudgment interest, an issue determined by the district court, not the jury, is governed by Minn. Stat. § 549.09.

CONSTITUTIONAL LAW

State v. Heath, (A03-737) 685 N.W.2d 48 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

No due-process violation occurs when law enforcement, in good faith and in accordance with state and federal regulations, destroys evidence from a clandestine drug-manufacturing operation.

Siemens Bldg. Techs., Inc. v. Peak Mech., Inc., (A04-131) 684 N.W.2d 914 (Minn. App. 2004), *review denied* (Minn. Oct. 19, 2004).

Minn. Stat. § 514.02 (2002), a mechanics' lien statute, does not provide a remedy against a third-party secured creditor who receives funds in the ordinary course of business and who is not in privity of contract with the party asserting a claim under the statute.

State v. Hartmann, (A03-1674) 681 N.W.2d 690 (Minn. App. 2004), *review granted* (Minn. Sept. 21, 2004).

Provisions of the Minnesota Consolidated Food Licensing Law and the Minnesota Meat and Poultry Inspection Act restricting, respectively, the sale of food without a license and the sale of custom-processed meat are valid exercises of the state's police powers and do not impinge on any fundamental rights. As such, those provisions are constitutional notwithstanding a constitutional provision authorizing farmers to sell or peddle farm products without obtaining a license.

State v. Schultz, (A03-1240) 676 N.W.2d 337 (Minn. App. 2004).

1. A district court has broad discretion to expunge judicial records if such expungement reduces or eliminates unfairness to an aggrieved party.

2. When an aggrieved party's constitutional rights are not infringed, the district court's inherent authority to order expungement shall not extend to non-judicial records retained by the executive branch.

3. Because executive agencies party to an expungement action share not only interwoven but identical interests, a reversal in favor of an appealing agency may also extend to non-appealing agencies.

State v. Kolla, (A03-55) 672 N.W.2d 1 (Minn. App. 2003).

1. The term "aquatic farm" as used in Minn. Stat. § 97A.255, subd. 2(a) (2000), applies exclusively to facilities that meet the definition of that term set forth in the Aquaculture Development Act (ADA), Minn. Stat. § 17.46-.4999 (2000).

2. Because Minn. Stat. §§ 97A.475, subd. 28(1), 97C.501, subd. 4(a) (2000) impose a differential license fee that favors resident minnow haulers and exporters over their nonresident counterparts, those provisions discriminate against interstate commerce in violation of the Commerce Clause.

Due Process

Kelly v. Campaign Fin. & Pub. Disclosure Bd., (A03-970) 679 N.W.2d 178 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

1. Relator generally complied with an earlier decision issued by respondent when he accepted a gift from a lobbyist principal on behalf of the City of St. Paul and used the gift for a public purpose.

2. Relator did not violate Minn. Stat. § 10A.071 (2002) where prior acceptance by the St. Paul City Council was not possible and the city council, as soon as practicable thereafter, accepted the gift and appropriated use of the gift to relator pursuant to Minn. Stat. § 465.03 (2002).

In re Welfare of Child of W.L.P. & T.J.S., (A03-1593, A03-1603) 678 N.W.2d 703 (Minn. App. 2004).

Admitting to the allegations in a petition to terminate parental rights does not convert the proceeding into a voluntary termination of parental rights. To voluntarily terminate parental rights the parent must affirmatively demonstrate a desire to terminate the parent-child relationship for good cause.

Pomrenke v. Comm'r of Commerce, (A03-497) 677 N.W.2d 85 (Minn. App. 2004), *review denied* (Minn. May 26, 2004).

1. Under the Minnesota Residential Originator and Servicer Licensing Act (Act), the Department of Commerce has jurisdiction over an employee of a licensee who performs mortgage origination services but who is exempt from the Act's licensure requirement.

2. The Department of Commerce does not infringe on an individual's property interest in private employment by prohibiting an individual found to have violated the Act from engaging in mortgage origination/servicing.

Equal Protection

Council of Indep. Tobacco Mfrs. of America v. State, (A03-2020) 685 N.W.2d 467 (Minn. App. 2004), *review granted* (Minn. Nov. 16, 2004).

1. Minn. Stat. § 297F.24 (Supp. 2003) does not unconstitutionally abridge the First Amendment rights of tobacco distributors and manufacturers who are not parties to the settlement of the state's tobacco suit, *State by Humphrey v. Philip Morris, Inc.*, No. C1-94-8565 (Minn. Dist. Ct. May 8, 1998).

2. Minn. Stat. § 297F.24 does not violate the Equal Protection Clause or the state's uniformity clause by taxing distributors of cigarettes manufactured by non-settling manufacturers.

3. Minn. Stat. § 297F.24 is not an unlawful bill of attainder.

4. Minn. Stat. § 297F.24 does not violate the state constitution's prohibition against special legislation.

First Amendment

Council of Indep. Tobacco Mfrs. of America v. State, (A03-2020) 685 N.W.2d 467 (Minn. App. 2004), *review granted* (Minn. Nov. 16, 2004).

1. Minn. Stat. § 297F.24 (Supp. 2003) does not unconstitutionally abridge the First Amendment rights of tobacco distributors and manufacturers who are not parties to the settlement of the state's tobacco suit, *State by Humphrey v. Philip Morris, Inc.*, No. C1-94-8565 (Minn. Dist. Ct. May 8, 1998).

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3. Minn. Stat. § 297F.24 is not an unlawful bill of attainder.

4. Minn. Stat. § 297F.24 does not violate the state constitution's prohibition against special legislation.

State v. Pedersen, (A03-249) 679 N.W.2d 368 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004).

To establish that one has a sincerely held religious belief in the medicinal use of marijuana that is protected under the Freedom of Conscience Clause, article I, section 16, of the Minnesota Constitution, the individual must articulate some connection between the use of marijuana and his or her communal religious practices or the principle tenets of his or her religion.

City of Elko v. Abed, (A03-1050) 677 N.W.2d 455 (Minn. App. 2004), *review denied* (Minn. June 29, 2004).

1. Nude dancing is "expressive conduct" that falls only within the outer ambit of the First Amendment's protection.

2. A municipal ordinance establishing licensing requirements for nude dancing establishments is constitutional where it is (1) a content-neutral time, place, and manner regulation; (2) designed to serve a substantial governmental interest; and (3) which does not unreasonably limit alternative avenues of communication.

3. Evidence showing the negative secondary effects of adult establishments is sufficient to support an ordinance establishing licensing requirements for nude dancing establishments unless a prospective licensee casts direct doubt on the reliability of the evidence.

4. In ordinances establishing licensing requirements for nude dancing establishments, a disqualification provision based on prior criminal convictions is valid where it: (1) has a substantial relationship between the information required and the government interest; (2) sufficiently limits the decision-maker's discretion; and (3) provides a specific time period within which individuals who have committed enumerated offenses cannot receive a license to operate a sexually oriented business.

5. Disclosure provisions in ordinances establishing licensing requirements for nude dancing establishments are valid where there is a significant governmental interest that is furthered by the required disclosures.

6. A prospective licensee has the burden to show that license and investigation fees contained in an ordinance establishing licensing requirements for nude dancing establishments are unreasonable.

7. Distance restrictions and prohibitions against gratuities in an ordinance establishing licensing requirements for nude dancing establishments are permissible where the restrictions and prohibitions are reasonable, content-neutral time, place and manner restrictions, and where the distance restriction is well defined.

State v. Dahl, (A03-375) 676 N.W.2d 305 (Minn. App. 2004), *review denied* (Minn. June 15, 2004), *cert. denied*, 73 U.S.L.W. 3169 (U.S. Sept. 13, 2004).

A content-neutral provision of law enacted to further a substantial governmental interest without entirely foreclosing a means of communication is valid so long as the legislative body reasonably determined its goal would be less effectively achieved without the provision.

Rooney v. Rooney, (A03-53) 669 N.W.2d 362 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003), *cert. denied*, 124 S. Ct. 2075 (Apr. 26, 2004).

1. A religious institution providing in-kind benefits to a church member is a "payor of funds" under Minn. Stat. § 518.6111 (2002).

2. A district court has subject-matter jurisdiction to determine whether a religious entity is a "payor of funds" for child-support withholding purposes pursuant to Minn. Stat. § 518.6111 (2002), and may apply the statute without violating the Minnesota or federal constitutions.

3. The district court did not err by deciding a remand under a statute replacing the statute under which the remand was originally ordered.

CONTRACTS

Siemens Bldg. Techs., Inc. v. Peak Mech., Inc., (A04-131) 684 N.W.2d 914 (Minn. App. 2004), *review denied* (Minn. Oct. 19, 2004).

Minn. Stat. § 514.02 (2002), a mechanics' lien statute, does not provide a remedy against a third-party secured creditor who receives funds in the ordinary course of business and who is not in privity of contract with the party asserting a claim under the statute.

Johnson v. Wright, (A03-1511) 682 N.W.2d 671 (Minn. App. 2004), *review granted* (Minn. Oct. 19, 2004).

1. An agreement is champertous when a person without interest in another's lawsuit undertakes to carry it on at his or her own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation.

2. A loan agreement wherein a third party financially assists a litigant throughout the litigation process is valid if the third party has an expectation of reimbursement for the expenses paid regardless of the outcome of the litigation.

3. Jurisdiction by Minnesota courts is proper where there is nothing to suggest that exercise of such jurisdiction would interfere with or infringe on a Native American tribe's self-government, government functions, laws, or customs.

Vaubel Farms, Inc. v. Shelby Farmers Mut., (A03-1607) 679 N.W.2d 407 (Minn. App. 2004).

A "suit" refers to any proceeding by a party or parties against another in a court of general jurisdiction; it does not include arbitration.

Transit Team, Inc. v. Metro. Council, (A03-1344) 679 N.W.2d 390 (Minn. App. 2004).

1. Minn. Stat. § 473.392 (2002), which governs competitive bidding for metropolitan transit service, applies to competitively-procured paratransit contracts.

2. Minn. Stat. § 473.392 does not require the Metropolitan Council to abandon the competitive procurement standards and procedures of its predecessor.

3. A public authority may substantially comply with established standards and procedures, even if such compliance is inadvertent.

4. Injunction is improper where a trial court finds substantial compliance with established standards and procedures, even if such compliance is inadvertent.

Mon-Ray, Inc. v. Granite Re, Inc., (A03-660) 677 N.W.2d 434 (Minn. App. 2004), *review denied* (Minn. June 29, 2004).

1. An unpaid subcontractor does not have an equitable claim against a project owner for the payment of money forfeited by a general contractor when the subcontractor fails to timely pursue an available legal remedy.

2. A surety is not entitled, under a theory of equitable subrogation, to payment by a project owner of money forfeited by a general contractor.

Tollefson Dev., Inc. v. McCarthy, (A03-185) 668 N.W.2d 701 (Minn. App. 2003).

An equitable interest, obtained pursuant to a purchase agreement with unfulfilled contingencies, constitutes an insufficient interest in real property to maintain a partition action.

Meeting of Minds

TNT Props., Ltd. v. Tri-Star Developers, LLC, (A03-1186) 677 N.W.2d 94 (Minn. App. 2004).

When the parties to a real estate transaction orally recite the terms of a settlement agreement on the record in open court and expressly assent to be bound by the agreement, the writing and subscription requirements of the statute of frauds, Minn. Stat. § 513.04 (2002), are satisfied.

Modification

TNT Props., Ltd. v. Tri-Star Developers, LLC, (A03-1186) 677 N.W.2d 94 (Minn. App. 2004).

When the parties to a real estate transaction orally recite the terms of a settlement agreement on the record in open court and expressly assent to be bound by the agreement, the writing and subscription requirements of the statute of frauds, Minn. Stat. § 513.04 (2002), are satisfied.

Edina Dev. Corp. v. Hurrle, (A03-32) 670 N.W.2d 592 (Minn. App. 2003), *review denied* (Minn. Dec. 23, 2003).

1. The cancellation provisions of Minn. Stat. § 559.21 (2002) inform and are statutorily implied into a contract for the conveyance of real estate, but they do not become express terms of the contract.

2. Minn. Stat. § 559.21 does not enable a buyer who has defaulted under the terms of a purchase agreement to perform the agreement in accordance with its terms, but, instead, allows a buyer to enforce the agreement in spite of its terms.

CRIMINAL

Expungement

State v. Schultz, (A03-1240) 676 N.W.2d 337 (Minn. App. 2004).

1. A district court has broad discretion to expunge judicial records if such expungement reduces or eliminates unfairness to an aggrieved party.

2. When an aggrieved party's constitutional rights are not infringed, the district court's inherent authority to order expungement shall not extend to non-judicial records retained by the executive branch.

3. Because executive agencies party to an expungement action share not only interwoven but identical interests, a reversal in favor of an appealing agency may also extend to non-appealing agencies.

Forfeiture

Blackwell v. 2002 Kia 4 Door STL Sedan, (CX-03-395) 670 N.W.2d 19 (Minn. App. 2003).

An unsecured, private loan for the purchase of a car is not a "bona fide security interest" protected from forfeiture under Minn. Stat. § 169A.63, subd. 7(b) (2002).

Guilty Plea

State v. Anyanwu, (A03-1418) 681 N.W.2d 411 (Minn. App. 2004).

A guilty plea is per se invalid when the district court abandons its role as an independent examiner and improperly injects itself into the plea negotiations by promising a particular sentence in advance.

State v. Hagen, (C0-02-1318) 679 N.W.2d 739 (Minn. App. 2004), *review granted, opinion vacated, and cause remanded* (Minn. July 20, 2004) (*Blakely*).

Heightened scrutiny of upward durational departures is required to ensure that sentences for sex offenders are not improperly based on public-safety concerns already addressed by "risk management tools" such as registration, community notification, and the possibility of civil commitment, that are separate from the prison sentence imposed.

Stone v. State, (A03-987) 675 N.W.2d 631 (Minn. App. 2004).

1. Mistaken reference to "supervised" release rather than "conditional" release at the plea hearing and at sentencing, does not in itself render a guilty plea unintelligent.

2. Mandatory conditional release imposed under Minn. Stat. § 609.109, subd. 7 (2002), is included in calculating the maximum sentence for a criminal act.

Investigation

State v. Heath, (A03-737) 685 N.W.2d 48 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

No due-process violation occurs when law enforcement, in good faith and in accordance with state and federal regulations, destroys evidence from a clandestine drug-manufacturing operation.

State v. Whittle, (A03-1111) 685 N.W.2d 461 (Minn. App. 2004), *review denied* (Minn. Oct. 19, 2004).

A defendant's statement to police taken in violation of *Miranda* may be used to impeach the defendant's trial testimony even if the statement's only impeachment value is its omission of some details a suspect could ordinarily be expected to relate.

State v. Ruoho, (A03-2015, A03-2016) 685 N.W.2d 451 (Minn. App. 2004).

1. For purposes of establishing probable cause to issue a search warrant, the required nexus between the place to be searched and the items to be seized need not rest on direct observations or first-hand evidence of criminal activity at the place to be searched; instead, probable cause may be inferred from the circumstances, including the nature of the alleged crime, the nature of the items to be seized, the extent of an opportunity for concealment, and reasonable assumptions about where a suspect is likely to keep evidence.

2. In the absence of probable cause to arrest, the off-premises seizure of a person under the limited authority to detain implied in a search warrant is unlawful, unless the seizure is necessary to prevent flight, to minimize the risk of harm posed by the search to the officers executing the warrant, or to facilitate the search.

State v. Voss, (A03-1241) 683 N.W.2d 846 (Minn. App. 2004).

Administrative searches by firefighters, like searches by law enforcement, are subject to limitations under the United States and Minnesota Constitutions; the state bears the burden to justify warrantless searches by firefighters.

State v. Carter, (A03-1215) 682 N.W.2d 648 (Minn. App. 2004), *review granted* (Minn. Sept. 21, 2004).

Governing precedents do not require the district court, when considering the cause stated in an application for a search warrant, to disregard evidence obtained through use of a dog sniff, so long as use of the dog does not offend privacy expectations deemed by society to be reasonable. There is no such privacy expectation in the common areas of a gated, outdoor storage facility to which there is no claim that public access is restricted.

State v. Bergh, (A03-1577) 679 N.W.2d 734 (Minn. App. 2004).

1. In Minnesota, the moment a motorist asks to consult with a lawyer before deciding whether or not to submit to blood-alcohol testing, a limited constitutional right to counsel attaches irrespective of whether the test results might be used as evidence in a civil or criminal proceeding.

2. The denial of an opportunity to secure the pre-test assistance of counsel violates the Minnesota Constitution and test results may not be used to enhance a subsequent charge.

3. Under Colorado law, a motorist has no right to the pre-test assistance of counsel. A Colorado driver’s license revocation resulting from an uncounseled blood-

alcohol test violates the Minnesota Constitution and cannot be used to enhance Minnesota impaired driving charges.

4. A stipulation that Colorado law does not permit a pre-test right to counsel coupled with appellant's affidavit that he was not given an opportunity to consult with a lawyer before deciding to submit to blood-alcohol testing satisfies appellant's burden of production of evidence to show that he was denied assistance of counsel.

State v. Johnson, (A03-1385) 679 N.W.2d 169 (Minn. App. 2004).

1. When the defendant has had ample opportunity to present evidence in a probation revocation hearing, the rules of evidence do not preclude admission of hearsay evidence, such as a letter reporting that defendant violated the terms of probation.

2. In a probation revocation hearing, a police officer may testify as to what he observed during a traffic stop even though there was lack of articulable suspicion for the stop.

State v. Laducer, (A03-1533) 676 N.W.2d 693 (Minn. App. 2004), *review denied* (Minn. June 15, 2004).

1. Minn. Stat. § 169A.41 does not prohibit the results of a breath test administered by a non-peace officer from being considered by a peace officer in forming probable cause to arrest for violation of Minn. Stat. § 169A.20.

2. The arresting officer had probable cause to arrest appellant for driving while under the influence of alcohol and to invoke the implied consent law.

State v. Volkman, (A03-1123) 675 N.W.2d 337 (Minn. App. 2004).

1. A police officer who makes observations during the course of a lawful stop, which create a reasonable and articulable suspicion that a defendant may be engaged in criminal activity, may expand the scope of the stop by requesting consent to search.

2. An inventory search is not based on probable cause, but is an administrative search designed to protect the property of a vehicle's owner and shield the police from claims for loss or destruction of property.

3. Evidence discovered during a challenged search need not be suppressed if it inevitably would have been discovered during a legal inventory search.

State v. Kolb, (A03-931) 674 N.W.2d 238 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004).

Police do not need reasonable, articulable suspicion to conduct a narcotics dog sniff around the exterior of a lawfully impounded vehicle.

In re Welfare of C.M.A., (A03-773) 671 N.W.2d 597 (Minn. App. 2003).

1. The state may appeal a pretrial order dismissing a delinquency petition for lack of probable cause if review presents a legal question based solely on the legal interpretation of a statute.

2. Minn. Stat. § 634.03 (2002), which states that a confession "shall not be sufficient to warrant conviction without evidence that the offense charged has been committed," does not apply to a probable cause determination, where the record includes not only the confession, but also other evidence that establishes the commission of a crime.

State v. Bergerson, (A03-112) 671 N.W.2d 197 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004).

1. As a precautionary measure, law enforcement officers may conduct protective sweep searches of areas immediately adjacent to the place of arrest without probable cause or reasonable suspicion.

2. For areas near, but not immediately adjacent to, the place of arrest, law enforcement officers may conduct protective sweep searches if they have an articulated reasonable suspicion that the area to be searched harbors one or more individuals who threaten the safety of those on the scene.

3. A postconviction court does not abuse its discretion by denying relief for ineffective assistance of counsel where counsel's failure to elicit testimony resulted from a tactical decision and where appellant cannot show that the trial outcome would have been different but for that decision.

Postconviction Relief

State v. Bergerson, (A03-112) 671 N.W.2d 197 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004).

1. As a precautionary measure, law enforcement officers may conduct protective sweep searches of areas immediately adjacent to the place of arrest without probable cause or reasonable suspicion.

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3. A postconviction court does not abuse its discretion by denying relief for ineffective assistance of counsel where counsel's failure to elicit testimony resulted from a tactical decision and where appellant cannot show that the trial outcome would have been different but for that decision.

Pretrial

State v. Hartmann, (A03-1674) 681 N.W.2d 690 (Minn. App. 2004), *review granted* (Minn. Sept. 21, 2004).

Provisions of the Minnesota Consolidated Food Licensing Law and the Minnesota Meat and Poultry Inspection Act restricting, respectively, the sale of food without a license and the sale of custom-processed meat are valid exercises of the state's police

powers and do not impinge on any fundamental rights. As such, those provisions are constitutional notwithstanding a constitutional provision authorizing farmers to sell or peddle farm products without obtaining a license.

State v. Cham, (A03-1239) 680 N.W.2d 121 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

1. It is within the discretion of the district court to appoint an interpreter for a defendant who is handicapped in the English language.

2. The district court may evaluate the defendant's competency in the English language, and therefore the defendant's need for an interpreter, by considering, on a nonexclusive basis, the complexity of the proceedings or indicators such as the defendant's mispronunciations, pauses, facial expressions, gestures, comprehension of proceedings, communication with counsel, or communications with the presiding judicial officer.

State v. Bergh, (A03-1577) 679 N.W.2d 734 (Minn. App. 2004).

1. In Minnesota, the moment a motorist asks to consult with a lawyer before deciding whether or not to submit to blood-alcohol testing, a limited constitutional right to counsel attaches irrespective of whether the test results might be used as evidence in a civil or criminal proceeding.

2. The denial of an opportunity to secure the pre-test assistance of counsel violates the Minnesota Constitution and test results may not be used to enhance a subsequent charge.

3. Under Colorado law, a motorist has no right to the pre-test assistance of counsel. A Colorado driver's license revocation resulting from an uncounseled blood-alcohol test violates the Minnesota Constitution and cannot be used to enhance Minnesota impaired driving charges.

State v. Wickner, (C4-03-215) 673 N.W.2d 859 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004).

Under the governing state statute, intentionally absconding from electronic monitoring while on intensive supervised release from a correctional facility constitutes escape from lawful custody.

Sentencing

State v. Rouland, (A04-620) 685 N.W.2d 706 (Minn. App. 2004), *review denied* (Minn. Nov. 23, 2004).

1. The comments to the Minnesota Sentencing Guidelines are advisory and are not binding on the courts.

2. Where there is a conflict between the clear and unambiguous language of a guidelines text and the comment accompanying that guideline, the text controls.

State v. Whitley, (A03-725) 682 N.W.2d 691 (Minn. App. 2004).

1. The evidence is sufficient to show force or coercion and to sustain appellant's conviction for fourth-degree criminal sexual conduct under Minn. Stat. § 609.345, subd. 1(c) (2002).

2. When the state seeks sentencing enhancement under Minn. Stat. § 609.108, subds. 1, 2 (2002), a jury must find that the offender committed a predatory offense involving sexual contact or penetration; to permit the court to determine this issue, a defendant must make a knowing and intelligent waiver of the right to a jury trial on the sentencing enhancement issue.

State v. Rourke, (A03-1254) 681 N.W.2d 35 (Minn. App. 2004), *review granted, opinion vacated, and cause remanded* (Minn. Sept. 21, 2004) (*Blakely*).

When the victim of an assault has suffered from an ongoing cycle of severe and egregious domestic violence at the hands of the defendant, the vulnerability of the victim and the position of power of the abuser are proper grounds for upwardly departing from the presumptive guidelines sentence.

State v. Hadgu, (A03-739, A03-1002) 681 N.W.2d 30 (Minn. App. 2004), *review denied* (Minn. Sept. 21, 2004).

A defendant is entitled to jail credit for the time spent in the custody of the United States Immigration and Naturalization Service when the defendant has posted bail, the INS held the defendant after the state court conviction and before sentencing, and the hold was in connection with the local offense.

State v. Hagen, (C0-02-1318) 679 N.W.2d 739 (Minn. App. 2004), *review granted, opinion vacated, and cause remanded* (Minn. July 20, 2004) (*Blakely*).

Heightened scrutiny of upward durational departures is required to ensure that sentences for sex offenders are not improperly based on public-safety concerns already addressed by "risk management tools" such as registration, community notification, and the possibility of civil commitment, that are separate from the prison sentence imposed.

State v. Pedersen, (A03-249) 679 N.W.2d 386 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004).

To establish that one has a sincerely held religious belief in the medicinal use of marijuana that is protected under the Freedom of Conscience Clause, article I, section 16, of the Minnesota Constitution, the individual must articulate some connection between the use of marijuana and his or her communal religious practices or the principle tenets of his or her religion.

Martinek v. State, (A03-1033) 678 N.W.2d 714 (Minn. App. 2004).

1. A letter of the district court that is neither served on a criminal defendant nor filed with the court cannot be construed as an order to amend a sentence.

2. The expiration of a criminal sentence bars further proceedings to amend or increase the sanctions on a conviction.

State v. Kier, (A03-643) 678 N.W.2d 672 (Minn. App. 2004), *review denied* (Minn. June 15, 2004).

A sentencing court may commit a person to the commissioner of corrections for a gross misdemeanor under Minnesota law when the sentence is served consecutively to a felony sentence.

State v. Bendzula, (A03-656) 675 N.W.2d 920 (Minn. App. 2004).

The appellate courts defer to the trial court's assessment of reduced culpability in its exercise of traditional sentencing discretion, including the court's examination of atypical considerations of the case and its attention given to public policy aims stated in the state sentencing guidelines.

Stone v. State, (A03-987) 675 N.W.2d 631 (Minn. App. 2004).

1. Mistaken reference to "supervised" release rather than "conditional" release at the plea hearing and at sentencing, does not in itself render a guilty plea unintelligent.

2. Mandatory conditional release imposed under Minn. Stat. § 609.109, subd. 7 (2002), is included in calculating the maximum sentence for a criminal act.

State v. Zeimet, (A03-273) 673 N.W.2d 191 (Minn. App. 2004), *review granted* (Minn. Mar. 30, 2004).

Under Minnesota statutes and sentencing guidelines, a prosecutor may elect to use qualified prior civil impaired-driving incidents to enhance an offender's driving-while-impaired charge to a first-degree felony level, leaving qualified prior criminal impaired-driving incidents for use in augmenting the offender's criminal history score.

State v. Blooflat, (C0-02-2095) 671 N.W.2d 591 (Minn. App. 2003).

1. Gross misdemeanor driving after cancellation under Minn. Stat. § 171.24, subd. 5 (Supp.1999) is not a lesser-included offense of aggravated driving under the influence under Minn. Stat. § 169.129 (Supp.1999).

2. Minn. Stat. § 609.035, subd. 2(g) (Supp.1999), which imposes consecutive sentences exceeding one year for gross misdemeanor convictions, is unconstitutional under Article I, Section 6 of the Minnesota Constitution.

Statutes

State v. Strandness, (A03-1863) 684 N.W.2d 516 (Minn. App. 2004).

1. Minn. Stat. § 169.06, subd. 9 (2002), provides an affirmative defense for a motorcyclist charged with failing to obey the instructions of an official traffic-control device; it does not exclude a motorcyclist from the requirement of Minn. Stat. § 169.06, subd. 4, that the driver of any vehicle obey such instructions.

2. A defendant charged with failing to obey the instructions of an official traffic-control device who raises the affirmative defense provided in Minn. Stat. § 169.06, subd. 9, has the burden of proving the elements of the defense.

State v. Hartmann, (A03-1674) 681 N.W.2d 690 (Minn. App. 2004), *review granted* (Minn. Sept. 21, 2004).

Provisions of the Minnesota Consolidated Food Licensing Law and the Minnesota Meat and Poultry Inspection Act restricting, respectively, the sale of food without a license and the sale of custom-processed meat are valid exercises of the state's police powers and do not impinge on any fundamental rights. As such, those provisions are constitutional notwithstanding a constitutional provision authorizing farmers to sell or peddle farm products without obtaining a license.

State v. Myrland, (A03-1646) 681 N.W.2d 415 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004).

Convictions for possession of pictorial representations of minors under Minn. Stat. § 617.247 (2002) must be reversed where the evidence is insufficient to prove beyond a reasonable doubt that the defendant possessed the material and either knew or should have known of its content.

State v. Cham, (A03-1239) 680 N.W.2d 121 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

1. It is within the discretion of the district court to appoint an interpreter for a defendant who is handicapped in the English language.

2. The district court may evaluate the defendant's competency in the English language, and therefore the defendant's need for an interpreter, by considering, on a nonexclusive basis, the complexity of the proceedings or indicators such as the defendant's mispronunciations, pauses, facial expressions, gestures, comprehension of proceedings, communication with counsel, or communications with the presiding judicial officer.

State v. Bergh, (A03-1577) 679 N.W.2d 734 (Minn. App. 2004).

1. In Minnesota, the moment a motorist asks to consult with a lawyer before deciding whether or not to submit to blood-alcohol testing, a limited constitutional right to counsel attaches irrespective of whether the test results might be used as evidence in a civil or criminal proceeding.

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State v. Laducer, (A03-1533) 676 N.W.2d 693 (Minn. App. 2004), *review denied* (Minn. June 15, 2004).

1. Minn. Stat. § 169A.41 does not prohibit the results of a breath test administered by a non-peace officer from being considered by a peace officer in forming probable cause to arrest for violation of Minn. Stat. § 169A.20.

2. The arresting officer had probable cause to arrest appellant for driving while under the influence of alcohol and to invoke the implied consent law.

State v. Enyeart, (A03-360) 676 N.W.2d 311 (Minn. App. 2004), *review denied* (Minn. May 18, 2004), *cert denied*, 125 S. Ct. 310 (Oct. 12, 2004).

1. The department of revenue rule listing considerations for deciding whether a person is domiciled in Minnesota for income-tax purposes, Minn. R. 8001.0300 (2001), is not unconstitutionally vague.

2. The state's method for counting days spent in Minnesota for tax purposes is not preempted by 49 U.S.C. § 40116 (2000) in cases involving the domiciliary status of air-carrier employees.

State v. Dahl, (A03-375) 676 N.W.2d 305 (Minn. App. 2004), *review denied* (Minn. June 15, 2004), *cert. denied*, 73 U.S.L.W. 3169 (U.S. Sept. 13, 2004).

A content-neutral provision of law enacted to further a substantial governmental interest without entirely foreclosing a means of communication is valid so long as the legislative body reasonably determined its goal would be less effectively achieved without the provision.

State v. Wickner, (C4-03-215) 673 N.W.2d 859 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004).

Under the governing state statute, intentionally absconding from electronic monitoring while on intensive supervised release from a correctional facility constitutes escape from lawful custody.

State v. Zeimet, (A03-273) 673 N.W.2d 191 (Minn. App. 2004), *review granted* (Minn. Mar. 30, 2004).

Under Minnesota statutes and sentencing guidelines, a prosecutor may elect to use qualified prior civil impaired-driving incidents to enhance an offender's driving-while-

impaired charge to a first-degree felony level, leaving qualified prior criminal impaired-driving incidents for use in augmenting the offender's criminal history score.

State v. Kolla, (A03-55) 672 N.W.2d 1 (Minn. App. 2003).

1. The term "aquatic farm" as used in Minn. Stat. § 97A.255, subd. 2(a) (2000), applies exclusively to facilities that meet the definition of that term set forth in the Aquaculture Development Act (ADA), Minn. Stat. § 17.46-.4999 (2000).

2. Because Minn. Stat. §§ 97A.475, subd. 28(1), 97C.501, subd. 4(a) (2000) impose a differential license fee that favors resident minnow haulers and exporters over their nonresident counterparts, those provisions discriminate against interstate commerce in violation of the Commerce Clause.

State v. Blooflat, (C0-02-2095) 671 N.W.2d 591 (Minn. App. 2003).

1. Gross misdemeanor driving after cancellation under Minn.Stat. § 171.24, subd. 5 (Supp.1999) is not a lesser-included offense of aggravated driving under the influence under Minn.Stat. § 169.129 (Supp.1999).

2. Minn.Stat. § 609.035, subd. 2(g) (Supp.1999), which imposes consecutive sentences exceeding one year for gross misdemeanor convictions, is unconstitutional under Article I, Section 6 of the Minnesota Constitution.

State v. Kramer, (C8-02-2054) 668 N.W.2d 32 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003).

Because the defendant's knowledge of the complainant's age is not an element of third-degree criminal sexual conduct, the defendant has the burden of raising and proving by a preponderance of the evidence the mistake-of-age defense.

Sufficiency of Evidence

State v. Whitley, (A03-725) 682 N.W.2d 691 (Minn. App. 2004).

1. The evidence is sufficient to show force or coercion and to sustain appellant's conviction for fourth-degree criminal sexual conduct under Minn. Stat. § 609.345, subd. 1(c) (2002).

2. When the state seeks sentencing enhancement under Minn. Stat. § 609.108, subds. 1, 2 (2002), a jury must find that the offender committed a predatory offense involving sexual contact or penetration; to permit the court to determine this issue, a defendant must make a knowing and intelligent waiver of the right to a jury trial on the sentencing enhancement issue.

State v. Myrland, (A03-1646) 681 N.W.2d 415 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004).

Convictions for possession of pictorial representations of minors under Minn. Stat. § 617.247 (2002) must be reversed where the evidence is insufficient to prove beyond a

reasonable doubt that the defendant possessed the material and either knew or should have known of its content.

State v. Hadgu, (A03-739, A03-1002) 681 N.W.2d 30 (Minn. App. 2004), *review denied* (Minn. Sept. 21, 2004).

A defendant is entitled to jail credit for the time spent in the custody of the United States Immigration and Naturalization Service when the defendant has posted bail, the INS held the defendant after the state court conviction and before sentencing, and the hold was in connection with the local offense.

State v. Ali, (A03-806) 679 N.W.2d 359 (Minn. App. 2004).

1. When there is adequate evidence that a laser-based speed-measuring device used to support a conviction has been tested for accuracy and that officers using the device have been trained in its use, a district court does not abuse its discretion by taking judicial notice of the device's general reliability.

2. Because Minn. Stat. § 169.14, subd. 10(a), (b) (2002), complies with, rather than conflicts with, the rules of evidence, it does not violate the separation-of-powers doctrine and is, therefore, constitutional.

3. Where the record demonstrates that a police officer is trained to use a laser-based speed-measuring device and that the device is routinely tested for accuracy by reliable internal and external methods, a district court does not abuse its discretion by admitting the laser reading under Minn. Stat. § 169.14, subd. 10(a).

4. The district court did not abuse its discretion by admitting the Certificate of Testing and Accuracy into evidence under the business-records exception where the record demonstrates that the certificate was reliable and was not prepared solely for litigation purposes.

5. A police officer's visual estimate of the speed of a moving vehicle is alone sufficient to support a speeding conviction where the record demonstrates that the officer received proper training in visual estimations and his observations were reasonably accurate.

State v. Bernardi, (A03-608) 678 N.W.2d 465 (Minn. App. 2004).

1. Evidence that appellant accelerated his car while a police officer was lying on the hood trying to stop him was sufficient to support appellant's conviction of first-degree assault—use of deadly force against a peace officer.

2. A hearsay statement offered under Minn. R. Evid. 804(b)(5) may be excluded if, as here, it lacks circumstantial guarantees of trustworthiness equivalent to traditional express hearsay exceptions.

3. It is not error for the district court to prohibit defense counsel from commenting on the state's failure to call witnesses on the state's witness list when those witnesses were available to both the state and the defense and the defense called the witnesses to testify.

State v. Wickner, (C4-03-215) 673 N.W.2d 859 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004).

Under the governing state statute, intentionally absconding from electronic monitoring while on intensive supervised release from a correctional facility constitutes escape from lawful custody.

State v. DeYoung, (C6-02-2280) 672 N.W.2d 208 (Minn. App. 2003).

1. When a defendant requests an instruction explaining the limited purpose for which *Spreigl* evidence was admitted, the district court must modify CRIMJIGs 2.06 and 3.16, and give the requested limiting instruction.

2. When the victim of criminal damage to property provides the labor needed to repair the damaged property, the value of the victim's labor can be considered in calculating the reduced value of the damaged property.

Trial

State v. Whittle, (A03-1111) 685 N.W.2d 461 (Minn. App. 2004), *review denied* (Minn. Oct. 19, 2004).

A defendant's statement to police taken in violation of *Miranda* may be used to impeach the defendant's trial testimony even if the statement's only impeachment value is its omission of some details a suspect could ordinarily be expected to relate.

State v. Kurz, (A03-1747) 685 N.W.2d 447 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004).

The six-month period in which the state has to hold a trial on a criminal defendant's indictment under the Uniform Mandatory Disposition of Detainers Act is tolled by the time reasonably required to consider a defendant's pretrial motion to dismiss for lack of probable cause.

State v. Davis, (A03-1426) 685 N.W.2d 442 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004).

When it is unclear whether a person intentionally aided in the commission of the crime of illegal possession of a firearm, the question of whether that person is an accomplice should be decided by the jury and the accomplice-testimony jury instruction should be given.

State v. Babcock, (C9-03-131) 685 N.W.2d 36 (Minn. App. 2004), *review denied* (Minn. Oct. 20, 2004).

A defendant in a criminal case who requests an instruction on the limited purpose of *Spreigl* evidence is entitled to the requested instruction.

State v. Whitley, (A03-725) 682 N.W.2d 691 (Minn. App. 2004).

1. The evidence is sufficient to show force or coercion and to sustain appellant's conviction for fourth-degree criminal sexual conduct under Minn. Stat. § 609.345, subd. 1(c) (2002).

2. When the state seeks sentencing enhancement under Minn. Stat. § 609.108, subds. 1, 2 (2002), a jury must find that the offender committed a predatory offense involving sexual contact or penetration; to permit the court to determine this issue, a defendant must make a knowing and intelligent waiver of the right to a jury trial on the sentencing enhancement issue.

State v. Plantin, (A03-258) 682 N.W.2d 653 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004).

1. Evidentiary rulings at trial are within the sound discretion of the district court and will not be disturbed absent a clear abuse of discretion.

2. Polling the jury following the return of a verdict satisfies a criminal defendant's right to a unanimous verdict, even if the district court failed to give a unanimous verdict instruction, or if the court gave an arguably inadequate unanimity instruction.

3. Absent a showing of actual bias during the proceedings, we will not reverse an appellant's conviction because of an alleged conflict of interest on the part of the district court judge if appellant did not object to the alleged conflict before or at trial.

State v. Carter, (A03-1215) 682 N.W.2d 648 (Minn. App. 2004), *review granted* (Minn. Sept. 21, 2004).

Governing precedents do not require the district court, when considering the cause stated in an application for a search warrant, to disregard evidence obtained through use of a dog sniff, so long as use of the dog does not offend privacy expectations deemed by society to be reasonable. There is no such privacy expectation in the common areas of a gated, outdoor storage facility to which there is no claim that public access is restricted.

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State v. Myrland, (A03-1646) 681 N.W.2d 415 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004).

Convictions for possession of pictorial representations of minors under Minn. Stat. § 617.247 (2002) must be reversed where the evidence is insufficient to prove beyond a

reasonable doubt that the defendant possessed the material and either knew or should have known of its content.

State v. Anyanwu, (A03-1418) 681 N.W.2d 411 (Minn. App. 2004).

A guilty plea is per se invalid when the district court abandons its role as an independent examiner and improperly injects itself into the plea negotiations by promising a particular sentence in advance.

State v. Hagen, (C0-02-1318) 679 N.W.2d 739 (Minn. App. 2004), *review granted, opinion vacated, and cause remanded* (Minn. July 20, 2004) (*Blakely*).

Heightened scrutiny of upward durational departures is required to ensure that sentences for sex offenders are not improperly based on public-safety concerns already addressed by "risk management tools" such as registration, community notification, and the possibility of civil commitment, that are separate from the prison sentence imposed.

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1. When there is adequate evidence that a laser-based speed-measuring device used to support a conviction has been tested for accuracy and that officers using the device have been trained in its use, a district court does not abuse its discretion by taking judicial notice of the device's general reliability.

2. Because Minn. Stat. § 169.14, subd. 10(a), (b) (2002), complies with, rather than conflicts with, the rules of evidence, it does not violate the separation-of-powers doctrine and is, therefore, constitutional.

3. Where the record demonstrates that a police officer is trained to use a laser-based speed-measuring device and that the device is routinely tested for accuracy by reliable internal and external methods, a district court does not abuse its discretion by admitting the laser reading under Minn. Stat. § 169.14, subd. 10(a).

4. The district court did not abuse its discretion by admitting the Certificate of Testing and Accuracy into evidence under the business-records exception where the record demonstrates that the certificate was reliable and was not prepared solely for litigation purposes.

5. A police officer's visual estimate of the speed of a moving vehicle is alone sufficient to support a speeding conviction where the record demonstrates that the officer received proper training in visual estimations and his observations were reasonably accurate.

State v. Wright, (A03-589) 679 N.W.2d 186 (Minn. App. 2004).

When stipulating to an element of an offense, a defendant must personally waive the right to a jury trial on that element either in writing or orally on the record after an advice of rights.

Martinek v. State, (A03-1033) 678 N.W.2d 714 (Minn. App. 2004).

1. A letter of the district court that is neither served on a criminal defendant nor filed with the court cannot be construed as an order to amend a sentence.

2. The expiration of a criminal sentence bars further proceedings to amend or increase the sanctions on a conviction.

State v. Bernardi, (A03-608) 678 N.W.2d 465 (Minn. App. 2004).

1. Evidence that appellant accelerated his car while a police officer was lying on the hood trying to stop him was sufficient to support appellant's conviction of first-degree assault—use of deadly force against a peace officer.

2. A hearsay statement offered under Minn. R. Evid. 804(b)(5) may be excluded if, as here, it lacks circumstantial guarantees of trustworthiness equivalent to traditional express hearsay exceptions.

3. It is not error for the district court to prohibit defense counsel from commenting on the state's failure to call witnesses on the state's witness list when those witnesses were available to both the state and the defense and the defense called the witnesses to testify.

State v. Enyeart, (A03-360) 676 N.W.2d 311 (Minn. App. 2004), *review denied* (Minn. May 18, 2004), *cert denied*, 125 S. Ct. 310 (Oct. 12, 2004).

1. The department of revenue rule listing considerations for deciding whether a person is domiciled in Minnesota for income-tax purposes, Minn. R. 8001.0300 (2001), is not unconstitutionally vague.

2. The state's method for counting days spent in Minnesota for tax purposes is not preempted by 49 U.S.C. § 40116 (2000) in cases involving the domiciliary status of air-carrier employees.

State v. Bendzula, (A03-656) 675 N.W.2d 920 (Minn. App. 2004).

The appellate courts defer to the trial court's assessment of reduced culpability in its exercise of traditional sentencing discretion, including the court's examination of atypical considerations of the case and its attention given to public policy aims stated in the state sentencing guidelines.

State v. Wickner, (C4-03-215) 673 N.W.2d 859 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004).

Under the governing state statute, intentionally absconding from electronic monitoring while on intensive supervised release from a correctional facility constitutes escape from lawful custody.

State v. DeYoung, (C6-02-2280) 672 N.W.2d 208 (Minn. App. 2003).

1. When a defendant requests an instruction explaining the limited purpose for which *Spreigl* evidence was admitted, the district court must modify CRIMJIGs 2.06 and 3.16, and give the requested limiting instruction.

2. When the victim of criminal damage to property provides the labor needed to repair the damaged property, the value of the victim's labor can be considered in calculating the reduced value of the damaged property.

Peterson v. State, (C9-02-2287) 672 N.W.2d 612 (Minn. App. 2003), *review denied* (Minn. Mar. 16, 2004).

The defendant in a criminal case has a constitutional right to be present when a judge communicates with a deliberating jury.

DEBTOR/CREDITOR

Siemens Bldg. Techs., Inc. v. Peak Mech., Inc., (A04-131) 684 N.W.2d 914 (Minn. App. 2004), *review denied* (Minn. Oct. 19, 2004).

Minn. Stat. § 514.02 (2002), a mechanics' lien statute, does not provide a remedy against a third-party secured creditor who receives funds in the ordinary course of business and who is not in privity of contract with the party asserting a claim under the statute.

DITCH LAW

Agra Res. Coop v. Freeborn County Bd. of Comm'rs, (A03-1440) 682 N.W.2d 681 (Minn. App. 2004).

1. Minnesota's drainage statute authorizes a county board, as a drainage authority, to accept petitions for the drainage of clean industrial cooling water from a source outside an incorporated area.

2. A county board, as a drainage authority, has authority to assess reasonable, volume-based user fees for benefits and maintenance for discharge of a predictable quantity of water into a ditch system.

ECONOMIC SECURITY

Eligibility

Huston v. Comm'r of Employment & Econ. Dev., (A03-175) 672 N.W.2d 606 (Minn. App. 2003), *review granted* (Minn. Feb. 25, 2004).

Minn. Stat. § 268.085, subd. 4(c) (2002), which provides that any person who files for or receives Social Security disability benefits is ineligible for unemployment compensation, violates the Americans with Disabilities Act and is invalid as applied to persons who are available to work but are classified as disabled for Social Security purposes.

Procedure

Waletich Corp. v. Comm'r of Employment & Econ. Dev., (A03-1739) 682 N.W.2d 663 (Minn. App. 2004).

A telephone appeal of a determination by the Department of Employment and Economic Development regarding unemployment liability is not effective unless the determination provides that such an informal appeal is available.

Quit/Good Cause

Rootes v. Wal-Mart Assocs., Inc., (A03-233) 669 N.W.2d 416 (Minn. App. 2003).

An employee who resigns from employment rather than accept substantial adverse changes in wages and hours has good reason caused by the employer to quit under Minn. Stat. § 268.095, subd. 3(c) (2002), and is not disqualified from receiving unemployment benefits under Minn. Stat. § 268.095, subd. 1(1) (2002).

EMPLOYMENT

Discrimination

Egan v. Hamline United Methodist Church, (A03-675) 679 N.W.2d 350 (Minn. App. 2004), *review denied* (Minn. June 29, 2004).

1. A music director is a part of the church's religious staff and the Minnesota Human Rights Act does not protect such staff against discrimination and retaliation by the church as an employer if the discrimination and retaliation is based on the employee's sexual orientation.

2. The exemption for religious organizations from the prohibition against employment discrimination and retaliation based on sexual orientation in the Minnesota Human Rights Act may only be waived by a specific and unequivocal statement.

Public Employee

In re Appeal of Selection Process for Position of Electrician (Exam #000200), (A03-785) 674 N.W.2d 242 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004).

An order of the Minneapolis Civil Service Commission denying a request to reopen a civil service procedure must be reversed and a new hiring procedure conducted where (1) a municipality explicitly required and emphasized a specific educational requirement but then waived that requirement after applications were submitted and (2) there were inconsistencies in the method of point calculation of the applications.

Norman v. Hous. & Redev. Auth. of Chisholm, (A03-1613) 681 N.W.2d 376 (Minn. App. 2004), *review granted* (Minn. Aug. 17, 2004).

The requirement under Minn. Stat. § 471.61, subd. 2b (2002), that a public employer pay insurance premiums for a retired public employee if the collective bargaining agreement in effect when the employee retired provided that the employer would pay premiums indefinitely, prevails over the restriction in Minn. Stat. § 179A.20, subd. 2a (2002), on the duration of collective bargaining agreement provisions.

ENVIRONMENTAL LAW

State ex rel. Fort Snelling State Park Ass'n v. Minneapolis Park & Recreation Bd., (C4-03-36) 673 N.W.2d 169 (Minn. App. 2003), *review denied* (Minn. Mar. 16, 2004).

1. The Minnesota Environmental Rights Act protects an open space that is a part of a designated historic site when the open space independently and in connection with the remainder of the site constitutes a historical resource.

2. A proposed use for a historical resource may impose a serious and long-term effect without materially adversely affecting the historical resource under the Minnesota Environmental Rights Act.

3. An action to protect a historical resource under the Minnesota Environmental Rights Act is not precluded by administrative consultations and mediations conducted pursuant to the Minnesota or National Historic Sites Acts.

EQUITABLE RELIEF

Claussen v. City of Lauderdale, (A03-1983) 681 N.W.2d 722 (Minn. App. 2004), *review denied* (Minn. Sept. 21, 2004).

1. A district court's discretion to grant equitable relief is not unlimited and must be supported by the facts and law.

2. A district court cannot grant an exclusive use easement over publicly owned park property, where the party claiming such an easement fails to prove, by clear and convincing evidence, that the necessary elements existed prior to public ownership.

Injunctions

Birch Publ'ns, Inc. v. RMZ of St. Cloud, Inc., (A03-1913) 683 N.W.2d 869 (Minn. App. 2004), *review denied* (Minn. Oct. 19, 2004).

1. A trademark is abandoned when its use has been discontinued with intent not to resume such use.

2. Having "intent to resume" use of a trademark requires the trademark owner to have plans to resume commercial use of the trademark.

3. A party claiming that a trademark has been abandoned must show non-use of the name by the legal owner and no intent by that person or entity to resume use in the reasonably foreseeable future.

4. A trademark owner cannot protect a trademark by merely having "an intent not to abandon," which would allow a trademark owner to protect a trademark with neither commercial use nor plans to resume commercial use.

Haley v. Forcelle, (A03-182) 669 N.W.2d 48 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003).

1. When a minority shareholder is a guarantor of company debt and a co-founder, director, officer, and employee of a company, and the majority shareholder is aware of the minority shareholder's financial position and removes the minority shareholder from the board of directors and terminates the minority shareholder's employment in an effort to force the minority shareholder to sell his shares, the minority shareholder suffers irreparable harm.

2. A minority shareholder has a reasonable expectation of continued employment where the minority shareholder is a co-founder, employee, and a guarantor of company debt and there is evidence that the founders of the company contemplated continued employment for the minority shareholder.

3. A minority shareholder who has a reasonable expectation of continued employment and has his employment terminated by a majority shareholder for reasons other than incompetence or the inability to perform his duties has been treated in a manner that is unfairly prejudicial and is likely to prevail on the merits of a claim under Minn. Stat. § 302A.751, subd. 1(b)(3) (2002).

Writs

Loyd v. Fabian, (A03-1779) 682 N.W.2d 688 (Minn. App. 2004), *review denied* (Minn. Oct. 19, 2004).

The district court's scope of inquiry in a habeas corpus proceeding is limited to constitutional and jurisdictional challenges.

Johnson v. Wright, (A03-1511) 682 N.W.2d 671 (Minn. App. 2004), *review granted* (Minn. Oct. 19, 2004).

1. An agreement is champertous when a person without interest in another's lawsuit undertakes to carry it on at his or her own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation.

2. A loan agreement wherein a third party financially assists a litigant throughout the litigation process is valid if the third party has an expectation of reimbursement for the expenses paid regardless of the outcome of the litigation.

3. Jurisdiction by Minnesota courts is proper where there is nothing to suggest that exercise of such jurisdiction would interfere with or infringe on a Native American tribe's self-government, government functions, laws, or customs.

EVIDENCE

Affidavits

Maudsley v. Pederson, (A03-915) 676 N.W.2d 8 (Minn. App. 2004).

Minn. Stat. § 145.682 (2002) encourages parties to bring motions to dismiss medical-malpractice actions early in the proceedings, either to eliminate frivolous lawsuits or to give plaintiffs an opportunity to cure any defects prior to trial. Thus, to challenge the sufficiency of a plaintiff's expert affidavit, the defendant should file a timely motion to dismiss pursuant to Minn. Stat. § 145.682, subd. 6 (2002).

Expert Testimony

McDonough v. Allina Health Sys., (A03-1636) 685 N.W.2d 688 (Minn. App. 2004).

1. The district court did not err in excluding expert testimony as not generally accepted in the applicable medical or scientific community when appellants did not demonstrate that physicians, neurologists, or scientists generally accept the theory that high infusion rates of immunoglobulin cause strokes.

2. The district court did not abuse its discretion in excluding the expert testimony as unreliable when the experts did not eliminate other potential causes of the stroke or otherwise demonstrate the reliability of their opinions that a high infusion rate of immunoglobulin caused a stroke.

In re T.L.A., (A03-973) 677 N.W.2d 428 (Minn. App. 2004), *review denied* (Minn. June 15, 2004).

Unless contrary to the best interests of the child, when a birth parent has voluntarily terminated his/her parental rights and has directed that certain relatives not be accorded the relative preference for adoption, the commissioner of the Department of Human Services shall honor that request.

Maudsley v. Pederson, (A03-915) 676 N.W.2d 8 (Minn. App. 2004).

Minn. Stat. § 145.682 (2002) encourages parties to bring motions to dismiss medical-malpractice actions early in the proceedings, either to eliminate frivolous lawsuits or to give plaintiffs an opportunity to cure any defects prior to trial. Thus, to challenge the sufficiency of a plaintiff's expert affidavit, the defendant should file a timely motion to dismiss pursuant to Minn. Stat. § 145.682, subd. 6 (2002).

In re Appeal of Selection Process for Position of Electrician (Exam #000200), (A03-785) 674 N.W.2d 242 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004).

An order of the Minneapolis Civil Service Commission denying a request to reopen a civil service procedure must be reversed and a new hiring procedure conducted where (1) a municipality explicitly required and emphasized a specific educational

requirement but then waived that requirement after applications were submitted and (2) there were inconsistencies in the method of point calculation of the applications.

Ingram v. Syverson, (A03-967) 674 N.W.2d 233 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004).

1. Physicians testifying as expert witnesses in a personal-injury action, because of their training and experience, may rely on a patient's statement made about the patient's symptoms to formulate opinions concerning causation.

2. Where two theories of causation are reasonably plausible in a personal-injury action, a court may not circumvent the jury's authority to determine which theory is more probable by granting summary judgment.

Hearsay

In re Trusts A & B of Divine, (A03-405) 672 N.W.2d 912 (Minn. App. 2004).

When a trust grants a trustee discretion in the exercise of a power, determining whether the trustee abused its discretion requires consideration of (1) the extent of the discretion conferred on the trustee; (2) the purposes of the trust; (3) the nature of the power; (4) external standards by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; and (6) whether the trustee has an interest that conflicts with that of the beneficiaries.

FAMILY LAW

Attorney Fees

Peterka v. Peterka, (A03-440) 675 N.W.2d 353 (Minn. App. 2004).

Where a maintenance recipient is, because of an inadequate maintenance award due to a sharing of the hardship at the time of the dissolution, unable to approximate the parties' marital standard of living, the maintenance obligor is not entitled to have the expenses associated with a subsequent family considered in a subsequent determination of the obligor's ability to pay maintenance.

Bender v. Bender, (C1-03-172) 671 N.W.2d 602 (Minn. App. 2003), *review denied* (Minn. Jan. 28, 2004).

1. Under Minn. Stat. § 518.58, subd. 1 (2002), the district court has the discretion to adjust the valuation dates and the valuation of assets to ensure a fair and equitable division of property.

2. When parties enter a parenting plan pursuant to Minn. Stat. § 518.1705 (2002), but do not use a traditional description of the custody arrangement, the district court's description of the custody arrangement as sole or joint physical custody is binding for purposes of child support.

Child Custody

Gerber v. Eastman, (A03-811) 673 N.W.2d 854 (Minn. App. 2004), *review denied* (Minn. Mar. 16, 2004).

The Indian Child Welfare Act does not apply where a non-Indian father seeks permanent sole legal and physical custody of his biological child after the state district court has granted permanent sole legal and physical custody to the child's Indian maternal grandmother who resides with the child on the reservation.

Child Support

O'Donnell v. O'Donnell, (A03-897) 678 N.W.2d 471 (Minn. App. 2004).

1. Payment of college tuition for an emancipated child is not an increased living expense for a child support obligee that justifies an increase in support payments by the obligor.
2. Mortgage expenses incurred to finance a property settlement obligation in a marriage dissolution are not increased living expenses for a child support obligee that justify an increase in support payments by the obligor.
3. When parties stipulate to court-ordered child support, foreseeable child-related expenses do not constitute a change of circumstances that justifies a modification of child support five months later.
4. Absent a substantial change in circumstances, child support established pursuant to a stipulated judgment and supported by statutorily required findings is fair and reasonable, even if it represents a downward deviation from the statutory child support guidelines.

State ex rel. Jarvela v. Burke, (A03-1232) 678 N.W.2d 68 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

The adjudicator must consider an obligor's subsequent children when modifying and extending a child support obligation indefinitely for adults statutorily defined as "children."

Porro v. Porro, (A03-1086) 675 N.W.2d 82 (Minn. App. 2004).

1. Evidence of actual arrearages is not necessary for effective registration of a foreign child-support order for enforcement in Minnesota when the obligor fails to contest the registration of the order in a timely manner.
2. Minnesota courts lack subject-matter jurisdiction to modify a foreign child-support order when the petitioner is a Minnesota resident and the other parent lives elsewhere, unless the parties have filed written consents in the issuing tribunal for Minnesota courts to modify the order and assume continuing, exclusive jurisdiction over the order.

Kilpatrick v. Kilpatrick, (A03-557) 673 N.W.2d 528 (Minn. App. 2004).

In a IV-D case where there has not been an assignment of support, and the public authority has not made a motion to intervene as required by Minn. Stat. § 518.551, subd. 9 (b) (2002), and Minn. R. Civ. P. 24.01, the public authority does not have standing to bring a motion to modify child support, and a child-support magistrate does not have jurisdiction to hear the motion.

Bender v. Bender, (C1-03-172) 671 N.W.2d 602 (Minn. App. 2003), *review denied* (Minn. Jan. 28, 2004).

1. Under Minn. Stat. § 518.58, subd. 1 (2002), the district court has the discretion to adjust the valuation dates and the valuation of assets to ensure a fair and equitable division of property.

2. When parties enter a parenting plan pursuant to Minn. Stat. § 518.1705 (2002), but do not use a traditional description of the custody arrangement, the district court's description of the custody arrangement as sole or joint physical custody is binding for purposes of child support.

Wick v. Wick, (A03-74) 670 N.W.2d 599 (Minn. App. 2003).

1. A plaintiff must invoke the district court's personal jurisdiction over a defendant by a method (1) that is consistent with due process and (2) that complies with those portions of the Minnesota Rules of Civil Procedure that govern the commencement of civil actions and the service of process.

2. Neither Minn. Stat. § 518.6111 (2002) nor Minn. Stat. § 518.615 (2002) provides a basis for the exercise of personal jurisdiction by the district court for purposes beyond the pursuit of a contempt proceeding under Minn. Stat. § 518.615, subd. 2.

Rooney v. Rooney, (A03-53) 669 N.W.2d 362 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003), *cert. denied*, 124 S. Ct. 2075 (Apr. 26, 2004).

1. A religious institution providing in-kind benefits to a church member is a "payor of funds" under Minn. Stat. § 518.6111 (2002).

2. A district court has subject-matter jurisdiction to determine whether a religious entity is a "payor of funds" for child-support withholding purposes pursuant to Minn. Stat. § 518.6111 (2002), and may apply the statute without violating the Minnesota or federal constitutions.

3. The district court did not err by deciding a remand under a statute replacing the statute under which the remand was originally ordered.

Eisenschenk v. Eisenschenk, (C2-03-343) 668 N.W.2d 235 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003).

1. The existence of a IV-D case on behalf of a party to a child-support dispute from whom support is sought is sufficient to confer jurisdiction on the expedited child-support process under Minn. Stat. §§ 484.702, subd. 1(b), (f), and 518.54, subd. 14 (2002).

2. Income may be imputed to or estimated for a child-support obligor either because the support obligor is voluntarily unemployed or underemployed under Minn. Stat. § 518.551, subd. 5b (2002), or because it is impracticable to determine the obligor's actual income.

3. Where a child-support obligation is reserved and set at a later date, it is generally inappropriate to make the reserved obligation retroactively effective to the date of the ruling reserving the obligation, and the fact that support was not required to be paid by the order reserving the obligation is not a sufficient reason to decline to apply the general rule.

Domestic Abuse

Gada v. Dedefo, (A03-1441) 684 N.W.2d 512 (Minn. App. 2004).

In a proceeding for relief under the Minnesota Domestic Abuse Act, when temporary custody is contested, Minn. Stat. § 518B.01, subd. 6(a)(4) (2002), requires the district court to make findings as to the best interests of the child.

Property Division

Gatfield v. Gatfield, (A03-1618) 682 N.W.2d 632 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004).

The district court may enforce the provisions of a stipulation regarding spouse's military disability benefits in a marital dissolution action.

Bender v. Bender, (C1-03-172) 671 N.W.2d 602 (Minn. App. 2003), *review denied* (Minn. Jan. 28, 2004).

1. Under Minn. Stat. § 518.58, subd. 1 (2002), the district court has the discretion to adjust the valuation dates and the valuation of assets to ensure a fair and equitable division of property.

2. When parties enter a parenting plan pursuant to Minn. Stat. § 518.1705 (2002), but do not use a traditional description of the custody arrangement, the district court's description of the custody arrangement as sole or joint physical custody is binding for purposes of child support.

Spousal Maintenance

Peterka v. Peterka, (A03-440) 675 N.W.2d 353 (Minn. App. 2004).

Where a maintenance recipient is, because of an inadequate maintenance award due to a sharing of the hardship at the time of the dissolution, unable to approximate the parties' marital standard of living, the maintenance obligor is not entitled to have the expenses associated with a subsequent family considered in a subsequent determination of the obligor's ability to pay maintenance.

Kielley v. Kielley, (A03-689) 674 N.W.2d 770 (Minn. App. 2004).

An extrajudicial stipulation to modify spousal maintenance must be contractually sound and otherwise fair and reasonable.

Evans v. Evans, (A03-243) 672 N.W.2d 232 (Minn. App. 2003).

The Minnesota maintenance statutes do not preclude a trial court from divesting itself of jurisdiction to modify an award of permanent maintenance when the parties to a divorce so stipulate according to law.

Uniform Laws

Porro v. Porro, (A03-1086) 675 N.W.2d 82 (Minn. App. 2004).

1. Evidence of actual arrearages is not necessary for effective registration of a foreign child-support order for enforcement in Minnesota when the obligor fails to contest the registration of the order in a timely manner.

2. Minnesota courts lack subject-matter jurisdiction to modify a foreign child-support order when the petitioner is a Minnesota resident and the other parent lives elsewhere, unless the parties have filed written consents in the issuing tribunal for Minnesota courts to modify the order and assume continuing, exclusive jurisdiction over the order.

Gerber v. Eastman, (A03-811) 673 N.W.2d 854 (Minn. App. 2004), *review denied* (Minn. Mar. 16, 2004).

The Indian Child Welfare Act does not apply where a non-Indian father seeks permanent sole legal and physical custody of his biological child after the state district court has granted permanent sole legal and physical custody to the child's Indian maternal grandmother who resides with the child on the reservation.

Vacation of Judgment

Evans v. Evans, (A03-243) 672 N.W.2d 232 (Minn. App. 2003).

The Minnesota maintenance statutes do not preclude a trial court from divesting itself of jurisdiction to modify an award of permanent maintenance when the parties to a divorce so stipulate according to law.

IMMUNITY

Anderson v. State, Dep't of Natural Res., (A03-679) 674 N.W.2d 748 (Minn. App. 2004), *review granted* (Minn. Apr. 28, 2004).

1. The district court correctly deferred to the interpretation of the director of the Minnesota Department of Agriculture Pesticide Enforcement Section (MDA) to determine if respondents used pesticides in a manner inconsistent with the label in violation of Minn. Stat. §§ 18B.01-.39 (2002).

2. In the context of a negligence action, bees that fly or forage over lands are not trespassers, and a landowner does not owe a common-law duty of care to the bees but is prohibited from wantonly or intentionally harming the bees.

3. Absent proof that an exception applies to the general rule that an employer cannot be held liable for the negligent acts of its independent contractor, the employer of an independent contractor is not liable for the acts or omissions of the independent contractor.

4. A claim for nuisance does not exist in the absence of a diminution of the claimant's interest in his or her land.

Official

Unzen v. City of Duluth, (A04-80, A04-81) 683 N.W.2d 875 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004).

A clubhouse for a municipal golf course facilitates the recreational activity taking place on city-owned land, and is therefore subject to "recreational-use" immunity provided under Minn. Stat. § 466.03, subd. 6e (2002).

Hyatt v. Anoka Police Dep't, (A03-1707) 680 N.W.2d 115 (Minn. App. 2004), *review granted* (Minn. July 20, 2004).

1. Where imposition of the plain language of a statute would lead to contradictory and absurd results, a court may look beyond the literal language to ascertain the intent of the legislature.

2. The legislature did not intend Minn. Stat. § 347.22 (2002), which imposes strict liability upon the owner of a dog for injuries caused to a person, to apply to police dogs.

Bailey v. City of St. Paul, (A03-1277) 678 N.W.2d 697 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

Official immunity applies to the conduct of government-employed ambulance crews providing emergency medical care in the performance of their official duties, and vicarious official immunity protects their government employers.

Podruch v. State, Dep't of Pub. Safety, (A03-809) 674 N.W.2d 252 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004).

The Department of Public Safety Commissioner's discretionary act of charging a fee for disability parking certificates was legally reasonable, conferring official and vicarious official immunity on the commissioner and state.

Statutory

Unzen v. City of Duluth, (A04-80, A04-81) 683 N.W.2d 875 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004).

A clubhouse for a municipal golf course facilitates the recreational activity taking place on city-owned land, and is therefore subject to "recreational-use" immunity provided under Minn. Stat. § 466.03, subd. 6e (2002).

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2. The legislature did not intend Minn. Stat. § 347.22 (2002), which imposes strict liability upon the owner of a dog for injuries caused to a person, to apply to police dogs.

Minder v. Anoka County, (A03-1132) 677 N.W.2d 479 (Minn. App. 2004).

1. Whether a county is entitled to statutory immunity is a separate inquiry from whether a county breached a duty, statutory or otherwise, or was negligent.

2. Where a county does not have actual notice of an allegedly dangerous condition, the county is entitled to statutory immunity on a failure-to-warn claim if the county's inspection and maintenance policy balances competing political, social, and economic factors.

IMPLIED CONSENT

State v. Bergh, (A03-1577) 679 N.W.2d 734 (Minn. App. 2004).

1. In Minnesota, the moment a motorist asks to consult with a lawyer before deciding whether or not to submit to blood-alcohol testing, a limited constitutional right to counsel attaches irrespective of whether the test results might be used as evidence in a civil or criminal proceeding.

2. The denial of an opportunity to secure the pre-test assistance of counsel violates the Minnesota Constitution and test results may not be used to enhance a subsequent charge.

3. Under Colorado law, a motorist has no right to the pre-test assistance of counsel. A Colorado driver's license revocation resulting from an uncounseled blood-alcohol test violates the Minnesota Constitution and cannot be used to enhance Minnesota impaired driving charges.

4. A stipulation that Colorado law does not permit a pre-test right to counsel coupled with appellant's affidavit that he was not given an opportunity to consult with a lawyer before deciding to submit to blood-alcohol testing satisfies appellant's burden of production of evidence to show that he was denied assistance of counsel.

Probable Cause

State v. Laducer, (A03-1533) 676 N.W.2d 693 (Minn. App. 2004), *review denied* (Minn. June 15, 2004).

1. Minn. Stat. § 169A.41 does not prohibit the results of a breath test administered by a non-peace officer from being considered by a peace officer in forming probable cause to arrest for violation of Minn. Stat. § 169A.20.

2. The arresting officer had probable cause to arrest appellant for driving while under the influence of alcohol and to invoke the implied consent law.

INDIAN LAW

Johnson v. Wright, (A03-1511) 682 N.W.2d 671 (Minn. App. 2004), *review granted* (Minn. Oct. 19, 2004).

1. An agreement is champertous when a person without interest in another's lawsuit undertakes to carry it on at his or her own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation.

2. A loan agreement wherein a third party financially assists a litigant throughout the litigation process is valid if the third party has an expectation of reimbursement for the expenses paid regardless of the outcome of the litigation.

3. Jurisdiction by Minnesota courts is proper where there is nothing to suggest that exercise of such jurisdiction would interfere with or infringe on a Native American tribe's self-government, government functions, laws, or customs.

Gerber v. Eastman, (A03-811) 673 N.W.2d 854 (Minn. App. 2004), *review denied* (Minn. Mar. 16, 2004).

The Indian Child Welfare Act does not apply where a non-Indian father seeks permanent sole legal and physical custody of his biological child after the state district court has granted permanent sole legal and physical custody to the child's Indian maternal grandmother who resides with the child on the reservation.

INSURANCE

Arbitration

Am. Family Ins. Group v. Kiess, (A03-1764) 680 N.W.2d 552 (Minn. App. 2004), *review granted* (Minn. Aug. 25, 2004).

1. The jurisdictional claim limit for no-fault arbitration awards established by Minn. Stat. § 65B.525 (2002) is calculated exclusive of any penalty interest mandated by Minn. Stat. § 65B.54, subds. 1, 2 (2002).

2. Minn. Stat. § 65B.54 (2002) does not authorize an arbitrator to award interest payments against a no-fault insurance carrier that terminates an insured's no-fault benefits and receives no actual notice of subsequent claims until the insured initiates no-fault arbitration.

3. Under Minn. Stat. § 548.36, subds. 2, 3 (2002), a no-fault insurer has a duty to provide basic economic loss benefits to reimburse an injured insured's loss even when the insured has received compensation for the same loss from a different source.

4. A claimant has standing to assert a claim against a no-fault carrier for the full amount of medical expenses incurred by the claimant regardless of whether that amount was subsequently reduced as a result of collateral transactions involving the claimant's health insurer.

Vaubel Farms, Inc. v. Shelby Farmers Mut., (A03-1607) 679 N.W.2d 407 (Minn. App. 2004).

A "suit" refers to any proceeding by a party or parties against another in a court of general jurisdiction; it does not include arbitration.

State Farm v. Liberty Mut. Ins. Co., (A03-1205) 678 N.W.2d 719 (Minn. App. 2004), *review denied* (Minn. June 29, 2004).

A claim for indemnity under Minn. Stat. § 65B.53, subd. 1 (2002) when the no-fault insured dies, is subject to the six-year statute of limitations under Minn. Stat. § 541.05, subd. 1(2) (2002).

Klinefelter v. Crum & Forster Ins. Co., (A03-895) 675 N.W.2d 330 (Minn. App. 2004).

1. Under the No-Fault Act, workers' compensation insurance is primary. But a denial of workers' compensation benefits does not preclude, through res judicata or collateral estoppel, the arbitration and recovery of no-fault benefits.

2. There is no authority that a no-fault insurer's coverage is conditioned on an opportunity to obtain reimbursement for benefits paid to the insured.

Illinois Farmers Ins. Co. v. Glass Serv. Co., (A03-109) 669 N.W.2d 420 (Minn. App. 2003), *aff'd in part, rev'd in part,* 683 N.W.2d 792 (Minn. 2004).

1. An assignee of an insured whose claim is covered by no-fault insurance is subject to the mandatory arbitration provisions of the No-Fault Act, Minn. Stat. § 65B.525 (2002).

2. Under the No-Fault Act, separate claims assigned to the same assignee may not be consolidated so as to exceed the maximum limit for mandatory arbitration.

3. There is no authority to order one panel of arbitrators to consider all of the arbitrations that arise when the insureds assign their claims to the same assignee.

Collateral Sources

Am. Family Ins. Group v. Kiess, (A03-1764) 680 N.W.2d 552 (Minn. App. 2004), *review granted* (Minn. Aug. 25, 2004).

1. The jurisdictional claim limit for no-fault arbitration awards established by Minn. Stat. § 65B.525 (2002) is calculated exclusive of any penalty interest mandated by Minn. Stat. § 65B.54, subds. 1, 2 (2002).

2. Minn. Stat. § 65B.54 (2002) does not authorize an arbitrator to award interest payments against a no-fault insurance carrier that terminates an insured's no-fault benefits and receives no actual notice of subsequent claims until the insured initiates no-fault arbitration.

3. Under Minn. Stat. § 548.36, subds. 2, 3 (2002), a no-fault insurer has a duty to provide basic economic loss benefits to reimburse an injured insured's loss even when the insured has received compensation for the same loss from a different source.

4. A claimant has standing to assert a claim against a no-fault carrier for the full amount of medical expenses incurred by the claimant regardless of whether that amount was subsequently reduced as a result of collateral transactions involving the claimant's health insurer.

Contract Construction

Minn. Prop. Ins. v. Slater, (A03-556) 673 N.W.2d 194 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004).

1. An operable vehicle undergoing maintenance and repair to meet the Minnesota Department of Transportation registration requirements for commercial hauling is not in dead storage and may satisfy the homeowner's insurance policy exclusion of covering bodily injury arising out of maintenance or use of a motor vehicle.

2. Vehicle repair and maintenance work that is necessary to facilitate the commencement of a business's primary activity satisfies the business-pursuits exclusion to the homeowner's insurance policy.

Illinois Farmers Ins. Co. v. Glass Serv. Co., (A03-109) 669 N.W.2d 420 (Minn. App. 2003), *aff'd in part, rev'd in part,* 683 N.W.2d 792 (Minn. 2004).

1. An assignee of an insured whose claim is covered by no-fault insurance is subject to the mandatory arbitration provisions of the No-Fault Act, Minn. Stat. § 65B.525 (2002).

2. Under the No-Fault Act, separate claims assigned to the same assignee may not be consolidated so as to exceed the maximum limit for mandatory arbitration.

3. There is no authority to order one panel of arbitrators to consider all of the arbitrations that arise when the insureds assign their claims to the same assignee.

Auto-Owners Ins. Co. v. Forstrom, (C8-03-296) 669 N.W.2d 617 (Minn. App. 2003), *aff'd*, 684 N.W.2d 494 (Minn. 2004).

Extrinsic evidence may be introduced to rebut the presumption of vehicle ownership that is established by the certificate of title only to avoid vicarious liability or to avoid responsibility under the no-fault act.

No-Fault

Dougherty v. State Farm Mut. Ins. Co., (A03-1866) 683 N.W.2d 855 (Minn. App. 2004), *review granted* (Minn. Oct. 19, 2004).

1. When examining whether an injury arises out of the use of a motor vehicle, the no-fault act's disregard of driver fault precludes the courts from treating prior drinking as an act of independent significance that breaks causation between vehicle use and an injury.

2. The natural and reasonable consequences of using a motor vehicle necessarily extend to the driver's efforts to respond to weather-related emergency circumstances.

Am. Family Ins. Group v. Kiess, (A03-1764) 680 N.W.2d 552 (Minn. App. 2004), *review granted* (Minn. Aug. 25, 2004).

1. The jurisdictional claim limit for no-fault arbitration awards established by Minn. Stat. § 65B.525 (2002) is calculated exclusive of any penalty interest mandated by Minn. Stat. § 65B.54, subds. 1, 2 (2002).

2. Minn. Stat. § 65B.54 (2002) does not authorize an arbitrator to award interest payments against a no-fault insurance carrier that terminates an insured's no-fault benefits and receives no actual notice of subsequent claims until the insured initiates no-fault arbitration.

3. Under Minn. Stat. § 548.36, subds. 2, 3 (2002), a no-fault insurer has a duty to provide basic economic loss benefits to reimburse an injured insured's loss even when the insured has received compensation for the same loss from a different source.

4. A claimant has standing to assert a claim against a no-fault carrier for the full amount of medical expenses incurred by the claimant regardless of whether that

amount was subsequently reduced as a result of collateral transactions involving the claimant's health insurer.

State Farm v. Liberty Mut. Ins. Co., (A03-1205) 678 N.W.2d 719 (Minn. App. 2004), *review denied* (Minn. June 29, 2004).

A claim for indemnity under Minn. Stat. § 65B.53, subd. 1 (2002) when the no-fault insured dies, is subject to the six-year statute of limitations under Minn. Stat. § 541.05, subd. 1(2) (2002).

Kyute v. Auslund, (C2-03-164) 668 N.W.2d 698 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003).

Future medical expenses and loss of future earning capacity are economic damages and are not subject to the tort-threshold requirements of Minn. Stat. § 65B.51, subd. 3 (2002).

Pemberton v. Theis, (C4-03-313) 668 N.W.2d 692 (Minn. App. 2003).

1. A plaintiff's release, for consideration, of the right to collect no-fault benefits pursuant to Minn. Stat. § 65B.51 (2002) does not bar an action to recover future health care expenses as damages arising from the accident.

2. An award of future medical expenses in a negligence action for injuries sustained in an accident arising out of the use of a motor vehicle constitutes economic loss under Minn. Stat. § 65B.51, subd. 2 (2002), rather than noneconomic loss, and thus the award is not subject to the tort threshold under Minn. Stat. § 65B.51, subd. 3 (2002), of the Minnesota No-Fault Insurance Act.

3. The trial court did not err in deducting the amount received by the plaintiff in a settlement with her no-fault insurer from a jury's award of future medical expenses.

Illinois Farmers Ins. Co. v. Glass Serv. Co., (A03-109) 669 N.W.2d 420 (Minn. App. 2003), *aff'd in part, rev'd in part*, 683 N.W.2d 792 (Minn. 2004).

1. An assignee of an insured whose claim is covered by no-fault insurance is subject to the mandatory arbitration provisions of the No-Fault Act, Minn. Stat. § 65B.525 (2002).

2. Under the No-Fault Act, separate claims assigned to the same assignee may not be consolidated so as to exceed the maximum limit for mandatory arbitration.

3. There is no authority to order one panel of arbitrators to consider all of the arbitrations that arise when the insureds assign their claims to the same assignee.

Statutes

In re Universal Underwriters Life Ins. Co., (A04-184) 685 N.W.2d 44 (Minn. App. 2004).

1. The presumption of reasonableness of credit insurance rates that comply with the state's prima facie rates may be rebutted by a showing that, because the insurer's

average loss ratio is significantly below 50%, the rates are excessive in relation to benefits.

2. The withdrawal of approval of credit insurance rates that are excessive in relation to benefits is not unpromulgated rulemaking.

JUVENILE

Delinquency

In re Welfare of D.T.P., (A03-2057) 685 N.W.2d 709 (Minn. App. 2004).

1. When a juvenile with no prior misdemeanor adjudication commits a misdemeanor-level crime, it is considered a juvenile petty offense; but if the juvenile has a prior misdemeanor adjudication, the current misdemeanor-level offense is considered a misdemeanor.

2. When a juvenile is under the continuing jurisdiction of the court because the juvenile is on probation for a status offense that is not categorized as a delinquent act or a juvenile petty offense, the juvenile cannot be adjudged delinquent solely on the basis of contempt of court.

In re Welfare of A.A.M., (A03-1793) 684 N.W.2d 925 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004).

In an adjudication of delinquency for criminal sexual conduct, the district court is not required to judge the element of consent by a "reasonable juvenile" standard.

In re Welfare of C.M.A., (A03-773) 671 N.W.2d 597 (Minn. App. 2003).

1. The state may appeal a pretrial order dismissing a delinquency petition for lack of probable cause if review presents a legal question based solely on the legal interpretation of a statute.

2. Minn. Stat. § 634.03 (2002), which states that a confession "shall not be sufficient to warrant conviction without evidence that the offense charged has been committed," does not apply to a probable cause determination, where the record includes not only the confession, but also other evidence that establishes the commission of a crime.

Termination of Parental Rights

In re Welfare of Child of W.L.P. & T.J.S., (A03-1593, A03-1603) 678 N.W.2d 703 (Minn. App. 2004).

Admitting to the allegations in a petition to terminate parental rights does not convert the proceeding into a voluntary termination of parental rights. To voluntarily terminate parental rights the parent must affirmatively demonstrate a desire to terminate the parent-child relationship for good cause.

LOCAL GOVERNMENT/MUNICIPAL LAW

Unzen v. City of Duluth, (A04-80, A04-81) 683 N.W.2d 875 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004).

A clubhouse for a municipal golf course facilitates the recreational activity taking place on city-owned land, and is therefore subject to "recreational-use" immunity provided under Minn. Stat. § 466.03, subd. 6e (2002).

Transit Team, Inc. v. Metro. Council, (A03-1344) 679 N.W.2d 390 (Minn. App. 2004).

1. Minn. Stat. § 473.392 (2002), which governs competitive bidding for metropolitan transit service, applies to competitively-procured paratransit contracts.

2. Minn. Stat. § 473.392 does not require the Metropolitan Council to abandon the competitive procurement standards and procedures of its predecessor.

3. A public authority may substantially comply with established standards and procedures, even if such compliance is inadvertent.

4. Injunction is improper where a trial court finds substantial compliance with established standards and procedures, even if such compliance is inadvertent.

Kelly v. Campaign Fin. & Pub. Disclosure Bd., (A03-970) 679 N.W.2d 178 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

1. Relator generally complied with an earlier decision issued by respondent when he accepted a gift from a lobbyist principal on behalf of the City of St. Paul and used the gift for a public purpose.

2. Relator did not violate Minn. Stat. § 10A.071 (2002) where prior acceptance by the St. Paul City Council was not possible and the city council, as soon as practicable thereafter, accepted the gift and appropriated use of the gift to relator pursuant to Minn. Stat. § 465.03 (2002).

Clear Channel Outdoor Adver. v. City of St. Paul, (A03-1013) 675 N.W.2d 343 (Minn. App. 2004), *review denied* (Minn. May 18, 2004).

Where damage to a legal nonconforming use is less than 51% of the aggregate replacement cost of the entire use, a municipal authority may not lawfully deny permits to repair the damage by applying a standard that prohibits repair when the damage exceeds 51% of the replacement cost of one part of the entire integrated nonconforming use.

Fay v. St. Louis County Bd. of Commr's, (A03-1443) 674 N.W.2d 433 (Minn. App. 2004), *review denied* (Minn. Apr. 28, 2004).

1. The validity of a county redistricting plan is determined by application of the standards in the county-redistricting statute, Minn. Stat. § 375.025 (2002), which conform with the requirements for minimum population deviation prescribed by federal law.

2. The county redistricting statute requires that the county board consider and select a plan creating districts that satisfy both the ten-percent-or-less-population deviation and the as-nearly-equal-in-population-as-possible standards.

City of Lake Elmo v. Metro. Council, (A03-458) 674 N.W.2d 191 (Minn. App. 2003), *aff'd*, 685 N.W.2d 1 (Minn. 2004).

1. The proper standard of review for an appeal from a final decision of the Metropolitan Council under Minn. Stat. § 473.866 (2002) is that the court shall give deference to the administrative agency, but shall not give preference to either the administrative law judge's record and report or to the findings, conclusions, and final decision of the council.

2. On review of a final decision of the Metropolitan Council under Minn. Stat. § 473.866, this court shall not examine evidence that the administrative law judge excluded from the record, but shall base its decision upon a preponderance of the evidence as contained in the record on appeal.

3. When the Metropolitan Council determines that a city's plan will have a substantial impact on or contains a substantial departure from the council's plan, the council does not exceed its statutory authority by requiring the city to conform to the council's plan, even when conformity necessarily requires an action on the part of a city otherwise beyond the authority of the council to require.

JAS Apartments, Inc. v. City of Minneapolis, (C5-02-2058) 668 N.W.2d 912 (Minn. App. 2003).

The "sewer charges" provision in Minn. Stat. § 444.075, subd. 3 (2002), authorizes storm-sewer charges to be set based on the amount of water consumed by the property owner.

MALPRACTICE

Legal

Maudsley v. Pederson, (A03-915) 676 N.W.2d 8 (Minn. App. 2004).

Minn. Stat. § 145.682 (2002) encourages parties to bring motions to dismiss medical-malpractice actions early in the proceedings, either to eliminate frivolous lawsuits or to give plaintiffs an opportunity to cure any defects prior to trial. Thus, to challenge the sufficiency of a plaintiff's expert affidavit, the defendant should file a timely motion to dismiss pursuant to Minn. Stat. § 145.682, subd. 6 (2002).

Medical

McDonough v. Allina Health Sys., (A03-1636) 685 N.W.2d 688 (Minn. App. 2004).

1. The district court did not err in excluding expert testimony as not generally accepted in the applicable medical or scientific community when appellants did not demonstrate that physicians, neurologists, or scientists generally accept the theory that high infusion rates of immunoglobulin cause strokes.

2. The district court did not abuse its discretion in excluding the expert testimony as unreliable when the experts did not eliminate other potential causes of the stroke or otherwise demonstrate the reliability of their opinions that a high infusion rate of immunoglobulin caused a stroke.

PROBATE

Trusts

In re Ruth Easton Fund, (A03-1365) 680 N.W.2d 541 (Minn. App. 2004).

1. The district court acted within its discretion to confirm the trustees' suspension of distributions to the named beneficiary of a charitable trust when the beneficiary curtailed its program to develop new theatrical works, a stated condition for the suspension of funding under the governing instrument.

2. The cy pres doctrine, codified at Minn. Stat. § 501B.31 (2002), authorizes a district court to modify a trust to effect the intent of the settlor if circumstances make literal compliance with the instrument's terms impracticable, inexpedient, or impossible; but the trustees have not demonstrated the necessity for a modification to redirect trust distributions when the terms of the trust instrument state the conditions under which trust funds may be redirected, those conditions have not occurred, and the trustees have not shown that compliance with those terms is impracticable, inexpedient, or impossible.

In re Trusteeship of Trust Created Under Trust Agreement Dated Dec. 31, 1974, (A03-454) 674 N.W.2d 222 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004), *cert. denied*, 125 S. Ct. 312, 345 (Oct. 12, 2004).

Minn. Stat. § 501B.16(3), (4) (2002), which authorizes trustees to petition the district court for an order determining trust beneficiaries and interpret trust terms, does not authorize trustees to mount a collateral attack on a beneficiary's previously determined paternity without regard for the standing and timeliness requirements of applicable parentage laws.

In re Trusts A & B of Divine, (A03-405) 672 N.W.2d 912 (Minn. App. 2004).

When a trust grants a trustee discretion in the exercise of a power, determining whether the trustee abused its discretion requires consideration of (1) the extent of the discretion conferred on the trustee; (2) the purposes of the trust; (3) the nature of the

power; (4) external standards by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; and (6) whether the trustee has an interest that conflicts with that of the beneficiaries.

In re Foley Trust, (A03-43) 671 N.W.2d 206 (Minn. App. 2003).

1. Where a petition for construction of a trust places issues before the district court that were not contemplated by the trust agreement, the district court did not err in considering extrinsic evidence.

2. A district court's equitable resolution of a petition for construction of a trust will not be reversed absent an abuse of discretion.

Wills

In re Estate of Zeno, (A03-226) 672 N.W.2d 574 (Minn. App. 2003).

1. Signature requirements for execution of a self-proved will, conclusively presumed by law, include the statutory mandates that the witnesses saw either the signing of the will as required by law or saw the testator's acknowledgment of that signature or the acknowledgment of the will.

2. The conclusive presumption that a self-proved will complies with signature requirements for execution can be overcome with a showing of fraud or forgery affecting the testator's acknowledgment or the attached affidavits.

In re Estate of Savich, (A03-414) 671 N.W.2d 746 (Minn. App. 2003).

1. Title to real property cannot be transferred to a decedent by a posthumous quitclaim deed.

2. In order to reform a deed, the proponent of reformation must present clear and convincing evidence that the deed failed to express the real intentions of the parties and that this failure was due to a mutual mistake of the parties or a unilateral mistake accompanied by fraud or inequitable conduct by the other party.

3. Where the evidence is clear and convincing that it would be morally wrong to retain property, a constructive trust for the benefit of the intended recipient may be imposed on transferred property.

REAL PROPERTY

TNT Props., Ltd. v. Tri-Star Developers, LLC, (A03-1186) 677 N.W.2d 94 (Minn. App. 2004).

When the parties to a real estate transaction orally recite the terms of a settlement agreement on the record in open court and expressly assent to be bound by the agreement, the writing and subscription requirements of the statute of frauds, Minn. Stat. § 513.04 (2002), are satisfied.

Olmanson v. Le Sueur County, (A03-629) 673 N.W.2d 506 (Minn. App. 2004), *review granted* (Minn. Mar. 30, 2004).

1. As a statute of repose, Minn. Stat. § 541.051, subd. 1(a) (2002), provides that no action may accrue more than ten years after substantial completion of the construction in question. But subdivision 1(c) of the statute exempts actions for negligent maintenance, operation, and inspection. Thus, an action for failure to warn of a dangerous condition on a property-owner's land is not time-barred by subdivision 1(a).

2. A county is not protected by discretionary immunity under Minn. Stat. § 466.03, subd. 6 (2002), when it does not provide evidence of specific facts showing that the county established its policy through a deliberative decision-making process.

Edina Dev. Corp. v. Hurrle, (A03-32) 670 N.W.2d 592 (Minn. App. 2003), *review denied* (Minn. Dec. 23, 2003).

1. The cancellation provisions of Minn. Stat. § 559.21 (2002) inform and are statutorily implied into a contract for the conveyance of real estate, but they do not become express terms of the contract.

2. Minn. Stat. § 559.21 does not enable a buyer who has defaulted under the terms of a purchase agreement to perform the agreement in accordance with its terms, but, instead, allows a buyer to enforce the agreement in spite of its terms.

Tollefson Dev., Inc. v. McCarthy, (A03-185) 668 N.W.2d 701 (Minn. App. 2003).

An equitable interest, obtained pursuant to a purchase agreement with unfulfilled contingencies, constitutes an insufficient interest in real property to maintain a partition action.

Easements

Claussen v. City of Lauderdale, (A03-1983) 681 N.W.2d 722 (Minn. App. 2004), *review denied* (Minn. Sept. 21, 2004).

1. A district court's discretion to grant equitable relief is not unlimited and must be supported by the facts and law.

2. A district court cannot grant an exclusive use easement over publicly owned park property, where the party claiming such an easement fails to prove, by clear and convincing evidence, that the necessary elements existed prior to public ownership.

Mechanics Liens

Siemens Bldg. Techs., Inc. v. Peak Mech., Inc., (A04-131) 684 N.W.2d 914 (Minn. App. 2004), *review denied* (Minn. Oct. 19, 2004).

Minn. Stat. § 514.02 (2002), a mechanics' lien statute, does not provide a remedy against a third-party secured creditor who receives funds in the ordinary course of

business and who is not in privity of contract with the party asserting a claim under the statute.

Zoning

Save Lantern Bay v. Cass County Planning Comm'n, (A04-165) 683 N.W.2d 862 (Minn. App. 2004).

1. Preliminary-plat and final-plat approval by the planning commission are separate decisions subject to appeal under section 10.02 of the Cass County Subdivision and Platting Ordinance.

2. A grant of equitable estoppel is improper when the petitioner has not shown that the rights that it has ostensibly acquired in a plat would be destroyed by the proposed government action.

City of Elko v. Abed, (A03-1050) 677 N.W.2d 455 (Minn. App. 2004), *review denied* (Minn. June 29, 2004).

1. Nude dancing is "expressive conduct" that falls only within the outer ambit of the First Amendment's protection.

2. A municipal ordinance establishing licensing requirements for nude dancing establishments is constitutional where it is (1) a content-neutral time, place, and manner regulation; (2) designed to serve a substantial governmental interest; and (3) which does not unreasonably limit alternative avenues of communication.

3. Evidence showing the negative secondary effects of adult establishments is sufficient to support an ordinance establishing licensing requirements for nude dancing establishments unless a prospective licensee casts direct doubt on the reliability of the evidence.

4. In ordinances establishing licensing requirements for nude dancing establishments, a disqualification provision based on prior criminal convictions is valid where it: (1) has a substantial relationship between the information required and the government interest; (2) sufficiently limits the decision-maker's discretion; and (3) provides a specific time period within which individuals who have committed enumerated offenses cannot receive a license to operate a sexually oriented business.

5. Disclosure provisions in ordinances establishing licensing requirements for nude dancing establishments are valid where there is a significant governmental interest that is furthered by the required disclosures.

6. A prospective licensee has the burden to show that license and investigation fees contained in an ordinance establishing licensing requirements for nude dancing establishments are unreasonable.

7. Distance restrictions and prohibitions against gratuities in an ordinance establishing licensing requirements for nude dancing establishments are permissible where the restrictions and prohibitions are reasonable, content-neutral time, place and manner restrictions, and where the distance restriction is well defined.

Moreno v. City of Minneapolis, (A03-837, A03-943) 676 N.W.2d 1 (Minn. App. 2004).

1. A zoning application is not approved or denied for purposes of Minn. Stat. § 15.99 (2002) until the city has decided all appeals challenging the approval of the zoning application.

2. Where a zoning application is automatically approved by operation of Minn. Stat. § 15.99 (2002), the agency's approval of the application is, by definition, not arbitrary, capricious or an error of law.

Clear Channel Outdoor Adver. v. City of St. Paul, (A03-1013) 675 N.W.2d 343 (Minn. App. 2004), *review denied* (Minn. May 18, 2004).

Where damage to a legal nonconforming use is less than 51% of the aggregate replacement cost of the entire use, a municipal authority may not lawfully deny permits to repair the damage by applying a standard that prohibits repair when the damage exceeds 51% of the replacement cost of one part of the entire integrated nonconforming use.

City of Lake Elmo v. Metro. Council, (A03-458) 674 N.W.2d 191 (Minn. App. 2003), *aff'd*, 685 N.W.2d 1 (Minn. 2004).

1. The proper standard of review for an appeal from a final decision of the Metropolitan Council under Minn. Stat. § 473.866 (2002) is that the court shall give deference to the administrative agency, but shall not give preference to either the administrative law judge's record and report or to the findings, conclusions, and final decision of the council.

2. On review of a final decision of the Metropolitan Council under Minn. Stat. § 473.866, this court shall not examine evidence that the administrative law judge excluded from the record, but shall base its decision upon a preponderance of the evidence as contained in the record on appeal.

3. When the Metropolitan Council determines that a city's plan will have a substantial impact on or contains a substantial departure from the council's plan, the council does not exceed its statutory authority by requiring the city to conform to the council's plan, even when conformity necessarily requires an action on the part of a city otherwise beyond the authority of the council to require.

191.

Citizens for a Balanced City v. Plymouth Congregational Church, (A03-190) 672 N.W.2d 13 (Minn. App. 2003).

The federal Fair Housing Amendment Act requires a municipality to grant a waiver of a zoning ordinance where the waiver is capable of enhancing a disabled person's quality of life by ameliorating the effects of the disability while not imposing undue financial or administrative burdens on the municipality and is needed to allow disabled people the same opportunity to live in a neighborhood as people without disabilities.

SCHOOL LAW

School District

In re Expulsion of I.A.L., (A03-762) 674 N.W.2d 741 (Minn. App. 2004).

Expulsion proceedings that are initiated within a reasonable period after the alleged misconduct and that do not result in suspension for more than the 15-day statutory maximum do not violate the student's due process rights to timely proceedings.

Teachers

Hinckley v. School Bd. of Indep. Sch. Dist. No. 2167, (A03-1234) 678 N.W.2d 485 (Minn. App. 2004).

1. A principal assigned the responsibility of supervising a school building must hold a valid license for the assigned position.

2. A person whose administrative position has been discontinued by a school district does not have realignment rights to positions for which the person is not qualified.

STATUTES OF LIMITATION

State Farm v. Liberty Mut. Ins. Co., (A03-1205) 678 N.W.2d 719 (Minn. App. 2004), *review denied* (Minn. June 29, 2004).

A claim for indemnity under Minn. Stat. § 65B.53, subd. 1 (2002) when the no-fault insured dies, is subject to the six-year statute of limitations under Minn. Stat. § 541.05, subd. 1(2) (2002).

Contract

Entzion v. Ill. Farmers Ins. Co., (A03-742) 675 N.W.2d 925 (Minn. App. 2004).

1. The six-year statute of limitations governing contract actions applies to an insured's action against an insurer for no-fault benefits.

2. The statute of limitations begins to run on an action for no-fault benefits when the cause of action accrues.

Real Estate

Jensen-Re P'ship v. Superior Shores Lakehome Ass'n, (A03-1681) 681 N.W.2d 42 (Minn. App. 2004), *review denied* (Minn. Sept. 21, 2004).

The two-year statute of limitations provided in Minn. Stat. § 541.051, subd. 1(a) (2002), does not apply to a suit brought by individual condominium unit owners against the condominium-owners' association charged with the duties to manage and maintain the condominium complex.

Olmanson v. Le Sueur County, (A03-629) 673 N.W.2d 506 (Minn. App. 2004), *review granted* (Minn. Mar. 30, 2004).

1. As a statute of repose, Minn. Stat. § 541.051, subd. 1(a) (2002), provides that no action may accrue more than ten years after substantial completion of the construction in question. But subdivision 1(c) of the statute exempts actions for negligent maintenance, operation, and inspection. Thus, an action for failure to warn of a dangerous condition on a property-owner's land is not time-barred by subdivision 1(a).

2. A county is not protected by discretionary immunity under Minn. Stat. § 466.03, subd. 6 (2002), when it does not provide evidence of specific facts showing that the county established its policy through a deliberative decision-making process.

Taney v. Indep. Sch. Dist. No. 624, (A03-370) 673 N.W.2d 497 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004).

1. In a negligence action, the substantial remodeling of real property in the direct vicinity of an accident constitutes an improvement to that property and therefore the statute of repose, Minn. Stat. § 541.051, runs from the date of that remodeling rather than the date of original construction of the real property.

2. In a negligence action, so long as the jury instructions are a fair and correct statement of the law, the district court does not err when it refuses to issue an instruction that the jury may not consider violations of the Uniform Building Code in determining negligence.

TORTS

Minder v. Anoka County, (A03-1132) 677 N.W.2d 479 (Minn. App. 2004).

1. Whether a county is entitled to statutory immunity is a separate inquiry from whether a county breached a duty, statutory or otherwise, or was negligent.

2. Where a county does not have actual notice of an allegedly dangerous condition, the county is entitled to statutory immunity on a failure-to-warn claim if the county's inspection and maintenance policy balances competing political, social, and economic factors.

Damages

Rowe v. Munye, (A03-465) 674 N.W.2d 761 (Minn. App. 2004), *review granted* (Minn. Apr. 20, 2004).

1. Under Minnesota law, a person who has a pre-existing disability or pre-existing medical condition at the time of an accident is entitled to damages for any aggravation of that pre-existing condition, even though the particular results would not have followed if the injured person had not been subject to the pre-existing condition. Damages are limited, however, to those results that are over and above the results that

would have normally followed from the pre-existing condition, had there been no accident.

2. The jury instruction for aggravation of personal damage provided in CIVJIG 91.40 which instructs the jury that "[i]f you cannot separate damages caused by the pre-existing disability or medical condition from those caused by the accident, then (defendant) is liable for all the damages," misstates Minnesota law, and, when this instruction is given in a case that involves both a new injury and a pre-existing disability or medical condition, it constitutes prejudicial error.

Negligence

Oldakowski v. M.P. Barrett Trucking, Inc., (A03-1557) 680 N.W.2d 590 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004).

The liability of a carrier who leases equipment for the conduct of its owner/operator extends to the negligence of the owner/operator in operating the equipment or in other conduct within the scope of the agreement to provide hauling services. Genuine fact issues on the scope of the agreement must be resolved in trial proceedings.

Olson v. Alexandria Indep. Sch. Dist. No. 206, (A03-1104) 680 N.W.2d 583 (Minn. App. 2004).

This court must affirm a trial court's exercise of its broad discretion in reconciling inconsistent jury answers when the court reasonably assesses the indications of jury intentions and the reconciliation is consistent with fair inferences of the evidence.

Hernandez by Hernandez v. State, (A03-1433, A03-1445) 680 N.W.2d 108 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004).

1. The Federal Railroad Safety Act, 49 U.S.C. § 20101 (2000), in conjunction with the Federal Highway Administration's regulations for the adequacy of warning devices, 23 C.F.R. §§ 646.214(b)(3), (4) (2004), preempts a state-law negligence claim for failure to maintain adequate warning devices at a grade crossing if the devices have been installed with the participation of federal funds and have been approved by the Federal Highway Administration.

2. A state-law negligence claim against the State of Minnesota and the City of Marshall for allegedly failing to timely install warning devices in addition to those determined adequate by the FHWA is preempted by federal regulation; the state and the city have no common law duty which could be violated by failing timely to install additional warning devices.

Moren v. JAX Restaurant, (A03-1653) 679 N.W.2d 165 (Minn. App. 2004).

Under Minnesota law dealing with the negligence of a partner, the partnership is liable to the injured party and is also liable to indemnify the acting partner. This liability

is declared by statute for all conduct occurring in the ordinary course of business, even if this conduct also partly serves the partner's personal interests.

White v. White, (A03-1315) 676 N.W.2d 682 (Minn. App. 2004).

When an owner of a motor vehicle is also the operator, there is no coverage for an injured third party under Minn. Stat. § 170.54 (2002), the Safety Responsibility Act, because the owner is the sole operator.

Meyer v. Lindala, (A03-1142) 675 N.W.2d 635 (Minn. App. 2004), *review denied* (Minn. May 26, 2004).

1. The duty of an organization to protect its members from injury by a third party arises only where there is a special relationship between an organization and its members.

2. Minnesota's child abuse reporting act, Minn. Stat. § 626.556 (2000), does not provide for a civil cause of action.

Rowe v. Munye, (A03-465) 674 N.W.2d 761 (Minn. App. 2004), *review granted* (Minn. Apr. 28, 2004).

1. Under Minnesota law, a person who has a pre-existing disability or pre-existing medical condition at the time of an accident is entitled to damages for any aggravation of that pre-existing condition, even though the particular results would not have followed if the injured person had not been subject to the pre-existing condition. Damages are limited, however, to those results that are over and above the results that would have normally followed from the pre-existing condition, had there been no accident.

2. The jury instruction for aggravation of personal damage provided in CIVJIG 91.40 which instructs the jury that "[i]f you cannot separate damages caused by the pre-existing disability or medical condition from those caused by the accident, then (defendant) is liable for all the damages," misstates Minnesota law, and, when this instruction is given in a case that involves both a new injury and a pre-existing disability or medical condition, it constitutes prejudicial error.

Anderson v. State, Dep't of Natural Res., (A03-679) 674 N.W.2d 748 (Minn. App. 2004), *review granted* (Minn. Apr. 28, 2004).

1. The district court correctly deferred to the interpretation of the director of the Minnesota Department of Agriculture Pesticide Enforcement Section (MDA) to determine if respondents used pesticides in a manner inconsistent with the label in violation of Minn. Stat. §§ 18B.01-18B.39 (2002).

2. The context of a negligence action, bees that fly or forage over lands are not trespassers, and a landowner does not owe a common-law duty of care to the bees but is prohibited from wantonly or intentionally harming the bees.

3. Absent proof that an exception applies to the general rule that an employer cannot be held liable for the negligent acts of its independent contractor, the employer of

an independent contractor is not liable for the acts or omissions of the independent contractor.

4. A claim for nuisance does not exist in the absence of a diminution of the claimant's interest in his or her land.

Taney v. Indep. Sch. Dist. No. 624, (A03-370) 673 N.W.2d 497 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004).

1. In a negligence action, the substantial remodeling of real property in the direct vicinity of an accident constitutes an improvement to that property and therefore the statute of repose, Minn. Stat. § 541.051, runs from the date of that remodeling rather than the date of original construction of the real property.

2. In a negligence action, so long as the jury instructions are a fair and correct statement of the law, the district court does not err when it refuses to issue an instruction that the jury may not consider violations of the Uniform Building Code in determining negligence.

Kuhl v. Heinen, (A03-411, A03-431) 672 N.W.2d 590 (Minn. App. 2003).

It was not reasonably foreseeable that the presence of children on or near a daycare provider's driveway would distract motorists on an adjacent highway and thereby lead to a collision.

Alwin v. St. Paul Saints, (A03-686) 672 N.W.2d 570 (Minn. App. 2003).

Spectators at baseball games assume the normal risks incident to the conduct of that activity including being hit by a ball when returning from the restroom and cannot maintain an action for damages.

Bundy v. Holmquist, (A03-314) 669 N.W.2d 627 (Minn. App. 2003).

Premises liability is not limited to owners and possessors of real estate and those acting on their behalf but extends to any person who creates an unreasonable risk of harm that results in injury.

Pemberton v. Theis, (C4-03-313) 668 N.W.2d 692 (Minn. App. 2003).

1. A plaintiff's release, for consideration, of the right to collect no-fault benefits pursuant to Minn. Stat. § 65B.51 (2002) does not bar an action to recover future health care expenses as damages arising from the accident.

2. An award of future medical expenses in a negligence action for injuries sustained in an accident arising out of the use of a motor vehicle constitutes economic loss under Minn. Stat. § 65B.51, subd. 2 (2002), rather than noneconomic loss, and thus the award is not subject to the tort threshold under Minn. Stat. § 65B.51, subd. 3 (2002), of the Minnesota No-Fault Insurance Act.

3. The trial court did not err in deducting the amount received by the plaintiff in a settlement with her no-fault insurer from a jury's award of future medical expenses.

Products Liability

Duxbury v. Spex Feeds, Inc., (A03-1456) 681 N.W.2d 380 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004).

1. Statutory regulation of grain banks under Minn. Stat. ch. 236 does not abrogate actions for warranty under the Uniform Commercial Code or for products liability.

2. Calculation of prejudgment interest, an issue determined by the district court, not the jury, is governed by Minn. Stat. § 549.09.

Strict Liability

Hyatt v. Anoka Police Dep't, (A03-1707) 680 N.W.2d 115 (Minn. App. 2004), *review granted* (Minn. July 20, 2004).

1. Where imposition of the plain language of a statute would lead to contradictory and absurd results, a court may look beyond the literal language to ascertain the intent of the legislature.

2. The legislature did not intend Minn. Stat. § 347.22 (2002), which imposes strict liability upon the owner of a dog for injuries caused to a person, to apply to police dogs.

Sufficiency of Evidence

Taney v. Indep. Sch. Dist. No. 624, (A03-370) 673 N.W.2d 497 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004).

1. In a negligence action, the substantial remodeling of real property in the direct vicinity of an accident constitutes an improvement to that property and therefore the statute of repose, Minn. Stat. § 541.051, runs from the date of that remodeling rather than the date of original construction of the real property.

2. In a negligence action, so long as the jury instructions are a fair and correct statement of the law, the district court does not err when it refuses to issue an instruction that the jury may not consider violations of the Uniform Building Code in determining negligence.