

The background features a stylized illustration of a stack of books. On the left, there are four books with green spines and white pages. To the right, a single book with a red spine and white pages is leaning against the stack. The books are rendered in a simple, graphic style with grey outlines and flat colors.

# **Minnesota Court of Appeals**

## **Significant Decisions**

**September 2004-August 2005**

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## ADMINISTRATIVE LAW

### **Administrative Procedure**

*Minn. Ctr. for Env'tl. Advocacy v. Comm'r of Minn. Pollution Control Agency*, (A04-1324) 696 N.W.2d 95 (Minn. App. 2005).

1. Under Minnesota's nondegradation policy for protection of specially-designated high quality state waters, the Minnesota Pollution Control Agency (MPCA) may require a city to analyze whether downsizing a proposed new wastewater treatment plant and using decentralized wastewater treatment to meet anticipated additional population growth is a prudent and feasible alternative that would greatly reduce the resulting new discharge of wastewater into a river designated as an Outstanding Resource Value Water-Restricted (ORVW-R). Without that analysis, a decision by the MPCA that there is no prudent and feasible alternative to the proposed discharge of wastewater into an ORVW-R is not supported by substantial evidence in the record.

2. MPCA's position that it lacks authority to impose more than minimally required water quality standards necessary to protect the scenic and recreational aspects, rather than the high-water quality, of an ORVW-R from a proposed new discharge of wastewater is an error of law, causing MPCA's issuance of a permit for a proposed discharge without requiring affordable, available technology that would reduce the amount of pollutants from a proposed discharge into an ORVW-R to be affected by an error of law.

3. MPCA's failure to define and appropriately describe the high quality of the water in an ORVW-R makes the discharge limits set by the MPCA in a permit for a new wastewater treatment plant arbitrary and capricious and unsupported by substantial evidence in the record.

4. "Existing high quality" of water in a river into which no discharge of pollutants has previously been permitted means the quality of the water prior to the issuance of any permit to discharge pollutants into the water.

### **Gambling/Racing/Lottery**

*Minn. Souvenir Milkcaps, LLC v. State*, (A04-504) 687 N.W.2d 400 (Minn. App. 2004), review denied (Minn. Dec. 22, 2004).

In order for a "promotion" to qualify as an "in-package chance promotion" and thus avoid characterization as a lottery, there must be a legitimate, valuable product included in the package associated with the promotion.

### **MPCA/Environmental Quality**

*Minn. Ctr. for Env'tl. Advocacy v. Comm'r of Minn. Pollution Control Agency*, (A04-1323) 696 N.W.2d 398 (Minn. App. 2005).

1. The Minnesota Pollution Control Agency's use of its phosphorus strategy, which suggests a minimum water residence time of 14 days before a body of water is deemed a lake or reservoir for purposes of phosphorus-control rules, is not arbitrary and capricious.

2. Because, under a pertinent rule, a party proposing an action by an agency generally has the burden of proof in administrative proceedings, this burden is properly placed on a party asking the Minnesota Pollution Control Agency to include in a wastewater treatment plant permit a limit on phosphorus discharge established by rule.

3. A failure to trace the effect of phosphorus on a lake or reservoir to a particular discharge of phosphorus is a failure to show that the discharge "affects" the lake or reservoir within the meaning of the governing rule.

*In re Cities of Annandale & Maple Lake NPDES/SDS Permit*, (A04-2033) 702 N.W.2d 768 (Minn. App. 2005), *review granted* (Minn. Oct. 26, 2005).

Under 40 C.F.R. § 122.4(i) (2004), a National Pollutant Discharge Elimination System (NPDES) permit may not be issued for a new source when its discharge will cause or contribute to the impairment of waters with impaired status under the Clean Water Act.

*In re Rocheleau*, (A03-2046) 686 N.W.2d 882 (Minn. App. 2004), *review denied* (Minn. Dec. 22, 2004).

1. Minn. Stat. § 115.55, subs. 5, 5a (2002), which expressly provide for local regulation of individual-sewage-treatment systems (ISTS), do not preempt Carver County, Minn., Code of Ordinances ch. 52 (2001).

2. Minn. Stat. § 115.55, subs. 5, 5a, explicitly allow for judicial review of the decisions made by ISTS inspectors and, therefore, do not violate the separation-of-powers doctrine.

3. Minn. Stat. § 115.55, subd. 5a, allows for a meaningful opportunity to be heard and to dispute an inspector's determination that an ISTS constitutes an imminent threat to public health and safety and, therefore, does not create an unconstitutional irrebuttable presumption.

4. Minn. R. 7080.0060, subp. 3 (2003), which relies on the definitions set forth in Minn. R. 7080.0020, subps. 28e, 29a, 49b (2003), and the criteria outlined in Minn. R. 7080.0110, subp. 4 (2003), is not void for vagueness and does not create an unconstitutional irrebuttable presumption.

*Minn. Ctr. for Env'tl. Advocacy v. Comm'r of Minn. Pollution Control Agency*, (A04-1324) 696 N.W.2d 95 (Minn. App. 2005).

1. Under Minnesota's nondegradation policy for protection of specially-designated high quality state waters, the Minnesota Pollution Control Agency (MPCA) may require a city to analyze whether downsizing a proposed new wastewater treatment plant and using decentralized wastewater treatment to meet anticipated additional population growth is a prudent and feasible alternative that would greatly reduce the

resulting new discharge of wastewater into a river designated as an Outstanding Resource Value Water–Restricted (ORVW-R). Without that analysis, a decision by the MPCA that there is no prudent and feasible alternative to the proposed discharge of wastewater into an ORVW-R is not supported by substantial evidence in the record.

2. MPCA’s position that it lacks authority to impose more than minimally required water quality standards necessary to protect the scenic and recreational aspects, rather than the high-water quality, of an ORVW-R from a proposed new discharge of wastewater is an error of law, causing MPCA’s issuance of a permit for a proposed discharge without requiring affordable, available technology that would reduce the amount of pollutants from a proposed discharge into an ORVW-R to be affected by an error of law.

3. MPCA’s failure to define and appropriately describe the high quality of the water in an ORVW-R makes the discharge limits set by the MPCA in a permit for a new wastewater treatment plant arbitrary and capricious and unsupported by substantial evidence in the record.

4. “Existing high quality” of water in a river into which no discharge of pollutants has previously been permitted means the quality of the water prior to the issuance of any permit to discharge pollutants into the water.

### **Statutes/Rules**

*Minn. Ctr. for Env’tl. Advocacy v. Comm’r of Minn. Pollution Control Agency*, (A04-1323) 696 N.W.2d 398 (Minn. App. 2005).

1. The Minnesota Pollution Control Agency’s use of its phosphorus strategy, which suggests a minimum water residence time of 14 days before a body of water is deemed a lake or reservoir for purposes of phosphorus-control rules, is not arbitrary and capricious.

2. Because, under a pertinent rule, a party proposing an action by an agency generally has the burden of proof in administrative proceedings, this burden is properly placed on a party asking the Minnesota Pollution Control Agency to include in a wastewater treatment plant permit a limit on phosphorus discharge established by rule.

3. A failure to trace the effect of phosphorus on a lake or reservoir to a particular discharge of phosphorus is a failure to show that the discharge “affects” the lake or reservoir within the meaning of the governing rule.

### **ANIMALS**

*Hyatt v. Anoka Police Dep’t*, (A03-1707) 700 N.W.2d 502 (Minn. App. 2005), *review denied* (Minn. Oct. 18, 2005).

1. Because a city police department lacks the authority to sue and be sued, it is not a legal entity subject to suit.

2. When the challenged conduct involves police officers' decisions to use a police dog during a felony arrest and does not involve the city's decision to own police dogs, the city is not entitled to statutory immunity.

3. A city is entitled to vicarious official immunity for claims challenging the moment-to-moment decisions of its police officers to use police dogs during a felony arrest, even when those claims are made not by the suspect but by a bystander.

*Carlson v. Friday*, (A04-804) 694 N.W.2d 828 (Minn. App. 2005).

A dog groomer, who voluntarily accepts temporary responsibility for care of a dog and exhibits basic attributes of ownership, is the keeper of the dog for purposes of secondary ownership under Minn. Stat. § 347.22 (2004), the dog-bite statute.

*Berne Area Alliance for Quality Living v. Dodge County Bd. of Comm'rs*, (A04-1287) 694 N.W.2d 577 (Minn. App. 2005), *review denied* (Minn. June 28, 2005).

1. To determine whether a proposed feedlot is exempt from environmental review under Minn. Stat. § 116D.04, subd. 2a(d) (2004), because the proposed feedlot has a "capacity" of fewer than 1,000 animal units, "capacity" is measured by the number of animal units physically capable of being housed in the proposed facility, rather than the number of animal units legally authorized at the proposed facility.

2. Under Minn. R. 7020.1600, subp. 4a (2003), and Minn. R. 7020.0405, subp. 1 (2003), counties that have assumed responsibility to process feedlot applications lack authority to grant certain permits for a "concentrated animal feeding operation" (CAFO), and for construction and operation of a non-CAFO feedlot capable of holding 1,000 animal units or more.

*Border State Bank of Greenbush v. Bagley Livestock Exch., Inc.*, (A03-1973 & A04-86) 690 N.W.2d 326 (Minn. App. 2004), *review denied* (Minn. Feb. 23, 2005).

Under Minnesota law, a security interest attaches and is enforceable when the debtor has signed a security agreement that describes the collateral, value has been given, and the debtor has rights in the collateral; the debtor need not own the collateral.

## **ARBITRATION**

*Cnty. Partners Designs, Inc. v. City of Lonsdale*, (A04-1919) 697 N.W.2d 629 (Minn. App. 2005).

Where a contractual agreement contains a valid arbitration provision, a provision allowing either party to call for arbitration does not mean that either party can opt out of the agreement and negate the other side's request for arbitration in order to bring its claims in district court.

*A.J. Lights, LLC v. Synergy Design Group, Inc.*, (A04-809) 690 N.W.2d 567 (Minn. App. 2005).

Where a sales-representative's agreement contains a valid arbitration provision, the Minnesota Termination of Sales Representatives Act does not give the sales representative the option to bring its claims in district court.

*N. States Power Co. v. Gas Servs., Inc.*, (A04-913) 690 N.W.2d 362 (Minn. App. 2004).

Minn. Stat. § 481.13 (2002) confers jurisdiction on the district court to establish an attorney lien on an arbitration award.

*Murray v. Puls*, (A04-319 & A04-403) 690 N.W.2d 337 (Minn. App. 2004), *review denied* (Minn. Mar. 15, 2005).

When a party agrees to settle through arbitration the damages arising from an accident with an underinsured motorist and provides a *Schmidt-Clothier* notice to his or her underinsured-motorist insurer, Minn. Stat. §§ 572.18 and 572.21 (2002) require judicial confirmation of the arbitration award before the insured party can seek underinsured-motorist benefits from his or her insurer.

## **ATTORNEY FEES**

*N. States Power Co. v. Gas Servs., Inc.*, (A04-913) 690 N.W.2d 362 (Minn. App. 2004).

Minn. Stat. § 481.13 (2002) confers jurisdiction on the district court to establish an attorney lien on an arbitration award.

## **BUSINESS ORGANIZATIONS**

*Urban by Urban v. Am. Legion Post 184*, (A04-1409) 695 N.W.2d 153 (Minn. App. 2005), *review granted* (Minn. July 19, 2005).

Minnesota's Civil Damages Act, Minn. Stat. § 340A.801, subd. 1 (2004), gives rise to a cause of action in derogation of the common law and must be strictly construed, providing a cause of action only against persons who are in the business of providing liquor.

### **Corporations**

*Jensen v. Duluth Area YMCA*, (A04-807) 688 N.W.2d 574 (Minn. App. 2004).

An individual alleging that the termination of his membership in a nonprofit corporation violated Minn. Stat. § 317A.411 (2000), cannot bring a cause of action against the nonprofit corporation without complying with the requirements of Minn. Stat. § 317A.467 (2000).

*Isaacs v. Am. Iron & Steel Co.*, (A04-313) 690 N.W.2d 373 (Minn. App. 2004), *review denied* (Minn. Apr. 4, 19, 2005).

A corporation's bylaws establish rules of internal governance, which, like contracts and statutes, are construed according to their plain meaning within the context of the document as a whole.

### **Partnerships**

*Gale v. Rittenhouse*, (A04-7) 686 N.W.2d 50 (Minn. App. 2004).

A removed general partner does not have standing to bring a derivative action under the limited partnership agreement or the uniform limited partnership act.

*Fleming v. Hagen Estate*, (A05-49) 702 N.W.2d 786 (Minn. App. 2005).

Where a partnership is not at-will and the partnership agreement does not authorize an individual partner to unilaterally force an immediate dissolution, the partnership is not susceptible to unilateral dissolution by operation of Minn. Stat. § 323A.0801 (2004).

## **CIVIL PROCEDURE**

*Isaacs v. Am. Iron & Steel Co.*, (A04-313) 690 N.W.2d 373 (Minn. App. 2004), *review denied* (Minn. Apr. 4, 2005).

A corporation's bylaws establish rules of internal governance, which, like contracts and statutes, are construed according to their plain meaning within the context of the document as a whole.

*Hanson v. Woolston*, (A04-1628) 701 N.W.2d 257 (Minn. App. 2005), *review denied* (Minn. Oct. 18, 2005).

1. A judgment may be collaterally attacked for lack of jurisdiction if the record affirmatively shows that the requisite jurisdictional elements are missing.

2. A person who obtains an interest in property through the assignment of a void judgment may not acquire title as a third-party bona fide purchaser.

*Marchant Inv. & Mgmt. Co. v. St. Anthony W. Neighborhood Org., Inc.*, (A04-900) 694 N.W.2d 92 (Minn. App. 2005).

1. To survive a motion to dismiss based on immunity provided by Minnesota's participation-in-government statute, Minn. Stat. §§ 554.01-.05 (2004), the nonmoving party must clearly and convincingly demonstrate the existence of an actionable tort or a violation of a constitutional right.

2. In determining whether an alleged defamatory statement presents or implies a provably false assertion of facts, we look to the broad context of the communication, including the general tenor of the speech; the specific context and content of the

statement, including the use of hyperbolic and figurative language; and whether the statement is sufficiently objective to be susceptible of being proven true or false.

### **Discovery**

*Urban by Urban v. Am. Legion Post 184*, (A04-1409) 695 N.W.2d 153 (Minn. App. 2005), *review granted* (Minn. July 19, 2005).

Minnesota's Civil Damages Act, Minn. Stat. § 340A.801, subd. 1 (2004), gives rise to a cause of action in derogation of the common law and must be strictly construed, providing a cause of action only against persons who are in the business of providing liquor.

*Conaway v. St. Louis County*, (A04-2350) 702 N.W.2d 779 (Minn. App. 2005).

1. Even if the condition that gave rise to a peace officer's disability claim occurred prior to the effective date of Minn. Stat. § 299A.465 (2004), as long as the officer retires after that effective date, the officer is eligible for continued health-insurance coverage pursuant to that section.

2. Both Minn. Stat. §§ 299A.411 & 299A.465 (2004) provide benefits for peace officers disabled by posttraumatic stress disorder.

3. Because a determination by the Minnesota Public Employees Retirement Association (PERA) pursuant to Minn. Stat. § 353.656, subd. 1 (2004), that a peace officer is disabled is binding on a county as an employer for purposes of determining whether the officer qualifies for continued health-insurance coverage under Minn. Stat. § 299A.465, the county is not entitled to conduct discovery on the disability issue after PERA has reached its determination.

### **Jurisdiction**

*Gale v. Rittenhouse*, (A04-7) 686 N.W.2d 50 (Minn. App. 2004).

A removed general partner does not have standing to bring a derivative action under the limited partnership agreement or the uniform limited partnership act.

*Hyatt v. Anoka Police Dep't*, (A03-1707) 700 N.W.2d 502 (Minn. App. 2005), *review denied* (Minn. Oct. 18, 2005).

1. Because a city police department lacks the authority to sue and be sued, it is not a legal entity subject to suit.

2. When the challenged conduct involves police officers' decisions to use a police dog during a felony arrest and does not involve the city's decision to own police dogs, the city is not entitled to statutory immunity.

3. A city is entitled to vicarious official immunity for claims challenging the moment-to-moment decisions of its police officers to use police dogs during a felony arrest, even when those claims are made not by the suspect but by a bystander.

*Murray v. Puls*, (A04-319 & A04-403) 690 N.W.2d 337 (Minn. App. 2004), *review denied* (Minn. Mar. 15, 2005).

When a party agrees to settle through arbitration the damages arising from an accident with an underinsured motorist and provides a *Schmidt-Clothier* notice to his or her underinsured-motorist insurer, Minn. Stat. §§ 572.18 and 572.21 (2002) require judicial confirmation of the arbitration award before the insured party can seek underinsured-motorist benefits from his or her insurer.

*In re Child of A.S.*, (A04-2344 & A04-2357) 698 N.W.2d 190 (Minn. App. 2005), *review denied* (Minn. Sept. 20, 2005).

A parent's consent to permanent transfer of legal and physical custody of a child in exchange for a county's promise not to pursue termination of parental rights, based on the parent's agreement that the files and records before the district court established the statutory criteria for the transfer, is an involuntary transfer of custody for purposes of the application of a presumption of palpable unfitness to be a party to the parent and child relationship under Minn. Stat. § 260C.301, subd. 1(b)(4) (2004), in a subsequent proceeding.

### **Summary Judgment**

*Meier v. City of Columbia Heights*, (A04-58) 686 N.W.2d 858 (Minn. App. 2004), *review denied* (Minn. Dec. 14, 2004).

1. Official immunity may shield ministerial duties, unless an employee fails to perform or negligently performs those duties.

2. Vicarious official immunity is not automatically applied when a municipality fails to formally or informally adopt procedures to deal with abatement proceedings or imposition of costs and expenses related to the abatement of real property.

*Pollard v. Southdale Gardens of Edina Condo. Ass'n, Inc.*, (A04-2057) 698 N.W.2d 449 (Minn. App. 2005).

A written contract may be modified by subsequent acts and conduct of the parties to the contract. Because a nonwaiver clause may be modified by subsequent conduct, the mere presence of a nonwaiver clause does not automatically bar a waiver claim.

*Willhite v. Cass County Bd. of Supervisors*, (A04-660) 692 N.W.2d 92 (Minn. App. 2005), *review denied* (Minn. Apr. 19, 2005).

A surveyor's discovery that a previous surveyor's report deviated from a professional standard of care by relying on quarter corners erroneously located about thirty feet east of their true location is a discovery of an error in a land survey that provides a basis for an action to recover damages if it is brought within two years of this discovery and within ten years of the alleged error in the initial survey.

*Ag Servs. of Am., Inc. v. Schroeder*, (A04-1150) 693 N.W.2d 227 (Minn. App. 2005).

1. The seller of agricultural land must give the previous owner the 14-day notice of intent to sell required by Minn. Stat. § 500.245, subd. 1(a) (2004) and the affidavit affirming the purchase agreement required by Minn. Stat. § 500.245, subd. 2(b) (2004), to comply with the statutory right of first refusal.

2. The seller of farmland subject to Minn. Stat. § 500.245 may not enter into an enforceable purchase agreement to convey such land until such seller gives the 14-day notice of intent to sell required by law.

## COMMERCIAL LAW

*Border State Bank of Greenbush v. Bagley Livestock Exch., Inc.*, (A03-1973 & A04-86) 690 N.W.2d 326 (Minn. App. 2004), *review denied* (Minn. Feb. 23, 2005).

Under Minnesota law, a security interest attaches and is enforceable when the debtor has signed a security agreement that describes the collateral, value has been given, and the debtor has rights in the collateral; the debtor need not own the collateral.

### **Negotiable Instruments**

*Delacy Invs., Inc. v. Thurman*, (A04-1439) 693 N.W.2d 479 (Minn. App. 2005), *review denied* (Minn. June 14, 2005).

Under Minn. Stat. § 336.9-404(a)(1) (2004), the rights of an assignee “are subject to . . . all terms of the agreement between the account debtor and assignor.” This provision of the Uniform Commercial Code conforms with the common-law rule that an assignee of a claim possesses no greater rights than the original assignor.

## COMMITMENT

### **Neuroleptic Medication**

*In re Guardianship of Welch*, (A03-1871) 686 N.W.2d 54 (Minn. App. 2004).

1. Prior court approval is not necessary for a private guardian to consent to administration of neuroleptic medication to an incapacitated individual who is not civilly committed.

2. When an incapacitated individual asserts that administration of neuroleptic medication adversely affects his or her constitutional rights, the court must follow the procedures set forth in *Price v. Sheppard*, 307 Minn. 250, 239 N.W.2d 905 (1976), and *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976), to ensure protection of privacy and due process rights as guaranteed by the Minnesota constitution.

## CONSTITUTIONAL LAW

*Haumant v. Griffin*, (A04-1746) 699 N.W.2d 774 (Minn. App. 2005), *review denied* (Minn. Aug. 24, 2005).

Where a proposed charter amendment is in conflict with current state laws and would therefore be deemed preempted, a municipality is not obligated to place such an amendment on the ballot. Municipalities are not obligated to place proposed charter amendments on the ballot where the amendments are “manifestly unconstitutional,” the definition of which includes violative of existing public policy.

*Unity Church of St. Paul v. State*, (A04-1302) 694 N.W.2d 585 (Minn. App. 2005), *review dismissed* (Minn. June 9, 2005).

1. 2003 Minn. Laws ch. 28, containing the Minnesota Citizens’ Personal Protection Act of 2003, an amendment relating to firearm possession for certain criminal offenders, and various natural resources amendments, violates the single-subject requirement of Minn. Const. Art. IV, § 17. Its three disparate provisions are not germane to a single subject.

2. Severance of the Minnesota Citizens’ Personal Protection Act of 2003 from chapter 28 is the appropriate remedy where the act is the portion of chapter 28 being challenged and the act is not germane to the law’s remaining provisions.

### **Due Process**

*Doll v. Barnell*, (A04-925 & A04-1146) 693 N.W.2d 455 (Minn. App. 2005), *review denied* (Minn. June 14, 2005).

Minnesota’s child-support guidelines codified at Minn. Stat. § 518.551 (2004) do not violate the United States Constitution’s clauses respecting supremacy, equal protection, or due process.

*State v. Fitzpatrick*, (A03-1480) 690 N.W.2d 387 (Minn. App. 2004).

1. A law-enforcement compliance check that uses an undercover, underage person to purchase alcoholic beverages does not, without more, violate the due-process rights of a person who sells to the underage purchaser.

2. The absence of an exception in Minn. Stat. § 340.503, subd. 2(2) (2002), that permits the purchase of alcoholic beverages for enforcement purposes does not evince a legislative intent to prohibit law enforcement from using an undercover, underage purchaser in conducting compliance checks.

3. Constitutional principles relating to unreasonable searches and seizures are not applicable to a law-enforcement compliance check that uses an undercover, underage person to purchase alcoholic beverages from an alcoholic-beverage retailer.

*In re Welfare of R. V.*, (A04-2007) 702 N.W.2d 294 (Minn. App. 2005).

Because the rules of juvenile-delinquency procedure encompass the procedural safeguards that the Due Process Clause guarantees and afford juvenile probationers greater protection against the reflexive execution of a stayed disposition order requiring confinement in a secure facility than the three-step analysis set forth in *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980), a district court need not follow the three-step *Austin* analysis when revoking a juvenile's probation.

*Minn. Ins. Guar. Ass'n v. Integra Telecom, Inc.*, (A04-1877) 697 N.W.2d 223 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005).

1. The Minnesota Guaranty Association Act, Minn. Stat. §§ 60C.01-.22 (2002), does not require the Minnesota Insurance Guaranty Association to obtain consent prior to negotiating a settlement and recovering the amount of a covered claim paid on behalf of an insured with a net worth exceeding \$25 million.

2. Where the state is not a party, the rules of appellate civil procedure require a party challenging the constitutionality of a statute on appeal to timely notify the attorney general to afford an opportunity to intervene.

*Whitten v. State*, (A04-793) 690 N.W.2d 561 (Minn. App. 2005).

The government may not inform citizens convicted of a crime that all their civil rights have been restored and then prosecute them for conduct that is permitted when all their civil rights have been restored.

### **Equal Protection**

*Doll v. Barnell*, (A04-925 & A04-1146) 693 N.W.2d 455 (Minn. App. 2005), *review denied* (Minn. June 14, 2005).

Minnesota's child-support guidelines codified at Minn. Stat. § 518.551 (2004) do not violate the United States Constitution's clauses respecting supremacy, equal protection, or due process.

### **First Amendment**

*Marchant Inv. & Mgmt. Co. v St. Anthony W. Neighborhood Org., Inc.*, (A04-900) 694 N.W.2d 92 (Minn. App. 2005).

1. To survive a motion to dismiss based on immunity provided by Minnesota's participation-in-government statute, Minn. Stat. §§ 554.01-.05 (2004), the nonmoving party must clearly and convincingly demonstrate the existence of an actionable tort or a violation of a constitutional right.

2. In determining whether an alleged defamatory statement presents or implies a provably false assertion of facts, we look to the broad context of the communication, including the general tenor of the speech; the specific context and content of the

statement, including the use of hyperbolic and figurative language; and whether the statement is sufficiently objective to be susceptible of being proven true or false.

*Doe v. Lutheran High Sch. of Greater Minneapolis*, (A04-2335) 702 N.W.2d 322 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005).

1. Resolution of a discrimination claim by an ordained minister who is a religious teacher and campus pastor at a religious high school that he was wrongfully discharged under the Minnesota Human Rights Act based on his sexual orientation is prohibited by the entanglement doctrine of the First Amendment to the United States Constitution.

2. Resolution of a discrimination claim by an ordained minister who is a religious teacher and campus pastor at a religious high school that he was wrongfully discharged under the Minnesota Human Rights Act based on his sexual orientation is prohibited by the Freedom of Conscience Clause of the Minnesota Constitution.

3. Related entities may be considered a single employer within the meaning of Minn. Stat. § 363A.03, subd. 16 (2004).

4. Religious organizations may be exempt from claims of sexual-orientation discrimination under Minn. Stat. § 363A.26(2) (2004).

*Thorson v. Billy Graham Evangelistic Ass'n*, (A04-404) 687 N.W.2d 652 (Minn. App. 2004), *review denied* (Minn. Dec. 22, 2004).

Under Minn. Stat. § 363A.26 (Supp. 2003), a nonprofit religious association whose business activities are exclusively evangelical and entirely related to the religious purpose for which it is organized is exempt from the Minnesota Human Rights Act's prohibition against discrimination in employment based on sexual orientation.

## CONTRACTS

*Minnwest Bank Cent. v. Flagship Props. LLC*, (A04-476) 689 N.W.2d 295 (Minn. App. 2004).

Interest on a judgment in a foreclosure decree is calculated from the time of the decree at the statutory postjudgment rate.

*A.J. Lights, LLC v. Synergy Design Group, Inc.*, (A04-809) 690 N.W.2d 567 (Minn. App. 2005).

Where a sales-representative's agreement contains a valid arbitration provision, the Minnesota Termination of Sales Representatives Act does not give the sales representative the option to bring its claims in district court.

*River City Mortgage Corp. v. Baldus*, (A04-1338) 695 N.W.2d 375 (Minn. App. 2005).

Because it does not contain a definitive expiration date or term of the agreement, the rate-lock agreement entered into between appellant and respondent-Baldus violates the

unambiguous requirements of Minn. Stat. § 47.206 (2004), and the agreement is, therefore, unenforceable as a matter of law.

*Blackowiak v. Mielke*, (A04-1159) 692 N.W.2d 897 (Minn. App. 2005).

Pursuant to Minn. Stat. §§ 500.19, subd. 4, 507.02 (2004), a married person may directly convey real property to a spouse.

*Greuling v. Wells Fargo Home Mortgage, Inc.*, (A04-506) 690 N.W. 2d 757 (Minn. App. 2005).

An oral promise to refinance a mortgage loan is “a new credit agreement” for purposes of Minn. Stat. § 513.33, subd. 3(a)(3) (2002), and cannot be enforced under a theory of promissory estoppel.

### **Acceptance**

*McLaughlin v. Heikkila*, (A04-1906) 697 N.W.2d 231 (Minn. App. 2005), *review denied* (Minn. Aug. 24, 2005).

To create a binding agreement, the acceptance of a written offer to convey real estate must be in writing and be delivered to the other party.

### **Damages**

*Jensen v. Duluth Area YMCA*, (A04-807) 688 N.W.2d 574 (Minn. App. 2004).

An individual alleging that the termination of his membership in a nonprofit corporation violated Minn. Stat. § 317A.411 (2000), cannot bring a cause of action against the nonprofit corporation without complying with the requirements of Minn. Stat. § 317A.467 (2000).

*Middle River-Snake River Watershed Dist. v. Dennis Drewes, Inc.*, (A04-825) 692 N.W.2d 87 (Minn. App. 2005).

A party who, without good cause, fails to serve a necessary expert-identification affidavit within 180 days after initiation of a negligence claim against a professional cannot benefit from the statutory 60-day period available to cure postdemand deficiencies under Minn. Stat. § 544.42, subd. 6(c) (2004); Minn. Stat. § 544.42, subs. 2(2), 4, and Minn. Stat. § 544.42, subd. 6(c) (2004), read together, mandate dismissal of the claim.

### **Modification**

*Border State Bank of Greenbush v. Bagley Livestock Exch., Inc.*, (A03-1973 & A04-86) 690 N.W.2d 326 (Minn. App. 2004), *review denied* (Minn. Feb. 23, 2005).

Under Minnesota law, a security interest attaches and is enforceable when the debtor has signed a security agreement that describes the collateral, value has been given, and the debtor has rights in the collateral; the debtor need not own the collateral.

*Pollard v. Southdale Gardens of Edina Condo. Ass'n, Inc.*, (A04-2057) 698 N.W.2d 449 (Minn. App. 2005).

A written contract may be modified by subsequent acts and conduct of the parties to the contract. Because a nonwaiver clause may be modified by subsequent conduct, the mere presence of a nonwaiver clause does not automatically bar a waiver claim.

## **CRIMINAL**

*State v. Fitzpatrick*, (A03-1480) 690 N.W.2d 387 (Minn. App. 2004).

1. A law-enforcement compliance check that uses an undercover, underage person to purchase alcoholic beverages does not, without more, violate the due-process rights of a person who sells to the underage purchaser.

2. The absence of an exception in Minn. Stat. § 340.503, subd. 2(2) (2002), that permits the purchase of alcoholic beverages for enforcement purposes does not evince a legislative intent to prohibit law enforcement from using an undercover, underage purchaser in conducting compliance checks.

3. Constitutional principles relating to unreasonable searches and seizures are not applicable to a law-enforcement compliance check that uses an undercover, underage person to purchase alcoholic beverages from an alcoholic-beverage retailer.

### **Investigation**

*State v. Mahr*, (A04-1390) 701 N.W.2d 286 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005).

1. When a police officer's initial reasonable suspicion of criminal activity is dispelled by further investigation, a limited investigatory stop may be prolonged only if additional facts provide justification for prolonging the stop.

2. A defendant who waives his or her right to a jury trial and agrees to a *Lothenbach* proceeding in order to preserve pretrial issues for appeal may not obtain appellate review of the sufficiency of the evidence; a defendant who wants to challenge the state's proof must either proceed to trial or agree to a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 3.

3. Because a defendant in a *Lothenbach* proceeding concedes that the state's facts are accurate and primarily seeks to appeal a pretrial ruling, the district court's findings in support of its pretrial ruling satisfy the requirement for written findings set forth in Minn. R. Crim. P. 26.01, subds. 2, 3.

*In re Welfare of M.D.R.*, (A04-831) 693 N.W.2d 444 (Minn. App. 2005), *review denied* (Minn. June 28, 2005).

A police officer is justified in stopping a person on the street when the officer articulates cause to intrude, showing that he acted on reasonable suspicions and not on a

mere whim. A lawful frisk of the stopped individual may occur if the officer reasonably believes that such a search is necessary to protect the officer's safety or the safety of others.

Based on the totality of the circumstances, otherwise "innocent" behaviors, taken in combination, may provide a reasonable basis for stopping and frisking an individual. These principles permit the stop and frisk in the circumstances surrounding a police response in this case to an "officer-needs-help" call on a police radio.

*State v. King*, (A04-292) 690 N.W.2d 397 (Minn. App. 2005), *review denied* (Minn. Mar. 29, 2005).

The forced entry by police officers into a residence five to ten seconds after knocking and announcing "police, search warrant" is not an unreasonable search requiring suppression of evidence seized.

*State v. Wright*, (A03-1197) 686 N.W.2d 295 (Minn. App. 2004), *aff'd*, 701 N.W.2d 802 (Minn. 2005).

A 911 call from assault victims that qualifies as an excited utterance as defined by Minn. R. Evid. 803(2), and was not elicited by police interrogation or its equivalent, is not "testimonial" evidence under *Crawford v. Washington*, 124 S. Ct. 1354 (2004), and is therefore admissible despite the declarant's unavailability at trial and the defendant's lack of a prior opportunity for cross-examination.

*State v. Johnson*, (A04-176) 689 N.W.2d 247 (Minn. App. 2004), *review denied* (Minn. Jan. 20, 2005).

The imposition of an upward durational departure based on judicial findings following a *Lothenbach* trial to the court violates the defendant's Sixth Amendment right to a jury trial.

*State v. Coleman*, (A03-1827) 686 N.W.2d 325 (Minn. App. 2004).

A police officer has discretion to terminate a breath test before it is completed and to provide an alternative test if the subject burps multiple times during the test, even though the equipment does not indicate the presence of mouth alcohol.

*State v. Lopez*, (A04-1136) 698 N.W.2d 18 (Minn. App. 2005).

1. The occupant of a parked car is seized when a uniformed officer uses a law enforcement vehicle with emergency lights activated to partially block movement of the parked car, awakens the occupant, instructs the occupant to unlock the door, and opens the door to check on the occupant.

2. A law enforcement officer who receives a citizen report of an unconscious occupant in a vehicle has a reasonable basis for conducting a limited emergency check on the welfare of the occupant.

3. Evidence of criminal activity reasonably apparent in conducting an emergency welfare check is not the result of an improper search or seizure and is admissible.

### **Postconviction Relief**

*Danforth v. State*, (A04-1993) 700 N.W.2d 530 (Minn. App. 2005), *review granted* (Minn. Oct. 18, 2005).

Because the rule set forth in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), is not a watershed rule of criminal procedure that implicates the fairness and accuracy of a criminal proceeding, the case does not apply retroactively.

### **Pretrial**

*State v. Eibensteiner*, (A04-792) 690 N.W.2d 140 (Minn. App. 2004), *review denied* (Minn. Mar. 15, 2005).

1. In reviewing a challenge to the evidentiary basis for an indictment, the district court may consider only the evidence that was presented to the grand jury.

2. Evidence that establishes within a reasonable probability that a defendant aided and abetted an indirect corporate campaign contribution in support of or in opposition to a campaign for political office is sufficient to establish probable cause for indictment under Minn. Stat. § 211B.15, subd. 2 (2002).

3. Evidence that establishes within a reasonable probability that a defendant solicited or knowingly received an indirect corporate campaign contribution made by an insurance company doing business in Minnesota is sufficient to establish probable cause for indictment under Minn. Stat. § 72A.12, subd. 5 (2002).

*State v. Jones*, (A05-365) 700 N.W.2d 556 (Minn. App. 2005), *review granted* (Minn. Oct. 18, 2005).

Minnesota's predatory-offender registration statute, Minn. Stat. § 243.166 (2002), is civil/regulatory in nature and therefore the State of Minnesota does not have jurisdiction to apply the law to a Native American tribal member residing on an Indian reservation.

*State v. Baxter*, (A04-676) 686 N.W.2d 846 (Minn. App. 2004).

1. If denial of the prosecution's motion to amend a complaint will result in a trial on the original charges and bar subsequent prosecution on the proposed additional counts, the denial has a critical effect on the outcome of the trial and the order denying the motion to amend is immediately appealable.

2. The district court's inherent authority to grant or deny a motion to amend a complaint does not violate the separation-of-powers doctrine.

3. Minn. R. Crim. P. 3.04, subd. 2, does not require that every pretrial motion to amend a complaint be granted.

*Whitten v. State*, (A04-793) 690 N.W.2d 561 (Minn. App. 2005).

The government may not inform citizens convicted of a crime that all their civil rights have been restored and then prosecute them for conduct that is permitted when all their civil rights have been restored.

### **Sentencing**

*State v. Lee*, (A04-1402) 693 N.W.2d 216 (Minn. App. 2005), *review granted* (Minn. Apr. 27, 2005).

1. A stay of adjudication on non-felony charges that includes a jail term that must be served is a sentence and is not appealable as a pretrial order.

2. Minn. R. Crim. P. 28.04 does not authorize an appeal by the state from a non-felony sentence.

*State v. Carr*, (A04-338) 692 N.W.2d 98 (Minn. App. 2005).

For a defendant convicted of manufacturing an unlawful controlled substance, the charge of possessing that substance before completion of the manufacturing process arises out of the same behavioral incident.

*State v. Brown*, (A04-60) 689 N.W.2d 796 (Minn. App. 2004), *review granted in part* (Minn. Mar. 15, 2005) (denying defendant's request for review and granting review to state).

In accordance with guarantees of equal protection under the United States and Minnesota Constitutions, there is a rational basis to classify possession of a theft tool as a felony and underlying thefts as gross misdemeanors.

*State v. Bertsch*, (A04-177) 689 N.W.2d 276 (Minn. App. 2004), *review granted* (Minn. Feb. 15, 2005).

1. The offense of possession of child pornography is a lesser-included offense of the offense of dissemination of child pornography.

2. Computerized possession of multiple images of child pornography falls within the multiple-victim exception of Minn. Stat. § 609.035 (2002).

*State v. Hagen*, (C0-02-1318) 690 N.W.2d 155 (Minn. App. 2004).

An upward durational departure under the Minnesota Sentencing Guidelines may not be based on an "admission" by the defendant, under *Blakely v. Washington*, 124 S. Ct. 2531 (2004), unless the "admission" to an aggravating factor is accompanied by the defendant's waiver of his or her right to a jury trial on the aggravating factor.

*State v. Conger*, (A03-1771) 687 N.W.2d 639 (Minn. App. 2004), *review denied* (Minn. Oct. 26, 2005).

When a defendant pleads guilty to a criminal charge and the district court imposes a sentence that is an upward durational departure from the presumptive, fixed sentence established by the Sentencing Guidelines Commission for the defendant's offense, the district court's reasons for departing must be supported by findings of fact that are based solely on facts admitted by the defendant.

*State v. Mitchell*, (A03-110) 687 N.W.2d 393 (Minn. App. 2004), *review granted* (Minn. Dec. 22, 2004).

The determination that a defendant's prior convictions form a "pattern of criminal conduct," as required for departure under the career-offender statute, involves more than a finding of recidivism. Accordingly, under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), the defendant has a constitutional right to have the jury, rather than a judge, make that determination.

*State v. Beaty*, (A04-1798) 696 N.W.2d 406 (Minn. App. 2005).

When a district court stays the imposition of a sentence, thereby precluding a challenge to the duration of the sentence on direct review, and later vacates the stay and imposes an upward durational departure at a probation-revocation hearing, the new rule of criminal procedure announced in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), applies retroactively to a defendant's pending appeal of the sentence imposed.

*State v. Dettman*, (A04-975) 696 N.W.2d 812 (Minn. App. 2005), *review granted* (Minn. Aug. 16, 2005).

1. A defendant has a Sixth Amendment right to a jury determination of any fact not admitted by the defendant, except the fact of a prior conviction, that increases the maximum sentence for the offense for which the defendant was convicted.

2. A pretrial "admission" precluding a defendant from invoking the Sixth Amendment right to a jury determination of any fact that increases the prescribed statutory maximum sentence for the offense with which the defendant has been charged must be accompanied by a district-court advisory of the right and the defendant's personal oral or written waiver of the right.

*State v. Johnson*, (A04-176) 689 N.W.2d 247 (Minn. App. 2004), *review denied* (Minn. Jan. 20, 2005).

The imposition of an upward durational departure based on judicial findings following a *Lothenbach* trial to the court violates the defendant's Sixth Amendment right to a jury trial.

*State v. Thompson*, (A04-1808) 694 N.W.2d 117 (Minn. App. 2005), *review granted* (Minn. June 28, 2005).

Under *Blakely v. Washington*, 124 S. Ct. 2531 (2004), in order to constitute a valid waiver of the Sixth Amendment right to a jury trial, a defendant must explicitly acknowledge and waive, either in writing or orally on the record, her right to testify, to have prosecution witnesses testify in open court in her presence, to question the prosecution witnesses, and to require any favorable witnesses to testify in her defense.

*State v. Vance*, (A03-1632) 685 N.W.2d 713 (Minn. App. 2004), *review denied* (Minn. Nov. 23, 2004).

Where the credibility of the victim is at issue and the district court determines that expert testimony regarding battered-woman syndrome will assist the jury in resolving factual questions presented at trial, the district court may admit the testimony even if neither party has directly impeached the victim's trial testimony.

*State v. Holmes*, (A04-1134) 701 N.W.2d 267 (Minn. App. 2005), *review granted* (Minn. Oct. 26, 2005).

Mandatory consecutive sentencing under Minn. Stat. § 169A.28, subd. 1 (2002) results in a presumptive consecutive sentence under the Minnesota Sentencing Guidelines, for which duration of the sentence is determined using a criminal-history score of one under Minn. Sent. Guidelines II.F.

## **Statutes**

*State v. Brown*, (A04-60) 689 N.W.2d 796 (Minn. App. 2004), *review granted in part* (Minn. Mar. 15, 2005) (denying defendant's request for review and granting review to state).

In accordance with guarantees of equal protection under the United States and Minnesota Constitutions, there is a rational basis to classify possession of a theft tool as a felony and underlying thefts as gross misdemeanors.

*State v. Franklin*, (A04-411) 692 N.W.2d 82 (Minn. App. 2005), *review denied* (Minn. Apr. 19, 2005).

A parent who has been appointed trustee of a trust established for the benefit of his or her child is not shielded from prosecution for theft by temporary control, in violation of Minn. Stat. § 609.52, subd. 2(5)(i) (2002), by virtue of his or her status as parent of the beneficiary. And a parent-trustee who gambles with funds that are intended for the child's trust account may be convicted of theft by temporary control.

*State v. Gabbert*, (A04-1785) 693 N.W.2d 475 (Minn. App. 2005), *review denied* (Minn. May 25, 2005).

1. Minn. Stat. § 609.805, subd. 2(2) (2002), the ticket-scalping statute, does not prohibit selling tickets to an event at a price less than other tickets issued on the same date of the event.

2. When language printed on a ticket restricts its transfer and defendant allegedly sold the ticket in violation of the restriction, as a matter of law defendant may be guilty of violating Minn. Stat. § 609.805, subd. 2(4), the ticket-scalping statute.

*Ledden v. State*, (A04-445) 686 N.W.2d 873 (Minn. App. 2004), *review denied* (Minn. Dec. 22, 2004).

1. Minn. Const. art. IV, § 22 requires that all laws of the State of Minnesota contain an enacting clause.

2. The laws of Minnesota are bills that have been enacted by the legislature and then signed by the governor, enacted after three days of gubernatorial inaction, or passed by a legislative override of the governor's veto.

3. Statutes are enacted laws that are codified, organized, and assembled by the revisor of statutes.

4. The Minnesota statutes are prima facia evidence of the laws of Minnesota, but they are not the laws themselves.

5. Minn. Stat. § 3C.08 (2002), which sets forth the required contents of the Minnesota statutes, does not require that the enacting clauses be republished in the Minnesota statutes.

*State v. Jones*, (A05-365) 700 N.W.2d 556 (Minn. App. 2005), *review granted* (Minn. Oct. 18, 2005).

Minnesota's predatory-offender registration statute, Minn. Stat. § 243.166 (2002), is civil/regulatory in nature and therefore the State of Minnesota does not have jurisdiction to apply the law to a Native American tribal member residing on an Indian reservation.

*State v. Banken*, (A04-477) 690 N.W.2d 367 (Minn. App. 2004), *review denied* (Minn. Mar. 29, 2005).

Minn. Stat. § 169A.20, subd. 1(5) (2002) allows use of a breath test sample obtained more than two hours after driving to measure and determine that a driver's alcohol concentration exceeded the legal limit within two hours of driving.

### **Sufficiency of Evidence**

*State v. Franklin*, (A04-411) 692 N.W.2d 82 (Minn. App. 2005), *review denied* (Minn. Apr. 19, 2005).

A parent who has been appointed trustee of a trust established for the benefit of his or her child is not shielded from prosecution for theft by temporary control, in violation

of Minn. Stat. § 609.52, subd. 2(5)(i) (2002), by virtue of his or her status as parent of the beneficiary. And a parent-trustee who gambles with funds that are intended for the child's trust account may be convicted of theft by temporary control.

*State v. Brown*, (A04-60) 689 N.W.2d 796 (Minn. App. 2004), *review granted in part* (Minn. Mar. 15, 2005) (denying defendant's request for review and granting review to state).

In accordance with guarantees of equal protection under the United States and Minnesota Constitutions, there is a rational basis to classify possession of a theft tool as a felony and underlying thefts as gross misdemeanors.

*State v. Hinton*, (A04-1220) 702 N.W.2d 278 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005).

Unless personally waived by the accused, the accused is entitled to have every element of the crime determined by a jury. Despite the lack of such personal waiver, it is harmless error for the district court to admit evidence of the accused's prior criminal record to establish an element of the crime, when that record is stipulated to by counsel for the accused and the accuracy of the record is undisputed.

## **Trial**

*State v. Mahr*, (A04-1390) 701 N.W.2d 286 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005).

1. When a police officer's initial reasonable suspicion of criminal activity is dispelled by further investigation, a limited investigatory stop may be prolonged only if additional facts provide justification for prolonging the stop.

2. A defendant who waives his or her right to a jury trial and agrees to a *Lothenbach* proceeding in order to preserve pretrial issues for appeal may not obtain appellate review of the sufficiency of the evidence; a defendant who wants to challenge the state's proof must either proceed to trial or agree to a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 3.

3. Because a defendant in a *Lothenbach* proceeding concedes that the state's facts are accurate and primarily seeks to appeal a pretrial ruling, the district court's findings in support of its pretrial ruling satisfy the requirement for written findings set forth in Minn. R. Crim. P. 26.01, subs. 2, 3.

*Danforth v. State*, (A04-1993) 700 N.W.2d 530 (Minn. App. 2005), *review granted* (Minn. Oct. 18, 2005).

Because the rule set forth in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), is not a watershed rule of criminal procedure that implicates the fairness and accuracy of a criminal proceeding, the case does not apply retroactively.

*State v. Walker*, (A04-1099) 696 N.W.2d 89 (Minn. App. 2005), *review denied* (Minn. July 19, 2005).

1. When the district court fails to follow the procedure outlined in Minn. R. Crim. P. 17.03, subd. 5, before allowing the same attorney to represent two defendants at a joint trial, the burden is on the state to demonstrate beyond a reasonable doubt that a prejudicial conflict of interest did not exist.

2. The state fails to meet this burden when inconsistent defenses could have been presented at trial to address the differing culpabilities of the defendants and when the potential conflict of interest is compounded by the manner in which the charges against the defendants were presented to the jury.

*State v. Martinez*, (A04-546) 694 N.W.2d 86 (Minn. App. 2005), *review denied* (Minn. July 19, 2005).

1. Although, upon the request of counsel, the district court's cautionary instruction on *Spriegl* evidence must be modified to specify the issue to which this evidence is relevant, the more general instruction of the jury instruction guides remains appropriate when the evidence relates to multiple questions.

2. *Spriegl* evidence is appropriate when the district court, acting within the bounds of its discretion, determines that the evidentiary value of the proof exceeds its prejudicial effect.

*State v. Carr*, (A04-338) 692 N.W.2d 98 (Minn. App. 2005).

In accordance with guarantees of equal protection under the United States and Minnesota Constitutions, there is a rational basis to classify possession of a theft tool as a felony and underlying thefts as gross misdemeanors.

*State v. Scacchetti*, (A03-301) 690 N.W.2d 393 (Minn. App. 2005), *review granted* (Minn. Mar. 29, 2005).

A child accuser's out-of-court statements to a nurse practitioner, made in a hospital while a nurse examines the child for the purpose of medical diagnosis, are not testimonial and therefore their admission does not violate the defendant's right of confrontation.

*State v. Wright*, (A03-1197) 686 N.W.2d 295 (Minn. App. 2004), *aff'd*, 701 N.W.2d 802 (Minn. 2005).

A 911 call from assault victims that qualifies as an excited utterance as defined by Minn. R. Evid. 803(2), and was not elicited by police interrogation or its equivalent, is not "testimonial" evidence under *Crawford v. Washington*, 124 S. Ct. 1354 (2004), and is therefore admissible despite the declarant's unavailability at trial and the defendant's lack of a prior opportunity for cross-examination.

*State v. Clark*, (A04-1101) 698 N.W.2d 173 (Minn. App. 2005), *review granted* (Minn. Sept. 20, 2005).

Criminal defendants have a constitutional right to be represented by an attorney and, as a corollary, a constitutional right to self-representation. But Minnesota does not recognize a right under our state constitution to advisory counsel when the right of self-representation is exercised.

*State v. Johnson*, (A04-838) 699 N.W.2d 335 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005).

Subject to the limitations imposed by the rules of evidence, a defendant may be cross-examined about his probationary status and the conditions of his probation to reveal the existence of an additional incentive to lie or an additional ulterior motive for his testimony.

*State v. Robinson*, (A04-840) 699 N.W.2d 790 (Minn. App. 2005), *review granted* (Minn. Sept. 28, 2005).

An assault victim's reliable and trustworthy out-of-court statements identifying her abuser in a written response to an emergency-room questionnaire and to an attending nurse are non-hearsay statements of identification under Minn. R. Evid. 801(d)(1)(C).

*State v. Yeboah*, (A04-1031) 691 N.W.2d 87 (Minn. App. 2005), *review denied* (Minn. Apr. 19, 2005).

1. The double-jeopardy clauses of both the federal and Minnesota constitutions provide that, after jeopardy attaches, a defendant cannot be tried for the same crime more than once.

2. In a jury trial, jeopardy attaches when the jury has been sworn.

3. A retrial is not barred if the trial has been terminated for a manifest necessity.

4. Unsolvability of juror problems, an apparent deadlock, and counsel's disagreement as to the minimum number of jurors acceptable, constituted a manifest necessity for a mistrial.

*State v. Vance*, (A03-1632) 685 N.W.2d 713 (Minn. App. 2004), *review denied* (Minn. Nov. 23, 2004).

Where the credibility of the victim is at issue and the district court determines that expert testimony regarding battered-woman syndrome will assist the jury in resolving factual questions presented at trial, the district court may admit the testimony even if neither party has directly impeached the victim's trial testimony.

*State v. Hinton*, (A04-1220) 702 N.W.2d 278 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005).

Unless personally waived by the accused, the accused is entitled to have every element of the crime determined by a jury. Despite the lack of such personal waiver, it is harmless error for the district court to admit evidence of the accused's prior criminal record to establish an element of the crime, when that record is stipulated to by counsel for the accused and the accuracy of the record is undisputed.

## **DEBTOR/CREDITOR**

*Gerber v. Gerber*, (A04-1538) 694 N.W.2d 573 (Minn. App. 2005), *review granted* (Minn. June 28, 2005).

Wage withholding to collect child-support arrearages is a judicial remedy subject to the ten-year statute of limitations under Minn. Stat. § 541.04 (2004).

## **ECONOMIC SECURITY**

*Nelson v. Comm'r of Employment & Econ. Dev.*, (A04-1930) 698 N.W.2d 443 (Minn. App. 2005).

The weeks of a claimant's lockout from employment do not count toward the 26 weeks of work earning at least \$30 per week required before the qualifying separation date to receive trade readjustment allowance benefits under 19 U.S.C. § 2291 (2002).

### **Eligibility**

*Samuelson v. Prudential Real Estate*, (A04-1416) 696 N.W.2d 830 (Minn. App. 2005).

For purposes of establishing an unemployment benefits account, an insurance salesperson who is compensated by both a commission and an employer-provided benefits package is not compensated "solely" by commission, and therefore is not engaged in noncovered employment under Minn. Stat. § 268.035, subd. 20(26) (2002).

### **Employment Relationship**

*Samuelson v. Prudential Real Estate*, (A04-1416) 696 N.W.2d 830 (Minn. App. 2005).

For purposes of establishing an unemployment benefits account, an insurance salesperson who is compensated by both a commission and an employer-provided benefits package is not compensated "solely" by commission, and therefore is not engaged in noncovered employment under Minn. Stat. § 268.035, subd. 20(26) (2002).

## **Quit/Good Cause**

*Munro Holding, LLC v. Cook*, (A04-1249) 695 N.W.2d 379 (Minn. App. 2005).

1. When an employer-owner repeatedly grabs an employee's hips, brushes up against her from behind and, on one occasion, squeezes the employee's buttocks, the employer has engaged in sexual harassment as defined by Minn. Stat. § 268.095, subd. 3(e)(3) (Supp. 2003).

2. When an employer-owner sexually harasses an employee in a patently offensive manner, the employee need not complain to the employer or wait for the employer to take timely and appropriate action to stop the conduct in order to establish that the employee quit because of a good reason caused by the employer.

*Johnson v. Walch & Walch, Inc.*, (A04-1451) 696 N.W.2d 799 (Minn. App. 2005), *review denied* (Minn. July 19, 2005).

An employee's unsupported apprehension that her income at a nearby work site will be substantially less than at her current work site is not good reason to quit under unemployment compensation law.

## **EMPLOYMENT**

*Stringer v. Minn. Vikings Football Club, LLC*, (A03-1635 & A04-205) 686 N.W.2d 545 (Minn. App. 2004), *aff'd on other grounds*, 2005 WL 3071592 (Minn. 2005).

1. When an employee undertakes direct action to assist a co-employee with a workplace injury, that employee acquires a personal duty to exercise proper care.

2. When a co-employee has a personal duty to exercise proper care in the treatment of a workplace injury and provides more than scant care that does not entirely disregard the consequences of the injury, the co-employee is entitled to summary judgment in an action for gross negligence under the workers' compensation act.

## **Discrimination**

*Gee v. Minn. State Colls. & Univs.*, (A04-1542) 700 N.W.2d 548 (Minn. App. 2005).

Walking and seeing are major life activities for purposes of determining whether a physical impairment constitutes a disability under the Minnesota Human Rights Act, Minn. Stat. § 363A (2004).

*Doe v. Lutheran High Sch. of Greater Minneapolis*, (A04-2335) 702 N.W.2d 322 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005).

1. Resolution of a discrimination claim by an ordained minister who is a religious teacher and campus pastor at a religious high school that he was wrongfully discharged under the Minnesota Human Rights Act based on his sexual orientation is

prohibited by the entanglement doctrine of the First Amendment to the United States Constitution.

2. Resolution of a discrimination claim by an ordained minister who is a religious teacher and campus pastor at a religious high school that he was wrongfully discharged under the Minnesota Human Rights Act based on his sexual orientation is prohibited by the Freedom of Conscience Clause of the Minnesota Constitution.

3. Related entities may be considered a single employer within the meaning of Minn. Stat. § 363A.03, subd. 16 (2004).

4. Religious organizations may be exempt from claims of sexual-orientation discrimination under Minn. Stat. § 363A.26(2) (2004).

*Thorson v. Billy Graham Evangelistic Ass'n*, (A04-404) 687 N.W.2d 652 (Minn. App. 2004), *review denied* (Minn. Dec. 22, 2004).

Under Minn. Stat. § 363A.26 (Supp. 2003), a nonprofit religious association whose business activities are exclusively evangelical and entirely related to the religious purpose for which it is organized is exempt from the Minnesota Human Rights Act's prohibition against discrimination in employment based on sexual orientation.

### **Noncompete Agreement**

*Farm Bureau Mut. Ins. Co. v. Schwan*, (A04-368) 687 N.W.2d 388 (Minn. App. 2004).

Findings in support of a district court's order for temporary injunction are not binding on subsequent fact finding by the ultimate finder of fact.

### **Public Employee**

*Schmidt v. City of Columbia Heights*, (A04-2321) 696 N.W.2d 413 (Minn. App. 2005).

Minn. Stat. § 299A.465, subd. 1 (2004), requires the employer of a public-safety officer who is disabled in the line of duty to continue to pay health-care benefits for the dependents of that officer until the officer reaches the age of 65. When the officer dies prior to attaining the age of 65, the statute requires the employer to continue to pay health-care benefits for the officer's dependents until the 65th anniversary of the officer's birth.

*Conaway v. St. Louis County*, (A04-2350) 702 N.W.2d 779 (Minn. App. 2005).

1. Even if the condition that gave rise to a peace officer's disability claim occurred prior to the effective date of Minn. Stat. § 299A.465 (2004), as long as the officer retires after that effective date, the officer is eligible for continued health-insurance coverage pursuant to that section.

2. Both Minn. Stat. §§ 299A.411, .465 (2004) provide benefits for peace officers disabled by posttraumatic stress disorder.

3. Because a determination by the Minnesota Public Employees Retirement Association (PERA) pursuant to Minn. Stat. § 353.656, subd. 1 (2004), that a peace

officer is disabled is binding on a county as an employer for purposes of determining whether the officer qualifies for continued health-insurance coverage under Minn. Stat. § 299A.465, the county is not entitled to conduct discovery on the disability issue after PERA has reached its determination.

### **Whistleblower**

*Nelson v. Productive Alternatives, Inc.*, (A04-1691) 696 N.W.2d 841 (Minn. App. 2005), review granted (Minn. Aug. 16, 2005).

1. Minnesota's Whistleblower Act does not expressly abrogate or otherwise displace the common-law tort action recognized by this court in *Phipps v. Clark Oil & Ref. Corp.*, 396 N.W.2d 588, 592 (Minn. App. 1986) (*Phipps I*), as modified by *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569, 571 (Minn. 1987) (*Phipps II*).

2. Under the supreme court's holding in *Phipps II*, an employee may bring a common-law action for wrongful discharge if that employee is discharged for refusing to participate in an activity that the employee, in good faith, believes violates any state or federal law or rule or regulation adopted pursuant to law.

*Gee v. Minn. State Colls. & Univs.*, (A04-1542) 700 N.W.2d 548 (Minn. App. 2005).

Walking and seeing are major life activities for purposes of determining whether a physical impairment constitutes a disability under the Minnesota Human Rights Act, Minn. Stat. § 363A (2004).

### **Wrongful Termination**

*Nelson v. Productive Alternatives, Inc.*, (A04-1691) 696 N.W.2d 841 (Minn. App. 2005), review granted (Minn. Aug. 16, 2005).

1. Minnesota's Whistleblower Act does not expressly abrogate or otherwise displace the common-law tort action recognized by this court in *Phipps v. Clark Oil & Ref. Corp.*, 396 N.W.2d 588, 592 (Minn. App. 1986) (*Phipps I*), as modified by *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569, 571 (Minn. 1987) (*Phipps II*).

2. Under the supreme court's holding in *Phipps II*, an employee may bring a common-law action for wrongful discharge if that employee is discharged for refusing to participate in an activity that the employee, in good faith, believes violates any state or federal law or rule or regulation adopted pursuant to law.

## **ENVIRONMENTAL LAW**

*Minn. Ctr. for Env'tl. Advocacy v. Comm'r of Minn. Pollution Control Agency*, (A04-1323) 696 N.W.2d 398 (Minn. App. 2005).

1. The Minnesota Pollution Control Agency's use of its phosphorus strategy, which suggests a minimum water residence time of 14 days before a body of water is

deemed a lake or reservoir for purposes of phosphorus-control rules, is not arbitrary and capricious.

2. Because, under a pertinent rule, a party proposing an action by an agency generally has the burden of proof in administrative proceedings, this burden is properly placed on a party asking the Minnesota Pollution Control Agency to include in a wastewater treatment plant permit a limit on phosphorus discharge established by rule.

3. A failure to trace the effect of phosphorus on a lake or reservoir to a particular discharge of phosphorus is a failure to show that the discharge “affects” the lake or reservoir within the meaning of the governing rule.

*Berne Area Alliance for Quality Living v. Dodge County Bd. of Comm’rs*, (A04-1287) 694 N.W.2d 577 (Minn. App. 2005), *review denied* (Minn. June 28, 2005).

1. To determine whether a proposed feedlot is exempt from environmental review under Minn. Stat. § 116D.04, subd. 2a(d) (2004), because the proposed feedlot has a “capacity” of fewer than 1,000 animal units, “capacity” is measured by the number of animal units physically capable of being housed in the proposed facility, rather than the number of animal units legally authorized at the proposed facility.

2. Under Minn. R. 7020.1600, subp. 4a (2003), and Minn. R. 7020.0405, subp. 1 (2003), counties that have assumed responsibility to process feedlot applications lack authority to grant certain permits for a “concentrated animal feeding operation” (CAFO), and for construction and operation of a non-CAFO feedlot capable of holding 1,000 animal units or more.

*Minn. Ctr. for Env’tl. Advocacy v. Comm’r of Minn. Pollution Control Agency*, (A04-1324) 696 N.W.2d 95 (Minn. App. 2005).

1. Under Minnesota’s nondegradation policy for protection of specially-designated high quality state waters, the Minnesota Pollution Control Agency (MPCA) may require a city to analyze whether downsizing a proposed new wastewater treatment plant and using decentralized wastewater treatment to meet anticipated additional population growth is a prudent and feasible alternative that would greatly reduce the resulting new discharge of wastewater into a river designated as an Outstanding Resource Value Water–Restricted (ORVW-R). Without that analysis, a decision by the MPCA that there is no prudent and feasible alternative to the proposed discharge of wastewater into an ORVW-R is not supported by substantial evidence in the record.

2. MPCA’s position that it lacks authority to impose more than minimally required water quality standards necessary to protect the scenic and recreational aspects, rather than the high-water quality, of an ORVW-R from a proposed new discharge of wastewater is an error of law, causing MPCA’s issuance of a permit for a proposed discharge without requiring affordable, available technology that would reduce the amount of pollutants from a proposed discharge into an ORVW-R to be affected by an error of law.

3. MPCA’s failure to define and appropriately describe the high quality of the water in an ORVW-R makes the discharge limits set by the MPCA in a permit for a new

wastewater treatment plant arbitrary and capricious and unsupported by substantial evidence in the record.

4. “Existing high quality” of water in a river into which no discharge of pollutants has previously been permitted means the quality of the water prior to the issuance of any permit to discharge pollutants into the water.

## **EQUITABLE RELIEF**

*Ripley v. Piehl*, (A04-1962) 700 N.W.2d 540 (Minn. App. 2005), *review denied* (Minn. Oct. 18, 2005).

A professional lender’s negligent failure to discover a properly recorded mortgage against real property prior to acquiring its own mortgage against that property is not an excusable mistake of fact entitling the lender to be equitably subrogated to the rights of a prior senior lienholder.

*Greuling v. Wells Fargo Home Mortgage, Inc.*, (A04-506) 690 N.W. 2d 757 (Minn. App. 2005).

An oral promise to refinance a mortgage loan is “a new credit agreement” for purposes of Minn. Stat. § 513.33, subd. 3(a)(3) (2002), and cannot be enforced under a theory of promissory estoppel.

## **Injunctions**

*Farm Bureau Mut. Ins. Co. v. Schwan*, (A04-368) 687 N.W.2d 388 (Minn. App. 2004).

Findings in support of a district court’s order for temporary injunction are not binding on subsequent fact finding by the ultimate finder of fact.

## **EVIDENCE**

*Foust v. McFarland*, (A04-760 & A04-1956) 698 N.W.2d 24 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005).

The district court has broad authority in determining what sanctions are to be imposed for spoliation of evidence.

## **Expert Testimony**

*Middle River-Snake River Watershed Dist. v. Dennis Drewes, Inc.*, (A04-825) 692 N.W.2d 87 (Minn. App. 2005).

A party who, without good cause, fails to serve a necessary expert-identification affidavit within 180 days after initiation of a negligence claim against a professional cannot benefit from the statutory 60-day period available to cure postdemand deficiencies

under Minn. Stat. § 544.42, subd. 6(c) (2004); Minn. Stat. § 544.42, subds. 2(2), 4, and Minn. Stat. § 544.42, subd. 6(c) (2004), read together, mandate dismissal of the claim.

## **FAMILY LAW**

### **Child Custody**

*Williams v. Carlson*, (A04-2223) 701 N.W.2d 274 (Minn. App. 2005).

1. Under Minn. Stat. § 257.75, subds. 2, 3 (2004), a recognition of parentage has the force and effect of a judgment or order determining the existence of a parent and child relationship, when it has not been revoked within 60 days after its execution, there is no presumed father, or no other man has signed a competing recognition under Minn. Stat. § 257.55, subd. 1(g) or (h) (2004).

2. A recognition of parentage can be vacated within one year after its execution or within six months after obtaining genetic test results indicating that the man who executed the recognition is not the father of the child; an action to vacate must be based on fraud, duress, or material mistake of fact.

*Lewis-Miller v. Ross*, (A04-2224) 699 N.W.2d 9 (Minn. App. 2005), *review granted* (Minn. Sept. 28, 2005).

A party who files a valid petition commencing third-party child custody proceedings under Chapter 257C is entitled to an evidentiary hearing to prove an interested-third-party status.

### **Child Support**

*Doll v. Barnell*, (A04-925 & A04-1146) 693 N.W.2d 455 (Minn. App. 2005), *review denied* (Minn. June 14, 2005).

Minnesota's child-support guidelines codified at Minn. Stat. § 518.551 (2004) do not violate the United States Constitution's clauses respecting supremacy, equal protection, or due process.

*Maki v. Hansen*, (A04-1339) 694 N.W.2d 78 (Minn. App. 2005).

1. Absent a showing of prejudice, service of documents may be effective even if not in compliance with all requirements of the Minnesota Rules of General Practice.

2. A parent of a child incapable of self-support may request continued support after the child reaches the age when the support obligation for an able-bodied child terminates.

*Gerber v. Gerber*, (A04-1538) 694 N.W.2d 573 (Minn. App. 2005), *review granted* (Minn. June 28, 2005).

Wage withholding to collect child-support arrearages is a judicial remedy subject to the ten-year statute of limitations under Minn. Stat. § 541.04 (2004).

### **Parentage**

*Williams v. Carlson*, (A04-2223) 701 N.W.2d 274 (Minn. App. 2005).

1. Under Minn. Stat. § 257.75, subs. 2, 3 (2004), a recognition of parentage has the force and effect of a judgment or order determining the existence of a parent and child relationship, when it has not been revoked within 60 days after its execution, there is no presumed father, or no other man has signed a competing recognition under Minn. Stat. § 257.55, subd. 1(g) or (h) (2004).

2. A recognition of parentage can be vacated within one year after its execution or within six months after obtaining genetic test results indicating that the man who executed the recognition is not the father of the child; an action to vacate must be based on fraud, duress, or material mistake of fact.

### **Property Division**

*Siewert v. Siewert*, (A04-702) 691 N.W.2d 504 (Minn. App. 2005), *review denied* (Minn. May 17, 2005).

An antenuptial agreement is invalid and unenforceable if it is not witnessed by two persons other than the parties to the agreement, as required by Minn. Stat. § 519.11, subd. 2 (2002).

*Sirek v. Sirek*, (A04-1353) 693 N.W.2d 896 (Minn. App. 2005).

Because Minn. Stat. § 518.58, subd. 1a (2002) assumes that marital property disposed of by one party is not part of the marital estate, the statute does not apply when such property has been returned to the marital estate before the time of the district court's property division.

*Antone v. Mirviss*, (A04-1367) 694 N.W.2d 564 (Minn. App. 2005), *review granted* (Minn. June 28, 2005).

1. A rule 12.02 motion to dismiss an action is deemed to be a motion for summary judgment if matters outside the pleadings are submitted and not excluded by the district court.

2. A cause of action accrues for purposes of applying the statute of limitations when the cause of action is able to survive a motion to dismiss for failure to state a claim.

3. A cause of action will survive a motion to dismiss only if at least "some" ascertainable damages have occurred, even if not all damages are known or determinable.

4. In a legal malpractice action based on an allegation that a lawyer was negligent in preparing an antenuptial agreement and thus failed to prevent a former

spouse from obtaining property that was to be protected by the agreement, the requisite damages do not occur until the district court awards such property to the former spouse.

5. The term “some” damage means damages that are fixed and ascertainable and not merely hypothetical or potential.

## IMMUNITY

### **Official**

*Hyatt v. Anoka Police Dep’t*, (A03-1707) 700 N.W.2d 502 (Minn. App. 2005), *review denied* (Minn. Oct. 18, 2005).

1. Because a city police department lacks the authority to sue and be sued, it is not a legal entity subject to suit.

2. When the challenged conduct involves police officers’ decisions to use a police dog during a felony arrest and does not involve the city’s decision to own police dogs, the city is not entitled to statutory immunity.

3. A city is entitled to vicarious official immunity for claims challenging the moment-to-moment decisions of its police officers to use police dogs during a felony arrest, even when those claims are made not by the suspect but by a bystander.

*Meier v. City of Columbia Heights*, (A04-58) 686 N.W.2d 858 (Minn. App. 2004), *review denied* (Minn. Dec. 14, 2004).

1. Official immunity may shield ministerial duties, unless an employee fails to perform or negligently performs those duties.

2. Vicarious official immunity is not automatically applied when a municipality fails to formally or informally adopt procedures to deal with abatement proceedings or imposition of costs and expenses related to the abatement of real property.

### **Qualified**

*Meier v. City of Columbia Heights*, (A04-58) 686 N.W.2d 858 (Minn. App. 2004), *review denied* (Minn. Dec. 14, 2004).

1. Official immunity may shield ministerial duties, unless an employee fails to perform or negligently performs those duties.

2. Vicarious official immunity is not automatically applied when a municipality fails to formally or informally adopt procedures to deal with abatement proceedings or imposition of costs and expenses related to the abatement of real property.

## **Statutory**

*Hyatt v. Anoka Police Dep't*, (A03-1707) 700 N.W.2d 502 (Minn. App. 2005), *review denied* (Minn. Oct. 18, 2005).

1. Because a city police department lacks the authority to sue and be sued, it is not a legal entity subject to suit.

2. When the challenged conduct involves police officers' decisions to use a police dog during a felony arrest and does not involve the city's decision to own police dogs, the city is not entitled to statutory immunity.

3. A city is entitled to vicarious official immunity for claims challenging the moment-to-moment decisions of its police officers to use police dogs during a felony arrest, even when those claims are made not by the suspect but by a bystander.

*Marchant Inv. & Mgmt. Co. v. St. Anthony W. Neighborhood Org., Inc.*, (A04-900) 694 N.W.2d 92 (Minn. App. 2005).

1. To survive a motion to dismiss based on immunity provided by Minnesota's participation-in-government statute, Minn. Stat. §§ 554.01-.05 (2004), the nonmoving party must clearly and convincingly demonstrate the existence of an actionable tort or a violation of a constitutional right.

2. In determining whether an alleged defamatory statement presents or implies a provably false assertion of facts, we look to the broad context of the communication, including the general tenor of the speech; the specific context and content of the statement, including the use of hyperbolic and figurative language; and whether the statement is sufficiently objective to be susceptible of being proven true or false.

## **IMPLIED CONSENT**

### **Testing**

*State v. Coleman*, (A03-1827) 686 N.W.2d 325 (Minn. App. 2004).

A police officer has discretion to terminate a breath test before it is completed and to provide an alternative test if the subject burps multiple times during the test, even though the equipment does not indicate the presence of mouth alcohol.

## **INDIAN LAW**

*State v. Jones*, (A05-365) 700 N.W.2d 556 (Minn. App. 2005), *review granted* (Minn. Oct. 18, 2005).

Minnesota's predatory-offender registration statute, Minn. Stat. § 243.166 (2002), is civil/regulatory in nature and therefore the State of Minnesota does not have

jurisdiction to apply the law to a Native American tribal member residing on an Indian reservation.

## **INSURANCE**

*Minn. Ins. Guar. Ass'n v. Integra Telecom, Inc.*, (A04-1877) 697 N.W.2d 223 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005).

1. The Minnesota Guaranty Association Act, Minn. Stat. §§ 60C.01-.22 (2002), does not require the Minnesota Insurance Guaranty Association to obtain consent prior to negotiating a settlement and recovering the amount of a covered claim paid on behalf of an insured with a net worth exceeding \$25 million.

2. Where the state is not a party, the rules of appellate civil procedure require a party challenging the constitutionality of a statute on appeal to timely notify the attorney general to afford an opportunity to intervene.

### **Arbitration**

*Murray v. Puls*, (A04-319 & A04-403) 690 N.W.2d 337 (Minn. App. 2004), *review denied* (Minn. Mar. 15, 2005).

When a party agrees to settle through arbitration the damages arising from an accident with an underinsured motorist and provides a *Schmidt-Clothier* notice to his or her underinsured-motorist insurer, Minn. Stat. §§ 572.18, .21 (2002) require judicial confirmation of the arbitration award before the insured party can seek underinsured-motorist benefits from his or her insurer.

### **Collateral Sources**

*Kahnke v. Green*, (A04-1569) 695 N.W.2d 148 (Minn. App. 2005).

For the purposes of the collateral-source statute, an assertion of subrogation rights is reasonable and timely when it is made prior to the district court's ruling on the collateral-source motion.

*Tezak v. Bachke*, (A04-2134) 698 N.W. 2d 37 (Minn. App. 2005), *review denied* (Minn. Aug. 24, 2005).

1. Minn. Stat. § 548.36 (2004), the collateral-source statute, does not apply to the difference between the amount an injured person is billed for the reasonable value of medical services arising out of injuries caused by the wrongful act or omission of another and the amount for which the injured person's health insurer settled the medical providers' claims.

2. When a person who has been injured by the wrongful act or omission of another dies of causes unrelated to such injuries, the trustee for the heirs and next-of-kin of the decedent may recover from the tortfeasor, as special damages under Minn. Stat. §

573.02, subd. 2 (2004), the reasonable value of the medical services provided. The trustee's claim is not limited to the amount paid by the decedent's health insurer to settle medical providers' claims.

### **Duty to Defend**

*Westfield Ins. Co. v. Kroiss*, (A04-1330) 694 N.W.2d 102 (Minn. App. 2005), *review denied* (Minn. June 28, 2005).

1. Coverage under an "occurrence" liability insurance policy is arguably triggered by and the insurer has a duty to defend the insured homebuilder in actions for damages due to faulty construction during the policy period.

2. When an insurer breaches its contractual duty to defend, the insurer is liable for attorney fees incurred by the insured in a declaratory judgment action to determine the duty to defend even if other insurers undertook the underlying legal defense.

### **No-Fault**

*Auto-Owners Ins. Co. v. Great West Cas.*, (A04-1591) 695 N.W.2d 646 (Minn. App. 2005), *review denied* (Minn. July 19, 2005).

If an insured is injured in an accident involving a stalled vehicle loaded on top of an automobile-transport trailer, the injury resulted from the "maintenance or use" of the stalled vehicle, and the insurer of the stalled vehicle is responsible for payment of no-fault insurance benefits to the insured under Minn. Stat. § 65B.47, subd. 3 (2000).

### **Settlements/Releases**

*Bunce v. A.P.I., Inc.*, (A04-1348 & A04-1394) 696 N.W.2d 852 (Minn. App. 2005).

1. Where plaintiff executed a standard *Pierringer* release with defendant and third-party plaintiff, the defendant and third-party plaintiff cannot then pursue claims for contribution and indemnity against non-settling third-party defendants.

2. Under a standard *Pierringer* release, the settling tortfeasor does not pay more than its fair share of liability. Any possible claims the settling tortfeasor says it retains for contribution and indemnity will never accrue.

### **Subrogation**

*Kahnke v. Green*, (A04-1569) 695 N.W.2d 148 (Minn. App. 2005).

For the purposes of the collateral-source statute, an assertion of subrogation rights is reasonable and timely when it is made prior to the district court's ruling on the collateral-source motion.

*Tezak v. Bachke*, (A04-2134) 698 N.W. 2d 37 (Minn. App. 2005), *review denied* (Minn. Aug. 24, 2005).

1. Minn. Stat. § 548.36 (2004), the collateral-source statute, does not apply to the difference between the amount an injured person is billed for the reasonable value of medical services arising out of injuries caused by the wrongful act or omission of another and the amount for which the injured person's health insurer settled the medical providers' claims.

2. When a person who has been injured by the wrongful act or omission of another dies of causes unrelated to such injuries, the trustee for the heirs and next-of-kin of the decedent may recover from the tortfeasor, as special damages under Minn. Stat. § 573.02, subd. 2 (2004), the reasonable value of the medical services provided. The trustee's claim is not limited to the amount paid by the decedent's health insurer to settle medical providers' claims.

## **UIM**

*Murray v. Puls*, (A04-319 & A04-403) 690 N.W.2d 337 (Minn. App. 2004), *review denied* (Minn. Mar. 15, 2005).

When a party agrees to settle through arbitration the damages arising from an accident with an underinsured motorist and provides a *Schmidt-Clothier* notice to his or her underinsured-motorist insurer, Minn. Stat. §§ 572.18 and 572.21 (2002) require judicial confirmation of the arbitration award before the insured party can seek underinsured-motorist benefits from his or her insurer.

## **Workers Compensation**

*Stringer v. Minn. Vikings Football Club, LLC*, (A03-1635 & A04-205) 686 N.W.2d 545 (Minn. App. 2004), *aff'd on other grounds*, 2005 WL 3071592 (Minn. 2005).

1. When an employee undertakes direct action to assist a co-employee with a workplace injury, that employee acquires a personal duty to exercise proper care.

2. When a co-employee has a personal duty to exercise proper care in the treatment of a workplace injury and provides more than scant care that does not entirely disregard the consequences of the injury, the co-employee is entitled to summary judgment in an action for gross negligence under the workers' compensation act.

*Zurich Am. Ins. Co. v. Bjelland*, (A04-709) 690 N.W.2d 352 (Minn. App. 2004), *review granted* (Minn. Mar. 4, 2005).

1. An alleged third-party tortfeasor in a workers' compensation subrogation action has a right to a jury trial on both damages and liability, and the insurer-subrogee is not automatically entitled to the full recovery of benefits paid and payable without first proving damages and liability.

2. The plain meaning of the amended language of Minn. Stat. § 176.061, subds. 3, 5, 7, 10 (2002), permits an insurer-subrogee full recovery of workers' compensation benefits paid and payable, regardless of common law or statutory limits.

## JUVENILE

### **Delinquency**

*In re Welfare of M.D.R.*, (A04-831) 693 N.W.2d 444 (Minn. App. 2005), *review denied* (Minn. June 28, 2005).

A police officer is justified in stopping a person on the street when the officer articulates cause to intrude, showing that he acted on reasonable suspicions and not on a mere whim. A lawful frisk of the stopped individual may occur if the officer reasonably believes that such a search is necessary to protect the officer's safety or the safety of others.

Based on the totality of the circumstances, otherwise "innocent" behaviors, taken in combination, may provide a reasonable basis for stopping and frisking an individual. These principles permit the stop and frisk in the circumstances surrounding a police response in this case to an "officer-needs-help" call on a police radio.

*In re Welfare of R.V.*, (A04-2007) 702 N.W.2d 294 (Minn. App. 2005).

Because the rules of juvenile-delinquency procedure encompass the procedural safeguards that the Due Process Clause guarantees and afford juvenile probationers greater protection against the reflexive execution of a stayed disposition order requiring confinement in a secure facility than the three-step analysis set forth in *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980), a district court need not follow the three-step *Austin* analysis when revoking a juvenile's probation.

### **Termination of Parental Rights**

*In re Child of A.S.*, (A04-2344 & A04-2357) 698 N.W.2d 190 (Minn. App. 2005), *review denied* (Minn. Sept. 20, 2005).

A parent's consent to permanent transfer of legal and physical custody of a child in exchange for a county's promise not to pursue termination of parental rights, based on the parent's agreement that the files and records before the district court established the statutory criteria for the transfer, is an involuntary transfer of custody for purposes of the application of a presumption of palpable unfitness to be a party to the parent and child relationship under Minn. Stat. § 260C.301, subd. 1(b)(4) (2004), in a subsequent proceeding.

## MALPRACTICE

*Antone v. Mirviss*, (A04-1367) 694 N.W.2d 564 (Minn. App. 2005), *review granted* (Minn. June 28, 2005).

1. A rule 12.02 motion to dismiss an action is deemed to be a motion for summary judgment if matters outside the pleadings are submitted and not excluded by the district court.

2. A cause of action accrues for purposes of applying the statute of limitations when the cause of action is able to survive a motion to dismiss for failure to state a claim.

3. A cause of action will survive a motion to dismiss only if at least “some” ascertainable damages have occurred, even if not all damages are known or determinable.

4. In a legal malpractice action based on an allegation that a lawyer was negligent in preparing an antenuptial agreement and thus failed to prevent a former spouse from obtaining property that was to be protected by the agreement, the requisite damages do not occur until the district court awards such property to the former spouse.

5. The term “some” damage means damages that are fixed and ascertainable and not merely hypothetical or potential.

## PROBATE

*In re Estate of Bonde*, (A04-784) 694 N.W.2d 74 (Minn. App. 2005).

1. The debtor-creditor law definition of what constitutes a homestead applies to the administration of decedent’s estates.

2. Residential property owned but not occupied by decedent did not qualify as her homestead in her estate.

## Conservatorship

*In re Guardianship of Welch*, (A03-1871) 686 N.W.2d 54 (Minn. App. 2004).

1. Prior court approval is not necessary for a private guardian to consent to administration of neuroleptic medication to an incapacitated individual who is not civilly committed.

2. When an incapacitated individual asserts that administration of neuroleptic medication adversely affects his or her constitutional rights, the court must follow the procedures set forth in *Price v. Sheppard*, 307 Minn. 250, 239 N.W.2d 905 (1976), and *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976), to ensure protection of privacy and due process rights as guaranteed by the Minnesota Constitution.

## Wills

*In re Estate of Martignacco*, (A04-814) 689 N.W.2d 262 (Minn. App. 2004), *review denied* (Minn. Jan. 26, 2005).

1. A nonmarital issue may establish parentage for purposes of intestate succession through the probate code by clear and convincing evidence, even after the death of the issue's biological parent.

2. A purely biological relationship may establish parentage for purposes of intestate succession.

*In re Estate of Mealey*, (A04-1498) 695 N.W.2d 143 (Minn. App. 2005).

A person who is not affected by the administration of a will does not have standing to appeal the final accounting.

## **REAL PROPERTY**

*Minn. Ctr. for Env'tl. Advocacy v. Comm'r of Minn. Pollution Control Agency*, (A04-1323) 696 N.W.2d 398 (Minn. App. 2005).

1. The Minnesota Pollution Control Agency's use of its phosphorus strategy, which suggests a minimum water residence time of 14 days before a body of water is deemed a lake or reservoir for purposes of phosphorus-control rules, is not arbitrary and capricious.

2. Because, under a pertinent rule, a party proposing an action by an agency generally has the burden of proof in administrative proceedings, this burden is properly placed on a party asking the Minnesota Pollution Control Agency to include in a wastewater treatment plant permit a limit on phosphorus discharge established by rule.

3. A failure to trace the effect of phosphorus on a lake or reservoir to a particular discharge of phosphorus is a failure to show that the discharge "affects" the lake or reservoir within the meaning of the governing rule.

*Cederberg v. City of Inver Grove Heights*, (A04-214) 686 N.W.2d 853 (Minn. App. 2004).

1. A document is filed with the district court when it is delivered to or received by the office where it is required to be filed, even though the document may not be stamped "filed" until sometime later.

2. Joinder of additional property owners as parties in an assessment appeal concerning benefits and damages is generally inappropriate because each appeal necessarily involves different facts relevant only to an individual piece of property.

*Willhite v. Cass County Bd. of Supervisors*, (A04-660) 692 N.W.2d 92 (Minn. App. 2005), *review denied* (Minn. App. 19, 2005).

A surveyor's discovery that a previous surveyor's report deviated from a professional standard of care by relying on quarter corners erroneously located about thirty feet east of their true location is a discovery of an error in a land survey that provides a basis for an action to recover damages if it is brought within two years of this discovery and within ten years of the alleged error in the initial survey.

*Middle River-Snake River Watershed Dist. v. Dennis Drewes, Inc.*, (A04-825) 692 N.W.2d 87 (Minn. App. 2005).

A party who, without good cause, fails to serve a necessary expert-identification affidavit within 180 days after initiation of a negligence claim against a professional cannot benefit from the statutory 60-day period available to cure postdemand deficiencies under Minn. Stat. § 544.42, subd. 6(c) (2004); Minn. Stat. § 544.42, subs. 2(2), 4, and Minn. Stat. § 544.42, subd. 6(c) (2004), read together, mandate dismissal of the claim.

*Pollard v. Southdale Gardens of Edina Condo. Ass'n, Inc.*, (A04-2057) 698 N.W.2d 449 (Minn. App. 2005).

A written contract may be modified by subsequent acts and conduct of the parties to the contract. Because a nonwaiver clause may be modified by subsequent conduct, the mere presence of a nonwaiver clause does not automatically bar a waiver claim.

*Wong v. Interspace-West, Inc.*, (A04-2409) 701 N.W.2d 301 (Minn. App. 2005), *review denied* (Minn. Oct. 18, 2005).

A computer-generated document containing the statutorily mandated language in 12-point, bold-type font should be classified as "printed" and deemed to satisfy the prelien-notice requirements of Minn. Stat. § 514.011, subd. 1 (2004).

*David E. McNally Dev. Corp. v. City of Winona*, (A03-1785) 686 N.W.2d 553 (Minn. App. 2004).

1. To rebut the presumption that an approved assessment roll is valid and that the benefit of the municipal improvement exceeds the amount of a special assessment, a property owner must clearly testify that the assessment exceeds the benefit.

2. A municipality has reasonable discretion to divide property into different classes for assessment purposes and may consider such factors as the timeline for development and the additional cost of extending the proposed utilities to undeveloped property.

3. A municipality must comply with its ordinances in determining the benefits and assessing the costs of public improvements.

4. If failure to correctly identify the larger area benefited by an improvement affects the entire assessment roll, the district court may order a reassessment of all the property on the roll.

*Ag Serv. of Am., Inc. v. Schroeder*, (A04-1150) 693 N.W.2d 227 (Minn. App. 2005).

1. The seller of agricultural land must give the previous owner the 14-day notice of intent to sell required by Minn. Stat. § 500.245, subd. 1(a) (2004) and the affidavit affirming the purchase agreement required by Minn. Stat. § 500.245, subd. 2(b) (2004), to comply with the statutory right of first refusal.

2. The seller of farmland subject to Minn. Stat. § 500.245 may not enter into an enforceable purchase agreement to convey such land until such seller gives the 14-day notice of intent to sell required by law.

*Block 25 Comm. v. City of Walker*, (A04-833) 690 N.W.2d 403 (Minn. App. 2005).

Minn. Stat. § 340A.702(6) (2002), which makes it a gross misdemeanor to sell intoxicating liquor within 1,000 feet of a state hospital, training school, reformatory, prison, or other institution under the supervision and control, in whole or in part, of the Commissioner of Human Services or the Commissioner of Corrections, does not apply to sales within 1,000 feet of a county jail.

*McLaughlin v. Heikkila*, (A04-1906) 697 N.W.2d 231 (Minn. App. 2005), *review denied* (Minn. Aug. 24, 2005).

To create a binding agreement, the acceptance of a written offer to convey real estate must be in writing and be delivered to the other party.

### **Condemnation**

*In re Wren Residential Relocation Claim*, (A04-207) 685 N.W.2d 721 (Minn. App. 2004), *aff'd*, 699 N.W.2d 758 (Minn. 2005).

Under the Minnesota Uniform Relocation Act, a governmental entity undertakes the acquisition of property in a redevelopment area when the entity is significantly involved in the redevelopment project.

*St. Louis Park Post No. 5632 v. City of St. Louis Park*, (A04-500) 687 N.W.2d 405 (Minn. App. 2004), *review denied* (Minn. Dec. 14, 2004).

The holder of a lease to a nonconforming billboard is not owed compensation under Minn. Stat. § 173.17(c) (2002) where a city informs a landowner that the billboard must be removed as a condition of city approval of the landowner's request to develop property.

*Concept Props., LLP v. City of Minnetrista*, (A04-1414) 694 N.W.2d 804 (Minn. App. 2005), *review denied* (Minn. July 19, 2005).

1. A municipality's decision to redraw its Metropolitan Urban Services Area (MUSA) line as part of a comprehensive plan update is not unreasonable when the municipality predicates its decision on over 12 months of public meetings, bases its decision on the public commitment to rural character and an assessment of available resources, and reduces the MUSA to comply with the Metropolitan Council's directives.

2. A municipality's denial of an application to rezone and amend its comprehensive plan is not arbitrary or capricious when its decision is based on a desire to conform to the recently drafted comprehensive plan and the landowner does not present a compelling reason for amendment.

3. An agency may cure a violation of the simultaneous-written-findings requirement of Minn. Stat. § 15.99, subd. 2 (2002), by rendering a second decision with simultaneous written findings within the statutory or agreed-upon time limit as long as the agency's decision-making process demonstrates an absence of bad faith.

### **Mechanics Liens**

*Twin City Pipe Trades Serv. Ass'n, Inc. v. Peak Mech., Inc.*, (A04-356) 689 N.W.2d 549 (Minn. App. 2004).

The trustees of an employee-benefit trust fund may enforce an employer's obligation to contribute to the fund through a mechanics' lien action against real property improved through the labor of the employees.

*Wong v. Interspace-West, Inc.*, (A04-2409) 701 N.W.2d 301 (Minn. App. 2005), *review denied* (Minn. Oct. 18, 2005).

A computer-generated document containing the statutorily mandated language in 12-point, bold-type font should be classified as "printed" and deemed to satisfy the prelien-notice requirements of Minn. Stat. § 514.011, subd. 1 (2004).

### **Mortgages**

*Ripley v. Piehl*, (A04-1962) 700 N.W.2d 540 (Minn. App. 2005), *review denied* (Minn. Oct. 18, 2005).

A professional lender's negligent failure to discover a properly recorded mortgage against real property prior to acquiring its own mortgage against that property is not an excusable mistake of fact entitling the lender to be equitably subrogated to the rights of a prior senior lienholder.

*Timeline, LLC v. Williams Holdings #3, LLC*, (A04-2189) 698 N.W.2d 181 (Minn. App. 2005), *review denied* (Minn. Aug. 24, 2005).

Minn. Stat. § 580.25 (2002) sets forth the express requirements necessary to effectuate a valid redemption. Evidence of a corporate name change or attorney-in-fact status need not be provided to the county sheriff in order to complete a valid redemption.

*River City Mortgage Corp. v. Baldus*, (A04-1338) 695 N.W.2d 375 (Minn. App. 2005).

Because it does not contain a definitive expiration date or term of the agreement, the rate-lock agreement entered into between appellant and respondent-Baldus violates the unambiguous requirements of Minn. Stat. § 47.206 (2004), and the agreement is, therefore, unenforceable as a matter of law.

## **Unlawful Detainer**

*Cole v. Met. Council HRA*, (A04-261) 686 N.W.2d 334 (Minn. App. 2004).

1. Under 24 C.F.R. § 982.552(b)(2) (2003), the Minnesota Council HRA must terminate Section 8 benefits for a family evicted from housing for a serious violation of the lease.

2. 24 C.F.R. § 982.552(b)(2) is mandatory, and a hearing officer is not permitted to consider a particular hardship that would result from the termination of Section 8 benefits.

*Hanson v. Woolston*, (A04-1628) 701 N.W.2d 257 (Minn. App. 2005), *review denied* (Minn. Oct. 18, 2005).

1. A judgment may be collaterally attacked for lack of jurisdiction if the record affirmatively shows that the requisite jurisdictional elements are missing.

2. A person who obtains an interest in property through the assignment of a void judgment may not acquire title as a third-party bona fide purchaser.

*Blackowiak v. Mielke*, (A04-1159) 692 N.W.2d 897 (Minn. App. 2005).

Pursuant to Minn. Stat. §§ 500.19, subd. 4, 507.02 (2004), a married person may directly convey real property to a spouse.

## **Zoning**

*Roselawn Cemetery v. City of Roseville*, (A04-672) 689 N.W.2d 254 (Minn. App. 2004).

A municipality does not act unreasonably, arbitrarily, or capriciously by denying a conditional use permit when the applicant fails to show that its proposed use will not adversely affect the general public health, safety, or welfare of the community.

*Concept Props, LLP v. City of Minnetrista*, (A04-1414) 694 N.W.2d 804 (Minn. App. 2005), *review denied* (Minn. July 19, 2005).

1. A municipality's decision to redraw its Metropolitan Urban Services Area (MUSA) line as part of a comprehensive plan update is not unreasonable when the municipality predicates its decision on over 12 months of public meetings, bases its decision on the public commitment to rural character and an assessment of available resources, and reduces the MUSA to comply with the Metropolitan Council's directives.

2. A municipality's denial of an application to rezone and amend its comprehensive plan is not arbitrary or capricious when its decision is based on a desire to conform to the recently drafted comprehensive plan and the landowner does not present a compelling reason for amendment.

3. An agency may cure a violation of the simultaneous-written-findings requirement of Minn. Stat. § 15.99, subd. 2 (2002), by rendering a second decision with

simultaneous written findings within the statutory or agreed-upon time limit as long as the agency's decision-making process demonstrates an absence of bad faith.

## STATUTES OF LIMITATION

*Antone v. Mirviss*, (A04-1367) 694 N.W.2d 564 (Minn. App. 2005), *review granted* (Minn. June 28, 2005).

1. A rule 12.02 motion to dismiss an action is deemed to be a motion for summary judgment if matters outside the pleadings are submitted and not excluded by the district court.

2. A cause of action accrues for purposes of applying the statute of limitations when the cause of action is able to survive a motion to dismiss for failure to state a claim.

3. A cause of action will survive a motion to dismiss only if at least "some" ascertainable damages have occurred, even if not all damages are known or determinable.

4. In a legal malpractice action based on an allegation that a lawyer was negligent in preparing an antenuptial agreement and thus failed to prevent a former spouse from obtaining property that was to be protected by the agreement, the requisite damages do not occur until the district court awards such property to the former spouse.

5. The term "some" damage means damages that are fixed and ascertainable and not merely hypothetical or potential.

### **Real Estate**

*Willhite v. Cass County Bd. of Supervisors*, (A04-660) 692 N.W.2d 92 (Minn. App. 2005), *review denied* (Minn. Apr. 19, 2005).

A surveyor's discovery that a previous surveyor's report deviated from a professional standard of care by relying on quarter corners erroneously located about thirty feet east of their true location is a discovery of an error in a land survey that provides a basis for an action to recover damages if it is brought within two years of this discovery and within ten years of the alleged error in the initial survey.

*Allianz Ins. Co. v. PM Servs. of Eden Prairie*, (A04-898) 691 N.W.2d 79 (Minn. App. 2005).

1. Adding a water-purification system to a building's plumbing system is an improvement to real property subject to the two-year statute of limitations contained in Minn. Stat. § 541.051 (2002).

2. The contemporaneous replacement of a pipe fitting and inspection of other fittings on the water-purification systems is ancillary to the installation, constitutes part of the improvement to real property, and is subject to the two-year statute of limitations contained in Minn. Stat. § 541.051.

## TORTS

*Allianz Ins. Co. v. PM Servs. of Eden Prairie*, (A04-898) 691 N.W.2d 79 (Minn. App. 2005).

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### Damages

*Zurich Am. Ins. Co. v. Bjelland*, (A04-709) 690 N.W.2d 352 (Minn. App. 2004), *review granted* (Minn. Mar. 4, 2005).

1. An alleged third-party tortfeasor in a workers' compensation subrogation action has a right to a jury trial on both damages and liability, and the insurer-subrogee is not automatically entitled to the full recovery of benefits paid and payable without first proving damages and liability.

2. The plain meaning of the amended language of Minn. Stat. § 176.061, subs. 3, 5, 7, 10 (2002), permits an insurer-subrogee full recovery of workers' compensation benefits paid and payable, regardless of common law or statutory limits.

*Johnson v. Foundry, Inc.*, (A04-2290) 702 N.W.2d 274 (Minn. App. 2005).

The owners of a corporation and their dependents, who claim the corporation lost profits due to the acts of an intoxicated driver who damaged the property from which the corporation conducted its business, cannot assert those lost-profits claims as claims for loss of means of support under the Minnesota Civil Damages Act against the liquor vendor that illegally sold intoxicating beverages to the intoxicated driver.

### Defamation

*Marchant Inv. & Mgmt. Co. v St. Anthony W. Neighborhood Org., Inc.*, (A04-900) 694 N.W.2d 92 (Minn. App. 2005).

1. To survive a motion to dismiss based on immunity provided by Minnesota's participation-in-government statute, Minn. Stat. §§ 554.01-.05 (2004), the nonmoving party must clearly and convincingly demonstrate the existence of an actionable tort or a violation of a constitutional right.

2. In determining whether an alleged defamatory statement presents or implies a provably false assertion of facts, we look to the broad context of the communication, including the general tenor of the speech; the specific context and content of the

statement, including the use of hyperbolic and figurative language; and whether the statement is sufficiently objective to be susceptible of being proven true or false.

*Lewis v. St. Cloud State Univ.*, (A04-1308) 693 N.W.2d 466 (Minn. App. 2005), *review denied* (Minn. June 14, 2005).

The state university system and state university are not liable as publishers for defamatory statements published in a student newspaper that operates under a binding system-wide policy prohibiting the university from exercising any control over the newspaper's content.

### **Dram Shop**

*Urban by Urban v. Am. Legion Post 184*, (A04-1409) 695 N.W.2d 153 (Minn. App. 2005), *review granted* (Minn. July 19, 2005).

Minnesota's Civil Damages Act, Minn. Stat. § 340A.801, subd. 1 (2004), gives rise to a cause of action in derogation of the common law and must be strictly construed, providing a cause of action only against persons who are in the business of providing liquor.

*Johnson v. Foundry, Inc.*, (A04-2290) 702 N.W.2d 274 (Minn. App. 2005).

The owners of a corporation and their dependents, who claim the corporation lost profits due to the acts of an intoxicated driver who damaged the property from which the corporation conducted its business, cannot assert those lost-profits claims as claims for loss of means of support under the Minnesota Civil Damages Act against the liquor vendor that illegally sold intoxicating beverages to the intoxicated driver.

### **Intentional**

*Border State Bank of Greenbush v. Bagley Livestock Exch., Inc.*, (A03-1973 & A04-86) 690 N.W.2d 326 (Minn. App. 2004), *review denied* (Minn. Feb. 23, 2005).

Under Minnesota law, a security interest attaches and is enforceable when the debtor has signed a security agreement that describes the collateral, value has been given, and the debtor has rights in the collateral; the debtor need not own the collateral.

### **Negligence**

*Laska v. Anoka County*, (A04-1661) 696 N.W.2d 133 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005).

An individual who accepts the entrustment of a group of vulnerable individuals owes a legal duty of care to each member of that group.

*Middle River-Snake River Watershed Dist. v. Dennis Drewes, Inc.*, (A04-825) 692 N.W.2d 87 (Minn. App. 2005).

A party who, without good cause, fails to serve a necessary expert-identification affidavit within 180 days after initiation of a negligence claim against a professional cannot benefit from the statutory 60-day period available to cure postdemand deficiencies under Minn. Stat. § 544.42, subd. 6(c) (2004); Minn. Stat. § 544.42, subs. 2(2), 4, and Minn. Stat. § 544.42, subd. 6(c) (2004), read together, mandate dismissal of the claim.

*Stringer v. Minn. Vikings Football Club, LLC*, (A03-1635 & A04-205) 686 N.W.2d 545 (Minn. App. 2004), *aff'd on other grounds*, 2005 WL 3071592 (Minn. 2005).

1. When an employee undertakes direct action to assist a co-employee with a workplace injury, that employee acquires a personal duty to exercise proper care.

2. When a co-employee has a personal duty to exercise proper care in the treatment of a workplace injury and provides more than scant care that does not entirely disregard the consequences of the injury, the co-employee is entitled to summary judgment in an action for gross negligence under the workers' compensation act.

*Carlson v. Friday*, (A04-804) 694 N.W.2d 828 (Minn. App. 2005).

A dog groomer, who voluntarily accepts temporary responsibility for care of a dog and exhibits basic attributes of ownership, is the keeper of the dog for purposes of secondary ownership under Minn. Stat. § 347.22 (2004), the dog-bite statute.