

An illustration of several books. On the left, there is a stack of four books with green spines. To the right of this stack is a single book with a red spine, leaning against the others. The books are rendered in a simple, stylized manner with grey outlines and white pages.

# **Minnesota Court of Appeals**

## **Significant Decisions**

**September 2010-August 2011**

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## PART I – CIVIL CASES

### Administrative Law

*American Bank of St. Paul v. City of Minneapolis*, 802 N.W.2d 781 (Minn. App. 2011).

An assessment collected under a city’s police power is subject to a reasonableness standard rather than the special-benefit standard that applies to assessments collected under a city’s taxing power.

*City of East Bethel v. Anoka County Housing & Redevelopment Authority*, 798 N.W.2d 375 (Minn. App. 2011).

1. The special law authorizing the creation of Anoka County Housing and Redevelopment Authority (ACHRA) prohibits ACHRA from exercising jurisdiction in any city that has established a housing and redevelopment authority (HRA).

2. The special law’s restriction on ACHRA’s jurisdiction limits ACHRA’s authority to assess special-benefit taxes in a city that has established an HRA regardless of when the city HRA was established.

*Minnesota Board of Chiropractic Examiners v. Cich*, 788 N.W.2d 515 (Minn. App. 2010).

1. A district court does not have authority under the injunctive power articulated in Minn. Stat. § 214.11 (2008) to modify or extend an order of the Minnesota Board of Chiropractic Examiners.

2. Acupuncture is not a “pertinent professional service” for purposes of the Minnesota Professional Firms Act, Minn. Stat. §§ 319B.01-.12 (2008).

*Peterson v. Washington County Housing & Redevelopment Authority*, \_\_\_ N.W.2d \_\_\_, 2011 WL 3557818 (Minn. App. Aug. 15, 2011), *review denied* (Minn. Oct. 26, 2011).

A local housing authority’s decision to terminate a Section 8 housing voucher participant’s benefits is not arbitrary and capricious merely because the housing authority’s hearing officer failed to consider the mitigating factors listed in title 24, section 982.552(c)(2)(i), of the Code of Federal Regulations.

## **Business Organizations**

*Asian Women United of Minnesota v. Leiendecker*, 789 N.W.2d 688 (Minn. App. 2010).

1. Unless otherwise provided in a corporation's articles of incorporation or bylaws, an indemnification advance by a corporation under Minn. Stat. § 317A.521, subd. 3 (2008), is mandatory when the statutory requirements for an advance have been met, even when the advance is sought in a proceeding that the corporation brought against the person seeking the advance.

2. When a person who requests an indemnification advance under Minn. Stat. § 317A.521, subd. 3, is determined to be ineligible for an advance under the methods set forth in Minn. Stat. § 317A.521, subd. 6(a)(1)-(4), (b) (2008), the person may apply to the district court for a determination of eligibility under Minn. Stat. § 317A.521, subd. 6(a)(5) (2008), and the district court must make an independent determination whether the person is entitled to an indemnification advance.

## **Child Protection**

*In re Welfare of Child of J.L.L.*, 801 N.W.2d 405 (Minn. App. 2011), *review denied* (Minn. July 28, 2011).

Before a district court orders a termination of parental rights, the court has discretion to allow a parent to withdraw his or her consent to voluntary termination.

*In re Welfare of Children of D.M.T.-R.*, 802 N.W.2d 759 (Minn. App. 2011).

Under the child-protection provisions of the Juvenile Court Act, Minn. Stat. §§ 260C.001-260C.451 (2010), and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Minn. Stat. §§ 518D.101-518D.317 (2010), Minnesota district courts have original and continuing subject-matter jurisdiction over proceedings to terminate parental rights to children in Minnesota who are not United States citizens.

## **Debtor-Creditor**

*Midland Credit Management v. Chatman*, 796 N.W.2d 534 (Minn. App. 2011).

Minn. Stat. § 550.37, subd. 22 (2010), does not exempt proceeds from the settlement of a personal-injury lawsuit from creditors' claims.

## **Environmental Law**

*State ex rel. Swan Lake Area Wildlife Association v. Nicollet County Bd. of County Commissioners*, 799 N.W.2d 619 (Minn. App. 2011).

The district court did not abuse its discretion by ordering Nicollet County to establish a crest elevation of 973 feet above sea level for Little Lake and Mud Lake as an equitable remedy for the county's violation of the Minnesota Environmental Rights Act. The district court reasonably concluded that a crest elevation of 973 feet is in harmony with the concurrent authority of the county and the Department of Natural Resources to manage water levels pursuant to other statutory schemes. The district court reasonably concluded that the remedy sought by appellant, a crest elevation of 976 feet above sea level, would constitute an improper retroactive application of the Minnesota Environmental Rights Act. And the district court reasonably concluded that appellant's sought-after remedy would impose unnecessary hardships on the county as well as the owners of properties near the lakes.

## **Family Law**

*In re Adoption of T.A.M.*, 791 N.W.2d 573 (Minn. App. 2010).

1. A party's motion to vacate an adoption that occurred before January 1, 2005, is subject to the deadline imposed by Minnesota Rules of Civil Procedure 60.02 rather than the deadline imposed by Minnesota Rules of Adoption Procedure 47.02.

2. Because the argument that Minnesota law does not authorize same-sex "second-parent" adoption by unmarried persons is not frivolous, a natural mother and her attorney do not become subject to conduct-based sanctions under rule 16.02 of the Rules of Adoption Procedure by advancing the argument in a motion to vacate the adoption of the mother's children.

3. An attorney's personal doubts about the persuasiveness of an argument that he has advanced is not a basis to subject him to conduct-based monetary sanctions under rule 16.02 of the Rules of Adoption Procedure.

*Boland v. Murtha*, 800 N.W.2d 179 (Minn. App. 2011).

On appeal of the denial of a motion to modify custody or restrict parenting time without an evidentiary hearing, this court (1) reviews de novo whether the district court properly considered the allegations in the moving party's affidavits; (2) reviews for an abuse of discretion the district court's determination of whether a prima facie case for modification or restriction exists; and (3) reviews de novo whether an evidentiary hearing is required.

*In re C.D.G.D.*, 800 N.W.2d 652 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011).

1. A district court abuses its discretion by treating a grandparent essentially as a noncustodial parent when calculating the amount and arrangement of grandparent visitation under Minnesota Statutes section 257C.08, subdivision 1 (2010).

2. A grandparent visitation schedule ordered against a custodial parent's wishes under Minnesota Statutes section 257C.08, subdivision 1, may be so substantial in quantity and intrusive in structure that it necessarily exceeds the district court's discretionary authority limiting grandparent visitation to schedules that do not interfere with the parent-child relationship.

3. A district court abuses its discretion by ordering grandparent visitation under Minnesota Statutes section 257C.08, subdivision 1, without giving presumptive deference to the parent's determination as to visitation or without receiving proof by clear and convincing evidence that the visitation will not interfere with the parent-child relationship.

*County of Dakota v. Blackwell*, \_\_\_ N.W.2d \_\_\_, 2011 WL 3654529 (Minn. App. Aug. 22, 2011).

Minn. Stat. § 257.60 (2010) requires that all presumptive fathers and alleged biological fathers be joined in an action brought under the Minnesota Parentage Act.

*Foster v. Foster*, 802 N.W.2d 755 (Minn. App. 2011).

After the district court determines that changing a minor child's name pursuant to Minn. Stat. § 259.11(a) (2010), is in the best interests of the child, a parent opposing the change may prevent the district court from granting the name-change request by establishing that evidence in support of the change is not clear and compelling that the substantial welfare of the child necessitates such change.

*In re Ihde*, 800 N.W.2d 808 (Minn. App. 2011).

A party may not compel the removal, pursuant to Minn. R. Civ. P. 63.03, of a district court judge assigned to a motion to modify child custody if the judge previously presided over the parties' dissolution action before the judgment and decree.

*In re M.R.P.-C.*, 794 N.W.2d 373 (Minn. App. 2011).

The district court has an affirmative obligation to inquire into whether the Indian Child Welfare Act (ICWA) applies to a custody determination when the facts suggest that the subject child may be an Indian child as defined by 25 U.S.C. § 1903(4) (2006).

*Passolt v. Passolt*, 804 N.W.2d 18 (Minn. App. 2011), *review denied* (Minn. Nov. 15, 2011).

In determining the appropriateness of a maintenance award under Minn. Stat. § 518.552 (2010), the district court may consider a maintenance recipient's prospective ability to become fully or partially self-supporting without making a finding that the recipient has acted in bad faith to remain unemployed or underemployed.

*Risk ex rel. Miller v. Stark*, 787 N.W.2d 690 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010).

In a bifurcated marriage-dissolution proceeding, when one party dies after the district court dissolves the parties' marriage, the dissolution proceeding does not abate and the district court has continuing jurisdiction to divide the parties' property.

*Xiong v. Xiong*, 800 N.W.2d 187 (Minn. App. 2011), *review denied* (Minn. Aug. 16, 2011).

For the purposes of Minnesota's putative-spouse law, whether a person had a good-faith belief that he or she was legally married is measured subjectively.

### **Governmental Immunities**

*Curtis v. Klausler*, 802 N.W.2d 790 (Minn. App. 2011), *review denied* (Minn. Oct. 18, 2011).

In order for a governmental entity to be entitled to statutory immunity pursuant to Minn. Stat. § 3.736, subd. 3(e) (2010), a wild animal in its natural state must be a direct and proximate cause of the plaintiff's injuries.

### **Insurance Coverage**

*EEP Workers' Compensation Fund v. Fun & Sun, Inc.*, 794 N.W.2d 126 (Minn. App. 2011).

1. A former employer-member of a workers' compensation self-insurance group is liable to reimburse the group for benefits paid to its employee after the employer-member has withdrawn from the group for an injury that occurred prior to withdrawal.

2. A workers' compensation self-insurance group may be equitably estopped from recovering reimbursement from an employer-member if the group fails to keep the employer-member apprised of outstanding claims and the employer-member's negative individual fund balance upon and subsequent to its withdrawal from the fund.

## **Jurisdiction and Procedure**

*Butts by Iverson v. Evangelical Lutheran Good Samaritan Society*, 802 N.W.2d 839 (Minn. App. 2011), *review denied* (Minn. Oct. 26, 2011).

A district court abuses its discretion by granting a motion for voluntary dismissal of claims that have abated under Minnesota's survival statute, Minn. Stat. § 573.01 (2010), because dismissal without prejudice deprives the defendant of an otherwise available defense.

*Collins v. Waconia Dodge, Inc.*, 793 N.W.2d 142 (Minn. App. 2011), *review denied* (Minn. Mar. 15, 2011).

A district court may sanction a party for bringing a meritless claim after the claim survived a summary-judgment motion if the denial of summary judgment does not relate to the issue on which sanctions were imposed.

*County of Washington v. TMT Land V, LLC*, 791 N.W.2d 132 (Minn. App. 2010).

A district court abuses its discretion when it orders the entry of judgment *nunc pro tunc* thereby amending the date of entry of judgment to avoid application of the effective interest rate set forth in Minn. Stat. § 549.09, subd. 1(c) (Supp. 2009).

*D.Y.N. Kiev, LLC v. Jackson*, 802 N.W.2d 821 (Minn. App. 2011).

An award of attorney fees pursuant to Minnesota Statutes section 322B.38 or section 322B.833, subdivision 7, does not relate to the merits of a violation of chapter 322B but, rather, is collateral to the merits. Thus, a judgment on the merits of a claim alleging a violation of chapter 322B is an appealable final judgment even if the issue of attorney fees has been reserved.

*Elsenpeter v. St. Michael Mall, Inc.*, 794 N.W.2d 667 (Minn. App. 2011).

A party who obtains an order compelling arbitration, but does not prevail in the underlying action, is not a prevailing party entitled to an award of fees and costs.

*Frontier Insurance Company v. Frontline Processing Corporation*, 788 N.W.2d 917 (Minn. App. 2010), *review denied* (Minn. Dec. 14, 2010).

As a discovery sanction under Minn. R. Civ. P. 37.02, a district court may dismiss plaintiff's claims against all defendants if plaintiff's disobedience prejudiced all defendants, regardless of whether each defendant moved for a discovery sanction.

*JL Schwieters Construction, Inc. v. Goldridge Construction, Inc.*, 788 N.W.2d 529 (Minn. App. 2010), *review denied* (Minn. Dec. 14, 2010).

On a motion to dismiss for lack of personal jurisdiction, preliminary evidence that a nonresident parent company operated its subsidiary to develop and hold real estate in Minnesota is sufficient to establish a prima facie showing of vicarious personal jurisdiction over the parent.

*Storms v. Schneider*, 802 N.W.2d 824 (Minn. App. 2011), *review denied* (Minn. Oct. 26, 2011).

In a case in which a party has pleaded a cause of action for replevin, each party has a right to a trial by jury on that cause of action.

*Willis v. Indiana Harbor Steamship Company*, 790 N.W.2d 177 (Minn. App. 2010), *review denied* (Minn. Dec. 22, 2010).

A party is not subject to a spoliation sanction for the loss of evidence over which the party had no physical control.

### **Labor and Employment**

*City of Minneapolis v. Minneapolis Police Relief Association*, 800 N.W.2d 165 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011).

The Police and Firefighters' Relief Association Guidelines Act, Minn. Stat. § 69.77, subd. 11 (2010), requires covered police and firefighter relief associations to obtain city ratification of bylaw amendments that “increase[] or otherwise affect[] the retirement coverage provided by or the service pensions or retirement benefits payable from [the associations].” But the statute does not govern when such bylaw amendments must be made.

*Coursolle v. EMC Insurance Group, Inc.*, 794 N.W.2d 652 (Minn. App. 2011), *review denied* (Minn. Apr. 19, 2011).

Constructive discharge is not an independent cause of action. Constructive discharge is a doctrine that may be invoked by a plaintiff in some employment-related actions to prove that the defendant made an adverse employment action.

*Matthews v. Eichorn Motors, Inc.*, 800 N.W.2d 823 (Minn. App. 2011).

A person is liable for aiding and abetting a violation of the Minnesota Human Rights Act when that person knows that another person's conduct constitutes a violation of the act and gives substantial assistance or encouragement to that person's conduct.

*Rios v. Jennie-O Turkey Store, Inc.*, 793 N.W.2d 309 (Minn. App. 2011), *review denied* (Minn. Mar. 29, 2011).

A claim for unpaid overtime compensation under the Minnesota Fair Labor Standards Act fails as a matter of law if the amount of compensation received by a plaintiff for a workweek exceeds the amount required to be paid under the act for that workweek.

*Williams v. National Football League*, 794 N.W.2d 391 (Minn. App. 2011), *review denied* (Minn. Apr. 27, 2011).

1. On appeal from an order denying permanent injunctive relief, when appeal is not also taken from final judgment, this court's scope of review is limited and encompasses the merits of the underlying claims only to the extent necessary to review challenges to the injunction.

2. Because the definition of “drug” in the Drug and Alcohol Testing in the Workplace Act (DATWA) does not encompass bumetanide, testing done solely to detect the presence of bumetanide is not subject to DATWA’s requirements.

### **Liens and Foreclosures**

*Beecroft v. Deutsche Bank National Trust Company*, 798 N.W.2d 78 (Minn. App. 2011), *review denied* (Minn. July 19, 2011).

As a prerequisite to foreclosure by advertisement, Minn. Stat. § 580.02 (2010) requires the mortgage and any assignments of the mortgage to be recorded, except when the mortgage is on registered land, in which case the mortgage and all assignments shall be duly registered. Minnesota law does not require a power of attorney authorizing an entity or person to assign a mortgage to be recorded.

*Somsen, Mueller, Lowther & Franta, PA v. Estates of Olsen*, 790 N.W.2d 194 (Minn. App. 2010).

An attorney’s lien filed against a decedent’s real estate to secure a claim for payment of costs and expenses of administration under Minn. Stat. § 524.3-805(a)(1) (2008) does not have priority over a previously registered mortgage. Unless a mortgagee seeks a deficiency judgment, a mortgagee may proceed to foreclose its mortgage against a decedent’s real estate without presenting the mortgage indebtedness as a claim against the decedent’s estate under Minn. Stat. § 524.3-803 (2008).

### **Probate**

*In re Beachside I Homeowners Association*, 802 N.W.2d 771 (Minn. App. 2011).

Minn. Stat. § 524.3-101 (1990) provides that statutorily defined heirs obtain a vested interest in the estate of a person who dies intestate immediately upon that person’s death. A probate proceeding to determine the heirs is not required.

*Greer v. Professional Fiduciary, Inc.*, 792 N.W.2d 120 (Minn. App. 2011).

A formerly incapacitated person’s claims against her former conservator and former guardian constitute improper collateral attacks on the probate court’s final orders when the claims challenge actions taken during the conservatorship and guardianship that are addressed in the probate court’s final orders.

## **Real Estate and Property Rights**

*Britney v. Swan Lake Cabin Corporation*, 795 N.W.2d 867 (Minn. App. 2011).

An action for judicial determination of boundary by practical location must be dismissed when the party seeking the determination fails to comply with the procedural requirements of Minn. Stat. § 508.671 (2010).

*BOB Acres, LLC v. Schumacher Farms, LLC*, 797 N.W.2d 723 (Minn. App. 2011), *review granted* (Minn. June 14, 2011), *and appeal dismissed* (Minn. Aug. 12, 2011).

In a contract for the sale of real property, the exchange of promises to sell and to purchase the property may provide adequate consideration to create an enforceable contract; the mere recital of an exchange of nominal earnest money that was not in fact paid or requested does not preclude formation of an enforceable contract.

*Henricksen v. Town Board of Kerrick*, 797 N.W.2d 211 (Minn. App. 2011), *review denied* (Minn. June 14, 2011).

The filing of a petition to establish, alter, or vacate a township road under Minn. Stat. § 164.07, subd. 2(a) (2010), does not entitle owners of land affected by a town board's decision on the petition to personal service of the order describing the road and giving notice of when and where the board will meet to act on the petition.

*Interstate Companies, Inc. v. City of Bloomington*, 790 N.W.2d 409 (Minn. App. 2010), *review denied* (Minn. Apr. 27, 2011).

1. In a claim of regulatory taking under the Minnesota Constitution, the decision in *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980), informs and broadens the analysis under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978).

2. The Minnesota Constitution, Article 1, § 13, which states that “[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefore, first paid or secured,” provides greater protection for property owners than the less restrictive language of the United States Constitution, Amendment V.

3. In an inverse condemnation case, the issue of whether a property owner has demonstrated a substantial diminution in value generally is a fact question for determination by the factfinder.

*Khan v. Minneapolis City Council*, 792 N.W.2d 463 (Minn. App. 2010).

The Minneapolis Code of Ordinances does not authorize the city council to order the demolition of a building absent a current finding that the building constitutes a nuisance.

*NC Properties, LLC v. Lind*, 797 N.W.2d 214 (Minn. App. 2011).

1. A seller's right to retain a down payment upon cancellation of a contract for the sale of land under Minn. Stat. § 559.21 (2010) does not entitle the seller to also recover under provisions of other documents related to the sale that do not reference a down payment.

2. A seller who cancels a transaction for the sale of land under Minn. Stat. § 559.21 thereby elects a remedy and may not obtain a double recovery by enforcing provisions of other documents related to the sale.

### **School Law**

*Zinter v. University of Minnesota*, 799 N.W.2d 243 (Minn. App. 2011).

A student's claims against an academic institution for failure to award a post-graduate degree are properly dismissed when their resolution requires the court to inquire unduly into the educational processes of that institution.

### **Torts**

*Ames & Fischer Co. v. McDonald*, 798 N.W.2d 557 (Minn. App. 2011), *review denied* (Minn. July 19, 2011).

A cause of action for professional malpractice based on the allegedly negligent failure to make or advise to make an I.R.C. § 754 (2006) election accrues, and the statute of limitations begins to run, when the income-tax return is filed without making the election.

*Ironwood Springs Christian Ranch, Inc. v. Walk to Emmaus*, 801 N.W.2d 193 (Minn. App. 2011).

1. The liability of a person who undertakes another's duty owed to a third person is governed by Restatement (Second) of Torts § 324A.

2. To be liable under Restatement (Second) of Torts § 324A(b), a person who undertakes another's duty owed to a third person must completely assume the duty.

*White v. Many Rivers West Limited Partnership*, 797 N.W.2d 739 (Minn. App. 2011).

1. A landlord has no common-law duty to install window screens that will withstand the force of a child and prevent his accidental fall.

2. A landlord has no common-law duty to warn that a window screen cannot withstand the force of a child when the hazard is open and obvious or when the tenant is otherwise actually aware of the screen's inability.

## **Unemployment Benefits**

*Kelly v. Ambassador Press, Inc.*, 792 N.W.2d 103 (Minn. App. 2010).

Insufficient notice of an appeal hearing under Minn. Stat. § 268.105, subd. 1(a) (Supp. 2009), may constitute good cause for an applicant's failure to participate in the evidentiary hearing.

*Lewis v. West Side Community Health Services, Inc.*, 802 N.W.2d 853 (Minn. App. 2011).

An individual employed by an educational-service agency that contracted to provide services to an educational institution is ineligible to receive unemployment benefits during time not worked between academic years or terms when the individual reasonably anticipates returning to the employment.

*Santillana v. Central Minnesota Council on Aging*, 791 N.W.2d 303 (Minn. App. 2010).

1. A misrepresentation made by an applicant during the hiring process that is material to the position constitutes employment misconduct under Minn. Stat. § 268.095, subd. 6(a) (Supp. 2009).

2. An employee cannot be discharged for aggravated employment misconduct unless the involved conduct was committed during the same time period as the employment.

*Sykes v. Northwest Airlines, Inc.*, 789 N.W.2d 253 (Minn. App. 2010).

When deciding whether an applicant for unemployment benefits quit her job to accept a different one with “substantially better terms and conditions of employment” under the better-job exception defined in Minn. Stat. § 268.095, subd. 1 (Supp. 2009), the former employer's agreement to continue to provide the former employee with health-insurance coverage is not a factor.

*Vasseei v. Schmitt & Sons School Buses Inc.*, 793 N.W.2d 747 (Minn. App. 2010).

Upon a timely request for reconsideration, if an unemployment-law judge (ULJ) determines that an unrepresented party's failure to present evidence at a hearing resulted from the ULJ's failure to assist the party as required by Minn. R. 3310.2921 (2009), the ULJ may set aside the decision and order an additional evidentiary hearing under Minn. Stat. § 268.105, subd. 2(a)(2) (Supp. 2009).

*Voge v. Department of Employment & Economic Development*, 794 N.W.2d 662 (Minn. App. 2011).

An individual whose state unemployment benefit year expired before the July 22, 2010 enactment of the Unemployment Compensation Extension Act of 2010, Pub. L. No. 111-205, § 3(a), 124 Stat. 2236, is not entitled to continue receiving federal extended unemployment benefit payments if the individual became eligible for a new state unemployment benefit account, even if the individual is unable to collect from the new state unemployment benefit account because the unemployment benefit amount has been recalculated downward.

## **PART II – CRIMINAL CASES AND CASES ON RELATED SUBJECTS**

### **Commitment of Sex Offenders**

*In re Commitment of Navratil*, 799 N.W.2d 643 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011).

A district court's decision whether to order indeterminate commitment of an individual as a sexually dangerous person (SDP) is based only on whether the individual continues to meet the statutory definition of an SDP after the initial commitment period. A treatment facility's failure to provide treatment during the initial commitment period has no bearing on the district court's decision.

### **Constitutional Law**

*State v. Peter*, 798 N.W.2d 552 (Minn. App. 2011).

When political speech is inextricably intertwined with expressive conduct that may be offensive by itself, the speech and conduct are protected by the First Amendment unless they rise to the level of fighting words.

### **DWI & Implied Consent**

*State v. Brown*, 801 N.W.2d 186 (Minn. App. 2011).

An intoxicated, physically disabled individual using a motorized device as a substitute for walking is not driving, operating, or in physical control of a motor vehicle for purposes of Minn. Stat. § 169.20, subd. 1 (2008).

*State v. Edstrom*, 792 N.W.2d 105 (Minn. App. 2010).

1. The district court did not err by holding a *Frye-Mack* hearing regarding the general acceptance and scientific reliability of gas headspace chromatography as performed on urine samples.

2. The district court did not abuse its discretion by admitting expert testimony regarding the acceptability and reliability of gas headspace chromatography for the purpose of a *Frye-Mack* hearing.

3. The *Frye-Mack* hearing established that gas headspace chromatography is generally accepted in the scientific community, and it is a reliable technique for determining the alcohol concentration in a urine sample, including a first-void urine sample.

*Ellingson v. Commissioner of Public Safety*, 800 N.W.2d 805 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011).

Because the body's natural processes cause the alcohol concentration of urine to change rapidly over time, exigent circumstances justify the warrantless collection of a urine sample from a person arrested for driving while impaired.

*State v. Ferrier*, 792 N.W.2d 98 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011).

Although a conviction for refusing to submit to implied-consent chemical testing requires proof of a volitional act that indicates unwillingness to submit to a test, this element may be established by direct or circumstantial evidence. Circumstantial evidence of a driver's conduct may demonstrate refusal.

### **Evidence**

*State v. Usee*, 800 N.W.2d 192 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011).

A district court does not violate a criminal defendant's right to confront witnesses against him under *Bruton v. United States* by admitting nontestimonial hearsay statements of a jointly tried codefendant.

### **Forfeiture**

*Peterson v. 2004 Ford Crown Victoria*, 792 N.W.2d 454 (Minn. App. 2010).

1. A party's failure to plead in accordance with the caption requirement of Minn. Stat. § 609.5314, subd. 3 (2008), does not deprive the district court of subject-matter jurisdiction over a request for judicial determination of forfeiture or require dismissal of such request.

2. Minnesota Rule of Civil Procedure 15 authorizes the district court to permit a party to correct the caption of pleadings.

3. If prior to completion of a judicial determination of forfeiture under Minn. Stat. § 609.5314, subd. 3, the state decides not to prosecute and releases a vehicle, governmental entities are responsible for the towing and storage fees to the extent of available forfeiture funds and in accord with the division of forfeiture proceeds under Minn. Stat. § 609.5315, subd. 5 (2008).

4. The district court may order the payment of attorney fees as a sanction if it makes explicit findings of improper conduct in accordance with the basis of the award.

## **Guilty Pleas**

*State v. Lopez*, 794 N.W.2d 379 (Minn. App. 2011).

The fair-and-just standard for withdrawal of a guilty plea is met when the district court fails to conduct the inquiry required under Minn. R .Crim. P. 15.02, subd. 1(3), to determine, before accepting the plea, that a defendant understands that if he is not a United States citizen a guilty plea may have adverse immigration consequences; and the defendant is not represented by counsel, has only minimal experience in the criminal justice system, has neither received nor signed a plea petition; and the prosecution has shown no prejudice that would result from a plea withdrawal.

## **Habeas Corpus**

*Aziz v. Fabian*, 791 N.W.2d 567 (Minn. App. 2010).

The holding of *Carrillo v. Fabian*, 701 N.W.2d 763 (Minn. 2005), that the “some evidence” standard as formerly used in prison disciplinary fact-finding violates due process, is not retroactively applicable to disciplinary hearings held before the release of that opinion.

## **Pretrial Procedure**

*State v. Pierce*, 792 N.W.2d 83 (Minn. App. 2010).

When the state prosecutes a person who has allegedly violated an order for protection under the Domestic Abuse Act by sending a prohibited message by electronic mail, venue is proper in the county from which the sender mailed the message or the county in which the recipient opened it.

## **Restitution**

*Anderson v. State*, 794 N.W.2d 137 (Minn. App. 2011), *review denied* (Minn. Apr. 27, 2011).

Because statutory law specifically demands a minimum of \$1,000 restitution for identity theft victims, the process is independent of general restitution statutes that provide for the reporting of victim losses and permit the defendant to challenge claimed amounts.

*State v. Maxwell*, 802 N.W.2d 849 (Minn. App. 2011), *review denied* (Minn. Oct. 26, 2011).

A criminal defendant is not entitled to a jury trial on the issue of restitution because Minnesota laws do not prescribe a statutory maximum amount of restitution.

*State v. Nelson*, 796 N.W.2d 343 (Minn. App. 2011).

For purposes of determining restitution in a criminal case, a district court may include the value of a crime victim's claimed item of loss only if the loss was directly caused by the conduct for which the defendant was convicted.

*State v. Ramsay*, 789 N.W.2d 513 (Minn. App. 2010).

In determining whether a claimed loss is an appropriate item of restitution, the district court abuses its discretion when it refuses to consider a civil settlement in which the victim agreed to limit its restitution request and when it awards a restitution amount in excess of that amount.

### **Search and Seizure**

*State v. Wiggins*, 788 N.W.2d 509 (Minn. App. 2010), *review denied* (Minn. Nov. 23, 2010).

A police officer's pulling up a person's excessively saggy pants during a constitutionally justified investigative stop is not a search requiring additional justification.

### **Sentencing**

*State v. Adams*, 791 N.W.2d 757 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011).

The mandatory minimum sentencing provision for a repeat offender who commits a second-degree controlled-substance crime under Minn. Stat. §§ 152.022, subd. 3(b), .026 (2006), prohibits a district court from staying execution of the sentence.

*Averbeck v. State*, 791 N.W.2d 559 (Minn. App. 2010).

A district court does not abuse its discretion by considering the implications for public safety when deciding a petition to restore the right to possess a firearm under Minn. Stat. § 609.165, subd. 1d (2008).

*State v. Hahn*, 799 N.W.2d 25 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011).

Under the Minnesota Sentencing Guidelines sections II.F.1 and VI (2005), a current felony conviction may permissively be sentenced consecutively to a prior felony sentence only when the latter is for a crime listed in section VI that has not expired or been discharged.

*State v. Hannam*, 792 N.W.2d 862 (Minn. App. 2011).

This court lacks authority to modify a sentence that has expired.

*State v. Weaver*, 796 N.W.2d 561 (Minn. App. 2011), *review denied* (Minn. July 19, 2011).

1. When the district court’s stated reasons for an upward sentencing departure are improper or inadequate, an appellate court may independently examine the record to determine if there is sufficient evidence to justify the departure based on legitimate reasons, so long as the court does not engage in fact-finding.

2. General disagreement with the Minnesota Sentencing Guidelines, or the legislative policies on which the guidelines are based, is not a valid reason for departure.

### **Substantive Criminal Law**

*State v. Ahmed*, 791 N.W.2d 296 (Minn. App. 2010), *review denied* (Minn. Feb. 15, 2011).

The phrase “any material compound, mixture, or preparation which contains any quantity of . . . [c]athinone; [m]ethcathinone” in Minn. Stat. § 152.02, subd. 2(6) (2008), does not exclude the untreated plant *catha edulis*, commonly known as khat.

*State v. Arnold*, 794 N.W.2d 397 (Minn. App. 2011).

To sustain a drug-possession conviction under Minnesota statutes section 152.021 (2006), the state may rely on evidence that the defendant constructively possessed drugs that were found where others also had access by establishing that the defendant exercised control over the drugs, and it is not improper for the prosecutor’s closing argument to refer to “dominion and control” simply as “control.”

*State v. Austin*, 788 N.W.2d 788 (Minn. App. 2010), *review denied* (Minn. Dec. 14, 2010).

1. To convict a defendant of second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(a) (2006), the state must prove beyond a reasonable doubt that the defendant acted with a sexual or aggressive intent and intended intimate contact to occur.

2. The doctrine of transferred intent applies to establish the intent element of Minn. Stat. § 609.343, subd. 1(a) (2006), when it can be shown both that the defendant intended intimate contact with someone other than the person with whom contact actually occurred and that the intended contact constituted an act of criminal sexual conduct.

*State v. Brown*, 796 N.W.2d 169 (Minn. App. 2011).

When the state introduces no evidence to establish the element of immediacy between the time the defendant left an alleged “drive-by” vehicle and discharged his firearm, the state has not proven that the defendant committed a felony drive-by shooting under Minnesota Statutes section 609.66 (2008).

*State v. Doebel*, 790 N.W.2d 707 (Minn. App. 2010), *review denied* (Minn. Jan. 26, 2011).

The statutory requirement that a driver signal a lane change, Minn. Stat. § 169.19, subd. 4 (2008), applies to a lane change made when approaching a stopped emergency vehicle pursuant to Minn. Stat. § 169.18, subd. 11(a) (2008).

*State v. Mertz*, 801 N.W.2d 219 (Minn. App. 2011).

A defendant must be given a properly administered formal oath by a court-designated individual when faced with the consequences of a perjury charge.

*State v. Milliman*, 802 N.W.2d 776 (Minn. App. 2011).

The word “attorney,” as used in Minnesota Statutes section 551.01, means an attorney-at-law.

*State v. Petersen*, 799 N.W.2d 653 (Minn. App. 2011), *review denied* (Minn. Sept. 28, 2011).

A criminal defendant was properly charged with and convicted of intentional murder of a human being, even if the defendant’s actions that caused the death of a child were directed toward the child while it was still a fetus, before it was born alive.

## **Trial Procedure**

*State v. Burdick*, 795 N.W.2d 873 (Minn. App. 2011).

A conviction based upon a stipulation pursuant to Minn. R. Crim. P. 26.01, subd. 4, is invalid if the parties fail to acknowledge, and the record does not indicate, that the preserved pretrial ruling is dispositive of the case or, if reversed on appeal, would make a contested trial unnecessary.

*State v. Infante*, 796 N.W.2d 349 (Minn. App. 2011), *review denied* (Minn. June 28, 2011).

1. If the district court excludes individuals from the courtroom without meeting the four-part test set forth in *Waller v. Georgia*, 467 U.S. 39, 48, 104 S. Ct. 2210, 2216 (1984), remand is appropriate to allow the district court to comply with *Waller*.

2. The district court need not instruct the jury that it must unanimously agree on which of two physical acts constitutes an assault if the two acts are part of a single behavioral incident.

*State v. Sailee*, 792 N.W.2d 90 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011).

If the defendant intends to testify that another person committed the offense, notice is required of the alternative-perpetrator defense under the criminal rules, but it is error for the district court to preclude the testimony without first considering alternative sanctions for violation of the rule.