

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 white highlights on the pages.

# **Minnesota Court of Appeals**

## **Significant Decisions**

**September 2005-August 2006**

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## **ADMINISTRATIVE LAW**

*Sweet v. Comm’r Human Servs.*, (A04-2274), 702 N.W.2d 314 (Minn. App. 2005), *review denied* (Minn. Nov. 15, 2005).

The absence of a provision for an evidentiary hearing in Minn. Stat. § 245C.27 (2004), is not an unconstitutional denial of procedural due process. Under the statute, allowing the applicant to file written submissions instead of holding an evidentiary hearing satisfies procedural due process so long as the procedure followed allows the applicant to adequately present his case.

### **Data Practices**

*In re GlaxoSmithKline PLC*, (A04-2150), 713 N.W.2d 48 (Minn. App. 2006), *review granted* (Minn. June 28, 2006).

1. The state may challenge a party’s confidentiality designation of documents produced pursuant to a civil investigatory demand under Minn. Stat. § 8.31, subd. 2(a) (2004), in accordance with an agreement and court order that provide for such challenges.

2. The Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01-.90 (2004), does not prevent the state from disclosing documents if the state determines that disclosure of the documents is otherwise authorized by law or if the documents are part of a judicial record.

3. The district court does not initially determine, but rather reviews the state’s determinations, that disclosure is justified under Minn. Stat. § 13.39, subd. 2.

4. Attachments to pleadings filed with the district court are part of the court record for purposes of Minn. Stat. § 13.39, subd. 3.

5. The First Amendment does not protect the confidentiality of documents produced in response to a civil investigatory demand under Minn. Stat. § 8.31, subd. 2(a).

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

*In re Class A License Application of N. Metro Harness, Inc.*, (A05-471), 711 N.W.2d 129 (Minn. App. 2006), *review denied* (Minn. June 20, 2006).

Without a statute or rule proscribing such action, a commission, in a quasi-judicial proceeding, has inherent authority to sua sponte move to reconsider a decision when the time for appeal has not expired.

### **MPCA/Environmental Quality**

*Minn. Ctr. for Env’tl. Advocacy v. City of St. Paul Park*, (A05-1029), 711 N.W.2d 526 (Minn. App. 2006).

A responsible governmental unit has discretion to select the geographic boundary for an alternative urban area-wide review and is not required to assess the cumulative impacts outside the boundary it selects.

## **Separation of Powers**

*State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet County Bd. of County Comm'rs*, (A05-1001), 711 N.W.2d 522 (Minn. App. 2006), *review denied* (Minn. June 20, 2006).

The district court has subject matter jurisdiction to hear a claim under the Minnesota Environmental Rights Act even if aspects of the claim could have been brought pursuant to administrative processes set out in the drainage code.

## **Utilities**

*In re Investigation Into Comm'n's Jurisdiction Over City's Intrastate Natural Gas Pipeline*, (Nos. A04-2342, A04-2414), 707 N.W.2d 223 (Minn. App. 2005), *review denied* (Minn. Mar. 14, 2006).

Minn. Stat. § 216B.01 (2004) excludes municipal utilities from regulation under the Minnesota Public Utilities Act “except as specifically provided herein.” Because Minn. Stat. § 216B.045 (2004) does not specifically provide for regulation of municipal utilities, respondent Minnesota Public Utilities Commission exceeded its statutory authority by asserting jurisdiction over the municipal utility’s pipeline.

## **ANIMALS**

*In re Molly*, (A05-1130), 712 N.W.2d 567 (Minn. App. 2006).

A city lacks authority to bring an action to enforce a non-self-executing statutory provision if the city has not adopted a procedure for the provision’s implementation.

## **ARBITRATION**

*All Metro Supply, Inc. v. Warner*, (A05-446), 707 N.W.2d 1 (Minn. App. 2005).

A district court exceeds its authority when it submits an award to the arbitrator for clarification after expiration of the statutory time limits imposed by Minn. Stat. § 572.16, subd. 3 (2004).

## **ATTORNEY FEES**

*Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, (A05-800, A05-1533), 715 N.W.2d 458 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006).

Upon finding excusable neglect pursuant to Minn. R. Civ. P. 6.02, the district court may grant an extension of time for filing an affidavit certifying expert review after expiration of the 90-day limit imposed by Minn. Stat. § 544.42 (2004).

## **Trial**

*Gibson v. Trs. of Minn. State Basic Bldg. Trades Fringe Benefits Funds*, (A05-39), 703 N.W.2d 864 (Minn. App. 2005), *review granted and decision vacated in part* (Minn. Dec. 13, 2005), *remanded* (Minn. App. Dec. 20, 2005).

When real estate held in joint tenancy is subject to a judgment lien against the interest of one joint tenant and that real estate is sold, the judgment creditor may recover from only the fractional share of the proceeds of the real estate attributable to the joint tenant who is the judgment debtor.

## **549.211**

*Cargill Inc. v. Jorgenson Farms*, (A05-2287), 719 N.W.2d 226 (Minn. App. 2006).

The district court is not required to make a finding of “bad faith” before imposing sanctions under Minn. Stat. § 549.211, subd. 2(1) (2004).

## **BUSINESS ORGANIZATIONS**

*Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, (A05-1293), 716 N.W.2d 366 (Minn. App. 2006), *review granted* (Minn. Aug. 23, 2006).

An attorney’s false statement to an adverse party during a settlement negotiation constitutes an actionable misrepresentation if it implies facts that the attorney knows or has reason to know are false and on which the adverse party reasonably and detrimentally relies.

## **Corporations**

*Drewitz v. Motorwerks, Inc.*, (A04-2338), 706 N.W.2d 773 (Minn. App. 2005), *review granted* (Minn. Feb. 14, 2006).

1. The failure to amend a complaint to include a cause of action that arises from an overlapping nucleus of facts but does not accrue until after commencement of the original action does not result in claim preclusion.

2. Absent a provision in a mandatory buy-sell agreement that divests, or evidences an intent to divest, a shareholder-employee of his or her stock upon discharge, the discharged employee remains a shareholder until the corporation repurchases the shares according to the terms of the buy-sell agreement.

## CIVIL PROCEDURE

*Drewitz v. Motorwerks, Inc.*, (A04-2338), 706 N.W.2d 773 (Minn. App. 2005), *review granted* (Minn. Feb. 14, 2006).

1. The failure to amend a complaint to include a cause of action that arises from an overlapping nucleus of facts but does not accrue until after commencement of the original action does not result in claim preclusion.

2. Absent a provision in a mandatory buy-sell agreement that divests, or evidences an intent to divest, a shareholder-employee of his or her stock upon discharge, the discharged employee remains a shareholder until the corporation repurchases the shares according to the terms of the buy-sell agreement.

*Bradley v. First Nat'l Bank of Walker, N.A.*, (A05-634), 711 N.W.2d 121 (Minn. App. 2006).

1. Minn. Stat. § 336.3-307(b) (2004) (section 3-307(b) of the Uniform Commercial Code) and its accompanying statute of limitations, apply to claims against a payor bank for honoring checks fraudulently written by a fiduciary.

2. Where the Uniform Commercial Code Article 3 applies to breach-of-fiduciary-duty claims, it preempts common law bases for recovery.

3. Where an answer indicates a statute of limitations defense is raised and the opposing party has adequate opportunity to contest the defense, it is not an abuse of discretion for the trial court to consider the defense.

*In re GlaxoSmithKline PLC*, (A04-2150), 713 N.W.2d 48 (Minn. App. 2006), *review granted* (Minn. June 28, 2006).

1. The state may challenge a party's confidentiality designation of documents produced pursuant to a civil investigatory demand under Minn. Stat. § 8.31, subd. 2(a) (2004), in accordance with an agreement and court order that provide for such challenges.

2. The Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01-.90 (2004), does not prevent the state from disclosing documents if the state determines that disclosure of the documents is otherwise authorized by law or if the documents are part of a judicial record.

3. The district court does not initially determine, but rather reviews the state's determinations, that disclosure is justified under Minn. Stat. § 13.39, subd. 2.

4. Attachments to pleadings filed with the district court are part of the court record for purposes of Minn. Stat. § 13.39, subd. 3.

5. The First Amendment does not protect the confidentiality of documents produced in response to a civil investigatory demand under Minn. Stat. § 8.31, subd. 2(a).

## **Amended Complaint**

*State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet County Bd. of County Comm'rs*, (A05-1001), 711 N.W.2d 522 (Minn. App. 2006), *review denied* (Minn. June 20, 2006).

The district court has subject matter jurisdiction to hear a claim under the Minnesota Environmental Rights Act even if aspects of the claim could have been brought pursuant to administrative processes set out in the drainage code.

## **Collateral Estoppel**

*State v. Lemmer*, (A05-2481), 716 N.W.2d 657 (Minn. App. 2006), *review granted* (Minn. Sept. 19, 2006).

1. Because the doctrine of collateral estoppel is substantive law, Minn. Stat. § 169A.53, subd. 3(g) (2004), is a constitutional abrogation of *State v. Victorsen*, 627 N.W.2d 655 (Minn. App. 2001).

2. As a matter of comity, Minn. Stat. § 169A.53, subd. 3(g) (2004), is sustainable.

*Crossman v. Lockwood*, (A05-1372), 713 N.W.2d 58 (Minn. App. 2006).

The doctrine of collateral estoppel does not bar the relitigation of an issue when the party against whom collateral estoppel is asserted did not have controlling participation or active self-interest in a previous action involving the same issue.

*Zander v. State*, (A04-2393), 703 N.W.2d 845 (Minn. App. 2005).

A final judgment on the merits approving a wetland-replacement plan under Minn. Stat. § 103G.222 (2004), collaterally estops a party, or a party in privity, from maintaining a cause of action asserting that a wetland-replacement plan violated an environmental-quality standard or rule under Minn. Stat. § 116B.03, subd. 1 (2004), of the Minnesota Environmental Rights Act.

## **Costs and Disbursements**

*Posey v. Fossen*, (A05-691), 707 N.W.2d 712 (Minn. App. 2006).

For purposes of awarding costs and disbursements under Minn. Stat. §§ 549.02, .04 (2004), the district court has discretion to determine who the prevailing party is in an action involving a third-party complaint.

*Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, (A05-800, A05-1533), 715 N.W.2d 458 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006).

Upon finding excusable neglect pursuant to Minn. R. Civ. P. 6.02, the district court may grant an extension of time for filing an affidavit certifying expert review after expiration of the 90-day limit imposed by Minn. Stat. § 544.42 (2004).

*Rush v. Jostock*, (A05-714), 710 N.W.2d 570 (Minn. App. 2006), *review denied* (Minn. May 24, 2006).

1. Under Minn. Stat. § 548.36, subd. 3(a) (2004), when determining the amount of collateral sources to be deducted as an offset in the reduction of an award, only the premium paid to secure personal injury protection is to be used as an offset rather than the full automobile insurance premium.

2. Although the damages awarded under the verdict were less than the amount offered in defendant's offer of judgment, the plaintiff prevailed on the merits and therefore is entitled to costs and disbursements.

### **Jurisdiction**

*In re Welfare of Child of T.T.B.*, (A05-1615, A05-1631), 710 N.W.2d 799 (Minn. App. 2006), *rev'd*, 2006 WL 2975290 (Minn. Oct. 19, 2006).

1. The appellate standard of review for a decision on a motion to transfer jurisdiction of a child-protection case to a tribal court under the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act is abuse of discretion.

2. Good cause to deny a transfer of jurisdiction to a tribal court is not established by a four-hundred-mile distance between the state court and the tribal court or by the time lapse of six days between the filing of the amended child-protection petition and the transfer motion when the motion is filed before the deadline for pretrial motions.

*Breza v. City of Minnetrista*, (A04-2286), 706 N.W.2d 512 (Minn. App. 2005), *review granted* (Minn. Feb. 14, 2006).

1. Minn. Stat. § 15.99 (2004) is a timing statute that does not alter substantive law.

2. If a local government unit fails to act on an application for a wetland exemption within 60 days, under Minn. Stat. § 15.99 the application is approved only to the extent permitted by statute.

*Lorix v. Crompton Corp.*, (A05-2148), 720 N.W.2d 15 (Minn. App. 2006), *review granted* (Minn. Nov. 14, 2006).

Indirect-purchaser standing under the Minnesota Antitrust Act is limited to those who participate in the market restrained by the alleged antitrust violation.

*State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet County Bd. of County Comm'rs*, (A05-1001), 711 N.W.2d 522 (Minn. App. 2006), *review denied* (Minn. June 20, 2006).

The district court has subject matter jurisdiction to hear a claim under the Minnesota Environmental Rights Act even if aspects of the claim could have been brought pursuant to administrative processes set out in the drainage code.

## **Jury Instructions**

*Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, (A05-800, A05-1533), 715 N.W.2d 458 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006).

Upon finding excusable neglect pursuant to Minn. R. Civ. P. 6.02, the district court may grant an extension of time for filing an affidavit certifying expert review after expiration of the 90-day limit imposed by Minn. Stat. § 544.42 (2004).

*Rush v. Jostock*, (A05-714), 710 N.W.2d 570 (Minn. App. 2006), *review denied* (Minn. May 24, 2006).

1. Under Minn. Stat. § 548.36, subd. 3(a) (2004), when determining the amount of collateral sources to be deducted as an offset in the reduction of an award, only the premium paid to secure personal injury protection is to be used as an offset rather than the full automobile insurance premium.

2. Although the damages awarded under the verdict were less than the amount offered in defendant's offer of judgment, the plaintiff prevailed on the merits and therefore is entitled to costs and disbursements.

## **Service**

*Mercer v. Andersen*, (A05-1103), 715 N.W.2d 114 (Minn. App. 2006).

1. On a motion to dismiss based on insufficient service of process and expiration of the statute of limitations, the district court has jurisdiction to determine the substantive effect of the statute of limitations even if the plaintiff concedes that service was insufficient.

2. A plaintiff does not engage in a diligent search for purposes of tolling the statute of limitations under Minn. Stat. § 541.13 (2004) when the plaintiff knows that the defendant does not reside in Minnesota but makes no attempt to locate him outside the state.

*Smith v. Flotterud*, (A05-869), 716 N.W.2d 378 (Minn. App. 2006), *review denied* (Minn. Sept. 27, 2006).

For service of process under rule 4 of the Minnesota Rules of Civil Procedure to be sufficient, it must be made knowingly and intentionally.

## **Summary Judgment**

*Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, (A05-1293), 716 N.W.2d 366 (Minn. App. 2006), *review granted* (Minn. Aug. 23, 2006).

An attorney's false statement to an adverse party during a settlement negotiation constitutes an actionable misrepresentation if it implies facts that the attorney knows or has reason to know are false and on which the adverse party reasonably and detrimentally relies.

*Peterson v. Johnson*, (A05-1450), 720 N.W.2d 833 (Minn. App. 2006).

The 15-year statute of limitations prescribed in Minn. Stat. § 541.03 (2004) applies to a claim to have a conveyance absolute on its face declared an equitable mortgage.

*Northfield Care Ctr., Inc. v. Anderson*, (A04-2491), 707 N.W.2d 731 (Minn. App. 2006).

1. Under Minn. Stat. § 144.6501, subd. 4(d) (2004), an individual who signs a nursing-home contract as a “responsible party” is personally liable for costs incurred by the resident in the facility if the responsible party either failed to make timely payments of the facility’s obligations or knowingly failed to spend down the resident’s income and the responsible party misapplied the resident’s income.

2. Under Minn. Stat. § 523.21 (2004), an attorney-in-fact is not personally liable for attorney fees absent a finding of bad faith.

3. If there is a statutory or contractual basis for an award of attorney fees, it is not an abuse of discretion to award attorney fees in excess of the recovery amount if the district court determines that the amount is reasonable.

## COMMERCIAL LAW

*Bradley v. First Nat’l Bank of Walker, N.A.*, (A05-634), 711 N.W.2d 121 (Minn. App. 2006).

1. Minn. Stat. § 336.3-307(b) (2004) (section 3-307(b) of the Uniform Commercial Code) and its accompanying statute of limitations, apply to claims against a payor bank for honoring checks fraudulently written by a fiduciary.

2. Where the Uniform Commercial Code Article 3 applies to breach-of-fiduciary-duty claims, it preempts common law bases for recovery.

3. Where an answer indicates a statute of limitations defense is raised and the opposing party has adequate opportunity to contest the defense, it is not an abuse of discretion for the trial court to consider the defense.

## COMMITMENT

### **Mentally Ill and Dangerous**

*In re Carroll*, (A05-1019), 706 N.W.2d 527 (Minn. App. 2005).

1. An individual’s violent assaults against two hospital workers, along with a history of violent acts against others, show that the individual committed overt acts causing or attempting to cause serious physical harm to another under Minn. Stat. § 253B.02, subd. 17(b) (2004).

2. The treatment report required under Minn. Stat. § 253B.18, subd. 2(a) (2004), may be prepared by a designee of the head of the treatment center.

## **Neuroleptic Medication**

*In re Raboin*, (A05-615), 704 N.W.2d 767 (Minn. App. 2005).

1. When a district court authorizes the administration of neuroleptic medication to an unconsenting patient under Minn. Stat. § 253B.092 (2004), the order must identify the neuroleptic medication or medications that may be used.

2. An individual substitute decision-maker appointed by a district court under Minn. Stat. § 253B.092, subd. 6(a) (2004), does not have to be a person designated by the local mental-health authority.

## **CONSTITUTIONAL LAW**

*State v. Lemmer*, (A05-2481), 716 N.W.2d 657 (Minn. App. 2006), *review granted* (Sept. 19, 2006).

1. Because the doctrine of collateral estoppel is substantive law, Minn. Stat. § 169A.53, subd. 3(g) (2004), is a constitutional abrogation of *State v. Victorsen*, 627 N.W.2d 655 (Minn. App. 2001).

2. As a matter of comity, Minn. Stat. § 169A.53, subd. 3(g) (2004), is sustainable.

*Amundson v. State*, (A05-1245), 714 N.W.2d 715 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006).

The term “retired judge” in article VI, section 10 of the Minnesota Constitution includes a judge who has terminated active service and who qualifies for a retirement annuity under Minn. Stat. § 490.124, subd. 2 (2004).

*Dunham v. Roer*, (A05-421), 708 N.W.2d 552 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006).

1. Minn. Stat. § 609.748, subd. 1(a)(1) (2004), which defines harassment, does not substantially infringe on constitutionally protected speech or expression, and is not facially overbroad.

2. The statutory definition of harassment regulates constitutionally unprotected activity and is not demonstrably vague in all applications.

*State v. Ahmed*, (A04-2240), 708 N.W.2d 574 (Minn. App. 2006).

The statement of a driver of a vehicle to his passenger while being chased by another vehicle, identifying the driver of the chasing vehicle, is not a testimonial statement.

*In re Custody of J.J.S.*, (A04-2477), 707 N.W.2d 706 (Minn. App. 2006), *review denied* (Minn. Mar. 14, 2006).

1. The appropriate standard of equal protection review for a statute that classifies on the basis of gender is whether the classification serves an important governmental objective and is substantially related to the achievement of that objective.

2. Minn. Stat. § 257.75 (2004) and Minn. Stat. § 257.541 (2004) do not violate equal protection.

*State v. Bren*, (A05-812), 704 N.W.2d 170 (Minn. App. 2005), *review denied* (Minn. Dec. 13, 2005).

1. Minn. Stat. § 514.02 (2000) does not violate the constitutional prohibition against imprisonment for debt set out in Minn. Const. art. I, § 12, because it does not penalize a contractor's failure to pay debt, but rather imposes criminal penalties upon a contractor who creates a trust-like relationship when he accepts payment for improvements and then misapplies those funds by either failing to pay the subcontractor or by failing to furnish the homeowner with a valid lien waiver or a payment bond.

2. A reviewing court need not address issues raised by a respondent who does not file a notice of review.

### **Delinquency**

*In re Welfare of J.L.P.*, (A05-67), 709 N.W.2d 289 (Minn. App. 2006).

1. The imposition of a juvenile disposition and an adult sentence under Minn. Stat. § 260B.130, subd. 4(a) (2004), is a single sentence that does not violate the constitutional prohibition against double jeopardy.

2. An equal-protection challenge to the length of a sentence imposed under Minn. Stat. § 260B.130, subd. 4(a), is reviewed under a rational-basis test.

### **Due Process**

*State v. Eakins*, (A05-1453), 720 N.W.2d 597 (Minn. App. 2006).

1. Minn. Stat. § 169.444, subd. 6 (2004), which imposes petty-misdemeanor liability on an owner of a motor vehicle that is used to violate the school-bus-safety law by being driven in disregard to a bus's flashing red lights and extended stop-signal arm, is rationally related to the legitimate governmental purpose of protecting school children on or near roadways and does not violate due process.

2. The statute does not create a presumption that the owner of a motor vehicle that violates the school-bus-safety law was the driver of that vehicle, does not shift the burden of proof to the defendant, and does not require the defendant to testify against himself.

3. The evidence was sufficient to show both a violation of the school-bus-safety law and the identity of the registered owner of the violating vehicle.

*Magnuson v. Comm’r of Pub. Safety*, (A04-2212), 703 N.W.2d 557 (Minn. App. 2005).

An implied-consent advisory does not violate a driver’s due-process rights by not warning the driver that driving with an alcohol concentration of .20 or more is an aggravating factor that might increase the penalty for driving while impaired.

*In re Welfare of J.L.P.*, (A05-67), 709 N.W.2d 289 (Minn. App. 2006).

1. The imposition of a juvenile disposition and an adult sentence under Minn. Stat. § 260B.130, subd. 4(a) (2004), is a single sentence that does not violate the constitutional prohibition against double jeopardy.

2. An equal-protection challenge to the length of a sentence imposed under Minn. Stat. § 260B.130, subd. 4(a), is reviewed under a rational-basis test.

*Bendorf v. Comm’r Pub. Safety*, (A05-1484), 712 N.W.2d 221 (Minn. App. 2006), *review granted* (Minn. June 28, 2006).

When a driver’s-license revocation hearing has been scheduled under a statutory provision that is later declared unconstitutional, the remedy is a stay of the revocation; it is not rescission of the revocation.

*State v. Goharbawang*, (A05-747), 705 N.W.2d 198 (Minn. App. 2005), *review denied* (Minn. Jan. 17, 2006).

For purposes of using a revocation to enhance a subsequent offense, a driver’s license revocation for refusing to submit to chemical testing is effective immediately upon receipt of a notice and order of revocation. The provision for a seven-day temporary driver’s license does not toll the immediate and ongoing revocation and a driver’s due process rights are not violated when he has the opportunity for judicial review of the revocation.

*In re Welfare of J.C.P.*, (A05-1294), 716 N.W.2d 664 (Minn. App. 2006), *review denied* (Minn. Oct. 17, 2006).

A juvenile does not have a Sixth Amendment right under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), to a jury determination of the facts supporting adult certification.

### **Equal Protection**

*In re Custody of J.J.S.*, (A04-2477), 707 N.W.2d 706 (Minn. App. 2006), *review denied* (Minn. Mar. 14, 2006).

1. The appropriate standard of equal protection review for a statute that classifies on the basis of gender is whether the classification serves an important governmental objective and is substantially related to the achievement of that objective.

2. Minn. Stat. § 257.75 (2004) and Minn. Stat. § 257.541 (2004) do not violate equal protection.

*In re Welfare of J.L.P.*, (A05-67), 709 N.W.2d 289 (Minn. App. 2006).

1. The imposition of a juvenile disposition and an adult sentence under Minn. Stat. § 260B.130, subd. 4(a) (2004), is a single sentence that does not violate the constitutional prohibition against double jeopardy.

2. An equal-protection challenge to the length of a sentence imposed under Minn. Stat. § 260B.130, subd. 4(a), is reviewed under a rational-basis test.

### **First Amendment**

*In re Welfare of T.L.S.*, (A05-861), 713 N.W.2d 877 (Minn. App. 2006).

Police have probable cause to arrest for a violation of the disorderly conduct statute when the statute is applied to punish the manner by which constitutionally protected speech is delivered and the disorderly nature of the speech does not depend on its content.

*In re GlaxoSmithKline PLC*, (A04-2150), 713 N.W.2d 48 (Minn. App. 2006), *review granted* (Minn. June 28, 2006).

1. The state may challenge a party's confidentiality designation of documents produced pursuant to a civil investigatory demand under Minn. Stat. § 8.31, subd. 2(a) (2004), in accordance with an agreement and court order that provide for such challenges.

2. The Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01-.90 (2004), does not prevent the state from disclosing documents if the state determines that disclosure of the documents is otherwise authorized by law or if the documents are part of a judicial record.

3. The district court does not initially determine, but rather reviews the state's determinations, that disclosure is justified under Minn. Stat. § 13.39, subd. 2.

4. Attachments to pleadings filed with the district court are part of the court record for purposes of Minn. Stat. § 13.39, subd. 3.

5. The First Amendment does not protect the confidentiality of documents produced in response to a civil investigatory demand under Minn. Stat. § 8.31, subd. 2(a).

## **CONTRACTS**

*Bradley v. First Nat'l Bank of Walker, N.A.*, (A05-634), 711 N.W.2d 121 (Minn. App. 2006).

1. Minn. Stat. § 336.3-307(b) (2004) (section 3-307(b) of the Uniform Commercial Code) and its accompanying statute of limitations, apply to claims against a payor bank for honoring checks fraudulently written by a fiduciary.

2. Where the Uniform Commercial Code Article 3 applies to breach-of-fiduciary-duty claims, it preempts common law bases for recovery.

3. Where an answer indicates a statute of limitations defense is raised and the opposing party has adequate opportunity to contest the defense, it is not an abuse of discretion for the trial court to consider the defense.

*Rasmussen v. Hous. & Redev. Auth.*, (A05-1418, A05-1419), 712 N.W.2d 802 (Minn. App. 2006), *review denied* (Minn. July 19, 2006).

A landlord with eminent domain authority does not, as a matter of law, breach the quiet enjoyment provision of a lease by initiating condemnation proceedings against its tenant.

### **Acceptance**

*Riley Bros. Constr., Inc. v. Shuck*, (A04-2133), 704 N.W.2d 197 (Minn. App. 2005).

A subcontractor's bid to perform specific work at a specific price is an offer to enter into a contract, and a contract is formed between the subcontractor and the general contractor to whom the bid was submitted when the general contractor's words and conduct objectively demonstrate that it has accepted the offer.

### **Consideration**

*Riley Bros. Constr., Inc. v. Shuck*, (A04-2133), 704 N.W.2d 197 (Minn. App. 2005).

A subcontractor's bid to perform specific work at a specific price is an offer to enter into a contract, and a contract is formed between the subcontractor and the general contractor to whom the bid was submitted when the general contractor's words and conduct objectively demonstrate that it has accepted the offer.

### **Damages**

*Busch v. Model Corp.*, (A05-426), 708 N.W.2d 546 (Minn. App. 2006).

Improvements to real property qualify under the sale of real property exception and, therefore, are not a "home solicitation sale" as defined in Minn. Stat. § 325G.06 (2004).

*McClure v. Davis Eng'g, L.L.C.*, (A05-1285), 716 N.W.2d 354 (Minn. App. 2006).

A corporation may be a "commission salesperson" within the meaning of Minn. Stat. § 181.145, subd. 1 (2004).

*Riley Bros. Constr., Inc. v. Shuck*, (A04-2133), 704 N.W.2d 197 (Minn. App. 2005).

A subcontractor's bid to perform specific work at a specific price is an offer to enter into a contract, and a contract is formed between the subcontractor and the general contractor to whom the bid was submitted when the general contractor's words and conduct objectively demonstrate that it has accepted the offer.

## **Meeting of Minds**

*Northfield Care Ctr., Inc. v. Anderson*, (A04-2491), 707 N.W.2d 731 (Minn. App. 2006).

1. Under Minn. Stat. § 144.6501, subd. 4(d) (2004), an individual who signs a nursing-home contract as a “responsible party” is personally liable for costs incurred by the resident in the facility if the responsible party either failed to make timely payments of the facility’s obligations or knowingly failed to spend down the resident’s income and the responsible party misapplied the resident’s income.

2. Under Minn. Stat. § 523.21 (2004), an attorney-in-fact is not personally liable for attorney fees absent a finding of bad faith.

3. If there is a statutory or contractual basis for an award of attorney fees, it is not an abuse of discretion to award attorney fees in excess of the recovery amount if the district court determines that the amount is reasonable.

## **Offer**

*Riley Bros. Constr., Inc. v. Shuck*, (A04-2133), 704 N.W.2d 197 (Minn. App. 2005).

A subcontractor’s bid to perform specific work at a specific price is an offer to enter into a contract, and a contract is formed between the subcontractor and the general contractor to whom the bid was submitted when the general contractor’s words and conduct objectively demonstrate that it has accepted the offer.

## **CRIMINAL**

*Magnuson v. Comm’r of Pub. Safety*, (A04-2212), 703 N.W.2d 557 (Minn. App. 2005).

An implied-consent advisory does not violate a driver’s due-process rights by not warning the driver that driving with an alcohol concentration of .20 or more is an aggravating factor that might increase the penalty for driving while impaired.

## **Expungement**

*State v. A.C.H.*, (A05-1405), 710 N.W.2d 587 (Minn. App. 2006).

Statutory expungement of executive-branch records, which can only occur if all proceedings are decided in favor of the defendant, is not permitted when the defendant has both entered a guilty plea and admitted that he committed the crime, even when his plea is not accepted by the court.

*State v. H.A.*, (A05-1792), 716 N.W.2d 360 (Minn. App. 2006).

1. Expungement of court records under the district court’s inherent authority requires a determination of either (a) a constitutional infringement or (b) that the benefits to the petitioner of expungement are commensurate with the disadvantages to the public and the courts.

2. The balancing test of comparing the benefits to the petitioner of expungement with the disadvantages to the public and the courts requires that the district court make findings or state on the record its determination regarding (a) the extent that a petitioner has demonstrated difficulties in securing employment or housing as a result of the records sought to be expunged, (b) the seriousness and nature of the offense on record, (c) the potential risk that the petitioner poses and how this affects the public's right to access petitioner's records, (d) any additional offenses or rehabilitative efforts since the offense on record, and (e) any other objective evidence of hardship under the circumstances.

*State v. L.W.J.*, (A05-2071), 717 N.W.2d 451 (Minn. App. 2006).

Minn. Stat. § 609A.03, subd. 5 (2004), does not set forth additional statutory grounds for expungement beyond those grounds set forth in Minn. Stat. § 609A.02 (2004 & Supp. 2005); it merely provides that once a petitioner establishes grounds for expungement under Minn. Stat. § 609A.02, subd. 3, the burden shifts to the agency or jurisdiction whose records will be affected by expungement to show by clear and convincing evidence that the interests of the public outweigh the disadvantages to the petitioner of not sealing the record.

### **Forfeiture**

*Borgen v. 418 Eglon Ave.*, (A05-1138), 712 N.W.2d 809 (Minn. App. 2006).

Forfeiture of a house valued at \$18,300 and \$1,230 in cash under Minn. Stat. § 609.5311 (2004) as a result of a conviction of second-degree controlled-substance offense is not an unconstitutionally excessive fine under either the gross-disproportionality or nexus tests.

### **Guilty Plea**

*State v. Brown*, (A05-1793), 709 N.W.2d 313 (Minn. App. 2006).

1. The district court may not enforce against the prosecution a plea agreement that remains executory pending notification of the victim of the terms of the agreement.

2. There is no manifest injustice permitting the district court to accept a guilty plea to a lesser offense over the prosecutor's objection when the prosecution withdraws from the plea agreement prior to entry of a guilty plea because the victim opposes the terms of the agreement.

### **Investigation**

*State v. Kouba*, (A04-2489), 709 N.W.2d 299 (Minn. App. 2006).

While a warrantless search of a probationer's residence, which is consistent with the terms of his probation, does not violate the probationer's Fourth Amendment right to be free from unreasonable searches, when the probationer is not validly on probation

because his right to counsel was not vindicated at a hearing to extend his probation, any evidence obtained as a result of the warrantless search must be suppressed.

*State v. Davis*, (A05-857), 711 N.W.2d 841 (Minn. App. 2006), *review granted* (Minn. June 28, 2006).

A dog sniff in a common hallway of an apartment complex is not a search under the Fourth Amendment of the United States Constitution because a reasonable expectation of privacy in the hallway does not exist. A dog sniff in a common hallway is a search under the Minnesota Constitution and, because of the limited expectation of privacy in a common hallway, requires a reasonable, articulable suspicion of drug-related activity.

*State v. Myers*, (A05-1604), 711 N.W.2d 113 (Minn. App. 2006), *review granted* (Minn. May 16, 2006).

Failing to inform a driver that refusal to submit to a chemical test for intoxication administered under Minn. Stat. § 169A.51 (2004) is a gross misdemeanor that may result in harsher penalties than test failure does not actively mislead the driver as to the driver's legal obligations or implicitly assure the driver that the penalties for test refusal are less serious than the penalties for test failure and, therefore, comports with the fundamental fairness required by due process.

*State v. McGrath*, (A05-1021, A05-1022, A05-1023), 706 N.W.2d 532 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006).

Notwithstanding reckless misrepresentations of fact by the affiant in a search-warrant application, plastic bags containing marijuana residue obtained through a legal garbage search can establish an independent and substantial basis for probable cause to issue a search warrant for a residence.

*State v. Lushenko*, (A05-819), 714 N.W.2d 729 (Minn. App. 2006), *review granted and stayed* (Minn. July 19, 2006).

Conducting a bifurcated trial in order to submit to a jury, post-verdict, the issue of pattern of criminal conduct under former Minn. Stat. § 609.1095, subd. 4 (2002), was not error because the district courts possess the inherent authority to craft sentencing procedures in conformance with *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

*Kramer v. Comm'r of Pub. Safety*, (A04-2506), 706 N.W.2d 231 (Minn. App. 2005).

An incidental error in a report printed by an Intoxilyzer 5000 does not overcome the prima facie accuracy of the machine's test results where it is established by evidence that (1) the operator is certified; (2) diagnostic checks of the machine and chemicals are error-free; and (3) proper procedures were followed in testing the defendant.

*In re Welfare of T.L.S.*, (A05-861), 713 N.W.2d 877 (Minn. App. 2006).

Police have probable cause to arrest for a violation of the disorderly conduct statute when the statute is applied to punish the manner by which constitutionally protected speech is delivered and the disorderly nature of the speech does not depend on its content.

### **Postconviction Relief**

*Amundson v. State*, (A05-1245), 714 N.W.2d 715 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006).

The term “retired judge” in article VI, section 10 of the Minnesota Constitution includes a judge who has terminated active service and who qualifies for a retirement annuity under Minn. Stat. § 490.124, subd. 2 (2004).

*Erickson v. State*, (A04-2082), 702 N.W.2d 892 (Minn. App. 2005).

1. The Minnesota Supreme Court’s decision in *State v. Modtland*, 695 N.W.2d 602 (Minn. 2005), overrules the sufficient evidence exception to the *Austin* factors and creates a new rule.

2. *State v. Modtland*, 695 N.W.2d 602 (Minn. 2005), is not retroactively applicable to cases arising on collateral review.

*Miller v. State*, (A05-952), 714 N.W.2d 745 (Minn. App. 2006).

Minn. Stat. § 609.109, subd. 7(a) (1998), does not authorize a district court to impose consecutive conditional release periods.

### **Pretrial**

*State v. Lemmer*, (A05-2481), 716 N.W.2d 657 (Minn. App. 2006), *review granted* (Minn. Sept. 19, 2006).

1. Because the doctrine of collateral estoppel is substantive law, Minn. Stat. § 169A.53, subd. 3(g) (2004), is a constitutional abrogation of *State v. Victorsen*, 627 N.W.2d 655 (Minn. App. 2001).

2. As a matter of comity, Minn. Stat. § 169A.53, subd. 3(g) (2004), is sustainable.

*State v. Houx*, (A05-1934), 709 N.W.2d 280 (Minn. App. 2006).

1. The requirement in Minn. R. Crim. P. 6.02, subd. 1, that the court set money bail at which an offender may obtain pretrial release without non-monetary conditions applies to felony DWI offenders.

2. Although Minn. Stat. § 169A.44, subd. 2(a) (2004), requires courts to impose non-monetary conditions of pretrial release on DWI offenders, Minn. Stat. § 169A.44, subd. 2(b) (2004), provides that courts may comply with the requirement of rule 6.02, subd. 1, of money-only bail by setting an alternative money-only bail.

*State v. Brown*, (A05-1793), 709 N.W.2d 313 (Minn. App. 2006).

1. The district court may not enforce against the prosecution a plea agreement that remains executory pending notification of the victim of the terms of the agreement.

2. There is no manifest injustice permitting the district court to accept a guilty plea to a lesser offense over the prosecutor's objection when the prosecution withdraws from the plea agreement prior to entry of a guilty plea because the victim opposes the terms of the agreement.

*State v. Kouba*, (A04-2489), 709 N.W.2d 299 (Minn. App. 2006).

While a warrantless search of a probationer's residence, which is consistent with the terms of his probation, does not violate the probationer's Fourth Amendment right to be free from unreasonable searches, when the probationer is not validly on probation because his right to counsel was not vindicated at a hearing to extend his probation, any evidence obtained as a result of the warrantless search must be suppressed.

*State v. Goharbawang*, (A05-747), 705 N.W.2d 198 (Minn. App. 2005), *review denied* (Minn. Jan. 17, 2006).

For purposes of using a revocation to enhance a subsequent offense, a driver's license revocation for refusing to submit to chemical testing is effective immediately upon receipt of a notice and order of revocation. The provision for a seven-day temporary driver's license does not toll the immediate and ongoing revocation and a driver's due process rights are not violated when he has the opportunity for judicial review of the revocation.

### **Sentencing**

*State v. Barker*, (A04-1453), 692 N.W.2d 755 (Minn. App. 2005), *aff'd*, 705 N.W.2d 768 (Minn. 2005).

A defendant's sentence may not be increased under Minn. Stat. § 609.11, subd. 5 (2002), based on a judicial finding that the defendant used or possessed a firearm during the commission of the offense. Because the statute creates a mandatory-minimum sentence that replaces the ordinary presumptive sentence, *Blakely v. Washington*, 124 S. Ct. 2531 (2004) requires that the finding be made by a jury if the mandatory-minimum sentence exceeds the ordinary guidelines presumptive sentence.

*State ex rel. Guth v. Fabian*, (A05-1554), 716 N.W.2d 23 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006).

An offender who is removed from the challenge incarceration program is entitled to credit against his term of imprisonment for the number of days that he served in a state correctional facility during phase I of the program.

*State v. Hanf*, (A04-1058), 687 N.W.2d 659 (Minn. App. 2004), *rev'd and remanded* (Minn. Dec. 13, 2005).

Upward dispositional departures under the Minnesota Sentencing Guidelines and applicable caselaw are not based on fixed determinate-sentencing findings, but on broad assessments of offender characteristics similar to those made in indeterminate-sentencing schemes. Therefore, the facts supporting a dispositional departure need not be made by the jury under the United States Supreme Court's holding in *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

*State v. Losh*, (A04-1028), 694 N.W.2d 98 (Minn. App. 2005), *aff'd*, 721 N.W.2d 886 (Minn. Sept. 28, 2006).

Under Minnesota law *Blakely v. Washington*, 124 S. Ct. 2531 (2004), does not apply retroactively to a defendant's pending probation-revocation appeal taken after the time to file a direct appeal from the final judgment has expired.

*State v. Lushenko*, (A05-819), 714 N.W.2d 729 (Minn. App. 2006), *review granted and stayed* (Minn. July 19, 2006).

Conducting a bifurcated trial in order to submit to a jury, post-verdict, the issue of pattern of criminal conduct under former Minn. Stat. § 609.1095, subd. 4 (2002), was not error because the district courts possess the inherent authority to craft sentencing procedures in conformance with *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

*State v. Maley*, (A05-782, A05-883), 714 N.W.2d 708 (Minn. App. 2006).

A defendant's pre-sentencing statement indicating his willingness to accept his criminal-history score for sentencing does not constitute a waiver relieving the state of its burden to prove by a preponderance of the evidence each alleged out-of-state conviction to be included in the defendant's criminal-history score.

*State v. Robinson*, (A04-840), 699 N.W.2d 790 (Minn. App. 2005), *aff'd*, 718 N.W.2d 400 (Minn. 2006).

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. Senske*, (A03-1677), 692 N.W.2d 743 (Minn. App. 2005), *review denied* (Minn. May 17, 2005).

When sentencing on multiple counts, the district court may impose permissive consecutive sentences based on a judicial finding that the offenses are "crimes against persons" without violating the defendant's right to a jury trial under *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

*State v. Skipintheday*, (A04-1293), 704 N.W.2d 177 (Minn. App. 2005), *aff'd*, 717 N.W.2d 423 (Minn. 2006).

1. The crime of accomplice after the fact under Minn. Stat. § 609.495, subd. 3 (2002), is a crime against the administration of justice rather than against a personal victim and, for sentencing purposes, cannot be treated as a crime against a person for purposes of consecutive sentencing, or for purposes of the multiple-victim exception to the single-behavioral-incident rule.

2. When a felony is unranked under the Minnesota Sentencing Guidelines, the district court may exercise its sound discretion to determine the appropriate severity-level-ranking and will not be reversed absent a clear abuse of that discretion.

3. If the district court proposes to enhance a sentence for a crime committed for the benefit of a gang, the defendant has a right to a jury trial to determine the facts that would support the enhancement.

4. When multiple convictions arise from a single behavioral incident, sentencing policy suggests that a sentence be imposed for the most serious offense.

*State v. Bren*, (A05-812), 704 N.W.2d 170 (Minn. App. 2005), *review denied* (Minn. Dec. 13, 2005).

1. Minn. Stat. § 514.02 (2000) does not violate the constitutional prohibition against imprisonment for debt set out in Minn. Const. art. I, § 12, because it does not penalize a contractor's failure to pay debt, but rather imposes criminal penalties upon a contractor who creates a trust-like relationship when he accepts payment for improvements and then misapplies those funds by either failing to pay the subcontractor or by failing to furnish the homeowner with a valid lien waiver or a payment bond.

2. A reviewing court need not address issues raised by a respondent who does not file a notice of review.

*Johnson v. Fabian*, (A05-2498), 711 N.W.2d 540 (Minn. App. 2006), *review granted* (Minn. May 24, 2006).

1. Extending an inmate's term by delaying his or her supervised release date as a disciplinary sanction is a penalty that rises to the level of "compulsion" for purposes of the Fifth Amendment privilege against self-incrimination.

2. The Fifth Amendment protects an inmate from having his or her prison term extended as a disciplinary sanction for refusing to admit a criminal offense in treatment if his or her conviction is still on appeal.

*State v. Hobbs*, (A05-248), 713 N.W.2d 884 (Minn. App. 2006), *review granted and stayed* (Minn. Aug. 15, 2006).

The submission to a jury of the issue of dangerousness to public safety under former Minn. Stat. § 609.1095, subd. 2 (2002), was error because it was not authorized by the language of the statute in effect at the time of the offense.

*Miller v. State*, (A05-952), 714 N.W.2d 745 (Minn. App. 2006).

Minn. Stat. § 609.109, subd. 7(a) (1998) does not authorize a district court to impose consecutive conditional release periods.

*State v. Maurstad*, (A04-1000), 706 N.W.2d 545 (Minn. App. 2005), *review granted* (Minn. Feb. 22, 2006).

1. Appellant did not waive his right to appeal the calculation of his criminal history score by failing to raise a challenge to the score at sentencing.

2. Appellant is not required to show plain error before this court will review the district court's calculation of appellant's criminal history score.

### **Statutes**

*State v. Eakins*, (A05-1453), 720 N.W.2d 597 (Minn. App. 2006).

1. Minn. Stat. § 169.444, subd. 6 (2004), which imposes petty-misdemeanor liability on an owner of a motor vehicle that is used to violate the school-bus-safety law by being driven in disregard to a bus's flashing red lights and extended stop-signal arm, is rationally related to the legitimate governmental purpose of protecting school children on or near roadways and does not violate due process.

2. The statute does not create a presumption that the owner of a motor vehicle that violates the school-bus-safety law was the driver of that vehicle, does not shift the burden of proof to the defendant, and does not require the defendant to testify against himself.

3. The evidence was sufficient to show both a violation of the school-bus-safety law and the identity of the registered owner of the violating vehicle.

*State v. Bren*, (A05-812), 704 N.W.2d 170 (Minn. App. 2005), *review denied* (Minn. Dec. 13, 2005).

1. Minn. Stat. § 514.02 (2000) does not violate the constitutional prohibition against imprisonment for debt set out in Minn. Const. art. I, § 12, because it does not penalize a contractor's failure to pay debt, but rather imposes criminal penalties upon a contractor who creates a trust-like relationship when he accepts payment for improvements and then misapplies those funds by either failing to pay the subcontractor or by failing to furnish the homeowner with a valid lien waiver or a payment bond.

2. A reviewing court need not address issues raised by a respondent who does not file a notice of review.

*State v. Mitchell*, (A04-1487), 693 N.W.2d 891 (Minn. App. 2005), *review denied* (Minn. June 28, 2005).

Under Minnesota law, felony child neglect or endangerment that involves a special danger to human life as committed and in the abstract may properly serve as a predicate felony to a charge of felony murder.

*State v. Myers*, (A05-1604), 711 N.W.2d 113 (Minn. App. 2006), *review granted* (Minn. May 16, 2006).

Failing to inform a driver that refusal to submit to a chemical test for intoxication administered under Minn. Stat. § 169A.51 (2004) is a gross misdemeanor that may result in harsher penalties than test failure does not actively mislead the driver as to the driver's legal obligations or implicitly assure the driver that the penalties for test refusal are less serious than the penalties for test failure and, therefore, comports with the fundamental fairness required by due process.

*State v. Johnson*, (A05-1971), 713 N.W.2d 64 (Minn. App. 2006).

A reasonable, articulable suspicion exists to justify stopping a vehicle displaying any colored light, other than permitted by Minn. Stat. § 169.64 (2004).

*State ex rel. Henderson v. Fabian*, (A06-439), 715 N.W.2d 128 (Minn. App. 2006), *review granted* (Minn. Aug. 15, 2006).

An inmate who has exhausted his right to direct appeal no longer has a Fifth Amendment privilege not to discuss his offense of conviction in a mandated, in-prison, sex-offender treatment program. The possibility that the inmate may still collaterally attack the conviction by postconviction petition or by other means does not extend this privilege absent a showing by the inmate that such proceedings are necessary to correct a manifest injustice.

*State v. Ulmer*, (A05-1148), 719 N.W.2d 213 (Minn. App. 2006).

A person who surreptitiously gazes, stares, or peeps over a partition in a public restroom with the intent to intrude upon or interfere with the privacy of another person is guilty of interference with privacy, in violation of Minn. Stat. § 609.746 (2002).

### **Sufficiency of Evidence**

*State v. Eakins*, (A05-1453), 720 N.W.2d 597 (Minn. App. 2006).

1. Minn. Stat. § 169.444, subd. 6 (2004), which imposes petty-misdemeanor liability on an owner of a motor vehicle that is used to violate the school-bus-safety law by being driven in disregard to a bus's flashing red lights and extended stop-signal arm, is rationally related to the legitimate governmental purpose of protecting school children on or near roadways and does not violate due process.

2. The statute does not create a presumption that the owner of a motor vehicle that violates the school-bus-safety law was the driver of that vehicle, does not shift the burden of proof to the defendant, and does not require the defendant to testify against himself.

3. The evidence was sufficient to show both a violation of the school-bus-safety law and the identity of the registered owner of the violating vehicle.

*State v. Ulmer*, (A05-1148), 719 N.W.2d 213 (Minn. App. 2006).

A person who surreptitiously gazes, stares, or peeps over a partition in a public restroom with the intent to intrude upon or interfere with the privacy of another person is guilty of interference with privacy, in violation of Minn. Stat. § 609.746 (2002).

## **Trial**

*State v. Wembley*, (A05-245), 712 N.W.2d 783 (Minn. App. 2006), *review granted* (Minn. Aug. 15, 2006).

1. A critical stage of trial implicating a defendant's constitutional right to be present does not include the right to be present when a jury reviews videotaped evidence during deliberations.

2. Although an expert may not testify to a witness's credibility, such testimony is not necessarily prejudicial when the jury could judge for itself the witness's credibility, utilizing all of the factors on which the expert relied in making a credibility assessment.

3. An out-of-court statement offered in a party-declarant's favor may be assumed to be offered for its truth unless the proponent identifies a relevant nonhearsay purpose for the statement or unless such a purpose is readily apparent from its nature, content, or context.

4. Evidence that the victim's sister allegedly had been sexually abused by someone other than the appellant was irrelevant and the court did not err in excluding it on that ground.

5. Appellant has failed to carry his burden of showing that his defense attorney's failure to make certain objections, "investigate," and call certain witnesses would have altered the outcome of the case.

*State v. Losh*, (A04-1028), 694 N.W.2d 98 (Minn. App. 2005), *aff'd*, 721 N.W.2d 886 (Minn. 2006).

Under Minnesota law *Blakely v. Washington*, 124 S. Ct. 2531 (2004), does not apply retroactively to a defendant's pending probation-revocation appeal taken after the time to file a direct appeal from the final judgment has expired.

*State v. Robinson*, (A04-840), 699 N.W.2d 790 (Minn. App. 2005), *aff'd*, 718 N.W.2d 400 (Minn. 2006).

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).

*Erickson v. State*, (A04-2082), 702 N.W.2d 892 (Minn. App. 2005).

1. The Minnesota Supreme Court's decision in *State v. Modtland*, 695 N.W.2d 602 (Minn. 2005), overrules the sufficient evidence exception to the *Austin* factors and creates a new rule.

2. *State v. Modtland*, 695 N.W.2d 602 (Minn. 2005), is not retroactively applicable to cases arising on collateral review.

*State v. Bell*, (A04-1595), 703 N.W.2d 858 (Minn. App. 2005), *aff'd as modified*, 719 N.W.2d 635 (Minn. 2006).

Evidence of similar prior conduct by the accused against a victim of domestic abuse is admissible under Minn. Stat. § 634.20 (2002) unless its probative value is substantially outweighed by the danger of unfair prejudice. The admission of relationship evidence without first balancing the probative value of the evidence against the danger of unfair prejudice is an abuse of discretion, but the decision to admit such evidence will not be reversed unless the evidence substantially affected the verdict.

*State v. Ahmed*, (A04-2240), 708 N.W.2d 574 (Minn. App. 2006).

The statement of a driver of a vehicle to his passenger while being chased by another vehicle, identifying the driver of the chasing vehicle, is not a testimonial statement.

*State v. Hanke*, (A05-261), 712 N.W.2d 211 (Minn. App. 2006).

Where a bailiff in a criminal trial on drug charges twice made prejudicial comments in the presence of at least three jurors regarding the drug problem in the county and the need to punish offenders, the inculpatory evidence was circumstantial and not overwhelming, and the district court had no opportunity to take curative measures after learning of the comments posttrial, the state did not overcome the presumption of prejudice raised by the comments, and the defendant is entitled to a new trial.

*State v. Hobbs*, (A05-248), 713 N.W.2d 884 (Minn. App. 2006), *review granted* (Minn. Aug. 15, 2006).

The submission to a jury of the issue of dangerousness to public safety under former Minn. Stat. § 609.1095, subd. 2 (2002), was error because it was not authorized by the language of the statute in effect at the time of the offense.

## DEBTOR/CREDITOR

*Gibson v. Trs. of Minn. State Basic Bldg. Trades Fringe Benefits Funds*, (A05-39), 703 N.W.2d 864 (Minn. App. 2005), *review granted and decision vacated in part* (Minn. Dec. 13, 2005), *remanded* (Minn. App. Dec. 20, 2005).

When real estate held in joint tenancy is subject to a judgment lien against the interest of one joint tenant and that real estate is sold, the judgment creditor may recover from only the fractional share of the proceeds of the real estate attributable to the joint tenant who is the judgment debtor.

*Thompson v. First State Bank of Fertile*, (A05-1328), 709 N.W.2d 307 (Minn. App. 2006), *review denied* (Minn. App. Apr. 18, 2006).

1. A secured party's authority under Minn. Stat. § 336.9-609(b)(2) (2004) to take possession of collateral after default carries with it the privilege to enter another's land for the purpose of taking possession of the collateral if the entry is reasonably necessary in order to take possession.

2. There is no breach of the peace under Minn. Stat. § 336.9-609(b)(2) (2004) when a tow-truck driver representing a secured party enters the debtors' yard to take possession of a motor vehicle that serves as collateral, attaches the motor vehicle to the tow truck, and lifts wheels of the motor vehicle from the ground without any contact with the debtors.

3. Repossession of a motor vehicle is complete when a tow-truck driver has attached the motor vehicle to a tow truck and lifted wheels of the motor vehicle from the ground.

*Prof'l Fiduciary, Inc. v. Silverman*, (A05-1322), 713 N.W.2d 67 (Minn. App. 2006), *review denied* (Minn. July 19, 2006).

A personal representative can assert a malpractice claim against the decedent's former attorney even though the probate was initiated by a judgment creditor. Such a claim is not precluded by the creditor having been a co-defendant with the decedent in the proceeding out of which the malpractice claim arose and its judgment being based on a contribution claim against the decedent in that action.

### **Attachment/Garnishment**

*Minn. Voyageur Houseboats, Inc. v. Las Vegas Marine Supply, Inc., N. Nat'l Bank*, (A04-0866), 690 N.W.2d 762 (Minn. App. 2005), *aff'd*, 708 N.W.2d 521 (Minn. 2006).

When a debtor defaults under a promissory note and the note provides for the alternative and cumulative remedies of acceleration and setoff upon default, the debt is "due and owing" upon default and the bank may exercise its right of setoff without first declaring the entire indebtedness immediately due and owing.

## DITCH LAW

*State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet County Bd. of County Comm'rs*, (A05-1001), 711 N.W.2d 522 (Minn. App. 2006), *review denied* (Minn. June 20, 2006).

The district court has subject matter jurisdiction to hear a claim under the Minnesota Environmental Rights Act even if aspects of the claim could have been brought pursuant to administrative processes set out in the drainage code.

## ECONOMIC SECURITY

*Kennedy v. Am. Paper Recycling Corp.*, (A05-2142), 714 N.W.2d 738 (Minn. App. 2006).

An appeal postmarked 31 days after the mailing date of the department adjudicator's initial determination that the claimant is disqualified from receiving unemployment benefits is untimely and requires dismissal of the appeal.

## EMPLOYMENT

### Public Employee

*In re Application of Hildebrandt for Duty-Related Correctional Plan Disability Benefits*, (A04-2127), 701 N.W.2d 293 (Minn. App. 2005).

A local government correctional facility employee is entitled to duty-related disability benefits under Minn. Stat. § 353E.06, subd. 1 (2004), when the employee sustains an injury or illness that is a direct result of a task or function required of that employee as part of her employment.

*In re Application for PERA Police & Fire Plan Line of Duty Disability Benefits of Brittain*, (A04-2407), 705 N.W.2d 576 (Minn. App. 2005), *review granted* (Minn. Jan. 17, 2006).

Under Minn. Stat. § 353.656, subd. 1 (2004), line-of-duty benefits are payable for an injury, sickness, or disability incurred while on duty and are not limited solely to those incurred during the performance of hazardous duties.

*W. St. Paul Fed'n of Teachers v. Indep. Sch. Dist. No. 197*, (A05-1020), 713 N.W.2d 366 (Minn. App. 2006).

1. The term "benefits" in Minn. Stat. § 471.6161, subd. 5, encompasses not only tangible monetary payments, but also includes the choice of a health-care provider. The "aggregate value of benefits" covered by section 471.6161, subdivision 5, is reduced when covered employees incur increased out-of-pocket expenses to retain an existing choice of health-care provider.

2. Minn. Stat. § 471.6161, subd. 5, permits an exclusive representative to waive the statutory restriction on reduction of health-insurance benefits and, therefore, is not an unconstitutional delegation of legislative power under the non-delegation doctrine.

### **Wrongful Termination**

*Kvidera v. Rotation Eng'g & Mfg. Co.*, (A04-2493), 705 N.W.2d 416 (Minn. App. 2005).

When an employee's right to a bonus vests prior to the employee's termination, an employer's failure to pay that bonus within 24 hours of the employee's demand subjects the employer to a claim for statutory penalties under Minn. Stat. § 181.13(a) (2004).

## **ENVIRONMENTAL LAW**

*Zander v. State*, (A04-2393), 703 N.W.2d 845 (Minn. App. 2005).

A final judgment on the merits approving a wetland-replacement plan under Minn. Stat. § 103G.222 (2004), collaterally estops a party, or a party in privity, from maintaining a cause of action asserting that a wetland-replacement plan violated an environmental-quality standard or rule under Minn. Stat. § 116B.03, subd. 1 (2004), of the Minnesota Environmental Rights Act.

## **EQUITABLE RELIEF**

*Peterson v. Johnson*, (A05-1450), 720 N.W.2d 833 (Minn. App. 2006).

The 15-year statute of limitations prescribed in Minn. Stat. § 541.03 (2004) applies to a claim to have a conveyance absolute on its face declared an equitable mortgage.

*TCM Props., LLC v. Gunderson*, (A05-1979), 720 N.W.2d 344 (Minn. App. 2006).

It is not a violation of Minn. Stat. § 58.13, subd. 1(13) (2004), for a benefactor to take a mortgage on a homeowner's property during the homeowner's redemption period and redeem the property as a junior lienholder to (1) enlarge the redemption period; (2) facilitate a sale of the home; and (3) secure the loan that the benefactor anticipates will be repaid from proceeds of the sale.

## **Injunctions**

*State v. Lemmer*, (A05-2481), 716 N.W.2d 657 (Minn. App. 2006), *review granted* (Minn. Sept. 19, 2006).

1. Because the doctrine of collateral estoppel is substantive law, Minn. Stat. § 169A.53, subd. 3(g) (2004), is a constitutional abrogation of *State v. Victorsen*, 627 N.W.2d 655 (Minn. App. 2001).

2. As a matter of comity, Minn. Stat. § 169A.53, subd. 3(g) (2004), is sustainable.

## **EVIDENCE**

*Harrison ex rel. Harrison v. Harrison*, (A05-1038), 713 N.W.2d 74 (Minn. App. 2006), *review granted* (Minn. July 19, 2006).

1. The exception from Minn. Stat. § 169.685, subd. 4(a) (2004), created by Minn. Stat. § 169.685, subd. 4(b), does not apply only to a product-liability action.

2. Under the plain meaning of the statute, the exception created by Minn. Stat. § 169.685, subd. 4(b), applies to an action for damages arising out of an occurrence or event that involved a child passenger restraint system that had a defect or was faulty because of the way that it was connected or set in position and prepared for use, regardless of the theory of liability in the action.

## **Expert Testimony**

*Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, (A05-800, A05-1533), 715 N.W.2d 458 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006).

Upon finding excusable neglect pursuant to Minn. R. Civ. P. 6.02, the district court may grant an extension of time for filing an affidavit certifying expert review after expiration of the 90-day limit imposed by Minn. Stat. § 544.42 (2004).

*Mercer v. Andersen*, (A05-1103), 715 N.W.2d 114 (Minn. App. 2006).

1. On a motion to dismiss based on insufficient service of process and expiration of the statute of limitations, the district court has jurisdiction to determine the substantive effect of the statute of limitations even if the plaintiff concedes that service was insufficient.

2. A plaintiff does not engage in a diligent search for purposes of tolling the statute of limitations under Minn. Stat. § 541.13 (2004) when the plaintiff knows that the defendant does not reside in Minnesota but makes no attempt to locate him outside the state.

*Rush v. Jostock*, (A05-714), 710 N.W.2d 570 (Minn. App. 2006), *review denied* (Minn. May 24, 2006).

1. Under Minn. Stat. § 548.36, subd. 3(a) (2004), when determining the amount of collateral sources to be deducted as an offset in the reduction of an award, only the premium paid to secure personal injury protection is to be used as an offset rather than the full automobile insurance premium.

2. Although the damages awarded under the verdict were less than the amount offered in defendant's offer of judgment, the plaintiff prevailed on the merits and therefore is entitled to costs and disbursements.

### **Relevance**

*Riley Bros. Constr., Inc. v. Shuck*, (A04-2133), 704 N.W.2d 197 (Minn. App. 2005).

A subcontractor's bid to perform specific work at a specific price is an offer to enter into a contract, and a contract is formed between the subcontractor and the general contractor to whom the bid was submitted when the general contractor's words and conduct objectively demonstrate that it has accepted the offer.

## **FAMILY LAW**

### **Child Custody**

*Dailey v. Chermak*, (A05-1244), 709 N.W.2d 626 (Minn. App. 2006), *review denied* (Minn. May 16, 2006).

1. An award of sole physical custody of a minor child conditioned on maintaining a particular geographical residence for the child is permissible as long as that condition demonstrably serves the child's best interests.

2. When conclusions of law are designated as the judgment in a marriage dissolution and when a conflicting or inconsistent statement in the findings of fact remains after all opportunities for corrective action have expired, the judgment is binding and controlling.

*Johnson-Smolak v. Fink*, (A05-52), 703 N.W.2d 588 (Minn. App. 2005).

1. The standard for an endangerment-based modification of a custody order involving a third party is the same as the standard applicable to modification of custody for a parent. In both circumstances, the party requesting modification must demonstrate that: (1) there has been a change in circumstances that makes modification necessary to serve the best interests of the child; (2) the child's physical or emotional health is endangered; and (3) the harm likely to be caused by the change is outweighed by its advantages.

2. Although there is a presumption that a parent is entitled to custody unless shown to be unfit, this presumption is rebutted when the parent stipulated to joint custody with a third party and when several years have elapsed since the stipulation.

*In re Custody of J.J.S.*, (A04-2477), 707 N.W.2d 706 (Minn. App. 2006), *review denied* (Minn. Mar. 14, 2006).

1. The appropriate standard of equal protection review for a statute that classifies on the basis of gender is whether the classification serves an important governmental objective and is substantially related to the achievement of that objective.

2. Minn. Stat. § 257.75 (2004) and Minn. Stat. § 257.541 (2004) do not violate equal protection.

*Tarlan v. Sorensen*, (A04-2257), 702 N.W.2d 915 (Minn. App. 2005).

When a party establishes a prima facie case for limiting the custodial parent's authority to make health-care decisions, the district court errs by failing to hold an evidentiary hearing pursuant to Minn. Stat. § 518.176 (2004).

### **Child Support**

*Maschoff v. Leiding*, (A04-1757), 696 N.W.2d 834 (Minn. App. 2005).

1. Where parties stipulate to joint physical custody and to a support arrangement under which neither party pays child support to the other party but the support order lacks the findings required by Minn. Stat. § 518.551, subd. 5(i) (2004) to deviate from the guideline calculation of child support, the support arrangement is deemed an application of the Hortis/Valento formula, and not a reservation of support.

2. Res judicata has limited application to family law matters and, to the extent two motions to modify child support involve different aspects of child support, res judicata does not preclude litigation of the second motion.

3. To facilitate future motions to modify child support, district courts addressing child support, even if doing so by adopting a stipulation of the parties, should make findings of fact addressing the parties' existing circumstances.

### **Parentage**

*In re Custody of J.J.S.*, (A04-2477), 707 N.W.2d 706 (Minn. App. 2006), *review denied* (Minn. Mar. 14, 2006).

1. The appropriate standard of equal protection review for a statute that classifies on the basis of gender is whether the classification serves an important governmental objective and is substantially related to the achievement of that objective.

2. Minn. Stat. § 257.75 (2004) and Minn. Stat. § 257.541 (2004) do not violate equal protection.

## **Property Division**

*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.

*May v. May*, (A05-1157), 713 N.W.2d 910 (Minn. App. 2006).

The death of the former spouse of a pension-plan participant that occurs after entry of a dissolution judgment stating that the former spouse shall receive an interest in the participant's pension pursuant to a qualified domestic relations order, but before the qualified domestic relations order is issued, does not preclude entry of the qualified domestic relations order.

*Zander v. Zander*, (A05-2094), 720 N.W.2d 360 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006).

The monthly payments that a tribal member receives from the Shakopee Mdewakanton Sioux (Dakota) Community fall within the definition of "income" in Minn. Stat. § 518.54, subd. 6 (2004); therefore, any such payments received during a tribal member's marriage are marital property subject to division upon dissolution.

## **IMMUNITY**

*Mahoney & Hagberg v. Newgard*, (A05-1523), 712 N.W.2d 215 (Minn. App. 2006), *review granted* (Minn. June 20, 2006).

1. Where a witness makes statements in an affidavit relevant to the issues in a judicial proceeding, the witness is not subject to tort liability for breach of confidences, invasion of privacy, or civil conspiracy, and is absolutely immune from suit for such claims under the doctrine of judicial immunity.

2. A witness who makes statements in an affidavit is subject to liability for a claim for money owed that bears no relation to statements that are protected under the doctrine of judicial immunity.

## **Official**

*Brown v. City of Bloomington*, (A04-2221), 706 N.W.2d 519 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006).

The act of loading a firearm with less-lethal ammunition pursuant to police department policy is a ministerial act, and a police officer is therefore not entitled to official immunity for the allegedly negligent performance of that act.

## IMPLIED CONSENT

*Bendorf v. Comm'r Pub. Safety*, (A05-1484), 712 N.W.2d 221 (Minn. App. 2006), *review granted* (Minn. June 28, 2006).

When a driver's-license revocation hearing has been scheduled under a statutory provision that is later declared unconstitutional, the remedy is a stay of the revocation; it is not rescission of the revocation.

*State v. Lemmer*, (A05-2481), 716 N.W.2d 657 (Minn. App. 2006), *review granted* (Minn. Sept. 19, 2006).

1. Because the doctrine of collateral estoppel is substantive law, Minn. Stat. § 169A.53, subd. 3(g) (2004), is a constitutional abrogation of *State v. Victorsen*, 627 N.W.2d 655 (Minn. App. 2001).

2. As a matter of comity, Minn. Stat. § 169A.53, subd. 3(g) (2004), is sustainable.

*Magnuson v. Comm'r of Pub. Safety*, (A04-2212), 703 N.W.2d 557 (Minn. App. 2005).

An implied-consent advisory does not violate a driver's due-process rights by not warning the driver that driving with an alcohol concentration of .20 or more is an aggravating factor that might increase the penalty for driving while impaired.

*State v. Myers*, (A05-1604), 711 N.W.2d 113 (Minn. App. 2006), *review granted* (Minn. May 16, 2006).

Failing to inform a driver that refusal to submit to a chemical test for intoxication administered under Minn. Stat. § 169A.51 (2004) is a gross misdemeanor that may result in harsher penalties than test failure does not actively mislead the driver as to the driver's legal obligations or implicitly assure the driver that the penalties for test refusal are less serious than the penalties for test failure and, therefore, comports with the fundamental fairness required by due process.

*State v. Goharbawang*, (A05-747), 705 N.W.2d 198 (Minn. App. 2005), *review denied* (Minn. Jan. 17, 2006).

For purposes of using a revocation to enhance a subsequent offense, a driver's license revocation for refusing to submit to chemical testing is effective immediately upon receipt of a notice and order of revocation. The provision for a seven-day temporary driver's license does not toll the immediate and ongoing revocation and a driver's due process rights are not violated when he has the opportunity for judicial review of the revocation.

## **Testing**

*Kramer v. Comm’r of Pub. Safety*, (A04-2506), 706 N.W.2d 231 (Minn. App. 2005).

An incidental error in a report printed by an Intoxilyzer 5000 does not overcome the prima facie accuracy of the machine’s test results where it is established by evidence that (1) the operator is certified; (2) diagnostic checks of the machine and chemicals are error-free; and (3) proper procedures were followed in testing the defendant.

## **INSURANCE**

### **Contract Construction**

*Forestview The Beautiful, Inc. v. All Nation Ins. Co.*, (A05-50), 704 N.W.2d 773 (Minn. App. 2005).

The partial suspension of a business activity does not trigger coverage under an insurance policy containing a loss-of-business-income endorsement that provides coverage for the loss of business income due to a “necessary suspension” of operations.

### **No-Fault**

*Auto-Owners Ins. Co. v. Great W. 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).

*Ill. Farmers Ins. Co. v. Marvin*, (A05-874), 707 N.W.2d 747 (Minn. App. 2006).

1. There is no genuine issue of material fact regarding whether respondent was an occupant of a motor vehicle for purposes of underinsured motorist coverage when respondent was crushed between two cars as she was loading objects into the back of a vehicle and the upper half of her body had just been inside the vehicle mere moments before the impact.

2. Although the insured vehicle is not the direct cause of injury, the injuries are not so far removed from the use of that vehicle, when its bumpers directly contributed to the injuries sustained, to deny underinsured motorist coverage on that vehicle.

### **Settlements/Releases**

*Jacobs v. Cable Constructors, Inc.*, (A04-2191), 704 N.W.2d 205 (Minn. App. 2005).

1. Acceptance of a settlement offer made under Minn. R. Civ. P. 68 must comply exactly with the terms of the offer.

2. An insurer that intends to recoup its contribution to a Minn. R. Civ. P. 68 settlement offer from another insurer must give that insurer notice of the intent to recoup before the offer is accepted.

### **Subrogation**

*Crossman v. Lockwood*, (A05-1372), 713 N.W.2d 58 (Minn. App. 2006).

The doctrine of collateral estoppel does not bar the relitigation of an issue when the party against whom collateral estoppel is asserted did not have controlling participation or active self-interest in a previous action involving the same issue.

### **Underinsured Motorist (UIM)**

*Ill. Farmers Ins. Co. v. Marvin*, (A05-874), 707 N.W.2d 747 (Minn. App. 2006).

1. There is no genuine issue of material fact regarding whether respondent was an occupant of a motor vehicle for purposes of underinsured motorist coverage when respondent was crushed between two cars as she was loading objects into the back of a vehicle and the upper half of her body had just been inside the vehicle mere moments before the impact.

2. Although the insured vehicle is not the direct cause of injury, the injuries are not so far removed from the use of that vehicle, when its bumpers directly contributed to the injuries sustained, to deny underinsured motorist coverage on that vehicle.

## **JUVENILE**

*In re Welfare of M.A.R.*, (A05-1687), 718 N.W.2d 480 (Minn. App. 2006), *review denied* (Minn. Oct. 25, 2006).

Minn. Stat. § 260C.175 (2004), which is a child-protection provision of the Juvenile Court Act, authorizes a police officer to transport to a safe location a juvenile who is in violation of a curfew.

### **Certification/Reference**

*In re Welfare of L.M.*, (A06-44), 719 N.W.2d 708 (Minn. App. 2006).

1. Under the presumptive-certification statute, Minn. Stat. § 260B.125 (2004), when the state establishes that a juvenile is 16 or 17 years old at the time of the offense and has been charged with an offense that carries a presumptive prison sentence, the burden shifts to the juvenile to demonstrate by clear and convincing evidence that he is amenable to treatment and that adequate programming is available in the juvenile system.

2. In a presumptive-certification case, the mere possibility that a more comprehensive search for adequate juvenile programming than that conducted by the state might reveal the existence of an appropriate program is insufficient to satisfy the

defendant's burden of proving that retaining the case in the juvenile system serves public safety.

*In re Welfare of J.C.P.*, (A05-1294), 716 N.W.2d 664 (Minn. App. 2006), *review denied* (Minn. Oct. 17, 2006).

A juvenile does not have a Sixth Amendment right under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), to a jury determination of the facts supporting adult certification.

## **CHIPS**

*In re Welfare of Child of T.T.B.*, (A05-1615, A05-1631), 710 N.W.2d 799 (Minn. App. 2006), *rev'd*, 2006 WL 2975290 (Minn. Oct. 19, 2006).

1. The appellate standard of review for a decision on a motion to transfer jurisdiction of a child-protection case to a tribal court under the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act is abuse of discretion.

2. Good cause to deny a transfer of jurisdiction to a tribal court is not established by a four-hundred-mile distance between the state court and the tribal court or by the time lapse of six days between the filing of the amended child-protection petition and the transfer motion when the motion is filed before the deadline for pretrial motions.

## **Delinquency**

*In re Welfare of D.S.M.*, (A05-638), 710 N.W.2d 795 (Minn. App. 2006).

A 14-year-old juvenile who (1) is subjected to coercive questioning by police; (2) is not allowed to have a parent present at the interrogation, although a parent accompanies him to the station; (3) is held in a private room inside a police station; and (4) is not told he is free to terminate the interrogation at any time, was subjected to custodial interrogation and was entitled to receive a *Miranda* warning.

*In re Welfare of M.R.H.*, (A05-929), 716 N.W.2d 349 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006).

The depletion of accrued employment leave can be a compensable economic loss recoverable through restitution.

*In re Welfare of T.L.S.*, (A05-861), 713 N.W.2d 877 (Minn. App. 2006).

Police have probable cause to arrest for a violation of the disorderly conduct statute when the statute is applied to punish the manner by which constitutionally protected speech is delivered and the disorderly nature of the speech does not depend on its content.

## LOCAL GOVERNMENT/MUNICIPAL LAW

*Metro. Airports Comm'ns v. Bearman*, (A05-2041), 716 N.W.2d 403 (Minn. App. 2006), review denied (Minn. Sept. 19, 2006).

In order to levy a special assessment, a city must follow the procedure outlined in Minn. Stat. § 429.061 (2004), and absent a resolution adopting the special assessment, there is no valid lien against the property.

*Instant Testing Co. v. Cmty. Sec. Bank*, (A05-1505), 715 N.W.2d 124 (Minn. App. 2006).

The district court's jurisdiction to decide disputes under Minn. Stat. § 117.232, subd. 2 (2004), is contingent on the owner having previously rejected the purchaser's offer for appraisal fees and moving costs.

*Hans Hagen Homes, Inc. v. City of Minnerista*, (A05-1686), 713 N.W.2d 916 (Minn. App. 2006), review granted (Minn. July 19, 2006).

To deny effectively a written application for rezoning and for expanding a metropolitan-urban-service area, a multimember governing body must comply with the requirements of Minn. Stat. § 15.99, subd. 2(c) (2004), including the requirement to provide the applicant, in writing, a statement of the reasons for the denial. Failure to complete these requirements before expiration of the sixty-day statutory deadline, or an authorized extension, results in approval of the application as a matter of law.

*In re Molly*, (A05-1130), 712 N.W.2d 567 (Minn. App. 2006).

A city lacks authority to bring an action to enforce a non-self-executing statutory provision if the city has not adopted a procedure for the provision's implementation.

*State v. Reinke*, (A04-2219), 702 N.W.2d 308 (Minn. App. 2005).

A use of land that is unlawful at its inception, but which exists when a township enacts a regulatory change, is not exempt from the change as a preexisting nonconforming use.

## MALPRACTICE

*Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, (A05-800, A05-1533), 715 N.W.2d 458 (Minn. App. 2006), review denied (Minn. Aug. 23, 2006).

Upon finding excusable neglect pursuant to Minn. R. Civ. P. 6.02, the district court may grant an extension of time for filing an affidavit certifying expert review after expiration of the 90-day limit imposed by Minn. Stat. § 544.42 (2004).

## **Legal**

*Noske v. Friedberg*, (A05-1160), 713 N.W.2d 866 (Minn. App. 2006), *review denied* (Minn. July 19, 2006).

1. To prevent dismissal of a malpractice action against a professional, the safe-harbor provision of Minn. Stat. § 544.42, subd. 6(a) (2004), allows a plaintiff to replace a deficient affidavit of expert review with one that complies with the statutory requirements.

2. A legal-malpractice action may not be predicated on a claim that an attorney negligently failed to pursue a particular trial strategy in the exercise of professional judgment.

3. A legal-malpractice claim based on an allegation of professional negligence may not be predicated on acts constituting fraud or intentional misrepresentation.

*Prof'l Fiduciary, Inc. v. Silverman*, (A05-1322), 713 N.W.2d 67 (Minn. App. 2006), *review denied* (Minn. July 19, 2006).

A personal representative can assert a malpractice claim against the decedent's former attorney even though the probate was initiated by a judgment creditor. Such a claim is not precluded by the creditor having been a co-defendant with the decedent in the proceeding out of which the malpractice claim arose and its judgment being based on a contribution claim against the decedent in that action.

## **Medical**

*Mercer v. Andersen*, (A05-1103), 715 N.W.2d 114 (Minn. App. 2006).

1. On a motion to dismiss based on insufficient service of process and expiration of the statute of limitations, the district court has jurisdiction to determine the substantive effect of the statute of limitations even if the plaintiff concedes that service was insufficient.

2. A plaintiff does not engage in a diligent search for purposes of tolling the statute of limitations under Minn. Stat. § 541.13 (2004) when the plaintiff knows that the defendant does not reside in Minnesota but makes no attempt to locate him outside the state.

*Larson v. Wasemiller*, (A05-1698, A05-1701), 718 N.W.2d 461 (Minn. App. 2006), *review granted* (Minn. Oct. 17, 2006).

1. Minnesota does not recognize a common-law cause of action for negligent credentialing or privileging of a physician against a hospital or other review organization.

2. Minn. Stat. §§ 145.63-.64 do not explicitly grant immunity to a hospital or other review organization from liability for a claim of negligent credentialing or privileging of a physician. But the statutes limit liability to actions or recommendations not made in the reasonable belief that the action or recommendation is warranted by facts known to the review organization after reasonable efforts to ascertain the facts on which

the review organization's action or recommendation is made and limit evidence to support or defend against such claims to information available from original sources.

## **PROBATE**

*Prof'l Fiduciary, Inc. v. Silverman*, (A05-1322), 713 N.W.2d 67 (Minn. App. 2006), *review denied* (Minn. July 19, 2006).

A personal representative can assert a malpractice claim against the decedent's former attorney even though the probate was initiated by a judgment creditor. Such a claim is not precluded by the creditor having been a co-defendant with the decedent in the proceeding out of which the malpractice claim arose and its judgment being based on a contribution claim against the decedent in that action.

## **Trusts**

*Bradley v. First Nat'l Bank of Walker, N.A.*, (A05-634), 711 N.W.2d 121 (Minn. App. 2006).

1. Minn. Stat. § 336.3-307(b) (2004) (section 3-307(b) of the Uniform Commercial Code) and its accompanying statute of limitations, apply to claims against a payor bank for honoring checks fraudulently written by a fiduciary.

2. Where the Uniform Commercial Code Article 3 applies to breach-of-fiduciary-duty claims, it preempts common law bases for recovery.

3. Where an answer indicates a statute of limitations defense is raised and the opposing party has adequate opportunity to contest the defense, it is not an abuse of discretion for the trial court to consider the defense.

## **Wills**

*In re Torgersen*, (A05-1429), 711 N.W.2d 545 (Minn. App. 2006), *review denied* (Minn. June 20, 2006).

A person nominated as personal representative in a will who, in good faith, challenges the allowance of a subsequent will that names a different personal representative is entitled to attorney fees incurred in the challenge, whether successful or not, under Minn. Stat. § 524.3-720 (2004).

## REAL PROPERTY

*Gibson v. Trs. of Minn. State Basic Bldg. Trades Fringe Benefits Funds*, (A05-39), 703 N.W.2d 864 (Minn. App. 2005), *review granted and decision vacated in part* (Minn. Dec. 13, 2005), *remanded* (Minn. App. Dec. 20, 2005).

When real estate held in joint tenancy is subject to a judgment lien against the interest of one joint tenant and that real estate is sold, the judgment creditor may recover from only the fractional share of the proceeds of the real estate attributable to the joint tenant who is the judgment debtor.

*Ittel v. Pietig*, (A05-222), 705 N.W.2d 203 (Minn. App. 2005), *review denied* (Minn. Jan. 17, 2006).

Statutory new-home warranties in Minn. Stat. § 327A.02, subd. 3 (2004), may not be prospectively waived or modified in a settlement agreement's general release unless the waiver or modification complies with section 327A.04, subdivisions 2 and 3 (2004).

*Hans Hagen Homes, Inc. v. City of Minnetrista*, (A05-1686), 713 N.W.2d 916 (Minn. App. 2006), *review granted* (Minn. July 19, 2006).

To deny effectively a written application for rezoning and for expanding a metropolitan-urban-service area, a multimember governing body must comply with the requirements of Minn. Stat. § 15.99, subd. 2(c) (2004), including the requirement to provide the applicant, in writing, a statement of the reasons for the denial. Failure to complete these requirements before expiration of the sixty-day statutory deadline, or an authorized extension, results in approval of the application as a matter of law.

*Peterson v. Johnson*, (A05-1450), 720 N.W.2d 833 (Minn. App. 2006).

The 15-year statute of limitations prescribed in Minn. Stat. § 541.03 (2004) applies to a claim to have a conveyance absolute on its face declared an equitable mortgage.

*Metro. Airports Comm'ns v. Bearman*, (A05-2041), 716 N.W.2d 403 (Minn. App. 2006), *review denied* (Minn. Sept. 19, 2006).

In order to levy a special assessment, a city must follow the procedure outlined in Minn. Stat. § 429.061 (2004), and absent a resolution adopting the special assessment, there is no valid lien against the property.

### **Boundary Disputes**

*Magnuson v. Cossette*, (A05-377), 707 N.W.2d 738 (Minn. App. 2006).

1. A landowner does not have riparian rights unless the property extends into or abuts the waters of a lake, stream, or river.

2. When interpreting a legal description contained in a deed, the phrase “along the sea wall” is a description of a permanent physical landmark that takes precedence over language expressed in courses and distances in the same description.

### **Condemnation**

*Rasmussen v. Hous. & Redev. Auth.*, (A05-1418, A05-1419), 712 N.W.2d 802 (Minn. App. 2006), *review denied* (Minn. July 19, 2006).

A landlord with eminent domain authority does not, as a matter of law, breach the quiet enjoyment provision of a lease by initiating condemnation proceedings against its tenant.

### **Mortgages**

*In re Collier*, (A05-1178), 711 N.W.2d 826 (Minn. App. 2006), *review granted* (Minn. June 20, 2006).

A purchaser of Torrens property is a good-faith purchaser under Minn. Stat. § 508.25 (2004) even if he has actual notice of an unregistered mortgage in the property because the unregistered mortgage does not constitute an encumbrance under Torrens law.

*TCM Props., LLC v. Gunderson*, (A05-1979), 720 N.W.2d 344 (Minn. App. 2006).

It is not a violation of Minn. Stat. § 58.13, subd. 1(13) (2004), for a benefactor to take a mortgage on a homeowner’s property during the homeowner’s redemption period and redeem the property as a junior lienholder to (1) enlarge the redemption period; (2) facilitate a sale of the home; and (3) secure the loan that the benefactor anticipates will be repaid from proceeds of the sale.

### **Zoning**

*Bartheld v. Koochiching County*, (A05-2124), 716 N.W.2d 406 (Minn. App. 2006).

1. A temporary interim zoning ordinance not adopted in accordance with Minn. Stat. § 394.34 (2004), is invalid and does not provide a legally sufficient reason for denying an application for a conditional-use permit.

2. Neighborhood opposition based on generalized concerns not factually supported by the record is not a legally sufficient reason for the denial of a conditional-use-permit application.

*Veit Co. v. Lake County*, (A04-1958), 707 N.W.2d 725 (Minn. App. 2006), *review denied* (Minn. Apr. 18, 2006).

When a multimember governing body that denies a permit application fails to either (1) provide the permit applicant a written statement of the reasons for the denial at the time of the denial, or (2) adopt a written statement of the reasons for the denial at its

next meeting before the period for making a decision about the application expires and, upon adoption, provide the written statement to the applicant, the application is approved by operation of law under Minn. Stat. § 15.99, subd. 2 (Supp. 2003).

*Breza v. City of Minnetrista*, (A04-2286), 706 N.W.2d 512 (Minn. App. 2005), *review granted* (Minn. Feb. 14, 2006).

1. Minn. Stat. § 15.99 (2004) is a timing statute that does not alter substantive law.

2. If a local government unit fails to act on an application for a wetland exemption within 60 days, under Minn. Stat. § 15.99 the application is approved only to the extent permitted by statute.

*State v. Reinke*, (A04-2219), 702 N.W.2d 308 (Minn. App. 2005).

A use of land that is unlawful at its inception, but which exists when a township enacts a regulatory change, is not exempt from the change as a preexisting nonconforming use.

## **SCHOOL LAW**

### **School District**

*Indep. Sch. Dist. No. 709 v. Bonney*, (A05-84), 705 N.W.2d 209 (Minn. App. 2005).

Minn. Stat. § 123B.88, subd. 1 (2004), requires that a school district provide transportation to and from the home of a child with a disability who is not yet enrolled in kindergarten, when special instruction and services are provided in a location other than the child's home. The statute does not provide an exception from this requirement when the instruction and services take place at the site where the child receives daycare.

## **STATUTES OF LIMITATION**

*Mercer v. Andersen*, (A05-1103), 715 N.W.2d 114 (Minn. App. 2006).

1. On a motion to dismiss based on insufficient service of process and expiration of the statute of limitations, the district court has jurisdiction to determine the substantive effect of the statute of limitations even if the plaintiff concedes that service was insufficient.

2. A plaintiff does not engage in a diligent search for purposes of tolling the statute of limitations under Minn. Stat. § 541.13 (2004) when the plaintiff knows that the defendant does not reside in Minnesota but makes no attempt to locate him outside the state.

*Bradley v. First Nat'l Bank of Walker, N.A.*, (A05-634), 711 N.W.2d 121 (Minn. App. 2006).

1. Minn. Stat. § 336.3-307(b) (2004) (section 3-307(b) of the Uniform Commercial Code) and its accompanying statute of limitations, apply to claims against a payor bank for honoring checks fraudulently written by a fiduciary.

2. Where the Uniform Commercial Code Article 3 applies to breach-of-fiduciary-duty claims, it preempts common law bases for recovery.

3. Where an answer indicates a statute of limitations defense is raised and the opposing party has adequate opportunity to contest the defense, it is not an abuse of discretion for the trial court to consider the defense.

## **Real Estate**

*Peterson v. Johnson*, (A05-1450). 720 N.W.2d 833 (Minn. App. 2006).

The 15-year statute of limitations prescribed in Minn. Stat. § 541.03 (2004) applies to a claim to have a conveyance absolute on its face declared an equitable mortgage.

## **TORTS**

*Crossman v. Lockwood*, (A05-1372), 713 N.W.2d 58 (Minn. App. 2006).

The doctrine of collateral estoppel does not bar the relitigation of an issue when the party against whom collateral estoppel is asserted did not have controlling participation or active self-interest in a previous action involving the same issue.

## **Damages**

*Rush v. Jostock*, (A05-714), 710 N.W.2d 570 (Minn. App. 2006), *review denied* (Minn. May 24, 2006).

1. Under Minn. Stat. § 548.36, subd. 3(a) (2004), when determining the amount of collateral sources to be deducted as an offset in the reduction of an award, only the premium paid to secure personal injury protection is to be used as an offset rather than the full automobile insurance premium.

2. Although the damages awarded under the verdict were less than the amount offered in defendant's offer of judgment, the plaintiff prevailed on the merits and therefore is entitled to costs and disbursements.

*Commercial Assocs., Inc. v. Work Connection, Inc.*, (A05-862, A05-871), 712 N.W.2d 772 (Minn. App. 2006).

1. To determine the amount of fees to be forfeited for breach of a fiduciary duty, the district court should initially determine whether the breach involved actual fraud or bad faith and whether it resulted in actual harm. In the absence of either actual fraud

or bad faith, and actual harm, the district court may scale the amount of the fee forfeiture to the degree of misconduct by considering the factors that the trier of fact considers when making a standard punitive-damages award.

2. Fee forfeiture for breach of a fiduciary duty does not require forfeiture of standard insurance commissions paid by a third-party insurance company.

## **Negligence**

*Harrison ex rel. Harrison v. Harrison*, (A05-1038), 713 N.W.2d 74 (Minn. App. 2006), *review granted* (Minn. July 19, 2006).

1. The exception from Minn. Stat. §169.685, subd. 4(a) (2004), created by Minn. Stat. § 169.685, subd. 4(b), does not apply only to a product-liability action.

2. Under the plain meaning of the statute, the exception created by Minn. Stat. § 169.685, subd. 4(b), applies to an action for damages arising out of an occurrence or event that involved a child passenger restraint system that had a defect or was faulty because of the way that it was connected or set in position and prepared for use, regardless of the theory of liability in the action.

*Anderson v. McOskar Enters., Inc.*, (A05-1546), 712 N.W.2d 796 (Minn. App. 2006).

1. Parties to a contract may protect themselves against liability for negligence if the release language is unambiguous in scope and does not contravene public policy.

2. A release that purports to exonerate the benefited party from liability for “any act or omission, including negligence,” is not ambiguous as to negligence despite broad additional language.

3. A fitness club’s requirement that members sign a release of liability for negligence does not contravene public policy because such clubs are not engaged in a necessary public service and fitness services are widely obtainable elsewhere.

*Burck v. Pederson*, (A04-2230), 704 N.W.2d 532 (Minn. App. 2005), *review denied* (Minn. Dec. 13, 2005).

1. Minn. Stat. §169.685, subd. 4(a) (2004), prohibits the introduction of any evidence of seatbelt usage or non-usage in a personal-injury action arising from a motor-vehicle accident.

2. The language of Minn. Stat. § 169.685, subd. 4(a), is clear and applies equally to both plaintiffs and defendants.

*Bradley v. First Nat’l Bank of Walker, N.A.*, (A05-634), 711 N.W.2d 121 (Minn. App. 2006).

1. Minn. Stat. § 336.3-307(b) (2004) (section 3-307(b) of the Uniform Commercial Code) and its accompanying statute of limitations, apply to claims against a payor bank for honoring checks fraudulently written by a fiduciary.

2. Where the Uniform Commercial Code Article 3 applies to breach-of-fiduciary-duty claims, it preempts common law bases for recovery.

3. Where an answer indicates a statute of limitations defense is raised and the opposing party has adequate opportunity to contest the defense, it is not an abuse of discretion for the trial court to consider the defense.

*Prof'l Fiduciary, Inc. v. Silverman*, (A05-1322), 713 N.W.2d 67 (Minn. App. 2006), *review denied* (Minn. July 19, 2006).

A personal representative can assert a malpractice claim against the decedent's former attorney even though the probate was initiated by a judgment creditor. Such a claim is not precluded by the creditor having been a co-defendant with the decedent in the proceeding out of which the malpractice claim arose and its judgment being based on a contribution claim against the decedent in that action.

*Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, (A05-800, A05-1533), 715 N.W.2d 458 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006).

Upon finding excusable neglect pursuant to Minn. R. Civ. P. 6.02, the district court may grant an extension of time for filing an affidavit certifying expert review after expiration of the 90-day limit imposed by Minn. Stat. § 544.42 (2004).