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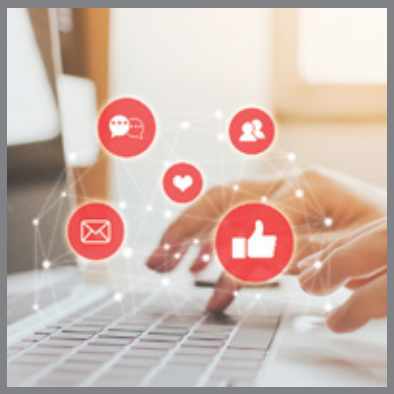

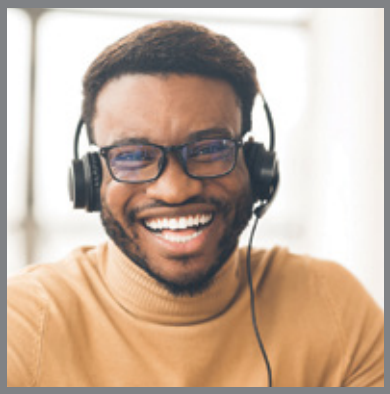

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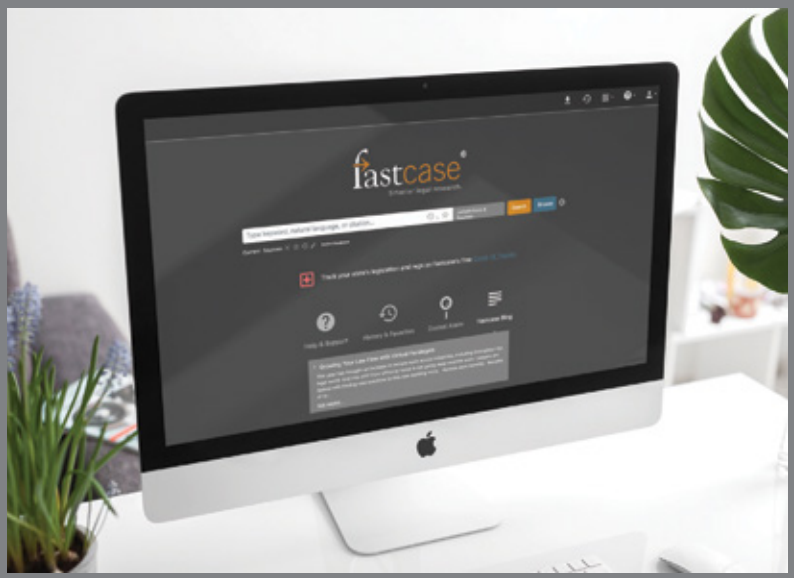

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EDITOR
Steve Perry
sperry@mnbars.org

ART DIRECTOR
Jennifer Wallace

ADVERTISING SALES
Pierre Production & Promotions, Inc.
(763) 497-1778

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ONE ATTORNEY WAS NAMED A CIVIL TRIAL CERTIFIED SPECIALIST:

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HOUSING COURT CLINICS NEED HELP

Minnesota has rapidly descended into chilly temperatures this fall, making winter visible on the horizon. For many of us, the idea of winter means groaning about driving in the snow, less daylight, and fewer opportunities to go outside. For those experiencing housing insecurity, however, the coming of winter can mean life or death. According to a September Star Tribune article, eviction filings in Hennepin County have surged since the statewide eviction moratorium was lifted in June, increasing the total eviction filings by 46 percent within one month.

And the average number of days from eviction filing to judgment has increased from 48 days in January 2022 to 124 days in August. This has dangerous implications: Those who have evictions filed against them in October and November could be facing a housing crisis during mid-winter, in the coldest part of the year.

Luckily, there are organizations working to support those in need. One of them is Volunteer Lawyers Network (VLN), which is operating housing court clinics in Hennepin, Ramsey, and Anoka Counties to offer advice, limited services, or full representation to tenants and low-income landlords appearing in court for the first time on an eviction or rent escrow matter. The work of the housing court clinics is critical, and Muria Kruger, housing program manager and resource attorney at VLN, says help is needed now more than ever.

"Starting October 3, 2022," Kruger notes, "Hennepin County increased the number of evictions heard weekly from 90 to 150. This drastic increase puts an immediate strain on our ability to provide legal services to those who are at risk of losing their home." The current need is especially acute in Anoka County, she adds.

So how can you get involved?

You can access VLN's comprehensive training resources, practice materials, and clinic shift sign-ups on their housing volunteer resources page (*www.vlnmn.org/volunteer/housing*). The typical time commitment for volunteers is a single four-hour shift per month. Learn more by visiting that URL or by contacting Kruger (*Muria.Kruger@vlnmn.org*). No time to spare? Visit *www.vlmmn.org/donate* to give money to the effort.

STATEWIDE DEBT LITIGATION PROJECT

SEEKS MEMBER FEEDBACK

Over the next twelve months, Mid-Minnesota Legal Aid (MMLA) is partnering with the Minnesota State Bar Association, Minnesota courts, January Advisors Data Science Consulting, and the Pew Charitable Trusts to research debt litigation in Minnesota's district courts and conciliation courts. Through analysis of court data and stakeholder input, our goal is to better understand how debt litigation policy and processes impact Minnesotans, and to identify opportunities for improvement.

If you have debt litigation as part of your practice, we encourage you to participate in this project by providing stakeholder input. You can volunteer to do so by completing the survey at *https://bit.ly/3EOaFJi*. Stakeholder input, particularly from our members, is highly valued to bring context to court data and to highlight the differences experienced across the state. For that reason, members from all parts of the state are highly encouraged to volunteer. For more info, please contact Access to Justice Director Katy Drahos (*kdrahos@mnbars.org*).

MOCK TRIAL

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The MSBA High School Mock Trial program—now entering its 38th year!—is seeking volunteer attorney coaches and judges for the upcoming season. Competitions will be held in-person at local courthouses and virtually in January and February. For more information, please contact Kim Basting (*kbasting@mnbars.org*) or visit our website at *www.mnbar.org/mocktrial*

Comment period open

ABA issues consultation report on Minnesota's discipline system

BY SUSAN HUMISTON ✉ *susan.humiston@courts.state.mn.us*

SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

The Minnesota Supreme Court periodically undertakes a review of its lawyer discipline system. Earlier this year, the Court invited the American Bar Association's Standing Committee on Professional Regulation to conduct such a review. This is the second time the Court has invited the ABA to consult on Minnesota's discipline system; the first came in 1981 and made the state one of the first jurisdictions to undertake such a review as part of a service that was then new to the ABA.

Since 1980, the ABA's Standing Committee has conducted 67 consultations, and accordingly brings a wealth of knowledge and insight into various ways to ensure "optimal fairness, effectiveness, transparency, accountability, and efficiency" in a discipline system.[1] The report for Minnesota contains a great deal of information and includes 25 recommendations for the Court's consideration to further optimize Minnesota's discipline system. The Court has opened a public comment period through December 30, 2022 and will conduct a public hearing on March 14, 2023.

As a longtime believer in continuous improvement, I have been excited to dig into the recommendations. The report is 88 pages long, so there is no way this brief column can do it justice. But I thought I would take this opportunity to highlight a few aspects of the report in case you were interested in learning more or submitting a comment.

Consultation team and process followed

The consultation team for Minnesota included Justice Daniel Crothers of the North Dakota Supreme Court; Sari Montgomery, private respondent's counsel from Chicago, Illinois; Maret Vessella, chief bar counsel for the State of Arizona (which has a similar-sized lawyer population to Minnesota's); and Ellyn Rosen, regulation and global initiatives counsel at the ABA and reporter for the Standing Committee. Although the report is the product of the Standing Committee as a whole, these individuals spent a great deal of time interviewing people, reviewing thousands of pages of information, and thoughtfully bringing their experience to bear to assist Minnesota.

The report describes (in almost 20 pages!) Minnesota's discipline system as well as the roles and responsibilities of numerous stakeholders in the process. It includes descriptions of the additional work of the OLPR beyond investigating and prosecuting discipline cases. The team dug into case files and reviewed dispositions and work product at all levels of the system. Further, the team sought input from a large contingent of stakeholders through interviews, both in person and virtually—complainants; respondents; respondent's counsel; the OLPR director, attorneys, and staff; Lawyers Professional Responsibility Board members (current and past); former OLPR directors; state bar leadership; district ethics committee chairs and investigators (lawyers and non-lawyers); Supreme Court discipline referees; probation supervisors; staff from Lawyers Concerned for Lawyers; and members of the bar generally. The length and detail of the report show the robust nature of the undertaking and the variety of perspectives and information sought and reviewed.

Strengths and recommendations

The report identified several strengths of our system. Chief among them is the longstanding commitment of the Court to an effective, fair, and transparent system, demonstrated by means that include ensuring adequate funding and resources to support the system and supporting periodic reviews to optimize the process. The report commended Minnesota on the number of dedicated volunteers throughout the state who play an integral role in many parts of the system by devoting significant time and talent.

The report acknowledged the Lawyer's Board work on training and education for Board members and its commitment to diversity and inclusion, including its adoption of a Commitment Statement on Non-Discrimination and Inclusion. The report also highlighted the website and the annual report produced, both of which provide lots of information so that the public and others can gain insight into a complex system. Finally, the report noted the commitment and efforts of the Office to improve case-processing times, the Office's use of technology and movement toward a paperless office, and its flexible hybrid work environment. The report further noted the Office's commitment to accessibility, expressed by various means—such as the fact that the office is open and accessible to the public, the ease of locating information relating to ADA accommodations and processes, and the variety of ways that non-

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The 25 recommendations were categorized in several areas: structure, resources, metrics, public access and outreach, training, procedures, diversion, and sanctions. Although there is a lot in the recommendations, a clear theme of the report is the recommended value to Minnesota of streamlining and updating processes and, depending on priorities, allocating additional resources. The theme of the report really resonated with me. Minnesota has a complex system that is not easily summarized or understood by those who have not spent years handling attorney discipline cases. While process is very important, it is also important to continually ask whether the right balance is being struck, the right structure is in place, and changes in practice over time are being reflected in the Office's procedures and rules.

The report offers a lot of substantive advice and includes several significant rule change recommendations. For example, recommendation 19 advocates the adoption of a diversion rule.[2] This is something that the Board and Office included in its 2018 strategic plan as an area to explore—though we have not yet had an opportunity to do so. The idea is that instances of isolated and non-serious misconduct, which currently result in private discipline such as an admonition, are better handled by referral to programs that are helpful to the lawyer (and therefore their clients), such as law practice management courses, trust account schools or ethics programs, or lawyer assistance programs. Most of these referral programs do not exist in Minnesota (beyond the excellent Lawyers Concerned for Lawyers—specifically acknowledged in the report), but nonetheless, many jurisdictions have successfully adopted diversion programs in lieu of discipline after creating such programs. Many jurisdictions around the country have diversion programs and they are structured in a variety of ways.

Recommendation 21 concerns streamlining the admonition process. Minnesota has more private discipline, per the team's experience, than other similarly situated jurisdictions (80-110 admonitions plus several private probations annually). Some of this discipline would necessarily be impacted by the creation of a diversion program, if adopted, but the report also recommended changing how and who reviews admonitions to eliminate a complex and inefficient appeal process.

This recommendation touches on more than just process, however. It is about when a private sanction is appropriate. The report recommends that admonitions "should only be issued in cases of minor misconduct where diversion is not appropriate, there is little or no injury caused by the misconduct, and the admonition will result in little likelihood of repeated misconduct."[3] In related fashion, recommendation 23 suggests eliminating the sanction of private probation.[4] In my experience reviewing cases from other jurisdictions, Minnesota issues admonitions or private probation in a lot of circumstances where public discipline would more likely be pursued elsewhere. Also, I'm concerned that we have lawyers with more private discipline than they should have. Adopting these recommendations would materially change how Minnesota approaches the distinction between private and public discipline, and in the Standing Committee's view, bring Minnesota more in line with other jurisdictions while fulfilling the primary purpose of discipline—protecting the public.

Conclusion

The report contains a lot of additional recommendations, as you can no doubt glean from the fact that I have only discussed three. I also do not want to leave you with the impression that, because there are 25 recommendations, our discipline system is a fixer-upper. Because it is not, and the nature of the recommendations make that clear. As I wrote in last month's column, lawyer regulation is an interesting and dynamic area of law, and there is a lot of change and innovation happening throughout the country. We have a solid system that can always be improved, including—potentially—in some fundamental ways if we think the changes are in the best interest of Minnesota. I'm very thankful to the Court for taking this opportunity to look beyond our borders and engage in this deliberative and transparent process. I hope you read the report. I hope you engage in the public comment process. And know that I would love to hear your opinion on the recommendations or other ideas you may have as we work together to optimize Minnesota's lawyer discipline system.

Postscript/Author's note

As already noted at its online posting, my September 2022 column was an update of Martin Cole's July 2015 Bench & Bar column entitled "Dealing with Unrepresented Persons," available on our website at *lprb.mncourts.gov*, as are all prior articles written by this Office. My failure to highlight that fact and provide the appropriate attribution was an error, which I regret. Thank you to Mr. Cole for graciously accepting my apology for this mistake. Also, to clarify any potential confusion caused by the statement, "The rule does not require an attorney to advise an unrepresented person in all instances to secure counsel," Rule 4.3(d), MRPC, permits but does not require a lawyer to advise an unrepresented person to secure counsel. ▲

NOTES

[1] American Bar Association Report on the Lawyer Discipline System for Minnesota (September 2022), on the Minnesota Judicial Branch website (*www.mncourts.gov*), with a link found at *www.lprb.mncourts.gov*.

[2] Report at 71-74.

[3] Report at 78.

[4] Report at 81-83.

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EXECUTIVE ORDER 22-20

and Minnesota's growing cybercrime rates

BY MARK LANTERMAN ✉ *mlanterman@compforensics.com*

MARK LANTERMAN is CTO of Computer Forensic Services. A former member of the U.S. Secret Service Electronic Crimes Taskforce, Mark has 28 years of security/forensic experience and has testified in over 2,000 matters. He is a member of the MN Lawyers Professional Responsibility Board.

This past August, Gov. Tim Walz issued Executive Order 22-20, Directing State Agencies to Implement Cybersecurity Measures to Protect Critical Infrastructure in Minnesota.[1] The order states:

> "The critical infrastructure that protects the health and safety of Minnesotans is facing increasingly sophisticated cyber attacks. Addressing this risk requires both the public and private sectors to coordinate our efforts and harden cyber defenses. Ongoing geopolitical conflicts and the proliferation of organized criminal networks engaged in nefarious cyber activities means that we must strengthen our cyber defenses across our critical infrastructure. We must do all that we can to enhance cybersecurity, especially for critical infrastructure in both the public and private sectors."

This order echoes the same sentiments as President Biden's 2021 Executive Order on Improving the Nation's Cybersecurity.[2] Heightened criminal cyberactivity has necessitated a renewed focus on cybersecurity, private and public sector cooperation, information sharing, and the establishment of the Cyber Safety Review Board (CSRB). As discussed in my recent article "The Cyber Safety Review Board's first report and the impact of Log4j" (B&B Sept. 2022), the CSRB's first report aimed to explain the Log4j vulnerability and the steps that organizations ought to take to counteract its impact. The creation of this board, and its subsequent investigations, provide opportunities for teamwork between the public and private sectors in managing largescale cyber events. The Log4j vulnerability was an ideal topic for the board's first report given how many organizations were affected and the potential for long-term consequences.

Similarly, Executive Order 22-20 looks to this kind of cooperation to improve the security of Minnesota's critical infrastructure. The order stipulates new requirements for state agencies and the need to understand their current security postures and unique risks. These new standards call for extensive cooperation between specified state agencies, the Department of Public Safety, Minnesota's Department of Information Technology Services, the FBI, and the U.S. Department of Homeland Security. Among many new requirements, state agencies are being tasked with monitoring cyber risk, assessing current vulnerabilities, increasing defenses, preparing for possible attacks, and utilizing appropriate tools. The order outlines deadlines for compliance and indicates that currently unincluded entities should still consult with MNIT to follow best practices (and that more formal instructions will be provided in February 2023).

Just as the nation at large finds itself at increased risk of international threat actors and an increase in cybercrime, so too does the state of Minnesota. In a recent interview, Minnesota FBI Special Agent in Charge Michael Paul explained that cybercrime in Minnesota is on the rise: "According to the FBI, there were more than 6,000 victims of cybercrimes across the state in 2021, which is a 50 [percent] increase since 2019.

The total financial losses for businesses and individuals was $82.15 million."[3] Many attribute this elevated level of cybercrime to the changes brought about by the pandemic, especially regarding the prevalence of remote working environments.

Social engineering attacks and targeted spear-phishing scams have proliferated, prompting many organizations to refresh their policies and update training procedures. A social engineering attack may involve tricking an individual into providing personal information, credentials, or even a device. This past September, I was interviewed about a cell phone theft ring in Minneapolis. The perpetrators would steal victims' phones after making sure they were unlocked and proceed to access applications, transferring cash and cryptocurrency from victims' accounts.[4] It is advised to never give an unlocked phone to a stranger (think someone asking to borrow your phone), to log out of apps that have sensitive data, and to take a moment to create extra passwords and set accessibility controls for key applications (such as screen time settings on the iPhone).

As is typically the case, implementing security measures now is certainly worth the saved time and money down the road. In addition to the financial losses associated with cybercrime, reputational and legal damages are also common and can be difficult to quantify at the time of an incident. In the case of critical infrastructure, the immediate risks of an attack may be devastating. The order issued by Gov. Walz is focused particularly on critical infrastructure and ensuring "the life, safety, and property of all Minnesotans," but all organizations and entities can benefit from assessing their security postures and determining how best practices are being applied.

Since critical infrastructure and the technologies that make up the internet of things are interconnected, our approach to security should be similarly integrated. On a national level, on a state level, in the public sector, and in the private sector, open communication and collaboration are essential to most efficiently protect the assets on which we all rely. Executive Order 22-20 provides a game plan for improving our state's ability to protect its critical infrastructure. Thorough cyber assessments and evaluating risks lay the foundation for strengthening defenses and sharing information. ▲

NOTES

[1] *https://mn.gov/governor/assets/EO%2022-20_tcm1055-539386.pdf*

[2] *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/12/executive-order-on-improving-the-nations-cybersecurity/*

[3] *https://kstp.com/kstp-news/top-news/minnesota-fbi-director-warns-of-increased-cyber-attacks-against-individuals/*

[4] *https://www.cbsnews.com/minnesota/news/12-men-accused-of-operating-highly-organized-cellphone-theft-ring-in-downtown-mpls/*

Q: WHAT'S THE MOST VALUABLE THING YOU DO FOR YOURSELF TO CREATE A MEASURE OF WORK/LIFE BALANCE?

Abou Amara, Jr.

Abou Amara, Jr. is an associate attorney at Gustafson Gluek PLLC, and is vice president of the Minnesota Association of Black Lawyers (MABL).

Since joining the bar, my life has increasingly been consumed by the practice—and lifestyle—of law. To be clear: it's been an amazing journey thus far and I feel extremely grateful. But I firmly believe if a lawyer doesn't know who they are *outside* of the law, my sense is they won't be able to sustain themselves *in* it.

So, here's what I do to create a sense of work/life balance: I schedule time on my calendar for me. Now I'm sure you're saying, "Ok, lame, Abou." Let me explain. This time I block off on my calendar isn't some abstract "me time." This time is *specific*, *unambiguous*, and *immovable* from my calendar. When you think about it that way, it becomes something much different.

For example, two Fridays ago, I set aside time in my personal calendar to "Shop for new pair of Black Nike Dunk Shoes" from 6 PM to 7:30 PM.

With this level of specificity, I find a sense of liberation and balance in my life. Once I scheduled time to look for new Nike Dunks (yes, I am an avid sneakerhead—a subject for another time), I no longer had to think about it and could focus on work. But conversely, when that scheduled time came, I could solely focus on the different types of shoes I wanted, without the fear of impending deadlines on a work project. To me, that is the essence of real work/life balance—mental freedom, and the ability to be truly present in *all* aspects of life without one aspect of life (often work) leaking into other aspects of life.

Jean Gustafson

Jean Gustafson practices elder and mental health law in Brainerd and Long Prairie. She is the 2017 Greater Minnesota Lavender Bar Association Fellowship recipient. Jean recently married the love of her life and has been a happy camper ever since.

I get out in nature as often as I can and walk—or just take a long lunch at a local park. I try to get out in nature for weekday walks at the Rotary Park in Brainerd, where I can watch the changing seasons, look at the water, listen to the birds, and feel the wind in my hair. When I get really stressed out, I take a more determined approach that I call a mental health break and go to the Crow Wing State Park, where I can walk along the banks of the Mississippi River and imagine what life was like in the old town of Crow Wing, escaping my troubles for just a little while until I return to my office refreshed and renewed.

We have some of the most beautiful landscapes in the country, so you don't have to go far to find them. This spring and summer found me discovering many new city parks in the south and west metro areas. I also discovered the love of camping, including camping at a former logging camp on private land in Aitkin, camping near Crosby. And a very special day at Jay Cooke State Park with my wife.

Getting out in nature centers me in a way that working out in the gym doesn't. While I plan on making exercise more of a priority in both the work and life side of my work-balance equation in the future, getting out in nature is something that anyone can do just about any time, and I recommend that to everyone.

Tom Pack

MSBA Secretary Tom Pack is a litigation shareholder at Greenberg Traurig, LLP, focusing his practice on defending medical device manufacturers and pharmaceutical companies in product liability litigation. When not working, you'll find Tom hanging out with his husband and friends in Minneapolis, or outside enjoying every bit of Minnesota spring, summer, and fall (but not winter).

My biggest struggle when it comes to work-life balance is not hours or travel but rather finding ways to turn my brain's "work mode" to the "off" position when I'm not working. I, along with my husband and friends, find it frustrating when I carve out non-work time and spend it lost in my mind thinking about work issues, or perusing the endless stream of emails on my phone. The sure-fire way I have found to turn my brain "off" work mode is exercise. Getting some hard exercise—on my Peloton in the basement, outside on a bike, or at a gym class—overwhelms my brain and forces me into the moment. It is not possible to think about brief edits or an upcoming hearing when I'm completely out of breath and trying to force my legs to keep moving at 105 repetitions per minute. It is similarly not possible to check emails while cruising down the Midtown Greenway on a sunny afternoon. Once I get off that bike or out of that class, drenched in sweat, my brain has received a much-needed infusion of dopamine and I feel "reset" and ready to engage in quality time with family, friends, or even recovery time alone by myself.

New Mitchell Hamline clinic tackles wrongful convictions in Minnesota


Zana Molina, 3L


Kate Kruse
Co-Director, Clinical Education Program
Professor of Law


Keith Ellison
Minnesota Attorney General

BY TOM WEBER

A new clinic at Mitchell Hamline is giving students the opportunity to work with a unit of the Minnesota Attorney General's office that is investigating cases of people possibly being wrongfully convicted.

This fall is the first time the Wrongful Conviction and Sentencing Clinic is being offered. Eight students are enrolled.

Their work is tied to a Conviction Review Unit that Attorney General Keith Ellison created in 2021. It's an independent unit that will review cases that have "plausible allegations of actual innocence or manifest injustice." Five of the 16 members of that panel are Mitchell Hamline alums.

Students are working with Professor Kate Kruse in teams to investigate applications the Conviction Review Unit has carefully selected.

"Mitchell Hamline's ethos is to train students to want to serve the public and make a difference," said Kruse. "I can't think of a more perfect example of that than giving students a chance to work on real-world cases that might lead to freeing someone who is in prison, serving time for a crime they did not commit."

The Conviction Review Unit partnered with Mitchell Hamline after several students worked with the unit as externs. The quality of the externs' work and the students' enthusiasm led the unit's director, Carrie Sperling, to approach Professor Kruse.

"We've received an overwhelming number of applications for assistance, and we wanted to increase our capacity to investigate them," said Sperling. "Partnering with Professor Kruse and her students seemed like a perfect solution.

"The clinic will provide our office with high-quality legal work, and the students will get a unique educational opportunity."

Kruse is also co-director of Mitchell Hamline's entire clinical education program; she teaches and writes in the areas of criminal law, criminal justice, and legal ethics.

The course also has a classroom component, where students will study how systemic issues lead to wrongful convictions.

One of the clinic's first students said she wanted to enroll the moment she heard about the new course because of her own hopes to work on innocence cases after graduation.

"I have always been interested in changing the justice system from within," said third-year student Zana Molina. "And there seemed like no better opportunity to do that than through this important work with prosecutors in the attorney general's office.

WAGE THEFT

New law and enforcement efforts implicate compliance & ethics challenges

BY MIKE SCHECHTER ✉ *mschechter@agcmn.org*

There are three main characters in wage theft stories: the deliberate criminals, the unawares, and the cleans. This article focuses on the middle group in the construction industry. We assume that if the deliberate criminals are undeterred by statute or prosecution, then they are banking on criminal defense counsel and wouldn't read an article about imputed risks and prevention. The cleans are those who have good protections, practices, and relations, and would take corrective action if shown that a problem exists. Although the cleans may be interested to learn about the increased enforcement and model protocols, the middle group of unawares is the literary "everyman" that is most interesting.

This group comprises a spectrum bridging the deliberates and the cleans. Some may suspect that they have problems and, like the deliberates, choose to ignore red flags. Some may have red flags to which they are oblivious. Some may not be aware that wage theft is a crime or may not recognize that the business could be liable for a third party's malfeasance. The line between culpable deliberate indifference and nonculpable ignorance involves determining whether the facts would put the business on notice that criminal activity likely was occurring, and whether it subsequently investigated.[1] One key question is whether the business has systems to become aware of suspicious facts; another is, what does it do when it learns suspicious facts?

The red flags may be subtle or dramatic. For instance, when the business receives a bid for labor-intensive scopes of work, like drywall, one bid may be significantly lower than the others. Supplies like drywall are close in cost among contractors. Efficiencies in management and scheduling could account for small differences. The factor that can create a significantly lower bid is cutting labor costs. This creates powerful economic incentives to do so.

Public ownership may inadvertently foster wage theft. On the one hand, public owners can adopt measures that prevent criminally low bids, such as enforcing the Responsible Contractor Law to filter out unethical contractors and requiring that workers be paid prevailing wages. On the other hand, a public owner may believe that it is paying less for comparable, legal work, and it may be required to accept low bids (not realizing—or ignoring—that the bid is criminally low). If a public owner misses or ignores a red flag, a criminally low bid could win the work.

The warning flags also may be camouflaged. Construction projects typically use tiered contracting, so the warning flags and the identities of subcontractors may be buried beneath multiple levels of subcontractors. The cut corner(s) could be bundled among other costs and scopes, and there is a disincentive to inquire. In sum, it can be hard to tell whether an organization fell prey to confirmation bias, chose to ignore suspicious signs, or really did not know.

Other red flags are clearer, like conduct observed on the jobsite or the receipt of a file from a public or community investigator. External investigations are increasing and putting more "unawares" on notice of potential problems.

The harms of wage theft

"Wage theft" occurs under Minnesota's criminal statute when an employer, with the intent to defraud: *(a)* fails to pay an employee all wages at the employee's rate of pay or at the rate of pay required by law, whichever is greater; *(b)* causes an employee to give receipt for wages greater than the amount actually paid to the employee; *(c)* demands or receives any rebate or refund from the employee; or *(d)* in any manner creates the appearance that wages paid to the employee were greater than the amount actually paid.[2] Wage theft can take the form of unlawfully withholding wages, evading employment taxes, misclassifying employees as independent contractors, or using other means that result in workers being paid less than they are legally owed.[3]

There are strong social reasons for the increased emphasis on combating wage theft. Wage theft victimizes the workers who are underpaid, may be housed in communal buildings, and may be shuttled like cattle in cargo vans to the jobsite. They often are deprived of basic worker rights and protections. Many receive little or no formal training or safety equipment, are uninsured, and meet a Dickensian fate if seriously injured.[4]

Also harmed are the legitimate contractors who lose the work because, by paying lawful wages, they are forced to make their bids higher. On the macro level, the economics push the legitimate contractors to thinner margins and smaller scopes of work. General contractors may be forced to take contract management work and have no power to prevent the owner—even the public owner—from awarding work to a suspiciously low bidder. When the economy sinks, the general contractor's margins wither and the good companies could fail.

> WAGE THEFT CAN TAKE THE FORM OF UNLAWFULLY WITHHOLDING WAGES, EVADING EMPLOYMENT TAXES, MISCLASSIFYING EMPLOYEES AS INDEPENDENT CONTRACTORS, OR USING OTHER MEANS THAT RESULT IN WORKERS BEING PAID LESS THAN THEY ARE LEGALLY OWED.

Finally, the state is harmed from tax revenue lost. One report concludes that Minnesota loses $136 million annually in unpaid income taxes, unemployment insurance contributions, and workers' compensation premiums.[5]

New laws emphasize wage theft enforcement

Minnesota's 2019 wage theft law was intended to counterbalance the temptations of wage theft by creating new wage notification requirements and protections for employees asserting their rights. It further made explicit that wage theft is a form of criminal theft and added enforcement authority to the Minnesota's Attorney General's Office to investigate and prosecute claims and to the Minnesota Department of Labor and Industry (DLI) to bring administrative actions (including compensatory and punitive orders). Finally, the law drew attention to wage theft as a significant state problem and funded new investigators.

The success of the wage theft law is unclear. Wage theft continues to be a significant issue in the Minnesota construction industry. While 18 percent of construction workers in the Upper Midwest report having experienced wage theft, Minnesota's rate is 23 percent.[6] A 2019 survey of non-union construction workers reports that nearly half of the workers surveyed have experienced wage theft.[7]

Critics point to the slow response by the AG's office and DLI to hire investigators and begin actions, and by local governments to prosecute or refer cases to the state. There have been a handful of prosecutions in the news, which may or may not represent a significant success considering how recent the law is. Public officials speak in terms of ramping up and expanding enforcement efforts. For instance, Attorney General Keith Ellison personally spoke last year at a national conference about his office's growing efforts, and reaffirmed that wage theft investigation and prosecution are high priorities for his office. Similarly, DLI has hired more full-time investigators. In April 2022, Gov. Walz proclaimed a "Construction Industry Tax Fraud Day of Action" to bring greater attention to wage theft issues.[8]

Community and construction associations also are engaging. For instance, a CLE at the January 2022 Construction Summit featured a community activist from Building Dignity and Respect Standards Council (BDC) and the head of the AG's Wage Theft Unit. BDC and the trade unions, particularly Carpenters and Laborers, have been very active—including hiring investigators and meeting with public owners to expose violations and emphasize ways to prevent wage theft. They are emerging as a second front in the state's increasing enforcement efforts.

This intensifying spotlight may create a scenario in which state or community activists provide a contractor or owner with specific information of wage theft on a project. Where once they might have dismissed red flags as red herrings, contractors in such instances will face the explicit decision to deliberately ignore the information or to investigate. Attorneys who work with contractors, either as in-house counsel or through outside law firms, may be called upon to advise the organization and, if so, should be aware of the potential implications under the Minnesota Rules of Professional Conduct (MRPC).

Evidence of wage theft implicates attorney's duties under MRPC 1.13

The business organization that deliberately commits wage theft or willfully ignores its red flags risks criminal and civil prosecution as well as the organization's ability to bid on future work. These con-

stitute risks of substantial harm to the organization and thereby implicate an attorney's duties under MRPC 1.13(b), which provides:

> "If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation... of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization...."

This means that the attorney who learns of reasonable flags that wage theft is occurring—whether in-house or outside counsel—may have the ethical duty to act. This duty to act is owed to the organization, not the business's employees or officers. If the first officer refuses to take corrective action, the attorney must appeal the warnings up to the organization's highest level. This highest authority "ordinarily will be the board of directors or similar governing body."[9]

MRPC 1.13(c) further contains a rare exception to the attorney-client privilege, permitting the lawyer to disclose confidential information if the organization's leadership chooses to ignore unlawful conduct. If the lawyer's services are used in a way that furthers the unlawful conduct, then the rules may demand withdrawal from representation.

Compliance to prevent the risk of wage theft

There are several takeaways here. First, the middle "unawares" group might be able to live in a space of ignorance or plausible deniability until it receives information that imputes notice of wage theft. As evidence and circumstantial suggestions of wage theft grow, the risk of liability also grows. Continuing to ignore these signs may be likened to playing a game of chicken.

Second, increased investigative and enforcement efforts by the state and others may bring this notice sooner and more sharply. The key question here stems from the organization's awareness of and decisions regarding "discernible" flags and "imputed" knowledge. How does the organization respond to a noticed flag? Does the organization proactively learn about flags where its knowledge could be imputed? For instance, job superintendents may see white cargo vans unload a multitude of workers, become aware through conversations with workers of evidence of wage theft, or make other observations that could impute to the organization sufficient knowledge to warrant investigation. A prosecutor could argue that the failure to learn or heed this information demonstrates willful indifference and renders the organization liable. Demonstrating willful indifference toward wage theft is a dangerous strategy.

Third, the attorney who becomes aware of these flags—or becomes aware that red flags may exist and are being ignored—may owe a duty to protect the organization. This protection begins with advice and likely builds to creating compliance protocols. Model compliance protocols[10] and the advice of outside counsel can help build or improve a compliance program to protect the business. Compliance efficacy rests on developing a culture of ethical behavior, the establishment of reporting mechanisms for noncompliant behavior, and the ability to audit and terminate subcontractors who could impute liability to the business. The investigation of concerns should be scalable—asking more questions when appropriate and, when concerns are verified, having the power to fix the problem or to terminate the contract with the violating subcontractor.

Wage theft is similar to other compliance matters. In matters ranging from preventing corruption to responding to harassment, organizations need to be on guard against the employee or subcontractor who is willing to cut corners, harm others, break the law, and risk harm to the organization. As wage theft spreads and the government increases its enforcement, lawyers need to be aware of the risks and any red flags, conscious of their duties to the organization, and prepared to advise client organizations. ▲

MIKE SCHECHTER is general counsel and director of labor relations with Associated General Contractors of Minnesota, a leading trade association in the construction industry that works with unions and provides educational events, form construction contracts, and the CHASE safety program. Mike also serves on the MSBA Construction Law Section Council.

NOTES

[1] *E.g. United States v. Novak*, 866 F.3d 921, 927 (8th Cir. 2017) (*quoting United States v. Florez*, 368 F.3d 1042, 1044 (8th Cir. 2004)).

[2] Minn. Stat. §609.52. subd. 1(13).

[3] Jonathan Moler, *Wage Theft and MPRC 1.13*, Presentation at Construction Summit (1/11/2022); *see also* Kelly Busche, *Minnesota Leads Midwest in Wage Theft, Report Says*, Finance & Commerce (1/20/2021), *https://finance-commerce.com/welcome-ad/?retUrl=/2021/01/minnesota-leads-midwest-in-wage-theft-report-says/*.

[4] Nathaniel Goodell & Frank Manzo, *The Costs of Wage Theft and Payroll Fraud in the Construction Industries of Wisconsin, Minnesota and Illinois* (*https://midwestepi.files.wordpress.com/2020/10/mepi-ilepi-costs-of-payroll-fraud-in-wi-mn-il-final.pdf*) at 1 (1/14/2021).

[5] *Id.* at 15.

[6] *Id.* at Executive Summary 1.

[7] Busche at 1.

[8] Proclamation of Gov. Tim Walz (4/18/2022).

[9] *Id.* at cmt. 5.

[10] *See* e.g. *www.agcmn.org/construction-resources/forms*

MINNESOTA AFTER *DOBBS*

Understanding the state Constitution's protections for reproductive rights

BY SHARON VAN DYCK AND SCOTT WILSON
sharon@vandycklaw.com scottwilsonappellate@gmail.com

On June 24, 2022, the United States Supreme Court delivered a "serious jolt" to the legal system and to the individual personal rights of American women. In *Dobbs v. Jackson Women's Health Org.*,[1] the Court overturned *Roe v. Wade*[2] and *Planned Parenthood v. Casey*,[3] eradicating for the first time in its history a personal Constitutional right that the Court formerly recognized—one that it had repeatedly affirmed.

In this radically altered reproductive rights landscape, state constitutional rights are now central and determinative. This article provides a basic survey of existing and evolving reproductive rights law protected by Minnesota's state constitution, viewed against the backdrop of the federal law pre- and post-*Dobbs*.

FEDERAL CONSTITUTIONAL LAW BEFORE AND AFTER *DOBBS*

Roe v. Wade

Decided in 1973, *Roe* was grounded in an unenumerated right of privacy identified primarily in the Fourteenth Amendment's due process clause, with antecedents in Supreme Court jurisprudence extending back to 1891.[4] The case was decided 7-2, and the majority opinion was written by Justice Harry Blackmun of Minnesota. The right to abortion recognized in *Roe* was identified as "fundamental," subjecting restrictions to strict scrutiny (*i.e.*, regulation "may be justified only by a 'compelling state interest'" advanced through the least burdensome means).[5]

Roe imposed a trimester-based framework on permissible regulation of abortion: During the first trimester of pregnancy, no restrictions were permitted ("the abortion decision and its effectuation must be left up to the medical judgment of the pregnant woman's attending physician."). During the second trimester, regulation was permissible to protect the health of the mother. During the third trimester ("the stage subsequent to viability"), the state could regulate and even ban abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life and health of the mother."[6]

Planned Parenthood v. Casey

Nineteen years later, the Court was asked to overrule *Roe*. It refused, choosing instead to limit and modify *Roe* in a complex 80-page plurality decision.

Subjecting *Roe* to an extensive *stare decisis* analysis,[7] the Court reaffirmed its core holding: A "woman's right to terminate her pregnancy before viability... is a rule of law and a component of liberty we cannot renounce."[8] However, the Court in *Casey* discarded the trimester framework, making viability (generally at 24 of 40 weeks) the marker for when "the State's interests are... strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."[9] Most important, the Court announced a new, less rigorous "undue burden" standard for pre-viability restrictions (state regulation is permissible if it does not have "the purpose or effect of imposing a substantial obstacle in the path of a woman seeking an abortion...."[10] *Casey* placed greater emphasis on the state's interest in protection of fetal life, effectively allowing first trimester waiting periods and "informed consent" requirements.

Dobbs v. Jackson Women's Health Org.

By greenlighting substantial pre-viability restrictions, *Casey* subjected *Roe* to a gradual death by a thousand regulatory cuts.[11] *Dobbs* ended this process abruptly.

The question taken vs. the question decided

The difference between the question the Court accepted for review and the issue it ultimately decided is striking. At the request of the State of Mississippi, the Court took review to decide "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional."[12] Rather than limiting its review to that question (which was tailored to the challenged statute, Mississippi's pre-viability ban on abortions after 15 weeks), the Court overruled *Roe* and *Casey*: "We... hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives."[13]

Justice Alito's majority opinion

Justice Samuel Alito wrote for the majority, joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett. The Court held that, contrary to *Roe* and *Casey*, a right to an abortion cannot be found in the Fourteenth Amendment due process clause's guarantee of liberty because it is not "deeply rooted in [the Nation's] history and tradition" and it is not "essential to our Nation's 'scheme of ordered liberty.'"[14]

The Court understood the term "liberty" itself as empty of meaning. It therefore engaged in an historical inquiry going back to the roots of the English common law.[15] It found that, from the time of the Fourteenth Amendment's 1868 adoption until *Roe*, most states made abortion a crime, as did the common law in antiquity.[16] This led the Court to what it described as "[t]he inescapable conclusion... that a right to abortion is not deeply rooted in the Nation's history and traditions." On this basis, the Court held that the right to an abortion is not part of a broader entrenched right of privacy, but instead is only a competing interest to be balanced as a function of "ordered liberty."[17]

The Court insisted that substantive due process antecedents to *Roe* and *Casey* (like *Griswold v. Connecticut*,[18] which identified a constitutional right in married people to access to contraception) are not undermined by its decision because those cases do not implicate destruction of a fetus, a "critical moral question."[19] The Court did not explain how this distinction would, in logic, prevent future courts from using the same analysis to revoke other established unenumerated rights.

The Court noted that *stare decisis* is not an "inexorable command"—and that it is at its weakest in interpretation of the Constitution.[20] The Court applied five factors in determining that *Roe* and *Casey* did not deserve respect under the doctrine of *stare decisis*: (1) nature of the error; (2) quality of reasoning; (3) workability; (4) effect on other areas of law; and (5) reliance interests.[21]

> JUSTICE THOMAS AGREED WITH LIMITATION OF *DOBBS* TO THE ABORTION CONTEXT, BUT STATED THAT IN FUTURE CASES THE COURT SHOULD RECONSIDER AS "DEMONSTRABLY ERRONEOUS" ALL SUBSTANTIVE DUE PROCESS DECISIONS, INCLUDING *GRISWOLD, SUPRA* (RIGHT OF MARRIED PERSONS TO OBTAIN CONTRACEPTION); *LAWRENCE V. TEXAS* (RIGHT TO ENGAGE IN PRIVATE, CONSENSUAL SEX ACTS); *OBERGEFELL V. HODGES* (RIGHT TO SAME-SEX MARRIAGE).

The heart of the Court's analysis here falls under the first two factors—its findings that *Roe* was "egregiously wrong," and its reasoning "exceptionally weak."[22] Remarkably, the Court denied the existence of significant reliance on the 49-year-old abortion right, asserting there were no "concrete" reliance interests, unlike those that might exist in the context of "property and contract rights."[23]

The Court refused to consider the public perception of political influence in its determination to overrule a "controversial 'watershed' decision": "[W]e cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work."[24]

Given the Court's determination that no fundamental constitutional right to an abortion exists, Mississippi's 15-week abortion ban was subject to rational-basis review, the most deferential standard.[25]

"Legitimate state interests" perceived as supporting the law included: "respect for and preservation of prenatal life at all stages of development...; protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex or disability."[26] Given the presence of these legitimate state interests under rational basis review, the constitutional challenge to the Mississippi ban failed.[27]

Concurrences

Justice Thomas's concurrence[28] is a wholesale attack on substantive due process under the due process clause of the Fourteenth Amendment,[29] which he would abolish altogether: "As I have previously explained, 'substantive due process' is an oxymoron that 'lack[s] any basis in the Constitution.'"[30]

Justice Thomas agreed with limitation of *Dobbs* to the abortion context, but stated that in future cases the Court should reconsider as "demonstrably erroneous" all substantive due process decisions, including *Griswold*, *supra* (right of married persons to obtain contraception); *Lawrence v. Texas*[31] (right to engage in private, consensual sex acts); *Obergefell v. Hodges*[32] (right to same-sex marriage).[33]

Justice Kavanaugh's concurrence can be fairly described as an attempt to soften the blow. He acknowledged what he perceived to be a good-faith controversy over abortion[34] and observed the "Constitution is neither pro-life nor pro-choice."[35]

Justice Kavanaugh emphasized that—in his view—other substantive due process precedents affecting contraception and marriage are not threatened, expressly including *Griswold*, *supra*; *Eisenstadt*, *supra* (right of unmarried persons to obtain contraceptives); *Loving v. Virginia*[36] (right to interracial marriage); and *Obergefell*, *supra*. He did not explain this assertion.[37]

Justice Kavanaugh also asserted that the right to travel to another state for an abortion is not threatened, "based on the constitutional right to interstate travel." He described this issue as "not especially difficult as a constitutional matter." No support is cited.[38]

Chief Justice Roberts concurred in the judgment. His opinion expressed regret that the Court did not strike a softer blow, limiting its review to the question it initially took. Chief Justice Roberts pointed out "[w]e granted certiorari to decide one question: 'Whether all pre-viability prohibitions on elective abortions are unconstitutional.'" He further noted that in arguing for review, "Mississippi stated that its case was 'an ideal vehicle' to 'reconsider the bright-line viability rule,' and that a judgment in its favor would 'not require the Court to overturn'" *Roe* and *Casey*.'"[39] Chief Justice Roberts would have adhered to "a simple but fundamental principal of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more."[40] "Surely," he argued, "we should adhere closely to principles of judicial restraint here, where the broader path the

Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis*."[41]

The Chief Justice observed that "The Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case."[42] He would have taken "a more measured course," discarding the viability line, but recognizing a right to terminate a pregnancy that extends "far enough to ensure a reasonable opportunity to choose," upholding Mississippi's 15-week ban on that basis.[43] "I would decide the question we granted review to answer," he wrote.[44] Chief Justice Roberts agreed the answer to that question is no, concurring in the judgment only.

The dissent

The dissent by Justices Breyer, Sotomayor, and Kagan is a 23-page requiem for unenumerated personal rights. The three dissenting justices took the unusual step of co-signing their opinion, which has been understood as an expression of unity and a response to the extreme nature of the majority's opinion.[45]

The dissent is intensely critical of both the majority's Fourteenth Amendment due process clause analysis[46] and its *stare decisis* analysis.[47] Most striking, however, are the dissent's critique of the majority's decision in terms of the Court's legitimacy, and its discussion of that decision's future implications for unenumerated personal rights.

The dissent's view of the decision's impact on the Court's legitimacy is encapsulated in two ringing statements:

> "The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law."[48]

> "Now a new and bare majority of this Court—acting at practically the first moment possible—overrules *Roe* and *Casey*.... It eliminates a 50-year-old constitutional right that safeguards women's freedom and equal station. It breaches a core rule-of-law principle, designed to promote constancy in the law. In doing all of that, it places in jeopardy other rights, from contraception to same-sex intimacy and marriage. And finally, it undermines the Court's legitimacy."[49]

The dissent further observed that a federal ban on abortion is now permissible.[50] It asserted "[w]hatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens."[51]

As to the decision's implications for unenumerated rights generally, the dissenting justices focused on the absence of any reasoned principle that would prevent the *Dobbs* Court's analysis from being used as Justice Thomas advocates—to dismantle all unenumerated rights based in Fourteenth Amendment substantive due process:

> "... no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation.... They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does 'cast[s] doubt on precedents that do not concern abortion.' But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not 'deeply rooted in history'.... The same could be said, though, of most of the rights the majority claims it is not tampering with.... So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other."[52]

> "Assume the majority is sincere in saying, for whatever reason, that it will go so far and no further. Scout's honor. Still, the future of today's decision will be decided in the future. And law often has a way of evolving without regard to original intentions—a way of actually following where logic leads, rather than tolerating hard-to-explain lines."[53]

MINNESOTA LAW

The right to terminate a pregnancy has therefore been returned to the states, stripped of any protection under the United States Constitution. For Americans seeking to protect that right, state law is now paramount. In Minnesota, the right is recognized under multiple provisions of the state constitution.

Women of the State v. Gomez[54]

The issue came before the Minnesota Supreme Court as a challenge to provisions of the state's Medical Assistance statute limiting the availability of public funds for abortion services.[55] Despite that narrow statutory context, the *Gomez* decision is understood as establishing a fundamental right to terminate a pregnancy under the Minnesota Constitution. The case was decided 5-1, with Chief Justice Sandy Keith writing for the majority. The Court concluded that the challenged Medical Assistance provisions "impermissibly infringe[d] on a woman's fundamental right of privacy under... the Minnesota Constitution."[56]

Underlying Minnesota constitutional provisions and principles

The *Gomez* Court looked substantially to a prior decision, *Jarvis v. Levine*,[57] for its understanding of the right of privacy guaranteed by the Minnesota Bill of Rights.[58] The supporting Minnesota constitutional references are concentrated in a single footnote:

"Specifically, in *Jarvis v. Levine*, we indicated that the right of privacy under the Minnesota Constitution is rooted in Article I, Sections 1, 2 and 10. 418 N.W.2d 139 (Minn. 1988). Article I, Section 1 [Object of government] provides: 'Government is instituted for the security, benefit and protection of the people * * *.' Article I, Section 2 [Rights and privileges] provides: 'No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. * * *.' Article I, Section 10 [Unreasonable searches and seizures prohibited] provides: 'The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated * * *.' ... We also find Article I, Section 7 [Due process] applicable: 'No person shall be held to answer for a criminal offense without due process of law * * * nor be deprived of life, liberty or property without due process of law.'"[59]

DESPITE *DOBBS'S* ELIMINATION OF THE FEDERAL CONSTITUTIONALLY GUARANTEED RIGHT, A WOMAN'S RIGHT TO TERMINATE AN UNWANTED PREGNANCY STILL EXISTS IN MINNESOTA. IT IS GROUNDED IN THE BROAD RIGHT OF INDIVIDUAL PRIVACY IDENTIFIED IN MULTIPLE PROVISIONS OF THE MINNESOTA CONSTITUTION.

Jarvis relied upon *State v. Gray*,[60] which for the first time recognized a fundamental right of privacy rooted in the Minnesota Constitution. *Gray* did so, however, by refusing to expand that fundamental right to protect engagement in commercial sex, and without specifying the applicable Minnesota constitutional provisions.[61] Instead, the Court in *Gray* relied heavily upon what it understood as a generalized natural law analysis in *Griswold* and *Roe*, since "[a] comparison of the Minnesota Bill of Rights with the federal constitutional provisions upon which the right of privacy is founded shows that the rights protected by the Federal Constitution are also protected by the Minnesota Bill of Rights."[62]

The Court's determination regarding the right of privacy found in the Minnesota Constitution

The *Gomez* Court found that Minnesota's Constitution provides for a broader right than that provided by the federal constitution:

"In reaching our decision, we have interpreted the Minnesota Constitution to afford broader protection than the United States Constitution of a woman's fundamental right to reach a private decision on whether to obtain an abortion and thus reject the United States Supreme Court's decision on this issue in *Harris v. McRae*, 448 U.S. 297... (1980)."[63]

In the pre-*Dobbs* legal environment, all parties to the case conceded "the state constitution protects a woman's right to choose to have an abortion."[64] Relying on *Jarvis*, the Court reasoned:

"The right of procreation without state interference has long been recognized as 'one of the basic civil rights of man * * * fundamental to the very existence and survival of the race.' *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942). *We can think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion. Indeed, this decision is of such great import that it governs whether the woman will undergo extreme physical and psychological changes and whether she will create lifelong attachments and responsibilities.* We therefore conclude that the Minnesota Constitution encompasses a woman's right to decide to terminate her pregnancy.[65] (Emphasis supplied.)

From these basic principles, the *Gomez* Court went on to overturn Minnesota's statutory scheme restricting the use of public funds for abortion:

"In the present case, the infringement is the state's offer of money for women for health care services necessary to carry the pregnancy to term, and the state's ban on health care funding for women who choose therapeutic abortions. Faced with these two options, financially independent women might not feel particularly compelled to choose either childbirth or abortion based on the monetary incentive alone. Indigent women, on the other hand, are precisely the ones who would be most affected by an offer of monetary assistance, and it is these women who are targeted by the statutory funding ban. We simply cannot say that an indigent woman's decision whether to terminate her pregnancy is not significantly impacted by the state's offer of comprehensive medical services if the woman carries the pregnancy to term. We conclude, therefore, that these statutes constitute an infringement on the fundamental right of privacy."[66]

Though handed down three years after *Casey*, *Gomez* deliberately applies *Roe*'s strict scrutiny standard of review, declining to adopt *Casey*'s "undue burden" analysis.[67]

Given that the right identified in *Gomez* is grounded independently in the Minnesota Constitution, the current Minnesota Supreme Court will likely follow *Gomez* rather than *Dobbs* in any future case implicating reproductive rights.

Gomez *is facially limited in application, but founded on a broad principle*

The *Gomez* Court offered a limited core ruling: "Statutes that permit the use of public funds for childbirth-related medical services but prohibit similar use of public funds for medical services related to therapeutic abortions impermissibly infringe on a woman's fundamental right of privacy under Art. 1 Sections 2, 7 and 10 of the Minnesota Constitution."[68] It cautioned that "[i]n light of the emotional and political overtones of the abortion issue in this country, we must emphasize that this case presents

a very narrow legal issue,"[69] and in its concluding paragraph stated "[w]e emphasize that our decision is limited to the class of plaintiffs certified by the district court and the narrow statutory provisions at issue in this case."[70]

Still, the reasoning of the *Gomez* Court is based in identification of a broad right of privacy that broadly supports the right to terminate a pregnancy:

> "It is critical to note that the right of privacy under our constitution protects not simply the right to an abortion, but rather it protects the woman's *decision* to abort; any legislation infringing on the decision-making process, then, violates this fundamental right."[71] (Emphasis in original.)

Gomez should, therefore, be understood to establish a right to terminate a pregnancy that is broad in application.

Judge Thomas Gilligan's July 11, 2022 decision in *Doe v. State of Minnesota*[72]

Ramsey County District Court Judge Thomas Gilligan's recent decision in *Doe v. Minnesota* is a case in point. In *Doe,* ruling on cross-motions for summary judgment, Judge Gilligan invalidated most existing Minnesota restrictions on access to abortion.

The case originated in a challenge to multiple Minnesota statutes brought by an obstetrician-gynecologist, a certified nurse midwife, and Our Justice, a Minnesota nonprofit corporation that provides support to women seeking abortions.[73]

The *Doe* court's reasoning is based on *Gomez.*

Judge Gilligan summarized his holding:

> "After three years of litigation, a thorough review of a well-developed factual record, and due consideration of the landmark decision of the Minnesota Supreme Court in [*Gomez*] and other reproductive rights jurisprudence, this court concludes that Minnesota abortion laws relating to mandated physician care, hospitalization, criminalization, parental notification, and informed consent are unconstitutional.
>
> "These abortion laws violate the right to privacy because they infringe upon the fundamental right under the Minnesota Constitution to access abortion care and do not withstand strict scrutiny. The parental notification law violates the guarantee of equal protection for the same reasons. The informed consent law also violates the right to free speech under the Minnesota Constitution, because it is misleading and confusing, and does not withstand intermediate scrutiny."[74]

Choosing to follow *Gomez*, Judge Gilligan referenced the United States Supreme Court's decision in *Dobbs*, and the sudden change wrought by that case: "Unlike the *Dobbs* Court, which threw out nearly 50 years of precedent, this court must respect the precedent set by the Minnesota Supreme Court in *Gomez* and that precedent will guide this court's decision in this case."[75]

Statutes invalidated and upheld

Judge Gilligan applied *Gomez*[76] and the broad right of privacy it identified in invalidating a lengthy list of abortion restrictions.[77] Only certain reporting laws (excepting felony penalties associated with those laws) were upheld.

The statutes invalidated (and the reporting laws upheld) are:

- **Physician-only law:** Minn. Stat. §145.412, subd. 1(1) essentially required that an abortion could only be performed by a licensed physician (invalidated because it infringed on the fundamental right to access abortion care and did not withstand strict scrutiny).
- **Hospitalization law:** Minn. Stat. §145.412, subds. 1(2), 3(1) provided that certain abortions must be performed in a hospital (invalidated because it infringed on the fundamental right to access abortion care and did not withstand strict scrutiny).
- **Reporting laws:** Various sections of Minn. Ch. 145 and Minn. R. 4615.3600 required physicians or facilities providing abortions to report certain information to the state or face criminal penalties or professional discipline (upheld because they do not infringe on a fundamental right and are not violative of equal protection or the constitutional prohibition against special legislation—but the associated felony penalties were struck down (see below)).
- **Felony penalties:** Minn. Stat. 145.412, subds. 1(3), 4 made willfully performing abortions in a manner inconsistent with the Health Commissioner's rules a felony (invalidated because they infringed on the fundamental right to access abortion care and did not withstand strict scrutiny).
- **Two-parent notification law:** Minn. Stat. §144.343, subds. 2-6 required abortion providers to notify both parents of a minor and observe a 48-hour waiting period before consent (invalidated because it infringed on the fundamental right to access abortion care and did not withstand strict scrutiny; it was also violative of equal protection).
- **Mandatory disclosure law:** Minn. Stat. §145.4242, required a physician performing an abortion or their agents to provide the patient with certain information during the informed consent process (invalidated because it infringed on the fundamental right to access abortion care and did not withstand strict scrutiny; it also infringed on free speech and did not withstand intermediate scrutiny).
- **Physician disclosure law:** Minn. Stat. §145.4242(a)(1)-(2) required that certain information required by the mandatory disclosure law must be provided only by a licensed physician (invalidated because it infringed on the fundamental right to access abortion care and did not withstand strict scrutiny).
- **Mandatory delay law:** Minn. Stat. §145.412, subds. 1(4), 4 required abortion providers to delay provision of care for at least 24 hours after the mandatory disclosures were made (invalidated because it infringed on the fundamental right to access abortion care and did not withstand strict scrutiny).

SHARON VAN DYCK is a 35-year civil litigator whose practice has focused on dispositive motions and appeals for the past 20 years. She is admitted to practice before the United States Supreme Court, the Eighth, Eleventh, and Fifth Circuit Courts of Appeals, the Federal District Courts of Minnesota and North Dakota, the Federal Court of Claims, and all Minnesota state courts. Sharon is a 1987 magna cum laude graduate of William Mitchell College of Law.

SCOTT WILSON is an appellate practitioner with 39 years' experience in civil litigation. He is a graduate of Duke University and Washington University School of Law. Scott offices in Minneapolis and primarily represents individuals seeking to enforce or protect their rights. He is admitted to practice before the Eighth Circuit, the Federal District Court for the District of Minnesota, and all Minnesota state courts.

Recent developments in the case

Attorney General Keith Ellison declined to appeal the decision.[78] Travis County Attorney Matthew Franzese moved to intervene as a matter of right (and, as backup, for permissive intervention) on August 4, 2022. Franzese moved for accelerated review at the same time. Of note, all parties to the lawsuit opposed the motion. Following a full hearing on the merits, Judge Gilligan denied Franzese's intervention motion, but granted accelerated review of that order.[79] Franzese appealed on September 12, 2022.[80] The plaintiffs filed a Conditional Notice of Related Appeal on September 23, 2022 seeking review of an interlocutory order dismissing additional claims.[81]

A new notice of intervention was filed in the district court on September 12, 2022—the day the appeal period expired—on behalf of Mothers Offering Maternal Support (MOMS). MOMS, "an unincorporated association comprised of Minnesota mothers who have at least one minor daughter," seeks post-judgment relief regarding the parental notification, mandatory disclosure, mandatory delay, and physician-only laws.[82] An Answer to the Amended Complaint and multiple supporting affidavits were filed in support of the motion, including a 185-page Declaration and Expert Report by David C. Reardon.[83] Despite a final judgment, resolution of proceedings at the district court level remain "open," as does the district court docket.

Precedential impact

Gomez remains controlling law in Minnesota, and *stare decisis* remains a controlling doctrine, at least in the eyes of the Ramsey County District Court. It would take a form of judicial activism not commonly found in this state to upset *Gomez*'s holding. Given the thoughtfulness of the memorandum opinion and the breadth of *Gomez's* confirmation of a woman's right to choose to terminate an unwanted pregnancy under the Minnesota Constitution, it seems likely that Judge Gilligan's summary judgment order will stand (assuming he does not grant the MOMS association's petition to intervene for the purpose of post-judgment relief). However, to date *Doe v. State* remains a district court decision, specific to Ramsey County. A district court decision may well be persuasive in its reasoning, impacting the thinking of other judges. But it is not precedent, except within the Ramsey County District Court from which it came.

Gov. Walz's June 25, 2022 executive order

The day after *Dobbs* was released, Gov. Tim Walz issued an executive order supporting access to abortion in Minnesota. The order:

- requires all state agencies to coordinate to protect reproductive health care services for "people... who are providing, assisting, seeking, or obtaining lawful reproductive health care services in Minnesota;"
- except as required by court order, or Minnesota or federal law, bars assistance from state agencies in "any investigation or proceeding that seeks to impose civil or criminal liability or professional sanctions" for provision of reproductive health care services or assistance relating to it; and
- provides protection against extradition for those charged with violation of the law of another state relative to reproductive health services, unless the acts supporting the charge would be criminal in Minnesota.[84]

Amendment of the Minnesota Constitution

Amending the Minnesota Constitution is relatively easy, requiring only bare majorities of the Minnesota House and Senate and the general electorate.

Art. IX, Sec. 1. Amendments, ratification.

"A majority of the members elected to each house of the legislature may propose amendments to this constitution. Proposed amendments shall be published with the laws passed at the same session and submitted to the people for their approval or rejection at a general election. If a majority of all the electors voting at the election vote to ratify an amendment, it becomes a part of this constitution. If two or more amendments are submitted at the same time, voters shall vote for or against each separately."[85]

The relative ease of the process notwithstanding, an anti-abortion amendment is unlikely to occur in Minnesota as things now stand.[86]

Conclusion

Despite *Dobbs'*s elimination of the federal, constitutionally guaranteed right, a woman's right to terminate an unwanted pregnancy still exists in Minnesota. It is grounded in the broad right of individual privacy identified in multiple provisions of the Minnesota Constitution, which offers broader protections than those formerly found in the United States Constitution. Attacks on access to abortion are likely to continue. However, the Ramsey County District Court's recent invalidation of many of the Minnesota Legislature's restrictions on abortion services, based on unwavering reliance on the Minnesota Constitution and Minnesota Supreme Court precedent, shows a solid grounding in and support for this constitutionally protected right. ▲

NOTES

[1] *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2316, 213 L.Ed.2d 545 (2022) (Roberts, C. J., concurring in the judgment).

[2] 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

[3] 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (674 (1992).

[4] One of the later cited cases, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (recognizing the right of unmarried people to obtain contraception) stated "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *See Roe*, *supra*, 93 S.Ct. at 726.

[5] *See* 93 S.Ct. at 727-28.

[6] *Id.* at 732.

[7] 112 S.Ct. at 2808-16.

[8] *Id.* at 2817.

[9] *Id.* at 2804.

[10] *Id.* at 2820-21.

[11] Mayeri, Serena, "How Abortion Rights Will Die a Death of 1,000 Cuts," New York Times, 8/30/2018.

[12] *Dobbs*, *supra*, 142 S.Ct. at 2310 (Roberts, C. J., concurring in the judgment), quoting Pet. for Cert. i.

[13] *Id.* at 2279.

[14] *See id.* at 2246.

[15] *See id.* at 2247.

[16] *Id.* at 2248.

[17] *Id.* at 2257.

[18] 381 U.S. 479, 85 S.Ct. 1578, 14 L.Ed.2d 510 (1965).

[19] *Dobbs*, 142 S.Ct. at 2257-58.

[20] *Id.* at 2262.

[21] *Id.* at 2265.

[22] *Id.* at 2265-66.

[23] *Id.* at 2276-77.

[24] *Id.* at 2278.

[25] *Id.* at 2283.

[26] *Id.* at 2284 (citation omitted). The first two considerations are familiar in reproductive rights jurisprudence, the last four less so.

[27] *Id.*

[28] *Id.* at 2300-04.

[29] "... nor shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. Const., Amendment 14, Sec. 1.

[30] *Id.* at 2301.

[31] 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

[32] 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2009).

[33] *Dobbs*, 142 S.Ct. at 2301-02.

[34] *Id.* at 2304.

[35] *Id.* at 2305.

[36] 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

[37] *Dobbs*, 142 S.Ct. at 2309.

[38] *Id.*

[39] *Id.* at 2310.

[40] *Id.* at 2311.

[41] *Id.*

[42] *Id.* at 2316.

[43] *Id.* at 2311-15.

[44] *Id.* at 2317.

[45] "Dissent in *Dobbs* offers a eulogy for *Roe* and the rule of law," Courthouse News Service, 6/28/2022.

[46] *See id.* at 2320-33. While the dissent acknowledges the majority's forays into the law both before and after the 1868 ratification of the Fourteenth Amendment, it asserts, after analysis, that "[t]he majority's core legal postulate... is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did.... If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist." *Id.* at 2324. The dissent counters that "applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents." *Id.* at 2326.

[47] *See id* at 2333-48.

[48] *Dobbs* at 2335.

[49] *Id.* at 2350.

[50] ... and, in fact, one has now been introduced by a sitting U.S. Senator. "Graham introduces bill to ban abortions nationwide after 15 weeks," Washington Post, 9/13/2022.

[51] *Dobbs*, 142 S.Ct. at 2318.

[52] *Dobbs*, *supra*, 142 S.Ct. at 2319.

[53] Id. at 2332.

[54] 542 N.W.2d 17 (Minn. 1995).

[55] 542 N.W.2d at 23.

[56] 542 N.W. at 18 (Syllabus of opinion).

[57] 418 N.W.2d 139 (Minn. 1988). *Jarvis* was decided in the context of forcible administration of neuroleptic medication. Relying on *State v. Gray*, 413 N.W.2d 107 (Minn. 1987), the court stated: "There is a right to privacy under the Constitution of Minnesota.... The right begins with protecting the integrity of one's own body and includes the right not to have it altered or invaded without consent." 418 N.W.2d at 148.

[58] Minn. Stat., Const. Art. I, §§1-17.

[59] *Gomez* at 26 n.10.

[60] 413 N.W.2d 107 (Minn. 1987).

[61] 413 N.W.2d at 110-14.

[62] 413 N.W.2d at 111.

[63] Gomez at 19. The referenced decision of the U.S. Supreme Court in *Harris* rejected a constitutional challenge to the "Hyde Amendment," which "restrict[s] the use of federal funds to reimburse only those abortions necessary to save a woman's life." *See id.* at 22.

[64] *Id.* at 28.

[65] Id. at 28-30.

[66] Id. at 31.

[67] *Id.* at 31-32.

[68] *Id.* at 18 (Syllabus of opinion).

[69] *Id.* at 19.

[70] *Id.* at 32.

[71] *Id.* at 31.

[72] Ramsey County Court No. 62-CV-19-3868.

[73] *Doe v. State of Minnesota*, Ramsey County Court No. 62-CV-19-3868, Memorandum, Parties and Claims (7/11/2022). Interestingly, the Republican-controlled Minnesota Senate tried to intervene, claiming (in apparent reference to Minnesota Attorney General Keith Ellison) that it was the "only institution in Minnesota that is able to defend the challenged statutes without conflict or qualification." *Id.*, Procedural Posture.

[74] *Doe v. State of Minnesota*, Ramsey County Court No. 62-CV-19-3868, Memorandum, Introduction (7/11/2022).

[75] *Id.*, Standards of Review, Part IX. Judge Gilligan noted that "the *Gomez* decision and its essential holding is unaffected by the United States Supreme Court decision in *Dobbs v. Jackson Women's Health Org*....." *Id.*, Part III.

[76] Judge Gilligan analyzed *Gomez* at length at *id.*, Standards of Review, Parts III-IV.

[77] *Id.*, The Challenged Laws.

[78] "Ellison won't appeal Minnesota abortion restrictions," Associated Press, 7/29/2022.

[79] The district court noted Franzese wishes to intervene "so he can appeal the Final Order, but not to contend that it was erroneous." Rather, Franzese "seeks to assert a defense: 1) that has not been made in the case; 2) on which no discovery occurred; 3) which was never decided by this court; and 4) after judgment has been entered." Franzese's intervention attempt is based on the state's failure to assert the lack-of-a-private-cause-of-action defense. "[T]hat [Pro-Life Action Ministries] and [Association for Government Accountability] attempted unsuccessfully to intervene to assert it, and that the... Court of Appeals affirmed this court's decision on that intervention attempt" was known in 2020. *Doe v. State of Minnesota*, Ramsey County Court No. 62-CV-19-3868, Index # 382 at 5-6 (9/6/2022).

[80] *Id.*, Index #384.

[81] *Id.*, Index # 406.

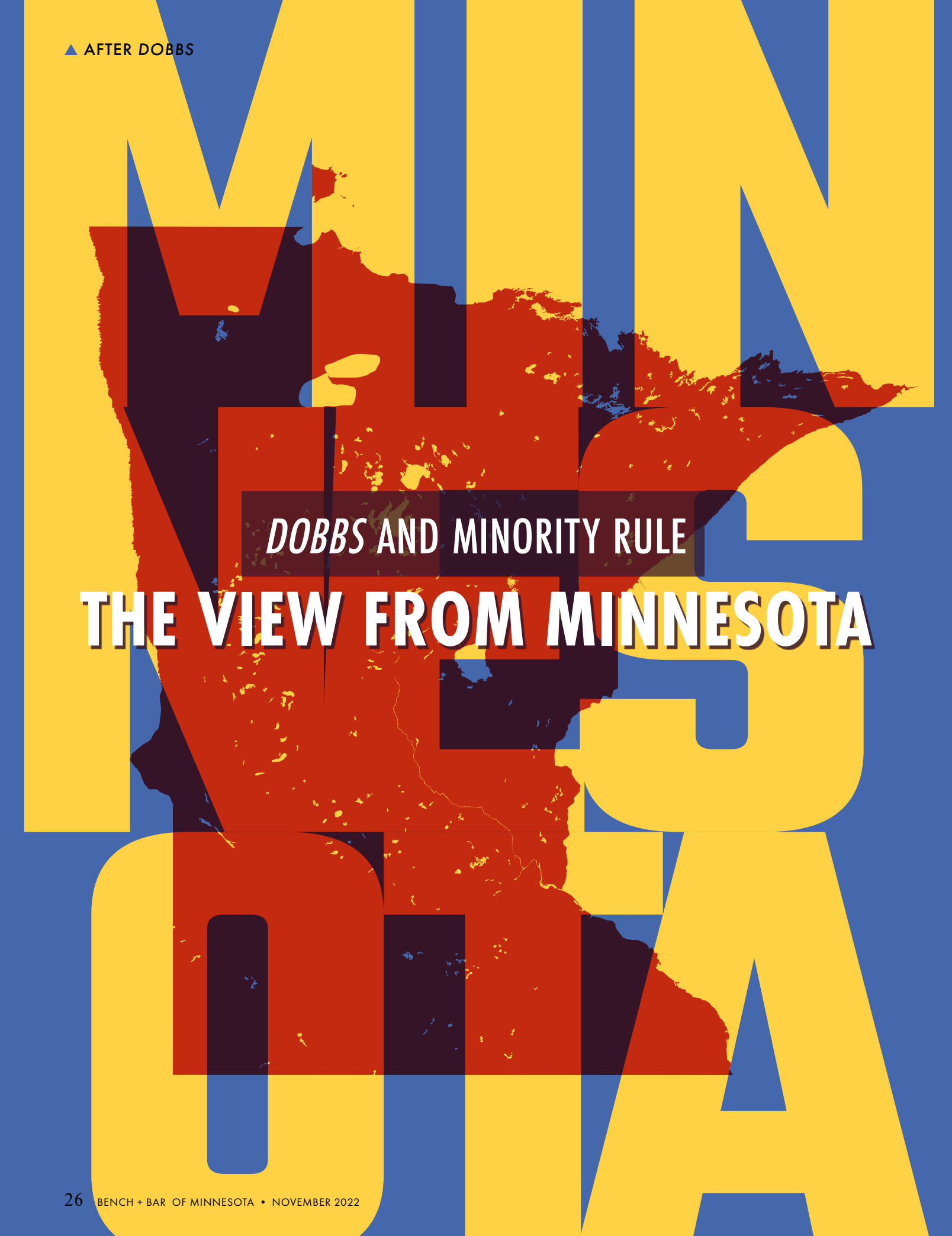
[82] *Id.*, Index #386.

[83] *Id.*, Index #405.

[84] Emergency Executive Order 22-16 by Minnesota Governor Tim Walz, signed 6/25/2022.

[85] Minn. Stat., Const., Art. IX, §1.

[86] 59% of voters in Kansas, a more rightward-leaning state, voted on 8/2/2022 to reject an amendment that would have nullified any right to abortion under that state's constitution. "Voters in Kansas decide to keep abortion legal in the state, rejecting an amendment," National Public Radio, 8/3/2022. A recent poll of 800 Minnesota voters found that 55% of those polled felt that abortion should be legal in most or all cases, while 41% said it should be illegal in most cases. "Poll: Minnesotans split on overturning *Roe v. Wade*," Minnesota Public Radio, 9/19/2022.



DOBBS AND MINORITY RULE

THE VIEW FROM MINNESOTA

Most Americans support the right to an abortion, but in the Upper Midwest, Minnesota is isolated in its protection of that right.

BY SCOTT WILSON AND SHARON VAN DYCK

U.S. public opinion generally favors an individual woman's right to an abortion. The Supreme Court's recent ruling in *Dobbs v. Jackson Women's Health Org.*[1] represents a marked divergence from public opinion. The divergence is less than surprising, since the composition of the current Court is a product of electoral and legislative mechanisms that lend themselves to minority control.

But while eliminating abortion rights may face headwinds in national opinion, it has received a warm welcome in many Midwestern state capitals. Minnesota stands alone in the upper Midwest as a jurisdiction offering stable legal protection of a woman's right to terminate an unwanted pregnancy.

This article will review the role of minority control in the composition of the *Dobbs* Court and briefly survey the status of abortion rights in Minnesota's neighboring states.

The anti-democratic nature of the Electoral College and the U.S. Senate

Democrats have won the popular vote in seven of the last eight presidential elections, but—thanks to the Electoral College—have elected presidents in only five of those cycles. According to *FiveThirtyEight*, a Democratic presidential candidate must now beat his or her Republican opponent by at least 3.5 percent in the popular vote to gain the White House—the largest advantage held by either party since 1948.[2] The explanation lies in an entrenched structural bias that favors smaller, more conservative states.

Minority control is even more extreme in the U.S. Senate. In the current Senate, the 50 sitting Democratic senators represent *42 million* more Americans than do the 50 sitting Republican senators.[3] An exaggerated form of the same structural bias operates here: The 25 largest states contain nearly 84 percent of the U.S. population. This means, remarkably, that 16 percent of the country (the population of the 25 smallest states) controls half the seats in the Senate.[4] The Republican Senate caucus, which represents smaller, more rural states, hasn't represented a majority of Americans since 1996, despite enjoying Senate majorities in more than half of the 12 election cycles since that year.[5] The problem is aggravated even further by the filibuster, which allows as few as 41 Republican senators to block most legislation.

Supreme Court composition and *Dobbs*

The president and the Senate determine the composition of the United States Supreme Court over time through the process of appointment and confirmation. The six-to-three "supermajority" of conservative appointees[6] on the current Court is a direct and recent expression of the anti-democratic aspects of those two institutions.[7]

Four of the five justices voting to overturn *Roe* and *Casey* (Justices Alito, Gorsuch, Kavanaugh, and Barrett) were appointed by Republican presidents—George W. Bush and Donald Trump—who were initially elected with less than a majority of the popular vote. Five of the sitting justices (the same four, plus Chief Justice Roberts) were confirmed by U.S. Senates controlled by Republican caucuses that did not represent a majority of Americans.[8]

The minority-controlled Republican Senates from 2014 through 2020 had a particular impact. During 2016, Senate Majority Leader Mitch McConnell blocked President Barack Obama's nomination of Merrick Garland to replace Justice Antonin Scalia for over 10 months, until President Donald Trump could take office and name Neil Gorsuch as Justice Scalia's replacement.[9] But after Justice Ruth Bader Ginsburg died on September 18, 2020, her replacement, Amy Coney Barrett, was confirmed in just over one month, on October 26, 2020.[10]

With Justice Barrett's confirmation, Chief Justice Roberts's vote was no longer needed to form a conservative majority on the Court. The Court took review in *Dobbs* seven months later, on May 17, 2021. The case was decided on June 24, 2022. Justice Alito wrote for the majority, joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett.[11]

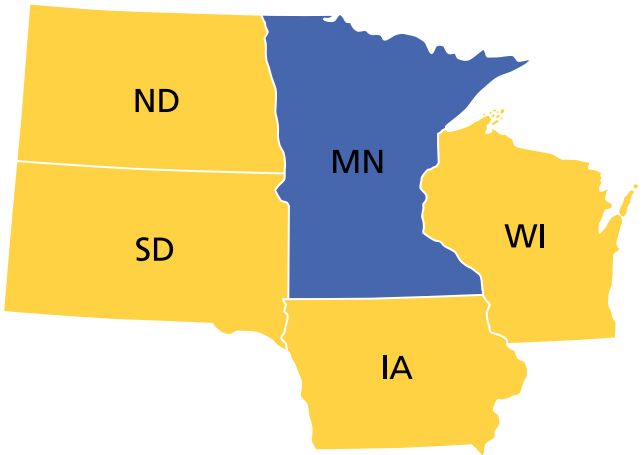
Dobbs and public opinion

Speaking for the *Dobbs* majority, Justice Alito plainly stated his lack of concern for negative public opinion: "[W]e cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work."[12]

Polling by the Pew Research Center suggests there is considerable negative public opinion to be unconcerned about. In a survey of 6,174 Americans taken between June 27 and July 4, 2022, 57 percent disapproved of *Dobbs*, with 43 percent strongly disapproving.[13] Sixty-two percent held the opinion that abortion should be legal in most or all cases. The divide is unsurprisingly partisan, with 84 percent of Democrats holding this opinion, compared with 38 percent of Republicans.[14]

In Minnesota the split in opinion may be closer, but still favors abortion rights. In a KARE 11 / Star Tribune / MPR News poll of 800 likely voters conducted between Sept. 12 and 14, 2022, 52 percent said they opposed *Dobbs*, with 40 percent approving. Fifty-five percent of the respondents said that abortion should be legal in most or all cases. The partisan divide is similar to that found in the referenced national poll.[15]

Elections function in part as polls with meaning. The August 2022 landslide defeat (59-41 percent) of an anti-abortion ballot initiative in Republican Kansas suggests to New York Times data analyst Nate Cohn that "around 65% of voters nationwide would reject a similar initiative to roll back abortion rights, including in more than 40 of the 50 states...."[16]



Minnesota's geographic isolation on the question of abortion rights

The right to choose an abortion in most or all circumstances may be supported by a majority of Americans, but in the Midwest, jurisdictions supportive of abortion rights are in the minority. Minnesota is one of the few.

The Midwest presents a rapidly changing—and generally anti-choice—legal landscape. While there have been some surprising developments (the Kansas referendum, for example), Minnesota and Illinois are the only Midwestern states where abortion rights are "legal and likely to be protected," according to the Washington Post.[17] Elsewhere in the Midwest, state law ranges from Missouri—where a law banning abortion at conception, with no exceptions for rape or incest, took effect when the state attorney general certified the *Dobbs* decision[18]—to Michigan, a state with a Republican-controlled legislature and a Democratic governor facing an election, where a pre-*Roe* abortion ban was recently enjoined by a county circuit judge[19] and a referendum has been placed on the November mid-term-election ballot that would amend the state constitution to protect the right to an abortion.[20]

Neighboring states

In the Upper Midwest, Minnesota is the only state west of the Great Lakes that provides a stable (*i.e.*, constitutional) guarantee of the right to terminate a pregnancy. Here is the current state of abortion rights in states adjacent to Minnesota:

Wisconsin

While its legal status is less than clear, post-*Dobbs* abortion is functionally banned (from conception and without exception for rape or incest) under a statute that traces its roots to 1849.[21] Gov. Tony Evers and Attorney General Josh Kaul, both Democrats, have refused to enforce the ban and have challenged it in court,[22] but clinics stopped performing abortion procedures in Wisconsin effective June 24, 2022.[23]

The Wisconsin Legislature is controlled by Republicans. Gov. Evers faces an election in November (as does Attorney General Kaul). The Wisconsin Supreme Court is currently controlled by a narrow 4-3 conservative majority. In April of next year, a statewide election will be held to fill the seat of a retiring conservative justice.[24]

Iowa

The law in Iowa has followed a politically driven, whiplash-inducing path. In 2018, the Iowa Supreme Court rejected the undue burden test fashioned by the United States Supreme Court in *Planned Parenthood v. Casey*,[25] and found that the due process clause of the Iowa Constitution protected abortion as a fundamental right, subjecting state restrictions to strict scrutiny.[26]

Immediately following that decision, between August 1, 2018 and the end of 2020, Republican Gov. Kim Reynolds appointed four justices[27] to the seven-member court. On June 17, 2022, one week before the *Dobbs* decision, the Iowa court reversed its 2018 decision, rejecting "the proposition that there is a fundamental right to an abortion in Iowa's constitution."[28]

For now, Iowa law permits abortion up to 20 weeks post-fertilization.[29] In the mix is a "heartbeat bill" that prohibits abortion at roughly six weeks,[30] but that restriction is presently subject to a permanent injunction.[31] Additional restrictions other than gestational time limits remain in place.[32]

South Dakota

Abortion is banned from conception under a "trigger ban" that went into effect immediately upon release of the *Dobbs* opinion. There are no exceptions for rape or incest.[33]

North Dakota

A trigger ban went into effect 30 days after *Dobbs*. This law also bans abortion from conception, but contains exceptions for rape and incest.[34] It has been preliminarily enjoined.[35]

There is a heartbeat ban[36] similar to Iowa's, which is permanently enjoined based on pre-*Dobbs* federal law.[37] For the present, there remains in place a statute permitting abortion until 20 weeks post-fertilization.[38] As in Iowa, additional restrictions other than gestational time limits remain.[39]

In practical terms, Red River Women's Clinic, the state's only abortion clinic, moved from Fargo to Moorhead, Minnesota on August 6, 2022 and will probably remain there, given Minnesota's more favorable legal environment.[40]

Conclusion

Most Americans favor a right to abortion protected under the U.S. Constitution. The Supreme Court, which eliminated that right in *Dobbs*, is constituted through an appointment process affected by governmental structures—the Electoral College and the Senate—that empower the minority will of smaller, more rural states. The result is a radically changed abortion policy that is broadly unpopular on a national level.

Despite its national unpopularity, that changed policy finds a receptive foothold in the law of most Midwestern states. Minnesota is now isolated in the Upper Midwest as a jurisdiction providing a stable, constitutional guarantee of the right to terminate a pregnancy. ▲

Editor's note: *Scott Wilson and Sharon Van Dyck's author biographical notes appear on p. 24 of this issue.*

IN THE UPPER MIDWEST, MINNESOTA IS THE ONLY STATE WEST OF THE GREAT LAKES THAT PROVIDES A STABLE (I.E., CONSTITUTIONAL) GUARANTEE OF THE RIGHT TO TERMINATE A PREGNANCY.

NOTES

[1] 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022).

[2] Geoffrey Skelley, "Even Though Biden Won, Republicans Enjoyed the Largest Electoral College Edge in 70 Years. Will That Last?" *www.fivethirtyeight.com,* 1/19/2021.

[3] Ian Millhiser, "America's anti-democratic Senate, in one number," *www.vox.com,* 1/6/2021.

[4] *Id.*

[5] Stephen Wolf, "How minority rule plagues Senate: Republicans last won more support than Democrats two decades ago," *www.dailykos.com,* 2/23/2021.

[6] The nine sitting justices of the United States Supreme Court are as follows, in order of appointment:
Justice Clarence Thomas, age 73—nominated 1991 by George H.W. Bush
Chief Justice John G. Roberts, Jr., age 67—nominated 2005 by George W. Bush
Justice Samuel A. Alito, Jr., age 72—nominated 2005 by George W. Bush
Justice Sonia Sotomayor, age 67—nominated 2009 by Barack Obama
Justice Elena Kagan, age 61—nominated 2010 by Barack Obama
Justice Neil M. Gorsuch, age 54—nominated 2017 by Donald Trump
Justice Brett Kavanaugh, age 57—nominated 2018 by Donald Trump
Justice Amy Coney Barrett, age 50—nominated 2020 by Donald Trump
Justice Ketanji Brown Jackson, age 51—nominated 2022 by Joe Biden

[7] The resulting Court is not just disproportionately conservative. It is also disproportionately Catholic. Six of the nine sitting justices (66.7%) identify as Catholic (five of these—Chief Justice Roberts and Justices Thomas, Alito, Kavanaugh, and Barrett—are Republican appointees). Twenty-two percent of the population of the United States identifies as Catholic. The Religion of the Supreme Court Justices, *news.gallup.com*, 4/8/2022.

[8] *See* Wolf, *supra.*

[9] What Happened with Merrick Garland in 2016 and Why It Matters Now, NPR, 6/19/2018.

[10] Justice Kavanaugh was confirmed in the interim.

[11] *See Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022).

[12] *Id.* at 2278.

[13] On the other side of that coin, 41% approved of *Dobbs*, 25% strongly approving. Majority of Public Disapproves of Supreme Court's Decision to Overturn *Roe v. Wade, www.pewresearch.org*, 7/6/2022.

[14] *Id.*

[15] "Minnesota poll: 52 percent of voters oppose overturning *Roe v. Wade*," mprnews.org, 9/19/2022.

[16] Kansas Result Suggests 4 Out of 5 States Would Back Abortion Rights in Similar Vote, New York Times, 8/4/2022.

[17] "Abortion is now banned in these states. See where laws have changed." Washington Post, updated 9/26/2022 (Washington Post abortion law tracker); *see also* Tracking the States Where Abortion Is Now Banned, New York Times, updated 9/23/2022 (New York Times abortion law tracker).

[18] *Id.*

[19] "Abortion remains legal in Michigan after injunction blocks 1931 law being reinstated," NPR, 8/20/2022.

[20] *Id.*; "After months, it's decided: Michiganders will vote on abortion rights in November," NPR, 9/9/2022.

[21] Wis. Stat. §940.04 (2022); *see* Frishman, "Twentieth Anniversary Celebration: Wisconsin Act 110: When an Infant Survives an Abortion," 20 Wis. Women's L.J. 101, 124 (Spring 2005), citing Wis. Stat. §133.11 (1849).

[22] The lawsuit, filed in Dane County, Wisconsin, seeks a declaration, among other things, that Wis. Stat. §940.04 has been superseded by more recent legislation. Gov. Evers, AG Kaul Announce Direct Legal Challenge to Wisconsin's 1800s-era Criminal Abortion Ban, Wisconsin Department of Justice news release, 6/28/2022.

[23] Washington Post and New York Times abortion law trackers, *supra*.

[24] In Wisconsin, 2 Huge Races Stand Between GOP and Near-Total Power, New York Times, 8/15/2022; "A ban, a lawsuit, an election: Abortion firestorm erupts in Wisconsin," Washington Post, 6/30/2022.

[25] 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (674 (1992).

[26] *See Planned Parenthood of the Heartland, Inc. v. Reynolds*, 975 N.W.2d 710, 715 (Iowa 2022) (*PPH III*), discussing *Planned Parenthood of the Heartland, Inc. v. Reynolds*, 915 N.W.2d 206, 237-38, 240 (Iowa 2018) (*PPH II*).

[27] Chief Justice Christensen and Justices McDonald, Oxley, and McDermott.

[28] *PPH III*, *supra.*

[29] Iowa Code §146B.2(1) (2022).

[30] Iowa Code §146C.2(2) (2022).

[31] After *Roe* Fell, Center for Reproductive Rights, *reproductiverights.org/maps/state/iowa* (last accessed 9/26/2022), n.2, citing *Planned Parenthood of the Heartlands, Inc. v. Reynolds*, No EQCE83074, 2019 WL 312072 at *5 (Iowa Dist., 1/22/2019). Governor Reynolds continues to seek enforcement of the statute. New York Times abortion law tracker, *supra.*

[32] *See generally* After *Roe* Fell, Center for Reproductive Rights, r*eproductiverights.org/maps/state/iowa, supra.*

[33] S.D. Codified Laws §22-17-5.1 (2022).

[34] N.D. Cent. Code §12.1-31-12 (2021).

[35] After *Roe* Fell, Center for Reproductive Rights, *reproductiverights.org/maps/state/north-dakota* (last accessed 9/27/2022), n.2, citing *Access Indep. Health Serv. Inc. v. Wrigley*, No. 08-2022-CV-1608 (N.D. S. Cent. Dist. Ct., 8/25/2022).

[36] N.D. Cent. Code §14-02.1-05.2 (2021).

[37] *See MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015), cert. denied (U.S., 1/25/2016).

[38] N.D. Cent. Code §14-02.1-05.3 (2021).

[39] *See generally* After *Roe* Fell, Center for Reproductive Rights, *reproductiverights.org/maps/state/north-dakota*, *supra*.

[40] "North Dakota judge blocks abortion ban from taking effect Friday," Washington Post, 8/25/2022.

MINNESOTA SHOULD STRENGTHEN ITS PROTECTION FOR REPRODUCTIVE LIBERTY

BY LAURA HERMER ✉ *laura.hermer@mitchellhamline.edu*

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*[1] underscores the limited, conditional rights that women and others with a functioning uterus enjoy in the United States. Paternalistic state legislatures can now force women to gestate unintended and unwanted children, upending women's futures and their families' lives in the process.[2]

But that is not all. The *Dobbs* decision, along with other cases decided this term, heralds a major change in the Court's substantive due process jurisprudence.[3] The *Dobbs* Court adopted a traditionalist approach that considers only whether a practice was arguably protected in law as a right at the time that relevant constitutional provisions or amendments were ratified.[4] In the case of *Dobbs*, the majority chose to examine selected laws and legal secondary sources ranging from the 13th century through the ratification of the 14th Amendment in 1868.

Using such an approach, it is no surprise that the *Dobbs* majority reached the decision it did. Many rights we take for granted now were not protected then. Married women had limited or no independent legal identity: In many states, they were not permitted to enter into binding contracts, own or control property, enter a profession, keep any wages they earned, or sue or be sued.[5] Rather, their husbands had those rights.[6] Enslaved African Americans had only just been freed, and Jim Crow laws were just around the corner. Interracial marriage was prohibited in some states.[7] Sodomy was a crime in most states.[8] Contraceptives were either unregulated under state law (just like pre-quickening abortion in many states, a status insufficient to be considered as part of a fundamental right by the *Dobbs* Court), or banned in the mail under federal law in 1873 as "obscene" and by many states soon thereafter.[9] Anyone who thinks the present Supreme Court will not use this history to eliminate federal constitutional

NOW THAT *ROE* AND *CASEY* HAVE BEEN OVERTURNED, OUR STATE CONSTITUTION UNQUESTIONABLY OFFERS MORE EXPANSIVE PROTECTION FOR MINNESOTANS' RIGHT TO AN ABORTION UNDER THE RIGHT OF PRIVACY. YET MINNESOTANS WHO CARE ABOUT RETAINING ROBUST PRIVACY RIGHTS MAY REASONABLY BE CONCERNED ABOUT ENSURING THE PROTECTION OF THEIR RIGHT TO AN ABORTION AND OTHER PRIVACY RIGHTS OVER TIME.

protection for other fundamental rights on which we now rely will likely be mistaken.

Fortunately, the Minnesota Constitution offers some protection against these predations. The Minnesota Supreme Court held in *Doe v. Gomez* that the right to privacy under our state constitution is broader than that under the federal constitution. It reasoned that:

> Minnesota possesses a long tradition of affording persons on the periphery of society a greater measure of government protection and support than may be available elsewhere. This tradition is evident in legislative actions on behalf of the poor, the ill, the developmentally disabled and other persons largely without influence in society.[10]

It accordingly held that the state constitution not only implicitly protects the fundamental right of pregnant people to decide to keep or terminate a pregnancy without state interference, but also prevents the state from seeking to influence the pregnant person's decision, for example, by paying for pregnancy care but not for abortion care.[11]

What now?

Now that *Roe* and *Casey* have been overturned, our state constitution unquestionably offers more expansive protection for Minnesotans' right to an abortion under the right to privacy. Yet Minnesotans who care about retaining robust privacy rights may reasonably be concerned about ensuring the protection of their right to an abortion and other privacy rights over time. There is no guarantee that the Minnesota Supreme Court will not eventually fall victim to the sorts of compositional changes we have lately seen to both the U.S. Supreme Court and that of our neighbor to the south, Iowa, which itself recently overturned abortion-protective precedent.[12]

It would therefore be prudent to take additional steps to further secure all Minnesotans' reproductive rights. One step would be to enact legislation expressly protecting these rights. The Protect Reproductive Options Act (the PRO Act, HF 259/SF 731), introduced in the 92nd Legislative Session, is a good example of what is needed. It would, if enacted, provide that "Every individual has a fundamental right to make autonomous decisions about the individual's own reproductive health," including the "fundamental" right to:

> (1) choose or refuse reproductive health care;
> (2) choose or refuse contraception or sterilization; and
> (3) choose to continue a pregnancy and give birth to a child, or choose to obtain an abortion.[13]

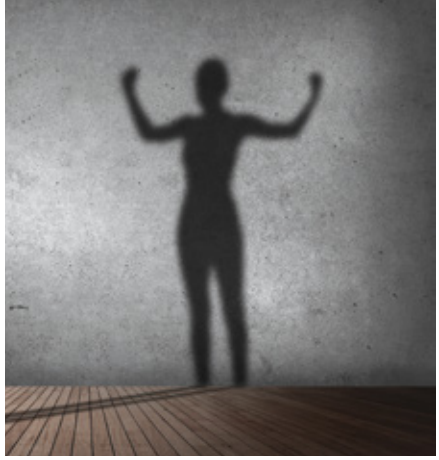
It would prohibit the state from "deny[ing], restrict[ing] or interfer[ing]" with these rights.[14] It would also, among other things, clarify that embryos and fetuses have no "independent rights" under Minnesota law.[15]

A more challenging but stronger approach, whether in addition to or in lieu of the latter, would be to seek a constitutional amendment protecting reproductive autonomy. Voters in California,[16] Vermont,[17] and Michigan[18] are considering such amendments in the November 2022 election. While voters in Minnesota may be more divided on the issue of abortion than their counterparts in some other states, a clear majority still supports access to abortion under many circumstances, including during the first trimester.[19]

Minnesota lacks a referendum or ballot initiative process that would allow voters to bypass the Legislature, and to change this would itself require a constitutional amendment.[20] Accordingly, both a statutory and a constitutional approach to protecting Minnesotans' reproductive autonomy will require a functioning state legislature with a majority in both chambers willing to protect the liberties of their constituents. Such majorities currently do not exist.[21]

It is within the power of Minnesota voters to bring this into being through the ballot box. If voters are made aware of the need, and if they care sufficiently about these freedoms and how they impact their own lives and the lives of their families, neighbors, and communities, then perhaps they will act to do so. ▲

LAURA HERMER is a professor of law at Mitchell Hamline School of Law.



NOTES

[1] 142 S.Ct. 2228, 2283 (2022).

[2] *See, e.g.*, Sarah McCammon, *Indiana Becomes the First State to Approve an Abortion Ban Post*-Roe, NPR (8/6/2022), *https://www.npr.org/2022/08/06/1116132623/indiana-becomes-1st-state-to-approve-abortion-ban-post-roe* (noting that the law bans all abortions, with limited exceptions for rape, incest, and lethal fetal anomalies); Diana Greene Foster, The Turnaway Study 169-70 (2020) (finding, overall, that 48 percent of women who obtained a wanted abortion both set and achieved one or more of their aspirational plans in the following year, as compared to only 30 percent of those who were denied a wanted abortion).

[3] *See, e.g.*, *New York State Rifle & Pistol Assn v. Bruen*, 142 S.Ct. 2111 (2022) ("To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command'").

[4] Cass R. Sunstein, *Dobbs and the Travails of Due Process Traditionalism* 4 (2022), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4145922*

[5] *See, e.g.*, *Bradwell v. State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) ("The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him.... The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator"); Bernie D. Jones, *Revisiting the Married Women's Property Acts: Recapturing Protection in the Face of Equality*, 22 Am. U. J. Gender Soc. Pol'y & L. 91, 99-110 (2013) (discussing the spread and effects of state Married Women's Property Acts).

[6] *See generally* William Blackstone, Commentaries p. 430 (1765) (observing that "By marriage, the husband and wife are one person in law [1] : that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband : under whole wing, protection, and cover, she performs every thing ; and is therefore called in our law-French a feme-covert....").

[7] *See, e.g.*, *Scott v. Georgia*, 9 Ga. 321 (1869) (noting that Georgia law "forever prohibits the marriage relation between the two races, and declares all such marriages null and void"); see also William Hardcastle Browne, *Miscegenation*, in Commentary on the Law of Divorce and Alimony (1890) (noting that 20 states voided interracial marriages).

[8] *See Bowers v. Hardwick*, 478 U.S. 186, 193, n.6 (1986).

[9] *United States v. Bott*, 24 F.Cas. 1204, 1204 (1873); Lanteen Laboratories, Inc. v. Clark, 13 N.E.2d 678, 681 (Ill.App. 1938) *see also* Linda Gordon, The Moral Property of Women: A History of Birth Control Politics in America 32 (2007).

[10] *Doe v. Gomez*, 542 N.W.2d 17, 30 (Minn. 1995).

[11] *Doe*, 542 N.W.2d at 31.

[12] *Planned Parenthood of the Heartland v. Reynolds*, 975 N.W.2d 710, 740-44 (Iowa 2022) (overturning *Planned Parenthood of the Heartland, Inc. v. Reynolds*, 865 N.W.2d 252 (2018)).

[13] HF 259, 92nd Leg. Sess. (Minn. 2021).

[14] *Id.*

[15] *Id.*

[16] California State Constitutional Amendment Number 10 provides that "[t]he state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by Section 1, and the constitutional right to not be denied equal protection guaranteed by Section 7. Nothing herein narrows or limits the right to privacy or equal protection."

[17] Mikalea Lefrak, *Vermont to Vote on Whether to Amend the State's Constitution to Protect Abortion*, NPR (6/29/2022), *https://www.npr.org/2022/06/29/1108710369/vermont-to-vote-on-whether-to-amend-the-states-constitution-to-protect-abortion*. The amendment would provide: "That an individual's right to personal reproductive autonomy is central to the liberty and dignity to determine one's own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means." Proposal 5 as Adopted by the Senate (Vermont 2019), *https://legislature.vermont.gov/Documents/2022/Docs/BILLS/PR0005/PR0005%20As%20adopted%20by%20the%20Senate%20Official.pdf*.

[18] Michigan Reproductive Freedom for All, Learn More (2022), *https://mireproductivefreedom.org/learn-more/*.

[19] Greta Kaul, *MinnPost Poll Reveals Two-Thirds of Minnesotans Oppose Ban on Abortions*, MinnPost (6/14/2022), *https://www.minnpost.com/data/2022/06/minnpost-poll-reveals-two-thirds-of-minnesotans-oppose-ban-on-abortions/*.

[20] Deborah K. McKnight, *Initiative and Referendum*, House Research Information Brief (1999), *https://www.house.leg.state.mn.us/hrd/pubs/initref.pdf*.

[21] *See, e.g.*, Walker Orenstein, *Handful of DFLers Who Oppose Abortion Could Be Key to DFL Keeping MN House Contr*ol, MinnPost (7/18/2022), *https://www.minnpost.com/elections/2022/07/handful-of-dflers-who-oppose-abortion-could-be-key-to-dfl-keeping-mn-house-control/*.

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LANDMARKS IN THE LAW

Current developments in judicial law, legislation, and administrative action together with a foretaste of emergent trends in law and the legal profession for the complete Minnesota lawyer.

Criminal Law
JUDICIAL LAW

Harassment Restraining Order: HRO hearing must be held if requested, unless petition is meritless. Appellant (wife) filed a petition to dissolve her marriage with respondent (husband), as well as a harassment restraining order (HRO) petition against husband. The HRO petition was denied. Later, a stipulation was entered in family court addressing, among other issues, wife's HRO petition, preventing her from filing a new petition making the same allegations as the first absent a new factual basis. Wife later filed another HRO petition, alleging the same incidents as in the first petition, but also alleging three additional incidents. Wife requested a hearing on her second petition, but the district court refused to hold a hearing, based on the family court stipulation.

The court of appeals holds that the district court abused its discretion by denying the requested hearing without determining whether wife's second HRO petition had merit. The HRO statute mandates that the district court hold a hearing on the merits of an HRO petition "[u]pon receipt of the petition and a request for a hearing by the petitioner." Minn. Stat. §609.748, subd. 3(a). The statute does not require a hearing if the petition "has no merit." *Id.* The district court denied wife's requested hearing without determining whether her petition had merit. The matter is reversed and remanded for the district court to make this determination. ***Houck v. Houck***, A22-0174, 2022 WL 4074765 (Minn. 9/6/2022).

Confrontation clause: Witness's possible exposure to covid-19 does not render witness unavailable. Appellant was brought to trial on second-degree murder charges. He claimed self-defense. Two eyewitnesses (S.S. and M.W.) to the incident testified appellant shot the victim in a manner inconsistent with self-defense. The first trial resulted in a mistrial. During the second trial, the eyewitnesses reported possible exposures to covid-19. The state argued both witnesses were unavailable and asked to read their testimony from the first trial to the jury or to present their testimony using remote video technology. The district court found the witnesses were unavailable and gave appellant the choice between reading the witnesses' prior testimony or having the witnesses testify remotely. Appellant objected to both options, but ultimately chose to have M.W.'s first trial testimony read into the record. The jury found appellant guilty of second-degree felony murder and second-degree manslaughter.

The Minnesota Court of Appeals finds that appellant's confrontation clause rights were violated by M.W.'s not testifying in person. Before admitting out-of-court testimonial statements of a witness, the witness must be unavailable and the accused must have had a prior opportunity to cross-examine the witness. The courts have not yet decided whether unavailability may be caused by a witness's possible exposure to a contagious virus. The rules of evidence state that a witness is unavailable only if they are exempt from testifying because a privilege applies; the witness refuses to testify despite being ordered to do so; the witness lacks the memory to testify; the witness cannot testify because of death or then-existing infirmity, physical illness, or mental illness; or the witness could not be brought to court by service of process or other reasonable means.

A witness with a possible covid-19 exposure, without any symptoms of illness that prevent them from testifying live and in person, does not fall within any of these categories. The state failed to prove by a preponderance of the evidence that M.W.'s in-person testimony posed a public health risk, because the state showed only a *possibility* that M.W. *may* have been in contact with the virus. Therefore, M.W. was available to testify and reading her prior testimony into the record violated the confrontation clause.

The court clarifies that *State v. Tate*, 969 N.W.2d 378 (Minn. Ct. App. 2022), *rev. granted* (Minn. 3/15/2022), does not answer the issue before the court. *Tate* concluded that a witness who is possibly exposed to covid-19 is unavailable for confrontation clause purposes, but was decided pursuant to *Maryland v. Craig*, 497 U.S. 836 (1990), in which a witness provided

live testimony via remote technology. In contrast, this case involves the legal framework described in *Crawford*, in which a witness's tape-recorded testimonial statement was played for the jury.

Finally, the court finds that the confrontation clause violation was not harmless beyond a reasonable doubt, given that M.W. was the state's sole eyewitness during the second trial, and there is a reasonable possibility her testimony contributed to appellant's conviction. Reversed and remanded for a new trial. ***State v. Trifiletti***, A21-1101, 2022 WL 4126380 (Minn. Ct. App. 9/12/2022).


Samantha Foertsch
Bruno Law PLLC
samantha@brunolaw.com


Stephen Foertsch
Bruno Law PLLC
stephen@brunolaw.com

Employment & Labor Law
JUDICIAL LAW

Minimum wages; chemical dependency program participants ineligible. A group of participants in a court-ordered drug and alcohol recovery program that required performing work on behalf of employers were not entitled to be paid under a state minimum wage law. Reversing a lower court decision, the 8th Circuit Court of Appeals held that the participants were the "primary beneficiaries" of the program because they avoided criminal penalties by joining it and, therefore, they were not entitled to minimum wages. Accordingly, they are not considered "employees" for the purposes of minimum wages and a lawsuit seeking class action certification was properly dismissed. ***Fochtman v. Hendren Plastics, Inc.***, ___ F.4th ___ 2022 WL 3652684 (8th Cir. 08/25/2022) (unpublished).

ERISA claims; fiduciary duty not breached. A class action brought by employees against an employer under an Employment Retirement & Income Security Act (ERISA) plan for breach of fiduciary duty by setting a low interest rate and engaging in prohibited transactions to make money for itself was rejected by the 8th Circuit. Following a prior ruling that the plan was a fiduciary, the trial court granted summary judgment on remand and the appellate court affirmed, holding that the interest rate was set for the purpose of ensuring that the plan could pay the expenses it had guaranteed, after deducting reasonable expenses. ***Rozo v. Principal Life Insurance Company***, ___ F.4th ___ 2022 WL 4005339 (8th Cir. 09/02/2022) (unpublished).

Disability reprisal claims; no causal link established. A claim by an employee for disability discrimination, along with reprisal, was properly dismissed on summary judgment, along with an effort to amend the complaint to include a defamation claim. Affirming a ruling of the Hennepin County District Court, the court of appeals ruled that the claimant failed to present specific evidence of disability and no evidence of a causal link between the disability and the employment termination, other than a short five-day time period, between the alleged discrimination and termination, which warranted dismissal of both claims. ***Kerber v. Recover***

Health of Minnesota, Inc., 2022 WL 4074806 (8th Cir. 09/06/2022) (unpublished).

Breach of contract; employee unsuccessful. A claim by the former manager of an appliance and recycling replacement program was not entitled to pursue a breach of contract claim. Affirming a decision by the Hennepin County District Court, the Minnesota Court of Appeals held that the contract was terminated by the employee, rather than the employer, which was not subject to a 90-day termination provision. The law-of-the-case doctrine did not require finding in favor of the employee due to a previous appellate court ruling because the findings were amply supported by the trial testimony. ***JanOne, Inc. v. Skybridge Americas, Inc.*** 2022 WL 3711475 (8th Cir. 08/29/2022) (unpublished).

Union leave and reimbursement policies; residents can sue school district and union. Anoka County residents may sue the school district and the union representing teachers in the district to challenge a union leave and reimbursement plan that allegedly violates constitutional statutory provisions. Reversing a lower court ruling by U.S. District Court Judge Nancy Brasel in Minnesota, the 8th Circuit held that a lawsuit objecting to the arrangement allowing teachers 100 days of paid leave per school year to work for the union could proceed as a taxpayer lawsuit under the *Flask v. Cohen* doctrine. The court held that the claimed violations of the freedom of speech clause of the First Amendment, as well as the parallel provisions of the Minnesota Constitution and the state Public Employee Labor Relations Act (PELRA), were maintainable under that principle that allows taxpayers to sue in certain circumstances. ***Huizenga v. Ind. Sch. Dist. #11***, 44 F.4th 806 (8th Cir. 08/11/2022).

Marshall H. Tanick
Meyer, Njus & Tanick
mtanick@meyernjus.com

Family Law
JUDICIAL LAW

The question of whether a proposed adjustment to parenting time constitutes a *de facto* change in physical custody is subject to an abuse-of-discretion review. Mother challenged the district court's order construing her request to enforce the recommendation of a parenting evaluator and reduce father's parenting time from 50% to 25% as a *de facto* modification of custody.

On appeal, the Minnesota Court of Appeals devoted most of its attention to the appropriate standard of review. Mother argued that whether to treat a change in parenting time as a custody or parenting time modification is a legal issue reviewed *de novo*. Father argued that the appellate court should review only for an abuse of discretion. Selecting the more lenient standard, the court relied on *Christensen v. Healy*, 913 N.W.2d 437, which requires a totality-of-the-circumstance analysis to distinguish parenting time and custody modifications. Given the fact-sensitive nature of the test, and the Supreme Court's own deferential review in *Christensen*, the court of appeals held that a district court's designation of a parenting time change as a *de facto* modification of physical custody is reviewed only for an abuse of discretion. Concurring specifically, Judge Rodenberg expressed skepticism that *Christensen* itself dictated the standard of review, but agreed that an abuse-of-discretion standard was appropriate. ***Bayer v. Bayer***, 979 N.W.2d 507, 512 (Minn. Ct. App. 2022).

The district court has a statutory mandate to equitably divide assets omitted from the dissolution decree pursuant to Minn. Stat. §518.58. In 2014, husband and wife jointly petitioned to dissolve their marriage, using the preprinted form available on the Minnesota Judicial Branch's website. In completing the forms, however, the couple omitted husband's retirement accounts, worth several hundred thousand dollars. In 2020, wife moved to enforce, clarify, or amend the dissolution decree, seeking an order awarding her half of husband's retirement accounts. The district court denied her motion, finding the parties had reached an unwritten agreement that husband would receive his retirement assets as consideration for assuming all marital debts and expenses. The court of appeals affirmed, concluding that the district court found that the parties had intentionally omitted the retirement accounts from the joint petition, and wife had not satisfied the requirements of Minn. Stat. §518.145 to reopen the decree.

The Minnesota Supreme Court reversed and remanded, holding that irrespective of her right to relief under Minn. Stat. §518.145, wife had an independent right to seek division of husband's retirement as an omitted asset. Citing district court's statutory responsibility to divide marital assets equitably, the Supreme Court distinguished between dividing a previously omitted asset and seeking relief from a decree under Minn. Stat. §518.145. The Court likewise rejected the district court's reliance on a purported "side agreement," reasoning that allowing parties to rely on unwritten side agreements would enable parties to evade review of the district court, which, in turn, would circumvent the purpose of the state's review of parties' stipulations.

Three justices dissented, arguing that the Court's decision ignores the jurisdictional time limits on reopening a judgment and decree under Minn. Stat. §518.145 by allowing the district court to grant relief after the one-year time limitation imposed by the statute. The dissent also argued that the Court improperly substituted its factual

findings for the district court's by finding that the division of the retirement accounts was not equitable. ***Pooley v. Pooley***, ___N.W.2d ___, No. A20-1250, 2022 WL 4230398 (Minn. 9/14/2022).

Note: Author Boulette was counsel for respondent in *Bayer* and appellant in *Pooley*.

Michael Boulette
Taft Stettinius & Hollister LLP
mboulette@taftlaw.com

Laura Kvasnicka
Taft Stettinius & Hollister LLP
lkvasnicka@taftlaw.com

Federal Practice
JUDICIAL LAW

Denial of motion to compel arbitration affirmed; dissent. Rejecting the defendant's appeal from the denial of a motion to compel arbitration, the 8th Circuit relied heavily on decisions by the 5th and 11th Circuits in affirming a district court decision that claims arising from sexual assault by a co-worker did not fall within the scope of a broad employment-related arbitration clause.

Judge Grasz dissented, asserting that the arbitration clause was sufficiently broad to encompass the sexual assault claims. ***Anderson v. Hansen***, 47 F.4th 711 (8th Cir. 2022).

28 U.S.C. §1927; sanctions; local counsel. Having concluded that sanctions of almost $58,000 should be imposed against plaintiff's counsel personally, Judge Wright exempted plaintiff's local counsel from those sanctions, finding that local counsel did not "actively participate in vexatious conduct that the Court had found to be sanctionable," and that the "reputational consequences of... prior orders have provided adequate sanction" to local counsel. ***Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.***, 2022 WL 3701555 (D. Minn. 8/26/2022).

Fed. R. Civ. P. 37; motion to compel granted in part; sanctions imposed. Where government defendants produced redacted documents in violation of a previous court order, Magistrate Judge Leung ordered the production of unredacted documents and sanctioned government defendants $500 for their failure to comply with the previous order. ***Bakambia v. Schnell***, 2022 WL 3054296 (D. Minn. 8/3/2022).

Motion to compel arbitration; trial required. Reversing an order by Judge Nelson that denied a motion to compel arbitration, the 8th Circuit found that a trial was required to address issues of fact relating to whether the parties' contracts incorporated an arbitration agreement. ***Ballou v. Asset Mktg. Servs., LLC***, 46 F.4th 844 (8th Cir. 2022).

Sanctions imposed for late expert disclosures; no abuse of discretion. The 8th Circuit found no abuse of discretion in a district court's exclusion of information included in an expert's second report, which included information that should have been included in his first report. ***Zick v. PACCAR, Inc.***, 47 F.4th 672 (8th Cir. 2022).

Appeal of state court rulings following removal; *Rooker-Feldman* not applicable. Determining that the *Rooker-Feldman* doctrine does not apply to removed cases, the 8th Circuit found that where a case was removed after the state court entered partial summary judgment, the state court's order "merged" into the federal district court's final judgment and was reviewable on appeal. ***Wills v. Encompass Ins. Co.***, ___ F.4th ___ (8th Cir. 2022).

Denial of request to amend complaint affirmed; failure to comply with local rules. The 8th Circuit found no abuse of discretion in a district court's denial of the plaintiff's request to amend his complaint, where the plaintiff failed to file a motion that complied with the applicable local rules. ***Magdy v. I.C. Sys., Inc.***, ___ F.4th ___ (8th Cir. 2022).

Minn. Stat. §549.191; punitive damages; intra-district split. For the past few years, this column has followed the evolving views on the application of Minn. Stat. §549.191 to claims pending in the District of Minnesota.

Affirming an order by Magistrate Judge Brisbois that denied a motion to amend to add a claim for punitive damages, and citing a number of cases decided in or before 2016, Judge Wright joined the "numerous Courts in this District that have required the pleading of punitive damages to conform to the require-

ments of Section 549.191."

This decision goes against the current trend in the district, and underscores the existing intra-district split on this important issue. ***Johannessohn v. Polaris Indus., Inc.***, 2022 WL 3585152 (D. Minn. 8/22/2022).

■ **Motion to amend scheduling order denied; attorney carelessness.** Magistrate Judge Foster denied the defendant's motion to amend a Pretrial Scheduling Order to extend the deadline for a hearing on a dispositive motion by almost four months, finding that defendant's counsel's "carelessness" in failing to schedule a hearing date prior to the deadline in the order did not establish "good cause" for the "lengthy" delay. ***Davis v. Experian Info. Solutions, Inc.***, 2022 WL 4343233 (D. Minn. 9/19/2022).

■ **Class action; standing; theft of personal information.** Denying most of the defendants' motion to dismiss for lack of standing on claims arising out of the alleged theft of plaintiffs' personal information, Judge Schiltz found that the plaintiffs had failed to establish standing for their claims seeking injunctive and declaratory relief, but that they had established sufficient "concrete injuries" to support standing on their claims for monetary relief. ***In Re Pawn Am. Consumer Data Breach Litig.***, 2022 WL 3159874 (D. Minn. 8/8/2022).

■ **Fed. R. Evid. 702; *Daubert*; expert's opinion excluded.** Judge Wright granted the defendant's motion to exclude the testimony of the plaintiff's expert, finding that his opinions were "unreliable" because they were based on "speculative calculations" or "incorrect factual premises" that were contradicted by the record. ***RG Golf Warehouse, Inc. v. The Golf Warehouse***, 2022 WL 4017438 (D. Minn. 9/2/2022).

■ **Personal jurisdiction; fraud; *Calder* effects test.** Relying primarily on the *Calder* effects test (*Calder v. Jones*, 465 U.S. 783 (1984)), Judge Brasel denied the defendants' motion to dismiss for lack of personal jurisdiction, finding that defendants' alleged torts were "felt primarily within Minnesota." ***Allina Health Sys. v. Gentox Med. Servs., LLC***, 2022 WL 3647822 (D. Minn. 8/24/2022).

■ **Fed. R. Civ. P. 12(b)(3); motion to transfer venue granted.** Rejecting the plaintiff's argument that 28 U.S.C. 1391(c)(2) applied to claims against the individual defendants, Judge Wright granted one defendant's motion to transfer the action to the District of North Dakota, where he resides. ***Personal Wealth Partners, LLC v. Ryberg***, 2022 WL 3700151 (D. Minn. 8/26/2022).

■ **Fed. R Civ. P. 37(a)(5)(A); failure to comply with subpoena; sanctions.** Magistrate Judge Docherty ordered a third party to comply with the plaintiff-petitioner's subpoenas and sanctioned his counsel $500 where counsel failed to meet with counsel for the plaintiff-petitioner and instead offered "empty assurances" that discovery disputes would be resolved. ***Beyond Blond Prods., LLC v. Hall***, 2022 WL 3444039 (D. Minn. 8/17/2022).

■ **Expert reports; reliance on undisclosed documents; reply report stricken.** Judge Wright rejected a challenge to an order by Magistrate Judge Leung that had ordered the defendant to pay certain costs incurred by the plaintiff following the untimely disclosure of documents relied on by the defendant's expert, and had also stricken the reply report by another of defendant's experts which did not contradict the report submitted by the plaintiff's damages expert. ***Eng'g & Constr. Innovations, Inc. v. Bradshaw Constr. Corp.***, 2022 WL 3585153 (D. Minn. 8/22/2022).

■ **Fed. R. Civ. P. 45(f); motion to transfer denied.** Judge Wright denied a motion to transfer a motion to quash a subpoena pursuant to Fed. R. Civ. P. 45(f) to the District of Rhode Island, finding no "exceptional circumstances" and noting that the subpoena recipient would suffer a "burden" if the motion was granted, because it had retained Minnesota counsel who are not admitted in the District of Rhode Island. ***CVS Pharmacy, Inc. v. Prime Therapeutics LLC***, 2022 WL 4354853 (D. Minn. 9/20/2022).

■ **Motion to compel; relevance of financial information.** Where plaintiffs sought to compel discovery relating to the defendants' net worth, gross revenue, and net revenue, and argued that this information was relevant to their claims for punitive damages, Magistrate Judge Leung conditionally granted their motion to compel, finding that the defendants would be required to produce that information only if plaintiffs' claims were to survive summary judgment. ***Dekker v. Cenlar FSB***, 2022 WL 4354855 (D. Minn. 9/20/2022).

■ **8th Circuit adopts brief quality control program.** The 8th Circuit now offers a Brief Quality Control Program, which allows filers to have their briefs electronically screened for potential errors prior to filing. The Clerk's office will continue to review briefs manually and will continue to issue deficiency notices when necessary.

Josh Jacobson
Law Office of Josh Jacobson
joshjacobsonlaw@gmail.com

Intellectual Property
JUDICIAL LAW

■ **Trade secret: No right to jury trial on misappropriation disgorgement claim.** Judge Frank recently granted defendant Corning Inc.'s motion to strike plaintiffs John R. Wilson and Wilson Wolf Manufacturing Corporation's (collectively, Wilson Wolf)

jury demand for its trade secret misappropriation claim. Wilson Wolf sued Corning alleging that Corning obtained Wilson Wolf's cell-culture technology under a confidentiality agreement and then wrongfully used that technology to develop and commercialize its own cell-culturing products and to file for and obtain patents claiming Wilson Wolf's technology as its own. Wilson Wolf sought disgorgement of unjustly enriched profits and compensatory damages. Corning moved to strike the jury demand arguing the remedy sought was equitable. Wilson Wolf argued the remedy was legal in nature or alternatively that the remedy is designed to punish a defendant. The court found both the unjust enrichment and compensatory damages sought are based on Corning's actual and projected revenues and profits (compensatory damages calculated as 50% of Corning's profits) and were thus equitable in nature. Finding that the weight of authority under federal law holds that the equitable remedy of disgorgement is not a remedy for which the Seventh Amendment guarantees a right to trial by jury, the court granted Corning's motion and struck Wilson Wolf's jury demand for its trade secret misappropriation claim. ***Wilson v. Corning, Inc.***, No. 13-210 (DWF/TNL), 2022 U.S. Dist. LEXIS 113669 (D. Minn. 6/28/2022).

■ **Copyright: Access requires dissemination sufficient to create a reasonable opportunity to access the copyrighted works.** Judge Frank recently granted defendants Target Corporation's and Target Enterprise's motion for summary judgment dismissing plaintiff's copyright infringement claim. Plaintiff Kristen Cooley is the mother of N.O.C., a 17-year-old artist living with autism who created a collection of original works of art, including his "sketch-style dot art." Cooley alleged that Target copyrighted 12 pieces of N.O.C.'s artwork and used them in Target's Cat & Jack apparel line. In July 2018, Target invited then 14-year-old N.O.C. to Target's headquarters to participate in a social media promotional project called "CrushCon" where Target had N.O.C. paint a jacket from Target's Wild Fable brand, directed at Gen Z purchasers.

A few months after CrushCon, Cooley discovered that Target was selling Cat & Jack products that were strikingly similar to N.O.C.'s artwork. A year and a half later, Cooley filed her action alleging that 17 Target products infringed on copyrights held by Cooley on N.O.C.'s behalf. Target argued that it created its designs independent of N.O.C.'s work and that its senior textile designer did not see N.O.C.'s work. Target moved for summary judgment, arguing that Cooley did not have valid copyrights in the copyrighted works and that Cooley failed to establish that Target infringed those works. To prove copyright infringement, Cooley needed to demonstrate that the copyrighted works were copied by Target where copying could be shown either by (1) direct evidence of copying, or (2) access to the copyrighted material and substantial similarity between the accused work and the copyrighted work. Because there was no direct evidence of copying, Cooley relied on evidence of access and substantial similarity. To establish access, Cooley needed to demonstrate that Target had an opportunity to view or to copy N.O.C.'s work. One way to prove access is by showing that the copyrighted works were widely disseminated to the public. Cooley argued that because a Target employee found N.O.C. through social media in 2018, there was no question that N.O.C.'s online presence was sufficient and widespread enough to provide Target a reasonable opportunity to access the copyrighted works. Considering Target's alleged access to each of the copyrighted works individually, the court found Cooley had failed to present evidence sufficient to establish that Target had access to N.O.C.'s works before the infringement. The court granted summary judgment of noninfringement based on failure to prove copying. Because the court granted Target's motion for summary judgment on other grounds, the court did not address the validity of the copyright issue. ***Cooley v. Target Corp.***, No. 20-2152 (DWF/DTS), 2022 U.S. Dist. LEXIS 175623 (D. Minn. 9/28/2022).

Joe Dubis
Merchant & Gould
jdubis@merchantgould.com

Real Property
JUDICIAL LAW

■ **Date of acceptance of purchase agreement fatal to mechanic's lien based on claimed equitable interest.** Defendant Lefebvres owned farmland in Otsego. WH Diversified Investment Group executed a purchase agreement on 12/12/ 2018 to purchase the property for a mixed-use development. The Lefebvres executed the purchase agreement on 12/21/2018. WH Diversified hired Landform Professional Services, LLC to conduct survey and civil engineering work for the planned development. Landform did not provide a pre-lien notice

to the Lefebvres. The sale transaction fell through. Landform recorded a lien in the amount of $356,524 and commenced a foreclosure action. Landform asserted that WH Diversified held an equitable interest in the property when it began work, and thus no pre-lien notice was required. But in its lien statement and various subsequent filings, Landform stated that its first day of work was 12/18/2018. The Minnesota Court of Appeals affirmed the district court's exclusion of a subsequent sworn declaration asserting a December 21 first day and affirmed the grant of summary judgment in favor of the Lefebvres. ***Landform Professional Services, LLC, Appellant, v. Kevin Lefebvre***, No. A22-0274, 2022 WL 3581658 (Minn. Ct. App. 8/22/2022).

Minn. R. Civ. P. 4.02 controls service of drainage appeal. Heron Lake Watershed District, the relevant drainage authority, issued an order approving a petition to improve an existing ditch. Property owners Krugers hand-served appeals under Minn. Stat. §§103E.091 and .095, challenging the determination of benefits and damages and establishment order. The drainage authority moved to dismiss the appeals for insufficient service of process, and the motion was granted by the district court. The court of appeals held that the service requirements of Minn. R. Civ. P. 4.02 applied to the drainage appeal statutes. Rule 4.02 does not allow for service by a party to an action. The court of appeals affirmed the district court's dismissal of the actions for lack of jurisdiction, agreeing that service of the appeals was not effective. ***Kruger v. Nordquist***, No. A22-0348, 2022 WL 4075068 (Minn. Ct. App. 9/6/2022).

Patrick C. Summers
DeWitt LLP
pcs@dewittllp.com

Tax Law
JUDICIAL LAW

Early childhood center "a seminary of learning" for tax exemption purposes. The Minnesota Constitution, art. X, §1, provides that "academies, colleges, universities, [and] all seminaries of learning... shall be exempt from taxation." A daycare and early learning center in Goodhue County asserted that it was a "seminary of learning" and therefore should be exempt from property taxation. The county and the tax court disagreed. The Minnesota Supreme Court interpreted the undefined "seminary of learning" and held that "an institution is a tax-exempt seminary of learning when it (1) is educational in nature, and (2) teaches a general curriculum, (3) in a thorough and comprehensive manner." ***Under the Rainbow Early Educ. Ctr. v. Cnty. of Goodhue***, ___N.W.2d ___, 2022 WL 3641789 (Minn. 8/24/2022).

Exclusion for foreign-earned income: An "abode" within the United States means your "tax home" is also within the U.S. Unless an exception applies, citizens of the United States are taxed on their income, regardless of where that income is earned. One such exception is provided in Section 911(a)(1), which permits taxpayers to elect to exclude foreign-earned income if two criteria are met. First, the taxpayer must have a "tax home" in a foreign country, and second, the taxpayer must *either* be a "bona fide resident" of one or more foreign countries *or* the taxpayer must be physically present in a country or countries during at least 330 days in a 12-month period. Although a person's tax home is generally the location of their regular or principal place of business, section 911(d)(3) provides that "[a]n individual shall not be treated as having a tax home in a foreign country for any period for which his abode is within the United States." As the Court summarized, "an individual whose 'abode' is within the United States cannot be treated having a 'tax home' in a foreign country."

Ruben Domdom, Jr. worked in Iraq from 5/23/2014 until 8/21/2015. His wages were deposited to his U.S. bank account and were not subject to taxation in Iraq. Mr. Domdom's timely filed 2014 and 2015 returns were prepared by a paid preparer and claimed the 911(a)(1) exemption for his Iraq-earned income. The parties disputed whether Mr. Domdom's tax home was in Iraq or the United States.

The court focused on the location of Domdom's abode during each year in issue. "Its dictionary definition notwithstanding," the court explained, "for purposes of federal income taxation a taxpayer's 'abode' is generally in the country in which the taxpayer has the strongest economic, family, and personal ties." Mr. Domdom's ownership of real and personal property in the United States, his maintenance of a U.S. address, and his ownership of a home where his former spouse and children lived were factors in the court's conclusion that Domdom's "abode" was the United States. Further, Domdom's claim of head of household status and dependency exemption deductions for his children residing in the United States signaled to the court that Domdom considered his abode to be the same as his children's. The court was "unable to reconcile petitioner's seemingly inconsistent choices in determining the location of his abode during either year in issue... common sense dictates that petitioner's abode could not at the same time... have been within the United States with his children, as his returns suggest, or not 'within the United States,' as entitlement to the section 911(a) exclusions here in dispute requires." Although Domdom was not entitled to the exclusion, the court did not hold him liable for accuracy-related penalties since he reasonably relied on the advice of his

return preparer and acted in good faith with respect to the underpayment of tax. ***Domdom v. Comm'r***, No. 18270-17S, 2022 WL 3755385 (T.C. 8/30/2022).

Charitable remainder annuity trusts (CRATs) distributions to beneficiaries are ordinary income; taxpayers not entitled to charitable contribution deductions for in-kind agricultural crop transfers to the CRATs. Married taxpayers Donald and Rita Furrer were actively engaged in the farming business as growers and sellers of corn and soybeans. They saw an ad in a farming magazine that inspired them to form sequential charitable remainder annuity trusts (CRATs) to which they transferred corn and soybeans grown on their farm. The CRATs sold the crops and purchased annuity plans with the proceeds; annual annuity payments went to the couple. The couple's son was the trustee and the couple were life beneficiaries, while three eligible section 501(c)(3) charities were remaindermen. The couple claimed a charitable deduction for the crop contributions and did not claim the annuity payments as income. The tax court disagreed with both of those positions. The court held that the taxpayers were not entitled to noncash charitable contribution tax deductions for the crop transfers and further that the distributions made by the annuities to the taxpayers were ordinary income to the taxpayers. ***Furrer v. Comm'r***, T.C.M. (RIA) 2022-100 (T.C. 2022).

A taxpayer may not deduct expenses paid on behalf of another taxpayer. A group of farmers received a very expensive reminder of this fundamental tax precept when individual members, who operated a family farm individually and through several related entities, deducted various expenses on their personal tax returns. The individual taxpayers claimed the expenses as ordinary and necessary expenses paid or incurred in carrying on trade or business. In tax court, the taxpayers argued that the payments should have been considered capital contributions to entity, which reduced income flowing from entity to taxpayer. The court rejected the argument. "A taxpayer cannot deduct expenses paid on behalf of another taxpayer," the court stated. "This long-established principle extends to corporations as a corporation's business is distinct from its shareholders." ***Vorreyer v. Comm'r***, T.C.M. (RIA) 2022-097 (T.C. 2022).

Property tax: Challenging assessment of multiple parcels in northern Minnesota. In a consolidated property matter, Marvin Lumber and Cedar Co.—maker of the well-known Marvin windows and doors—contested the assessed value of several parcels of real property in Warroad. The properties included a manufacturing plant and separate visitor center, as well as four retail parcels. The respective appraisers offered "widely differing values" that, the court noted, "reflect the difficulty in valuing a Plant that is not only large and remote, but also relatively old."

As the parties had done, the court addressed the valuation of the plant and visitor center separately, and then turned to the retail properties. With respect to the plant and visitor center, the parties disagreed on four issues: (1) whether the visitor center had a "highest and best use" separate from the plant and therefore should be valued separately; (2) the propriety of using the sales comparison approach to value the plant; (3) how to properly implement the cost approach; and (4) what weight to give to the sales comparison and cost approaches.

The court first determined that the highest and best use of the visitor center was to place it on a separate parcel and to separately market it for its current use as a museum and visitor center. The court could "see no reason why separately marketing the Visitor Center would prevent its purchase by an owner-user interested in purchasing the Plant."

The court addressed the dispute surrounding the sales comparison approach for the plant. The court acknowledged that the plant is a limited market property—"one for which there is a limited number of potential purchasers"—and further recognized that no value approach would be ideal in this situation. Where no value approach is ideal, the court continued, it is preferable to rely on the judgment of professional appraisers rather than the opinions of the parties' counsel. Relying on the appraisers' "candid subjective judgments about elements of comparison concerning which empirical evidence was apparently unavailable," the court adopted four comparable sales, which resulted in an indicated value of the plant. The court then turned to the cost approach for the plant, reliance on which was appropriate because comparable sales were of limited availability and quality, and the income capitalization approach was inapplicable. Ultimately, the court used both the sales comparison approach and the cost approach and gave each approach 50% weight to determine a final plant value. The court considered sales and cost approaches to the valuation of the visitor center and deemed the cost approach more reliable. The court followed a similar process for the retail properties, which included a mid-box home center (and associated storage buildings) and a strip mall.

Finally, the court rejected the county's argument that Marvin's evidence was insufficient to overcome the *prima facie* validity of the county's assessments. Instead, the court held that the appraisal performed by Paul G. Bakken, Marvin's expert, was substantial evidence sufficient to overcome the *prima facie* validity of the county's plant and visitor center assessment. ***Marvin Lumber and Cedar Co., v.***

County of Roseau, 68-CV-18-308, 2022 WL 4295388 (Minn. T.C. 9/16/22).

Morgan Holcomb
Mitchell Hamline School of Law
morgan.holcomb@mitchellhamline.edu

Brandy Johnson
Mitchell Hamline School of Law
brandy.johnson2@mitchellhamline.edu

Torts & Insurance
JUDICIAL LAW

Health care: Duty of care to patients and family members. Decedent sought medical care from defendants for mental health issues, including anxiety and depression. Decedent received out-patient care on several occasions and was prescribed medication for anxiety, depression, and sleep difficulties. During his visits, decedent disclosed several symptoms of depression and anxiety. But decedent made no violent threats, had no history of violent action, repeatedly denied suicidal ideation, was rational and planning for the future, and consistently referred to others only in a positive and supportive fashion. Tragically, between visits, decedent (who already owned a firearm) purchased a shotgun and killed his wife, his three children, and then himself. The trustee for the next of kin of the five family members brought suit against defendant for wrongful death, alleging negligent care. The district court granted defendants' motion for summary judgment with regard to duty. The court concluded that defendants did not owe a duty to decedent or his family members because defendant had no duty to control or protect decedent absent a custodial "special relationship" that was not present given the outpatient nature of the treatments. The court of appeals reversed and remanded for trial, concluding defendants owed a duty to decedent as its patient with respect to his suicide. It also concluded that defendants may have owed a duty of care to decedent's family members if harm to them was a foreseeable risk of the alleged departures from the standard of care.

The Minnesota Supreme Court affirmed in part, reversed in part, and remanded. The Court issued its ruling in a split opinion, with Justice Hudson authoring the opinion of the Court with respect to the duty owed in cases of patient suicide, and Justice Anderson authoring the opinion of the Court with respect to the duty owed to the patient's family. With respect to the duty owed to the patient, the Court held that defendants owed a duty of care to decedent, which was not extinguished by his suicide occurring outside defendant's facilities in the context of outpatient care. In so holding, the Court stated: "when the standard of care requires medical providers to take action to prevent a particular injury, a hospital can be liable for failing to exercise the requisite degree of skill and care even when that injury is caused by the intentional, criminal wrongdoing of a third party outside of the hospital's control and hospital grounds." The Court cautioned: "But we do not hold that [defendant] had a duty to control [decedent] or to prevent his suicide. We simply hold that [defendant] had a duty to provide treatment that met the standard of care. And a healthcare provider's lack of control over a patient does not negate that duty."

With respect to the second issue, the Court held that defendants did not owe a duty of care to decedent's wife and children. The Court's holding was based on the fact that plaintiff "presented no evidence that [decedent's] wife and children were patients of [defendant], were in contact with [defendant], or were under the control of [defendant]" and decedent "never threatened violence against his family, had no prior history of violent acts, and showed no warning signs that would distinguish him from other patients suffering from depression and anxiety." As a result, the Court held decedent's "actions in killing his wife and children were unforeseeable as a matter of law."

Justices Hudson and Anderson also issued dissenting opinions on the issues where their opinions were not the opinions of the court. With respect to the first issue, Justice Anderson argued that the duty of care should not extend to suicide absent a custodial relationship with the patient. On the second issue, Justice Hudson argued that plaintiff's expert opinion raised a genuine issue of material fact with respect to the foreseeability of harm to the decedent's family. ***Smits v. Park Nicollet Health Services, et al.***, A20-0711 (Minn. 9/7/2022).

Exculpatory clauses; strict construction. A mother executed a liability waiver allowing her child to play in an inflatable play area owned by defendant, which purported to "release and hold harmless [defendant] from and against any and all claims, injuries, liabilities or damages arising out of or related to... the use of the play area and/or inflatable equipment." Subsequently, plaintiff son sustained serious injuries after he fell out of the large inflatable and hit his head on carpet-covered concrete. Plaintiff filed suit against the inflatable company once he reached the age of 18, asserting a negligence claim. The district court held that the liability waiver was enforceable and granted summary judgment in favor of defendant. The court of appeals affirmed.

The Minnesota Supreme Court reversed and remanded. The Court reasoned that exculpatory clauses, like indemnity clauses, were subject to strict construction. The Court went on to analyze the language at issue, noting that the inquiry was not whether the "any and all claims" language in the waiver may encompass a negligence claim. Rather, the inquiry is whether the waiver specifically released defendant from liability for its negligent acts. The Court concluded that exculpatory

clauses, similar to indemnity clauses, need to "use specific, express language that clearly and unequivocally states the contracting parties' intent." Because the liability waiver did not clearly and unequivocally spell out the parties' intent to exculpate defendant for its own negligent acts, the Court held that the release was unenforceable.

Justice Anderson filed a dissenting opinion, which was joined by Chief Justice Gildea. In the dissent's view, there was no ambiguity in the exculpatory clause at issue and it encompassed a negligence claim: "I agree that 'any and all' means 'any and all,' and would hold that there is no ambiguity here." As a result, the dissent would have affirmed summary judgment in favor of defendant. ***Justice v. Marvel, LLC***, A20-1318 (Minn. 9/21/2022). *https://mn.gov/law-library-stat/archive/supct/2022/OPA201318-092122.pdf*

Common-interest doctrine recognized in Minnesota. Plaintiff, a nonprofit advocacy organization, submitted document requests to the Office of the Attorney General under the Minnesota Data Practices Act, seeking documents related to the AG's retention of special assistant attorneys general to litigate climate-change actions. The AG contended it did not need to release any data, as there was "no public data" responsive to the request, and as the common-interest doctrine allowed them to withhold the documents from production. Plaintiff filed suit alleging that the AG's office erroneously relied on claims of privilege. The parties agreed that the AG would describe which documents were nonprivileged and responsive to the request and submit a privilege log detailing which documents it claimed to be protected from disclosure. After submitting its privilege log, the AG's office moved for dismissal, and the district court granted its motion. The court of appeals reversed, concluding that the district court erred in applying the common-interest doctrine because the doctrine had not yet been recognized by Minnesota courts.

The Minnesota Supreme Court reversed the court of appeals' decision, officially recognizing the common-interest doctrine under Minnesota law. The Court clarified that the common-interest doctrine applies when (1) two or more parties, (2) represented by separate lawyers, (3) have a common legal interest, (4) in a litigated or non-litigated matter, (5) the parties agree to exchange information concerning the matter, and (6) they make an otherwise privileged communication in furtherance of formulating a joint legal strategy. The Court concluded the "doctrine should [also] extend to encompass attorney work product." In recognizing the common-interest doctrine, the Minnesota Supreme Court cautioned that the doctrine applies only to common legal interests, and not to "purely commercial, political, or policy" interests. Further, the doctrine is not limited to litigation; rather, it can apply in a litigated or non-litigated legal matter, permitting "parties with the same legal interests to share documents without losing the protection of the attorney-client privilege or work-product doctrine." ***Energy Policy Advocates v. Ellison***, No. A20-1344 (Minn. 9/28/2022). *https://mn.gov/law-library-stat/archive/supct/2022/OPA201344-092822.pdf*

Standard fire insurance policy; prejudgment interest. After fires damaged his home, plaintiff sought coverage from defendant, his homeowner's insurer. Defendant denied coverage, claiming plaintiff had intentionally set the fires. The insurance policy provided that the insurer will pay the amount of loss in excess of the insured's deductible, "not to exceed the applicable limit of insurance." The policy did not specifically address interest. Plaintiff sued and prevailed at trial. The district court awarded plaintiff prejudgment interest, but limited the amount, finding that plaintiff's total recovery for his personal property loss could not exceed the policy coverage limit. The court of appeals affirmed.

The Minnesota Supreme Court reversed and remanded. The Court began by noting that because in the insurance policy at issue did not contain an interest provision, Minn. Stat. §65A.01, subd. 3 applied to the loss at issue. The interest provision of the standard fire policy provides that the insurer "will not in any case be liable for more than the sum insured, *with interest thereon* from the time when the loss shall become payable." *Id.* (emphasis added). As a result, the Court held "that the plain language of the standard fire policy, by its express terms, entitles an insured to prejudgment interest in an amount that may cause the insured's total recovery to exceed the coverage limit of the policy." The Court went on to hold that prejudgment interest began to run "60 days after [defendant] received the proof of loss."

Justice Thissen filed an opinion concurring part and dissenting in part, which was joined by Chief Justice Gildea and Justice Anderson. The dissent agreed with the majority that an insurer is liable for the full amount of prejudgment interest under Minn. Stat. §65A.01, subd. 3, even if it exceeds the limits of the insurance policy. However, the dissent agreed with when prejudgment interest should begin to run. The dissent would have held that prejudgment interest begins to run "60 days after two things occur: (1) the insured submits proof of loss and (2) the amount of loss is ascertained." ***Else v. Auto-Owners Ins. Co.***, No. A20-0476 (Minn. 10/5/2022). *https://mn.gov/law-library-stat/archive/supct/2022/OPA200476-100522.pdf*

Jeff Mulder
Bassford Remele
jmulder@bassford.com

PEOPLE + PRACTICE

We gladly accept announcements regarding current members of the MSBA. BB@MNBARS.ORG

Kaelah Mastenbrook and **John Weber** have joined the Volunteer Lawyers Network. Both received JDs from the University of Minnesota Law School in 2022 and will assess and place cases with pro bono attorneys. Mastenbrook will establish a project to help owners recover vehicles seized through civil forfeiture. Weber will recruit and train volunteer lawyers to help Afghan evacuees pursue a permanent status in the USA.

Timothy Anderson and **Ethan Groothuis** have joined Meagher + Geer. Anderson joins the firm in the anti-fraud counseling and litigation practice group. He earned his JD from the University of St. Thomas School of Law. Groothuis joins the mass tort/toxic tort and products liability practice groups. He earned his JD from Mitchell Hamline School of Law.

Jacob S. Woodard joined Winthrop & Weinstine, PA as counsel in the mergers & acquisitions and general corporate practices. Prior to joining the firm, he was in-house general counsel for manufacturing and retail organizations.

Cody M. Bauer and **Panhia Vang** have joined Fredrikson & Byron. Bauer joins the energy group, advising utilities, transmission companies, and independent power producers. Vang joins the litigation group and has experience representing clients in shareholder, contract, patent and copyright, and property disputes.

Matthew Cavanaugh joined Spencer Fane LLP as an associate in the litigation and dispute resolution practice group.

Elizabeth Cadem became a partner at Burns & Hansen, PA. Cadem represents clients in primarily family law and appeals.

Gov. Walz appointed **Benjamin Wilcox** as district court judge in Minnesota's 8th Judicial District. Wilcox will be replacing Hon. Charles C. Glasrud and will be chambered in Morris in Stevens County. Benjamin Wilcox is a partner at Wilcox Law Office, PA. He serves as the city attorney for Benson and Kerkhoven and as an assistant city attorney in Clontarf, Danvers, DeGraff, Holloway, and Murdock.

Kate E. Polman joined Keegan Law Office as an associate attorney. Polman handles criminal defense and post-conviction matters.

Maslon LLP adopted a new governance structure and added partners **Susan Link** and **David Suchar** to its newly formed board of directors. Board Chair **Keiko Sugisaka**, Vice-Chair **Mike McCarthy**, and **Shauro Bagchi,** who were previously elected, will serve as board members along with Link and Suchar. The executive committee consists of two partner board members, Sugisaka and McCarthy, and Chief Operating Officer **Suzette Allaire**.

Steven L. Schleicher has accepted an invitation to join the International Association of Defense Counsel, an invitation-only legal organization for attorneys who represent corporate and insurance interests. Schleicher is a partner at Maslon LLP.

In memoriam

THOMAS MCCORMICK
died September 13, 2022 at age 74. He graduated from William Mitchell Law School. In 1988 he established McCormick Law Office, practicing civil litigation in Wisconsin and Minnesota.

ROBERT DONALD ESTES
died September 25, 2022, at age 79. He earned his law degree at Columbia University Law School and began practicing law in Minneapolis in 1968 with a focus on international business. In 1982 Estes was a founder of Estes, Parsinen, & Levy, PA. In 1989, he formed Estes Law, PA, where he devoted the rest of his professional life to serving his clients for the next 33 years.

THOMAS A. KELLER III
of Saint Paul, died on October 2, 2022 at age 87. He spent most of his career at the O'Connor & Hannan law firm before moving to Moss & Barnett, and later Gray Plant Mooty. His expertise was in business law, working on matters ranging from mergers and acquisitions to corporate governance and employment matters. Keller regularly served as a special master for the United States District Court in cases involving complex corporate litigation.

PAUL DENNIS DOVE
passed unexpectedly on October 6, 2022. After earning his Law Degree from University of Minnesota Law School in 1964, he established his law firm first in St. Paul then Bloomington. Paul continued to practice law for over 50 years, most recently at his firm Dove Frietland PLLP in St.Louis Park.

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ASSISTANT DIRECTOR—OEEO

The Metropolitan Council is the regional planning agency for the Minneapolis/St. Paul metropolitan area providing essential services to our region: transportation, wastewater treatment, growth and development of local communities, affordable housing programs, and regional park systems. This position is eligible for a hybrid (remote and onsite) telework arrangement for candidates with permanent residence in MN or WI. Join our team of professionals dedicated to cultivating a diverse, equitable, and inclusive community for our metro area. The Council's Office of Equity and Equal Opportunity (OEEO) is seeking to fill the position of Assistant Director. See Council's full job posting for more information and to apply: https://www.governmentjobs.com/careers/metrocouncil

ASSISTANT SWIFT COUNTY ATTORNEY

Swift County is seeking an Assistant Swift County Attorney. To be considered for this position, please visit our website at: www.swiftcounty.com/jobs and complete the application process. Immediate courtroom experience will be available under the supervision of the Swift County Attorney.

ASSOCIATE ATTORNEY

Christensen & Laue, PLLC, in Edina, Minnesota, seeks an associate attorney with one to three years of experience, to practice real estate, business, estate planning and probate law, in a collegial setting. Applicants must possess strong legal writing skills, experience working with clients, and experience in the practice areas listed above. Send resume and cover letter to: mw@edinalaw.com.

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Holmstrom, Kvam, & Blackwelder, PLLP a three-attorney firm located in Granite Falls, MN, is seeking an attorney for the general practice of law, with potential concentration in the areas of criminal law, estate planning, real estate, civil litigation, family law, business law, and other areas of law. Contact: Holmstrom, Kvam, & Blackwelder, PLLP, Email: hklaw@mvtvwireless.com

ASSOCIATE ATTORNEY

Minnesota and Wisconsin litigation firm located in the east metro is seeking an associate attorney with one to five years of litigation/insurance defense experience. Wisconsin license is preferred, but not necessary. Email resume to: l.fritze@redingpilney.com

ASSOCIATE ATTORNEY

Reichert Wenner, PA a general practice law firm in St. Cloud, MN has an immediate opening for an associate attorney with at least two years of experience in civil litigation, family law, real estate or corporate law. The candidate should have strong research, writing and client communication skills. Submit cover letter, resume and writing sample to: lmiller@reichertwennerlaw.com.

ASSOCIATE ATTORNEY

Jardine, Logan & O'Brien PLLP is a midsize law firm in the east metro looking for an Associate Attorney with experience in workers' compensation. Excellent communication skills and writing skills required. Insurance defense experience a plus. Our firm offers an extensive history of providing excellent legal services to our clients. This is an exciting opportunity for a bright and energetic attorney to work with an established law firm. Salary commensurate with experience. Jardine, Logan & O'Brien PLLP is an Affirmative Action/Equal Employment Employer. Please go to: www.jlolaw.com to apply.

ASSOCIATE ATTORNEY DULUTH, MN

Hanft Fride Law Firm is seeking an associate attorney with zero to five years of experience to join its civil litigation practice in Duluth. Associates will also have opportunities to experience our transactional practice. Qualified candidates will have excellent communication and writing skills, solid academic credentials, and the ability to work independently or as a team. Litigation experience or judicial clerkship experience preferred, but not required. For those interested in working at a well-established firm and living in a cool city, please apply online at: hanftlaw.com/careers

BUSINESS LITIGATION ATTORNEY

Anthony Ostlund Louwagie Dressen & Boylan PA is looking for an exceptional associate to join its fast-paced business litigation practice in Minneapolis, Minnesota. Applicants must have one to five years law firm experience in business litigation, excellent academic credentials, and superior writing and communication skills. The position offers a competitive compensation and benefits package. Visit the firm website at anthonyostlund.com. Send resume and relevant writing sample in confidence to Janel Dressen at: jdressen@anthonyostlund.com. An equal opportunity employer.

CORPORATE COUNSEL
Edina Realty, Inc. is seeking an attorney with zero to three years of experience to work as Corporate Counsel in its corporate office in Edina, MN office. Strong writing and oral communication skills are required; experience with real property law is a plus. Position entails giving legal direction to real estate agents, conducting educational presentations, contract negotiations, legal research and litigation management. Please contact Liz Godes, HR Generalist, at: lizgodes@edinarealty.com

CORPORATE FINANCE ASSOCIATE – FIVE PLUS YEARS' EXPERIENCE
Stinson LLP is seeking an associate with at least five years of experience to join the corporate finance division in our Minneapolis office. Qualified candidates will have at least five years of experience with mergers and acquisitions, securities law compliance/capital markets, venture capital, private equity, and corporate governance. For a full position description and to apply online, please visit: https://www.stinson.com/careers-current-opportunities For questions, contact recruiting@stinson.com. Stinson LLP is an equal opportunity employer.

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Meyer Njus Tanick, PA, a downtown Minneapolis law firm, is seeking a highly motivated attorney with three to six years of experience to support business, employment and litigation practice areas. A good academic record and strong research and writing skills are required. This is a unique opportunity for candidates seeking professional growth in a small-firm environment. Must be licensed to practice in the State of Minnesota. Flexible schedule accepted, with full or part time offerings. Work is done primarily in office, with remote work accepted as needed. Qualified candidates should submit their cover letter, resume, law school transcript and writing sample to: aemmers@meyernjus.com.

FTE STAFF ATTORNEY—ANISHINABE LEGAL SERVICES
Anishinabe Legal Services staff attorney –two salaried FTE positions available. Anishinabe Legal Services is looking to hire two highly motivated attorneys to provide civil legal assistance and court representation to program clients before area Tribal Courts, State Courts, and Administrative Forums. One attorney will be housed out of our main administrative office on the Leech Lake Reservation in Cass Lake, Minnesota and the other will be housed out of our White Earth Reservation office in Ogema. Primary duties will include handling a wide variety of civil matters before State and Tribal Courts. Compensation: $62,000/year + D.O.E. Generous benefit package includes individual and family health and dental insurance, paid time off, and life insurance. To Apply: Please email a cover letter and resume to Litigation Director Valerie Field, at: vfield@alslegal.org. Applications will be accepted until the position is filled.

LITIGATION ASSOCIATE
Meagher + Geer has openings in the Minneapolis office for litigation associate attorneys with zero to four years of experience. We have openings in several practice groups including employment advising and litigation and corporate real estate/business/estate planning & trusts. Applicants should have excellent academic credentials, exceptional writing skills, persuasive speaking and analytical skills, and be admitted to the Minnesota bar. Litigation experience or judicial clerkship experience preferred. Applications will only be accepted at: www.meagher.com on our Careers page and applicants are asked to submit a cover letter, resume, law school transcript and two writing samples.

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Faegre Drinker Biddle & Reath is actively recruiting a partner-track or counsel-track associate to join the transactional Real Estate practice group in our Minneapolis office. This attorney will be involved in real estate matters throughout the country. Our ideal associate candidate would have at least two years of experience in real estate-related law, including specifically drafting and negotiating agreements, leasing and financing of commercial real estate. Excellent writing skills, attention to detail, and very strong academic credentials are required. If you are looking for an opportunity with a growing, collaborative firm, please apply online including your resume, law school transcript, writing sample, and cover letter mentioning your preferred track. https://www.faegredrinker.com/en/careers/experienced-lawyers/lawyer-job-openings

LITIGATION ATTORNEY
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TRANSACTIONAL ASSOCIATE ATTORNEY

S Burns Legal PLLC is an expanding boutique law firm in St. Paul, Minnesota that provides transactional legal services to businesses in growth mode, with an emphasis on the cannabis industry. We are seeking a lawyer to join our team. The ideal candidate will effectively support clients' transactional matters by drafting contracts and other company documents, researching, drafting memos and legal opinions, among others. Flexibility in adjusting priorities, Team communication, and cloud-based file organization skills required. Salary DOE. To be successful, the candidate should be able to work on a variety of client matters, thrive in a busy, team-oriented environment, and be proactive. Qualifications: Licensed in Minnesota (or eligible). Two to five years of transactional experience. Experience in or desire to learn about cannabis law. Excellent research and writing skills. Submit a resume with two to three professional references and a transactional writing sample to: vici@sburnslegal.com.

ATTORNEY WANTED

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