

MINNESOTA

SUMMER 2023



Defense

THE NEW OMNIBUS JOBS BILL

VACATION, ALL I NEVER WANTED

STILL DELIBERATING: THE UNCERTAIN
IMPACT OF REMOTE WORK ON WOMEN
IN LAW

MDLA OFFICERS and DIRECTORS

PRESIDENT

Tammy Reno
250 S. Marquette Ave., Ste 800
Minneapolis, MN 55401
(612) 305-7552

VICE PRESIDENT

Brendan Tupa
100 South 5th St., Ste 140
Minneapolis, MN 55402
(612) 672-3668

TREASURER

Elizabeth Sorenson Brotten
250 Marquette Ave S, Ste 1200
Minneapolis, MN 55401
(612) 216-0265

SECRETARY

Stephanie Angolkar
9321 Ensign Ave S
Bloomington, MN 55438
(952) 548-7216

PAST PRESIDENT

Anthony J. Novak
30 E Seventh St #2800
St. Paul MN 55101
(651) 312-6500

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EXECUTIVE DIRECTOR

Lisa Mortier
9505 Copley Dr.
Indianapolis, IN 46260
(612) 750-8606
www.mdla.org
e-mail: director@mdla.org

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ARTICLES FROM PAST ISSUES

Members wishing to receive copies of articles from past issues of *Minnesota Defense* should forward a check made payable to the Minnesota Defense Lawyers Association in the amount of \$5 for postage and handling. In addition to the articles listed below, articles dating back to Fall '82 are available. Direct orders and inquiries to the MDLA office, director@mdla.org.

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JOIN A COMMITTEE

MDLA committees provide great opportunities for learning and discussion of issues and topics of concern with other members in similar practices. Activity in committees can vary from planning CLE programs, to working on legislation, to informal gatherings that discuss updated practice information or changes in the law. Serving on a committee is one of the best ways to become actively involved in the organization and increase the value of your membership.

If you would like to join a committee's distribution list, please update your member profile on mdla.org specifying the appropriate committee under the "Practice Type" section. You will be automatically added to the distribution list.

To learn more about an MDLA committee, please visit www.mdla.org. Meeting times and dates for each committee are listed online.

Committees available include:

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 - Membership Committee
 - Medical Liability and Health Care
 - New Lawyers Committee
 - Motor Vehicle Accident
 - Products Liability
 - Retail and Hospitality
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 - Workers' Compensation
 - Women in the Law
-



Tammy Reno

NILAN JOHNSON LEWIS

It's hard to believe I have just completed the home stretch of my MDLA presidency! I write this final letter with some sadness but also with a great deal of excitement and optimism about the future of this great organization. This year flew by, and I think for good reason – a lot has happened since August 2022.

Lisa Mortier took over as the Executive Director at the beginning of February. While the transition was not without some minor hiccups, I think Lisa adapted fabulously and is working hard to familiarize herself with us, our committees, our events, and to provide us with great ideas for moving forward given her vast experience with the Defense Trial Counsel of Indiana. I want to personally thank Lisa for her patience and hard work in the onboarding process. I know I speak on behalf of the group that we are grateful to have her as our Executive Director.

Our Associate Series has been a great success, with more sessions coming up this fall. The most recent one on September 7th was: From Surviving to Thriving: A Panel Discussion on Practical Well-Being Advice for Lawyers, which started with a 30-minute yoga session at Foley & Mansfield. In October, there will be a session on Second Chairing Your First Trial at Larson & King. Go to the website to find the details and register. These sessions are not just for associates. We can all use refreshers and who couldn't use a discussion on wellness and improving well-being in this profession? Look for announcements on the Trial Academy that we are bringing back after a long COVID hiatus. We are hoping to have it take place January 5-7, 2024. We will also be looking for volunteers to help with this valuable course. Courses like this are even more important now given not only the rarity of trials, but also given the fact newer lawyers have not been given as many, if any, opportunities to be in a courtroom. Encourage your associates to sign up for this. We also envision it being helpful to lawyers who have been in practice for some time but haven't had the opportunity to get into a courtroom and/or try a case.

The Diversity Seminar was held on May 24th at the Como Park Zoo and Conservatory, and we had an excellent presentation by the Advocates for Human Rights on Advocacy in the Immigration System. We also learned about pro bono opportunities. If you are interested in volunteering, contact me and I will connect with you the Advocates.

We had a wonderful Women's Breakfast at Windows on Minnesota on July 20th where MWL came and presented on its pandemic survey and how the legal landscape has changed since the pandemic and how it continues to affect women attorneys, in both positive and negative ways. The discussion was very insightful, applied to attorneys generally and not just to women, and was forward thinking, providing us with thoughtful discussion topics to take back to our firms on what may be working and what may not be working both in terms of work/life balance, remote/hybrid work, and growth opportunities, among other things. MWL said it is looking to possibly provide this seminar to firms. I highly recommend it. Email me if you want to be connected with MWL.

TTS from August 17, 2023, to August 19, 2023 was fantastic, featuring "Learning from the Legends", and all sessions were being led by former presidents of MDLA and other seasoned lawyers whose experience and wisdom we were honored to learn from. We also celebrated MDLA's 60th Anniversary with a Gala!

One takeaway from my tenure I wanted to share with you all is that we need to be mindful of what the Zoom era is doing to our social interactions and the growth/sustenance of our practices, particularly for younger lawyers. I'm

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guilty of taking the easy route and joining meetings and seminars via Zoom. We bill hours so it's easier to save that drive time. However, there is no substitute for meeting in person to develop relationships with our peers, grow our knowledge in our practice areas, and engage. If we are concerned that younger lawyers are not getting courtroom experience, we should also be concerned that they are not having the face-to-face interactions that were the norm pre-pandemic, particularly if the younger lawyers are working from home exclusively or even hybrid. As firm leaders, we have an obligation to teach by example. Take that extra time to attend committee meetings or other events in person. Bring your associates! Introduce them to the great MDLA members you know. Engage. We all need that.

As I hand over the reins, I want to thank our members, board, and executive committee for your support and for making this organization what it is. I feel grateful for the opportunity to have served as MDLA President. It's been an experience I will treasure.

Save The Date

January 26 - 28, 2024

Mid-Winter Conference

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Alexandria*

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WOMEN IN THE LAW

The mission statement of the Women in the Law Committee is to connect the more than 200 women who are MDLA members by:

- Providing opportunities to develop and strengthen relationships, facilitating business growth and professional development;
- Supporting women's career advancement by providing a forum for leadership and professional development; and
- Raising awareness about issues of interest to women lawyers.

For more information, email committee chairs Sarah Hoffman at shoffman@bassford.com, Jessie Sogge at jsogge@quinlivan.com, or Lauren Nuffort at lnuffort@lommen.com.

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For more information, email committee chair Steven Bader at sbader@rajhan.com.

THE NEW OMNIBUS JOBS BILL

BY TESSA MANSFIELD

On May 24, 2023, Governor Walz signed a sweeping Omnibus Jobs Bill into law. The bill makes numerous changes to Minnesota's employment laws that will significantly affect employers. Of particular note is the creation of mandatory paid sick leave for employees, a near total ban on non-compete agreements, additional protections for pregnant and lactating workers, a broadening of parental leave, and a prohibition on "captive audience" employer-sponsored meetings.

Mandatory Paid Sick Leave

One of the most significant changes implemented by the bill is the creation of mandatory paid sick and safe time for employees. Starting January 1, 2024, employees are entitled to accrue one hour of paid sick and safe time for every 30 hours worked, up to a maximum of 48 hours of sick and safe time per year, to be paid at the employee's regular hourly rate.

Employees may use their accrued sick and safe time for their own health condition and to seek medical care, including preventive care, as well as for the health condition or medical care of a family member. "Family member" is broadly defined to include virtually all types of familial relationships, including a catch-all "any other individual related by blood or whose close association with the employee is the equivalent of a family relationship."

Further, employees may use sick and safe time for absences arising from domestic abuse, sexual assault, or stalking of the employee or the employee's family member, provided the absence is to seek medical attention or counseling, obtain services from a victim services organization, seek relocation, or seek or participate in legal action related to the domestic abuse, sexual assault or stalking.

The bill also allows employees to use accrued sick and safe time for several other reasons, including if the employee's place of work is closed due to weather or public emergency or the need to care for a family member whose school or place of care has been closed, as well as where the employee is unable to work due to concerns related to exposure to and

transmission of communicable diseases, including while awaiting test result or medical diagnosis.

Employers are prohibited from interfering with, retaliating, or discriminating against employees for exercising their right to sick and safe time. Employers must also maintain employees' benefits during any sick or safe leave, including coverage under any insurance policies, and return the employee to the same rate of pay, with no interruption in the accrual of benefits or seniority.

The bill requires employers to maintain records related to employees' accrual of sick and safe time and provide those records to the employee upon request. Employers must also notify employees regarding their rights under the bill, including their entitlement to sick and safe time, the amount of time earned and how it is accrued, that retaliation is prohibited, and that employees have the right to file a complaint or bring a civil action if sick and safe time is denied or the employer retaliates against them.

The bill provides some protections for employers, including allowing employers to require "reasonable notice" by employees when the need for leave is foreseeable. However, employers may not require more than seven days' advance notice. Additionally, if the employer requires employees to provide reasonable notice, this requirement must be set forth in a written policy and a copy of the policy must be provided to employees.

The bill further allows employers to request documentation from the employee, such as a statement from a health care professional indicating the need for sick and safe time, but only when the employee uses sick and safe time for more than three consecutive days. However, employers are prohibited from requiring disclosure of details relating to domestic abuse, sexual assault, or stalking, or the details of an employee's or family member's medical condition. In addition, any records or information related to an employee or family member's medical condition or domestic abuse, sexual assault, or stalking, as well as the fact that an employee

Omnibus Jobs Bill continued on page 7



Tessa Mansfield Hirte is a partner in the Minneapolis office of Foley Mansfield PLLP. Tessa's practice focuses on employment, business, and property law. Tessa serves as the co-Chair of the MDLA Employment Law Committee. Tessa was named a Super Lawyers "Rising Star" in 2022 and to the Best Lawyers: Ones to Watch list in 2023..

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has requested or taken leave, may not be disclosed by the employer except with the employee's permission or when ordered by a court or administrative agency, or otherwise required by federal or state law.

The new bill provides protections similar to ordinances previously passed in several Minnesota cities, including Minneapolis, Bloomington, and Duluth. For example, Minneapolis' Sick and Safe Leave ordinance requires employers with more than six employees to provide employees with one hour of paid sick and safe leave for every 30 hours worked, up to a maximum of 48 hours per year. However, the bill expressly provides that it is not meant to preempt other laws that provide for a greater amount, accrual, or use of paid sick and safe time.

Employers should immediately review their sick leave and paid time off policies to ensure compliance with the new bill. The bill does not require employers to alter their policies if they currently maintain a paid time off or other sick leave policy that provides earned sick and safe time to their employees that may be used for the same purposes and under the same conditions as the new bill, provided that the policy meets or exceeds the minimum requirements of the bill. Thus, for some employers, this may only require minor changes to previously existing paid time off or sick leave policies. For others, however, this may require creating entirely new sick leave policies.

Lastly, employers will want to consider implementing policies and procedures for how the need for sick and safe time is reported to the employer, including the amount of notice that will be required. The employer should keep in mind, however, that any policies regarding notice must be provided to employees in writing.

Ban on Non-Compete Agreements

Another provision of the omnibus bill that will affect Minnesota employers is the near total ban on non-compete agreements. The new law makes any covenant not to compete contained in an employment contract executed after July 1, 2023, void and unenforceable.

The law defines a "covenant not to compete" as, "Agreements between employee and employer that restricts the employee, after termination, from performing: (1) work for another employer for a specified period of time; (2) work in a specified geographical area; or (3) work for another employer in a capacity that is similar to the employee's work for the employer that is party to the agreement." The ban applies to all individuals performing services for an employer, and expressly includes independent contractors.

The new law does contain a few exceptions to the ban. The law does not prohibit covenants not to compete that are agreed upon during the sale of business or in anticipation of the dissolution of a business. The law further explains that

it does not apply to nondisclosure agreements, agreements designed to protect trade secrets or confidential information, non-solicitation agreements, or agreements restricting the ability to use client or contract lists or solicit customers of the employer.

The bill also contains an important restriction on choice of venue and choice of law provisions in employment agreements. The new law prohibits contractual provisions that require an employee who primarily resides and works in Minnesota to adjudicate disputes outside of Minnesota or that would deprive the employee of the substantive protection of Minnesota law.

The law represents a departure from the current state of Minnesota law with respect to covenants not to compete. Currently, Minnesota law looks upon restrictive covenants with disfavor and subjects them to careful scrutiny. See *Nat'l Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 740 (Minn. 1982). However, where the covenant seeks to protect a legitimate interest of an employer, is reasonable, and does not injure the public, such covenants are typically held to be valid. *Bennett v. Storz Broad. Co.*, 270 Minn. 525, 533, 134 N.W.2d 892, 898 (1965). Minnesota courts look to four factors to determine whether a covenant was "reasonable": 1) the nature and character of the employment relationship; 2) the length of the restriction; 3) the restriction's geographic scope; and 4) whether the restraint is necessary to protect the employer's goodwill, trade secrets, or confidential information. *Midwest Sign & Screen Printing Supply Co. v. Dalpe*, 386 F. Supp. 3d 1037, 1047 (D. Minn. 2019). With the new law, these factors are no longer relevant—any covenant not to compete is void and enforceable, regardless of whether it is reasonable.

So what happens if an employer includes a covenant not to compete in an employment agreement after July 1, 2023? First, the covenant would simply be void and enforceable. Then, the bill also allows employees to seek various remedies for violations, including injunctive relief, reasonable attorney fees, and "any other remedy available." Finally, any disputes regarding such covenants would need to be adjudicated in Minnesota and Minnesota law would govern the dispute.

The ban does not extend to any employment agreements executed prior to July 1, 2023, so there is no need for employers to modify existing agreements. However, non-compete clauses should be removed from all employee agreements going forward, and any standard or form employee agreements must be revised. Further, employers should ensure that future employment agreements do not require employees to adjudicate disputes outside of Minnesota or under different laws.

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Broader Accommodations for Pregnancy, Nursing Mothers, and Lactating Employees

Minnesota employers should also be aware of provisions in the omnibus bill that broaden the protections for lactating and pregnant employees.

Currently, Minnesota law requires employers to provide reasonable break times to an employee who needs to express breast milk for an infant child for twelve months following the birth of the child. See Minn. Stat. § 181.939, Subd. 1(a). The revised law broadens this language by removing the term “breast,” and no longer restricting protections to only the twelve months following a child’s birth. The revised law now reads, “An employer must provide reasonable break times each day to an employee who needs to express milk.”

Furthermore, before this revision, an employer was not required to provide break times if it would unduly disrupt the operations of the employer. See *id.* This language has been stricken from the law, and employers are now required to provide such breaks, regardless of any disruption to operations.

Additional requirements have been added regarding spaces provided to employees for expressing milk. Under the prior version of the law, employers were required to make reasonable efforts to provide, “a room or other location, in close proximity to the work area, other than a bathroom or a toilet stall, that is shielded from view and free from intrusion from coworkers and the public and that includes access to an electrical outlet, where the employee can express milk in privacy.” Minn. Stat. § 181.939, Subd. 1(b). Employers must now ensure that such rooms or locations are also, “clean, private, and secure.”

The omnibus bill also expands the accommodations that must be provided to pregnant employees. Previously, under Minnesota law, employers were required to provide frequent breaks to pregnant employees, among other accommodations. See Minn. Stat. § 181.939, Subd. 2(a). The law now requires employers to provide not only more frequent but also longer breaks to pregnant employees.

The revised law also expands the reasonable accommodations that employers must consider, expressly listing accommodations such as a temporary leave of absence, a modification in work schedule or job assignments, and more frequent or longer break periods.

The bill also extends these pregnancy accommodation requirements to employers with one or more employees, in contrast to the previous iteration of the law, which applied only to employers with fifteen or more employees. See Minn. Stat. § 181.939, Subd. 2(e).

The omnibus bill also includes new notice requirements with respect to accommodations for both lactating and

pregnant employees. Specifically, employers must inform their employees of their rights at the time of hire and when an employee makes an inquiry about or requests parental leave. If the employer has an employee handbook, this information must also be included in the handbook.

The revised law also expressly prohibits certain retaliatory acts by employers. The previous version of the law simply stated that employers could not “retaliate” against employees for exercising their rights under this section. See Minn. Stat. § 181.939, Subd. 1(d) and Subd. 2(d). The revised law now expressly lists retaliatory acts that employers may not engage in, stating, “An employer shall not discharge, discipline, penalize, interfere with, threaten, restrain, coerce, or otherwise retaliate or discriminate” against employees.

Expanded Parental Leave Requirements

The omnibus bill also expands Minnesota’s unpaid parental leave law. Minnesota’s parental leave law requires employers to provide up to twelve weeks of unpaid leave to employees for prenatal care or incapacity due to pregnancy or childbirth related conditions, or in connection with the birth or adoption of a child. See Minn. Stat. § 181.941. The omnibus bill expands application of this law from employers with twenty-one or more employees, see Minn. Stat. § 181.940, Subd. 3, to any person or entity that employs one or more employees.

The previous version of the law also required employees to work for the employer for a minimum of 12 months and for an average number of hours per week equal to at least one half of a full time position before being entitled to leave. See Minn. Stat. § 181.940, Subd. 2. The amendment removes these length of service and weekly hour requirements. As a result, starting July 1, 2023, employers will be required to provide parental leave to any employee, regardless of length of service or number of hours worked.

Finally, the revised law also extends protections related to employee reinstatement after a leave of absence. Previously, an employee returning from parental or sick leave was entitled to reinstatement at the same rate of pay, in their former or a comparable position, and with all accrued benefits, as if there had been no interruption in their employment. See Minn. Stat. § 181.942. This protection now extends to employees who seek leave or other accommodations due to pregnancy under Minn. Stat. § 181.939.

Ban on “Captive Audience” Requirements

The omnibus bill also contains a new ban on “captive audience” requirements. Under this new law, employers

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are prohibited from disciplining or penalizing employees for declining to attend or participate in employer-sponsored meetings, where the purpose of the meeting is to communicate the employer's opinions about religious or political matters.

The New Ban

The law is aimed at prohibiting so called "captive-audience" meetings—or meetings during which employers discourage employees from unionizing and which employees are required to attend or face disciplinary action.

The law allows an aggrieved employee to bring a civil suit in district court "no later than 90 days after the date of the alleged violation." The law provides broad remedies for violations, including injunctive relief, attorney's fees and costs, reinstatement to the employee's former position or equivalent position, back pay, reestablishment of any employee benefits, and, "any

other appropriate relief as deemed necessary by the court to make the employee whole."

Employers must also post a notice of employees' rights under the new law within 30 days of the effective date, August 1, 2023. Employers are further prohibited from retaliating against employees for reporting violations of this new law.

The new law does not prohibit employers from communicating information that the employer is required by law to communicate, or which is necessary for the employees to perform their job duties. The law further does not prohibit employers from conducting meetings involving religious or political matters, provided attendance is wholly voluntary.

Potential Invalidation of the Ban

Notably, this new ban on mandatory employee-sponsored meetings is likely to face significant challenges to its validity for two reasons.

First, the provision is potentially preempted by Sections 7 and 8 of the National Labor Relations Act, which already protect employees' right to unionize and prohibit employers from interfering with, restraining, or coercing employees in the exercise of their rights. See 29 U.S.C. §§ 157-158; see also *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244, 79 S. Ct. 773, 779 (1959) ("When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.").

Second, the provision potentially runs afoul of the First Amendment of the U.S. Constitution by seeking to limit employers' free speech.

Connecticut, which passed a nearly identical law in 2022, is currently facing a federal lawsuit challenging the constitutionality of the law. See *U.S. Chamber of Commerce v. Bartolomeo, et al.*, No. 3:22-cv-1373 (D. Conn. Nov. 1, 2022). The plaintiffs, a coalition of various business groups, assert that the law is preempted by the NLRA and that it violates their First and Fourteenth Amendment rights.

Wisconsin passed a similar law in 2010, but when the law was challenged by local business groups, the state settled the lawsuit and acknowledged that the law was likely preempted by the NLRA.

A similar statute passed by Oregon in 2009 survived a challenge by the NLRB. However, the court did not reach the merits of the case, and instead dismissed the suit on ripeness and standing grounds. See *NLRB v. State of Oregon*, No. 6:20-cv-00203-MK (D. Or. Oct. 9, 2020).

It remains to be seen whether Minnesota's ban on captive audience will survive any potential challenges to its validity.

Key Take Aways for Employers

The changes to Minnesota employment law created by the Omnibus Jobs Bill will significantly alter employees' rights and employers' obligations in Minnesota. With some changes effective as early as July 1, 2023, employers must take immediate steps to ensure compliance with the new laws, including:

- Reviewing and revising written employment policies and handbooks, particularly any policies related to paid sick leave, parental leave, and accommodations provided to pregnant and lactating employees.
- Implementing a system for tracking employees' accrual and use of paid sick and safe time and for providing such records to employees upon request.
- Inspecting rooms or other areas provided to lactating employees to express milk and ensuring such spaces are clean, private, and secure.
- Revising any standard or form employment agreements to remove covenants not to compete, as well as any venue or choice of law provisions that require the adjudication of disputes outside of Minnesota.
- Providing employees with all written notices required under the Omnibus Bill, including notices regarding sick and safe time, accommodations for lactating and pregnant employees, and employees' rights related to the ban on captive audience meetings.

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Arthur Chapman is proud to have two shareholders on the MDLA Board of Directors. Shayne's practice is focused in automobile and No-Fault litigation and Steve's practice focuses in the areas of commercial transportation and general liability.

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Minneapolis, MN
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81 South Ninth Street
Minneapolis, MN 55402

ArthurChapman.com
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VACATION, ALL I NEVER WANTED

BY EMILY JOHNSON & PARKER OLSEN

A Look at Trends and Practice Pointers in Petitions to Vacate

For the sake of all parties involved, settlements are intended to be final. They allow everyone to move on and sleep soundly, knowing they are safe and sound from future litigation. Recently, there appears to be more discussion regarding pending petitions to vacate workers compensation settlements, and a focus on said petitions making their way to the Supreme Court. It made us think that it would be a good time to review the standards for vacating an award. In addition, we reviewed recent trends for petitions to vacate awards, and did a refresher on what we can do to better ensure that full and final settlements remain just that.

It is well established under Minn. Stat. § 176.461 that there are very specific limitations to undoing a supposedly final award. The Minnesota Workers Compensation Court of Appeals (“W.C.C.A.”) is limited to a four-part definition of “cause” sufficient to vacate an award on stipulation issued after July 1, 1992: (1) A mutual mistake of fact; (2) Newly discovered evidence; (3) Fraud; or (4) A substantial change in medical condition since the time of the award that was clearly not anticipated and could not reasonably be anticipated at the time of the award.

Prior to the 1992 statutory amendment, “cause” for mistake was slightly broader, and included unilateral mistake of fact, mistake of law, and in limited circumstances, lack of counsel.

Pre-July 1, 1992, awards also had a lower burden when it came to petitions based on substantial change in medical condition. The law prior to July 1, 1992, does not require that the change in condition be unforeseeable, whereas after July 1, 1992, the petitioner must demonstrate that the substantial change was unforeseeable. For now, let’s focus on the law for awards post-July 1, 1992.

Mutual Mistake of Fact

A mutual mistake of fact requires a showing that the parties shared a mistaken belief regarding a fact material to the settlement. In a mutual mistake case, “the inquiry focuses on what the situation was and what was known about it at the time of settlement.” *Franke v. Fabcon, Inc.*, 509 N.W.2d 373 (1993). These cases can range from allegations about the employee’s mental capacity at the time of settlement to the parties’ understanding (or lack thereof) of the terms of the settlement, to an error in the stipulation language that does not reflect the actual agreement. The court has consistently found that vacation based on mutual mistake is not appropriate where there was a mutual mistake of law or legal interpretation.

The easiest way to prevail on a petition to vacate for mutual mistake of fact is to show that the parties agree about the mistake. In *Jesse Wheeler v. St. Regis Paper Company and Wausau Insurance Companies* (1985), the employer and insurer filed a petition to vacate the award on stipulation based on an assertion that there was a misunderstanding

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Parker Olson is a shareholder at Aafedt, Forde, Gray, Monson & Hager, P.A. After working as a judicial clerk, he began practicing workers’ compensation defense in 2016 after graduating from the University of St. Thomas School of Law. Parker lives in Minnetonka with his wife, two children, and dog. Originally from San Francisco, CA, he is still an avid fan of the Bay Area sports teams.



Emily Johnson is a shareholder at Aafedt, Forde, Gray, Monson & Hager, P.A. She has been practicing workers’ compensation defense since she graduated from the University of St. Thomas School of Law. She did her undergraduate studies at Drake University. Emily lives in south Minneapolis with her husband and goldendoodle, Dottie Pepper. When she is not practicing law, Emily enjoys coaching high school gymnastics and cheering for Minnesota sports teams..

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between the parties with respect to the close out provision for permanent partial disability to the right lower extremity. The attorney for the employee initially opposed the petition to vacate, but later withdrew, signaling a bona fide mutual mistake of fact sufficient for the court to grant the petition.

Newly Discovered Evidence

A settlement could also be voided on the basis of newly discovered evidence. The key factor in the viability of an argument to vacate based on newly discovered evidence is that the evidence in question must not have been previously discoverable through the exercise of reasonable due diligence. The newly discovered evidence must also be relevant, admissible, and significant, such that it would have bearing on the outcome of the case. *Larson v. United Hosp.*, 53 W.C.D. 317 (W.C.C.A. 1995).

Fraud

Fraud is also a basis to vacate a settlement. The elements established by the W.C.C.A. required to establish fraud are as follows: 1) false representation of fact; 2) the representation deals with a past or present fact; 3) the fact is susceptible of knowledge; 4) the representing party knows the fact is false; 5) the representing party intends that another be included to act based on the false representation; 6) the other person acts on the false representation; and 7) the misrepresentation is a proximate cause of the damages.

Petitions to vacate based on fraud are relatively uncommon. Typically, it is the employee that is being accused of fraud they may even be accused criminally. This was the case in *Novak v. Trus Joist Macmillan*, 1996 WL 346323 (W.C.C.A. June 10, 1996). In *Novak*, the employee made a claim for temporary total disability benefits for occupational asthma. At his deposition, the employee testified that he had only worked for two days and had otherwise not earned any income for the relevant period of time. The employer and insurer agreed to pay a sum in full and complete settlement of the claim for temporary total disability benefits. However, later that year, a coworker for another employer provided testimony that the employee had been working and was working at the time the employee's original deposition had been taken. Criminal charges were brought against the employee in Crow Wing County, Minnesota, alleging that the employee committed a felony offense of workers' compensation fraud. The employee pleaded guilty. The stipulation asserted that the employee had received no wages and had been totally disabled since his date of injury. The court found that these statements were untrue, and the employee falsely represented past facts and knew the representations were false. Counsel for the employer and insurer stated that the employee's false representations

induced them to make payments of workers' compensation benefits to the employee. Accordingly, the court vacated the award on stipulation.

In contrast to the above, alleged fraud that occurs after the award is not grounds to vacate. In *Mehta v. Meldisco*, slip op. (W.C.C.A. Oct. 26, 1995) the insurer conducted surveillance on the employee after the settlement and discovered the employee was working. The employer brought a motion, in part, on the grounds of fraud. The employer and insurer contended that the employee was working, and that she fraudulently misrepresented that she was permanently and totally disabled. However, the evidence offered solely relied on alleged misrepresentations and/or fraudulent activities which occurred more than a year after the agreement was entered into by the parties, and, the court did vacate the settlement.

Substantial Change in Medical Condition

Most litigation regarding petitions to vacate involve substantial changes in medical conditions. To vacate an award based on a change in medical condition post-July 1, 1992, there must be a substantial change in medical condition occurring since the time of the award that was clearly not anticipated and could not have been anticipated at the time of the award. These cases are evaluated based on the factors set forth in *Fodness v. Standard Café*, 41 WCD 1054 (WCCA 1989). The Fodness factors include, 1) change in diagnosis; 2) change in employee's ability to work; 3) additional permanent partial disability; 4) necessity of more costly and extensive medical care/nursing services than initially anticipated; 5) causal relationship between the injury covered by the settlement and the employee's current worsened condition; and 6) contemplation of the parties at the time of settlement. These petitions are usually brought by the employee and contain allegation such as a change in the employee's diagnosis, amount of permanency or ability to work. Some petitions under this ground are inevitable, i.e., where an employee develops a condition stemming from a work injury after a settlement that no one could have predicted.

In determining whether the Fodness factors have been satisfied, it is at the discretion of the court to weigh the petition to vacate and the factors according to the facts of each case. *Hudson v. Trillium Staffing*, slip op. (WCCA Oct. 25, 2018), citing *Krebsbach v. Lake Lillian Coop. Creamery Ass'n*, 350 NW2d 349, 353, 36 WCD 796, 802 (Minn. 1984). By way of example, in *Haniff v. Wirsbo Co.*, slip op. (WCCA Jul. 2, 2012), the Stipulation closed out all benefits for injuries to the abdomen, cervical, thoracic, and lumbar spine, and included any and all consequential injuries. Future medical care for the abdomen, cervical thoracic, and lumbar spine

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were left open. The employee underwent a cervical spine fusion two years later. Two years after the surgery, he filed a petition to vacate the award. The W.C.C.A. agreed that because the employee was aware he had cervical spine issues prior to settlement but did not allege an injury to his cervical spine, it was not a change in diagnosis, but was a completely new diagnosis, which is not a basis for vacating the stipulation.

Most cases are very fact-specific and tend to wind up in a grey area, especially since the holding of *Ryan v. Potlatch Corp.*, 882 N.W.2d 220 (Minn. 2016). In *Ryan v. Potlatch Corp.*, an employee reached a settlement for a back injury claim on a full, final, and complete basis. The employee subsequently developed a consequential psychiatric condition, alleged to stem from his back injury. He brought a claim for this condition, and the employer argued that the claim was precluded by the settlement. It was further asserted that the employee would have to vacate the settlement in order to pursue the claim. The case went to the Minnesota Supreme Court, and they ultimately agreed with the employer. In their final opinion, the Supreme Court noted that a workers' compensation settlement agreement may close out not only the workers' compensation injury that is the subject of the agreement, but also conditions and complications arising out of the workers' compensation injury. It is not necessary that the condition or complication be specifically referenced in the settlement agreement. The agreement, however, must resolve not only the workers' compensation injury, but also any conditions or complications that arise out of the injury that were, or should have been, reasonably within the contemplation of the parties at the time of the agreement.

Trends?

With these fundamentals in mind, have we been seeing any trends in claims for vacated awards in Minnesota? As noted above, the vast majority of petitions to vacate awards are filed based on substantial change in medical condition. Since 1999, the W.C.C.A. database contains a total of 21 petitions to vacate cases based on "fraud," seven based on "mutual mistake of fact," 18 based on "newly discovered evidence," and 792 based on "substantial change in condition." While many of the petitions contain multiple arguments, substantial change in condition has a clear majority.

Since the landmark *Ryan v. Potlatch Corp.* decision in July 2016, there have only been 22 decisions (not referred back to OAH for evidentiary hearings) on petitions to vacate on the "substantial change in condition" ground, which would actually suggest a slowing trend when you compare that to the total number since 1999. Of those petitions since 2016, 11 were granted and 11 were denied. While these statistics do not suggest any clear trend in the rate at which petitions have been granted recently, there was an interesting note by the Honorable Judge Sean M. Quinn in a recent W.C.C.A. decision:

In *Leadens v. Diversified Distributors*, (W.C.C.A. June 25, 2021), a concurring opinion by Judge Quinn discussed the impact of *Ryan v. Potlatch* on petitions to vacate that are based on an alleged substantial change of condition resulting from a consequential injury or condition. The employee in that case asserted a consequential injury to a previously unclaimed body part as a basis to vacate the award under an "unanticipated change of condition." In his opinion, Judge Quinn noted, "I question whether this court could vacate the Award on Stipulation due to any post-settlement consequential injury given the Minnesota Supreme Court's holding in *Ryan v. Potlatch*." Judge Quinn wrote that because *Ryan* held that consequential injuries are "capable of being contemplated at the time of settlement[,] they would not necessarily represent an unanticipated substantial change in medical condition. This rationale suggests less petitions to vacate being granted on this ground when a consequential injury is claimed. However, there are certainly still many safeguards that employers and insurers should take when settling cases to make vacated awards even less likely.

Tips

Through daily practice, adjusters and attorneys should consider the potential of a future petition to vacate at the time settlement. This mindset can help avoid surprises in future litigation or pitfalls when outlining the agreement terms. While certainly there are times when a vacated award seems inevitable given the progression of an employee's condition, there are also a few practice tips parties can utilize when engaging in settlement talks and drafting stipulations for settlement.

First, it is important to know what evidence the W.C.C.A. will focus on in evaluating a petition to vacate an award. The W.C.C.A. looks not only at the evidence at the time of filing of the petition, but also the evidence that existed at the time of settlement. Parties should obtain and possess all medical records possible to assist in documenting the employee's diagnoses, restrictions, permanent partial disability ratings, medical recommendations, and causation opinions. This evidence will be vital not only in drafting the stipulation for settlement, but also in assessing the likelihood that an award could be vacated. It is also important to obtain statements, wage history, employment history, IME Reports, and deposition transcripts, which will help document the parties' anticipation or understanding of the condition(s) at the time of settlement. The more information the parties have, the less likely it will be that there is any dispute as to whether there was a mutual mistake of fact and the more likely it will be that a fraud allegation the claimant could be supported.

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Moreover, when drafting stipulations for settlement, it is important for parties to be as thorough as possible outlining the claims and contentions of each side as well as documenting defenses for each claimed benefit. As required under Minn. R. 1420.2050, Subp. 1, stipulations should also be accompanied by supporting documents, including relevant medical reports or documents. As noted in *Captain v. MTC*, (W.C.C.A. 1983), a closeout of future medical or rehabilitation benefits will not be permitted without a showing of the propriety and necessity for such a settlement.

The more information that can accompany a stipulation, the more likely the settlement will be approved at the compensation judge level; and presumably the less likely to allow it to be vacated later. Also, the more thoroughly a stipulation is written, the less likely key information or evidence becomes lost or forgotten down the road. This is especially true and important in cases where a significant amount of time has passed between the award and a subsequent petition to vacate. The additional benefit to this approach for stipulations is that by outlining all known conditions and claims clearly in the stipulation, it becomes less likely that an employee will be able to argue some condition addressed was not reasonably or could not have been reasonably anticipated, especially in light of the *Ryan v. Potlatch* decision.

Evidence is not preserved forever, especially in claims that have closed after an award is issued. Therefore, claims that are not referenced or outlined in the Stipulation can become difficult to support or recreate years later. The length of time that a party is required to store information depends on discovery rules, the status of the case, and the internal regulations of the employer and insurer.

Another example of the importance of being thorough can be drawn from the case of *Haniff v. Wirsbo Co.*, No. WC12-5402 (W.C.C.A. July 2, 2012) referenced above. The court in that case held that a cervical injury was not the subject of a settlement and that there was no need for a petition to vacate. However, in many cases, it has become standard practice for parties to negotiate as part of the settlement to include broader language that closes out any and all dates of injury and conditions that an employee has ever sustained with an employer, whether listed in the stipulation or not. This is in line with the *Ryan* rationale summarized above. Of course, the possible dispute with this language is that an employee could claim he or she did not know of said injury, or that it developed after the settlement and could not have been anticipated. To limit this risk, it is typically best practice to clearly define and list all body parts or conditions being closed out as well as any other specific dates of injury in the stipulation. This is true even where the employee has seemingly recovered from one or more of the conditions listed in the stipulation because it can then later be more difficult for an employee to argue that any change in condition could not have been anticipated.

It is also important to review the initial medical records closely. Oftentimes, an injured employee will complain of pain in an area of his or her body at an initial emergency room visit, but then not reference it later in treatment. Listing out each and every body part where the employee had symptoms after a work injury can avoid post-settlement litigation or disputes like those addressed in *Haniff*.

Whenever a settlement is reached, it is imperative to have an attorney draft the stipulation. It is also equally important to ensure that the employee fully understands the terms of the settlement. Special attention should be given to the employee's understanding of the settlement terms when there is a pro se employee claimant. The Workers' Compensation Court of Appeals has wide, but not unlimited, discretion in determining whether to vacate an award. Reference is often made to fundamental "fairness" as the overriding principle for determining whether the award should be set aside. (However, unfairness alone provides insufficient cause to vacate.) *Fodness v. Standard Cafe*, 41 W.C.D. 1054 (W.C.C.A. 1989). Where both the employer/insurer and the employee are represented by counsel, any settlement is deemed conclusively reasonable and fair subject to a judge's discretion if medical or rehabilitation is being closed out. The standard is higher in cases where the employee is not represented and will be subject to a higher level of scrutiny by the compensation judge. Even in those cases where a settlement with a pro se employee is approved, significant litigation can ensue with a later petition to vacate, especially if it is asserted that the employee did not have a full understanding or awareness of conditions that could later arise from the closed-out injury.

In conclusion, it is vital for employers and insurers to be aware of the grounds upon which an employee could bring a petition to vacate an award. Understanding the standard for such a claim helps defense parties predict and limit future risk through diligence at the time of settlement. While there is no obvious trend in vacations of awards, it is important to monitor and stay up to date on recent case law. Being thorough and transparent at the time of settlement can avoid costly litigation and significant exposure in the future on what seemingly was a closed claim. After all, this is not the kind of vacation the Go-Go's had in mind.

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STILL DELIBERATING: THE UNCERTAIN IMPACT OF REMOTE WORK ON WOMEN IN LAW

BY LYNNE McMULLEN

Three-and-a-half years after the COVID-19 pandemic restructured the way work is performed in law and many other fields, workers and employers are still considering how remote-work environments may benefit or hinder working women. In a 2022 survey conducted for the American Bar Association, 56% of women respondents reported that hybrid and remote-work offerings made it easier for them to balance personal and professional obligations. American Bar Association, ABA Survey: Most lawyers want options for remote work, court and conferences, <https://americanbar.org/news/abanews/aba-news-archives/2022/09/aba-survey-lawyers-remote-work/> (last accessed September 14, 2023, 4:30 P.M.). Whether that number appears surprisingly low, shockingly high, or about as expected likely depends on the reader's perspective and her family composition.

For many caregiving lawyers who work remotely, eliminating the daily commuting hours has created a sense that the workday never ends. Remote work has made it easier to complete chores like doing daily laundry, attending school events and sports practices, arranging playdates for their children, and accomplishing errands for their families. Women lawyers surveyed by the American Bar Association were significantly more likely than men to report taking on more childcare responsibilities during the COVID-19 pandemic. Stephanie Scharf and Roberta D. Liebenberg, *Practicing Law in the Pandemic and Moving Forward: Results and Best Practices From a Nationwide Survey of the Legal Profession*, American Bar Association 12 (2021) <https://www.americanbar.org/content/dam/aba/administrative/digital-engagement/practice-forward/practice-forward-survey.pdf>. Women responding to the same survey also reported a higher rate of disruption in

their workdays due to childcare responsibilities than their male counterparts. *Id.* at 18. Without the trek to and from work every day separating their professional lives and their family responsibilities, many women lawyers reported increased stress and experiencing higher levels of doubt about whether full-time work was a valuable use of their time. *Id.* While remote and hybrid work arrangements provide more opportunities for mother lawyers to spend time with their children, these opportunities may increase pressure to be constantly available for families, clients, and coworkers.

Among women without caregiving responsibilities, remote and hybrid work arrangements have allowed greater flexibility, but the transition to out-of-office work arrangements has not been without challenges. By lessening the impact of seasonal weather and traffic on lawyers' commutes to court, client meetings, and mediation sessions, remote work has given all lawyers more time to devote to hobbies, exercise routines, and friendships. In return, remote work has presented all lawyers with challenges to overcome in their practice. Regardless of family status or gender, all lawyers are faced with challenges to protecting client confidentiality in accordance with Minnesota Rule of Professional Conduct 1.6 when using home office spaces and on personal internet networks. Finding suitable spaces for client meetings has also forced lawyers of all genders and caregiving statuses to get creative, opting for private conference rooms at local libraries, outdoor meetings at infrequently used parks, and even visits to clients' homes. The difficulty of finding safe, appropriate meeting spaces can feel especially stressful for women lawyers who may feel greater safety concerns than their male colleagues when meeting clients in unsecured spaces.

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Attorney Lynne McMullen is licensed in Minnesota and Wisconsin. Lynne started practicing in Wisconsin in 2017 and is currently based in St. Paul, Minnesota. Lynne works within the Claim Litigation Counsel Section of the Law Department of State Farm Mutual Automobile Insurance Company.

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Although practice has changed for all lawyers in the era of “Zoom court,” women are substantially more likely than men to express worry about how employers’ view their productivity and dedication when they choose to work remotely or on a hybrid basis. *Id.* at 18. Whether women’s fears that remote and hybrid work arrangements will negatively impact their ability to engage new clients, participate in complex projects, and secure leadership positions are founded remains to be seen in years to come. Across the legal field and other industries, remote workers consistently report increased happiness, better mental wellbeing, and self-perceived increases in productivity compared with their experiences onsite. Bryan Robinson, Ph.D. Remote Work is Here to Stay and Will Increase into 2023, Experts Say FORBES, <https://www.forbes.com/sites/bryanrobinson/2022/02/01/remote-work-is-here-to-stay-and-will-increase-into-2023-experts-say/> (last accessed September 14, 2023, 4:00 PM). As remote and hybrid work arrangements continue to evolve, the balance between happiness and fulfillment, mental wellbeing and advancement will continue to present unique tradeoffs and challenges for employers and women lawyers alike.

My views expressed herein do not necessarily reflect the view and position of State Farm and they are given in my individual capacity.

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DEIA OPPORTUNITY – JOIN A NEW UNLEARNING RACISM BOOK GROUP

What: Unlearning Racism Book Group

When: 1 x Monthly

Where: Usually virtual, but potential coffee or happy hour meet ups

Who: You! Moderated by attorney Rachel Beauchamp, Cousineau Malone P.A., as part of MDLA’s Diversity Committee’s mission to promote diversity, equity, inclusion, and accessibility (DEIA).

Minnesota is well-known for its lack of diversity in both race and culture, and that issue is certainly regularly discussed in the legal field, with most law firms taking an active interest in fostering diversity. No matter how much we value the concept of diversity personally, and professionally, we cannot create diversity out of thin air; and, we simultaneously have a duty to work towards diversity, equity, and changing culture; educational materials about fostering diversity urge firms to embrace the concepts and education that support a diverse work environment regardless of the actual known racial and cultural makeup of their specific employees.

White attorneys (and white individuals in general) of all ages and career stages often ask “what can I do? How can I be a part of changing culture and creating environments where diversity is valued and celebrated?” This question is the first step! However, the emotional labor of answering this question cannot be placed on our BIPOC colleagues—it is our own job. The resources necessary to push ourselves forward in education and growth already exist.

With this Unlearning Racism book group, the goal is to push ourselves towards unlearning racism education in a casual, open, accepting, and also personally challenging group, by reading books recommended by BIPOC authors for individuals who are interested in personal self-growth, as well as the professional goal of changing law firm (and societal) culture. This book group will aim to meet approximately once a month via internet meeting service; and, to read books at a relatively slow pace to acknowledge the emotional intensity of this work, the need for real reflection on the reading we do, and the reality of the high-paced-demands already placed on us by our legal careers.

This group is designed towards educating white-presenting individuals and embraces the goal of self-accountability towards unlearning racism work without reliance upon BIPOC individuals to answer questions, share painful experiences, or carry the emotional labor of this process; however the group is absolutely and invitingly open to any and all who wish to be involved in this type of work! This group is envisioned to be a long-term social work group that will take place over time, not a one-stop lunch and learn. Most meetings will be via electronic meeting for convenience, but with a potential happy hour, coffee shop, or other in-person meeting from time to time as well. The group will be moderated by attorney Rachel Beauchamp, with insight and aid from the MDLA Diversity Committee. We will also be asking for elimination of bias CLE credits for this group. There may be sponsorship opportunities available for law students who wish to join but cannot afford to purchase the books. If you are interested in joining, please send an email to director@mdla.org asking to be added to the Unlearning Racism email group.

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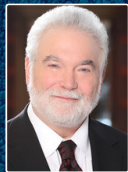
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The Voice of the Defense Bar

BY JESSICA SCHWIE

KENNEDY & GRAVEN, CHTD

MDLA DRI State Representative



Hello from DRI! I had an amazing time attending the Trial Techniques Seminar in August along with the Gala. There were also other DRI representatives attending as well to share time with friends, colleagues, and clients while learning how to be a better legal professional in Minnesota and across other states.

Right now, DRI is offering a new membership opportunity to current MDLA members. Now through September 30, 2023, members of MDLA who have not been a member of DRI in the last five years, will be able to join DRI for the first time at no cost for the first year. This is a great time for new lawyers to secure the additional advantages of being a member of DRI. MDLA provides you with timely skills and knowledge for litigating matters in Minnesota; DRI brings the additional knowledge and support to your practice through the expansive expert data bank and the Center for Law and Public Policy which provides information and arguments on new legal trends unfolding across the nation.

Registration is now open for DRI's annual meeting taking place in San Antonio, Texas. Entertaining speakers such as storyteller and NPR National Political Correspondent, Mara Liasson, whose reports can be heard regularly on NPR's award-winning newsmagazine programs Morning Edition and All Things Considered, will lead seminar discussions. Federal appellate judge Jeffrey Sutton will also speak and provide insight on handling federal appeals effectively. Please mark your calendar for October 25-27, 2023.

In the meantime, a number of substantive law seminars are scheduled—from trucking law to employment to

medical claims and a variety of other areas of practice. More information on the seminars and how to develop your practice and your network in certain substantive areas can be found at DRI's website. For those that do not have the time and resources to travel, webinars in the various practice areas are available and sections, such as the Government Liability Committee, will be hosting Town Hall meetings, zoom happy hours, and remote coffee chats where practitioners come out of isolation to gather for comradery and to engage in vicarious legal research and strategy.

For more information on the membership opportunities, upcoming meetings and access to resources, visit dri.org or reach out to me at jschwie@kennedy-graven.com and we will get you connected.

In closing, the last time I connected with you here, we were kicking off the New Associate Training series being put on by MDLA. It is now drawing to an end for this season. I appreciated the opportunity to meet new lawyers and to reconnect with those I have met before. It felt good to share wisdom amongst a group of people gathered for the purpose of developing the law and good arguments. I continue to look forward to seeing you at the upcoming MDLA and DRI events that band us together and bring us personal and professional growth.

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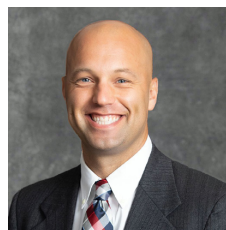
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MDLA CONGRATULATES—SEND US YOUR VICTORIES!

The “MDLA Congratulates” column recognizes significant defense victories at summary judgment, trial, or appeal by MDLA members. To be included in the next edition, send a short, one-paragraph summary of the case including the MDLA member attorneys involved, the type of victory, and the issues presented to director@mdla.org by December 1, 2023. Inclusion in the MDLA Congratulates column is subject to space limitations, and the MDLA Editorial Committee reserves the discretion to determine which cases will be included in the column and/or to shorten submissions as appropriate.

Stephanie Angolkar and Jason Hiveley of Iverson Reuvers obtained a defense verdict in a Section 1983 use of force case in *Anderson v. Vanden Avond*, No. 20-cv-1147 on August 9, 2023 in United States District Court of Minnesota. The jury trial was heard in Duluth before the Honorable Kate Menendez. The jury determined the use of a less-lethal beanbag round to take a felony domestic suspect into custody during a standoff was not excessive force, despite the suspect’s injury.

Robert and Patria Sanden, et al, v. Jerame and Suzanne Tysdal, and Otter Tail Township, 56-CV-20-1772.

This case is the product of a number of legal theories developed throughout the decades regarding the conflicting rights of the public and private landowners in unopened platted public roads and the responsibilities and rights that accrue to a municipality upon plat dedication of such a roadway. Plaintiff brought claims against the Township (represented by Jessica Schwie and Josh Devaney of Kennedy & Graven) arguing that it has the responsibility to maintain a strip of land as a roadway as it was dedicated to the same effect in the plat. Plaintiff also brought claims against their neighbor, arguing that the neighbor was blocking the roadway by placing various items in it or parking their car or shoveling snow to block it. The neighbor brought claims against the Township arguing that the road did not exist. We argued at summary judgment that the roadway exists despite not being opened barring an affirmative action from the Township to destroy the same, and that the Township has no duty to maintain or police it until it opens the roadway, which it may do at a time of its choosing, and prevailed on those arguments, leaving the only remaining claim for trial as Plaintiffs’ claim against a neighboring property owner for obstructing the use of the roadway. In Minnesota, as we established at summary judgment, a property owner adjacent to an unopened platted public road has the right to use that roadway as their own property, up to the centerline, so long as their use is not inconsistent with the public’s rights to use of the land as a roadway - historically a high bar. At trial, though, we prevailed in finding that both permanent and temporary objects placed in the roadway are an inconsistent use and therefore must be removed. This case, reaching questions of existence, maintenance, and use of unopened platted roadways is a distillation of all of the concepts Township attorneys have been championing for decades.



Minnesota Defense Lawyers Association
9505 Copley Dr.
Indianapolis, IN 46260
(612) 750-8606
www.mdla.org