Torts in the Courts

Mitchell Hamline School of Law Alumni CLE

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No-Fault Automobile Insurance

Schroeder v. Western National Mutual Ins. Co., 865 N.W.2d 66 (Minn. 2015)

- Schroeder was disabled following an automobile accident. While she was disabled she maintained her own home, although she was not able to perform the standard household duties, such as yard work, laundry, and vacuuming.
- No one assisted her.
- She made a claim for $3,400 in replacement service loss against her insurer, Western National.
- Because she was primarily responsible for household care and maintenance, she argued that she was entitled to recover for the "reasonable value" of the home services and maintenances that she could not perform.

- The issue was “whether a person injured in an automobile accident may recover the reasonable value of household services under Minn. Stat. § 65B.44, subd. 5 (2014), if those services were not replaced or performed during the period of disability.”
- The supreme court noted that “loss” and “economic detriment” are equivalent terms that are effectively defined in section 65B.44 by the six categories of loss for which compensation is available.
- One of those categories is replacement services loss. If the statutory standard is met, “loss” has been sustained within the meaning of the No-Fault Act.
- The court held that Schroeder sustained “loss” in the form of replacement services loss, even though she did not incur any actual expenses and even though no one performed any services for her.

State Farm Mut. Auto. Ins. Co. v. Lennartson, 872 N.W.2d 524 (Minn. 2015)

- Lennartson initially received medical expense benefits from State Farm in the amount of $11,671.16, before State Farm terminated benefits following an independent medical examination.
- She then brought a negligence action against the driver of the other vehicle.
- A jury awarded her $23,910.11 in past medical expenses.
- The district court offset the medical expenses paid by State Farm from that amount.
- Lennartson then petitioned for no-fault arbitration, seeking to recover for the medical expenses that the jury had awarded her in the negligence action.
- The district court held that collateral estoppel barred her from recovering in arbitration the same damages she received compensation for in her lawsuit against the other driver.
- The court of appeals reversed.
- The supreme court reversed the court of appeals in holding that the No-Fault Act did not bar the plaintiff from recovering for her medical expense loss in the arbitration proceeding, even if it meant a double recovery for that loss.

- State Farm argued that Lennartson did not incur “loss” because she did not meet the threshold requirement of “economic detriment” because she had previously been compensated for her medical expenses in the tort action, and that allowing her to recover for that loss in arbitration would be an impermissible double recovery. The supreme court rejected both arguments.
- The Act defines “loss” as “economic detriment resulting from the accident causing injury.” “Loss” consists only of six categories of loss, including “medical expense.” Relying on its decision in *Schroeder*, the court held that there is no requirement that the claimant independently prove “economic detriment” in order to have reimbursable loss.

- The supreme court concluded that "[i]n light of the No–Fault Act's provision that "loss" accrues as medical expense is "incurred" and consistent with our construction of that provision in *Stout* . . . we hold that an insured's recovery of her claimed past medical expenses under a negligence theory does not reduce or eliminate her "loss," which accrued to her when the expenses were billed. Accordingly, Lennartson suffered a medical-expense "loss" within the meaning of the No–Fault Act."

Sleiter v. American Family Insurance Co. , 868 N.W.2d 21 (Minn.2015)

- Sleiter was one of 19 people injured when the school bus he was riding in was struck by an at-fault driver.
- The at-fault vehicle was insured with a liability limit of $60,000 per accident. The school bus had $1,000,000 in UIM coverage.
- Sleiter was insured under his family's auto insurance policy, which had UIM limits of $100,000. After the accident the insurers of the school bus and at-fault vehicles tender their policy limits to the district court, which the appointed a Special Master to assess the damages of each accident victim.
- The Special Master found that the total damages for all of the accident victims was $5,302,800. The Special Master determined that Sleiter's damages totaled $140,000.
- There was a significant gap between the insurance coverage and total amount of damages sustained by all the accident victims.
- Because of that the Special Master concluded that the 19 victims should share in the insurance proceeds on a percentage basis.
- The Special Master determined that Sleiter's pro rata share was $1,600.33 from the at-fault vehicle's policy, and $34,543.70 from the policy covering the school bus.

- Sleiter's damages exceeded the available UIM coverage on the bus. He then sought to recover UIM benefits in the amount of $65,456 (the difference between the amount paid under the policy covering the school bus and his actual damages).
- Following the accident, the carriers for the at-fault vehicle and the school bus tendered their respective policy limits to the district court.
- The district court appointed a Special Master to assess the victims' damages and determine the value of each claim.
- The Special Master found that the damages for the 19 victims totaled $5,302,800.
- With respect to Sleiter, the Special Master found that his damages totaled $140,000.
- Due to the substantial gap between the total damages and the tendered insurance limits, the Special Master concluded that the 19 victims would share on a percentage basis in the insurance proceeds.
- After calculating the percentage basis for each claimant, the Special Master found that Sleiter's pro rata share was $1,600.33 from the at-fault vehicle's policy, and $34,543.70 from the school bus's policy.
- The district court approved the Special Master's findings and Sleiter received his respective share of the proceeds, which totaled $36,144.03.

- Because Sleiter's damages exceeded the insurance coverage available to him under the pro-rata distribution, Sleiter sought $65,456 in excess UIM benefits from American Family, which insured the Sleiter family vehicle for up to $100,000 in UIM coverage.
- American Family denied coverage, claiming that, pursuant to Minn. Stat. § 65B.49, subd. 3a(5) (2014), of the Minnesota No–Fault Automobile Insurance Act (No–Fault Act), Sleiter's excess UIM coverage ($100,000) did not "exceed" the UIM coverage provided by the school bus's insurance ($1,000,000). American Family, therefore, denied Sleiter's claim for excess UIM benefits.

- After American Family denied Sleiter's claim, Sleiter brought this action, seeking the difference between the recovery he received and his UIM policy limits, or $65,456, from American Family.
- The district court and court of appeals concluded that he was not entitled to UIM benefits because his policy limit of $100,000 was not greater than the $1,000,000 UIM "coverage available" to him under the school bus policy. The supreme court reversed.

- Sleiter argued that the “coverage available” means the actual coverage available rather than the policy limits. American Family argued that the term referred to the policy limits available.
- The supreme court concluded that both interpretations were reasonable and that the statute was therefore ambiguous. The court saw Sleiter’s position as “the more natural reading because it is more consistent with the legislative purpose of preventing injured passengers from being undercompensated,” and “because it allows individuals such as Sleiter to access their personal insurance coverage giving them nothing more than access to the coverage they have selected and purchased.”

Hegseth v. American Family Mutual Insurance Group, 877 N.W.2d 191 (Minn.2016)

- The issue was when the statute of limitations on an excess UIM claim began to run.
- The court adhered to its position in *Weeks v. Am. Family Mut. Ins. Co.*, 580 N.W.2d 24 (Minn.1998), and held that the statute of limitations begins to run on the date of the accident.
- In so holding, the court refused to overrule *Weeks* and, in addition, held that resolution of the primary UM claim is not a condition precedent to bringing an excess UM claim.

- Justice Lillehaug concurred because the court's decision adhered to established precedent in *Weeks*, but he saw a "silver lining" in the court's decision:
  - Today the court announces, in no uncertain terms, that a claim made in good faith against an excess UM insurer is fully ripe as of the date of the accident. The court thereby gives clear notice to excess UM insurers that they may no longer contend that injured parties' claims to excess coverage are legally premature. Now injured parties may press excess UM insurers to join primary UM insurers at the settlement table, upon pain of lawsuit.

Products Liability

Montemayor v. Sebright Products, Inc., 2016 WL 1175089 (Minn. Ct. App. Mar. 28, 2016)

- The plaintiff was injured in an accident involving a machine called a high-density extruder, which was used by his employer, VZ Hogs, LLP, to extract liquid from food waste, which was then used for hog feed.
- The extruder stopped working and a control light came on, indicating a problem existed. The plaintiff and his co-employees were untrained in servicing the extruder. The plaintiff was in the hopper trying to unjam it when another employee started the extruder, causing a hydraulically powered door to descend on his legs, necessitating the amputation of both legs above the knee.

- Montemayor brought suit against Sebright alleging negligent failure to warn and strict liability for defective design.
- Sebright moved for summary judgment. The district court granted the motion, holding that the plaintiff could not establish a causal link between the failure to warn and his injuries because he neither saw nor read the warnings prior to the accident and because he was unable to establish that the extruder was defective when it left Sebright's control.
- The court of appeals affirmed.

- The court first held that Sebright was not liable because the injury Montemayor sustained was not foreseeable.
- "The underlying principle of reasonableness guides our determination of whether an accident was foreseeable. In determining foreseeability, we 'look at whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivablepossibility.' . . We also consider whether "the possibility of an accident was clear to the person of ordinary prudence.' *Domagala v. Rolland*, 805 N.W.2d 14, 27 (Minn.2011) (quotation omitted). Stated another way, a manufacturer has a duty to design a product that does not present an unreasonable risk of harm associated with 'reasonably foreseeable use[s]. . . *. Here, that requires us to determine whether it was reasonable for Sebright to expect an individual to be inside the extruder while it was in operation."*

- “The district court reasoned that while some of the individual circumstances that led to the injury were foreseeable, the ultimate accident was not. And the court concluded that the constellation of events that culminated in the accident was not foreseeable. “
- Montemayor argued that the district court erred in concluding that the ultimate accident was not foreseeable and that “the constellation of events that culminated in the accident was not foreseeable.”
  - He argued that the district court inappropriately focused on the precise manner in which the accident occurred, rather than whether the possibility of an accident *was clear to a person of ordinary prudence*.

- The court of appeals rejected the argument:
  - "In determining whether a duty to warn exists, courts may determine that no duty exists when the connection between the alleged negligent act and the accident 'is too remote to impose liability as a matter of public policy." . . . Evaluating whether the causal connection is too remote necessarily requires consideration of all relevant circumstances.' (quoting *Germann v. F.L. Smithe Mach. Co.* , 395 N.W.2d 922, 924 (Minn.1986)).

- Montemayor also argued that the events leading up to the accident were foreseeable because the extruder was known to jam and that it would therefore be reasonable for someone to enter the machine to fix the problem.
  - He relied on *Parks v. Allis-Chalmers Corp.*, 289 N.W.2d 456 (Minn.1979) for the proposition that it is foreseeable for product manufacturers to foresee that someone would be injured while attempting to clean a machine that is either operational or starts unexpectedly.
    - In that case the plaintiff lost part of his right arm when he got it caught in a corn forage harvester while trying to unclog corn stalks in the harvester.
    - The supreme court stated that "It was for the jury to determine whether defendant, knowing that manual unclogging would be required and that some users would leave the power connected while unclogging and thereby incur a risk of harm, exercised reasonable care with a machine design which presented no obstacle to unclogging with the power connected." *Id.* at 459.

- The court of appeals also rejected that argument.
  - The court concluded that Montemayor did not present any evidence that entering the discharge chute to manually unjam the extruder with the power connected served any purpose.
  - The court also concluded that “the circumstances leading up to his accident are not within a reasonable product manufacturer’s sight.”
  - “In sum, Montemayor and his fellow employees were not only violating numerous standard workplace-safety rules and disregarding Sebright’s warnings, but there was a significant breakdown in communication that led to multiple employees simultaneously attempting to clear the jam using different methods. While the constellation of circumstances that resulted in this tragic accident may have been within the realm of conceivable possibility, it is too remote to impose liability on Sebright as a matter of public policy.”

- Because the court disposed of the case based on its finding of no duty it did not reach the issue of whether Sebright would be liable for failure to warn.
  - The court noted in a footnote, however, that it agreed with the district court's conclusion that the plaintiff was not entitled to recover for failure to warn because the plaintiff did not read the warnings on the machine. If the warning isn't read there is no causal link.

Tropple v. Black & Decker, 2015 WL 4992011 (D. Minn. Aug. 20, 2015).

- The plaintiffs brought suit against Black & Decker for injuries Gerald Tropple sustained because of a small angle grinder they allege was defective in design and because of inadequate warnings. The evidence established that the grinder did not contain a no-volt release, which disconnects the lock-on switch if power is interrupted.
- The district court denied the defendant's motion for summary judgment on the design defect claim, concluding that the evidence was sufficient to create a fact question as to whether the grinder in question was defective in its design.

- The district court granted the motion for summary judgment on the failure to warn claim, however, because the plaintiff stated that he did not check to see if the grinder was in the “on” position, but also that he did not read the warning on the grinder, which referred him to the warnings in the manual about inadvertent startups.
- The court concluded that Minnesota law was clear in holding that failure to read a warning on a product precludes liability on a failure to warn claim as a matter of law.
  - If the warning isn’t read there is no causal link.

Punitive Damages

Hooser v. Anderson, No. 06–CV–12–62, 2016 WL 1619464 (Minn. Ct. App. Apr. 25, 2016)

- The lawsuit arose out of a landlord-tenant dispute
- Hooser and Heisinger rented a house from Anderson. They complained about the conditions in the house. When Anderson failed to correct the conditions they withheld rent. Anderson attempted to evict them but an eviction court ruled that they could stay in the house without paying rent until Anderson fixed the conditions.
- Various incidents followed that gave rise to recovery in a civil action by Hooser and Heisinger against Anderson for battery, defamation, and invasion of privacy.
- They recovered $44,000 in actual damages and $55,000 in punitive damages in a two-part jury trial.

- In the first appeal the court of appeals held that the respect to invasion of privacy, battery, and defamation, the court of appeals concluded that the punitive-damages findings were insufficient.
- The district court made the required threshold finding that appellant had acted with deliberate disregard for the rights or safety of respondents.
- The district court did not make specific findings on the factors provided by the punitive-damages statute, Minn. Stat. § 549.20, subd. 3.
- The court of appeals remanded for the district court to make those findings. See *Hooser v. Anderson*, No. A14–1055, 2015 WL 1959898 (Minn. Ct. App. May 4, 2015).

Minn. Stat. § 549.20, subds. 3 and 5

- **Subd. 3. Factors.** Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including
  - the seriousness of hazard to the public arising from the defendant's misconduct,
  - the profitability of the misconduct to the defendant,
  - the duration of the misconduct and any concealment of it,
  - the degree of the defendant's awareness of the hazard and of its excessiveness,
  - the attitude and conduct of the defendant upon discovery of the misconduct,
  - the number and level of employees involved in causing or concealing the misconduct,
  - the financial condition of the defendant, and
  - the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.
- **Subd. 5. Judicial review.** The court shall specifically review the punitive damages award in light of the factors set forth in subdivision 3 and shall make specific findings with respect to them. The appellate court, if any, also shall review the award in light of the factors set forth in that subdivision. Nothing in this section may be construed to restrict either court's authority to limit punitive damages.

- In the second appeal the court of appeals held that the district court's findings were specific enough to sustain the punitive damages award with respect to each of the torts, battery defamation, and invasion of privacy.
- One example – battery. The district court's findings:
  - Anderson's conduct presented a serious hazard to the public. The district court concluded that punitive damages are necessary to deter Anderson, a landlord, from using physical violence in dealing with future tenant disputes.
  - Anderson's attack on Heisinger was not directly profitable, but such an attack could deter the "assertion of bothersome legal rights" by tenants.
  - The duration and any concealment of the battery were non-factors.
  - Anderson's awareness of awareness of the hazard of his action and its excessiveness was "acute."
  - Anderson's attitude and conduct upon discovery of the battery was, again, "completely defiant." The court determined that appellant showed no remorse for the injuries he inflicted on Heisinger.
  - Anderson was financially able to pay the punitive damages award.

  - The total effect of other punishment likely to be imposed on Anderson would not be likely to have a sufficient punitive or deterrent effect on him.
    - Anderson pled guilty to disorderly conduct, but he did not believe that was a punishment for the battery and considered himself exonerated on the charge.
- The court of appeals concluded that the "district court considered each required statutory factor. Its specific findings are supported by the record. The district court did not abuse its discretion in approving a punitive-damages award on . . . Heisinger's battery claim."

Innkeeper's Liability

Comparative Fault

Odebrecht v. Bad Latitude, LLC, d/b/a Smalley's Caribbean Barbeque and Pirate Bar, No. 82-CV-14-5670 (10th Jud. Dist. Jan. 22, 2016)

- Laurence Odebrecht, as trustee for the next of kin of Adam McCloud, brought suit against Bad Latitude, L.L.C., d/b/a Smalley's Caribbean Barbeque and Pirate Bar and Eric Richard, for the death of McCloud arising out of an alleged battery by Richard and Smalley's negligent failure to prevent it.
- Following a fight at Smalley's, McCloud died at a local hospital where he was being treated for his injuries. The case was submitted to the jury on the theories of battery and innkeeper's liability.
- The jury concluded that Smalley's was not negligent, and that neither McCloud nor Smalley's were a direct cause of McCloud's death.

- The case presents problems in determining what the special verdict form should look like.
- The claim against Smalley's for the death of Adam McCloud is a negligence claim based on an innkeeper's liability theory (there was no claim under the Civil Damage Act, Minn. Stat. § 340A.801).
  - Because it was a negligence claim, McCloud's contributory negligence, if any, would be a defense.
- The claim against Richard was a battery claim.
  - Contributory negligence is not a defense to an intentional torts claim.
- Smalley's argued that its fault and the fault of Eric Richard should be compared.

- The trial court rejected Smalley's claim that its fault should be subject to apportionment along with the fault of Richard.
- The net effect is that a finding of negligence would make Smalley's liable for all the plaintiff's damages in the wrongful action and a finding of battery on the fault of Richard would make Richard liable for all of the plaintiff's damages as well.
- On the issue of whether there should be a comparison of fault of intentional and negligent tortfeasors, see *ADT Security Services, Inc.*, 687 F. Supp. 2d 884, 895 (D. Minn. 2009).

We, the Jury in the above-titled action, make the answers to the following questions on our special verdict:

INTENTIONAL ACT

Question 1. Was Defendant Richard's battery upon Adam McCloud a direct cause of his death?

No

Yes or No

NEGLIGENCE

INNKEEPER'S DUTY

Question 2. Was Defendant Bad Latitude, L.L.C. d/b/a Smalley's Caribbean Barbeque and Pirate Bar ("Smalley") on notice of Defendant Richard's vicious or dangerous potential by some prior act or threat?

No

Yes or No

Question 3. Did Smalley's have adequate opportunity to protect Adam McCloud?

No

Yes or No

Question 4. Did Smalley's take reasonable steps to protect Adam McCloud?

Yes

Yes or No

Question 5. Was Smalley's negligent in failing to protect Adam McCloud?

No

Yes or No

Question 6. Was Smalley's negligence a direct cause of Adam McCloud's death?

No

Yes or No

ADAM McCLOUD

Question 7. Was Adam McCloud negligent at the time of the September 28, 2012 incident?

_____Yes_____

Yes or No

Question 8. Was Adam McCloud's negligence a direct cause of his death?

_____No_____

Yes or No

Regardless of your answers to the previous questions, you must answer the following question:

Question 9. Taking all of the negligence that was a direct cause of Adam McCloud's death to be 100%, what percentage do you attribute to:

Defendant Bad Latitude, L.L.C. d/b/a Smalley's	
Caribbean Barbeque and Pirate Bar	_____50_____%
Adam McCloud	_____50_____%
Total	100%

Premises Liability

Benton v. Hedine, 2015 WL 4523789 (Minn. Ct. App. June 29, 2015)

- Benton was injured when she slipped and fell on a patch of ice from four or five inches to around two feet on a sidewalk in front of Hedine Jewelers.
- The store had an awning on the front of its building.
- The parties agreed that the patch of ice on the sidewalk was formed because of ice melting and dripping from the awning and refreezing on the sidewalk.
- The patch of ice was darker in color than the rest of the sidewalk. The plaintiff was able to see the ice patch after she fell.

- The Hedine brothers, who owned the store, admitted that they had seen water drip off the awning in front of the store and either drain off the sidewalk or accumulate on the sidewalk when the sun hit the awning.
- The Hedines hired a company to maintain and clear the sidewalk in front of the store. The Hedines also had salt in the store to apply to the ice, but at the time of the accident there was no sand or ice on the sidewalk.
- The sidewalk was clear of snow and ice accumulation except for the spot where Benton slipped and fell.

- The district court granted the defendants' motion for summary judgment. The district court held
  - The Hedines did not owe a duty to Benton because the ice patch was a visible and obvious hazard, and
  - The Hedines were not negligent in maintaining their property because they did not have actual or constructive knowledge that a dangerous condition existed.

- The court of appeals affirmed.
  - Landowners have a duty to perform reasonable inspections of their premises and must either repair dangerous conditions or provide adequate warnings if they has actual or constructive knowledge of the condition.
  - A landowner may be charged with constructive notice of the presence of a dangerous condition if the condition "existed for a sufficient period of time."
  - The court held that the evidence was insufficient to establish that the Hedines had actual or constructive notice of the ice patch.
    - The ice patch wasn't visible at 8:00 a.m. when one of the Hedine brothers came to work.
    - The ice patch likely occurred when the sun hit the awning around noon.
    - There was no evidence indicating that the ice patch existed for more than a brief period prior to the accident.

- Even if the Hedines had actual or constructive knowledge of the dangerous condition, however, the court also held that the danger was open and obvious.
  - "A landowner's duty of care to entrants does not require him to protect against dangerous conditions 'whose danger is known or obvious" to entrants, "unless the [landowner] should anticipate the harm despite such knowledge or obviousness.' *Louis v. Louis*, 636 N.W.2d 314, 319 (Minn.2001)."
    - Benton conceded that the danger was obvious but argued that the Hedines should nonetheless have anticipated harm due to slipping on the ice patch even if it was obvious.
    - The court rejected that argument because Benton could easily have avoided the patch of ice; the fact of potentially distracting window displays did not change the result.

Kindem v. Menard, Inc., 2015 WL 5157518 (D. Minn. Sept. 2, 2015)

- Kindem sustained injuries when she slipped and fell in a checkout area at a Menard store, injuring her elbow and shoulder.
- At her deposition she stated that she thought she slipped on water on the floor, but she did not recall seeing a wet substance on the floor either before or after she fell, nor did she any other dangerous condition on the floor.
- In support of her negligence claim the plaintiff retained Earl Smith, a commercial flooring expert.
  - Smith reviewed Menard surveillance tape at the store where the accident occurred and hired Braun Intertec Corporation to conduct a Dynamic Coefficient of Friction (DCOF) test on several areas in the store. The test determines slipperiness of surfaces.

- Braun Intertec tested three areas of the Menards store, concluding that the area where Kindem fell had an acceptable slip resistance value but that two other areas were less slip resistant.
- Smith's opinion noted that the impact of a person moving from a more slippery surface to a less slippery surface may cause the person to fall (a reverse of the phenomenon when a person in the winter moves from a non-slippery surface to black ice).
- He concluded that "Kindem walking in the Menards Store should have an expectation that the surfaces that she is walking on are similar and in this case where she fell the surface friction changed causing the accident."

- Smith's report did not discuss Kindem's account of the fall, but did include a discussion of a surveillance video in which a customer appeared to alter his gait in the same location as Kindem's fall, around the same time that Kindem fell.
- Smith concluded from the footage and Kindem's fall that "it appears there was something on the floor that was different in front of the drinking machine causing a change in walking pattern."

- Menard moved for summary judgment, in part based on its Rule 702 and *Daubert* challenge to Smith's testimony.
- The court held that Smith's testimony was admissible even though his description of the reason for the fall differed from the plaintiff's.
- Also, while his test occurred a year after the accident, there were no indications of any substantial changes in the flooring in the store.

- Menard also argued that summary judgment was appropriate because it did not owe a duty to the plaintiff.
- The court concluded that Menard owed a duty to the plaintiff:
  - "A storeowner has 'an affirmative duty to protect [invitees] not only from dangers known to defendant but also from those which with reasonable care it might discover.' *Smith v. Kahler Corp.*, 211 N.W.2d 146, 151 (Minn.1973)."
- That left the breach issue.
  - The court held that there was sufficient evidence of breach.

Immunities

Pfeil v. St. Matthews Evangelical Lutheran Church, 877 N.W.2d 528 (Minn. 2016)

- LaVonne and Henry Pfeil were informed by letter of their excommunication from the church based on "complaints that the Pfeils had been engaged in 'slander and gossip' against the leadership and ministry of the congregation."
- The Lutheran Church–Missouri Synod advised the St. Matthews leadership to hold a "special voters' meeting" to give the congregation an opportunity to affirm or reject the decision of the pastors to excommunicate them.
- Braun addressed the meeting, reading from a set of prepared remarks, and published the August 22 letter to those present at the meeting. According to the Pfeils, Braun's remarks and the August 22 letter contained several defamatory statements, including:

- The Pfeils were actively involved in slander, gossip, and speaking against Braun and his wife, Behnke, and the St. Matthew Board of Elders.
- The Pfeils had intentionally attacked, questioned, and discredited the integrity of Braun, Behnke, and other St. Matthew church leaders.
- Other people had observed the Pfeils display anger and disrespect toward Braun.
- The Pfeils had publicly engaged in “sinful behavior” inside and outside St. Matthew.
- The Pfeils had engaged in behavior unbecoming of a Christian.
- The Pfeils had engaged in a “public display of sin.”
- The Pfeils had refused to meet for the purpose of confession and forgiveness.
- The Pfeils had “refused to show respect” toward servants of God and St. Matthew church leadership.
- The Pfeils had led other people into sin.
- The Pfeils had engaged in slander and gossip and had refused to stop engaging in slander and gossip.
- The Pfeils had refused to follow the commands and teachings of God’s word.

- The congregation affirmed the decision to excommunicate the Pfeils, as did a Missouri Synod panel on reconsideration of that decision.
- They brought suit against the church and church pastors alleging negligence and defamation.
- The district court dismissed the complaint based on First Amendment concerns and the court of appeals affirmed, based on the courts' conclusion that they lacked subject matter jurisdiction to consider the claims because of the "ecclesiastical abstention doctrine.'

- The Minnesota Supreme Court affirmed, but clarified that the "ecclesiastical abstention doctrine" does not go to the issue of subject matter jurisdiction.
- The court viewed it as a form of abstention, but declined to consider whether a challenge based on the doctrine is an affirmative defense because the parties had not briefed the issue.
- The court applied the doctrine to the internal disciplinary proceedings, holding that approaching each of the plaintiff's claims individually would result in an excessive entanglement in violation of the First Amendment's Establishment Clause.

Doe 175 v. Columbia Heights School District ISD No. 13, 873 N.W.2d 352 (Minn. Ct. App. 2016)

- Facts
  - Doe, a high school student, was working as a football coach and weight room supervisor for the school district when he engaged in an inappropriate relationship with a fourteen-year-old high school freshman.
  - The relationship involve inappropriate sexual touching and the exchange of sexually explicit text messages and emails of sexually explicit pictures.
  - The school district's employment manual provided that "Sexual relationships between school district employees and students, without regard to the age of the student, are strictly forbidden and may subject the employee to criminal liability."

  - When the relationship was discovered Warnke was arrested and his employment was terminated.
  - He pleaded guilty to one count of fourth-degree criminal sexual conduct and two counts of solicitation of a minor to engage in sexual conduct.
- Doe then brought suit against Warnke and the school district alleging
  - sexual battery against Warnke and
  - vicarious liability, negligence, and negligent supervision against the school district.

- Holding
  - The court of appeals affirmed the district court's grant of summary judgment to the school district on all claims.
- Vicarious liability
  - Minn. Stat. § 466.02 provides that "[s]ubject to the limitations of sections 466.01 to 466.15, every municipality is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function."
  - Minn. Stat. § 466.03, 15, excludes "[a]ny claim against a municipality, if the same claim would be excluded under section 3.736, if brought against the state."

- Minn. Stat. § 3.76, subd. 1 provides that "[t]he state will pay compensation for injury to or loss of property or personal injury or death caused by an act or omission of an employee of the state while acting within the scope of office or employment . . . ."
- Minn. Stat. § 3.732, subd. 1(3) defines "scope of office or employment to mean "that the employee was acting on behalf of the state in the performance of duties or tasks lawfully assigned by competent authority."
- The court of appeals thought it undisputed that Warnke was acting on his own behalf and not on behalf of the school district.
  - "The school district persuasively argues that section 3.736, subdivision 1, creates a general rule that the state *is* immune from vicarious liability for the torts of its employees *unless* they were committed 'within the scope of office or employment.'"

- Negligence and negligent supervision
  - Under either theory the court noted that the harm had to be foreseeable to the school district.
  - Doe argued that there were certain “red flags” establishing that the sexual conduct was foreseeable.
- Foreseeability
  - “Whether a risk is foreseeable is a legal question that must be decided by the district court before submitting a case to a jury. Alholm v. Wilt, 394 N.W.2d 488, 491 (Minn.1986). In the context of negligence and negligent supervision claims, foreseeability means “a level of probability which would lead a prudent person to take effective precautions.” Fahrendorff by Fahrendorff v. N. Homes, Inc., 597 N.W.2d 905, 912 (Minn.1999) (quotation omitted). “In determining whether a danger is foreseeable, courts look at whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility.” Whiteford by Whiteford v. Yamaha Motor Corp., U.S.A., 582 N.W.2d 916, 918 (Minn.1998). Sexual abuse “will rarely be deemed foreseeable in the absence of prior similar incidents.” K.L. v. Riverside Med. Ctr., 524 N.W.2d 300, 302 (Minn.App.1994), review denied (Minn. Feb. 3, 1995).”
  - The court held that the evidence was insufficient as a matter of law to establish foreseeability.

Stresemann v. Jesson, 868 N.W.2d 32 (Minn. 2015)

- Facts
  - Stresemann was the sole owner of Affiliated Counseling Center. Morton-Peters was the Chief Investigator of the Medicaid Fraud Control Unit of the Minnesota Attorney General's Office at the relevant time.
  - The MFCU has the authority to investigate and prosecute suspected Medicaid fraud. In the course of investigating Affiliated for Medicaid fraud Morton-Peters applied for and received a warrant to search Affiliated's premises. The warrant request included a request for patient files. The Fridley police executed the warrant and seized numerous documents from the office, including patient files for non-Medicaid patients.

- Stresemann sought to have the certain files and records returned. When the MCFU failed to return the files Stresemann sued Morton-Peters, alleging, inter alia, that Morton-Peters had committed conversion and trespass to chattels by losing and/or destroying some of Affiliated's files.
- Morton-Peters moved to dismiss the claims on the basis that she was protected by prosecutorial immunity.

- The supreme court concluded “that there is a material difference between investigative functions normally performed by an investigator or police officer and the prosecutorial functions of filing and maintaining criminal charges,” and held “that prosecutorial immunity does not extend to an investigator whose conduct is not intimately involved with the initiation and maintenance of criminal charges. Here, the alleged conduct by Morton–Peters was not intimately involved with the initiation and maintenance of criminal charges, and therefore the court of appeals erred when it concluded that she was entitled to prosecutorial immunity.”
- The court remanded for consideration of other immunity claims.

Stresemann v. Jesson, No. A13–1967, 2015 WL 7693339 (Minn. Ct. App. Nov. 30, 2015)

- On remand the court of appeals considered whether Morton-Peters was entitled to have Stresemann's claims dismissed under Rule 12.02(e) of the Minnesota Rules of Civil Procedure because of official immunity.
- The court noted the importance of the procedural posture of the case in denying the motion, observing that:
  - The law concerning a motion to dismiss for failure to state a claim is not hospitable to the doctrine of official immunity. "[A] defendant relying upon an immunity bears the burden of proving he or she fits within the scope of the immunity." *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn.1997).
  - "[A] motion to dismiss pursuant to rule 12.02(e) on the basis of official immunity may be granted only if the applicability of official immunity is clearly established by the allegations in the complaint."

Statutes of Limitation

Minn. Stat. § 541.051

328 Barry Avenue, LLC v. Nolan Properties, 871 N.W.2d 745 (Minn. 2015)

- Facts
  - 328 Barry Avenue, LLC (328 LLC) used Nolan Properties Group, LLC (NPG) as the general contractor for the construction of a three-story commercial building. Both companies were owned by John Nolan.
  - NPG did not have a written contract with 328 LLC, but NPG did enter into written contracts with the subcontractors on the project, including Carciofini Company, Marvin Windows, Inc., Minuti–Ogle Co., Inc., and R.T.L Construction, Inc.
  - Construction began in 2008.
  - There were reports of water leakage in October of 2009, although the problems were apparently addressed.

- The City of Wayzata issued a certificate of occupancy for the building in January 2010, although parts of the building were still unfinished.
- The parties agree, however, that construction was substantially complete by May 2010 when 328 LLC began to occupy the building for commercial purposes.
- In August 2010, 328 LLC noticed water on the floor of the building.
- Throughout 2011 and 2012, NPG and 328 LLC hired a number of experts to investigate the extent and cause of the water damage to the building.
- Based on these reports, 328 LLC brought suit against NPG on June 14, 2012, alleging failure to exercise reasonable care in performing its duties as general contractor, including the negligent supervision of subcontractors and the negligent selection of building materials.
- NPG filed a third-party complaint against the respondent subcontractors for contribution and indemnity.

- The statute
  - Minn. Stat. § 541.051, subd. 1(a) provides, in relevant part, that "no action by any person in contract, tort, or otherwise to recover damages for any injury to property ... arising out of the defective and unsafe condition of an improvement to real property, shall be brought . . . more than two years after discovery of the injury."
- The issues
  - Whether the statute of limitations can be triggered prior to substantial completion of a construction project.
  - Whether the district court erred in concluding that 328 LLC discovered an actionable injury when NPG first discovered a leak near a window in the fall of 2009.

- The opinion
  - The plain language of the statute predicates the accrual of a cause of action, and the commencement of the statute of limitations, on the "discovery of the *injury.*"
  - The court concluded that there was a fact issue as to when the plaintiff discovered the leak and that summary judgment was therefore improperly granted by the district court.

Blaine v. City of Sartell, 865 N.W.2d 723 (Minn. Ct. App. June 15, 2015)

- In 1998 Blaine purchased property and built a house in a development that was constructed on property that was benefited by a ditch that was constructed by Stearns County following a petition by property owners in LeSauk Township for construction of the ditch, which was substantially completed by mid-1986.
- The City declined the county's request to turn over or transfer Ditch 50 to the city's utility system. The city declined but later annexed from the township most of the property on which Ditch 50 was located.

- The City declined the county's request to turn over or transfer Ditch 50 to the city's utility system. The city declined but later annexed from the township most of the property on which Ditch 50 was located.
- As of June 21, 2011, the county had never received a complaint about the ditch and it had never undertaken inspection. C learning, maintenance, or repair of the ditch.
- In July of 2011, two rainfalls resulted in substantial water accumulation in the basement of Blaine's house, causing substantial damage.

- Blaine brought suit against the county, the township, and the city, alleging that the flooding and consequent water damage to his house was "attributable to ... an improperly designed, installed, operated, malfunctioning and/or maintained" public drainage system.
- Blaine asserted three claims:
  - Negligent design or installation of Ditch 50; negligent maintenance, operation, or inspection of Ditch 50
  - Trespass
  - Nuisance
- He also claimed that the flooding constituted a taking without just compensation or due process of law.

- The defendants argued that Minn. Stat. § 540.051, subd. 1 barred recovery.
- Blaine conceded that the ditch was an improvement to real property and that his claim for negligent design or installation was barred by the statute.

- Minn. Stat. § 541.051, subd. 1(d) does not bar recovery, however, for "actions for damages resulting from negligence in the maintenance, operation or inspection of the real property improvement against the owner or other person in possession."
- The county argued that the exception "was meant only to exempt claims of negligence from the ten year statute of repose, not other tort claims."

- The court of appeals rejected the argument.
  - The claims of trespass, nuisance, and taking are claims for damages allegedly resulting from the county's *negligence* in the maintenance, operation, or inspection of Ditch 50, a real-property improvement in the county's ownership or possession.

Legal Malpractice

Guzick v. Kimball, 869 N.W.2d 42 (Minn. 2015)

- Guzick, personal representative of Nyberg's estate and trustee of the George Nyberg Trust, brought suit against Kimball, an attorney, and the Kimball Law Office for alleged malpractice arising out of the drafting of a Minnesota Standard Short Form Power of Attorney agreement by the attorney's legal assistant that gave Nyberg's nephew the power to transfer property to Nyberg's nephew, the attorney-in-fact. Following transfer of funds by Nyberg's nephew, Guzick brought a conversion action against the nephew and his wife. They filed for bankruptcy. Guzick then was awarded a judgment in the nephew's bankruptcy proceeding.

- Guzick's malpractice suit against Kimball and the Kimball Law Office alleged that Kimball had a duty to supervise his legal assistant to "ensure that her conduct and work product were 'compatible with [Kimball's] professional obligations,'" and that Kimball also had a duty to meet with Nyberg to assess his competency, the need for a POA, the scope of the authority provided for in the POA, the risks associated with that authority, and to determine if the nephew was the appropriate person to be named Nyberg's attorney-in-fact.

- Kimball moved for summary judgment, arguing that Guzick had failed to provide a satisfactory affidavit of expert disclosure within the necessary time period, as required by section 544.42, subd. 2(2), and also that Guzick did not qualify for the curative (safe harbor) provision in subdivision 6. Kimball argued that it was necessary for the expert to establish all elements of a legal malpractice claim.
- Guzick argued in response that his original affidavit of expert review satisfied subdivision for and, in the alternative, that his affidavit was sufficient to qualify for the safe-harbor protection in subdivision 6 (c).

- The supreme court held that while the expert affidavit as a whole might be read to imply that Kimball's actions were the proximate cause of the injuries claimed by Guzick, it did not satisfy the requirement in the court's decision in *Brown–Wilbert, Inc. v. Copeland Buhl & Co*., 732 N.W.2d 209, 219 (Minn.2007), of "meaningful information that 'summarizes the expert's opinion.'" 869 N.W.2d at 51 (quoting *Brown-Wilbert*, 732 N.W.2d at 219).

- The court also considered the issue of whether it is necessary in a legal malpractice action for the plaintiff to prove the existence of but-for causation through the use of expert testimony.
- Rather than relying on a general rule, the court stated that it determines “whether the facts needed to establish but-for causation are within an area of common knowledge and lay comprehension such that they can be adequately evaluated by a jury in the absence of an expert.”

Property Damage

Nichols v. Cimbura, No. A15–0861, 2016 WL 456952 (Minn. Ct. App. Feb. 8, 2016).

- Nichols was involved in a car accident with Cimbura. Cimbura admitted fault. Cimbura's insurer paid $11,456 to Nichols for the repairs that were made to his car.
- Nichols hired an appraisal expert "to conduct a diminished-value appraisal on his car" post-accident.
  - The expert reported that the repair work on the car was of excellent quality and that there was no repair-related diminution in value.
  - Based on the pre-accident value of the car, however, the expert's opinion was that Nichols's car suffered a diminution in value of $4,938.97, solely because it was involved in an accident.
  - There was no explanation in the report as to how the expert determined the pre-accident value of the car. The report emphasized "'the general perception of the public that a collision history is a "defect" that diminishes the value and quality of a vehicle.' "
- Both parties moved for summary judgment.
  - The district court denied Nichols's motion and granted Cimbura's.
  - The court of appeals affirmed.

- Minnesota adopted the rule from the Restatement of Torts § 928 (1939) in *O'Connor v. Schwartz*, 304 Minn. 155, 158, 229 N.W.2d 511, 513 (1975). That rule gives the plaintiff the option of recovering for the difference in value before and after the harm or the reasonable cost of repair and restoration, with due allowance for the difference in value before and after the repairs. That rule was continued in the Restatement (Second) of Torts § 928 (1979), which reads as follows:
  - When one is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for
  - (a) the difference between the value of the chattel before the harm and the value after the harm or, at his election in an appropriate case, the reasonable cost of repair or restoration, with due allowance for any difference between the original value and the value after repairs, and
  - (b) the loss of use.

- The court of appeals concluded that *O'Connor* and the Restatement supported Nichols's argument that he should be permitted to recover for the diminution in fair market value due to the car's accident history, a result permitted in other jurisdictions applying section 928 of the Restatement (Second) of Torts. 2016 WL 456952, at *4 n. 1.
- The court concluded that the evidence was insufficient to establish the "due allowance" for any diminution in the value of the car:

  - His expert failed to examine the car before the accident, and Nichols presented no evidence to substantiate the conclusion that the car was in "excellent" condition before the accident. Nichols further failed to provide an appraisal of the car's post-accident, pre-repair value or a detailed appraisal of the car after repairs were completed. Without these figures, the district court could not, as a matter of law, determine that Nichols's chosen measure of damages—the cost of repairs—would not exceed the alternative measure of damages, diminution in value. Because genuine issues of material fact remained, Nichols was not entitled to judgment as a matter of law. The district court properly denied his motion for summary judgment.

  - 2016 WL 456952, at *4 n. 1.