
# STATE OF MINNESOTA COMPENDIUM OF LAW

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**Updated 2015**

## PRE-SUIT AND INITIAL CONSIDERATIONS

### Pre-Suit Notice Requirements/Prerequisites to Suit

A) **Dram shop.** Minnesota has a pre-lawsuit notice requirement in dram shop actions. Any person or insurer claiming damages, contribution, or indemnity from a licensed retailer of alcoholic beverages or municipal liquor store under Minnesota's Dram Shop Act must give written notice to the licensee or municipality. MINN. STAT. § 340A.802 (2014). The notice must set forth: (1) the time and date when, and the person to whom, the alcoholic beverages were sold; (2) the name and address of the people injured or whose property was damaged; and (3) the approximate time, date, and place where the injury to the person or property occurred. *Id.* In an action for damages, written notice must be given within 240 days of entering into an attorney-client relationship with respect to the claim. *Id.* § 340A.802(2). For indemnity or contribution claims, the notice must be served within 120 days of the injury or within sixty (60) days of receipt of written notice of a claim for contribution or indemnity. *Id.*

B) **Professional malpractice.** Minnesota also has a pre-lawsuit requirement for medical malpractice actions. By statute, the plaintiff's attorney must provide an affidavit with the initial complaint that certifies: (1) that the case has been reviewed by an expert before filing suit and (2) that the expert believes there was a departure from the standard of care. MINN. STAT. § 145.682(2-3) (2014). This affidavit must be served with the summons and complaint, and must acknowledge that an expert has reviewed the claim and believes a deviation from the applicable standard of care has occurred. *Id.* § 145.682(3). Then, 180 days after filing the complaint, the plaintiff must submit a detailed affidavit from the expert outlining the appropriate standard of care, opinions about how that standard was breached, and the causal chain to the injury alleged. Failure to comply with this requirement results in mandatory dismissal of the claim with prejudice. *Id.* § 145.682(6). If, however, the plaintiff brings a *prima facie* case that does not require expert testimony, then this requirement does not apply. *Id.* § 145.682(2); Jason Leo, Case Analysis, *Medical Malpractice: The Legislature's Attempt to Prevent Cases Without Merit Denies Valid Claims*, 27 WM. MITCHELL L. REV. 1399, 1406 (2000). A similar requirement exists for a malpractice case against a licensed attorney or an architect, certified public accountant, engineer, land surveyor, or landscape architect. MINN. STAT. § 544.42 (2014).

C) **Product Liability.** The attorney for a person who intends to claim damage for or on account of personal injury, death or property damage arising out of the manufacture, sale, use or consumption of a product shall cause to be presented a notice of possible claim stating the time, place and circumstances of events giving rise to the claim and an estimate of compensation or other relief to be sought. This notice shall be given within six months of the date of entering into an attorney-client relation with the claimant in regard to the claim. Notice shall be given to all persons against whom the claim is likely to be made. Any person in the chain of manufacture and distribution shall promptly furnish to the claimant's attorney the names and addresses of all persons the person knows to be in the chain of manufacture and distribution if requested to do so by the attorney at the time the notice is given. MINN. STAT. § 604.04 (2014).

**Relationship to the Federal Rules of Civil Procedure**

Minnesota has its own Rules of Civil Procedure. The state has adopted portions of many of the federal rules. In addition, Minnesota District Courts are subject to the Minnesota General Rules of Practice.

**Description of the Organization of the State Court System**

A) **Judicial selection.** A judge may come to serve on the bench by either being elected to that position by the general public or by being appointed by the Governor. An elected judge has a term of six (6) years. When a judge is appointed by the Governor, MINN. CONST. art. VI, § 8 provides that the judge must stand for district-wide election in the next general election that is more than one (1) year after the appointment.

1) *Commission on Judicial Selection.* To assist the Governor in appointing judges to the bench, MINN. STAT. § 480B.01 (2014) provides for a Commission on Judicial Selection. The Commission's purpose is to solicit and evaluate candidates, and to make recommendations to the Governor on who to appoint to vacancies in the District Court bench and on the Workers' Compensation Court of Appeals. *Id.* The Commission is not required to make recommendations for vacancies in any other courts.

B) **Structure.** Minnesota's court structure is the traditional model. The trial court level is known as the District Court. Appeals from the District Court are generally heard first by the Court of Appeals. The Supreme Court determines which cases to review and most often considers cases from the Court of Appeals. *See* MINN. CONST. art. VI, § 2-3.

1) **Court of Appeals.** The Minnesota Court of Appeals has nineteen judges who sit in three-judge panels and travel to locations throughout Minnesota to hear oral arguments. *See* Minnesota Judicial Branch, Court of Appeals, *available at* http://www.mncourts.gov/Documents/0/Public/Court_Information_Office/Informational%20Brochures/CourtofAppeals2008.pdf (last visited March 11, 2015).

C) **Alternative dispute resolution.**

1) **Arbitration.** The Minnesota No-Fault Automobile Insurance Act requires "the mandatory submission to binding arbitration of all cases at issue where the claim at the commencement of arbitration is in an amount of $10,000.00 or less against any insured's reparation obligor for no-fault benefits or comprehensive or collision damage coverage." MINN. STAT. § 65B.525 (2014).

2) **Mediation.** In all cases, Minnesota judges require some form of ADR. Mediation is typically the chosen form.

**Service of Summons**
MINN. R. CIV. P. 4.03 (2014) governs personal service of summons.

A) **Person.** MINN. R. CIV. P. 4.03(a) provides that service of summons to a person shall be made by delivering a copy to the individual personally or by leaving a copy at the individual's usual place of abode with a person of suitable age and discretion. If the individual has, pursuant to statute, consented to any other method of service or appointed an agent to receive service of summons, or if a statute designates a state official to receive service of summons, service may be made in the manner provided by such statute. If the individual is confined in a state institution, service may be made by serving the chief executive officer at the institution. If the individual is a child younger than fourteen years old, service may be made by serving the mother or father. If neither parent is in the state, then service may be made upon the resident guardian. If the child has no guardian, then service may be made upon the person having control of the child or with whom the child resides, or with whom the child is employed.

B) **Public corporation.** MINN. R. CIV. P. 4.03(e) provides that service upon a municipal or other public corporation may be made by delivering a copy of the summons to one of the following: the chair of the county board or the county auditor of the defendant county; the chief executive officer or to the clerk of the defendant city, village or borough; the chair of the town board or to the clerk of a defendant town; any member of the board or other governing body of the defendant school district; or any member of the board or other governing body of a defendant public board or public body not previously enumerated.

C) **Private corporation.** MINN. R. CIV. P. 4.03(c) provides that service upon a domestic or foreign corporation must be made by delivering a copy to an officer or managing agent or any other agent authorized to receive summons. If the corporation is a transportation or express corporation, the summons may be served by delivering a copy to any ticket, freight, or soliciting agent in the county where the action is brought. If it is a foreign corporation and there is no agent in the county, then service may be made upon any agent in the state.

D) **Partnership or association.** MINN. R. CIV. P. 4.03(b) provides that service upon a partnership or association may be made by delivering a copy to a member or the managing agent of the partnership or association. If the partnership or association has consented to service in any other method, pursuant to statute, or appointed an agent to receive service of summons, or if a statute designates a state official to receive service of summons, service may be provided in the manner provided by the statute.

E) **Waiver.** An improperly-served defendant waives his right to challenge a court's jurisdiction by taking "an affirmative step to invoke the power of a court to determine the merits of all or part of a claim" before contesting jurisdiction. *Turek v. A.S.P. of Moorhead, Inc.*, 618 N.W.2d 609, 612 (Minn. Ct. App. 2000) (internal citations omitted). Merely appearing before the court does not constitute waiver of a jurisdictional defense. *See, e.g., Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 868 (Minn. 2000) (stating that "simple participation in the ligitation" does not, standing alone, waive a jurisdictional defense"); *Igo v. Chernin*, 540 N.W.2d 913, 914 (Minn. App. 1995) ("An objection to jurisdiction is not waived by later appearing generally and defending

on the merits."). Acknowledgment of service in writing also waives the right to challenge service of process. MINN. R. CIV. P. 4.06 (2012).

F) If the defendants are numerous, the court may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants, and that any cross-claim, counterclaim, or affirmative defense is deemed to be denied by all other parties, and that the filing of any such pleading with the court and service upon the plaintiff constitutes due notice to all of the parties. MINN. R. CIV. P. 5.03 (2014).

**Statutes of Limitations**

A) **Construction.** MINN. STAT. § 541.051 subd. 1(a) (2014) provides that an action for damages for injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property shall be brought within two (2) years of the discovery of the injury and not more than ten (10) years after substantial completion of the construction. If the cause of action accrues during the ninth or tenth year, an action may still be brought within two (2) years of discovery as long as it is no more than twelve (12) years after substantial completion of the construction. MINN. STAT. § 541.051 subd. 2.

Subpart (b) provides that despite paragraph (a) an action for contribution or indemnity arising out of the defective and unsafe condition of an improvement to real property must also be brought within two (2) years after the cause of action for contribution or indemnity has accrued, regardless of whether it accrued before or after the ten (10) year period referenced in (a). MINN. STAT. § 541.051 subd. 1.

For purposes of subpart (a), an action generally accrues upon discovery of the injury. MINN. STAT. § 541.051 subd. 1(c). And, for subpart (b), an action accrues upon the earlier of commencement of the action against the party seeking contribution or indemnity, or payment of final judgment, arbitration award, or settlement arising out of the defective and unsafe condition. *Id.*

B) **Contract.** Except where otherwise provided in the Uniform Commercial Code, the general contract statute of limitations in MINN. STAT. § 541.05(1) (2014) provides a six (6) year statute of limitation for express or implied contracts. There is a two (2) year statute of limitations applicable to oral or written employment contracts and claims for wages and related damages. MINN. STAT. § 541.07(5) (2014); *Portlance v. Golden Valley State Bank*, 405 N.W.2d 240, 243 (Minn. 1987).

C) **Contribution.** In *Grothe v. Shaffer*, the Minnesota Supreme Court held that a claim for contribution by a joint tortfeasor "does not accrue or mature until the person entitled to the contribution has sustained damage by paying more than his fair share of the joint obligation." 232 N.W.2d 227, 232 (Minn. 1975). The resolution of the underlying tort action is a condition precedent to the transformation of a contingent liability to a fixed one. *Id.* Without a fixed liability, there can be no damage that would trigger commencement of the statute of limitations on a contribution claim by a joint tortfeasor. *Id.*

D) **Employment**. There is a two (2) year statute of limitations for the recovery of wages, overtime, damages, fees, or penalties arising under any state or federal law. MINN. STAT. § 541.07(5) (2011).

E) **Fraud.** Under MINN. STAT. § 541.05(6), claims for relief on the ground of fraud must be commenced within six (6) years from the time the aggrieved party discovers or, in the exercise of reasonable diligence, ought to have discovered the fraud.

*See also, e.g., Universal Film Exchs., Inc. v. Swanson*, 165 F. Supp. 95, 97 (D. Minn. 1958).

1) **Objective reasonableness.** The Minnesota Supreme Court has construed the statute as imposing a standard of objective reasonableness upon a plaintiff to discover the facts constituting the fraud:

> The facts constituting the fraud are deemed to have been discovered when, with reasonable diligence, they could and ought to have been discovered. The mere fact that the aggrieved party did not actually discover the fraud will not extend the statutory limitation, if it appears that the failure sooner to discover it was the result of negligence, and inconsistent with reasonable diligence.

*Bustad v. Bustad*, 116 N.W.2d 552, 555 (Minn. 1962).

Under this reasonableness standard, a plaintiff "must exercise reasonable diligence when he or she has notice of a possible cause of action for fraud." *Buller v. A.O. Smith Harvestore Prods., Inc.*, 518 N.W.2d 537, 542 (Minn. 1994). In order for the limitations period to commence, a party does not need to know the details of the evidence establishing a cause of action, only that the cause of action exists. *Id.* Accordingly, the limitations period begins to run irrespective of when the plaintiff makes the causal connection between the fraud and the resulting injury. *Veldhuizen v. A.O. Smith Corp.*, 839 F. Supp. 669, 676 (D. Minn. 1993) ("The limitations period does not wait to run until the [plaintiffs] were able to make a causal connection between the failure of the silo to perform as promised and a particular design defect."). The failure to actually discover the fraud will not toll the limitations period if that failure is inconsistent with this reasonable diligence standard. *Blegen v. Monarch Life Ins. Co.*, 365 N.W.2d 356, 357 (Minn. Ct. App. 1985).

F) **Governmental entities.** Actions by or on behalf of the state and its political subdivisions are subject to the same statutes of limitations as any other actions. MINN. STAT. § 541.01 (2014). Statutes of limitations are construed narrowly against the government. *BP. Prod. Co. v. Burton*, 549 U.S. 84, 94 (2006) (citing *E.I. DuPont de Nemours & Co. v. Davis*, 264 U.S. 456 (1924)).

G) **Indemnity.** An insurer that has paid no-fault benefits may have an indemnity claim against the tortfeasor. Such a claim is subject to the six (6) year limitation period of MINN. STAT. § 541.05(1).

H) **Personal injury.** Most personal injury claims are governed by a six (6) year statute of limitations. MINN. STAT. § 541.05(10).

I) **Professional liability.** Medical malpractice actions must be commenced within four (4) years from the date the cause of action accrued. MINN. STAT. § 541.076 (2014).

Actions for malpractice against veterinarians must be commenced within two (2) years. MINN. STAT. § 541.07(1) (2011).

J) **Property damage.** There is a six (6) year statute of limitations for injury to personal property. MINN. STAT. § 541.05(4). Section 541.07(7) provides a two (2) year statute of limitations for property damage resulting from the application of pesticide to real property for purposes of injury.

K) **Survival.** In Minnesota, statutes treat voluntarily and administratively-dissolved corporations differently with respect to legal claims.

1) **Voluntarily-dissolved corporations.** A three (3) year statute of limitations generally applies to voluntarily-dissolved corporations. MINN. STAT. § 302A.781 (2014) (providing for a three year statute of limitations and a one year extension for claims where good cause may be shown why they were not previously brought during the three-year period, respectively).

2) **Administratively-dissolved corporations.** In contrast, administratively-dissolved corporations are held perpetually open to claims. MINN. STAT. § 302A.821, subd. 1(b) (2014) ("A corporation dissolved in this manner [administrative dissolution] is not entitled to the benefits of section 302A.781.). In the words of one commentator, "Since Minnesota holds administratively dissolved corporations perpetually open to claims, insurers of administratively dissolved policy holders also appear to be under a perpetual duty to defend or indemnify against claims brought against such an entity." Sarah Hornbrook, Note, *Corporate Resuscitation: The Effect of Survival Statutes on Administratively Dissolved Corporations in Minnesota, Illinois and Iowa*, 29 J. CORP. LAW 179, 195 (2003).

L) **Tolling.** MINN. STAT. § 541.15 (2014) sets forth the situations in which statutes of limitations are tolled. The statute of limitations does not run when the beginning of the action is stayed pursuant to an injunction. MINN. STAT. § 541.15(a)(4).

1) **Minors.** Under Minnesota law, except in cases of medical malpractice, the statute of limitations begins to run upon a plaintiff minor's eighteenth birthday. MINN. STAT. § 541.15(a)(1); s*ee also Johnson v. Elk River Area Sch. Dist.*, No. A06-2341,

2007 WL 4170854, at *1- 2 (Minn. Ct. App. Nov. 27, 2007). Limitations periods for sexual abuse of a minor may be found in MINN. STAT. § 541.073 (2014).

2) **Malpractice.** For malpractice claims, a lawsuit must be filed within one (1) year of the minor's eighteenth birthday, but not more than seven (7) years after the date of injury. MINN. STAT. § 541.15(b).

3) **Insanity.** Statutes of limitations are also tolled in cases of the plaintiff's insanity. MINN. STAT. § 541.15(1)(2).

M) **Wrongful death.** There is no limitation on the time to commence an action to recover for death caused by an intentional act constituting murder. MINN. STAT. § 573.02, subd. 1 (2014); *Huttner v. State*, 637 N.W.2d 278, 283 (Minn. Ct. App. 2001). Any other action under Section 573.02 for wrongful death must be commenced within three (3) years of the date of death, but not more than six (6) years after the act or omission causing the death. MINN. STAT. § 573.02, subd. 1.

According to MINN. STAT. § 573.02, subd. 1, actions to recover for death caused by the professional negligence of a physician, surgeon, dentist, hospital or sanitarium must be commenced within three (3) years of the date of death. However, they may also not be commenced beyond the time set forth in § 541.076, discussed above under *Professional Liability*.

**Statutes of Repose**

"[A] statute [of repose] is intended to terminate the possibility of liability after a defined period of time, regardless of the potential plaintiff's lack of knowledge of his or her cause of action. Such statutes reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct." *Weston v. McWilliams & Assocs.*, 716 N.W.2d 634, 641 (Minn. 2006) (internal citation omitted).

A) **Construction.** MINN. STAT. § 541.051(1) (2011) generally prevents the accrual of a cause of action arising out of the defective or unsafe condition of an improvement to real property after ten (10) years from the completion of the construction. For further discussion, see *Construction* under *Statute of Limitations* section above.

**Venue Rules**

MINN. STAT. Chapter 542 govern the venue of actions. Every action shall be tried in the county in the county in which it began, unless changed in accordance with a specific statute. MINN. STAT. § 542.01 (2014).

A) **Land.** Under MINN. STAT. § 542.02, actions relating to land, such as for the recovery of real estate, foreclosure of a mortgage, injuries to the land, and so on, are to be tried in the county where such real estate or some part thereof is situated.

B) **Personal property.** Similarly, under MINN. STAT. § 542.06, actions to recover the possession of personal property that was wrongfully taken shall be tried in the county in which the taking occurred or in the county in which the property is situated.

C) **Public officer.** Actions against a public officer or a person appointed to execute a public officer's duties, and actions to recover penalties or forfeitures imposed by statute, shall be tried in the country in which the cause of action arose. MINN. STAT. § 542.03. Upon motion, any action against a state official for acts affecting the use of land or water of the state may be tried in any country where the land or water is located. *Id.*

D) **Wage recovery.** An action to recover wages or money due for manual labor shall be brought in the county in which the labor was performed. MINN. STAT. § 542.08.

E) **Motor vehicle actions.** Venue for a cause of action stemming from a motor vehicle accident may be brought in either the county in which the action arose or in the county of the residence of the defendant or a majority of the defendants. MINN. STAT. § 542.095.

F) **Catch-all.** MINN. STAT. § 542.09 is **t**he catch-all for all other cases that are not specifically enumerated. It provides that all other causes of action shall be tried in a county in which one or more of the defendants reside when the action is begun or in which the cause of action or some part thereof arose. If none of the parties reside in or can be found in the state, then the action may be tried in any county the plaintiff designated.

G) **Change of venue.** MINN. STAT. § 542.10 provides the guidelines for demanding a change of venue as of right. If the action has been venued in an improper county, the defendant may within twenty (20) days of the summons demand in writing that venue be changed to the proper county. Also, if the county designated in the complaint is not the county in which the cause of action or some part of it arose and if there are several defendants residing in different counties, then venue may be changed to the county where a majority of defendants have united in demanding it be venued.

1) **Court-ordered changes.** Venue may also be changed by court order under § 542.11. This order may be made in any of the following four circumstances: (1) written consent of the parties; (2) motion showing that any party has been made a defendant for purpose of preventing venue change; (3) impartial trial cannot be had in the county where the action is pending; or (4) the convenience of the witnesses and the ends of justice would be promoted by the change.

## NEGLIGENCE

### Comparative Fault

A) **Scope.** Minnesota's comparative fault rules are set forth in the Comparative Fault Act. MINN. STAT. § 604.01(1) (2014) defines the scope of the Act. It provides recovery of damages "if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the

amount of fault attributable to the person recovering." The Act defines "fault" that may be compared as acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801. *Id.*

B) **Apportionment and Reallocation.** MINN. STAT. § 604.02 (2014) governs joint and several liability and loss reallocation. It provides that persons who are severally liable will have contributions in proportion to their fault. However, persons will be held jointly and severally liable for the whole award if (1) the person's fault is greater than 50 percent, (2) two or more persons act in a common scheme or plan that result in injury, (3) a person who commits an intentional tort, or (4) a person whose liability arises under various environmental statutes.

1) **Generally.** Subdivision 2 provides that on motion made not more than one year after judgment is entered, uncollectible amounts may be reallocated among other parties, including a claimant at fault, according to their respective percentages at fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment. However, "a party who is severally liable under Minn.Stat. § 604.02, subd. 1, cannot be ordered to contribute more than that party's equitable share of the total damages award under the reallocation-of-damages provision in Minn.Stat. § 604.02, subd. 2." *Staab v. Diocese of St. Cloud*, 853 N.W.2d 713, 722 (Minn. 2014).

2) **Products liability.** MINN. STAT. § 604.02(3) provides for the reallocation of uncollectible amounts in a products liability action. It provides that when there is an amount uncollectible from any person in the chain of manufacture and distribution in a products liability action, the amount shall be reallocated "among all other persons in the chain of manufacture and distribution but not among the claimant or others at fault who are not in the chain of manufacture or distribution of the product."

**Exclusive Remedy – Workers' Compensation Protections**

Minnesota's Workers' Compensation Act ("WCA") contains an exclusivity provision that applies to claims by employees, personal representatives, surviving spouses, parents, children and dependants, "or any other person entitled to recover damages on account of such injury or death." MINN. STAT. § 176.031 (2014).

A) **Arising out of and in the course of employment.** The WCA defines a personal injury as an injury arising out of and in the course of employment, but under the assault exception, a personal injury "does not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of personal reasons, and not directed against the employee as an employee, or because of the employment." MINN. STAT. § 176.011, subd. 16 (2014). Assaults are compensable under the WCA if (1) the motivation for the assault arises solely out of the activity of the victim as an employee; or (2) the

assault was neither directed against the victim as an employee nor for reasons personal to the employee. *McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830, 834 (Minn. 1995).

**Indemnification**

Minnesota recognizes two types of indemnification: indemnification against loss or damage, and indemnification against liability. *Aetna Ca. & Sur. Co. v. Bros.*, 33 N.W.2d 46, 48 (Minn. 1948).

A) **Applicability.** In Minnesota, joint tortfeasors are allowed to indemnify one another in only five situations: (1) where the indemnitee is only derivatively or vicariously liable; (2) where the indemnitee acted in reliance on the indemnitor; (3) where the indemnitee has suffered a breach of duty; (4) where the indemnify failed to detect or prevent the conduct of the indemnitor; or (5) where the parties agree contractually to hold one party responsible. *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 366 (Minn. 1977) (quoting *Hendrickson v. Minn. Power & Light Co.*, 104 N.W.2d 843, 848 (Minn. 1960)).

B) **Construction.** Minnesota courts require any indemnity clause relating to negligence to be explicit. *See, e.g.*, *Tolbert*, 255 N.W.2d at 366. Indemnity agreements "are to be strictly construed when the indemnitee . . . seeks to be indemnified for its own negligence. There must be an express provision in the contract to indemnify the indemnitee for liability occasioned by its own negligence." *Nat'l Hydro Sys. v. M.A. Mortenson Co.*, 529 N.W.2d 690, 694 (Minn. 1995) (quoting *Farmington Plumbing & Heating Co. v. Fischer Sand & Aggregate, Inc.*, 281 N.W.2d 838, 842 (Minn. 1979)).

Because they alter the regular rules of negligence and comparative fault law, indemnification agreements are generally disfavored, and are strictly construed against the benefitted party. *Scholbohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982). An indemnity agreement may also be void if it is determined to be against public policy. *Id.; see also Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 789 (Minn. 2005) (holding that an indemnification clause in a houseboat rental contract was unenforceable against an individual who was not warned about potential dangers on the houseboat); *Zerby v. Warren*, 210 N.W.2d 58, 64 (Minn. 1973) (contact cement seller's indemnity agreement void because the sale of such products to a minor violates public policy).

**Joint and Several Liability**

Joint and several liability, "is a collection mechanism designed to assist a plaintiff in collecting a judgment by shifting the burden of collecting payment onto liable defendants." *EMC Ins. Cos. v. Dvorak*, 603 N.W.2d 350, 353 (Minn. Ct. App. 1999) (internal citations omitted).

Generally under the comparative fault act, jointly liable defendants are individually liable and jointly responsible for the entire harm that the plaintiff suffered. See the discussion of comparative fault above.

Joint and several liability may also be imposed based on the single-indivisible-injury rule. Where the damage casused by two or more defendants is not capable of being separated, each defendant is liable for the entire damage, and the degree of individual culpability is immaterial. *Canada By & Through Landy v. McCarthy*, 567 N.W.2d 496, 507-08 (Minn. 1997). The burden of proving that the harm is capable of being separated lies with each defendant who contends it can be divided. Whether the injury is capable of apportionment is a question of law. Once the trial court finds that the harm can be apportioned, the question of actual apportionment is a question of fact for the jury. *Id.*

Contribution allows a party who has paid more than its fair share of a judgment to recover against the party whose portion it paid for. *Horton by Horton v. Orbeth, Inc.*, 342 N.W.2d 112, 114 (Minn. 1984). In Minnesota, a contribution claim requires both (1) common liability, and (2) one party must have paid more than its fair share. *Id.* at 117. A

**Strict Liability**

Strict liability holds an individual responsible for the damages caused by their actions regardless of fault. RESTATEMENT (SECOND) OF TORTS § 519 states that strict liability "arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity." Liability may therefore exist regardless of the level of care a defendant exercises. Minnesota courts recognize strict liability under two theories: (1) unreasonably dangerous products; and (2) ultra-hazardous activities.

A) **Strict products liability. Strict products liability encompasses theories of design defect, manufacturing defect, and failure to warn.** For a plaintiff to recover on a theory of strict products liability, it must be proved that (1) the defendant's product was in a defective condition unreasonably dangerous for its intended use; (2) the defect existed when the product left the defendant's control; and (3) the defect was the proximate cause of the injury. *Marcon v. Kmart Corp.*, 573 N.W.2d 728, 731 (Minn. Ct. App. 1998). For manufacturing defects, "unreasonably dangerous" is defined by a consumer-expectation standard. For design defects, manufacturers are held to a reasonable-care standard that balances whether the manufacturer acted reasonably in adopting a particular design. *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616, 621-22 (1984).

In any product liability action based in whole or in part on strict liability in tort commenced or maintained against a defendant other than the manufacturer, the non-manufacturer party may certify the correct identity of the manufactuere to the court. Once the manufacturer has been served and has answered, the certifying defendant may be dismissed, unless it has exercised significant control over the product. MINN. STAT. § 544.41 (2014).

B) **Inherently dangerous or ultra-hazardous activities.** In *Sachs v. Chiat*, 62 N.W.2d 243, 296 (Minn. 1968), a case involving property damage that was caused by a pile-driving concussion, the Minnesota Supreme Court held that pile driving could be classified as "an inherently dangerous or ultra-hazardous activity," and therefore it was subject to strict

liability. The decision, however, was explicitly limited: "We do not undertake to frame a general rule for application to all situations in which concussion and vibration damage may result from the use of the widely varied mechanical instruments common in our industrialized society." *Id.* at 245.

1) **Risk utility analysis.** Since *Sachs*, the Minnesota Supreme Court has declined to extend the doctrine of strict liability for ultra-hazardous activities. More recently, the court has retreated from strict liability based upon risk-utility analyses, without adopting specific strict liability formulations. In *Ferguson v. N. States Power Co.*, 239 N.W.2d 190, 193 (Minn. 1976), the Minnesota Supreme Court considered the risk at issue so unusual that it invited oral argument on the issue of whether strict liability should apply, and ultimately rejected the theory. The case involved a high-voltage power line accident that occurred while two people were trimming trees in their back yard. *Id.* at 192. Although rejecting the theory of strict liability, the Court noted that a compelling argument existed that "spreading the cost of serious injury over all consumers of electricity is equitably more appealing." *Id.* at 194. The Court did note that the power company should be held to a "high degree of care," though not strict liability. *Id.* at 194 (quoting *Anderson v. E. Minn. Power Co.*, 266 N.W. 702, 704 (Minn. 1936)).

2) **Escaped gas.** The Court in *Mahowald v. Minn. Gas Co.*, 344 N.W.2d 856, 862-63 (Minn. 1984), held that the theory of strict liability did not apply in a case where an explosion caused gas to escape from the utility's gas line. The Court acknowledged the high degree of danger associated with gas leaks, but reasoned that if liability were imposed the result would be that homeowners' insurance companies would shift the loss they contracted to pay to the gas company, even if the gas company was free from negligence. *Id.* at 862.

C) **Learned intermediary.** The Minnesota Supreme Court recognized the learned intermediary defense in *Mulder v. Parke Davis & Co.*, 181 N.W.2d 882, 885 (Minn. 1970). In that case, the Court applied traditional common law causation principles and held that the failure of a drug manufacturer to warn a physician of the dangers of a drug was not the proximate cause of the injury to the patient, because the physician acknowledged he was fully aware of its potentially dangerous effects. *Id.* Under the learned intermediary doctrine, as adopted in Minnesota, prescription drug manufacturers can satisfy their duty to warn by warning prescribing physicians of the risks associated with a drug, rather than warning patients directly. *In re Levaquin Products Liab. Litig.*, 700 F.3d 1161, 1166 (8th Cir. 2012)

The Court declined to extend the learned intermediary doctrine to the employer-employee relationship in the industrial context in *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 276 (Minn. 2004). In that case, a former foundry worker who contracted silicosis brought a products liability action against the silica sand supplier, alleging that the supplier failed to warn him of the dangers of breathing silica dust. *Id.* at 271-73. The Court stated that the learned intermediary defense was developed for the special circumstances of pharmaceutical suppliers and should not be extended to industrial environments. *Id.* at

276. *But see Minneapolis Soc'y of Fine Arts v. Parker-Klein*, 354 N.W.2d 816, 821-22 (Minn. 1984), *overruled on other grounds by Hapka v. Paquin Farms*, 458 N.W.2d 683, 687 (Minn. 1990) (holding that a brick manufacturer had no duty to instruct on the appropriate precautions to follow when installing the bricks, because the evidence "was overwhelming that the architects employed by [the plaintiff] should have known" of the these precautions).

**Willful and Wanton Conduct**

Willful and wanton conduct is the "failure to exercise ordinary care after discovering another in a position of peril." *Bryant v. N. Pacific Ry. Co.*, 23 N.W.2d 174, 179 (Minn. 1946). It is the failure to exercise ordinary care *after* the discovery of peril, not before, that creates a cause of action. *Anderson v. Minneapolis, St. Paul, & S.S.M.R. Co.*, 114 N.W. 1123, 1127-28 (Minn. 1908). Willful and wanton negligence cannot be predicated upon "honest misjudgment." *Bryant*, 23 N.W.2d at 181 (citing *Ashe v. Minneapolis, St. Paul, & S.S.M. Ry Co.*, 164 N.W. 803 (Minn. 1917)).

A) **Liability.** Liability for willful and wanton conduct can only exist where the failure to exercise such care is the proximate cause of injury. *Westerberg v. Motor Truck Serv. Co.*, 197 N.W. 98, 99 (Minn. 1924). The obligation imposed under this rule extends to personal property as well as individuals. *Bryant*, 23 N.W.2d at 179.

## DISCOVERY

**Electronic Discovery Rules**

Electronic discovery relates to the discovery of electronically-stored information. MINN. R. CIV. P. 34 (2014) governs the discovery of such information. A party is entitled to serve upon any other party a request to produce and permit the party making the request to inspect and copy, test, or sample any designated electronically-stored information. MINN. R. CIV. P. 34.01. This information includes writings, drawings, graphs, charts, photographs, sound recordings, images, or any other data stored in any medium "from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form." MINN. R. CIV. P. 34.01(1).

In the absence of "exceptional circumstances," a court may not impose sanctions on a party for failing to provide electronically-stored information lost as a result of the routine, good-faith operation of an electronic information system. MINN. R. CIV. P. 37.05 (2014).

**Expert Witnesses**

A) **Forms of disclosure.** Under MINN. R. CIV. P. 26.01(b) (2014), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Minnesota Rule of Evidence 702, 703, or 705. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report - prepared and signed by the witness - if the witness is one retained or specially employed to provide expert

testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: (A) a complete statement of all opinions the witness will express and the basis and reasons for them; (B) the facts or data considered by the witness in forming them; (C) any exhibits that will be used to summarize or support them; (D) the witness's qualifications, including a list of all publications authored in the previous 10 years; (E) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and (F) a statement of the compensation to be paid for the study and testimony in the case. If the witness is not required to provide a written report, this disclosure must state: (A) the subject matter on which the witness is expected to present evidence under Minnesota Rule of Evidence 702, 703, or 705; and (B) a summary of the facts and opinions to which the witness is expected to testify. If the court does not order a different deadline, these disclosures are due at least 90 days before trial.

In addition, MINN. R. CIV. P. 26.02(e) (2014) provides that facts known and opinions held by experts that were acquired or developed in anticipation of litigation may be obtained through interrogatories requiring any party to identify each person they expect to call as an expert witness, the facts and opinions on which the expert is expected to testify, and a summary of the grounds for each opinion. The rules do not provide for expert witnesses to be deposed. However, upon motion, the court may order further discovery by other means.

A party may also discover facts known or opinions held by an expert who has been retained by another party in anticipation of litigation or in preparation for trial who is not expected to be called as a witness when there has been a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain the facts or opinions on the same subject by other means or as provided in Rule 35.02, governing mental and physical examinations of a party by court order. Further, unless there would be manifest injustice in doing so, the court shall require the party seeking discovery to pay the expert a reasonable fee for the time spent in responding to discovery, and depending on the reason for the discovery sought (for example, an expert under Rule 35.02) the party seeking discovery may be required to pay the other party a fair portion of the fees and expenses reasonably incurred by the other party in obtaining the facts and opinions from the expert.

B) **Rebuttal witnesses.** Rebuttal evidence is that "which explains, contradicts, or refutes the defendant's evidence." *Molkenbur v. Hart*, 411 N.W.2d 249, 252 (Minn. Ct. App. 1987). Proper rebuttal evidence is almost entirely within the discretion of the trial court. *Id.* (citing *Farmers Union Grain Terminal Assoc. v. Indus. Elec. Co.*, 365 N.W.2d 275, 277 (Minn. Ct. App. 1985)); s*ee also Riley Bros. Constr., Inc. v. Shuck*, 704 N.W.2d 197, 205 (Minn. Ct. App. 2005) (finding that a district court did not err in excluding rebuttal testimony "not highly probative of a crucial issue"). Expert rebuttal reports must be disclosed within 30 days of the other party's disclosure. MINN. R. CIV. P. 26.01(b).

C) **Discovery of expert work product.** The general rule is that materials provided to a testifying expert witness are not protected by the attorney-client privilege, and are therefore discoverable. *See* MINN. R. CIV. P. 26.02(e). A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in

anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35.02 (governing expert reports) or upon a showing of exceptional circumstances. MINN. R. CIV. P. 26.02(d); s*ee also Lilly & Co. v. Comm'r of Revenue*, Nos. 6702-6708, 1997 WL 211319, at *1 (Minn. Tax Ct. 1997).

**Non-Party Discovery**

A) Every subpoena issued through Minnesota state court must (1) state the name of the court from which it is issued; (2) state the title of the action, the name of the court in which it is pending, and its court file number (if one has been assigned); (3) command each person to whom it is directed to attend and give testimony, or to produce and permit inspection, copying, testing, or sampling of designated things; and (4) contain a notice to the person to whom it is issued advising that the person is entitled to reimbursement for certain expenses. MINN. R. CIV. P. 45.01(a) (2014).

1) **Responses.** Failure without adequate excuse to obey a subpoena may be deemed contempt of the court on behalf of which the subpoena was issued. MINN. R. CIV. P. 45.05 (2014). A person responding to a subpoena is required to produce documents as they are kept in the usual course of business, or to organize and label them with the categories in the demand. MINN. R. CIV. P. 45.04(a)(1) (2014). A person responding to a subpoena is not required to provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. MINN. R. CIV. P. 45.04(a)(4).

2) **Compliance.** A Minnesota court may quash or modify a subpoena if it fails to allow a reasonable time for compliance, if it requires a nonparty to travel outside the county where that nonparty resides or regularly transacts business in person, or where it requires disclosure of privileged or other protected matter. MINN. R. CIV. P. 45.03(c)(1) (2014). Where information subject to a subpoena is withheld on the basis that it is privileged, the claim must be made expressly, and must be supported by a description of the nature of the documents or communications that is sufficient to enable the demanding party to contest this claim. MINN. R. CIV. P. 45.04(b)(1).

B) **Respondents.** According to MINN. R. CIV. P. 45.04, a person's duties in responding to a subpoena are as follows: (1) in responding to a subpoena to produce documents, the person shall produce the documents as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand; (2) if the subpoena does not specify the form or forms for producing electronically-stored information, the person responding must produce the information in a form or forms in which the person ordinarily maintains the information or in a form or forms that are reasonably usable; (3) the respondent does not need to produce the same electronically-stored information in more than one form; and (4) the respondent does not need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost.

C) **Time Frames for Responses.** MINN. R. CIV. P. 45.03(b)(2) provides that "a person commanded to produce and permit inspection, copying, testing, or sampling may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises—or to producing electronically stored information in the form or forms requested."

**Privileges**

A) **Attorney-client privilege.** MINN. STAT. § 595.02(1)(b) (2011) sets forth the privilege for attorney-client communications: "An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent." To establish this privilege, a party must show (1) a professional relationship between an attorney and a client; (2) the client sought legal advice; and (3) the communication was confidential between the attorney (or agent of the attorney) and the client. The client is the holder of the privilege. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 737 (Minn. 2002).

B) **Statements.** Minnesota's alternate dispute resolution statute provides that no person presiding at any such proceeding is competent to testify in any subsequent civil proceeding or administrative hearing as to any statement, conduct, decision, or ruling occurring at the prior proceeding. MINN. STAT. § 595.02 subd.1a. Exceptions exist, however, with respect to any statement or conduct that could constitute a crime, give rise to disqualification proceedings under the Rules of Professional Conduct; or constitute professional misconduct. *Id.*

C) **Work product.** MINN. R. CIV. P. 26.02(d) restricts the discoverability of trial preparation materials. The rule encompasses the "work product" doctrine without specifically using that term. The work product doctrine has two major categories, "fact" work product and "opinion" work product. Rule 26.02(d) uses the terms "trial preparation material," "attorney mental impressions," and "witness statements" to cover these categories. Thus, when a court refers to trial preparation documents as part of the "work product doctrine," the reference is to trial preparation materials of Rule 26.02(d), which is also known as "fact work product." *See City Pages v. State of Minnesota*, 655 N.W.2d 839, 846 (Minn. Ct. App. 2003).

D) **Self-critical analysis.** The self-critical analysis privilege has not been recognized by the Minnesota appellate courts or the legislature. Other unrecognized privileges include: accountant-client, academic peer review, teacher-student, insurance agent, and confidential clerk-stenographer.

E) **Other privileges.**

1) **Doctor-patient.** MINN. STAT. § 595.02, subd. 1(d) (2014) provides a privilege for doctor-patient communications. To establish the privilege, the following must be met: (1) professional relationship between doctor and a patient; (2) the patient is seeking medical assistance; and (3) the communication is between a doctor (or medical assistant) and involves medical advice. The patient is the holder of the privilege.

2) **Marital communications.** MINN. STAT. § 595.02, subd. 1(a),prevents spouses from testifying against each another without consent. It also prohibits testimony about communications between spouses made during the marriage without consent.

3) **Arbitrator/mediator.** MINN. STAT. § 595.02 subd. 1a, prohibits calling mediators and arbitrators as witnesses in civil matters in which they have served as neutrals, except under limited circumstances.

4) **Priest-penitent.** MINN. STAT. § 595.02, subd. 1(c),prevents a member of the clergy or other minister of any religion to disclose a confession made to them in the course of exercising their religion without the consent of the party who made the confession. Also, clergy or other minister of any religion cannot be examined as to any communication made to them by a person seeking religious or spiritual advice or aid without the consent of the person.

5) **Public officer.** MINN. STAT. § 595.02, subd. 1(e), prevents a public officer from disclosing communications made to the officer in official confidence when the public interest would suffer from the disclosure.

6) **Therapist-patient.** MINN. STAT. § 595.02, subd. 1(g),prevents a registered nurse, psychologist, consulting psychologist, or licensed social worker who performs psychological or social assessment or treatment of an individual at the individual's request, to disclose any information or opinion based on the professional's experience with the client without the consent from the client.

7) **Interpreter.** MINN. STAT. § 595.02, subd. 1(h), prevents an interpreter for a person disabled to disclose any communication that would be privileged if the interpreter was not present without the consent of the disabled person.

8) **Chemical dependency counselor.** MINN. STAT. § 595.02, subd. 1(i), prevents licensed chemical dependency counselors from disclosing information or opinions based on the information they acquire from persons consulting them in their professional capacities, and that was necessary to enable them to act in that capacity. However, they may reveal this information if they have been given informed written consent, when the information reveals the contemplation or ongoing commission of a crime, or when the consulting person waives the privilege by bringing suit or filing charges against the licensed professional that was consulted.

9) **Parent-child.** MINN. STAT. § 595.02, subd. 1(j), prevents a parent or the minor child of the parent from being examined as to any communication made in confidence by the minor to the minor's parent. The communication is only confidential if it is made outside the presence of people who are not members of the child's immediate family, living in the same household. This privilege is not absolute and there are many situations that it may not apply. The privilege can also be waived by express consent to disclosure by either parent or child, or by failure to object when the contents of the communication is demanded.

10) **Sexual assault counselor.** MINN. STAT. § 595.02, subd. 1(k), prohibits sexual assault counselors from disclosing "any opinion or information received from or about the victim without the consent of the victim." However, a counselor may be compelled to identify or disclose information in investigations or proceedings related to neglect or termination of parental rights if the court determines good cause exists.

**11) Peer-Review. Data and information acquired by a review organization, in the exercise of its duties and functions, or by an individual or other entity acting at the direction of a review organization, shall be held in confidence, shall not be disclosed to anyone except to the extent necessary to carry out one or more of the purposes of the review organization, and shall not be subject to subpoena or discovery. The proceedings and records of a review organization shall not be subject to discovery or introduction into evidence in any civil action against a professional arising out of the matter or matters which are the subject of consideration by the review organization. However, information, documents or records otherwise available from original sources shall not be immune from discovery or use in any civil action merely because they were presented during proceedings of a review organization, nor shall any person who testified before a review organization or who is a member of it be prevented from testifying as to matters within the person's knowledge, but a witness cannot be asked about the witness' testimony before a review organization or opinions formed by the witness as a result of its hearings. MINN. STAT. § 145.64**

**12) Insurer and insured. If an insurer makes clear to a client advised that the information elicited was to be used exclusively in defense of any litigation arising out of the accident, statements made by defendant in response to questions then asked by the insurance representative would be privileged. *State v. Anderson*, 247 Minn. 469, 477, 78 N.W.2d 320, 326 (1956).**

**Requests to Admit**

MINN. R. CIV. P. 36.01 permits service of requests after service of the summons and complaint; however, this rule is subject to MINN. R. CIV. P. 26.04, which requires parties to confer and prepare a discovery plan under Rule 26.06 before they may engage in any

discovery. The deadline for submitting requests is usually contained in the scheduling order provided by the court pursuant to Minnesota General Rule of Practice 111.03 or in a pre-trial order. A request for the admission of an ultimate issue in a case may be permissible. *Dahle v. Aetna Cas. & Sur. Ins. Co*., 352 N.W.2d 397, 402 (Minn. 1984).

A) **Objections.** Since a request for admission may be used only in the pending civil action, an objection on the grounds that an admission would be incriminating may not be sound. This is because the admission would have no incriminating effect in another case. In *Parker v. Hennepin Cnty. Dist. Court, Fourth Judicial Dist.*, 285 N.W.2d 81, 84 (Minn. 1979), the district court's order deeming certain matters admitted despite the party's insistent claim of Fifth Amendment privilege was affirmed. The court specifically limited its order of admission to the pending action, and pointed to the provision of the rule limiting the scope of admissions made under Rule 36. *Parker*, 285 N.W.2d at 84.

B) **Sanctions.** Failure to properly respond to admissions can result in sanctions. For example, in *Zurich Reins. (UK) Ltd. v. Canadian Pac. Ltd.*, 613 N.W.2d 760, 766 (Minn. Ct. App. 2000), the Minnesota Court of Appeals affirmed the imposition of a $25,000 monetary sanction in favor of a policyholder because of the insurer's failure to properly respond to admissions.

**Unique State Issues**

Minnesota law does not require expert depositions. See *Experts*, above.

## EVIDENCE, PROOFS, AND TRIAL ISSUES

**Accident Reconstruction**

Minnesota courts have ruled that an expert may give his or her opinion relating to automobile speed based upon skid marks, if lay testimony is nonexistent or of little aid to the jury. *See, e.g., LeMieux v. Bishop*, 209 N.W.2d 379, 384 (Minn. 1973); *Grapentin v. Harvey*, 114 N.W.2d 578, 583-84 (Minn. 1962). In *Dunshee v. Douglas*, the court implied that this rule applies to all accident reconstruction evidence. 255 N.W.2d 42, 47-48 (Minn. 1977). In that case, the Court ruled that the admissibility of expert accident reconstruction depends on "(1) whether there exist sufficient factual data to assure a reasonably complete and accurate reconstruction of the accident without indulging in speculation; and (2) more importantly, whether such opinion testimony will assist the triers of fact." *Id.* at 47 (quoting *LeMieux*, 209 N.W.2d at 383). *But see W.G.O. ex rel. Guardian of A.W.O. v. Crandall*, 640 N.W.2d 344, 350 (Minn. 2002) (holding expert accident reconstruction evidence inadmissible and prejudicial as speculative and not helpful to jury); *Busch v. Busch Const., Inc.*, 262 N.W.2d 377, 391 (Minn. 1977) (excluding expert accident reconstruction evidence portions excluded due to "fundamentally statistical nature of . . . testimony" and because the opinion was not based on firsthand investigation of accident).

## Appeal

MINN. R. CIV. APP. P. 104.01 (2014) governs the time for the filing and service of an appeal. In general, an appeal may be taken from judgment within sixty (60) days after its entry, unless a statute provides otherwise. Likewise, for an appealable order, the appeal must be within sixty (60) days after service by any party of written notice of its filing. Post-trial motions may extend the deadline during the time the district court considers the motions. See Minn. R. Civ. App. P. 104.01, subd. 2.

Failure to file a timely appeal may be fatal to later review. If a timely appeal is filed, notwithstanding the pendency of a request for reconsideration in the trial court, the court of appeals can accept the appeal as timely, but stay it to permit consideration of the reconsideration motion. *See Marzitelli v. City of Little Can.*, 582 N.W.2d 904, 907 (Minn. 1998).

## Biomechanical Testimony

Biomechanics is the study of "the mechanics of biological and esp. muscular activity." 29 MINN. PRAC. § 10:128 (quoting WEBSTER'S NINTH COLLEGIATE DICTIONARY 152 (1989)). It is also referred to as "the understanding or the application of engineering and physics principles to biological systems." *Id.* (quoting *Pineda v. L.A. Turf Club, Inc.*, 112 Cal. App. 3d 53, 58 n.3 (Cal. Ct. App. 1980). In *State v. Slaughter*, the Court of Appeals upheld a district court's decision to allow a doctor to testify, based on his expertise in biomechanics, regarding the cause of an accident involving injury to an infant. A08-0030, 2009 WL 1683985 *4 (Minn. Ct. App. June 16, 2009). *Slaughter* indicates a willingness for the courts in Minnesota to allow limited biomechanical testimony into evidence, but the admissibility of such evidence remains within the discretion of the court. *See id*.

## Collateral Source Rule

The common-law collateral source rule allowed an injured plaintiff to recover damages from a source other than the tortfeasor. The Minnesota legislature did away with the common law rule by enacting the Collateral Source Statute, MINN. STAT. § 548.251 (2014). The collateral source statute prevents windfalls by plaintiffs at the expense of defendants. *See Buck v. Schneider*, 413 N.W.2d 569, 572 (Minn. Ct. App. 1987). It denies plaintiffs recovery of damages to the extent compensation is available from a collateral source. *Id.* In effect, the collateral source statute requires a reduction in the plaintiff's recovery amount by the amount of benefits that have been paid by a collateral source, except for benefits for which subrogation rights have been asserted. *See Johnson v. Consol. Freightways, Inc*., 420 N.W.2d 608, 615 (Minn. 1988).

The question of what constitutes appropriate deductions under the collateral statute is a question for the court, not the jury, to decide. *See* MINN. STAT. § 548.251 subd. 3(b). Neither party should therefore reveal the existence of any potential collateral sources to the jury. *See id.*

Collateral sources are specifically delineated within the statute. But, not every term is clearly defined. In *Swanson v. Brewster*, for instance, lack of a clear definition of the term "payment" resulted in parties disputing whether medical expenses charged to an injured party but later written-off by medical providers pursuant to a health insurance contract was a collateral source within the meaning of the statute. 784 N.W.2d 264, 273 (Minn. 2010). In other words, was the amount of the discount that was negotiated between the healthcare provider and the health insurance company for the care of its insureds, a payment (i.e. "collateral source") under the collateral source statute; and, therefore, deductible from a jury's damage award. *Id*. at 268. In 2012, the Minnesota Supreme held that *a negotiated discount of medical expenses constituted a collateral source* under the statute and could therefore be properly deducted from the plaintiff's personal injury award. *See id.* at 282. Plaintiffs in Minnesota cannot therefore recover the amount of a negotiated-discount related to health insurance or coverage.

**Convictions**

A) **Criminal**. Evidence that a witness has been convicted of a crime punishable by imprisonment of more than one year or for a crime involving dishonesty or a false statement may be admitted for attacking the credibility of a witness if the district court determines that the probative value of the evidence outweighs its prejudicial effect. MINN. R. EVID. 609(a) (2014). Such an inquiry must include the following factors:

> (1) the impeachment value of the prior crime; (2) the date of the conviction and the defendant's subsequent history; (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach); (4) the importance of defendant's testimony; and (5) the centrality of the credibility issue.

*State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978). There is a rebuttable presumption that a conviction has lost its probative value after ten years. *See* MINN. R. EVID. 609(b) (2014).

B) **Traffic.** Evidence of a conviction for a traffic offense is not admissible as evidence in any civil action. MINN. STAT. § 169.94 (2014). Such a conviction also "shall not affect or impair the credibility of such person as a witness in any civil or criminal proceeding." *Id.* § 169.94(2) (2014); s*ee also State v. Currie*, 126 N.W.2d 389, 396 (Minn. 1964). It is an open question whether this prohibition applies to drunk-driving convictions under Chapter 169A.

**Day in the Life Videos**

Trial courts have broad discretion in admitting a "day in the life" video as evidence. *See Hahn v. Tri-Line Farmers Co-op*, 478 N.W.2d 515, 525 (Minn. Ct. App. 1991), *overruled on other grounds by Conwed Corp. v. Union Carbide Chems. & Plastics Co., Inc.*, 634 N.W.2d 401 (Minn. 2001). *Hahn* involved an employee who was severely injured when an auger he was towing behind a tractor detached from the tractor, rolled down a hill, and

struck him in the back. *Id.* at 519-20. The court held that such videotapes of paraplegics may be admissible over objections that the videotapes are "cumulative, prejudicial, or inflammatory." *Id.* at 525.

**Dead Man's Statute**

Dead man's statutes are used in order to exclude testimony that would otherwise be admissible under an exception to the hearsay rule. *Gravley v. Sea Gull Marine, Inc.*, 269 N.W.2d 896, 901-02 (Minn. 1978) (citing *Engel v. Starry*, 128 N.W.2d 874 (Minn. 1954)).

The Minnesota dead man's statute was effectively repealed by MINN. R. EVID. 617: "A witness is not precluded from giving evidence of or concerning any conversations with, or admissions of a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof."

**Medical Bills**

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury. MINN. R. EVID. 409 (2014). However, this rule is limited only to the payment or offer to pay. Any "gratuitous statements" accompanying the payment or offer to pay is not excluded under Rule 409. Use of such evidence to prove other consequential facts are governed by Rules 401 and 403. Minnesota Supreme Court Advisory Committee Comment (1977).

**Offers of Judgment**

MINN. R. CIV. P. 68 was extensively revamped in 2008 to accomplish three purposes: (1) remove "traps" inherent in the rule, (2) make the rule generally more specific and "user-friendly," and (3) make it a more effective tool in accomplishing its purpose of encouraging the settlement of litigation where possible. Supreme Court Advisory Committee on the Rules of Civil Procedure, Report with Proposed Amendments to Rule 68 (Oct. 2007). Because of the extensive changes in 2008, "much of the prior case law interpreting the old rule as well as Federal Rule 68, and decisions interpreting it may not be persuasive guidance in construing the new rule." Jennifer E. Ampulski, *New Tool for Litigators? Offers of Judgment & Rule 68*, BENCH & B. OF MINN., 32, 33 (April 2008).

A Rule 68 offer may be made at any time more than ten (10) days before the trial begins. Acceptance of the offer must me made in writing within ten (10) days of the service of the offer. The offer is irrevocable during that 10 day period.

A) **Categories of offers.** There are two types of offers: total obligation and damages only. MINN. R. CIV. P. 68.01. A total obligation offer includes then-accrued applicable prejudgment interest, costs and disbursements, and attorney fees, if allowed. *Id.* To determine if the relief awarded is less favorable than the offer, the offer is compared against the amount of damages awarded to the plaintiff, plus applicable prejudgment interest, costs and disbursements, and applicable attorney fees that have accrued as of the date of the

offer. *Id.* A damages-only offer does not include prejudgment interest, costs and disbursements, or attorneys' fees. MINN. R. CIV. P. 68.01(c). Instead, a damages-only offer is simply compared with the amount of damages awarded to the plaintiff. *Id.* The purpose of this option is to allow a party entitled to attorney fees to make a later calculation of such fees, and to put the other side on notice that simply paying the settlement amount will not resolve the matter.

> The primary reason for these distinct types of offers is that the rule may operate with significantly different results depending on how the law treats attorneys' fees. Ampulski, at 33. Although attorneys' fees are normally not allowable at common law (the "American rule"), there may be cases where a party may recover them by contract or a fee-shifting statute. If those fees are recoverable as a "cost" such as in some employment-action statutes or under Minnesota's private attorney general statute, fees "may dramatically change the amount and effect of the offer, and result in a dreadful surprise for unsuspecting parties and counsel." *Id.*

B) **Cost-shifting.** In order for an offeror to take advantage of the cost-shifting consequences of the rule, the offer must expressly refer to Rule 68.01. MINN. R. CIV. P. 68.01(b). If a defendant made the Rule 68 offer, when the relief awarded is less favorable than the offer, the plaintiff must pay the defendant's costs and disbursements, but only those incurred *after* service of the offer. MINN. R. CIV. P. 68.03. The plaintiff will not, as the "prevailing party," recover any costs and disbursements incurred after service of the offer, except that the applicable attorneys' fees available to the plaintiff are not affected. *Id.* When a plaintiff makes an offer to settle and the relief awarded is greater than that amount, the defendant must pay not only the plaintiff's costs and disbursements allowed under Rule 54.04, but an additional amount equal to the plaintiff's costs and disbursements incurred after service of the offer. This can result in a plaintiff receiving double costs. *Id.*

> Unlike the former rule, new Rule 68 affords the district court some leeway to relieve a party of these obligations in the event they would cause undue hardship or some other inequity. If the court determines that the obligation to pay costs and disbursements as a result of a party's failure to accept an offer would impose undue hardship or would be inequitable, the court may reduce the amount of the offeree-party's obligation. Presumably, an appellate court would review the district court's decision whether to do so for abuse of discretion. Jennifer E. Ampulski, *New Tool for Litigators? Offers of Judgment & Rule 68*, BENCH & B. OF MINN., 32, 33 (April 2008).

**Offers of Proof**

In Minnesota, an offer of proof is required to preserve an argument that evidence was wrongly excluded. *Grimestad v. Lofgran*, 117 N.W. 515, 518 (Minn. 1908). The Minnesota Rules of Evidence actually permit trial error preservation in absence of formal offers of proof where the context is clear. MINN. R. EVID. 103(a)(2); *see also Uhlman v. Farm Stock & Home. Co.*, 148 N.W. 104, 105-06 (Minn. 1914).

Some jurisdictions are much less stringent with respect to the requirements for offers of proof on cross examination. 1 MCCORMICK ON EVID. § 51 (6th ed. 2006). "On cross-examination, the examining counsel is ordinarily assumed not to have had an advance opportunity to learn how the witness will answer, and the requirement of an offer will not usually be applied." *Id.* Minnesota does not have any law allowing an exception to the offer of proof requirement for cross-examination. According to Minnesota Rule of Evidence 103(c), offers of proof should be conducted outside of the jury's earshot, so as not to defeat the purpose of excluding inadmissible evidence. *See* Committee Comment to MINN. R. EVID. 103 (1989).

**Prior Accidents**

Evidence of prior accidents may be introduced to show that a cause is dangerous and that "a person responsible for [the cause] was aware of its dangerous character." *Henderson v. Bjork Monument Co.*, 24 N.W.2d 42, 45 (Minn. 1946). In addition, evidence of absence of prior accidents resulting from same physical defect or inanimate cause, under substantially similar circumstances, is admissible to prove that such defect or cause was not dangerous or likely to cause such accidents, and further to prove that person responsible for defective condition was not reasonably chargeable with knowledge of its dangerous character. *McCarty v. Vill. of Nashwauk*, 164 N.W.2d 380, 382 (Minn. 1969). The party seeking admission of other accidents must show that "the circumstances surrounding the other accidents were substantially the same as those involved in the accident in litigation." *Colby v. Gibbons*, 276 N.W.2d 170, 176 (Minn. 1979).

**Relationship to the Federal Rules of Evidence**

Minnesota has its own Rules of Evidence. These rules have adopted portions of many of the Federal Rules of Evidence.

**Seat Belt and Helmet Use Admissibility**

A) **Seat belt.** Minnesota law provides that "proof of the use or failure to use seat belts or a child passenger restraint system . . . shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of a motor vehicle." MINN. STAT. § 169.685, subd. 4(a) (2014). This rule applies to plaintiffs and defendants equally. *Burck v. Pederson*, 704 N.W.2d 532, 534 (Minn. Ct. App. 2005). This rule is not entirely without exceptions. Section 169.685, subd. 4(a), specifically does not affect "the right of a person to bring an action for damages arising out of an incident that involves a defectively designed, manufactured, installed, or operating seatbelt or child passenger restraint system." MINN. STAT. § 169.6854(4)(b).

B) **Helmets.** Minnesota enacted a mandatory motorcycle helmet law for drivers and passengers on motorcycles in 1967. 1967 Minn. Laws ch. 875, §§ 1-5. Ten years later, the law was repealed, and a new section providing that in a personal injury action, no injured person who had failed to wear a helmet could recover for any damages due to their failure to wear a helmet. 1977 Minn. Laws ch. 17. In 1999, that section was repealed. 1999

Minn. Laws ch. 230, § 46. There is currently no mandatory helmet law and no limitation on the right to recover for damages that could have been avoided if a helmet had been worn. 27 MINN. PRACTICE § 7.11 (2007).

The Minnesota Supreme Court in *Burgstahler v. Fox*, 186 N.W.2d 182, 183 (Minn. 1971), a case that arose before the mandatory helmet law took effect, held that the exclusion of evidence relating to a motorcyclist's wearing of a safety helmet was proper. The Court in that case followed the holding in *Rogers v. Frush*, a Maryland Court of Appeals decision in which the court rejected helmet evidence. Although the Maryland General Assembly had made helmet use mandatory some three years after the accident in the case, the court held that it was insufficient to justify a conclusion that a standard of care requiring helmet use was "expected by the general public." 262 A.2d 549, 552 (Md. Ct. App. 1970).

It is unclear whether *Burgstahler* still controls after the repeal of the mandatory helmet law. 27 MINN. PRACTICE § 7.11 (2007). In *Johnson v. Farmers Union Cent. Exch., Inc.*, 414 N.W.2d 425, 432 (Minn. Ct. App. 1987), *rev. denied* (Minn. Nov. 24, 1987), the court of appeals read *Burgstahler* as having excluded the evidence primarily because the supreme court did not want to impose a standard of care requiring helmet use.

**Spoliation**

The Minnesota courts do not currently recognize an independent tort for spoliation of evidence. However, Minnesota courts consistently hold that a party may be subject to spoliation sanctions where it has failed to preserve evidence that it knew or should have known would be relevant to pending or future litigation. *See, e.g., Foust v. McFarland*, 698 N.W.2d 24, 30 (Minn. Ct. App. 2005) abrogated on other grounds by *Swanson v. Brewster*, 784 N.W.2d 264 (Minn. Jun 30, 2010). This duty to preserve evidence extends to evidence held by third parties. *Himes v. Woodings-Verona Tool Works, Inc.*, 565 N.W.2d 469, 470 (Minn. Ct. App. 1997).

A) **Standard.** Only "relevant evidence" must not be spoliated. *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 71 (Minn. App. 1998). Spoliation sanctions may only apply in situations where the missing evidence was in a party's "exclusive control and possession." *See Kmetz v. Johnson*, 113 N.W.2d 96, 101 (Minn. 1962); *Minn.-Chem., Inc. v. Richway Indus., Ltd.*, 2000 WL 1066529, *1-2 (Minn. Ct. App. Aug. 1, 2000). Sanctions may arise from the intentional, negligent, or inadvertent destruction of evidence. *See, e.g., Patton v. Newmar Corp.*, 538 N.W.2d 116, 118-19 (Minn. 1995); *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436-37 (Minn. 1990). A sanction for spoliation is only appropriate if the unavailability of the evidence results in prejudice to the opposing party. *Foss v. Kincade*, 766 N.W.2d 317, 323 (Minn. 2009)

B) **Sanctions.** Possible sanctions for spoliation of evidence include: (1) allowing an unfavorable inference to be drawn from a party's failure to produce evidence and allow the jury to infer that the evidence, if produced, would have been unfavorable to such party; (2) discovery sanctions; (3) criminal sanctions; (4) excluding expert testimony; (5) precluding evidence; and (6) attorney professional discipline. *See Patton*, 538 N.W.2d at 119 (Minn.

1995); *Federated Mut. Ins. Co.*, 456 N.W.2d 434, 436-37 (Minn. 1990) (failure to comply with order compelling discovery)); *see also* MINN. STAT. § 609.63(1)(7) (intentional destruction of evidence); MINN. R. PROF. CONDUCT 3.4(a) (2008) (fairness to opposing party and counsel); 4 MINN. PRAC. CIVJIG 12.35 (4th ed. 1999); *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 71-72 (Minn. Ct. App. 1998).

**Subsequent Remedial Measures**

Minn. R. Evid. 407 (2014) bars the admission into evidence of subsequent remedial measures. Rule 407 expressly provides that subsequent remedial measures can be admissible for the purpose of demonstrating the feasibility of precautionary measures where this is at issue.

**Use of Photographs**

Photographs are admissible as competent evidence where they *accurately* portray anything which it is competent for a witness to describe in words, or where they are helpful as an aid to a verbal description of objects and conditions, provided they are relevant to some material issue; and they are not rendered inadmissible merely because they vividly bring to the jurors the details of a shocking crime or incidentally tend to arouse passion or prejudice. *State v. DeZeler*, 41 N.W.2d 313, 319 (Minn. 1950); s*ee also State v. Jobe*, 486 N.W.2d 407, 416 (Minn. 1992) ("The admission of photographs at trial is in the discretion of the trial court.").

## DAMAGES

**Caps on Damages**

Minnesota does not have a statutory cap on the amount of recovery available in a suit except those against a municipality. *See* MINN. STAT. § 466.04 (2014). This same statute does not allow recovery of punitive damages from municipalities. *Id.*

The economic loss doctrine in Minnesota precludes certain tort claims and remedies for losses resulting from the sale or lease of a defective product. For such losses characterized as merely or purely "economic," a remedy must be sought under the rules of contract law relating to the sale or lease of goods. Accordingly, a buyer may not bring a product defect tort claim against a seller for compensatory damages unless a defect in the goods sold or leased caused harm to the buyer's tangible personal property other than the goods or to the buyer's real property. *See* MINN. STAT. § 604.101 subd. 3 (2014). For any claim brought in Minnesota in which the economic doctrine applies, the buyer may recover only for (1) loss of, damage to, or diminution in value of the other tangible personal property or real property, including, where appropriate, reasonable costs of repair, replacement, rebuilding, and restoration; (2) business interruption losses, excluding loss of good will and harm to business reputation, that actually occur during the period of restoration; and (3) additional

family, personal, or household expenses that are actually incurred during the period of restoration. *See id*.

**Calculation of Damages**

In Minnesota, a variety of items may be included in calculating a damage award for personal injuries including: (1) past and future pain and suffering; (2) past and future medical expenses; (3) loss of past or future earnings; (4) disability; (5) past and future disfigurement; (6) the effect on plaintiff's enjoyment of the amenities of life; and (7) aggravation of a preexisting medical condition. *Rowe v. Munye*, 702 N.W.2d 729, 736, 742 (Minn. 2005); *Ossenfort v. Associated Milk Producers, Inc*., 254 N.W.2d 672, 685 (Minn. 1977); 4A MINN. PRAC. CIVJIG 91.10, 91.25, 91.35 (6th ed.).

Damages may be categorized as economic or non-economic, and an award for damages may consist of both. Economic damages include past and future medical expenses, and lost wages. *Johnson v. St. Farm Mut. Auto. Ins. Co*., 574 N.W.2d 468, 470, 472 (Minn. Ct. App. 1998). Pain and suffering are non-economic damages. *Ward v. Ward*, 453 N.W.2d 729, 732 (Minn. Ct. App. 1990).

**Available Items of Personal Injury Damages**

A) **Past medical bills.** Past medical expenses are recoverable as economic damages. *See Pemberton v. Theis*, 668 N.W.2d 692, 696 (Minn. Ct. App. 2003).

B) **Future medical bills.** A plaintiff may recover for future medical bills as economic damages. *See, e.g., Ward v. Ward*, 453 N.W.2d 729, 732 (Minn. Ct. App. 1990). In order to recover for future medical expenses, the plaintiff must (1) show that future medical treatments will be required; and (2) establish the amount of damages through expert testimony. *Krutsch v. Walter H. Colling GmBh Verfahrenstechnik Und Maschinenfabric*, 495 N.W.2d 208, 213 (Minn. Ct. App. 1993); *But see Kwapien v. Starr*, 400 N.W.2d 179, 184 (Minn. Ct. App. 1987) (holding that it was possible for a jury to take a plaintiff's life expectancy and factor it against the cost of her past physical treatments to arrive at an approximate figure for future medical expenses).

1) **Insurers.** In *Ferguson v. Ill. Farmers Ins. Group Co.*, 348 N.W.2d 730, 733 (Minn. Ct. App. 2000), the Minnesota Supreme Court concluded that, consistent with the purpose of preventing a double recovery, a no-fault insurer receives credit for the future medical expenses awarded by a jury, and the plaintiff may recover from a no-fault insurer only after they have accumulated future medical expenses that exceed the new award of future medical damages from the tortfeasor. *See Simpson v. Am. Family Ins. Co.*, 603 N.W.2d 860, 864 (Minn. Ct. App. 2000).

C) **Hedonic Damages.** In determining damages, the jury has a right to consider the effect of a plaintiff's injuries on his or her enjoyment of the amenities of life. *Anunti v. Payette*, 268 N.W.2d 52, 55 (Minn. 1978); *Ossenfort v. Associated Milk Producers Inc*., 254 N.W.2d

672, 685 (Minn. 1977). The trial court has discretion in choosing whether to give specific jury instructions regarding loss of enjoyment of life. *Leonard v. Parrish*, 420 N.W.2d 629, 633-34 (Minn. Ct. App. 1988). Currently, Minnesota does not have a specific jury instruction for loss of enjoyment of the amenities of life. *See* 4A MINN. PRAC. CIVJIG 91.10, 91.25 (6th ed.).

D) **Increased risk of harm.** Damages may be awarded for increased risk of future harm if the future harm is reasonably certain to occur. Testimony to a reasonable medical certainty is usually sufficient to prove increased risk of harm. *Dunshee v. Douglas*, 255 N.W.2d 42, 47 (Minn. 1977).

E) **Disfigurement.** A plaintiff may recover damages for disfigurement. *Anunti v. Payette*, 268 N.W.2d 52, 55 (Minn. 1978); *Ossenfort*, 254 N.W.2d at 685. Minnesota recognizes disfigurement as a type of compensatory damage. *See, e.g., Edwards v. Engen*, 178 N.W.2d 731, 733-34 (Minn. 1970).

F) **Loss of normal life.** *See Disability* and *Loss of Society.*

G) **Disability.** A plaintiff may recover damages for disability resulting from injury caused by the defendant. *Ossenfort*, 254 N.W.2d at 685.

H) **Past pain and suffering.** A plaintiff may recover damages for past pain and suffering. *Anunti*, 268 N.W.2d at 55; *Ossenfort*, 254 N.W.2d at 685.

I) **Future pain and suffering.** Future pain and suffering is a factor considered in assessing damages for personal injuries. *Ossenfort*, 254 N.W.2d at 685. However, to recover such damages, the plaintiff must show that such damage is more likely than not to occur. *Pietrzak*, 295 N.W.2d at 508. Damages for future pain and suffering are not adjusted to present cash value. 4A MINN. PRAC. CIVJIG 90.25 (6th ed. 2007).

J) **Loss of consortium.** A spouse may seek damages for loss of consortium. *Thill v. Modern Erecting Co.*, 170 N.W.2d 865, 869 (Minn. 1969). Consortium refers to the reciprocal rights inherent in marriage, which include love, companionship, comfort, and commitment to the needs of each other. *Id.* at 867-68. There are three conditions under which a wife, for instance, may recover damages for loss of consortium: (1) her husband must have recovered damages from the same defendant; (2) her trial must be joined with the husband's trial against the defendant; and (3) any award she receives must be joined with her husband's unless she specifically declares to the jury that the award should be in her name only. *Id.* at 869. Additionally, a parent may be entitled to damages for the loss of services that his or her child would have rendered during minority had the child not been injured. *See, e.g., Eichten v. Cent. Minn. Coop. Power Ass'n. of Redwood Co.*, 28 N.W.2d 862, 871 (Minn. 1947).

K) **Lost income, wages, earnings.** A plaintiff may recover damages to compensate for the impaired ability to work resulting from a defendant's negligence. *Simpson v. Am. Family Ins. Co.*, 603 N.W.2d 860, 863 (Minn. Ct. App. 2000). To recover damages for impaired

earning capacity a plaintiff does not need to prove actual earnings or income before the injury occurred. *Fifer v. Nelson*, 204 N.W.2d 422, 425 (Minn. 1973); *Cooper v. Kretzman*, No. C1-95-1727, 1996 WL 229277, at * 2 (Minn. Ct. App. 1996). However, a jury may consider factors such as the plaintiff's age, health, occupation, life expectancy, skill, and training. *Fifer*, 204 N.W.2d at 425. Damages for impaired earning capacity are usually reduced to present cash value. *Olsen v. Special Sch. Dist. No.1*, 427 N.W.2d 707, 714 (Minn. Ct. App. 1988); 4A MINN. PRAC. CIVJIG 91.35 (5th ed. 2007). A plaintiff may recover past damages for lost earnings. 4A MINN. PRAC. CIVJIG 91.20 (5th ed. 2007).

**Loss of a Chance Doctrine**

The Minnesota Supreme Court adopted loss of chance theory in *Dickhoff ex rel. Dickhoff v. Green*, 836 N.W.2d 321 (Minn. 2012). Under Minnesota's version of this doctrine, the total amount of damages recoverable is equal to the percentage chance of survival or cure lost, multiplied by the total amount of damages allowable for the death or injury. *Id.* at 336. The patient retains the burden of proving by the traditional preponderance of the evidence standard that the physician's negligence substantially reduced the patient's chance of recovery or survival. *Id.* at 337. Minnesota's version of the loss-of-chance doctrine is somewhat distinctive in that it does not require that the unfavorable outcome (usually death) ever occur or even that its occurrence be certain. Sarah E. Bushnell, "Loss of Chance: New Medical Malpractice Risk in Minnesota," 70 Bench & B. Minn. 18 (Nov. 2012). It remains unclear whether the loss-of-a-chance doctrine applies to wrongful death cases in Minnesota.

**Mitigation**

An injured plaintiff has a duty to mitigate damages. This means that the plaintiff must act reasonably in obtaining treatment for his or her injury. *Adee v. Evanson*, 281 N.W.2d 177, 180-81 (Minn. 1979). Accordingly, if a plaintiff fails to act reasonably or with precaution in caring for his or her injury, he or she cannot recover damages that result from the lack of precaution. *Couture v. Novotny*, 211 N.W.2d 172, 174 (Minn. 1973).

A) **Surgery.** Although there is a duty to mitigate damages, an injured plaintiff does not have to agree to undergo major surgery to fulfill this duty. *Couture v. Novotny*, 211 N.W.2d 172, 174 (Minn. 1973). The reasoning behind this is that major surgeries involve risks that only the plaintiff bears, especially where there is a possibility of unsuccessful or disastrous results. *Id*. at 175. However, where an injury may be corrected or improved with surgery and a reasonably prudent person would undergo such a surgery, then this is usually taken into account in determining how much to reduce a damages award. *Id*. at 176.

B) **Property.** In addition to mitigating damages or injury to the person, there is a duty to mitigate damages to one's property. *See, e.g., Waseca Sand & Gravel v. Olson*, 379 N.W.2d 592, 595 (Minn. Ct. App. 1985).

C) **Failure to mitigate.** Failure to mitigate damages is recognized as an affirmative defense and as required under MINN. R. CIV. P. 8.03 (2014), a party must plead such a defense in its answer. *See* MINN. R. CIV. P. 8.03 (2012); *see also City of Minneapolis v. Ames & Fischer Co., II, LLP*, 724 N.W.2d 749, 754 (Minn. Ct. App. 2006); *Reardon Office Equip.*

*v. Nelson*, 409 N.W.2d 222, 225 (Minn. Ct. App. 1987). Failure to mitigate is subject to comparison as types of contributory negligence under the Minnesota Comparative Fault Act. MINN. STAT. § 604.01.

D) **Seat belts.** Although an injured party has a duty to mitigate damages, under Minnesota's seat belt gag rule, a defendant, in any lawsuit involving personal injury or damage to property, cannot introduce into evidence proof that a plaintiff failed to wear a seat belt to show that damages would have been mitigated. MINN. STAT. § 169.685 (2014); *Lind v. Slowinski*, 450 N.W.2d 353, 359 (Minn. Ct. App. 1990).

**Punitive Damages**

A) **Bringing a claim.** Section 549.191 of the Minnesota Statute allows punitive damages to be sought only by motion to the court requesting leave to amend the pleading to add punitive damages. They cannot be plead in the original complaint. According to the statute, leave may only be granted upon a finding of *prima facie* evidence in support of the motion. MINN. STAT. § 549.20 (2014). Section 549.191 requires that the moving party submit prima facie evidence that the defendant's acts constituted deliberate disregard for the rights or safety of others. *See* MINN. STAT. §§ 549.191, .20. In 1990, section 549.20 was amended; "willful indifference" was changed to "deliberate disregard," which resulted in a 'heightened standard' for punitive damages." *See McCloud v. Norwest Bank Minn., N.A.*, No. C4-96-601, 1996 WL 509846, at *5 (Minn. Ct. App. Sept. 10, 1996) (citing *Bougie v. Sibley Manor, Inc.*, 504 N.W.2d 493, 500, n.4 (Minn. Ct. App. 1993)).

B) **Standard.** MINN. STAT. § 549.20 ( allows for punitive damages to be sought in any civil action upon a showing of "clear and convincing evidence," that "the acts of the defendant show deliberate disregard for the rights or safety of others." Deliberate disregard exists where a defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights of others and deliberately proceeds to act in conscious or intentional disregard of or with indifference to the rights of others. MINN. STAT. § 549.20(1)(b); *Gamma-10 Plastics, Inc. v. Am. President Lines, Ltd.*, 32 F.3d 1244, 1255 (8th Cir. 1994).

C) **Insurability.** The Minnesota Supreme Court has held that "in most instances public policy should prohibit a person from insuring himself against misconduct serious enough to warrant punitive damages." *Wojciak v. N. Package Corp.*, 310 N.W.2d 675, 679-80 (Minn. 1981) (discussing *Nw. Nat'l Cas. Co. v. McNulty*, 307 F.2d 432, 440-41 (5th Cir. 1962)). Despite this general rule there are certain exceptions.

1) **Exceptions.** The first exception is for certain statutory penalties. For example, in *Wojciak*, the Minnesota Supreme Court found that damages were in fact covered by a workers compensation policy because the statute was enacted not only to deter wrongful conduct, but also to afford redress to employees who lose their employment; therefore, it would not be against public policy for the insurer to pay punitive damages. *Id.*

The second exception is for vicarious liability. Minnesota courts will not preclude coverage for punitive damages that are extended to a party who is only vicariously liable. *See, e.g., Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 216 (Minn. 1984). In 2000, this exception was codified at Minnesota Statute section 60A.06, subdivision 4.

The third exception is for municipalities. Section 466.06 of the Minnesota Statute specifically allows municipalities to obtain coverage for payment of punitive damages. The Minnesota Supreme Court explained the reasoning for this exception in *Douglas v. City of Minneapolis*, 230 N.W.2d 577, 584-85 (Minn. 1975). The Court held:

> [W]hile we believe the circumstances would be limited and infrequent in which a municipality would choose to pay a judgment in a case in which the employee's acts were not in good faith, we decline to preclude such a payment where the governing body for reasons of overriding importance to the community […] might decide otherwise.

*Id.* at 585.

D) **Caps.** There is no legislated limit on punitive damages for a common law tort claim in Minnesota.

**Recovery of Pre- and Post-Judgment Interest**

A) **Prejudgment interest.** Recovery of prejudgment interest is governed by MINN. STAT. § 549.09(1) (2011). Prejudgment interest is considered an element of damages because it is awarded to fully compensate the plaintiff; it converts the amount of damages at the time of demand into the amount of damages at the time of the verdict. *Balder v. Haley*, 441 N.W.2d 539, 544 (Minn. Ct. App. 1989). In essence, prejudgment interest accrues from the date the lawsuit was filed, or the date notice of a claim was given, to the date of verdict. *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 335 (Minn. 1990); MINN. STAT. § 549.09(1)(b)-(c).

1) **Offer to settle.** If either party makes a written offer to settle the dispute, the other party has thirty (30) days to make a counter offer. If the parties are unable to reach a settlement agreement, and if the losing party's offer is closer to the judgment, the prevailing party will receive interest only on the amount of the settlement offer or the judgment, whichever is less; such interest accrues only from the time the lawsuit was filed to the time the settlement offer was made. If the prevailing party's offer is closer to the judgment, then interest is calculated from the time the lawsuit was filed until the time judgment is rendered. MINN. STAT § 549.09(1)(b); *Krutsch v. Walter H. Collin GmBH Verfahrenstechnik Und Maschinenfabric*, 495 N.W.2d 208, 215 (Minn. Ct. App. 1993).

2) **Past general damages.** Pre-judgment interest may be awarded on past general damages, *Myers v. Hearth Tech. Inc*., 621 N.W. 2d 787, 794 (Minn. Ct. App. 2001),

including damages for past pain, disability, and emotional distress. *Skifstrom v. City of Coon Rapids*, 524 N.W.2d 294, 296 (Minn. Ct. App. 1994). However, pre-judgment interest is not awardable on punitive damages or other non-compensatory damages unless allowed by law or agreed to by contract. MINN. STAT. § 549.09(1)(b)(3).

3) **Payments.** In civil cases, after the court has determined the amount of damages, a defendant can file a motion to request that the court determine if the plaintiff has received any payments related to his or her injury or disability. MINN. STAT. §548.36(2) (2011). In such a situation, the court calculates pre-judgment interest after the damages award has been reduced by any such payments made to the plaintiff. *Jewett v. Deutsch*, 437 N.W.2d 717, 722 (Minn. Ct. App. 1989).

B) **Post-judgment interest.** Recovery of post-judgment interest is governed by MINN. STAT. § 549.09 (2014). Post-judgment interest is awarded to a plaintiff as compensation for the loss of use of money resulting from a defendant's failure to pay damages or any sum that the court has determined the defendant owes. *Lienhard v. State*, 431 N.W.2d 861, 865 (Minn. 1988). Because Minnesota does not consider post-judgment interest to be part of a damages award, municipalities are subject to the post-judgment interest statute despite the statutory cap on their liability. *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 336 (Minn. 1990).

**Recovery of Attorneys' Fees**

In Minnesota, attorneys' fees are not damages. *St. Paul Prof'l Emps. Ass'n v. City of St. Paul*, 226 N.W.2d 311, 313 (Minn. 1975). The general rule in Minnesota is that an individual cannot recover attorneys' fees from the adverse party unless there is a contract or a statute permitting such recovery. *Fownes v. Hubbard Broad. Inc.*, 246 N.W.2d 700, 702 (Minn. 1976); *St. Paul Prof'l Emps. Ass'n*, 226 N.W.2d at 313.

A) **Reasonableness.** The trial court has a duty to ensure that an award for attorneys' fees is reasonable. In making such a determination, the court considers a number of factors such as the time and labor involved; the nature and difficulty of the attorney's responsibilities; the amount involved and the results obtained; the customary fee for such services; the attorney's experience, reputation and abilities; and the type of fee arrangement existing between the attorney and the client. *City of Minnetonka v. Carlson*, 298 N.W.2d 763, 765 (Minn. 1980); *Madsen v. Hanson*, 2004 WL 1327780, at *2 (Minn. Ct. App. June 15, 2004).

**Settlement Involving Minors**

In Minnesota, a parent or guardian can settle a minor's personal injury suit; however, court approval is required for such a settlement to be valid. *See Wilson v. Davidson*, 17 N.W.2d 31, 34 (Minn. 1944); MINN. STAT. § 540.08 (2014). In addition, a parent can settle a claim, with court approval, even when the lawsuit has not begun. *Wilson*, 17 N.W.2d at 34. However, if a minor does not have a representative who is duly appointed by law, the minor

must be represented by a guardian *ad litem* appointed by the court. MINN. R. CIV. P. 17.02 (2014).

**Taxation of Costs**

Generally, for any lawsuit brought in a Minnesota district court, the prevailing party may recover for reasonable disbursements paid or incurred during trial. MINN. STAT. § 549.04 (2014).

On appeal, MINN. R. CIV. APP. P. 139 (2014) provides for an award of costs and disbursements to prevailing sets time limits for taxing those costs and objecting to taxation. The rule also empowers the appellate courts, in their discretion, to deny costs and disbursements in whole or in part for violation of the appellate rules or for other good cause. MINN. R. CIV. APP. P. 139.04 does not allow an appeal from taxation or denial of costs.

**Unique Damages Issues**

A) **Spousal nursing services.** The court may award special damages for nursing services rendered by one spouse to the other; however, only one of the spouses may receive such an award, not both. *Ossenfort v. Associated Milk Producers Inc*., 254 N.W.2d 672, 686 (Minn. 1977); *Dawydowycz v. Quady*, 220 N.W.2d 478, 481 (Minn. 1974).

B) **Loss of consortium.** An individual cannot recover damages for loss of consortium where his or her spouse is the defendant, nor can a child recover damages for loss of consortium. *Plain v. Plain*, 240 N.W.2d 330, 332 (Minn. 1976); *Salin v. Kloempken*, 322 N.W.2d 736, 739-40 (Minn. 1982).

C) **Furnishing necessities.** A plaintiff cannot recover damages incurred in furnishing necessities such as medical expenses to his or her spouse. *Plain*, 240 N.W.2d at 332-33.

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