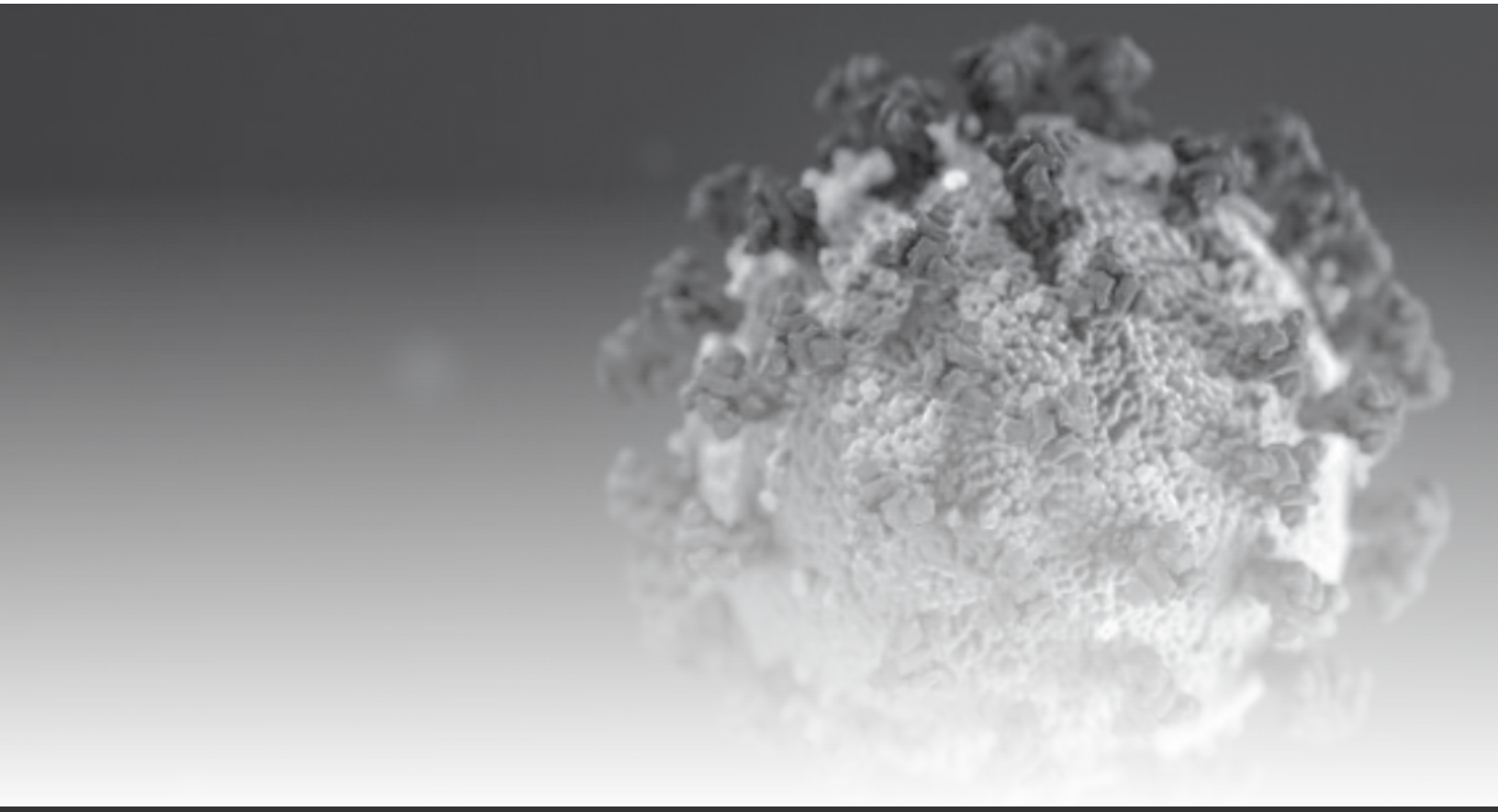
MINNESOTA

Defense

COMPLIMENTARY

SUMMER 2020



COVID-19 IN THE WORKPLACE — AN OCCUPATIONAL DISEASE

THE RISE OF MODULAR CONSTRUCTION: COMMON LEGAL ISSUES

WHY WOMEN WANT: AN ANALYSIS OF ADDICTION IN FEMALES

The Editorial Committee welcomes articles for publication in *Minnesota Defense*. If you are interested in writing an article, please contact one of the Chief Editors or call the MDLA office at 651-290-6293.

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Minnesota Defense is a regular publication of the Minnesota Defense Lawyers Association for the purpose of informing lawyers about current issues relating to the defense of civil actions.

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Benjamin D. McAninch

Blethen Berens

This is the last note I'll have the privilege of writing as your MDLA president. Unless our incoming president's "rooting" interests drastically change, you will likely not read much more in these pages about the Alabama Crimson Tide. I'm sure you find that severely disappointing. But, I'll make it up to you by providing, as a parting gift, my favorite quote from the noted philosopher and football coach, Nicholas Lou Saban, Jr., one that I find particularly applicable to this year at the MDLA:

"We can't win together if we don't work together." [1]

I've always heard that when a crisis or emergency enters your life, you find out a lot about yourself and the people around you. You find out what you're made of, so to speak. It is clear to me that the MDLA is made up of smart, tough, compassionate people who value the organization and are willing to make personal sacrifices to further our goals and initiatives. Coach Saban would be proud.

Pressure seems to sharpen the focus of most lawyers. Issues that seemed vitally important a few months ago are now… not. From what I can see, this global pandemic has caused all of us to focus in our own lives and also in our practices. The MDLA is no different. The level of focus and commitment demonstrated by the MDLA members with whom I've been working has been nothing short of exemplary. I've asked favors of more than a few of you, and every single time you've answered without reservation or hesitation. For that, I'm extremely grateful.

It's no secret that belt tightening is going on throughout our ranks. I'm grateful for those of you on the Membership Committee who doubled down on your efforts to stem the tide of declining registrations. I'm grateful to our Events Committee for remaining flexible and objective enough to make reasonable decisions during an emotional time. I'm grateful to our sponsors who have stuck with us despite the fact that we were unable to hold our flagship event, the Trial Tactics Seminar in Duluth. Not only have those sponsors stood by their financial commitments to this organization; they have rallied to help put on a number of highly relevant and useful virtual CLE programs. Some of these seminars will have taken place by the time you read this, but there are many more to come.

Our Women's Breakfast is one of our signature events and often one of the best attended. I'm grateful to the Women in Law Committee for their ability to adapt to the impracticality of conducting this event in person. Our team quickly pivoted to hold this event virtually and offered excellent programming free of charge. In keeping with our initiatives during recent seminars, we added a philanthropic opportunity for attendees as well. What an impressive effort by this group—a group that is known throughout the country for being at the forefront.

I'm grateful to our Diversity Committee for persevering during this difficult time to complete the pilot program for our Diversity Clerkship Initiative, one of the first in the country from an organization like ours. Again, this committee has put in whatever work is necessary to focus on the crucially important issue of cultivating and celebrating diversity in our practice and in our community.

The Law Office Practice Committee had not met for a number of years before the pandemic but came back together out of necessity as a means to share ideas while member firms worked through the myriad of new issues we all face. We were able to mobilize a panel discussion

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1 *This quote narrowly edged out the following quote from Coach Saban, "I've never considered joining Twitter, nor do I know why anyone would."*

ARTICLES FROM PAST ISSUES

Members wishing to receive copies of articles from past issues of *Minnesota Defense* should forward a check made payable to the Minnesota Defense Lawyers Association in the amount of $5 for postage and handling. In addition to the articles listed below, articles dating back to Fall '82 are available. Direct orders and inquiries to the MDLA office, 1000 Westgate Drive, Suite 252, St. Paul, MN 55114.

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Hannah Felix

When Worker's Compensation and Tort Law Collide
Elizabeth Roff and Cindy Butler

Same as It Ever Was: Lambertson Contribution in a Post-Fish v. Ramler World
Rachel Beauchamp and Peter Lindberg

Village Lofts Ensured Repose for Condo Contractors, and Clarified the Law Governing Two Harbors Settlements. Here's How
Jon Zentner, Steven Erffmeyer and Jeff Markowitz

Winter 2020

The Whole Truth: What Whole Exome Sequencing and Other Genetic Tests Can Reveal about Causation in Birth Injury Cases
Sarah Hoffman

Minnesota Joins Majority of States in Enacting Additional Statutory Legislation Related to Licensing and Regulation of Assisted Living Facilities
Elle Lannon and Patti Skoglund

Practical and Ethical Pitfalls of Audio Recording Neuropsychological Examinations
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Fall 2019

Inclusion: A Critical Element in the Evolutionary Process of the Legal and Construction Professions
Kristine A. Kubes

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What it Means to Be Exclusive: The Overruling of Karst and the Effect on the WCA's Exclusivity Provision
Erik Rootes

JOIN A COMMITTEE

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

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

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

Committees available include:

- Amicus Curiae
- Construction Law
- Diversity
- Editorial
- Employment Law
- Events Committee
- Governmental Liability
- Insurance Law
- Law Improvement
- Law Practice Management
- Long Term Care
- Membership Development
- Medical Liability and Health Care
- New Defense Lawyers
- Motor Vehicle Accident
- Products Liability
- Retail and Hospitality
- Technology
- Workers' Compensation
- Women in the Law

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regarding the changing landscape in light of COVID-19 and I'm sure similar discussions will be offered to our membership going forward.

Since every practice area has been affected by COVID-19 and the legislation that has followed, I'm grateful for the efforts of each substantive law committee for their ability to quickly put out timely virtual programming in their respective areas of law. Of particular note was the Workers' Compensation Committee's virtual seminar on the new electronic filing system. This seminar drew attendance that rivalled the kind of turnout we see in Duluth at TTS. Nice work!

I'm grateful for our team at Ewald Consulting for their efforts to mobilize multiple virtual meetings and platforms to ensure that we can communicate with our members effectively. They were quick to offer advice and we were able to leverage their experiences with other clients to streamline these transitions.

Your incoming president, Matt Thibodeau, put together a first-class program regarding storytelling for our TTS seminar. I know he was excited to lead our largest conference in his home city and I also know that we'd all like to be reading this after a great conference and another fun family weekend in Duluth. While I'm disappointed that we weren't be able to get together this year, I'm hopeful we will do so soon and I'm confident that this valuable programming will be carried forward into TTS 2021.

As I approached this year as president of the MDLA, I can say with certainty that "global pandemic" was not among the list of things I thought we'd be facing. Having seen how you responded—how you simply rolled up your sleeves, put your heads down and got to work at dealing with this crisis—I leave this position with a sense of awe, appreciation and inspiration for the caliber and capability of everyone in this organization. We faced an unknown and downright scary situation with focus, hard work and dedication. While there were bumps and hurdles along the way, we dealt with it, and continue to do so by working together. For that I will be forever grateful and proud of my association with this group.

Because I'm sure there's something or someone I inadvertently forgot to specifically mention, I want to be sure I express to our leadership, our members, our sponsors and our management company the following sincere message from me:

Thank you.

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Focused on the defense of retailers, restaurants and hospitality businesses against suits for:

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

JOIN ONE OF MDLA'S COMMITTEES

WOMEN IN THE LAW

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

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

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

COVID-19 IN THE WORKPLACE — AN OCCUPATIONAL DISEASE

By Amy M. Byrne, Aafedt, Forde, Gray, Monson & Hager, P.A.

The COVID-19 pandemic uniquely affects the workers' compensation system. Employees with prior injuries are left uncomfortably situated while same elective treatments are on standby. *See* Minn. Exec. Order 20-17 (suspending all non-essential and elective surgeries that use Personal Protective Equipment). Employers must follow Executive Orders to "flatten the curve" and protect employees from harmful viral exposure. Minn. Exec. Order 20-0; 20-51. Employees, employers and workers' compensation carriers must inevitably adapt to meet new legal expectations set by State and Federal law. *See, e.g.*, FECA-PM 2-806 (providing coverage for Federal occupational disease claims).

EXISTING LAW ON OCCUPATIONAL DISEASES

Before COVID-19, and the resulting laws and regulations, Minnesota provided workers' compensation coverage for occupational diseases. Minn. Stat. 176.011, subd. 15. (2019) (defining occupational diseases). The definition of an occupational disease is any "mental impairment" "or physical disease arising out of and in the course of employment peculiar to the occupation in which the employee is engaged and due to causes in excess of the hazards ordinary of employment." *Id.*, at subd. 15(a). Essentially, an occupational disease is viral and internal in contrast to an external, physical work injury.

Importantly, occupational diseases are not the same as ordinary diseases to human life. *Id.* In our daily lives, we are exposed to diseases such as the common cold or flu. These common diseases are known as ordinary diseases of life because the general public has equal exposure to such diseases from engagement in everyday activities. Moreover, the ability to mitigate the risks or identify the source for a common, widespread disease is minimal. Without the ability to identify the source, it is difficult to hold a workers' compensation payor liable. *See* Minn. Stat. 176.141 (requiring Notice for occupational injury). As a result, the law provides no compensation for any occupational disease that is ordinary and common to daily life. Minn. Stat. 176.011, subd. 15.

Occupational hazards are an exception to the rule for ordinary diseases. *Id.* at subd. 15(a). Diseases that are occupational hazards result from additional viral exposure to employees and are more readily identifiable conditions. *Id.* For example, an employee working within a congested smoke factory without "PPE," personal protective equipment. The employee could claim a lung condition because there is a connection between work smoke inhalation and lung damage. The law provides that occupational hazards must "follow as an incident of an occupational disease." *Id.* In other words, the disease and the occupational hazard must be causually linked. There

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Amy Byrne is an associate at the firm Aafedt, Forde, Gray, Monson & Hager, P.A. She received her Juris Doctor degree from the University of Minnesota Law School. Ms. Byrne represents employers and insurers in workers' compensation, civil litigation and subrogation. While attending law school, Amy was a judicial extern for the Honorable Joan. N. Ericksen at the United States District Court for the District of Minnesota. She also worked as a director within the school's civil practice clinic and held two editor positions on the Minnesota Journal of International Law. *Oral advocacy is one of Amy's strengths for clients. She received an award for her advocacy in a regional moot court conference and has argued in District Court in two complex dissolution trials that involved conflicting evidence and cross-examination of witnesses. Amy has a detailed and personable approach to her practice, examining legal intricacies that can help resolve client issues at the forefront.*

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must be connection to the employment for an occupational disease, and it must be supported by medical evidence. Specifically, for compensation to be established, the "disease arises out of the employment only if there is a direct causal connection between the conditions under which the work is performed and if the occupational disease follows as natural incident of the work as a result of the exposure occasioned by the nature of the employment." *Id.* In general, compensation for diseases requires the employee to find a direct and proximate connection to a viral hazard located at the employer. *Id.*

In recent years, the definition for occupational disease under Minnesota Statute 176.011, has grown to include new diagnoses. *See* Minn. Stat. 176.011 subd. 15(b); subd. 15(c). Most notably, the statute provides a class of employees a presumption for workers' compensation coverage for certain occupational diseases. *Id.* Workers for the Minnesota State Patrol, for example, are found to presumptively have work-related myocarditis, coronary sclerosis, or pneumonia, if the employee works immediately prior to the infection. Minn. Stat. 176.011 subd. 15(b). Firefighters on active duty presumptively have an occupational disease if the injury is related to exposed to heat, radiation, or a known carcinogen. Minn. Stat. 176.011 subd. 15(c). Coverage is extended for employees who have occupational hazards associated with the nature of their employment.

Prior to the 2020 COVID-19 legislation, the Workers' Compensation Act included work-related presumptions for emergency medical technicians and licensed nurses that provide medical care in certain circumstances:

> [Covered employee] who contract an infectious or communicable disease to which the employee was exposed in the course of employment outside of a hospital, then the disease is presumptively an occupational disease and shall be presumed to have been due to the nature of employment and the presumption may be rebutted by substantial factors brought by the employer or insurer.

Minn. Stat. 176.011 subd. 15(b).

Accordingly, a party defending against a workers' compensation claim subject to this section must have substantial factors to prevail on a denial. *Id.* Evidence of external contributing factors for the disease would likely be sufficient to warrant an investigation. For example, examining past medical records and conducting a deposition of the employee would provide insight into the employee's past medical history and daily work environment. If the work hazard is minimal, or if records suggest a different cause, the employer or insurer may be able to rebut the presumption.

Another way employers can seek to rebut the presumption is if the evidence suggests causation is too remote. Minn. Stat. 176.011, subd. 15(a). If an employee had zero to no occupational exposure, there is likely sufficient reason to deny compensation and likely sufficient evidence to rebut the presumption. *Id.* For example, an employee who works for a congested smoke factory but has no direct exposure to any smoke hazard because he is isolated, working in a separate, smoke-free building. This scenario may warrant a coverage denial because the exposure is too remote, especially if there is a history of smoking or other lung related medical history. Thus, when exposure is too remote, and there are medically related pre-existing conditions, the employer should investigate further and may be successful in rebutting the presumption.

The Workers' Compensation Act provides an employer is free from any liability if the occupational disease is not a direct and proximate cause from the workplace. *Id.* Employers also have no liability for diseases that are not found to be a hazard that is "peculiar to" the employment. *Id.* In a claim for occupational disease, an employee must establish specific facts supporting causation and specific hazards which are peculiar to their employment in order to be successful in a claim for workers' compensation benefits. *See id.*

The pre-COVID-19 law on occupational diseases, such as for State Patrol workers, firefighters and nurses, provides compensation for diseases that originate at the workplace. These specific employees have a presumption that is unique from general occupational disease claims. The standing law for occupational diseases provides a framework for understanding and anticipating the legal process for disease claims, such as COVID-19.

The existing law on occupational diseases may provide compensation to employees who contract COVID-19 at the workplace. Minn. Stat. 176.011 subd. 15. In particular, this law would seem to apply to employees that work directly with COVID-19 patients to treat and cure the disease in a health care setting. That work environment certainly exposes such employees to COVID-19 if they are providing care to those infected with the virus. Thus, such an employee would have a good argument that the hazards of employment were the direct and proximate cause of contracting COVID-19, even if they were equally exposed to COVID-19 in their everyday life. *See id.*

The law on occupational diseases provides employees with a right of action if COVID-19 is contracted at the workplace. For many workers, it will be difficult to establish who they contracted COVID-19 in the workplace, given how contagious and community-spread the virus has proven to be; the disease can undoubtedly be contracted outside of the workplace. *See* Situation Update for Coronavirus 2019

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(COVID-19), Minnesota Department of Health, *Minnesota Case Overview* (May 14, 2020), *available at*: https://www.health.state.mn.us/diseases/coronavirus/situation.html. However, those who are at high risk for contracting the disease, given the hazards or nature of employment, may be successful in establishing liability for COVID-19 related medical treatment and disability.

EXECUTIVE ORDERS; A WORKING PERSPECTIVE

On March 13, 2020, Governor Tim Walz signed his first Executive Order concerning the COVID-19 pandemic. Minn. Exec. Order 20-01. At that time, there were only fourteen confirmed cases of COVID-19 in Minnesota. *Id.* Since that initial order, a string of over fifty-one orders have been signed by Governor Walz in effort to slow the spread of the disease. *See* Minn. Exec. Order 20-52. Many of the orders affect workability for employees. Minn. Exec. Order 20-02; 20-03; 20-04. The Governor's numerous mandates create challenges for workers' compensation coverage determinations.

On March 15, 2020, the second Executive Order, 20-02, directed all schools to close. *Id.* To care for emergency personnel and their children, directive eleven within Executive Order 20-02 provides an exception: although schools are directed to close, emergency personnel and their children may continue to use school services to ensure emergency workers can continue to work. *Id.* Emergency workers were defined to include firefighters, first line responders, law enforcement and court personnel. *Id.* With the execution of the Executive Order, workers' compensation stakeholders immediately began considering implications for workers' compensation coverage in cases which involve employees who contract COVID-19. Stakeholders found that additional legislation was necessary to protect first responders and those affected by the Executive Order. *See* Minnesota House of Representatives, Minnesota Legislature, *House passes workers' comp changes for health care workers first responders with COVID-19* (April 7, 2020), *available at*: https://www.house.leg.state.mn.us/SessionDaily/Story/15216. As a result, the new legislation extends coverage to certain employees including first responders, medical professionals and day care workers who must take care of the workers' children. *Id; see also* Minn. Stat. 176.011 subd. 15.

AMENDMENT TO THE OCCUPATIONAL DISEASE STATUTE

Effective April 8, 2020, the legislature directly addressed compensation for certain employees who contract COVID-19. *See* Minn. Stat. 176.011, subd. 15 (2020). The legislative amendment to the occupational disease statute, Minnesota Statute 176.011, subd. 15, approved and presumed workers' compensation coverage for first responders and child care workers who provide care for children of first responders. *Id.* In the new legislation, these employees do not have a burden to prove any infection occurred at the workplace to be eligible for workers' compensation benefits. *Id.*

More broadly, covered employees are those who continue to work during the pandemic and consequently have more exposure and susceptibility to a COVID-19 infection. *See id.* Accordingly, as might be expected, the presumption for COVID-19 applies to licensed peace officers under section 626.84, subdivision 1 and presumes coverage for firefighters, paramedics, health care workers including nurses, correctional officers, and security counselors who are employed by the state. *Id.* But the presumption goes further, applying to any "assistive employee employed in a health care, home care, or long-term care setting with direct COVID-19 patient care, or ancillary work in COVID-19 patient units." *Id.* Thus, the presumption extends to workers who not only provide direct patient care but also those who work on or near COVID-19 patient floors, such as janitorial services. *Id.* (granting presumption for ancillary workers). As noted above, the presumption is also applicable to workers who provide child care to first responders and health care workers. *Id.* This presumption allows all included employees to apply for workers' compensation benefits without any burden to prove additional information concerning the infection and its source. Although the presumption is available to the aforementioned categories of employees, such covered employees have two requirements: testing and notice. *Id.*

For testing, covered employees must confirm COVID-19 is present by either taking a test or receiving a diagnosis. *Id.* The law states that the employee should seek and obtain a positive laboratory test if it is available. *Id.* The employee may receive a viral test or antibody test. *See* Coronavirus Disease 2019, Centers for Disease Control and Prevention, *Testing for* (May 14, 2020), *available at*: https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/testing.html (A viral test tests for a current infection; an antibody test tests for a past infection. *Id.*) Only if a test is not available should the employee use the alternative and obtain a COVID-19 diagnosis. Minn. Stat. 176.011, subd. 15 (2020). The diagnosis must come from a licensed physician or nurse practitioner. *Id.* The diagnosis may be based on the physician's or practitioner's expertise and review of the employee's symptoms. Obtaining the positive test or diagnosis is the first step and requirement for engaging the COVID-19 workplace presumption.

Second, following a test or diagnosis, the covered employee must notify the employer. *See* Minn. Session Laws, 2020, Session, Ch. 72., H.F. No. 4537 (stating the employee's contraction of COVID-19 must be confirmed by a laboratory test or a diagnosis). The employee must provide the positive test or diagnosis to the employer or to the workers' compensation carrier. Minn. Session Laws, 2020, Session, Ch. 72., H.F. No. 4537 ("diagnosis shall be provided to the employer or insurer"). This will notify the employer and workers' compensation carrier of any potential workplace

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exposure. Once the covered employee tests positive or has a positive diagnosis for COVID-19, coverage is presumed. *Id.* The employer and workers' compensation carrier may rebut the presumption only if there is evidence that employment was not the direct cause for the disease. *Id.* The statute provides the employer and insurer this rebuttal exception to dispute liability. *Id.*

APPLYING THE MINNESOTA COVID-19 STATUTE IN PRACTICE

In litigation, the daily activities of covered COVID-19 employees must be evaluated extensively. Some factors to consider may be whether the employee uses public transportation, lives in a household with other members, has access to PPE outside of work, and where the employee lives.

At the time this article was written, there were over 4,000 positive COVID-19 cases in Hennepin County. *See* Situation Update for Coronavirus 2019 (COVID-19), Cases by County of Residence, Minnesota Department of Health, *Minnesota Case Overview* (May 14, 2020), *available at*: https://www.health.state.mn.us/diseases/coronavirus/situation.html.

In contrast, there were just under 200 positive cases in Scott County, a Twin Cities suburb. *Id.* Thus, it is clear that the employee's community and residence may significantly affect the strength of a COVID-19 workers' compensation case. The more positive cases surrounding an employee, the greater the likelihood of community-spread infection rather than an occupational infection. If the employee is a covered employee under the new statute, the employee will immediately be presumed to have an occupational disease. Minn. Session Laws, 2020, Session, Ch. 72., H.F. No. 4537. If the employee is not a covered employee, the employee will have the burden to prove the occupational disease, unless a presumption already exists. *Id.* In both cases, the defense must prepare to evaluate all claims on a case-by-case basis.

COVID-19 WORKPLACE COMPLIANCE

On May 13, 2020, Governor Walz signed Executive Order 20-56 regarding safely reopening Minnesota's economy and ensuring safe non-work activities during the COVID-19 Peacetime Emergency. Minn. Exec. Order 20-56. The order extensively devises a plan for employees to return to work. *Id.* Employers should be prepared to follow and implement a plan to minimize exposure to COVID-19 in the workplace. *Id.* (requiring non-essential businesses to implement a COVID-19 Preparedness Plan).

At minimum, employers that operate non-critical businesses must be compliant with five factors. *Id*. Employers must (1) require work from home wherever possible, (2) ensure that sick workers stay home, (3) establish social distancing throughout the workplace, (4) employ worker hygiene and source control, and (5) have cleaning, disinfection, and ventilation protocols. *Id.* A preparedness plan without the five requirements will not only expose employees to infection, but employers may be fined up to $3,000, be imprisoned and/or be guilty of a gross misdemeanor. *Id.* The executive order mandates that employers comply with Order 20-56 to protect employees and members of the public. Moreover, if employers comply, it will assist employers with determining and defending workers' compensation cases because exposure is monitored and more limited.

FUTURE COVID-19

Overall, the law on occupational diseases, is important for employees seeking workers' compensation for a COVID-19 infection. Minn. Stat. 176.011, subd. 15. The new legislation both distinguishes and incentivizes a specific class of workers to continue working and provides additional protection for those workers. *Id.* With the virus showing strong evidence of community spread, the ability for employees and employers to identify whether the infection took place at the workplace will be increasingly more difficult, unless the new presumption applies. Minn. Exec. Order 20-56 (acknowledging cases in Minnesota have "rapidly increased" and that COVID-19 is "community spread"). Moving forward, cases will become increasingly more fact specific and dependent on the exposure surrounding the employee. Litigants will review the daily activities employees engage in to determine to what extent the employee may be exposed to COVID-19. Litigants will also review the steps taken by employers to limit exposure pursuant to the executive orders from Governor Walz and recommendations from the CDC.

There is a high likelihood that employers will receive an increasing amount of COVID-19 reports from their employees because the disease is community spread. Litigation is pending for occupational disease claims under Minnesota Statute 176.011, subdivision 15. It is important employers, insurers and any workers' compensation carriers closely evaluate each COVID-19 compensation claim on a factual case-by-case basis.

THE RISE OF MODULAR CONSTRUCTION: COMMON LEGAL ISSUES

By Janet G. Stellpflug, Stellpflug Law PLLC; John F. Thomas, Stellpflug Law PLLC ; Eric H. Chadwick , DeWitt LLP

INTRODUCTION

This article provides a general overview of modular construction, and an outline of common legal issues defense counsel might face when advising construction companies involved in such construction.

What is modular construction? Modular construction refers to one or more structures or units constructed off-site, used as components within a finished building. The components can range from a single wall or bathroom, to a full unit or "full stack." The components are fabricated off-site, typically in a manufacturing plant.

These prefabricated modules are completed with interior finishes, as well as the electrical, mechanical and plumbing, and then fitted together into the finished building. The finishes (such as walls, windows, HVAC, electrical and plumbing) are precision designed and fabricated to interconnect and mesh effortlessly on-site, much like a giant Lego® set. The timing of delivery is coordinated to ensure that the units arrive exactly when the site is ready, so that each unit can be installed shortly after it arrives. Such coordination and design require extensive planning on the front end to meet demands of the evolving industry. Lack of attention to design or engineering can result in units that do not mesh properly in the field, requiring significant refabricating on-site, or even delays in installation leaving units exposed to weather damage.

Modular units are built to endure transportation and storage, meaning they are somewhat portable and protected from the elements. Before leaving the factory, the units are protected to endure transport — by ship, train or crane — as well as weather and unforeseen delays. But even with the best coordination and planning, the units may experience unintended consequences. Multiple, focused inspections at the factory are conducted both for compliance and to mitigate risk.

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John Thomas, a partner at Stellpflug Law PLLC, concentrates his practice in the area of Civil Litigation with an emphasis on construction litigation and products liability litigation. John can be reached at jft@sl-pllc.com.

Eric Chadwick's practice includes representing clients in various technology and commercial disputes throughout the U.S. He focuses primarily on intellectual property litigation. He works with his clients to achieve goal-oriented litigation. Additionally, Eric has taken ten cases to verdict, in matters ranging from life-saving medical devices to farming technology.

The Rise of Modular **continued from page 10**

A recent rise in large scale modular construction, including hotels, apartments, and healthcare and industrial facilities, poses multiple issues for construction counsel. *See Reinventing Construction: A route to higher productivity*, McKinsey Global Institute and McKinsey's Capital Projects & Infrastructure Practice, February 2017, McKinsey.com. Construction counsel should be well-versed in these legal issues.

APPLICABILITY OF THE UCC: GOODS OR SERVICES?

Historically, courts across the country, including in Minnesota, have generally construed traditional construction contracts to be primarily contracts for services, and thus have found that the Uniform Commercial Code ("UCC") does not apply. *See McCarthy Well Co. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312, 315 (Minn. 1987) (contract for restoration of artesian well construed as services contract); *DiIorio v. Structural Stone & Brick Co., Inc.*, 845 A.2d 658, 663 (N.J. Super. A.D. 2004); *Openaire, Inc. v. L.K. Rossi Corp.*, 940 A.2d 724, 726 (Vt. 2007) (contract to build and install a swimming pool enclosure was a contract for services); *Lincoln Pulp & Paper Co. v. Dravo Corp*., 436 F.Supp. 262, 275 (D. Me. 1977) (finding UCC inapplicable to contract relating to the sale, engineering and construction of heat recovery unit).

Modular construction, however, has the potential to challenge that premise because most of the construction takes place off-site, often in a manufacturing facility owned and operated by a third-party. In such cases, a modular construction may be considered a contract for the sale of goods, rather than services, potentially triggering the application of the UCC, rather than traditional construction contract principles.

DETERMINING WHETHER THE UCC APPLIES

Minnesota will likely use the "predominant purpose test" to determine whether the UCC applies to a modular construction project.

The UCC, as adopted in Minnesota, is codified as Chapter 336 of Minnesota Statutes, and defines goods as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale." Minn. Stat. § 336.2-105(1).

When a transaction involves both goods and services, Minnesota courts use the "predominant factor test" to determine whether the transaction is a sale under the UCC. *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 386–87 (Minn. Ct. App. 2004) (citing *Valley Farmers' Elevator v. Lindsay Bros. Co.*, 398 N.W.2d 553, 556 (Minn. 1987)). Under this test, the courts examine whether the predominant factor in the transaction is the transfer of goods or the provision of services. *Id.* Relevant considerations include the language of the contract, the business of the supplier, and the "intrinsic worth" of the goods involved.

Minnesota courts' treatment of mobile and modular homes (through the application of the predominant factor test) suggests that the UCC may play a larger role in the future of modular construction. *See Carpenter v. Anderson Homes, Inc.*, 2007 WL 5129716 (Minn. Dist. Ct. June 11, 2007) (concluding that the sale of a modular home was governed by Article 2 of the UCC); *Peterson v. Bendix Home Sys., Inc.*, 318 N.W.2d 50, 53 (Minn. 1982) (breach of warranty action involving sale of mobile home).

Indeed, one Minnesota federal court recently applied the predominant purpose test to find a contract for the design and construction of six sugar storage silos to be a contract for the "sale of goods" governed by the UCC under Minnesota law. *See generally S. Minn. Beet Sugar Coop. v. Agri Sys.*, 17-CV-5552 (WMW/BRT), 2019 WL 6873050, at *2 (D. Minn. Dec. 17, 2019). In reaching this conclusion, the court found that the purpose and central focus of the contract was the procurement of the sugar-storage silos, which were goods. *See id.* at *2. The court noted that the cost of materials used to construct the silos was vastly higher than the labor, engineering, and construction costs, which the court found to be a significant consideration supporting the conclusion that the agreement at issue was a contract for goods. *Id.*

DOES IT MATTER?

As discussed above, there is an increased likelihood that the UCC will apply to modular construction contracts. The impact on contract interpretation could be significant.

The parties to a modular construction contract may not anticipate that the UCC will apply, leading to additional and unnecessary complications. For instance, and significantly, the UCC imposes contract terms on certain key provisions to the extent they go unaddressed in the parties' written contract. For example, under Section 2-207 of the UCC, a party can accept an offer even if it "states terms additional to or different from those offered or agreed upon …." *See* Minn. Stat. § 336.2-207(1). This opens up the possibility that the parties to a modular contract, due to its "movable" nature, may be bound to contractual terms to which they did not agree, or did not want.

To avoid this (and the application of the UCC altogether), construction counsel should consider advising contracting parties to avoid using form contracts when procuring modular units in favor of a crafted agreement that sets forth all terms of the transaction. The contract may include a specific provision that renders the UCC inapplicable, if that is the intent. Doing so will help minimize, and hopefully eliminate, the risk of triggering an inadvertent application of the UCC. Alternatively, the parties may include provisions affirmatively addressing application of the UCC, if that is their intended course. Either way, construction counsel should be aware of the potential, and the contract should affirmatively anticipate the possibility.

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Warranties

Article 2 of the UCC covers various warranties, both express and implied, which impose certain obligations on sellers and manufacturers of goods. Therefore, a seller or manufacturer of modular units and components ought to familiarize itself with how such warranties are created and enforced.

Under the UCC, express warranties are created when a seller makes an affirmation of fact or promise relating to the goods that becomes part of the reason the buyer purchases the goods. Minn. Stat. § 336.2-313(1)(a)-(c)). Thus, express warranties are created as a result of being specifically mentioned by the seller at the time of purchase.

The UCC also provides two types of implied warranties that, unlike express warranties, are created regardless of whether they are specifically mentioned by the seller at the time of purchase: (1) a warranty of merchantability and (2) a warranty that the goods are fit for a particular purpose. Minn. Stat. § 336.2-314.

As a word of caution, a court may find that the foregoing warranty protections are available even if the contract is found to be for services. In fact, the drafters of Article 2 recognized this possibility in the following Official Comment:

> Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract.

See UCC § 2-313, comment 2. Thus, any contracting party wishing to disclaim these Article 2 warranties must expressly do so during the contract negotiation and drafting process.

Additional statutory and contract warranties apply to the sale of modular units. Notably, the sale of a modular home is the sale of a dwelling, subject to the statutory home warranties set forth in Minn. Stat. § 327A.02. The statutory warranties in section 327A.02 would also apply to the sale of modular residential units within a condominium.

Contract Performance Under UCC

Application of the UCC may also impose significant consequences to construction contractors from a contract performance standpoint. Under Minnesota common law, a contractor does not materially breach a construction contract if it substantially performs its obligations. *Material Movers, Inc. v. Hill*, 316 N.W.2d 13, 18 (Minn. 1982). By contrast, under the UCC, "if the goods or the tender of delivery fail in any respect to conform to the contact, the buyer may reject the whole, accept the whole, or accept particular units and reject the rest." Minn. Stat. § 336.2-601. Thus, the UCC has a far less lenient standard for contract performance compared to common law.

For the reasons highlighted above, the UCC presents many additional, and often unnecessary, complications that typically do not arise in the traditional construction contract context governed by common law. At a minimum, these issues should serve as a reminder that construction counsel should be aware of these differences when advising clients involved in a modular construction project.

UCC Liens

Are modular units real or personal property for purposes of filing a UCC lien statement? It depends. If bank loans are used to make improvements to the units so that any such improvements become comingled, it may give the bank rights in that property. The analogous situation is a bankruptcy case in which a debtor corporation did not have rights in the modular, non-fixture building property sufficient to grant the creditor a security interest where the individual officers and owners of the debtor corporation who purchased the property never formally conveyed the property to the corporation. *In re Hot Shots Burgers & Fries, Inc. v. Fas Fax Corp .*, 169 B.R. 920, 925 (E.D.Ark.1994); *See also M & M Dev. Inc. v. LS Monticello JV Inc.*, 599 N.Y.S.2d 137, 138 (N.Y. App. Div. 3d Dept. 1993) (finding that modular homes were "fixtures" under the UCC and therefore supplier had priority over mortgage covering property on which fixtures were located); *Green Tree Financial Servicing Corp. v. Sutton*, 264 Neb. 533, 650 N.W.2d 228 (Neb. 2002).

DOES PRODUCT LIABILITY THEORY APPLY TO THE MODULAR UNIT?

Some failed building components are considered defective products, subject to typical product liability claims. Consider an air handling unit that causes a fire and burns a strip mall, or a bathroom fan that burns a home. There is little question those products would be subject to a potential claim and typical product liability theory would apply. The key in those instances is the type of damage — damage to other property.

Determining whether modular building components would be subject to a potential product liability claim involves the same factual and legal analysis. It would depend on the circumstances, including the nature of the damage caused by the component, as well as the claimant.

As a general rule, if the plaintiff is the owner of the building, or any party in the contracting chain, and pleads typical breach of contract claims against the manufacturer of the

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modular building components, and if the alleged damage is only to the modular units themselves, product liability theories will fail. Minnesota does not allow tort claims for damages flowing from a breach of contract. Additionally, the economic loss doctrine would prohibit such claims for damage to the product itself. Moreover, "when a plaintiff seeks to recover damages for an alleged breach of contract," Minnesota law limits the claim "to damages flowing only from such breach except in exceptional cases where the defendant's breach of contract constitutes or is accompanied by an independent tort." *Wild v. Rarig*, 302 Minn. 419, 234 N.W.2d 775, 789 (1975). [W]hen "a tort claim is based on a breach of duty that is indistinguishable from the breach of contract, the tort claim will fail." *Zimmerschied v. JP Morgan Chase Bank, N.A.*, 49 F. Supp. 3d 583, 597 (D. Minn. 2014) (quotations omitted).

Product liability claims would be subject to dismissal under the economic loss doctrine, unless the modular units have caused damage to other property. Under Minn. Stat. § 604.101, "a buyer may not bring a product defect tort claim for compensatory damages unless the defect 'caused harm to the buyer's tangible personal property other than the goods or the buyer's real property'." *Daigle v. Ford Motor Co.*, 713 F.Supp.2d 822, 829 (D. Minn. 2010) (quoting Minn. Stat. § 604.101, subd. 3). On the flip side, if a modular component damages or injures a third party, not in the contracting chain, a product liability claim could survive.

INTELLECTUAL PROPERTY ISSUES

Given the large capital outlays associated with development, modular providers will no doubt guard the ideas behind their manufacturing processes through utility patent or trade secret protection. Likewise, the expression or ornamental features of the finished designs are well-suited to copyright, design patent and trade dress protections. The creator of the intellectual property—whether inventor, architect or engineer—will typically retain rights to it, although ownership or more likely licensure for other contracting parties to use those rights in some capacity can and should be handled through contract. The key aspects of the contractual provisions, however, will lie in the whether and how well the grant of these rights is defined.

Although numerous issues may arise, a potential trouble spot will be the scope of rights vested in the purchaser of modular units from the creator of the intellectual property, particularly as they relate to the ornamental features or "look and feel" of the design of the singular modular units as compared to the completed project comprised of multiple modular units. The intellectual property owner likely will desire to maintain ownership over intellectual property in the modular unit so, for example, it can be repurposed to other projects. At the same time, the purchaser needs flexibility with respect to the finished project.

For some purchasers, an obvious approach might be to obtain license rights to use the intellectual property for all purposes relating to the finished project or the particular property in question. Thus, when the modular units are combined into a finished building, the purchaser would be protected in its ability to use, at its discretion, all intellectual property subsisting in that final product, as opposed to the modular unit. But such an approach will prove insufficient for others. Some companies (*e.g.*, hotel chains) that maintain numerous properties, all of which require a consistent look and feel to build brand value, will require rights broader than just a single project or property. Such rights will need to be anticipated and spelled out. But intellectual property owners, generally, may be reluctant to grant broad rights. Doing so may dilute value, which makes little sense given the amount of initial investment required by an owner to develop and obtain the intellectual property. Moreover, the owner may wish to retain the right to use some or all components of a modular unit in subsequent transactions. So a broad grant of rights, with an attendant risk of loss of control over the intellectual property, seems unlikely.

Thus, defining the scope of intellectual property rights with clarity from the outset is critical. As with the UCC considerations discussed above, form contracts must be avoided. Given the unique issues associated with each modular construction, they will either not address the allocation of intellectual property rights properly or, worse yet, fail to address them at all. Foresight and collaboration between contracting parties is a must to ensure that each possesses necessary protections and flexibility to maximize the value of their assets without uncertainty or fear of unnecessary limitations.

INSURANCE ISSUES — "YOUR WORK" AND "YOUR PRODUCT" EXCLUSIONS

A benefit to modular construction is reduced risk when units are manufactured off-site in a controlled environment. But new risks must be contemplated, such as damage during transportation or storage, as well as who performs repairs to the units if they are damaged during this process, or the potential that the units might not be as designed when they arrive on the site despite an intense inspection process.

Insurance coverage issues in the modular construction context may include application of the "your product" and "your work" exclusions typically found in a commercial general liability policy.

The "your work" exclusion has been enforced in Minnesota in claims involving repairs to the insured's own work and has been heavily litigated in other states in the modular construction context. *See e.g., Glob. Modular, Inc. v. Kadena*

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P., Inc., 222 Cal. Rptr. 3d 819, 822 (Cal. App. 4th Dist. 2017); *Scottsdale Ins. Co. v. Tri-State Ins. Co. of MN.*, 302 F. Supp. 2d 1100, 1104 (D. N.D. 2004).

Commercial general liability insurance policies limit property damage coverage through exclusions, including exclusions j(5), j(6), l, and m—known as the "business risk exclusions"—which insurers argue exclude coverage for damages arising out of the insured's own work on the project. Minnesota case law, however, is not so clear cut. Minnesota cases discussing the "your work" exclusion under the business-risk doctrine hold that it bars coverage for the costs associated with repairs of the insured's defective work, finding no coverage for damages related to "redoing" of the insured's own defective work. *Corn Plus Coop. v. Cont'l Cas. Co.*, 516 F.3d 674, 680 (8th Cir. 2008) (citing *Bright Wood Corp. v. Bankers Standard Ins. Co.*, 665 N.W.2d 544, 548-49 (Minn. Ct. App. 2003) (barring coverage for damages associated with the cost of repairing or replacing an insured's defective product or work); *see also* 22 Britten D. Weimer, Clarance E. Hagglund & Andrew F. Whitman *Minnesota Practice*, § 5:11 (2018 ed.)

The "your product" exclusion in the standard commercial general liability policy excludes "'property damage' to 'your product' arising out of it and any part of it." *See* 9A Couch on Ins. § 129:20 (citations omitted.) This exclusion bars coverage for damage to an insured's product arising out of a defect with that product.

The standard definition of "your product," however, expressly provides that real property is not included within the purview of this phrase. And under Minnesota law, the "your product" exclusion does not apply to services. *Western World Ins. Co. v. H.D. Engineering Design & Erection Co.*, 419 N.W.2d 630, 636 (Minn. Ct. App. 1988). Thus, work performed by contractors on dwellings, buildings, structures and any other form of realty is therefore not considered to be the product of the insured.

Other jurisdictions focus on the location of the modular units at the time of the occurrence giving rise to the claim. In such cases, if property damage to a modular unit occurs after the unit is built into the project, it no longer fits within the definition of "your product," and the exclusion should not apply. *See Scottsdale Ins. Co. v. Tri-State Ins. Co. of MN.*, 302 F. Supp. 2d 1100 (D.N.D. 2004) (manufactured building module); *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 104 P.3d 997, 1004 (Kan. Ct. App. 2005) (holding custom home constructed by insured was real property outside of "your product" exclusion); *Scottsdale Ins. Co. v. Tri-State Ins. Co. of MN.*, 302 F.Supp.2d 1100, 1104 (D. N.D. 2004); *Cincinnati Ins. Co. v. Fab Tech`21, Inc.*, No. CIV.03-CV-410-SM, 2005 WL 1492377 (D. N.H. June 24, 2005).

CONCLUSION

Modular construction is clearly an evolving area, and construction counsel should be well-versed in the legal issues surrounding this novel and growing field.

WHY WOMEN WANT: AN ANALYSIS OF ADDICTION IN FEMALES

AN OVERVIEW OF THE 19TH ANNUAL MDLA WOMEN LAWYERS' BREAKFAST HOSTED BY THE WOMEN IN THE LAW COMMITTEE

By Jessie Sogge

ABOUT THE MDLA WOMEN'S BREAKFAST

2020 marked the 19th Annual MDLA Women Lawyers' Breakfast. This was the first time it was ever held remotely. Nevertheless, it still lived up to its caliber. Members and non-members came together for a virtual "brunch" and to listen to a powerful presentation focusing on well-being, why women are particularly vulnerable to substance use and how we can focus on prevention and recovery management. And, because there were no costs for this year's event, the MDLA sought donations and contributed all non-member registration fees to Wayside Recovery Center. Wayside helps women and their families find healing for substance abuse and mental illness. (Waysiderecovery.org)

THIS YEAR'S PRESENTATION

This topic of wellbeing and substance abuse in women was chosen before the new challenges and changes COVID-19 presented, albeit fitting. It stemmed from the Minnesota Supreme Court's 2019 Call to Action for lawyer wellbeing. That initiative was prompted by the publication of the ABA Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation study that found lawyers are grappling with serious barriers to well-being. Lawyers, judges and law students are faced with an increasingly competitive and stressful profession. Studies show that substance use, addiction and depression are at surprisingly high rates. Undoubtedly, this remains the case during the ongoing pandemic. Our committee felt it was important that we work collectively to identify ways to reduce the level of toxicity in our profession, eliminate the stigma associated with help-seeking behaviors, and emphasize that well-being is an indispensable part of a lawyer's duty of competence. This starts with education.

ABOUT THE SPEAKER, KRISTEN SCHMIDT, MD, MAPH

Dr. Schmidt is a board-certified addiction psychiatrist at Hazelden Betty Ford who assists patients in their recovery in both residential and intensive outpatient settings.

OVERVIEW OF PRESENTATION

Dr. Schmidt's presentation was extremely thought-provoking. It was fascinating to learn the scientific reasons why there is such a big difference in how women process substances than men, and why women are generally more pre-disposed to substance use disorders ("SUDs").

Dr. Schmidt described the prevalence of drug and alcohol use among various cohorts, noting a closing male-female gap in indicators of use and related harms. She explained that research shows women achieve disordered use faster than males and that female use severity is more significant. At the same time, women also present to treatment in less time after initiation and those females who have a support system have a really good chance at a favorable outcome.

Dr. Schmidt explained that women have a biological predisposition to use. This is due to certain female chromosomes and hormones that impact the brain. The research shows that increased estrogen and progesterone

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can increase stimulant response, which corresponds with increased use. Interestingly, these female hormones are also suggested to play a role in reduced alcohol consumption during pregnancy. Dr. Schmidt also spoke about modeling. Females are more likely to have had an alcohol dependent parent or a dysfunctional family pattern, and young women are more influenced by their parents' behavior, with maternal behavior particularly significant.

Finally, Dr. Schmidt discussed psychiatric comorbidities. Women are more likely to have co-occurring mental health discorders and SUDs. For example, women with PTSD were five times more likely than women without PTSD to have substance use disorders. Also, alcohol use co-occurs with depression more often in women, and women with depression are seven times more likely than women without to have alcohol dependence in two years. Depression has been positively correlated with craving. Women are also more likely to have eating disorders, which correlate highly with growing up in a dysfunctional SUD family.

Importantly, Dr. Schmidt explained that due to a difference in "why women want" there is a need for a different approach to treatment for women. Women need more of a supportive, rather than confrontational, behavioral approach. They need a projection of acceptance and care, trust and warmth, and a sense of confidence in their abilities with a focus on relationships. Research suggests females are more likely to stay in treatment longer if they stay within the same treatment services and maintain a connection with treatment providers through a continuum of care. Dr. Schmidt stated that this gender-specific treatment also needs to focus on comorbid psychiatric illnesses, recognize hormonal factors, consider fight or flight vulnerability and acknowledge weight gain and relapse potential. Other behavioral approaches to improve outcomes included a focus on issues with child care access, couples therapy, and safety. These are important because more women than men described their caretaker role at home as a rationale for use as increasing energy for work, home and child care. They also reported that an inability to find care for their children was a roadblock to obtaining treatment. Additionally, there exists a stigma of use by mothers and also a fear of seeking help while pregnant or after due to potential legal and custody problems.

Due to these stigma and barriers, women with SUDs are less likely than males to enter treatment, 2:1. To that point, our committee also offered time at the end of the program for Lawyers Concerned for Lawyers to provide information about the services they offer lawyers and their families free of charge.

MATERIALS

Materials from this event can be found on the MDLA website.

If you have questions concerning this event, or the Women in the Law Committee in general, please contact Jessie Sogge at Quinlivan & Hughes, P.A. law firm at (320) 251-1414 or jsogge@quinlivan.com.

MDLA CONGRATULATES—SEND US YOUR VICTORIES!

The "MDLA Congratulates" column recognizes significant defense victories at summary judgment, trial, or appeal by MDLA members. To be included in the next edition, send a short, one-paragraph summary of the case including the MDLA member attorneys involved, the type of victory, and the issues presented to jmulder@bassford.com, areisbord@bassford.com or director@mdla.org by Oct 1, 2020. Inclusion in the MDLA Congratulates column is subject to space limitations, and the MDLA Editorial Committee reserves the discretion to determine which cases will be included in the column and/or to shorten submissions as appropriate.

PAT COLLINS AND TESSA MCELLISTREM WIN SUMMARY JUDGMENT ON WRONGFUL-DEATH CLAIM OF INMATE

Congratulations to Pat Collins and Tessa McEllistrem, who obtained summary judgment on behalf of Dakota County and three Dakota County employees. The Plaintiff, who was the Trustee for the next-of-kin of an inmate who committed suicide in the Dakota County Jail, brought claims under 42 U.S.C. § 1983 for failure to provide adequate medical care and failure to train, along with a wrongful death claim under Minnesota Statute § 573.02. The Court dismissed the Section 1983 claims on the grounds that there was no constitutional violation because the County employees did not know and should not have known that the inmate was a substantial suicide risk. Additionally, the Court dismissed Plaintiff's wrongful death claim based on official and statutory immunity.

STEVE SHERIDAN, JENNIFER OLSON, AND OLIVIA MOE WIN SUMMARY JUDGMENT ON PERSONAL INJURY CLAIM

Steve Sheridan, Jennifer Olson, and Olivia Moe of Fisher Bren & Sheridan, LLP won summary judgment for a general contractor in a personal injury lawsuit arising out of the plaintiff's allegations that he contracted a severe gastrointestinal illness caused by exposure to infectious bacteria from poultry while he was working on a construction project at a poultry processing plant. The plaintiff—an employee of an electrical contractor hired directly by the plant owner—contended that the general contractor breached duties to warn or protect all workers at the site from risks of harm. Ms. Moe persuaded the Court that the general construction contractor owed no duty to warn or protect an employee of a co-contractor from the risks of biological hazards from exposure to poultry where the general contractor did not create the hazard, did not control the co-contractor's work, did not own or possess the premises, and had no superior knowledge of the risk of poultry-related illnesses.

GERALD BREN, JENNIFER OLSON, AND DAN BERLINGER WIN SUMMARY JUDGMENT ON PERSONAL INJURY CLAIM

Gerald Bren, Jennifer Olson, and Dan Berlinger secured a summary judgment win in Minnesota's Tenth Judicial District, on behalf of a retail store. The case involved plaintiff's claim that she sustained personal injury after allegedly slipping (she did not fall) on a slippery, slimy substance on the floor. Judge Strand found summary judgment appropriate because there was no evidence that the retail store had actual or constructive notice of the substance. The Court examined surveillance footage surrounding the incident, which depicted others walking through the same area without incident. She noted that the retail store's employees cleaned up the alleged substance within one minute of plaintiff slipping. She further found there was no evidence in the record of the source of the slippery substance on the floor, how long the substance had been on the floor, and no evidence that that the retailer knew or should have known of the presence of the slippery substance.

MARK BRADFORD WINS APPEAL ON WRONGFUL-DEATH ASBESTOS-CLAIM ACCRUAL; JEFF MARKOWITZ, SARAH BUSHNELL, CHERYL HOOD LANGEL, AND BRIAN KLUK SUBMIT "EXCELLENT" AMICUS BRIEF ON MDLA'S BEHALF

Mark Bradford, Bassford Remele, P.A., recently obtained a favorable, unanimous ruling from the Minnesota Supreme Court, on behalf of Honeywell International, Inc. *Palmer, Tr. for Palmer v. Walker Jamar Co.*, No. A18-2114, 2020 WL 3552088, ___ N.W. ___ (Minn. July 1, 2020).

Jeff Markowitz and Sarah Bushnell (Arthur Chapman Kettering Smetak & Pikala, P.A.), and Cheryl Hood Langel and Brian Kluk (McCollum Crowley P.A.), authored an amicus brief on MDLA's behalf, in support of Honeywell's position. During oral argument, they were honored to hear Justice Lillehaug refer to the brief as "excellent," and cite one of its points when questioning appellant's counsel.

The appellant claimed wrongful death of her husband, based on asbestos exposure. On review was summary judgment (affirmed by the Court of Appeals), based on the six-year statute of limitations in Minn. Stat. § 573.02, subd. 1, and *DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45 (Minn. 1982). The Supreme Court rejected appellant's argument that accrual was subject to a broad discovery rule, under which wrongful-death asbestos claims do not accrue until "all of the elements of the cause of action, including the identity and fault of the tortfeasor, are discoverable or reasonably discoverable by the plaintiff." The Court reaffirmed that, under *DeCosse* and the "some damages" accrual rule, the claim accrues "upon the manifestation of the fatal disease in a way that is causally linked to asbestos, or upon the date of death—whichever is earlier." That happened when appellant's husband learned "exposure to asbestos caused the mesothelioma."

DRI CORNER

The Voice of the Defense Bar

By Richard C. Scattergood
Tomsche, Sonnesyn & Tomsche, P.A.
MDLA DRI State Representative

This column comes to you during strange times. Many events that we all look forward to, including the summer conference in Duluth, have been canceled or postponed due to COVID-19. DRI recently made the decision that the annual meeting in Washington in October 2020 will be a scaled-down, virtual conference. Plans are in the works for a summer conference in 2021 for the business summit that was intended to take place at the annual meeting in Washington. Dates, location and other details will be forthcoming. In the meantime, you may continue to benefit from your DRI membership. The committees continue to hold virtual meetings. One group that I recently joined through DRI is the Small Law Firm Network Digest. I frequently pick up valuable information regarding issues that we are all addressing, such as affordable cyber insurance, COVID-19 compliance, and many other resources useful to small and medium-sized law firms. I encourage you to continue to remain connected to DRI virtually because the free sharing of good ideas from smart lawyers across the country will continue to benefit you, your law firm, and your practice despite not having in-person contact.

2020 was a trying summer in our community. This column is no platform for expressing political views. But I do wish to remind the readers that throughout the history of this Republic, many of our great leaders were lawyers first. As lawyers, we are not only professionals, but we are individuals who are held in high esteem by the community, notwithstanding the litany of jokes and portrayals in TV and movies to the contrary. This is a time for lawyers to remember the oath we all took to uphold the Constitution. As part of the commitments we made to become lawyers, we have a duty to add thoughtful and reasoned discourse to conversations regarding issues relating to race relations and police behavior in our community. We all must do what we can to be part of the solution.

I hope you, your colleagues, employees, and families are enjoying relative health and safety. I hope that future circumstances will allow this column to discuss the activities and achievements of MDLA and DRI. I look forward to the time when we can all see each other in person and under happier circumstances.

DRI SEMINAR SCHEDULE

All events are virtual until further notice.

OCT 7	Webinar: Federal Court Jurisdiction: Removal Complexities and Common Pitfalls to Avoid in the Process
OCT 21	Seminar: Virtual Annual Meeting

For more details on these and other upcoming DRI events, go to www.dri.org/Events

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