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Recent Developments in Minnesota Corporate Law

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RECENT DEVELOPMENTS IN MINNESOTA CORPORATE LAW

Mark S. Weitz, Jeffrey L. Cotter, and David J. Seno[†]

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This article summarizes a number of select cases and statutory amendments involving various topics in Minnesota corporate law. Sections I and II address 2003 statutory changes and cases decided in 2003, respectively. Sections III and IV address 2004 statutory changes and cases decided in the first half of 2004, respectively. The purpose of this article is to provide the practitioner with an overview of recent developments in Minnesota corporate law.

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I. SELECT 2003 MINNESOTA STATUTES

1. *Minnesota Statutes sections 308B.001-.975*

Minnesota Statutes sections 308B.001-.975 were added to authorize businesses to organize as cooperative associations.¹

2. *Minnesota Statutes sections 80A.14, 80A.15*

Minnesota Statutes section 80A.14, subdivision 17, and Minnesota Statutes section 80A.15, subdivision 2 were amended to provide for the addition of cooperative associations under chapter 308B.²

3. *Minnesota Statutes section 322B.70*

Subdivision 1: This section was amended to allow domestic limited liability companies to merge with domestic cooperatives organized under chapter 308A or 308B.³

4. *Minnesota Statutes section 322B.755*

Minnesota Statutes section 322B.755 was added to allow domestic limited liability companies to merge with domestic cooperatives organized under chapter 308A or 308B.⁴

II. SELECT 2003 MINNESOTA CASES

A. *Contracts*

1. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minnesota*, 664 N.W.2d 303 (Minn. 2003) (holding that lease containing merger clause was completely integrated, and, therefore, reformation was inappropriate)

This case involved the interpretation of a commercial lease entered into between Alpha Real Estate Company, the lessee, and Sui Generis, the lessor.⁵ In 1995, Alpha and Delta Dental entered

1. 2003 Minn. Laws ch. 105, art. 1, §§ 1-86.

2. *Id.* §§ 1, 2.

3. *Id.* § 3.

4. *Id.* § 4.

5. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664

into an agreement (the “1995 agreement”) in which the parties agreed that Alpha would lease a dental clinic from Sui Generis.⁶ The 1995 agreement contained an additional rent clause that stated that during the first 10 years of the lease, Alpha would remit to Sui Generis 5% of cash receipts in any year that cash receipts exceeded \$1 million.⁷ The 1995 agreement also contained an option to purchase clause that provided that, upon purchase, the 5% rental payment would survive for the remainder of the ten-year period.⁸

Later in 1995, Alpha and Sui Generis entered into a lease (the “1995 lease”).⁹ Similar to the 1995 agreement, the 1995 lease contained an option to purchase clause, but did not contain a provision for the payment of the 5% additional rent upon purchase, nor did it contain a survival clause.¹⁰ The 1995 lease also provided that upon closing of the option to purchase, the lease would be cancelled and the parties would be relieved of all obligations under the lease.¹¹ In 1997, the parties entered into a second lease (the “1997 lease”) that contained provisions identical to the 1995 lease, except that the 1997 lease said nothing about the 5% additional rent upon purchase.¹²

In August 1999, Alpha attempted to exercise the 1997 lease’s option to purchase the property.¹³ Sui Generis refused to honor the option unless Alpha continued to pay the 5% additional rent after the purchase.¹⁴ Alpha brought action against Delta and Sui Generis seeking specific performance of the 1997 lease’s option to purchase and alleging that the 5% additional rent clause violated federal and state law.¹⁵

The district court concluded that the parties intended that the 5% additional rent clause survive in the event of purchase, that the 1997 lease was not fully integrated, and that the parties intended the 1997 lease to be read in conjunction with the 1995

N.W.2d 303, 305 (Minn. 2003).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 307.

13. *Id.*

14. *Id.*

15. *Id.* at 308.

agreement.¹⁶ In addition, the district court construed the 1995 agreement and the 1997 lease together and reasoned that “the absence of language regarding the five percent surcharge from the 1997 lease was the result of an error; the absence of language regarding the five percent surcharge did not reflect the intent of either party. It was not negotiated.”¹⁷ As such, the district court held that Alpha breached the 1995 agreement and the 1997 lease by failing to pay the additional 5% rent, and that the 5% additional rent clause survived the closing of the option to purchase.¹⁸ Furthermore, the district court held that the 5% additional rent clause did not violate state or federal statutes.¹⁹ The court of appeals affirmed.²⁰

The first issue addressed by the Minnesota Supreme Court was whether the 5% additional rent clause survived in the event of purchase.²¹ On this issue, the court held that the 1997 lease, which did not contain the additional rent provision at issue, was completely integrated, and thus reformation of the 1997 lease was inappropriate.²² The court disagreed with Delta’s argument that the parties intended to have their relationship governed by both the 1995 agreement and the 1997 lease, noting in particular that the 1997 lease contained a merger clause that specifically stated that the 1997 lease was the “entire agreement between the parties.”²³ As a result, the court stated that it did not have to look beyond the 1997 lease itself to determine whether it was a complete integration.²⁴ Further, the court noted that the 1997 lease provided that the parties would be relieved of all obligations under the lease upon the closing of the purchase, and thus any survival of the additional rent payments contradicted the clear language of the 1997 lease.²⁵ Accordingly, the court reversed the court of appeals and held that Alpha’s 5% additional rent obligation would terminate upon closing of the purchase.²⁶

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 311.

22. *Id.* at 313.

23. *Id.*

24. *Id.*

25. *Id.* at 314.

26. *Id.*

The next issue addressed by the Minnesota Supreme Court was whether the 5% additional rent payment provision violated (i) the federal kickback statute, and (ii) Minnesota's prohibition against fee splitting by dentists under Minnesota Statutes section 150A.11.²⁷ Because the court felt that the court of appeals had applied an erroneous scope of review, it remanded these issues for further proceedings.²⁸ On remand, the court of appeals held that the additional rent provision did not violate the federal kickback statute, disagreed with Alpha's argument that the 5% rent clause was solicited with illegal intent, and ruled that the rent clause did not violate federal law because of lack of evidence.²⁹

However, the court of appeals did conclude that the rent clause violated the state prohibition against fee splitting under Minnesota Statutes section 150A.11.³⁰ The court noted that the rental payments were directly based on the amount of receipts received from patients and also pointed out that Delta's marketing efforts were efforts to increase the number of patients seen at the dental clinic.³¹ In the end, the court held that the additional rent clause was unenforceable, but severable, from the remainder of the 1997 lease.³²

2. *In re Silicone Implant Insurance Coverage Litigation*, 667 N.W.2d 405 (Minn. 2003) (finding that, under actual-trigger theory, occurrence-based liability policies were triggered at or about the time of silicone breast implantation and, therefore, allocation of risk was not appropriate)

This case arose from silicone breast implant tort litigation involving 3M and its excess-layer, occurrence-based liability insurers.³³ In 1992, 3M began to be named in suits alleging that its silicone breast implants caused systemic autoimmune disease.³⁴ The suits arose from injuries allegedly caused by breast

27. *Id.*

28. *Id.*

29. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 671 N.W.2d 213, 218 (Minn. Ct. App. 2003).

30. *Id.* at 221.

31. *Id.*

32. *Id.*

33. *In re Silicone Implant Ins. Coverage Litig.*, 667 N.W.2d 405, 408 (Minn. 2003).

34. *Id.* at 410.

implantations that occurred between 1977 and 1985.³⁵ In July 1993, 3M sent notice of the litigation to its occurrence-based policy insurers for the 1977-1985 period.³⁶ The claims were eventually settled in a class action suit.³⁷

On September 22, 1994, the insurers brought a declaratory judgment action against 3M and its claim-based insurers to clarify coverage in the breast implant litigation.³⁸ After jury and bench trials, the district court made the following coverage findings: (i) the occurrence-based liabilities policies were triggered by injuries occurring shortly after implantation, (ii) 3M's losses should be allocated "pro rata by the time on the risk" among all triggered policies, and (iii) 3M was entitled to attorney fees and costs.³⁹ Under the pro rata by the time on the risk approach, an individual's insurer's share of damages is determined by multiplying the settlement amount by a fraction that has as its denominator the total number of years of the claimant's injury, and as the numerator the number of years within that period the insurer's policy was in effect.⁴⁰ The court of appeals affirmed the court's first two findings, but reversed the award of attorney fees and costs.⁴¹

On appeal, the Minnesota Supreme Court held that the occurrence-based policies were triggered at the time of implantation.⁴² First, the court stated that the district court had erred by applying the "continuous trigger" theory, which the court had explicitly rejected in *Northern States Power Co. v. Fidelity and Casualty Co. of New York*, 523 N.W.2d 657, 662 (Minn. 1994).⁴³ Under the continuous trigger theory, policies are triggered if they are in effect at the time of exposure, or the time of manifestation, or at any time in between.⁴⁴ Under the actual-trigger theory, only those policies in effect when bodily injury or property damage occurred are triggered.⁴⁵ The court then

35. *Id.* at 408.

36. *Id.* at 410.

37. *Id.*

38. *Id.*

39. *Id.* at 411.

40. *Id.*

41. *Id.* at 413.

42. *Id.* at 417.

43. *Id.* at 414.

44. *Id.*

45. *Id.* at 415.

proceeded to apply the “actual-injury trigger” theory and found that the policies were triggered upon implantation, disagreeing with the insurers’ contention that the policies were triggered only upon a demonstrable manifestation of autoimmune disease.⁴⁶ Instead, the court agreed with 3M that substantial expert testimony supported the finding that bodily injury occurred at the time of implantation.⁴⁷

On the issue of allocation, the Minnesota Supreme Court reversed the lower courts and held that only those insurers on the risk at the time of implantation were liable, and agreed with 3M’s argument that the time of implantation was a discrete and identifiable event and, therefore, allocation among the triggered policies was not appropriate.⁴⁸ The court noted that under its “actual-trigger” framework, allocation of losses is the exception, not the rule.⁴⁹ Unlike certain environmental contamination cases, the court found that this case was not one of those “difficult cases” where allocation was appropriate.⁵⁰ Instead, in this case, implantation was a readily identifiable event that caused injury and, therefore, triggered coverage.⁵¹ As such, the court held that those insurers on the risk at the time of implantation were liable for 3M’s losses up to the limits of their respective policies.⁵²

Finally, with respect to the issue of attorney fees and costs, the Minnesota Supreme Court held that 3M was not entitled to attorney fees and costs.⁵³ 3M contended that, as a result of the court’s holding in *American Standard Insurance Co. v. Le*, 551 N.W.2d 923 (Minn. 1996), a breach of the duty to reimburse defense costs, and not just a breach of the duty to defend, supported an award for attorney fees and costs.⁵⁴ However, the court disagreed and noted that an agreement to reimburse the insured’s defense costs is simply an agreement for the payment of money.⁵⁵ Unlike a breach of the duty to defend, attorney fees are

46. *Id.* at 416.

47. *Id.*

48. *Id.* at 421.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 425.

54. *Id.* at 424.

55. *Id.* at 425.

not recoverable in declaratory judgment actions to establish that the insurer must pay the insured money.⁵⁶ Accordingly, the court held that the district court erred in finding that 3M was entitled to attorney fees.⁵⁷

3. *State Farm Mutual Auto. Insurance Co. v. Cincinnati Insurance Co.*, 666 N.W.2d 334 (Minn. 2003) (holding that liability insurer had a contractual obligation to honor property insurer's demand for arbitration even though insured elected not to invoke liability coverage and instructed the liability insurer not to defend him)

State Farm Mutual Automobile Insurance Company ("State Farm") paid for property damage to the vehicle of its insured, Michelle Miller, resulting from a collision with a vehicle driven by Glen Meyer, the insured of Cincinnati Insurance Company ("Cincinnati").⁵⁸ Meyer informed Cincinnati that he declined coverage and would negotiate with State Farm himself.⁵⁹ State Farm requested that Meyer pay for the damage to Miller's vehicle, but Meyer offered to pay only half of the total damages.⁶⁰

State Farm and Cincinnati were both parties to an inter-company Automobile Arbitration Agreement ("Arbitration Agreement") that required arbitration of minor claims with no personal injury.⁶¹ However, Cincinnati refused to arbitrate because it contended that it provided no coverage to Meyer since he had instructed Cincinnati to neither defend nor indemnify him.⁶² State Farm filed a motion in district court to compel arbitration pursuant to the Arbitration Agreement.⁶³ The district court denied the motion, concluding that an insured must tender a defense of a claim as a condition precedent to compelling arbitration under the Arbitration Agreement.⁶⁴ The Minnesota Court of Appeals affirmed.⁶⁵

56. *Id.*

57. *Id.*

58. *State Farm Mut. Auto. Ins. Co. v. Cincinnati Ins. Co.*, 666 N.W.2d 334, 335 (Minn. 2003).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 336.

63. *Id.* at 335.

64. *Id.* at 335-36.

65. *Id.* at 336.

The Minnesota Supreme Court reversed, holding that Cincinnati had a contractual obligation to honor State Farm's demand for arbitration.⁶⁶ State Farm argued that the Arbitration Agreement applied because Cincinnati's only defense to coverage, that Meyer requested that Cincinnati not defend or indemnify him, amounted to "noncooperation" and that the Arbitration Agreement excluded a defense to coverage based on noncooperation.⁶⁷ Cincinnati argued that the Arbitration Agreement did not apply because Meyer never tendered defense of the claim and such a tender was a prerequisite to the insured's duty to cooperate.⁶⁸

The Minnesota Supreme Court disagreed with Cincinnati's argument and noted that the mandatory insurance scheme of the Minnesota No-Fault Automobile Insurance Act would be seriously undermined if each insured had the right to opt-out of coverage after an accident occurred.⁶⁹ The court further stated that any desire of an insured to gain control of a claim to avoid adverse impact on that insured's ability to retain insurance does not release the insurer from its obligations under the Arbitration Agreement.⁷⁰ Therefore, the Minnesota Supreme Court reversed and remanded to the district court with instructions to compel arbitration.⁷¹ Justice Gilbert dissented, arguing that there is no statutory or contractual requirement that Miller or Meyer resolve their dispute through arbitration.⁷²

4. *Fox Sports Net North, LLC v. Minn. Twins Partnership*, 319 F.3d 329 (8th Cir. 2003) (finding that lease agreement was an "acceptable stadium solution" which triggered broadcaster's option right to televise Minnesota Twins games)

In January 1998, Midwest Sports Channel ("MSC") and the Minnesota Twins ("Twins") entered into a telecast agreement that granted MSC the right to televise Twins games on its network

66. *Id.* at 337.

67. *Id.* at 336.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 337.

72. *Id.* at 337-38.

from the 1998 through the 2001 season.⁷³ The agreement contained an option clause that extended the agreement for two additional seasons if, by the end of the 2001 season, the Twins were able to secure an “acceptable stadium solution,” excluding a new stadium.⁷⁴ The agreement also contained a clause that entitled the Twins to yearly bonus payments if the Twins secured an acceptable stadium solution or new stadium solution.⁷⁵

In 1998, the Twins secured a lease agreement with the Metropolitan Sports Facilities Commission (“MSFC”) that obligated the team to continue playing home games at the Metrodome in Minneapolis.⁷⁶ The lease agreement contained three separate, one-year options, which the Twins could exercise to use the Metrodome for the 2001, 2002, and 2003 seasons.⁷⁷

In February of 2001, Fox Sports Net North, LLC (“Fox”) bought MSC.⁷⁸ Shortly thereafter, Fox informed the Twins that the current lease agreement with MSFC was an acceptable stadium solution, and that Fox would, as a result, exercise its right to broadcast games for the 2002 and 2003 seasons.⁷⁹ However, Fox maintained that this acceptable stadium solution was insufficient to qualify the Twins for bonus payments under the telecast agreement and Fox filed suit on May 30, 2001 alleging breach of contract and numerous tort claims.⁸⁰ The Twins counterclaimed alleging business defamation, defamation, unfair competition, and tortious interference with prospective business relations.⁸¹ The district court granted partial summary judgment in favor of both Fox and the Twins with respect to specific agreement claims and granted summary judgment in favor of the Twins on the tort claims.⁸² Both appealed.⁸³

In resolving the breach of agreement issues, the court of appeals determined that the telecast agreement was clear and

73. Fox Sports Net N., LLC v. Minn. Twins P’ship, 319 F.3d 329, 332 (8th Cir. 2003).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 333.

79. *Id.*

80. *Id.* at 332.

81. *Id.*

82. *Id.*

83. *Id.*

unambiguous and that the lease was an acceptable stadium solution for the purpose of triggering Fox's option rights.⁸⁴ Therefore, the lease was also an acceptable stadium solution for the purpose of entitling the Twins to bonus payments once they exercised their options under the lease.⁸⁵ Because the Twins did exercise their options, the court of appeals held that the team was entitled to bonus payments.⁸⁶

The court of appeals affirmed the district court's grant of summary judgment on Fox's tort claims and the Twins' counterclaims.⁸⁷ With respect to the Twins' counterclaims for business defamation and defamation, the court of appeals stated that relief for defamation was proper only if it is established that Fox published a false statement about the Twins that harmed the Twins' reputation.⁸⁸ It further found that a press release issued by Fox contained nothing that was actually false, and the defamation claims were dismissed.⁸⁹ The court of appeals also dismissed the Twins' claims of unfair competition and tortious interference based on a letter from Fox to the Minnesota Timberwolves because it contained only truthful information.⁹⁰

B. *Corporate Liability*

1. *Podvin v. Jamar Co.*, 655 N.W.2d 645 (Minn. Ct. App. 2003) (holding that tort and contract claims against a corporation sixteen years after the corporation voluntarily dissolved are barred by the corporate dissolution statute)

This case is a personal injury action against two related companies that voluntarily dissolved in 1985.⁹¹ The action was brought by workers of other companies.⁹² Walker Jamar Company and Jamar Company installed ventilation systems and insulation products, some of which contained asbestos.⁹³ Jamar Company

84. *Id.* at 334.

85. *Id.* at 335.

86. *Id.*

87. *Id.* at 336.

88. *Id.*

89. *Id.* at 337.

90. *Id.*

91. *Podvin v. Jamar Co.*, 655 N.W.2d 645, 646 (Minn. Ct. App. 2003).

92. *Id.* at 647.

93. *Id.*

eventually merged into Walker Jamar Company.⁹⁴ On July 17, 1985, Walker Jamar Company filed its notice of intent to dissolve.⁹⁵ On August 12, 1985, Walker Jamar Company filed its Articles of Dissolution and, on that same day, the Secretary of State issued its Certificate of Dissolution.⁹⁶ In December 2001, the workers sued Walker Jamar and the Jamar Company for installing or selling asbestos-containing products at their various companies.⁹⁷ The companies moved to dismiss the action claiming that, as dissolved corporations, they could no longer be served.⁹⁸ The trial judge denied the motion to dismiss.⁹⁹

The court of appeals held that the workers' claims were barred by the dissolution statute because the claims were not obligations incurred at the time of the companies' dissolution.¹⁰⁰ The workers argued that their personal injury claims constituted "liabilities incurred during dissolution proceedings" under subdivision 3 of section 301A.781.¹⁰¹ The companies maintained that the claims did not fall within the statutory definition.¹⁰²

Applying statutory construction principles, the court of appeals found that the language "liabilities incurred" applies to a debt or obligation that the company was legally obligated to pay at the time of the dissolution, not to unmatured tort or contract claims.¹⁰³ Therefore, the court of appeals reversed the district court's denial of the companies' motion to dismiss.¹⁰⁴

2. *Thesenga Land Co. v. Cirrus Warehouse, Inc.*, No. C5-03-370, 2003 WL 22889499 (Minn. Ct. App. Dec. 9, 2003)
(determining that an agent of third party had apparent authority to bind third party to lease guaranty)

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 652.

101. *Id.* at 649.

102. *Id.*

103. *Id.* at 652.

104. *Id.*

This case arose out of the execution of a lease guaranty.¹⁰⁵ In 1995, Cirrus Warehouse, Inc. (“Cirrus”), the lessee, and Thesenga Land Company (“Thesenga”), the lessor, entered into a lease for the use of warehouse space.¹⁰⁶ By separate agreement, Pillsbury and Cirrus agreed that Pillsbury would be entitled to use the warehouse space to store flour.¹⁰⁷ Although Cirrus was named as lessee on the lease, Pillsbury’s agent, Edward Slanga, a vice president of Pillsbury, negotiated the lease agreement between Cirrus and Thesenga and executed a guaranty of the lease agreement.¹⁰⁸ After Cirrus failed to pay rent, Thesenga brought an action for breach of contract.¹⁰⁹ The district court concluded that Slanga had apparent authority to execute, deliver, and bind Pillsbury to the terms of the lease guaranty and entered judgment against Pillsbury for \$355,342 for rent due.¹¹⁰

On appeal, Pillsbury argued that Slanga did not have apparent authority to sign the lease guaranty.¹¹¹ The court of appeals disagreed, finding that Slanga acted with apparent authority because he negotiated the lease between Cirrus and Thesenga, passed out business cards that designated him as a vice president, and met with representatives of Thesenga to discuss Pillsbury’s warehouse needs.¹¹² The court of appeals further disagreed with Pillsbury’s argument that the lease guaranty was extraordinary and sufficiently outside the normal scope of negotiating a warehouse lease so as to impose a duty to inquire into Slanga’s authority.¹¹³ The court of appeals stated that, while there was some merit to Pillsbury’s assertion that it guaranteed a stranger’s (Cirrus’s) obligation, Pillsbury benefited from the lease when Slanga negotiated the terms of the lease to satisfy Pillsbury’s warehousing needs, and Pillsbury continued to use the space to store its flour.¹¹⁴ The court reasoned that under these circumstances, Thesenga had reason to believe that Pillsbury was

105. Thesenga Land Co. v. Cirrus Warehouse, Inc., No. C5-03-370, 2003 WL 22889499, at *1 (Minn. Ct. App. Dec. 9, 2003).

106. *Id.*

107. *Id.*

108. *Id.*

109. *See id.*

110. *Id.*

111. *Id.*

112. *See id.* at *1-*3.

113. *See id.* at *3.

114. *Id.*

a party to the lease guaranty.¹¹⁵ Therefore, the court of appeals concluded that Pillsbury was liable for rent due under the lease.¹¹⁶

3. *Wilson v. Commissioner*, 656 N.W.2d 547 (Minn. 2003)
(holding that personal assessment of entire amount of delinquent taxes against corporate officer was unconstitutional)

A company employee owed \$45,352.55 to the State of Minnesota Department of Revenue for delinquent income and sales taxes.¹¹⁷ The Commissioner of Revenue sent a notice of wage levy to the employee's company to collect 25% of the employee's wages to help satisfy the employee's delinquent tax obligations.¹¹⁸ James L. Wilson, the company officer responsible for withholding and remitting the wage levy, delivered a check in the amount of \$315.08 to the Commissioner, but failed to remit any further payments.¹¹⁹ Wilson then attempted to negotiate a personal payment plan with the Commissioner on the employee's behalf.¹²⁰ After the company failed to withhold and remit any further payments to the State, the Commissioner assessed the entire amount of the employee's delinquent tax obligation against the company.¹²¹ A day after the company failed to pay the employee's tax obligation, the Commissioner assessed the entire amount of the obligation personally against Wilson.¹²²

On appeal to the tax court, Wilson claimed, inter alia, that the Commissioner's personal assessment constituted an excessive fine under the U.S. and Minnesota Constitutions.¹²³ The tax court concluded that the Commissioner was entitled to summary judgment, ruling that Wilson was barred by the doctrine of res judicata from raising constitutional issues.¹²⁴

The Minnesota Supreme Court first addressed whether the Commissioner's personal assessment against Wilson constituted a

115. *Id.*

116. *Id.*

117. *Wilson v. Comm'r*, 656 N.W.2d 547, 548 (Minn. 2003).

118. *Id.* at 549.

119. *Id.* at 550.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 551 (citation omitted).

124. *Id.* (citation omitted).

“punishment” subject to the Excessive Fine clauses of the U.S. and Minnesota Constitutions.¹²⁵ The court found that the personal assessment of the entire amount was not solely remedial in nature but, rather, served a deterrent and retribution purpose.¹²⁶ Therefore, the court held that the personal assessment constituted a “punishment” under the Excessive Fine clauses of the United States Constitution and Minnesota Constitution.¹²⁷

The Minnesota Supreme Court then addressed the issue of whether the personal assessment was excessive under the Eighth Amendment to the United States Constitution and under article I, section 5 of the Minnesota Constitution.¹²⁸ In its analysis, the court focused on whether the punishment was related to the offense that it was designed to punish.¹²⁹ Applying the principle of proportionality, the court noted that the personal assessment against Wilson was “grossly disproportional” to the amount due under the wage levy, and concluded that the Commissioner’s personal assessment of the entire amount against Wilson was impermissible under both Constitutions.¹³⁰

Because the personal assessment for the entire amount was unconstitutional, the Minnesota Supreme Court was left to determine what liability, if any, *could* be assessed against Wilson.¹³¹ After review of the relevant statutes, the court concluded that Wilson was liable for 25% of the employee’s wages earned during the period of the tax levy, and 25% of the entire levied amount as punishment for failing to withhold and remit 25% of the employee’s wages without a showing of reasonable cause.¹³²

125. *See id.* at 552.

126. *Id.* at 554.

127. *Id.*

128. *Id.* at 554.

129. *See id.* at 554-55 (citations omitted).

130. *Id.* at 557.

131. *See id.*

132. *Id.* at 557-58.

C. *Sale of Business*

1. *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320 (Minn. 2003) (holding that sale of intangibles to competitor did not include antitrust or other commercial tort claims)

Motorsports Racing Plus, Inc. (“MRP”) was formerly in the business of organizing and promoting snowmobile races.¹³³ In June 1998, MRP’s owner decided to sell the snowmobile racing circuit portion of its assets to World Snowmobile Association (“WSA”), a competitor formed by two former MRP employees.¹³⁴ In the “Agreement to Acquire Snowmobile Racing Program,” these assets were defined as “the Snowmobile Racing Program, and all rights to promote, sanction and operate MRP race dates, information regarding racers, officials, sponsors and site officials, including all electronic database information, all permits, all sponsor rights and *any intangibles and goodwill related to the Snowmobile Racing Program. . . .*”¹³⁵ The agreement further provided that “there are *no claims*, actions, suits, proceedings, or investigations (whether or not purportedly on behalf of MRP) pending or threatened against or affecting MRP or the Assets There is no reasonable basis for any claim, action, suit, proceeding, or investigation against or affecting MRP or the Assets.”¹³⁶

Almost two years after the sale, MRP brought an action involving antitrust and business tort claims against certain snowmobile manufacturers who allegedly conspired with WSA to damage MRP’s racing circuit business before the sale.¹³⁷ The manufacturers moved for summary judgment, alleging that MRP lacked standing to bring the action.¹³⁸ The district court found that MRP had standing but granted summary judgment because MRP failed to show injury.¹³⁹ The court of appeals reversed on

133. *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 321 (Minn. 2003).

134. *See id.* at 322.

135. *Id.* (emphasis added).

136. *Id.* (emphasis added).

137. *See id.* at 321-22.

138. *Id.* at 322.

139. *Id.*

the issue of standing.¹⁴⁰ Based on the definition of assets and MRP's representation that it had no claims, the court of appeals held that MRP did not have standing to bring antitrust and commercial tort claims because it had sold its rights to bring such suits to WSA.¹⁴¹

On appeal, the Minnesota Supreme Court held that MRP had standing to bring its antitrust and commercial tort claims against the manufacturers.¹⁴² The court found that the words "any intangibles . . . related to the Snowmobile Racing Program," when analyzed in the context of the entire agreement, the relationship between MRP and WSA, and the nature of the claim alleged by the former owner, did not support a finding that the parties intended to include the former owner's antitrust and commercial tort claims as part of the sale.¹⁴³ The court noted that the former owner did not go out of business but merely sold a portion of his business, and in such a circumstance, it would be "illogical" to find that the former owner intended to assign his personal claims of injury to WSA.¹⁴⁴ The court also stated that the manufacturers' policy argument of protecting a purchaser from interference with the acquired assets was not applicable in this case.¹⁴⁵ Such a policy argument is strong when the purchaser is an innocent party, but cannot be sustained when a seller alleges that the purchaser was not an innocent party.¹⁴⁶ Therefore, the court reversed the court of appeals, reinstated the district court's decision regarding standing, and remanded the case to the court of appeals for review of causation and injury.¹⁴⁷

140. *Id.* at 323.

141. *Id.* (citation omitted).

142. *Id.* at 327.

143. *Id.*

144. *Id.*

145. *Id.* at 326.

146. *Id.*

147. *Id.* at 327.

2. *Inter-Tel, Inc. v. CA Communications, Inc.*, No. Civ. 02-1864PAMRLE, 2003 WL 23119384 (D. Minn. Dec. 29, 2003) (holding that purchaser of business cannot enforce noncompetition and severance agreements against former employees of seller who formed a competing company after being terminated by seller)

Inter-Tel, Inc. (“Inter-Tel”), a telephone equipment company, bought part of McLeodUSA (“McLeod”), a telephone service company.¹⁴⁸ In connection with the sale, McLeod terminated the services of five employees (the “Defendants”), who later formed CA Communications, Inc., a competitor of Inter-Tel.¹⁴⁹ Among other claims for relief, Inter-Tel sought to enforce certain non-compete and severance agreements entered into between the Defendants and McLeod.¹⁵⁰ Notably, the agreements did not mention Inter-Tel, nor did they specify if the agreements were assignable to third parties.¹⁵¹

Inter-Tel argued that the non-compete and severance agreements were assigned to it as part of the sale of the business because Minnesota law allows the assignment of covenants not to compete in all circumstances.¹⁵² The Defendants argued that Inter-Tel could not enforce the non-compete and severance agreements because they did not expressly provide for assignment, and moved for summary judgment.¹⁵³

The district court concluded that the non-compete and severance agreements could not be assigned to Inter-Tel, and, therefore, Inter-Tel could not enforce the covenants not to compete.¹⁵⁴ In its analysis, the court first stated that a finding of assignability depends on the language of the contract.¹⁵⁵ It noted that “Minnesota courts are historically reluctant to enforce covenants not to compete because such covenants decrease competition and restrict the employee’s ability to make a

148. *Inter-Tel, Inc. v. CA Communications, Inc.*, No. Civ. 02-1864PAMRLE, 2003 WL 23119384, at *1 (D. Minn. Dec. 29, 2003).

149. *Id.*

150. *Id.*

151. *See id.*

152. *Id.* at *3 (citation omitted).

153. *See id.* at *1.

154. *Id.* at *5.

155. *Id.* at *4 (citing *Miller Constr., Inc. v. Schaefer*, 298 N.W.2d 455, 458 (Minn. 1980)).

living.”¹⁵⁶ As such, the district court reasoned that, where the agreement does not provide for assignment, a Minnesota court would likely construe the language of the contract against the employer and find any assignment void.¹⁵⁷ The district court also noted that Inter-Tel and McLeod were sophisticated companies and could have easily avoided this result.¹⁵⁸ The court opined that, at a minimum, Inter-Tel should have insisted that any non-compete and severance agreements should provide for assignment, and that Inter-Tel’s failure to ensure that the covenants not to compete were assignable was fatal to its claim seeking to enforce those covenants.¹⁵⁹ In light of such reasoning, the district court granted summary judgment in favor of the Defendants.¹⁶⁰

3. *Fung v. Riemenschneider*, No. C6-02-197, 2003 WL 21005539 (Minn. Ct. App. May 6, 2003) (holding sellers of business to have an implied duty not to solicit former customers)

In September 2000, respondent Deborah Fung agreed to purchase the assets and goodwill of Richard Riemenschneider’s dental practice for \$150,000.¹⁶¹ The parties signed a non-compete agreement which prohibited Riemenschneider “directly or indirectly, [from] engag[ing] in a competing dental practice in any manner whatsoever, within [a] five (5) mile radius of the Dental Practice,” for a six-year period.¹⁶² In connection with the purchase, the parties also executed a consulting agreement and an independent contractor agreement.¹⁶³

Soon after they started working together, the parties’ professional relationship began to unravel.¹⁶⁴ In early October 2001, Fung cancelled the independent contractor agreement and locked Riemenschneider out of the dental office.¹⁶⁵ From January to April 2001, Riemenschneider sent hundreds of billing

156. *Id.*

157. *Id.* (citation omitted).

158. *Id.* at *5.

159. *Id.*

160. *Id.* at *8.

161. *Fung v. Riemenschneider*, No. C6-02-197, 2003 WL 21005539, *1 (Minn. Ct. App. May 6, 2003).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

statements to former patients on the dental practice's letterhead in an attempt to collect his bills.¹⁶⁶ Soon thereafter, Riemenschneider sent "Dear Friends" letters to a limited number of patients who expressed interest in retaining him as their dentist.¹⁶⁷

In December 2000, Fung brought fraud, misrepresentation, and breach of contract claims against Riemenschneider.¹⁶⁸ The jury found Riemenschneider liable and awarded Fung, among other things, \$24,264 for fraud and misrepresentation, \$43,941 for lost profits as a result of the breach of the non-compete agreement, and \$18,500 for future lost profits.¹⁶⁹

The first issue addressed by the court of appeals was whether Riemenschneider breached the non-compete agreement.¹⁷⁰ On this point, the court of appeals found that Riemenschneider breached the non-compete agreement by sending his "Dear Friends" letters.¹⁷¹ Riemenschneider argued that because he did not provide dental services within a five-mile radius, he did not breach the agreement.¹⁷² Fung conceded that Riemenschneider did not provide dental services within a five-mile radius, but she argued that Riemenschneider violated the non-compete covenant by soliciting former patients.¹⁷³ The court agreed, noting that Minnesota law imposes on sellers of a business an implied duty not to solicit former customers.¹⁷⁴ The court stated that if it construed the non-compete agreement as Riemenschneider urged, it would have defeated the purpose for its inception and would have frustrated the parties' intent.¹⁷⁵ Thus, the court of appeals held that Riemenschneider breached the non-compete agreement even though it did not explicitly prohibit his solicitation.¹⁷⁶

The court of appeals also found that the lost-profits award

166. *See id.* at *1-*2.

167. *Id.* at *2.

168. *Id.*

169. *Id.*

170. *See id.* at *2-*3.

171. *Id.* at *3.

172. *Id.* at *2.

173. *Id.*

174. *Id.* at *3 (citation omitted).

175. *Id.* (citation omitted).

176. *Id.*

was unsupported by the evidence.¹⁷⁷ Fung had estimated lost profits by using a combination of the “before-and-after” and the “yardstick” methods.¹⁷⁸ The before-and-after method compares a plaintiff’s profit record before the violation with its record after, while the yardstick method relies on studies of the profits of businesses that are closely related to the plaintiff’s.¹⁷⁹ In its analysis, the court opined that the before and after method, as applied by Fung, was speculative because it failed to take into account factors other than Riemenschneider’s conduct that may have contributed to the clinic’s loss of patients.¹⁸⁰ Moreover, the court noted that the application of the yardstick test was also flawed because Fung did not compare her clinic to closely related clinics, and accordingly vacated the lost-profits award.¹⁸¹

With regard to the misrepresentation award, the court of appeals held that this award was unsupported because Fung had failed to prove separate misrepresentation damages, with one exception.¹⁸² The court said that although Riemenschneider misrepresented certain facts, and Fung relied on these misrepresentations before signing the purchase agreement, her reliance was unreasonable because she had full access and opportunity to inspect the records of the clinic before signing the purchase agreement.¹⁸³ Therefore, the court of appeals held that Fung did not meet her burden of proving damages and, based on this holding, vacated all but \$2,430 of the misrepresentation award.¹⁸⁴

D. *Minority Shareholders*

1. *Zacharias v. Polinsky*, C3-03-304, 2003 WL 21694591 (Minn. Ct. App. July 22, 2003) (holding that officers’ failure to disclose facts was not proximate cause of appellants’ stock loss)

177. *Id.*

178. *Id.* at *4 (citations omitted).

179. *Id.* (citations omitted).

180. *Id.* at *5.

181. *Id.*

182. *Id.* at *5-6.

183. *Id.* at *6.

184. *Id.* at *7.

Appellants Frank Zacharias and Nancy Zacharias (the “Zachariases”) invested in International Gaming Management, Inc. (“IGM”), a public entity in the gaming business.¹⁸⁵ After experiencing steep losses on their investment, the Zachariases brought a fraud claim against Respondents, Douglas Polinsky and Mark Sorensen, the senior officers of the company.¹⁸⁶

The Zachariases argued that, had the officers disclosed certain facts, they would not have invested in the company.¹⁸⁷ The undisclosed facts included: (1) Polinsky’s father owned 11% of the company and was under investigation for fraud, (2) Polinsky illegally sent gambling machines to Michigan, (3) the state of Minnesota subpoenaed records from the company, (4) Mississippi was questioning the company’s acquisition of property from related parties, and (5) the company had sold unrestricted shares in previous offerings while Respondents’ shares were restricted, therefore diminishing the shares’ value.¹⁸⁸

The district court held that the undisclosed facts were not the proximate cause of the Zachariases’ loss and entered summary judgment in favor of the officers.¹⁸⁹ The court of appeals affirmed, holding that the “superseding” cause of the Zachariases’ loss was state and federal authorities executed a search warrant at the company to investigate the activities of Polinsky’s father and brother, and that the company’s stock collapsed after public announcement of the search.¹⁹⁰ The court of appeals noted that “fraud must be based on a past or existing material fact, not speculation about a future event” and that the Zachariases merely proved “transaction causation,” not “loss causation,” the essential element in a fraud claim.¹⁹¹ As a result, the court concluded that the Zachariases failed to produce enough evidence to support their fraud claim against respondents.¹⁹²

185. Zacharias v. Polinsky, C3-03-304, 2003 WL 21694591, at *2 (Minn. Ct. App. July 22, 2003).

186. See *id.* at *1-*2.

187. *Id.* at *2.

188. *Id.*

189. *Id.* at *1-*2.

190. *Id.* at *2.

191. *Id.* (citations omitted).

192. *Id.* at *1.

2. *Haley v. Forcelle*, 669 N.W.2d 48 (Minn. Ct. App. 2003) (deciding that minority shareholder had a reasonable expectation of continued employment and is likely to prevail under Minnesota Statutes section 302A.751, subdivision 1(b)(3))

This case arose out of a dispute between minority shareholders and a majority shareholder in a closely held corporation.¹⁹³ In June 1995, Dennis Forcelle and Jack Haley agreed to create Stellar Technologies, Inc. (“Stellar”) for the purpose of handling some of Medtronic’s manufacturing needs.¹⁹⁴ Because Forcelle was subject to a criminal investigation (he was later convicted), his shares in Stellar were titled in his wife’s name.¹⁹⁵ Accordingly, Forcelle’s wife, Estelle, held approximately 73% of the outstanding shares of Stellar, with Haley and his wife holding the remaining interest.¹⁹⁶ Estelle was Stellar’s CEO, Haley was president, and Forcelle was director of new technologies.¹⁹⁷ In 2002, Stellar’s board of directors was comprised of Estelle, Forcelle, and Haley.¹⁹⁸ The parties never adopted a shareholders’ agreement.¹⁹⁹

In September 2002, Forcelle began divorce proceedings against Estelle, and Haley filed an affidavit that supported Forcelle’s position in the proceedings.²⁰⁰ Later, Stellar needed to borrow funds.²⁰¹ Stellar eventually obtained financing, but Estelle was concerned that, because of Forcelle’s conviction, Stellar would face financing problems in the future.²⁰² In response, she called a shareholders’ meeting on February 7, 2003.²⁰³ Without discussion with the other shareholders, and using her power as the majority shareholder, Estelle removed Forcelle from the board of directors and made his position, director of new technologies, a non-officer position.²⁰⁴ She also removed Haley

193. *Haley v. Forcelle*, 669 N.W.2d 48, 52-55 (Minn. Ct. App. 2003).

194. *Id.* at 53.

195. *Id.*

196. *Id.*

197. *Id.* at 54.

198. *Id.*

199. *Id.* at 53.

200. *Id.* at 54.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

from the board of directors, eliminated the position of president, and changed Haley's title to milling technician.²⁰⁵ Estelle claimed that her actions were intended to consolidate the control of Stellar during financial crisis.²⁰⁶ In February 2003, Estelle terminated Forcelle's employment, alleging that he was stealing corporate assets and records and paying his personal expenses using Stellar funds.²⁰⁷ Estelle also terminated Haley, asserting that he was using Stellar funds to pay personal expenses.²⁰⁸

The Haleys filed a complaint for themselves and on behalf of Stellar against the Forcelles, alleging breach of contract, breach of fiduciary duties, fraud and misrepresentation.²⁰⁹ The Haleys also filed a motion for a temporary restraining order or a temporary injunction, requested that Forcelle and Haley be reemployed by Stellar, and requested that the court order a receiver to control Stellar's checkbook and check ledger.²¹⁰ The district court found, *inter alia*, that Haley had a reasonable expectation of lifetime employment and seemed to be an innocent victim of the divorce.²¹¹ The district court then granted the Haleys' temporary injunction motion.²¹²

On appeal, the Forcelles first argued that the district court abused its discretion by granting the Haleys' motion for a temporary injunction because the Haleys did not suffer irreparable harm.²¹³ The court of appeals disagreed, noting that this case was distinguishable from a typical employment-termination case.²¹⁴ The court found that when Haley was terminated, he lost his sole source of income for his family, as well as the ability to manage and watch over the company that he both helped create and partially owned.²¹⁵ The court of appeals opined that there was a high likelihood that the financial hardship of being terminated would force the Haleys to sell their

205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 54-55.
211. *Id.* at 55.
212. *Id.*
213. *Id.* at 56.
214. *Id.* at 57.
215. *Id.*

shares in Stellar.²¹⁶ In addition, the court noted the possible argument that the Haleys were minority shareholders without the protection of a shareholders' agreement, and thus had no right to expect continued employment or continued participation in Stellar's management.²¹⁷ However, the court of appeals stated that "in close corporations, the expectations of shareholders are not always encompassed in written agreements, and written agreements are not always dispositive of shareholder expectations."²¹⁸ As such, the court of appeals concluded that the Haleys would suffer irreparable harm unless injunctive relief was granted.²¹⁹

Secondly, the Forcelles argued that the district court erred by concluding that the Haleys were likely to prevail under Minnesota Statutes section 302A.751.²²⁰ The court of appeals disagreed. First, the court of appeals noted that "the threshold issue in a claim of shareholder oppression based on termination of employment is whether the minority shareholder had a reasonable expectation of continued employment."²²¹ The court stated that the factors to be considered in determining reasonableness included "whether (1) the shareholder made a capital investment in the company; (2) continued employment could be considered part of the shareholder's investment; (3) the shareholder's salary could be considered a de facto dividend; and (4) continued employment was a significant reason for making the investment."²²² Furthermore, the court noted that continued employment is only a reasonable expectation if it is known and accepted by other shareholders and is balanced with the majority or controlling shareholders' need for flexibility in running the business.²²³

In light of these considerations, the court of appeals found that Haley's expectation of continued employment seemed reasonable based on the agreements that the Haleys and Forcelles entered into, to jointly guarantee \$4.3 million in Stellar

216. *Id.*

217. *Id.* at 57-58.

218. *Id.* at 58.

219. *Id.*

220. *Id.* at 58.

221. *Id.* at 59 (citation omitted).

222. *Id.*

223. *Id.* at 59-60.

loans.²²⁴ The court of appeals found it unlikely that Haley would personally guarantee company debt if he did not expect to have a continuing role in company operations and management.²²⁵ Moreover, the court found that the Forcelles and Haleys had contemplated continued employment and equal salaries for Forcelle and Haley.²²⁶ Based on these facts, the court of appeals held that the district court did not abuse its discretion in holding that there was a likelihood that the Haleys would prevail on their claim under Minnesota Statutes section 302A.751.²²⁷ Justice Forsberg dissented, arguing that the case was nothing more than a typical employment matter and that Haley's financial hardship was insufficient to demonstrate irreparable injury.²²⁸

3. *Triple Five of Minnesota, Inc. v. Simon*, 280 F. Supp. 2d 895 (D. Minn. 2003), *amended*, No. Civ.99-1894 PAM/RLE, 2003 WL 23018825 (D. Minn. Dec. 23, 2003) (determining that partner breached fiduciary duty by failing to disclose sale negotiations and usurping partnership opportunity)

Triple Five of Minnesota ("Triple Five"), a 50/50 partner in Mall of America Associates ("MOAA"), a partnership that held a 45% interest in the Mall of America (the "Mall"), brought action against its other partner, Si-Minn Developers Limited Partnership ("Si-Minn, LP"), its officers and related entities (collectively, "Defendants").²²⁹ Triple Five alleged that Defendants breached their fiduciary duties and usurped a partnership opportunity in connection with the October 1999 sale of a 27.5% interest in the Mall by Teachers Insurance and Annuity Association ("Teachers") to the Simon Property Group, LP ("Simon"), an entity related to Si-Minn, LP.²³⁰

Triple Five argued that (1) Defendants breached their fiduciary duties to Triple Five in part by failing to disclose the fact that Simon was pursuing and negotiating a deal with Teachers,

224. *Id.* at 60.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 61-62.

229. *Triple Five of Minn., Inc. v. Simon*, 280 F. Supp. 2d 895, 897-98 (D. Minn. 2003), *amended*, No. Civ.99-1894 PAM/RLE, 2003 WL 23018825 (D. Minn. Dec. 23, 2003).

230. *Id.* at 905, 909.

(2) Defendants refused to disclose to Triple Five any of the material details of the transaction after Triple Five learned of the sale negotiations, and (3) Defendants breached their fiduciary duties by usurping an opportunity that should have been offered to MOAA or to Triple Five.²³¹ In response, Defendants countered that (1) their conduct did not breach their duty to disclose information to Triple Five because Simon was the entity that negotiated and eventually accomplished the deal with Teachers, and Simon did not owe Triple Five any fiduciary duties; (2) Triple Five was not entitled to any details of the sale but was only entitled to general information, which information Defendants sent them in various letters; and (3) even if the 1999 transaction was a partnership opportunity, Triple Five's usurpation claim failed because Teachers refused to deal with Triple Five.²³²

After a bench trial, the district court agreed with Triple Five, concluding that Defendants breached their fiduciary duties by failing to disclose the sale and the details surrounding the sale, and by usurping a partnership opportunity.²³³ In its analysis, the district court noted that "[i]t was reasonable for Triple Five to believe that the individual Defendants would act consistently with their fiduciary duties to Triple Five, whether they were acting for Si-Minn, LP or Simon."²³⁴ In addition, the district court found that Defendants repeatedly refused to provide any specific information to Triple Five about the sale and that, "[a]s fiduciaries, Defendants were obligated to provide Triple Five with all material information, whether or not Triple Five requested that information."²³⁵ In addition, the district court also found that Triple Five had the financial ability to purchase the entire interest from Teachers and that Teachers had not refused to deal with Triple Five before the sale to Simon was approved by Teachers' investment committee.²³⁶ Accordingly, the district court found that Defendants' involvement in the sale constituted a usurpation of MOAA's opportunity to purchase Teachers' interest.²³⁷

231. *Id.* at 902, 905.

232. *Id.* at 903-05.

233. *Id.* at 909.

234. *Id.* at 903.

235. *Id.* at 904.

236. *Id.* at 905-06.

237. *Id.* at 906.

Triple Five further argued, and the district court agreed, that monetary damages would not adequately compensate Triple Five for Defendants' breaches of fiduciary duties.²³⁸ Among other things, the district court imposed a constructive trust on that portion of the Mall owned by Simon.²³⁹ Moreover, the court held that Triple Five was entitled to purchase Simon's 27.5% interest in the Mall, and if purchased, Simon must disgorge all net profits received as a result of this interest from 1999 to the present.²⁴⁰ Furthermore, the district court found it necessary to amend MOAA's partnership agreements to remove Si-Minn, LP as the managing general partner of MOAA if and when Triple Five elected to purchase Simon's interest.²⁴¹ Moreover, the district court enjoined Defendants from conducting any business activities relating to the Mall outside the ordinary course of business without first consulting and receiving written consent from Triple Five.²⁴² Finally, the court found that the breaches of fiduciary duty outlined above required Defendants to reimburse Triple Five for its reasonable attorney fees and costs incurred in this case.²⁴³

E. Miscellaneous

1. *Oarfin Records, Inc. v. Delange*, No. C0-02-931, 2003 WL 348168 (Minn. Ct. App. Feb. 12, 2003) (denying indemnification of attorney fees and costs when president of company did not act in the best interests of company and failed to act in good faith)

Respondent Oarfin is a musical recording studio and promotions and distribution business.²⁴⁴ Appellant John Delange was a director, shareholder, and president of Oarfin from 1993 until August 2000.²⁴⁵ This case arose out of appellant's request for indemnification of attorney fees and costs pursuant to

238. *Id.* at 908.

239. *Id.*

240. *Id.* at 909.

241. *See id.* at 910.

242. *Id.*

243. *Id.*

244. *Oarfin Records, Inc. v. Delange*, No. C0-02-931, 2003 WL 348168, at *1. (Minn. Ct. App. Feb. 12, 2003).

245. *Id.*

Oarfin's by-laws and the Minnesota Business Corporation Act.²⁴⁶

In October of 2000, Oarfin filed an action against Delange seeking damages for, inter alia, breach of contract, breach of fiduciary duty, breach of covenant of good faith and fair dealing, and misappropriation of secrets and confidential information.²⁴⁷

In April of 2001, Delange requested indemnification pursuant to Oarfin's by-laws and Minnesota Statutes section 302A.521.²⁴⁸ The by-laws provided that the "[c]orporation shall indemnify and reimburse its officers and directors whenever such indemnification or reimbursement is permitted" by Minnesota Statutes section 302A.521.²⁴⁹ Oarfin asserted that Delange failed to act in good faith or in the best interests of the corporation, and denied the indemnification request.²⁵⁰ In November 2001, Delange asked the district court to grant his indemnification request.²⁵¹ Because the court found that Delange had not acted in good faith, and that he had not acted in the best interests of the business, the district court denied indemnification.²⁵²

The court of appeals concluded that (1) Delange did not act in good faith because certain demonstration tapes were allegedly missing following his resignation, and (2) he did not act in the best interests of the business because he failed to properly manage the recording studio.²⁵³ On appeal, Delange argued that the district court abused its discretion by denying him an evidentiary hearing.²⁵⁴ However, the court of appeals disagreed, stating that Minnesota Statutes section 302A.521 does not require the court to conduct a hearing to determine indemnification eligibility.²⁵⁵ The court noted that the district court had made its eligibility determination based on detailed affidavits and deposition testimony.²⁵⁶ Therefore, the court held that the district court did not abuse its discretion by refusing to conduct an evidentiary hearing.²⁵⁷

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 2.

250. *Id.* at 1.

251. *Id.*

252. *Id.* at 1-2.

253. *Id.* at 3-4.

254. *Id.* at 4.

255. *Id.*

256. *Id.* at 4-5.

257. *Id.* at 5.

2. *Janssen v. Best & Flanagan*, 662 N.W.2d 876 (Minn. 2003) (allowing boards of nonprofit corporations to receive the protection of the business judgment rule and to appoint “special litigation committee”)

The Minneapolis Police Relief Association (“MPRA”), a nonprofit corporation, made an ill-advised investment in a company known as Technimar and as a result, lost approximately \$15 million.²⁵⁸ George Janssen and other members of the MPRA (collectively “Janssen”) brought a derivative suit on behalf of the MPRA against Best & Flanagan alleging legal malpractice.²⁵⁹ In response to Janssen’s demand that MPRA join the litigation, the board of MPRA appointed a “special litigation committee,” consisting of a single attorney (the “Investigator”), to evaluate whether joining the derivative action was in the best interests of the association.²⁶⁰ After conducting two separate investigations (the latter investigation was more independent and thorough), the Investigator issued reports to the board concluding that it was not in the best interests of MPRA to join Janssen’s suit.²⁶¹ Based on the Investigator’s second report, MPRA moved to dismiss the suit.²⁶²

The district court treated the Investigator as a special litigation committee, applied the business judgment rule to the special litigation committee’s decision not to proceed with the derivative action, and dismissed Janssen’s derivative suit.²⁶³ The court of appeals reversed, concluding that the legislature had not granted nonprofit corporations authority to appoint special litigation committees.²⁶⁴ In addition, the court of appeals concluded that even if such authority existed, the special litigation committee failed to meet the threshold test of the business judgment rule in this case.²⁶⁵

On appeal, the supreme court addressed whether the Minnesota Nonprofit Corporations Act (the “Nonprofit Act”)

258. *Janssen v. Best & Flanagan*, 662 N.W.2d 876, 879 (Minn. 2003).

259. *Id.*

260. *Id.* at 880.

261. *Id.*

262. *Id.* at 881.

263. *See id.*

264. *Id.*

265. *Id.*

prohibits a nonprofit corporation's board of directors from establishing an independent committee with authority to make decisions about derivative lawsuits, and whether the Investigator, as a special litigation committee, displayed sufficient independence and good faith to be entitled to the deference of the business judgment rule.²⁶⁶ Notably, the supreme court first discussed the principles by which they apply the business judgment rule to a *for-profit* corporate board's decision whether to join a derivative lawsuit.²⁶⁷ The supreme court then considered whether to grant similar deference to nonprofit boards of directors and noted that other states have applied the business judgment rule to decisions of nonprofit corporations.²⁶⁸ The court further noted that the "primary rationales" for applying the business judgment rule to for-profit corporations also apply to nonprofit corporations.²⁶⁹ In addition, the supreme court opined that directors of nonprofits may take fewer risks if they are concerned about liability for well-meaning decisions, and that "judges should not be caught in the middle of fighting factions of nonprofits any more than they should be thrust between dissatisfied shareholders and profit-seeking boards."²⁷⁰ As such, the supreme court concluded that "the boards of nonprofit corporations may receive the protection of the business judgment rule."²⁷¹

Next, the supreme court disagreed with the court of appeals, concluding that the Nonprofit Act does not prohibit nonprofit corporations from appointing independent committees and granting them authority to decide whether the corporation should join a member's derivative suit.²⁷² After finding the Nonprofit Act ambiguous and discussing legislative intent, the supreme court agreed with the district court that "if nonprofit corporate boards are unable to establish independent committees whose informed business judgments merit deference from the courts, the judiciary would be forced to review the merits of every lawsuit brought by a member of a nonprofit

266. *Id.*

267. *Id.* at 883.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 887-88.

corporation.”²⁷³ Furthermore, the supreme court noted that “reviewing all derivative suits for nonprofit corporations would intrude on the authority of nonprofit boards, significantly tax the court system’s resources, and require judges to step significantly beyond their expertise.”²⁷⁴

Having concluded that nonprofit corporations can create special litigation committees, the supreme court then addressed whether the Investigator deserved the deference of the business judgment rule.²⁷⁵ The supreme court agreed with the court of appeals and concluded that the Investigator failed to meet the threshold test of independence and good faith.²⁷⁶ In reviewing the Investigator’s first report, the supreme court noted that he lacked independence because he was told to rely on facts developed by law firms that had been hired to represent MPRA in other lawsuits, and that he failed to talk to Janssen or Janssen’s attorneys in investigating the suit.²⁷⁷ Moreover, the supreme court concluded that the Investigator did not engage in a good faith attempt to deduce the best interests of MPRA with respect to the litigation against Best & Flanagan because he neither interviewed Janssen or Janssen’s attorneys nor gave any indication that he had undertaken the careful consideration of all the benefits and detriments to MPRA that is indicative of a good faith business decision.²⁷⁸ Thus, the supreme court held that the Investigator’s first investigation lacked the independence and good faith necessary to merit deference under the business judgment rule.²⁷⁹

The supreme court declined to consider whether the Investigator’s second investigation and report to the board deserved deference, noting that the rights of shareholders and members will be “effectively nullified” if boards are allowed to continually improve their investigations to support their business decisions.²⁸⁰ Justices Hanson and Blatz dissented, arguing that no authority exists to support the majority’s development of a “one strike you’re out” rule for conducting an investigation of claims

273. *Id.* at 886.

274. *Id.*

275. *Id.* at 888.

276. *Id.*

277. *Id.*

278. *Id.* at 889.

279. *Id.*

280. *Id.*

made in a derivative action.²⁸¹

III. SELECT 2004 MINNESOTA STATUTES

1. *Minnesota Statutes section 302A.011*

Minnesota Statutes section 302A.011 sets forth the definitions to Chapter 302A – Business Corporations. This section was amended as follows.

Subdivisions 21 & 31: The definitions of “parent” and “subsidiary” were broadened to include foreign parent and subsidiary corporations.²⁸²

Subdivision 49: An exception was added to the definition of “interested shareholder” to include “a licensed broker/dealer or licensed underwriter who: (i) purchases shares of an issuing public corporation solely for the purposes of resale to the public; and (ii) is not acting in concert with an interested shareholder.”²⁸³

Subdivision 51: An exception was added to the definition of “share acquisition date.” The addition states that the share acquisition date, with respect to a person who is the beneficial owner, directly or indirectly, of ten percent or more of a corporation’s outstanding shares at the time the corporation becomes an issuing public corporation, means the date on which the person first became the beneficial owner, directly or indirectly, of ten percent or more of the voting power of the issuing public corporation.²⁸⁴

Subdivision 63: The definition of “converted organization” was added. “Converted organization” means the corporation or domestic limited liability company resulting from a conversion under sections 302A.681 to 302A.691.²⁸⁵

Subdivision 64: The definition of “converting organization” was added. “Converting organization” means the corporation or domestic limited liability company that effects a conversion under sections 302A.681 to 302A.691.²⁸⁶

281. *Id.* at 890-92.

282. 2004 Minn. Laws ch. 199, art. 14, §§ 1, 2.

283. *Id.* § 3.

284. *Id.* § 4.

285. *Id.* § 5.

286. *Id.* § 6.

2. *Minnesota Statutes section 302A.111*

Subdivision 2: lists a number of provisions that govern a corporation unless modified in the articles of incorporation. This section was amended to allow for a plurality vote to elect directors (section 302A.215, subdivision 1). Added to this section is a provision stating that a written action of shareholders must be signed by all shareholders with respect to section 302A.441 (action without a meeting).²⁸⁷

3. *Minnesota Statutes section 302A.137*

In Minnesota Statutes section 302A.137, paragraph (a), which mandated a class or series vote to increase or decrease the aggregate number of shares of the class or series voting on proposed amendments, was deleted. Paragraph (b) was modified to provide a class or series vote on a proposed amendment that would reduce the number of shares of the class or series only if all other classes and series are not similarly affected. Paragraph (e) was deleted because of its similarity to paragraph (b).²⁸⁸

4. *Minnesota Statutes section 302A.215*

Subdivision 1: This subdivision was amended to allow directors to be elected by a plurality vote at a meeting at which a quorum is present.²⁸⁹

5. *Minnesota Statutes section 302A.231*

Subdivision 4: This subdivision governs notice of board meetings and was amended to allow notice to be given in any form of electronic communication, such as by electronic mail or fax, so long as the director consents to receive notice electronically. Also added was a provision that allows consent by a director to notice given by electronic communication to be given in writing or by authenticated electronic communication.²⁹⁰

Subdivision 6: This subdivision, which governs “waiver of notice,” was amended to allow a director to waive notice by

287. *Id.* § 7.

288. *Id.* § 8.

289. *Id.* § 9.

290. *Id.* § 10.

authenticated electronic communication.²⁹¹

6. *Minnesota Statutes section 302A.401*

Subdivision 3: Section 302A.401 allows the board to authorize shares. A statement setting forth the board's resolution must be filed with the Secretary of State. Although the initial filing of a statement with the Secretary of State is not considered an amendment to the articles for purposes of sections 302A.135, 302A.137 and 302A.471, the amendment proclaims that: "[f]iling an *amendment* of such a statement with the Secretary of State is considered an amendment of the articles for purposes of sections 302A.135, 302A.137 and 302A.471."²⁹²

7. *Minnesota Statutes section 302A.402*

Subdivision 2: This section was amended to account for the related change to section 302A.215 affecting class or series voting.²⁹³

8. *Minnesota Statutes section 302A.437*

Subdivision 1: This section was amended to except from majority vote the election of directors, as related to the change to section 302A.215.²⁹⁴

9. *Minnesota Statutes section 302A.441*

Subdivision 1: Permits written action to be taken by less than unanimous shareholder consent in some cases. The addition states that "[t]he articles of a corporation that is not a publicly held corporation may provide that any action may be taken by written action signed, or consented to by authentic electronic communication, by shareholders having voting power equal to the voting power that would be required to take the same action at a meeting of the shareholders at which all shareholders were present."²⁹⁵

Also added was a provision stating that once the initial

291. *Id.* § 11.

292. *Id.* § 12 (emphasis added).

293. *Id.* § 13.

294. *Id.* § 14.

295. *Id.* § 15.

articles are adopted, any amendment to permit written action to be taken by less than all shareholders requires the approval of all of the shareholders entitled to vote on the amendment.

Subdivision 3: A further addition includes language stating that if written action may be taken by less than all shareholders, each shareholder must be notified no later than five days after the effective time of the action. A shareholder who does not sign or consent to the written action has no liability for any action authorized by the written action.²⁹⁶

10. *Minnesota Statutes section 302A.471*

Minnesota Statutes section 302A.471, which deals with rights of dissenting shareholders, was amended as follows.

Subdivision 1: This subdivision creates dissenters' rights if an amendment to the articles materially and adversely affects the rights and preferences of the shares of the dissenting shareholder, and was amended to allow a corporation to avoid such action via a provision in the articles. Clause (a)(5) was added and provides that an amendment to the articles eliminating the right to obtain payment gives rise to dissenters' rights. Clause (e) was added and provides that a plan of conversion adopted by the corporation also gives rise to dissenters' rights.²⁹⁷

Subdivision 3: This subdivision excludes from dissenters' rights "shares of any class or series of shares listed on the New York Stock Exchange, or the American Stock Exchange, or designated as a national market system security on an inter-dealer quotation system by the National Association of Securities Dealers, Inc."²⁹⁸

11. *Minnesota Statutes section 302A.473*

Minnesota Statutes section 302A.473, which sets forth the rules regarding the procedures for asserting dissenters' rights, was amended as follows.

Subdivision 3: This section was amended to state that before a shareholder may exercise dissenters' rights, the proposed action

296. *Id.*

297. *Id.* § 16.

298. *Id.* § 17.

must be approved by the shareholders and the corporation must hold a shareholder meeting.²⁹⁹

Subdivision 4: This subdivision was amended to include a provision requiring notice of proposed action which has been approved by the board to be sent to all shareholders who did not sign or consent to a written action that gave effect to the action creating the right to obtain payment under section 302A.471.³⁰⁰

12. *Minnesota Statutes section 302A.521*

Minnesota Statutes section 302A.521 was amended so the definition of “official capacity” includes “governor” and “manager” in its list of positions.³⁰¹

13. *Minnesota Statutes section 302A.651*

Subdivision 1: This subdivision, on merger or exchange with foreign corporations or limited liability companies, was amended to permit a merger pursuant to section 302A.621.³⁰²

14. *Minnesota Statutes section 302A.661*

Subdivision 2: On the transfer of assets, this subdivision was amended to provide that shareholder approval of such transfers is not required if the corporation retains a “significant continuing business activity.”³⁰³ The amendment goes on to state that “[i]f a corporation retains a business activity that represented at least (1) 25 percent of the corporation’s total assets at the end of the most recently completed fiscal year and (2) 25 percent of either income from continuing operations before taxes or revenues from continuing operations for that fiscal year, measured on a consolidated basis with its subsidiaries for each of clauses (1) and (2), then the corporation will conclusively be deemed to have retained a significant continuing business activity.”³⁰⁴

299. *Id.* § 18.

300. *Id.* § 19.

301. *Id.* § 20.

302. *Id.* § 21.

303. *Id.* § 22.

304. *Id.*

15. *Minnesota Statutes section 302A.681*

Minnesota Statutes section 302A.681 was added to allow a corporation to become a domestic limited liability company, and a domestic limited liability company to become a corporation, if converted pursuant to a “plan of conversion.”³⁰⁵

16. *Minnesota Statutes section 302A.683*

Minnesota Statutes section 302A.683 was added to supplement section 302A.681 and defines the necessary elements of a “plan of conversion.” Under this section, a “plan of conversion must contain: (1) the name of the converting organization; (2) the name of the converted organization; (3) whether the converted organization is a corporation or a limited liability company; (4) the terms and conditions of the proposed conversion; (5) the manner and basis of converting each ownership interest in the converting organization into ownership interests in the converted organization or, in whole or in part, into money or other property; (6) a copy of the proposed articles of incorporation or articles of organization of the converted organization; and (7) any other provisions with respect to the proposed conversion that are deemed necessary or desirable.”³⁰⁶

17. *Minnesota Statutes section 302A.685*

Minnesota Statutes section 302A.685 was added and sets forth the requirements for board approval of a “plan of conversion” and also the requirements for “notice to owners” regarding the same.³⁰⁷

18. *Minnesota Statutes section 302A.687*

Minnesota Statutes section 302A.687 was added and sets forth the requirements necessary to prepare the “articles of conversion.”³⁰⁸

305. *Id.* § 23.

306. *Id.* § 24.

307. *Id.* § 25.

308. *Id.* § 26.

19. *Minnesota Statutes section 302A.689*

Minnesota Statutes section 302A.689 was added and sets forth the requirements necessary for “abandonment of conversion.”³⁰⁹

20. *Minnesota Statutes section 302A.691*

Minnesota Statutes section 302A.691 was added and sets forth the “effective date or time of conversion” and its effect.³¹⁰

21. *Minnesota Statutes section 302A.723*

Subdivision 1: This subdivision requires filing notice of intent to dissolve with the Secretary of State (if dissolution of the corporation is approved pursuant to section 302A.721). Paragraph (c) was amended to provide that notice shall contain: “a statement that the requisite vote of the shareholders was received, or that the requisite shareholders entitled to vote signed a written action.”³¹¹

22. *Minnesota Statutes section 302A.821*

Minnesota Statutes section 302A.821, which sets forth the requirements for Minnesota corporate registration, was amended as follows.

Subdivision 1: The statute requires the Secretary of State to send a postcard “reminder” to the corporation announcing the need to file an annual registration. The amendment allows for filing the annual registration on-line or in paper.³¹²

Subdivision 2: This subdivision sets forth the information required and the manner of filing.³¹³

Subdivision 4: The Secretary of State may now administratively dissolve any corporation failing to file its registration for two consecutive years and lists the policy for reinstatement.³¹⁴

309. *Id.* § 27.

310. *Id.* § 28.

311. *Id.* § 29.

312. *Id.* ch. 251, § 2.

313. *Id.* § 3.

314. *Id.* § 4.

23. *Minnesota Statutes section 308A.121*

Subdivision 1: This section, setting forth the requirements related to the name of a cooperative, was amended to remove section 322A.03 while adding section 321.109 (under which the name or right of a corporation may be reserved or provided for).³¹⁵

24. *Minnesota Statutes section 308A.995*

Subdivision 5: This subdivision was amended to remove the requirement that a cooperative must act within “one-year” of the date of administrative dissolution to be reinstated.³¹⁶

25. *Minnesota Statutes section 308B.121*

Subdivision 5: Similar to section 308A.995, this subdivision was amended to remove the requirement that a cooperative must act within “one-year” of the date of administrative dissolution to be reinstated.³¹⁷

26. *Minnesota Statutes section 308B.201*

Minnesota Statutes section 308B.201 was amended to read: “[a] cooperative may be formed and organized on a cooperative plan for any lawful purpose, including: . . . (3) for any other purposes that cooperatives are authorized to perform by law.”³¹⁸

27. *Minnesota Statutes section 308B.311*

Subdivision 6: Related to agricultural product marketing contracts, this subdivision was amended to limit penalties for contract interference and false reports to patron members or patrons of a cooperative.³¹⁹

28. *Minnesota Statutes section 308B.735*

Subdivision 1: This subsection is related to the distribution of unclaimed property. A cooperative making the election to

315. *Id.* ch. 199, art. 14, § 111.

316. *Id.* ch. 251, § 5, ch. 254, § 36.

317. *Id.* ch. 251, §6, ch. 254, § 37.

318. 2004 Minn. Sess. Law Serv. ch. 228 (West).

319. *Id.*

distribute unclaimed property must now file with the Department of Commerce instead of the Secretary of State.³²⁰

29. *Minnesota Statutes section 317A.011*

Minnesota Statutes section 317A.011, which sets forth the definitions for Chapter 317A related to nonprofit corporations, was amended as follows.

Subdivision 3b: According to this subdivision, “ballot” means: “a written ballot or a ballot transmitted by electronic communication.”³²¹

Subdivision 14: This subdivision allows notice to be given by a corporation to a director, officer, member, or other person by means of electronic communication.³²²

30. *Minnesota Statutes section 317A.115*

Subdivision 2: This subdivision, setting forth the requirements related to the “corporate name,” was amended to remove section 322A.03 while adding section 321.109 (under which the name or right of a corporation may be reserved or provided for).³²³

31. *Minnesota Statutes section 317A.231*

Minnesota Statutes section 317A.231, related to board meetings, was amended:

Subdivision 4: This subdivision governs notice of board meetings, and was amended to allow notice to be given in any form of electronic communication, such as by electronic mail or fax, so long as the director consents to receive notice electronically. Also added was a provision that allows consent by a director to notice given by electronic communication to be given in writing or by authenticated electronic communication.³²⁴

Subdivision 5: This subdivision, which governs “waiver of notice,” was amended to allow a director to waive notice by authenticated electronic communication.³²⁵

320. *Id.*

321. 2004 Minn. Laws ch. 199, art. 14, § 30.

322. *Id.* § 31.

323. *Id.* art. 13, § 112.

324. *Id.* art. 14, § 32.

325. *Id.* § 33.

32. *Minnesota Statutes section 317A.443*

Subdivision 2: This subdivision sets forth the requirements for when the members may act and was amended to allow for delivery of balloting via electronic communication (under section 317A.447) and for action to be taken by “remote” communication (under section 317A.450).³²⁶

33. *Minnesota Statutes section 317A.447*

Minnesota Statutes section 317A.447 was amended to allow for delivery of a ballot by electronic communication if a member consents to receiving a ballot in such a manner.³²⁷

34. *Minnesota Statutes section 317A.823*

Subdivision 1: This subdivision sets forth the annual corporate registration requirements and was amended to require the Secretary of State to send a postcard “reminder” to the corporation announcing the need to file an annual registration. The amendment allows for filing the annual registration on-line or in paper.³²⁸

35. *Chapter 322A*

Chapter 322A – the 1976 Uniform Limited Partnership Act: Minnesota Statutes sections 322A.01-.88, were repealed effective January 1, 2007.³²⁹

36. *Minnesota Statutes section 322B.03*

Minnesota Statutes section 322B.03 sets forth the definitions for Chapter 322B – Limited Liability Companies.

Subdivisions 36a and 45a: These subsections were amended to include foreign parent and subsidiary limited liability corporations in the definitions of “parent” and “subsidiary.”³³⁰

326. *Id.* § 34.

327. *Id.* § 35.

328. *Id.* ch. 251, § 7.

329. 2004 Minn. Sess. Law Serv. 199 (West).

330. 2004 Minn. Laws ch. 199, art. 14, §§ 36, 37.

37. *Minnesota Statutes section 322B.115*

Subdivision 2: This subsection sets forth the statutory provisions that may only be modified in the articles of organization. Paragraph 12 was amended to allow for a plurality or majority vote for an action of the members.³³¹

38. *Minnesota Statutes section 322B.12*

Subdivision 1: Setting forth the requirements related to the “limited liability company name,” the subdivision was amended to remove section 322A.03 while adding section 321.109.³³²

39. *Minnesota Statutes section 322B.346*

Subdivision 1: This subdivision was amended to except from its “majority required” provision the election of governors, which is governed by section 322B.63.³³³

40. *Minnesota Statutes section 322B.35*

Subdivision 1: This subdivision, relating to the method of taking action without a meeting, was amended to include the following provision: “[a]fter the adoption of the initial articles or the first making of a member control agreement, an amendment to the articles or to a member control agreement to permit written action to be taken by less than all members requires the approval of all the members entitled to vote on the amendment.”³³⁴

41. *Minnesota Statutes section 322B.383*

Subdivision 1: This provision, which sets forth the actions creating rights of dissenting members, was amended to allow a member of a limited liability company to dissent from, and obtain fair market value for, his interest unless otherwise provided in the articles, if an amendment to the articles of organization materially affects the member’s interest in that it eliminates the right to obtain payment under clause (1). A provision was added

331. *Id.* § 38.

332. *Id.* art. 13, § 113.

333. *Id.* art. 14, § 40.

334. *Id.* § 41.

that allows a member to dissent from, and obtain fair market value for his interest if a plan of conversion occurs.³³⁵

42. *Minnesota Statutes section 322B.386*

Subdivision 3: Regarding “notice of dissent,” this statute was amended to read: “[i]f the proposed action must be approved by the members and the limited liability company holds a meeting of members, a member who is entitled to dissent under section 322B.383 and who wishes to exercise dissenters’ rights must file with the limited liability company before the vote on the proposed action a written notice of intent to demand the fair value of the membership interests owned by the member and must not vote the membership interests in favor of the proposed action.”³³⁶

43. *Minnesota Statutes section 322B.40*

Subdivision 6: Section 322B.40 allows the board of governors to make and accept contributions. A statement setting forth the board’s resolution must be filed with the Secretary of State. Subdivision 3, which governs the procedure for fixing terms, was amended to clarify paragraph (c). Although the initial filing of a statement with the Secretary of State is not considered an amendment to the articles of organization for purposes of sections 322B.15, 322B.115, and 322B.383, the amendment proclaims that: “[f]iling an amendment of such a statement with the Secretary of State is considered an amendment of the articles for purposes of sections 322B.15, 322B.115, and 322B.383.”³³⁷

44. *Minnesota Statutes section 322B.63*

Minnesota Statutes section 322B.63 was amended so that the default rule with respect to electing governors is by a plurality vote.³³⁸

335. *Id.* § 42.

336. *Id.* § 43.

337. *Id.* § 45.

338. *Id.* § 46.

45. *Minnesota Statutes section 322B.643*

Minnesota Statutes section 322B.643, related to board of governors meetings, was amended.

Subdivision 4b: This subdivision governs notice of board of governors meetings, and was amended to allow notice to be given in any form of electronic communication, such as by electronic mail or fax, so long as the director consents to receive notice electronically. Also added was a provision that allows consent by a director to notice given by electronic communication to be given in writing or by authenticated electronic communication.³³⁹

Subdivision 6: This subdivision, which governs “waiver of notice,” was amended to allow a director to waive notice by authenticated electronic communication.³⁴⁰

46. *Minnesota Statutes section 322B.77*

Subdivision 2: This subdivision, relating to the transfer of assets, was amended to provide that member approval of such transfers is not required if the limited liability company retains a “significant continuing business activity.”³⁴¹ The amendment goes on to state that “[i]f a limited liability company retains a business activity that represented at least (i) 25 percent of the limited liability company’s total assets at the end of the most recently completed fiscal year and (ii) 25 percent of either income from continuing operations before taxes or revenues from continuing operations for that fiscal year, measured on a consolidated basis with its subsidiaries for each of clauses (i) and (ii), then the limited liability company will conclusively be deemed to have retained a significant continuing business activity.”³⁴²

47. *Minnesota Statutes section 322B.78*

Minnesota Statutes section 322B.78 was added to allow a domestic limited liability company to convert to a domestic corporation pursuant to sections 302A.681 to 302A.691.³⁴³

339. *Id.* § 47.

340. *Id.* § 48.

341. *Id.* § 49.

342. *Id.*

343. *Id.* § 50.

48. *Minnesota Statutes section 322B.960*

Minnesota Statutes section 322B.960, regarding annual registration, was amended.

Subdivision 1: This subdivision was amended to require the Secretary of State to send a postcard “reminder” to the limited liability company announcing the need to file an annual registration. The amendment allows for filing the annual registration on-line or in paper.³⁴⁴

Subdivision 2: This subdivision sets forth the information and fees required for filing.³⁴⁵

Subdivision 5: This subdivision was amended to remove the requirement that a limited liability company must act within “one-year” of the date of administrative termination to be reinstated.³⁴⁶

49. *Minnesota Statutes section 323A.1-01*

Minnesota Statutes section 323A.1-01 sets forth the definitions related to Chapter 323A – Uniform Partnership Act of 1994. The definition of “record,” “recorded,” and “recording” was amended to mean that a certified copy of a statement meeting the applicable requirements of this chapter as filed with the Secretary of State has been recorded in the Office of the County Recorder in the county in which the real property affected by the statement is located or, if the real property is registered land under chapter 508 or 508A, memorialized on the certificate of title for that property.³⁴⁷

IV. SELECT 2004 MINNESOTA CASES

A. *Contracts*

1. *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267 (Minn. 2004) (holding that assignment of right to compensation to judgment creditor was not a valid assignment of future rights because the management agreement expressly provided that rights and obligations

344. *Id.* ch. 251, § 8.

345. *Id.* § 9.

346. *Id.* § 10.

347. *Id.* ch. 199, art. 13, § 114.

under the agreement were not assignable)

In August 1989, Travertine Corporation (“Travertine”), a real-estate development venture, entered into a management agreement with James E. Lennon and George Berkey.³⁴⁸ The management agreement provided, inter alia, that if Travertine terminated the parties’ agreement, Lennon and Berkey would be entitled to compensation for their services up to the termination date, and that disputes under the agreement were subject to arbitration.³⁴⁹ The agreement further provided that it was “binding on the parties and their respective personal representatives, successors and assigns; provided, however, that the rights and obligations of Berkey/Lennon shall not be assignable except that Berkey may assign to Lennon or Lennon assign to Berkey such rights and obligations.”³⁵⁰

In February 1992, Berkey assigned all of his rights under the management agreement to Lennon.³⁵¹ “In May 1996, Lexington-Silverwood, L.P. (“Lexington”) obtained a judgment against Lennon in a matter unrelated to Travertine.”³⁵² In settlement of the judgment, Lennon purported to assign to Lexington his rights under the management agreement.³⁵³ The assignment agreement provided that Lexington “has an equitable assignment of Lennon’s stock in Travertine” and that “Lennon agrees to transfer all other compensation, including anything due Lennon from his management agreement with Travertine.”³⁵⁴ In early 2000, Travertine cancelled the management agreement.³⁵⁵ Then, in March 2002, Lexington filed a demand for arbitration, stating that it was entitled to the compensation due to Lennon under the management agreement.³⁵⁶ Travertine had refused to pay it.³⁵⁷ Travertine moved to stay arbitration.³⁵⁸ The court deemed

348. Travertine Corp. v. Lexington-Silverwood, 683 N.W.2d 267, 269 (Minn. 2004).

349. *Id.*

350. *Id.* at 269-70.

351. *Id.* at 270.

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

Lennon's transfer of his right to compensation an invalid present assignment, "and concluded that, even if the assignment was enforceable, it was only an assignment of Lennon's right to receive compensation and not his right to demand arbitration."³⁵⁹

The district court granted Travertine's motion to stay arbitration, but the court of appeals reversed, noting that the management agreement did not explicitly limit Lennon's power to assign, nor did it explicitly render assignments void.³⁶⁰ Furthermore, the court of appeals noted that the agreement provided that it "shall be binding on the parties and their respective . . . assigns."³⁶¹ The court of appeals opined that this language indicates that "the non-assignment clause, if it was intended to apply to the assignment of compensation, [gave] Travertine a right to damages for breach of the clause but [did] not render Lennon's assignment ineffective."³⁶² Therefore, the court of appeals held that the non-assignment clause did not render Lennon's assignment of compensation to Lexington void, and, accordingly, concluded that Lexington may compel arbitration to enforce the payment of compensation.³⁶³ The Minnesota Supreme Court reversed.³⁶⁴

On appeal, Lexington argued that the only reason the anti-assignment clause in the management agreement created a covenant not to assign was because it did not state certain things.³⁶⁵ For instance, it did "not specifically state that any attempted assignment would be 'void' or 'invalid,' or that Lennon 'lack[ed] the power' to assign the contract."³⁶⁶ Travertine then argued that the those terms were not required because the agreement "expressly prohibit[ed] the assignment of the rights and obligations of the parties."³⁶⁷ The Minnesota Supreme Court agreed with Travertine and held the anti-assignment clause to be clear and unambiguous.³⁶⁸

359. *Id.*

360. *Id.* at 272.

361. *Travertine Corp. v. Lexington-Silverwood*, 670 N.W.2d 444, 448 (Minn. Ct. App. 2003).

362. *Id.*

363. *Id.* at 449.

364. *Travertine*, 683 N.W.2d at 270.

365. *Id.* at 271.

366. *Id.*

367. *Id.*

368. *Id.*

The supreme court discredited Lexington's reliance on the Restatement (Second) of Contracts section 322 which distinguished between a party's "right" to assign and a party's "power" to assign.³⁶⁹ The supreme court noted that, in Minnesota, parties may agree that their contractual rights and obligations are not to be assigned.³⁷⁰ In addition, the court opined that "a contract to pay money may be assigned by the person to whom the money is payable, unless there is *something* in the terms of the contract manifesting the intention of the parties that it shall not be assigned."³⁷¹

In this case, the supreme court noted that the agreement provided that "the rights and obligations of Berkley/Lennon shall not be assignable."³⁷² Furthermore, the court noted that the use of the term "shall" reflects a mandatory imposition, and as a result, the language satisfied the requirement that the parties include "something" in the contract indicating their intention to disallow an assignment of rights under the contract.³⁷³ As a result, the court held that the contract between Travertine and Lennon was not assignable.³⁷⁴

B. *Sale of Business*

1. *Rainforest Café, Inc. v. Wisconsin Investment Board*, 677 N.W.2d 443 (Minn. Ct. App. 2004) (allowing courts to reject conflicting expert testimony and determine fair value of dissenters' shares based on any and all factors the court finds relevant, and may include market price and transactional evidence)

This case addressed the proper value to be used for purposes of dissenters' rights under the Minnesota Business Corporation Act.³⁷⁵ The case resulted from a two-step merger where Rainforest Café ("Rainforest") was acquired by a subsidiary of Landry's

369. *Id.* at 273.

370. *Id.* at 272.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Rainforest Café, Inc. v. State of Wis. Inv. Bd.*, 677 N.W.2d 443, 445-46 (Minn. Ct. App. 2004).

Seafood Restaurants, Inc. (“LSR”).³⁷⁶ In the first step, LSR commenced a cash tender offer for a majority of the shares of Rainforest at \$3.25 per share, and upon acceptance by a majority of Rainforest shareholders, the balance would be acquired by merger at the same price.³⁷⁷ Holders of 80% of the outstanding shares accepted the tender offer, and the back-end merger was completed.³⁷⁸ Prior to the transaction, the shares of Rainforest were trading at \$2.00 per share.³⁷⁹

The State of Wisconsin Investment Board (the “Board”) asserted dissenters’ rights under Minnesota Statutes section 302A.473, subdivision 6, seeking the fair value of its shares.³⁸⁰ At trial, both parties presented expert testimony as to the fair value of the shares.³⁸¹ The Board’s experts testified that the fair value of the shares was \$6.10 per share, while LSR’s experts testified that the fair value was \$3.00 per share.³⁸² Using its own valuation methods, the trial court held that the fair value of the shares was \$3.25 per share.³⁸³ On appeal, the court of appeals held that it was not reversible error to reject the conflicting expert testimony of both parties and for the trial court to establish its own value.³⁸⁴ The appellate court noted its holding was supported by both prior case law and the express language of Minnesota Statutes section 302A.473, subdivision 7, which directs the court to “determine the fair value of the shares, taking into account any and all factors the court finds relevant . . . whether or not used by the corporation or a dissenter.”³⁸⁵

The court of appeals also held that it was not reversible error for the trial court to determine a value based on market prices and transactional evidence.³⁸⁶ In so doing, the court of appeals noted that market price is a generally accepted technique used by the financial community, that the negotiations, tender offer, and merger occurred at arms length, and that 80% of the

376. *Id.* at 447.

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.* at 445.

381. *Id.* at 446.

382. *Id.*

383. *Id.* at 448-49.

384. *Id.* at 451.

385. *Id.* at 450.

386. *Id.* at 452.

shareholders accepted the tender offer.³⁸⁷ Moreover, the court noted that a 62% premium was paid for the shares, compared to a typical premium of 40%.³⁸⁸

In the end, the court of appeals concluded that in accounting for the fair value of the dissenters' shares, the trial court did not err by rejecting the valuation opinions of expert witnesses and basing fair value on market price.³⁸⁹

C. *Minority Shareholders*

1. *Popp Telecom, Inc. v. American Sharecom, Inc.*, 361 F.3d 482 (8th Cir. 2004) (holding that former shareholders did not show detrimental reliance required to establish fraud)

In this case, Popp Telecom, Inc., Humbird Securities, Co., Northern Securities, Co., and Washington Sharecom, Inc. (collectively the "dissenters"), appealed from entry of summary judgment in favor of American Sharecom, Inc. ("American") and Steven C. Simon, James J. Weinart, and William J. King, the president, vice president, and chief financial officer, respectively, of American.³⁹⁰

Simon, Weinart, and the dissenters were shareholders of American.³⁹¹ In 1992, American's board approved a "freeze-out" merger with Sharecom Holdings, Inc., a corporation owned exclusively by Simon and Weinart.³⁹² The dissenters opposed the merger and exercised their dissenters' rights under Minnesota Statutes section 302A.471(1)(c) and challenged American's proffered payment per share of \$17,694.64.³⁹³ However, American's shareholders approved the merger by a divided vote on May 8, 1992.³⁹⁴

The dissenters claimed that Simon and Weinart used a series of schemes to steal control of American.³⁹⁵ The dissenters further

387. *Id.* at 453.

388. *Id.*

389. *Id.* at 454.

390. *Popp Telecom, Inc. v. Am. Sharecom, Inc.*, 361 F.3d 482, 485 (8th Cir. 2004).

391. *Id.* at 486.

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.* at 487.

claimed that the merger was invalid due to fraud, arguing that Simon and Weinart misrepresented the value of American's shares, used unexercised options to dilute the price, made material misrepresentations in, or omitted material facts from, tender offers in order for American to redeem shares, made material misrepresentations to financial institutions, and lied under oath.³⁹⁶ Lastly, prior to the district court proceedings, the dissenters amended their complaint to include a civil claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO").³⁹⁷

The court of appeals agreed with the district court's grant of summary judgment with respect to the RICO claim, but used different reasoning to come to its conclusion.³⁹⁸ The district court held that the dissenters' RICO claim was barred by the Private Securities Litigation Reform Act of 1995 ("PSLRA").³⁹⁹ The allegedly illegal conduct giving rise to the dissenters' RICO claim occurred prior to the PSLRA's effective date, but the dissenters did not amend their complaint to add the RICO claim until after the PSLRA's enactment.⁴⁰⁰ As a result, the district court held that the dissenters' right to assert their RICO claim expired on the PSLRA's effective date because such a claim did not have retroactive effect.⁴⁰¹

In its analysis, the court of appeals held that no retroactivity analysis was needed because the PSLRA is merely a procedural rule regulating the filing of a RICO claim.⁴⁰² The court of appeals determined that the PSLRA applies to all securities-based RICO claims commenced after its effective date, even if such claims are based on conduct that predates the PSLRA, and that such claims are barred unless shown to be pending on the date of the PSLRA's enactment.⁴⁰³ Despite the dissenters' argument that their RICO claim related back to their original pleading, the court held that because the RICO claim was filed after the PSLRA became effective, the district court did not err in granting summary judgment in favor of American.⁴⁰⁴

The court of appeals also affirmed the district court grant of

396. *Id.*
397. *Id.* at 486 n.2.
398. *Id.* at 488.
399. *Id.* at 487.
400. *Id.* at 488.
401. *Id.*
402. *Id.*
403. *Id.*
404. *Id.* at 490.

summary judgment in favor of American on the dissenters' common law fraud claims because the dissenters lacked standing and failed to establish detrimental reliance.⁴⁰⁵ Although the evidence supported an allegation that Simon, Weinart, and King engaged in fraudulent conduct to convince shareholders to sell their shares, the dissenters never sold their shares and, therefore, were not so induced to their detriment.⁴⁰⁶

Similarly, the court of appeals found no error in granting American summary judgment with respect to the dissenters' claims of breach of fiduciary duty and unfairly prejudicial conduct.⁴⁰⁷ The court of appeals agreed with the district court, which had held that such claims were derivative claims belonging to the Corporation and that a shareholder asserting a cause of action belonging to the corporation must seek redress in a derivative action on behalf of the corporation rather than in a direct action by the individual shareholder.⁴⁰⁸

The dissenters' argument that the Minnesota Securities Act, Minnesota Statutes section 80A.01, applied was rejected because the court of appeals determined the statute only applies to some type of *decision* to sell stock, and, in this case, the merger eliminated the dissenters' ability to make a decision regarding the sale of stock.⁴⁰⁹ Lastly, the court of appeals held that the Minnesota Prevention of Consumer Fraud Act was not applicable because it only protects consumers and the dissenters in this case were *sellers*.⁴¹⁰

2. *Wiltse v. Boarder Financial Services, Inc.*, No. A03-852, 2004 WL 771493 (Minn. Ct. App. Apr. 13, 2004) (holding that minority shareholder was not treated prejudicially under the permissive language of Minnesota Statutes section 302A.751, and, therefore, justice did not require the corporation to buy his shares)

In 1996, appellant Jeff Wiltse and ten of the eleven shareholders of Boarder State Bank ("Bank") formed respondent corporation, Boarder Financial Services, Inc. ("Boarder

405. *Id.* at 492.

406. *Id.* at 491.

407. *Id.* at 492.

408. *Id.*

409. *Id.* at 493.

410. *Id.*

Financial”), to purchase and operate an insurance agency.⁴¹¹ Wiltse and the ten bank shareholders held all of the shares in Boarder Financial, and all eleven shareholders were directors.⁴¹² However, Wiltse was the only board member familiar with the details of Boarder Financial’s operations, and eventually became the owner of 20% of the shares of Boarder Financial.⁴¹³ Wiltse was also manager of Boarder Financial and served as its president.⁴¹⁴

In September 2001, Wiltse resigned as manager and president of Boarder Financial to move to another city.⁴¹⁵ The officers of Boarder Financial urged him to stay and offered to sell him the business.⁴¹⁶ Wiltse declined but offered to assist Boarder Financial through the transition to new management.⁴¹⁷ Although Wiltse wanted to sell his shares, and Boarder Financial’s officers and directors held several meetings and discussions regarding possible buy/sell arrangements, no agreement could be reached.⁴¹⁸ Wiltse then commenced an action for a mandatory buyout of his stock under Minnesota Statutes section 302A.751, subdivision 1(b)(3).⁴¹⁹ Wiltse claimed that the other officers, directors, and shareholders prejudiced him in a number of ways, such as by failing to offer him a reasonable price for his shares, discussing Boarder Financial business at Bank meetings, failing to give him proper notice of meetings, by not aggressively trying to sell Boarder Financial, and by considering an offer for Boarder Financial at a lower price more favorable to the Bank.⁴²⁰ The district court found none of Wiltse’s claims adequate to justify a mandatory buyout, and the court of appeals affirmed.⁴²¹

First, Wiltse argued that the failure of Boarder Financial to offer fair value for his shares constituted unfairly prejudicial action.⁴²² However, the court of appeals found that there was no

411. Wiltse v. Boarder Fin. Servs., No. A03-852, 2004 WL 771493, at *1 (Minn. Ct. App. Apr. 13, 2004).

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.* at *2.

buy/sell agreement in place and there was no evidence to support his argument that the offered price was unfair.⁴²³ The court of appeals also found the shareholder's offer to sell Boarder Financial to Wiltse to be reasonable because they offered to sell Wiltse their shares on the same terms and conditions included in their offer to buy his shares.⁴²⁴

Second, Wiltse argued that Boarder Financial's freezing him out of Boarder Financial business after his resignation was unfairly prejudicial conduct.⁴²⁵ As evidence, he argued that he was not given adequate notice of meetings in which Boarder Financial business was being discussed.⁴²⁶ However, the court of appeals found that Wiltse was treated no differently than other shareholders, that he was still able to participate in Boarder Financial business, and that it was his own actions that resulted in his limited involvement.⁴²⁷ Furthermore, the court of appeals found that Wiltse participated in many of the meetings to which he objected.⁴²⁸

Lastly, the court of appeals held that Wiltse, as a shareholder, did have a reasonable expectation that the board would consider the best interests of Boarder Financial, rather than the Bank, when selling Boarder Financial.⁴²⁹ However, the court also found that the board's actions did not frustrate any of Wiltse's reasonable expectations because, in large part, the sale terms were acceptable.⁴³⁰ Without more evidence to the contrary, the court of appeals held it would not interfere with the board's decision making.⁴³¹ As a result, under the permissive language of Minnesota Statutes section 302A.751, subdivision 1, the court of appeals held that justice did not require a forced sale.⁴³²

D. Miscellaneous

423. *Id.*

424. *Id.*

425. *Id.* at *3.

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.* at *4.

1. *Afremov v. Amplatz*, Nos. A03-448, A03-659, 2004 WL 77851 (Minn. Ct. App. July 20, 2004) (deciding that court appointment of a receiver is appropriate where directors are deadlocked in the management of the corporation, but the court may not issue a temporary injunction without addressing the issue of security)

AGA Medical Corporation (“AGA”), a manufacturer and designer of medical devices, is a Minnesota closely held corporation.⁴³³ After AGA was incorporated in 1995, respondent Michael Afremov and appellants Franck Gougeon and Kurt Amplatz each became one-third shareholders and a director in AGA.⁴³⁴ Afremov acted as vice president of operations and was responsible for research and development, manufacturing, and quality control.⁴³⁵ In October 2002, Amplatz and Gougeon voted together to elect Gougeon CEO over Afremov’s objection.⁴³⁶ After the meeting, Gougeon terminated Afremov’s employment with AGA, but Afremov remained an officer.⁴³⁷ In December 2002, AGA held another board meeting at which, over Afremov’s objection, Amplatz and Gougeon voted to create an AGA subsidiary corporation to receive certain AGA assets and operations.⁴³⁸ After the December 2002 board meeting, Afremov filed an action in district court seeking equitable relief pursuant to Minnesota Statutes section 302A.751 to protect his rights and his interest in AGA.⁴³⁹

In March 2003, the district court ordered equitable relief, pursuant to Minnesota Statutes section 302A.751 in the form of a temporary injunction.⁴⁴⁰ The temporary injunction restrained Amplatz and Gougeon from transferring any assets or operations of AGA to any entity unless Afremov was guaranteed an ownership interest in any such entity equal to his current interest in AGA.⁴⁴¹ Furthermore, the court order stated that all decisions

433. *Afremov v. Amplatz*, Nos. A03-448, A03-659, 2004 WL 77851, at *1 (Minn. Ct. App. July 20, 2004).

434. *Id.*

435. *Id.*

436. *Id.* at *2.

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.* at *2-*3.

441. *Id.* at *2.

involving the operations of AGA had to be made by a unanimous vote of Afremov, Amplatz, and Gougeon.⁴⁴² In May 2003, the court modified its temporary injunction.⁴⁴³ The modification involved appointing a receiver to evaluate any proposed corporate action in which the three officers could not unanimously agree.⁴⁴⁴

The court of appeals affirmed, holding that the district court had not abused its discretion by issuing the March order for a temporary injunction.⁴⁴⁵ In doing so, the court noted that public policy considerations favored the temporary injunction because AGA is a Minnesota closely held corporation, and shareholders of a closely held corporation owe a fiduciary duty to deal openly, honestly, and fairly with all the other shareholders of the corporation.⁴⁴⁶ The court of appeals opined that because Minnesota Statutes section 302A.751 provides courts with the authority to grant *any* equitable relief deemed just and reasonable, the district court did not clearly abuse its discretion by protecting Afremov's rights in AGA under the circumstances.⁴⁴⁷

Similarly, the court of appeals determined that section 302A.751 authorized the district court's appointment of a receiver.⁴⁴⁸ The court of appeals stated that a district court may appoint a receiver before it enters judgment when any party to the action applies to the court and shows both "an apparent right to property which is the subject of such action and is in the possession of an adverse party," and that the property in question is in danger of being lost or materially impaired.⁴⁴⁹ The court of appeals found that those elements were met in this case.⁴⁵⁰

Nevertheless, the court of appeals held that the district court had erred by failing to require, or even consider, security for the injunction and because it had not required the court-appointed receiver to post a bond.⁴⁵¹ To the first point, the appellate court

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.* at *4.

446. *Id.* at *6.

447. *Id.* at *8.

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.* at *9.

held that the district court could have waived the requirement of security for the injunction, but it should have affirmatively addressed that issue first.⁴⁵² To the second point, the court of appeals held that, under Minnesota Rules of General Practice 137.03, a receiver is required to post a bond.⁴⁵³

2. *TNT Properties, Ltd. v. Tri-Star Developers, LLC*, 677 N.W.2d 94 (Minn. Ct. App. 2004) (granting request to compel settlement because writing and subscription requirements of the statute of frauds had been met even if due date of first payment which respondent missed was an “essential term” of the agreement)

On February 3, 2003, appellant TNT Properties, Ltd. (“TNT”), and respondents Tri-Star Developers, LLC (“Tri-Star”), reached a settlement in their real estate transaction.⁴⁵⁴ The settlement was read in open court, and all parties assented to its terms.⁴⁵⁵ In part, the settlement called for an initial earnest money payment of \$25,000 (of the \$3,100,000 total purchase price) on February 10.⁴⁵⁶ Tri-Star mistakenly believed that the first installment payment was due on Wednesday, February 12.⁴⁵⁷ Although Tri-Star tendered the first installment payment on February 12, TNT refused to accept it and sent the money back to Tri-Star.⁴⁵⁸

The district court granted Tri-Star’s motion to enforce the settlement and held that the settlement agreement was an enforceable purchase agreement.⁴⁵⁹ Furthermore, the court noted that because Tri-Star tendered the first payment less than forty-eight hours from when it was due, it was not a material breach.⁴⁶⁰ Even if the late payment was a material breach, the court determined that TNT was required to cancel the contract pursuant to Minnesota Statutes section 559.21 and give Tri-Star

452. *Id.*

453. *Id.*

454. *TNT Props., Ltd. v. Tri-Star Developers, LLC*, 677 N.W.2d 94, 97 (Minn. Ct. App. 2004).

455. *Id.*

456. *Id.* at 97.

457. *Id.*

458. *Id.* at 97-98.

459. *Id.* at 98.

460. *Id.*

an opportunity to cure, which TNT failed to do.⁴⁶¹ Lastly, the district court held that an agreement entered on the record constitutes a writing sufficient to satisfy the statute of frauds.⁴⁶² The court of appeals affirmed.⁴⁶³

On appeal, TNT first argued that the settlement agreement, orally placed on the record in open court, did not satisfy Minnesota Statutes section 513.04, the statute of frauds.⁴⁶⁴ The court noted that the basic purpose of the statute of frauds is only to provide reasonable safeguards to insure honest dealing and that it was not enacted to make a “fetish of literal statutory compliance.”⁴⁶⁵ In this case, the appellate court found that because the settlement agreement between the parties was the product of extensive negotiation, was read in open court with counsel present, and assented to by both parties, it reasonably insured honest dealing and satisfied the writing and subscription requirements of the statute of frauds.⁴⁶⁶

The court of appeals likewise rejected TNT’s argument that the parties did not mutually assent to the essential terms of the agreement.⁴⁶⁷ TNT argued that the parties had no “meeting of the minds” because it believed the first payment was due on Monday, February 10, with failure to perform rendering the agreement null and void, while Tri-Star believed that the first payment was due Wednesday, February 12.⁴⁶⁸ Tri-Star argued that the parties always understood payments would be due on Wednesdays and that when counsel said “one week from today” when the settlement was read, he meant February 12, not February 10.⁴⁶⁹

The court of appeals first considered whether the date of the first installment payment was an “essential term” of the agreement and noted that a binding contract can exist despite the parties’ failure to agree on a term if the term is not essential or can be supplied.⁴⁷⁰ The appellate court determined that the

461. *Id.*

462. *Id.*

463. *Id.* at 97.

464. *Id.* at 98.

465. *Id.* at 100.

466. *Id.*

467. *Id.* at 101-02.

468. *Id.* at 101.

469. *Id.*

470. *Id.*

\$25,000 first installment, which was intended only to secure the underlying \$3,100,000 agreement, was not essential.⁴⁷¹ However, the court held that even if it were essential, TNT's argument would still fail because Tri-Star did not materially breach the agreement.⁴⁷² The court of appeals stated that Minnesota follows the objective theory of contract formation, under which an outward manifestation of assent, rather than a party's subjective intent, is determinative.⁴⁷³ As a result, the court determined that, disregarding respondent's subjective intent, the outward manifestation of assent to the phrase "one week from today" was sufficient to establish mutual assent to the February 10 due date.⁴⁷⁴ However, the court also noted that a delay in a single installment payment is not the type of material breach or substantial failure of performance that cancels a contract for deed.⁴⁷⁵ As such, the court held that Tri-Star did not materially breach the agreement, furthering supporting its decision by emphasizing that the first installment payment constituted less than one percent of the \$3,100,000 deal.⁴⁷⁶

Third, the court of appeals held that even if Tri-Star had materially breached the agreement, it would have been entitled to an opportunity to cure its default under Minnesota Statutes section 559.21, which states that a defaulting buyer of real property may maintain the agreement in force if he complies with the conditions of default within the applicable statutory period.⁴⁷⁷ TNT's argument that section 559.21 was not triggered because the settlement agreement was unenforceable as a matter of law under the statute of frauds was rejected because the settlement constituted a valid, binding agreement.⁴⁷⁸

Last, the court of appeals rejected TNT's argument that the district court had abused its discretion by amending the dates of performance because the alternative would have been to make compliance with the court's order (approving the settlement) impossible.⁴⁷⁹

471. *Id.*

472. *Id.*

473. *Id.* at 102.

474. *Id.*

475. *Id.*

476. *Id.* at 102.

477. *Id.* at 104.

478. *Id.*

479. *Id.*

3. *I-Sys., Inc. v. Softwares, Inc.*, No. Civ. 02-1951 JRTFLN, 2004 WL 742082 (D. Minn. March 29, 2004) (granting summary judgment as to breach of fiduciary duty claim because the parties held nothing more than an ordinary producer-distributor relationship)

Plaintiffs, i-Systems, Inc. (“ISI”) and Jeremy Kahn (collectively “Plaintiffs”) brought an action against defendants Softwares, Inc. (“Softwares”), Quantum Management Systems, LLC (“Quantum”), and Christ’s Household of Faith, Inc. (“CHOF”) (collectively, “Defendants”) alleging numerous claims related to Softwares’ development of a new software product to replace the one developed by Plaintiffs.⁴⁸⁰ In 1996, ISI entered into a development agreement with CHOF, which provided that Kahn would develop a software product, later known as TQ Tracker, that CHOF would develop and distribute.⁴⁸¹ The development agreement provided that in the event of a breach, Softwares would be granted an “irrevocable, worldwide, perpetual license to use, and sublicense TQ Tracker.”⁴⁸² However, terms of the software licenses, which were included in the development agreement, did not allow the customer to reverse engineer, modify, or create derivative works based upon the software, or to conduct any competitive business activity.⁴⁸³

Over time, Softwares became unhappy with the effectiveness of TQ Tracker and decided to develop a new software product to replace it.⁴⁸⁴ In the development process, Softwares invited current TQ Tracker customers to participate in focus groups and marketed the new product as an upgrade of TQ Tracker.⁴⁸⁵ When the Plaintiffs discovered that Softwares was marketing the new product, they terminated Softwares’ exclusive distributorship of TQ Tracker.⁴⁸⁶ Plaintiffs then filed suit against Defendants, alleging breach of contract, breach of implied covenant, breach of fiduciary duty, and disregard of corporate entity.⁴⁸⁷ Defendants

480. *I-Sys., Inc. v. Softwares, Inc.*, No. Civ. 02-1951 JRTFLN, 2004 WL 742082, at *1 (D. Minn. March 29, 2004).

481. *Id.*

482. *Id.*

483. *Id.* at *2.

484. *Id.*

485. *Id.*

486. *Id.*

487. *Id.*

moved for summary judgment on all claims.⁴⁸⁸

First, the district court held that summary judgment with respect to the breach of contract claim was inappropriate.⁴⁸⁹ Plaintiffs alleged that the Defendants breached the development agreement because Softwares failed to pay all license fees owed and violated the license terms by reverse engineering and by creating derivative works based on TQ Tracker.⁴⁹⁰ Plaintiffs further argued that Defendants organized a business that would directly or indirectly compete with ISI.⁴⁹¹ On the other hand, the Defendants claimed that Kahn breached the agreement by failing to use “commercially reasonable efforts,” failing to meet deadlines, or failing to submit a log, when the development agreement specifically required ISI to use commercially reasonable efforts to develop TQ Tracker and to meet reasonable deadlines.⁴⁹² Both parties agreed that the development agreement constituted a valid contract.⁴⁹³

The development agreement defined “commercially reasonable efforts” as thirty hours of work per week, but the district court could not determine from the language of the agreement whether “thirty hours per week” was the entire definition.⁴⁹⁴ Furthermore, despite the Defendants submission of a “timeline” of major events during the development of TQ Tracker, the court decided that such evidence did not establish that Kahn, in fact, had missed any established deadlines.⁴⁹⁵ Although Kahn failed to submit a log of his hours worked, the court determined that such failure, without more, could not constitute a material breach of the agreement.⁴⁹⁶

Softwares also argued that Plaintiffs’ alleged breach of the development agreement granted it the right to use TQ Tracker any way it wanted, including use in contravention of the licenses.⁴⁹⁷ The district court held that even if Plaintiffs had breached the agreement, resulting in Softwares receiving an

488. *Id.* at *1.

489. *Id.* at *7.

490. *Id.* at *4.

491. *Id.*

492. *Id.* at *5.

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.*

497. *Id.*

irrevocable license to use and sublicense TQ Tracker, such breach would not create the right to copy TQ Tracker, create a competing product, or use the software in any way it wanted.⁴⁹⁸ Altogether, the court held that numerous issues of material fact remained and that summary judgment was therefore inappropriate on Plaintiffs' breach of contract claim.⁴⁹⁹

Second, the district court also held that summary judgment was inappropriate as to the breach of implied covenant claim.⁵⁰⁰ The court noted that every contract includes an implied covenant of good faith and fair dealing, requiring one party to refrain from arbitrary and unreasonable conduct that has the effect of preventing the other party to the contract from receiving the fruits of the contract.⁵⁰¹ Furthermore, the district court stated that Minnesota does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing without an underlying breach of contract claim.⁵⁰²

Plaintiffs presented evidence that Defendants used TQ Tracker's customers in focus groups related to the new software and misrepresented the new software as an "upgrade" of TQ Tracker, and that TQ Tracker sales substantially declined after the new software was marketed.⁵⁰³ The court found that such evidence was enough to generate genuine issues of material fact as to whether the covenant of good faith and fair dealing had been breached.⁵⁰⁴

Third, the court granted Defendants' summary judgment motion as to the breach of fiduciary duty claim.⁵⁰⁵ The court noted that under Minnesota law, a fiduciary relationship exists when confidence is reposed on one side and there is resulting superiority and influence on the other.⁵⁰⁶ The district court further opined that special circumstances sufficient to create a fiduciary relationship may also exist where there is a disparity of business experience and the party with the greater experience

498. *Id.*

499. *Id.* at *7.

500. *Id.* at *13.

501. *Id.* at *12.

502. *Id.*

503. *Id.* at *13.

504. *Id.*

505. *Id.*

506. *Id.*

has invited the other's confidence.⁵⁰⁷ The court found that Plaintiffs did not demonstrate any special circumstances distinguishing the case from an ordinary producer-distributor relationship and that no jury could therefore find a fiduciary relationship existed.⁵⁰⁸

Lastly, the district court did not grant Defendants' motion for summary judgment as to the disregard of corporate entity claim.⁵⁰⁹ The court noted that Minnesota recognizes the "alter ego" doctrine, also known as "piercing the corporate veil," to impose liability on an individual shareholder or parent corporation that has used a corporate form to evade liability.⁵¹⁰ The court opined that to prevail under this claim, a plaintiff must meet a two-pronged test.⁵¹¹ The first prong focuses on the shareholder's relationship to the corporation, and the second requires showing that injustice or fundamental unfairness will result from permitting a defendant to rely on the corporate veil.⁵¹²

At trial, evidence was produced demonstrating that CHOF is the sole shareholder of both Softwares and Quantum.⁵¹³ The district court found that many employees of Softwares also work for Quantum.⁵¹⁴ CHOF capitalized Softwares by transferring its interest in Softwares, Inc. (dissolved in 1998) to Softwares.⁵¹⁵ Quantum was capitalized by a ten dollar payment from CHOF and the transfer of the new software product from Softwares to Quantum.⁵¹⁶ The court noted that funds were frequently moved between the three companies to satisfy debts and that the process was accomplished without formal agreements or regular enforcement.⁵¹⁷ As a result, the district court held that CHOF's intimate involvement with both Softwares and Quantum negated granting summary judgment on the corporate entity claim.⁵¹⁸

507. *Id.*

508. *Id.*

509. *Id.* at *17.

510. *Id.* at *16.

511. *Id.*

512. *Id.*

513. *Id.* at *17.

514. *Id.*

515. *Id.*

516. *Id.*

517. *Id.*

518. *Id.*