MINNESOTA

Defense

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AMICUS CURIAE UPDATE: 2018

By Louise A. Behrendt, Chair; Amicus Curiae Committee

In what seems to be developing into an annual event, this article summarizes the cases in which MDLA has participated, and is presently participating, on an Amicus Curiae basis, before Minnesota's appellate courts. This article also follows Steven Bader's interesting piece in the Fall 2018 issue ("Supreme Shift: Lessons the Defense Bar Can Learn from Recent Supreme Court Opinions"), which highlighted some recent Minnesota Supreme Court opinions addressing what appear to be plaintiffs'- oriented decisions reversing summary judgment to defendants in tort-based injury claims. Whether the court's recent opinions signal a shift or a trend that should be of concern to the defense bar could be the subject of some interesting debates. What is clear, however, is that—as Justice G. Barry Anderson remarked during this year's MDLA/MAJ Judges' Reception on October 22, 2018—the Minnesota Supreme Court appreciates the insight and perspective provided in Amicus Curiae briefs from the MDLA (MAJ, too).

Overall, the purpose of the Amicus Curiae Committee is to screen potential cases for possible Amicus involvement; cases which are of statewide significance, and which involve MDLA's overall goal of ensuring a "level playing field" between plaintiffs and defendants. Typically, cases come to the attention of the Committee upon specific requests from MDLA members. And those cases come to the Committee's attention at various stages; including while a case is pending before the Minnesota Court of Appeals, while a Petition for Further Review (PFR) is pending before the Minnesota Supreme Court, or after a PFR has been granted. Participation is also sought (and approved) on appeals before the Eighth Circuit Court of Appeals. Finally, sometimes Committee members flag cases as those in which MDLA might weigh.

In whatever manner the cases come to the attention of the Committee, it is important to keep in mind that time is of the essence. Individuals desiring MDLA Amicus involvement should contact the Chair of the Amicus Curiae Committee as soon as possible; during the PFR process is not too soon, and after review is granted might be too late. While MDLA does not typically get involved at the court of appeals level, we have done so in cases flagged as having important statewide impact likely to wind up before the Minnesota Supreme Court. Finally, it is helpful if the requestor can articulate a perspective that MDLA might add on appeal, as well as identify an individual who might be willing to write an Amicus brief on MDLA's behalf.

MDLA's Amicus participation cannot exist without the willingness of individuals to devote their time and talents to preparing an Amicus brief. Many thanks to the writers.

Henson v. Uptown Drink* and *Soderberg v. Anderson: The value placed by the courts on Amicus Curiae briefs is demonstrated by two cases argued this fall: *Henson v. Uptown Drink,* No. A17-1066 (Minn. App. Dec. 26, 2017), and *Soderberg v. Anderson*, No. A17-0827 (Minn. App. Jan. 16, 2018). Both cases concern, to a certain extent, the long-recognized Minnesota doctrine of implied primary assumption of risk, although application of the doctrine arose out of completely different circumstances.

In *Henson,* the Minnesota Court of Appeals reversed an order granting summary judgment to the defendant in a case involving a death that occurred at a bar. The decedent, a bar patron, voluntarily decided to help a bar employee eject two intoxicated individuals and, in the process, sustained fatal injuries. Issues included foreseeability - causation in the context of a dram shop claim, and primary assumption of risk. As to the latter, the court of appeals found fact questions as to whether decedent voluntarily assumed the risk of "roughhousing or fighting," and whether defendant "enlarged the risk of harm." And as to the dram shop claim,

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the court found that Henson's decision to voluntarily inject himself into the altercation between the bar employee and the intoxicated patrons did not "break the causal chain" and that "there appeared to be evidence" that intoxication was a "substantial factor" in causing the death.

In *Soderberg*, the court of appeals reversed summary judgment to the defendant in a ski injury case. That case squarely presented the issue of whether the plaintiff—an experienced skier and ski instructor—primarily assumed the risk of being injured by a snowboarder, when he unsuccessfully attempted an aerial maneuver. In reversing, the court of appeals found a fact question as to whether the snowboarder's conduct was so reckless or inept as to be wholly unanticipated, and as to whether the snowboarder enlarged the well-known inherent risks associated with skiing.

The Minnesota Supreme Court accepted review on the *Henson* case first. Later, when it granted review in *Soderberg*, the court not only combined both cases for oral argument, but took the unusual (but not unheard of) step in specifically seeking amicus involvement from both MDLA and MAJ. Finally, the court specifically (and surprisingly) asked that the parties address the question of whether Minnesota should continue to recognize the doctrine of implied primary assumption of the risk. In neither case did any of the parties request that the court assess the continued vitality of this doctrine.

As of the time this article is being written both *Henson* and *Soderberg* have been fully briefed, and oral argument was heard on October 10, 2018. In light of the possibility that these cases may sound the death knell for primary assumption of the risk in Minnesota, the court's decisions in these cases are ones to watch.

Kevin McCarthy wrote MDLA's Amicus brief in *Henson*, and Jeff Lindquist wrote the Amicus brief on behalf of the MDLA in *Soderberg*.

***Getz v. Peace*,** No. A18-0121, 918 N.W. 2d 233 (Minn. App. 2018): this case, which concerns a collateral source deduction under Minn. Stat. § 548.251 and *Swanson v. Brewster*, for UCare and Medica discounts, was brought to the attention of the Amicus Curiae Committee at the court of appeals level, with counsel speculating that it might be one to reach the supreme court. That supposition proved true.

The court of appeals issued its decision on this case on September 17, 2018, in a published opinion in which the court reversed and remanded the matter to the Blue Earth County District Court, concluding: "Discounts negotiated for Medicaid beneficiaries under Minnesota's Prepaid Medical Assistance Program are 'payments made pursuant to the United States Social Security Act' that are excepted from collateral-source offset under Minn. Stat. § 548.251, subd. 1 (2) (2016)." The Court specifically held that discounts for healthcare costs did not need to have been directly negotiated by state or federal authorities or directly mandated by the Social Security Act in order to have been excepted from offset, and discounts made pursuant to the Social Security Act constituted collateral sources excepted from offset. The Minnesota Supreme Court accepted review of this case on November 28, 2018.

Laura Mohrle and Dyan Ebert wrote the MDLA Amicus brief before the court of Appeals, and will write the Amicus brief before the Minnesota Supreme Court as well.

Conda v. Honeywell International, Inc., No. A17-1381, 2018 WL 2293530 (Minn. App. May 21, 2018): This wrongful death — asbestos exposure case concerned, among other things, whether the current version of Minnesota's reallocation of fault statute, Minn. Stat. 604.02, adopted in 2003, applies to latent injury cases where exposure occurred prior to 2003, but where illness and injury manifested after 2003. The case was originally tried in the summer of 2016. The jury allocated 10% of the fault to Honeywell, 10% to a previously-settled defendant, and 80% to the decedent's employer. The issues on appeal in this case concerned, among other things, whether the district court utilized the correct version of Minnesota Statutes section 604.02 when it determined that some portion of the employer's 80% fault allocation should be reallocated to Honeywell. Honeywell took the position that under the current version of the statute, adopted in 2003, its fault should be capped at 10% because it is not subject to reallocation when its fault is less than 50%. But the plaintiff argued, and the Ramsey County District Court agreed, that the prior statute, adopted in 1988, applied, because of the effective-date language included with the 2003 amendment. The district court concluded, and the court of appeals has now agreed, that Honeywell is responsible for its own fault as well as 50% of the employer's fault.

The issue was one of statutory interpretation, and functioned as a companion, of sorts, to the issues recently decided in the *Staab v. Diocese of St. Cloud* case, which was twice-reviewed by the Minnesota Supreme Court. In this case, however, the supreme court declined review.

John E. Hennen wrote the MDLA Amicus brief.

Great Northern Ins. Co. v. Honeywell Int'l, 911 N.W. 2d 510 (Minn. 2018). This case addressed, for the first time, the "equipment or machinery" exception to Minnesota's ten-year "statute of repose" for improvements to real property within Minn. Stat. 541.051. It also addressed whether Minnesota should recognize the Restatement (Third) of Torts concerning the existence of a post-sale duty to warn. The trial court originally granted summary judgment to the defendant on a subrogation claim

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involving an allegedly defective heat exchange ventilator, for fire damage occurring more than ten years after the product was originally installed. While the trial court granted summary judgment to the defendant, concluding that the repose provisions within the statute applied to bar the claim as untimely, the court of appeals reversed. The Minnesota Supreme Court ultimately agreed, concluding that undefined statutory term "equipment or machinery" required application of common dictionary definitions of "machine," without consideration of whether the item was integrated into a building structure.

As to the post-sale duty to warn issue, the court adopted Restatement (Third) of Torts: Products Liability § 10, which provides that such a duty exists "if a reasonable person in the seller's position would provide such a warning." The court adopted the Restatement's "conjunctive factors" for when a reasonable person would provide a warning, which exist when, first, the seller knew or reasonably should know that the product poses a substantial risk of harm; *and* second, those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; *and* third, a warning can be effectively communicated to and acted on by those to whom a warning might be provided; *and* fourth, the risk of harm is sufficiently great to justify the burden of providing a warning. The supreme court concluded that the plaintiff must establish all four factors before a duty may attach. Ultimately, as to defendant and the subject heat exchange ventilator, the court concluded that while the plaintiff established two of the factors, the evidence did not establish that defendant had a reasonable means by which to identify those to whom a warning might be provided, or an effective way to communicate a warning to consumers.

Cheryl Hood Langel wrote the MDLA Amicus brief.

***Ouradnik v. Ouradnik*,** 912 N.W. 2d 674 (Minn. 2018). This case concerns whether the recreational use statute, Minn. Stat. § 604A.22, applies to confer immunity upon a landowner with respect to injuries sustained by his son while climbing a deer stand. While the Minnesota Supreme Court agreed that all three of the statute's requirements were generally met, it ultimately concluded that immunity was not available because the property was not offered for public use, but was instead offered for use only to the landowner's immediate family.

Tal A. Bakke wrote the Amicus brief on behalf of MDLA.

Ekblad v. St. Paul Public Schools (ISD 625), ___ Fed. Appx. _, 2018 WL 3768429 (8th Cir. Aug. 8, 2018). The United States District Court for the District of Minnesota granted summary judgment to the defendant school district in a case arising out of an assault on a teacher, committed by a student during a lunch break. The district court concluded that the exclusive remedy provisions of the Minnesota Worker's Compensation Act (WCA), Minn. Stat. § 176.031, applied to preempt the plaintiff's claims. The Eighth Circuit Court of Appeals affirmed summary judgment to the defendant in a per curiam opinion, concluding that none of the three relevant exceptions (the assault exception, the intentional act exception, and the co-employee exception) applied.

Bill Davidson and Joao Medeiros wrote the brief for the MDLA.

***Western National Ins. Co. v. Nguyen*,** 909 N.W. 2d 341 (Minn. 2018), *affirming* 902 N.W. 2d 645 (Minn. Ct. App. 2017). This case concerns an automobile insurer's motion to vacate a no-fault arbitration award requiring it to pay medical expenses that the insured incurred following a no-fault arbitrator's earlier denial of prior medical expenses. It concerned, as a matter of first impression, application of Minn. Stat. § 62Q.75, subd. 3. The trial court granted the insurer's motion and the court of appeals affirmed, in relevant part, concluding that an insured's claim for medical expense benefits from his no-fault carrier may be barred if application of the statute results in the insured not suffering a "loss" as defined in Minn. Stat. § 65B.54, subd. 1. The case was argued before a six-member court, prior to Justice Thissen's appointment. On March 23, 2018 the court issued a one-page order affirming the decision of the court of appeals, because the court was evenly divided on the issue. It's anyone's guess as to how the case would have turned out had Justice Thissen been on the panel.

Tammy Reno and Kelly Magnus wrote the MDLA Amicus brief.

At this point in Minnesota legal history, MDLA Amicus participation might be more important than ever, as significant issues affecting the defense bar make their way before the currently-configured Minnesota Supreme Court. And as noted above, the court also views MDLA's input as helpful and valuable, as demonstrated by its express request for MDLA amicus participation in the *Henson* and *Soderberg* case.

Please contact the Amicus Curiae Committee if you desire MDLA Amicus involvement. The present Chair is Louise Behrendt; lbehrendt@meagher.com, or (612) 347-9140. You may also contact members of the Committee: Bill Davidson, Bill Hart, Brendan Tupa, Dyan Ebert, Jeff Lindquist, Mark Bradford, and Steve Laitinen.