MINNESOTA

WINTER 2024

Defense

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DRIVEWAYS AND OBSTACLES

The Editorial Committee welcomes articles for publication in *Minnesota Defense*. If you are interested in writing an article, please contact the Chief Editor or call the MDLA office at 612-750-8606.

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ARTICLES FROM PAST ISSUES

Members wishing to receive copies of articles from past issues of *Minnesota Defense* should forward a check made payable to the Minnesota Defense Lawyers Association in the amount of $5 for postage and handling. In addition to the articles listed below, articles dating back to Fall '82 are available. Direct orders and inquiries to the MDLA office, director@mdla.org.

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Evaluating Exculpatory Clause After *Justice & Rugged Races*
Patrick O'Neill & Samuel H.J. Schultz

JOIN A COMMITTEE

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

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

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

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- Minnesota Civil Damage Act
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For more information, email committee Co-Chairs Kelly Magnus - kmagnus@nilanjohnson.com or Brandon D. Meshbesher - brandon.meshbesher@lindjensen.com

THE PRESIDENT'S COLUMN

Elizabeth Sorenson Brotten

Foley Mansfield

As the cooler weather arrives and the snow is falling, I am excited to share some of the many ways MDLA members have engaged both with each other and with the wider legal community this fall. This season has been full of events that highlight our commitment to excellence in the civil defense bar!

Joint Judicial Reception with the Minnesota Association for Justice

One of the highlights of every MDLA year is the Judicial Reception, which we hosted together with the Minnesota Association for Justice (MAJ). Held at beautiful Allianz Field on October 10, the reception brought together judges from Minnesota's district, appellate, and administrative courts, along with leaders in the plaintiffs and defense bar. This event highlights the importance of building strong relationships within the profession and hearing about the challenges and opportunities within our courts. The evening was filled with lively conversations and the strengthening of professional connections. It was a fantastic opportunity for MDLA members to meet and learn from the judiciary and gain insights into current judicial perspectives.

DRI Annual Meeting in Seattle

In mid-October, I attended DRI's Annual Meeting in Seattle, Washington, along with MDLA Executive Director Lisa Mortier, Vice President Stephanie Angolkar, Past President/Outgoing DRI State Representative Jessica Schwie, and Past President/Incoming DRI State Representative Tony Novak. We attended the Leadership Conference, where we shared ideas for engagement and retention with leaders of other State and Local Defense Organizations (SLDOs). The Annual Meeting also featured an impressive lineup of speakers, including travel guru Rick Steves, and included discussion on issues important to the future of our profession, including innovation, artificial intelligence, social inflation and nuclear verdicts, and lawyer well-being. We had the opportunity to join in an early morning "grunge" run/walk to the Space Needle, and to network with others from across the country during an evening event at the Museum of Pop Culture. We came away with new insights and strategies aimed at building an even stronger MDLA! The week ended on a special and celebratory note, as MDLA received the 2024 DRI Rudolph A. Janata Award at the Annual Meeting's Closing Celebration. This award is truly a testament to both MDLA's history and its strong commitment to the future.

I want to share a special thank you to our outgoing DRI State Representative, Jessica Schwie. Jessica has served both MDLA and DRI very well over her past three years in this role. Thank you, Jessica! Tony Novak picked up the torch and now takes over as our new State Representative. I know Tony will work to continue MDLA's strong relationship with DRI.

Return of MDLA's Trial Academy

One of the most eagerly anticipated events this season was the return of MDLA's Trial Academy, under the leadership of Hilary Fox and Tessa McEllistrem. After a brief hiatus, we were excited to bring back this important piece of MDLA's professional development offerings. The Trial Academy, hosted by Larson King on November 7 and 8, 2024, was a tremendous success, attracting the next generation of civil defense trial lawyers, who learned from seasoned Minnesota practitioners and judges. Participants had the opportunity to develop and sharpen their trial skills in a supportive and dynamic environment, preparing them to tackle the complexities of civil trial practice with greater confidence.

Looking Ahead

As we celebrate the successes of this fall, we are also eagerly awaiting what is next for MDLA. Please mark your calendars now and make plans to attend the 2025 Mid-Winter Conference, January 24-26, 2025, at the newly renovated Chase on the Lake resort in Walker, Minnesota. It will provide yet another opportunity to network and engage with MDLA members, learn from the wonderful program Rachel Beauchamp is putting together, and what are always fun winter activities Up North. Do not miss it!

JOIN A COMMITTEE

DIVERSITY & INCLUSION COMMITTEE

Seeking to promote diversity within its membership and the law firms in which its members work. We appreciate and embrace that our legal community and clientele come from a rich variety of diverse cultures, beliefs, perspectives and backgrounds. Through an open and inclusive membership, we hope to achieve a better understanding of the broader issues of diversity, as well as the cultural similarities and differences within our society, so that we may better serve the legal community and the people we represent.

- Annual Diversity Seminar
- Law Clerk Summer Program
- Law Student Attendance at Seminars

For more information, email committee Chair, Madison Fernandez - mfernandez@larsonking.com or Vice-Chair, Aaron Brown - abrown@larsonking.com

WOMEN IN THE LAW

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

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

For more information, email committee chairs: Ashely Ramstad - ashley@iversonlaw.com, Vicky Hruby - VHruby@jlolaw.com, Anissa Mediger - anissa.mediger@ci.stpaul.mn.us or Kaylin Schmidt - Kaylin.Schmidt@gtlaw.com.

SAVE THE DATES

January 24-26, 2025

Mid-Winter Conference
Chase on the Lake
Walker, MN

May 21, 2025

Diversity Seminar
Nilan Johnson Lewis
Minneapolis, MN
1:30pm

July 24, 2025

Women in the Law
Breakfast
The Marquette Bldg
Tenant Lounge
8:30am

FACT(S) OR FICTION?—AN ANALYSIS OF THE FACTUAL FOUNDATION REQUIRED FOR EXPERT OPINIONS

By Scott Jurchisin and Nick Rauch

Expert witnesses have significant power in the courtroom and have a direct impact on how defense counsel litigate their cases. Their opinions are deemed helpful to a jury in all types of cases regarding the standard of care, causation, and damages, as long as they have sufficient foundation. Having that foundation allows experts to tell the jury what they think about an issue the jury will have to decide. But this power is not unfettered. Lawyers have an obligation to challenge the admissibility of unfounded expert opinions, and to advise the judge on whether said expert has the requisite foundation to testify. Many expert-foundation battles address whether an expert has the qualifications to opine in a certain discipline or used reliable methods to arrive at their opinion. But a more fundamental challenge to an expert's opinion—one that is often more simple—is whether they have sufficient factual foundation. It is not uncommon for expert opinions lacking factual foundation to be excluded, resulting in dismissal of the action. For these reasons, lawyers must analyze not only the experts' opinions, but the stated factual foundation.

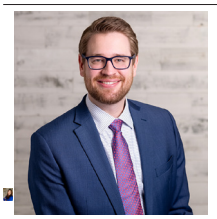
Unlike in its federal counterpart—which requires expert opinions to be based on "sufficient facts or data"—Minnesota's Rule of Evidence 702 buries the factual foundation requirement for expert opinions. It states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.

Minn. R. Evid. 702. Minnesota's Rule 702 contains no explicit mention of the factual foundation required for expert opinions. But case law has found the requirement within the term "foundational reliability." "Foundational reliability" also appears in the *Frye-Mack* standard. Goeb v. Tharaldson, 615 N.W.2d 800, 814 (Minn. 2000). The analysis of the foundational reliability requirement is "nearly identical" in these two contexts, so cases analyzing either occurrence have been used to define it. *State v. Garland*, 942 N.W.2d 732, 747 (Minn. 2020).

Several cases have explicitly found factual foundation to be an element of foundational reliability and have highlighted various nuances of the requirement. First, an expert must be familiar with the facts of the case. *Kedrowski v. Lycoming Engines,* 933 N.W.2d 45, 56 (Minn. 2019) ("'familiarity with the facts of a case is an essential element of reliability'" (quoting Peter B. Knapp, *The Other Shoe Drops: Minnesota Rejects Daubert,* 27 Wm. Mitchell L. Rev. 997, 1015 (2000))). Second, an expert's opinion must be supported by enough facts. *Hudson v. Trillium Staffing*, 896 N.W.2d 536, 540 (Minn. 2017) ("It is well settled that expert opinions must have an adequate factual foundation to be admissible."). And third, "[t]he facts upon which an expert relies for an opinion must be supported by the evidence." *Gianotti v. Indep. Sch. Dist.* 152, 889 N.W.2d 796, 801–02 (Minn. 2017). These articulations of the requirement further the long-standing position of excluding expert opinions that are based on speculation or conjecture. *Whitney v. Buttric*k, 376 N.W.2d 274, 278 (Minn. App. 1985), citing *Gerster v. Special Adm'r for Wedin's Estate*, 199 N.W.2d 633, 636 (Minn. 1972). Such speculative or conjectural opinions have "no evidentiary value." *Id.*

The case law poses a simple, yet important, question that should be posed to opposing experts or to the presiding



Scott A. Jurchisin is an attorney with Larson King, LLP in Minnesota. Scott practices in the areas of professional liability, construction litigation, and business litigation. Prior to joining Larson • King, Scott served as trial counsel for individuals and companies in business and construction cases. Before that, he specialized in medical malpractice litigation at a nationally recognized Minneapolis law firm. Scott used his passion for trial and trial management to develop a career focused on trial advocacy.

Nick Rauch is an attorney with the Larson King firm in St. Paul, Minnesota. He focuses his practice in the areas of transportation and logistics, professional liability, products liability, and complex torts. Nick defends several national and regional motor carriers and utility companies in a variety of claims and leads the firm's accident rapid response team. Nick also previously managed nationwide litigation for a local Fortune 500 life insurance company involving wrongful death, accidental death, and disability claims. He currently serves on the steering committee for the DRI Litigation Skills committee, the board of directors for the Minnesota Defense Lawyers Association, and recently served as the program chair for the Rising Leadership Summit.

Fact or Fiction **continued from page 6**

judge: *is the opinion based on facts found within the case, or based on the expert's assumptions?* The answer is not always straightforward. For example, if an opposing expert opines that the decedent was conscious for "5-10 seconds" before death, many additional questions can develop while determining how the expert arrived at this opinion, including (but not limited to):

- *Was the time range quoted from a record that has been produced in the case?*

- *Do any witnesses support the stated time range?*

- *Was the time range taken from peer reviewed literature, studies, or industry materials?*

- *Was the time range based on the expert's clinical practice and/or experience?*

- *Did the time range account for the decedent's health, condition, injuries, etc. or is it based in generalities?*

Opinions cannot be generalizations. Each expert must find factual support within the record to support the opinion. Otherwise, the opinion itself is based on speculative information or data that has minimal evidentiary value.

The courts have also articulated the other side of this coin—how an expert opinion may lack factual foundational reliability. They have held that "[a]n expert opinion lacks adequate foundation when (1) the opinion does not include the facts and/or data upon which the expert relied in forming the opinion, (2) it does not explain the basis for the opinion, or (3) the facts assumed by the expert in rendering an opinion are not supported by the evidence." *Mattick v. Hy-Vee Foods Stores*, 898 N.W.2d 616, 621 (Minn. 2017) (quoting *Hudson v. Trillium Staffing*, 896 N.W.2d 536, 540 (Minn. 2017)). So when an expert excludes necessary facts, fails to explain the facts supporting their opinion, or assumes facts not supported by the evidence, their opinion does not have the factual foundational reliability required by Minnesota courts.

The lack of factual support can appear in expert reports in multiple forms. Expert reports will rarely admit that the expert witness has no facts supporting an assumption. But they often use conditional language to mask a gap in their factual support. Here is an example of such conditional language being used in an expert report. In a wrongful death case related to a workplace accident, the plaintiff intended to call an expert witness to opine on the amount of pain and suffering of the decedent, who died at the scene. Witnesses had stated that they had seen the decedent breathing after the incident, but did not state specifically how long he was breathing. The plaintiff's expert report included the opinion that he "would expect [the decedent] to have breathed for approximately 1 minute following the blunt injuries to his lungs." The opinion was not based in witness testimony or the EMS records related to the accident. This opinion is not admissible because the expert's expectation for how long the decedent would have continued breathing was not based on any facts in the case, and was therefore speculative. Additionally, there were no facts supporting that the decedent experienced any pain and suffering. That is because there was no evidence that the decedent was conscious at any point after the crash until his death—no witnesses stating that they heard him talk or moan, or that they saw him move other than his breathing. Therefore, any expert opinion regarding the pain the decedent felt or the suffering he experienced was not supported by the evidence and was speculative.

Other expert reports may be written in a way that ignore the lack of factual support and provide opinions purportedly to the requisite level of certainty. For example, in a medical malpractice case in which an infant on ECMO support suffered a stroke, the plaintiff's experts opined that the stroke was more likely than not caused by a specific clot noted in the medical records to be present in the ECMO tubing near the infant's body. However, the infant had undergone multiple surgeries that carry with them the risk of causing clots, and clots are an inevitability with ECMO support. There were no facts in this case that would indicate the origin of the clot that caused the plaintiff's stroke. Because there were no facts supporting the plaintiff's expert opinions that one specific clot in the tubing caused the plaintiff's stroke, those opinions lacked sufficient factual support and were inadmissible.

But not every factual gaffe will result in the exclusion of an expert. Minnesota courts have held that an expert's opinion may still be admitted when the expert lacks certain evidence: "An expert need not be provided with every possible fact, but must have enough facts to form a reasonable opinion that is not based on speculation or conjecture." *Gianotti,* 889 N.W.2d at 802. Courts also avoid excluding expert opinions by filling in factual gaps with context. *See, e.g., id.*; *Mattick*, 898 N.W.2d at 621–22. Courts have even held that when calculating vehicle speed, "error[s] in calculations or in the assumption of facts or data upon which the opinion was based [go] to the weight of the testimony, not to its admissibility." *LeMieux v. Bishop*, 209 N.W.2d 379, 382 (Minn. 1973). However, in this last illustration, the Minnesota Supreme Court acknowledged "the admission of this testimony approaches the outer limits of the trial court's discretion." *Bohach v. Thompso*n, 239 N.W.2d 764, 767 (Minn. 1976).

Opposing experts provide contradicting opinions in nearly every case. There is no way to avoid that reality. But when the plaintiff's expert reaches an opinion with questionable support in the record, defense lawyers need to be ready to dissect the factual foundation and challenge any such opinion.

TURNING OVER A NEW LEAVE: UPDATES TO MINNESOTA'S EARNED SICK AND SAFE TIME LAW

By Alemayehu Z. Ditamo

The Earned Sick and Safe Time Act ("ESSTA"), which passed on May 24, 2023, took effect on January 1, 2024 and was amended on May 24, 2024 to expand coverage and applicability. The revised law applies to any employer with one or more employees, so there is no small city exemption, and applies to school districts, nonprofit organizations (encompassing charter schools), and other governmental subdivisions. Employees covered by ESSTA now include people employed, including temporary and part-time employees, and whom the employer anticipates working for at least 80 hours a year.

The ESSTA grants covered employees the right to accrue one hour of sick and safe leave for every 30 hours worked, up to a maximum of 48 hours per year. Employees may carry over accrued hours, but the accumulated hours may not exceed 80. Alternatively, employers may frontload the earned sick and safe time ("ESST") accrual to comply with the new ESSTA requirements. Under the front-loading method, employers must provide employees with 48 hours of ESST if the employer pays out unused ESST at the end of the year. If the employer does not pay out unused ESST at the end of the year, an employer using the frontloading method must frontload 80 hours of ESST.

Despite broad coverage, certain individuals, including, but not limited to, federal employees, independent contractors, elected officials, and temporary employees of staffing agencies (considered employees of the staffing agency) are exempt from ESSTA coverage. Because ESSTA is now law, employers, including school districts, will want to begin preparing for the new paid leave benefit for their employees and proactively consider and address possible new challenges concerning ESST (e.g., how to effectively track ESST leave and how it may interplay with other types of leave, including, but not limited to, soon-to-be-paid family and medical leave as well as exiting employer-sponsored leave).

Before the Minnesota Legislature updated the ESSTA during the 2024 Legislative Session, the ESSTA required employers to provide on the statement of earnings the total number of ESST hours accrued and available for use and the hours used during the pay period. It also referred to an "hourly rate" for calculating ESST pay, did not apply to greater sick leave or paid time off ("PTO") amounts provided by the employer, and did not impose any penalties for violations. The 2023 version of ESSTA allowed an employer to require notice of intent to use ESST up to seven days in advance if the reason for leave is foreseeable and the employer has a written policy that is provided to employees. It also allowed the employer to require reasonable documentation for requests for more than three consecutive workdays of leave.

The ESSTA, as amended and updated, now states that employees using ESST must be paid equal to the base rate the employee earns from employment. The amendment also redefined the term "employee" to expand coverage of who is and is not considered an employee for ESST leave. A couple of additional "eligible uses" were added for earned sick and safe time, including the "need to make arrangements for or attend funeral services or a memorial, or address financial or legal matters that arise after the death of a family member." The Legislature clarified that reasonable documentation for the use of ESST is required after "three consecutive scheduled workdays," and if it cannot be obtained in a "reasonable time or without added expense," then the employee may provide a written statement of the purpose for the use of ESST.

The total number of hours accrued and available for use and hours used during the pay period is no longer required on the statement of earnings, but that information must still be provided to each employee at the end of each pay period through a "reasonable system." The Legislature also clarified that any sick time provided by an employer that is more than the ESSTA's requirements must meet or exceed the standards required under the ESSTA. The Legislature confirmed that employers face potential liability if they are not in compliance with the ESSTA in certain circumstances.

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Turning Over a New Leave **continued from page 8**

With these updates in mind, it is important to understand that while sick leave was traditionally for self-care, and while the Family and Medical Leave Act ("FMLA") permitted leave for a narrow set of family members, ESST may be used to care for many more relatives, including, but not limited to, child (including a foster child), spouses, domestic partners, siblings, grandparents, and any family members of an employee's spouse or registered domestic partner. ESST can also be used as it is accrued—there is no waiting period—for a wide variety of uses, including, but not limited to, caring for self and family members. Additionally, leave under the ESSTA does not limit or otherwise affect the applicability of other laws that extend other protections to employees, rendering ESST leave discrete from other leave. As a result, nothing prevents an employee from using ESST hours concurrently or consecutively with FMLA or other protected time to mitigate wage loss during leave. This also means that even if there is an overlap with other leave, such as FMLA, an employee is not required to use other leave before, during, or after ESST leave. Employers should properly designate leave under these laws and maintain records and documents, as applicable. For employees covered by a collective bargaining agreement, it is likely that they already receive at least 48 hours of sick leave per year. Furthermore, an employer's existing leave policy, such as PTO, may already satisfy ESSTA requirements if the PTO plan: (1) provides employees at least as much time as required by the ESSTA; (2) allows employees to use the time for all of the reasons and under the same conditions required by the ESSTA; and (3) lists on employee pay statements the time accrued and available.

Employers are likely grappling with the administrative overlap between standard PTO, ESST, and FMLA. For many employers, this may lead to the dilemma of leave stacking—offering multiple types of leave without overwhelming their HR systems or confusing employees—which could create significant staffing challenges. Employers could consider consolidating PTO and ESST into a singular bucket of paid leave that complies with all legislative requirements, which would reduce confusion and limit administrative burdens. HR departments should be trained on the nuances of each leave type and how they can be used concurrently or consecutively. Employers should also audit their current leave policies for full compliance, ensuring, to the extent applicable, that PTO policies meet the minimum standards for the ESSTA while allowing for the expanded reasons for use of ESST that the ESSTA covers. This would allow for policies outlined in employee handbooks to be updated, if needed, to provide clear guidance on ESST leave, including, but not limited to, the documentation requirements and, if applicable, integration of ESST with other leaves. If the handbook contradicts state law (for example, demanding more documentation than legally required), such provisions should be removed. Employers can also adopt policies that encourage employees to use ESST concurrently with other leave programs, where applicable, rather than allowing leaves to be taken consecutively. However, as noted above, an employee is not required to use other leave before, during, or after ESST leave.

Additionally, to streamline leave tracking, automated leave management software could be employed. These systems may ensure employees do not overdraw leave, help classify leave types appropriately, and eliminate confusion among state, federal, and employer-provided leaves. Such software can also anticipate complex leave combinations and provide insights into better staffing and budgeting decisions. In addition to compliance with the ESSTA, employers who have unionized workforces face the added complexity of renegotiating collective bargaining agreements. As noted above, many unions may have already secured more generous sick leave provisions, but these agreements need to be updated to align with the ESSTA's specific requirements. Employers should consider engaging unions early in the process to negotiate ESSTA compliance without compromising existing leave benefits. This can be done by folding ESST into existing leave policies, subject to meeting all ESSTA requirements. Proactive communication and negotiation will be key to ensuring compliance without disrupting established agreements or employee satisfaction.

Employers are responsible for following the ESSTA's requirements. Failure to do so will subject the employer to penalties that are enforced by the Minnesota Department of Labor and Industry ("DLI"). DLI may issue a cease-and-desist order, require back pay, gratuities, compensatory damages, an equal amount as liquidated damages, and litigation and hearing costs. Repeated and willful violations will be subject to a civil penalty of up to $10,000 per violation. Recordkeeping violations will be subject to a penalty of up to $10,000 per failure. In addition, affected employees will have three years to bring a civil lawsuit to address alleged ESSTA violations and recover damages, costs, reasonable attorney's fees, and injunctive and other equitable relief. Accordingly, understanding and complying with the new ESSTA in Minnesota is essential for employers. Employers are encouraged to seek legal advice for specific scenarios and to ensure compliance.

This article is intended to provide general information with commentary. It should not be relied on as legal advice. If required, legal advice regarding this topic should be obtained from district legal counsel.

Thank You *for your service*

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Arthur Chapman is proud to have two shareholders on the MDLA Board of Directors. Shayne's practice is focused in automobile and No-Fault litigation and Steve's practice focuses in the areas of commercial transportation and general liability.

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THE HUMAN FACTORS Q & A

By Jeff Suway with Angela Miles and Shannon Nelson

When considering what types of experts to use in a personal injury case, independent medical examiners and vocational experts usually come to mind first. Then, there are other case-specific types of experts. For example, you may consider using an accident reconstructionist or biomechanical expert in a case involving a motor vehicle accident, or an engineer who specializes in building codes in a premises liability case. But, how often do you consider using a human factors expert? In fact, what IS a human factors expert?

Angela Miles and Shannon Nelson sat down with human factors expert, Jeff Suway, to find out.

Q. What is Human Factors?

A. Human factors is the study of how we interact with our world. There are many practical applications, such designing a chair and desk that allows a person to sit comfortably and access the desk drawer while typing writing at the desk. Other applications include typical driver, bicyclist, and pedestrian behavior. This involves perception response time, typical eye glance patterns, gap acceptance, and even object detection.

In a motor vehicle accident case, perception response time is measured from the time a hazard becomes easily identifiable as a hazard that requires an emergency response until the time the vehicle meaningfully responds. For example, it could be important to understand the amount of time it takes a driver to decelerate hard enough to leave a tire mark on the roadway after perceiving the hazard. Likewise, it also might be important to understand the amount of time it takes a driver to recognize a hazard on the roadway. Ultimately, these analyses allow a human factors expert or accident reconstructionist to determine if a driver acted within the normal range of response times, based on past human performance, which can aid a trier of fact in determining if someone acted reasonably.

Q. What type of schooling is required for a Human Factors specialty?

A. Typical human factors professionals have degrees or education in engineering or psychology. There are many continuing education classes and seminars that are targeted at teaching human factors for vehicle accidents or object detection.

Q. Can you please provide examples of when human factors experts are used?

A. Human factors experts are typically used to compare what a person did in a specific case to what people typically do in those situations. These comparisons can be useful to address a wide variety of issues. For instance, if a pedestrian's visual search pattern typically includes quick glances at the ground before moving their feet to ensure that they avoid any elevation changes or other obstacles that they could trip on. Similarly, pedestrians often visually search the environment before entering a street to cross. Human factors experts can also be used to determine when an object, such as a stopped vehicle or pedestrian, would be recognized as a hazard by an oncoming driver at night.

Human Factors **continued on page 12**

Jeff Suway is a licensed Professional Mechanical Engineer, an ACTAR accredited accident reconstructionist, and human factors expert, and he has been working in these fields since 2008. Mr. Suway holds a Master of Science degree in Civil Engineering with a specialty in Transportation Safety from the George Washington University through the National Crash Analysis Center (NCAC), and he holds a Bachelor of Science in Mechanical Engineering from Bucknell University. He has testified as an expert in Accident Reconstruction and Human Factors, including complex visibility and conspicuity analyses for vehicle accidents, premises incidents or other transportation modes. He can be reached at: jsuway@jsforensics.com

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Angela Miles is in house counsel with Progressive handling auto accident claims in Minnesota and Wisconsin.

Human Facors **continued from page 11**

Q. Can you explain the various range of topics you specialize in as it relates to Human Factors? (i.e.: contrast, looming, line-of-sight, glare, risk assessment, OSHA, human error, visual attention, biomechanics, visibility, perception response time, etc.).

A. Human factors topics in which I specialize include: night visibility, object detection, night photos/videos/lighting simulations/animations, visibility and conspicuity, perception response time, looming (the ability to detect the closing speed of a vehicle on the roadway in front), glare, line-of-sight, typical eye glance behavior, visual attention, gap acceptance, driver response to Advanced Driver Assistance Systems (ADAS), and warning labels.

Q. Can you provide examples of different testing performed by human factors experts?

A. Human factors research spans a very large body of topics. Human factors research has utilized eye-tracking devices to determine where and when drivers look at various locations while performing different driving tasks. Similar research has been done on pedestrians crossing a street. Other research has focused on how long it takes a driver to respond once a hazard is detected. There is additional research into how humans detect objects, especially in low-light scenarios. Some of this research concerns the basis for the colors and patterns (camouflage) used by the military for ships, planes, and clothing. Other research focuses on the requirements for the red and white retroreflective tape on tractor trailers or the performance of highway lane lines.

Q. What documents are helpful for a Human Factors expert that should be requested in discovery?

A. When discussing a nighttime accident, the EMS run report or 911 call logs provide the most accurate time of the incident. This can be important when determining the amount of ambient illumination at a scene.

Depositions and statements are also important to understand what everyone says they were doing, where they were looking, and their expectations and familiarity with the situation. For example, a pedestrian could state that they have walked on the subject sidewalk every morning for the last 10 years, the sidewalk was always cracked, and they were looking towards the ground for the crack that they expected, but they still tripped on that hazard. This allows the human factors expert to discuss this specific pedestrian's expectation and understanding of the condition. Similarly, if a driver testifies that there was a person throwing rocks at their vehicle and they turned to look at this when the vehicle in front of them suddenly slammed on their brakes, this provides an explanation for why the driver did not see the vehicle braking in front of him.

Cell phone data / downloads can also be important. This information can include driver activity with the cell phone, such as text messages sent while driving and average vehicle travel speeds and locations traveled.

Vehicle infotainment data can also be very useful. This is similar to cell phone data, but it is stored in the subject vehicle.

Q. What types of questions should be asked at an expert deposition or in written discovery that would be helpful in analyzing a case?

A. The most important deposition questions concern the basis for the expert's opinions. Oftentimes I hear "experts" discuss their opinions and beliefs based on past experience (education / training) without being able to cite a single scientific study or research article matching their personal opinion. Understanding the science behind the expert (or "expert") opinion is always important.

When discussing night visibility cases, I like to understand what methodology the other expert has used, including what lighting measurements (if any) were taken and, more importantly, how those measurements were used in their analysis. How did the expert determine when the object was visible (or not), and what method was used? What perception response time (PRT) was used, and why? What published and peer-reviewed paper did they use? When did the expert start the PRT clock? These questions determine whether the expert has applied theisscientific methodology in the (hopefully) published and peer-reviewed study.

If the other expert has taken nighttime (or low-light) photographs, video, animations or lighting simulations, it is important to understand how these were calibrated. If the "expert" used whatever settings they felt matched best (or even worse, automatic settings), this could be the basis of motions to exclude. Proper methodology and techniques are published and generally accepted.

Q. How does distraction play a role in accidents?

A. Distraction—or more precisely, attention to something other than what is required to avoid an impact—can take many forms. This could be a driver attending to their cell phone, but it can also be a driver attending to a person throwing rocks at their vehicle. As vehicle systems, infotainment centers, and cell phones, are becoming more advanced and more integrated into our lives, research is showing an increase in vehicle accidents where one or more drivers were distracted from the driving task. Driver distraction is something that can be investigated by getting access to data from a driver's cell phone or the vehicle infotainment center.

Human Factors **continued on page 13**

Human Factors **continued from page 13**

Q. Can you explain how Human Factors relates to visibility and conspicuity during nighttime incidents?

A. Human factors experts can specialize in night visibility and conspicuity issues. This can range from a pedestrian tripping over a curb stop when it is dark out or a driver striking a blacked-out vehicle on the highway. The human factors expert should be able to determine when and where the hazard (the curb stop or blacked out vehicle, in these examples) would be expected to be detected and what a typical response to that hazard would be (if any).

Q. How does daytime and nighttime lighting affect accidents?

A. When drivers have more information, they tend to respond better (more accurately and quicker). When the lighting level is low (nighttime), drivers tend to respond slower and less accurately than during the day. This is similar during fog, rain, snow or dust storms.

Q. Can you explain how you analyze vehicle-pedestrian accidents?

A. From a human factors perspective, there are many aspects to analyze for a vehicle-pedestrian accident. This includes: average walking speed, the ability of the driver to detect the pedestrian on the roadway, the ability of the pedestrian to detect the vehicle, driver perception response time, and typical driver response (steer, brake or both).

Ultimately, I compare what the pedestrian and the driver did in the subject case to what pedestrians and drivers have done in published and peer-reviewed research. Then the trier of fact can determine who acted reasonably/unreasonably and who is at fault and at what percentage.

Q. Do you utilize animation to recreate accidents?

A. I utilize lighting simulations for nighttime and, sometimes, daytime accidents. These lighting simulations are accurate with respect to lighting, visibility, contrast, and color. This ensures that the demonstration is fair and accurate when shown to the trier of fact.

For daytime accidents where the lighting and contrast are not at issue, I use animations and other visualizations to show the area and what occurred.

As it can be hard to understand complex vehicle motions and how visible an object is or is not, visualizations allow the trier of fact to have a much greater understanding of the issues being discussed.

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

EDITORIAL COMMITTEE

MDLA's Editorial Committee is responsible for publication of its quarterly magazine, Minnesota Defense. If you would be interested in publishing in the Minnesota Defense or serving as an editor, please contact us at director@mdla.org.

For more information, email committee chairs Rachel Beauchamp - rbeauchamp@cousineaulaw.com or Ryan Paukert - rpaukert@meagher.com

GOVERNMENT LIABILTY

Attorneys who work with municipalities on a wide range of government liability issues. The Committee typically meets quarterly with a CLE type format. An annual update regarding recent case law decisions, focusing on issues that pertain to cities, counties and other municipalities, is given in the winter at the League of Minnesota Cities in St. Paul. Other meetings rotate among the firms. The December holiday party is always enjoyable.

- Quarterly CLE
- Winter Annual Update of Case Law Decisions
- Representing Cities
- Representing Counties
- Representing other Municipalities
- Annual Holiday Party

For more information, email committee Co-Chairs Jordan H. Soderlind- jhs@ratwiklaw.com or Julia Kelly - julia.c.kelly3@gmail.com

DRIVEWAYS AND OBSTACLES

By Jessica E. Schwie and Joshua P. Devaney

In his 1914 poem "Mending Wall," poet laureate Robert Frost gave us a now well-worn aphorism: "Good fences make good neighbors." This dispute may prove him wrong.

Meet Alex and Elena Ugorets, who live on a unique property near Lake Minnetonka in Minnesota, formed as it is due to the vacation of a roadway. Their lot lies entirely on the Brentwood Plat within the City of Tonka Bay. The front of their house faces north, where a paved driveway connects to Brentwood Avenue. The rear of their L-shaped property sits at a lower elevation and extends east until it reaches the western edge of a street called Timber Lane. Timber Lane is a public street that lies entirely on the Timber Lane Plat within the City of Shorewood.

The scene of the present dispute is where the eastern edge of the Ugorets' property (outlined in red below) meets the western edge of the Timber Lane right of way (outlined in green). Those property lines also mark the borderline separating Tonka Bay from Shorewood (outlined in yellow). Within the Timber Lane right of way area, Timber Lane's paved surface lies 30 feet east of the Ugorets property line, across a stretch of grassy turf.

Ugorets v. City of Shorewood, 696 F. Supp. 3d 557, 562 (D. Minn. 2023). The foregoing is an excerpt of one of Judge Jerry Blackwell's first decisions after taking a seat on the federal bench. Under the decision issued by Judge Blackwell, and relying on state and federal case law, the Ugorets now have access to both Timber Lane and Brentwood Avenue. A few months later, the Minnesota Court of Appeals addressed a similar situation and likewise concluded that the abutting property owner was entitled to a second access to an abutting public road. *In re Stoick Creek, LLC*, 999 N.W.2d 915, 920 (Minn. Ct. App. 2023). In both cases, the courts ordered the removal of obstacles in the road—bollards erected to restrict access. A few months later, the Minnesota Court Appeals further addressed the point at which an item placed within the road becomes an obstacle that impedes the use of the road such that it must be removed. *Sanden, et al. v. Tysdals, et al.*, No. A23-1636, 2024 WL 4259313, at *6-10 (Minn. Ct. App. Sept. 23, 2024). This series of cases highlights the constant conflict between public and private rights where driveways and roadways meet. The following is a discussion of historical and applicable law.

Every property owner has a right of access to an abutting public road

Under Minnesota law, "property owners have a right of reasonably convenient and suitable access to a public street or highway which abuts their property." *Johnson v. City of Plymouth*, 263 N.W.2d 603, 605 (Minn. 1978) (citation and quotations omitted). In both *Ugorets* and *Stoick Creek*, the property owners were seeking a second driveway to a plat dedicated, opened, and maintained public road that abutted their respective properties according to plat maps. However, in each case the abutting roadway was clearly not designed to serve the plaintiff's property. Rather, in reality, the roads that they were seeking access to each terminated in a cul-de-sac that served properties developed in a separate and distinct residential plat and neighborhood. As built, the cul-de-sacs did not directly abut the property and was as much as 30 feet from the owner's property line. In keeping with prior case law developed in *State v. Northwest Airlines, Inc.*, 413 N.W.2d 514 (Minn. Ct. App. 1987), both courts concluded that the owner was still regarded as an

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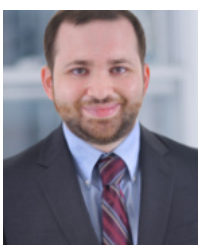

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abutting owner with a right of access to the cul-de-sac. *Stoick Creek*, 999 N.W.2d at 921; *Ugorets*, 696 F. Supp. 3d at 566. In other words, in the first instance, by mere virtue of the fact that the respective properties abutted a public road according to the plat maps, the property owners had a right of access to the abutting road, despite the apparent incompatibilities presented.

If the property abuts two different public roads, owner might be entitled to second access

Moving on from resolution of the issue above, the court in *Stoick Creek* noted that statutory law may afford the grant of a second access in certain circumstances. In so concluding, the court stated:

The plain language of [Minnesota statute] section 160.18, subdivision 3, indicates that a property owner's right of direct private access to a public highway is not limited to only one access point. The statute states that a property owner may have "*such other or additional means* of ingress from and egress to the highway as will facilitate the efficient use of the property for a particular lawful purpose." Minn. Stat. § 160.18, subd. 3 (emphasis added).

Stoick Creek, 999 N.W.2d at 921. Reviewing the record before it, the court noted that there was no evidence that the additional access was an inefficient use of the property or that the proposed use was unlawful. *Id.*

In *Ugorets*, although discussed for different reasons, the court similarly found that the requested secondary access specifically improved the character and use of the property because it allowed for access to storage facilities for boats and other equipment associated with the property near Lake Minnetonka. *Ugorets*, 696 F. Supp. 3d at 568. In this manner then, both courts ruled that not only were the involved property owners entitled to a right of access to a road abutting one of their property lines; the property owners were entitled to a second right of access even though their properties already had an existing access point along a different property line. In other words, as specifically noted by the *Stoick Creek* court, the mere fact that a property owner already had in place an "equally accessible" route was not a rational reason in and of itself to deny a second access.

The right to access the public road is still subject to reasonable regulation

While the property owners may have had a right to a second access point, the court in *Stoick Creek* noted that the local jurisdictional authority, Wells Township, still maintained regulatory authority. Discussing section 160.18 subdivision 3, the Court stated

The statute expressly provides that a property owner's right of direct private access to a public highway is "subject to reasonable regulation by and permit from the road authority as is necessary to prevent interference with the construction, maintenance and safe use of the highway and its appurtenances and the public use thereof." Minn. Stat. § 160.18, subd. 3.

Stoick Creek, 999 N.W.2d at 920. As such, regulations limiting but not completely impeding travel on a roadway such as the establishment of one-way streets, median strips, restrictions on turns, and weight, size, and speed regulations, have been held to be permissible restrictions and regulations. *Hendrickson v. State*, 120 N.W.2d 165, 170 (Minn. 1964).

Interference with a roadway's free use may become an unreasonable interference

On this point, the decision in *Sanden* becomes instructive. In *Sanden*, the Court affirmed the existence of a plat dedicated road that runs perpendicular to Highway 75 and ends at Otter Tail Lake, thus creating public access to the lake. Sanden, 2024 WL 4259313, at *6-10. The road was not maintained by the Town which, thus, under the law requires the abutting property owners to maintain the road for the benefit of the public and themselves to the extent that their use does not interfere with the rights of the public. *Id.* At issue was whether certain landscaping, a retaining wall, a boat lift and other similar items encroaching upon the road constituted an impermissible interference with the roadway. *Id.* When read collectively, *Ugorets, Stoick Creek,* and *Sanden* establish that (1) objects placed in the roadway constitute an unreasonable interference when they "prevent free use" of the roadway by the public, present a danger, or are not an improvement to the travel and use of the roadway, and (2) the court has the equitable power to order removal of the items or in certain cases, to order reinstatement of items that facilitated travel.

In both *Ugorets* and *Stoick Creek*, the governmental entity had blocked the use of the respective secondary access points by erecting bollards. In both cases, the courts ordered removal of the bollards, concluding that the respective governmental actions unreasonably interfered with the right of access and travel. In Sanden, an abutting property owner was ordered to remove a retaining wall and other items that unreasonably interfered with the right of access and travel on a platted public roadway and was ordered to re-install a concrete pad that had been in existence to facilitate launching boats where the road met Otter Tail Lake. Although the legal theories and posture were different in each case, the takeaways from each are the same—in order to evaluate whether access to, and travel on a road, has become unreasonably restricted, the court looks to the character of the abutting properties, the character of the road, whether the obstacle presents an improvement to the public's use of the road as a thoroughfare, and whether the obstacle presents a threat to the safe use of the road. See

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Stoick Creek, 999 N.W.2d at 924; *Ugorets*, 696 F. Supp. 3d at 568; *Sanden*, 2024 WL 4259313, at *6-10 (Minn. Ct. App. Sept. 23, 2024); see generally *Kelty v. City of Minneapolis*, 196 N.W. 487, 487 (Minn. 1923) (discussing similar concepts).

In *Ugorets*, the court reviewed the record before the local jurisdictional authority, the City of Shorewood. While the record contained some suggestions that there were concerns regarding parking and emergency vehicle access, the court noted that there was no evidence in the record that the second access point presented a safety concern. *Ugorets*, 696 F. Supp. 3d at 568. Instead, the record reflected only complaints by the remaining neighbors on the cul-de-sac who objected to requests for access and advocated for the installation of bollards. Id. at 564. The court further opined that the bollards presented no improvement to the public because they limited emergency vehicle access and impeded parking. *Id*. at 568. The court further opined that due to the width of their home and related landscaping, the Ugorets could not meaningfully access the rear portion of their yard from the home's driveway that abutted their primary access and driveway on Brentwood Avenue. *Ugorets*, 696 F.Supp.3d at 569–70. Instead, the rear portion of the yard and the underground storage garage therein was best and only reasonably accessed by Timber Lane which was done "infrequently." *Id.* Under the totality of the circumstances, the court concluded that bollards presented an unreasonable interference with the right of access and safety needs of the area, and, thus, removal was ordered.

In *Stoick Creek*, the Minnesota Court of Appeals also rejected the rationale of the local jurisdictional authority. Wells Township had denied access citing five reasons which the court summarized as follows.

First, the town board determined that ***Stoick Creek*** had not shown good cause for a second entrance to its property and that its property, including the location of the proposed storage building, is "equally accessible" from either the existing entrance on county highway 38 or Wells Lake Court. Second, the town board determined that Wells Lake Court was created by subdivision plats, that Stoick Creek's property is not within the platted subdivisions, that the plat-dedicated road "does not inure to the benefit of" Stoick Creek's property, and, thus, that Stoick Creek "does not have a right of access to Wells Lake Court." Third, the town board determined that Wells Lake Court is part of a "subordinate service district" (SSD), see Minn. Stat. §§ 365A.01-.10 (2022), which pays for the maintenance of Wells Lake Court, that Stoick Creek's property is not located within the SSD, and that allowing Stoick Creek to have access to Wells Lake Court would impose a burden on the members of the SSD. Fourth, the town board determined that Stoick Creek's proposed use of its property, which the board deemed agricultural in nature, is incompatible with the character of Wells Lake Court, a residential street. Fifth, the town board determined that Stoick Creek's requested access "could cause liability, drainage, and maintenance problems for the township, including but not limited to problems with snow storage within the Wells Lake Court right of way."

Stoick Creek, 999 N.W.2d at 919. The court addressed each reason in turn. As outlined above, the Court of Appeals rejected the first and second reasons concluding that there was a right of access to an abutting road in the first instance. With regard to the third reason, the court held "the absence of a financial contribution [to the maintenance of the road] does not constitute 'interference' with the maintenance of a public road or highway or the public use of such a road or highway." *Id*. at 923. With regard to the fourth reason advanced by the township, the court rejected the reasoning, stating that the "statutory right asserted by Stoick Creek does not depend on the nature of the property for which access is sought, and the town's rationale is not related to any particular regulatory purpose specified in the statute." *Id.* Finally, in reaching the fifth reason put forth by the Town, the court noted that there was no evidence in the record to support the Town's conclusion that the requested access point would create snow storage issues. *Id*. at 925. In effect, while it is commonly known in Minnesota that there is snow and snow storage is needed, the extent of its impacts on a particular road and access point are not something that can be decided by the Town in a conclusory fashion, nor upon which judicial notice can be taken. In re *Stoick Creek*, 999 N.W.2d at 921-924.

In *Sanden*, unlike *Stoick Creek*, the Court concluded that there was enough evidence in the record to support a bench trial verdict that safety hazards and liability exposure had been created by interference with the roadway. *Sanden*, 2024 WL 4259313, at *6-7. In *Sanden*, there was testimony that the roadway was frequently utilized by snowmobilers and ice fishers to access the lake. *Id.* Snow was being piled by an abutting property owner in a manner to restrict safe access and the retaining wall (obscured by snow) was not otherwise readily discoverable, thus creating liability exposure. *Id*.; *see e.g., Olmanson v. LeSueur Cnty*., 693 N.W.2d 876 (Minn. 2005) (addressing liability drainage ditch cement golf cart culvert running under county road); *Steinke v. City of Andover*, 525 N.W.2d 173 (Minn. 1994) (addressing liability where snowmobile struck); *Razink v. Krutzig*, 746 N.W.2d 644 (Minn. Ct. App. 2008) (addressing liability where snowmobile struck sign); *Kolkin v. Am. Fam. Ins. Co*., 347 N.W.2d 538 (Minn. Ct. App. 1984) (addressing liability where snowmobile struck stationary vehicle protruding into roadway); and *Treinen v. N. States Power Co*., No. A08-0159, 2009 WL 173717, at *1 (Minn. Ct. App. Jan. 27, 2009) (addressing liability exposure where snowmobile struck electrical pole). Although no injury and claim had yet occurred since the installation of the retaining wall, the Court held that the testimonial evidence was sufficient to uphold the verdict that there had been an unreasonable interference with the roadway and a related order to remove the items. *Sanden*, 2024 WL 4259313, at *6-7.

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Unreasonable denial of access may result in injunctive and monetary relief

The next issue in each of the cases became the measure of relief to be granted to the respective property owners in *Ugorets, Stoick Creek*, and *Sanden*. The procedural posture of the cases was different in each with important impacts to additional legal issues flowing from the respective case postures. In all three cases, the primary relief desired by the property owners was removal of the obstacles impeding "free use" and access to the abutting roadway and in all three the requested relief was granted.

In *Stoick Creek,* the property owner brought a Writ of Certiorari challenging Wells Township's decision to block and deny the second access as arbitrary and capricious. Therefore, once it was decided that Stoick Creek had a right to a second access, the question became what remedy was available to Stoick Creek on a Writ of Certiorari. The Court of Appeals noted that the ordinary rule on a Writ of Certiorari, where a decision of a governmental entity is found to be insufficiently supported in evidence or based on an error of law, is to remand the decision to allow for new proceedings. *Stoick Creek*, 999 N.W.2d at 925. The court, citing other law, concluded that the situation in *Stoick Creek* did not call for the application of the ordinary rule. *Id.* Instead, the court reversed the decision outright and ordered removal of the bollards. Why? The court noted that Wells Township had considered the application for a driveway permit on two separate occasions, each with multiple meetings, each ending with denial of the second access, and there was a separate intervening lawsuit after the first denial. *Id.* In other words, Wells Township's position on the access was clear, it was inconsistent with case law, and it would effectively only serve to give the Township a third bite at the apple.

The Ugorets brought a Section 1983 claim against the City of Shorewood, arguing that the City had violated their Fifth Amendment rights by blocking and denying access. Minnesota and federal case law both generally hold that once a governmental entity deprives a property owner to a right of access to a public road, a compensable taking has occurred. *See e.g., Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2168 (2019) (federal takings law); *Burger v. City of St. Paul,* 64 N.W.2d 73 (Minn. 1954) (state takings law). Therefore, once it was decided that the Ugorets had a right to a second access, the question became what remedy was available to the Ugorets under a Section 1983 takings claim.

In *Ugorets*, Judge Tunheim, following established case law, initially concluded that injunctive relief was not available. Judge Blackwell was later reassigned to the case and reversed the ruling of Judge Tunheim. In light of the undisputed record, the court concluded that "money damages do not constitute a complete, practical, and efficient remedy for the Ugorets." *Ugorets*, 696 F. Supp. 3d at 571. The court opined: Because the Ugorets used the Timber Lane access only occasionally and for specific uses, the bollards blocking that access impose what the Minnesota Supreme Court calls a "constantly recurring grievance." […] So long as the bollards are in the way, the harm recurs each time the Ugorets wish to use the access but cannot. In addition, the nature of each recurring injury varies depending on the desired usage of the access and the burdensomeness of alternative solutions. The nature, extent, and amount of each harm changes depending on precisely how, when, and why the Ugorets need access. Such a variable and forward-looking injury is not amenable to present specific identification or compensability. Therefore, while Minnesota state law generally provides a monetary remedy through an inverse condemnation cause of action, the circumstances render that remedy inadequate here to address the valuation of future harms, though such future harms are inevitable.

Id. at 571–72. The Court, thus ordered, injunctive relief in the form of ordering the removal of the bollards. This appears to be a departure from traditional damages and relief analysis in the Eighth Circuit when it comes to a partial taking.

Previously, courts consistently held that "in partial taking cases, the proper measure of compensation is the difference between the fair and reasonable market value of the entire ownership immediately before the taking and the fair and reasonable market value of what is left immediately after the taking." *United States v. 9.20 Acres of Land*, 638 F.2d 1123, 1126–27 (8th Cir. 1981); *see also U.S. v. Virginia Elec. & Power Co.*, 365 U.S. 624, 632 (1961) (holding that, in the case of a partial taking, the conventional method of appraising damages is taking the difference of the value of the property before and after the taking); *U.S. v. Causby*, 328 U.S. 256, 261 (1946) (holding that compensation under the Fifth Amendment is the market value of the property taken); *U.S. v. Miller,* 317 U.S. 369, 374 (1943) (holding that the standard of "just compensation" is loss of market value, where market value is "what a willing buyer would pay in cash to a willing seller"). Indeed, in even holding that damages would need to consider the *Ugorets'* particularized usage of their driveway, the Ugorets court appeared to depart from the longstanding axiom that loss of market value, not personal value, was the sole consideration as "loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it . . . is properly treated as part of the burden of common citizenship." *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 5 (1949). And, similarly, equitable relief is generally considered not available in takings cases. *See Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."); *Knick*, 139 S. Ct. at 2176 ("because the federal and nearly all state governments provide just compensation

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remedies to property owners who have suffered a taking, equitable relief is generally unavailable"). Ultimately, while the parties in *Ugorets* called into question the efficacy of the decision and departure from law, they decided to resolve the matter. On another day, whether injunctive relief may be granted on a takings claim and Judge Blackwell's decision in this regard may be called into question.

Finally, in *Sanden*, declaratory and injunctive relief was sought to enforce related property rights arising under state statute and case law relating to the creation, maintenance, and use of roads. Property owners to the south of the road at issue sued the property owners abutting the road to the North and Otter Tail Township, seeking declaratory and injunctive relief related to the road and general property laws applicable to it—that it was public road to be maintained by the Town and/or the abutting owners in a manner so as to not interfere with the public's right of access. As outlined above, following a bench trial a verdict granting the requested declaratory and injunctive relief was granted, setting the rights and obligations of the abutting property owners and confirming that the Town, who had elected not to maintain the road, was not required to do so. *Sanden*, 2024 WL 4259313, at *6-12. While the legal theories presented in the cases differed, it is clear from these series of cases, that courts are willing to utilize equitable remedies and injunctive relief as necessary to protect and facilitate access to, use of, and maintenance of roadways.

Postscript:

In closure of the above analysis, we would like to take a moment here to pause and express gratitude to each of our counsel of record in these matters—*Sanden, Stoick Creek,* and *Ugorets*. We often hear about how the bar is rampant with incivility. We wonder if the public would be surprised by how well counsel of record can get along as was the case in each of these instances. Yes, each of these cases was fought to the point of issuance of a decision. But in each case the lawyers had convened and agreed that a court order was necessary to preserve and set the rights of all involved in perpetuity. The fight was, thus, on the legal principles and property interests held dearly by the involved parties, specifically including the governmental entities who were charged within enforcing the rights and interests of the public as a whole, not just one property owner.

We also thank the Bench in each of the matters for serving, as suggested by Chief Justice John G. Roberts, Jr., as "umpires" and "servants of the law". See Chief Justice Roberts' Statement—Nomination Process available at https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process. The failure of the parties to settle cases in the court ordered conferences does not equate to incivility or unreasonableness. Sometimes, it just means that the judge needs to make the call.

MOTOR VEHICLE ACCIDENT

MDLA's Motor Vehicle Accident Committee consists of attorneys who primarily represent insurance carriers and their insureds in the defense of motor vehicle accident related claims. The attorneys associated with this committee typically defend claims involving no-fault, property damage, bodily injury and wrongful death issues. We focus on providing members with relevant speakers and regular updates on developments in this practice area. We also provide the members with a committee-specific listserv for communicating about relevant and emerging topics involving this practice area.

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Larson King
MDLA DRI State Representative

Hello from DRI! I am excited to be writing my first "DRI Corner" as your new Minnesota DRI State Representative. I know I have some big shoes to fill, as Jessica Schwie capably filled this role for the past couple of years. I will do my best to bring the thoughtfulness and insight that Jessica shared with MDLA during her years both in MDLA leadership and as DRI State Rep.

Having recently returned from the DRI Annual Meeting in Seattle, I am enthusiastic about how MDLA and DRI can continue to work together to make each other stronger, and to provide more benefit to their members. Having been a long-time member of both MDLA and DRI, I am a strong proponent of having a strong network both within your main state of practice and nationally. For me personally, I have been fortunate to develop a strong group of friends and professional resources from within both MDLA and DRI. Much like my predecessor Jessica, while the CLEs are a nice benefit of attending both MDLA and DRI events, it has always been the relationships developed during these meetings that drive my participation.

While at the DRI Annual Meeting, I was fortunate to attend the Leadership Conference, which included both substantive committee leaders and those holding leadership positions in State and Local Defense Organizations (SLDOs). The meetings were very well attended, and incredibly interactive, with attendees gathering tips and tricks from groups around the country. MDLA was well represented, with several of your Executive Committee leaders in attendance, along with MDLA's executive director. As for the DRI Annual Meeting itself, I very much enjoyed hearing former Senator (and two-time NBA Champion) Bill Bradley provide his perspective on the current state of politics, and how we can all do better as citizens.

I look forward to working with you all as I transition into this new role. If you are considering becoming a DRI member (or you've taken a break and want to re-engage with your DRI membership), please do not hesitate to reach out with any questions. I'm a big fan of the opportunities provided by both MDLA and DRI. I would love to share how membership with both groups can provide fantastic professional (and personal) opportunities for growth.

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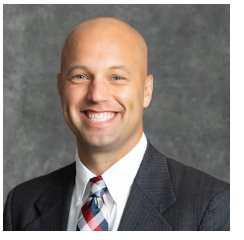

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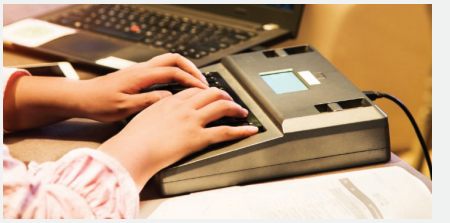

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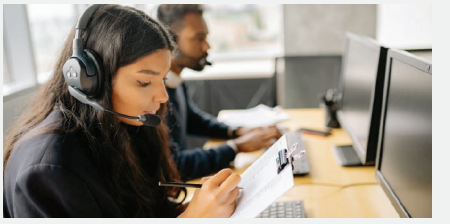

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