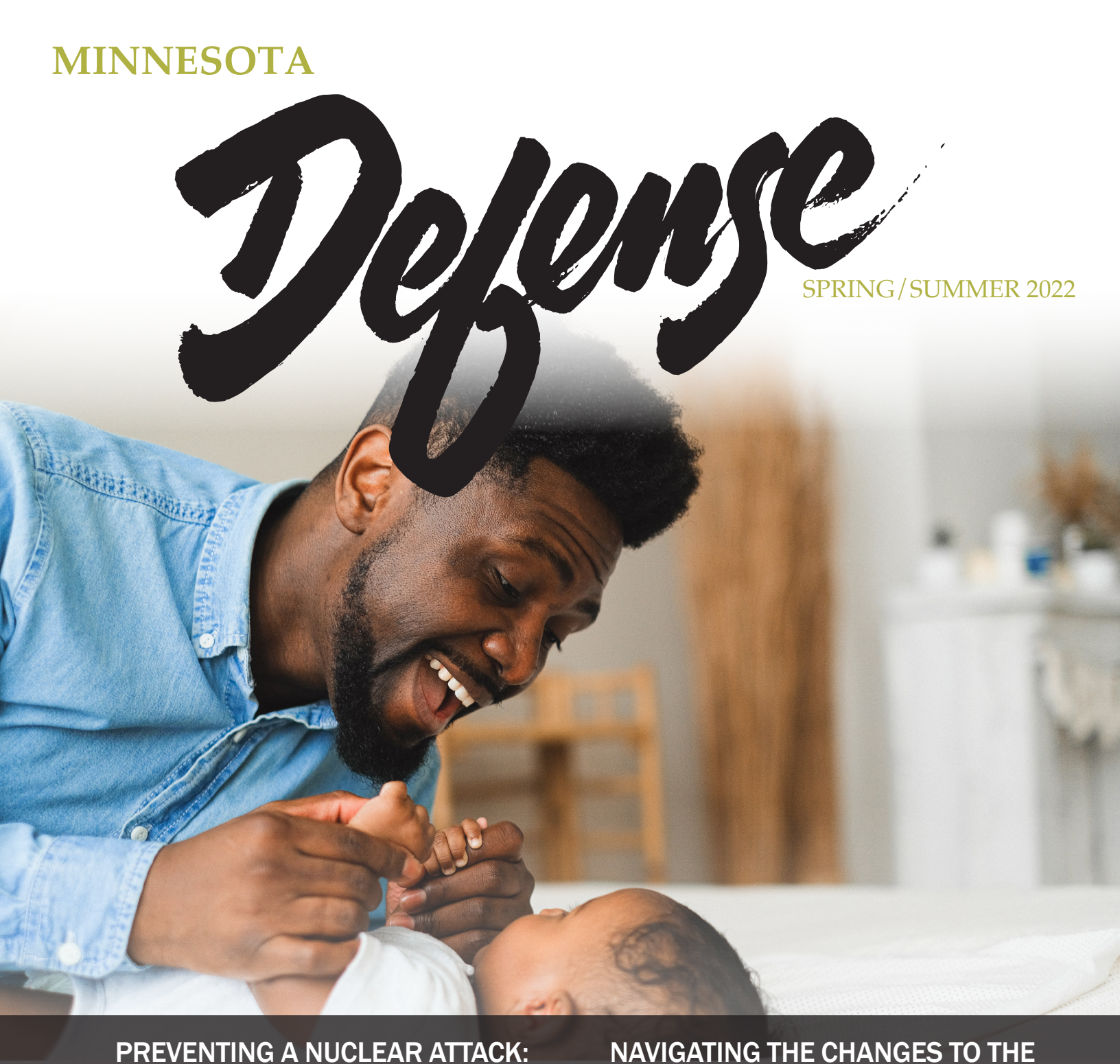
MINNESOTA

Defense

SPRING/SUMMER 2022



PREVENTING A NUCLEAR ATTACK: RECOMMENDED STRATEGIES IN RESPONDING TO NUCLEAR VERDICT TACTICS

NAVIGATING THE CHANGES TO THE RULES GOVERNING MILLER-SHUGART SETTLEMENT AGREEMENTS IN MINNESOTA

UNTANGLING THE WEB OF AN EMPLOYER'S OBLIGATION TO PROVIDE EMPLOYEES LEAVE: THE MINNESOTA PARENTAL LEAVE ACT

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 651-290-6293.

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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, 1000 Westgate Drive, Suite 252, St. Paul, MN 55114.

Winter 2022

Telling Your Story — Using the Doctor Deposition Offensively
Kevin McCarthy

Pandemic Staffing Shortage Causing Care Concerns In Long-Term Care Facilities
Mollie Buelow, Vicki Hruby and Pat Skoglund

MDLA's New Affinity Bar Fee Structure
Stacy Lundeen and Elle Lannon

Under (Peer) Pressure: A Breakdown of Minnesota's Peer Review Statute
Ryan Paukert

Fall 2021

A Tale of Two Pandemics: COVID-19 and Multi-Million-Dollar Verdicts
Elena D. Harvey

"Construction" Re-Defined: Demolition Work Now Potentially Subject to the Improvement To Real Property Statute of Limitations
Elizabeth Roff

Why Women Lawyers Lead
Stacy Lundeen and Elle Lannon

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It's 2021. Do You Know Where Your Employees Are?
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When Fee Scheduling Actually Costs You Money
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Are Pre-Litigation Communications Between an Insured and a Liability Insurer Protected from Discovery?
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Cryptocurrency: Do Property Policies Cover Its Value if Lost or Stolen?
Stephen M. Warner and Mark S. Brown

Collateral Estoppel After Quasi-Judicial Determinations: Another Tool in the Defense Toolkits
Tim A. Sullivan and Adam J. Frudden

What to Think? Investigating and Defending a Mild Traumatic Brain Injury
Rylee Retzer-Busselman and Elizabeth Roff

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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- Motor Vehicle Accident
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- Workers' Compensation
- Women in the Law

THE PRESIDENT'S COLUMN

Tony Novak

Larson King, LLP

Like the spring and summer of this year, ongoing COVID issues and changes to this magazine's staffing caused Spring to come late and Summer to go fast and this combined Spring/Summer 2022 MN Defense magazine is the result!

Likewise, as we continue to grapple with the impact of COVID on our law practices, and the Courts continue to look for ways to keep case dockets moving, MDLA recently participated in meeting with Chief Justice Gildea and the co-chairs of the oneCourtMN Hearings Initiative (Judge Kathryn Messerich and Heather Kendall, District Administrator for the Second Judicial District). MDLA was one of several Justice Partners who participated in a discussion about the initiative, which follows Chief Justice Gildea's lifting of the pandemic-related restrictions on Court proceedings (on April 19, 2022). The oneCourtMN Hearings Initiative Policy (Judicial Branch Council Policy 525) lays out the framework for presumed hearing locations during the evaluation phase. Some hearing types that have been held remotely returned to in-person events, while other hearing types will continue to be held remotely unless exceptional circumstances exist. The Order and Policy went into effect June 6, 2022.

The oneCourtMN Hearings Initiative Steering Committee invited various stakeholders and groups to come together to learn more about the initiative, and to provide feedback. MDLA, along with the other Justice Partners, was encouraged to share the meeting summary, and was encouraged to invite our members to provide feedback to the group. The feedback form can be found on the Minnesota Judicial Branch website. Additional points related to the meeting and initiative are outlined below. I hope you all have a great summer!

Tony

OVERVIEW OF ONECOURTMN HEARINGS INITIATIVE

oneCourtMN Hearings Initiative

Judge Kathryn Messerich and Heather Kendall, District Administrator for the Second Judicial District, serve as the oneCourtMN Hearings Initiative co-chairs and provided an overview of the initiative. The oneCourtMN Hearings Initiative's work will take place over three phases: take action, evaluate, and recommend and implement. The Branch is currently in the Take Action phase. During this phase, the Branch is working to identify ways to continue to make remote and in-person hearings better. The key work efforts within this phase are:

- implementing criminal and non-criminal hearing plans,
- beginning a phased and continuous approach to improving remote hearings, and
- addressing challenges with in-person hearings.

Our next phase will focus on evaluating the improvements that we have made to court operations to advance continuous improvement within the Branch. Finally, the initiative will culminate in strategic and well-informed recommendations for Judicial Council's consideration.

To create the oneCourtMN Hearings Initiative work plan, the Steering Committee compiled feedback from the Other Side Workgroup listening sessions, issues identified by District Administration, and work currently in progress that could impact hearings. Our work plan includes a wide array of projects that will impact many aspects of court operations going forward. Some of the initiatives include:

- Solving legal issues, such as the service issues we encounter when we in a remote setting
- Enhancements to our electronic tools. For example, identifying ways to sign documents while in a remote hearing, implementing an eCheck-In tool,

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and exploring the possibility of adding remote hearing information to eReminders.

» Finding solutions to a variety of issues related to remote appearance, such as addressing challenges with fingerprinting those in-custody and appearing remotely from another jurisdiction.

» Addressing scheduling challenges, like those we are experiencing with the Department of Corrections.

Hearing Implementation Plans

After June 6, any new hearings scheduled will need to be scheduled according to the new framework. This framework includes a list of factors that can be considered for judicial officers to rule that exceptional circumstances exist for a hearing to be held in a different way.

For non-criminal cases, the statewide case-by-case chart, found in the April Judicial Council policy, states which hearing and case types will generally be held as remote hearings, and which will generally be held as in-person hearings.

Additionally, each district has been tasked with developing a local plan for when they will use remote and in-person hearings in criminal cases based on their own local needs and conditions. Each district may establish a single criminal hearings plan for all courthouses within the district, or may choose to establish individualized criminal hearing plans for each county within the district. The plans will also specify the factors district courts are to apply when considering requests to conduct a presumptively in-person hearing remotely, or to conduct a presumptively remote hearing in-person.

Justice Partner Engagement

Critical to the success of the oneCourtMN Hearings Initiative is the continued involvement of justice partners and court customers in its development. OHI will provide opportunities for justice partner input through regular justice partner meetings, surveys, and public presentations. Additionally, the oneCourtMN Hearings Initiative will work with media outlets from across Minnesota to generate awareness, build support, and demonstrate outcomes about the initiative and its related projects.

INPUT FROM JUSTICE PARTNERS

Hearing Management

Justice partners wondered how the Branch addresses judges who are not in compliance with hearing standards set out by the Branch. Chief Justice Gildea requested that when justice partners encounter issues with hearings, they need to bring them to the attention of Branch leadership so that they can be addressed. Once these issues are known about Branch leadership can work with Chief Judges in the districts to address them.

Justice partners asked what the Branch's plans are for ensuring an adequate hearing record. They also raised the related issue of masking and technology issues interfering with court reporters being able to capture the record correctly. Heather Kendall stated that the Branch will continue to capture the record as it has traditionally done and run a backup to make sure that hearings are captured correctly. Additionally, the Branch is working on training for judicial officers and court reporters on capturing the record during remote hearings. Judge Messerich added that it is important that the judicial officer establishes before the hearing that everyone can be clearly heard. It is also important for court reporters to be assertive when they cannot hear parties during a hearing.

Justice partners raised an additional issue around opposing counsel not having the same opportunities to discuss and negotiate cases outside of remote hearings as they would in the hallway outside of an in-person hearing. Jeff Shorba said that this issue has been raised for criminal hearings as well where the public defender is not getting time to meet with their client or negotiate with the prosecutor. He expressed that the Branch needs to determine a structured process for allowing informal interactions between attorneys to take place. This could potentially occur by opening the remote hearing early to allow attorneys to go to a breakout room and talk. A justice partner noted that the court in Apple Valley requires attorneys to appear 30 minutes before a hearing. That time could be used to hold informal discussions between attorneys.

They also said that there is a potential issue of litigants using the excuse of technology issues to not show up to their hearing. Although the commenter had not experienced an issue with it, she did have an experience that was close.

Access to Justice

Justice partners asked about addressing access to justice for people that lack access to or are uncomfortable with technology. Jeff Shorba said that the Branch is very aware of the digital divide that exists across Minnesota and the Branch has taken steps to address it. The Branch has partnered to install 260 remote hearing kiosks across the state in publicly accessible locations. Additionally, all courthouses have remote hearing rooms that allow court customers to participate in their hearings regardless of where the hearing is being held in the state. Chief Justice Gildea added that there are also options in the recent Judicial Council policy to allow courts to hold a presumptively remote hearing in an in-person setting if technological barriers exist.

Additionally, they inquired if the Branch has seen improvements in failure to appear rates as a result of remote

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The President's Column **continued from page 5**

hearings. Chief Justice Gildea said that appearance rates have increased significantly with the use of remote hearings.

Decorum

Justice partners asked if the Branch planned to establish remote hearing decorum rules or guidance for attorneys and litigants. Jeff Shorba stated that the Branch is working to address remote hearing decorum issues. There is current a pilot in the Sixth District that provides practice sessions, especially for self-represented litigants, to familiarize themselves with the remote hearing environment and discuss decorum issues like appropriate clothing and call-in locations. The Branch is also looking at better ways to notify litigants, such as providing an eCheck-In process five days before a hearing that includes a decorum guide. Additionally, the Branch is working to provide techniques for judges to manage decorum and identify the appropriate structures and staffing to better operate in a remote environment.

Professional Development and Experience for New Lawyers

Further, they raised the issue of how we provide opportunities for new attorneys to have in-courtroom experience with the continued use of remote hearings. Judge Messerich said that as we make remote hearings more structured and formal, the skills and experiences in remote hearings will be more similar to in-person hearing experiences. Chief Justice Gildea expressed that remote hearings are official court proceedings and provide an opportunity to interact with judges and opposing counsel. Remote hearings provide an opportunity to build courtroom skills and gain experience.

A request for remote hearing tips for attorneys was made. The OHI team will partner with attorney stakeholders to create a tips/best practices document for attorneys in remote proceedings.

Justice Partner Engagement Opportunities

Justice partners inquired if there will be opportunities for additional input about the oneCourtMN Hearings Initiative and the remote and in-person hearing plans for the broader justice partner community and/or public. Heather Kendall said that we plan to provide a lot of opportunities for additional input through future justice partner meetings, focus groups, and surveys as the initiative progresses.

Attendees expressed their appreciation for the opportunity to learn more about the oneCourtMN Hearings Initiative and hearing implementation plans. They also were grateful for the opportunity to share their feedback on improving remote hearings and court operations.

NEXT STEPS

Chief Justice Gildea thanked the justice partners for sharing their time and expertise during the meeting. Following the meeting, a summary will be shared which can help spark discussions with your organization and constituents. Justice Partners will also receive a short survey to provide additional feedback. The Branch hopes that justice partners will join us for future OHI justice partner meetings to discuss OHI work efforts and lessons learned from the remote and in-person hearing plans.

PREVENTING A NUCLEAR ATTACK: RECOMMENDED STRATEGIES IN RESPONDING TO NUCLEAR VERDICT TACTICS

By Rylee Retzer and Shannon Nelson

Now that we are nearing the end of the COVID-19 pandemic, courts are returning to normal proceedings, including by conducting more civil jury trials. Looking through the Twin Cities Jury Verdict Reporters 2021 for Quarters 2, 3, and 4, these authors noticed several jury verdicts that seemed disproportionally high in proportion to the last offers and demands in automobile accident cases. When we spoke with mediators, plaintiff attorneys, and defense colleagues, we discovered that many of them agreed: jury verdicts are on the rise in Minnesota, at least anecdotally. Attorneys and legal professionals in other states have also noticed this trend.

What explains this rise in jury verdicts? Theories include growing sympathy for fellow citizens in hard economic times, increased animosity toward large institutions that profited from the hard times, socio-economic unrest from publicized police actions, social-media trumpeting of large verdicts, and the changing view of the value of the dollar as people are exposed to multi-million-dollar payments to sports figures and movie stars.

These excessively large verdicts are known as "nuclear verdicts" or "runaway jury verdicts." In these situations, the general damages are often grossly disproportionate to the special damages. In his book, *Nuclear Verdicts, Defending Justice for All*, California trial lawyer Robert F. Tyson, Jr. discusses this relatively new phenomenon, and how defense attorneys can approach and diffuse a plaintiff attorney's attempts to prime a jury to return a nuclear verdict.

The purpose of this article is to discuss the plaintiff bar's nuclear-verdict tactics, and how to defeat them using Tyson's trial strategies. We give full credit and special thanks to Mr. Tyson for sharing his thoughts and strategies and we encourage defense attorneys to read his book.

Tyson sets forth ten core principles in defending against plaintiff-side nuclear-verdict strategies. Following is a summary of each principle:

1. ACCEPT RESPONSIBILITY:

Anger is the most common cause of a runaway jury, and plaintiff attorneys routinely use anger or emotion to influence the jury. The best way to diffuse that anger, per Tyson, is to accept responsibility and show you care about the plaintiff. By accepting responsibility, the defense will look more reasonable and likable to a jury. And the jury will be less likely to be angry, allowing them to use reason rather than emotion to reach a reasonable verdict. Accepting responsibility does not necessarily mean accepting liability.

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Rather, accepting responsibility allows a jury to focus their attention on the actions and fault of the other parties, including the plaintiff. If a defendant denies responsibility altogether, the jury will be looking for things that the defendant could have done to avoid the incident.

At trial, there will are three potential scenarios for the defense: 1) Your client is 100% at fault—there is no dispute; 2) Your client shares fault with other parties, possibly including the plaintiff—(comparative fault); 3) Your client is not at fault, or at least, that is what your client is arguing. If your client is 100% at fault for the incident, Tyson advocates that you refrain from telling a jury that "We stipulate to liability." Rather he advocates stating something like "We accept responsibility for our actions, and we are here for you to hold us accountable." These are words a jury will understand. This will also help diffuse the anger. In a comparative fault situation in which other parties may also be at fault, when accepting responsibility, do not specifically identify to the jury what your client did wrong—if a jury agrees with you, and they also find other things that your client did wrong, they may start tallying up the percentage of fault against your client. Rather, Tyson recommends saying something like "We accept responsibility for our actions, and we are here for you to decide how much liability we have and who else is responsible." If the defense is denying liability altogether, accept responsibility for something—highlight all of the things your client did right. For example, accept responsibility for your client meeting the duty of care, maintaining a safe workplace, or putting a safe product into the stream of commerce.

2. ALWAYS GIVE A NUMBER:

Defense attorneys tend to shy away from giving a damages number early on in trial. We may wait until closing argument to tell the jury the value of economic and non-economic damages. However, Tyson recommends that defense attorneys give a number, give it early, and give it often. Plaintiffs, according to Tyson, have in the past 10-15 years been utilizing a tactic called "priming," a strategy to introduce damages numbers early and often in an attempt to persuade the jury to be comfortable with their numbers. In nuclear verdict outcomes, these numbers are significant and disproportionate to the actual value of the case. Even awarding half of the plaintiff's attorney's proposed amount may result in a significant windfall for the plaintiff.

So, what to do when faced with a plaintiff's damages number early on in trial? Tyson advocates countering that number by giving a defense number. He urges defense counsel to give a number early, and give it often. Tyson cites a study reported in the *Iowa Law Review*. The study concluded that juries that heard a defense lawyer give a damages number throughout a trial were more likely to award a defense verdict than those who do not. Jurors who heard the defense merely attack the plaintiff's number, or ignore the plaintiff's number altogether, were less effective.

When giving the early number, an exact amount is not required. In fact, according to Tyson, the appropriate time to give an exact amount is during closing argument. Before then, he recommends presenting a range. For example, "We believe the evidence will show the plaintiff is entitled to an award of $500,000 or less." Additionally, the dollar amount should never go up in trial, as you can lose credibility with the jury.

Tyson's view may be somewhat controversial. Some may view giving an early number as a concession of weakness if one is seeking a defense verdict. However, he explains—with support from the same *Iowa Law Review* study—that a defense verdict can be achieved even when the defense attorney suggests a reasonable damages number. Especially when it comes to non-economic damages (discussed further later), giving the jury a defense number provides jurors with an alternative to a potential nuclear-verdict amount sought by the plaintiff.

3. PAIN AND SUFFERING:

According to Tyson, non-economic damages are generally the biggest component of a nuclear verdict. Ironically, research has shown that in a large majority of runaway trials, defense attorneys have not argued non-economic damages at all. Tyson advocates framing non-economic damages through two questions (also known as the Tyson & Mendes method of arguing):

- What is the impact of the injury on the plaintiff's life?; and
- What is the impact of money on the plaintiff's life?

A. What is the impact of the injury on the plaintiff's life? Tyson urges defense counsel to talk about how the accident impacted the plaintiff. The goal is to show that the plaintiff's life is not truly as bad as the plaintiff's lawyer portrays it. Talk about the good news and tell the other side of the story.

Developing and fleshing out this evidence in discovery is the key. Find out what the plaintiff's life was like before and after the accident. Get to know the plaintiff. Proper deposition inquiries may include hobbies, vacations, travel, who a plaintiff shares these experiences with, the cost of these hobbies and experiences, and how these experiences look post-loss. Examine practical aspects of a plaintiff's life before and after the accident. Examples include employment, housework/chores, mobility and transportation, any economic or financial hardships, and

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worries about the future. Be certain to discover the good, bad, and ugly so there are no surprises at trial. Importantly, this information can be used to tell the story of the positive aspects of the plaintiff's life after the accident. Tyson states that a positive perspective on a plaintiff's life after the accident can support the lower pain and suffering number presented by the defense to a jury. Further, this story can support the argument that the defense's number will reasonably support the plaintiff's lifestyle.

B. What is the impact of money on the plaintiff's life? The second and most important element to arguing pain and suffering, according to Tyson is to show the jury what the real impact of the money will be on the plaintiff's life. In other words, what is the value of money to the plaintiff? Tyson states in his book, "Any dollar amount the jury awards must be fair and reasonable to this plaintiff based on the impact the money will have on the plaintiff's life." The amount should be proportionate to the plaintiff's lifestyle. Again, understanding the impact of money on a particular plaintiff requires getting to know that plaintiff and his or her unique situation in discovery. Questions discussed supra, and questions related to the employment income pre- and post-accident, assets, and other financials help to understand how a plaintiff values money. Tyson advises using this information to ground the jury in reality, and to come up with a number that is fair and reasonable to the specific plaintiff. Use creativity and show how that money can improve a plaintiff's life post-accident.

4. THE VALUE OF LIFE: IN A WRONGFUL DEATH TRIAL, TYSON DOES NOT SHY AWAY FROM PLACING A NUMBER ON HUMAN LIFE.

In addition to the aforementioned strategies, he advises recognizing, acknowledging, and showing compassion for all involved in the case. Caring and compassion must be sincere. The loss should be acknowledged. "If a jury sees you are truly emotionally invested in this case, they will be more receptive to what you have to say," writes Tyson. Again, consider the impact of the incident on the plaintiff, and the impact of money on that plaintiff. Get to know the plaintiff. The best opportunity to get to know the plaintiff is at the deposition, when similar questions discussed supra may be deployed. Additionally, deposition questions like, "What is your fondest memory of the decedent", "What do you miss most about the decedent", "What made the decedent happy or sad?", and "What is your biggest disappointment now that the decedent is gone?" go to the heart of the loss and provide a factual basis for what the loss meant to the plaintiff. This must be understood, says Tyson, before you can place a number on the loss.

Tyson also emphasizes humanizing your client and, if necessary, acknowledging difficult truths about your client's behavior. Show that the defendant cares, take responsibility for the facts, and apologize if appropriate. And if an apology is appropriate, it should be communicated humanely and effectively, or not at all.

5. HAVE A THEME:

Develop a theme that cannot be derailed by a rogue ruling by a judge or bad witness testimony. The plaintiff will certainly have a theme that will appeal to the emotions of a jury, and will likely have the upper hand in terms of sympathy. The defense needs to develop a theme that appeals to a jury's higher values, such as justice, honesty, responsibility, home, family, peace, and country. Jurors want to do what is right and want the defendant to do what is right. The theme should take into consideration responsibility, reasonableness, and common sense. Start with voir dire and continue through the opening statement, witness testimony, and closing argument. Developing a theme can also help overcome bad facts.

In his book, Tyson tells the story of one of his cases in which a Mexican immigrant who had been working as a housekeeper for a wealthy Southern California family sued for wrongful termination, harassment, and racial discrimination. Very briefly, the housekeeper was terminated after an argument with the family's German house manager. One evening the family returned home to a very heated argument between the German house manager and Mexican housekeeper. Near the end of the argument, the housekeeper went into the laundry room and started kicking and punching the washing machine. That evening the family decided to terminate the housekeeper the following day. When the housekeeper arrived, she gave the family a letter explaining how the German housekeeper had been abusing her, including by insisting that she learn to speak English. The family terminated her that day anyway. The housekeeper's allegations were supported by facts learned through discovery. The facts for the defense were bad and got worse throughout the trial with unexpected witness testimony. But, the defense had developed a theme focused on the universal aim of living in a safe and peaceful home. In voir dire, Tyson asked the jury about the importance of having a safe and peaceful home, and he reminded them of their words in his closing arguments. It worked. The jury returned a defense verdict.

6. PERSONALIZE THE CORPORATE DEFENDANT:

Although the defense wants to argue facts, it must understand that emotions help a jury decide what to do with those facts. A jury will know all about the plaintiff on a personal level; they need to know about the defendant on a personal level, too. Tell the jury who works for the company, the company's values, and its mission. If the company is

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a third generation family business, tell their story. If it is a big corporation, tell the jury what good the corporation has done for the community, such as volunteering and fundraising. Choose a good corporate representative who will be the face of the company. Make sure it is someone who loves their job, and ask them about it. A jury will be less likely to issue a big award if the company is humanized.

7. SLAY THE REPTILE:

What is the reptile theory? It is a method plaintiff attorneys use to appeal to jurors' primal ("lizard brain") instincts of preservation and survival. Classically, the plaintiff's attorney tries to show that a defendant broke a safety rule and that the defendant's behavior was dangerous to the entire community, including the jurors and their loved ones. Jurors, the theory goes, can be primed to react like reptiles and instinctually seek to protect themselves and their community. The tactic also appeals to emotions, including anger. This leads to juries sending a message by awarding higher damages to protect the community from the likelihood of the same incident being repeated. The method was developed by David Ball and Dan Keegan, who wrote the book Reptile: *The 2009 Manual of the Plaintiff's Revolution*. There have been many seminars and articles written on the method, and how to combat it from the defense side. We encourage you to perform your own research on the topic.

Reptile tactics are typically used in personal injury, products liability, medical malpractice, and construction defect cases. They start with written discovery and continue through depositions and trial, including voir dire, opening statements, witness testimony, and closing arguments. It's important to be able to identify it when you see it and be prepared to respond effectively. This includes preparing your client witness to respond to reptile tactics during their deposition and trial. The plaintiff's attorney will start by asking the defendant questions about general safety rules and then become more specific, ending with a question essentially asking the defendant to agree to liability. Your client should be advised never to say "yes" and to qualify any answers. As attorneys, it's also important to know how to object during testimony. It may also be prudent to prepare motions in limine ahead of trial to prepare the court to address the reptile tactics. Similarly, Tyson proposes that the defense can use "reverse reptile" tactics, especially in instances of comparative fault. The same line of questioning plaintiffs use against defendants can be used by defendants against plaintiffs and other defendants.

In one of Tyson's cases, the plaintiff was driving on a mountain road when a 6-foot-long white PVC pipe that had fallen off of Defendant's truck was bouncing on the road toward her windshield. To her right was a steep cliff, and to her left was oncoming traffic and a large rocky embankment. The plaintiff could avoid the pipe by either turning right (which would mean certain death) or turning left. She turned left, striking the embankment, and sustained significant injuries. Tyson asked her questions, utilizing the "reverse reptile theory" to ask if she made the safety of the community a priority:

Q: A double yellow line separated the lanes of traffic on that section of the road, correct?
A: Yes.

Q: What does a double yellow line on the road mean?
A: It means you should not cross the line.

Q: Why is that the law, if you know?
A: For safety.

Q: This is to protect people, so people don't get hurt, right?
A: Yes, of course.

Q: How about the safety of others, is that a priority of yours when you are driving?
A: Absolutely.

Q: You understand if you drive over a double yellow line, you can hurt someone, correct?
A: Yes.

Q: In fact, you could even kill someone in a head-on collision, right?
A: Yes.

Q: And you understand there was traffic coming the other way—right at you—that morning because you saw my client's truck, right?
A: Yes, I did.

Q: Fortunately, no one died when you crossed over the double yellow line, correct?
A: Yes.

Q: You will agree you had a duty to maintain control of your vehicle at all times during this accident, right?
A: Yes.

Q: But when you saw that piece of plastic, you didn't drive right over it, did you?
A: No.

Q: You also didn't just come to a stop, correct?
A: No, I didn't stop.

Q: No, instead you turned your Jeep into oncoming traffic and lost control of your Jeep, didn't you?

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A: I don't think I lost control.

Q: Well, you drove into an embankment, right?
A: Yes, that's right.

The jury found the plaintiff to be 40% at fault for her injuries.

8. SPREAD THE GOOD NEWS:

Plaintiff attorneys will undoubtedly tell a doom and gloom story of how the plaintiff was damaged so that a big damages number can be suggested. But, people as a whole are generally hopeful and want to hear good news—they want to hear the story of how a person overcame adversity. So, tell a better story—acknowledge the plaintiff's challenges, but focus on the positive changes in his life. If supported by the facts, tell the jury how the plaintiff got a better job, became stronger, or realized how much his wife loved him when she cared for him afterward. Talk about all of the things he can still do despite the injury like spending time with his family, walking his dog, going to the gym, or vacationing with his family (even if they are different types of vacations). Tyson warns that the defense cannot be cavalier or dispassionate; the "good news" must be presented sincerely and supported by truth and evidence, or the argument may backfire. Tie the good news with a defense verdict number.

9. VOIR DIRE:

Tyson's recommendations on handling voir dire are grounded in the common-sense principles that all defense attorneys likely know and understand. Voir dire is the first and only opportunity to get to know the jury. It is the only chance to make the first impression. Tyson advises first and foremost, get the jury to like you. Why is this important? Because a jury that likes the defense attorney is less likely to hurt or punish the defendant unfairly. Common sense recommendations include saying "please" and "thank you." Listen to potential jurors. Make eye contact. Use their names. Engage. Tyson notes that it is important to remember that jurors are not adversaries, so do not treat them as such. Do not act like you are entitled to personal information. Do not make them cry. Be aware of what you are asking potential jurors—and how you ask it—because other jurors are likely paying attention and judging you. Tyson states that potential jurors are forming initial opinions of you, so be cognizant of how you are treating potential jurors. According to Tyson, if a jury finds defense counsel genuine and there is mutual respect, jurors are more likely to listen attentively, receive your information with an open mind, and ultimately find for the defense if facts support it.

Voir dire is also the opportunity to advance the themes of responsibility, reasonableness, and common sense. Introduce and regularly touch on these themes throughout the jury selection process. For example: Ask a parent if she ever talks to her kids about the importance of taking responsibility for their actions. "Does your family value responsibility?" Ask a manager if he ever has to talk to any of his employees about taking responsibility for their actions. Ask whether common sense is something you leave at the steps of the courthouse. "Are you comfortable listening to technical evidence and experts and then applying your common sense?" Talk about reasonableness. "If the evidence supports it, are you comfortable telling a plaintiff and her lawyer that you do not feel what they are asking for is reasonable?" "You may hear emotional testimony and argument from the plaintiff's counsel—can you tell them 'no' if you do not think their requests are reasonable?"

10. CLOSING ARGUMENT:

Tyson emphasizes that closing argument is the last, and perhaps best, chance to persuade the jury to rule in favor of the defense. Tyson emphasizes the importance of the "silent witness." Often, the most important evidence is not what is presented in witness testimony or exhibits, but the evidence the jury does not hear or see. The silent witness, according to Tyson, often testifies the loudest because they appeal to a juror's common sense. Examples include a long-time physician who was not called to testify on behalf of the plaintiff, or gaps in treatment. According to Tyson, the silent witnesses tell a jury the story the plaintiff does not want to tell. "Simply stated, silent witnesses are the irrefutable facts that empower jurors to set aside complex testimony and apply common sense when rendering a verdict," writes Tyson. In closing argument, identify these silent witnesses and tell the jury precisely what each silent witness means. Naturally, the introduction and use of these silent witnesses must comply with rules of evidence. Nonetheless, Tyson writes that using silent witnesses is a powerful way to advance trial themes and tell a story. Closing arguments are powerful. They are the opportunity to tie the evidence together, advance themes, tell the story and give the numbers. Tyson encourages defense counsel to be real, be truthful, be sincere, and, importantly, to show that they care about the parties and the process.

Finally, Tyson emphasizes that defense attorneys must begin sharing. He notes that plaintiff attorneys share everything with each other. Indeed, the Minnesota plaintiffs' bar has a dedicated listserv for sharing information with each other about tactics, experts, and even defense attorneys. Tyson acknowledges that defense counsel may have business reasons for not sharing information, but still encourages doing so for the good of the whole defense bar, and their clients.

As you can see, Tyson's tactics are an integrative approach to defending damages, from discovery through the closing argument at trial. His approach is thoughtful, systematic, and sincere, appealing to a jury's sense of responsibility, reasonableness, and common sense. Give it a try!

UNTANGLING THE WEB OF AN EMPLOYER'S OBLIGATION TO PROVIDE EMPLOYEES LEAVE: THE MINNESOTA PARENTAL LEAVE ACT

By Michelle Christy

An employer's obligation to provide appropriate leave for employees is an ever-growing web of local, state, and federal laws. The Minnesota Parental Leave Act ("MPLA" or "Act") has existed in some form since 1987, but creates ever-changing requirements for employers with the most recent changes taking effect on January 1, 2022. Minn. Stat. § 181.940 *et. seq*; H.F. No. 234 § 359 (1987). The MPLA requires employers to provide eligible employees leave to care for children, relatives, and themselves in different situations. Minn. Stat. § 181.940 *et seq*. While all Minnesota employers are subject to the requirements of the MPLA, much of the recent litigation has been against public entities. See *Minnesota Chamber of Commerce v. City of Minneapolis*, 944 N.W.2d 441 (Minn. 2020); *Hinrichs-Cady v. Hennepin County*, 943 N.W.2d 417 (Minn. Ct. App. 2020), *review granted* (June 30, 2020), *appeal dismissed as improvidently granted*, 961 N.W.2d 777 (Minn. 2021).

The purpose of the MPLA is to provide a base amount of leave and protections for employees. Minn. Stat. § 181.843(b). The MPLA establishes a bare minimum for employee leave. However, employers can still provide leave in addition to the required MPLA leave. And, as is necessitated by federal supremacy, the Act does not limit or restrict any of the employees' protections provided by the federal Family Medical Leave Act ("FMLA"). U.S. Const. art. VI, cl. 2; 28 USC § 2601 *et seq*. All employers, including government entities and private employers, are subject to the Act although many requirements of the MPLA only apply to employers with more than 21 employees at a single site. Minn. Stat. § 181.940 subd. 3. The Act explicitly applies to the state, counties, towns, cities, school districts, or other government subdivisions. *Id.* The following is a discussion of the application of the MPLA, the responsibilities of employers, the interaction between the MPLA and other statutes, the MPLA in litigation, the future of the MPLA, and takeaways for employers.

APPLICATION OF THE MPLA

With one exception, the MPLA applies to employers with 21 or more employees at one site. Minn. Stat. § 181.940 subd. 3; *Polley v. Gopher Bearing Co*., 478 N.W.2d 775, n. 1 (Minn. Ct. App. 1991). One provision, the school conferences and activities provision, applies to all employers in Minnesota regardless of size or number of employees at a single site. Minn. Stat. § 181.940 subd. 3. In most cases, the MPLA applies to more employers than the FMLA even though some employee leaves are protected by both the MPLA and FMLA. 29 C.F.R. 825.104(a); Minn. Stat. § 181.940 subd. 3. There has not been litigation yet examining what constitutes an employee at one site under the MPLA, but similar language has been significantly litigated in connection with the Worker Adjustment and Retraining Notification ("WARN") Act. See e.g. *Rifkin v. McDonnell Douglas Corp*., 78 F.3d 1277, 1280 (8th Cir. 1996).

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With the exception of the school leave provision, an employee is covered by the Act if they perform services for hire for the employer for an average number of hours per week equal to one-half the full-time equivalent position in the employee's job classification as defined by the employer's personnel policies or practices or pursuant to the provisions of a collective bargaining agreement during the 12-month period immediately preceding the leave. Minn. Stat. § 181.940 subd. 2. In essence, an employee is eligible if they work half the hours required for full time for the position. *Id.* Under the school leave and activities provision, an employee is not required to work for an employer for twelve months to be eligible for leave, but still must work half of full time. *Id.* Minn. Stat. § 181.9412.

RESPONSIBILITY OF EMPLOYERS

The MPLA is an unforgiving statute for employers, so it is vital that employers understand their responsibilities and implement policies with the MPLA in mind. Minn. Stat. § 181.944 (addressing how an employee can initiate civil litigation and receive damages if an employer violates any provision of the MPLA). There are three types of leave mandated by the MPLA: (1) leave for pregnancy or adoption of a child, (2) leave for the care of a relative or safe leave, and (3) leave for school conferences and school activities. The MPLA also dictates the mandatory process for an employee returning from leave. Following is a summary of an employer's obligations under the MPLA. The obligations are consistent for government entities and private employers.

Leave for pregnancy or adoption of a child

The MPLA provides twelve weeks of leave for pregnancy, birth, or adoption. Minn. Stat. § 181.941, sub. 1. Employees of all sexes are eligible for leave for the birth or adoption of a child. *Id.* Female employees are also eligible for leave for prenatal care or incapacity due to pregnancy. *Id.* Unlike the FMLA, the MPLA does not provide leave for the placement of a new foster child. § 6:17. Minnesota Parenting Leave Law, 17 Minn. Prac., Employment Law & Practice § 6:17 (4th ed.). The leave must begin when a female employee is incapacitated due to pregnancy or within twelve months after the birth or adoption of the child. Minn. Stat. Ann. § 181.941 subd. 2. This twelve-month period can have a delayed start if the child is hospitalized longer than the mother. *Id.*

Leave for the care of a relative or safety leave

The MPLA allows an employee to use their employer provided sick leave benefits to care for a close relative or themselves. Minn. Stat. § 181.9413 (a-b). An employee may take leave to care for a relative who is sick, suffering from an injury, or for safety leave. *Id.* Safety leave is leave that allows for an employee to provide or receive assistance for sexual assault, domestic abuse, harassment, or stalking. *Id.* (b). An employee may take safety leave to care for themselves or for a relative. *Id.* The definition of relatives under the MPLA is fairly broad and includes children, adult children, spouses, parents, siblings, grandchildren, parents-in-law, or stepparents. Minn. Stat. 181.9413(a). Stepchildren, foster children, and adopted children and grandchildren are also included as relatives. *Id.* (e-f). Under this provision, an employer must allow an employee to use up to 160 hours of their employer provided benefits in a twelve-month period for the care of a relative or for safety leave. *Id.* (c). However, this 160-hour limitation cannot apply to absences due to the illness or sickness of a child. *Id.*

Leave for school conferences or activities

The school conference and activities provision of the MPLA is the only provision of the Act that applies to a broader range of employers and employees. Unlike the rest of the Act, this provision does not require an employee to work for an employer in the twelve months preceding the requested leave. Minn. Stat. § 181.9412. Further, this provision applies to all employers regardless of whether or not they have 21 employees at a single location. Minn. Stat. § 181.940 subd. 3. This provision requires that an employer provide 16 hours of leave during any 12-month period for an employee to attend school conferences or school-related activities related to the employee's child, provided the conferences or school-related activities cannot be scheduled during nonworking hours. Minn. Stat. Ann. § 181.9412. subd. 2a. Under the MPLA, school conferences and activities also include prekindergarten and special education activities. *Id.* This provision requires an employee to attempt to schedule the conference during nonworking hours and to provide the employer with reasonable notice of the leave. *Id.* An employer is not required to pay the employee for the leave unless the employee elects to use some accrued paid vacation time or other appropriate paid leave. *Id.* at subd. 3.

Reinstatement of an employee after leave

The MPLA also establishes procedures for an employee returning from protected work. When an employee is returning from a leave that has lasted more than a month, the employee must provide at least two weeks' notice of their intent to return to work. Minn. Stat. § 181.942 subd. 1. If the employee took leave to care for a relative or for school activities the employee must be returned to their same position. *Id.* If the employee is returning from a longer leave, then they must be returned to the same or a similar position. *Id.* Under the MPLA, a similar position means a position of comparable duties, hours, and compensation. *Id.* An employee is not entitled to reinstatement if there is a bona fide reduction in force, but if an employee is laid off while taking protected leave, the likelihood of litigation is

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high. Minn. Stat. § 181.942 subd. 1(b). During a leave, an employee's pay must be adjusted in a similar pay scale to other comparable employees. Minn. Stat. § 181.942 subd. 2.

Other miscellaneous provisions

There are three other provisions of the MPLA that are worth noting because they relate to employers' obligations or options. First, the MPLA previously contained a requirement that employers provide accommodations for nursing mothers. Minn. Stat. 181.9414 (repealed January 2022). This provision was repealed on January 1, 2022, and instead was separated as a standalone provision in the Nursing Mothers Act. Minn. Stat. § 181.939. Second, with regard to insurance, under the pregnancy provision, the employer must continue to make insurance coverage available when an employee is on leave. Minn. Stat. § 181.941, subd. 4. Unlike the FMLA, an employer is not required to continue to pay insurance benefits. 29 CFR § 825.209(a). Finally, while not required for employers, the MPLA requires that the State of Minnesota create a poster addressing employees' rights under the MPLA. Minn. Stat. § 181.9436. This poster is available to employers upon request. *Id.*

RELATIONSHIP BETWEEN THE MPLA AND OTHER LOCAL AND FEDERAL STATUTES

The MPLA was not created in a vacuum and instead its application is considered in addition to other laws providing protected leave, most notably the FMLA. For example, when leave can be covered by both the FMLA and the MPLA, an employer may reduce the amount of available MPLA leave time by leave already taken under the FMLA. Minn. Stat. 181.943. Further, the MPLA does not prohibit other local ordinances from creating even more leave requirements for government entities or private employers. In a recent Minnesota Supreme Court case, the Court held that the MPLA did not preempt other local ordinances addressing the provision or accrual of leave. *Minnesota Chamber of Commerce v. City of Minneapolis*, 944 N.W.2d at 447 (determining that Minneapolis' Sick and Safe Time Ordinance was not preempted by the MPLA). Beyond Minneapolis, there are also other local ordinances that provide leave; St. Paul and Duluth also have additional sick and safe leave ordinances that require employers to provide additional leave for their employees. Duluth, Minn., Codes § 29E.2(g); Saint Paul, Minn., Codes § 233.21.

MPLA IN LITIGATION

Like many state statutes created to provide employees with rights, employers who do not comply with the MPLA could face lawsuits. The MPLA is meant to be liberally construed and therefore the Act applies whether or not the employee specifically requests the leave. Hansen, 813 N.W.2d at 916 (holding that an employee properly requested leave even though she did not specifically mention the MPLA when taking the protected leave). Therefore, employers must be aware of the MPLA and its restrictions in order to avoid potential liability.

Plaintiffs can bring two types of claims against an employer under the MPLA: (1) interference claims and (2) retaliation claims. *Hanson v. Mental Health Res., Inc.*, 948 F. Supp. 2d 1034, 1044 (D. Minn. 2013). In order to survive early dismissal on both interference and retaliation claims, an employee must establish that they work for a qualified employer and that they are a covered employee. See *Scheidecker v. Arvig Enterprises, Inc.*, 122 F. Supp. 2d 1031, 1044 (D. Minn. 2000). With the exception of the school leave provision, for the MPLA, Courts look at (1) whether the employer has more than 21 employees at a single site, (2) whether the plaintiff has worked at the location for more than twelve months, (3) whether the employee has worked on average more than half time in the past year, and (4) whether the requested leave is covered by one of the provisions of the MPLA. Minn. Stat. § 181.940.

Because of the overlap of rights between the MPLA and the FMLA it is very common to see plaintiffs bring claims in federal court and allege counts under both the FMLA and MPLA. See *Hillins v. Mktg. Architects, Inc.*, 808 F. Supp. 2d 1145 (D. Minn. 2011); *Wages v. Stuart Mgmt. Corp.*, 21 F. Supp. 3d 985, 993 (D. Minn. 2014), amended, 012CV02905PAMSER, 2014 WL 12781226 (D. Minn. July 1, 2014), order corrected, 12-CV-2905 (PAM/SER), 2014 WL 12617427 (D. Minn. Aug. 11, 2014), and vacated and remanded, 798 F.3d 675 (8th Cir. 2015), and aff'd, 798 F.3d 675 (8th Cir. 2015). A plaintiff can support multiple claims in conjunction with MPLA claims. Hinrichs-Cady, 943 N.W.2d at 423 (finding that the exclusivity provisions under the Minnesota Human Rights Act do not preclude claims under the Minnesota Whistleblower Act and MPLA); Hanson, 948 F. Supp. 2d at 1043 (stating that interference and retaliation claims under the MPLA can be analyzed with parallel FMLA claims). It is important that an employer understand both types of claims in order to avoid future litigation or at least be in a position to win.

Interference Claims

An interference claim is an allegation that the employer interfered with an employee's rights under the MPLA. An interference claim under the MPLA looks identical to an interference claim under the FMLA. Hanson, 948 F. Supp. 2d at 1043. To establish an interference claim, a plaintiff must prove (1) that they are eligible for leave, (2) the employer knew that the employee needed leave, and (3) that the employer interfered with the plaintiff's ability to access the leave. *Hasenwinkel v. Mosaic*, 809 F.3d 427, 432 (8th Cir. 2015). Interference includes prohibiting, restricting, or preventing an employee from utilizing rights established under the MPLA. Hanson, 948 F. Supp. 2d at 1044.

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However, an interference claim does not create strict liability. *Id.* That is to say, even if an employee requests leave and is soon thereafter terminated before they can take the requested leave, there must be some connection between the requested leave and the termination. Hanson 948 F. Supp. 2d at 1044; *Halleck v. MMSI, Inc*., A11-256, 2011 WL 4531052, at *6 (Minn. Ct. App. Oct. 3, 2011) (stating that an employee who requests leave would have no greater protection against their employment being terminated for reasons not related to their request than they did before submitting the request).

Reprisal

Like many other Minnesota civil rights statutes, the MPLA contains an anti-reprisal provision. Minn. Stat. § 181.941 subd. 3; Minn. Stat. § 181.9413 (h). While reprisal and retaliation are not defined by the MPLA, Courts have looked to the Minnesota Human Rights Act and the Minnesota Whistleblower Act for structuring and analyzing claims. *Gangnon v. Park Nicollet Methodist Hosp*., 771 F. Supp. 2d 1049, 1054 (D. Minn. 2011). For MPLA reprisal claims, courts utilize the McDonnell Douglas burden shifting test. *Id.* Under the burden shifting test, plaintiffs have the initial burden of establishing (1) that they engaged in a protected activity under the Act, (2) that they experienced an adverse employment action, and (3) that there is a causal connection between the protected activity and the adverse employment action. *Id.* (citing *Hubbard v. United Press Intern., Inc*., 330 N.W.2d 428, 444 (Minn.1983). The burden then shifts to the employer to establish that there is a legitimate reason for the adverse employment action. *Id.* If the employer states a legitimate reason for termination, then the burden shifts back to the employee to show that the stated reason for termination is mere pretext for retaliation. Gangnon, 771 F. Supp. 2d at 1054.

While the MPLA states that an employee cannot be terminated for taking protected leave, an employee can still be terminated for other reasons, such as excessive absenteeism beyond the protected leave. See *Id.* (finding that there was not a causal connection when the employee already had excessive absenteeism before her protected leave and when she continued to not report for work after the protected leave was over).

Damages

An employee may bring a civil action alleging either type of claim under the MPLA. Minn. Stat. § 181.944. An employee may recover any and all damages recoverable at law, together with costs and disbursements, including reasonable attorney's fees, and may receive injunctive and other equitable relief as determined by a court. *Id.* Damages awarded by a jury applying the MPLA can easily reach $200,000. See *McVey v. Morrie's 394 Hyundai, LLC*, 2020 WL 7258143, at *1 (Minn. Dist. Ct.). Attorney's fees and costs are calculated using the Lodestar analysis which is calculated based on the number of reasonable hours billed multiplied by a reasonable billing rate. *Vosdingh v. Qwest Dex, Inc*., CIV. 03-4284 ADM/AJB, 2005 WL 2290255, at *2 (D. Minn. Sept. 19, 2005).

FUTURE OF THE MPLA AND RELATED LITIGATION

While the MPLA has been around in some version or another since 1987, there are still many areas of the Act that have not been addressed by Courts. There are still potential areas for development in the law or upcoming changes including (1) determining how remote work will impact who is considered a covered employer with 21 employees at a site, (2) an application of remote work when an employee needs to stay home to care for a relative, (3) potential legislative changes to make protected leave paid, and (4) the utilization of MPLA liability to support other claims.

First, one area of future development is the scope of what it means to have 21 employees at a location under the MPLA. With recent developments in office trends, we are seeing more and more workplaces go partially or entirely remote. Courts have not yet addressed how to calculate remote or transient workers into the consideration of 21 employees at a single location under the MPLA. Because of the amount of litigation, it is expected that the WARN Act may address the calculation of fully remote workers before it is addressed in relation to the MPLA. While the WARN Act determination will not be binding on an interpretation under the MPLA, it is very possible that Courts may look to the WARN Act for assistance, so it may be something good to monitor.

Another consideration that may need to be addressed either through legislative action or through the courts is the application of remote working to MPLA leave. Although not all jobs can be completed remotely, it may be prudent for an employer to establish policies for when an eligible employee can work remotely. It is important that any remote policy does not infringe on an employee's rights that are established under the MPLA.

Third, there may also be legislative changes that will affect the Minnesota parental leave system. Minnesota DFL legislators, with the support of the Governor, have proposed creating a paid state sick and parental leave system that would pay employees for up to twelve weeks of leave that is covered by the MPLA. A pending version of the bill is in the Senate as SF 1205 and in the House as HF 1200. As of February 2022, Governor Walz has proposed including a twelve-week paid family leave program through the State of Minnesota as part of a large government benefits bill that would utilize some of the state's budget surplus. The pending bills propose creating a system similar to unemployment insurance that would take a small portion

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of employees' paychecks each month and put it toward the government protection system.

Finally, as plaintiffs' attorneys get more and more creative, it is possible that plaintiffs will attempt to utilize protections established in the MPLA to support other claims. See e.g. *Henry v. Indep. Sch. Dist. #625*, 964 N.W.2d 667, 675 (Minn. Ct. App. 2021), review granted (Oct. 19, 2021) (using circumstantial evidence of a hostile work environment claim to support a wrongful termination claim). This has already been seen in limited circumstances. See Polley, 478 N.W.2d at 779 (reversing a Minnesota Commissioner's determination that an employee did not have good cause to quit her employment when her employer violated the MPLA and, therefore, finding an employee eligible for unemployment benefits).

TAKEAWAYS FOR GOVERNMENT ENTITIES AND OTHER EMPLOYERS

The MPLA is an unforgiving statute for government entities and other employers. Beyond the civil remedy route, if an employee complains that an employer is violating the MPLA, employers may also be subject to investigation by the Division of Labor Standards and Apprenticeship. Minn. Stat. § 181.9435. The obligations of the MPLA apply to employers whether or not employees even know about the MPLA protections. Hansen, 813 N.W.2d at 916. Therefore, it is paramount that employers are aware of their responsibilities under the MPLA.

There are some reasonable policies that employers can establish before an employee requests MPLA leave including (1) determining how paid time off interacts with MPLA leave, (2) creating a process for employees to provide as much notice as possible when the employee thinks they may need leave for a protected activity, and (3) creating a remote-work policy that allows for MPLA leave. If an employer is considering a reduction in force or a termination that would impact an employee who has recently taken protected leave or requested leave, documentation of the reason for termination is critical for supporting a termination. While it may be impossible to avoid all litigation, knowledge about the applicable statutes and establishing employer policies that take into consideration the requirements of the MPLA are the best ways to avoid liability.

NAVIGATING THE CHANGES TO THE RULES GOVERNING MILLER-SHUGART SETTLEMENT AGREEMENTS IN MINNESOTA

By Beth A. Prouty, Arthur Chapman Kettering Smetak & Pikala, P.A.
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When it comes to liability insurance, the insurer is generally in control of settlement decisions. Liability insurance policies typically grant the insurer the right to settle a claim or suit against its insured and contain cooperation and voluntary payment clauses that preclude an insured from making settlement decisions on their own. For 40 years, however, the Minnesota Supreme Court has recognized a narrow exception to this general rule. In *Miller v. Shugart*, the supreme court approved a settlement method that protects an insured defendant when an insurer disputes the existence of any insurance coverage for the claims or suit against its insured. 316 N.W.2d 729, 733-34 (Minn. 1982). In these cases, a claimant and an insured can stipulate to a judgment against the insured on the condition that the insured be released from any personal liability and the judgment be collected only from the insurer.

Since being approved in Minnesota, *Miller-Shugart* settlements have been scrutinized under a unique set of rules. In general, to be enforceable against an insurer, a *Miller-Shugart* settlement not only has be covered under the insurer's policy, but it also has to be reasonable and not the product of fraud or collusion. In addition, it has long been understood that to be enforceable such settlements must allocate damages by defendant when multiple defendants are involved, see *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 331 (Minn. 1993), and allocate by damage item in cases of a single defendant when covered and uncovered damages are involved, see *Corn Plus Co-op. v. Cont'l Cas. Co.*, 516 F.3d 674, 681 (8th Cir. 2008). With the Minnesota Supreme Court's recent decision in *King's Cove Marina, LLC v. Lambert Com. Constr. LLC*, 958 N.W.2d 310 (Minn. 2021), however, allocation between covered and uncovered claims when there is a single defendant is no longer required.

In this article, we discuss the purpose and logistics of *Miller-Shugart* settlements, the facts that led to the Minnesota Supreme Court's decision in *King's Cove*, the supreme court's new two-step inquiry for determining the reasonableness of an unallocated *Miller-Shugart* settlement, and what the change means for using these settlements going forward.

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THE PURPOSE AND LOGISTICS OF *MILLER-SHUGART* SETTLEMENTS

Miller-Shugart settlements are only permitted when an insurer denies coverage of all claims—or reserves its rights on all claims alleged against the insured. If an insurer denies coverage, an insured can enter a *Miller-Shugart* settlement without providing any notice to the insurer. If an insurer defends while reserving rights on coverage for all claims, however, an insured must provide notice to the insurer before entering into a *Miller-Shugart*.

Under a *Miller-Shugart* settlement, an insured defendant admits liability and stipulates to the entry of a judgment for a specific amount on condition that the judgment is collectible only from the insurer. Liability is then established, and the plaintiff can pursue collection from the insured defendant's insurer by garnishment or in a separate declaratory judgment action. In either proceeding, the insurer may challenge not only the scope of coverage under the insurance policy, but also the validity and reasonableness of the settlement. See *Alton M. Johnson Co. v. M.A.I. Co.*, 463 N.W.2d 277, 279 (Minn. 1990). A *Miller-Shugart* settlement is only enforceable against the insurer to the extent it is covered, reasonable, and not the product of fraud or collusion. See Miller, 316 N.W.2d at 733-35.

A plaintiff seeking to enforce a *Miller-Shugart* settlement must first establish that it is a settlement of covered claims. "[I]f there is found to be no coverage for the *Miller-Shugart* judgment, that ends the matter; there is no recovery against the insurer and the reasonableness of the settlement becomes a moot issue." Alton M. Johnson, 463 N.W.2d at 279. To establish coverage, the plaintiff must do more than cite the allegations in the underlying complaint or the stipulated facts recited in the *Miller-Shugart* settlement. There must be actual facts that establish coverage for some or all of the claims—and only those claims are covered. *Nelson v. Amer. Home Assur. Co.*, 824 F. Supp. 2d 909 (D. Minn. 2011), aff'd, 702 F.3d 1038 (8th Cir. 2012).

A plaintiff seeking to enforce a *Miller-Shugart* settlement also has the burden to prove the settlement was reasonable and prudent. Miller, 316 N.W.2d at 735. Reasonableness is a question of fact for the district court. Alton M. Johnson Co., 463 N.W.2d at 279. Reasonableness is not linked directly to what a jury would have decided, but rather to "whether the [tortfeasor] could have been liable for" the amount of the settlement considering liability risks and damage uncertainty. *Osgood v. Medical, Inc.*, 415 N.W.2d 896, 903 (Minn. App. 1987). The rough guide is whether a settlement figure is "what a reasonably prudent person in the position of the defendant would have settled for on the merits of plaintiff's claim." Miller, 316 N.W.2d at 735.

A *Miller-Shugart* settlement is not binding on the insurer if obtained through fraud or collusion. See Miller, 316 N.W2d at 734. In Miller, the Minnesota Supreme Court recognized the possible collusion that can occur in a *Miller-Shugart* settlement because there is no incentive for the insured to negotiate any terms favorable to the insurer, and the adversity between the plaintiff and insured in a sense disappears in the face of the mutual goal of shifting all exposure to a liability insurer. See id. at 735. The "dynamics of *Miller-Shugart* settlements make [the] settlement amount more suspect than in other consent settlements because a defendant with little to lose may agree to an inflated judgment amount in order to avoid personal liability." *Indep. Sch. Dist. No. 197 v. Accident & Cas. Ins. of Winterthur*, 525 N.W.2d 600, 607 (Minn. App. 1995), rev. denied (Minn. April 27, 1995).

If coverage does not exist, the plaintiff recovers nothing. If coverage exists but the stipulated judgment amount is invalid or unreasonable, then the settlement is unenforceable and the plaintiff's initial tort action against the insured is reinstated. Alton M. Johnson Co., 463 N.W.2d at 279-280. That is, unless the plaintiff waives reinstatement of its claims against the insured defendant as part of the *Miller-Shugart* settlement. See *Corn Plus*, 516 F.3d at 681 (declining to reinstate litigation underlying unreasonable *Miller-Shugart* settlement based on plaintiff's express waiver of reinstatement as part of the settlement).

Historically, in cases with multiple defendants and/or multiple claims, courts have held that a *Miller-Shugart* settlement must allocate stipulated damages among multiple defendants and/or between covered and non-covered claims to be reasonable. See e.g., *Bob Useldinger & Sons*, 505 N.W.2d at 331 (requiring allocation among multiple defendants); *Corn Plus*, 516 F.3d at 681 (requiring allocation between covered and uncovered claims); *Ebenezer Soc. v. Dryvit Systems, Inc.*, 453 N.W.2d 545, 549 (Minn. App. 1990) (finding no probable cause to hold insurers liable for potentially covered damages because there was no allocation in *Miller-Shugart* settlement for covered and non-covered items of damages).

Until the Minnesota Supreme Court's recent decision in King's Cove, the Eighth Circuit's decision in *Corn Plus* was the leading allocation case in Minnesota. In *Corn Plus*, a cooperative alleged a contractor performed faulty welding work on the cooperative's ethanol facility, resulting in decreased ethanol production, the need to repair the defective welds, and loss of use while the welds were being repaired. 516 F.3d at 676. After the contractor's insurers denied coverage, the cooperative and contractor entered into a *Miller-Shugart* settlement that did not itemize/allocate the damages being settled. *Id.* at 677. The district court and Eighth Circuit held the *Miller-Shugart* settlement was unreasonable and thus unenforceable because it failed to allocate damages. *Id.* at 678, 681. In so holding, the court noted "[a]bsent such allocation, a judicial determination into the reasonableness of the *Miller-Shugart* settlement is

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impractical since the parties are naturally in a better position to calculate the damages." *Id.* at 681. "Moreover, parties would also be tempted to inflate their covered claims post hoc if they were permitted to designate a settlement amount without damage allocation." *Id.*

In *King's Cove*, the Minnesota Supreme Court rejected the *Corn Plus* allocation rule and instead held that a *Miller-Shugart* settlement agreement with a single insured defendant is not per se unreasonable if it fails to allocate between covered and uncovered claims. The supreme court instead established a detailed two-step inquiry for courts to follow when scrutinizing the reasonableness of unallocated *Miller-Shugart* settlements.

KING'S COVE

In *King's Cove*, the King's Cove Marina hired Lambert Commercial Construction LLC to expand and remodel the main building of the marina. Lambert performed certain work itself and hired Roehl Construction, Inc. to perform certain other work. During the course of the construction project, a number of issues arose with the work of Lambert and Roehl, including water intrusion issues that led to damage to interior finishes that were not part of the work. King's Cove ultimately sued Lambert and others for breach of contract and negligence.

Lambert tendered the defense of the lawsuit to its liability insurer United Fire & Casualty Company, who denied coverage for the claims but defended Lambert under a reservation of rights. United Fire also started a separate declaratory judgment action. After notifying United Fire, King's Cove and Lambert settled pursuant to a *Miller-Shugart* settlement agreement, whereby Lambert stipulated to a judgment against it for the sum of $2 million, plus interest and costs, and King's Cove agreed to enforce the judgment against only United Fire. The agreement reserved any claims and damages that King's Cove had for the work of others, including the work of Roehl Construction.

The district court approved the *Miller-Shugart* settlement and allowed King's Cove to proceed against United Fire. In defense of the garnishment proceeding, United Fire denied coverage and asserted the *Miller-Shugart* settlement was unreasonable both overall and because it failed to allocate damages between covered and uncovered claims. The district court ruled in favor of King's Cove, concluding that there was insurance coverage under the United Fire policies for the entire settlement and that the settlement was reasonable in light of Lambert's potential exposure.

Both sides appealed, and the court of appeals reversed and remanded. See generally *King's Cove Marina, LLC v. Lambert Com. Constr. LLC*, 937 N.W.2d 458 (Minn. App. 2019). The court of appeals initially concluded that the district court erred in its coverage determination by failing to distinguish between damages associated with repairing or replacing Lambert's faulty work, which were barred from coverage by the "your work" exclusion, and damages to other property, which, if proven, would be covered. *Id.* at 468-69. Because King's Cove's claims and damages were at best only partially covered, the court of appeals further concluded the *Miller-Shugart* agreement was "unreasonable as a matter of law and unenforceable" against United Fire because it did not allocate between covered and uncovered damages. *Id.* at 470.

King's Cove again appealed, and the Minnesota Supreme Court affirmed in part, reversed in part, and remanded the case to the court of appeals for further proceedings. 958 N.W.2d at 313.

The Minnesota Supreme Court first affirmed the court of appeals' application of the "your work" exclusion to bar coverage for damages associated with repairing or replacing Lambert's own work. *Id.* at 320. The exclusion applied to exclude coverage for "'property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'" *Id.* While not the most-talked about part of the King's Cove decision, the supreme court's clear application of the "your work" exclusion to bar coverage for a large portion of the claimed damages is an important part of the decision. The court characterized the exclusion as a "business-risk exclusion" designed to "exclude coverage for property damage caused by the insured's faulty workmanship where the damages claimed are the cost of correcting the work itself." *Id.* at 316-17 (quotations omitted). Consistent with its purpose, the court expressly held that the language of the exclusion was clear and unambiguous and that it plainly barred coverage for the claimed property damage to Lambert's own work, notwithstanding the products-completed operations hazard. *Id.* at 318.

All of the claims involving Lambert's work were included in the "products-completed operations hazard" ("PCOH") definition because the property damage occurred away from Lambert's premises and arose out of Lambert's work after the work was completed. *Id.* In seeking to collect on the judgment, King's Cove argued that all of the claims settled in the *Miller-Shugart* settlement were covered claims. King's Cove referenced the separate "Products Completed Operations Aggregate Limit" in the Declarations Page and argued that the limit was separate coverage not subject to any of the exclusions within the CGL Policy. *Id.* at 318-19. In other words, King's Cove argued that because the damages for Lambert's work fell within the definition of "products-completed operations hazard," there was up to $2 million in coverage for those claims and the exclusions to Coverage A did not apply. *Id.*

The Minnesota Supreme Court rejected King's Cove's argument. It concluded that the PCOH limit is merely a

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"different applicable limit" of coverage and remains subject to exclusions in the Policy. *Id.* at 319-20. Further, application of exclusion l. to work within the definition of "products completed operations hazard" did not make the policy ambiguous or render coverage illusory. *Id.* at 320. The court concluded that application of the "your work" exclusion "is consistent with the general purpose of a commercial general liability policy, which is intended to protect the insured when its work damages someone else's property and is not intended to be a performance bond covering an insured's own work." *Id.* (quotations omitted).

Once it determined that damage to Lambert's roof and siding work was not covered but that damage to existing property adjacent to the work would, if proven, be covered, the Minnesota Supreme Court proceeded to consider the reasonableness of the unallocated *Miller-Shugart* settlement between King's Cove and Lambert. As a threshold matter, the court rejected a per-se rule that *Miller-Shugart* settlements involving a single defendant are unreasonable and unenforceable if they fail to allocate between covered and uncovered claims. *Id.* at 320, 322. The court reasoned that the test for reasonableness should instead be a "flexible one, grounded in principles of equity." *Id.* at 322.

The Minnesota Supreme Court also recognized that "[t]he issue of how much of the settlement is covered is distinct from the issue of whether a settlement is reasonable." *Id.* at 323 (quoting *Jostens, Inc. v. CNA Ins./Cont'l Cas. Co.*, 403 N.W.2d 625, 629 (Minn. 1987), overruled on other grounds by *N. States Power Co. v. Fid. & Cas. Co. of N.Y.*, 523 N.W.2d 657 (Minn. 1994)). The supreme court thus held that the reasonableness of unallocated *Miller-Shugart* settlements should be determined post-hoc under the following two-step inquiry:

The district court first considers the overall reasonableness of the settlement. If the settlement is reasonable, the district court then considers how a reasonable person in the position of the insured would have valued and allocated the covered and uncovered claims at the time of the settlement.

958 N.W.2d at 323. Despite calling the approach a two-step inquiry, the court acknowledged: "[b]ecause the relevant evidence on reasonableness and allocation overlaps, we contemplate that the district court typically will consider the reasonableness and allocation issues at the same time. If the district court finds that the unallocated settlement is reasonable, the district court then makes an allocation ruling in light of the ultimate coverage determination." *Id.* at 324.

The plaintiff judgment creditor bears the burden of showing that "the settlement is reasonable and prudent"—i.e., "what a reasonably prudent person in the position of the defendant would have settled for on the merits" of the plaintiff's claims at the time of the settlement. Miller, 316 N.W.2d at 735. This is a multi-factor objective test, which requires the district court to consider "the customary evidence on liability and damages," as well as the risks of going to trial, "the likelihood of favorable or unfavorable rulings on legal defenses and evidentiary issues if the tort action had been tried," expert legal opinions, and "other factors of forensic significance." Alton M. Johnson, 463 N.W.2d at 279. The reasonableness inquiry must consider the value of both the covered and uncovered claims.

If the overall settlement is reasonable, the district court must then consider allocation—i.e., how a reasonable person in the position of the insured would have valued and allocated the covered and uncovered claims at the time of the settlement—as it does in other contexts. *King's Cove*, 958 N.W.2d at 323-24 (citing *UnitedHealth Grp. Inc. v. Exec. Risk Specialty Ins. Co.*, 870 F.3d 856, 863 (8th Cir. 2017)). Following *King's Cove*, allocation in the *Miller-Shugart* settlement context will now be handled similarly to how it is handled in the context of arbitration awards, jury verdicts, and non-*Miller-Shugart* settlements. See *id.* (citing *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 618 (Minn. 2012) (allocating arbitration award); *RSUI Indem. Co. v. New Horizon Kids Quest, Inc.*, 933 F.3d 960, 966 (8th Cir. 2019) (applying allocation analysis in *Remodeling Dimensions* to an unallocated jury award); *UnitedHealth Grp.*, 870 F.3d at 863 (adopting a similar allocation test in a dispute over coverage for settlements under professional liability excess insurance policies).

As with the overall reasonableness inquiry, the Minnesota Supreme Court recognized the plaintiff judgment creditor bears the burden of proof on allocation, in part because they are in the better position to know how the settling parties valued the claims and to shape the record on that issue. *Id.* at 325. "The allocation issue relates to the relative value of covered and uncovered claims. 'An allocation is, by its very nature, a determination of the relative value—not the absolute value—of the items being assessed.'" *Id.* at 323 (quoting *UnitedHealth Grp. Inc. v. Columbia Cas. Co.*, 47 F. Supp. 3d 863, 877 (D. Minn. 2014) (italics in original)). "The relevant evidence regarding allocation may include (1) information that was available to the parties at the time of the settlement regarding the underlying facts, (2) materials produced in discovery and any court rulings in the underlying litigation, (3) evidence of how the parties and their attorneys evaluated the claims at the time of the settlement, and (4) expert testimony about the value of the settled claims." *Id.* at 324.

On remand, the court of appeals declined to consider the reasonableness of the unallocated *Miller-Shugart* settlement and instead remanded the case to the district court for further analysis in light of the supreme court's new, two-step reasonableness inquiry. *King's Cove Marina, LLC v. Lambert Com. Constr. LLC*, 2021 WL 4259025, at *4 (Minn.

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Ct. App. Sept. 20, 2021). As of this writing, no further proceedings have taken place since the court of appeals' remand decision.

MILLER-SHUGART SETTLEMENT DYNAMICS AFTER *KING'S COVE*

The Minnesota Supreme Court's rejection of a bright-line rule requiring contemporaneous allocation will likely lead to increased costs, litigation, and uncertainty over the reasonableness of *Miller-Shugart* settlements involving covered and uncovered damages. If the parties to a *Miller-Shugart* settlement define and allocate the claims and damages being settled and a court subsequently determines that some claims and damages are covered while others are not, the court can efficiently and without further litigation apply its coverage determination to the settlement and bring the case to a close. On the other hand, under the new rule that allows and even encourages lump-sum settlements and post-settlement allocation, the potential for increased litigation is obvious. Following a district court's coverage determination, additional and potentially extensive proceedings—often requiring the need for expert opinions—will be necessary to allocate the lump-sum, unallocated settlement.

To avoid protracted after-the-fact litigation, the parties to a *Miller-Shugart* settlement may still want to specify and allocate the damages being settled up front instead of fully deferring the issue of allocation for post-settlement proceedings. In addition to streamlining the collection process, contemporaneous allocation may put the plaintiff judgment creditor in a better position to establish and collect the covered portion of a *Miller-Shugart* settlement. The plaintiff judgment creditor will ultimately bear the burden of proof on allocation, and what better evidence could there be of "how the parties and their attorneys evaluated the claims at the time of the settlement" than a contemporaneous allocation of the claims and damages being settled and for what amount? See *King's Cove*, 958 N.W.2d at 324 ("Events and circumstances happening after settlement are relevant only insofar as they inform how a reasonable party would have valued and allocated the claims at the time of settlement."); In re *RFC & ResCap Liquidating Tr. Action*, 399 F. Supp. 3d 804, 813 (D. Minn. 2019) ("An objective analysis of good faith and reasonableness, in turn, requires an analysis of what the parties knew or could have known at the time of the settlement; knowledge obtained years later, of new facts or new law, cannot inform the reasonableness of the settlement at the time it was made.") (citing Miller, 316 N.W.2d at 735).

This is not to say the parties to a *Miller-Shugart* settlement need to delve into what claims and damages might or might not be covered. In rejecting a per-se allocation rule, the Minnesota Supreme Court suggested "requiring allocation between covered and uncovered claims may unfairly burden the settling parties with predicting how the court in the garnishment action may resolve complex coverage issues." *King's Cove*, 958 N.W.2d at 322 (quotation omitted). But no such prediction is necessary. The purpose of a *Miller-Shugart* settlement is to fully resolve the liability claims against the insured and preserve any issues of coverage for subsequent resolution. Just as with an arbitration award, jury verdict, or non-*Miller-Shugart* settlement, however, the parties to a *Miller-Shugart* settlement may still be well-served to include a breakdown of the claims and damages being settled to which the court can then apply its coverage determinations.

The two-step reasonableness inquiry adopted in King's Cove also makes clear that in a case with covered and uncovered claims, the overall *Miller-Shugart* settlement amount must be for all of the claims, not just the covered ones. In *King's Cove*, King's Cove argued it was entitled to recover the entire $2 million stipulation judgment (which just happened to be equal to the combined limits of the United Fire Policies) from United Fire regardless of whether certain of its claimed damages were not covered. It urged the court to evaluate the reasonableness of the settlement "in light of the value of the covered damages claims" and enforce the settlement "if the value of the covered claim exceeds the value of the settlement." See *King's Cove*, 958 N.W.2d at 323. But, as explained by the Minnesota Supreme Court, "the issue of how much of the settlement is covered is distinct from the issue of whether a settlement is reasonable." *Id.* (quoting Jostens, 403 N.W.2d at 629). In a post-King's Cove world, the judgment creditor may have increased control over allocating damages to only the covered claims and minimizing damages for the non-covered claims. However, since a *Miller-Shugart* settlement resolves all claims against an insured defendant irrespective of coverage, a plaintiff judgment creditor should still only be able to recover the entire settlement amount if a court concludes all claims are fully covered.

The supreme court's analysis in *King's Cov*e also suggests allocation will still be required in multiple defendant cases. See *id.* at 322. In fact, in rejecting a per-se rule in single defendant cases involving covered and uncovered claims, the court expressly distinguished its prior holding in *Bob Useldinger & Sons* that a *Miller-Shugart* agreement that did not allocate damages among multiple defendants was unenforceable as a matter of law. *Id.*

The multiple-defendant rule was recently raised, in the only known *Miller-Shugart* appeal since the *King's Cove* decision, but not ultimately addressed by the court of appeals due to the facts and procedural history of the case. See *Bella Vista Condo. Ass'n v. Western Nat'l Mut. Ins. Co*., 2021 WL 4145005 (Minn. App. Sept. 13, 2021). In Bella Vista, the plaintiff executed an "Assignment of Claim under *Miller v. Shugart*"

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with a defendant contractor after the plaintiff obtained a default judgment against the settling defendant and others jointly and severally. *Id.* at *1. The district court concluded the agreement's failure to properly allocate rendered it per se unreasonable and unenforceable, but the court of appeals reversed. *Id.* at *2-3. The court of appeals held the agreement was not a true *Miller-Shugart* settlement because it involved a default judgment instead of a stipulated judgment. *Id.* at *3. The court of appeals added, however, that even if the agreement had been a valid *Miller-Shugart*, the court of appeals still would have had to remand the case for application of the new two-step reasonableness inquiry created in *King's Cove*. *Id.* at *3 n. 4.

CONCLUSION

The Minnesota Supreme Court's decision in *King's Cov*e changed the rules governing *Miller-Shugart* settlement agreements in cases involving a single defendant. Upfront allocation between covered and uncovered claims is no longer required for such agreements to be enforceable. This change may give plaintiff judgment creditors an increased ability to maximize coverage for *Miller-Shugart* settlements. But that does not mean lump-sum settlements in cases involving covered and uncovered damages will or should become the norm. Considering the increased costs, litigation, and uncertainty they may face, the parties to a *Miller-Shugart* settlement may still want to specify and allocate the damages being settled up front instead of fully deferring the issue of allocation for post-settlement proceedings. Only time will tell how settling parties handle *Miller-Shugart* settlements under the relaxed rules.

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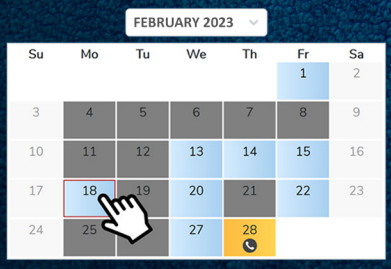

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By Jessica Schwie
Kennedy & Graven, Chtd
MDLA DRI State Representative

It is has been great working with, and seeing, many of you who participated in DRI's 2022 Civil Rights and Governmental Tort Liability Seminar at the Minneapolis Marriott City Center April 6-8, 2022. If you are interested in learning more about the event and materials, please visit www.dri.org. In getting ready for that event and MidWinter, I worked with MDLA's executive director and DRI to update our joint and respective contact lists. If you have been missing communications from MDLA or DRI, please reach out and help us to update our lists.

I and members of the MDLA Board further developed our leadership skills by attending DRI's North Central Regional meeting at the Houston Hyatt Regency March 23-25, 2022. Information on law firm security, trending legislative reforms of the civil justice system, and the effects of the great retirement and resignation as well as others were discussed. We are planning to share the acquired information in MDLA's law firm management committee meetings as well as with the legislative committee.

DRI's Annual Employment & Labor Law Seminar was held in May in Colorado and in conjunction with the Diversity Seminar. Following close behind was the Life, Health, Disability and ERISA Seminar in Nashville.

Finally, do not forget that DRI, just like Westlaw or Google, can be one of your go-to places for legal research. LegalPoint (formerly DRI Online) is a members-only service providing DRI members with exclusive access to a vast online library of DRI articles, books, and materials. Members can search thousands of documents and filter them by practice area and resource. LegalPoint includes content from:

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MDLA CONGRATULATES—SEND US YOUR VICTORIES!

The "MDLA Congratulates" column recognizes significant defense victories at summary judgment, trial, or appeal by MDLA members. To be included in the next edition, send a short, one-paragraph summary of the case including the MDLA member attorneys involved, the type of victory, and the issues presented to jmulder@bassford.com, areisbord@bassford.com or director@mdla.org by September 12, 2022. Inclusion in the MDLA Congratulates column is subject to space limitations, and the MDLA Editorial Committee reserves the discretion to determine which cases will be included in the column and/or to shorten submissions as appropriate.

CHRISTOPHER MALONE AND CVMM WIN DIRECTED VERDICT IN PERSONAL INJURY CASE.

Christopher Malone defended his client from claims that it was negligent with regards to the safety of its employee while working at Hawkins Chemical. After testimony from many fact witnesses and two expert witnesses, the judge ruled that CVMM's client was not negligent as a matter of law because Hawkins Chemical had the sole ability to control the worksite and warn of any potential hazards. The jury proceeded to find liability against the remaining defendant, Hawkins Chemical, and awarded over $2.2 million for the plaintiff's personal injuries.

March 14-17, 2022

Verdict: Defense verdict on immunity.

SHAREHOLDER MEAGHAN BRYAN, ASSOCIATE PETER LINDBERG, AND CVMM WIN DEFENSE VERDICT ON OFFICIAL IMMUNITY IN PERSONAL INJURY CASE.

Shareholder Meaghan Bryan and attorney Peter Lindberg were proud to defend a former Minnesota State Patrol Trooper who was involved in a motor vehicle accident when he entered an intersection against a red light and collided with another vehicle, allegedly causing the death of one of the vehicle's occupants. Before trial, Bryan filed a motion for summary judgment on official immunity grounds, which was denied because there was a factual dispute over whether the Trooper sounded his siren prior to entering the intersection. The matter proceeded to a jury trial in Ramsey County, and, after testimony from many fact witnesses and two expert witnesses, the jury found that the Trooper had sounded his siren before entering the intersection; and he and the State of Minnesota were immune from liability.

May 23-26, 2022

Verdict: Directed verdict for third-party defendant on day four of trial.

CECILIE LOIDOLT AND CHRISTINE CHAMBERS WIN TWO MEDICAL MALPRACTICE TRIALS.

In the first, the case alleged a pain specialist was negligent for the over-prescription of opioid medications leading to addiction over the course of 23 years. Plaintiffs' counsel requested a verdict in excess of $8 million. This is the first trial of its kind in Minnesota in which a physician has been sued for prescribing opioid medication, and allegedly causing addiction in the patient. An interesting highlight is that the defendant was located in Hong Kong during the trial due to COVID. He attended the trial and testified via Zoom.

May 16–25, 2022

Verdict: Defense verdict

In the second, the plaintiffs alleged that the anesthesia team was negligent for failure to evaluate limited neck extension and for negligent intubation during low back surgery, resulting in massive disc herniation at C5-C6, and paralysis. Plaintiffs' counsel requested a verdict in excess of $12 million.

February 14–28, 2022

Verdict: Defense verdict

DAVID CAMAROTTO, TAL BAKKE, BASSFORD REMELE, OBTAIN JURY DEFENSE VERDICT IN PERSONAL INJURY CASE

Bassford Remele Shareholder David Camarotto and Attorney Tal Bakke obtained a defense verdict in a personal injury jury trial venued in Swift County District Court. Plaintiffs alleged that the firm's client, a regional propane service provider, negligently performed service work at a residential property, resulting in a propane explosion approximately eight years later. Plaintiffs asserted claims of personal injury, lost income, and loss of consortium, and sought damages in excess of $13 million dollars. The jury made a finding of no liability, returned a verdict in favor of Bassford's client on all counts, and further awarded Plaintiffs $0 in damages.

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