JARDINE LOGAN & O'BRIEN P.L.L.P.
ATTORNEYS AT LAW

651.290.6500

8519 Eagle Point Boulevard, Suite 100
Lake Elmo, Minnesota 55042
info@jlolaw.com

JLO Newsletter June 2017

Firm Successfully Obtains Multiple Dismissals

Ariola v. City of Stillwater

The Minnesota Court of Appeals in *Ariola v. City of Stillwater*, 889 N.W.2d 340 (Minn. Ct. App. 2017), *review denied* (Minn. Apr. 18, 2017) affirmed summary judgment dismissal of a wrongful death claim on the basis of recreational immunity. **Pierre N. Regnier** and **Jessica E. Schwie** successfully argued that in order to overcome immunity actual knowledge of an artificial condition likely to cause death or serious bodily harm is required to establish the adult trespasser exception to recreational use immunity. The court agreed that in this case, while the county was aware that a lake located in the city had tested positive for naegleria fowleri (an amoeba that caused the death of a child), such knowledge by the county did not establish that the city had actual knowledge of the condition, as required under the law.

Snow v. City of Wabasha

Joseph E. Flynn, **Jessica E. Schwie**, and **Tessa M. McEllistrem** obtained dismissal of a class action lawsuit challenging payments made in conjunction with the driver safety programs established by a number of cities in *Snow v. City of Wabasha*, et al., No. 79-CV-14-223. The plaintiffs were individuals who had received traffic citations and participated in a pretrial diversion program instituted by various cities and counties across the State of Minnesota which were designed to make Minnesota roads safer while simultaneously absolving the court system of the burden of processing traffic violations. In lieu of receiving a traffic citation, the plaintiffs were offered the opportunity to participate in a driver safety class. The plaintiffs claimed that they were entitled to a refund of the money that they had paid to attend driver safety classes because the programs had been held to be improperly organized. In early motion practice, JLO first successfully limited the class action in size. Then, and ultimately, JLO obtained dismissal of the remaining class action claim of unjust enrichment. The court agreed with the cities represented by JLO that plaintiffs had benefitted from attending the classes and therefore they were not entitled to a refund.

Schill v. Pederson, et. al

Jessica E. Schwie and **Tal A. Bakke**, assisted by **Jordan Leitzke**, successfully obtained dismissal of a pro se plaintiff's 42 U.S.C. section 1983 claim against a Minnesota jail and its administration in *Schill v. Pederson, et. al*, No. 16-CV-1280 (D. Minn. Dec. 21, 2016). The Plaintiff was an inmate who alleged he had an improper relationship with a correctional officer, the jail administration failed to properly address his grievance regarding the same, and the relationship violated the United States Constitution and the Prison Rape Elimination Act. Plaintiff was separated from the correctional officer once the jail administration had learned of the allegations. The Court agreed with the jail and jail administration's arguments and dismissed the case because Plaintiff: (1) lacked standing because he could not show a threat of ongoing harm; and (2) failed to state a claim upon which relief can be granted because there is no private right of action under PREA and allegations of an improper relationship between an inmate and correctional officer, without any physical contact, are insufficient to state a claim for violations of the Eighth Amendment.

Henderson v. City of Woodbury

In *Henderson v. City of Woodbury*, 15-CV-3332 (D. Minn. Feb. 9, 2017) **Joseph E. Flynn** and **Vicki A. Hruby** obtained an order for summary judgment, dismissing the §1983 excessive force and wrongful death claims brought by Tawana Henderson against the City of Woodbury and its officers arising out of the death of her son, Mark Henderson. Henderson was shot when he burst out of a hotel room, without warning, as one or more shots were fired. Henderson and the gunshot came simultaneously from the hotel room, a room from which a gun had been pointed at an officer's head moments earlier. Henderson ran at the officers, who ordered him to stop, show his hands, and get down on the

(Continued on page 2)

(Continued from page 1)
ground. When Henderson failed to do so, the officers fired upon him, reasonably believing he posed a serious threat to themselves and others. The Court found the officers' use of deadly force was reasonable as Henderson presented an imminent threat of bodily harm and found the officers were entitled to qualified immunity.

Brinkman Claim Service, LLC v. Jeremy Korn and Pharmacists Mutual Insurance Company

In *Brinkman Claim Service, LLC v. Jeremy Korn and Pharmacists Mutual Insurance Company*, 50-CV-16-128 (D. Minn. Jan. 15, 2016) **Jason M. Hill** and **Jessica E. Schwie** recently secured a significant defense win on summary judgment. Plaintiff, an independent adjusting firm, argued that a former employee/adjuster breached non-compete and non-solicitation covenants and violated a duty of loyalty by seeking and obtaining employment with defendant insurance company. Prior to leaving plaintiff's employment, the defendant employee had adjusted claims for the insurance company. Plaintiff also claimed the insurance company tortuously interfered with its former employee's contract, claiming that it intentionally procured its breach by enticing the employee to begin working "in-house." The court found the restrictive covenants to be invalid because (1) it was undisputed that defendant employee signed the covenants after he had started working for plaintiff, and (2) the covenants were not supported by necessary independent consideration.

Even if plaintiff had presented evidence of independent consideration, the court determined its claims would fail because (1) defendant employee's right to earn a livelihood outweighs plaintiff's legitimate business interests, and (2) any loss of revenue to plaintiff's business was not caused by the employee's decision to work for the insurance company. The Court highlighted the fact that plaintiff did not have a sufficient business interest because its customers (various insurance companies) were not the same as the defendant insurance company's customers (policyholders), and therefore, there was no competition. Further, the court acknowledged the insurance company's independent business decision to hire an in-house claims adjuster and noted that the insurance company would have filled the position regardless of defendant employee's interest in the position.

The court also found no breach of the duty of loyalty. In effect, the plaintiff sought to create an implied covenant not to compete, asking the court to establish a cause of action against an employee who simply begins looking for work and interviewing with a new employer while still being employed by the old employer. The court rejected plaintiff's argument, finding that defendant employee was merely seeking a job change and that he should not be unduly hindered in that process.

Ketroser v. Asphalt Driveway Company

In *Ketroser v. Asphalt Driveway Company* 16-CV-01020 (D. Minn. April 19, 2016) **Hannah G. Felix** and **Jessica E. Schwie** of Jardine, Logan & O'Brien, P.L.L.P. obtained an order for summary judgment dismissing the federal ADA claims brought by Plaintiff David B. Ketroser against Asphalt Driveway Company of St. Paul. Ketroser alleged that (1) the handicap parking space was not located on the shortest accessible route from adjacent parking to an accessible entrance, (2) the slope of the handicap parking space and access aisle were too steep, and (3) the curb ramp did not have flared sides in violation of the ADA. In the Report and Recommendation, Magistrate Judge Mayeron held that Ketroser's status as an "ADA tester" is not sufficient to confer standing, but rather, like any plaintiff, he must demonstrate that he indeed suffered a cognizable injury in fact that will be redressed by the relief sought. Magistrate Judge Mayeron determined that Ketroser lacked standing to assert his ADA claims under Title III because (1) he failed to show any injury resulting from the alleged architectural barriers, and (2) he did not demonstrate a reasonable likelihood of returning to the premises for reasons other than to confirm whether the barriers had been removed. District Court Judge Frank adopted Magistrate Judge Mayeron's Report and Recommendation. The state law MHRA claims were remanded to Hennepin County District Court. Ketroser subsequently voluntarily dismissed the state law MHRA claims.

Newsflash

LaPoint v. Family Orthodontics, P.A., No. A15-0396, 2017 WL 1244276 (Minn. Apr. 5, 2017)

The Minnesota Supreme Court recently remanded a pregnancy-discrimination case back to the district court to determine if it would again rule in favor of the employer after applying the correct standard. The Supreme Court identified the proper standard as one that does not require a finding of animus but rather focuses on whether discrimination was a substantial factor in the employment decision. A more detailed article on this case will be included in the next newsletter.

Two Minnesota Supreme Court Workers' Compensation Decisions Result in Legislative Changes

By Keith R. Czechowicz

Are Medical Providers Required to Attend Workers' Compensation Hearings?

When an employee seeks medical treatment for an injury or condition he or she claims is the result of a work injury, medical providers—hospitals, clinics, physical therapy centers, and others—may look to the employee's workers' compensation insurer for payment of their bills. When a workers' compensation insurer disputes liability for and denies payment of these bills, the medical provider can intervene in the matter and become a party to the litigation.

Minn. Stat. § 176.361, subd. 4 traditionally required intervening medical providers to appear at conferences, hearings, and other proceedings in workers' compensation matters. This requirement was affirmed in the oft-cited case of *Sumner v. Jim Lupient Infiniti*, 865 N.W.2d 706 (Minn. 2015), in which the Minnesota Supreme Court held that the plain meaning of Minn. Stat. § 176.361, subd. 4 required intervening medical providers to attend workers' compensation proceedings. The statute provided as follows: "Failure to appear shall result in the denial of the claim for reimbursement." Minn. Stat. § 176.361, subd. 4.

The court in *Sumner* held, in essence, that § 176.361, subd. 4 means what it says, and affirmed the Workers' Compensation Court of Appeals' order denying payment to a medical provider that did not attend a hearing as required under the statute.

More recently, Jardine, Logan & O'Brien, P.L.L.P. represented the Saint Paul Public Schools in *Xayamongkhon v. ISD 625*, A16-0832 (Minn. 2017). In this case, the petitioner challenged Minn. Stat. § 176.361, subd. 4, and therefore *Sumner*, arguing that notwithstanding the statute, the petitioner should be permitted to make a direct claim for medical expenses owed to a provider that intervened, but failed to attend the workers' compensation hearing.

The Minnesota Supreme Court summarily affirmed the Workers' Compensation Court of Appeals, which reinforced the requirement that intervening medical providers attend workers' compensation proceedings.

Recent Developments

Following the court's decision in *Sumner*, the Minnesota legislature enacted significant changes to Minn. Stat. § 176.361. Effective August 1, 2016, the statute no longer requires attendance by an intervenor in workers' compensation proceedings, unless a compensation judge issues an order mandating attendance.

The legislative change to the statute effectively overturned key portions of *Sumner*. Going forward, in order for employers and insurers to obtain dismissal of intervention claims for failure to appear at key proceedings, they must file motions specifically requesting that the court require an intervenor's attendance. The statute affords judges discretion in granting or denying such motions to compel appearance, but by its terms does not impose any duty on employers and insurers to show cause or meet any legal requirements to compel attendance. If the court grants such a motion, and the intervenor still fails to appear, then the employer and insurer can move to have the intervenor dismissed consistent with the practice prior to the 2016 legislative change. Employers and insurers must file said motions at least 20 days prior to the scheduled hearing which they would compel the intervenor to attend.

When Is Post-Traumatic Stress Disorder a Compensable Work Injury?

In *Schuette v. City of Hutchinson*, 843 N.W.2d 233 (Minn. 2014), Jardine, Logan & O'Brien successfully represented the City of Hutchinson before the Minnesota Supreme Court. The court held that a claim for post-traumatic stress disorder (on its own, without a physical injury) was not compensable under Minnesota workers' compensation law. The court found in favor of the City of Hutchinson in ruling that an employee's alleged PTSD was not compensable under *Lockwood v. Indep. Sch. Dist. No. 877*, 312 N.W.2d 924 (Minn. 1981), because the employee's PTSD was deemed a mental, not physical, injury.

Subsequently, the petitioner filed a new claim petition alleging the same PTSD and ensuing physical injury, claiming that the physical injury was compensable as a "mental-physical" injury—that is, a physical injury

(Continued on page 4)

(Continued from page 3)

compensable because it was caused by a mental stimulus, pursuant to the Minnesota Supreme Court's holding in *Lockwood v. Indep. Sch. Dist. No. 877*, 312 N.W.2d 924 (Minn. 1981).

The employee's initial claim petition, filed in 2009, claimed that the alleged PTSD was compensable as a physical injury to the employee's brain; in the 2014 claim petition, the employee argued that the PTSD condition was a mental injury or stimulus, which then caused a physical injury years later.

The compensation judge denied the employee's claims in their entirety in 2015, holding that the employee's claims, already heard in 2014 by the Minnesota Supreme Court, were barred by the doctrine of *res judicata* and the statute of limitations. The judge held that because the issue of whether or not the employee's PTSD was compensable had already been fully adjudicated on the merits by the compensation judge, the Workers' Compensation Court of Appeals, and the Minnesota Supreme Court, the employee was not permitted to bring a new claim for the exact same benefits.

The Workers' Compensation Court of Appeals and the Minnesota Supreme Court affirmed the compensation judge's holding.

Subsequent Change in Law

The effect of the *Schuette* decisions was to hold that post-traumatic stress disorder was not a compensable work injury under Minnesota workers' compensation law when the condition is not found to have caused a physical injury, as opposed to mental. Given the ongoing divergence in opinions in contemporary medical literature as to whether PTSD does, in fact, cause a physical brain injury, this holding obviously had significant implications for Minnesota workers, employers, and insurers.

However, in 2013, the Minnesota legislature amended the definition of "personal injury" and "occupational disease" in Minn.Stat. § 176.011, subds. 15–16, to include "mental impairment." Minn. Stat. § 176.011, subds. 15(a), (d), 16. Mental impairment is defined as "a diagnosis of post-traumatic stress disorder." Minn. Stat. § 176.011, subd. 15(d). In other words, the 2013 amendment recognizes PTSD claims regardless of whether the PTSD manifests itself as a physical or mental injury. However, this amendment is only effective for employees whose injuries occurred on or after October 1, 2013. Art. 2, § 14(a), 2013 Minn. Laws at 377.

Thus, the victory for Minnesota employers and insurers in the *Schuette* decisions was short-lived, as work-related PTSD is now deemed compensable in workers' compensation cases pursuant to the 2013 legislative amendment. ●

Congratulations

Jardine, Logan & O'Brien, P.L.L.P. is pleased to announce that

Elisa Hatlevig and **Vicki Hruby**
have been recognized by Super Lawyers for inclusion in the *Top Women Attorneys in Minnesota* selection.

This is Elisa's fifth selection to the Rising Stars list and fourth inclusion in the Top Women Attorneys in Minnesota list. Elisa is licensed in Minnesota, Wisconsin and North Dakota and practices primarily in the areas of municipal liability defense, construction defect, premises liability and general liability defense. This is Vicki's second selection to the Rising Stars and second inclusion in the Top Women Attorneys in Minnesota list. Vicki is licensed in Minnesota and practices primarily in the areas of municipal liability defense and employment law.

About the Author

Keith R. Czechowicz
Associate
kczechowicz@jlolaw.com
651.290.6503

Keith is an associate at Jardine, Logan & O'Brien, P.L.L.P. and practices in the areas of Workers' Compensation and Civil Litigation. He received his J.D., *cum laude*, from William Mitchell College of Law.

Correction

The article "Cell Phones and Motor Vehicle Accidents" contained in the **January 2017** edition of the newsletter contained a misstatement. The sentence: "Under Minn. Stat. § 169.96(b), violation of a traffic statute establishes per se negligence if violated in a municipality and prima facie negligence if out of a municipality;" has since been changed to indicate the statute provides for prima facie negligence in both situations. We apologize for the error.

About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients. View our website at www.jlolaw.com to obtain additional information. Please call us to discuss a specific topic.

A ***referral*** is the best compliment you can give an attorney. If you know of anyone who may be interested in receiving this newsletter, please email the following information to info@jlolaw.com: Name, Company, Phone Number, and Email.

To opt out of receiving this newsletter, please reply with ***Newsletter Opt Out*** in the subject line.

Disclaimer