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 Winter 2018

SEISMIC POLICY SHIFT?

Recent Minnesota Supreme Court Decisions Mark a Change in Policy

By Lawrence M. Rocheford

Shortly after his inauguration and following a 2009 meeting with congressional republicans, President Obama was quoted as saying "elections have consequences." Closer to home, elections had, and are continuing to have, consequences. Governor Mark Dayton has appointed the following current Justices to the Minnesota Supreme Court:

> David Lillehaug (2013), Natalie Hudson (2015), Margaret Chutich (2016) and Anne McKeig (2016).

Minnesota Supreme Court, Minn. Jud. Branch, http://www.mncourts.gov/SupremeCourt.aspx (last visited Dec. 21, 2017).

In 2016, Governor Dayton appointed Wilhelmina M. Wright to the Minnesota Supreme Court. President Obama subsequently appointed Justice Wright to the federal bench so she no longer serves on the Minnesota Supreme Court.

The quartet of Lillehaug, Hudson, Chutich and McKeig has released two decisions melodic to the plaintiffs' counsel by over-ruling dismissals and remanding those significant damage cases for jury trial. The first one is a double amputee injury case concerning products liability. *See Montemayor v. Sebright Products, Inc.*, 898 N.W. 2d 623 (Minn. 2017)*; see also Montemayor v. Sebright Products, Inc.*, No. A15-1188, 2017 WL 5560180 (Minn. Ct. App. Nov. 20, 2017) (affirming in part, reversing in part, and remanding to the trial court). Second is a case concerning premises liability where a child nearly drowned and consequently sustained permanent brain injury. *See Senogles v. Carlson*, 902 N.W.2d 38 (Minn. 2017). The majority decisions in *Montemayor* and *Senogles* arguably represent a real **policy shift** by the Minnesota Supreme Court. Both decisions changed established law and held that the trial court should not decide whether there are sufficient facts to support the imposition of a duty of care. In each case, the court determined that the issue was too close, so foreseeability should be decided by the jury.

This policy shift is arguably a consequence of Governor Dayton's judicial appointments. These judicial appointments shall be Governor Dayton's legacy. In addition to appointing the majority of justices on the Minnesota Supreme Court, Governor Dayton has also appointed 12 judges to the Minnesota Court of Appeals. *See Judges Appointed by Mark Dayton*, BallotPedia, https://ballotpedia.org/Judges_appointed_by_Mark_Dayton (last visited Dec. 21, 2017). Of these 12 appointees, 10 remain on this court, including its Chief Judge. *See Minnesota Court of Appeals*, Minn. Jud. Branch, http://www.mncourts.gov/CourtOfAppeals.aspx (last visited Dec. 21, 2017). Of the 293 district or trial court judges in the state, Governor Dayton has appointed 107. *See About the Courts,* Minn. Jud. Branch., http://mncourts.gov/About-The-Courts.aspx (last visited Dec. 21, 2017)*; see also Judges Appointed by Mark Dayton, supra.* More may be coming: as of this writing, there are six vacancies in Minnesota district courts. *See Judicial Appointments*, Office of Governor Mark Dayton and Lt. Governor Tina Smith, https://mn.gov/governor/appointments/judicial-appointments/ (last visited Dec. 21, 2017).

While all judicial appointees must stand for election, Minn. Stat. § 480B.01 *et seq.* (2016), being appointed helps one get elected. Additional-

(Continued on page 2)

Welcome Sarah!

JLO welcomes **Sarah Squillace** as an associate to Jardine, Logan & O'Brien, P.L.L.P. She joined the firm in 2017 and practices in the areas of Workers' Compensation and Civil Litigation.

Sarah has 12 years experience representing employers, insurers and self-insureds in Minnesota. Experience in all aspects of workers' compensation litigation from initial filings through the Workers' Compensation Court of Appeals.

(Continued from page 1)

ly, Governor Dayton appointed the Chief Judge at the Office of Administrative Hearings, pursuant to Minnesota Statutes section 14.48, subdivision 2. The Office of Administrative Hearings decides a host of matters, including workers' compensation cases.

Legal Duty Determinations Are To Be Determined By The Trial Court

From time immemorial courts, legal scholars, law students, and trial lawyers have understood that in tort cases, the burden is on the plaintiff to bring forth enough facts to support the imposition of a duty of care on one party for the benefit of another, as follows:

> Before any duty, or any standard of conduct may be set, there must first be proof of the facts which give rise to it; and once the standard is fixed, there must be proof that the actor has departed from it . . . . [o]ver such questions of fact the courts have always reserved a preliminary power of decision, as to whether the issues shall be submitted to the jury at all. If the evidence is such that no reasonably intelligent man would accept it as sufficient to establish the existence of a fact essential to negligence, it becomes the duty of the court to remove the issue from the jury, . . . direct a verdict for the defendant, or even to set aside a verdict once rendered.

William L. Prosser, Law of Torts 205 (4th ed. 1978) (citations omitted). Dayton's quartet is intent on changing this well-established common law. Two cases demonstrate this shift away from established common law: (1) *Montemayor* and (2) *Senolges*.

Montemayor

In *Montemayor*, after the close of discovery, the manufacturer Sebright moved for full summary judgment, arguing it owed no legal duty to the plaintiff given the plaintiff's conduct and the OSHA violations and fault of the plaintiff's employer. *Montemayor,* 898 N.W.2d at 627-28. The trial court in *Montemayor* concluded that the manufacturer Seabright did not owe a duty of care to plaintiff Montemayor. *Id.* at 628. It further found that it was not reasonably foreseeable that two people would simultaneously attempt to unjam Sebright's high density extruder. *Id.* The trial court further held that plaintiff Montemayor's failure to warn claim failed on its merits because plaintiff Montemayor never read Sebright's warning in the first instance and, on the design defect claim relating to the control panel for the extruder, Montemayor's claims failed because Montemayor's employer altered the control panel after it left Seabright's control. *Id.* at 628 n. 2.

The Minnesota Court of Appeals affirmed the trial court, but the Minnesota Supreme Court granted Montemayor's Petition for Further Review on the issue of foreseeability only. *Id.* at 628.

Given the unanimity of the trial court and the court of appeals, one may rightfully question the propriety of the Minnesota Supreme Court in granting Montemayor's Petition for Review. Unlike the Minnesota Court of Appeals, which is an "error correcting" appellate court, the Minnesota Supreme Court is the highest appellate court in Minnesota and is meant to create "policy."

The *Montemayor* Supreme Court quartet wrote as follows:

> To determine foreseeability, "we look to the defendant's conduct and ask whether it was objectively reasonable to expect the specific danger causing the plaintiff's injury." "If the connection between the danger and the alleged negligent act is too remote to impose liability as a matter of public policy, the courts then hold there is no duty." We do not look to "the precise nature and manner" of the injury, but rather to "whether the possibility of an accident was clear to the person of ordinary prudence."

Id. at 629 (citations omitted). Additionally, in a footnote, the *Montemayor* majority decision states:

> "In determining whether a dispute of material fact exists, all inferences arising from the evidence must be resolved in favor of the non-moving party . . . . A case is "close" not only when the evidence presents an explicit dispute of material fact, but also when "reasonable persons might draw different conclusions from the evidence."

Id. at 623 at n. 3 (citations omitted).

In response to the quartet's opinion, writing for the minority, in a blistering dissenting opinion, Minnesota Supreme Court Chief Justice Gildea wrote as follows:

> It is not reasonable, as a matter of law, common sense, or public policy, to expect a manufacturer to foresee—absent any admissible evidence—that the safety device it installed on the machine would be disabled and that an employer would violate multiple safety regulations in using the machine. As the District Court

(Continued on page 3)

(Continued from page 2)

said, "Bad facts can lead to bad law." The facts of this case are most certainly bad, and the majority has written bad law.

Montemayor, 898 N.W.2d at 633-34 (Gildea, J., dissenting). With that vitriolic language, Chief Justice Gildea was just starting off her dissent. The dissent is powerfully written. It argues that foreseeability is not for juries to decide but is a function for the trial court. *See id.* at 634-37.

Senogles

In *Senogles* the same quartet of Dayton appointees reversed the dismissal of a trial court and reversed the affirmance of the Court of Appeals. In *Senogles*, the 4-year-old claimant wandered off during a family party on his great uncle's property and was found nearly drowned in the Mississippi River. *Senogles*, 902 N.W.2d at 40. He was revived but sustained severe brain damage. *Id.* His mother sued the premises owner, the 4-year-old's great uncle, claiming that he breached his duty of care as the land owner to his invited guest because he failed to prevent the 4-year-old's access to the Mississippi River, failed to supervise the 4-year-old, failed to have a safety plan for the many child guests, and failed to warn the 4-year-old of foreseeable dangers on his property. *Id.* at 41. At the close of discovery and on summary judgment, the trial court dismissed the plaintiff's claims on the ground that the near drowning was not foreseeable to the premises owner. *Id.* The Court of Appeals of Minnesota affirmed the dismissal but on a different ground: that the premises owner was not liable because the danger was "obvious" to the 4-year-old. *Id.*

For the quartet majority opinion, Dayton appointee Justice Lillehaug described the applicable law as follows:

> A "landowner generally has a continuing duty to use reasonable care for the safety of all entrants". . . . . A landowner is not liable to invitees when the "danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."

Id. at 42 (citations omitted). The Supreme Court's majority decision then repeatedly discussed its *Montemayor* decision and "foreseeability." The quartet majority stated the law in *Senogles* as follows:

> The landowner, is liable to . . . the guest, for harm to the guest arising from an activity or condition on the landowner's property, *except* if the danger was known or obvious to the guest unless the landowner should have anticipated the harm to the guest. In other words, was the danger of returning to the Mississippi River to swim alone known or obvious to [the landowner's] 4-year-old guest, and, even if it was, should [the landowner] have anticipated the harm to [the 4-year-old guest]?

Id. at 43. The majority then restated the issue in such a way that prompted only one answer. The majority opinion notes that the trial court never got to the issue of whether the 4-year-old knew or appreciated the danger of the river. *Id.* at 44. When it affirmed the trial court's dismissal, the Court of Appeals based its decision solely on the "obvious" nature of the hazard. *Id.* In the morning, the 4-year-old in *Senogles* had previously asked to be taken to the river by an adult. *Id.* at 45. He waited a second time for an adult to take him swimming. Earlier, when the 4-year-old had swum that day in the river, he and other children had been supervised by nearly eight adults.

The quartet indicated that the danger posed by returning to the river, as a 4 -year-old, unsupervised, was not obvious to this 4-year-old as he had already been swimming on that day, had enjoyed it, and had remained in his swimsuit all day. *Id.* at 45. Some may argue those facts are meaningless when determining the landowner's duty, if any.

The quartet went back to its refrain from *Montemayor* and stated that "the issue of foreseeability should be submitted to the jury where "reasonable persons might differ." *Id.* at 43.

Justice Anderson wrote the dissent which was joined by Chief Justice Gildea and Justice Stras. The majority opinion departed from Minnesota case law the dissent stated, in part, "the risk of the Mississippi River was obvious to an objectively reasonable child of 4-years and 8 months." *Id.* at 53 (Anderson, J., dissenting). The dissent stated the trial court did not err in finding no duty.

Looking Forward

On December 26, 2017, Governor Dayton appointee, Minnesota Court of Appeals Judge James Florey released *Henson vs. Uptown Drink, LLC*, 2017 WL 6567957 (Minn. Ct. App. December 26, 2017). In *Henson,* decedent Maxwell Henson was off duty at his place of employment, the Uptown Drink, and was fatally injured when he was helping a co-worker remove intoxicated patrons. At the trial court level, the trial court dismissed the wrongful death action, the negligent innkeeper claim, as it was barred by the decedent's primary assumption of the risk by voluntarily involving himself in the altercation

(Continued from page 3)

and dismissed the dram shop claim as the assailant's intoxication was not a proximate cause of the decedent's injury and death. Citing *Senogles*, the Court of Appeals panel ruled that the "issue of foreseeability should be submitted to the jury when reasonable persons could reach different conclusions from the evidence." *Senogles vs. Carlson*, 902 N.W.2d 38, 43 (Minn. 2017). It seems that, when faced with a dismissal motion, a plaintiff need only argue that the issue of foreseeability is a jury issue whenever "reasonable persons could reach different conclusions." Expect more dismissal motions to be denied and, when granted, expect dismissals to be overruled under *Montemayor, Senogles* and, now, *Henson*. To overcome a dismissal motion, the plaintiff need only argue that *reasonable persons could reach different conclusion.*

This quartet is not afraid to reverse a dismissal. It is clear that Dayton appointees will step in and find a fact question as to whether an accident is foreseeable. That new policy, to deny summary judgment on the issue of duty, when "reasonable persons might differ" will likely prompt trial judges to deny future no duty dismissal motions. If one is to prevail on the "no duty" argument, the moving party will clearly need experienced counsel to develop a clear record pinning down the plaintiff's theory that there are no facts—everyone agrees and admits—to support the imposition of a duty of care.

More appointments can be expected from Governor Dayton. President Trump has nominated Minnesota Supreme Court Justice David Stras to a judgeship on the United States Circuit Court of Appeals, for the Eighth Circuit. Assuming Justice Davis Stras does get appointed to the Eighth Circuit, his seat on the Minnesota Supreme Court will open, giving Governor Dayton yet another opportunity to appoint someone to the Minnesota Supreme Court. The quartet could become a quintet. ●

Case Announcements

Ugrich v. Itasca County, et. al., No. 16-1008 (D. Minn. Oct. 6, 2017)

Jessica Schwie, **Tessa McEllistrem**, and **Tal Bakke** achieved dismissal on behalf of Itasca County and the individually named Defendants in *Ugrich v. Itasca County*. The Plaintiff in Ugrich alleged he was retaliated against by the Sheriff, Chief Deputy, and his supervisor because he supported a challenger to the Sheriff in the previous election. We brought a Motion for Summary Judgment arguing Plaintiff could not establish a prima facie case of First Amendment retaliation because he could not establish that he suffered an adverse employment action. Plaintiff argued he suffered an adverse employment action because he was constructively discharged when he was purposefully excluded from a search warrant that was executed while he was serving civil process which placed him in danger. Plaintiff further argued being placed on paid administrative leave was an adverse employment action because he lost the opportunity for overtime and shift-differential pay. United States District Court of Minnesota Judge Donavan Frank rejected Plaintiff's arguments and granted our motion. Judge Frank found that one instance, 18 months prior to Plaintiff's resignation, could not form the basis of a constructive discharge claim. Further, Judge Frank found Plaintiff's claim for lost extra pay while on paid administrative leave was not an exception to the general rule that an employee placed on paid administrative leave, with pay and rank intact, does not suffer an adverse employment action.

GreenMark Solar, LLC v. Wacouta Township, No. 25-CV-17-1462, (Minn. Dist. Oct. 11, 2017)

Jessica Schwie and **Tal Bakke** achieved summary judgment on behalf of Wacouta Township in *GreenMark Solar, LLC v. Wacouta Township*. The Plaintiff alleged Wacouta Township acted arbitrarily in denying its request for a Conditional Use Permit (CUP) to establish a community solar garden within the Township boundary because Goodhue County had already approved its application for a CUP. Cross-motions for summary judgment were brought. GreenMark argued the Township acted contrary to law in applying its Zoning Ordinance because its Zoning Ordinance was inconsistent with and based on different standards than the County's Zoning Ordinance. GreenMark based its argument on the fact that the County had an Ordinance specific to its proposed project whereas the Township did not such that it was entitled to a CUP from the Township. We argued the Township's Ordinance was more restrictive than the County's, which is allowed by Minnesota Statute, and that the Township had no legal obligation to adopt an ordinance provision that is the same or more restrictive than every County ordinance provision. The Court agreed and determined the Township's Ordinance applied because it was more restrictive than the County's and the Township was not required to adopt every ordinance in place by the County. After determining the Township's Ordinance applied, the Court determined the Township appropriately denied GreenMark's application for a CUP under its applicable zoning provisions.

Notice and Remediation of Architectural Barriers in Accessibility Lawsuits

By Hannah G. Felix

The American Disability Act ("ADA"), 42 U.S.C. § 12182 and the Minnesota Human Rights Act ("MHRA") under Minnesota Statute § 363A.11, require full and equal enjoyment of public accommodations and prohibit discrimination on the basis of disability.

Accessibility lawsuits have been demanding attention as they increase in number and frequency around the state. Many businesses were forced to defend lawsuits or pay a settlement for technical violations of the ADA and MHRA that the business was unaware of. The businesses would have remedied the alleged violations to ensure full compliance and access by all customers to their business had they been notified of the alleged architectural barriers prior to being served with a lawsuit. As a result, the Minnesota legislature addressed accessibility accommodation during the 2016 and 2017 legislative sessions. The current law in place after the 2017 legislative session includes the following notice requirement in an effort to provide relief to businesses.

Minnesota Statute § 363A.331 subdivision 2:

> **Notice of architectural barrier.** (a) Before bringing a civil action under section 363A.33, a person who is an attorney or is represented by an attorney and who alleges that a business establishment or place of public accommodation has violated accessibility requirements under law must provide a notice of architectural barrier consistent with subdivision 3. The notice of architectural barrier must be dated and must:
>
> (1) cite the law alleged to be violated;
>
> (2) identify each architectural barrier that is the subject of an alleged violation and specify its location on the premises;
>
> (3) provide a reasonable time for a response, which may not be less than 60 days; and
>
> (4) comply with subdivision 3.
>
> (b) A notice described in paragraph (a) must not include a request or demand for money or an offer or agreement to accept money, but may offer to engage in settlement negotiations before litigation.
>
> (c) A civil action may not be brought before expiration of the period to respond provided in the notice under paragraph (a), clause (3). Subject to paragraph (d), a civil action may be brought after the response time provided in the notice.
>
> (d) If, within the response time provided under paragraph (a), clause (3), the business establishment or place of public accommodation indicates in writing an intent to remove the barrier but can demonstrate that weather prevents a timely removal, a civil action may not be brought before 30 days after the date of the response time in the notice, provided the business establishment or place of public accommodation specifies in writing the steps that will be taken to remove the barrier and the date by which the barrier will be removed.

This notice requirement, however, only applies to claims brought under the MHRA. The ADA does not currently have a notice requirement.

The Minnesota federal district court has, however, held cases moot when the alleged architectural barriers are remedied, holding that a favorable resolution of the ADA claim would not redress the alleged violations. *Davis v. Queen Nelly, Inc.* 16-CV-2553 (PJS/SER), 2016 WL 5868066 (D. Minn. Oct. 6. 2016).

For example, in ***Davis v. Scheman Development, LLC*, 15-cv-03041-WMW-KMM (D. Minn. Feb, 24, 2017)**, the Plaintiff alleged the following ADA violations: accessible parking spaces in the River City Center customer parking lot were not identified by vertical signs; access aisles next to accessible parking spaces in the River City Center parking lot were not at least 60 inches wide for the entire length of the parking space; and entrances to retail stores at the River City Center did not provide sufficient level maneuvering clearance. Defendant sought a motion to dismiss for lack of subject-matter jurisdiction based on a factual challenge under Federal Rule of Civil Procedure 12(b)(1) contending that the Plaintiff lacked standing and that Defendant's voluntary compliance with the law has rendered Plaintiff's ADA claim moot.

The court held that ADA claims are moot when a defendant has presented evidence that modifications to its property have remedied the ADA violations identified in the Complaint. A defendant is not required to demonstrate that it has remedied conditions that were *not* identified as ADA violations in the complaint to show that an ADA claim is moot.

(Continued on page 6)

(Continued from page 5)

The court further held that a plaintiff is not permitted to investigate and present evidence addressing other alleged ADA violations. The court ultimately held that the Plaintiff did not suffer a redressable injury and therefore, lacked standing. The court stated that because it lacked subject-matter jurisdiction over the Plaintiff's ADA claim, it declined to exercise supplemental jurisdiction over the Plaintiff's state-law claims.

In ***Davis v. Commander Companies, LLC*, 15-CV-4133-LIB, (D. Minn. Mar. 6, 2017)**, the Plaintiff alleged the parking lot had "no accessible parking spaces with adjacent access aisles." Defendants added striping and signage bearing the international symbol of accessibility and sought a motion to dismiss for lack of subject-matter jurisdiction based on a factual challenge under Federal Rule of Civil Procedure 12 (b)(1). The Defendants argued that *Disability Support All. v. Geller Family Ltd. P'ship, III*, 160 F. Supp. 3d 1133 (D. Minn. 2016), supports consideration of their mootness argument under Rule 12(b)(1). The court held that *Geller* was persuasive even though *Geller* turned on the doctrine of standing because the remediation occurred before the plaintiffs filed the lawsuit rather than after. The court held that the jurisdictional question and the merits in the case were not sufficiently intertwined to justify converting Defendant's 12(b)(1) motion to one under Rule 56. The court stated that deciding whether Plaintiff's ADA claim is moot requires merely a determination of which asserted violations are at issue in the case and whether it is absolutely clear that those violations have ceased and are not reasonably likely to recur.

Plaintiff conceded that Defendant's actions were sufficient to bring the accessible parking space and adjacent access aisle into compliance. However, Plaintiff for the first time in motion papers, alleged that the access aisle was too steep and the path of travel to a door of the Dairy Queen was impermissibly obstructed by a garbage can and a bicycle, leaving the parking lot noncompliant with the ADA. The court held that despite attempts to include broad language in the Complaint, the original ADA violations as asserted by Plaintiff were clearly and specifically grounded in the missing signage and the faded parking lot paint and were understood by both parties as such. The court stated "[t]o allow Plaintiff to now expand the alleged violations at issue at the eleventh hour to include violations beyond the parties understanding of what was at issue in [the] case would run afoul of the notice requirements of Federal Rule of Civil Procedure 8." The court held that Plaintiffs failure in not alleging any of the purported additional specific violations involving slope and obstruction of the accessible path into the restaurant until opposing the motion was fatal because Plaintiff did not give Defendants fair notice that Plaintiff intended to allege such violations. For those reasons, the court held that the ADA claims properly before the court were only those based on the alleged violations caused by the missing sign and the faded paint in the parking lot.

The court stated that "[t]o establish mootness based on voluntary compliance with the ADA, Defendants must meet the 'formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.' See, *Friends of the Earth*, 528 U.S. at 190. See also *Disability Support All. v. Monali, Inc.*, No. 15-cv-1522 (MJD/TNL), 2016 WL 859442, *9 (D. Minn. Feb. 12, 2016), report and recommendation adopted by 2016 WL 868174 (D. Minn. March 3, 2016)." The court held the Defendants had clearly shown that they had voluntarily ceased the offending conduct by making the repairs. In regard to establishing that the challenged conduct could not reasonably be expected to start up again, the court reasoned that because (1) the Defendants had instituted a policy of evaluating the condition of the parking lot on a semi-annual basis and (2) the Defendants did <u>not</u> have a history on noncompliance that was intentional and continuing. (To support the fact that Defendants did not have a history of noncompliance, the Defendants provided a supporting affidavit from the Building Official/ Code Enforcement Official for the City stating that the city had never received a notice or complaint that the parking lot contained no accessible parking spaces with adjacent access aisles.) The court held that facts of the case and support affidavits weighed in favor of a finding that the violations are not reasonably likely to recur. The court declined to exercise supplemental jurisdiction over Plaintiff's remaining state-law claims and granted the Defendants' motion to dismiss without prejudice as to those claims.

In ***Hillesheim v. Buzz Salons, LLC*, 16-cv-2225, 2017 WL 3172870 (D. Minn. June 19, 2017) *report and recommendation adopted by* 2017 WL 3172751 (D. Minn. July 25, 2017)** the Plaintiff alleged that (1) a large metal cabinet mounted on wheels partially blocked the doorway to the bathroom; and (2) the sales counter was over 36 inches in height. The Defendant moved to dismiss the complaint pursuant to Rule 12(b)(1). The Defendant moved the metal

(Continued on page 7)

(Continued from page 6)

cabinet and replaced the service counter to be compliant. The court held that because the Defendant voluntarily brought the alleged violations into compliance and there were no alleged ADA violations that Defendant did not address, the court was persuaded that the Defendant will remain compliant and future violations are not reasonably expected to recur. The court further held that the Defendant's retention of an accessibility specialist and efforts to address other potential issues not identified by Plaintiff in the complaint demonstrate a mindset of compliance rather than simply an effort to defeat injunctive relief. In regard to violations not pled, the court distinguished the case from *Steger v. Franco Inc.*, 228 F.3d 889, 893 -94 (8th Cir. 2000) stating that *Steger* speaks to the plaintiff's ability to sue, not mootness. Holding there was no further relief it could order, the court dismissed Plaintiff's ADA claim as moot and for lack of subject matter jurisdiction. However, the court held that the Defendant was not entitled to attorney's fees and costs. The court declined to exercise supplemental jurisdiction over the Plaintiff's MHRA claim and dismissed Plaintiff's claims without prejudice.

In ***Hillesheim v. Holiday Stationstores, Inc.,*** **No. 16-1222 (MJD/DTS), 2017 WL 3835219 (D. Minn. Aug. 31, 2017)(appeal filed Oct. 2017)** the Plaintiff alleged the following violations: (1) tow parking spaces were reserved as accessible parking spaces, but both spaces lacked signage; (2) one accessible parking space lacked an adjacent access aisle; and (3) the top of the curb ramp was obstructed by a garbage can. Defendant upgraded the handicap parking to address the issues in Plaintiff's Complaint. The court dismissed the Plaintiff's ADA claim as moot. In regard to Plaintiff's MHRA state law claim, the court held that remand of the MHRA claim was not warranted because discovery was closed and dispositive motions had been brought, therefore, the court had sufficient evidence upon which to issue a decision to dismiss the MHRA claim.

In ***Davis v. Morris-Walker, LTD and Orchard Park, LLC,*** **17-1270 (DSD/FLN), 2017 WL 6209825 (D. Minn. Dec. 7, 2017)** the Plaintiff alleged the following violations: (1) One of the three accessible parking spaces did not contain a sign reserving the spot; (2) two of the three accessible parking spaces had signs positioned too low to the ground to be visible at all times; (3) no ramp from the parking lot to the sidewalk, which would require travel through the parking lot to the front door of the restaurant; and (4) the nearest curb was in disrepair, which made wheelchair access difficult. The Defendants brought a Rule 12(b)(6) motion seeking dismissal of the complaint. The court granted the Defendants' motion and dismissed the Plaintiff's ADA claim as moot and holding that it was not concerned that the alleged violations would recur given the Defendants' expeditious and thorough efforts to redress the problems. The court declined to exercise supplemental jurisdiction over the MHRA claim but dismissed the MHRA claim without prejudice rather than remanding to state court for consideration.

In ***Midwest Disability Initiative et al. v. JANS Enterprises, Inc. d/b/a/ Nico's Taco & Tequila Bar and JC LLC*****, 17-cv-4401 (JNE/FLN), 2017 WL 6389685 (D. Minn. Dec. 13, 2017)** the court held that res judicata barred the claims by the Plaintiffs because the individual Plaintiff in the case was in privity with Defendant Midwest Disability Initiative, which had previously sued the same Defendant in conjunction with a different individual Plaintiff in a previous lawsuit for primarily the same alleged accessibility violations.

The Minnesota federal district court has also held that a Plaintiff alleging ADA accessibility violations does not have the right to conduct a full inspection of the Defendant's place of business – inside and out – in order to hunt for other possible violations of the ADA of which the Plaintiff was not aware when the alleged violations in the complaint have been remediated by the Defendant. *Smith v. RW's Bierstube, Inc. and Yanz Properties, LLC*, 17-cv-1866 (PJS/HB), 2017 WL 5186346 (D. Minn. Nov. 8, 2017). *See also Hillesheim v. Buzz Salons, LLC*, 16-cv-2225, 2017 WL 3172870 (D. Minn. June 19, 2017) *report and recommendation adopted by* 2017 WL 3172751 (D. Minn. July 25, 2017) (distinguishing *Steger v. Franco Inc.*, 228 F.3d 889, 893 -94 (8th Cir. 2000) and stating that, even in the appropriate context, *Steger* does not confer standing on plaintiffs to conduct a site inspection so that they may demand removal of the barriers they discovered during that site inspection); *Davis v. Morris-Walker, LTD and Orchard Park, LLC,* 17-1270 (DSD/FLN), 2017 WL 6209825 (D. Minn. Dec. 7, 2017) (upholding the magistrate judge's denial of Plaintiff's motion to amend where the Plaintiff admitted to never having been present inside the business and presented no evidence that she planned to do so in the future).

Therefore, while there is not a notice requirement under the ADA, the federal court has provided businesses relief when remediation has occurred. While a notice requirement under the ADA would further assist in unnecessary litigation in federal

(Continued on page 8)

(Continued from page 7)

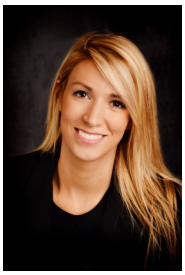
court, the developments that have occurred for both MHRA and ADA claims provide a much more reasonable solution for addressing alleged violations and encouraging remediation rather than prolonged litigation or forced monetary settlements due to defense costs, which may not ultimately result in remediation of the alleged violations. •

About the Authors

Lawrence M. Rocheford
Partner
lrocheford@jlolaw.com
651.290.6516

Larry Rocheford has practiced civil litigation at the firm since 1985 and is a twenty-five-year partner at Jardine, Logan & O'Brien, P.L.L.P. Larry chairs three practice groups at JLO: Major Case, Product Liability and Wisconsin Civil Litigation. Larry is an associate in the American Board of Trial Advocates (ABOTA). The National Board of Trial Advocacy first certified him as a Civil Trial Advocate in 1993 and the Minnesota State Bar Association has repeatedly certified him as a Civil Trial Specialist. For more than a decade, Larry Rocheford has been named for inclusion in the Minnesota Super Lawyers editions. Currently, by Minnesota Supreme Court appointment, Larry Rocheford serves on the Minnesota Supreme Court Advisory Committee on the Rules of Civil Procedure and on the Minnesota Supreme Court Advisory Committee on the Rules of Evidence. For years, lawyers have recognized Larry Rocheford by providing him with an AV Preeminent Peer Review, Martindale Hubbell, the highest rating possible. And, as a service to law students, since 2001, Larry Rocheford has taught as an adjunct professor at Mitchell Hamline Law school teaching advocacy.

Larry Rocheford has successfully tried to verdict cases valued by plaintiffs in the eight figures. Whether the case is simple or catastrophic, Larry's experience will result in a prompt and fair resolution of case.



Hannah G. Felix
Associate

Hannah is an associate at Jardine, Logan & O'Brien, P.L.L.P. and practices civil litigation in the areas of Employment Law and Government Liability. Hannah received her J.D. from William Mitchell College of Law in 2013. During law school, Hannah was a law clerk in the litigation department at the League of Minnesota Cities. Hannah has recently accepted a defense attorney position at the League of Minnesota Cities and will be leaving the firm to return to work at the League of Minnesota Cities beginning in 2018. The firm wishes her well.

Any questions related to ADA Accessibility claims should be directed to **Jessica E. Schwie** at jschwie@jlolaw.com—651-290-6591 or **Abby J. Jacobson** at ajacobson@jlolaw.com—651-290-6504.

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.

Disclaimer