"What I Learned About Being a Lawyer While I Was a Judge"

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ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

JUDGES NEED ALL THE HELP PARTIES CAN GIVE THEM

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Appealing To A Deluged Court

Luther T. Munford

"The number of federal appeals doubled from 1924 to 1962, doubled again by 1969, again by 1978, and yet again by 1990."

"It is...no longer necessary to have the physical stamina of a Daniel Webster to argue the Dartmouth College case for two days."

"About half the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop."

Hill v. Norfolk & W. R. Co., 814 F.2d 1192, 1202 (7th Cir. 1987), *quoting* 1 Jessup. Elihu Root 133 (1938).

REMEMBER WHO KNOWS THE MOST ABOUT YOUR CASE

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Supreme Court of Minnesota

Opinions Authored by Chief Justice Eric Magnuson

Stewart Title Guaranty Company, Relator, v. Commissioner Of Revenue, Respondent. (No. AOB-429).

Dec. 4, 2008.

Background: Title insurer appealed Commissioner of Revenue's decision to tax entire premium including portion retained by agents and never remitted to insurer. The Tax Court, Ramsey County, Kathleen H. Sanberg, J., 2008 WL 126590, granted partial summary judgment in favor of Commissioner of Revenue. Insurer appealed.

Holding: The Supreme Court, Magnuson, C.J., held that gross premiums subject to taxation included premiums retained by title insurer's agents and never remitted to insurer.

Affirmed.

Supreme Court of Minnesota

Opinions Authored by Chief Justice Eric Magnuson

In the Matter of the Risk Level Determination of J.M.T. (No. AOB-365).

Jan. 15, 2009.

Background: Sex offender sought review of decision of End of Confinement Review Committee (ECRC) raising his sex offender risk level score from one to two. The Court of Appeals dismissed appeal, finding that it lacked jurisdiction because offender failed to properly serve a petition for writ of certiorari on the State within the 30-day time period prescribed by the Minnesota Administrative Procedure Act (MAPA). Offender petitioned for further review.

Holding: The Supreme Court, Magnuson, C.J., held that offender's service by first-class mail was not effective service under the MAP A.

Affirmed.

Supreme Court of Minnesota

Opinions Authored by Chief Justice Eric Magnuson

State of Minnesota, Respondent, v. Jeffrey C. Pendleton, Appellant. (No. A07-2313).

Jan. 29, 2009.

Background: Defendant was convicted in the District Court, Redwood County, David W. Peterson, J., of first-degree premeditated murder and first degree murder in the course of a kidnapping. Appeal followed.

Holdings: The Supreme Court, Magnuson, C.J., held that: (1) a jury instruction that a particular witness was an accomplice was not warranted; (2) defendant did not show that the state knowingly offered false testimony of another witness; (3) evidence was sufficient to show that defendant killed victim intentionally; (4) evidence was sufficient to show that defendant acted with premeditation in killing victim; (5) evidence was sufficient to support the conviction for first-degree murder in the course of a kidnapping; (6) evidence was sufficient to show that defendant did not abandon his criminal purpose to kill victim; and (7) certain statements by prosecutor did not constitute a disparagement of the defense.

Affirmed.

Supreme Court of Minnesota

Opinions Authored by Chief Justice Eric Magnuson

International Brotherhood Of Electrical Workers, Local NO. 292, Appellant, v. City Of St. Cloud, and Design Electric, Inc., Respondents. (Nos. A07-1388, A07-1418).

May 7, 2009.

Background: Labor union brought action against city, seeking disclosure of city contractor's payroll records, under the Minnesota Government Data Practices Act (MGDPA). Contractor intervened. The District Court, Steams County, Thomas P. Knapp, J., granted union's motion for summary judgment, awarded union $500 in attorney fees, but denied union's motion for additional attorney fees under the MGDPA. Appeals were taken. The Court of Appeals, 750 N.W.2d 307, affirmed in part and reversed in part. Union and contractor sought further review.

Holding: The Supreme Court, Magnuson, C.J., held that names, salaries, and home addresses of contractor's employees were presumed public and required to be disclosed.

Affirmed in part and reversed in part.

Supreme Court of Minnesota

Opinions Authored by Chief Justice Eric Magnuson

Minnesota Voters Alliance, et al., Appellants, v. The City of Minneapolis, et al., Respondents, Mark Ritchie, in his official capacity as the Secretary of State for the State of Minnesota or his successor, et al., Defendants, Fair Vote Minnesota, Inc., intervenor-defendant, Respondent. (No. A09-182).

June 11, 2009.

Background: Voters brought action to challenge the constitutionality of instant runoff voting election methodology adopted by city pursuant to referendum. The District Court, Hennepin County, George F. McGunnigle, J., granted city's and interest group's motions for summary judgment. Voters appealed, and city petitioned for accelerated review.

Holdings: The Supreme Court, Magnuson, C.J., held that: (1) instant runoff voting did not unequally weigh votes in a manner that would make the methodology facially unconstitutional; (2) instant runoff voting did not inevitably reallocate "surplus" votes in a multiple-seat election; (3) non-monotonic nature of instant runoff voting did not render the methodology facially unconstitutional; (4) city's interests justified burden on right to vote imposed by instant runoff voting; and (5) instant runoff voting did not violate equal protection rights.

Affirmed.

Supreme Court of Minnesota

Opinions Authored by Chief Justice Eric Magnuson

Rachel Fleeger, Plaintiff, v. Wyeth and its division Wyeth Pharmaceuticals, Inc., and Greenstone, Ltd., Defendants. (No. AOB-2124).

Sept. 3, 2009.

Background: The United States District Court, Eastern District of Arkansas, 2008 WL 5102004, certified a statute of limitations question, in an action by a medication user against drug manufacturers of a generic hormone therapy medication, in which neither defendant was a Minnesota resident, but both admitted that Minnesota courts had general personal jurisdiction over them.

Holding: The Supreme Court, Magnuson, C.J., held that under common law, the Minnesota statute of limitations applied to cases properly commenced in the State.

Question answered.

Supreme Court of Minnesota

Opinions Authored by Chief Justice Eric Magnuson

In re the Matter of Elaine Irene Lee, Appellant, v. Raymond Michael Lee, Respondent. (No. A07-JJO).

Dec. 3, 2009.

Background: Former husband filed motion to terminate maintenance. Former wife filed motion for lifetime maintenance, security for maintenance, and attorney fees. The District Court, Washington County, Susan Miles, J., modified former husband's maintenance obligation, ordered former husband to obtain life insurance to secure maintenance obligation, and awarded former wife attorney fees. Former husband appealed. The Court of Appeals, 749 N.W.2d 51, affirmed in part as modified and reversed in part. Former wife appealed.

Holdings: The Supreme Court, Magnuson, C.J., held that: (1) trial court could consider pension payments derived from benefits earned by former husband prior to his marriage when calculating former husband's monthly income to determine his maintenance obligation; (2) pension payments derived from benefits earned by former husband during his marriage to former wife that had previously been awarded to former husband as marital property could not be considered by the trial court in calculating former husband's ability to pay spousal maintenance; and (3) the trial court could consider pension payments derived from benefits earned by former husband after the parties dissolved their marriage when calculating former husband's monthly income to determine his maintenance obligation.

Affirmed in part, reversed in part, and remanded.

Supreme Court of Minnesota

Opinions Authored by Chief Justice Eric Magnuson

State of Minnesota, Respondent, v. Jeffrey Brian Alphonse Stein, Appellant. (No. A06-1848).

Jan. 7, 2010.

Background: Defendant was convicted in the District Court, Hennepin County, Lloyd B. Zimmerman, J., of first-degree burglary. Defendant appealed. The Court of Appeals, 2008 WL 313603, affirmed. Defendant sought review.

Holding: The Supreme Court, Magnuson, C.J., held that circumstantial evidence was sufficient to support conviction.

Affirmed.

Supreme Court of Minnesota

Opinions Authored by Chief Justice Eric Magnuson

Pamela Krueger, Appellant, Diamond Dust Contracting, LLC, Plaintiff, v. Zeman Construction Company, Respondent.(No. AOB-206).

April 29, 2010.

Background: Sole owner/operator of limited liability company (LLC) and LLC brought suit under Minnesota Human Rights Act against construction company, asserting claim for discrimination in performance of contract on basis of sex. The District Court, Hennepin County, Denise D. Reilly, J., granted construction company's motion to dismiss owner/ operators personal claim for failure to state claim, and owner/operator appealed. The Court of Appeals, 758 N.W.2d 881, affirmed.

Holding: On further review, the Supreme Court, Magnuson, C.J., held that owner/operator lacked standing to sue construction company under Minnesota Human Rights Act for business discrimination in performance of contract between LLC and company.

Affirmed.

Supreme Court of Minnesota

Opinions Authored by Chief Justice Eric Magnuson

Deanna Brayton, et al., Respondents, v. Tim Pawlenty, et al., Appellants. (No. AJ0-64).

May 5, 2010.

Background: Recipients qualified to receive payments under state food assistance program brought action against state Governor and Commissioners of Management and Budget (MMB), Human Services, and Revenue, challenging validity of reductions in program made under unallotment statute, allowing executive branch to reduce allotments of legislative appropriations in order to avoid deficit spending. The District Court, Ramsey County, Kathleen R. Gearin, J., granted temporary restraining order enjoining defendants from reducing allotment to program, and subsequently entered judgment determining that defendants' use of the unallotment authority was invalid. Defendants appealed.

Holding: The Supreme Court, Magnuson, C.J., held that defendants could not reduce allotments for program for a budgetary period in which Legislature and Governor had not enacted a balanced budget.

Affirmed.

Supreme Court of Minnesota

Opinions Authored by Chief Justice Eric Magnuson

In the Matter of the Welfare of the Child of S.L.J., Parent. (No. A09-80).

May 14, 2010.

Background: Private attorney, who was appointed in termination of parental rights action to represent indigent parent who was entitled to counsel under federal Indian Child Welfare Act (ICWA), sought order requiring county to pay his attorney fees and expenses. The District Court, Rice County, Thomas M. Neuville, J., issued a peremptory writ of mandamus requiring county to pay attorney and to establish a system for payment of costs for representing indigent parents in juvenile protection cases. County appealed. The Court of Appeals, 772 N.W.2d 833, affirmed in part and reversed in part. County filed petition for review.

Holdings: The Supreme Court, Magnuson, C.J., held that: (1) although entitled to appointed counsel under ICWA, indigent Indian parents in juvenile protection proceedings are not entitled to the appointment of a public defender; (2) the cost of court-appointed counsel to represent indigent Indian parents in juvenile protection proceedings is to be paid by the county in which the juvenile protection proceedings are held; and (3) a judicial order compelling the payment of county funds must be paid no later than the first fiscal year after the order is received by the county.

Affirmed.

Supreme Court of Minnesota

Opinions Authored by Chief Justice Eric Magnuson

In the Matter of the Welfare of the Children of J.B. and R.P.; S.KJ. and J.N.T.; S.L.A.J. and B.J. T., Parents. (No. A09-1146).

May 14, 2010.

Background: County appealed order of the District Court, Crow Wing County, Jon A. Maturi, J., finding county officials in civil contempt as a result of county's refusal to comply with court order directing county to pay for court-appointed attorneys for indigent parents in child protection proceedings.

Holdings: The Supreme Court, Magnuson, C.J., held that: (1) trial court was not required to appoint public defenders to represent parents; (2) fees of appointed private counsel were required to be paid by county; and (3) order did not violate separation of powers.

Affirmed.

Supreme Court of Minnesota

Opinions Authored by Chief Justice Eric Magnuson

Mary Lickteig, Plaintiff/Appellant, v. Robert Kolar, Jr., Defendant/Appellee. (No. A09-1728).

May 27,2010.

Background: Sister filed diversity-jurisdiction action in federal court against her brother for sexual abuse and battery allegedly committed during their childhood. The United States District Court for the District of Minnesota dismissed case for failure to state cause of action. Sister appealed. The Court of Appeals certified questions of state law.

Holdings: The Supreme Court of Minnesota, Magnuson, C.J., held that: (1) Minnesota law does not recognize a separate cause of action for sexual abuse apart from common-law tort, although such common-law tort claims may arise from "sexual abuse" as defined by the delayed-discovery statute of limitations applicable to claims based on sexual abuse; (2) doctrine of intrafamilial immunity does not apply between siblings for a battery tort based on sexual abuse committed when both were unemancipated minors; and (3) delayed-discovery statute of limitations for claims based on sexual abuse applies retroactively and can revive previously barred claims.

Certified questions answered.

THE COURT IS NOT MONOLITHIC

Supreme Court of Minnesota

Opinions Authored by Chief Justice Eric Magnuson

Brian F. Kidwell, Appellant, v. Sybaritic, INC., Respondent. (Nos. A07-584, A07-788).

June 24, 2010.

Background: Former employee who was employed as in-house attorney brought action against former employer, alleging that he was terminated in violation of the Minnesota Whistleblower Act. Following jury trial, the District Court, Hennepin County, 2007 WL 1303946, entered judgment for former employee. Former employer appealed. The Court of Appeals, 749 N.W.2d 855, reversed. Former employee appealed.

Holding: The Supreme Court, Gildea, J., held that former employee did not engage in conduct protected by the Act when he sent an e-mail to former employer's senior management.

Affirmed.

Magnuson, C.J., concurred in the result and filed opinion.

HAVE A POINT AND MAKE IT

"One of the first tests of a discriminating advocate is to select the question, or questions, that he will present…Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one."

Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentation in Advocacy and the King's English*, 216 (G. Rossman ed. 1960).

"If an appellant can't win on the strength of the strongest claim or claims, he stands little chance of winning a reversal on the basis of weaker claims....The court needs to know just where the heart of the matter lies; distracting attention from the most important issues can hardly help an appellant's cause."

Myron H. Bright, *Appellate Briefwriting*: *Some 'Golden' Rules*, 17 Creighton L. Rev. 1069, 1071 (1983-84).

Great Briefs and Winning Briefs

Mark Herrmann and Katherine B. Jenks

"Great briefs are magnificent. They are erudite, knowledgeable, imaginative, even brilliant. They are sometimes profound -- almost works of art. Their authors are proud of them and justifiably."

"Great briefs may merit a frame and a picture hook or a place on the shelf bound in vellum… Lawyers who see the great brief will scramble to make copies for their personal files. The manager of the firm's brief bank will be delighted by the great brief, knowing that here at last is a submission worthy of retention, perusal, and awe."

Great Briefs and Winning Briefs

Mark Herrmann and Katherine B. Jenks

"Once in a while, in a particular jurisdiction before a particular judge, a great brief may even win. But not often. Winning briefs are different."

"Winning briefs are not great briefs. This does not mean that they are bad briefs. Winning briefs are not illiterate, incomprehensible, or filled with typographical errors. But winning briefs also are not suitable for binding and adding to a Great Books collection. Winning briefs are puny things -- not comprehensive, but focused. A judge can carry one home in a coat pocket."

Twenty Pages And Twenty Minutes

The Honorable John C. Goldbold

"Appellate practice itself is also changing. Bench and bar are learning to get to the bare bones of disputes with less concern for the fat. There is an overall tenor of 'no nonsense.'"

"Ego building and esteem repairing ... are counter-productive when they interfere with the essential tasks of communication and persuasion."

Twenty Pages And Twenty Minutes

The Honorable John C. Goldbold

"I have discussed this subject many times with practicing attorneys in speeches and seminars. An article reducing these informal dialogs to writing may appear simplistic, but I prefer the risk of oversimplification to even a whisper of unnecessary complexity. Communication in simple, understandable terms is a simple theme for me."

"I recall with pain and amusement the comment of a colleague, seated beside me, after 15 minutes of argument by an impassioned lawyer in a significant *en banc* case: 'Do you have the remotest idea what he is talking about?'"

HARRY MCLAUGHLIN AND THE REALLY SMART GOVERNMENT LAWYER

"What's your point, counsel?"

KNOW YOUR AUDIENCE

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Appeals Are Different

Appeals involve only questions of law.

What issues an appellate court will look at, and the way it will look at those issues, are different from what a trial court will do, and rigidly constrained.

The function of the appellate courts is to correct error, and not to decide most questions anew. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 68 n.2 (Minn. 1979).

Findings of Fact By Trial Court

Factual findings are reviewed under the "clearly erroneous" standard of review. Fed. R. App. P. 52(a).

"To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must ... strike us as wrong with the force of a five-week old, unrefrigerated dead fish."

Fisher v. Roe, 263 F.3d 906, 912 (9th Cir.2001), quoting *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir.1988).

"Abuse of discretion must be eye-popping, neck-snapping, jaw-dropping egregious error."

Roger W. Badeker, *Wide As a Church Door, Deep as a Well: A Survey of Judicial Discretion*, THE JOURNAL, March/April 1992, at 33.

THERE IS A REASON FOR ALL THOSE PESKY RULES

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

It is the responsibility of counsel to state clearly the arguments that they are advancing, raising all issues, and to state specifically the relief sought from the appellate courts.

"Judges are not like pigs, hunting for truffles buried in briefs."

U.S. v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991).

"The purpose behind Rule 128 is to provide a standardized brief format to allow appellate courts to read and absorb the voluminous presented materials in each of the multiple cases that the court simultaneously considers .... Failure to comply with the rules can diminish a brief's persuasiveness ..., lead to non-consideration of an issue ..., or dismissal of an appeal."

Cole v. Minneapolis Star Tribune, 581 N.W.2d 364, 371 (Minn. Ct. App. 1998).

[Fed. R. App. P. 28(a)] requirements are mandatory. . . Appellant has filed a noncompliant brief. Her submission lacks the requisite statement-of-facts and summary-of-the-argument sections, which are required, but the absence of which is sometimes overlooked. Crucially, however, the brief furnishes-in lieu of an argument-only a precis on the law of summary judgment and Title VII.

Sioson v. Knights of Columbus, 303 F.3d 458, 459-60 (2d Cir. 2002).

"Indeed, Appellant's brief is tantamount to an "invitation [for us] to scour the record, research any legal theory that comes to mind, and serve generally as an advocate for appellant." . . . This we declined to do in *Ernst Haas,* and we will not do so here. Nor will we take the absence of an argument on appeal as an invitation to dig up and scrutinize anew the memorandum in opposition to summary judgment that Appellant submitted to the court below."

Sioson v. Knights of Columbus, 303 F.3d 458, 460 (2d Cir. 2002).

IF YOUR OPPONENT IS A STINKER, THE COURT WILL FIGURE IT OUT ON ITS OWN – DON'T BE ONE YOURSELF

The Wrong Stuff

The Honorable Alex Kozinski

"But let's face it, a good argument is hard to hold down. So what you want to do is salt your brief with plenty of distractions that will divert attention from the main issue. One really good way of doing this is to pick a fight with opposing counsel. Go ahead, call him a slime. Accuse him of lying through his teeth…"

"But let's say your opposing counsel is too smart to get into a hosing contest with you. No matter. You can always create a diversion by attacking the district judge."

The Wrong Stuff

The Honorable Alex Kozinski

"Chiseling on the type size and such has two wonderful advantages: First, it lets you cram in more words, and when judges see a lot of words they immediately think: LOSER, LOSER. You might as well write it in big bold letters on the cover of your brief. But there is also a second advantage: It tells the judges that the lawyer is the type of sleazeball who is willing to cheat on a small procedural rule and therefore probably will lie about the record or forget to cite controlling authority."

AT THE END OF THE DAY –

Keep it Real

Keep it Simple

Keep it Focused

Be a Help

"In 1596, an English chancellor ordered a hole cut through the center of a 120-page brief. The chancellor decreed that the author's head be stuffed through the hole and that the fellow be exhibited in that state to all those attending court at Westminster hall."

Mylward v. Weiden (Ch. 1596), discussed in R. Wydick, Plain English for Lawyers 3 (2d ed. 1985).

Bibliography

- Luther T. Munford, *Appealling to a Deluged Court*, The Practical Litigator, May 1994, at 61.
- Mark Herrmann & Katherine B. Jenks, Great Briefs and Winning Briefs, 19 LITIG.,Summer 1993, at 56.
- John C. Godbold, *Twenty Pages and Twenty Minutes*, 15 No. 3 Litig. 3 (1994).
- Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. Rev 325 (1992).