CASE SUMMARY SERIES

Cousineau McGuire | October 2010

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LAW FIRM NEWS

Michigan Office Address Change

Our new Northern Wisconsin/Michigan Office contact information:

1439 E. Cloverland Drive    Updated E-mail Addresses:
Ironwood, Michigan 49938    Lisa F. Kinney: lfk@cousineaulaw.net
Toll Free: 800.877.8661    Julie Meinke: jmeinke@cousineaulaw.net
In State: 906.932.0726    Jessica Kirtland: jkirtland@cousineaulaw.net

U.S. News and Best Lawyers in America Recognizes Cousineau McGuire's Workers' Comp Practice

U.S. News and Best Lawyers® joined forces to survey and report on the “Best Law Firms” rankings for large metropolitan areas across the country. Cousineau McGuire's Workers' Compensation Practice is included in the #1 tier for Workers' Compensation Practices Representing Employers in Minneapolis/St. Paul.

This #1 ranking comes just weeks after the notice that six of our firm’s attorneys were included in the 2010 Best Lawyers of America: Workers’ Compensation: Thomas F. Coleman, Thomas P. Kieselbach, Mark A. Kleinschmidt, Richard W. Schmidt, James R. Waldhauser and Peter G. Van Bergen.

Super Lawyers Recognizes Cousineau McGuire Attorneys

Cousineau McGuire is proud to announce that seven of its attorneys have been named in the Minnesota Super Lawyers® list. Lawyers included represent our employment, civil litigation, personal injury, general litigation, workers' compensation and transportation practices. The following attorneys from the firm's office were selected for inclusion in the 2010 Minnesota Super Lawyers® list in the categories indicated below:

Barbara A. Burke, Employment Litigation: Defense
James L. Haigh, Civil Litigation Defense
Thomas P. Kieselbach, Workers’ Compensation
Michael W. McNee, Transportation/Maritime
Susan D. Thurmer, Personal Injury Defense
Peter G. Van Bergen, General Litigation
James R. Waldhauser, Workers’ Compensation

The Minnesota Super Lawyers® selection process involves a statewide nomination process with peer review by practice area and independent research. Only five percent of the attorneys in Minnesota are named to the list.

Teel Promoted to Officer

Whitney L. Teel has been promoted to Officer status. Whitney’s current practice focuses on workers’ compensation. She represents clients in all aspects of workers’ compensation, including advising clients on determinations of primary liability, case evaluations, settlement negotiations, and throughout all phases of litigation.
Care Providers of Minnesota’s 2010 Convention & Exposition
Jim Haigh will present on Arbitration Agreements at the November Care Providers of Minnesota Convention. Tamara Novoty, Robyn Johnson and Jessica Theisen of firm’s Care Facility Practice will also be meeting attendees and exhibiting in the Expo Hall. Cousineau McGuire provides defense and coverage counsel to nursing homes and other care facilities throughout Minnesota.

2010 Workers’ Compensation Deskbook Seminar
Tom Kieselbach will speak at the upcoming 2010 Workers’ Compensation Deskbook Seminar. He will co-present “Idiopathic Injuries – the Latest Word” at the seminar on December 7 at the Minnesota CLE Conference Center. For more information about this event, contact Tom or visit www.minncle.org.

LEGAL NEWS

These cases are posted, in full, on our website and are available for download.

Vargo-Schaper vs. Weyerhaeuser Company
United States Court of Appeals, 8th Circuit, filed August 9, 2010. While defendant owed plaintiff’s decedent a duty of care to prevent latent loading defects, it did not have a duty to prevent or correct any open or obvious loading defect in the tractor trailer; here, the district court did not err in concluding there was no latent defect due to crowning of the bundles because any defect would have been visible on inspection; district court did not err in rejecting plaintiff’s argument to invoke the doctrine of res ipsa loquitur because the record showed the load was not under defendant’s exclusive control and there were other possible causes for the accident which were not reasonably excluded by the evidence.

Khoury vs. Philips Medical Systems
District court did not err in finding plaintiff’s expert, an ergonomist, was not qualified to testify on the question of whether the design of the equipment in question was unreasonably dangerous.

Nancy Driscoll as Trustee for the Next-of-Kin of Deane Driscoll vs. Standard Hardware, Inc. and Atlas Copco Drilling Solutions, LLC,
Minnesota Court of Appeals, filed July 20, 2010. The economic-loss doctrine, Minn. Stat. § 604.101 (2008), does not preclude claims for breach of warranties under the Uniform Commercial Code by a buyer of an allegedly defective product who has sustained only property damage.
State of Minn. ex rel. Northern Pacific Ctr., Inc. vs. BNSF Ry. Co.
United States District Court, District of Minnesota, filed July 14, 2010. This case presents an unusual, interesting, and unresolved question: Is an admitted polluter, which has, at the direction of a state’s environmental protection agency completed environmental remediation, required to perform a subsequent and more stringent remediation if the agency later raises its standards? Excerpt re statute of limitations bar to non-MERLA claims: Here, plaintiff’s claims for nuisance, trespass, waste, and Environmental Rights Act violations all involve damages due to lead contaminated soil on the property. Plaintiff does not deny it knew of long-standing contamination well before its property purchase, more than six years prior to filing this lawsuit. Court’s conclusion: [D]efendant’s motion for summary judgment [Docket No. 17] is denied as to plaintiff’s MERLA claims, and granted as to all other claims.

David Swanson vs. Rebecca Brewster, et al.
Minnesota Supreme Court, filed June 30, 2010. Negotiated-discount amounts – amounts a plaintiff is billed by a medical provider but does not pay because the plaintiff’s insurance provider negotiates a discount on the plaintiff’s behalf – are “collateral sources” for purposes of the collateral-source statute, Minn. Stat. § 548.251 (2008).

Minnesota Supreme Court, filed June 30, 2010. A court can order primary insurers who insure the same insured for the same risks, and whose policies are triggered for defense purposes, to be equally liable for the costs of defense based on equitable contribution where there is otherwise no privity between the insurers.

Timothy B. Allen vs. Burnet Realty, LLC, d/b/a Coldwell Banker Burnet
Minnesota Court of Appeals, filed June 29, 2010. An indemnification plan is not insurance within the meaning of Minn. Stat. § 60K.47, when it apportions risk and responsibilities between parties, is related to the principal object or purpose of the relationship between the parties, and indemnifies for risk of losses over which the indemnitor has an existing connection and exercises some control.

T. E. S. Construction, Inc. vs. Stephen J. Chicilo
Minnesota Court of Appeals, filed June 29, 2010. For a person to be a defendant in a civil action for theft of the proceeds received for contribution to an improvement to real estate under Minn. Stat. § 514.02, subd. 1a (2008), the person need not have been convicted of a criminal violation of Minn. Stat. § 514.02, subd. 1 (2008). Except: Appellant urges this court to read subdivision 1a’s use of the term “violation” to mean criminal conviction of theft, as provided for in subdivision 1(b). We decline to do so because the violation of a statute is unambiguously distinct from a criminal conviction for any such violation.

GENERAL LITIGATION
Edited by Jo Ann Strauss
SUPREME COURT
Insurance
Booth v. Gades, et al,
Supreme Court, 8/19/2010 ~
Reviewed by Meaghan C. Bryan
Overturning the Court of Appeals, the Minnesota Supreme Court held that a Drake v. Ryan partial release agreement, which released all claims against the tortfeasor/employee up to the tortfeasor’s primary policy limits, but specifically reserved excess claims against the policy held by the City/employer, operated as a full and final release of the tortfeasor’s – and, therefore, the City’s – liability. The Court reasoned that the tortfeasor did not have excess coverage through the City’s policy, and that the plain language of the release agreement did not merely limit the source of recovery to the City’s policy, as the Court of Appeals had held, but instead limited the type of recoverable claim to excess coverage available to the tortfeasor. The Court further held that the plaintiffs could not access the excess policy held by the City on a theory of vicarious liability because the tortfeasor had been fully released. The Court stated that it was well-settled that the release of liability of an agent necessarily operates as a release of the principal.
Sitek v. Sitek,
Court of Appeals (unpublished), 7/27/10 ~
Reviewed by Daniel R. Mitchell
In this unpublished decision, the Minnesota Court of Appeals held that where an ex-husband had previous knowledge of his ex-wife’s representation by an attorney throughout their divorce proceeding, the ex-husband was obligated to serve his ex-wife’s attorney with motion papers. Ex-husband knew that his ex-wife had been represented in the divorce and subsequent proceedings. When the ex-husband sought to file a motion to suspend maintenance, he attempted service via mail to ex-wife’s last known address and a process server left the documents in the doorway. The ex-wife defaulted at the motion hearing. On appeal, the ex-wife claimed she was never served and never received notice of the motion hearing. The Court of Appeals held that under Minn. R. Civ. P. 5.02 service was mandated on counsel for a represented party absent a court order permitting service.

Contracts

Johnson v. Fit Pro, LLC d/b/a Golds Gym,
Court of Appeals (unpublished), 7/27/10 ~
Reviewed by Daniel R. Mitchell
The Minnesota Court of Appeals ruled that, where the plaintiff signed an exculpatory clause precluding claims of liability against the fitness club, plaintiff was unable to maintain his lawsuit for a slip and fall injury he suffered while in the club’s sauna. Plaintiff argued that the exculpatory clause was against public policy. The Court of Appeals concluded that the exculpatory clause met both public policy requirements. First, the Court held that there was no disparity in the bargaining power of the parties in that the plaintiff voluntarily applied for a membership and could have gone elsewhere. Second, the Court held that the type of services provided were not a public or essential service.

Damages

Hogan v. Kothe,
Court of Appeals (unpublished), 7/27/10 ~
Reviewed by Daniel R. Mitchell
In this unpublished opinion, the Minnesota Court of Appeals upheld a trial court’s collateral offset for no-fault benefits paid despite no itemization of damages to determine if those bills’ offset were duplicated in the award. Out of over $200,000 in claimed medical bills, a jury awarded $32,300 in past medical bills. The trial court deducted the full $20,000 in medical benefits that were paid by plaintiff’s no-fault carrier as a collateral offset. The Court of Appeals held that under Tuenge v. Konetski, 320 N.W.2d 420 (Minn. 1982) the Minnesota Supreme Court rejected undertaking a bill by bill comparison. The trial court correctly offset the damages awarded by the amount of no-fault paid.

Dog Bite

Engquist v. Loyas,
Court of Appeals, 8/17/10 ~
Reviewed by Meaghan C. Bryan
In this case, the Minnesota Court of Appeals formulated a proper jury instruction for the “provocation” defense in dog-bite cases, holding that the jury instruction used by the District Court allowed the jury to erroneously conclude that any act which stimulates or excites a dog may be deemed “provocation.” The Court held that Minnesota law is properly reflected by the following jury instruction:
“A person provokes a dog when, by voluntary conduct, and not by inadvertence, the person invites or induces injury. Mere physical contact with a dog, or conduct that results in stimulating a dog, does not constitute provocation unless the danger of injury is apparent when the person acts to invite or induce injury.”

**Employment**

*Spiera v. Kosieradzki Smith Law Firm, LLC,*
Court of Appeals (unpublished), 7/12/10 ~
Reviewed by Meaghan C. Bryan

In this employment discrimination case, the Minnesota Court of Appeals agreed with the trial court that the employee had not made a prima facie showing of age and gender discrimination because several associate attorneys were hired after her termination, one of whom was a female, the remainder of whom had been offered positions prior to her discharge. The Court further held that, even had the employee made a prima facie showing of discrimination, she would not have been able to show that the law firm’s asserted reasons for the firing were pretext – the same firm partners that plaintiff was accusing of discrimination had hired her two years prior, when her age and gender were readily apparent; the firm partners had offered her a contract eight months prior to the termination, which she had rejected; and the firm had increased her compensation in the months preceding her termination. Instead of discrimination, the Court held that the facts demonstrated simply that the employee was “not a good fit” for the firm.

**Insurance**

*Industrial Door Co., Inc. v. The Builders Group,*
Court of Appeals (unpublished), 7/27/10 ~
Reviewed by Daniel R. Mitchell

The Minnesota Court of Appeals ruled that an insurer breached its duty to defend its insured. In this coverage case, a worker provided to Industrial Door by Team Personnel was injured while operating a spring winding machine. The worker sued Industrial Door for negligence in the design and manufacture of the machine. There were multiple insurance companies involved, including The Builders Group, to whom Industrial Door sought to tendered their defense to. The Builders Group refused to accept the tender or participate in the lawsuits. The Builders Group argued that its policy language provides a duty to defend “where recovery is permitted by law” and that plaintiff was unable to maintain its action as his sole remedy was workers compensation. The Court of Appeals held that The Builders Group breached its duty to defend because it knew that the plaintiff was an employee of the insured, knew that the plaintiff was pursuing a products liability claim and not as an employee, and that there was at least one doctrine on which the plaintiff could potentially recover damages.

**Juries**

*Stellmach v. Towbridge,*
Court of Appeals (unpublished), 7/27/10 ~
Reviewed by Daniel R. Mitchell

The Minnesota Court of Appeals held that the trial court did not err in refusing to dismiss a juror when it was learned in voir dire that the juror was acquainted with defendant’s wife. During voir dire, the juror explained that he was acquainted with the defendant’s wife and had heard about the accident. In chambers, the juror explained that he and defendant’s wife had volunteered together a number of times approximately a year before the trial and he had heard about the accident, but he could be fair and impartial. Counsel for plaintiff did not exercise a preemptory challenge, but instead challenged the juror.
for cause. The trial court denied, and the juror ended up serving as the foreperson of the jury. Following a favorable verdict for defendant, on appeal, plaintiff argued that the juror was more than a mere acquaintance. The Court of Appeals held that plaintiff’s assertions were merely argumentative and not enough to defeat the trial court’s ruling on the matter. In chambers the juror was successfully rehabilitated to the satisfaction of the court, and the Court of Appeals will not substitute its own judgment.

The Court held that the proper standard of review was de novo as opposed to substantial evidence. It reasoned that because there were no factual disputes in the case, the issue was the legal conclusions to be drawn from the facts. It held that the Compensation Judge’s finding that the employee was not covered due to her commute was in error as she was performing a special errand for her employer during her commute.

According to the Court, given the lack of factual dispute, Gibberd was not controlling and in this case, deference should not be given to the Compensation Judge’s inferences drawn from the facts. It relied on Varda v. Northwest Airline Corp., a retraining case. Appeal to the Minnesota Supreme Court is pending.

Insurance


The U.S. Court of Appeals held that the District Court erred in determining that defendant had no duty to defend an action under the Computer Fraud and Abuse Act which alleged the insured’s software had damaged the user’s computer. The policy provided coverage if the insured caused the loss of use of tangible property that is not physically injured. The user’s allegations that the computer would stop running and had spyware that required him to reconstruct the infected files were sufficient allegations of loss of use within the meaning of the policy to trigger the duty to defend. The insurer failed to establish that the complaint fell outside the coverage contained in the policy.

Beukes v. Divine Health Care, WCCA, 8/5/2010 ~ Reviewed by Whitney L. Teel

The WCCA reversed the findings of the Compensation Judge and found that the employee was in the course of her employment when injured. The employee was a visiting nurse. Her duties included providing medication, wound care for patients and supervising home health aides. She visited one home and then, before proceeding to the next appointment, drove to a gas station to use the restroom. The restroom was busy, so she walked over to the ATM. She thought she would need some cash at the end of the day to put gas in the rental car she was using. As she walked to the ATM, she tripped over a case of soda and injured herself. The Compensation Judge found that the trip to the gas station to use the restroom was not a deviation, but that her “personal errand” to use the ATM took her out of the course of employment and denied the claim. The employee appealed and the WCCA found the claim compensable, noting that it was undisputed the employee was a traveling employee, and in using the restroom she had continuous coverage under the personal comfort doctrine. Walking across the room to use an ATM at a gas station cannot be characterized as anything other than reasonable activity. A traveling employee is entitled to portal to portal coverage, unless that traveling employee participates in an unreasonable activity, the activities the employee does participate in will be covered under workers’ compensation.

Arising Out Of

Dorr v. National Marrow Donor Program, WCCA, 7/7/10 ~ Reviewed by Kirsi Pourpore

The WCCA reversed the Compensation Judge’s finding that the employee’s injury did not arise out of and in the course and scope of her employment while commuting to work. The WCCA held that the “special errand” exception to the coming and going rule applied when the employee was injured driving to a work conference that occurred offsite and on a Saturday.
Average Weekly Wage

_Lowe v. Northwest Airline Corp.,_  
WCCA, 8/25/2010  
Reviewed by Whitney L. Teel

The WCCA reversed the Compensation Judge’s findings on average weekly wage, when the Compensation Judge calculated the average weekly wage based on actual earnings. After the employee’s injury, all flight attendants were required to take a reduction in pay. There is also an issue that when the employee returned to work, she was released without restrictions, but she testified that she wanted to take it easy and get used to her duties again before fully increasing her hours. The WCCA held that was a personal decision having nothing to do with her work injury as she had been released to work with no restrictions. The Compensation Judge had awarded temporary partial disability based on the 26-week pre-injury wage. The WCCA held that this was not a fair approximation of the employee’s earning capacity; that her current wage was not a fair approximation of the earning capacity, as it did not take into account the mandatory reduction that all flight attendants took and in addition did not take into account the employee’s personal choice to slowly come back to work despite being released without restrictions. The WCCA remanded to the Compensation Judge for additional evidence on a weekly wage and a fair approximation of the earning capacity.

Res Judicata

_Budke v. St. Francis Medical Center,_  
WCCA, 8/26/2010  
Reviewed by Whitney L. Teel

The WCCA held that despite an earlier finding that a retraining program as a certified nurse practitioner was denied, the employee was still able to later bring a claim for the same retraining program, and if granted, the prior findings denying that retraining were not _res judicata_. The WCCA again reminded the parties that _res judicata_ applies in workers’ compensation cases only with respect to the issues and claims that were in fact decided in an earlier decision. Where the question at a later hearing is one of benefit eligibility which depends on factual circumstances subsequent to the prior decision, the prior determination is _res judicata_ only with respect to the period considered in the former hearing. Simply stated, the employee is entitled to bring the same retraining claim at different periods, and the fact that it was denied once does not mean it will be denied twice. Each time an employee brings a claim for retraining, it must be decided on its own merits at that specific time period.

Roraff Fees

_LaFountain v. M. A. Gedney Company,_  
WCCA (8/16/2010)  
Reviewed by Whitney L. Teel

The WCCA reversed the Compensation Judge’s decision on Roraff fees. The Compensation Judge awarded Roraff fees on a surgery. The insurer utilized Minn. Rule 5221.6050, subp. 9c, which allows an insurer to request independent medical examination and secure that report within 45 days to authorize or decline a proposed non-emergency surgery. In the present case, the insurer did not approve the surgery within the 45-day period contemplated by the Rules because the surgery originally requested was withdrawn and a second surgical proposal was sent to the insurer a few months later. The employee’s attorney cannot recover fees related to a medical procedure that was never performed. With regard to the second surgical proposal, there was no evidence in the record that the employee’s attorney performed any significant legal services in connection with the request. There was no certification of dispute and none was issued. The award of Roraff fees was reversed.

Medical Evidence

_Divine v. Hoigaard’s, Inc.,_  
WCCA, 8/18/2010  
Reviewed by Whitney L. Teel

John Thul of Cousineau McGuire successfully secured a reversal of the Compensation Judge’s finding that the employee’s right shoulder injury in 2002 was a substantial cause for his current need for surgery. In reversing, the WCCA agreed with the employer and insurer’s position that substantial evidence did not support the findings. Specifically, employee’s expert relied on several facts that were not supported by the record. In several points on the employee’s expert, there was absolutely no evidence to support the doctor’s statements. The employee’s testimony did not match up with the employee’s expert’s understanding of the facts. Because substantial evidence did not support the Compensation Judge’s findings, the matter was reversed, and the employer and insurer did not have to pay for the surgery.
Mailing List:

If you or someone you know would like to receive a copy of the Case Summary Series, fill out the information below and mail to:

Cousineau McGuire
C/o Jennifer Metz
1550 Utica Avenue South
Suite 600
Minneapolis, MN 55416-5318

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DISCLAIMER

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FIRM CONTACT INFORMATION (area code 952)

### Attorneys

<table>
<thead>
<tr>
<th>Name</th>
<th>Phone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Barrett, Michael D.</td>
<td>525-6920</td>
<td><a href="mailto:mdb@cousineaulaw.com">mdb@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Borken, Joshua E.</td>
<td>525-6946</td>
<td><a href="mailto:jeb@cousineaulaw.com">jeb@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Bryan, Meaghan C.</td>
<td>525-6985</td>
<td><a href="mailto:mcb@cousineaulaw.com">mcb@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Burke, Barbara A.</td>
<td>525-6951</td>
<td><a href="mailto:bab@cousineaulaw.com">bab@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Coleman, Thomas F.</td>
<td>525-6941</td>
<td><a href="mailto:tfc@cousineaulaw.com">tfc@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Davern, William F.</td>
<td>525-6936</td>
<td><a href="mailto:wfd@cousineaulaw.com">wfd@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Fitzgerald, Jennifer M.</td>
<td>525-6948</td>
<td><a href="mailto:jmf@cousineaulaw.com">jmf@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Fitzpatrick, Richard H.</td>
<td>525-6927</td>
<td><a href="mailto:rhf@cousineaulaw.com">rhf@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Fleming, Kimberly</td>
<td>525-6922</td>
<td><a href="mailto:kxf@cousineaulaw.com">kxf@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Gagne, Dawn L.</td>
<td>525-6926</td>
<td><a href="mailto:dlg@cousineaulaw.com">dlg@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Gottschalk, Randall E.</td>
<td>525-6953</td>
<td><a href="mailto:reg@cousineaulaw.com">reg@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Haigh, James L.</td>
<td>525-6943</td>
<td><a href="mailto:jlh@cousineaulaw.com">jlh@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Johnson, Robyn K.</td>
<td>525-6991</td>
<td><a href="mailto:rkj@cousineaulaw.com">rkj@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Kiesellbach, Thomas P.</td>
<td>525-6955</td>
<td><a href="mailto:tpk@cousineaulaw.com">tpk@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Kinney, Lisa F.</td>
<td>800-877-8661</td>
<td><a href="mailto:lfk@cousineaulaw.net">lfk@cousineaulaw.net</a></td>
</tr>
<tr>
<td>Kleinschmidt, Mark A.</td>
<td>525-6931</td>
<td><a href="mailto:mak@cousineaulaw.com">mak@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Koth, Amber R.</td>
<td>525-6928</td>
<td><a href="mailto:ark@cousineaulaw.com">ark@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Larsen, Craig A.</td>
<td>525-6934</td>
<td><a href="mailto:cal@cousineaulaw.com">cal@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Malone, Christopher P.</td>
<td>525-6924</td>
<td><a href="mailto:cpm@cousineaulaw.com">cpm@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Marquez, Marisela (Chela) J.</td>
<td>525-6947</td>
<td><a href="mailto:mj@cousineaulaw.com">mj@cousineaulaw.com</a></td>
</tr>
<tr>
<td>McNee, Michael W.</td>
<td>525-6932</td>
<td><a href="mailto:mwm@cousineaulaw.com">mwm@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Mitchell, Daniel R.</td>
<td>525-6990</td>
<td><a href="mailto:drm@cousineaulaw.com">drm@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Novotny, Tamara L.</td>
<td>525-6939</td>
<td><a href="mailto:tln@cousineaulaw.com">tln@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Pfister, Mark L.</td>
<td>525-6930</td>
<td><a href="mailto:mlp@cousineaulaw.com">mlp@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Poupore, Kirsi L.</td>
<td>525-6944</td>
<td><a href="mailto:klp@cousineaulaw.com">klp@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Reisbord, Andrea E.</td>
<td>525-6925</td>
<td><a href="mailto:aer@cousineaulaw.com">aer@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Rosha, Valerie C.</td>
<td>525-6938</td>
<td><a href="mailto:vjc@cousineaulaw.com">vjc@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Schmidt, Richard W.</td>
<td>525-6921</td>
<td><a href="mailto:rws@cousineaulaw.com">rws@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Strauss, Jo Ann</td>
<td>525-6949</td>
<td><a href="mailto:jas@cousineaulaw.com">jas@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Teel, Whitney L.</td>
<td>525-6940</td>
<td><a href="mailto:wlt@cousineaulaw.com">wlt@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Theisen, Jessica J.</td>
<td>525-6929</td>
<td><a href="mailto:jjt@cousineaulaw.com">jjt@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Thul, John T.</td>
<td>525-6937</td>
<td><a href="mailto:jtt@cousineaulaw.com">jtt@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Thurman, Susan D.</td>
<td>525-6945</td>
<td><a href="mailto:stt@cousineaulaw.com">stt@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Van Bergen, Peter G.</td>
<td>525-6952</td>
<td><a href="mailto:pvb@cousineaulaw.com">pvb@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Waldhauser, James R.</td>
<td>525-6933</td>
<td><a href="mailto:jrw@cousineaulaw.com">jrw@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Weissenborn, Matthew J.</td>
<td>525-6923</td>
<td><a href="mailto:mjw@cousineaulaw.com">mjw@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Wikoff, David A.</td>
<td>525-6954</td>
<td><a href="mailto:daw@cousineaulaw.com">daw@cousineaulaw.com</a></td>
</tr>
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### Paralegals

<table>
<thead>
<tr>
<th>Name</th>
<th>Phone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fronek, Jody L.</td>
<td>525-6979</td>
<td><a href="mailto:jfronek@cousineaulaw.com">jfronek@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Jenkins, Sharon R.</td>
<td>525-6969</td>
<td><a href="mailto:sjenkins@cousineaulaw.com">sjenkins@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Klein, Joy B.</td>
<td>525-6997</td>
<td><a href="mailto:jklein@cousineaulaw.com">jklein@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Larson, Elizabeth A.</td>
<td>525-6988</td>
<td><a href="mailto:elarson@cousineaulaw.com">elarson@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Melody, Alexandra (Alex)</td>
<td>525-6971</td>
<td><a href="mailto:amelody@cousineaulaw.com">amelody@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Meinke, Julie</td>
<td>800-877-8661</td>
<td><a href="mailto:jmeinke@cousineaulaw.com">jmeinke@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Meyer, Kathy A.</td>
<td>525-6977</td>
<td><a href="mailto:kmeyer@cousineaulaw.com">kmeyer@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Parks, Susan L.</td>
<td>525-6986</td>
<td><a href="mailto:sparks@cousineaulaw.com">sparks@cousineaulaw.com</a></td>
</tr>
<tr>
<td>Pekkaala, Cindy K.</td>
<td>525-6950</td>
<td><a href="mailto:cpekkala@cousineaulaw.com">cpekkala@cousineaulaw.com</a></td>
</tr>
</tbody>
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