



BASSFORD REMELE

# Legal Foundations

A Publication of the Construction Practice Group

VOLUME 2, ISSUE 1

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## **Worker Classification**

The New DOL Final Rule, Current State Law, and Proposed Changes to Minnesota's Construction Classification Law

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# From the Practice Group Chairs

Our construction law practice group is excited to issue our second quarterly edition of *Legal Foundations with Bassford Remele*.

As we reported in the last issue of *Legal Foundations*, 2023 was a historic year for legislative changes in Minnesota for the construction and real estate industries. These included controversial changes to the anti-indemnity statute, wage theft, cannabis legalization, and more.

This issue highlights some lingering issues related to recent legislative changes, as well as the court's interpretation of law impacting the construction industry, changes to the Department of Labor and Industry's rules regarding classification of workers that directly impact the construction industry, data privacy and security, and the recent Corporate Transparency Act. It also features a summary of Bassford Remele's inaugural Construction Law Summit, featuring Wipfli and Lockton, on February 8, 2024.

We have summarized several recognitions our construction practice group members recently received. These include *Attorney of the Year, Finance & Commerce Top Woman in Construction – Professional Services*, and Tier 1 in "2024 Bet-the-Company Litigation" by *The Best Lawyers in America*®. Finally, we have highlighted some important upcoming events that may be of interest to our readers, including Bassford Remele's Annual Employment Law Seminar, which will have a mental health and legislative update component, our annual ethics seminar, which will discuss the challenges and benefits of Artificial Intelligence, and our Women's Leadership Summit—both women and men are welcome.

The next issue of *Legal Foundations* will contain a summary of Minnesota's 2024 legislative session, which may be nearly as important as the 2023 session because there is proposed legislation that would impact the independent contractor classification, worker safety and underground utility location, and potential revisions to legislation that were passed in 2023.

Thanks for your interest.

Best Regards,



Kyle Willems

*Construction Practice Group Co-Chairs*



Janine Loetscher



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# Accolades



**Kyle Willems** was a Real Estate Lawyer of the Year finalist for the 2023 Minnesota Real Estate Awards. He has been named to the Minnesota Rising Stars list by *Super Lawyers* and Best Lawyers: Ones

to Watch. Kyle was also selected to the 2023 *Minnesota Monthly* Top Lawyers list in Construction Law. This list was generated from a survey collectively run by Professional Research Services and *Minnesota Monthly* in which actively practicing attorneys were eligible to vote for their fellow attorneys that they believe are the best in their field of law. Kyle serves on the Minnesota State Bar Association Construction Law Section Council.



**Janine Loetscher** was named the 2024 Top Woman in Construction in the Professional Services category by *Finance & Commerce*. She was also named to the *Minnesota Super Lawyers* and *Best Lawyers* lists.

Janine serves as the Legal Advisor to the Association of Women Contractors.



**Andrew Marshall** was named an Attorney of the Year by *Minnesota Lawyer*. Andy is committed to serving the community in which he works and lives and is also recognized as a North Star Lawyer by the Minnesota State

Bar Association. The program recognizes members who provide 50 hours or more of pro bono legal services per year to people who otherwise could not afford representation. Andy was also selected to the *Minnesota Super Lawyers* list.



**Steven Sitek** was selected to the *Minnesota Super Lawyers* list and named to the 2023 *Minnesota Monthly* Top Lawyers list. Steve is a Minnesota State Bar Association Certified Civil Trial Specialist, a certification awarded to less than 3% of

trial attorneys in Minnesota.



**Wynne Reece** was named to the Minnesota Rising Stars list by *Super Lawyers*. Wynne is also recognized as a North Star Lawyer by the Minnesota State Bar Association (“MSBA”), and serves as a MSBA Mock Trial Committee Member



**Bryce Riddle** was named to the Minnesota Rising Stars list by *Super Lawyers*.



**Beth LaCanne** was named to the Minnesota Rising Stars list by *Super Lawyers*. The Minnesota Supreme Court appointed Beth to serve a four-year term on the Commission on Judicial Selection for the Tenth Judicial District. Beth was

also elected Treasurer of the Hennepin County Bar Foundation.



**Bassford Remele** received a Metropolitan Tier 1 “2024 Bet-the-Company Litigation” ranking by *The Best Lawyers in America*.

# Team Member Intro

## **BETH LaCANNE**

Beth LaCanne focuses her practice in the areas of employment law, professional liability, and general liability. She represents clients from many industries, including the construction industry, in employment matters whether it be in providing advice on employee handbooks, accommodation requests, difficult employees, and terminations or defending employers in administrative and legal proceedings related to violations of local, state and federal discrimination and wage statutes. Beth is licensed in Minnesota and Wisconsin.

### **Where are you from?**

I grew up on a dairy farm in Kenyon, a small town in southeastern Minnesota. Although the cattle are long gone, my family still owns the farm and rents most of the land out to other farmers. Fortunately, my siblings run just enough land that my son gets to ride in tractors and combines.

### **What do you do in the construction industry?**

I assist contractors, subcontractors, and material suppliers in employment matters ranging from risk mitigation by reviewing employee handbooks and policies to risk management by defending clients in legal proceedings.

### **In 2023, you were appointed by the Minnesota Supreme Court to serve on the Commission on Judicial Selection for the Tenth Judicial Selection.**

#### **What is your role on that committee?**

When a judicial vacancy in the Tenth Judicial District opens up, we (the Commission members) meet to determine which applicants we will interview. After we conduct the first round of interviews, we recommend which applicants should be interviewed by the governor who then makes the final decision on which applicant will be appointed to the vacancy.

### **Before you started in private practice, you served as a judicial law clerk to the Honorable Diane B. Bratvold and the Honorable Ivy S. Bernhardson. Tell us about that experience.**

As a judicial law clerk, I assisted my judges by reviewing and summarizing documents submitted to the court, attending hearings and trials, researching legal issues, and preparing preliminary drafts of the judge's decision on an issue or case. In addition to enhancing my research and writing skills, I also observed a wide array of lawyering skills and traits. I learned which skills and traits I would incorporate into my practice and those that I would avoid.

### **What did you want to be when you grew up?**

A doctor until I discovered my aversion to blood. After that, I wanted to be an Olympic volleyball player,



a sports commentator, or something law-related, including being a criminal profiler for the FBI.

### **What is the best superpower?**

Flying so I could fly to a beach whenever I wanted.

### **What is your favorite charity that you wish more people knew about?**

Children With Hair Loss. It provides free wigs to children and young adults who have lost their hair due to a medical condition.

### **What's your favorite place you've ever visited?**

Any place where there is a white sand beach with turquoise blue waters and temperatures in the 70s.

### **Favorite season?**

Flip-flop season which runs from when temperatures are consistently above 50 degrees until the snow flies.

### **What is on your bucket list?**

My bucket list is mostly places I want to visit, such as the Azores/Portugal, Belize, Costa Rica, Norway, Greece, Croatia, and many of the islands in the Caribbean.

### **How do you pronounce your last name?**

Like a fancy French bathroom: La - can.

### **What is one thing that people would be surprised to learn about you?**

I like to refinish furniture and want to learn better woodworking skills so that I can build furniture.

# 2024 Bassford Remele Construction Law Summit, featuring Wipfli and Lockton

We held our inaugural Construction Law Summit on Thursday, February 8, 2024, at Oak Ridge Country Club. Attendees started the afternoon with networking and lunch, attended four informative sessions (for which they received 3.00 Residential Building continuing education credits from the Minnesota Department of Labor and Industry), and ended the day with a happy hour. Here is a recap:

## **SESSION 1: Strategies and Considerations for Construction Professionals Who Are Thinking About Investing and Succession Planning in Closely-Held Companies**

Business succession planning is one of the hottest topics in the construction industry. Bassford attorneys Kyle Willems and Wynne Reece are on the forefront of this topic. Much of Wynne's practice focuses on advising individuals and businesses during mergers, acquisitions, and related issues. Kyle is the opposite of Wynne, and often advises individuals and business when a merger, acquisition, or related matter goes south and may require legal intervention. Joined by experienced business succession planning experts from Lockton and Wipfli, Kyle and Wynne discussed some of the hot topics affecting the merger and acquisition space. Notably:

- The latest market considerations (retiring Baby Boomers, private equity, etc.)
- The importance of identifying and sharing clear objectives on both sides of a deal
- Short and long-term planning for a deal
- Key legal considerations
- The tax code and how it might affect your deal
- The new role that data is playing in deals.

Contact Kyle and Wynne for more information.

## **SESSION 2: Legislative Update**

The Legislative Update covered several laws that were enacted in 2023 by the Minnesota legislature which impact the construction industry. We covered the numerous employment laws that affect the workplace and employers' policies and handbooks, including mandatory paid time off (earned sick and safe time), the legalization of cannabis, and enhanced protections for pregnant and nursing employees. We

also covered the state ban on non-competes and the potential for a national ban on non-competes. Next, we discussed the changes to the wage theft statute which expanded liability exposure to upstream entities for a subcontractor's wage theft. Finally, we discussed the changes to the scope of indemnity agreements regarding the duty to defend and defense costs.

Contact Janine or Beth for additional information.

## **SESSION 3: Mitigating the Risk of New Technology**

This panel discussed the risks and potential liabilities of the over reliance on artificial intelligence (AI) technology and the under reliance of cyber security. Specific topics included information leaks, contract writing and bid automation with AI technology, and underwriting issues in the construction industry related to AI technology. The speakers also stressed the importance of cyber security sharing stories and recent cases to highlight the risks. While the presentation focused on many negatives, the presenters also each offered some parting advice to mitigate such risks and liabilities.

Contact Ben or Mike to learn more about mitigating new technology risks and liabilities.

## **SESSION 4: Hot Trends in the Construction Industry and What You Need to Know About These Trends**

Kyle was joined by construction industry consultants from Lockton and Wipfli to discuss some of the hottest topics in the construction industry right now. These topics included:

- The impact of substantial changes to some of Minnesota's construction laws.
- SDI, OCIP/CCIP and other hot insurance products
- Outsourcing, people retention, and labor shortage issues
- The impact of new tech, like AI, wearables, drones, and project management software.
- The infusion of state and federal funds for infrastructure and green projects.

Contact Kyle to learn more about the latest trends in the industry, and some legal considerations that relate to each hot trend.



Session 1, L-R: Teresa Martin (Lockton), Kyle Willems and Wynne Reece; not pictured Anthony Gullickson (Wipfli) and Scott Lang (Wipfli).



Session 2: L-R: Kristin Kingsbury, Beth LaCanne and Janine Loetscher.



Session 3: L-R: Connor Danford (Wipfli), Thomas Kleinschnitz (Lockton), Jeff Olejnik (Wipfli), Benjamin Gilchrist and Michael Pfau.



Session 4: L-R: Connor Danford (Wipfli), Scott Lang (Wipfli), Kyle Willems and Thomas Kleinschnitz (Lockton)

# Recent Articles

## **Worker Classification: The New DOL Final Rule, Current State Law, and Proposed Changes to Minnesota's Construction Classification Law**

By Daniel Olson and Beth LaCanne

Worker classification is a potential minefield for employers. Employers must grapple with competing federal and state laws and, for employers with workers in multiple states, potential conflicting state laws in the various states in which they operate. Complicating matters further, recently, the Department of Labor (“DOL”) issued a final rule that effectively reverts to the classification rules in effect before 2021. Additionally, Minnesota legislators have proposed legislation that, if enacted, will further change the worker-classification laws in the construction industry. Below is an update on these important developments.

### **DOL Final Rule**

The DOL is tasked with enforcing the Fair Labor Standards Act (“FLSA”) which guarantees an employee’s right to fair pay and applies to nearly every employer. One component of the FLSA is ensuring employers are not improperly classifying workers as independent contractors to avoid the reach of the FLSA.

Effective March 11, 2024, the DOL began utilizing a six-factor test to determine whether a worker is an employee or an independent contractor. The six-factor test looks at the totality of the circumstances by giving each factor equal weight. The six factors are: (1) the opportunity for profit/loss depending on managerial skill; (2) the investments by the worker and potential employer; (3) the degree of permanence of the work relationship; (4) the nature and degree of employer’s control over performance of the work and working relationship; (5) the extent to which the work performed is an integral part of an employer’s business; and (6) the skill and initiative of the worker. These factors should be familiar because they have been part of the worker classification analysis for many years, albeit with different application.

### **Minnesota's Classification Statute and Proposed Changes**

Similar to the new DOL revised rule, Minnesota applies the “right to control” test to determine employee classification. Under the right-to-control test, courts apply the following five factors to determine whether an individual is an employee or an independent contractor: (1) the right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of materials and tools; (4) the control of the premises where the work is to be done; and (5) the right of the employer to discharge the individual. Again, classification is based on the totality of circumstances for these five factors.

Minnesota’s classification law applies differently to the construction industry, however. For the construction industry, an individual is considered an independent contractor only if all nine of the following factors are met: (1) the individual maintains a separate business with its own office, equipment, materials, and other facilities; (2) the business holds or has applied for a federal employer identification number or has filed self-employment income tax returns with the IRS within the past year; (3) the individual operates under a contract to perform specific services for specific amounts of money under which the individual maintains control over the means of performance; (4) the individual incurs the main expenses related to the services performed; (5) the individual is responsible for the completion of the services and is liable for any failure thereunder; (6) the individual is paid on a per-job or competitive-bid basis; (7) the individual may either suffer a loss or make a profit under the contract to perform services; (8) the individual has recurring business liabilities and obligations; and (9) the success or failure of the individual’s business depends on the relationship of business receipts to expenditures.

The Minnesota legislature is considering a bill that will expand this nine-factor test to a fourteen-factor test. Though some of the current nine factors would be modified slightly by the bill, the proposed legislation would also require an individual to meet five new criteria to be considered an independent contractor: (10) the individual’s business provides W9 forms as required by the IRS; (11) the business has a current certificate of good standing with the Minnesota Secretary of State; (12) the business maintains an unemployment-insurance account; (13) the business maintains workers’-compensation insurance; and (14) the business holds all requisite licenses, registrations, and certifications as required by law.

The effect of the proposed legislation will make it more difficult for construction companies to designate individuals as independent contractors. The proposed legislation also increases the penalties for construction companies who misclassify individuals as independent contractors. If passed, construction companies that misclassify an individual would be liable for the following: compensatory damages, including (but not limited to) the value of unpaid overtime, shift-differential, vacation pay, sick time, health insurance, life and disability insurance, retirement contributions, and social security and Medicare contributions; and a civil penalty of at least \$5,000 but no greater than \$10,000 per violation. These increased penalties are in addition to potential prosecution from the Attorney General’s Office for wage theft.



## The Basics: Why Data Security Matters

By Jessica Klander and Bryce Riddle

In today's digital age, the personal and sensitive consumer information organizations store is the single greatest target for bad actors. Breaches can financially cripple unprepared small businesses. Business leaders must understand the contour of data privacy laws and best practices to safeguard this information.

### The importance of data privacy

"Data privacy" describes the protection of personal and sensitive information from unauthorized access, use or disclosure. This includes social security numbers, financial records, health information and other details that could identify or harm individuals.

Safeguarding such information is vital. A data breach may trigger legal consequences and reporting obligations which could divert internal resources and cause significant financial losses including fines, legal fees and compensatory restitution and nonmonetary damages, including reputational harm.

### Laws and regulations governing data privacy

Numerous state, federal and international laws govern data privacy and security. These laws are rapidly evolving and broadly applied to large and small businesses. Because of this, it is important to stay abreast of new laws. Some notable ones include:

**California Consumer Privacy Act (CCPA)** applies to entities doing business in California that meet certain gross revenue requirements and who buy, sell or share personal information of 100,000 or more California residents. The CCPA grants California residents certain rights and controls over the use of their personal information.

**Health Insurance Portability and Accountability Act & Health Information Technology for Economic and Clinical Health (HIPAA/HITECH)** safeguards patients' protected health information by requiring covered entities and their business associates to comply with certain health record security standards and sets out health information use and disclosure requirements.

**The Safeguards Rule of the Gramm-Leach-Bliley Act (GLBA)** requires companies that offer consumers financial products or services such as loans, financial or investment advice or other consumer-facing financial products to explain their information-sharing practices and to implement specific security practices to safeguard sensitive information.

### Do these laws apply to my business?

Data privacy laws and regulations apply to businesses that collect, maintain or use sensitive consumer information. All businesses should understand data privacy industry standards and what laws and regulations may govern their internal policies and procedures for safeguarding such information.

### Best practices for a small business?

There is no single approach to implementing a data privacy and security management system. The appropriate safeguards depend upon the size of the organization, the kind of information gathered and used, and the laws applicable to your organization. With that in mind, here are a few key concepts:

**Encryption:** Encrypt sensitive data during transmission and storage to prevent unauthorized access.

**Access control:** Implement strict access controls to limit who can access sensitive data and regularly update these permissions.

**Test, monitor and audit:** Conduct regular security penetration tests, audits and assessments to identify areas for improvement.

**Data minimization:** Collect only the data necessary for business purposes and delete data no longer needed. Implement data destruction policies and ensure that data is retained consistent with business needs and applicable law.

**Employee training:** Train employees on data security protocols and practices to reduce human error.

**Incident response plan:** Develop a clear and comprehensive incident response plan to address data breaches promptly and effectively.

### Biggest threats to my business' data security?

**Cyberattacks:** These encompass phishing, malware, ransomware and distributed denial of service attacks.

**Third-party vulnerabilities:** Vendors, outsourcing agencies and other third-parties can introduce vulnerabilities to your systems and customers. Review vendor contracts to ensure there are contractually obligated security standards and notification requirements. Watch for indemnity provisions attempting to shift the financial burden of a breach to your business!

*Continued*

# Recent Articles

## *Data Security, continued*

**Human error:** Negligence, such as misconfigured cloud storage or accidentally sharing information, remains common.

**Advanced persistent threats:** These are long-term, targeted attacks aimed at stealing sensitive data or disrupting operations.

### **What should I do if my business is breached?**

A well-prepared response is generally required and can mitigate financial losses to your customers and your business. When a breach is discovered, be prepared to take these steps:

**Activate your incident response plan:** The longer you wait, the larger your potential consequences.

**Secure your operations:** Isolate and secure your systems from further access and fix vulnerabilities that may have caused the breach. Do not destroy evidence that may assist in locating the bad actor or mitigating the damage. If you don't have the internal expertise to secure and mitigate the data breach, contact an area expert to do so.

**Contact an attorney.** Contacting an attorney with knowledge of cybersecurity laws will ensure you follow the appropriate and necessary processes required when responding to a breach.

**Contact law enforcement.** The more quickly you contact law enforcement, the more likely you are to locate the bad actor and potentially recover any financial losses.

**Investigate the breach:** After you have secured the data and stopped the breach, investigate the scope and cause of the breach.

**Mitigate damage:** Take steps to rectify vulnerabilities and prevent future breaches.

**Notify affected parties:** Depending on the nature of the breach and relevant laws, you may want or be required to notify individual consumers affected by the breach.

**Communicate transparently:** Keep stakeholders informed about the situation and actions taken to address it.

**Improve security measures:** After you have contained and responded to the breach, improve security protocols and update policies and procedures based on what you learned.



## **The Corporate Transparency Act - What You Need to Know**

By Kyle Willems and Wynne Reece

Effective The Corporate Transparency Act (CTA), which went into effect January 1, 2024, represents a significant shift in the regulatory landscape for small businesses in the United States. Enacted as part of the National Defense Authorization Act for Fiscal Year 2021, the CTA mandates the reporting of beneficial ownership information to the Financial Crimes Enforcement Network (FinCEN), in an effort to make it more difficult for individuals to use complex corporate structures to facilitate illegal activities, evade taxes, or launder money. The days of anonymity benefits of incorporating in places like Delaware are gone (at least for now).

### **Who Does This Apply To?**

The CTA applies broadly to corporations, LLCs, and other similar entities created by the filing of a document with a secretary of state or similar office under the law of a state or Indian tribe.

Of note for small business owners, your business is exempt from the CTA if it meets two requirements: (1) the business has an annual revenue of at least \$5,000,000 and (2) has more than 20 full time employees.

The CTA provides a litany of other exemptions. For instance, the following entities are exempt from the CTA: publicly traded companies, banks, credit unions, and insurance companies. The rationale behind these exemptions is that such entities are already subject to substantial regulatory scrutiny and, in many cases, have existing beneficial ownership disclosure requirements.



### What Does the Filing Entail?

Businesses subject to the CTA must report certain information about their beneficial owners to FinCEN in a BOI (Beneficial Owner Information) report. Under the CTA, a “beneficial owner” is defined as any individual who, directly or indirectly, exercises substantial control over an entity, or owns or controls at least 25% of the ownership interests of an entity. This broad definition is intended to capture a wide range of control and ownership scenarios, ensuring that the actual individuals behind business entities are identified and recorded.

In addition to the initial filing, there are ongoing compliance filing requirements.



### When Does the Filing Have to Be Completed?

Entity Type	BOI Filing Deadline
Entities in Existence Prior to January 1, 2024	On or before January 1, 2025
Entities Formed on or after January 1, 2024	90 days from the date of formation
Entities Formed on or after January 1, 2025	30 days from the date of formation

### What If I Fail to Comply with the CTA?

There are civil and criminal penalties for failing to comply with the CTA. These penalties include civil monetary penalties of up to \$500 for each day a violation continues and/or criminal penalties of up to \$10,000 in fines and 2 years in prison. Consequently, businesses must be diligent in understanding their obligations under the CTA and ensuring that their reporting is accurate and timely.

### Wasn't the CTA Just Found to be Unconstitutional?

On March 1, 2024, an Alabama federal court ruled against certain provisions of the CTA, a move that may significantly impact the CTA's regulatory landscape.

The court's ruling stems from concerns over privacy and the regulatory burden on small businesses. In the court's holding, it notes that the CTA's requirements could infringe on individual privacy rights and impose undue hardships on small entities. If upheld, the court's ruling could result in changes to the CTA or lead to a more nuanced application of its provisions. Conversely, the court's ruling is pending an appeal, and the ruling may be struck down in part or in its entirety.

While there is injunction in place on parts of the court's ruling, the injunction is limited in scope. The injunction only applies to the defendants in that case and the ruling DOES NOT affect any other entity's obligations under the CTA.

We will monitor this and similar court actions and will continue to provide you with information on developments.

The Corporate Transparency Act marks a pivotal development in the U.S. government's efforts to enhance transparency and combat financial crimes facilitated through the misuse of corporate structures. By shedding light on the beneficial owners of U.S. entities, the CTA aims to deter illegal activities and promote a more transparent business environment. Businesses affected by the CTA will need to navigate these new reporting requirements carefully, ensuring compliance to avoid penalties while contributing to the broader goal of curbing illicit financial flows.

**We are offering flat fee services for Corporate Transparency Act filings. Please contact your attorney for more information.**

# Summaries



## **Business Succession Planning: Top 10 Dos and Don'ts from the Lawyers' Perspective**

Kyle Willems and Wynne Reece

Business succession planning is top of mind as the Baby Boomer generation retires. From a legal perspective, it's essential to navigate the process carefully to avoid potential pitfalls, streamline transition and secure the future of the business, both in times of planned and unplanned transition. Kyle Willems and Wynne Reece provide ten considerations when it comes to planning for your business.

## **How Artificial Intelligence Can Help (And Hurt) Your Practice** | Bryce Riddle

It is 2024, and artificial intelligence (AI) is taking the world by storm. Do you have a question you need answered? AI can help with that. Do you have a photo you want edited? AI can help with that, too. Do you have a hankering for pancakes, but no pancakes handy? Unfortunately, it is unlikely that AI can help with that, although it would not be surprising if that answer changes by the end of 2024. AI is rapidly developing, and no one quite knows what its limitations will be (if any).

## **SCOTUS Hears Oral Argument on Landmark Employment Law Case** | Michael Pfau

On December 6, 2023, the U.S. Supreme Court heard arguments in *Muldrow v. City of St. Louis*. The question presented was whether Title VII of the Civil Rights Act of 1964 prohibits discrimination in transfer decisions absent a separate court determination that the transfer caused a significant disadvantage in employment, which could have a significant impact on the construction industry.

## **Don't Show Me The Money** | Beth LaCanne

As Minnesotans ushered in the new year, a new law targeting pay disparity became effective. As of January 1, 2024, a new subdivision of Minnesota Statute § 363A.08 went into effect. The new subdivision bars employers from asking an applicant for their pay history and using that information to make decisions about the applicant's compensation. The law reflects the current Minnesota legislature's focus on closing the wage disparity experienced by females and people of color.

## **"Slander of Title": The Counter-Punch to a Mechanic's Lien** | Kyle Willems, Beth LaCanne and Michael Pfau

The mechanic's lien is one of the best weapons in a contractor or material supplier's arsenal when it is not getting paid on a project. It may allow for the recovery of attorney's fees, interest, payment, and the right to foreclose to get payment. Because a mechanic's lien is a powerful tool, Minnesota law allows for a powerful counterpunch. That counterpunch is called the "slander of title" claim.

These articles can be found on the [Construction Practice Group page at bassford.com](https://www.bassford.com).

# Presentations

***How to Win or Defend a Bad Faith Claim,*** Minnesota Continuing Legal Education Uninsured, Underinsured, No-Fault Insurance & Bodily Injury Update, March 2024 (Janine Loetscher)

***Adopting Practices That Reduce Construction Defects and Failures,*** Preventing and Addressing Construction Defects and Failures in Minnesota Seminar, Halfmoon Publications, February 2024 (Kyle Willems)

***Diversity & Women in Construction,*** Minnesota Real Estate Journal 16th Annual Minnesota Construction Summit, January 2024 (Janine Loetscher, panel moderator)

***Avoiding Disputes & Winning Disputes,*** Minnesota Real Estate Journal 16th Annual Minnesota Construction Summit, January 2024 (Kyle Willems, panel moderator)

***Construction Contracts 401,*** Associated General Contractors of Minnesota Construction Summit, January 2024 (Kyle Willems)

***Advanced Leave Topics: Requirements for Two Special Situations,*** Minnesota Continuing Legal Education How to Manage Leave Requests Seminar, January 2024 (Beth LaCanne)

***Determining Damages, Trying Defamation Cases, and Settlement Considerations,*** Minnesota Continuing Legal Education, December 2023 (Kyle Willems)

# Case Law Update

## ***The City of Elk River v. Bolton & Menk, Inc.*** **(Minn. Jan. 31, 2024)**

By Janine Loetscher

A recent case by the Minnesota Supreme Court affirms the principle that, in deciding whether to certify a partial final judgment under Minnesota Rule of Civil Procedure 54.02 (so as to allow immediate appeal), the district court is in the best position to evaluate whether there are justifiable reasons for an immediate appeal, and has considerable discretion in doing so. This suggests that, where a district court carefully documents its reasons for certifying a partial final judgment, appellate courts will not second guess its determination.

In *The City of Elk River v. Bolton & Menk, Inc.*, the City of Elk River sued a consultant who had provided professional design services for the design of a wastewater treatment facility improvement project. The City alleged breach of contract and professional negligence. The consultant denied the claims and initiated a third-party complaint against three other parties involved in the project, alleging they were partially or totally responsible for any of the City's damages. The district court thereafter granted the third-parties' motion to dismiss the third-party claims. The consultant moved the district court to enter partial final judgment so as to allow it to appeal the dismissal. The City agreed, but the third-parties opposed the motion. The district court granted the motion and entered final judgment on the dismissal order, expressly noting that judicial economy was best served by permitting an immediate appeal, as three potentially-necessary parties had been dismissed, such that the risk of the time and expense of excluding necessary parties outweighed the burden of delay from an immediate appeal. The district court also concluded that delaying the appeal until the remaining claims between the City and the consultant would not simplify appeal and could impact the resolution of the remaining claims.

The court of appeals dismissed the appeal. The court of appeals reasoned that allowing an immediate appeal to proceed would conflict with the general policy against piecemeal appeals because the third-party claims and principal claims all relate to the same construction project. Although the court acknowledged that an immediate appeal might potentially avoid the time and expense of additional proceedings, such as a second trial, it concluded this consideration did not outweigh the general policy against piecemeal appeals.

The Minnesota Supreme Court reversed and reinstated the district court's order granting partial final judgment. In support of its holding, the Court reasoned that the district court was in the best position to determine whether factors justified immediate appeal, and that the district court had diligently documented its reasons for granting certification.

This case impacts the construction industry, which frequently involves third-party claims derivative of contract claims between an owner or municipality and its consultants and contractors, based on the varying contracts at issue in a construction project. Such claims often subject to motion practice regarding the respective fault or responsibility of each party. Going forward, this case suggests that parties seeking to certify a partial final judgment of a claim or defense should provide the Court with articulate and well-supported reasons why an immediate appeal is justified. Further, contracts and subcontracts should be reviewed by counsel to ensure parties are protected in the event of a dispute.



Elk River, Minnesota. (2024, March 10).  
In Wikipedia. [https://en.wikipedia.org/wiki/Elk\\_River,\\_Minnesota](https://en.wikipedia.org/wiki/Elk_River,_Minnesota)



# Save the Date

## UPCOMING EVENTS

### Bassford Remele's The Work Week Annual Employment Law Seminar

Thursday, July 18, 2024  
1:30-4:00 PM: Seminar  
4:00-5:00 PM: Social

### Exploring the Ethical Labyrinth: Navigating *AI's Pitfalls and Promises in Your Practice*

Tuesday, August 20, 2024  
11:30 AM-1:00 PM  
(1.50 ethics CLE credits will be applied for)

### Women's Leadership Summit Thursday, September 26, 2024

3:00-4:30 PM: Summit  
4:30-5:30 PM: Social  
*Women and men are welcome*



## BASSFORD REMELE CONSTRUCTION TEAM

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