

# HENNEPIN LAWYER

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## Play Ball!

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### Yogisms & Minnesota Law

By **Marshall H. Tanick & Cathy Gorlin**

The baseball season is beginning at the end of March. After another long, brutal and quite consequential (and controversial) winter, it's appropriate to take a bit with a look at Minnesota jurisprudence through the eyes of that All-Star sage, Yogi Berra.

This iconic New York Yankees catcher was known as much, if not more, for his pithy sayings that reflect simple verities cloaked in non sequiturs.

Here in Hennepin County, the Minnesota Twins are getting ready to try to bounce back from two consecutive disappointing seasons with a new management team comprised of a retooled front office and a new on-field manager, Derek Shelton. The season starts on March 26, with series in Baltimore and Kansas City, before the club comes home to Target Field in downtown Minneapolis for its opening home weekend series against the Tampa Bay Rays, Friday, April 3, through Sunday, April 5. So it's fitting to consider how jurisprudence in Minnesota, and here in Hennepin County, is reflected in nine "Yogisms" attributed to the Hall of Famer. While these sayings were often ascribed to him, he demurred, remarking: "I didn't say all of the things they said I said I said."

But even if he didn't say precisely everything that they said he said, he probably *would* have said what they said he said, if he thought about saying them—and these words of wisdom are appropriate for the bench and bar to ponder as it's time to: **Play Ball!**

#### "When you come to a fork in the road, take it."

In Minnesota, alternative pleadings are permissible under Rule 8.01 (b) of the Rules of Civil Procedure. So, too, are parallel statutory common law claims, even if they are somewhat inconsistent.

But claimants cannot obtain "double recovery" for the same harm, when pled in the alternative. Claimants must choose which remedy to take if more than one is awarded. *Wirig v. Kinney Shoe Company*, 451 N.W.2d 374 (Minn. 1990).

#### "Nobody goes there anymore; it's too crowded."

Yogi's reluctance to frequent a particular restaurant may be true of the state of civil litigation lately in Minnesota. After many years of crowded court dockets, filings have stabilized—or even subsided—on both federal and state court systems.

In the federal court system, the number of civil filings has been steady over the past few years, with slight decreases followed by equally small increases. In the Minnesota state court system, docket congestion has declined over the past few years. The total number of civil lawsuits filed in the 10 judicial districts declined during COVID, and has stayed stable since then.

#### "It sure gets late early out there."

Yogi's observation about the distractions caused during World Series games by autumn shadows in left field, where he played late in his career, resonate with civil claimants facing imminent expiration of statute of limitations.

Pragmatic reasons may exist to defer commencing a lawsuit, despite the rapidly advancing shadow of a limitation period, such as the need to gather more pre-litigation evidence, the possibility of engaging in pre-litigation negotiation or mediation, and the desirability of avoiding a public filing, among others.

These circumstances may warrant a tolling agreement, an agreement to which parties, usually through counsel, mutually consent to suspend the statute of limitations pending further negotiations or further developments. The device is permissible in most instances, except for those rare instances when a limitation period is deemed to be jurisdictional and cannot be extended.

But tolling agreements can be fraught with complexities. One complication occurs when an impatient litigant files a lawsuit during the pendency of a tolling agreement. Despite the existence of the tolling arrangement, a lawsuit may continue, subject to a breach of contract defense by the other aggrieved party. *Kunza v. St. Mary's Regional Health Center*, 747 N.W.2d 586 (Minn. App. 2008).

#### "Always go to other people's funerals; otherwise they won't go to yours."

Pursuing claims for wrongful death also can pose issues of timeliness.

Under Minn. Stat. § 573.02, the limitations period for wrongful death claims generally is three years, even if the underlying cause of action, including negligence is for a longer period of time, such as six years for most torts.

Another trap for the unwary in pursuing wrongful death claims is the need for appointment of a personal representative or trustee before the three-year limitations period expires. Failure to do so bars a subsequent claim. *Miklas v. Parrot*, 663 N.W.2d 583 (Minn. App. 2003).

#### "Never answer an anonymous letter."

The pervasiveness of defamation on the internet is overtaking conventional forms of media defamation. As nearly everyone has access to the internet these days, lacking any editing or filtering function, defamation thrives in that milieu, whether done through blogs, emails, tweets, Instagram posts, or other forums.

Minnesota law imposes restrictions on pursuing claims for internet defamation, particularly when the perpetrators are out of jurisdiction, unless the communication is "expressly aimed" in Minnesota, a difficult standard to satisfy. *Griffis v. Luban*, 646 N.W.2d 527 (Minn. 2008).

Another challenge for someone who is the subject of defamation on the internet is to determine the identity of the perpetrators, because they often mask themselves in cloaks of anonymity. Various devices can reliably attempt to ascertain the identity of an anonymous source of defamation, often necessitating filing of a "John/Jane Doe" lawsuit in order to have access to subpoena power to seek information from the internet host entity.

#### "We were overwhelming underdogs."

The likelihood of obtaining appellate review by the Minnesota Supreme Court of a decision of the Court of Appeals had remained stable and slight over the years. The percentage of cases that the Supreme Court agrees to take, other than those they must hear, such as first-degree murder and workers' compensation cases—those rare cases with original jurisdiction—have hovered around the 10- to 15-percent mark, meaning that the chances of achieving review are no greater than one out of seven, or even fewer. Despite the long odds, the chances are far better than seeking review by certiorari from the U.S. Supreme Court, which hears a decreasing number of cases, less than 1% of some 10,000 sought per year, 62 last term.

The criteria for granting petition for review are set forth in Rule 117 of the Minnesota Rules of Civil Procedure. Dissatisfaction often occurs on the part of parties whose petitions are declined, because the court has never given reason for accepting petition or, more importantly, for declining them. The court has been urged from time to time to articulate why it has taken a particular case or declined to do so to make the decision-making process more transparent. This practice is followed only on rare occasions by the U.S. Supreme Court and never at the state level, where declinations are invariably accompanied by a curt one sentence denial.

#### "It is déjà vu all over again."

But the chances of winning if the challenge can get the case heard are much higher. About half of the appeals heard on discretionary review by the Minnesota Supreme Court result in reversal, remand, or other favorable outcomes for the appealing litigants. Although the case load includes a number of workers compensation and murder cases, which usually are affirmed, the reversal rate for civil cases approaches 50 percent or more. This is a far cry from the U.S. Supreme Court, which, in recent years, has shown a penchant for overturning the few cases it actually hears. The reversal rate has been in excess of 70 percent over the past two decades—actually 71 percent of its rulings since 2007.

Yogi's déjà vu observation, which supposedly occurred while he was watching Roger Maris and Mickey Mantle hit back-to-back home runs in their historic 1961 race to break Babe Ruth's existing home run record, might apply to trial or rehearing of cases upon remand from appellate courts.

Re-litigating a case after remand—or when a new trial is granted by a trial court—is reminiscent of the movie *Groundhog Day*, in which Bill Murray's character experiences each day repeating itself.

But unlike Murray's world-weary weatherman in *Groundhog Day*, the results of retrial may differ from the original case. A different outcome from the original proceeding may be attributable to parties learning from the past, changing tactics, and other manners—or even changes in the law—which result in the outcome of the second trial differing from the first. *Sigurdson v. Isanti County*, 386 N.W.2d 715 (Minn. 1986), 448 N.W.2d 89 (Minn. 1989) (gender discrimination claim actionable).

#### "It ain't over 'til it's over."

Family court proceedings, more than some others, tend to be prolonged with reconsiderations, modifications, and appeals. Several key issues, such as custody, are subject to review on multiple occasions and may be modified in future proceedings during and after a marital dissolution is finalized.

Even if a decision is not appealed, the result can be modified under the "change of circumstances" tenet. Under Minn. Stat. § 518A.39, Child Support can be revised based upon a "substantial change of circumstances." See *Sheehy v. Kalis*, 19 N.W.2d 186 (Minn. 2025) (child support); *Crawley v. Crawley*, 897 N.W.2d 293 (Minn. 2017) (custody due to endangerment). These vacillations in post-dissolution rulings show that even when lawyers and litigants may think the matter is over, it frequently is not.

### Extra Innings

#### "If the world were perfect, it wouldn't be."

Yogi's most oft-repeated observations is applicable to the Minnesota appellate court process.

In the state court system, appeals generally can be taken within 60 days of most rulings through the Minnesota Court of Appeals under Rule 104.02 of the Minnesota Rules of Civil Appellate Procedure. There are, however, some instances in which a party need not wait that long, but may bring an interlocutory appeal earlier, before proceedings are concluded, in the trial court. Under Rule 103.03 (b), interlocutory appeals may be taken from the granting, denying, or dissolving of an injunction. Other interlocutory appeals can include a dismissal of a case for lack of jurisdiction, even before final judgment is entered.

Additionally, cases that are not finalized may be appealed under Rule 54 of the Minnesota Rules of Civil Procedure, provided the trial judge deems there to be separate and distinct matters and there is no "just reason" for delay. Another route for pre-finality appeal is through certification, which allows the appellate court to pass upon an issue that is regarded as "important" or "doubtful" by the lower court, even if the case is not concluded under Rule 105 (i) of the Minnesota Civil Appellate Rules. In addition, the appellate court may exercise discretionary review under Rule 105, even if the matter is not otherwise ripe for appeal.

A similar device exists at the federal level under 28 U. S. C. 1292(b), but it is framed somewhat differently, restricted to a "controlling issue" of "substantial" doubtfulness and will "materially advance" termination of the litigation, and it is rarely invoked and often declined. See *EEOC v. Old Dominion Freight Line*, 2013 U. S. Dist. LEXIS 88352 (8th Cir. July 8, 2013).

Another pre-finality appellate route, although infrequently used, is certification by the U.S. District Court to the Minnesota Supreme Court to address an unresolved issue of state law under the Uniform Certification of Questions of Law statute, Minn. Stat. § 480.065. E.g., *State v. Klawitter*, 518 N. W. 2d 587 (Minn. 1994); *State v. Jacobson*, 681 N. W. 2d 398 (Minn. App. 2004), *aff'd* 697 N. W. 2d 610 (Minn. 2005) (criminal cases).

Similar mechanisms exist for other cases. Under Minn. Stat. s.480.065 subd. 3, the Minnesota appellate courts can hear cases certified from foreign jurisdictions, although the state Supreme Court rarely indulges in exercising that discretionary authority. E.g., *Lyon Financial Services Inc., v. Illinois Paper Co.*, 848 N. W.2d 535 (Minn. 2014).

#### Yogi's years

Yogi played against the Minnesota Twins in the declining years of his career, from 1961 to 1963, before ending his playing days with the cross-town New York Mets in 1964 and then managing both New York teams the Mets and the Yankees, at-torrent times.

He only hit a meager .200 (three hits in 15 at bats) against the Twins compared with a respectable .285 overall lifetime batting average. But his comments about life have caught on and hit home with Minnesota lawyers, including those in Hennepin County.

But whether he actually said them, or they are apocryphally ascribed to him, these remarks—and yet additional remarks—reflect what he probably would have said, had he said so.

For those eager for the baseball season to get underway, Yogi might urge patience, reminding them: "It's gonna begin when it starts."

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**Engaged Voir Dire:**  
**Successful Jury Selection in Civil and Criminal Trials:**  
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Wednesday, Mar 25th 12:00 PM - 1:00 PM

**Standing Tall or Falling Short? How Federal Courts Measure Article III Standing:**  
**Consumer and Creditor Law**

Wednesday, Mar 25th 5:00 PM - 7:00 PM

**Appellate Practice Spring Social:**  
**Appellate Practice Section**

Thursday, Mar 26th 12:00 PM - 1:00 PM

**HCBA New Lawyers Hybrid Section Meeting:**  
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