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THE MINNESOTA COURT OF APPEALS: ARGUING TO, AND LIMITATIONS OF, AN ERROR-CORRECTING COURT

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I. INTRODUCTION

In late 1982, Peter Popovich, who was soon to become the first Chief Judge of the Minnesota Court of Appeals, was doing his research and sounding out members of the bar. I happened to be in the hallway at Briggs and Morgan's St. Paul office when he was just leaving a conversation with Leonard Keyes, a Briggs partner, a former Ramsey County District Court Judge, and an authority on all things judicial. As they passed, Keyes made this closing remark, "remember, you are to be an error-correcting court—don't go making judicial policy."

It struck me then as an odd concept. But, of course, I should have known that it was not a foreign idea because the federal judiciary and the states that preceded Minnesota with intermediate appellate courts had already struggled to define the relationship between an intermediate appellate court and its corresponding supreme court.

When Congress added the courts of appeals to the federal judiciary in 1891, it contemplated that the court would fulfill an error-correcting function and the Supreme Court would continue to perform the law-developing foundation.[1] The role of the federal courts of appeal has changed, however, as caseload pressures and increasing federal jurisdiction have required the courts of appeal to declare and define the national law, subject only to Supreme Court review.[2] The federal courts of appeal are—for the majority of cases

1. Evarts Act, Ch. 517, 26 Stat. 826 (1891); Martha J. Dragich, *Once a Century: Time for Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 21–23 (1996).

2. Dragich, *supra* note 1, at 21–23 (citing Commission on Revision of Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, *reprinted in* 67 F.R.D. 195 (1975)).

litigated in the federal system—the court of last resort.[3]

The experiences of two regional states demonstrate that there is no uniform mold for defining the role of an intermediate appellate court. When Wisconsin created its court of appeals in 1978, it designed the court to be a "high-volume, error-correcting court."[4] But, most commentators would agree that, in reality, the court has become a "*de facto* law-developing Court."[5] In fact, the Chief Justice of Wisconsin has directly observed that the court of appeals has two functions: "an error correcting function, and a law-defining and developing function."[6] It has been suggested that this law-developing function is inevitable because the Wisconsin Court of Appeals publishes three times more opinions, its published decisions are binding precedent, and its decisions cover a wider range of topics.[7] It has been suggested that the Wisconsin Court of Appeals "makes law in the 'micro' sense through its application of the existing law to a new fact pattern, and the Supreme Court develops law in the 'macro' sense of taking only cases with ideal fact patterns that involve questions of public policy."[8]

The Nebraska Court of Appeals, on the other extreme, was strictly limited to its error-correcting function. In fact, as originally constituted, the decisions of the court of appeals were not even given precedential value for the trial courts.[9] The Nebraska Supreme Court reasoned that, because the court of appeals was intended to be an error-correcting court, and the statutes creating it did not expressly give its decisions precedential value, only

3. Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 613 (2003) (citing Textile Mills Sec. Corp. v. Comm'r, 314 U.S. 326, 335 (1941)) (explaining that the benefits of uniformity and finality achieved by en banc review "are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases"); *see also* Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913, 959 (1994) (referring to the federal courts of appeals as "junior varsity supreme court[s]" because they frequently have the final say on issues of federal law within their circuits).

4. Swan v. Elections Bd., 394 N.W.2d 732, 735 (Wis. 1986).

5. Matthew E. Gabrys, Comment, *A Shift into the Bottleneck: The Appellate Caseload Problem Twenty Years After the Creation of the Wisconsin Court of Appeals*, 1998 WIS. L. REV. 1547, 1555 (1998).

6. Cook v. Cook, 560 N.W.2d 246, 250 (Wis. 1997).

7. Gabrys, *supra* note 5, at 1557–58.

8. *Id.* at 1558.

9. Metro Renovation v. Neb. Dep't of Labor, 543 N.W.2d 715, 721–22 (Neb. 1996).

decisions of the supreme court could create precedent.[10] In other words, the decisions of the court of appeals were binding only on the parties to the case before it. Later, the Nebraska Legislature amended the statute to provide that the court of appeals decisions did have precedential value.[11]

The Minnesota Court of Appeals was established twenty-five years ago to act as an error-correcting court. Although the enabling statute does not expressly state that the court's published decisions are precedential, that conclusion is clear by negative inference from the provision that "[u]npublished opinions of the Court of Appeals are not precedential."[12] The court of appeals has frequently reminded litigants that it serves to correct errors, not to make policy or judicial doctrine for the state.[13] And sometimes the supreme court has issued a friendly reminder to the court of appeals.[14]

Nonetheless, the court of appeals, just as the district court, must decide the case before it. That means the court must, at times, decide issues of first impression, some of which require it to resolve competing public-policy interests. The essential function of the court, however, is to review the district court record and correct errors or confirm that no errors were made. Unlike Wisconsin, the Minnesota Supreme Court has not recognized the law-developing function of the Minnesota Court of Appeals.

II. HISTORY

The error-correcting function of the court of appeals is not new and, in fact, was the original intent in creating the intermediate court. To properly understand the Minnesota Court of Appeals's function and purpose as an error-correcting court, its creation must be put into context.

Twenty-five years ago, the landscape of Minnesota's court system changed remarkably with the creation of the court of appeals. At one time, the Minnesota court system comprised three

10. *Id.* at 715.

11. L.B. 1296, Neb. Unicameral, 94th Leg., 2nd Sess. (1996).

12. MINN. STAT. § 480A.08, subdiv. 3(c) (2008).

13. *See, e.g.*, Anderson v. Federated Mut. Ins. Co., 465 N.W.2d 68, 72 (Minn. Ct. App. 1991).

14. *See, e.g.*, Pike v. Gunyon, 491 N.W.2d 288, 290 (Minn. 1992); Sefkow v. Sexton, 427 N.W.2d 203, 210 (Minn. 1988).

types of district courts[15] and the Minnesota Supreme Court. The Minnesota Supreme Court alone shouldered the burden of reviewing all civil and criminal appeals, appeals from certain administrative agency determinations, and special matters such as writs of mandamus or prohibition. In addition to those duties, the supreme court was expected to develop new law and judicial policies, as well as provide administrative oversight for the entire judicial system.

In the early 1980s, dramatic increases in the number of filings placed substantial pressure on the supreme court's ability to fulfill all of these functions. Burdened by such large caseloads, the supreme court was required to focus most of its energies on error correcting rather than developing the law of Minnesota. The court sat in panels and made frequent use of summary dispositions,[16] leaving litigants with little understanding of the rationale behind the court's decisions. As former Court of Appeals Judge and Supreme Court Justice Peter Popovich remarked, "[a]s a matter of policy the right to appeal was rarely denied, but the burden of maintaining that policy was becoming overwhelming."[17]

In making the case for an intermediate court, the Judicial Planning Committee noted that the creation of an intermediate appellate court would do away with the summary dispositions and provide "a high quality of appellate justice by insuring that judges, not appointed staff, consider and decide cases."[18] An intermediate court of appeals would enable "all appellate disputes to be resolved with dispatch,"[19] enhance the geographic accessibility of the appellate process by allowing cases to be heard in various locations throughout the state, and "permit[] more litigants to appeal."[20] The Judicial Planning Committee's report concluded:

> Creating an intermediate appellate court would . . . reduce the rate of delay of appellate dispositions. It would enable the Supreme Court to focus on the development of case law. It would provide an appellate court with primary responsibility to review district court

15. The district courts, county courts, and municipal courts.

16. Decisions without written explanation or analysis.

17. PETER S. POPOVICH, BEGINNING A JUDICIAL TRADITION: FORMATIVE YEARS OF THE MINNESOTA COURT OF APPEALS 1983–1987, 8 (1987).

18. Gregory A. Lang, *The Case for a Minnesota Court of Appeals* (Minnesota Supreme Court, Judicial Planning Committee 1980).

19. *Id.*

20. *Id.*

> decisions and correct errors. It would assure a high quality of justice. It would make the appellate system more accessible to litigants. The Court of Appeals will benefit the litigants, the bar, and the bench.[21]

After years of work, preparation and study, the Minnesota Legislature, in 1982, passed enabling legislation for the intermediate appellate court. Following the requirements for amending the state constitution, the proposal to create a court of appeals was presented to the electorate that same year. Voters approved the amendment and the Minnesota Court of Appeals was established in 1983.

Judge Popovich had high goals for the court, noting that "I would presume ninety percent of the cases would stop here . . . . A few cases on a writ will go on."[22] Commenting on the precise role of the new court he said, "We'll be an error-correcting court. We will not be legislative . . . after all, that's up to the Supreme Court and the legislature."[23]

The Office of the State Court Administration's report on the "new" appellate court's first year of operation showed that the intent behind creating the court, and Judge Popovich's goals, were being met.[24] The court of appeals processed a high volume of cases with a focus on error correction. The court of appeals had jurisdiction over almost all traditional appeals and writ matters previously brought before the supreme court, reducing the original appellate jurisdiction of the supreme court to a fraction of its former level. The court granted oral argument to all parties who requested it and traveled to each of the judicial districts around the state to hear cases. It published opinions at a rate which exceeded most other appellate courts. Ultimately, the court's workload would grow to average almost twenty-five hundred decisions each year.

The original, mandatory jurisdiction of the supreme court was reduced so that most of its workload came by discretionary petition. But the creation of the intermediate court did more than simply reallocate the supreme court's workload. Under the reorganized

21. *Id.*

22. ROLAND C. AMUNDSON, THE FIRST TEN: AN INFORMAL HISTORY OF THE FIRST TEN YEARS OF THE MINNESOTA COURT OF APPEALS (1993).

23. *Id.*

24. OFFICE OF THE STATE COURT ADMINISTRATOR, THE NEW MINNESOTA APPELLATE COURT SYSTEM: REPORT ON THE FIRST FULL YEAR OF OPERATION: 1984 (1985).

appellate system, the supreme court could give full consideration to issues of statewide, precedential, or constitutional significance. Once again, the supreme court could hear matters en banc and focus on the development of the law and the expression of legal principles.

In addition to putting the significant, statewide, precedential issues before the supreme court, the work of the court of appeals involving error correction allowed the supreme court to perform its supervisory and administrative responsibilities, which are critical to the effective and efficient functioning of Minnesota's legal and judicial systems. The following observations concerning the purpose for the Indiana Court of Appeals have equal application in Minnesota:

> Without some restriction on access to a court of last resort, that court's ability to act in its law-giving function will eventually be destroyed in favor of its error-correcting function. Creation of an intermediate court can limit access to the state's supreme court and protect its law-giving function from the dangers of an unrestricted docket. That protection is only as successful as the supreme court's authority to select what it will consider from the trial courts or the intermediate court.[25]

III. PURPOSE AND FUNCTION OF THE COURT OF APPEALS

When creating the court of appeals, the legislature intended it to correct district court errors while reserving the establishment of new legal concepts to the supreme court. These goals provided the framework for the court of appeals's internal rules of operation, which were published and widely disseminated. In the introductory paragraph to its internal rules, the court's purpose is clearly stated as follows:

> The Court of Appeals is an intermediate appellate court. It is primarily decisional and error correcting rather than a legislative or doctrinal court. Its primary function is the correction of error by application of legal principles. Its task is to find the law, to state it and apply it to the facts. Only when there are no statutory or judicial precedents to

25. Chief Justice Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669, 680 (1988).

follow will the Court of Appeals make new law.[26]

As an error-correcting court, the court of appeals reviews district court proceedings to determine: (1) whether there was sufficient evidence to sustain the judgment, (2) whether proper district-court procedure was used, and (3) whether the settled law was applied to the facts as reflected in the record. This standard of review differs from the duties of the supreme court, which is required to consider cases to: (1) resolve conflicts and thus maintain doctrinal harmony, (2) provide authoritative construction of the Minnesota and United States Constitutions, (3) determine the validity of Minnesota statutes, and (4) establish or modify common-law principles of statewide importance.

Because significantly fewer cases reach Minnesota's highest court, as a practical matter the court of appeals is a de facto court of last resort for most litigants. Thus, the court of appeals plays a very substantial role in the application of the common law, the interpretation of statutes, and virtually all areas of civil and criminal law. Although the supreme court is primarily concerned with the precedential impact of its decisions on future litigants, the court of appeals is primarily concerned with the resolution of the case before it.

Federal courts have begun to recognize the vital role that the court of appeals plays in the development of Minnesota law. The general rule still exists that federal courts exercising diversity jurisdiction are only bound by state law as determined by the highest state court. But recent decisions in the Eighth Circuit Court of Appeals and the Federal District Court of Minnesota acknowledged that decisions of the court of appeals—while not binding—are highly persuasive and should be followed when they are the best evidence of state law.[27]

IV. COURT OF APPEALS RECOGNIZES ITS LIMITATIONS AS AN ERROR-CORRECTING COURT

The court of appeals often expressly describes its role as an intermediate court, recognizing its own limitations as an "error-correcting" court. The primary area where the court of appeals

26. MINN. CT. APP. INTERNAL R. 1 (repealed 1991).

27. Bureau of Engraving v. Fed. Ins. Co., 5 F.3d 1175, 1176 (8th Cir. 1993); Nelson Distrib., Inc., v. Stewart-Warner Indus. Balancers, 808 F. Supp. 684, 687 (D. Minn. 1992).

recognizes this limitation is when it is asked to create a new common law cause of action. For example, in two specific cases, the court of appeals refused to create new common law causes of action: loss of consortium and the negligent infliction of emotional distress.

In *Belisle v. Dori*,[28] the court of appeals rejected the right to claim loss of consortium to unmarried persons who held themselves out as married.[29] The court stated as follows: "[t]his court, as an error-correcting court, is without authority to change the law. It is not the function of this court to establish new causes of action, even when such actions appear to have merit."[30] The court declined to reach the merits of Belisle's argument that the common law should reflect societal changes.[31]

Similarly, in *Engler v. Wehmas*,[32] the court demonstrated its limitations when it refused to expand the common law cause of action of negligent infliction of emotional distress.[33] The plaintiff in *Engler*, a mother, witnessed her young child get hit by a car and commenced a lawsuit claiming negligent infliction of emotional distress arising from her fear for her own safety and the distress caused by witnessing her son's injuries.[34] If the court allowed the plaintiff to recover, the door would open for allowing liability to be extended to a third party.[35] The court declined to expand the scope of negligent infliction of emotional distress claims, explaining that it was not the function of the court of appeals to create new law.[36]

The court of appeals further demonstrated its limited function as an error-correcting court when asked to change an existing common law standard. For example, in *Miller v. Mercy Medical Center*,[37] the court was asked to recognize, for the first time, the discovery rule in medical-malpractice actions in lieu of the current standard, the termination-of-treatment rule.[38] The discovery rule, which tolled the statute of limitations for medical-malpractice

28. No. C6-99906, 1999 WL 1038013, at *1 (Minn. Ct. App. Nov. 16, 1999).
29. *Id.*
30. *Id.*
31. *Id.*
32. 633 N.W.2d 868, 873 (Minn. Ct. App. 2001).
33. *Id.*
34. *Id.* at 870.
35. *See id.* at 872.
36. *Id.*
37. 380 N.W.2d 827, 831 (Minn. Ct. App. 1986).
38. *Id.*

actions until the negligent act is discovered, had been adopted by courts in a sizable number of states. The court of appeals, citing its internal rules, acknowledged that its job was primarily decisional and error-correcting rather than legislative or doctrinal.[39] The court held that it would not reverse longstanding judicial precedent by adopting the discovery rule over the termination-of-treatment rule.[40]

These examples demonstrate the challenges of operating as an error-correcting court while being a de facto court of last resort. In both *Miller v. Mercy Medical Center* and *Belisle v. Dori*, the supreme court denied further review. Both cases presented strong policy arguments in favor of changing the existing law. Yet in both cases, the court of appeals declined to change the law, recognizing the limits of its error-correcting responsibilities.

Of course, the creation of precedent is a natural and necessary component of the common law system. One commentator observed that when presented with an issue of first impression, a court of appeals must "break new ground or else fail to decide the case that was before it."[41] Another commentator viewed the role of an intermediate court as follows: "Until a point has been settled by the higher court it is the function of the inferior tribunal to render *its* decision on the point involved; to express *its* best thinking for the appraisal of the higher court."[42]

The court of appeals itself struggled with this dilemma—sometimes fully addressing the merits of a case of true first impression, where the supreme court previously neither accepted nor rejected the proposition argued, while at other times declining to decide the issue even when it is not bound by clear precedent. For example, compare these two statements:

> We acknowledge that we are primarily an error-correcting court. Minn. Ct. App. Internal R. 1. Where our appellate courts have not clearly addressed the central issue in a case, however, it is our duty to note the direction of developments and to anticipate changes in the law.[43]

39. *Id.*

40. *Id.*

41. Robert A. Leflar, *The Task of the Appellate Court*, 33 NOTRE DAME L. REV. 548, 549 (1958).

42. Charles M. Merrill, *Some Reflections on the Business of Judging*, 40 CAL. ST. B.J. 811, 812–13 (1965).

43. Anderson v. Federated Mut. Ins. Co., 465 N.W.2d 68, 72 (Minn. Ct. App. 1991).

> This argument states a claim for "loss of chance," a medical malpractice doctrine that Minnesota has neither adopted nor rejected. This court, as primarily an error-correcting court, is hesitant to adopt new theories of law.[44]

In one interesting example, the Minnesota Supreme Court allowed the court of appeals to determine several cases of first impression regarding awarding attorneys' fees under the declaratory judgment act, declining further review.[45] But in *Garrick v. Northland Insurance Co.*,[46] the supreme court granted review on that issue and reversed the prior holdings of the court of appeals.[47] The supreme court held that the court of appeals exceeded its authority in deciding legislative policy.[48] In fact, the supreme court itself declined to review that policy, deferring the question to the legislature.[49] Although the supreme court has the powers of a doctrinal court, it often declines to exercise them in situations where it believes that the legislature is in a better position to hear from all interested constituents and consider all aspects of public policy. Often this cannot be done within the constraints of an actual case and controversy.

Just a few years later, the supreme court reprimanded the court of appeals for exceeding its authority by deciding a case of first impression. In *Pike v. Gunyou*,[50] the court of appeals addressed a taxpayer's challenge to legislation authorizing bonds to finance construction and repairs of an aircraft maintenance facility.[51] The court of appeals held the statute at issue applied to the taxpayer's suit and ordered appellants post a bond or have their suit dismissed with prejudice.[52] In deciding this issue, the court of appeals recognized that the supreme court might extend further review to the matter, providing guidance on the legal principles applied in

44. Fabio v. Bellomo, 489 N.W.2d 241, 245 (Minn. Ct. App. 1992).

45. *See, e.g.*, Wondra v. Am. Family Ins. Group, 432 N.W.2d 455, 460–61 (Minn. Ct. App. 1988); Kline v. Hanover Ins. Co., 368 N.W.2d 381, 383 (Minn. Ct. App. 1985).

46. 469 N.W.2d 709, 714 n.2 (Minn. 1991).

47. *Id.* at 714.

48. *Id.*

49. *Id.* ("If the change in Minnesota's historical doctrine is to be made, it seems to us that this argument ought to be directed to the legislature.").

50. 488 N.W.2d 298, 300 (Minn. Ct. App. 1992), *vacated*, 491 N.W.2d 288 (Minn. 1992).

51. *Id.* at 299–300.

52. *Id.* at 308.

the case.[53] But the court of appeals felt it could not avoid its responsibility to "identify fully the issues presented and to encourage reasoned discussion on a case of this magnitude."[54]

The supreme court vacated the opinion of the court of appeals.[55] In its opinion, the supreme court expressly disapproved of the court of appeals's decision, finding it addressed matters unrelated to the scope of the issues raised on appeal.[56] By considering matters unrelated to its appellate task of reviewing the exercise of the district court's discretion, the supreme court held that the court of appeals "inappropriately injected uncertainty as to the finality of its ultimate disposition. . . ."[57] In addition to vacating, the supreme court directed that neither the majority nor the concurring opinions of the court of appeals be given any dispositional or precedential value.[58]

V. THE ERROR-CORRECTING LIMITATION APPLIES TO AREAS BEYOND THE COMMON LAW

A. Constitutional Issues

In *State v. Fort*,[59] the court of appeals stated that in the absence of precedent, it is not the appropriate court to construe a provision of the Minnesota Constitution more expansively than the United States Supreme Court construed its federal counterpart.[60] In *Fort*, the court of appeals was asked to change the existing law that required a totality-of-the-circumstances analysis of passenger consent-to-search cases, to a more protective rule that would require officers to inform passengers of their right to refuse a search.[61] The court of appeals recognized that the goal of protecting citizens from unreasonable impositions upon their liberty and privacy was admirable.[62] But the court also recognized that as "an error-correcting court, [it was] without the authority to

53. *Id.*
54. *Id.*
55. Pike v. Gunyou, 491 N.W.2d 288, 290 (Minn. 1992).
56. *Id.* at n.1.
57. *Id.*
58. *Id.* at 290.
59. No. C2-011732, 2002 WL 1013474, at *3 (Minn. Ct. App. May 21, 2002), *reversed*, 660 N.W.2d 415 (Minn. 2003).
60. *Id.*
61. *Id.* at *2.
62. *Id.* at *4.

change the law."[63]

This deference to the supreme court was similarly present in *State v. Berge*.[64] At issue was whether the Minnesota constitutional protection against self-incrimination precluded admission of evidence of the refusal to submit to alcohol testing made admissible by statute.[65] In *South Dakota v. Neville*,[66] the United States Supreme Court held that such a statute did not violate the Fifth Amendment of the United States Constitution.[67] The appellant in *Berge* argued that the protections against compelled self-incrimination should be broader under the Minnesota Constitution than the United States Constitution.[68] The court of appeals declined to address this argument, concluding that it was the "province of the 'state supreme court' to extend protection of the state constitution beyond that offered by the United States Supreme Court."[69]

B. Statutory Interpretation

As an intermediate court, the court of appeals has the authority to interpret statutes when there are no statutory or judicial precedents to follow. Nevertheless, interpretations made by the court of appeals may not hold precedential power. Even though the legislature, in Minnesota Statutes section 645.17(4), expressly references prior court interpretations as a source of legislative intent to be used when a court interprets present and subsequent laws, only interpretations by a court of last resort should be used.[70] In *Anderson-Johanningmeier v. Mid-Minnesota Women's Center, Inc.*,[71] the supreme court stated that the principle of statutory construction embodied in section 645.17(4) does not apply to the court of appeals' interpretation because it is not a court of last resort.[72]

In circumstances where there has been a judicial overlay on a

63. *Id.* at *3.
64. State v. Berge, 464 N.W.2d 595 (Minn. 1991).
65. *Id.* at 596.
66. 459 U.S. 553 (1983).
67. *Id.*
68. *Id.* at 595–96.
69. *Id.* at 597.
70. MINN. STAT. § 645.17(4) (2008).
71. 637 N.W.2d 270, 276 (Minn. 2002) (noting the court of appeals is not the court of last resort with respect to a statute's construction).
72. *Id.* at 273.

statute, the court of appeals may be powerless to interpret the statute a different way. For example, when asked to determine when a cause of action occurs under Minnesota's statute of limitations for medical-malpractice actions,[73] and to replace the termination-of-treatment rule with a discovery rule, the court of appeals declined to address the issue because of the "long standing judicial precedent" adopting the "termination of treatment rule."[74] The court reached this decision despite the concurring opinions of two of the three member panel, suggesting that "it is time for this state to reject the termination of treatment rule, in favor of the 'discovery doctrine;' especially in those cases involving erroneous diagnosis."[75]

C. Rules of Court

The court of appeals must also be mindful to not overstep its boundaries into the domain of the rulemaking authority of the supreme court. In *State v. Jenkins*,[76] the respondent argued that he could not be charged for soliciting a minor if that minor had been previously adjudicated as an adult.[77] The court of appeals declined to address this argument on appeal, holding that "it is not the role of this court to extend existing law or create new law."[78] Because there was no existing authority to suggest persons certified as juveniles for one offense should be so certified for another, the court of appeals did not rule on that issue.[79]

Additionally, the court of appeals did not address the respondent's claim that he should have been entitled to appeal prior to trial without having to wait for the state's notice of appeal.[80] The court of appeals recognized that the supreme court is the judicial body which is authorized to make substantial changes to the Minnesota Rules of Criminal Procedure.[81] As such, it rejected the argument that criminal defendants should have the

73 MINN. STAT. § 541.07(1) (2008).
74 Miller v. Mercy Med. Ctr., a Div. of Health Cent., Inc., 380 N.W.2d 827, 831 (Minn. Ct. App. 1986).
75 *Id.* at 832.
76. No. A05-68, 2005 WL 1950241, at *12 (Minn. Ct. App. Aug. 15, 2005).
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*

right to file pretrial appeals.[82]

Sometimes, however, the court of appeals does not have the luxury of declining to address these types of arguments. In *Lennartson v. Anoka-Hennepin Independent School District No. 11*,[83] the court of appeals was asked to decide whether the newly adopted Minnesota Rules of Professional Conduct explicitly superseded a three-part test for lawyer disqualification set forth two years earlier by the supreme court. The court of appeals acknowledged its function as an error-correcting court, and as such, was bound to follow the supreme court's precedent in *Jenson v. Touche Ross & Co.*[84] The court of appeals also noted that after the rules were adopted, the supreme court gave no indication of an intent to overrule *Jensen*.[85] The court ultimately held that the *Jenson* balancing test was controlling despite the adoption of the Minnesota Rules of Professional Conduct.[86]

The supreme court reversed the court of appeals in *Lennartson*.[87] It held that insofar as the test it articulated in *Jenson* was inconsistent with the revised Minnesota Rule of Professional Conduct, it had been superseded by the rules.[88] In *Lennartson*, one can argue the court of appeals did exactly what it was supposed to do, which is to not make precedent, even in light of a newly adopted rule. It was the ultimate province of the supreme court to conclude which disqualification test was to be used going forward. And the supreme court was in a position to say what it meant when it adopted its rule.

D. Supervisory Powers

The supreme court possesses supervisory powers to ensure the fair administration of justice.[89] On occasion, the supreme court exercises these supervisory powers over the court of appeals. For example, in *Sefkow v. Sefkow*,[90] the supreme court reminded the

82. *Id.*
83. 638 N.W.2d 494, 496 (Minn. Ct. App. 2002).
84. *Id.* at 497 (citing Jenson v. Touche Ross & Co., 335 N.W.2d 720, 731–32 (Minn. 1983)) (setting forth a three part balancing test).
85. *Id.*
86. *Id.*
87. Lennartson v. Anoka-Hennepin Indep. Sch. Dist. No. 11, 662 N.W.2d 125 (Minn. 2003).
88. *Id.* at 135.
89. State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).
90. 427 N.W.2d 203 (Minn. 1998).

court of appeals that its function was limited to identifying errors and correcting them. In *Sefkow*, the court of appeals did not defer to the district court, nor did it mention its appropriate role as a reviewing court.[91] Instead, the court of appeals proceeded to review the record *de novo* and make its own decision.[92] The supreme court concluded that the court of appeals had exceeded its limited scope of review.[93]

Presumably, the court of appeals would not have the authority to adopt a new exclusionary rule of evidence, such as that adopted by the supreme court involving the recording of custodial interrogatories.[94] The supreme court exercised its supervisory power to ensure the fair administration of justice to suppress at trial any statements made by a suspect in custodial interrogation unless the settlement was recorded.[95]

VI. DIFFERENCES IN THE WORK BETWEEN THE MINNESOTA SUPREME COURT AND COURT OF APPEALS

To understand the error-correcting function of the court of appeals, it is helpful to compare and contrast the work of the intermediate with that of the supreme court.

The most significant difference between the court of appeals and supreme court is the nature of the cases that come before it. The supreme court's jurisdiction is discretionary, granting review to those cases that present such important questions, or involve matters of such precedential value or complexity, as to require the full attention of the supreme court. The supreme court has repeatedly warned, however, that denial of a petition for further review means no more than that the supreme court has declined—for whatever undisclosed reasons—to consider the matter. The supreme court has stated that, "the denial does not give the court of appeals decision any more or less precedential weight than a court of appeals decision from which no review was sought."[96] Thus, there is a level of uncertainty to the precedential effect of court of appeals's opinions.

The court of appeals, on the other hand, takes virtually all

91. *Id.*
92. *Id.*
93. *Id.*
94. *See Scales*, 518 N.W.2d at 592.
95. *Id.*
96. Murphy v. Milbank Mut. Ins. Co., 388 N.W.2d 732, 739 (Minn. 1986).

cases from the district court (with a few exceptions like first degree murder) and cases from local governments and administrative agencies. These differences in jurisdiction reflect the difference in the error-correcting function of the court of appeals and the law and doctrinal function of the supreme court.

Another major difference is that the supreme court publishes all of its decisions, whereas the court of appeals publishes only a minority of its opinions. Although the court of appeals provides reasons for *all* of its decisions, not every case warrants a full opinion—cases disposed of by dismissal, denial, or other disposition may require only a short recitation of the court's reasons. In cases warranting a written opinion, the legislature suggests that the court of appeals only publish decisions that establish a new rule of law, overrule a previous court of appeals's decision not reviewed by the supreme court, provide important procedural guidelines in interpreting statutes, involve a significant legal issue, or aid in the administration of justice.

Although not precedential, unpublished opinions play an important role in the workings of the court of appeals. Unpublished decisions are superior to summary dispositions because an unpublished opinion commits thoughts to paper, permitting the parties to see that the judges have considered their arguments and know the court's reasoning.

VII. PRACTICE POINTERS

Attorneys appearing before the Minnesota Court of Appeals must be aware of its error-correcting function. This function makes appearing before the court of appeals much different from appearing before the Minnesota Supreme Court. There are a few pointers that every attorney appearing before the Minnesota Court of Appeals should have in mind.

A. Understand the Court You Are In

Attorneys appearing before the court of appeals must have an understanding of the court that they are in and the function that the court serves. The court of appeals is not a policy or lawmaking court. If your argument must ask the court of appeals to depart from prior decisions, you are likely in the wrong court. That does not mean that you should not make the argument because you must make the argument to preserve the issue for the supreme

court's review. It just means that your chances for success on that issue in the court of appeals are slim.

B. Error-Correcting Limitations May Support Accelerated Review

The supreme court has rarely used the tool of accelerated review in any context. Unlike the Iowa Supreme Court, which regularly "reaches down" and takes cases for immediate review, the Minnesota Supreme Court has shown a strong preference to review cases after the court of appeals has completed its work. But one could argue that a case which may turn on a request to expand or contract existing common law should bypass the court of appeals because of its error-correcting limitations.

C. Preserve the Error and Raise the Issue

Your preparation for an appeal to an error-correcting court starts long before the notice of appeal is filed. To correct an error, the error must have been preserved. Moreover, appellate courts can only consider issues actually raised in the district court. New issues presented for the first time on appeal will not be considered. For this reason, arguments that may be beyond the error-correcting function of the court of appeals should nevertheless be raised there, to be certain they are preserved for supreme court review.

D. In the "Interest of Justice"

If you fail to make a record of the error in the district court or to file a new trial motion, the court of appeals will apply the "interest of justice" standard when determining whether it should address the error.[97] This is a high burden, particularly in the court of appeals because of the limits of its authority. More often than not, the court of appeals will recite the standard rule that issues not properly preserved are not before the court. For example, although the supreme court has recognized its inherent powers to accept a late appeal in the interest of justice, the court of appeals has held that it has no such inherent powers.[98] The court of appeals considers itself constrained by the civil appellate rules, which prohibit extension of the time to file a notice of appeal or to

97. *See* MINN. R. CIV. APP. P. 103.04.

98. *Compare* Township of Honner v. Redwood County, 518 N.W.2d 639, 641 (Minn. Ct. App. 1994) *with* State v. M.A.P., 281 N.W.2d 334, 336–37 (Minn. 1979).

obtain review of an agency action.[99]

E. Standard of Review

Know the standard of review for your particular issue or issues. If the standard is *de novo*, the court will look at the record with fresh eyes to determine if a mistake was made and will not need to give any deference to the district court's decision. If the standard is clear error or abuse of discretion, your chances of success in the court of appeals will diminish. Under the clear-error standard, the district court's error must be so clear on the record that the court of appeals is left with the definite and firm conviction that a mistake has been made. Similarly, under the abuse-of-discretion standard, the court of appeals gives deference to the trial court's ruling and will not reverse it absent a clear abuse of discretion.

F. Authorities To Use

If available, always cite to Minnesota Supreme Court cases as your primary authority. As the highest court in the state, these decisions are binding on all courts. If a Minnesota Supreme Court decision is not available on the issue, cite to the court of appeals's published decisions. If you have no other decision to cite and the facts are substantially similar, the unpublished decisions of the court of appeals may provide some guidance to the decision makers. Decisions from other states or scholarly works likely have less weight in the court of appeals than they may have in the supreme court.

G. Your Briefs and Appendices

The shotgun approach of raising every conceivable error that the district court might have made to the court of appeals rarely works. Focus your briefs to your best arguments of where you believe the district court made a mistake and that mistake had a significant impact on the outcome of the case. The court of appeals has the record, but you should include the important orders and exhibits in the appendices. This will save time for a high-volume court.

99. MINN. R. CIV. APP. P. 126.02.

H. Final Judgments Versus Interlocutory Appeals

The court of appeals generally wants to review all claimed errors at one time. There are exceptions to the final-judgment rule that allow interlocutory appeals, but they are very narrow.

I. Oral Argument

Oral argument must be carefully planned because of the limited time: twenty minutes for the appellant and fifteen minutes for the respondent. Be prepared for questions and answer them directly. Select your best issue and focus your primary attention there. Know that the judges have read the briefs, so do not simply repeat what you have said in your brief. Focus your argument—even more than your brief—to address the key points and to counter the weaknesses in your case.

VIII. CONCLUSION

Now that we have enjoyed the work of the court of appeals for twenty-five years, it is difficult to remember a time when we did not have such a court. Clearly, hundreds of litigants would not have had the real opportunity for a second opinion on their cases, and hundreds of others would have received only a summary decision. The court of appeals has contributed enormously to the effectiveness of the Minnesota Judiciary and to the high level of trust and confidence which it enjoys with the citizens of our state.