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IOWA DEFENSE COUNSEL ASSOCIATION

DEFENSE UPDATE

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Incompetence, Unfitness, or Dangerous Characteristics: An Overview of Negligent Employment Claims and Defending Direct Negligence Claims Against Employers

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INTRODUCTION

It is an axiom of our judicial system that a defendant is tried for actions before the court, not their general character.[1] However, when a plaintiff claims that a defendant employer negligently hired, retained, or supervised an employee and that the employer's negligence caused the plaintiff damage, what the employer knew about the employee's propensities prior to the incident giving rise to the lawsuit becomes relevant. The result is that evidence which would be plainly inadmissible in a lawsuit against the employee directly is admissible and relevant for purposes of the direct claim against the employer.[2]

The receipt of this type of evidence risks angering the jury and raises the specter of the dreaded "nuclear verdict."[3] If defendants can defeat negligent employment claims, this leaves only the direct claim against the employee and vicarious claims against the employer.

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WHAT'S INSIDE

IDCA President's Letter

Sam Anderson
IDCA President

I am very proud to have made a career out of being a defense litigation attorney. The insureds assigned to us from carriers, or the independent businesses which seek our help, come with a myriad of problems, some of their own making and some not. Universally, whether they have a personal financial stake in the outcome or not, they are traveling on a road of stress they do not know how to navigate. The greatest satisfaction I get out of my job is helping them take a turn from a stressful road onto smooth pavement and of managing the problem then leading it to the best possible outcome. Ultimately, I have found, helpful personal interactions with people in their times of need most fulfilling.

Another aspect of being a defense litigation attorney I have cherished is being a member of the defense bar. I think the defense bar has the most talented and ethical lawyers who are all-around good people. I have been a member of the Iowa Defense Counsel Association since I was an associate attorney in the mid-1980s. I cherish the many personal and professional friendships I have made with these great lawyers over the years. I am still making new ones to date, and it is for this reason I take great pride in having the opportunity to represent the IDCA as its president. I have huge shoes to fill to meet the skilled leadership of my predecessors, but the job is less daunting, knowing that I have a very strong IDCA board of directors to help keep the organization's leadership at a high level.

This year, I want to get more of the membership involved in the IDCA by creating opportunities to participate in the important work the organization is doing. The board has approved an expansion of the committees of the IDCA that it believes are vital for addressing critical issues to the IDCA and the defense bar. The list of committees, with a very brief description of their tasks, is set forth below. The first five committees listed are designed to address matters of substantive law on behalf of the defense bar. The remaining seven committees are designed to help the IDCA better serve its membership. All are important to the IDCA organization.

SUBSTANTIVE LAW COMMITTEES

1. Reptile Theory Task Force: This committee analyzes the reptile theory and devises appropriate responses that can be made by the defense bar. This committee is designed to create a systemic strategy for fighting the pernicious use of the strategy by the plaintiff bar. This could include form pleadings and motions used by the defense bar and instructional materials for their strategic use. The bench is now seeing a structured patternable strategy from the plaintiff bar. We need to devise a structured patternable strategy of our own with which we can educate the bench as we combat the reptile trend.

2. Pro Hoc Vice Committee: This committee analyzes the law and rules regarding practicing pro hoc vice and devising appropriate responses for defendants faced with plaintiff counsel from other states abusing the rules. It has come to the attention of the IDCA that there are an increasing number of out-of-state lawyers who abuse our pro hoc vice rules by teaming up with local lawyers to the degree that they are practicing law in our state without a license to do so. This committee is purposed with creating a systemic strategy for fighting this abuse. This could range from creating form pleadings or motions and instructional pieces for use by the defense bar or devising proposed rules or statutory changes that we could forward to our legislature or the Supreme Court for consideration.

3. Rules of Civil Procedure and Evidence Committee: This committee is tasked with analyzing any proposed rule changes by the court and devising appropriate responses for the IDCA during the rule-making period. It is also charged with proposing changes appropriate for improving the trial process. The plaintiff bar is very well-coordinated in its efforts to influence the rules of civil procedure and evidence, and the defense bar has been playing catch up. It is time we become more proactive in this area.

4. Legislative Committee: This committee is tasked with working with lobbyists to monitor legislation and advise which legislation should be actively promoted or resisted by

the IDCA. It is also charged with proposing any legislation the IDCA should consider promoting to the legislature.

5. Amicus Committee: This committee is tasked with monitoring requests for amicus briefs and making recommendations to the IDCA board regarding which amicus briefing to become involved with and which lawyers/law firms should be assigned the briefing.

MEMBERSHIP BENEFIT COMMITTEES

6. Insurance Company/Private Counsel Development Committee: This committee would ideally be made up of a mixture of insurance company representatives and IDCA members that would work to make sure the defense bar can continue to encourage new lawyers to become involved as defense counsel for the benefit of both insurance companies and the defense bar and to work on any issues of mutual benefit to the insurance defense industry.

7. Editorial Board/Defense Update: Responsible for developing content needs, soliciting articles, working with IDCA committee chairs, and editing the Defense Update, IDCA's quarterly newsletter. This is a very valuable tool for disseminating ideas among the defense bar. While we have a dedicated crew working on this board, the more membership and help on this board we can have, the better this outstanding publication will become.

8. IDCA Webinars: Last year, under the leadership of Sue Hess, the board decided to create free continuing education webinars for IDCA members. This was very well received, and we want to keep that up. We need a committee that would be tasked with deciding timely seminar topics, soliciting presenters, and providing an introduction of speakers for these webinars to be offered 4-6 times annually.

9. New Lawyers/Deposition Bootcamp: Designed to benefit our young defense lawyers, this committee would be tasked with setting up and promoting an annual one-day deposition boot camp. This was a very popular event prior to Covid, and we want to get the program up and running again.

10. Membership Committee: This committee encourages new and maintaining current membership. A key focus would be to provide the IDCA board with guidance on what can be done to enhance the membership benefits and experience of IDCA membership.

11. Marketing Committee: The continued operation of the IDCA depends heavily on income derived from having our experts and service providers be willing to come to our annual seminar and to advertise with the IDCA. This committee would be tasked with working with the IDCA director, president-elect, and chair of For the Defense publication to market the newsletter, annual seminar, and potentially other events or resources to potential experts and sponsors for purposes of increasing the revenue of the IDCA and exposing our membership to the resources of the sponsors.

12. Website Committee: This committee monitors and improves the IDCA website. The IDCA is committed to making its website an increasingly useful tool for exchanging ideas and disseminating information to the IDCA membership. Ultimately, this could also become the most effective tool for advancing the work of the rest of the committees listed above. While I list this committee last, it may be one of the more important committees listed.

If you are interested in serving on any of these committees or even think you *might* be interested in serving, or if you just want more information, please do not hesitate to contact me at sanderson@s-c-law.com or our executive director, Jessica Thornton, at Jessica@amplifymyassociation.com. I strongly encourage you to become involved with at least one of these committees. Your participation will be valuable not just to the committee, the IDCA, and the defense bar but also to you as you start, build, or strengthen your relationships with fellow defense bar counsel. I promise these relationships will be valuable to you personally and professionally throughout your career.

One last thing before I close. In the last year or so, we have only been able to come out of Covid and once again have personal contact with each other. For all those who attended last year's and this year's seminars, the best thing was being together in one place and seeing each other face-to-face again. It made us realize how much we missed personal contact and understand what a privilege that is. It is hard to get to know anyone via e-mail. Going forward, whether in committee work or otherwise, I encourage you to engage in as much personal contact as possible. It will be better for the health of your business, the health of this organization, and most importantly, better for your own mental health and well-being. That is a segue into the topic for my following letter.

Thank you for electing me to fill this position for the next year. I really look forward to serving you in this capacity. Do not hesitate to reach out to me with any questions or with any ideas to improve our IDCA organization.

Sam Anderson

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This renders any evidence of the employee's prior misdeeds or transgressions inadmissible outside limited character evidence exceptions.[4]

These claims can be defeated if the defendant can show that the actions of the employee were not foreseeable (i.e., the employer did not know nor should not have known of the employee's dangerous characteristic).[5] These claims can also be defeated on the basis that the employee's alleged dangerous characteristic did not cause plaintiff's claimed injuries.[6] Negligent employment claims can also be defeated when proving the employer's negligence would require a standard of care testimony that the plaintiff failed to procure.[7] Even when a negligent employment claim cannot be defeated in its entirety, bifurcation properly avoids the problem of prejudicial evidence reaching the jury before the employee's underlying liability is ever determined.[8]

NATURE OF NEGLIGENT EMPLOYMENT CLAIMS

The Iowa Supreme Court first formally recognized tort claims against employers for negligent hiring, retention, or supervision of employees in 1999.[9] To recover, a plaintiff must show: (1) that the employer knew, or in the exercise of ordinary care should have known, of its employee's unfitness at the time of hiring/retention/supervision; (2) that through the negligent hiring/retention/supervision of the employee, the employee's incompetence, unfitness, or dangerous characteristics proximately caused the resulting injuries; and (3) that there is some employment or agency relationship between the tortfeasor and the defendant employer.[10]

The relevant inquiry involves whether the employer knew or should have known of the unfitness "at the time the employee engaged in wrongful or tortious conduct."[11] If a plaintiff fails to show that the employer either had actual knowledge or should have known of the employee's unfitness at the time the alleged tortious conduct, the plaintiff cannot recover on a negligent hiring, retention, or supervision claim.[12]

DEFENDING NEGLIGENT EMPLOYMENT CLAIMS LACK OF FORESEEABILITY

One means of defeating negligent employment claims is by showing that the tortious conduct of the employee was not foreseeable based on what was known or should have been known by the employer.[13] The employer's duty is "to exercise ordinary care in supervising the employment relationship so as to prevent the *foreseeable* misconduct of an employee from causing harm to others."[14] The importance of foreseeability to the analysis of negligent employment claims has become even more pronounced after the Iowa Supreme Court adopted the scope of liability standard set forth in the Restatement (Third) of Torts.[15]

Where the employee's misconduct is not foreseeable, a plaintiff cannot recover. This was the result in the seminal case of *Godar*. The Court found that the plaintiff presented no evidence to create a jury question as to whether a school district negligent hired, retained, or supervised a curriculum director accused of sexually abusing students.[16]

In a recent federal case citing *Godar*, the court held that the defendant was entitled to summary judgment because the plaintiff failed to raise an issue of genuine material fact that the employer knew or should have known that an employee engaged in sexual harassment.[17] The plaintiff failed to show that the employer knew or should have known that the defendant employee had a propensity to engage in sexual relationships with co-workers. That the defendant employee was on a final warning for other job-performance problems did not make it foreseeable that the employee would sexually harass a co-worker.

LACK OF CAUSATION

The second element in *Godar* provides that a plaintiff must show that the employee's alleged incompetence, unfitness, or dangerous characteristics caused plaintiff's resulting injury. This element goes to factual causation, whereas the employee's misconduct not being foreseeable is relevant to the scope of liability analysis.[18] An employer is entitled to summary judgment on a negligent employment claim when the plaintiff cannot show that the defendant employee's conduct caused a compensable injury.[19]

That there must be some causal connection between the employee's alleged unfitness and the damage sustained is further reflected in the Iowa Code, which provides that the sole basis of a negligent hiring claim cannot be the employee's conviction of any public offense.[20] Where a court concludes that the plaintiff's damages were not caused by the alleged propensity of the defendant employee, an employer is entitled to summary judgment.[21]

NECESSITY FOR TESTIMONY ON STANDARD OF CARE

In some instances, expert testimony may be required to prove that an employer negligently hired, retained, or supervised an employee.[22] Just as with any other claim, "[t]he test for determining if expert testimony is required is whether, when the primary facts are accurately and intelligently described, the jurors

are as capable of comprehending the primary facts and drawing correct conclusions from them as an expert."[23]

The requirement for expert testimony has most often arisen in the context of health care professionals. The Iowa Supreme Court and the Iowa Court of Appeals have both indicated that expert testimony is needed when a plaintiff is asserting a negligent employment claim against a healthcare professional related to the employment of professional staff, such as physicians.[24] The Iowa Supreme Court has also signaled that expert testimony is needed to support a negligent credentialing claim against a hospital.[25]

However, the requirement of expert testimony for these types of claims is not limited to claims against professionals. At the very least, some testimony, whether it be expert or lay, is required to establish the appropriate standard of care for hiring, training, and retaining employees.[26] Negligent employment claims fail as a matter of law without testimony establishing the standard of practice for employing employees for the job at issue. The alternate result would be that "employers could be sued for negligent training whenever there is an avoidable accident."[27]

Without any such testimony assisting the trier of fact, the jury would have to be knowledgeable about numerous concepts, including industry standards for supervision of employees, what is and is not acceptable supervision, and how the alleged failure to adequately supervise contributorily caused the plaintiff's claimed injury.[28] Without this knowledge, the jury cannot adequately adjudicate negligent employment claims. Where the jurors are not as capable of drawing these accurate conclusions from the relevant facts as an expert, the testimony must be provided by an expert.[29]

BIFURCATION

Even if a negligent employment claim cannot be defeated in its entirety, bifurcation of the claim against the employer from the underlying claim against the employee is often proper.[30] Bifurcation is appropriate where the claim against the employer cannot be tried without the introduction of inadmissible and unfairly prejudicial evidence against the employee. Bifurcation avoids the problems of jury confusion or prejudice, which may result from admitting prior bad acts of the employee in a combined trial of both claims.

The general standard for bifurcation in Iowa applies; bifurcation is appropriate "for convenience or to avoid prejudice."[31] Bifurcation is the proper remedy to avoid unfair prejudice when the evidence as to one claim may inappropriately influence the outcome of other claims.[32] Bifurcation serves a convenience purpose when determination of one claim may be dispositive of the entire dispute.[33] Any negligent hiring, retention, or supervision claim must include, as an element, "an underlying tort or wrongful act committed by the employee."[34]

Separating the direct claims against an employee from a negligent employment claim against an employer serves the dual aims of bifurcation. Bifurcation promotes judicial economy, as extensive evidence irrelevant to the direct claim against the employee would not need to be received until after a finding that the employee committed an underlying tort. Unfair prejudice is also avoided as irrelevant evidence, which would tend to incite the jury would not be improperly admitted before an underlying determination of liability is made.[35]

CONCLUSION

Negligent employment claims can leave employers susceptible to the jury hearing incendiary evidence which would not otherwise be admissible. Employers can defeat these claims at the summary judgment stage by showing that the employee's misconduct was not foreseeable or that the employee's alleged unfit characteristic did not cause the plaintiff's damages. Plaintiffs must also offer testimony, often from an expert, on the issue of the applicable standard of care. Judicial economy and avoiding unfair prejudice support the bifurcation of negligent employment claims where such claims survive summary judgment.

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1 *State v. Thoren*, 970 N.W.2d 611, 618 (Iowa 2022).

2 *See Rieder v. Segal*, 959 N.W.2d 423, 430 (Iowa 2021) (noting that evidence of prior medical malpractice lawsuits is generally inadmissible but could be admissible in a claim against the hospital, alleging negligent credentialing of a physician).

3 *See, e.g.*, Louis Casiano, *Spectrum Cable Ordered to Pay $7 Billion to Murder Victim's Family*, Fox Business (updated July 28, 2022), https://www.foxbusiness.com/technology/spectrum-cable-ordered-pay-billion-murder-victims-family.

4 Iowa R. Evid. 5.404; 5.608; 5.609.

5 *Shearer v. Hirschbach Motor Lines, Inc.*, 2022 WL 2317443, at *22 (N.D. Iowa 2022).

6 *Wilson v. Cintas Corp. No. 2*, 2008 WL 5235514, at *4 (Iowa Ct. App. 2008).

7 *Struck v. Mercy Health Servs.-Iowa Corp.*, 973 N.W.2d 533, 544 (Iowa 2022).

8 *Rieder*, 959 N.W.2d at 430.

9 *Godar v. Edwards*, 588 N.W.2d 701, 709 (Iowa 1999).

10 *Id.* at 708–09.

11 *Est. of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 680 (Iowa 2004).

12 *Godar*, 588 N.W.2d at 709–10.

13 *Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19, 42 (Iowa 2018).

14 *Id.* (emphasis in the original) (quoting 27 Am. Jur. 2d Employment Relationships § 375, at 885 (2014)).

15 *DeBower v. Spencer*, 2021 WL 4887976, at *4 (N.D. Iowa 2021) (quoting *Bandstra*, 913 N.W.2d at 40) (discussing "post-*Thompson*" foreseeability standard with respect to negligent hiring and supervision claims).

16 *Godar*, 588 N.W.2d at 709–10.

17 *Shearer v. Hirschbach Motor Lines, Inc.*, 2022 WL 2317443, at *21–22 (N.D. Iowa June 28, 2022).

18 *See id.* at 22 (distinguishing between defendant employer's knowledge of employee's misconduct and whether such misconduct caused plaintiff injuries).

19 *Wilson*, 2008 WL 5235514, at *4.

20 Iowa Code § 671A.1(1).

21 *Hanner, et al. v. Smith, et al.*, Woodbury County Case No. LACV191581 (District Court Ruling, Feb. 18, 2022) at 17 (plaintiff could not show her alleged injury in medical malpractice case was caused by defendant physician's alleged fraudulent billing practices).

22 *Struck*, 973 N.W.2d at 544; *Rieder*, 959 N.W.2d at 430.

23 *Schmitt v. Floyd Valley Healthcare*, 2021 WL 3077022, at *1 (Iowa Ct. App. 2021) (citing *Thompson v. Embassy Rehab. & Care Ctr.*, 604 N.W.2d 643, 646 (Iowa 2000)).

24 *Struck*, 973 N.W.2d at 544; *see also Wolfe v. Shenandoah Med. Ctr.*, 2022 WL 2160449, at *3 (Iowa Ct. App. 2022) (final publication decision pending).

25 *Rieder*, 959 N.W.2d at 431.

26 *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 708–09 (Iowa 2016).

27 *Id.* at 709.

28 *Wolfe*, 2022 WL 2160449, at *2.

29 *Thompson*, 604 N.W.2d at 646.

30 *Rieder*, 959 N.W.2d at 430; *Doe v. Roe*, 2015 WL 576060, at *5 (Iowa Ct. App. 2015).

31 Iowa R. Civ. P. 1.914.

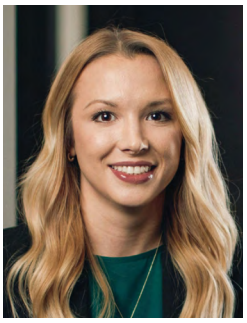
32 *See Handley v. Farm Bureau Mut. Ins. Co.*, 467 N.W.2d 247, 250 (Iowa 1991).

33 *Homeland Energy Sols., LLC v. Retterath*, 938 N.W.2d 664, 685 (Iowa 2020).

34 *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 53 (Iowa 1999).

35 *See Burke v. Deere & Co.*, 6 F.3d 497, 513 (8th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994) (applying Iowa law) (jury may not consider a defendant's wealth when setting compensatory damages and such evidence should only be received upon a showing of entitlement to punitive damages).

New Member Profile



Jessica McNamara

Jessica McNamara is a civil litigator at Lederer Weston Craig PLC at its West Des Moines office. Jessie practices insurance defense and general civil litigation. She is originally from Dubuque, Iowa and received her bachelor's degree in Political Science and Public Administration from the University of Northern Iowa. She earned her law degree from the University of Iowa College of Law in 2016. Jessie is licensed in Iowa and Illinois and is a member of the Iowa State Bar Association, Polk County Bar Association, Iowa Defense Counsel Association, and the Blackstone Inn of Court. Jessie serves on the board of directors for Justice101, a non-profit organization that focuses on teaching students their 4th Amendment rights during law enforcement interactions.

Case Law Update

By Austin McMahon, Swisher & Cohrt

Austin McMahon

NORTH STAR MUTUAL INSURANCE COMPANY V. LIPPS 2022 WL 4131700 (N.D.IOWA 2022)

WHY IT MATTERS

In this somewhat factually unique case, the district court for the Northern District of Iowa provides a notable analysis of causation and damages in legal malpractice claims and also predicts that Iowa courts would allow plaintiffs in legal malpractice cases to recover "corrective attorney's fees" (money paid to new counsel in the underlying action to correct the problem caused by the negligent lawyer).

FACTUAL & PROCEDURAL BACKGROUND

In December 2017, Ehrich Pakala completed an application for home insurance through North Star. The application asked whether any insurer had ever canceled, declined, or refused to provide Pakala home insurance. In response, Pakala wrote: "Packaged company, auto canceled, so home followed." North Star issued a home insurance policy to Pakala, effective December 23, 2017. Less than two weeks later, on December 31, 2017, the heating system in Pakala's home failed, causing the water pipes to freeze and burst. Pakala submitted a claim to North Star for the resulting water damage.

North Star discovered that Pakala's prior insurance company decided not to renew his policy because of "unacceptable signs of excessive deterioration to the siding with paint chipping and also some rotting," as well as a missing stairwell handrail. North Star hired Defendant Lipps (attorney) to determine if North Star could legally cancel the policy. Lipps opined that under Iowa Code § 515.129A, as well as the policy's terms, North Star could rescind the policy based on a material misrepresentation Pakala made in his application related to the reasons he had lost his prior home insurance. After receiving Lipps's opinion letter, North Star sent a letter to Pakala on February 7, 2018, voiding his insurance policy. The letter suggested Pakala misrepresented the reasons he had lost home insurance in his application to North Star.

Pakala eventually hired a lawyer. In August 2019, Pakala's lawyer wrote to North Star, stating that North Star owed Pakala for the water damage based on Iowa Code § 515.133. That provision states that upon issuance of an insurance policy, the insurance company must provide the insured with a copy of his application; the failure to do so precludes the insurance company from relying on misrepresentations in the application to void the policy. When North Star informed Lipps of this section of Iowa Code, Lipps agreed that North Star should not have voided the policy; he had been unaware of the existence of § 515.133.

Pakala's lawyer demanded $350,000, which he alleged encompassed the full policy benefits plus interest, as well as extracontractual damages for bad faith, punitive damages, emotional distress, and attorney's fees. Pakala's counsel rejected North Star's request to investigate, noting that North Star waived its investigative rights under the policy when it purported to void the policy. Pakala agreed to sit with Lipps for an examination, however. At the meeting, Lipps apologized to Pakala's attorney, acknowledging that Pakala had "been through hell" and that the claim should have been paid right away.

North Star paid Pakala $125,384.20 to cover the original loss amount ($114,615.15) plus interest ($10,769.05), and North Star and Pakala agreed to engage in mediation on the remainder of the claim. North Star reported the claim to its liability insurance carrier, NAMICO, which hired counsel and participated in the mediation. North Star informed Lipps that it would seek indemnity and contribution from him based on his erroneous legal advice, but Lipps declined to participate in the mediation and settlement proceedings.

Although mediation in late November 2019 was unsuccessful, the parties continued their settlement talks. North Star initially offered $500,000, which was rejected. After some back-and-forth, North Star and Pakala settled all claims in December 2018 for $575,000 (on top of the money North Star had already paid). NAMICO and North Star attributed $329,000 of the settlement to extracontractual (bad faith) damages; NAMICO covered these damages less North Star's $100,000 deductible. The mediator indicated that his settlement range for the case was around $600,000; North Star's attorney also believed the $575,000 settlement was reasonable.

North Star commenced an action against Lipps in September 2020. North Star attributed $329,000 of the settlement with Pakala to extra-contractual (punitive and emotional distress) damages and sought to recover this amount from Lipps. Additionally, North Star sought to recover attorney's fees incurred in the underlying litigation (including the mediation).

Lipps moved for summary judgment and argued that North Star could not prove proximate cause or damages. Lipps further argued that North Star could not recover corrective attorney's fees (attorney's fees incurred in settling the underlying action).

HOLDING

The court denied Lipps motion for summary judgment. The court held that North Star offered evidence that Lipps's opinion letter caused it to incur damages in settling Pakala's lawsuit. Additionally, the court held that Iowa courts would allow recovery of corrective attorney's fees.

ANALYSIS

Lipps first argued that North Star's reliance on Lipps's (bad) advice would have precluded a finding in the underlying action that North Star acted in bad faith, and North Star would have necessarily failed, limiting Pakala's recovery to contractual damages. In short, Lipps argued that his legal advice provided North Star with a reasonable basis to deny the claim. The court rejected this argument, stating that advice of counsel does not automatically establish good faith but instead is a factor to consider in determining whether a party acted in good or bad faith. Further, the court stated that a statute clarified that North Star could not rely on the misrepresentations in Pakala's application to deny coverage since North Star had not provided Pakala with a copy of that application when it issued the policy. The court concluded that "at the very least, it is an open question whether an advice-of-counsel defense would have been successful against Pakala's bad-faith claim."

Lipps nevertheless correctly noted that in a legal malpractice context, the general measure of damages is the amount of loss actually sustained as a proximate result of the conduct of the attorney and that when litigants bring malpractice actions against their former lawyers, they must prove that, absent the lawyer's negligence, they would have won the underlying lawsuit. North Star argued that it was not alleging that Lipps's mishandling of the underlying case resulted in it losing the case or having to pay a larger settlement than it would have otherwise; rather, its damages came from the potential of being sued at all. North Star argued that, but for Lipps's negligent opinion letter, it would not have voided the policy, and it would have paid Pakala's claim right away, thereby avoiding Pakala's claim for damages based on bad faith.

The court reasoned that:

> Under the circumstances, North Star can prove that Lipps is the proximate cause of its damages without proving that it would have lost the Pakala lawsuit. Proving a case-within-a-case is not a hard-and-fast requirement in legal malpractice actions. When a plaintiff's damages are based on the attorney's negligent conduct in the underlying lawsuit causing the plaintiff to lose the underlying suit, then the case-within-a-case requirement makes sense: if the plaintiff would have lost the underlying case anyway, there is no causation between the lawyer's negligence and the plaintiff's loss. But here, even if North Star had taken Pakala's case to trial and ultimately prevailed, North Star would still have incurred damages in having to face the case at all.

The court analogized the circumstances of this case to the principle that an insurance company may recover damages based on a reasonable settlement with an insured and stated that North Star could recover damages based on its settlement with Pakala.

As to punitive damages, Lipps argued that his advice would have precluded a finding in the underlying action that North Star acted willfully and wantonly. The court rejected this argument, stating that North Star did not necessarily need to prove that Pakala would have been successful in obtaining punitive damages in the underlying action. Rather, the court noted that the fact may be relevant to the reasonableness of the settlement, but North Star's damages came from the threat of facing punitive damages at all and that North Star offered evidence that it would not have defended against Pakala's lawsuit (and incurred the costs to settle it) absent Lipps's opinion letter.

The court asserted that it was for the jury to determine whether North Star reasonably settled the claim and that a genuine issue of material fact existed as to whether Lipps's advice caused North Star's damages in settling Pakala's claim.

As to the corrective attorney's fees, Lipps cited the American Rule that each party bears its own attorney's fees absent an applicable statute or contract. The court stated that North Star's theory was that absent Lipps's erroneous advice about voiding Pakala's policy, North Star would have paid out on Pakala's claim in early 2018, thus avoiding the need for settlement negotiations on Pakala's additional contractual damages and bad-faith claim (as well as avoiding the related attorney's fees). The court reasoned that allowing North Star to recover its underlying attorney's fees would comport with the general goal in a legal malpractice suit to put clients in the position they would have occupied had the attorney not been negligent.

Notably, the court observed that the "Iowa Court of Appeals recognized in 2015 that Iowa courts had not yet affirmatively held that attorney fees from the underlying case are recoverable in a malpractice action." Ultimately, the court found that Iowa courts would allow the recovery of corrective attorney's fees (money paid to new counsel in the underlying action to correct the problem caused by the negligent lawyer).

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2022 IDCA 58th Annual

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Thank You!

To all of the members and attendees at this year's annual meeting.

IDCA hosted the 58th Annual Meeting & Seminar, September 15-16 at the Embassy Suites in downtown Des Moines. Highlights from this year's event included:

130 ATTENDEES

24 SPONSORS

12 EXHIBITORS

Planning is already underway for 2023: September 14-15, back at the Embassy Suites.

thank you

LifeServe BLOOD CENTER

On behalf of LifeServe, thank you to those who donated their time and blood to a great cause! 36 potential lives will be helped because of you!

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8 FIRST TIME DONORS

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36 POTENTIAL LIVES SAVED

Meeting & Seminar Recap

Awards

The President's Award is in honor and recognition of superior commitment and service to IDCA. The following members have worked diligently in furthering IDCA's mission:

Josh McIntyre, *Lane & Waterman*
Jason O'Rourke, *Lane & Waterman*

The Meritorious Service Award (formerly the Lifetime Award) is bestowed upon IDCA members whose long-standing commitment and service to the Iowa Defense Counsel Association has helped to preserve and further the civil trial system in the State of Iowa.

Kevin Reynolds, *Whitfield & Eddy*

The Rising Star Award is bestowed upon IDCA members who have shown outstanding commitment and leadership in the organization and who have been members of the organization for five years or less. Rising Star nominations are from committee chairs and voted on for approval by the Board of Directors.

Spencer Dirth, *Elverson Vasey*

In 1988 Patrick Roby proposed to the board, in Edward F. Seitzinger's absence, that the IDCA honor Ed as a founder and first president of IDCA and for his continuous, complete dedication to IDCA for its first 25 years by authorizing the Edward F. Seitzinger Award, dubbed "The Eddie Award." This award is presented annually to the IDCA Board member who contributed most to IDCA during the year. It is considered IDCA's most prestigious award.

Stephen E. Doohen, *Whitfield & Eddy*
(Not present to receive award)

IOWA DEFENSE COUNSEL ASSOCIATION

1255 SW Prairie Trail Parkway
Ankeny, IA 50023

2023 Board Slate

President Sam Anderson
President-Elect Amanda Richards
Secretary Pat Sealey
Treasurer Randall Stravers
Past President Susan Hess
District I Christopher Fry
District II Christopher Wertzberger
District III Bill Larson
District IV Michael Gibbons
District V Jon Vasey
District VI Jace Bisgard
District VII Josh McIntyre
District VIII Brent Ruther
At-Large Sean O'Brien
At-Large Thais Folta
At-Large Katie Graham
At-Large Jason O'Rourke
At-Large Josh Strief
New Lawyers Rep Blake Hansen
New Lawyers Rep Courtney Wilson
DRI Representative Kami Holmes

IDCA Annual Meeting

September 14–15, 2023

59TH ANNUAL MEETING & SEMINAR
September 14–15, 2023
Embassy Suites by Hilton, Des Moines Downtown
Des Moines, Iowa

Join IDCA

Do you know a colleague or a member of your firm that would benefit from joining IDCA? Please encourage them to sign on with IDCA by contacting staff@iowadefensecounsel.org