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Avoid the Appellate Trap—Preserving Error on Motions in Limine

By Spencer Vasey Dirth with Elverson Vasey

Spencer Vasey Dirth

"Anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." *Puckett v. United States*, 556 U.S. 129, 134 (2009). For this reason, "[i]t is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before [the appellate court] will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). "It is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable." *State v. Pickett*, 671 N.W.2d 866, 869 (Iowa 2003).

But what happens when it *seems* like the district court has ruled on an issue by granting or denying a motion in limine? Each side presents their case to the court, vehemently arguing why the evidence should, or should not, be excluded, and the court makes a decision. Surely this satisfies the requirements of error preservation, right? Wrong. As a general matter, motions in limine do not preserve error for appellate review, a lesson far too many litigants learn a bit too late, when their appeal is denied for failure to preserve error. This article will examine the doctrine

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WHAT'S INSIDE

IDCA President's Letter

Amanda Richards
IDCA President

Dear Members:

It gives me great pleasure to announce the launch of the IDCA Forum on the IDCA website. The Forum, which replaces our prior listserv from years past, launched on April 8, 2024, and we could not be more proud and excited to finally share with you this new community.

The Forum has been a project that has been in the work for several years. As the defense practice has continued to change, it is more important than ever to collaborate and share ideas with one another. The IDCA Forum is the space for us to connect as an organization and collaborate.

This project has been a real labor of love. Our board collaborated to develop a user-friendly hub community that we hope will become a daily tool in your practice. I reached out to several states to learn the successes and failures of other states' databases. I am proud to report that what we have come up with has inspired other states to follow our lead. We will continue to collaborate with our sister states to ensure we are delivering the best experience we can.

To access the Forum, visit www.iowadefensecounsel.org and log in to your account. Once logged in, the IDCA Forum can be found on the top right.

Once you are in the Forum, I encourage you to click the "Take Community Tour" button in the top left, which will guide you through step by step how to use our Forum. The Forum allows you to subscribe to information that you want to see, and you can choose how often the updates hit your inbox.

The Forum contains "Resources" where you will find uploaded documents, motions, and transcripts. We encourage our membership to upload interesting briefs and motions. In "Discussions" you will find a place to post questions and answers on a variety of topics. The "Groups" tab is the home for our organization's groups. This is a great spot to get involved in this organization. The "Directories" tab contains our membership information. We encourage you to create a profile on the Forum when you visit.

Please visit the Forum and participate in growing our community. We also encourage you to reach out with any questions or comments on the Forum, including things you would like to see added to our community. We look forward to your feedback on this tool which we hope will be a true benefit to our membership.

Amanda

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of error preservation as it pertains to motions in limine, and will help ensure that at your next trial, you are equipped to prepare your case for appeal, should you need to do so.

THE RULE: MOTIONS IN LIMINE ARE NOT APPEALABLE

As a general rule, a party cannot appeal from the trial court's order granting or denying a motion in limine. *State v. Langley*, 265 N.W.2d 718, 720 (Iowa 1978). This is because, though often treated as such, a motion in limine is *not* a ruling by the court that evidence is admissible or inadmissible. *Twyford v. Weber*, 220 N.W.2d 919, 922-23 (Iowa 1974). Instead, a motion in limine "is a red flag to counsel that the evidence is not to be brought before the jury unless and until it is separately taken up with the court in the posture of the case at trial." *Langley*, 265 N.W.2d at 721. Thus, "the error comes, if at all, when the matter is presented at trial and the evidence is then admitted or refused." *Id* at 720. "[T]he district court's ruling on a motion in limine is not subject to appellate review." *Wailes v. Hy-Vee, Inc.*, 861 N.W.2d 262, 264 (Iowa Ct. App. 2014).

THE EXCEPTION: SOMETIMES MOTIONS IN LIMINE ARE APPEALABLE

There is a narrow exception to the general rule prohibiting an appeal directly from a motion in limine. "An exception exists where such a motion is granted on a hearing which is evidentiary in nature, the court is completely advised of the factual situation, and nothing occurs at trial to change the status." *Langley*, 265 N.W.2d at 720. In such a situation, if the court's ruling "leaves no question that the challenged evidence will or will not be admitted at trial, counsel need not renew its objection to the evidence at trial to preserve error." *Quad City Bank & Trust v. Jim Kircher & Assoc.*, 804 N.W.2d 83, 90 (Iowa 2011). "The key to deciding whether the general rule or the exception applies in a given case is determining what the trial court purported to do in its ruling." *Id*. If the court's ruling makes clear that its decision is final, the ruling is appealable. *Id*.

For example, in *Quad City Bank & Trust v. Jim Kircher & Assoc., P.C.*, the Court held that the exception to the general rule applied to allow for an appeal from a motion in limine to exclude certain expert testimony on standard of care and causation. *Id*. The district court's ruling had been made after review of the expert's deposition testimony and a hearing on the same, which satisfied the requirement that the court be completely advised of the contents of the proffered evidence when making its decision. *Id*. Further, in granting the motion in limine, the district court concluded the expert was unqualified to express his proffered opinions on standard of care and causation, which, the Court held, made clear to the parties that such evidence would not be admitted. *Id*. The Court found that, under these circumstances, the district court's ruling on the motion in limine was a final one, and an appeal from the motion was proper. *Id*.

Likewise, in *State v. Thoren*, the Court held that the exception applied to preserve error in a sexual abuse case against the defendant massage therapist. 970 N.W.2d 611, 620-21 (Iowa 2022). The motion at issue in that case sought to exclude testimony from four former massage clients, who had made complaints to the Iowa Massage Board about incidents of sexual abuse several years prior to the alleged abuse underlying the criminal charges. *Id*. The district court's ruling denying the motion in limine was made after being made aware of the specific allegations the former clients would make at trial, and the order denying the motion definitively stated "[t]he State will be allowed the opportunity to present evidence of prior incidents of unwanted sexual touching during massages." *Id*. When the prosecutor presented the testimony of the massage clients at trial, the defendant did not object. *Id*. The Court held that, despite the defendant's failure to object at trial, error was preserved because the district court's ruling on the motion in limine had been unequivocal, and "left no question about its finality." *Id*.

In both *Quad City Bank & Trust* and *Thoren*, the district court's orders were definite, and contained no language to suggest that the court may change its mind on admissibility at a later time. This seems to be key in cases where the exception is applied. Likewise, in cases where the exception applies, the district court is apprised of the specific contents of the proffered evidence. In *Quad City Bank & Trust*, the district court was able to review the expert's deposition testimony, and in *Thoren*, the district court was apprised of the specifics of the complaints made to the massage board by the former clients. Thus, when examining whether the exception to the general rule might apply to your case, you must examine whether the district court had a chance to review the proffered evidence, and whether the court's order left open any possibility that its ruling would change.

THE PRACTICE: WHEN IN DOUBT—OFFER OF PROOF & OBJECT

While the Court has applied the exception to the general rule more frequently in recent years, the best practice is to avoid the exception altogether by preserving error with an offer of proof or an objection during the course of trial. In general, when the court grants a motion in limine to exclude evidence, the party that sought to introduce the evidence must make an offer of proof to preserve error. *Langley*, 265 N.W.2d at 721. An offer of proof is

sufficient if it gives the trial court, and later the appellate court, a "complete understanding of the evidentiary issue," including the contents of the evidence sought to be admitted and the reasons for its admissibility. 7 Laurie Kratky Doré, Iowa Practice Series: Evidence § 5.103:11 (West 2023). The offer of proof must set forth with specificity the substance of the evidence that would have been elicited, including a "recitation of specific facts based upon the personal knowledge of the witness." *Id*. It should also include facts necessary to establish the admissibility of the evidence, which was previously rejected by the trial court. *Id*.

In contrast, when the court denies a motion in limine, the party seeking to exclude the evidence must object when the evidence is presented during trial. *Thoren*, 970 N.W.2d at 621. "[W]here the motion is denied the movant must base his complaint on the trial record," which requires objections to the evidence during the course of trial. *Twyford v. Weber*, 220 N.W.2d 919, 924 (Iowa 1974).

CONCLUSION

Error preservation is perhaps the most important component to any appeal. When error is not preserved, appeals of even the most egregious rulings will falter. The nature of motions in limine make counsel particularly susceptible to mistakenly believe error is preserved, in cases where it is not. For this reason, counsel must be especially cognizant of the language of the court's order granting or denying a motion in limine, and, when in doubt, counsel must object, or make an offer of proof, to preserve their

New Member Profile

Jaquilyn Waddell Boie

Attorney Jaquilyn Waddell Boie practices at Heidman Law in the areas of civil, commercial, and personal injury litigation; medical malpractice defense; construction law; and agricultural law. Before joining Heidman, Jaquilyn served as an extern to the South Dakota Supreme Court and South Dakota Attorney General's Office as well as a Kline Fellow at Kline & Specter in Philadelphia.

Prior to becoming an attorney, Jaquilyn obtained a Joint PhD in International Relations and Policy from Princeton University, working over a decade in international law and policy. She also holds an MBA and MPP. Jaquilyn's work and research in international law and policy took her throughout Europe and the Middle East.

Jaquilyn lives with her husband and seven children in the Loess Hills of Northwest Iowa. They reside at and help operate the family farm Jaquilyn grew up on.

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Case Law Update

By Zack A. Martin
Heidman Law Firm, PLLC


Zack A. Martin

SINGH V. MCDERMOTT, 2 N.W.3D 422 (IOWA 2024)

FACTUAL & PROCEDURAL BACKGROUND

In the early morning hours of January 26, 2019, a cow owned by McDermott escaped from its confinement and wandered onto Interstate 80 (I-80). Singh was driving a Peterbilt truck and struck the cow. Singh brought a negligence claim against McDermott. McDermott moved for summary judgment. The district court granted McDermott's motion. Singh appealed. The appeal was transferred to the Court of Appeals, which affirmed. Singh applied for further review, and the Supreme Court granted his application.

HOLDING

The district court properly granted summary judgment. The cow's mere presence on I-80 did not provide sufficient evidence of McDermott's negligence. Singh's alternative res ipsa loquitur theory of negligence also failed because Singh lacked the required expert testimony to prove that the cow would not escape its confinement and wander onto a highway, in the ordinary course of things, in the absence of negligence.

ANALYSIS

Cattle owners such as McDermott owe a common law duty to exercise such care as an ordinarily prudent and careful farmer exercises under like circumstances. Pursuant to this duty, the appearance of an animal on the highway is insufficient prima facie evidence of the animal owner's negligence. Therefore, Singh could not prove his negligence claim against McDermott based solely on the presence of the cow on I-80.

The Court then turned to Singh's claim that, under the doctrine of res ipsa loquitur, there was sufficient circumstantial evidence of McDermott's negligence. Res ipsa loquitur allows the jury to infer negligence if the plaintiff introduces substantial evidence that "the injury was caused by an instrumentality under the exclusive control and management of the defendant," and "the occurrence causing the injury is of such a type that in the ordinary course of things would not have happened if reasonable care had been used."

Assuming without deciding that the cow was in McDermott's exclusive control, the Court held that Singh presented insufficient evidence that the cow wandering onto I-80, despite being fenced in, would not have occurred in the ordinary course of things had reasonable care been used. Relying on the Restatement (Third) of Torts, the Court explained that the second element of a res ipsa loquitur claim "requires the jury to understand what happens 'in the ordinary course of things' when 'reasonable care' is or is not used in a particular situation." In some cases, there is a lack of common knowledge and experience from which a jury can draw to make this determination. "In such cases, the plaintiff needs expert testimony in order to escape judgment as a matter of law on the res ipsa claim."

The Court held that Singh's claim required expert testimony. The photographs in the record showed that McDermott's fence and gate were in good working order. Under these circumstances, the Court determined the probability of cow escapes is not a matter within the general experience of most citizens.

> We don't think that the nuances of bovine behavior are so widely understood that a jury of ordinary citizens would be able to say that—"in the ordinary course of things"—a cow would not have escaped without negligence by McDermott. Rather, the jury would need the assistance of expert testimony to reach that conclusion.

WHY IT MATTERS

Singh identifies the applicable standard for wandering animal cases in Iowa. In cases where a plaintiff lacks direct evidence of the animal owner's negligence (e.g., insufficient fencing), expert testimony is required to prove that in the ordinary course of things, the animal would not have escaped in the absence of negligence. Claims unsupported by direct evidence of negligence and without expert testimony in support of a res ipsa loquitur theory of recovery are subject to summary judgment dismissal.

HUMMEL V. SMITH, 999 N.W.2D 301 (IOWA 2023)

FACTUAL & PROCEDURAL BACKGROUND

Plaintiff asserted a medical negligence claim against the defendant plastic surgeon. Plaintiff served the required certificate of merit

in support of her claim. However, Plaintiff's expert acknowledged in his certificate of merit that he had retired from clinical practice roughly one (1) year prior to signing the affidavit in support of Plaintiff's claim. Defendants moved for summary judgment, arguing that Plaintiff's certificate of merit was deficient because Plaintiff's expert did not meet the applicable expert witness standards. Specifically, the expert was not "licensed to practice" at the time he signed the certificate of merit. The district court denied Defendants' motion. Defendants filed an application for interlocutory review, which the Supreme Court granted and retained.

HOLDING

A qualified expert under Iowa Code section 147.139 must possess a current active license to practice. A certificate of merit from a retired/inactive expert does not substantially comply with the requirements. Plaintiff's failure to substantially comply with the certificate of merit statute resulted in the Court reversing and remanding with directions that judgment be entered in favor of Defendants.

ANALYSIS

Iowa's expert witness statute for medical negligence cases imposes several requirements. Those requirements include that the expert is currently "licensed to practice in the same or a substantially similar field as the defendant." Iowa Code § 147.139(1). While Plaintiff argued that 'licensed to practice' means nothing more than 'licensed,' Defendants insisted that this interpretation would effectively read "to practice" out of the statute.

Determining that the phrase "licensed to practice" was sufficiently ambiguous, the Court turned to tools of statutory interpretation. The Court noted the presumption against superfluous words and the presumption in favor of interpreting statutes to reach reasonable results. The Court also reviewed how "licensed to practice" is used elsewhere in Iowa Code and relevant legislative history.

Weighing these considerations, the Court concluded that "license to practice" as used in section 147.139(1) requires that the expert currently possess a license that authorizes practice of medicine. This reading is most consistent with the actual text of the statute. This interpretation is more consistent with how terms like "license" and "license to practice" are used elsewhere in chapter 147. The Court cited other states which interpreted similar expert witness statutes and reached the same conclusion. Because the certificate of merit from a retired/inactive expert did not substantially comply with the statutory requirements, dismissal with prejudice of Plaintiff's claim was the proper remedy.

WHY IT MATTERS

This case confirms that the "licensed to practice" expert witness standard requires plaintiffs in medical malpractice cases to designate certificate of merit and section 668.11 experts who maintain an active license permitting the practice of medicine. This theoretically eliminates a wide pool of potential plaintiffs' experts and precludes the cottage industry of retired physicians testifying against actively practicing physicians and in support of claims asserted by patients. Certificates of merit or expert witness designations of retired experts should be met with the appropriate motion to strike or dismiss.

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