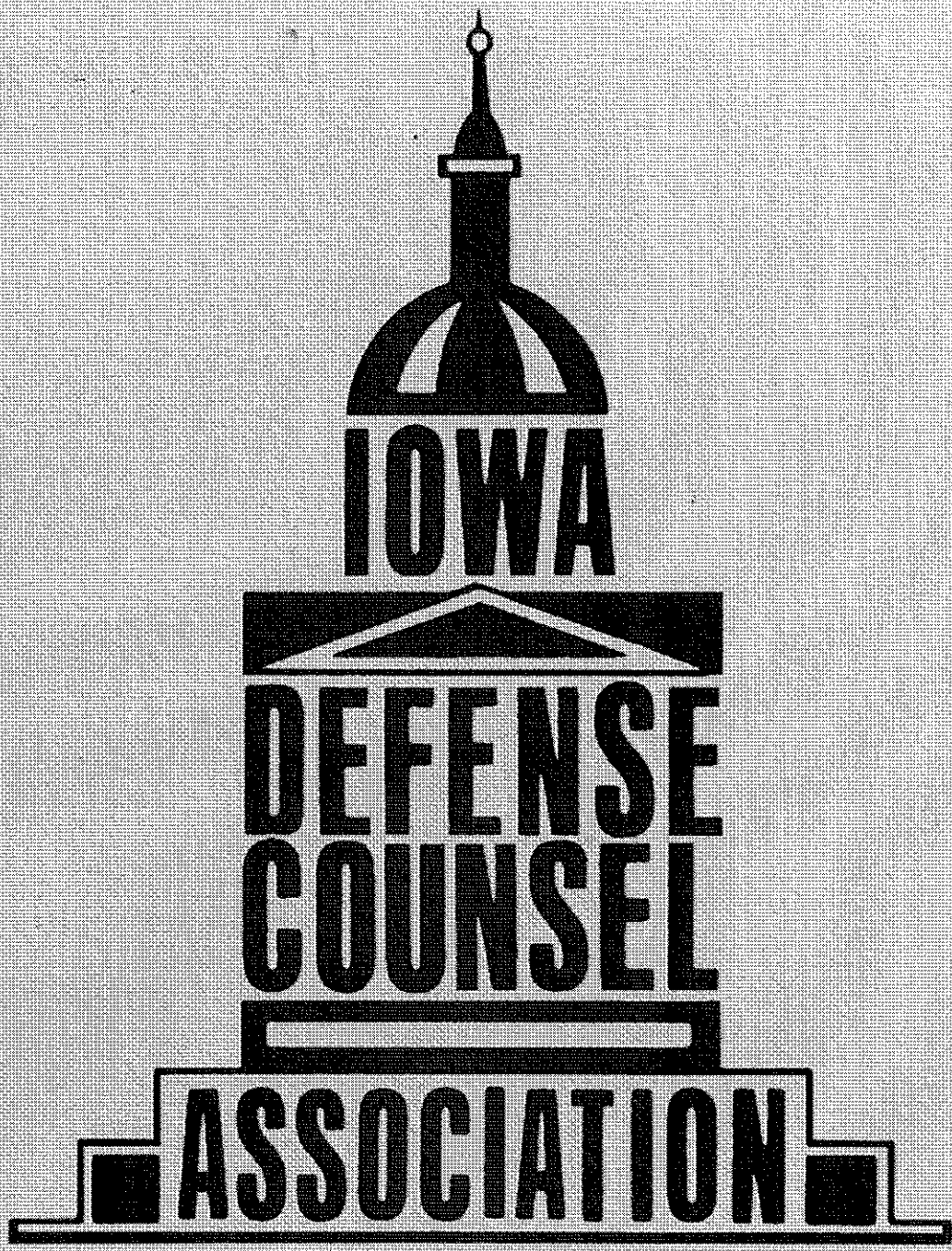


# 1988 Annual Meeting

OCTOBER 27, 28 & 29, 1988
UNIVERSITY PARK HOLIDAY INN
WEST DES MOINES, IOWA

## THURSDAY, OCTOBER 27, 1988

**7:00 AM**
**Board Meeting**

**8:00 AM**
**Registration**

**8:30 - 9:00 AM**
**Report of Association**

**9:00 - 9:45 AM**
**Annual Workers' Compensation Update**
Richard Garberson - Cedar Rapids

**9:45 - 10:15 AM**
**Defending Employee Termination Cases**
Bruce Johnson - Des Moines

**10:15 - 10:30 AM**
**BREAK**

**10:30 - 11:30 AM**
**Pre-Trial and Courtroom Ethics**
Honorable Harold D. Vietor
Honorable August F. Honsell
Honorable James P. Rielly

**11:30 - 12:00 Noon**
**Effect of Comparative Fault on Consortium Claims**
Marion Beatty - Decorah

**12:00 - 1:00 PM**
**LUNCHEON**

**1:00 - 1:30 PM**
**Iowa Supreme Court Update**
Honorable David Harris

**1:30 - 2:00 PM**
**Defending Road Defect Cases**
John Baty - Des Moines

**2:00 - 2:30 PM**
**Intentional Interference Cases - A Defense Perspective**
Maurice B. Nieland - Sioux City

**2:30 - 3:00 PM**
**Defending Construction Cases**
Steven Udelhoten - Des Moines

**3:00 - 3:15 PM**
**BREAK**

**3:15 - 5:00 PM**
**Evaluating and Defending Closed Head Injury Cases**
Larry McLellan
Frank Comito with a panel of physicians including
Dr. David J. Boarini, Dr. Joseph M. Dord
and Dr. Thomas A. Carlstrom

**Evening**
**Cocktails - 6:30 - 7:30 PM**
**Hawaiian Luau - 7:30 PM**

## FRIDAY, OCTOBER 28, 1988

**8:30 - 8:45 AM**
**Trial Demonstration**
Daniel Smith v. Light and Power Company
**Introduction**
Ralph W. Gearhart and Magistrate Ronald Longstaff
**Counsel for Plaintiff**
Richard Santi - Des Moines and
Thomas Shields - Davenport
**Counsel for Defendant**
Charles Brooke - Davenport and
William Rosebrook - Des Moines
**Plaintiff Consultant**
Dr. Thomas Sannito - Dubuque
**Defendant Consultant**
Dr. Edward Bodaken - Paso Robles, California

**8:45 - 9:30 AM**
**Jury Voir Dire - Plaintiff and Defendant**

**9:30 - 10:15 AM**
**Arguments - Plaintiff and Defendant**

**10:15 - 10:30 AM**
**Jury Instructions**

**10:30 - 10:45 AM**
**BREAK**

**10:45 - 11:15 AM**
**Defense Techniques and Jury Selection**
Dr. Thomas Sannito

**11:15 - 12:00 Noon**
**Putting Your Best Feat Forward - Effective Opening Statement**
Dr. Edward Bodaken

**12:00 - 1:00 PM**
**LUNCHEON**

**1:00 - 1:30 PM**
**Latest Information from the U.S. District Court**
Honorable Charles Wolle

**1:30 - 2:30 PM**
**Defense of Civil Litigation - A National Perspective**
A panel including David Phipps - Des Moines
Alanson K. Elgar - Mt. Pleasant
Robert Babcock - Kansas City, Missouri
George McGugin - Nashville, Tennessee
James Morris III - Richmond, Virginia and
H. Franklin Perritt - Jacksonville, Florida

**2:30 - 3:00 PM**
**What I Hate About Defense Lawyers**
Nick Critelli - Des Moines

**3:00 - 3:15 PM**
**BREAK**

**3:15 - 3:45 PM**
**Products Liability Update**
Gregory G. Barntsen - Council Bluffs

**3:45 - 4:30 PM**
**Defending Punitive Damage Claims**
Bibb Allen - Birmingham, Alabama

**Evening**
**Cocktails - 6:30 - 7:30 PM**
**Dinner - 7:30 PM**

## SATURDAY, OCTOBER 29, 1988

**9:00 - 10:00 AM**
**Annual Appellate Court Review**
Gregory Lederer - Cedar Rapids

**10:15 - 10:45 AM**
**Annual Legislative Update**
E. Kevin Kelly - Des Moines

**10:45 - 11:15 AM**
**Iowa Rules of Appellate Practice Update**
Emil Trott - Des Moines

**11:15 PM**
**Recessed Annual Meeting**

**12:00 Noon**
**Board Meeting**

# ANNUAL MEETING

*OCTOBER 27, 28 & 29, 1988*

**15 Hours C.L.E., (6 Federal)**

Since we all couldn't go to HAWAII this year, we're bringing HAWAII here! Plan to attend this *LUAU* we are preparing for you Thursday evening. It promises to be *FUN, RELAXING* and full of *SURPRISES!*

***HAWAIIAN LUAU - THURSDAY, OCTOBER 27***

***ANNUAL BANQUET - FRIDAY, OCTOBER 28***


# OFFICERS AND DIRECTORS
# 1985-1986

**PRESIDENT**

Thomas D. Hanson
1300 Des Moines Building
Des Moines Iowa 50309

**PRESIDENT - ELECT**

Patrick M. Roby
500 Merchants National
Bank Building
Cedar Rapids Iowa 52406

**SECRETARY**

Craig D. Warner
Mississippi Valley Savings Bldg
321 N 3rd. Street
Burlington, Iowa 52601

**TREASURER**

Eugene Marlett
5400 University Avenue
West Des Moines Iowa 50265

## BOARD OF DIRECTORS
## (Date is Term Expiration Date)

**District I**

David L. Hammer - 1990
200 CyCare Plaza
Dubuque, Iowa 52001

**District II**

Craig L Johnson - 1988
118 E. Main, P O. Box 1180
Marshalltown, Iowa 50158

**District III**

Alan E Fredregill - 1989
200 Home Federal Building
Sioux City, Iowa 51102

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307 Midlands Mall
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Sioux City, Iowa 51101

## PAST PRESIDENTS & DIRECTORS

**Edward F. Seitzinger, 1964-1965**
**1223 Cummins Parkway**
**Des Moines Iowa 50311**

* Frank W. Davis 1965-1966

D. J. Goode, 1966-1967
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Harry Druker, 1967-1968
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Marshalltown Iowa 50158

* Philip H Cless, 1968-1969

Philip J. Willson, 1969-1970
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Dudley Weible, 1970-1971
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Forest City, Iowa 50436

Kenneth L. Keith 1971-1972
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Webster City, Iowa 50595

*Edward J Kelly, 1977-1978

Don N Kersten 1978-1979
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Fort Dodge Iowa 50501

Marvin F. Heidman, 1979-1980
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L. R Voigts, 1981-1982
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* Albert D Vasey (Hon ) 1983

Harold R Grigg, 1983-1984
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Primghar, Iowa 51245

Raymond R Stefani 1984-1985
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Cedar Rapids Iowa 52401

**Claire F. Carlson, 1985-1986**
**7th Floor, Snell Bldg.**
**Fort Dodge, Iowa 50501**

David L Phipps, 1986 - 1987
1300 First Interstate Bank Bldg
Des Moines Iowa 50309

## IOWA DEFENSE COUNSEL FOUNDERS AND OFFICERS

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President

D J. Fairgrave
Vice-President

*Frank W Davis
Secretary

*Edward J Kelly

Mike McCrary
Treasurer

William J. Hancock

Paul D. Wilson

## ANNUAL MEETING CHAIRPERSONS

Edward F Seitzinger
General Program Chairperson

Thomas D Hanson
Program Chairperson

* Deceased

# 1988 Annual Meeting

## INDEX



A B C D E F G H I J K L M N O P Q R

A

# ANNUAL WORKER'S COMPENSATION UPDATE

Richard C. Garberson
Shuttleworth & Ingersoll, P.C.
500 Merchants National Bank Building
Cedar Rapids, Iowa

## TABLE OF CONTENTS

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## A. INTRODUCTION

The following is an attempt to summarize the significant decisions, agency and court as well as agency rule modifications occurring in the field of worker's compensation during the last twelve months. Since the last Annual Meeting, David Lindquist has been confirmed as Industrial Commissioner to complete the term of Robert Landess. He is the appointed head of what is now known as the Division of Industrial Services. Because of some change of personnel, the following is a listing of his deputies and other staff members:

1. Chief Deputies:
   (a) Clair Cramer
   (b) Jon Heitland
   The responsibilities of chief deputies Cramer and Heitlend are related to drafting of appeal decisions on behalf of Commissioner Lindquist.

2. Helenjean Walleser

3. Larry Walshire

4. Michael Trier

5. David Rasey

6. Michelle McGovern

7. Walter McManus

8. Debra Dubick

9. Rose Ricke -
   Legal analyst for the Division of Industrial Services. She is the person who should be contacted concerning the status of any contested case proceeding before the Division of Industrial Services. She can generally provide information concerning the status of a particular case insofar as the decision making process is concerned.

## B. RULE CHANGES

Two recent rule changes have been made which are of considerable significance. The first is embodied in Rule 343-4.8(2). This Rule, effective July 1, 1988, imposes a $65 filing fee for all arbitration or review reopening petitions seeking "weekly benefits". In the event of a claimant who is, in the opinion of the Commissioner, unable to pay the filing fee at the time of filing, the fee can be deferred. A written request for the deferral is, however, required. No filing fee requirements apply for filings not seeking weekly benefits, i.e., medical benefits, burial benefits, equitable apportionment, vocational rehabilitation benefits, commutation, employee's examination, etc.

Chapter 9 entitled Public Records and Filing Information Practices, to the Division of Industrial Services rules was also adopted. These Rules are intended to implement the Uniform Agency Rules concerning fair information practices. In a general sense, it describes the types of information the public can obtain from the Division of Industrial Services concerning worker's compensation claims and the persons and circumstances under which information may be obtained. You will want to become familiar with these provisions before requesting information from the Division of Industrial Services.

## C. NO EX PARTE CONTACT WITH PHYSICIANS

In Morrison v. Century Engineering, 8/24/88, No. 87-934, the Iowa Court of Appeals rather dramatically changed what most worker's compensation practitioners felt was a universally accepted right of both claimant and employer (and their counsel) to contact health care providers. In this case, claimant's counsel told the doctors not to speak with employer or its attorneys. As a result,

the Industrial Commissioner was asked to and did enter an order specifically authorizing employer's counsel to meet with claimant's treating physician. The Court of Appeals found that ex parte communications are not authorized by Chapter 85. The Court did note that Section 85.27 provides for the release of information relative to a worker's compensation claim and that the same Section waives any privilege for the release of information. The Court concluded, however, that it does not follow that ex parte communications with a treating physician are permitted. The Court of Appeals relied on Roosevelt Ltd. Partnership v. Sweeney, 394 N.W.2d 353 (Iowa 1986), which interpreted somewhat analogous Section 622.10, Code of Iowa. The implications of this decision are potentially very significant The Morrison decision is presently the subject of an Application for Further Review to the Iowa Supreme Court.

## D. PRIVILEGE FOR DEFAMATION

In Tallman v. Hanssen, _____ N.W.2d _____ (Iowa 1988), No. 87-182, filed 8/17/88, the Supreme Court reviewed a decision of the Court of Appeals. While reversing it on other grounds, the Court recognized the well known doctrine that for public interest reasons an attorney enjoys absolute immunity for libelous or slanderous matters published as part of a judicial proceeding. The Court concluded that worker's compensation proceeding is a judicial proceeding and thus any defamatory statement by counsel made in a brief before the Industrial Commissioner is absolutely privileged.

## E. IS THE WORKER AN "EMPLOYEE?"

1. One of the fundamental requisites for entitlement to worker's compensation benefits is the proof of an employer/employee relationship.

Interesting questions often occur as to whether an employment relationship existed as opposed to an independent contractor or other relationship. Those cases usually involve a detailed review of the nature and the extent of control exercised by employer over claimant. Sperry v. D&C Express, Inc., 12/10/87, File No. 785108, demonstrates the difficulty often involved in making this determination. Here Sperry was a truck driver for defendant. Sperry furnished his own tractor and trailer and drove the equipment. Occasionally he would hire someone else to drive and he would compensate that driver. His written employment agreement, however, provided that the equipment was in the exclusive possession and control of defendant. Defendant's name was placed on the truck. Sperry would call defendant each Sunday evening to determine if loads were available. If so, a load had to be picked up at a time specified by defendant. Sperry was required to call defendant on a daily basis to provide information concerning location. Defendant provided the necessary paperwork for each load, carried insurance on the cargo and liability insurance, and computed the fuel tax owed by the driver. Sperry was required to and did secure collision coverage on his equipment and was required to maintain the equipment and meet all safety requirements. Under the written agreement, Sperry was responsible for health and worker's compensation insurance. Sperry could haul freight for another company under trip leases while returning to Iowa for Defendant, but on at least one occasion defendant denied Sperry permission to take a trip lease back to Iowa. Claimant was paid a percentage of the revenue from the freight and paid his expenses out of his gross revenue. The Commissioner noted that the factors were somewhat inconsistent, but that sufficient control existed over the details of Sperry's work and driving that it could be said defendant had the right to exercise control. Accordingly, an employer/employee relationship was found.

2. In Mahlberg v. Meek Dry Wall Co., Inc., 9/9/87, File No. 745455, claimant had a different "employer/employee problem." Claimant injured his left shoulder in September of 1983. At the time of his injury, he was installing dry wall in a house. The sub-contract for dry wall had been let to Meek Dry Wall Company. Council Bluffs Dry Wall supplied the dry wall material for the house. The testimony indicated that claimant and other Council Bluff Dry Wall employees drove a truck to the subject house on the day the claimant was injured and the claimant was working on another house for Council Bluff Dry Wall at the same time. Meek Dry Wall testified that on the injury date was an employee of Council Bluff Dry Wall and not of Meek Dry Wall Company.

What makes the case interesting is that prior to bringing this action against Meek Dry Wall, claimant brought an action against Council Bluff Dry Wall. Claimant failed in the Council Bluff Dry Wall action because he did not demonstrate an employment relationship with Council Bluff Dry Wall. The second action then resulted. Remarkably, claimant lost again.

Commissioner Lindquist found that claimant failed to prove that he was an employee of Meek Dry Wall. Evidently claimant relied in large part on the "first" decision thinking that if he was found not be an employee of Council Bluff Dry Wall he must, therefore, be an employee of Meek Dry Wall. The Commissioner noted that while this decision may seem unfair, claimant could have appealed the earlier case or could have named both Meek Dry Wall and Council Bluff Dry Wall as defendants in his first petition.

## F. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

1. Madison v. Sturgeon Truck Lines, 4/28/88, File No. 794964. Essential elements in establishing a right to worker's compensation benefits

requires demonstrating that claimant sustained injuries "arising out of" and "in the course" of his employment. Section 85.3(1). The words "out of" mean the cause or source of the injury. "In the course of" refers to the time, place and circumstances of the injury. An injury occurs in the course of employment when it is within the period of employment at a place the employee may reasonably be and while he is doing his work or something incidental to it. Accordingly, when an employee leaves the line of his duty, compensation coverage ceases. For the coverage to cease, however, the departure from the usual place of employment must amount to an abandonment of the employment or be an act wholly foreign to the usual work. The mere fact that an employee happens to be a short distance away from the actual work site does not, in itself, prevent the recovery of compensation benefits. In determining whether an employee is acting in the course of his employment, a relevant factor to be considered is the question of whether the activity was of benefit to the employer.

Here claimant was injured when he voluntarily assisted another truck driver in moving trailer axles. Significantly, this activity was not performed on employer's premises. Claimant's truck was being loaded at a third-party's premises and claimant went to the assistance of another truck driver some distance away from the loading dock. The Industrial Commissioner found that although drivers by custom help each other, any benefit to his employer was to attenuated to support claimant's contention that his activity was in the course of his employment. Accordingly, the injury was found not to be compensable. One might well surmize that had the custom of helpfulness been demonstrated and the injury occurred while on employer's premises, the result would have been different.

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2. Cruoe v. Fab, 3/15/88, File No. 802807. This is a heart attack death case involving claimant physician. Once again the issue is whether the heart attack and death "arose out of" and "in the course" of his employment. An injury is in the course of one's employment when it is within the period of employment at a place the employee may reasonably be while he is doing his work or something incidental to it.

Here, decedent was a farm laborer. His duties involved driving a tractor across a field of at the farm of Gerald Brown. While doing this, he observed a fire in a shed. He left the tractor and told Mrs. Brown of the fire and then took steps to contain the fire. From the record it was clear the fire posed no danger to Mrs. Brown or her children. A truck belonging to claimant's employer was in the yard but was not in danger from fire. Accordingly, it was found he was not acting to save any person from the fire or to save his employer's property from the fire.

The death was found to be not compensable. While the activities were commendable, they were a deviation from his employment. While emergency situations have been held to be an extention of an employee's employment such as an emergency which poses danger to a person or to the employer's property. However, no such extention exists for an emergency endangering a third-party's property.

The facts were very favorable to employer. There was no evidence Cruoe was excited or that the had run from his tractor to the farm house. It was quickly determined no persons were in danger and that his employer's truck was not in danger. In fact, there was testimony concerning some joking between Cruoe and Mrs. Brown. Accordingly, it was determined the injury was not "in the course of" his employment.

It was also determined the death did not "arise out of" his employment even if he were in the course of it. There was no medical showing that the heart attack was caused by the activity of warning Mrs. Brown of the fire. While Cruoe's wife, an R.N., was willing to opine that the fire and excitement caused by it could have caused her husband's death, the Commissioner held that such an opinion, coming not from a physician, is not competent as medical evidence on causation. Accordingly, the claim for death benefits was denied.

3. Pyle v. Carstensen Freight Lines, 7/24/87, File No. 753661. This is another heart attack case. Claimant suffered a heart attack while driving a truck for defendant. Medical testimony indicated that the heart attack was the result of an atherosclerotic condition of his arteries. Claimant's risk of heart attack was increased by the fact he was a heavy smoker and overweight. Despite what seems to be favorable medical testimony, the heart attack and resulting disability was found to be compensable.

Claimant left his terminal for Des Moines to make a delivery. Claimant was rushed - having only a half hour to travel from Cedar Rapids to Des Moines. During the trip to Des Moines he began to experience pain in his chest. The pain subsided but then reoccurred after arrival in Des Moines. He continued to work with the pain because of a need to make Des Moines deliveries by 4:00 p.m. He unloaded about 14,000 pounds of freight using hand carts while in Des Moines. He testified that he was forced to drive in excess of speed limits to meet his schedule and that he had previously been told that he would be fired if his performance did not improve. He made no complaints of pain to anyone at any delivery sites. He did not use a toll free number of employer to report problems he was having.

Significantly, medical testimony indicated that the heart attack and resulting damage could have been avoided if claimant had not continued his delivery activities in Des Moines. The Commissioner found that the claimant's belief that he felt compelled to continue working, even with pain, was reasonable. Further, that the excertion required of him in his job was greater than that required in non-employment life and accordingly claimant sustained an injury arising out of and in the course of his employment. He was awarded total permanency benefits.

4. Estate of Martin v. Medical Assoc. Clinic, P.C., 9/29/87, File No. 756244. Claimant Martin, a physician, was killed in an automobile accident. As a regular part of his work he performed surgery at nearby hospitals and travelled to the hospitals in his personal car. He had no fixed hours of work and was on call every other weekend and every other day. When he was on call, he was required to be available at all times to go to a hospital if needed. He was on call during the weekend he was killed.

The evidence reflected Martin had two heart surgeries scheduled the day he killed. He left home the morning of his death about 5:50 a.m. He mentioned to his wife the evening before that he had some medical matters to take care of at the hospital the next morning.

The decision required an assessment of the application of the "going and coming" rule. Normally an injury is not compensable if it is incurred while the employee is going to or returning from work. Had he been going to his office, the decision suggests the death would not have been compensable. However, he was on his way from his home to the hospital which was found to analogous to the trip of an employee who is sent by his employer on a business trip with instructions to leave directly from his home. Death benefits were awarded.

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5. Tuttle v. Mickow Corp., 418 N.W.2d 364 (Iowa App. 1987). Claimant was killed in an motor vehicle accident. He had a written agreement with employer under which he would lease a tractor and trailer to employer and work exclusively for Mickow. He was obligated to maintain the tractor and trailer. Claimant had been leasing a trailer and decided to purchase another trailer to increase his income. The new trailer was in Norfolk, Nebraska.

After delivery of a "Mickow" load in Minnesota, claimant went "out of service" so he could acquire the trailer in Norfolk. He went to Des Moines to finalize the trailer purchase and lease it to employer. He drove to Norfolk to get the new trailer. No load was hauled for Mickow to Norfolk and no load was obtained Norfolk.

Claimant was returning to his home in Arkansas to perform maintenance work on the trailer when he was involved in a fatal traffic accident near Avoca, Iowa. The issue, therefor, was whether claimant was in the course of his employment.

The Court of Appeals reversed the Commissioner's denial of benefits. The question, as framed by the Court, was whether decedent's activity was for the benefit of his employer. The court said that because claimant was required to provide his own trailer, he was "engaged in an activity that would benefit his employer."

The Court concluded:

> "We hold that in the case of over-the-road truck drivers that are required by their employer to provide the tractors and trailer equipment, that efforts performed by the employee to place the equipment in a condition to be utilized in the performance of employer's business is worked performed in the course of employment."

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## G. MEDICAL EXPENSE ISSUES

1. Veterans Admin. v. Chase Manufacturing Co., 9/9/87, File No. 735517. The issue is whether the VA had standing to maintain a claim for medical services which had provided to claimant/employee Palas. Claimant had previously, by compromise settlement pursuant to Section 85.35, resolved his dispute with employer. The VA initiated proceedings before the Industrial Commissioner to obtain compensation for the value of medical services it provided to claimant. Section 85.26(4), 1983, provides:

> "No claim or proceedings for benefits shall be maintained by any person other than the injured employee, his or her dependent or his or her legal representative if entitled to benefits."

Reversing a deputy's decision, the Commissioner held that VA lacked standing to institute worker's compensation proceedings under these circumstances.

2. Trumbo v. Oscar Mayer & Co., 12/23/87, File No. 718988. In its answer, employer admitted employee sustained an injury arising out of and in the course of his employment. As a part of the pre-hearing order, that position was changed somewhat to indicate that the issue of "work relatedness" was contested. Claimant received VA hospital care and treatment and generated a bill of $5,100. Employer challeged both the reasonableness of the bill and contended that the medical expenses were not authorized by employer under Section 85.27. The decision discussed the absolute right under §85.27 of an employer to choose medical care for an injured employee. It was also noted that unauthorized medical expenses, absent an emergency are not the responsibility of employer.

In reiterating a long-standing agency policy, the Commissioner noted:

> "It does not seem logical that defendants can deny liability on one hand and guide the course of treatment on the other."

The Commissioner went on to conclude that because "work relatedness" was designated in the pre-hearing order to be an issue, that employer forfeited its right to control medical. It was ordered to pay medical expenses incurred by claimant at the VA hospital.

3. The lien for medical services provided under Section 85.27 is preserved. In Johnson v. Harlan Comm. School Dist., _____ N.W.2d _____ (Iowa 1988), No. 87-341, filed 8/17/88, the Supreme Court "resurrected" the Section 85.27 lien for medical services in reversing a Court of Appeals' decision. Section 85.22(1) makes provision for subrogation rights of an employer/insurance carrier for "compensation . . . paid the employee." The fighting issue was whether compensation paid the employee refers only to weekly benefits and/or whether it also includes medical benefits paid. The District Court answered the question in favor of employer, the Court of Appeals reversed holding that the statute confers subrogation rights only with respect to "weekly" disability or healing period benefits.

A review of the applicable sections in Chapter 85 reflect some inconsistency in the use of nomenclature. Several instances the word "compensation" either specifically or by implication refers only to weekly benefits and not medical expenses. Supreme Court agreed that the term "compensation" is not used uniformily throughout Chapter 85. Finding subrogation rights for medical benefits the Court looked to legislative intent. It observed that the purpose of the subrogation provisions is to permit an employer to recovery money it paid under

the provisions of Chapter 85 from third-party tort-feasors. It found no reason, in achieving this purpose, why the legislature would distinguish between amounts paid as weekly benefits as opposed to amounts paid for medical and hospital care.

4. Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Krohn sustained a work related injury. In a review reopening proceeding, employer was ordered to pay a specified medical expenses. The order became final. Krohn then filed a certified copy of the order with the district court and obtained an ex parte money judgment against employer in the amount of the medical bills which were ordered paid. Employer then moved to set the judgment aside on grounds that a worker's compensation claimant is not entitled to a money judgment for medical expenses unless he seeks reimbursement for expenses which he actually paid. Employer also contended that it satisified its obligation to Krohn under an employer provided non-occupational health contract. The Supreme Court agreed with employer.

In the first instance, the Court looked to the Commissioner's order relative to the manner in which expenses were to be paid. It ordered the obligations to be satisifed which the court said is consistent with an employer's obligation under Section 85.27 to furnish medical and hospital services. Accordingly, the employer may satisify its obligation to furnish such services by an arrangement to pay suppliers directly. Consequently, Krohn was not entitled to be paid these sums personally unless he demonstrated he had paid the suppliers himself - entitling himself to reimbursement.

The State argued that it satisified its obligation by paying the expenses pursuant to a group non-occupational medical and hospitalization plan. Krohn argued that the State should not be permitted to satisify its obligation through the credit devise outlined in Section 85.38(2). In so urging, Krohn contended that the

credit was not raised in the pre-hearing report form utilized by the Industrial Commissioner. The court held that failure to identified Section 85.38(2) credit as an issue is not a circumstance which should deny employer the benefit of its statutory credit.

The Court was careful in noting that it was acting only upon the specific order entered in this case and that it was not suggesting that orders might not be entered in other cases requiring payment directly to a claimant.

## H. INTOXICATION

Stull v. Truesdall Coop Elevator Co., 12/14/87, File No. 780309. This decision involves an interpretation of Section 85.16 which provides that no compensation is allowed for an injury caused:

> "2. By the employee's intoxication, which did not arise out of and in the course of employment but which was due to the effects of alcohol . . . if the intoxication was a substantial factor in causing the injury."

The facts of the accident which resulted in claimant's death looked promising for employer. Stull was killed while driving his employer's pick up when he ran into the 48th car of an 88 car train about midnight. The train was travelling 25 miles an hour. Topography at the accident scene was level and flat, and there were no weather conditions which would have obscured vision. The railroad crossing had reflective cross bars, a painted sign on the road surface 747 feet from the crossing, and a separate railroad warning sign 747 feet from the crossing. Claimant left 372 feet of skid marks prior to the point of impact. Claimant's blood alcohol was tested several times and registered readings of .149 to .157 grams of alcohol per 100 milliliters of blood.

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Defendant and his manager Hersom quit working for employer at about 5:00 p.m. They were to travel to another city to deliver soybean samples and attend a dinner. They didn't attend the dinner. Instead they went from Hersom's home in Fonda, Iowa to Fort Dodge where they had one or two beers at each of two bars. They left Fort Dodge at 9:45 p.m. and returned to Fonda. They arrived at a bar in Fonda at about 11:00 p.m. Several witnesses indicated claimant did not show signs of intoxication. There was no drinking in the vehicle during the course of the evening. Claimant took Hersom to his home and was returning alone to his home when the accident occurred.

Section 85.16 is a defense which places the burden of proof of employer. Intoxication occurs when a person has affected his reason or his facilities or has lost control in any manner as a consequence of alcohol. The Commissioner held that the terminology "of substantial factor" means nothing more than "proximate cause." Accordingly, the employer must show the intoxication was a substantial factor in bringing about the accident.

The Commissioner found claimant was intoxicated by virtue of his blood alcohol tests. He concluded, however, that there was no proof to demonstrate that his intoxication was a substantial factor in the collision. In finding compensability, the 372 feet of skid marks were said to have indicated action on the part of claimant to avoid the train. No "speed" evidence was offered. The speed of the truck was found to be a substantial factor in the accident. The inability of claimant to detect the presence of the train more quickly than he did was also found to be a factor. The Commissioner noted that employer did not show that if claimant's reaction had been quicker the accident could have been avoided. Great reliance was placed upon the fact that people who observed

claimant shortly before the accident indicated that claimant did not appear to be impaired. Further, according to the decision, there was no showing the decedent could have avoided the accident had he not been intoxicated. The decision concludes with:

> "While it is possible that intoxication may have been a factor in the accident, the evidence fails to show that it was probable. Briefly stated, there are too many other possible causes of this accident to conclude that intoxication was a substantial factor."

## I. NINETY DAY NOTICE OF INJURY

Koopmans v. Iowa Electric Light & Power Co., 12/30/87, File No. 694831.

Section 85.23 provides:

> "Unless the employer or employee's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed."

Claimant died from a heart attack on March 5, 1980. He was a foreman of a line crew. It was noted he had great concern for safety. His duties included working after hours in emergency and inclimate weather. He often experienced conflict with his supervisor and the supervisor frequently counter-manded his instructions. The decedent smoked, drank coffee and suffered from indigestion. On the day of his death, he came home after work, ate dinner and watched an apparently unexciting basketball game on T.V. His wife left for an evening meeting and returned home finding claimant dead in the chair. Testimony indicated that he related no unusual work event that evening and displayed no excitement during the game. The autopsy showed he died of cardiac arrest due to

moderately severe atherosclerosis - a disease which builds up over a period of years. Risk factors for the disease included smoking, obesity, poor diet and a sedentary lifestyle. Claimant had no history of heart or circulatory problems.

After his death, claimant's spouse retained an attorney who represented her in the estate proceedings. He wrote employer asking what company benefits were available, making no reference to or inquiry about worker's compensation benefits. Employer received a death certificate showing the cause of death was as a result of atherosclerosis. The widow indicated she knew: that her husband's work was stressful; that he had been to doctors for nerve problems and stress; that stress caused heart attacks; that her husband died of a heart attack; that she felt a connection might exist between her husband's work and his heart attack and death; and that she was aware of worker's compensation benefits being available for injuries resulting from one's employment. She took no action for about two years at which time, because of legal advise, she filed her claim for death benefits. Significantly, claimant acknowledged that she had concern or suspicions in her own mind that work might have caused decedent's death.

The decision undertakes a rather extensive review of the written and unwritten requisites of Section 85.23 regarding ninety day notice. The first instance it is an affirmative defense which must be proved by a preponderance of the evidence. Of importance is the fact the ninety day time period does not begin to run until claimant has knowledge of the nature of his injury/disability. Alternatively, even if an employer knows of an injury it must have information to suggest it is work related.

The ninety day notice duty arises when a claimant should recognize the nature, seriousness and probable compensable character of his injury or disease.

The reasonableness of claimant's conduct is to be judged in a light of his education and intelligence.

> "Claimant must know enough about the injury or disease to realize that it is both serious and work connected, but positive medical information is unnecessary."

The purpose of the ninety day notice requirement is to give the employer an opportunity to conduct a timely investigation. The word "compensable" in this context is not used to connote legal knowledge but rather that a disabiling injury has been sustained which is work connected.

It was determined the employer had no actual knowledge that the death was work connected. No information was imparted to employer after the death which could be argued would give employer information that decedent's at-home heart attack was work connected. The "discovery rule" applies to Section 85.23. The ninety day period does not begin to run until the claimant knew or should have known that a compensable injury occurred. Discovery rule, therefore, focuses on that point in time when the claimant knew or should know two things: (1) that the injury is serious and (2) that it is work connected. It would be inappropriate to define "compensable" predicated upon the subjective understanding of a claimant as to the applicability of worker's compensation laws to a particular injury. Here claimant's failure to recognize her legal remedy in time was a mistake of law, not a mistake of fact, and her claim is therefore time barred.

## J. CUMMULATIVE INJURY - McKEEVER

Babe v. Greyhound Lines Inc., 2/29/88, File Nos. 706132; 790714. This decision invovles efforts by the Industrial Commissioner to address the cummulative injury doctrine adopted in McKeever Custom Cabinets v. Smith, 379

N.W.2d 369 (Iowa 1985). This is an interesting decision that bears re-reading for those involved in cummulative injury cases.

Claimant was employed by Greyhound from 1970 through 1984 as a ticket and baggage agent. His duties include sales and also lifting of baggage up to 100 pounds. He had no back problems prior to 1979 when he was unloading 80 pound bags of iron from a bus and felt pain in his back. He was off work for nine days. Later that year, he was off work for five weeks due to low back pain following lifting of heavy freight at work. X-rays were negative. In November of 1980, he sought medical attention for back pain as well as right leg and left arm pain - again following the lifting of heavy boxes. The pain radiated into his arm and leg. He missed no work.

In June of 1982, after lifting baggage weighing 30 to 40 pounds he again experienced low back pain. He missed eight days of work. A Memorandum of Agreement was filed for the June 1982 injury.

In November 1982, claimant slipped on stairs at his home, hurt his back and again missed work. The diagnosis was possible disc herniation. A 50 pound lifting limit was imposed. He was off work for two weeks.

In October of 1983, while lifting a package he felt a pull in his back. Further medical attention was obtained.

In November 1984, claimant was terminated from his job when a "commission" agent as opposed to a Greyhound employee was used.

In March of 1985, claimant reported he had pain in his back while cutting fire wood at home. In December of 1985, a CT Scan showed a disc herniation at L5-S1. His physician indicated that the herniation was as a result of repeated traumatic events of the low back occurring over time.

Claimant testified that throughout his employment with Greyhound he suffered numerous additional incidents of back pain but reported only those incidents and sought medical attention only when pain was severe. He also noticed incidents at home where he experienced back pain while lifting his children.

Claimant's condition has remained generally stable since his employment with Greyhound ended. He now lifts only 25 to 30 pounds and does light duty construction on a self-employed basis.

In finding McKeever did not apply, the Commissioner analyzed McKeever in some detail. In the first injury in McKeever, claimant did not miss work. Here claimant did. In McKeever, the repetitive nature of claimant's work and the gradual worsening of the condition meant that the employee had no single identifying event putting him on notice of a work related injury. Here, by contrast, claimant had a series of discernable and separate incidents. Significantly, as a consequence of the first, he missed work. Accordingly it was concluded that the injuries were separate and distinct and were not cummulative. The effect of these injuries was not gradual but traumatic. The Commissioner noted that these were not the results of repetitive small injuries such as hammering in McKeever, but rather were caused by varying activities that involved heavy weights on multiple dates. It was held:

> "The mere fact that the subsequent injuries were numerous or that claimant was frequently required to lift heavy weights does not make those injuries cummulative in nature."

Having determined the cummulative injury doctrine does not apply, the Commissioner was required to determine if the June 1982 and October 1983 incidents were separate injuries causing new impairment or whether they

constituted aggrevations of pre-existing conditions. Given the fact claimant's condition remained generally the same from January 1979 onward, the Commissioner concluded that the June 1982 incident aggrevated a pre-existing condition. The same conclusion would be reached with respect to the October 1983 incident. Accordingly any award of benefits would be limited to the extent the two incidents aggrevated his pre-existing condition. No award could be made for injuries received in January 1979, October 1979 or November 1980. See the limitation provisions of Section 85.26.

The Commissioner then went on to hold that claimant failed to show that either of the two incidents materially aggrevated his pre-existing condition. The fact he was able to return to work the same job was significant. Similarly intervening at-home incidents were fatal to claimant meeting his burden of proof. Permanency benefits were denied.

## K. REVIEW REOPENING TRAPS

1. Pilcher v. Penick & Ford, 10/21/87, File No. 618597. In order to be successful in a review reopening proceeding, claimant must show "a change of condition" since the previous award (or agreement for settlement) "which would entitle him to an additional award" of benefits. A mere difference of opinions of experts as to the percentage of disability resulting from the original injury does not justify a finding of a change of condition.

Here, claimant and employer entered into an Agreement for Settlement pursuant to Section 86.13 after a November 1979 injury. Lime was sprayed into his face. His left eye recovered fully, but he had only shadow vision in his right eye. By virtue of the agreement for settlement he was paid for the loss of his right eye. Issue of healing period was left open. He returned to work in

September of 1980. Psychological problems subsequently developed. He developed fear of losing his good eye, indicated that he did not like to socialized and no longer participated in sports. Psychological testimony indicated that loss of visual accutity and disfigurement affected him psychologically in all phases of life. Psychiatric testimony indicated that he had a major depressive disorder including social withdrawal and paranoia. He was also psychiatrically diagnosed as having a possible adjustment disorder.

Claimant failed to met his burden of proof. While he showed that his psychological condition developed since the time of his eye injury - the evidence did not show whether the condition changed since the time of settlement. Claimant failed to satisify his burden of proof. Claimant's counsel may well wish to preserve in some fashion, at the time of an agreement for settlement (deposition of claimant, deposition of physician, physician's reports, etc.) in order to prevent falling into this trap.

In addition, claimant made no showing that his psychological difficulties were unknown to him at the time he entered into the settlement agreement. On the contrary, the testimony indicated that change in claimant's attitude was noted immediately after the injury and his sought psychological counseling less than four months after the settlement agreement was approved. The Commissioner found it interesting that claimant did not seek a psychological evaluation for problems which existed for two years until four months after entering into a settlement agreement with his employer. In this regard, the Commissioner noted:

> "To show a change in condition one must show what that condition was at the time of the previous hearing or settlement. The fact that one goes out and obtains evidence that wasn't presented at a prior time does not establish a change in condition. To come up with new evidence may only show a different opinion or shed

light on something that should have been presented earlier."

Lastly, even if claimant had shown a change of condition, he could not recover for industrial disability because his injury was to a scheduled member and not to the body as a whole. While psychological problems may affect one's earning capacity to some degree, that affect is already compensated for by virtue of the benefit schedule. Schell v. Central Engineering Co., 223 Iowa 421, 4 N.W.2d 399 (1942).

2. Linn v. Webster City Products, 6/20/88, File No. 686205. Once again, the issue was whether claimant established a "change of condition" sufficient to obtain review reopening benefits. In her initial Application for Arbitration, claimant failed to put on evidence as to her future earning potential. In denying benefits, it was held:

> "Claimant has failed to show a condition of conditions since the prior hearings. It is difficult to determine whether claimant has established a change of condition where no evidence was introduced at the prior hearings as to claimant's future earning potential. Introducing evidence for the first time at this hearing only shows what claimant's present condition is -- it does not demonstrate that claimant's condition has changed."

3. Doyle v. Land-O-Lakes, 11/30/87, File No. 618155. In the underlying Arbitration action, it was determined claimant sustained a work injury resulting in a subdural hematoma. During that proceeding, the evidence indicated that he had seizures two or three times a week. A fifteen percent functional award was make. No appeal was taken.

During these review reopening proceedings, testimony indicated that the nature of the seizures had not changed but that the frequency had increased. Evidence also indicated that his disposition had deteriorated and that he had

memory problems. The Commissioner reiterated that in a review reopening proceeding the claimant must show a change in condition since the previous award which would entitle him to an additional award. While the frequency of the seizures seems to increased, claimant failed to show a change in his industrial disability. No new restrictions were placed on his employment and in fact he had bid into a better job. The lesson to be learned is that claimant must not only show that his condition is worsened - he must show those changes have adversely affected his industrial disability.

## L. RATE OF COMPENSATION

1. Jones v. R.M. Boggs Co., Inc., 6/29/88, File No. 655193. Claimant, a pipefitter, was found to be totally disabled as a consequence an inner ear injury which seriously affected his balance. In addition, he was affected with a "startle" reflex which made it virtually impossible for him to engage in desk type jobs.

Although a Memorandum of Agreement had been filed, the Memorandum of Agreement establishes conclusively the occurrence of an injury arising out of and in the course of employment -- not the causal connection. Claimant must still prove the causal connection between the work injury and his claimed disability.

An interesting part of the decision dealt with how claimant's compensation rate was determined. Claimant had been long burdened with severe and multiple health problems unrelated to his employment. The "normal" work week for persons in claimant's job description were between 37 and 40 hours per week. Claimant normally, however, due to his unrelated medical problems, did not work "full" weeks. In the 45 weeks before his injury, he worked "full" weeks only nine times. He was paid $14.25 an hour.

Employer argued that in determining the rate of compensation claimant's rate should be based upon what he normally earned -- not what other employees earned. In so doing, employer argued that either 13 week average [Section 85.36(6)] should be used or a 52 week average should be used. This would, in effect, recognize the fact claimant normally did not work full weeks. In declining to do so, the Commissioner considered only those thirteen weeks in which claimant worked 37 or more hours.

2. Sperry v. D&C Express, Inc., 12/10/87, File No. 785108. Here, claimant was trucker who was paid 78 percent of revenue generated by his truck. From said sum he would pay for his fees, permits, maintenance, fuel and compensation to other drivers. The 78 percent gross revenue figure resulted in an average weekly wage of $955.00. Once again, employer failed to succeed on the rate of compensation issue. It was determined that $955.00 weekly gross revenue week was the amount to be used in determining claimant's compensation rate despite the fact that claimant paid for maintenance and many other expenses out of his share of weekly revenue. In so doing, the Commissioner said:

> "The statutory scheme of rate calculation is specific and it was designed to ease the process of calculation. It would be an impossible task to determine rate if employee paid expenses were taken in account."

3. Marcks v. Richman Gordman, 6/29/88, File No. 679369. Claimant, an administrative secretary, was also working part-time as a sales clerk for Richman Gordman. She fell off a ladder injurying her back and elbow. Her injuries became extremely disabiling. Medical testimony indicated that she was totally disabled as far as performing a job in the open market.

Her earnings with her "main" employer in the twelve months before her injury were $7,945.00. During the same time period, she received monthly bonuses based on profit of $2,728.00. During her employment with Richman Gordman in the twelve months before her injury, she earned $650.00. Her irregular bonuses are to be considered in determining her rate of compensation.

Claimant also attempted to rely on the "odd lot" doctrine articulated in Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985). Since the doctrine was not raised prior to or at hearing, claimant could not rely on the doctrine. Significantly, however, it was observed that even if the doctrine were properly raised claimant was not an odd lot employee. She was employed at the time of hearing although he job was part time, paid minimal wages and might not continue much longer because of her increasing disability. There was some indication that her part time job was a "make work" job. The Commissioner observed:

> "In order to find that a claimant is an odd lot employee, it must be shown that there is no market available for services claimant can perform. Clerical positions are commonly held by persons confined to a wheelchair and suffering disability as great as, or even greater than claimant suffers. Some of these people work for years and are a great asset to their employers as well as society. To say that such people are permanently totally disabled is factually incorrect."

The third issue involved a physician's testimony concerning the extent of claimant's ability to perform jobs in the job market. The testimony in this regard indicated 100 percent disability. The Commissioner held such testimony, from a physician, is inadmissible. He said that although the physician

> ". . .stated that his rating was based on functional impairment, it was brought out in the record that [the physician] also took into consideration the types of jobs claimant could perform and the availability of the that type of work. Medical evidence is properly limited to opinion testimony on the degree of functional impairment."

Of similar import is Duce v. Textron, Inc., 11/23/87, File No. 776806. One needs to be careful to determine that, when receiving an impairment rating from a physician, the impairment rating is limited to a functional rating as opposed to containing some component of the doctor's personal feelings as to the types of work claimant can perform subsequent to his or to her injury.

An apportionment was also required between the work injury and a pre-existing condition. She had a prior disc herniation and fusion at L5-S1. The extent of her industrial disability related to the pre-existing condition was the subject of an evidentiary presentation by defendant and ten percent of her current disability was attributed to the pre-existing condition.

The case also addresses an unusual aspect of a claimant's entitlement to healing period benefits. Healing period benefits are payable during the period of time there is a reasonable expectation that improvement will occur and the healing period ends when maximum medical improvement is reached. Where improvement is not anticipated from the start, claimant is not entitled to healing period benefits.

## M. SUSPENSION OF WEEKLY BENEFITS

1. Barkdoll v. American Freight System Inc., 6/28/88, File Nos. 816913; 778471. This decision discusses the inter-relation between Sections 85.39 and 85.27. The latter Section requires the employer to furnish medical care as a consequence of a work related injury. Section 85.39 grants the employer the right to insist that an injured employee shall submit to an "examination" (as opposed to treatment) as frequently as asked by physician or physicians selected by employer. Upon employee's refusal to submit to such examination, his rights to benefits shall be suspended during the period of refusal.

Here, claimant did not refuse to attend Section 85.39 examination. He refused to undergo a myelogram and related surgery - treatment under §85.27. He also refused to set up an appointment with a specialist to treat his headache problems. It is only under the "examination" provisions of Section 85.39 that a suspension of benefits can occur - not the "treatment" provision of Section 85.27. The Commissioner does note, however, that when claimant refuses treatment which would, had it been undertaken, have minimized his disability, then a reduction of his ultimate disability might be appropriate.

2. Assmann v. Blue Star Food, 5/18/88, File No. 866389. Employer, through Petition for Declaratory Ruling, requested a forfeiture of benefits as a consequence of claimant's refusal to keep medical and physical therapy appointments. Again, the distinction between §85.39 (examination) and §85.27 (treatment) was reviewed. While claimant apparently missed several treatment appointments, many were rescheduled. This may ultimately affect his entitlement to benefits. His non-attendance at treatment does not compel a conclusion he unreasonably refused medical treatment so that reduction, suspension or forfeiture would be warranted under Stufflebean v. City of Ft. Dodge, 233 Iowa 438, 9 N.W.2d 281 (1943).

The second issue was whether employer could insist claimant consult with a psychologist. A psychologist is not mentioned in §85.27. Section 85.27 lists, among treatment providers: surgeons, medical, dental, osteopathic, chiropractic, pediatric, physical rehabilitation, nursing, ambulance and hospital services. Claimant could not be compelled to submit to treatment with a psychologist unless so referred by a §85.27 health care provider.

In the third part of its Petition, employer sought a ruling permitting a nurse employed by it to attend treatment sessions. The purpose was to

> "provide medical history, obtain a first hand report from the medical providers of what needs to be done, help furnish centralized monitoring of medication and treatment, [and] to help make certain that claimant keeps appointments. . ."

The Commissioner refused to allow employer's nurse to attend under the circumstances described.

3. Bertrand v. Sioux City Grain Exchange, 419 N.W.2d 402 (Iowa 1988). Bertrand was killed in an industrial accident in 1974. Employer paid compensation benefits. Thereafter, Bertrand's estate recovered $228,000.00 from a third party tort-feasor. After deduction of litigation expenses and attorneys' fees, the estate had $147,232.00 available for distribution. Of that sum, two thirds was distributed to the surviving children and one third or $49,077.00 was distributed to his surviving spouse pursuant to the intestacy statutes. Out of her share, the spouse repaid the employer $13,000.00 for benefits already received. The employer then received a credit for future benefits in the amount of $35,985.00 - the balance of wife's share of the wrongful death proceeds.

Employer's credit for future benefits expired in May of 1986 and weekly benefits were scheduled to resume at that time. Employer began a declaratory judgment action before the Commissioner seeking a determination that it was entitled to a further credit against its liability to the surviving spouse for the balance of the settlement which was distributed to the decedent's children. The Commissioner agreed with the employer and the district court affirmed. The Supreme Court reversed. The issue, as framed by the Supreme Court, is whether employer's right to "be indemnified out of the recovery of damages" [Section

85.22(1)] entitles the employer to withhold benefits from a dependent spouse on account of damages received by the estate and paid to the decedent's children.

The Supreme Court concluded the quoted language is ambiguous because it does not specify the type of damages to which an employer has subrogation rights. The Court observed that a wrongful death action involves more than one type of damage. While the wording of Section 85.22(1) may suggest that an employer has subrogation rights against all wrongful death damages, "the manifest intent of the legislature will prevail over the literal import of the words used."

The Court then embarked on a determination of legislative intent. It observed that the purpose behind the worker's compensation scheme is to protect and provide for dependents who are wholly dependent on the employee. It noted that wrongful death benefits, in contrast, are distributed without regard to dependency. Accordingly, an interpretation of Section 85.22(1) which would deprive an otherwise qualified dependent of benefits because of recovery which is unavailable to the dependent would conflict with the basic legislative plan. Accordingly, the Court held:

> "We hold that the employer's right to withhold benefits under Section 85.22(1) extends only to that portion of the wrongful death proceeds actually paid or legally available to the person entitled to receive the worker's compensation benefits. The employer's liability to a dependent is not reduced by the amount of damages recovered by the estate but paid to someone else."

## N. SANCTIONS

1. Rozell v. Sioux Tools Inc., 12/18/87, File No. 753062. Here, the parties were required by Industrial Service Rule 343-4.17 to submit medical records within ten days of their receipt. At the telephone pre-hearing conference, employer indicated that it had received and exchanged all medical reports. An

assignment order was entered indicating that employer's list of exhibits to be offered at the hearing was to be served on claimant by a designated date. Employer acknowledged non-compliance with the Rule and the Order through inadvertance and oversight. Employer's offer of two medical reports was met with exclusion by the deputy and affirmance by the Commissioner.

2. Swift v. Allied Construction Services, Inc., 6/24/88, File No. 799010. The pre-hearing order required the parties to list witnesses and list exhibits within 30 days. A physician's name was not listed by employer in compliance with the 30 day pre-hearing order. A belated witness list (six days late) was filed and evidentiary deposition obtained about 30 days thereafter. The deputy considered the physician's testimony. Commissioner Lindquist reversed and held that the deputy erred in allowing the deposition into evidence and in considering it. In so doing, he noted: "A Deputy Industrial Commission does not have the power or authority to change another Deputy's order. If a party does not agree with a Deputy's order, they have an opportunity to appeal that decision."

Employer also had problems with the timing of its appeal. Rule 343-4.30 requires that the hearing transcript be filed within 30 days after notice of appeal. Here, the notice of appeal was filed November 20 and the request for transcript was made on December 1. The transcript was not filed until January 23. While apparently this constituted a violation of Rule 343-4.30, that violation was not found to warrant dismissal.

3. Other Comments. Several other decisions seem to indicate a strong and uniform practice to rigidly enforce Rules and/or orders regarding witness lists, exhibit lists, and the exchange of medical reports within ten days after receipt. In several instances, minimal, if any prejudice was shown yet the challenged witnesses or exhibits were excluded.

In several other instances a "belated" effort was made to rely on the odd lot doctrine. The Commissioner uniformly held that the doctrine would not be considered unless properly raised. This is done by identifying the odd lot doctrine either as an issue in the Petition or in the pre-hearing procedure.

Lastly, some care is advisable in carefully identifying, during the pre-hearing process, the issues that are to be decided at hearing. In several instances, issues which one or both of the parties were apparently contemplating having decided at hearing were not considered by virture of the failure of the one party or the other to list the matter as a hearing issue.

## O. HEARING LOSS

Cannon v. Keokuk Steel Casting, 1/27/88, File No. 7905331. This is an interesting appeal decision addressing a claim based upon hearing loss. Two separate provisions for hearing loss inhere in the worker's compensation law. The first is Section 85.34(2)(r) which provides compensation for hearing loss, other than occupational hearing losses, on a scheduled basis. Section 85B.4(1) is the occupational hearing loss provision. It defines an occupational hearing loss as a loss of hearing in excess of 25 decibels which arises out of and in the course of employment "caused by prolonged exposure to excessive noise levels."

Here, claimant appealed the deputy's award of a one percent industrial disability for hearing loss. He had not only a loss of hearing, but also tinnitus (ringing) and resultant psychological stress - all occurring as a result of an explosion. He sustained a hearing loss in both ears together with ringing in both ears. He missed no work. The ringing has been constant since his injury and occasionally caused him sleeplessness and increased irritability. In addition, claimant has difficulty understanding conversations in noisy settings. The

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conditions are permanent and no treatment is available. The treating physician indicated that this condition was common for people exposed to loud noises on a repeated basis. He had a 20dBA loss in the right ear and a 25dBA loss in the ear. However, according to the treating physician, under the AMA guides, his loss would be zero percent. Psychological testimony indicated that claimant would likely suffer permanent psychological difficulty in adjusting to his hearing loss. No rating or degree of impairment was offered in connection with this testimony.

The petition was brought under Chapter 85 not Chapter 85B. Since the hearing loss does not exceed 25dBA as required by Section 85B.4(1) he was not entitled to benefits under Section 85B. In addition, since his condition was caused by trauma in the form of an explosion as opposed to prolonged exposure -- Chapter 85B is not applicable. Thus, if there is compensability it must be under Chapter 85.

Since he had a zero percent loss of hearing, the question then became whether the ringing sensation is a scheduled loss under Section 85.34(2)(r) or whether it is an injury to the body as a whole for which he would be entitled to industrial disability benefits under Section 85.34(2)(u).

In determining that the ringing should be treated as a scheduled loss of hearing under Section 85.34(2)(r), Commissioner Lindquist noted that the few previous decisions on tinnitus do not provide a ready answer to the question. In the other cases, some loss of hearing was present. The Commissioner also noted that this case is unique because claimant does not suffer from dizziness or loss of balance which "might be" considered as extending his condition from a scheduled member to the body as a whole. The Commissioner determined that the ringing affects claimant's ability to hear or distinguish words but does not affect any

other part of his body. Therefore, it is a scheduled injury. No compensation can be awarded for psychological effects from a scheduled injury. His disability was found to be three percent of 175 weeks.



## P. FULL AND PARTIAL COMMUNITATIONS

1. Huss v. Bolton & Hay, Inc., 12/31/87, File No. 769042. The worker's surviving spouse sought a full communtation of her entitlement to weekly death benefits. She is 69 years old, a retired school teacher, had no dependents, was financial stable, owned her own home without debt, and had $57,000.00 in a bank account. Her income, based on worker's compensation, social security and interest, aggregated $2,300.00 per month. Her expenses were $1,900.00 a month. She obtained financial advise from her children and son-in-law. Her main concerns related to the possibility of catastrophic illness (although she was in good health) and the possible need for nursing home care. She does, however, have Medicare and Medicare supplement to meet expenses of an illness.

She desired the full commutation because of the flexibility a lump sum receipt of funds would afford her. She had no definite plan for the commutation proceeds if granted. She had considered investing in a second home, investing in an annuity, and possibility providing for her grandchildren's education. If the commutationw was granted, she planned to invest the lump sum in a certificate of deposit until she determined which option, or combination or options, she wished to pursue.

Interestingly, if she pursued the annuity option her net monthly spendable income would decreased by $140.00 due to tax consequences.

Section 85.45 makes provision for commutation when it is demonstrated the commutation is in the

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> "best interest of the person or persons entitled to the compensation, or that periodic payments as compared with a lump sum payment will entail undue expense, hardship, or inconvenience on the employer liable therefor."

In applying this Section, a request for commutation will not granted unless the commutation is in claimant's best interest. The relevant factors include claimant's personal, family and financial circumstances and the reasonableness of the plan for the commuted funds. Here, claimant was in financially sound condition with a steady source of income. Her income flow would be lessened under her plan. Additionally, her plans, at least at present, were found to be speculative and conjectural. Although one of her tenative plans included a fund for the education of her grandchildren -- such a use of commuted funds is not for her direct benefit and not an intended purpose for worker's compensation benefits. The request for full commutation was therefore denied.

2. Rickett v. Hawkeye Building Supply Co., 6/28/88, File No. 739306. Here, claimant sought a partial commutation of $43,750.00 of his total permanent award. The deputy granted only a $9,000.00 partial commutation. The deputy, in essence, denied that portion of the requested partial commutation which represented his attorneys' fees on grounds that it would not be in claimant's best interest to grant a partial commutation to pay attorneys' fees.

The two essential elements for a commutation are that the period of disability must be "definitely determined" and it must be in claimant's best interest. Employer opposed the partial commutation on several grounds. It argued because employer could institute review reopening proceeding if claimant's disabilty lessened, claimant's period of disability was not "definitely determined." This was rejected.

Employer also argued the commutation was not in claimant's best interest. It argued, and Commissioner agreed, the permanent total award was subject to divestment if his condition changed. This means claimant may, in the future, have to defend his continued entitlement to benefits. If counsel is not paid in full for his services in securing the permanent total award, counsel will have a continuing interest:

> ". . .in providing a defense to claimant in order to preserve the award and thus his fee. If counsel has already received his fee, then his interest in preserving claimant's award may well be diminished.*** It would seem that unless counsel contractually obligates himself to provide claimant legal services at least equal to the cash value of his advance fees at the time a defense become necessary, partial commutation would not be in claimant's best interest."

The deputy's decision was affirmed on appeal by Commissioner Lindquist. An appeal to the Woodbury County District court was taken by claimant.

3. Mathieson v. Ebasco Services, 4/28/88, File No. 494274. Here the dispute focused on whether certain medical expenses incurred by claimant should be paid by employer. The noteworthy aspect of the decision is the implicit approval given to the underlying special case §85.35 settlement, which left open future medical treatment.

## Q. MULTIPLE SCHEDULED INJURIES

McDonough v. Dahlen Transportation, 6/21/88, File No. 762853. Claimant was injured in a motor vehicle accident. He hit his head against the inside of the vehicle and broke an arm. 45 days later he began experiencing a humming in his head. He ultimately lost all hearing in his left ear. In addition, he suffers a

fourteen percent impairment to his left upper extremity but has no restrictions on the use of his arm. Claimant is right handed. Because claimant sustained injuries to two scheduled members, he is entitled to industrial disability benefits under Section 85.34(2)(u).

## R. NO PENALTY ON MEDICAL BENEFITS

Ray v. GET Plastics, 11/30/87, File No. 752493. Claimant appeals from a decision denying Section 86.13 penalty benefits. Section 86.13 allows for the imposition of penalty of up to 50 percent of the amount of benefits unreasonably delayed or denied where delay, commencement or termination of benefits occurs without reasonable or probable cause or excuse.

Employer was ordered to pay healing period, permanency and claimant's medical expenses. Although slightly delayed, permanency and healing period benefits were paid. Medical benefits were paid directly to the specified health care providers. The decision did not indicate to whom the medical benefits were to be paid. Citing Klein v. Furnas Elec. Co., 384 N.W.2d 730 (Iowa 1986), the Commissioner held that penalty benefits cannot be awarded under Section 86.13 for a delay in the payment of medical expenses.

## S. STATUTES OF LIMITATION

1. McDanel v. Chemplex Co., 12/22/87, File No. 698042. Claimant injured his shoulder in December of 1981. He experienced additional pain in March of 1982 and was examined by a physician. He was told not to return to work and through an employee manual prepared by his employer he was notified that if he was hurt at work he was covered by worker's compensation. The First Report of Injury was filed immediately after the December 1981 injury. In March

of 1982, a revised First Report of Injury was filed indicating a lost time injury. Claimant left work in March of 1982 pursuant to doctor's orders. At that time, employer was involved in a safety program attempting to achieve one million man hours without a lost time injury. At the request of employer, the physician changed his statement to allow claimant to return to restricted work as opposed to not returning to work at all. The claimant missed six days work and during that time was paid full salary. He was told his medical bills would be paid under worker's compensation. The employer ultimately achieved its safety goal. Claimant had periodic medical examinations until August of 1982. He had no further treatment until October of 1984 as a consequence of increased shoulder pain. Surgery was performed in November of 1984. Prior to July 1, 1982, an employer's failure to file a Memorandum of Agreement within 30 days after starting weekly benefits tolled the statute of limitations under Section 85.26(1). Claimant perceived that the "off work" benefits paid in 1982 were in lieu of worker's compensation. He was told his medical bills would be paid. Since no Memorandum of Agreement was filed concerning the payments he received while off work for six days in March of 1982, this operated to toll the statute of limitations. Accordingly, the action is not time barred.

2. Sawyer v. National Transporation Co., 3/11/88, File No. 789205. The claimant was involved in a January 14, 1981 motor vehicle accident. He was knocked unconscious and subsequently hospitalized. He obtained a temporary work release in May of 1981 but was unable to function as a truck driver. He was told to discontinue working. In August of 1981, he was advised by his physician that his symptoms would probably be permanent and by Feburary of 1982 he was given a ten percent full body rating. That rating was increased in May of 1983 to

fifteen percent.

On August 6, 1984, an Application for Approval of Final Lump Sum Settlement between claimant and employer was filed and approved in Douglas County, Nebraska District Court. The settlement agreement provided, in substance, that upon the making of a lump sum payment ($7,500.00) defendant was fully released and forever discharged from any and all liability which claimant had against employer under or by virtue of the worker's compensation laws of the State of Nebraska or any other state.

Claimant commenced this Iowa proceeding in March of 1985. No Memorandum of Agreement (required for all pre-July 1, 1982 injuries for which weekly benefits were paid) was filed in Iowa. Claimant argued the action is not time barred pursuant to Section 85.26(1) because of employer's failure to file a Memorandum of Agreement as required by Section 86.13, Code of Iowa 1981. Employer argued that the provisions of then 86.13 relate to payment of Iowa worker's compensation benefits. The Commissioner agreed. He held the Nebraska payments were not payments contemplated under Section 85.26(2). Accordingly, provisions of 85.26(2) were found not to be controlling and therefore the tolling provisions of Section 86.13 were found not to be applicable. The Commissioner found persuasive employer's argument that if the theory urged by claimant were correct claimant would have an unlimited period of time to commence a worker's compensation action in Iowa under circumstances where he had been paid in another state pursuant to a decision or settlement there. That situation, in the view of the Commissioner:

> ". . .would be an absurd result and contrary to orderly resolution of worker's compensation claims."

# COMMON LAW EMPLOYEE TERMINATION CLAIMS

Bruce Johnson
Des Moines, Iowa

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## I. Statutory Exceptions to Employment-At-Will-Doctrine

A. Over the years statutes have carved exceptions to the Employment-At-Will-Doctrine. Statutory exceptions spawning the most lawsuits are Title VII of the 1964 Civil Rights Act, the Iowa Civil Rights Act, the Rehabilitation Act of 1973, and the federal Age Discrimination in Employment Act, which collectively prohibit discrimination based on race, sex, national origin, religion, disability, or age, and the National Labor Relations Act, which prohibits discrimination based on union activity. This outline does not deal with statutory exceptions.

## II. Claim That Discharge Was Wrongful Because It Was Against Public Policy.

A. So far in Iowa it looks like recognition of this type of claim will be limited to a claim proving existence of an independent statutory or constitutional duty and that discharge of the employee violated the employer's statutory or constitutional duty. The Iowa Supreme Court has indicated it does not favor finding public policy exceptions based on duties created by court decisions rather than statutory or constitutional duties. Most of what the Iowa Supreme Court has said about recognitic of a claim for a discharge violating public policy was set out in Northrup v. Farmland Industries, Inc., 372 N.W.2d 193, 195-196 (Iowa 1985):

> "The general rule is that an at-will employee may be terminated at any time, for any reason. See Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454, 455 (Iowa 1978); Harper v. Cedar Rapids Television Co., 244 N.W.2d 782, 791 (Iowa 1976); Allen v. Highway Equipment Co., 239 N.W.2d 135, 139 (Iowa 1976).
>
> Northrup concedes that he is an employee at will and that he would be precluded from recovery for wrongful discharge under the general rule. However, he argues that a discharge

for alcoholism is against public policy and that, when an employee's discharge violates public policy, the general rule of no liability is subject to an exception.

This court has never expressly recognized a public-policy exception, although we recently noted its increasing acceptance in other jurisdictions. See Abrisz, 270 n.W.2d at 455. See also Thompson v. St. Regis Paper Co., 102 Wash.2d 219, 685 P.2d 1081, 1088 n. 1 (1984)(listing jurisdictions recognizing this exception); Note, Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith, 93 Harv. L.Rev. 1816, 1822-24 (1980).

While we hinted in Abrisz that, under proper circumstances, we would recognize a common-law claim for a discharge violating public policy, we did not apply it there because the facts did not establish such a violation. We observed, moreover, that '[c]ourts should not declare conduct violative of public policy unless it is clearly so.' Abrisz, 270 N.W.2d at 456. It has been observed, in fact, that successful common-law claims for wrongful discharge have been based in large part on violations of independent statutory policy, not those established by court decisions. See Note, Protecting At-Will Employees, supra, 93 Harv.L.Rev. at 1822-23."

B. In Northrup the Court acknowledged that a person discharged solely because of alcoholism could pursue a remedy under Chapter 601A, The Iowa Civil Rights Act. In Northrup, however, the employee failed to file his suit within the limitation period set out in Chapter 601A and abandoned his Chapter 601A claims in favor of an independent common law action. The Court held at 372 N.W.2d 196-197 that Chapter 601A was the employee's exclusive remedy and refused to recognize any common law action based on that statute. This was, of course, a sound decision because the statute carved out an exception to the employment-at-will-doctrine and the quid pro quo for obtaining the benefit of that exception is to follow the statute's procedural requirements.

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C. In Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1204-1205 (8th Cir. 1984), the 8th Circuit Court of Appeals noted that the Arkansas Supreme Court had not at that time upheld a claim for wrongful discharge against public policy but had indicated a willingness to recognize a public policy exception to the employment-at-will-doctrine. In Lucas the 8th Circuit sustained the trial court's dismissal of the employee's Title VII sexual discrimination claim because it was not timely filed, but held the employee stated a common law claim for wrongful discharge against public policy because her allegation that she was discharged for refusing the sexual propositions of her foreman amounted to discharge for refusing to violate Arkansas' statute prohibiting prostitution.

D. Examples From Other Jurisdictions

The leading case, Petermann v. International Brotherhood of Teamsters, Local 396, 344 P.2d 25 (Cal. 1959), discharge of employee because he would not commit perjury actionable because against public policy; Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978), discharge in retaliation for filing worker's compensation claim; Perry v. Hartz Mountain Corp., 537 F.Supp. 1387 (S.D.Ind. 1982), discharge of employee because he would not commit acts violating anti-trust laws actionable as against public policy; Adler v. American Standard Corp., 432 A.2d 464 (Md. 1981), employee discharged for reporting illegal company practices to superiors; Parks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3rd Cir. 1979), since Pennsylvania law made it a misdemeanor to require a polygraph test as a condition of employment or continuation of employment, refusal to take the test was actionable under Pennsylvania law for tortious discharge (Iowa has the same statute, §730.4, The Code).

III. Claims That Discharge Violates Promises of Permanent Employment or Provisions of Employee Manuals.

A. The general rule is that an at-will employee may be terminated at any time, for any reason. Northrup v. Farmland Industries, Inc., 372 N.W.2d 193, 195 (Iowa 1985).

B. In Stauter v. Walnut Grove Products, 188 N.W.2d 305, 311 (Iowa 1971), the Court addressed the exception to the general rule that arises when the employee gives his employer additional consideration:

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> "Absent any consideration beyond the employee's promise to perform, a contract for permanent or lifetime employment is construed to be for an indefinite time, terminable at the will of either party...
>
> However, a different situation arises where there is consideration in addition to the promise to perform services. Where the employee furnishes consideration in addition to his services, a contract for permanent or lifetime employment is valid and enforceable and continues to operate as long as the employer remains in business and has work for the employee once the employee performs competently."

C. In Stauter the plaintiff sold a competitive business to the defendant and alleged that as part of the sale there was an oral agreement to employ plaintiff "for as long as [he] desires to be thus employed and as long as he was able to competently perform the services which he undertook to do under said contract." 188 N.W.2d at 308. Giving up a competitive business to the employer was held to be sufficient additional consideration. In Collins v. Parsons College, 203 N.W.2d 594, 597-598 (Iowa 1973), sufficient "other consideration" was found when a college professor gave up a tenured position at one college for another tenured position at a college in Iowa because "the employment surrendered was itself permanent and the new employer is aware of the facts." Id. at 599. In Wolfe v. Graether, 389 N.W.2d 643, 653-654, sufficient additional consideration to support a contract for permanent employment was found where the plaintiff gave up his status as an equal partner to become an employee of a professional corporation formed to operate the clinic.

D. Other cases have found no sufficient additional consideration: Laird v. Eagle Iron Works, 249 N.W.2d 646, 647-648 (relinquishment of another employment at-will position was insufficient consideration for the employer's promise that the employee could remain as a marketing consultant at half salary for as long as he desired); Hanson v. Central Show Printing Co., 256 Iowa 1221, 1224, 130 N.W.2d 654, 656 (1964)(giving up the opportunity for another job is insufficient

consideration for the employer's promise that he would guarantee plaintiff 40 hours a week "each year until you retire of your own choosing"); Moody v. Bogue, 310 N.W.2d 655, 658-659 (Iowa App. 1981)(an employee who left his at-will employment as a draftsman and sold his house in Des Moines, and whose new employer in Ida Grove told him his job as a draftsman there would be permanent and ongoing, did not provide sufficient consideration to render a promise of permanent lifetime employment enforceable); Bixby v. Wilson & Co., 196 F.Supp. 889, 901 (N.D. Iowa 1961)(moving expenses paid by employee was insufficient consideration.)

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IV. Wolfe v. Graether and Cannon v. National By-Products Inc.

A. Wolfe v. Graether, 389 N.W.2d 643 (Iowa 1986).

1. In Wolfe v. Graether the Court spent two pages (652-654) explaining that the Plaintiff had provided sufficient additional consideration to support a contract for permanent employment. At 389 N.W.2d 652, the Court restated the additional consideration rule:

> "Contracts expressly offering lifetime or permanent employment or which a trier of fact has interpreted as offering such employment based on extrinsic evidence will be interpreted as indefinite and terminable at-will in the absence of some executed consideration in addition to the services to be rendered."

2. Then, at 389 N.W.2d 654, during a discussion of whether parole evidence should be admitted to aid interpretation of an integrated agreement's duration, the Court said:

> "...[W]e believe the better view to be that the so-called 'additional consideration' requirement applied in contracts of permanent employment is not truly a rule of consideration in the traditional sense, but rather an adjunct rule of interpretation. As such it is not strictly governed by those principles of contract law applicable to the sufficiency of consideration required to enforce a promise."

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3. In the end the Court in Wolfe at 389 N.W.2d 657 tells us additional consideration is indeed necessary to enforce a contract for permanent employment but may not be sufficient:

> "Additional consideration is an essential element of a contract for permanent employment.[3] Such additional benefit or forebearance does not create that status, however, unless this was the intention of both the employer and the employee, or unless this was the employee's intention and the employer should reasonably have known that it was."

Footnote 3 at 657 states:

> "The sufficiency of the consideration in order to permit a finding of permanent employment is an issue of law for the court. Whether the claimed additional consideration was in fact rendered is an issue of fact for the jury."

4. So, in Wolfe, additional consideration remains an essential legal requirement for a contract for permanent employment but where the employee cannot prove the employer intended permanent employment, the employee can supply the requisite element of intention through the doctrine of reasonable expectations.

B. In Young v. Cedar County Work Activity Center, Inc., 418 N.W.2d 844 (Iowa 1987), a written employment contract provided either the employer or employee could terminate the contract with a thirty day notice. An employee manual provided a five step disciplinary procedure leading up to termination. The employee was terminated without following the employee manual discharge procedures, but the trial court made a factual finding that the employee manual was not part of the employee's written employment contract. The Iowa Supreme Court said:

> "Because the evidence strongly suggests that the manual was in existence at the time the employment agreement was signed, this tends to support the district court's finding that its provisions were not intended to be contractual. Moreover, the language in the employee's manual purports to describe steps which 'shall normally be taken.'"

However, during its discussion the Court in Young, quoting Wolfe v. Graether as authority, said that under the doctrine of reasonable expectations the trial court might have found on the evidence that the discharge procedures set forth in the employee manual formed a part of the employee's contract of employment. At 418 N.W.2d 848. The employee manual in Young set out procedural steps to be followed by the employer prior to discharge but did not set out any discharge standards such as discharge only for cause. The Court in Young did not mention the issue of a contract for permanent employment or the requirement of additional consideration for such a contract.

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C. Cannon v. National By-Products, Inc., 422 N.W.2d 638 (Iowa 1988).*

1. In Cannon the employee manual said that an employee would not be "dismissed without just and sufficient cause." The manual further provided that should a controversy over discharge arise, certain internal procedural steps within the company were to be taken by the employee to press his grievance.

2. At 422 N.W.2d 640 the Court in Cannon, citing Young, said:

> "...[W]e conclude that in the present case the question of whether the written personnel policy became part of plaintiff's contract is to be determined on the basis of plaintiff's reasonable expectations. Even if it was not defendant's intention that these policies confer contractual rights, a contract may be found to exist if this was the plaintiff's understanding and defendant had reason to suppose that plaintiff understood it in that light. See Iowa Code §622.22 (1985). The issue of how these written personnel policies were perceived by plaintiff was, on the present record, an issue to be determined by the trier-of-fact."

3. Then, at 422 N.W.2d 641 the Court in Cannon cites Wolfe and states:

*James L. Pillers of Clinton was the successful attorney for the appellee-employee.

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"[W]e indicated that, in the permanent employment cases, the requirement of so-called 'additional consideration' is not truly a rule of consideration in the traditional sense, but rather an adjunct rule of interpretation. That rule applies in the determination of questions involving the duration of employment where that subject has not been specifically fixed in the agreement. This is not to be confused with those principles of contract law applicable to the sufficiency of consideration required to enforce a promise...the issue of interpretation which is presented in the present case does not involve the duration of plaintiff's employment contract. Rather it focuses upon thelegal effect of a specific written guarantee that discharge may only take place 'for cause.' In resolving this issue, we find no need to resort to the adjunct rule of interpretation which requires a showing of additional consideration. Instead the issue becomes: what does the contract provide and was it breached to plaintiff's detriment."

4. So in Cannon the Court does not actually do away with the rule that consideration in addition to simply performing employment services is an essential element of an enforceable contract for permanent employment. The Court in Cannon, however, says that an employee manual containing a cause standard for discharge is not a contract for permanent employment and therefore the additional consideration rules applicable to contracts for permanent employment need not be satisfied.

5. The employee in Cannon did not utilize the grievance procedures set out in the employee manual the Court found to be a contract. Three years after his discharge the employee filed his lawsuit and four and one-half years after his discharge he amended to claim the employee manual was a contract. The Court in Cannon held that failure to exhaust the grievance procedures in the manual did not bar the employee's claim for breach of contract. The Court said at 422 N.W.2d 642:

"[The grievance process was not] expressly recognized in the agreement as a condition for his own performance...we do not interpret the personnel manual as mandating that the employees must follow the review procedures as a condition for receiving the benefits which the agreement otherwise confers upon them."

6. A contract for permanent employment or for a definite term, such as three years, contains a cause standard of discharge by implication. In Allen v. Highway Equipment Co., 239 N.W.2d 135, 140 (Iowa 1976), the Court said:

"A contract of employment which by its express terms is for a definite time or to last until a definite day presents, of course, no problem concerning its duration and termination. The employer has the implied right to discharge the employee for cause, but otherwise the employment cannot be terminated of right during the term of its existence as expressed in the contract."

7. Cannon means that the employee who has been given a manual stating discharge will only be for cause can have a permanent job so long as he can persuade a jury he reasonably believed the manual was a contract and no reasonable cause existed for discharge. This is a better deal than if the employee had been given a contract for a definite term of years.

V. Effect On Employers

A. Under Cannon and Young employee manuals can be found by a jury to be enforceable employment contracts under the doctrine of reasonable expectations and without proof the employee gave any consideration in addition to his promise to perform services. An employer should seriously consider whether any employee manual is necessary to its business.

B. The practical effect of Cannon may be limited since most employee manuals probably do not contain a cause standard or other standard for discharge. However, now that the court in Cannon has eliminated

any requirement that additional consideration be proved to make enforceable a promise that discharge will only be for cause, will the Iowa Supreme Court find a jury question when an employee claims an oral promise that discharge would only be for cause?

C. Young may have broader application since many more manuals are likely to contain discharge procedures. However, to comply with the dicta in Young it is only necessary that the procedures be followed and the final decision on whether to discharge the employee should still lie with the employer rather than with a jury.

D. Any manual used should contain disclaimers clearly stating it is not a contract of employment, that the employee can terminate his employment at any time for any reason, and that the employer can discharge the employee at any time for any reason. Parts of any manual pertaining to insurance programs or retirement programs should state clearly that the statements in the manual about those programs are merely informational and are not a contract and that the employee should see the retirement plan or the insurance plan to determine his rights and obligations. The disclaimer should make it clear that upon discharge from employment no new or additional rights will vest or accrue under retirement plans, insurance plans, etc.

E. If in-house grievance procedures are included in an employee manual, the Court in Cannon wants to see language saying the procedures are the employee's exclusive and final remedy and are a condition for receiving the benefits of employment. Otherwise the Court will find the grievance procedures are not a prerequisite to the right to sue. If such language is included, the employee manual again starts to sound like a contract, whereas the goal is to have a manual that is not a contract of employment. However, if an employee manual disclaiming any contractual obligations is to be given to employees, it probably is best to include a grievance procedure telling the employee a written grievance must be filed if the employee feels he or she is being treated unfairly or improperly because of race, religion, national origin, sex, age, physical handicap, status as a veteran, or other reasons. A time limit should be placed for filing the written complaint and it should be made clear that the complaint procedure also

governs any grievance over discharge from employment. The procedure should be simple and easy to follow from the employer's standpoint. Such complaint procedures appearing in employee handbooks are helpful in defending discrimination suits based on statutory exceptions to employment at will if the complaining employee never notified his or her employee of the discrimination complaint before filing with the state or federal agencies. Of course, the sure way to avoid the effect of Young is to eliminate grievance procedures from any manual.

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F. The following are some examples of language included in an employment manual that disclaims contractual liability.

THIS HANDBOOK IS INTENDED FOR INFORMATIONAL PURPOSES ONLY. NEITHER IT, COMPANY PRACTICES, NOR OTHER COMMUNICATIONS CREATE AN EMPLOYMENT CONTRACT OR TERM. IT DOES NOT CONTAIN ALL OF THE INFORMATION YOU WILL NEED DURING THE COURSE OF YOUR EMPLOYMENT. YOU WILL RECEIVE INFORMATION THROUGH VARIOUS NOTICES AS WELL AS ORALLY.

MANAGEMENT IS COMMITTED TO REVIEWING ITS POLICIES AND BENEFITS CONTINUALLY. ACCORDINGLY, THE POLICIES AND BENEFITS OUTLINED IN THIS HANDBOOK ARE SUBJECT TO REVIEW AND CHANGE BY MANAGEMENT AT ANY TIME. NO COMMUNICATION OR PRACTICE LIMITS THE REASONS OR PROCEDURES FOR TERMINATION OR MODIFICATION OF THE EMPLOYMENT RELATIONSHIP.

Employment Relationship

Because business requirements fluctuate often in our industry and management often must make decisions that affect the status of employees, your employment conditions and status are subject to change at any time. Therefore, although you may have been hired for a specific position with specified hours, pay, duties, etc., all of these can be reduced, increased, or, in fact, terminated without advance notice and for any reason, with or without cause. Consequently, you also have the right to terminate your employment in the same manner, at any time, for any reason, with or without cause. This lack of a guarantee or an employment contract applies to other benefits, privileges, and working conditions of employment at United Suppliers.

## Health Insurance

**NOTE:** The information set out here is only a summary or guide and is not a contract of insurance. To determine your rights as to coverage and benefits in specific situations, you should consult the terms of the group insurance agreement which may be obtained from the company's controller.

## 401(k) RETIREMENT SAVINGS PLAN

**NOTE:** The information set out here is only a summary or guide and is not a contract. To determine your rights as to coverage and benefits, you should consult the terms of the 401(k) retirement savings document which may be obtained from the company's controller.

C

# CONFLICTS OF INTERESTS

# AND

# THE MOTION TO DISQUALIFY

August F. Honsell
Judge, 6th. Judicial District

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# CONFLICTS OF INTERESTS AND THE MOTION TO DISQUALIFY

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## Introduction

A motion to disqualify opposing counsel asserting a conflict of interest focuses attention on a field of the legal profession that is not very often brought into the courtroom. Such a motion places emphasis on the import of rules of professional responsibility on litigation, and may bring about a change of counsel in the pending lawsuit.

The introductory paragraph of the article, The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm, authored by Harry I. Subin,[1] provides insight into the present interest in ethics and the legal profession. It states:

> The second half of the twentieth century has been marked by extraordinary growth in the size and influence of the legal profession. In our increasingly complex society, it has become difficult, and in some respects impossible, to conduct one's affairs effectively without expert legal advice. Moreover, it appears that the trend toward the lawyering of America has been intensified in the past two decades. We may not be a nation of lawyers, but we are certainly a nation unimaginable without them.

The author's first footnote addresses the fact that the autnor of, The Lawyers, M. Mayer, observed that as of 1967 one in every 250 members of the labor force was an attorney.

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[1] 70 Iowa L. Rev. 1091, 1092 (1985).

The footnote also contains the observation made by Justice Frankfurter. "Our society, now more than ever, is a legal state in the sense that almost everything that takes place will sooner or later raise legal questions."

Premised on the fact that a lawyer cannot serve two masters at the same time in regard to the same situation, we should remember that our actions may be perceived in ways different than we intend. We must provide professional loyalty to our clients and protect the confidences gained by reason of the lawyer-client relationship in addition to diligently pursuing their best interests.[2]

Conflicts of interest appear to be the most common problems concerning professional responsibility which confront a lawyer. The legal profession isn't unique. Every agent or fiduciary who acts as the representative of another is, to some extent, subject to special rules imparting trust and confidentiality:

> Because lawyer conflict rules are largely prophylactic, it is sometimes unfortunate that the subject is so commonly referred to as 'conflict' of interests, which has a vaguely pejorative and motive-questioning ring. Much of what is circumscribed is only imperfectly described by that phrase. Better would be a phrase such as 'additional interests'; 'compound interests' or 'differing interests', which was employed by the 1969 Code. But 'conflict of interests' is a term

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[2] Charles W. Wolfram, Modern Legal Ethics (1986), at p. 312. I highly recommend this textbook because it addresses many practical current ethics problems which face lawyers in all phases of the practice.

> that is engrained too deeply into professional consciousness to permit the use of any other.[3]

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Examples of some of the areas which give rise to assertions of a conflict of interests are: fees; negotiations and settlement of a case; confidences or secrets of former clients; and, as may be the case with many of us, there is frequently a tendency to become involved in a vague arrangement with a client regardless of the nature of the business depending on good faith rather than exploring the parameters of the situation at the beginning of the transaction.

Confidentiality and Loyalty

Iowa Supreme Court Rule 119(b) alerts the Iowa lawyer to the fact that the Iowa Code of Professional Responsibility for Lawyers has been adopted by the Court and appropriately published. The Court has many times made allusion to the fact that it has the "inherent and exclusive power to supervise the conduct of attorneys who are its officers and to prescribe reasonable conditions upon which persons may be admitted and permitted to practice in the Courts of this state." The Court also reminds us that the Iowa Constitution provides a firm basis to support this rule.[4]

The basic thrust of Rules of Professional Responsibility

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[3]Id. at p. 313.
[4]Rowen v. LeMars Mut. Ins. Co. of Iowa, 230 N.W.2d 905, 913-14 (Iowa 1975).

impacting the area of conflicts of interest is to protect the reasonable expectations of the client concerning loyalty and confidentiality. Canon No. 4 of the Iowa Code of Professional Responsibility for Lawyers addresses the confidentiality mandate. It provides: "A lawyer should preserve the confidences and secrets of a client." A confidence is that information protected by the attorney-client privilege as defined by applicable law; and a secret is that information gained by reason of the professional relationship which the client requests to be held inviolate or the disclosure of which could be embarrassing or likely to be detrimental to the client.[5] Canon No. 5 addresses the loyalty mandate. It provides: "A lawyer should exercise independent professional judgment on behalf of a client." This canon deals with conflicts of interest. Its controlling mandate dictates the avoidance of any situation where the interests of the lawyer may impair his or her independent professional judgment." For example, in the absence of full disclosure resulting in a client's consent, a lawyer cannot represent any client whose business interests conflict with that of the lawyer's. Neither can a lawyer represent clients with interests that conflict. "Indeed, any person seeking legal counsel can expect unfettered independence of professional judgment of a lawyer

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[5] DR 4-101.
[6] DR 5-101.

whose loyalty to that person is total."[7] On the other hand, a conflict did not occur in a situation where a lawyer undertook employment in a dissolution proceeding in which the lawyer had drafted a prenuptial agreement some thirty years in the past, when it was not apparent that the agreement was in dispute or that the lawyer would be called as a witness.[8] Adding to the complexity of the area of conflict of interests is Canon 9 which provides: " A lawyer should avoid even the appearance of professional impropriety."

Recognizing that conflicts of interest problems can create complicated legal situations, it can be very tempting to turn to Canon 9 for the solution. Courts have resolved complex conflicts of interest cases by ordering that counsel are disqualified premised on there being an appearance of impropriety contrary to Canon 9 which must be avoided. This has been done without saying what specific mandatory rule has been violated.[9] Many courts assert that Canon 9, by itself, is not a mandatory rule, therefore, there should be a showing that the claimed activity comes within the purview of a specific rule which when associated with Canon 9 gives rise to the claimed disqualification.[10]

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[7] Committee on Prof. Ethics v. Oehler, 350 N.W.2d 195, 196-7 (Iowa 1984).
[8] Heninger & Heninger v. Davenport Bank & Trust, 341 N.W.2d 43 (Iowa 1983).
[9] Rensnaw v. Ravert, 460 F.Supp. 1089 (E.D. Pa. 1978).
[10] Modern Legal Ethics, supra at p. 319.

Determining Whether a Conflict Exists.

Conflicts of interest problems can arise in a myriad of ways. Therefore, the development of specific standards to identify every conflict is difficult. The Iowa Code of Professional Responsibility "sets the standard for an attorney's conduct in any transaction in which his professional judgment may be exercised."[11] In Committee on Prof. Ethics, Etc., v. Benke,[12] Chief Justice Reynoldson stated:

> The purpose of the canons, as explained by the ethical considerations, disciplinary rules, and adjudicated decisions, is to show lawyers the professionally acceptable route through the questions or doubts which may arise in their professional activities.

Since the broad basis upon which this area of the Code of Professional Responsibility is founded is loyalty and confidentiality; a good criterion for testing whether a conflict exists is whether either one or both of these principles will be seriously impaired. However, it must be remembered that not all situations which impact these principles call for disqualification of counsel. Inflexible rules will adversely affect the client's free choice of counsel causing delay and expense. Additionally, it might be pointed out that rigid or inflexible standards can affect people in different ways such as those who live in the small community which has few lawyers and where, for example, there

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[11] Cornell v. Wunsnel, 408 N.W.2d 369, 377 (Iowa 1987).
[12] 276 N.W.2d 838, 843 (Iowa 1979).

are many families who are at least distantly related to one another.[13]

In discussing standards concerning identification of conflicts of interest, Professor Wolfram addresses the area in the following manner.

> In light of the competing principles and interests that underlie conflicts rules, to what extent must it be evident that an impermissible conflict between clients exists? Expressions can be found in decisions under the 1969 Code that indicate that even a mere possibility of a conflict is fatal. But most Courts speak in weightier terms of a 'substantial risk' of a conflict. A provision of the Code states that a conflict exists if the lawyer's judgment 'will be or reasonably may be affected.' 'Reasonably' here seems to refer to particular facts that confront the lawyer and to call for exercise of the judgment of a lawyer who is ordinarily cautious about the risks of conflicts. The basic and mandatory client-client conflict rules in the Code, DR 5-105(A) and (B), refer to the 'likely' impairment of independent professional judgment or representation of differing interests. On the other hand, EC 5-15 gives the nonbinding advice that a lawyer confronted with 'potentially differing interests... should resolve all doubts against the propriety of the representation.'[14]

Not all activities undertaken by a lawyer are considered to involve the principles of loyalty and confidentiality which can give rise to a conflict of interest. Serving on an

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[13] Modern Legal Ethics, supra at pgs. 316-18.

[14] Id., at p323. It should be noted that although Iowa has adopted the 1969 Code of Professional Conduct alluded to by Professor Wolfram, his allusion to DR 5-105(A) and (B) corresponds to DR 5-105(B) and (C) of the Iowa Code of Professional Responsibility.

advisory board does not necessarily preclude representation in a suit involving one member of the subject organization against another. However, it is advisable to weigh every situation carefully. In the event that confidential information is disseminated and a lawyer sitting on a given board becomes privy to the information, the use of it may come within the purview of a conflict calling for disqualification.

If a person is in a position where her or she gives confidential information to a lawyer, a relationship which can result in violation of the rules regardless of whether a fee is paid can arise when the lawyer enters into a business arrangement with another person. "An attorney owes no less professional honesty to his business associates and personal friends than to a casual client."[15]

Standing.

The Iowa Supreme Court in Rowen v. LeMars Mut. Ins. Co. of Iowa,[16] found that it had standing to entertain a Motion to Disqualify Counsel in a pending proceeding before it premised on the fact that such right is an essential concomitant of power of the Supreme Court to license lawyers. This power is not accorded the Trial Court, therefore, the issue of standing of a party to address a motion to

[15]Committee on Professional Ethics v. Randall, 285 N.W.2d 161, 165 (Iowa 1979).
[16]Supra, note #3.

disqualify opposing counsel may play an important part of a hearing with regard to such a motion.

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Professor Wolfram addresses the standing question in the following manner. "In order to raise an issue of conflict of interest, the objecting party must be able to demonstrate that continued representation of the other party by his or her present lawyer would materially harm a cognizable interest of the objecting party."[17]

Exercise of Discretion by The Court.

If a moving party identifies a conflict of interest and shows that a cognizable interest of the objecting party has been materially harmed, the next question to be addressed is whether or not judicial power should be exercised in the form of granting a Motion to Disqualify.

In Meat Price Investigators Ass'n. v. Spencer Foods, Inc.,[18] the Court, in addressing an appeal of a Motion to Disqualify opposing counsel premised on violation of a provision of the Iowa Code of Professional Responsibility for Lawyers, reviewed the District Court's findings applying the standard of whether of not the trial court had abused its discretion. The District Court, in finding an insufficient showing of prejudice, had addressed the issue by holding that violation of a disciplinary rule would not necessarily

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[17] Modern Legal Ethics, supra, at p. 333.
[18] 572 F.2d 163 (8th Cir. 1978).

result in disqualification. It found that the issue was whether the purported misconduct tainted the lawsuit to the extent that the motion needed to be granted. In reviewing this determination by the lower court, the Circuit Court indicates with evident approval that the Trial Court used a balancing test: balancing the client's interest in being represented by counsel of its choice; the opposing party's interest in trial free from prejudice due to disclosure of confidential information; and the public's interest in scrupulous administration of justice.

In Rowen v. LeMars Mut. Ins. Co. of Iowa, infra, the Court provides that a potential conflict of interest is sufficient to warrant granting a motion to disqualify opposing counsel.

In making the decision concerning whether or not to grant a motion to disqualify opposing counsel, the trial court in addition to considering the factors alluded to in Meat Price Investigators Ass'n., id. and Rowen[19] may also consider such other factors as: costs; delay occasioned by removal of counsel; timeliness of the filing of the motion, particularly unexplained delays; whether or not the motion has been filed for strategic purposes; discovery of opposing counsel's work product; and any other factors which impact the particular case.[20]

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[19]Supra, note #4 at p. 914.
[20]See: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1471-84 (1981).

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Mechanics of The Hearing.

On many occasions the hearing on a motion to disqualify counsel may be had without the necessity of the production of evidence or with limited presentation of evidence. The use of affidavits, transcripts from depositions and/or other reported proceedings, and the statements of counsel may suffice. However, in the event that there is a dispute concerning an important material fact, an evidentiary hearing should be held. The moving party has the burden of proof. The better approach appears to be that the burden of proof should be by a preponderance of the evidence.[21]

Conclusion.

While it is not anticipated that you will be confronted with any of the situations alluded to in the subject matter that has been discussed, I hope that this brief review will be of some value to you and serve as a resource tool.

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[21] Modern Legal Ethics, supra at pgs. 335-36.

# ETHICAL CONCERNS REGARDING DISCOVERY AND TRIAL PRACTICE

JUDGE JAMES P. RIELLY

OSKALOOSA, IOWA

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## I. DISCOVERY

A. Evasive Responses to Requests for Admissions.

The problem of parties responding to requests for admissions under Rule 27 in an evasive manner is frequently encountered in our court system. This problem often impedes or inhibits settlement and often necessitates otherwise needless discovery. If this does occur during litigation and the case is tried to its conclusion, Rule 134(c) provides for a sanction which would order the guilty party to pay reasonable expenses, including the making of the proof during trial and including reasonable attorney's fees.

The Iowa Supreme Court Special Committee on Discovery recently considered recommending the imposition of sanctions in those cases where evasive responses occur in cases which settle and therefore are not reached by Rule 134(c). In its report to the Court, the Committee stated that:

> "The problem identified was that contrary to the purpose of admissions to eliminate unnecessary proofs it would require a trial in a case that had already been settled to determine if there was an unreasonable and therefore abusive failure to admit. There is, in consequence, no way to sanction evasive responses to requests for admissions for the cases settled prior to trial. The problem with attempting to apply sanctions to refusals to admit in the pretrial setting is that

> the cure may be as bad or worse than the illness. The cure may require a substantial amount of the Court's time, substantial presentation of evidence, along with briefing and argument--in short, a minitrial."

Accordingly, the committee concluded that rather than change the rule, more effective and well publicised use of the present rule, meaningful sanctions would give counsel pause before abusing requests for admission procedure.

Rule 121(b) of the Iowa Rules of Civil Procedure provides that:

> "The rules providing for discovery and inspection shall be liberally construed and shall be enforced to provide the parties with access to all relevant facts. Discovery shall be conducted in good faith, and responses to discovery requests, however made, shall fairly address and meet the substance of the request." (Emphasis added).

E.C.7-27 of the Iowa Code of Professional Responsibility for Lawyers provides that:

> "Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce. . ."

The Special Committee on Discovery concluded that the above-quoted provisions of Rule 121B(b) should serve as a mandate to the trial judges of this state to ensure that all discovery rules are enforced in a forceful and fair manner. The Court should uniformly apply appropriate sanctions to curb abuse of the

discovery rules.

II. TRIAL PRACTICE

C

A. Ex-parte Commuunications with Judge.

Judges frequently encounter the problem of attorneys making ex-parte comments to them about pending litigation. This is a bad habit which should be guarded against both by the trial lawyer and the trial judge. E.C.7-35 of the Iowa Code of Professional Responsibility provides that:

> "All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client."

B. Disrespectful or Abusive Conduct.

While Canon 7 of the Iowa Code of Professional Responsibility provides that "a lawyer should represent a client zealously within the bounds of the law," there are occasions when the trial courts encounter disrespectful or abusive conduct on

the part of lawyers.

In Sonksen v. Legal Services Corporation, 389 N.W.2d 386 (Iowa 1986), the Iowa Supreme Court censured plaintiff's attorney because it found that he had filed a brief which contained racial slurs, language calculated to demean poor persons and contained comments which personally demeaned opposing counsel and the trial tribunal. The Court stated that:

> "We must, of course, accord lawyers the widest possible freedom of expression. First Amendment rights are of crucial importance to everyone, but to no one are they more vital than a lawyer acting in a professional capacity. Although they tend to be ineffective for purposes of advocacy, comments which betray socially unacceptable views can and must be tolerated in the courts -- but only up to a point. That point was reached and greatly exceeded in this case. The comments plainly amounted to 'undignified (and) discourteous conduct. . . degrading to 'this' tribunal.' Iowa Code of Professional Responsibility for Iowa Lawyers, DR7-106(C)(6). It also violated EC1-5. The demeaning comment concerning the trial court ruling violated EC7-22. The derrogatory personal references to opposing counsel violated EC7-37."

In the case of In Re Glenn, 130 N.W.2d 672 (Iowa 1964), the Iowa Supreme Court suspended the license of an attorney who printed and circulated a leaflet stating that a municipal judge in Ottumwa, Iowa proved not only that justice in Ottumwa was blind but it was also deaf and dumb. The leaflet further stated that the judge wished to deny the litigants a fair trial on appeal and that he was subject to the control of city and county officials. The Court concluded that these comments went beyond

an attorney's right of free speech and that he was guilty of misconduct which justified the suspension from practice.

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In the case of Committee on Professional Ethics v. Horak, 292 N.W.2d 129 (Iowa 1980), the Iowa Supreme Court reprimanded an attorney who filed a counterclaim which stated, in part:

> "Further, plaintiffs acting in concert with Judge James C. Smith, entered hereinto a conspiracy by late amendment to petition herein and by knowingly violating the provisions of statute 648.19 (1977) Code of Iowa, wherein an action for damages cannot be combined with forcible entry and detainer action and further by attempting to seek double damages and damages in excess of the sums specified in the lease all constitutes violations of defendant's constitutional rights under 42 U.S.C. Section 1983 and 1985."

The Court stated that DR8-102B provides that 'a lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.' EC8-6 provides, in part, that:

> "Adjudicatory officials not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citzen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticism, for unrestrained and intemporate statementts tend to lessen public confidence in our legal system. Criticism motivated by reasons other than a desire to improve the legal system are not justified."

The Court further noted the provisions of EC7-36 and of Section 610.14 of the Code and then stated that:

> "The statements of this respondent run afoul of each of the statutory and disciplinary

> standards set out above. With specific reference to DR8-102B, we conclude that this statement was false and the respondent knew it was false at the time it was made. His contention that it was necessary to invoke federal jurisdiction or that it was not intended to be interpreted in the manner in which the complainant did are immaterial."

In the case of Committee on Professional Ethics v. Wilson, 290 N.W.2d 17 (Iowa 1980), the Iowa Supreme Court denied an application by the respondent for the reinstatement of his license to practice law. Among the grounds which served as the basis for the denial of the application was a finding that the attorney had forged a judge's signature on a decree and that he made an insulting telephone call to a judge and falsely denied doing so.

C. Failure to Communicate with Client.

An attorney has an obligation to communicate with his client, and a failure to discharge that duty is a proper ground for disciplinary action. Trial courts from time to time encounter situations where attorneys representing insurance carriers will make settlements on behalf of their insured and fail to communicate the fact that settlement has been made. Serious problems also result from a failure of the attorney to convey to his insured client offers of settlement within the insured policy limits.

D

# EFFECT OF COMPARATIVE FAULT ON CONSORTIUM CLAIMS

Prepared for the
Iowa Defense Counsel Association
1988 Annual Meeting

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I

INTRODUCTION

The Iowa Supreme Court has now addressed the question of whether a spouse's recovery for loss of consortium should be reduced by the proportion of fault attributable to the injured spouse under our comparative fault rules. Several other jurisdictions which had previously had the opportunity to review this issue had concluded that loss of consortium damages should be proportionally reduced by the percentage of fault attributable to the injured spouse. This had been recognized as the prevailing or majority rule. In **Schwennen v. Abell**, No. 86-1674, the Iowa Supreme Court elected to follow the minority rule.

II

MAJORITY RULE

In basic fairness to the defendant, a consortium award should be reduced by the fault of the injured person from whom the consortium claim was derived.

III

MINORITY RULE

A consortium award is not reduced by the fault of the injured person from whom the consortium claim arose.

IV

CONSORTIUM CLAIMS BEFORE GOETZMAN V. WICHERN

A. **Fuller v. Buhrow**, 292 N.W.2d 672 (Iowa 1980) The Iowa Supreme Court, under contributory negligence rules, held that contributory negligence of the injured spouse does not bar a claim by the other spouse for loss of consortium. **Fuller v. Buhrow** held that consortium claims were independent and not derivative. Such a holding alleviated the harshness of the injured spouse's slight negligence operating as a complete bar to the consortium spouse's cause of action.

B. **Handeland v. Brown**, 216 N.W.2d 574 (Iowa 1974) Providing the same protection for parents with Rule 8 claims, the court had earlier held that a child's contributory negligence, not the sole proximate cause of his injury, was not a defense to a parental claim for the expense and actual loss of services, companionship and society resulting from the injury and death of the child.

V

CONSORTIUM CLAIMS AFTER GOETZMAN V. WICHERN

A. Much of the concern about the harshness of the effect of contributory negligence on a consortium claim is "eliminated with the advent of comparative negligence in which slight contributory negligence does not act as a

complete bar to recovery, and a spouse's claim for loss of consortium is similarly not completely barred." **Runcorn v. Shearer Lumber Products, Inc.**, 690 P.2d 324, 329 (Idaho 1984) (noting issue had been considered by at least eight comparative negligence jurisdictions; majority ruling loss of consortium damages should be proportionally reduced.) See **Maidman v. Stagg**, 441 NYS 2d 711 (Sup. Ct. App. Div. 2d Dept. 1981); **Eggert v. Working**, 599 P.2d 1389 (Alaska 1979); **Mayo v. Tri-Bell Industries, Inc.**, 787 F.2d 1007 (5th Cir. 1986) (finding Texas' routine reduction of spouse's damages for loss of consortium by percentage of negligence attributed to negligent spouse to be in accord with "conclusion of the majority of the comparative negligence jurisdictions") Restatement (Second) of Torts Section 494 at 554 (1965); Comparative Negligence Law and Practice, Section 18.50 (5)

B. Justification for treating consortium claims as derivative of the injured spouse for comparative fault purposes:

1. The harsh effect of the contributory negligence of an injured spouse no longer bars recovery on either the personal injury or the

consortium claim (so long as the fault of the person against whom recovery is sought is equal to or greater than the injured party's).

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2. The derivative approach is the simplest and most efficient method to reach a just result. As the court said in **Lee v. Colorado Dept. of Health**, 718 P.2d 221 (Colo. 1986), "While it is true that 'each spouse is equal and independent and suffers a personal loss when the other is injured,'. . . the fact remains that the basis for recovery on a consortium claim is interference with the continuance of a healthy and happy marital relationship. The loss to that relationship resulting from an accident 'is best distributed among those whose negligence caused it in proportion to the fault of each of them.' **Eggert**, 599 P.2d at 1391."

3. If a claim for loss of consortium is viewed as totally independent of the other spouse's personal injury claim, there would be no reason to preclude one spouse from suing another for loss of consortium, but see **McIntosh v. Barr**, 397 N.W.2d 516 (Iowa 1986).

4. **CONSIDER:** If a claim for loss of consortium is viewed as a completely independent cause of action for purposes of comparative fault, could a spouse have the right to sue the injured spouse's employer for consortium damages arising out of a work-related injury, notwithstanding the fact that the claim of the injured spouse was subject to the workers' compensation legislation?

If the goal of the Workers' Compensation Law is to provide compensation for job-related injuries without regard to fault and to immunize the employer from common law tort claims arising out of such injuries, as is commonly understood to be the objective, then these objectives would be seriously undermined if consortium claims are viewed as totally independent of the claims of the injured plaintiff.

**Section 85.20** of the Code of Iowa provides: "The rights and remedies provided in this Chapter. . . shall be the exclusive and only rights and remedies of . . . the employee's personal or legal representatives, dependents, or next of kin, at common law or otherwise on account of <u>such injury</u>. . . (emphasis added)

**Schwennen v. Abell** says the consortium claim is an "independent injury" and not part of the injured spouse's injury.

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5. **CONSIDER:** If a loss of consortium claim is a totally independent claim, may this give rise to statute of limitation questions?

Certainly it is possible and even likely that a loss of consortium claim may not show up for some time after the event causing the personal injuries to the other spouse/parent, the resolution of the personal injury action would not necessarily preclude, under the independent approach, the filing by the spouse of a loss of consortium claim at some time later, but c.f. **Madison v. Colby**, 348 N.W.2d 202 (Iowa 1984) (holding that consortium claims must be joined with the injured person's or administrator's action whenever feasible. If brought separately, the burden will be on the consortium claimant to show joinder was not feasible.)

6. It makes sense.

**NOTE:** Even though Iowa does not reduce the consortium claimant's recovery in a consortium

action by the percentage of fault attributable to the injured spouse, the jury must be instructed that the consortium claimant's own fault must be considered in reaching its verdict.

C. The Iowa Supreme Court has not been willing to reconsider the contributory-negligence era cases as they impact on claims for contribution.

1. **McIntosh v. Barr**, 397 N.W.2d 516 (Iowa 1986) The Court held that a tortfeasor could not sue the injured, but negligent, plaintiff for contribution toward a judgment in favor of plaintiff's wife for loss of consortium. The Court reasoned that the right to contribution rests upon common liability, that is liability which is enforceable against each tortfeasor individually. The Court found that a suit for contribution in this context failed the common liability test as one spouse has no duty to provide marital services, society, companionship, affection, and other elements of consortium to the other. Thus, no independent claim for loss of consortium by one spouse against another can be made, because there is

no actionable duty breached. Since there is no actionable duty, no liability, and thus no common liability and no right to contribution.

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2. **Telegraph Herald, Inc. v. McDowell**, 397 N.W.2d 518 (Iowa 1986) In McDowell, minor son was operating his father's truck when an accident occurred. Father sued the Herald and County for damages to his vehicle. In the same action, son sued for his personal injures. Jury found son 75% negligent, Herald 15%, County 10%. (Pure comparative applied to the suit.) The Court entered judgment against the Herald and County for father's damages in full, and for son's damages, less the percentage attributed to his own negligence. Herald paid County's share and took assignment of its right to contribution from son. Suit for contribution followed. The Court held that there was a material fact question as to whether there was any common liability and whether father, as owner of the vehicle operated by his son, could sue son for damaging the vehicle. The Court held that the minor had asserted facts which, if true, would immunize him from suit by the parent.

**CONSIDER:** Do contribution claims against children have some validity? As the Iowa Defense Counsel Association Newsletter Vol. 1 No. 1 stated, the language in the **McIntosh** case was unequivocal, while McDowell said the minor "could conceivably bring the case under some remaining vestage of parent-child immunity."

**CONSIDER:** Is there a distinction to be drawn between a parent's claim for property damage and Rule 8 damages? **McIntosh** would lead one to believe that Rule 8 claims will be treated the same as spousal consortium claims.

D. Section 668.4 provides: "In actions brought under this chapter, the rule of joint and several liability shall not apply to defendants who are found to bear less than fifty percent of the total fault assigned to all parties." This section limits the plaintiff's recovery against a defendant less than fifty percent negligent to the percentage that the defendant is specifically found to bear. **Reese v. Werts Corp.**, 379 N.W.2d 1, 4 (Iowa 1985); **Baldwin v. City of Waterloo**, 372 N.W.2d 486, 493 (Iowa 1985); **Kopsas v. Iowa Great Lakes Sanitary District of Kick. Cty.**, 407 N.W.2d 339 (Iowa 1987).

Based on this provision of the code, it seems generally well accepted that the resulting inequity to defendants, "is limited to instances where the defendant is judged to be 50% or greater at fault. When the defendant is judged to be less than 50% at fault, the defendant is not jointly and severally liable to the spouse who sues for loss of consortium." Iowa Defense Counsel Ass. Newsletter supra.

**CONSIDER:** How does the court instruct when we have an injured spouse (driver/husband of vehicle) and injured spouse (passenger/wife), both of whom are suing for personal injuries and loss of consortium?

VI

OTHER CONSORTIUM CASES

1. **Audubon-Exira Ready Mix, Inc. v. Ill. Central Gulf Railroad Company**, 335 N.W.2d 148 (Iowa 1983). The Court held that : (1) the word "services" under the wrongful death statute providing for recovery of the value of services and support as spouse or parent of a person wrongfully or negligently injured or killed included both spousal and parental consortium damages, without regard to whether spouse or parent is killed or merely injured; (2) the period of damages with respect to

surviving child's claim for parental consortium is not limited to the period of the child's minority, overruling **Weitl v. Moes**, 311 N.W.2d 259; (3) the period of damages with respect to surviving spouse's claim for post-death spousal consortium is limited to the lesser of decedent's or surviving spouses normal life expectancy; (4) in the case of the parent's death, the administrator of the deceased parent is the person to bring child's claim for loss of parental consortium, and in the case of the parent's injury, the injured parent is the proper person to recover for the child; (5) the administrator of the deceased spouse's estate, rather than the surviving spouse, should bring the claim for the surviving spouse's loss of post-death consortium under Iowa Code Section 613.15.

2. **Dunn v. Rose Way, Inc.**, (Iowa 1983) The Court held: (1) an action for the wrongful death claim of an unborn child may not be maintained under Iowa's survival statute. The Court affirmed its interpretation that the word "person" in Iowa's survival statute excludes a viable unborn child as one for whom damages are allowable; (2) the term "minor child" as used in Rule 8 of the Rules of Civil Procedure providing that parents

may sue for the expense and actual loss of services, companionship and society resulting from the injury to or death of a minor child, means one who has not yet reached majority, a category which includes unborn persons. Thus, the father could maintain an action, under the rule, for damages arising from the deprivation of the unborn child's companionship, society, and services.

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3. **Madison v. Colby**, 348 N.W.2d 202 (Iowa 1984) The Court held: (1) Loss of consortium damages should be awarded to the person who suffered the loss; (2) the statutory bar against double recovery is not intended to preempt the common-law action of the spouse who suffers loss; therefore the deprived spouse, not the injured person, has the right to sue for and recover for predeath loss of consortium; (3) to assure against double recovery consortium claims must be joined whenever feasible with the injured person's or administrator's action; and (4) where the spouse of the injured person asserted his independent claim for loss of consortium with the injured person's negligence action, the court should include the tangible loss of services element in its instructions.

4. **Fraternal Order of Eagles v. Illinois Cas. Co.**, 364 N.W.2d 218 (Iowa 1985). The Court held: that the

language "injured in person" of Section 123.92 refers to bodily injury and did not include a parent's claim for loss of a child's consortium under Iowa Rule 8. The Court specifically left open the question whether the words "injured in property" encompass a Rule 8 claim. The Court determined the purpose of the dramshop policy was to provide insurance coextensive with Eagles' potential statutory liability, and it followed the phrase "injured in person" appearing in the policy should also be interpreted as referring to bodily injury. See **Gail v. Clark**, 410 N.W.2d 662 (Iowa 1987).

5. **Lepic v. Iowa Mutual Insurance Co. & Sullivan v. Cashner**, 402 N.W.2d 758 (Iowa 1987) The Court held: "Each person" liability limit of policies capped recovery for all claims arising from one bodily injury including recovery for parent's loss of consortium damages. (Parents' loss of consortium as a result of injuries to their children was not "bodily injury" within the meaning of the automobile policies provisions for underinsured motorist coverage and for bodily injury liability coverage, which limited liability to $100,000.00 for all damages for bodily injury sustained by any one person in any one automobile accident.)

6. **Craig v. IMT Ins. Co.**, 407 N.W.2d 584 (Iowa 1987) The Court held: that for purposes of loss of consortium claim, an unborn child was a "person" within the scope of the policy and parents could recover for the loss of consortium where the per person liability limit with respect to injury to the child had not been exhausted by any claim on behalf of the unborn child. (The Court determined that a loss of consortium claim was a distinct cause of action wholly separate from any cause of action otherwise available to persons suffering bodily injury, and thus parents could maintain loss of consortium claim arising from death of unborn child regardless of whether wrongful death claim was or could have been brought on behalf of the child. Iowa R. Civ. P. 8.

7. **Gail v. Clark**, 410 N.W.2d 662 (Iowa 1987) The Court held: Husband's and wife's right to spousal consortium, and child's right to parental consortium, are "property" within the meaning of the dramshop statute; overruling **Haafke v. Mitchell**, 347 N.W.2d 381 (Iowa 1984)

8. **Miller v. Wellman Dynamics Corp.**, 419 N.W.2d 380 (Iowa 1988) The Court held: There is no common-law

right of parents to sue for consortium damages resulting from the wrongful death of an adult child.

VII

CONSORTIUM CLAIMS AFTER SCHWENNEN V. ABELL

1. **Schwennen v. Abell**, No. 86-1674, Iowa 1988. In this case Mary E. Abell's consortium claim arose out of an automobile collision. Mary's husband, William Abell, was driving a car which collided with one driven by Schwennen. Mary's loss of consortium claim was brought against her husband, the other driver, and, because of the duty to maintain the intersection where the accident occurred, Floyd County. The jury determined that Mary was damaged in the amount of $85,000.00 and assessed the fault 63% to William Abell, 27% to the Schwennens, and 10% to Floyd County. The question posed in this case was whether Mary's consortium judgment against the other defendants should be reduced by the percentage of fault assigned to her husband. The majority opinion held that the consortium judgment should not be reduced by the percentage of fault assigned to her husband.

As the dissenting opinion points out in that case, in **McIntosh v. Barr**, 397 N.W.2d 516, 517 (Iowa 1986), the

Court had held that a husband was not liable to his wife for loss of consortium when his injuries resulted in part from his own negligence. If in fact that is solid law, how does it make sense to allow recovery against others for the husband's same fault? As Justice Harris pointed out, either husband should be made to pay for consortium loss arrived from his own fault, or others should not be required to pay for it. A consistent result with **McIntosh v. Barr** would require such determination.



The majority opinion held that **Iowa Code Section 668.4** does not permit apportionment of fault to the injured spouse so as to reduce liability of third party tortfeasors. So finding, the Supreme Court relied on **Reese** and **Baldwin v. City of Waterloo**, 372 N.W.2d 486 (Iowa 1985) and said:

> We established in Reese that in determining the apportionment of fault among parties and released parties pursuant to section 668.3(2)(b) only parties "whose fault toward the claimant is an issue" should be included in the total aggregate of causal fault. Reese, 379 N.W.2d at 6. The fault of parties toward the claimant which has not been placed in issue cannot be considered. Peterson v. Pittman, 391 N.W.2d 235, 238 (Iowa 1986). Similarly, fault of parties placed in issue in the pleadings which is ultimately determined to be legally insufficient to support the claim may not be considered in the aggregate fault apportionment. Payne Plumbing & Heating Co. v. Bob McKiness Excavating & Grading, 382 N.W.2d 156, 158-60 (Iowa 1986); Reese, 379 N.W.2d at 6.

The Court then concluded that since **McIntosh v. Barr** had held that a husband is not liable to his wife for loss of consortium when his injuries result in part from his own negligence, Mary did not have a legally sustainable claim against her husband. Further, the Court concluded the Schwennen defendants therefore did not have a claim for contribution against William for his fault toward Mary. The Court then said because no legally "sustainable theory of recovery may be predicated on William's fault towards Mary, his fault should not have a played a role in the apportionment of aggregate fault under Section 668.3(2)(b)."

On retrial, the Court instructed that the combined fault of the Schwennen defendants and Floyd County should total 100% of the causal fault involved in Mary's claims. Her damages already established in the first trial at $85,000.00 would not be redetermined.

**CONSIDER:** The majority holding in effect allows for joint and several liability in contravention of **Iowa Code Section 668.4**, as defendants less than 50% at fault by the jury's determination are held to answer for the entire amount of a consortium claimant's damages.

**CONSIDER:** As Justice Harris points out in his dissent, what the right hand took away in **McIntosh v.**

**Barr**, the left hand now is restoring with **Schwennen v. Abell**. Others are made to answer for the husband's fault.

D

**CONSIDER:** Consortium claims are unique. They do involve "close family relationships and compensate for voluntary services which 'cannot be legally exacted'". **McIntosh v. Barr**, 397 N.W.2d at 518.

**CONSIDER:** Does unjust enrichment of a single economic unit result?

**CONSIDER:** Is the Supreme Court establishing a new definition of consortium with its apparent adoption and approval of the **Christie v. Maxwell** language cited in the opinion as follows:

> (T)he injury incurred can neither be said to have been "parasitic" upon the (injured spouse's) cause of action nor can it be properly characterized as an injury to the marital unit as a whole. Rather, it is comprised of (the deprived spouse's) own **physical, psychological and emotional pain and anguish** which results when her (spouse) is negligently injured. . . From the vantage point of the negligent defendant, (the deprived spouse) is simply a foreseeable plaintiff to whom he owes a separate duty of care.

**Christie v. Maxwell**, 40 Wash. App. 40, 44, 696 P.2d 1256, 1258 (1985); See also **Fuller v. Buhrow**, 292 N.W.2d 672, 675 (Iowa 1980) (quoting California case defining consortium injury as including psychological and emotional pain and anguish).

**CONSIDER:** Did not the Supreme Court previously tell us: "Grief, mental anguish or suffering" was not within the definition of services or consortium? See **Iowa-Des Moines National Bank v. Schwerman**, 288 N.W.2d 198 at 205 (Iowa 1980); **Audubon-Exira v. Ill. Cent. Gulf R. Co.**, 355 N.W.2d 148 at 152; **Iowa Code Annotated Section 613.15; Uniform Jury Instruction 200.30, 200.31.**

**CONSIDER:** **Barnhill v. Davis**, 300 N.W.2d 104 (Iowa 1981); **Oberreuter v. Orion Industries, Inc.**, 342 N.W.2d 492 (Iowa 1984). In **Oberreuter v. Orion**, the Supreme Court refused to expand the **Barnhill v. Davis** decision and recognize Violet Oberreuter's claim for negligent infliction of emotional distress arising out of injuries to her husband and son, even though she was neither a witness nor a bystander to the injury-causing incident. The Court relied on the **Barnhill** decision and stated that the elements of geographic nearness and contemporaneous perception are required to insure that the plaintiff will have been subjected to the emotional trauma caused by the plaintiff's visceral participation in the event. The Court stated that in a situation where the tragedy was not actually witnessed, the problem of learning to live with the aftermath of a disaster is the substance of a claim for loss of consortium.

Now is the Supreme Court allowing the deprived spouse to recover under loss of consortium what the deprived spouse was barred from claiming previously absent the **Barnhill** elements?

**NOTE:** A proposed amendment to Chapter 668 has been submitted as follows:

> Chapter 668.3(1) is hereby amended by adding thereto the following sentence: "The claim of any person seeking damages for loss of consortium shall be reduced by the fault of the injured person whose injury gives rise to their claim for loss of consortium."

D

**200.30 Elements - Injured Parents' Claim For Deprived Child's Loss Of Parental Consortium.** "Parental consortium" is the relationship between parent and child and the right of the child to the benefits of companionship, comfort, guidance, affection, the aid of the parent in every parental relation, general usefulness, industry and attention within the family. It does not include the loss of financial support from the injured parent.

If you find, _____ as [parent and next friend] [guardian] of [minor] is entitled to recover damages on behalf of the child, it is your duty to determine the amount. In doing so you shall consider the following items:

1. The reasonable value of loss of parental consortium which [injured parent] would have performed for their [child] [children] from the date of injury until the present time.
2. The present value of loss of parental consortium which [injured parent] would have performed for their [child] [children] in the future.

A child is not entitled to damages for loss of parental consortium unless the injury to the parent has caused a significant disruption or diminution of the parent-child relationship. Damages for loss of parental consortium are limited in time to the shorter of the child's or parent's normal life expectancy.

In determining the value for loss of parental consortium, you may consider:

1. The circumstances of the injured parent's life.
2. Their age at the time of their injury.
3. The health, strength, character and life expectancy of the injured parent and child.
4. The injured parent's capabilities and efficiencies in performing the duties as a parent
5. The injured parent's skills and abilities in providing instruction, guidance, advice and assistance to the children.
6. The children's respective needs
7. All other facts and circumstances bearing on the issue.

12/86

The amount you assess for [loss of parental consortium past and future] cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by the defendant(s] as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. [Similarly, damages awarded to one party shall not be included in any amount awarded to another party.]

Add together the amounts, if any, you find for each of the above items and the total will be used to answer the special verdicts.

**Authority**

*Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Co., 335 N.W 2d 148 (Iowa 1983)*

*Weitl v. Moes, 311 N W.2d 259 (Iowa 1981)*

12/86

D

**200.31 Elements - Spousal Consortium - Spouse's Damage.** "Spousal consortium" is the fellowship of a husband and wife and the right of each other to the intangible benefits of company, cooperation, affection, and the aid of the other in every marital relationship, general usefulness, industry and attention within the home and family. It does not include loss of monetary support from the injured spouse.

If you find [spouse] is entitled to recover damages, it is your duty to determine the amount. In doing so you shall consider the following items:

1. The reasonable value of loss of spousal consortium which [injured party] would have performed for plaintiff from the date of injury until [the present time] [death].
2. The present value of loss of spousal consortium which [injured party] would have performed in the future.

Damages for loss of spousal consortium are limited in time to the shorter of the spouse's or [name of decendent] normal life expectancy.

In determining the value for loss of spousal consortium you may consider:

1. The circumstances of spouse's life.
2. Their age at the time of their injury.
3. Their health, strength, character and life expectancy and that of the spouse.
4. The spouse's capabilities and efficiencies in performing the duties as a spouse.
5. The spouse's skills and abilities in providing instructions, guidance, advice and assistance.
6. The spouse's respective needs.
7. All other facts and circumstances bearing on the issue.

The amount you assess for [loss of spousal consortium past and future] cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by the defendant(s) as proved by the evidence.

12/86

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. [Similarly, damages awarded to one party shall not be included in any amount awarded to another party.]

Add together the amounts, if any, you find for each of the above items and the total will be used to answer the special verdicts.

**Authority**

*Madison v. Colby, 348 N W 2d 202 (1984)*

*Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Co., 335 N W 2d 148 (Iowa 1983)*

*Fuller v. Buhrow, 292 N W 2d 672 (Iowa 1980)*

*Acuff v. Schmit, 248 Iowa 272, 78 N W 2d 480 (1956)*

# DEFENDING MUNICIPAL OR STATE HIGHWAY TORTS

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E

## I. Transfer of Jurisdiction Immunity

Chapter 232 72GA 1987 Sess. includes the following:

"Sec. 18. Section 306.42, Code 1987, is amended by adding the following new subsection:

NEW SUBSECTION. 6. Notwithstanding any other provision of the Code, for transfers of roads and streets made after May 1, 1987, neither the transferring jurisdiction or the receiving jurisdiction shall be held liable for any claim or damage for any act or omission relating to the design, construction, or maintenance of the road or street that occurred prior to the effective date of the transfer. This paragraph shall apply to all transfers pursuant to this chapter or section 313.2."

This should be a useful immunity since the type of roads involved in transfer are often old and may be relatively high volume. It is much stronger than the similar immunities in Chapters 25A and 613.A.

This statute was proposed after the state settled a case in which the plaintiff claimed a former state highway did not meet standards at the time of original construction. The road was transferred to Polk County after World War II. The county won the negligent signing and resurfacing issues at trial. An appeal involving another issue resulted in a 5-4 win for the county. Shawhan v. Polk County, 420 N.W.2d 808 (Iowa 1988).

## II. Actual Knowledge of Defect Defense

See, Iowa Code Section 613A.3 (alternate safe route etc. defense).

## III. Traffic Control Devices

A. Section 668.10 provides:

Governmental exemptions.

In any action brought pursuant to this chapter, the state or a municipality shall not be assigned a percentage of fault for any of the following:

1. The failure to place, erect, or install a stop sign, traffic control device, or other regulatory sign as defined in the uniform manual for traffic control devices adopted pursuant to section 321.252. However, once a regulatory device has been placed, created, or installed, the state or municipality may be assigned a percentage of fault for its failure to maintain the device.

* * *

B. Malloy v. Guthrie County, 368 N.W.2d 121 (Iowa 1985) (nice pre-668.10(1) win for county.)

C. Metier v. Cooper Transport Co., Inc., 378 N.W.2d 907 (Iowa 1985) (deer crossing sign case) (Seiber v. State, 211 N.W.2d 698 (Iowa 1973) revisited). In this first case under Sec. 668.10(1). The section proves its worth.

D. Prell v. Wood, 386 N.W.2d 89 (Iowa 1986) Rumble strips are traffic control devices under Sec. 688.10(1). A county can't be liable for failing to install them.

E. Hershberger v. Buena Vista County, 391 N.W.2d 217, 220 (Iowa 1986). A guardrail is a traffic control device and falls under Sec. 668.10(1).

F. Gipson v. State, 419 N.W.2d 369 (Iowa 1988). The signing issue involving the IDOT was pre-668.10(1). The case discusses the evidentiary impact of the Manual on Uniform Traffic Control Devices.

G. Saunders by Saunders v. Dallas County, 420 N.W.2d 468 (Iowa 1988) A "misplaced" traffic control device same as no device at all and thus county immune under Sec. 668.10(1).

## IV. Snow and Ice

A. Section 668.10(2) provides:

In any action brought pursuant to this chapter, the state or a municipality shall not be assigned a percentage of fault for any of the following:

* * *

2. The failure to remove natural or unnatural accumulations of snow or ice, or to place sand, salt, or other abrasive

material on a highway, road, or street if the state or municipality establishes that it has complied with its policy or level of service for snow and ice removal or placing sand, salt or other abrasive material on its highways, roads, or streets.

B. What does this "exemption" do for highway authorities? Get you an useful instruction? Help you in motion for summary judgment? Scare off timid plaintiff's attorneys? Put burden of proof on you?

C. Koehler v. State, 263 N.W.2d 760 (1978). Division II of that opinion appears to have continuing validity if you can't meet your standard because of unusual conditions. It's always nice to cite the public agency's duty--reasonable care--not insurer of the safety of travelers from every possible accident--in a case the public agency won. Koehler, 263 N.W.2d at 765.

D. Hunt v. State, 252 N.W.2d 715 (Iowa 1977). Iowa allows your internal policies to be used against you. Hunt, 252 N.W.2d at 718-720. In view of Sec. 668.10(2) and Hunt, agency should only adopt written standards they can meet and then train and manage to see that they are met.

## V. Contribution Against State or Municipality

A. Iowa Code Section 668.10 provides:

"Governmental exemptions.

In any action brought pursuant to this chapter, the state or a municipality shall not be assigned a percentage of fault for any of the following:

* * *

3. For contribution unless the party claiming contribution has given the state or municipality notice of the claim pursuant to sections 25A.13 and 613A.5.

Does the statute of limitations run from the date of accident or date the right of contribution accrues? Is it the one year statute under 668.6(3)(a) or the various times in the tort claim acts? Section 25A.13 says, "This section is the only statute of limitations applicable to claims as defined in this chapter."

B. Prospective contribution defendant must be specifically named as released to be subject to contribution suit. Aid Insurance Company vs. Davis County, Iowa, Sp. Ct. #87-937, July 20, 1988.

VI. Maintenance

A. Ehlinger v. State, 237 N.W.2d 784 (Iowa 1976) (negligently failing to repair frost heave--sign not sufficient--driver drunk--full damages collected from state). As with snow and ice, be careful with your procedures requiring too much.

B. A somewhat similar district court case prompted the highway authorities to successfully push for the limitation to joint and several liability. Iowa Code Section 668.4.

C. DeYarmen v. State, 226 N.W.2d 86 (Iowa 1975). Proximate cause successfully used as a line of defense.

D. Fritz v. Parkinson, 397 N.W.2d 714 (Iowa 1986) (trees obstructing view.) The county wasn't allowed to bring adjoining landowner who owned the trees in for contribution.

VII. Iowa Code Sections 613A.4(3) (7) (8)

A. Same statutes for state 25A.14 (1) (8) (9). These are the discretionary function, design, and upgrade immunities.

B. Butler v. State, 336 N.W.2d 416 (Iowa 1983). The unreported court of appeals in this case prompted the foregoing amendments to Chapters 613A and 25A.

VIII. City/State Liability on Primary Extensions

A. This common situation was subject of an unreported court of appeals' decision which overturned a city's summary judgment absolving it from liability (on contribution claim from state) for accidents on primary highways in cities. The following authorities apply to the situation:

B. Iowa Code Section 306.4(3) "Concurrent jurisdiction" over joint primary highways/city streets. There are also many other statutes on duties of city and state.

C. Smith v. City of Algona, 232 Iowa 362, 5 N.W.2d 625 (1942) and Drainage Dist. No. 119 vs. Inc. City of Spencer, 268 N.W.2d 493 (Iowa 1978)

IX. Highway-Railroad Grade Crossings

A. Symmonds v. Chicago M. St. P. and P.R. Co., 242 N.W.2d 262 (Iowa 1976). Scott County was held liable with the railroad for signing on grade crossing. Will 668.10(1) reduce highway authorities exposure in grade crossing accidents?

E

B. Highway authorities are sometimes confronted with a damaging DOT study that recommends some improvement to the crossing. A recent federal law could help the defense.

Section 132 of P.L. 100-17 amends 23 U.S.C. §409 and provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or identifying [,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, railway-highway crossings, pursuant to sections 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data.

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# INTENTIONAL INTERFERENCE CASES-- A DEFENSE PERSPECTIVE

## I

## THE HISTORY OF INTERFERENCE WITH EXISTING OR PROSPECTIVE CONTRACTUAL RELATIONS CASES.

The tort of interference with existing or prospective contractual relations is an intentional tort, in that the Defendant must either have a desire to bring about the harm to Plaintiff or have known that this result was substantially certain to be produced by his conduct. There are also defenses to this tort, which are commonly called justification.

The law in this area is still in the formative stage. The Restatement (Second) of Torts, and Section 766 to 766B describes in more detail the elements and factors necessary to determine liability.

The liability for tortious interferences with advantageous economic relations developed first in cases of intentional prevention of prospective dealings, by violence, fraud or defamation. These cases all exhibit conduct that was essentially tortious in nature, either to the third party or the injured party. Restatement (Second) of Torts, Section 766, comment c (1979). The ground breaking case in this area of tort law, was Lumley v. Gye, 2 El. and Bl. 216, 118 Eng. Rep. 749 (1853). It was in Lumley that the development of inducement of breach of contract evolved as a separate tort. There, a singer under contract to sing at Plaintiff's theatre was induced by the Defendant to break her contract with the Plaintiff in order to sing for the Defendant. The Defendant operated a competing

theatre. No allegations of violence, fraud or defamation were plead by Defendant. A decision in favor of Plaintiff rested largely on the analogy of the rules relating to the enticement of another's servants. This case differed from earlier cases in that the means of inducement utilized by Defendant were not tortious. The rule of Lumley v. Gye subsequently expanded to cases which included contracts other than contracts of service and to interference with advantageous business relations which were not cemented by a contract. Restatement (Second) of Torts, supra.

The interferences with contract torts, as stated in the Restatement (Second) of Torts are as follows:

> Section 766. INTENTIONAL INTERFERENCE WITH PERFORMANCE OF CONTRACT BY THIRD PERSON.
>
> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

> Section 766A. INTENTIONAL INTERFERENCE WITH ANOTHER'S PERFORMANCE OF HIS OWN CONTRACT.
>
> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

> Section 766B. INTENTIONAL INTERFERENCES WITH PROSPECTIVE CONTRACTUAL RELATION.

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from the loss of the benefits of the relation, whether the interferences consists of
>
> (a) Inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

F

II.

IOWA CASE LAW--INTENTIONAL INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATION

The foundation case recognizing that intentional interferences with prospective contractual relations is a valid tort is Clark v. Figge, 181 N.W.2d 211 (Iowa 1970). Prior decisions on this subject were rendered in Dunshee v. Standard Oil Company, 132 N.W. 371 (Iowa 1911, Second Appeal at 146 N.W. 830) and Boggs v. Duncan-Scheel Furniture Company, 143 N.W. 482 (Iowa 1913).

In Dunshee, Defendant installed a scheme of retail distribution of oil in the City of Des Moines, not for the purpose of establishing a retail trade, but a mere temporary expedient to drive out the Plaintiff company. After having accomplished this, and having the field to itself, Defendant than withdrew its wagons and drivers, and gave its whole attention to its wholesale business. At the Defendant's final meeting with its employees, the Defendant manager stated "the fight is over and we have bought them out," Dunshee at 373. The Court felt that the record as a whole was sufficient to justify the

inference that the real end sought to be accomplished was to bar or exclude from the retail trade one who would not give Defendant its exclusive patronage. Id.

The Defendants in the Dunshee case contended that if it was liable at all, it was only liable for inducing breach of existing contracts. To this the Court responded that they were not of the opinion that an actual contract must exist before wanton interference by a third party would amount to a legal wrong. 132 N.W. at 376. In its dicta, the Dunshee Court also indicated that while many authorities may be found holding without apparent qualification or exception, that the law takes no account whatever of motives as constituting an element of civil wrong, this Court did not. "The laws of competition in business are harsh enough at best; but if the rule here suggested were to be carried to its logical and seemingly unavoidable extreme, there is no practical limit to the wrongs which may be justified upon the theory that 'it is business.' Fortunately, we think, there has for many years been a distinct and growing tendency of the Court's to look beneath the letter of the law and give some effect to its beneficent spirit, thereby preventing the perversion of the rules intended for the protection of human rights into engines of oppressions and wrong." Dunshee at 373.

In 1975 the Iowa court again had the chance to deal with an interference with prospective business advantage case. Under the set of facts in Farmers Cooperative Elevator vs. State Bank, 236 N.W.2d 674, Elevator brought an action against the bank for wrongful dishonor of checks and tortious interference with

prospective business advantage. The Elevator did not assert interference with existing contracts, but rather with prospective business advantage by causing the Elevator to be closed, the loss of customer's good will, and the loss of profits it otherwise would have earned. Id. at 679. The acts usually relied on by Plaintiffs in tortious interference with prospective advantage cases are usually directed at third persons - causing them not to enter into transactions with the plaintiff. However, in Farmers Coop Elevator, the court saw no reason why the result should be different when the acts were directed at the plaintiff itself, provided, of course, the other elements of a cause of action are present. Id. The role of the actor's purpose, however, was stressed in cases involving loss of prospective advantage. A purpose to injure or destroy is essential. Farmers Coop at 479 citing Restatement, Tort Second, Section 766. The essential role of the actor's purpose to injure or destroy is also manifest in the foundation cases of Boggs vs. Duncan-Scheel Furniture, 143 N.W. 842 (Iowa 1913) and Dunshee v. Standard Oil Company, 132 N.W. 371 (Iowa 1911).

F

The theory behind this requirement is as follows:

> "Every man has the legal right to advance himself before his fellows, and to build up his own business enterprises, and to use all lawful means to that end, although, in the path of his impetuous movements he leaves strewn the victims of his greater industry, energy, skill, prowess, or foresight. But the law will not permit him to wear the garb of honor only to destroy." Farmers Coop at 681 citing Boggs v. Duncan-Scheel, 143 N.W. at 486.

The rule has arisen that to have a viable cause of action, the

actor must have as at least one of his objects the purpose to injure or destroy the plaintiff. Farmers Coop at 681.

The statutory period of limitations cannot run for purposes of action for intentional interference with prospective contractual relation until the events have developed to a point where the injured party is entitled to a legal remedy, not merely a symbolic judgment such as an award of nominal damages. Stoller Fisheries, Inc. v. American Title Insurance, 258 N.W. 336 (Iowa 1977). There, a judgment debtor brought an action against an assignee of a judgment for damages arising out of the assignee's alleged tortious interference which prevented the judgment debtor from deriving prospective economic advantage from negotiating a settlement with the judgment creditor. The judgment debtor, five years after the judgment was assigned to the assignee, finally paid his judgment, and on that day, filed his action for tortious interference. The assignee alleged the affirmative defense of the statute of limitations, Section 614.1(4). Evidently, the assignment of this judgment was executed at a time when the judgment debtor was considering the judgment creditor's offer to sell the judgment of $11,313.56 for $5,658.28. The judgment debtor contended that the assignee induced the judgment creditor to assign the judgment and therefore tortiously interfered with the debtor's prospective economic advantage. Stoller at 338.

The debtor contended its cause of action for tortious interference was not barred by the Code, Section 614.1(4), because the cause of action did not arise until April 25, 1975, the date it paid the affirmed judgment. It was argued that until

that point in time, the debtor had not suffered any damage and therefore, it had no cause of action. The debtor contended it was not seeking relief from the assignee's wrongful act of April 15, 1970, but rather from the consequences of that act which occurred on April 25, 1975, when the debtor paid the judgment.

The basic elements going into a prima facia establishment of this tort are as follows:

1. The existence of a valid contractual relationship or business expectancy.

2. Knowledge of the relationship or expectancy on the part of the interferer.

3. Intentional interference inducing or causing a breech or termination of the relationship or expectancy; and

4. Resulting damage to the party whose relationship or expectancy has been disrupted. Stoller at 340.

In light of these elements and the case law developments to date, the Stoller court concluded that actual loss or resultant damage to the party whose relationship or expectancy had been disrupted by defendant's intentional and wrongful interference is an essential element of a cause of action for this tort. Consequently, if the alleged intentional and wrongful interference does not cause damage, it generates no claim for relief predicated on this tort. Supra at 341. Thus, the statutory period of limitations cannot run until events had developed to a point where the injured party is entitled to a legal remedy, not merely a symbolic judgment such as an award of nominal damages. Id.

As stated earlier, the tort of intentional interference

with prospective business relations requires proof that the actor had a purpose to "injure or destroy the plaintiff's business." Harsha v. State Savings Bank, 346 N.W.2d 791 (Iowa 1984). If a defendant acts for two or more purposes, his improper purpose must predominate in order to create liability. Harsha at 799. Deliberate breaches of contract are generally not considered to be improper means, as the law provides a remedy for such breaches with damages calculated to give the injured party the benefit of the bargain and, therefore, there is no need for additional tort remedies. However, if a party breaches a contract with the immediate purpose of injuring or destroying prospective business relations, the means may be considered improper. Therefore, if a party acts with intent to inflict injury beyond that contemplated as a result of the mere breach of contract, the contract does not grant the defaulter immunity from tort liability. Harsha at 799 citing Leigh Furniture and Carpet v. Isom, 657 P.2d 293 (Utah 1982), Cherberg v. Peoples National Bank of Wash., 564 P.2d 1137 (Wash. 1977). W. Prosser, Handbook of the Law of Torts, Section 129 at 943 (4th Edition 1971) and R.E.T. Corporation v. Frank Paxton Company, 329 N.W.2d 416 (Iowa 1983).

For the plaintiff to succeed in Harsha v. State Savings Bank, on its claim for tortious interference with prospective business relations, the record must contain substantial evidence showing that defendant acted with a predominantly improper purpose or by improper means. To sustain this burden, Plaintiff relied on circumstantial evidence. While circumstantial and direct evidence are equally probative, the substantial evidence

rule requires that the circumstances have "sufficient probative force to constitute the basis for a legal inference, and not for mere speculation." Harsha at 800. The circumstances in this case were not sufficiently probative for Plaintiff and the court concluded that the tort basis of liability should not have been submitted to the jury for consideration. Id.

All of the decisions to this date have held that the purpose on defendant's part to financially injure or destroy the plaintiff is essential for intentional interference with prospective business advantage. Although the Restatement (Second of Torts) softens this requirement in this developing field of law, the Iowa Court has declined to depart from its long established rule. "That defendant act with the purpose to financially injure or destroy is still the prevailing requirement in this kind of case." Page County Appliance Center v. Honeywell, 347 N.W.2d 171, 177 (Iowa 1984). The purpose of this rule is to avoid opening the door to virtually limitless suits of a highly speculative and remote nature. Page County Appliance Center at 178, citing Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corporation, 345 N.W. 2d 124, 130 (Iowa 1984).

As the defendant's action or lack of action could only be interpreted as showing a total disregard for the success of the Appliance Center's enterprise, the court held against plaintiff in this case stating that substantial evidence was not introduced of a purpose on the part of either defendant to injure or destroy the Appliance Center's business. Id. at 178.

In Gordon v. Knoll, 356 N.W.2d 559 (Iowa 1984),

Plaintiff sought to show that his liquor license suspension was induced by false statements to the public bodies by police officers. If it were not for the decision to suspend his license, Plaintiff could not establish interference with his business expectancies. Thus, if the licensing decision could not be impeached, Plaintiff had no intentional interference claim. Gordon at 563.

The evidence showed that Plaintiff had a full and fair opportunity to be heard on the licensing issue before the public bodies charged with making the licensing decision. Full advisory proceedings were conducted. With all the evidence before them, the administrative body made the decision that Plaintiff's license should be suspended. This exercise of independent judgment by the licensing authorities broke the chain of causation between the officers allegedly false statement and Gordon's loss of expectancies. Therefore, this court ruled that the trial court erred in overruling Defendant's Motion for a Directed Verdict on the intentional interference claim. Gordon at 563.

III.

TORTIOUS INTERFERENCE WITH EXISTING CONTRACTS

This portion of the outline deals only with intentional interference with existing contracts. The rule stated for this tort does not apply to a mere refusal to deal. It is common knowledge that deliberately and at his pleasure, one may ordinarily refuse to deal with another, and this conduct is not regarded as improper, subjecting the actor to liability.

Restatement (Second) of Torts, Section 766, comment b (1979).

> "One may not, however, intentionally and improperly frustrate dealings that have been reduced to the form of a contract. There is no general duty to do business with all who offer their services, wares or patronage; but there is a general duty not to interfere intentionally with another's reasonable business expectancies of trade with third persons, whether or not they are secured by contract, unless the interference is not improper under the circumstances. When the interference is with a contract, the interference is more likely to be treated as improper than in the case of interference with prospective dealings, particularly in the case of competition."

F

It should be noted that the Restatement (Second) of Torts sets forth basically two substantially similar rules regarding interference with existing contracts. However, there is a difference. Section 766 states the rule for an actor's intentional interference with a third person's performance of his existing contract with the Plaintiff. Section 766A may be contrasted by stating that this section is concerned only with the actor's intentional interference with the Plaintiff's performance of his own contract by preventing that performance or making it more expensive or burdensome. Restatement Second of Torts, Section 766A, comment a (1979).

In Iowa, the tort of interference with an existing contract was ruled upon in Westway Trading Corporation v. River Terminal Corporation, 314 N.W.2d 398 (Iowa 1982). The controversy in that case arose from a dispute concerning Plaintiff's need for steam to facilitate the pumping of molasses from barges into its storage tanks in a Mississippi River barge terminal in Muscatine. The Plaintiffs had a lease right to use a

two inch steamline on Defendant's premises to bring steam to the dock. The court awarded Plaintiff actual and punitive damages from Defendants for denying Plaintiff the use of the steam line. The Court also ordered Defendants either to let Plaintiff to use the line or to grant Plaintiff an easement to construct its own steam line over Defendant's property at Defendant's expense. The Defendant's appealed and Plaintiff's cross-appealed. The Supreme Court reversed the award of actual damages, but otherwise affirmed the trial court in both appeals. Westway Trading Corporation at 400.

The trial court in this case found both Defendants liable on a theory of conspiring in the commission of the business tort of interference with contractual relations. The elements of this tort are as follows:

1. An existing valid contractual relationship or business expectancy
2. Knowledge of this by the interferer
3. Intentional interference inducing or causing a breach or termination of the relationship or expectancy; and
4. Resulting damage. Westway Trading Corporation at 402.

The statute of limitations was also an issue in this controversy. The statute of limitations for the tortious interference action is five (5) years. Westway Trading Corporation at 403, citing Iowa Code Section 614.1(4) and Clark v. Figge, 181 N.W.2d 211 (Iowa 1970). Defendants contended the present action was barred by this statute because the alleged tort occurred in 1966 and the action was not brought until 1974. However, the court

did not determine when the tort was complete because the Defendants did not plead the statute of limitations at the trial level. Another issue which was not raised, and which this court did not address, was whether a party in the position of Defendant may tortiously interfere with a contract to which it is a party.

Because the Supreme Court found substantial evidence to support the trial court's finding that Plaintiff suffered actual damages, but insufficient evidence to support determination of their amount, the award of compensatory damages was reversed. As to the issue of punitive damages, this court held that they may be awarded for the tort of intentional interference with a business relationship, if the tort is committed with legal malice. Westway Trading Corporation at 404.

Also cited as authority with regard to the tort of intentional interference with an existing contract is Reihman v. Foerstner, et al., 375 N.W. 2d 677 (Iowa 1985). While not significantly adding to the body of law in the area, the court did point out that it had recently recognized that this tort is available even where the contract is terminable at will. Id. at 683. The tort of intentional interference is not established when the alleged tortfeasor's conduct has not caused the contract between the other two parties to be breached. Id.

In Wolfe v. Grather, 389 N.W.2d 643 (Iowa 1986), the court recognized that the threat of economic reprisal is a valid basis for permitting recovery in tortious interference cases. Id. at 661. The Defendant in this case, a member of a professional organization, was also improperly denied a proposed jury

instruction on the privilege of officers and directors to act with respect to corporate matters. This instruction would have more accurately presented the legal effect of the special relationships of the parties in the case. Therefore, the case was reversed and remanded.

The most recent case to deal with the tort of intentional interference with an existing contract relation is Kendall/Hunt Publishing Company v. Rowe, 424 N.W.2d 325 (Iowa 1988). A publisher sued a former employee and competitor in academic publishing for wrongful disclosure and use of trade secrets, unfair competition and conspiracy to unfairly compete, interference with business contracts, conversion and breach of fiduciary duty and oral employment contract. Judgment was had for the Defendants. The issue of proximate cause became a relevant factor in this case. Before one can be liable for interference with a contract, the person must be shown to have caused the interference. Kendall/Hunt Publishing Company at 245, citing W. P. Keaton, D. B. Dobbs, R. E. Keaton, and D. G. Owen, Prosser and Keaton on Torts, Section 129 at 989 (5th Edition 1984); and the Restatement (Second) of Torts, Section 766, comment o. Thus, the rules of legal causation, that is proximate cause, apply.

"Proximate cause is a fact question and only in exceptional cases is it decided as a matter of law. Iowa Rule of Appellate Procedure 14(f)(10). Proximate cause may be decided as a matter of law only when the facts are clear and undisputed and relation to cause and effect so apparent to every candid mind that but one conclusion may be fairly drawn." Id. at 245. The two part

test employed for proximate cause is as follows:

> (1) But for Defendant's conduct, the Plaintiff's damages would not have occurred;
>
> (2) The Defendant's fault must be a substantial factor in bringing about the Plaintiff's harm. Substantial factor is defined as Defendant's conduct has such an effect in producing harm as to lead a reasonable person to regard it as a cause. Peterson v. Kuhr, 201 N.W.2d 711, 713 (Iowa 1972).

On the issue of causation, the District Court found and the Supreme Court agreed that Plaintiff failed to establish that Defendants had interfered with any contractual relationship.

IV

DEFENSE TO THE TORT OF INTENTIONAL INTERFERENCE WITH CONTRACT - JUSTIFICATION

A common defense to the torts of intentional interference with an existing contract or intentional interference with prospective business relations is justification. Locksley v. Anesthesiologists of Cedar Rapids, 333 N.W.2d 451 (Iowa 1983).

As stated in the Restatement Second of Torts, Section 767, comment b (1979):

> Unlike other intentional torts such as intentional injury to person or property, or defamation, this branch of tort law has not developed a crystallized set of definite rules as to the existence and nonexistence of a privilege to act in a manner stated in Sections 766, 766A, or 766B. Because of this fact,this Section is expressed in terms of whether the inference is improper or not, rather than in terms of whether there was a specific privilege to act in the manner specified. The issue in each case is whether the inference is improper or not under the circumstances; whether, upon a consideration

of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another. The decision therefore depends upon a judgment and choice of values in each situation. This Section states the important factors to be weighed against each other and balanced in arriving at a judgment; but it does not exhaust the list of possible factors.

SECTION 767

FACTORS IN DETERMINING WHETHER INTERFERENCE IS IMPROPER

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

(a) The nature of the actor's conduct

(b) The actor's motive

(c) The interests of the other with which actor's conduct interferes

(d) The interest sought to be advanced by the actor

(e) The social interest in protecting the freedom of action of the actor and the contractual interest of the other

(f) The proximity or remoteness of the actor's conduct to the interference, and

(g) The relations between the parties

Therefore, in determining whether the facts indicate if an interference is improper, one should look to the Restatement of Torts (Second), Section 767-774 (1979). Basically, this process involves a balancing of the particular facts involved in a case and the factors described in the Restatement Second of Torts, Section 767 (1979).

VI

OTHER CASES

Kunau vs. Pillers, Pillers, and Pillers, P.C., 404 N.W.2d 573 (Iowa App. 1987).

The torts of intentional interference with contract or interference with prospective economic advantage are not available in situations arising out of the marital relationship.

Klooster vs. North Iowa State Bank, 404 N.W.2d 564 (Iowa 1987).

F

Debtors failed to state a cause of action against the bank for tortious interference with existing business relationships where conduct giving rise to claim involved transactions between bank and debtors inter se.

Peterson vs. First National Bank of Iowa, 392 N.W.2d 158 (Iowa App. 1986).

Edward Bantine Studios vs. Fraternal Composite, 373 N.W.2d 512 (Iowa App. 1985).

A competitor's interference with existing contracts between another photographer and various fraternities and sororities was improper for purposes of tort of interference with contractual relations, where the competitor suggested or agreed that if fraternities and sororities would execute a new contract with the competitor, competitor would insert a clause agreeing to indemnify fraternities and sororities for any legal costs or fees incurred by their breach of existing contracts with photographers. Many of the fraternities would not have breached their agreements with the photographer and contracted with the competitor without this indemnity clause.

Legal malice, for the purpose of awarding punitive damages in intentional interference cases, may be shown by wrongful or illegal conduct committed or continued with a willful or reckless disregard of another's rights.

Bump vs. Stewart, Wimer and Bump, P.C., 336 N.W.2d 731 (Iowa 1983).

VII

DEFENSE PERSPECTIVE

INSTRUCTION NO. _____

You are instructed that a contract is an agreement between two or more persons to do or not to do a particular thing. In order to constitute a valid contract, there must be an offer and an acceptance of a proposition so that the minds of the two parties "meet" concerning the essential terms and conditions of the subject about which they are contracting, and they thereby agree or mutually assent to the same thing. Whether there has been a mutual assent to the essential terms of a contract depends upon the intention of the parties as determined objectively from their words and actions viewed within the context of the situation and surrounding circumstances.

In determining whether the words and conduct of the parties constitute offer and acceptance, or a manifestation of their understanding of and mutual assent to the essential terms and conditions of the alleged contract, you may consider words and conduct showing the parties' intention to be bound or acknowledgment of being bound, and the circumstances surrounding such words and conduct and the interferences ordinarily and reasonable to be drawn therefrom.

A valid contract also needs something called "consideration." Consideration is the promises or actions given in exchange between the parties of a contract.

A contract must be definite and certain in order to be recognized by the law. Contract terms are sufficiently definite if it can be determined with reasonable certainty the duty of each party and the conditions relative to performance. Again, in determining

whether there is a contract in this case, you must consider not only the language used by the parties, but also the surrounding circumstances and the conduct of the parties. A valid contract may be partially oral and partially written. It may also arise from a series of correspondence between the parties.

An "option" is merely a contract whereby the seller agrees to hold his offer to the buyer open for a period of time. The definition and elements of a contract, set forth earlier in this instruction, apply equally to option contracts.

F

INSTRUCTION NO. _____

The Plaintiff's second theory of recovery is based on a theory called tortious interference with contract. With respect to this claim, the law of Iowa provides that one who intentionally and improperly interferes with another's prospective contractual relation is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, where the interference consists of preventing the other from acquiring or continuing the prospective relation.

In determining whether the defendant's conduct was improper, consideration must be given to the following factors:

a) The nature of the Defendant's conduct;

b) The Defendant's motive;

c) The interest of the Plaintiff with which the Defendant's conduct interfered;

d) The interest sought to be advanced by the Defendant;

e) The social interest in protecting the freedom of action of the Defendant in the prospective business relationships of the Plaintiff;

f) The proximity or remoteness of the Defendant's conduct to the interference; and

g) The relations between the parties.

If you find the Defendant liable under this theory, the Plaintiff may recover for the loss of profits to be made out of the expected contracts that would have been entered into had there been no tortious interference with the contract. You may also award such other consequential damages suffered as a direct result of the Defendant's conduct. See also Instruction 13 on damages.

INSTRUCTION _____

Damages must be reasonable. If you should find that the Plaintiff is entitled to a verdict, you may award him only such damages as will reasonably compensate him for such injury and damage as you find, from a preponderance of the evidence in the case, that he has sustained as a proximate result of the Defendant's conduct.

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You are not permitted to award speculative damages. So, you are not to include in any verdict compensation for any prospective loss which, although possible, is not reasonably certain to occur in the future. The Court instructs you that the Plaintiff may recover lost profits under any of the theories explained heretofore. Profits are defined as the net pecuniary gain reduced by the cost of obtaining it.

In order to award lost profits on any of the Plaintiff's theories, you must find (1) that the injury was foreseeable as a probable result of the breach when the contract was made; (2) that the evidence affords a sufficient basis for estimating lost profits with reasonable certainty, although exact proof is not required; and (3) that they are not speculative or conjectural.

# CHAPTER 1200

## BUSINESS RELATIONS - INTERFERENCE

**1200.1 Intentional Interference With Contract - Essentials For Recovery.** Plaintiff must prove all of the following propositions:

1. The plaintiff had a contract with [name of third person.]

2. The defendant knew of the contract.

3. The defendant intentionally and improperly* interfered with the contract by [set out the particulars supported by the evidence.]

4. The interference caused [(name of third person) not to perform the contract] [plaintiff not to perform the contract] [or]

4a. The interference caused plaintiff's performance of the contract to be more burdensome or expensive.

5. The amount of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount. [If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, then you will consider the defense of _____ _____ as explained in Instruction No. _____.]



### Authority

*Wolfe v. Graether, 389 N.W.2d 643 (Iowa 1986)*

*Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398 (Iowa 1982)*

*Restatement of Torts (Second), Sections 766 and 766A.*

### Comment

**Note: Guidance relating to the question of improper interference is contained in Restatement of Torts (Second), Sections 767-774.*

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**1200.2 Intentional Interference With Prospective Business Advantage - Essentials For Recovery.** Plaintiff must prove all of the following propositions:

1. The plaintiff had a prospective [contractural relationship] [business relationship] with [name of third person.]
2. The defendant knew of the prospective relationship.
3. The defendant intentionally and improperly* interfered with the relationship by [set forth the particulars supported by the evidence].
4. The interference caused [name of third person] not [to enter] [to continue] the relationship [or]

4a. The interference prevented the plaintiff from [entering] [continuing] the relationship.

5. The amount of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount. [If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, then you will consider the defense _____ _____ as explained in Instruction No. _____.]

### Authority

*Gordon v. Noel, 356 N.W.2d 559 (Iowa 1984)*

*Harsha v. State Savings Bank, 346 N.W.2d 791 (Iowa 1984)*

*Restatement of Torts (Second), Section 766B*

### Comment

**Note. Guidance relating to the question of improper interference is contained in Restatement of Torts (Second), Sections 767-774.*

**1200.3 Interference With Contract - Definition Of Contract.** A contract is an agreement between two or more persons to do or not to do something.

### Authority

*Compiano v. Kunz, 226 N.W.2d 245 (Iowa 1975)*

*Restatement of Torts (Second), Section 766, comment f*

6/87

### Comment

*Caveat: If the existence of a contract is an issue, this definition should be tailored to the facts of the case.*

**1200.4 Interference With Contract - Knowledge.** A person knows a contract exists when the person either knows about the contract or the facts that make the contract. The person does not need to know the legal meaning of the facts.



### Authority

*Restatement of Torts (Second), Section 766, comment i*

**1200.5 Interference With Contract - Intentional Interference.** A defendant's interference with a contract is intentional if the defendant either interferes with the contract on purpose or knows the conduct is substantially certain to interfere with the contract.

### Authority

*Restatement of Torts (Second), Section 766, comment j*

**1200.6 Interference With Prospective Business Advantage - Definitions.** ["Prospective contractual relationship" means a reasonably likely contract of financial benefit to the plaintiff.] ["Prospective business relationship" means a reasonably likely business relationship of financial benefit to the plaintiff.]

### Authority

*Restatement of Torts (Second), Section 766B, comment c*

**1200.7 Interference With Prospective Business Advantage - Intentional Interference.** A defendant's interference with a [prospective contractual relationship] [prospective business relationship] is intentional if the defendant's interference is done with [the purpose] [the predominant purpose] of financially harming or destroying the plaintiff's business.

### Authority

*Page County Appliance Center v. Honeywell, 347 N.W.2d 171 (Iowa 1984)*

### Comment

✶ *Note: The Iowa standard on this element is stricter than the Restatement standard. Id at 177. Moreover, when a defendant acts with two or more purposes, the improper purpose must predominate in order to create liability. Harsha v. State Savings Bank, 346 N.W.2d 791, 799 (Iowa 1984)*

6/87

# DEFENDING CONSTRUCTION CASES

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A Federal District Court Judge was once inclined to comment, "A construction case is nothing more than a contract case with more zeros." Another District Judge said, "I don't like to have a case with so many documents in it. Let the witnesses appear and tell their stories." It would appear to me that neither judge had very much experience with construction cases nor did they comprehend that the records on a construction project form the base upon which a construction case is built. The likelihood of success in defending a construction claim is usually reduced without records. I would also note that records may provide the impetus for an early resolution of a case.

G

Effective representation in a construction dispute seems to most generally involve stages that all parties go through. Organizing and controlling those stages is a key factor in managing the dispute to your client's best interest.

Effective representation can be accomplished in many ways and in many different formats. There are seven phases of representation during a construction claim that, if followed, should result in complete and fair representation of your client.

Those phases can be defined as follows:

1. Develop the factual record;
2. Review the contractual clauses;
3. Consider theories apart from the contract;
4. Compute damages;

5. Determine the obligation of insurers;

6. Determine the rights and obligation of surities;

7. Develop a strategy for cost-effective resolution

Negotiation

Mediation

Arbitration

Litigation

G

## DEVELOPING THE FACTUAL RECORD

Public contracts are most generally subject to the requirements of public bidding. In those cases, the lowest responsible bidder must be awarded the contract and is bound by the contract document. Responsibility is intended to mean more than financial ability. Responsibility is to include judgment, skill, integrity, fitness and ability to successfully perform. (Comp. Gen., B99854).

The construction documents generally include:

1. Information for bidders
2. A proposal
3. Agreement
4. General conditions
5. Special conditions
6. Specifications
7. Plans
8. Bonds, if any
9. Addenda, if any

The proposal is usually simply an offer by the bidder to the owner based upon the contract documents which have been prepared by the owner or the owner's retained consultant. The award of the contract is then the acceptance by the owner by the bidder's proposal. Generally, work will not commence until a notice to proceed is issued. Both the award and the notice to proceed typically are on a standard form, but in essence, are simply letters setting forth dates that may be important and may provide formal recognition and information that the successful bidder has been awarded the contract and that he may proceed with the work.

G

The bidding process itself is usually a fertile ground for error that later becomes a construction dispute. Certain mistakes are generally considered to be such in nature to allow the contractor to withdraw his bid. These include:

1. Reversing intended bid entries for two different items
2. Omitting the cost of material, labor and computing the overall price
3. Incorrectly transcribing prices from a worksheet to a bid form
4. Incorrectly adding or extending prices, and
5. Using the wrong unit, such as feet instead yard to compute the bid price. (Burger, Mistakes in Bids, 2, Federal Publications, Inc., October 1976).

Development of the factual records can uncover these kinds of errors. It would be imparative in each of those kinds of situations that the bidder have available his original bid worksheets, including all calculations. Where the mistake is based upon an error in judgment or an erroneous belief or

assumption, it is possible that the Court would not provide relief and therefore, thorough document retention of the bid process is critical. Ihe information for bidders usually contains guidelines relating the bid itself. These guidelines will include the time and place of bid, the bid form, rights of withdrawal, qualifications, bond requirements, notices and direction regarding questions.

Usually the information to bidders requires a pre-bid investigation of the site. Generally, the Court will not interpret that to mean that the contractor is expected to do things to investigate the subsurface conditions nor does it mean that he need not rely upon the conditions indicated in the contract document. If the conditions represented by the owner are at variance with conditions actually encountered at the site, the contractor may be entitled to reimbursement for his extra expenses. However, a showing that any reasonable prudent examination would have clearly disclosed the "unanticipated condition" will generally defeat an effort by a contractor to obtain additional compensation for that condition. (Walsh Brothers v. United States, 107 CT.CL.627 (1947).

Other provisions often found in the information to bidders generally include time expectations, liquidated damages, clauses, applicablity of excise taxes and even disclaimers (especially regarding quality or quantity). Consequently, it is essential to be familiar with the information to bidders to know whether or not any of the provisions cover the matter in dispute.

The agreement, general and special conditions provide contractual language upon which to base or reject a claim. Construction cases are primarily contract cases. Claims of negligence and misrepresentation are often made in conjunction with a contract claim, but basically the obligations and duties of the various parties stem from their contractual relationship. Ihe architect or engineer generally contracts with the owner and the owner generally contracts with the contractor. Construction managers, subconsultants, subcontractors and suppliers have additional contractual relationships generally not directly with the owner. Tortious conduct, of course, would allow a party to seek consequential damages which may be prohibited under a contract, however, the first and most important step is to review the agreement in general and special conditions to understand the rights and obligations of the parties.

G

Construction litigation often revolves around some change on the site or an alleged defect in the plan. Development of the factual record should clearly identify those elements of the claim that relate to a particular issue. Developing the information for the factual record is done through witnesses and the contractual documents. Since the most prevelant construction claims, that concerning scope changes or extras, differing or changing site conditions and delays and disruptions, the written factual record is crucial. Changes in scope or extras in differing site conditions are most frequently interpreted as contract document problems, whereas delays and disruptions are generally more related to breaches of the contract itself.

The factual record generally includes daily worksheets and personnel records identifying those persons involved in performing the work. The use of initial daily cost sheets is practiced by many contractors. Where daily initial cost sheets are available, the attorney has an excellent record from which to prepare a claim for extra work.

There are cases that hold that unless the owner can establish that the contractor's costs are unreasonable, the contractor's actual costs are presumed to be the fair and reasonable value of performing the extra work. (Bruce Construction Corporation v. United States, 163 CT.CL.97 (1963).

Another source of factual information are the daily logs. The daily logs should show what the contractor is doing each day of the project. These records would include information on the equipment and labor that worked on the project each day and the personnel that were available. The type of equipment and manpower used to perform the work with that kind of equipment can be back calculated from these logs even if seperate cost records are not available. Inquiries should be made as to the availability of equipment logs, since oftentimes the hours that equipment worked are recorded in a seperate accounting policy. These logs are kept in the ordinary course of business and should be admissable as proof of costs in a courtroom setting.

The identification of equipment not only allows a basis to determine the actual costs incurred on a project, but can also develop a basis to determine the attendant personnel costs associated with operation and use of the equipment.

The value of the equipment is, of course, quite easy to determine if it has been rented. Rental invoices and contractual arrangements would be readily available. On the other hand, if the equipment is self-owned, there are formulas available and are accepted in the industry. The Associated General Contractors' Manual is not a rental schedule, but does contain a narrative guideline in the development of that cost.

> "Construction equipment such as cranes, dredge trucks, and other heavy equipment is expensive. The equipment also has a limited useful life, a limited period of time in which it can be used economically on commercial projects. When the useful life of a piece of equipment is at an end, the equipment may be replaced and it should have produced enough earnings to cover the cost of replacement. It is essential, therefore, that a contractor be able to estimate what it costs to own and maintain the equipment during its useful life. These aspects of the cost of equipment are identified as the cost of ownership and the cost of repair and maintenance in order to isolate them from costs such as operating labor, full lubrication and expendable equipment supplies."

G

Another source of factual information includes all labor costs. Every project has detailed labor cost information that is required for federal and state tax purposes. A competent forman is often aware that extra work is being performed and maintains a seperate record of the men performing that work.

Another step in the development of actual cost is the raw invoice file that is generally maintained by the contractor. Disputes over quantity and price are easily resolved if those records can be uncovered and deciphered.

These considerations all seem to center around actual documents, however, it is these contractual documents that can provide you with the basis for development of your factual record. These documents will contain the critical dates, times and cost accounting necessary to establish or defeat a claim.

Specifications generally speak for themselves, however, it has been my experience that specifications describe everything in precise detail except the item that is the subject of litigation. The garnering of the specifications is the crucial step in development of the factual record. It may seem unbelievable, but there are many claims out there where there will be some uncertainty to what specifications actually govern the project. Ihis situation can arise when a pre-bid set of specifications sent out to equipment suppliers well before contract is let for bids. Information can be different or simply omitted between the pre-bid specifications and the final specifications handed to the contractor.

Plans, bonds and addenda to the contract are also obviously critical information to the development of your factual record.

A thorough development of the record requires interviews and meetings with your own client in the dispute. Prudence would indicate that in developing the factual information you put your client to the test and make them prove their allegations to you. This kind of "doubting Thomas" factual gathering will often uncover the weaknesses of your case in an early stage where you are best able to deal with those weaknesses.

An obvious source for additional factual information also include the correspondence file, diaries and shop drawings. Painful as it may be, an attorney should review this material in his development of Stage 1, the factual record.

Other sources of information to develop the factual record include daily logs, since these often provide enough factual information to determine whether or not there were excusable delays, such as acts of God, fires, floods, labor disputes or strikes or unusually weather. In other instances, records such as local climatic data should be used to determine whether or not the weather condition which caused the delay was unusual for that area during the time period involved.

G

Most construction contracts require the contractor to submit a progress schedule in some form. There are cases where the owner provides one for the contractor. Ihe progress schedule is usually prepared and presented to the owner in the first meeting with the owner and the engineer after the award. Ihe information is generally provided in the form of a bar chart, sometimes referred to as a Gannt chart or a critical path method, often referred to as CPM.

A bar consists of a series of horizontal bars which show major work activities. To obtain maximum effectiveness, each bar should represent a pay item on the partial payment requisition. Coordination on the bar chart and the payment requisition eliminates the possibility of disputes relating to the information derived from the document if it is used and followed.

Generally, the bar chart will cover the entire construction period, starting on a particular date and finishing on the anticipated completion date.

It can be very helpful to superimpose upon a bar chart a curve representing the contractor's anticipated progress over the contract and a second curve representing the contractor's actually progress over the contract.

The CPM schedule is different in that the CPM is based upon time allocations to the work activities and the effect upon those activities. The bar chart is based primarily upon money earned.

A delay to a critical activity in a CPM, absent a change in the sequence of work, signifies a delay to the entire project. Some of the terms you might run into in using and understanding a CPM are:

| | |
|---|---|
| Critical Path | - The line of activity that will take the longest time to complete before the next line of activity commences. |
| Float | - The extra time allowed for th completion of the work and the difference between the latest finish time and the earliest finish tie, or between the latest start time and the earliest start time. |
| Negative Float | - Where a job is behind schedule. |
| Arrow Diagram | - The diagram showing the work activities, their durations, the restraints and the critical path. |
| Printout | - The computer data sheets showing, among other things, the early start, early finish, late finish dates and the amount of float time, if any. |
| Nodes | - The numbers circled in the arrow diagram used to cover specific work activities. |

Narratives - The monthly reports explaining what has occurred ont eh project and what work is being planned for the future.

Updates - The monthly changes in the CPM schedule reflecting the work that has been performed and changes, if any, in the time and/or sequence of the work still to be performed.

Important sources of delay information are often found in job minutes and monthly reports. The larger the job, the more care that is generally taken in job minutes and monthly report documentation. Job minutes are taken when the contractor and the owner's representative meet periodically to discuss the problems of the job and their resolution. Monthly reports are generally made by the owner's representative to describe the status of the project. Ihe engineer, on occasion, will also produce monthly reports, as will a construction manager. Ihese docuemnts will often provide information about problems that have caused delays or problems that have or have not been raised at these meetings.

Another area of factual gathering is not only the shop drawings themselves, but the shop drawing logs. Ihese shop drawings should be reviewed to determine whether or not there were delays in processing any of the shop drawing. Delays can signify staffing problems, quality of work, document interpretation problems and difficulty in reading the specifications. Delays in delivery and processing of shop drawings should be compared and checked to see whether this time affected the time of completion or the timing of actual construction of the item under dispute. The owner has an obligation through his representatives to process shop drawings

in a timely fashion and when that obligation is breached, the owner cannot be held responsible for delays caused by that deriliction. (Special Assembling and Packing Company v. United States, 355 Fed. 2nd 554 (1966).

Another clear area for development of the factual record is preliminary reports by subconsultants and testing reports. These reports often raise the expectations of the owner beyond the contractual documents by the very nature of the salesmanship that is often found in these reports. It is imperative that the attorney in preparing himself to develop the factual record thoroughly reads and studies any preliminary report from the owner's perspective.

## REVIEW OF CONTRACTUAL CLAUSES

A review of all documents on a construction case is tedious, but essential. Any one or all of them may contain data which prove critical elements for your case.

A contract document generally should advise you as to the rights, liabilities and defenses of the parties involved and will most likely give you the most solid basis for formulating an approach to resolution of the claim you are dealing with. Ihe most common reoccurring problems that come from contractual documents are those arising from unforeseen conditions, change orders and schedules.

Unforeseen Conditions Clauses: The most common problem that I see arise is the discovery by the contractor of an unforeseen site condition which allegedly affects the performance of the

work on the project. This discovery then provides the basis for a claim for a change order or delay. This type of claim most frequently occurs on projects involving excavation or subterranean work, however, similar claims are often made in the renovation of existing conditions or because of unexpected availability of materials.

Generally, to recover for such claim, the contractor must be prepared to prove four things: 1) the actual conditions, 2) the conditions indicated by plant specifications or other contract documents, 3) the variant, 4) that he gave proper notice of that variant.

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The second type of claim, and one which is generally more difficult to prove, is one that is not based upon indications from the contract documents, but upon the encountering of conditions that differ materially from those ordinarily encountered and generally recognized as inherring in the work of the character of the contract. This kind of claim does not involve a comparison between contract indications and actual conditions, but instead, compares actual conditions with what the contractor could have reasonably anticipated taking into account those factors which are reasonably prudent and experienced bitter customarily uses in making judgments about site conditions, quality, quantity and methods of performing particular work. The key to recovery into this type of theory lies in proving that a site investigation would not and did not disclose the condition that the contractor could not reasonably anticipate.

Specifications: In general, the specifications describe the work to be performed and the material to be used. Plans and drawings depict where and how the work shall be constructed. Most often, a dispute over extras is really a disagreement over what the specifications mean or what the drawings show. Most construction contracts contain a provision similar to the following:

> "Anything mentioned in the specifications and not shown in the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy either in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the [owner's representative], who shall promplty make a determination in writing. Any adjustment by the contractor without such a determination shall be at his own risk and expense."

Normally the contract provisions take precidence over specifications (66 ALR Building Contract, Alterations and Extras, 658, 659, Section 3d) and the specifications control the drawings. (Early v. O'Brien, 51 AD 569 64 NY Sup. 848, 1st Depart. 1900). Specific requirements generally govern against general requirements. (American Sign Company v. Rundback, 161 NY Sup. 228, 1st Depart. 1960). Ihese rules of presidence apply, however, where the work requirement is clearly defined someplace else in the contract document, however, most quarrels arise from an ambiguity in the work description itself.

Construction documents are generally filed with words of art that may seem clear on their face, however, experience in

judicial interpretation have convinced me otherwise. There are twelve basic rules of interpretation that I try to consideration in reviewing contractual relationships:

**RULE 1:** Reasonable, Logical Interpretation.

**RULE 2:** Manifest Intent of the Drafter.

One of the important interpretation "aids" to be considered is the intention of the drafter of the contract - as manifested by the words, phrases, symbols or legends he elects to use.

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**RULE 3:** Look to the Whole Agreement of the Contract.

Of all of the "aids" to a reasonable interpretation, none is used more frequently by courts and procuring agency Contract Appeal Boards than the "whole agreement" rule.

**RULE 4:** Normal Meaning of Words.

Words, symbols and marks will be given their common and normal meaning, unless it is clearly shown that such words, symbols or marks have (1) either a technical meaning and were used in the contract in their technical sense, or (2) some other special meaning accorded to them by the parties.

**RULE 5:** The Principal and Apparent Purpose of the Contract.

One of the maxims of interpretation to be "given great weight" in ascertaining a contract's reasonable meaning is the principal apparent purpose of the contract.

**RULE 6:** Custom and Usage.

Custom and usage of the trade is commonly used as an "aid" to interpretation in two situations: (1) Where it is necessary to add a term to the contract without which the obligations of one or both of the parties would be unclear; and (2) Where a custom

and usage is needed to clarify an otherwise ambiguous provision.

**RULE 7:** Knowledge of Other Party's Interpretation.

This rule, that a contracting party is bound by his knowledge of the other party's interpretation unless he indicates disagreement therewith, is steeped in ethics as well as law. It is based on the principle that an interpretation is unreasonable if it permits one contracting party to take advantage of another.

**RULE 8:** Concurrent Interpretation.

Where there is evidence of a concurrent interpretation by (1) other bidders prior to entering into the contract, or (2) the parties or their representatives during performance and before a controversy arises, or (3) the contractor's subcontractors before a controversy arises, such an interpretation (unless clearly erroneous) is to be given great, if not controlling weight.

**RULE 9:** Order of Precedence.

Contracts frequently set forth the precedence to be accorded to words, terms and drawings should it develop that conflicts exist between them.

**RULE 10:** Construction Against Drafter.

If the words are ambiguous, the provision will be construed against the party who drafted it. This rule is known as the doctrine of "contra proferentem." Ambiguities, which form the basis of many claims, are generally construed against the owner. The following language found in Peter Kiewit & Sons' Company, et al. v. United States, explains the law clearly.

> "When the government draws specifications which are fairly susceptible of a certain construction and the contractor actually and reasonably so construes them, justice and equity require that construction be adopted. Where one of the parties to a contract draws the document and uses therein language which is susceptible of more than one meaning, and the intention of the parties does not otherwise appear, that meaning will be given the document which is more favorable to the party who did not draw it. This rule is specifically applicable to Government contracts where the contractor has nothing to say as to its provisions."

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**RULE 11:** Parol Evidence.

The parol evidence rule provides that where two parties have reduced their agreement to a written contract all prior negotiations and understandings (whether written or oral) are merged into the contract and cannot be used to contradict the express terms of the contract.

**RULE 12:** Duty to Seek Clarification.

When an ambiguity is obvious or patent, a party has an obligaton to seek clarification.

## THEORIES APART FROM CONTRACT

Among the various theories of legal liability that may be interposed by the parties to a construction litigation are 1) negligence of the AE, 2) negligence of the contractor, 3) third-party beneficiary theories, 4) strict liability and tort, 5) warranties, expressed or implied, 6) implied duties, 7) contract breaches which involve a separate and independent tort, 8) misrepresentation of fraud; 9) active interference, 10) acceleration and constructive change. Ihis list, I'm sure, is

not an exhaustive litany, but is the most usual claims that I have encountered aside from the contract theory itself.

## NEGLIGENCE OF THE AE

Generally negligence theories of recovery can be imposed by the owner against the architect and contractor and by the contractor against the architect. Generally, AEs are under a duty to exercise such reasonable care, technical skill and ability and diligence as are ordinarily required of AEs in the course of their conduct and for the protection of any person who foreseeably and with reasonable certainty might be injured by their failure to do so. A contract claim against an AE is in essence a negligence claim because the contract will call for the AE to use his judgment and skill in the preparation of his work.

Generally, the architect implies by undertaking the work that he possesses the necessary competence and ability to enable him to furnish plans and specifications prepared with a reasonable degree of technical skill and such as would produce a followed and adhered to a building as a like and kind called for. Skill and ability which is bound to exercise are such as that ordinarily required of architects, which is a higher degree than that required of unskilled persons. The architect's competence, however, should be judged only to the knowledge that was available to his profession at the time he was employed. (This is the famous or infamous state of the art argument.) Ihe architect's undertaking in the absence of a special agreement does not imply or guarantee a perfect plan or satisfactory result.

It is not unusual to find that there exists other claims for relief based upon the same conduct or alleged deficiency. Consideration must be given to the measure of damages collectible under the various theories. It is the theories apart from contract that may provide a framework to increase the client's claim for damages.

## COMPUTING THE DAMAGE



Proper computation of damages depends upon the number of interrelated things. The contract, the applicable, the facts, including available records, the nature and type of wrong, the steps taken by your client in responding to the wrong and the certainty or to the degree to which the alleged damages can be calculated.

A good damage calculation strategy involves several steps:

1. Be reasonable, but ask for everything he could be entitled to receive. Overly inflated claims are foolish and can only embarrass you or threaten your credibility in the long term.

2. Evaluate the claim and the damages on their merits, not on what your client needs or wants. It is my experience that a contractor will often take a position that he needs to recover a certain amount. This type of approach leads to a false expectation and a forced calculation of damages rather than a well reasoned and rational calculation of damages. Claims are worth only what you can prove.

3. Always assume that the damage calculations you present to your client or to your opposition will someday be presented to a court. The damage claim should be presented clearly and make

reference to source materials used in calculating the damages. The damage calculation should be in sufficient detail to be understood and evaluated and be in a form that is consistent with the fact.

4. Whenever possible, structure your damage calculation to meet your opposition's needs. In the early stages of litigation, you should meet with the owner's representatives to discuss the format used and the principles used for establishing rate, cost and profit. When you are presenting your claim to the jury, you must avoid the assumptions of technical accepted practice in an industry and provide clear and easy to follow documentation of your alleged claim.

Your damage calculation should be framed in a manner which shows that the claim is for compensation for actual damage suffered. Remember, in Iowa, the measure of damages for tort and breach of contract is not the same. Consequential damages for breach of contract are limited to those that were within the reasonable contemplation of the parties at the time the contract was signed. Damages for tort are those that proximately result from the wrongful conduct, whether contemplated or not. REI Corp. v. Frank Pax & Co., Inc., 329 N.W.2d 416 (Iowa 1983).

Remember that the claiming party's actual costs are generally viewed by jurors as a prima facie case for reasonableness.

Damage calculations are most difficult to discredit when they are established on a cause and effect basis. In other words, when an event occurs, if the contractor can establish a

separate cost category for that extra work and records the added cost in accordance with the normal practice, the fact finder is most likely to accept that actual cost as a reasonable cost.

The owners generally insert a liquidated damage provision in their contracts. In the absence of proof by the contract that he is entitled to time extensions, the owner will usually be entitled under this clause to receive a sum equal to the daily amount specified in the contract multiplied by the number of days of delay. The only real variable in that formula is the number of days of delay. The liquidated damages are not to be so large as to constitute a penalty. Prieb & Son v. United States, 332 U.S. 407 (1947).

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If the contract does not contain the liquidated damage provision, the owner would be entitled to recover whatever sum he can establish as being the direct and consequential damages suffered due to delay. These damages generally include rental value of the completed structure, a reasonable return on investments or any other damage which the owner can dream up that is not "speculative". Generally, the owner may not recover both liquidated and actual damages. Rex Trailer Co. v. United States, 350 U.S. 148 (1956).

Damages to a contractor arising from delay or construction issues are generally more complicated than those to the owner. They can include: 1) field office expense, 2) central or home office expense, 3) extended insurance costs, 4) extended equipment costs, 5) increased wages, 6) increased material costs, 7) loss of labor efficiency. These costs are generally

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reflected in the books and records of the contractor and may be extraculated from those records to be applied directly to the extent of the delay.

Field office expenses are those costs incurred by the contractor in the field during the delay period. Ihey should not include direct labor costs, but do include such costs as the salaries of superintendent's office rental, providing telephones, stationery, secretarial service and other support item costs. Ihese field costs are incurred regardless of whether or not the work force is performing at the time.

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Home office expenses are generally taken right from the accounting records of the contract. These costs generally include items such as salaries of officers, estimators, secretaries, rent telephone, electricity, stationery and office expenditures of the central office not directly related to a project. Ihe Eichleay formula has been adopted by a number of courts as a means of determining home office costs. The formula is: billings for this contract over total billings for the same period times contractor's total overhead for the same period equals total allocable overhead. Ihe total allocable overhead provided by days of performance equals daily contract overhead times the number of days of delay equals the home office delay expense. Ihe Eichleay formula is accepted by most jurisdictions as the better rule because it calculates a daily home office cost and then multiplies that daily cost by the number of days of delay.

Another means for calculating the damages has been set up for the New York court based upon the amount of work left to be done. The formula could be summarized as follows:

1. Estimate the actual cost of the work done after the scheduled completion date by deducting from the contract price the portion allocable to overhead and profit.

2. Allocate a percentage of this cost after the scheduled completion date for overhead and allow this as excess overhead due to delay.

3. Add this to a project percentage based on this excess overhead.

4. Award the sum of two and three as delay damages less any apportionment of fault should that be applicable.

The New York formula is based upon the cost of work to be performed during the delay period under the contract price rather than the daily cost over the delay period.

Other considerations include:

- Extended insurance costs of the additional insurance premiums which a contractor must pay because he is on the job longer than the contract period.

- Extended equipment costs are the additional costs of using or having to retain equipment on the site during the delay period.

- Increased wages are obviously the escalated wages paid during any delay period.

Increased material cost is payment by a contractor for materials above and beyond the original base price when the increase is because of the delay. Occasionally, a contractor is unable to install purchased materials as anticipated because of a delay and, therefore, is required to store material in a

professional should not involve himself in the interpretation of policy language. It is, however, critical to know that in the first instance there is coverage and, secondarily, the limits of that coverage.

The information must be realized and understood by the attorney defending a claim to know the potential limitations he may have in representing his client's best interests.

Liability insurance policies generally involve two distinct obligations on the part of the insured: First, the duty to pay a judgment against the insured or to indemnify him and, second, the duty to defend the insured. Generally, the duty to defend exists even if the accusations are groundless, false or even fraudulent.

Generally, an insurer may not avoid its burden to pay claim and to incur the cost of investigation, settlement and litigation of the claim simply by electing to pay the policy amount to the insured.

Generally, the obligation to defend arises when the insurer knows, or should know, through a reasonable investigation that there are facts which may bring the suit within the policy's coverage. Aetna Insurance Co. v. Lythgae, 618 P.2d 1057 (Wyoming 1980). If the complaint alleges facts partly within and partly outside of the coverage, the insured's duty to defend runs to the whole case. Bituminous Ins. Co. v. Pennsylvania Assoc. of Ins. Co., 427 F. Supp. 539 (Penn. 1976).

The insured's duty to defend is broader than the duty to indemnify. There may even be a duty to defend although there exists no duty to indemnify. Ihe attorney handling the

construction claim must remember that insurers are generally held to a high duty of good faith and fair dealing when adjusting the claims of their insureds. Ihis means that the insureds are always looking to posture themselves in those excess cases to make a bad faith claim. Ihe attorney's duty is for full and fair disclosure of every salient fact to the insured. Settlement negotiations must be open and fully involve the insured at all steps.

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DEIERMINING THE RIGHTS AND OBLIGATIONS OF SURETIES

A surety is one who engages to answer for the debtor default of another. The surety becomes bound by the execution of a bond. A bond is three-party contract between a surety, principal and obligee. A bond obligation is supplemental to an underlying and existing contract between the principal of the bond and the obligee. Generally, the agreement of the surety under the terms of the bond is to secure the obligee from default of the principal in the performance of the principal's contract obligation. The obligations of the surety end of the bond are limited by 1) the scope of the principal's obligations under the contract, 2) the expressed provisions of the bond and, 3) the penal sum of the bond. Essentially then, this surety incurs two obligations upon execution of the contractor's bond. These obligations are performance and payment. Ihese two obligations may be contained in separate instruments or may be contained in one instrument with one penal sum to meet both obligations. It is possible that the surety can incur a payment obligation even

though only a performance bond was executed. This is particularly true in jurisdictions that liberally apply a third-party beneficiary theory so that the contract between the obligee and the principal will require the principal to pay all labor and material furnished in the performance of work. Restatement Security, Section 165. Dealer's Electric Supply v. U. S. F. & G., 258 N.W.2d 131 (Nebraska 1977).

The performance obligation defined as the duty of the surety to the obligee to the extent of the penal sum of the bond to assure performance of the contract between the principal and the obligee.

The payment obligation is defined as the duty of the surety to the extent of the penal sum of the bond and in accordance with the conditions precedent of the bond to pay those who furnish labor and material to the principal in the performance of the contract between the principal and the obligee. Io determine the rights and obligations of the surety, one must understand who may make the claim, what may be the subject of a claim, when and to whom notice of a claim must be given, when must suit be instituted and where must the suit be brought.

## DEVELOPING A SIRATEGY FOR COSI EFFECIIVE RESOLUTION

Following the first six steps most assuredly will assist you in preserving the evidence to avoid the dispute or analyze it for ultimate resolution. It is almost always advisible for any party in construction disputes to try to settle the dispute before resorting to either litigation or arbitration. Parties involved

though only a performance bond was executed. This is particularly true in jurisdictions that liberally apply a third-party beneficiary theory so that the contract between the obligee and the principal will require the principal to pay all labor and material furnished in the performance of work. Restatement Security, Section 165. Dealer's Electric Supply v. U. S. F. & G., 258 N.W.2d 131 (Nebraska 1977).

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## DEVELOPING A STRATEGY FOR COSI EFFECTIVE RESOLUTION

Following the first six steps most assuredly will assist you in preserving the evidence to avoid the dispute or analyze it for ultimate resolution. It is almost always advisible for any party in construction disputes to try to settle the dispute before resorting to either litigation or arbitration. Parties involved

in litigation or arbitration incur legal fees, expert witness fees and down time of their own personnel.

Ihere are really four methods to conclude the construction dispute: negotiation, mediation, arbitration or litigation.

NEGOTIAIION: The art of negotiation is obviously subject to the personal style and experience of participants. The key to successful negotiation is preparation. Recognition of your strong points and your weak points is imperative and anticipation of your opposing parties strong points and weak points is essential.

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It is my personal belief that negotiation should include the parties and their insurers. Reaction, expression and interpretation are often lost in relaying negotiating sessions to your client. It is important to know that you extent of your authority and to have a fixed goal that you hope to achieve through negotiation.

MEDIATION: Mediation is a process whereby the services of a third-party are used to promote a negotiated settlement. Ihe success or failure of the mediation will depend in large part on the skills of the mediator and the willingness of the parties to communicate. Mediation is often a successful tool in muti-party litigation where each party is afraid to make the first move or contribute more than their fair share.

Participation in the mediation process requires the same thorough preparation required by any other effective means to resolve a dispute.

ARBIIRAIION: Arbitration comes in many forms and under many different agreements. Most construction contracts delineate that all disputes shall be arbitrable. Often, these contracts will incorporate language referring to the tools of the American Arbitration Association.

Arbitration is a relatively modern development. Historically, Courts were jealous of their jurisdiction and so protected the person's rights to have access to the Courts that they would not enforce agreements to arbitrate dispute unless the arbitration process had already been completed and had resulted in a timely award. The practical effect of this is that either party could nullify the arbitration agreements simply by withdrawing his consent at any time before the arbitrator issued his award. (C. F. Blanchard Company v. Beach Concrete Company, 297 Atlantic 2nd 587 (New Jersey 1972). Today, however, most jurisdictions and Iowa in particular, have accepted alternate methods of dispute resolution as a necessity. Iowa has specifically adopted arbitration by statute.

Arbitration is quite frequently viewed as a much cheaper and quicker means to conclude a lawsuit. It is my own personal opinion that oftentimes arbitration is quicker, but in many cases is no less expensive. An arbitration case must be prepared as thoroughly and as completely as one would prepare for a jury trial.

LIIIGATION: Ihe fourth avenue for obtaining relief leads to the Court. Ihe Court leads us to the Rules of Civil Procedure that result in formal discovery proceedings that should be utilized to nail down what you believe your factual record has developed into. Probably the most significant task of the advocate involved in construction litigation is the collection, organization and analysis of the project documentation in a manner that will allow adequate proof on both liability and damages. The organization of this material is crucial not only to understanding the material, but presenting it to a lay jury who will ultimately render a decision. A large cast of characters that usually surfaces in construction litigation include the contractors, subcontractors, suppliers, owner, sureties, design professionals, construction managers, lenders and subconsultants. Ihe organization of the case to stress simplicity is crucial to satisfactory outcome. Simplicity is accomplished if we have carefully documented the steps that proceeded this discussion and have linked all the information available under those steps.

Having achieved this garnering of the facts and simplicity, remember the contractor who was overheard remarking to his lawyer as they left the Courtroom, "Beaten sir, beaten on all counts. Yet, this morning you told me I had an excellent case.

Ihe lawyer replied, "Yes, damn it, and I'm ready to handle your appeal but I must warn you, I never take a case to the Appellate Courts for less than $10,000.00."

# EVALUATION AND DEFENSE OF CLOSED HEAD INJURY CASES

I. ANATOMY AND PATHOPHYSIOLOGY (Dr. Boarini)

A. Anatomy of the skull and brain.

B. Spectrum of head injuries in neurosurgical practice.

C. Neurosurgical treatment of head injuries.

1. Emergency room evaluation and diagnosis.

2. Surgical and nonsurgical treatment of head injury.

II. THE NEUROLOGIST AND EVALUATION OF HEAD INJURY (Dr. Doro)

A. The role of the neurologist in the treatment evaluation of head injury.

B. The value of the EEG in the treatment of head injury.

C. Post traumatic seizures.

D. Post traumatic headache.

III. THE NEUROPSYCHOLOGIST AND EVALUATION OF HEAD INJURY

A. Summary of a neuropsychological evaluation.

B. Estimating premorbid performance.

C. Difficulties with evaluation and clinical impressions in the neuropsychological diagnosis of the sequelae to minor head trauma.

IV. THE NEUROSURGICAL EVALUATION OF HEAD INJURY AND IT'S SEQUELAE (Dr. Carlstrom)

A. The neurosurgeon and treatment of head injury.

1. History and exam.

2. Past medical history.

3. X-rays

B. Follow-up evaluation and testimony in head injury cases.

1. Jury selection.

2. Testifying.

3. Clinical recovery and life style following head injury.

C. Tort Reform

# DANIEL SMITH v. LIGHT AND POWER COMPANY

Electrical Burn Negligence Case

Prepared by

Ralph W. Gearhart and Robert D. Houghton
Shuttleworth & Ingersoll, P.C.
500 MNB Building
Cedar Rapids, Iowa 52406

For
The Iowa Defense Counsel Association

1988 Annual Meeting

## DANIEL SMITH v. LIGHT AND POWER COMPANY

## TABLE OF CONTENTS

## INTRODUCTION

Plaintiff Daniel Smith brought this action against Defendant Light and Power Company seeking damages as a result of an electrical burn injury which occurred on July 2, 1981.

Smith alleges that on that date he was an employee at Coe College. At eight o'clock in the morning, he had been directed by his supervisor, Dave Williams, to go to the roof on Eby Annex to oil some bearings on a cooling tower. After Smith had completed oiling the bearings, he saw a bird's nest in a fan on a transformer near the cooling tower. He proceeded to climb on top of the transformer and attempted to remove the bird nest from the fan. While he was on top of the transformer, he noticed another bird's nest and attempted to remove that as well. He alleges that he had been instructed to remove bird nests from fans and other related equipment by Dave Williams and he further alleges that he did not know that he was working on a transformer. While he was attempting to remove the second bird's nest, he was electrocuted by the 34,500 volt transformer.

Daniel Smith claims that the Light and Power Company was negligent in failing to enclose the transformer with a brick wall or a chain link fence and power warning signs. Light and Power claims that the transformer was properly enclosed and protected from public access. The Light and Power Company further denies that it was negligent and claims that Plaintiff was negligent in climbing on the transformer to remove the bird's nest.

Pre-trial discovery has been completed. The applicable law set forth is contained in the proposed jury instructions which are set forth at the end of the case file.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

| | | |
|---|---|---|
| DANIEL SMITH,<br><br>Plaintiff,<br><br>vs.<br><br>LIGHT AND POWER COMPANY,<br><br>Defendant. | ) | COMPLAINT AND JURY DEMAND |

1. Daniel Smith is a resident of a state other than Iowa or New York.

2. Light and Power Company is an Iowa corporation engaged in the generation and distribution of electrical power in Iowa and elsewhere with its principal place of business in Cedar Rapids, Iowa. It is and was at all material times herein, the holder of an exclusive franchise with the City of Cedar Rapids, Iowa for the furnishing of electrical power to the City's inhabitants.

3. The amount in controversy exceeds Ten Thousand Dollars ($10,000.00), exclusive of interest and costs. This Court has jurisdiction pursuant to 28 USC 1332.

4. On July 2, 1981, Daniel Smith, who was then 19 years of age, was a student at Coe College in Cedar Rapids, Iowa. On that date, he was employed by Coe College in the maintenance department. In connection with his employment, he went to the roof of a building on the Coe campus known as the Eby Annex to perform certain work. While on the roof performing his work, he came into contact with portions of a 34,500 volt electric transformer.

5. As a result of that contact, Daniel Smith was severely burned over 57% of his body. Bodily organs, or parts of them, were burned from his body.

6. Light and Power Company owned, operated and maintained the electric transformer which caused injury to Daniel Smith. It was negligent in one or more of the following particulars, which negligence was a proximate cause of the injury to Daniel Smith and the resulting damages to him:

(a) In failing to arrange the space in which the transformer was located with fences, screens, partitions or walls and in failing to display warning signs at or near the transformer.

7. As a result of the negligence of Light and Power Company, Daniel Smith has been damages as follows:

(a) He has been permanently disfigured.

(b) He has lost organs of his body.

(c) He has incurred medical and hospital bills.

(d) He will incur medical and hospital bills in the future.

(e) He will incur expenses for prosthetic devices throughout his life.

(f) He has incurred, and will continue to incur throughout his life, great pain, suffering, embarrassment and humiliation.

(g) His ability to earn a living has been impaired.

(h) He will be unable to enjoy a normal life and will be unable to pursue the activities of a normal man.

8. As a result of the foregoing, Daniel Smith has sustained damages in the amount of Three Million Dollars ($3,000,000.00).

WHEREFORE, Daniel Smith prays for judgment against Light and Power Company in the amount of Three Million Dollars ($3,000,000.00), plus interest, as provided by law, and for his costs.

RICHARD SANTI

THOMAS SHIELDS

ATTORNEYS FOR PLAINTIFF

Plaintiff, Daniel Smith, demands trial by jury of all issues in this action.

RICHARD SANTI

ATTORNEY FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

| | | |
|---|---|---|
| DANIEL SMITH,<br><br>Plaintiff,<br><br>vs.<br><br>LIGHT AND POWER COMPANY,<br><br>Defendant. | ) | ANSWER BY LIGHT AND POWER COMPANY |

Defendant Light and Power Company for answer to the Complaint, states:

**FIRST DEFENSE**

1. For lack of information upon which to form a belief, denies the allegations of paragraph 1.

2. Admits paragraph 2.

3. Admits paragraph 3.

4. For lack of information upon which to form a belief, denies the allegations of paragraph 4.

5. Specifically denies each allegation of paragraph 5.

6. Specifically denies of paragraph 6.

7. Specifically denies each allegation of paragraph 7, including subparagraphs a through h, inclusive.

8. Specifically denies each allegation of paragraph 8.

**SECOND DEFENSE**

For further answer and affirmative defense, Light and Power Company states:

That during all of the times and at all of the places mentioned and material to plaintiff's Complaint, the plaintiff in his conduct, both of act and omission, was negligent and his negligence was a proximate cause of the alleged injury and damages, and Light and Power Company asserts and relies on the defense of contributory negligence as a bar to plaintiff's recovery.

**THIRD DEFENSE**

For further answer and affirmative defense Light and Power Co. states:

That during all of the times and at all of the places mentioned and material to Plaintiff's Complaint, Plaintiff was guilty of contributory fault which was approximate cause of the alleged injury and, damages, and damages allowed, if any, should be diminished in proportion to the amount of fault attributable to the Plaintiff.

WHEREFORE, Light and Power Company, having fully answered, prays that the Court deny and dismiss plaintiff's Complaint and for judgment on its costs.

LIGHT AND POWER COMPANY

CHARLES BROOKE

WILLIAM ROSEBROOK

ATTORNEYS FOR DEFENDANT
LIGHT AND POWER COMPANY

## DEPOSITION SUMMARY

## OF

## DANIEL SMITH

Daniel Smith was called to testify on deposition by the defendants and having been duly sworn testified as follows:

My name is Daniel Smith. I live in Hopewell, Virginia with my father and my two brothers. I am now 23 years old. I am a high school graduate, and I graduated in 1980. During my elementary education I took courses in general science. During my junior high school education I took courses In science. This also was true while I was in senior high school. I did not take any educational courses on the use of electrically powered equipment, appliances, machines or tools. When I was 17 I took a vocational class called Electricity. It was my understanding that electricity was dangerous and that I should be respectful of it. I knew that I could get severely injured or possibly die from touching a light socket. I also knew that telephone wires, cables and things of that sort were not to be messed with. I was generally very respectful of electricity. I also knew that if I came into contact with electricity, I could be burned through that contact. I had a 3.7 average in high school.

One of the reasons that I took the vocational course I mentioned earlier was that I wanted to learn a trade to become an electrician. I wanted to have knowledge of electricity, metals and woodcrafts, and I wanted to be a handyman. I wanted to have the knowledge to be able to eventually build my own house, wire it and this type of thing.

After I graduated from high school I attended Coe College. I wanted to work for Coe College in order to better myself in the skills which I mentioned before and which I felt I was weak. That's why I applied for the job at the Coe College Physical Plant. When I first worked at Coe, I was employed by the Food Service. I was working to pay off my work grant. I worked for them from September of 1980 to May of 1981. Eventually I became involved in off-campus patrol. In June of 1986, I continued my employment with Coe as a part of the staff for the Physical Plant. In that job I was helping out full-time workers. I was still a student at Coe trying to pay my tuition off, and Coe helped me out any way they could. I considered my immediate supervisor to be Dave Williams, because I work with him over 50 percent of the time.

The first time I was on the roof at Eby Annex was to change nuts on the two white dome shaped obstacles. There was a padlock on the door for the hatchway to the roof shown on Exhibit 37. I did not have a key to that padlock. Dave Williams had one.

The next time I went up to the roof on the Eby Annex was to oil the fan units. The first time that I was involved in the work of oiling the fans in the cooling tower unit I believe we oiled all of them. This occurred on July 1. Also at

that same time we changed bearings for the fans on the cooling tower. The fans were also on the cooling tower. I believe we changed the bearings on three units.

When I was up on the roof at the Eby Annex I heard this sound emanating from the transformer. The nature of the sound was a low hum. I had no idea what the low hum was.

There was a fan on the transformer. It can be seen on Exhibit 45. Dave Williams never told me to oil the fan on the transformer. He did not tell me how to reach that particular fan to service it by oiling it. However, Mr. Williams did tell me to pull the bird nesting from the fan units and whenever possible, and he never specified which fan unit. Dave Williams told me that the bird nesting clogs up the fan units whenever possible, I should remove them. I did not know that the transformer was in fact called a transformer until after the accident while I was in the hospital. I thought of the transformer as being a part of the fan unit as a whole. In other words, the whole fan unit was enclosed within a brick wall.

Prior to the accident, both Dave Williams and I had removed bird nestings from the fan units on the coolers. We did this when we were removing and replacing bearings.

On the date of the accident I saw some bird nestings on the fan in the transformer. I proceeded straight across the cement girders and went over to the electrical transformer. I will refer to Exhibit 52. There are steps on the cabinet which I will refer to as a transformer, but keep in mind I did not know that it was a transformer at the time. I proceeded straight across the concrete girders, across the grating and proceeded up the steps on the transformer. These steps are in the front, and I simply climbed up them. I walked on to the cabinet located to the right side of the steps. The cabinet appeared to have a double door and a handle kind of in the center. I used my hands to aid me in getting on top of the cabinet. I do not remember hearing the low hum at that time coming from the transformer. Next I stood on top of a second cabinet which looks like a box with both feet. Then I proceeded to the top of the transformer. I'm sure that the fuses and connecting wires were in place on the date of the accident, although I did not know them to be such then. Once I was on top of the transformer I walked all the way across it. Once I got across the transformer I observed the fan in Exhibit 45. I kneeled and got a closer look at the fan. I saw a fan which had bird nesting inside of it. I reached over and tried to get the bird nesting out, and I do not remember if my hand touched any part of the fan. I realized I could not get the bird nesting with my hands. Therefore, I went back to search for a stick or something to assist me. When I turned around on top of the transformer I saw another bird nest. I believe that the bird nest was directly in front of me. I would have been facing the north wall, and I think the bird nest was at the base of the insulator on the far west side. I saw the bird nesting, and I wanted to do my job and get the bird nesting out. I crouched down, and I was facing the north wall. The insulator where I saw the bird nest was on top of the transformer and not the north wall. I crouched down and proceeded to loosen the bird nesting and tried to get as much out as possible. I do not remember if my hand reached the bird nesting. By the way, there are two types of insulators on top of the transformer. The bird nesting that I saw was on side one of the tower or larger of the two types of insulators.

My hand therefore would have been inserted beyond the three shorter types of insulators atop the cabinet. I do not remember touching any of the insulators or the fuses. The next thing that I remember beyond my reaching for the bird nesting at the base of the insulator was one of the firemen telling me that I was going to be all right and everything was okay. At this time I was on the top of the roof on Eby Annex on the other side of the wall.

The course that I had in high school involved the wiring of a house and the study of the general concepts of the practical use of electricity. We actually would run wire to a junction box and connect it to a socket or to a switch. However, I had no knowledge concerning the language, and I did not know what the term amperage meant or voltage meant. I am a musician, and I have been a musician all my life. I play the drums. After I took the course I decided that I did not want to become an electrician. As an maintenance helper, I do not recall receiving any information about electricity. The bird nest was lodged between the cylindrical structures on the back of the transformer. I got down on my hands and knees in order to reach for or dig at the bird nest. My shoulders were then in between the fuses. When I was removing the second bird nest I was facing the north wall or the wall with the coils on top of it. At that time I was either between fuses I and 2 or fuses 2 and 3 in my attempt to remove the bird nest. Therefore, there would have been a fuse on either shoulder at that time. As I was facing the north wall where the coils were on top of the wall, I was reaching for a bird nest and there would have been a fuse on either side of me.

Exhibit IF shows electrical wires which powers the light on the telephone pole. This picture is taken near Coe College. I do not know what the voltage is of the electrical wire. Exhibit 2F is also taken in the area of Coe College. I recognize the telephone poles with wires running onto them. I recognize them as electric transmission wires. What has been circled on those photographs is a utility box. I have not heard it referred to as a transformer and do not know what function it serves. If I touch the wire I know that I would be injured very badly by electricity. Exhibit 4F shows electric trasmission lines. What has been circled on those photographs I have seen in connection with electrical transmission wires. It is a common kind of object that I have seen on electric transmission poles and utility poles. I recognize it as being associated with the transmission of electrical current. Exhibit 9F is a photograph taken from the side of Eby Annex and it shows poles with insulators and electrical wiring leading up to insulators and electrical wiring on the Eby Annex roof. The arrow is pointed to the north wall of the roof as viewed from the outside. I see electric transmission wires running to the insulators located on the north wall. Exhibit 13F is again the north brick wall. On the inside of the wall is the cooling unit and transformer. The arrows point to three lines going from the top of the photograph toward the wall and these are electric wires. Below the wires are insulators which are in some way related to electric transmission wires.

## DEPOSITION SUMMARY

## OF

## DAVID WILLIAMS

My name is David Williams, and I was born May 27, 1925. My employer is Coe College. I started to work as an employee at Coe College on August 5, 1970. My job title during 1981 was in preventive maintenance. I took care of the chores, motors, fan belts and compressors and just about everything else that goes wrong. I also took care of the cooling towers which were located on the Eby Annex roof. There is one cooling tower on the roof of Eby Annex. Near the cooling tower on the roof of Eby Annex is the transformer.

The hatch shown in Exhibit 37 was the way that I got to the roof. It was also the way that I exited from the roof. The hatch opens outward, and there is a padlock that locks the hatch. There is a brick faced enclosure around the cooling tower and the electrical transformer.

In my work in preventive maintenance we had nothing to do with the transformer. The reason is that we were not educated for it. 1.E. took care of the transformer. I was never given any advice, caution, notice or warning about the transformer. 1.E. always took care of it.

There was a fan on the west side of the transformer unit. I did not have any responsibility for cleaning, maintaining, repairing or servicing the fan. The fan can be seen in Exhibit 45.

Dan Smith was an employee that I supervised. I was with him three days at most before the accident. The accident happened July 2. The first time Dan Smith went up to the roof with me was on June 30, 1981 I never told him about the electrical transformer. I did not tell him that his only work would be the maintenance service or repair of the cooling tower. I did not tell him that the electrical transformer was off limits.

As I mentioned before, in order to get on the roof the hatch was locked. Dan Smith did not have a key to the padlock. He was not authorized to have a key since he was a helper. Access to the roof was to be controlled to a responsible person.

On June 30, 1981, Dan Smith was with me on the roof all day. We changed bearings that were a part of the fans. The fans are a part of the cooling tower. As best I remember it, we changed three bearings that day. All Dan did was stand there. If I would drop a tool he would go down after it. Also he helped me get the bearings out when I put the bearings in. On that day Dan Smith never asked about the transformer. The transformer was never mentioned that day.

On Wednesday, July 1, 1981, the day before the accident, Dan and I went back on the roof. I think we changed two more bearings. Dan did the same type of

work that he did the day before. The conversation on July I also did not include the transformer.

The following morning, July 2, 1981, was the date of the accident. I saw Dan the first time around eight o'clock when he reported to work. I told him that we were not going to put any more bearings in because I had to get some more, and I was going to wait until we got a complete set. I told Dan that I wanted him to go up and oil the bearings. Dan had oiled the bearings before July 2, 1981. He did it on the afternoon of July 1. I instructed him on how to oil the bearings at that time. I did not tell him anything about the transformer on the morning of July 2, 1981 I told Dan that when he finished around the cooling tower that he should wait there by the cooling tower, and I would be right up. I was going to be coming up again to put some chemicals in some water at the cooling tower.

After Dan went on the roof, I went to a different level and the lights started to flicker. Sometimes the electricity goes off in a different kind of unit that we have in the basement. Therefore, I went to the basement to see if there were any problems. When I got in the basement everything went black. At that time I thought that Dan was on the roof, and I went up to the roof because I did not want Dan to be scared because all the fans and everything would go out. When I got on the roof I saw Dan lying on top of the transformer. His head was by the fuse farthest to the east, and he would have been next to the fuses. The middle fuse and the fuse to the east were blown. The farthest fuse to the east was spitting juice. The juice was hitting the zipper and it was being drawn down there like a spurt of water. His chest was on fire as well as the side of his head. I thought for a second if I could help him in any way I would, but I was scared. I went downstairs and I yelled for the men to cut the juice off. That's all I can remember.

The following day, July 3, 1981, I went back to the top of the roof. I wanted to check and make sure that Dan had oiled the bearings like he was supposed to. Dan did his job like he was supposed to, and he put the oil can back where it was supposed to be.

## DEPOSITION

## OF

## HAROLD R. BERN

My name is Harold R. Bern. I'm employed by Light and Power as electric operations engineer.

My educational background is this: I graduated from high school in Sioux City, Iowa, in 1942; I graduated from Iowa State in August of 1949 with a bachelor's degree in electrical engineering. I am a registered professional engineer in Iowa only.

I was responsible for doing the design work, the engineering work, ordering out the materials, and then follow up with the actual construction on the transformer on top of the roof at Eby Annex.

The prime function of a substation would be to house a transformer device that could be used for transforming a high voltage power on down to a usable or the more usable level.

The item depicted on Plaintiff's Exhibit 45 is a substation transformer that is utilized to transform the energy from the high voltage transmission voltage on down to the primary, which is fed into the customer's premises. This is the transformer that is located at the Eby Fieldhouse Annex at Coe College. A substation, when we construct it normally, is on the ground. It is made up of a tower in addition to this particular unit that we see sitting before us here in this photograph. It has an enclosure around it; that is, it is designed for the purpose of keeping the public away from the equipment, and it's usually a rocked-in area here so you would not have to worry about weeds growing up into it and things of that nature.

As I recall originally the substation that was intended to be built here to serve Coe was to be a ground-mounted substation. As we progressed on this thing and in follow up conversations, it was the wish of Coe to locate the transformer from a ground-located enclosure here to a roof installation.

This is all that was ended up being constructed in this particular installation because the Coe College people elected here to hide the transformer by building a wall up around this particular transformer. Also Coe provided us with assurance that this particular installation would be secure from the public to keep them away from it.

When we were contacted to build a substation, as I indicated earlier, it was a ground-mounted substation. In this particular installation as it ended up, we provided no tower and no fence enclosure, so in that sense here it is not a complete substation.

I was the one for Light and Power involved with the ordering of materials. I worked with the Coe College people in the design and the locating of that transformer on the Coe College roof. Coe's representation was Gene Slack.

On the very front of the unit foremost in the Exhibit 31 here we see the shorter-skirted devices which are called bushings. They are high voltage bushings that enter the high voltage into the internal windings of the transformer. The tall skirted devices at the rear on Exhibit 31, which are much taller, are the high voltage lightning arresters, so that any lightning that might strike the incoming line here would be diverted into the lightning arrester to ground through the tank of the transformer rather than getting in and blowing up the internals of the transformer.

On Exhibit 52, the top portion of the insulator would be energized. Maybe I could draw it all in configuration on that one. I'll put a capital E up above those so later we can remember that we used that to show energized. The cables would be energized although they are insulated coming out of the low voltage, compartment. I'll put the word, "insulated," above those. The items with the letter E on them are insulated from the wall or they are insulated from the tank of the transformer by the make-up of the bushing itself or the make up of the insulator. Any contact that would be made to these energized devices marked E would be subject to a voltage of about 20,000 volts phase to ground.

I was the principal representative of Iowa Electric in the discussions with Coe College and the architect presumably and the contractor concerning this substation.

After consultation with Gene Slack, it was agreed that it would be located on the top of their building. I am sure there were many discussions that he had with people at Coe that indicated this was a requirement, but Slack was the prime person that I consulted with.

The first time that I was assured of the security of that installation is when we were observing the termination of the wires and we were getting close to operation. We learned on that particular visit that the wall was built so that the view of that transformer could be hidden from the public. The transformer was located on concrete beams above the roof. I displayed concern to Slack that personnel could get up on to these beams. Slack's response was that there was controlled access to that roof and only authorized people under his direction would be allowed access to the roof. We were assured by Slack that the enclosure of the the substation equipment here would be a brick and concrete block wall.

Light and Power did not include in their specs a chain link fence for this enclosure. They were assured by Slack that the concrete and brick wall would enclose this equipment. I did not ever ask whether the concrete wall would extend all the way to the floor. I did not seek to determine whether the concrete wall would have openings in it.

Slack told me only personnel under his direction would be authorized on the roof. He was in charge of maintenance for the facility. I did not have any

discussion as to what experience, training or qualifications personnel authorized on the roof would be required to have.

Light and Power required an enclosure. I did take steps to insure myself that the enclosure was adequate. In plaintiff's Exhibit 52, I do see the brick wall and the opening there at the end. I did not see that opening prior to July 2, 1981. The wall does not comprise an enclosure because it has openings. I.E. did not, prior to July 2, 1981, take any steps or action to satisfy itself that there was a solid wall enclosure or chain link fence enclosure around the Coe College substation.

Plaintiff's Exhibit 74 is Light and Power Safety Bulletin Number 58. That safety bulletin was prepared because for a considerable period of time there were signs mounted on substation enclosures that were removed for the purposes of damage or to prevent damage to the substation equipment from vandals and rifles and things of this nature. The Safety Bulletin 58 refers to all substations. To the best of my knowledge the Coe substation has not installed a danger sign on any enclosure.

The decision to pass up this particular installation from Safety Bulletin 58 was made based on the fact that we had assurances from Coe people that there would be limited access to qualified people who were the only ones permitted to gain access. For this reason there were no signs placed. Those indications were given at the time of the installation here originally when I made the arrangements with Mr. Slack 13 years prior to Safety Bulletin 58.

In Safety Bulletin 58, the topic of danger signs to be installed on substation enclosures was called to our attention by an incident that happened whereby a small boy had made access to a substation on the southwest part of Cedar Rapids. It was felt appropriate that we should consider installation of danger warning signs here on substation enclosures.

I don't recall that I ever communicated to any other I.E. employee or representative what I have referred to as the assurance received from Mr. Slack. The mutual understanding that we had with Slack was to the degree that we would be assured, we had his assurance, his commitment, that there would be only qualified people in this area.

I did not make inquiry as to what the training and experience would be of the persons who would be permitted in the vicinity of the substation.

## DEPOSITION SUMMARY

## OF

## BERYL C. WOODSON

My name is Beryl C. Woodson. I am 71 years old. I'm presently with Kelly Security.

I was formerly employed by Light and Power Company for 48 years. I retired in September 1976.

At I.E., I was in the operating department in the electric metering the first 12 years of my service, from 1928 to 1950 and Safety Director from 1940 to 1976.

In connection with my work as a Safety Director, I attended courses and seminars on safety.

Il have not ever been present at an installation located atop the Eby Fieldhouse Annex at Coe College.

I would have considered it an industrial transformer, not a substation because of the essential difference in substations, being points of distribution from a high voltage to an intermediate voltage to be utilized by the customer and this was a single installation for Coe's use at that point only.

The incoming voltage from the appearance in the photographs was 34,500 volts.

I don't know what attributes of a substation the unit on top of the Eby Fieldhouse Annex lacks.

I am acquainted with a Mr. Harold Bern.

I was Safety Director at the time the particular unit involved here was installed in 1966.

I would defer to people such as Mr. Bern in deciding whether an installation was a substation.

Once an installation was identified as a substation I couldn't say that I was aware of specific requirements regarding substations or requirements for fencing or solid wall enclosures around substations.

I did recommend to the General Safety Committee of the Iowa Electric Light & Power Company in 1967 that all substations have warning signs placed upon them.

If it were an industrial station wholly within the confines of a specific customer, then I probably would not inspect that station because it wasn't subject o public exposure.

I might have needed to go to the location and see if it was within the confines of the customers' premises and not exposed to the public, but if it were within the confines and not open to public access, then in most cases, I would not have inspected it.

In 1967 I did believe signs saying "Danger, High Voltage" should be displayed where there was public access, but not within industrial confines.

When I made my substation inspection in 1967, I can't conceive of there being any of them that did not have fences or solid wall enclosures in a public place.

There were many industrial or single customer stations I didn't see.

## DEPOSITION

## OF

## DAVID JOSEPH HINGTGEN

David Joseph Hingtgen called as a witness and being first duly sworn testified as follows:

My name is David Joseph Hingtgen. I am 32 and an employee of Light and Power Company. I have a bachelors of business administration degree from the University of Iowa.

September of 1972 I became a safety technician for Light and Power Company. In 1974 I became safety supervisor and in 1976 I became safety director of the company. Very generally the safety director is an administrative staff function within the company responsible for developing accident prevention programs, working with various levels of management to get these programs approved, to work with the line organization, assisting them in the implementation of the various programs that we have developed.

Light and Power Company provides warning signs and/or decal on its pad-mounted transformers. The best as I can recall, these signs address the existence of energized equipment inside the pad-mounted transformer, warns the need to stay out of it, as well as addressing our desire not to have people dig around the transformers, but to call Light and Power to locate facilities prior to doing so. Light and Power does have a program for warning and signing of transformers owned by it which do have located on them exposed, energized parts. That program provides for the installation of "Danger, High Voltage" signs on transformers other than pad-mounted that are setting on the ground or surfaces that are not elevated. Let me add if the transformers are inaccessible, we do not put a "Danger, High Voltage" sign on them. It is the operating department's responsibility to install the signs and consequently it would be their responsibility to make the decision of inaccessibility.

Exhibit 73 is a cover letter which I wrote for the distribution of Exhibit 74, which is Safety Bulletin No. 58 titled "Specifications for Installation of Danger Signs on Substation." I prefer not to attempt to define a substation. I don't know if I have the ability to define it. As safety director of Light and Power and the man who wrote the cover letter that accompanied - - Safety Bulletin No. 58, I would not know the specific pieces of equipment that the Safety Bulletin applied to.

I have my own thoughts on what a substation is. A substation is a transformer. Exhibit 74 says "all substations shall have danger signs installed on the enclosure as follows." It refers to two different kinds of enclosures; chain link fence enclosures and solid wall enclosures. These enclosures being a barrier through which one cannot pass.

I don't know the procedure for marking substations with danger signs that did not have either a chain link fence enclosure or solid wall enclosure because I don't know that there would be any that didn't have one or the other type of enclosures.

I am familiar with the transformer on top of the Eby Fieldhouse Annex at Coe College. I don't know if I would categorize that facility as a substation without consulting supervision involved. It does not contain a normal electrical apparatus that one sees in a typical substation. It is a transformer, it doesn't contain as far as I can see, lightening arresters, switches, oil circuit breakers and relay equipment and all the other typical things you see in a substation. Operations people would be in a better position to address this question. The apparatus I see in the background of Exhibit 36 based upon my experience as Light and Power Company's safety director appears to be a transformer.

Safety Bulletin 58 was issued in 1977 to all of the people holding Safety Bulletin Manuals and we have not reissued it since that date. People in the operations department would get one. If I had a Light and Power substation with the identical enclosure around it as the one located on top of the Eby Annex at Coe College, I would not consider such an enclosure to be a solid wall enclosure of the kind described in Exhibit 74. I cannot honestly say as safety director whether this transformer should have a "Danger, High Voltage" sign on it. That would be up to the operations department.

Since 1977 when Exhibit 74 was issued I as safety director have taken certain steps to determine whether or not Light and Power substations have danger signs installed on enclosures. I have done some random survey of substations and also have had conversations with people responsible. As safety director of Light and Power Company I do not have any serious reservations about the safety of the transformer on Eby Annex. I think essentially the device is inaccessible and there is adequate protection.

I had not seen the installation prior to the accident I have to believe, had I seen it I would have had no reservations about it. I don't think it's fair to evaluate the installation after the occurrence. The cost of the "Danger, High Voltage" sign is probably not more than five dollars. I believe that one of the reasons for putting fences, walls around substations and signs on these enclosures is to keep unauthorized people away from the equipment and hurting themselves.

## DEPOSITION SUMMARY

## OF

## EUGENE C. SLACK

My name is Eugene C. Slack. My address is Route 1, Alfred Station, New York 14803. I am 58 years old.

I was employed at Coe College in Cedar Rapids, Iowa from June 1963 through June 1968. I was Director of Physical Plant.

As Director of Physical Plant at Coe College I did become involved with the architects and engineers and others who were designing the addition to the Eby Fieldhouse, known as Eby Annex.

I do not remember any kind of discussion where I was involved with representatives of Iowa Electric where there was talk about limiting access to the roof in order to provide protection from and to the transformer.

At that point in time it was common knowledge where you have high voltage equipment, signs should be placed adjacent to the area where they were located, whether it be on the entrance door or on the equipment itself.

I don't recall any discussion when the decision was made to place the transformer on the roof, near the cooling tower, to modify the wall enclosure that was going to be placed around those two pieces of equipment.

I do remember that wall was not a complete enclosure in that there was a a space between the roof and the bottom of the wall of approximately three to four feet where a person could go under the wall and gain access to the equipment.

I do not remember anyone from Iowa Electric protesting the placement of the transformer on the roof because of its possible exposure to members of the general public or people who were untrained or unqualified to be around electrical equipment.

Any piece of high voltage equipment is dangerous if people have access to it, but the location of that would seem not to be the case because it was isolated and you couldn't see it from the street, nobody knew it was there unless only the people that were working there.

As I recall, we kept the trapdoor locked, but I can't be absolutely specific.

Maintenance people that had the responsibility for maintaining the cooling tower equipment on the roof were issued keys that would unlock it. These would be no more than three people, including myself. It's possible that these keys had general use throughout the campus and unlocked other doors besides this particular trap-door. I was in charge of keys when I was there as Director of Physical Plant.

The members of the physical plant staff did not service any other equipment located on the roof of Eby Annex while I was the Director of the physical plant, other than possibly the roof vent located on Exhibit 2 and Exhibit 1. Those were exhaust vents.

While I was the director of the physical plant we had no knowledge of our crew having any high voltage equipment that we were to maintain. In the event that we had to get involved in the high voltage, we referred to an outside contractor to come in and handle that material. This was beyond our capacity in order to service this kind of equipment or even be associated with it.

While I was there, no Coe employees or members of the physical plant staff were allowed to perform any service to the electrical transformer on the roof of Eby Annex to my knowledge.

There was no component or piece of equipment or apparatus attached to the electrical transformer that employees of Coe College would render maintenance service to that I recall.

In light of the knowledge that I have, as the Director of the physical plant, I would absolutely not know of a service or work duty that would be required of a summer employee assigned to the physical plant staff that would require the employee to be onto and on top of the electrical transformer? because this was very high voltage equipment and we did not have the capabilities within our own operation to do any type of service work in that particular function; neither would we send an inexperienced person up to do anything to it.

After an authorized person would get on top of the roof by using the opening where the trap door was located, they would get onto the area to service this cooling tower from our access underneath the concrete structure, adjacent to the trap door. At that point then we would get up on the catwalk, which is a certain section that made available some of the equipment.

The concrete beams are wide enough to walk on, but were never intended to be used for that purpose in their present design configuration.

CEDAR RAPIDS POLICE

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General Information

| ADDRESS OF OCCURRENCE | OCCURRENCE TIME, DATE, & DAY | WEATHER |
|---|---|---|
| Coe Colledge(priv.prop) | 0853 7-2-81 Thurs. | Cloudy |

| | VICTIMS (FIRM NAME IF APPLICABLE) | ADDRESS | AGE | SEX | RACE | PHONE | SOBRIETY |
|---|---|---|---|---|---|---|---|
| 1 | Smith, Daniel J. | Murry Hall Coe Colledge | 19 | M | W | Coe Coll. | ☒ SOBR |
| 2 | VICTIMS PLACE OF EMPLOYMENT: Coe Stud. & Coe Colledge | ADDRESS: Coe Colledge | | | | PHONE | HOURS: 080 |
| 3 | PERSON REPORTING OFFENSE: Off. Schmitt | ADDRESS: C.R.P.D. | | | | 3985353 | ☒ SOBR |
| 4 | PARENT OR GUARDIAN IF VICTIM IS JUVENILE: Guard.-Ray-Carol Cowart | ADDRESS: 3317-N.49th St., Omaha Nebb. | | | 402 | 4532172 | ☐ SOBR |
| 5 | WITNESS: Williams, David E. | ADDRESS: 202-8 Ave. Hiawatha, Ia | 56 | M | W | 393-1878 Coe Coll | ☐ SOBR |
| 6 | WITNESS | ADDRESS | | | | | ☐ SOBR |
| 7 | SUSPECT | ADDRESS | | | | | |
| 8 | SUSPECT | ADDRESS | | | | | |

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CHECK BOXES APPLICABLE (DESCRIBE DETAILS IN NARRATIVE)
☐ FORCIBLE ENTRY ☐ THEFT FR. RESIDENCE ☐ VANDALISM TO VEHICLE
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☐ ATTEMPTED ENTRY ☐ THEFT FR. VEHICLE

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| ☐ YES ☐ NO | | | | | |

NATURE OF EVIDENCE

WEAPON USED: ☐ NONE ☐ FIREARM ☐ KNIFE ☐ OTHER WEAPON ☐ STRONG ARM
DESCRIBE WEAPON IN DETAIL (MORE THAN 1 USE NARRATIVE)
PHOTOS: ☐ NO ☐ YES — NAME OF PHOTOGRAPHER — DATE

VICTIM INJURED: ☐ YES ☐ NO ☐ REFUSED AID
NATURE OF INJURIES
☐ NO HOSPITAL ☐ ST LUKES ☐ MERCY
TAKEN TO HOSPITAL BY WHOM

| | CLASS | NUMBER | BRAND NAME | SERIAL NUMBER | VAL |
|---|---|---|---|---|---|
| 1 | | | | | $ |
| RECOVERED $ | RECOVERED DATE | DESCRIPTION OF | | STATE ITEM NUMBER | |
| 2 | CLASS | NUMBER | BRAND NAME | SERIAL NUMBER | VAL |
| RECOVERED $ | RECOVERED DATE | DESCRIPTION OF | | STATE ITEM NUMBER | |
| 3 | CLASS | NUMBER | BRAND NAME | SERIAL NUMBER | VAL |
| RECOVERED $ | RECOVERED DATE | DESCRIPTION OF ARTICLE | | STATE ITEM NUMBER | |

DEPOSITION EXHIBIT 2 (PENCAD-Bayonne, N. J.)

NARRATIVE (GIVE DETAILED DESCRIPTION OF OFFENSE) (WHO - WHAT - WHERE - WHEN - WHY - HOW?)

At or about 0853 Hrs. this date received a report of a 10-70 at Coe Coll: this was later changed to a Ambulance call & it was further reported tha man was trapped on t he roof of the Physical Plant at "Coe". When I arri it was reported to me that the Vic.was on the roof of the Phy.Pant & tha had touched a transformer and was still alive. I had the Radio Opr. chec the Lgt.Co., as we needed the power shut off so that we could get the Vi of the roof. The Lgt.Co arrived,power was cut and the Vic. was brought d from the roof by the Fire Dept., the Lgt.Co. at this time reported to me there was 34,500 Volts of Elec. running thbough the Tranf. that the Vic. evidently touched. The Vic. was taken to St. Lukes Hosp. by area Amb. & was taken by Air Amb. to Iowa Univ. Hosp.,the burn center Pho-319 356249

| | PERSON ARRESTED | ADDRESS | AGE | SEX | RACE | CHARGE |
|---|---|---|---|---|---|---|
| 10 | | | | | | |
| 11 | PERSON ARRESTED | ADDRESS (21) | AGE | SEX | RACE | CHARGE |

| REPORTING OFFICER'S SIGNATURE | PIN | SHIFT | SQUAD | UNIT | | DATE OF REPORT TIME | OFFICER ASSISTING |
|---|---|---|---|---|---|---|---|
| 12 Daniel Schmitt | 59 | 7AB | 1SF | 761 | 59 | 7-2-81 | 13 |

THIS LINE FOR CASES TO ☐ DB ☐ YB | DISPOSITION ☐ UNFOUNDED | ASSY ☐ CLEARED BY ARREST | SUPERVISOR SIGNATURE

CEDAR RAPIDS POLICE

CASE NO 81011914

| | ADDRESS OF OCCURRENCE | DATE OF OCCURRENCE | IS CONTINUATION SHEET |
|---|---|---|---|
| General Info. | Coe Colladge | 7-2-81 | ☐ SUPPLEMENTAL REPO |
| VICTIM'S NAME | ADDRESS | PHONE NO. | PAGE 2 OF 2 |
| Smith, Daniel J | Murray Hall Coe Colladge | | |

I talked to David Williams Coe Colledge Physical Pant Emp. who was workind with the Vic. and he told me the following. The Vic. is a Coe Student who is from Lima, Peru. His parents still live in Peru, and he graduated from High School there and had just completed his 1st year at Coe Colledge and was working a Coe this summer in the Physical Pant and was helping David Williams service the fans and Air cond. on the Pyh.Plant Roof. David Willi had told the Vic. that they were going to Oil the fans on the roof shortly but not to do anything, or touch anything as he wanted to be there when th job was to be done. In the mean time David Williams was talking to Robert White and the "Chiller" suddenly went off and the lights dimmed. David Williams told Robert White that he had a boy on the roof, so David ran up roof of the Phy.Plant to check on the Vic., Dan Smith. David Williams calle out to Dan Smith several times and finally found him laying on top of the transformer, waving his arms with his head headed westerly and his feet dangling over the side. David told the Vic. to lay still and not touch any thing, and he ran down to get help and called a Amb.

I talked to the Vic. at St.Lukes, befor he was tranported to Iowa Cit and he was burnt very badly, his face was nearly black, he told me that he did not know what had happed, he appeared to be very sharp in other ways ne might not have been telling me the truth. Dr. Helbey treated the Vic. St. Lukes, he was burnt over 70 per cent of his body, 2nd & 3rd Deg. burn

| INVESTIGATING OFFICER'S SIGNATURE | PIN | SHIFT | SQUAD | UNIT | DATE OF REPORT | TIME | SUPERVISOR'S SIGNATURE |
|---|---|---|---|---|---|---|---|
| | | | | | | | |


July 29, 1977

Ladies and Gentlemen,

Attached find Safety Bulletin #58, "Specifications for Installation of Danger Signs on Substations". Also enclosed is a revised Table of Contents to permit insertion of both in your Safety Bulletin Manual.

Sincerely,

David J. Hingtgen
Safety Director

DJH:mg
Attachments

SPECIFICATIONS FOR INSTALLATION OF DANGER SIGNS

ON SUBSTATIONS

All substations shall have "Danger Signs" installed on the enclosure as follows:

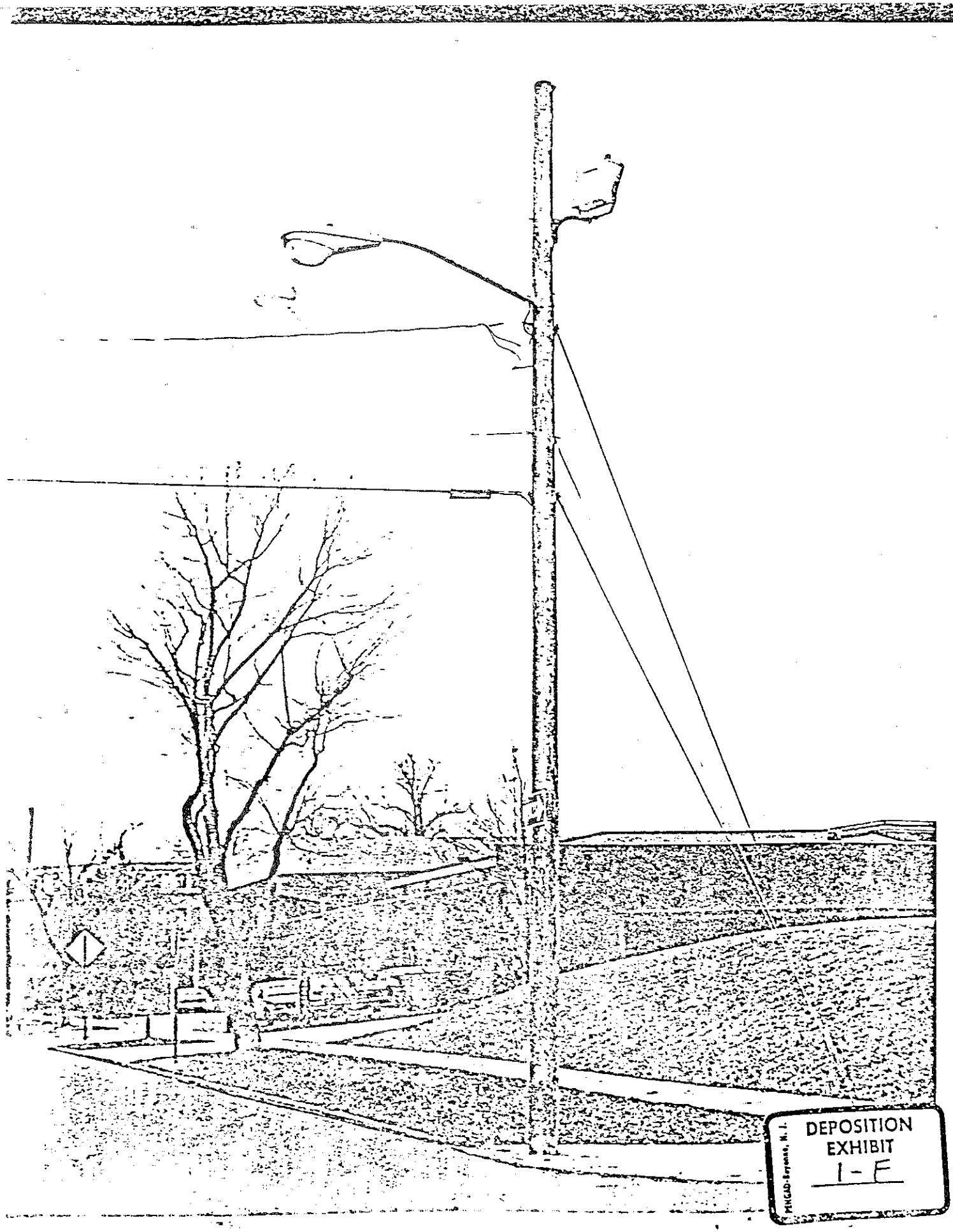
a. Chain link fence enclosures

   1. One sign on each entrance.

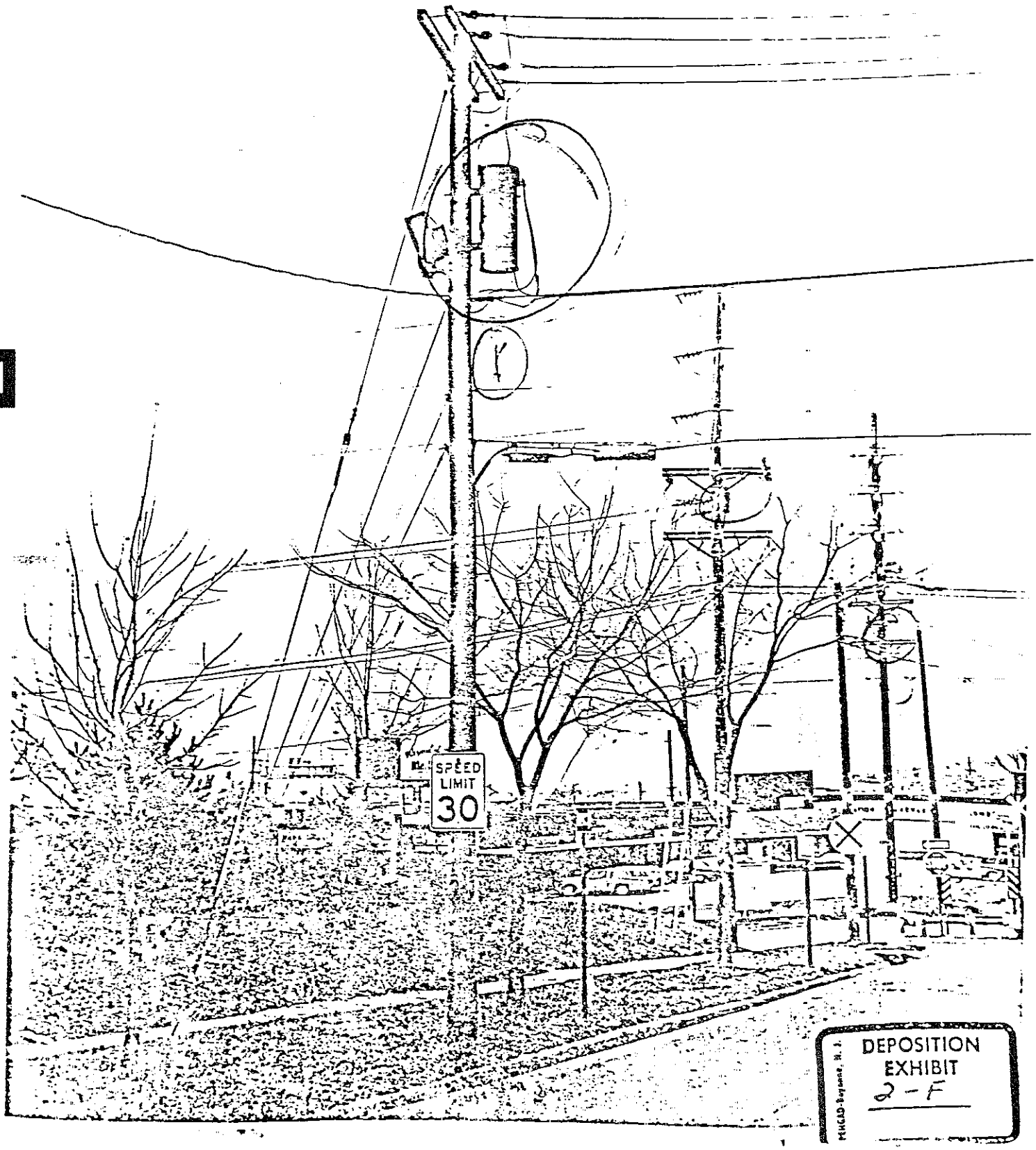
   2. One sign on each additional side of the enclosure.

   3. Additional signs required on sides of enclosures of 75' travel distance or more.

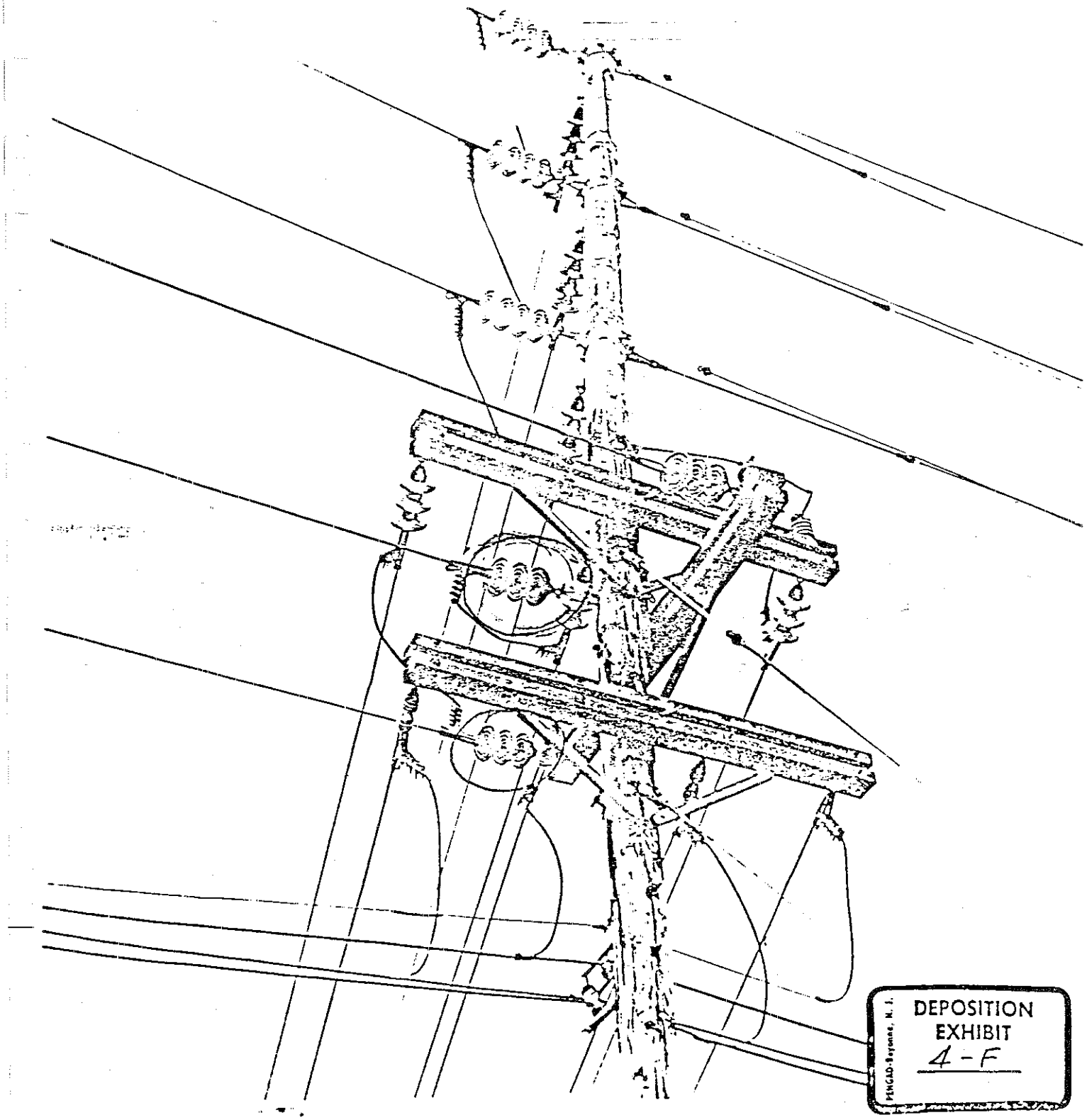
b. Solid wall enclosures - one sign on the entrance only.



DEPOSITION
EXHIBIT
1-F




DEPOSITION
EXHIBIT
9-F



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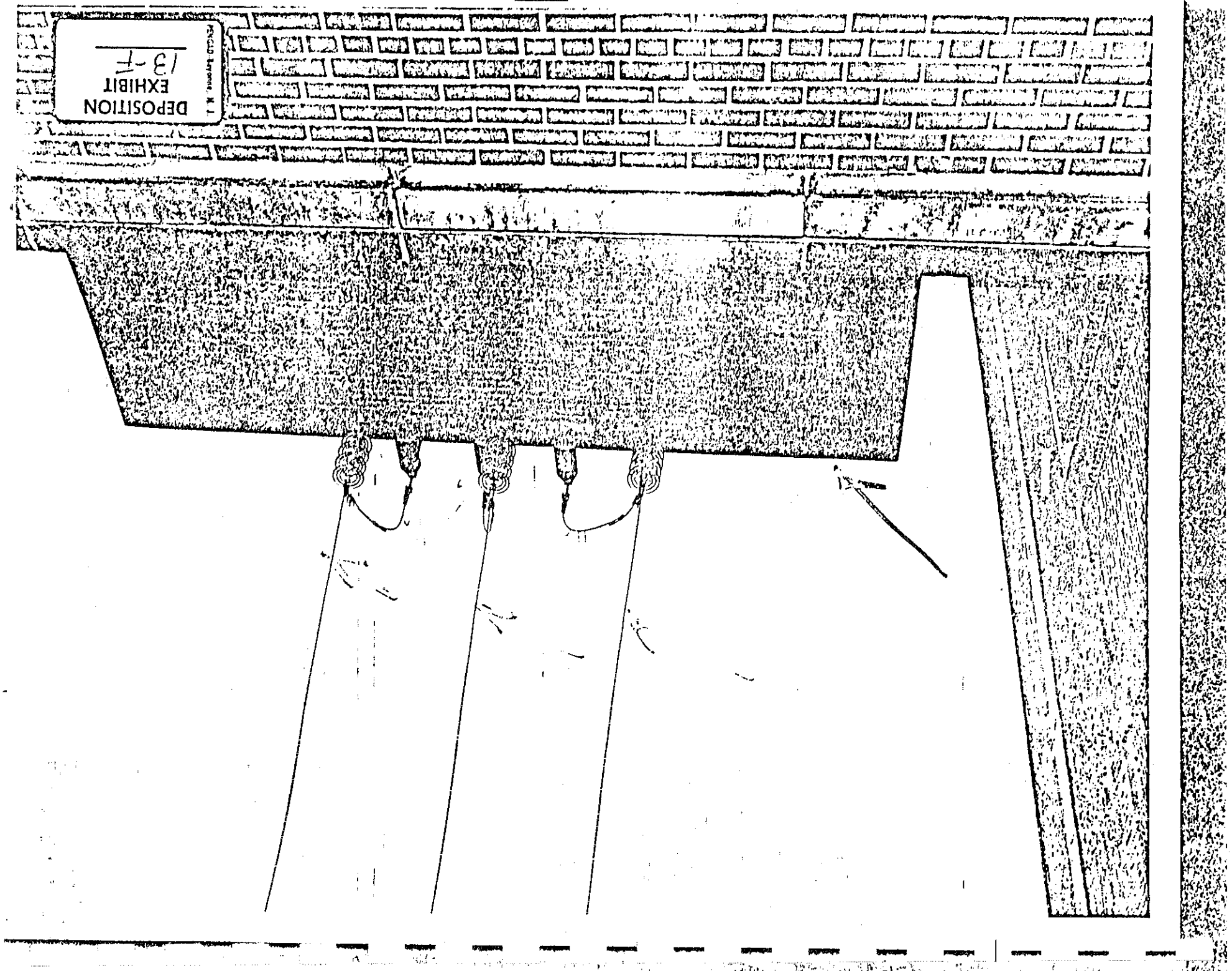
PENGAD-Bayonne, N. J.

DEPOSITION
EXHIBIT
9-F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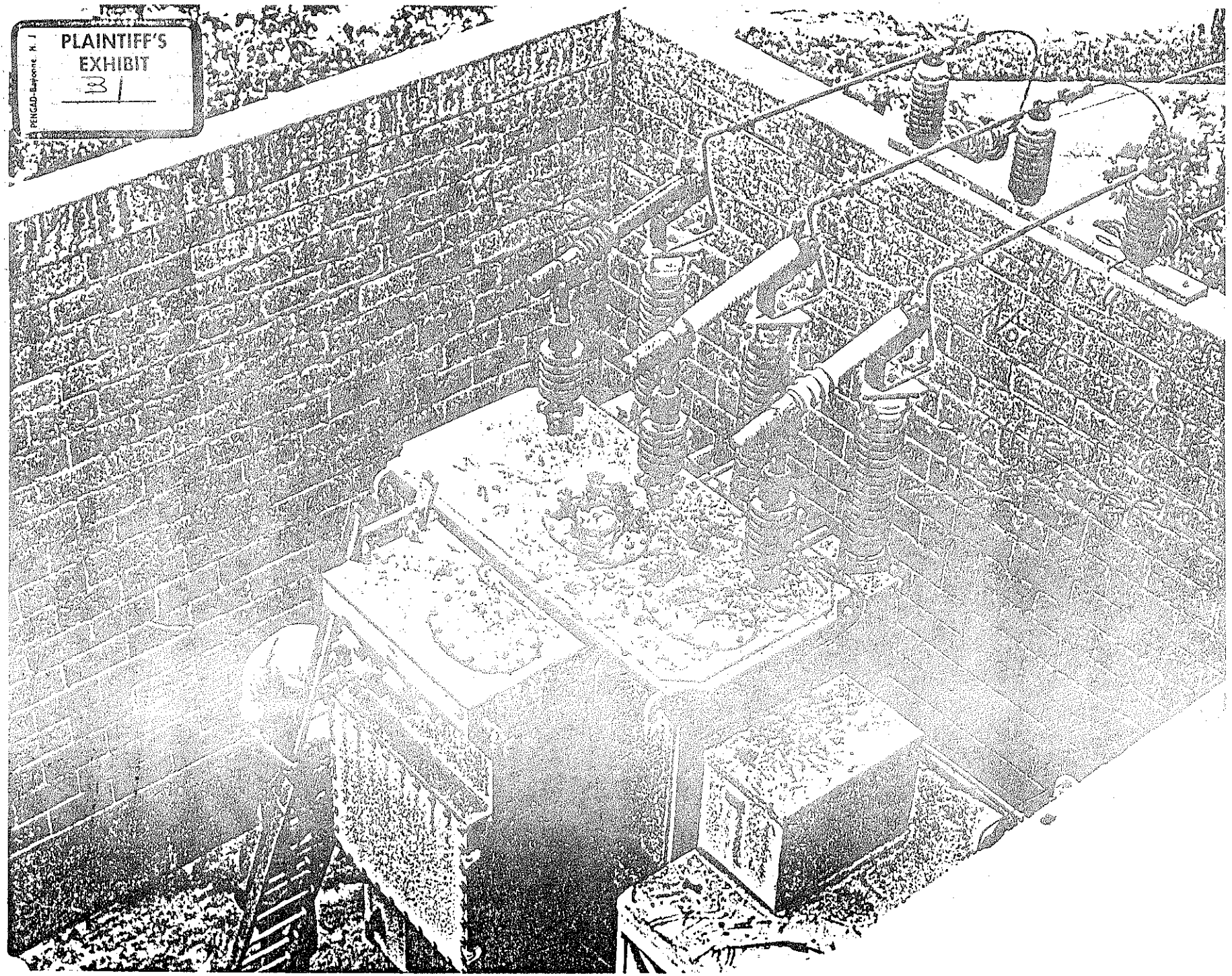
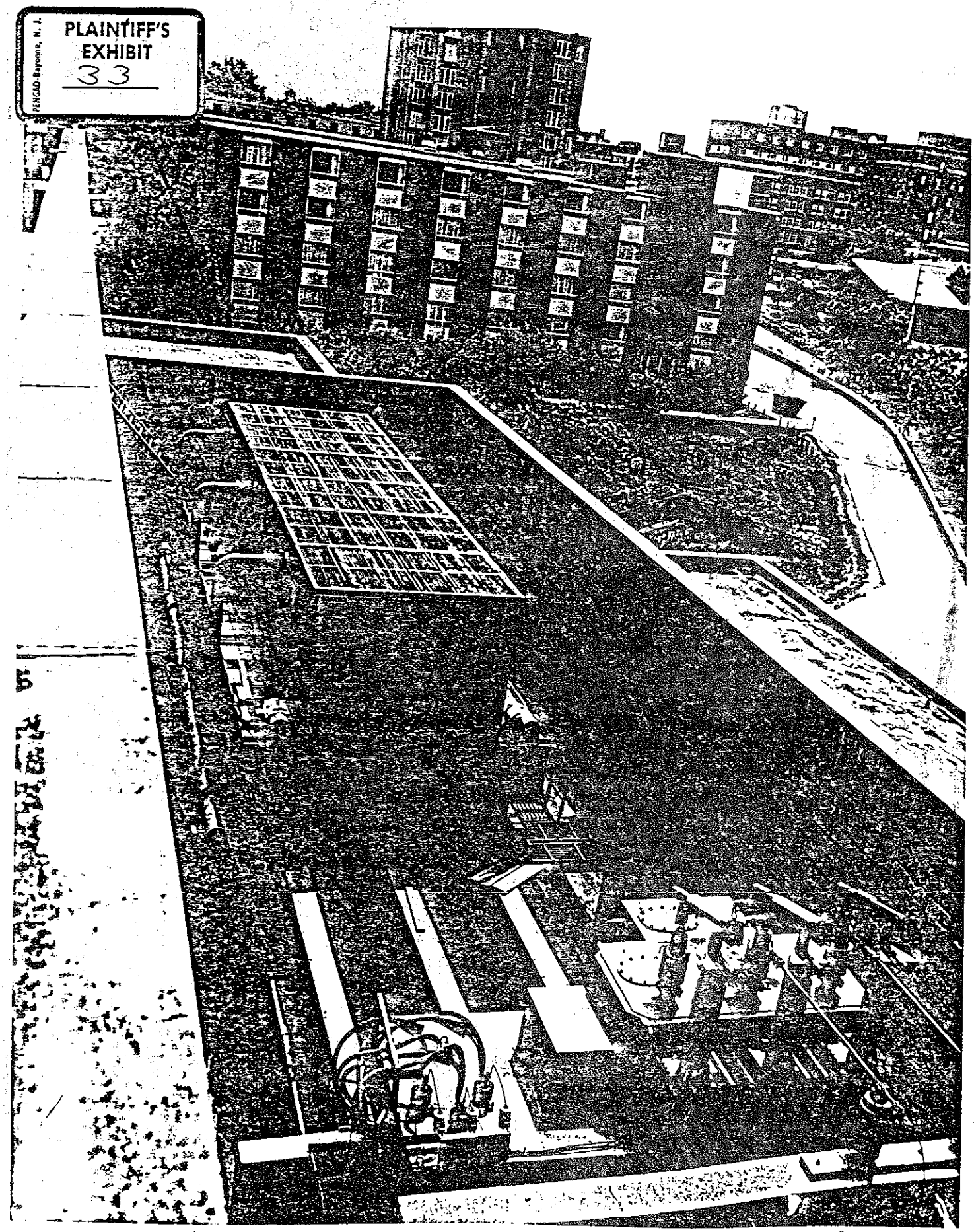

PLAINTIFF'S
EXHIBIT
31
PENGAD-Bayonne, N. J.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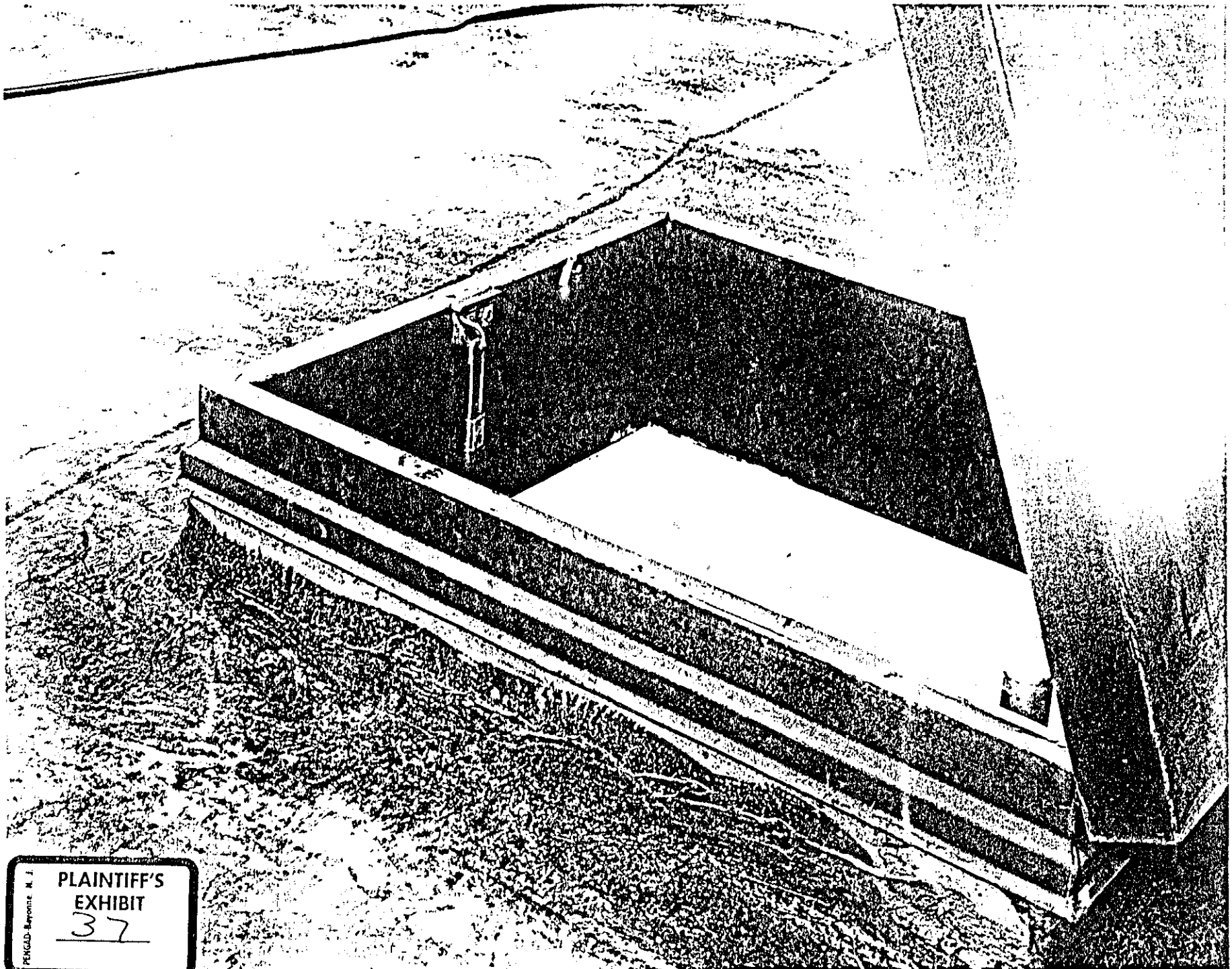

PLAINTIFF'S EXHIBIT 37

PENGAD-Bayonne, N. J.

Exhibit
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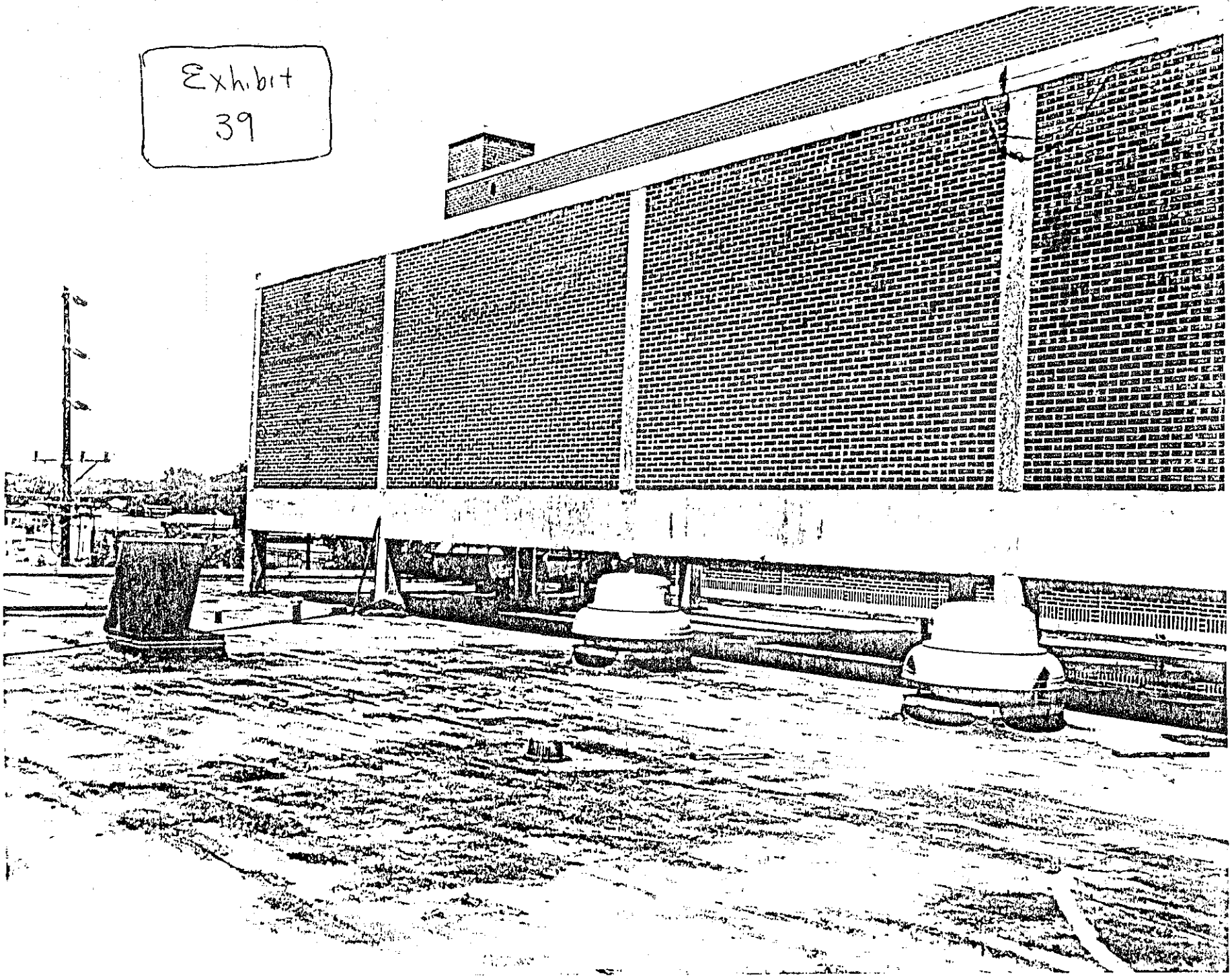

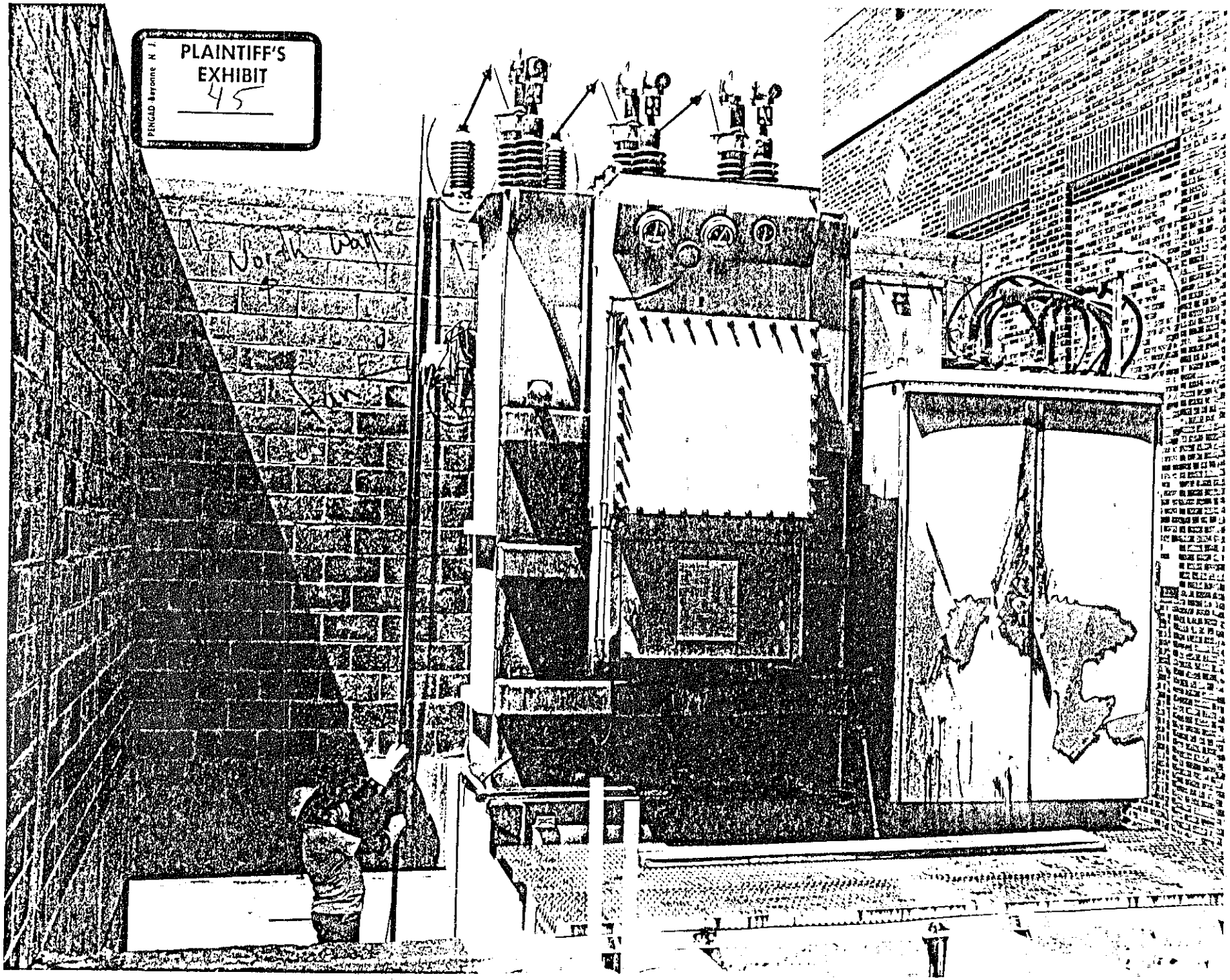
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EXHIBIT
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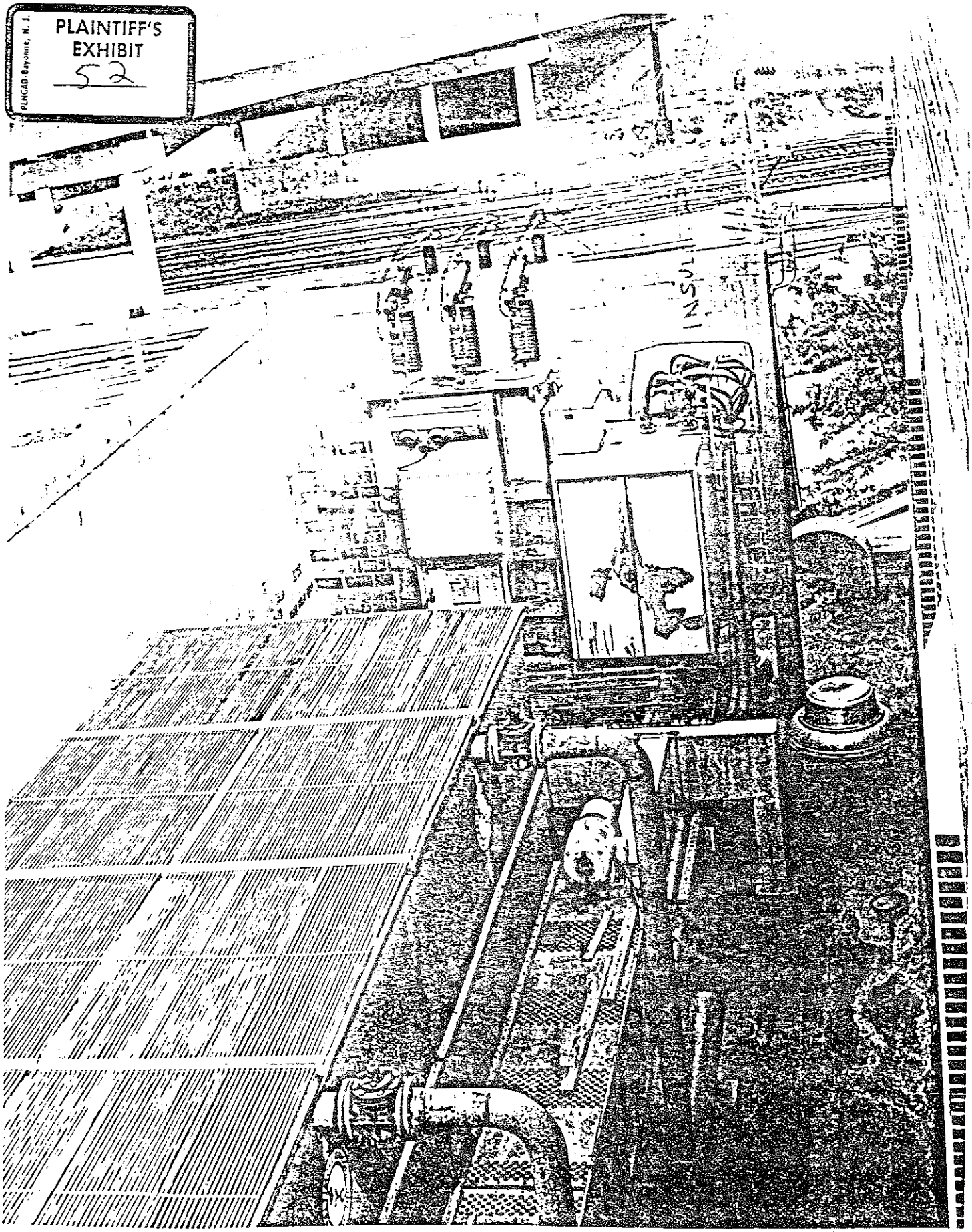
PENGAD Bayonne N J
North Wall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PENGAD-Bayonne, N. J.

## DEPOSITION SUMMARY

## OF

## ROBERT E. HEYWOOD

My name is Robert E. Heywood. My current address is Wellsville, New York. I am an associate professor of accounting at Alfred University. I was employed as business manager for Coe College from 1960 to 1969.

The plan for Eby Annex was devised while I was at Coe and I was involved in the discussions regarding its construction. The primary reason for placing the transformer on the roof was to maximize use of space and also the transformer was located on the roof for aesthetic reasons. Therefore there were two reasons for not placing the transformer on the ground level and this was because of land use and for aesthetic purposes. I was involved in the decision for locating the transformer on the roof along with the architects and engineers.

I was aware that the location of the transformer was a matter of safeguarding the transformer against unauthorized access to the transformer. Coe felt that it had adequate protection for the transformer. It felt that locating the transformer on the roof kept it from being readily accessible plus the hatch was the only access to the roof and the building where the hatchway was a secured building.

I do not believe that students were allowed access to the roof of Eby Annex. There was no reason for students to be on the roof unless they had a task to perform. Use of students in high voltage areas would only be under the supervision of a full-time employee.

## STATEMENT OF WAYNE ASHCROFT

The following statement represents all the information and knowledge I possess regarding the injury to Daniel J. Smith which occurred on top of the transformer on the roof of Eby Annex on the morning of 2 July 1981.

At the time of the incident I was working as a security guard for Coe College. I had come on duty that morning at 0800 hours. At approximately 0900 hours while patrolling the campus with Tom McDermott, the safety director, we received a call from Marquis Hall regarding electrical problems in that building. When we reached that building we noticed the lights were blinking on and off and then they finally went out. At that time we began walking down to the Physical Plant to check what was happening. We then received a call from the Physical Plant stating that one of the student employees had been caught on a transformer and emergency services had been called. No more than 10 minutes had elapsed since we had received the first call. Mr. McDermott and myself proceeded directly to the roof of Eby Annex. When we reached the roof there were three people already up there. One Physical Plant employee and two paramedics. One of the paramedics had moved under the dividing wall and up the stairs to the victim's location at the base of the transformer. The other paramedic was calling instructions down to the fire truck located in Eby parking lot. The Physical Plant employee was standing by the access hatch to the roof. He had come up to lead the paramedics up and show them the transformer location. He did not know who the victim was at the time.

I then moved to the edge of the roof and assisted the paramedic in getting a litter onto the roof. We then carried it to where the victim was located at the base of the transformer. For approximately the next 5 to 10 minutes we stayed with the victim while equipment to get him off the roof was prepared. During this time he regained consciousness and we provided psychological first aid. I then recognized him as Daniel J. Smith. Once the equipment was ready we placed him in the litter and carried it down to the edge of the roof to rig it up to a hoist. Once we moved him off the roof I stayed on the roof to assist the investigators for Iowa Electric while they conducted their on-site investigation.

To the best of my knowledge Daniel Smith was on the roof of Eby Annex for the sole purpose of oiling the bearings of the fans on machinery which is located 20 to 30 feet away from the transformer and is not connected to it by a walkway. The only safe way to get from one to the other is to go down some stairs, walk across the roof and climb back up the stairs. The concrete beams which support the equipment and join the two locations are very narrow and are obviously not designed as a walkway. Daniel Smith was working as a student employee for the Physical Plant and was therefore unskilled labor. Any job he received would have had to be accomplished without the necessity of his having any skill or experience in that area. There is no possible way he would have been given a work assignment on the transformer and I am sure he was told not to go near it at all. As far as I can see there was no possible benefit or service Daniel Smith could render Coe College by climbing on top of or even going near the transformer.

As to why he climbed onto and on top the transformer I can only make an educated guess based on my association with Daniel Smith. Daniel Smith worked part-time with college security during part of the period I was employed there. During this period I noticed, and he made no attempt to hide the fact, that he opened and explored every room to which he had a key. This included all the generator and equipment rooms in all the buildings on campus, which were off limits except in emergencies. It seem to give him a thrill at doing something which was wrong plus it fulfilled his curiosity. I am sure that it was this same thrill and curiosity which prompted him to climb on top of the transformer. The thrill of doing something he had been told was dangerous plus the curiosity of seeing what kind of a view you could get from atop the transformer.

There is no doubt in my mind that Daniel Smith climbed on top of that transformer solely because he wanted to. I believe he knew exactly what he was doing but simply did not pause to consider the consequence of his decision.

WAYNE S. ASHCROFT
485-94-2295
2LT, IN
USA

## FURTHER STATEMENT OF WAYNE ASHCROFT

When Mr. McDermott and myself went onto the roof of Eby annex, after having been notified of the accident, this was the first time either of us had been up there that morning.

The call we received notifying us of the accident, was made by Byron Mason was employed in the Physical Plant office at that time. To the best of my knowledge the message was phrased as follows:
Mr. Mason. "Tom, we've had an accident down here. We've called the fire dept and an ambulance."
Mr. McDermott: "What happened Byron?"
Mr. Mason: "One of the student employees was caught on the transformer on the roof."
Mr. McDermott: "We'll be right there."

I cannot recall who the Physical Plant employee was on the roof. I remember he was quite distressed and obviously in mild shock. I asked him who the victim was and he replied that he did not know. I then asked him if the victim had been working for him and he replied, "No, I just came up here to guide the paramedics." He then told me "He's all burned up! It's terrible, he's all burned up! His penis is burned off!" At that time I moved over to assist the medic in getting the litter onto the roof.

The reference to a paramedic does refer to the ambulance attendants who responded to the emergency.

The basis for which I made the statement that "There is no possible way he would have been given a work assignment on the transformer" was from my experience working as a student employee at the Physical Plant. When I worked at the Physical Plant, during the summer of 1978, student employees were only given tasks that required unskilled labor. This freed the full time employees to work on tasks requiring knowledge or expertise. Also, Daniel Smith was working for Dave Williams, the Physical Plant electrician. From my personal knowledge of Mr. Williams I am certain that he would not have assigned any task to Daniel Smith that could have been dangerous or that would have required technical expertise to perform. The Cedar Rapids Police Dept, Iowa Electric officials, and myself interviewed Mr. Williams later in the morning, at which time he told us that he had told Daniel Smith not to go near the transformer. Furthermore, he told us that when the power started cutting out, he went onto the roof to check if Daniel Smith was all right or if something had happened. He never even looked at the transformer, because Daniel Smith had been told not to go near it. Mr. Williams stated he walked all around the cooling fans looking for Daniel Smith before he glanced upwards and saw that he was on top of the transformer.

As far as I know there was no formal policy to advise people not to go near the transformer. The reason for this is that unless a specific task had to be performed on the roof of the Eby Annex, no one went up there and the access hatch was kept padlocked shut. However, there is no doubt in my mind that if Dave

Williams took Daniel Smith onto the roof of the Eby Annex to work and left him there, he would have informed him to keep away from the transformer.

I personally saw Daniel Smith in the equipment room in Gage Union, and when I asked him what he was doing he said, "Just looking around." During the time he worked for security, he told me that he had been in the equipment rooms in Peterson Hall as well. The only reason security had to go in an equipment room was to turn off and reset the fire alarms if they were accidently pulled. To the best of my knowledge, this never occurred when Daniel Smith was on duty.

**STATEMENT OF THOMAS NEWMAN**
**Assistant Principal**

**Wakefield High School**
**Arlington, Virginia**

**May 2, 1983**

Construction classes are actually taught in a separate facility from Wakefield High School. Construction 1 and 11 are taught in the Career Center Building which is affiliated with Wakefield High School. The Wakefield High School Program of Studies Handbook for 1978-79 provides as follows for Construction 1:

A full year course with three credits. It meets three periods a day for grades 10 through 12. This course is designed for students interested in new construction, remodeling, repairing and maintaining structures. Although there are no prerequisites to the program, basic reading and computation skills are an asset. Instruction is provided in a variety of activities, such as finishing various materials; using technical specifications; development of manipulative skills; sound work and safety habits are emphasized. During the first two weeks the students will be given introductory instruction in the three areas of the construction program; 1) electricity, 2) masonry, and 3) carpentry. Each student will select one area as his specialty.

The student would then spend the remainder of the school year studying the specific areas of electricity, masonry or carpentry depending upon which one he would choose.

I would have no way of knowing by way of records at Wakefield High School which specialty area or instruction area Daniel Smith opted for during his year in construction.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

| | | |
|---|---|---|
| DANIEL SMITH,<br><br>Plaintiff,<br><br>vs.<br><br>LIGHT AND POWER COMPANY,<br><br>Defendant. | ) | INSTRUCTIONS TO THE JURY |

**Members of the Jury:**

The Court gives you the following instructions:

## The Issues

Two issues are submitted to you for determination today:

(1) Was Light and Power Company negligent? This issue focuses upon whether the company was required to enclose its transformer by wall, fence, or screen and post appropriate signs warning of the presence of high voltage electricity.

(2) Was Dan Smith contributorially negligent? This issue focuses on whether he failed to exercise ordinary care in going onto the Company's transformer for the purpose of removing a bird nest.

## Burden of Proof - Dan Smith

Dan Smith has the burden of proving by a preponderance of the evidence that Light and Power Company acted or failed to act in one of the ways claimed by his attorney and that in so acting or failing to act it was negligent.

You will record your finding on this issue on the attached form of the consensus verdict.

## Burden of Proof - Light and Power Company

Light and Power Company has the burden of proving by a preponderance of the evidence that Dan Smith acted or failed to act in one of the ways claimed by the Company's attorney and that in so acting or failing to act he was negligent.

You will record your finding on this issue on the attached form of consensus verdict.

## Jury Deliberations

You will select one of your number to act as chairperson, who shall preside over your deliberations.

For the purpose of this case, you will promptly return a consensus verdict by each of you (including the chairperson) making answer to the interrogatories now submitted to you on the consensus verdict form.

Your chairperson will record the response of each juror and sign the verdict on behalf of the jury. When this is done, you will then return and announce your verdict.

## Consensus Verdict Form

We, the jury, have reached a consensus in response to the following interrogatories:

Issue No. 1: Was Light and Power Company negligent?

Answer "yes" or "no".

ANSWER: Yes _____ No _____

(If a majority of the juror answers to Issue No. 1 is "no", then you shall not attribute any percentage of fault to Light and Power Company).

Issue No. 2: Was Dan Smith negligent?

Answer "yes" or "no".

ANSWER: Yes _____ No _____

(If a majority of the juror answers to Issue No. 2 is "no", then you shall not attribute any percentage of fault to Dan Smith)

Issue No. 3: Using 100% as the total combined fault of Dan Smith and Light and Power Company, what percentage of such combined fault is attributable to Dan Smith and what percentage of such combined fault is attributable to Light and Power Company? (The percentage entries shall be based upon a majority vote of the jury; however, if in accordance with your previous answers a majority of the jurors have not attributed any negligence to Dan Smith or to Light and Power Company, then enter zero percent after his or its name).

ANSWER: Dan Smith _____%

Light and Power Company _____%

Total _____%

# The Psychology of Selecting a Defense Jury

by

Thomas Sannito, Dubuque, Iowa

(outline)

I. INTRODUCTION: Two factors predict verdicts in personal injury cases, generic and idiosyncratic traits. The idiosyncratic characteristics forecast the liability decisions of jurors and the generic dispositions determine the award size.

A. Idiosyncratic Predictors: In every case, a distinctive feature can be identified that will activate a specific attitude in jurors. Accidents due to slips-and-falls, automobile collisions, and surgical confusions (e.g., operating on the wrong limb or even the wrong person) belong to the general class of personal injuries, but each one has unusual properties not common to the others. The individualized reaction that is set off in jurors by a novel quality of a case in called the idiosyncratic trait.

Each case of personal injury will have a distinctive quality that will strike a unique response in jurors. What gives unusual meaning to a personal injury case? It is tempting to conclude mistakenly that the distinguishing feature lies in the type of injury such as burn disfigurement, blindness, or crippling quadriplegia, since each one holds its own special horror. However, the reactions jurors have to the sundry assortment of injuries are not qualitatively different but rather various degrees of the same response, pity. It is not the type of injury that makes a personal injury case novel; it is who is being blamed for the accident. The person or group against whom the lawsuit is levied gives a case its special significance. Doctors, hunters, love pirates, and dog owners as civil defendents will provoke unique responses in jurors that will influence their decisions of liability. For every defendant in a personal injury case, there is an idiosyncratic bias or prejudice to be measured by the attorney.

In a medical malpractice suit, for example, whether a juror who is evaluating the defendent doctor has a long-standing medical dependency or a tough-minded medical independence is crucial to the assignment of blame. A person addicted to doctors, from whom she derives security, will feel uneasy criticizing them. A medically independent juror, on the other hand, who believes nature should cure most ailments, may ascribe blame to these "monsters" who violate the natural order. Medical bias (+) or prejudice (-) will be measured on a bipolar scale between the extremes of medically dependent (reverent) v. medically independent (irreverent).

B. Generic Traits: Generic traits are general dispositions, developed through life experiences, that predispose a juror toward the whole class of personal injuries. These general characteristics might be in the form of an attitude, value, need, moral belief, or feeling that contaminates the judgment of jurors hearing a case. Any one of these traits have the power to distort the perception of evidence; jurors will see what they expect to see. They will hear evidence that is consistent with their belief, attitude, value, need or feeling, and they will devalue and distort evidence that is inconsistent. Generic traits constitute a second major factor to be given special attention by plaintiff's attorneys.

While idiosyncratic traits may help sway jurors in liability deliberations, it is a generic disposition of generosity that determines the amount of the award. To be able to recognize this characteristic in prospective jurors, one must first be able to understand what makes a person generous. Generosity is not a singular trait but actually two characteristics combined, namely sympathy and reckless spending.

Jurors will vary in degree of generosity from unfeeling misers of the stingy extreme to sympathetic givers at the generous end. Those entering the jury box will be predisposed toward all personal injuries by a generalized response of "stinginess," or "generosity" or some degree in between. A stingy person who doesn't believe in giving away any money will turn in a meager award for a brain injury, burn disfigurement, or loss of an eye, since all personal injury claims involve giving away money. On the other hand, recklessly generous types, who are a soft touch for beggars, will come in high. This attitude of stingy-hoarding or free-giving, that grows within the person, becomes the generic measure of greatest significance in predicting the verdict size.

The generosity spending scale, from which personal injury verdicts are predicted, is shown in bipolar form in Figure 1. The extremes of this dimension are sympathetic extravagance (+4) and uncaring stinginess (-4). Actually, this eight-point dimension blends two predisposing tendencies together to increase precision of forecasting the verdict, namely money attitude and feeling for others. A person who has sympathetic extravagance (+4) is reckless in both compassion and spending habits and one with uncaring stinginess (-4) is a miser without sympathy for the underdog. Taken separately generosity and money habits each would be good predictors of awards but blended together as the generosity spending scale they become the best single indicator of magnitude of monetary compensation.

Generosity Spending Scale

| | | |
|---|---|---|
| Sympathetic Extravagance | +4 | (Favorable Plaintiff) |
| ---------- | +3 | |
| Kind Prodigality | +2 | |
| ---------- | +1 | |
| Impersonal Parsimony | 0 | |
| ---------- | -1 | |
| Dispassionate Frugality | -2 | |
| ---------- | -3 | |
| Uncaring Stinginess | -4 | (Unfavorable Plaintiff) |

Figure 1. The generosity spending scale is shown in bipolar form, with sympathetic extravagance being a dream for the plaintiff and uncaring stinginess linked to dramatic savings for the defense. The person with an attitude of impersonal parsimony is objectively economical without bias for either side.

The sagacity of superimposing spending attitude and generosity to form the more accurate generosity spending scale can best be understood by an examination of people at both extremes. A person with sympathetic extravagance is not only generous but also is daring enough financially to spend a lot of money to feel good toward a fellow person. What good would it do to have a warm, generous person who has taken few money risks? Awe of $1 million and fear of passing it on to someone will more than cancel such exceptional sympathy for another person. However, a big-hearted risk-taker who likes to roll the big dice could bankrupt the defense. At the other extreme, a juror with the uncaring stinginess trait will be unsympathetic to the plaintiff. A miser with a warm heart may on occasion lose his head and give away small amounts of money, but one with a cold-blooded feeling probably will vote close to zero.

In actual practice, attorneys are more likely to see people with less extreme dispositions. More frequently, the attorney will be measuring between the reduced extreme opposites on the scale of kind prodigality (+2) and dispassionate frugality (-2). The kindly, prodigal juror will turn in a healthy verdict but will not make any legal history in personal injury awards. The juror is a kind, empathic human who spends profusely, but, at +2, is not a wild risk-taker bursting with sympathy for the unfortunate. In stark contrast, the juror with dispassionate frugality (-2) will be true to an indifferent, penurious philosophy by voting for a meager award. Unlike the cold, uncaring miser at (-4), the dispassionately frugal juror's penny-pinching is without malice. To seat the most objective juror, one would look for an economical money handler who was neutral in feelings, one with impersonal parsimony (0).

The main line of inquiry, then, for predicting a dollar award in a personal injury case is along the generosity spending scale from one extreme of uncaring stinginess to the other of sympathetic extravagance.

II. CONCLUSION: Jury selection or deselection in personal injury cases involve the indentification of at least two variables among juror candidates, idiosyncratic and generic traits. For liability, attention should focus on the unique attitudes toward the person being blamed, therefore, idiosyncratic traits. When picking jurors for a large verdict, the attorney should measure the sympathy and money spending habits of jurors, which add up to the generic trait of generosity. These idiosyncratic and generic traits are the lawyer's best guide to successful jury selection in a personal injury case.

# THE OPENING STATEMENT

Edward M. Bodaken, Ph.D.
BODAKEN ASSOCIATES
2530 Vineyard Drive
Paso Robles, CA 93446
(805) 238-9090

I. Ultimate verdict is determined by opening statement.

   A. Post-trial interviews (products, contract, termination)

   B. Research (mock, summary trial)

   C. Shadow Jury interviews

   D. Jurors and Perry Mason

II. Factors influencing PREPARATION of the opening statement.

   A. Attorney attitude and experience
      1. Overcoming communication apprehension
      2. Hitting to your power

   B. Insight into jury composition
      1. Understanding communication skills
      2. Selecting graphic format
      3. Juror media exposure/consumption

   C. Determination of case themes
      1. Positioning the issue
      2. Developing believable metaphors, analogs

   D. Structure/Organization
      1. Chronology is least effective without graphic
      2. Use themes as structural foundation
      3. Events are more memorable
      4. Organization depends on case substance

   E. Not proper matter for "all-nighter" or "winging it"

III. DELIVERING the opening statement.

   A. Contextual factors affect statement effectiveness
      1. State or Federal jurisdiction
      2. Opposing counsel style
      3. Non-controllable variables (e.g., time)

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4. Plaintiff appearance in courtroom
5. Defense counsel/files at table

B. Use of graphics
1. Key criterion is function
2. Prepare completely even if to draw before jury
3. In very technical cases, forecast expert materials (e.g., medical, chemical)

C. Seek but do not rely on juror feedback
1. Basic communication factors (e.g., eye contact, facial expressions) important--not predictive

D. Avoid objections at all costs
1. Control and knowledge are defense counsel stereotypes--objections suggest that attorney lacks one or other

IV. Observations on statement in Smith vs. Light & Power

BODAKEN

Friday, October 28, 1988 - 12:00-1:30 P.M.
United States District Judge Charles R. Wolle

# LATEST INFORMATION FROM U.S. DISTRICT COURT

I. The Unbearable Lightness of Being (a Federal Judge)

Statistics (see attached September 1988 docket report)

Overview - how do we bear the load?

II. What the Light was Like

Dedication of Chief Judge Vietor's Courtroom by Justice Blackmun

Observations on current federal practice

Criminal Docket

Assignment of cases

Scheduling of cases

Exchange of information

Motion practice

Sentencing

Civil Docket

Administrative agency review

Resolving jurisdictional issues early

Motions requiring fact-finding

Class-action certification

Summary judgment

Scheduling hearings (when request for hearing is granted)

Scheduling trial
Advantages of consent to trial before U.S. Magistrate

III. Lightening the Burden

Pretrial tips for counsel

Consider alternate dispute resolution

Settlement conference

Summary jury trial

Lighten up during discovery

Good-faith effort to resolve disagreements

Trial tips for counsel

Consent to trial before U.S. Magistrate

Know local rules

Beware of questioning by judge

Lighten Up -- Have Fun

IV. Enlightening Decisions

Fineman v. City of Des Moines
Pioneer Hybrid v. Holden Foundation Seeds
Nordbrock v. Hawkeye Bank Corp.
U.S.A. v. Unit 7, Unit 8, etc. (U.S.A. v. Kiser)
U.S.A. v. Kneen
U.S.A. v. Gaubert
U.S.A. v. Six and Petary
Hibbs v. K-Mart
FDIC v. First Interstate Bank
Swantz v. Gates Rubber Co.
[Not to forget all Eighth Circuit Court of Appeals decisions]

DISTRICT SOUTHERN IOWA

MONTH SEPTEMBER , 1988

# MONTHLY STATE OF THE DOCKET REPORT
# U.S. DISTRICT COURTS
# EIGHTH CIRCUIT

Cases Pending

| | First of Mo. | Filed | Transfers In | Transfers Out | Closed | End of Mo. | 6 Mos. or less | 6 Mos. - 1 yr. | 1 - 2 yrs. | 2 - 3 yrs. | 3 yrs. or more |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Criminal | 63 | 10 | | | 7 | 66 | 39 | 14 | 3 | 1 | 9 |
| Civil | 2449 | 104 | | | 141 | 2412 | 1360 | 324 | 467 | 172 | 89 |
| Title VII | 57 | 1 | | | 4 | 54 | 15 | 9 | 15 | 12 | 3 |
| Land Condemnation | 6 | | | | 1 | 5 | | | 2 | 1 | 2 |
| Total | 2575 | 115 | | | 153 | 2537 | 1414 | 347 | 487 | 186 | 103 |

Total Cases 1 Year Past: 1694
Total Cases 2 Years Past: 1485
Total Cases 3 Years Past: 1493

TOTALS EACH JUDGE

| Name | | No. |
|---|---|---|
| Donald E. O'Brien | 444 | 6205 |
| W.C. Stuart | 19 | 6306 |
| Harold D. Vietor | 540 | 6307 |
| Charles R. Wolle | 1430 | 6308 |
| R.E. Longstaff | 37 | 63AA |
| Lyle E. Strom | 1 | 6710 |

TOTAL: 2471

Mail to: Circuit Executive Office
P.O. Box 75428
St. Paul, Minnesota 55101
(FTS 777-3311)

cc: Circuit Executive Office
1114 Market Street, Room 610
St. Louis, Missouri 63101
(FTS 279-6219)

COMMENTS:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

STATE OF THE DOCKET AS OF JUNE 30, 1988
COMPARED TO
STATE OF THE DOCKET AS OF JUNE 30, 1980

## FILINGS

| 1980 | 1988 | Increase or Decrease |
|---|---|---|
| 952 Filed (381 per judge) | 2,368 Filed (947 per judge) | +148.7% |
| 849 (89.2%) Civil | 2,265 (95.6%) Civil | +166.8% |
| 103 (10.8%) Criminal | 103 (4.4%) Criminal | 0.0% |

## PENDING CASES

| 1980 | 1988 | Increase or Decrease |
|---|---|---|
| 860 Cases Pending (344 per judge) | 2,579 Cases Pending (1,032 per judge) | +199.9% |
| 823 (95.7%) Civil | 2,525 (97.9%) Civil | +206.9% |
| 37 (4.3%) Criminal | 54 (2.1%) Criminal | +45.9% |
| Of the civil, 23 were habeas corpus cases and 102 were prisoner §1983 cases, or 15% of the total civil cases. | Of the civil, 35 were habeas corpus cases and 262 were prisoner §1983 cases, or 11.8% of the total civil cases. | |
| 56 civil cases, or 6.9%, were over three years old. | 79 civil cases, or 3.1%, were over three years old. | |

## TRIALS

### 1980

There were 86 trials during the 12 months ended 6-30-80:

| | | Jury | Non-Jury |
|---|---|---|---|
| Civil Trials | 58 | 15 | 43 |
| Criminal Trials | 28 | 13 | 15* |

Median time from issue to trial for civil cases was 12 months.

Median time from filing to trial in criminal cases was not computed, but time from filing to disposition was 3.7 months.

### 1988

There were 93 trials during the 12 months ended 6-30-88:

| | | Jury | Non-Jury |
|---|---|---|---|
| Civil Trials | 58 | 18 | 40 |
| Criminal Trials | 35 | 15 | 20* |

Median time from issue to trial for civil cases was 17 months.

Median time from filing to disposition in criminal cases was 3.1 months.

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* Includes pretrial evidentiary hearings, such as a hearing on a motion to suppress evidence.

# COMMENTS FROM THE OTHER SIDE OF THE COUNSEL TABLE

Nick Critelli
Des Moines, Iowa

Learned colleagues of the Iowa Defense Counsel, please accept these comments in the spirit of cooperation that binds us together as Trial Lawyers.

1.

## On the Polarization of the Trial Bar

Section 602.10101 authorizes the Supreme Court to admit attorneys and counsellors to practice in the Courts of this state. It does not authorize or conceive of the division of the Trial Bar into "plaintiff's attorneys or defense attorneys." Yet, through practice, custom and pure chance, the general Bar has become divided so as to designate Trial Lawyers as a distinct branch of the profession, and, within that branch, to further designate between civil plaintiff trial lawyers and defense lawyers. Far too often younger lawyers tend to take on the identity and cause of their client. If they are defending, they become "defense lawyers" and everyone else becomes "plaintiff's lawyers." Young lawyers would do well to keep in mind that, in reality, through education and socialization, they have more in common with their opposing colleague than with either the insurance

company or injured plaintiff. The insurance carrier or the injured plaintiff retains one's services and talent as an advocate for a particular piece of litigation. E.C. 17 mandates that "the obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interest or desires of his client." Experience has taught us that crusades, no matter what the cause, are subjective, and subjectivity is a severe detriment in advocacy.

Cooperation between advocates is essential for the successful operation of the judicial system. The goal of the litigation process is a fair trial not a favorable verdict. E.C. 7-1. That goal cannot be attained unless counsel cooperate whenever necessary.

The parties engage counsel for a professional resolution of their differences. By the retention, they have a right to expect that professionalism and collegiality will be maintained by their chosen professional advocates. Counsel should understand and appreciate that such standards are for the protection of the client. By engaging in less than professional conduct, counsel puts the client at risk. Polarization

and subjectivity to the detriment of the client is nowhere more evident that in Kooyman v. Farm Bureau Mut. Ins. Co., 313 N.W.2d 30 (Iowa 1982), where Farm Bureau's attorney advised plaintiff's counsel to "kiss my ---," in response to a settlement demand. Such conduct became a central issue in a series of litigation concerning Farm Bureau's bad faith. By allowing himself to become subjective, Farm Bureau's attorney deprived his client of the right to objective counsel and subjected the client to damage.

2.

On the Training of the Young Advocate

Unlike every other English speaking country in the world, we have no formal internship or training requirement for our young advocates. Upon successful completion of the Bar examination and admission to the Bar, a young lawyer can begin practice without ever having appeared in Court. Far too often, the young lawyer, while practicing with a firm, is given little, if any, formal training or guidance. Training, at best, is on a hit or miss or "catch me as you can" basis. Training usually consists of allowing the lawyer to engage in discovery. When employing a new

associate, senior counsel should be mindful that the young lawyer is without education or training in the customs and practices of the profession. Orientation and initiation regarding professional relationships, client relationships and one's duty to the Court are of equal importance with instruction in substantive and procedural aspects of the law. In addition to doing the young lawyer a disservice, senior counsel can be disciplined for failing to adequately supervise the new lawyer. In Re Neimark, 214 N.Y.S.2d 12 (2nd Div. 1961).

3.

On Discovery Abuse

Depositions are the most expensive form of discovery. To the client, every minute consumed and word uttered by counsel have the familiar ring of the cash register. One must seriously question the competency and ethics of the advocate who begins every deposition by eliciting the witness' neonatal history. Counsel should consider the following additional methods of factual discovery:

1. Meet with opposing counsel in advance of discovery and discuss what

information may be needed and how it can be acquired.

2. Ask opposing counsel for an office interview with the opposing party. Most experienced trial lawyers realize that in representing a plaintiff they must give relevant information to opposing counsel, so that counsel can properly evaluate the risk exposure on the case and intelligently enter into settlement negotiations. Usually the plaintiff is plaintiff's counsel's best exhibit.

3. If deep background information is necessary, consider sending a questionnaire to opposing counsel to be answered by the opponent under oath.

4. Discuss, from an objective viewpoint, the contested issues in the case so that both sides may fully understand each other's position. Far too often the only meaningful discussion of the case occurs in the expensive form of motions and objections.

While formal discovery should not be entirely disregarded, it should be employed in a meaningful manner. Premature and injudicious use of contention interrogatories wastes the time of Court and counsel and adds to the client's expense. See, In Re Convergent Technologies Securities Litigation, No. C-84-20749-RPA (N.D. Ca. Oct. 28, 1985), where U.S. Magistrate Wayne D. Brazil limited the use of contention interrogatories by placing the burden of justification for their early use on the propounding party.

Formal discovery with full use of interrogatories and depositions is a luxury enjoyed only by American lawyers. Like the proverbial goose with the golden egg, if we do not check discovery abuse, we will soon lose the right to use it.

4.

On Conflict of Interests...

Counsel Protect Thyself

Insurance defense counsel walk a precarious line regarding conflicts of interest. While the interest of the insured and insurer may be united at the inception of the litigation, as it ensues, either the insurer or

the insured may adopt a position adverse to the other. While it is virtually undisputed among lawyers that the insurer-employed defense counsel's client is "the insured," the platitude is, in reality, nothing more than a legal fiction. Miselman, in his work "Attorney Malpractice: Law and Procedure," suggests that "it may be unreasonable to expect a lawyer to make any strong requests of the insurance company in behalf of a one-time non-paying client." The unsoundness of the fiction is manifest in its operation. Explain to a jury, for example, that one's client is the insured and not the insurance company who regularly employs and pays counsel and to whom counsel regularly reports. Further, explain that counsel is discharging his or her duty to advise and keep the "client" informed by regular communication with the insurer, no copies of which are sent to the insured.

Plaintiff's counsel routinely exacerbates defense counsel's precarious position by appropriate time-limited policy limit settlement demands. It is submitted that the realities of modern practice dictate a change in philosophy for the protection of all concerned: the insured, insurer, as well as, assigned

defense counsel. Given the ubiquitous nature of liability insurance, the prohibition against direct action should be revisited. Likewise, assigned defense counsel's dual responsibility should be explored and explained to both "clients," the insured and insurer. The insured should be allowed input, or, at the very least, a veto regarding the choice of a defender.

5.

Admit the Obvious

It is axiomatic in advocacy that one should admit the obvious to enhance credibility regarding the contested. Far too often defense counsel will deny and "put the plaintiff to the proof" on the obvious. Such tactics almost universally fail, and, in doing so, damage the defense credibility. Unfortunately, the practice is common in two areas: evidentiary foundation and matters of collateral fact.

An adequate evidentiary foundation serves two purposes in litigation. It not only satisfies the technical requirements of the law of evidence, but it also provides evidence of credibility and quality for the finder of fact. By an injudicious objection regarding foundation, the objector may be forced to

hear an expanded foundation enhanced with respect to the credibility and reliability of the exhibit.

With respect to collateral fact, defense counsel are oftentimes unwilling to admit the truth of the obvious, thereby putting their client's credibility in question. If, for example, ownership, operation or, in some situations, liability is clear and not subject to legitimate dispute, defense counsel may do well in admitting the fact and focusing the litigation on the truly contested issues in the case.

6.

The Plea for Mercy

Rarely seen, but universally feared by plaintiff's counsel, is the plea for mercy. The plea admits liability and indicates to the jury that defendant is willing to compensate for just damages. Usually an amount, generally extremely low from the plaintiff's viewpoint, is suggested to the jury. Inherent in the plea is the fact that plaintiff, by not accepting such a reasonable position, is greedy and only wishes to engage in the litigation lottery. To be effective, however, it is submitted that the plea must be disclosed to the jury in voir dire and reaffirmed in

opening statement. The effect of the plea is to shift scrutiny from the defendant to the plaintiff. Plaintiff's reasonableness becomes the sole issue in the litigation. When used with an early pre-trial strategy designed to commit the plaintiff to an unreasonably high or exorbitant dollar demand, which can later be used to impeach the plaintiff's trial position, the plea can be extremely effective.

## CONCLUSION

While jurisprudence is a science, advocacy is an art. An artist must learn by doing, studying and sharing ideas. As members of the Trial Bar, we are dedicated to the concept of resolving disputes through a process designed to guarantee a fair trial. As such, all trial lawyers, whether their interest or preference lies with the plaintiff or defendant, would benefit from the unified Trial Bar.

# PRODUCTS LIABILITY UPDATE

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Council Bluffs, Iowa

## I. APPLICATION OF CHAPTER 668 TO STRICT LIABILITY IN TORT.*

### A. In General.

1. The Chapter applies to all defined instances of "fault", including strict liability in tort and breach of warranty, if the same results in personal injury or damage to property. The act is patterned largely after the Uniform Comparative Fault Act.

2. The statute applies to damages sought for injury or death to person or damage to property. The comments to the Uniform Act make clear that the application of its provisions is confined to physical harm to person or property, and does not include matters such as economic loss resulting from a tort such as negligent misrepresentation, or interference with contractual relations, defamation, etc.

3. "Breach of warranty" as utilized in §668.1 refers to actions for breach of warranty resulting in personal injury or damage to property. Comments to the Uniform Act state that there is no intent to include within its coverage actions that are fully contractual in nature, as where plaintiff is suing solely to recover the benefit of a bargain. The restriction of the scope of the Act to physical harm to person or property excludes such claims, and there is no legislative intent evidenced to displace the warranty provisions of the Uniform Commercial Code. By implication, Iowa Code Chapter 668 is similar in scope.

4. Inclusion of the various types of "fault" in §1 of the Act results in the Act creating a true system of comparative causation. As such, the "fault" of a plaintiff may be

compared to the strict liability of the defendant, and liability of one defendant may be compared to that of another defendant, even if the underlying bases of liability are different, e.g., negligence of one and strict liability of another. §§668.1, 668.3.

B. Effect on Defenses.

1. Contributory Negligence and Assumption of Risk.

a. One of the effects of the application of Chapter 668 to products liability cases is on the defenses of contributory negligence and assumption of risk. Whereas "contributory negligence", as traditionally defined, had not been a defense to strict liability action, plaintiff's contributory negligence will now be considered and compared by the jury with the fault of other parties combining to produce the injury.

b. Chapter 668 diminishes the defense of secondary assumption of risk, which had been a complete defense. Now, such assumption of risk is merely another form of contributory fault of the plaintiff that may reduce, but will not bar, recovery. §668.1.

c. The type of assumption of risk which will constitute contributory fault under §668.1 is secondary assumption of risk, i.e., unreasonable assumption of a known risk. See, Nichols v. Westfield Industries, Ltd., 380 N.W.2d 392, 399 (Iowa 1985).

d. Chapter 668 defines "fault" to include conduct which is "in any measure negligent." It is not likely, however, that a plaintiff's negligence in failing to discover a defect can be considered as contributory fault since the existence of any duty on his part to do so seems lacking.

e. In classifying assumption of risk as merely another form of contributory fault, Iowa has legislatively resolved an issue which has produced conflicting holdings in other jurisdictions concerning the issue. Compare, e.g., Thibault v. Sears Roebuck & Co., 395 A.2d 843 (N.H. 1978) (holding assumption of risk is merely another form of contributory fault and will not totally bar recovery) with, Zahrte v. Sturm Ruger & Co., 498 F.Supp. 389 (D. Mon. 1980) (applying Montana law, assumption of risk as a complete defense to strict liability survives adoption of comparative fault).

2. Misuse of the Product.

a. Chapter 668 has a substantial effect on the defense of misuse of the product.

b. Before the adoption of comparative fault, the Iowa supreme court had held that misuse of the product was not an affirmative defense, but proof of foreseeable use was an element of plaintiff's strict liability case. Hughes v. Magic Chef, 288 N.W.2d 542 (Iowa 1980).

c. Under §668.1, the definition of "fault" specifically includes "misuse of a product for which the defendant otherwise would be liable". Thus, misuse would appear to be an affirmative defense which must be pled. Iowa Code §619.17 (1987).

d. The type of misuse which will be treated as contributory fault is misuse "for which the defendant otherwise would be liable". This terminology means foreseeable misuse. The comments to the Uniform Act support such an interpretation in stating:

> "The meaning in this section is confined to a misuse giving rise to a danger that could have been reasonably anticipated and guarded

against. The Act does not apply to a misuse giving rise to a danger that could not have reasonably have been anticipated and guarded against by the manufacturer, so that the product was not therefore defective or unreasonably dangerous". Uniform Comparative Fault Act §1, official comment.

e. The foregoing distinction has been recognized and thoroughly discussed by the supreme court. Henkel v. R&S Bottling Co., 323 N.W.2d 185, 190-192, (Iowa 1982); Hughes v. Magic Chef, 288 N.W.2d 542, 545-46, (1980); Hegwood v. General Motors Corp., 286 N.W.2d 29, 31 (Iowa 1979). While the statute therefore "reverses" the holding of Hughes, supra, by classifying misuse as an affirmative defense, the language of §668.1 seems to clearly recognize that an unforeseeable misuse is outside of this definition.

f. The language of §668.1, in light of the comments to §1 of the Uniform Act, indicates that unforeseeable misuse remains a complete defense. If the harm was the result of unforeseeable misuse, such misuse is deemed the proximate cause of the injury and not any defect or any unreasonably dangerous condition of the product. This view is supported by the supreme court's past discussions of unforeseeable misuse. See, Henkel v. R&S Bottling Co., supra, 323 N.W.2d at 192; Hegwood v. General Motors Corp., 286 N.W.2d at 31.

C. Damages.

1. Prorata set off is provided for under §668.7 of the Iowa Code which provides:

"Section 668.7 Effect of Release.

. . . However, the claim of the releasing person against other persons is reduced by the amount of the released

persons equitable share of the obligation, as determined in §668.3, Subsection 4.

Section 668.3 Comparative Fault - Effect - Payment Method.

4. The Court shall determine the amount of damages payable to each claimant by each other party, if any, in accordance with the finding of the Court or jury."

2. The conclusion that comparative fault statute has replaced the pro tanto credit rule with the pro rata rule is supported by the following cases:

A. Glidden v. German, 360 N.W.2d 716, 720 (Iowa 1984): "We recognize that the Iowa legislature has included in its recently--enacted comparative fault statute a provision for pro rata credit,. . ." (holding comparative fault statute did not apply to that case).

B. Duggan v. Hallmark Pool Manufacturing Co., Inc., 398 N.W.2d 175, 179 (Iowa 1986): "Because this case was filed before July 1, 1984 and tried after that date, statutory provisions for pro rata application of settlements contained in Iowa Code Chapter 668 apply only to the extent necessary to determine the joint and several liability provisions of that chapter."

C. Kopsas v. Iowa Great Lakes Sanitary District, 407 N.W.2d 339 (Iowa 1987): The Court pointed out that this case presented a question of first impression concerning the Iowa comparative fault statute and stated: "We conclude the Iowa legislature intended that statute to eliminate the pro tonto credit rule of Glidden v. German, 360 N.W.2d 719 (Iowa 1984) with the change applicable to all tort actions tried after July 1, 1984. In that case, it turned out the

plaintiff made a bad settlement by accepting $3,000.00 from one of the defendants who was eventually held to be 40% at fault and would have been responsible for $20,000.00 worth of damages had it not settled. The District Court improperly calculated the amount due the plaintiff by subtracting the plaintiff's percentage negligence and the settlement amount from the $50,000.00 verdict. The Supreme Court held that the remaining responsible defendant was to pay its percentage portion of fault times the total verdict. Some defense counsel may argue that in the case where a settling party pays more in settlement than is attributed to him by the jury that the remaining defendant should get credit for the overpayment. Based on the above cases, this is not a correct interpretation of the statute."

## II. STATUTORY CHANGES

### A. LIMITATION ON PRODUCTS LIABILITY OF NON-MANUFACTURERS UNDER §613.18 OF THE CODE:

1. Prior Law: Prior to §613.18 becoming effective on June 8, 1986, Iowa law provided under its tort and implied warranty of merchantability law that anybody who was in the business of selling a product could be held liable for any defects that were unreasonably dangerous or for any breach of implied warranty of merchantability. See Restatement of Torts, (Second), §402A and §§554.2104 and 554.2314 of the Iowa Code.

2. Text of Section 613.18: Limitation on products liability of non-manufacturers.

   a. A person who is not the assembler, designer, or manufacturer, and who wholesales, retails, distributes, or otherwise sells a product is: (a) immune from any suit based upon strict liability in tort or breach of implied warranty of merchantability which arises solely from an alleged defect in the original design or manufacture of the

product. (b) Not liable for damages upon strict liability in tort or breach of implied warranty or merchantability of the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this State and has not been judicially declared insolvent.

b. A person who is a retailer of a product and who assembles a product, such assembly having no causal relationship to the injury from which the claim arises, is not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability which arises from an alleged defect in the original design or manufacture of the product upon proof that the manufacturer is subject to the jurisdiction of the courts of the State and has not been judicially declared insolvent.

c. An action brought pursuant to this section, where the claimant certifies that the manufacturer of the product is not yet identifiable, tolls the statute of limitations against such manufacturer until such time as discovery in the case has identified the manufacturer.

3. Effect of the change.

a. This section applies to all wholesalers, retailers, distributors or persons who otherwise sells the product as long as they are not the assembler, designer or manufacturer.

b. Those persons are immune as long as the sole defect occurred in the original design or manufacture of the product (§613.18(1)(a)).

c. Section 613.18(1)(b) extends the immunity to a class of persons named on other claims as long as the manufacturer of the product is subject to the jurisdiction of the courts of Iowa and has not been declared judicially insolvent.

d. Section 617.18(2) seems to codify the Iowa law's present requirement of proximate cause by exempting the "assembler" of a product from liability where the assembly has no causal relationship to the injury arising from an alleged defect in the original design or manufacture of the product upon proof that the manufacturer is subject to the jurisdiction of the courts of the State of Iowa and has not been judicially declared insolvent.

e. The statute of limitation is tolled as to a manufacturer of the product who is not identifiable at the time the action is filed "until such time as discovery in the case has identified the manufacturer."

4. Questions to be answered:

a. Does the phrase "not judicially declared insolvent mean that the Court in which the case is filed must decide whether the manufacturer is insolvent or does this mean that proof that the company has not been in bankruptcy or declared insolvent in any of the 50 states meets this requirement?

b. Under Subsection 3 allowing tolling of the statute of limitations, can you sue the non-manufacturer in order to certify that you cannot find the manufacturer to toll the statute or can you sue John Doe or Corporation X as defendants?

c. Does this section shorten the statute of limitations after discovery? Or does a two year statute begin to run? How will this section relate to Chapter 668.8 which tolls the statute as to all future parties once the original action is brought?

B. STATE OF THE ART DEFENSE

1. Text of law:

668.12 Liability for Products - State of the Art defense.

In any action brought pursuant to this chapter against an assembler, designer, supplier of specifications, distributor, manufacturer or seller for damages arising from an alleged defect in the design, testing, manufacturing, formulation, packaging, warning, or labeling of a product, a percentage of fault shall not be assigned to such persons if they plead and prove that the product conformed to the state of the art in existence at the time the product was designed, tested, manufactured, formulated, packaged, provided with a warning, or label. Nothing contained in this section shall diminish the duty of an assembler, designer, supplier of specifications, distributor, manufacturer or seller to warn concerning subsequently acquired knowledge of the defect or dangerous condition that would render the product unreasonably dangerous for its foreseeable use or diminish the liability for failure to warn. (Applicable the cases filed on or after July 1, 1986.)

2. Prior Law: In Iowa it has always been the law in a strict liability case that the jury must consider the duty of the manufacturer at the time that the product was manufactured. Aller v. Rodger Machinery Manufacturing Company, Inc., 268 N.W.2d 830 (Iowa 1978).

3. Questions to be answered:

   1. Does this statute shift the plaintiff's burden to prove that the product was in a defective condition at the time of sale by requiring the defendant to "plead and prove that the product conformed to the state of the art in existence at the time?" Does "state of the art" under the statute mean what is feasible or will it be defined as it was in Chown v. U.S.M. Corp., 297 N.W.2d 218 (Iowa 1980) which distinguishes state of the art from custom? Custom in the industry may be something less.

2. What is the extent of the duty to warn concerning subsequently acquired knowledge of a defect or dangerous condition?

C. PUNITIVE DAMAGES

1. Chapter 668A.1, Punitive or exemplary damages, initially became applicable to cases filed on or after July 1, 1986.

2. Under 668A.1(a), as amended, the plaintiff must now prove "by a preponderance of clear, convincing and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." (Effective July 1, 1987 on all causes of action accruing on or after July 1, 1987 and on all causes of action accruing before July 1, 1987 and filed on or after September 15, 1987.)

3. Requires submission of special interrogatories to the jury; make findings of fact concerning whether the conduct constituted willful and wanton disregard for the rights or safety of another and whether the conduct of the defendant was directed specifically at the claimant. (See attached proposed jury instructions.)

4. If the conduct was not directed specifically at the claimant only 25% of the punitive damage award after payment of all applicable costs and fees is to be paid to the claimant with the remainder of the award to be ordered paid into a civil reparations trust fund.

5. Section 668A.1(3) ratifies the requirement that the mere allegation of punitive damages shall not form the basis for discovery of the wealth or ability to respond for damages on behalf of the party from whom punitive damages are claimed until a prima facie case is made to establish such liability.

D. ADDITIONS TO COMPARATIVE FAULT STATUTE RE: DAMAGES AND SUBROGATION

1. Section 668.5(3) was added to provide: contractural or statutory rights of

persons enumerated in §668.2 (parties defined) for subrogation for losses recovered in proceedings pursuant to this chapter shall not exceed that portion of the judgment or verdict specifically related to such losses, as shown by the itemization of the judgment or verdict returned under §668.3, Subsection 8, and according to the findings made pursuant to §668.14, Subsection 3, and such contractual or statutory subrogated persons shall be responsible for a pro rata share of the legal and administrative expenses incurred in obtaining the judgment or verdict.

2. Special Interrogatories.

Section 668.3(8) provides that the jury shall answer special interrogatories and make findings on each specific item of requested or awarded damages indicating that portion of the judgment awarded for past damages and that portion awarded for future damages. This would include items for medical care, rehabilitation services, custodial care, economic loss, etc. (Section 668.14.)

3. Subrogation rights of non-parties as defined in 668.2 are limited to amounts awarded by the jury for those specific losses such as medical bills, set forth in the answer to special interrogatories less a prorata share of the legal and administrative expenses incurred in obtaining the judgment or verdict. Does this mean that a person with subrogation rights can obtain the total amount of its rights without a reduction for the plaintiff's fault?

4. Subrogation payment restrictions imposed pursuant to Subsection 3 apply to settlement recoveries, but only to the extent that the settlement was reasonable.

5. Section 668.13 Interest on Judgments:

a. Interest on all damages except future damages accrue from the date of the commencement of the action.

b. Interest on future damages as determined by the jury in answering special interrogatories shall not begin to accrue until the date of the entry of the judgment.

c. If the interest rate is fixed by contract on which the judgment is entered, the interest allowed shall be at the rate expressed in the contract, not exceeding the maximum rate permitted under §535.2.

d. Interest rate is to be determined as of the date of judgment at a rate equal to the coupon issue yield equivalent, as determined by the United States Secretary of the Treasury, of the average accepted auction price for the last auction of United States Treasury Bill settled immediately prior to the date of the judgment. The State Court Administrator shall distribute notice monthly of that rate and any changes to that rate to all District Courts.

e. Interest shall be computed daily to the date of payment, except as may otherwise be ordered by Court pursuant to structured judgment under §668.3 of §7.

6. Section 668.14 Evidence of Previous Payment or Future Right of Payment:

a. The Court shall permit evidence and argument as to the previous payment or future right of payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation

services, and custodial care except to the extent that the previous payment or future right of payment is pursuant to state or federal program or from assets of the claimant or the members of the claimant's immediate family. This would seem to apply to worker's compensation payments or other insurance related payments.

b. If evidence or argument regarding these payments are permitted, the Court shall also permit evidence an argument as to the cost to the claimant of procuring those payments and as to any existing rights of indemnification or subrogation.

c. This section does not apply to §147.136 as it relates to personal injury claims against physicians, surgeons, etc.

7. These changes apply to all causes of action accruing on or after July 1, 1987; or all causes of action accruing before July 1, 1987 and filed on or after September 15, 1987.

III. INDUSTRY WIDE LIABILITY REJECTED BY IOWA SUPREME COURT

A. In the case of Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 19876), the Iowa Supreme Court rejected the application of market share liability, alternative liability and enterprise liability in the context of a DES case.

1. In this case there was evidence that one of the defendants had sold DES in the relevant market at the relevant time and two other companies probably had also done so. However, the Court found this to be insufficient to establish causation as a matter of law since plaintiff's evidence did not negate the marketing of DES in the relevant market area by many other manufacturers.

2. MARKET SHARE LIABILITY:

a. The theory of market share liability arises where the plaintiff is unable to identify the manufacturer of a generic product such as drugs or asbestos. After plaintiff identifies those defendants who comprise at least a "substantial share" of a given market, the burden of proof shifts to defendants to prove they could not have manufactured the product which harmed the plaintiff. Sindell v. Abbott Laboratories, 26 Cal. 3rd 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

b. If the defendant cannot prove that it did not manufacture the product, the Court applies the "market share" theory to a portion of damages among the defendants as a matter of policy since the defendants are better able to bear the cost than the innocent plaintiff. Sindell, supra, 607 P.2d at 936.

c. The Iowa Supreme Court rejected this theory as "Court constructed insurance plan" and held that providing relief on such a basis would provide "social engineering more appropriately within the legislative domain."

3. ALTERNATIVE LIABILITY

a. This theory imposes liability where the conduct of two or more defendants is tortious, and the plaintiff proves an injury was caused by one of them, but is unable to identify which has caused it. The burden of proof is then shifted to defendants to prove that they did not cause the harm. Restatement Tort, Second, §433B(3) (1965).

b. This theory was rejected by the Iowa Supreme Court in Mulcahy because the plaintiffs failed to prove a key element of proof that one of the parties had in fact caused the injury since other

manufacturers could have manufactured and sold the product.

4. ENTERPRISE LIABILITY

a. This theory imposes liability on manufacturers of a given industry based on group conduct and is premised on the theory that "joint control of the risk" by the industry warrants imposition of joint liability. Morton v. Abbott Laboratories, 538 F.Supp. 593, 598 (M.D. Fla. 1982).

b. The elements of enterprise liability may be summarized as follows:

1. The injury causing product was manufactured by one of a small number of defendants in an industry;

2. The defendants had joint knowledge of the risk inherent in the product and possessed a joint capacity to reduce those risks;

3. Each of them failed to take steps to reduce the risk but, rather, delegated this responsibility to a trade association.

c. This theory was rejected by the Iowa Supreme Court in Mulcahy because the Court found that the enterprise liability was designed for industry's control by a small number of defendants, whereas the number of potential DES manufacturers numbered in the hundreds.

5. CONCERT OF ACTION

a. This theory was not addressed by the Iowa Supreme Court since it was not a part of the certified question presented to it.

6. Other hybrid or modified theories of industry based liability was rejected by the Iowa Supreme Court.

7. The Court's opinion in Mulcahy contains equivocal language which indicates that its decision was not intended to "suggest nor foreclose adoption of any of these theories under other circumstances."

IV. PRODUCT LINE EXCEPTION TO SUCCESSOR CORPORATE LIABILITY REJECTED BY SUPREME COURT

A. In the case of DeLapp v. Xtraman, Inc., 417 N.W.2d 219 (Iowa 1987), the Iowa Court rejected the "product line" exception to traditional rules of successor corporate liability.

1. The general rule is that where one company sells or otherwise transfers all its assets to another company, the purchasing company is not liable for the debts and liabilities of the transferor. Arthur Elevator Corp. v. Grove, 236 N.W.2d 383, 391 (Iowa 1975). This principle of corporation law is accepted by the majority of American jurisdictions.

2. In the DeLapp case, the defendant corporation purchased substantially all of another corporation's assets in 1980, including equipment, inventory, raw materials, parts, patents and trade name. The defendant corporation was separate and independent from the corporation that manufactured and sold the allegedly defective hoist whose assets it purchased.

3. The plaintiffs asked the Court to depart from the general rule that a purchasing company is not liable for the debts and liabilities of the selling corporation unless (a) there is an agreement to assume such debts or liabilities; (b) there is a consolidation of the two corporations; (c) the purchasing corporation is a mere continuation of the selling corporation; or (d) the transaction was fraudulent in fact. Luedecke v. Des Moines Cabinet Co., 140 Iowa 223, 226, 118 N.W. 456, 457 (1908). They asked the Court to depart from this traditional rule of successor corporate liability by sanctioning what is known as the product line exception described as follows:

a. A party which acquires a manufacturing business and continues the output of its line of products . . . assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired. Ray v. Alad Corp., 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3 (1977).

4. The rationale for adopting the product line theory as set forth in the case of Ray, supra, was:

a. The virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successors acquisition of the business;

b. The successor's ability to assume the original manufacturer's risk spreading role;

c. The fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will be good will being enjoyed by the successor as a continued operation of the business.

5. The Iowa Court held that to impose liability on the defendant under the facts of this case would be inconsistent with the law of strict liability and tort as it is developed in the state based on the following rationale as set forth in other similar cases:

a. The exception is inconsistent with elementary products liability principles, and strict liability principles in particular, in that it results in an imposition of liability without a corresponding duty;

b. The exception threatens small successor businesses with economic annihilation because of the difficulty involved in obtaining insurance for defects in a predecessor's product; and

c. The exception is essentially a radical change in the principles of corporation law and as such should be left to legislative action.

V. DUTY TO WARN

A. No duty to warn exists where the danger is commonly known and obvious to the injured party. Garnes v. Gulf and Western Manufacturing Co., 789 F.2d 637 (8th Cir. 1986).

1. This case was pending in the Southern District of Iowa and involved an injured worker falling from a slanted top of a forging press the height of approximately ten feet where the injured party was aware of the danger; was familiar with the press and had inspected it 25 times; knew he was at a dangerous height; and acknowledged he was always careful in mounting and dismounting the press because he did not want to slip and fall. From these facts, the appeal Court held as a matter of law there was no duty to warn and it was error to submit that element to the jury.

2. The Court also held that an instruction stating "that it is the law that the manufacturer has a duty to produce a safe product with appropriate warnings and instructions where necessary" was erroneous because the words "where necessary" effectively advised the jury that the manufacturer had a duty to produce an absolutely safe product. The other instructions defining negligence and ordinary care did not cure this error. The Court stated the instruction should have discussed the fact that the duty was to use reasonable or ordinary care to produce a safe product.

B. No duty to warn exists if the manufacturer did not know or should not have known of the risk of danger. Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986).

1. This case involved allegations that the plaintiff had suffered a stroke as a result of chiropractic manipulation. The plaintiff

also sued Ortho Pharmaceutical Corp. under strict liability claiming it failed to warn chiropractors of the risk associated with giving chiropractic manipulations to patients who were taking Ortho's birth control pills.

2. In Brazzell v. United States, 788 F.2d 1352 (8th Cir. Iowa 1986), reached a totally opposite result in a case decided two days after Moore v. Vanderloo. The Court held that a manufacturer of swine flu immunization could be found strictly liable for failing to warn regardless of whether the manufacturer knew of the particular risk involved or whether the risk were foreseeable. It should be noted that the 8th Circuit's decision in Brazzell was an extension of its previous holding in another case where a prediction was made as to what the Iowa courts would do when faced with a similar issue.

C. Does the duty to warn include subsequently acquired knowledge of a defect or dangerous condition?

1. In §668.12 of the Iowa Code relating to the state of the art defense where it states that nothing contained in this section shall diminish the duty to warn concerning subsequently acquired knowledge of a defect or dangerous condition. Parent approval was given for this potential liability for failure to warn "post sale" in the case of Nichols v. Westfield Industries, Ltd., 380 N.W.2d 392, 398 (Iowa 1985) where the case indicated that a retailer's failure to cooperate in manufacturer's recall campaign and providing customers information concerning retrofit safety shields could support finding of negligence.

## VI. RECENT PRODUCTS LIABILITY CASES

A. Components parts manufacturer who designed, manufactured and distributed a prefabricated swimming pool assembled to constitute finished product may be held strictly liable for injuries resulting from defective condition of finished product. Duggan v. Hallmark Pool Mnfg. Co., Inc., 398 N.W.2d 175 (Iowa 1986).

1. Manufacturer of swimming pool in which motel guest sustained injuries could not avoid being held strictly liable for selling the finished product, a fully constructed swimming pool, notwithstanding its claim that it was merely a component parts manufacturer, where evidence clearly showed that manufacturer did more than merely produce component parts and, indeed, offered swimming pool as completely equipped and not only supplied concrete or an installation crew for pool floors or decks, but also supplied fiberglass sidewalls, steps, coping, filters, pumps, inlets, skimmers, lights, rope, ladders, diving boards, and suggested designs.

2. Because theory lacked support in record, the supreme court declined to expressly rule on the availability of the "mere supplier of component part" defense urged, but strongly suggested such a defense is unavailable if the component is causally connected to the injury citing, among other cases, Cooley v. Quick Supply Co., 221 N.W.2d 763 (Iowa 1984). 398 N.W.2d at 178.

3. The assembly of the components in the pool "package" to produce a finished product held not to effect a substantial change in its condition before reaching the consumer so as to constitute a defense. Id.

B. Dealer in used goods with latent defects, is not liable under doctrine of strict liability when the defect is caused while the goods were in the possession of a previous owner. Grimes v. Axtell Ford LincolnMercury, 403 N.W.2d 781 (Iowa 1987).

1. Automobile dealership which purchased used axle having unknown latent defect from salvage yard and which installed it in van after replacing axle's grease seal and pinion yoke could not be held liable for personal injuries or property damage caused by defect under doctrine of strict liability in tort; declining to follow Jordan v. Sunnyslope Appliance Propane & Plumbing Supplies Co., 135 Ariz. 309, 660 P.2d 1236 (App.); Hovenden v. Tenbush, 529 S.W.2d 302 (Tex.App.-San Antonio).

2. Opinion expressly holds open the possibility of Courts applying strict liability to sellers of used goods under other circumstances.

3. Decision based on court's conclusion its "goal to deter the sale of defective goods would not be significantly furthered by applying strict liability to dealers in used goods under the facts given." Id. at 785.

C. Repairer of grain auger is not strictly liable to user of auger injured by same for creating a "deceptive appearance of safety," where user was aware of hazard. Anderson v. Glynn Const. Co., Inc., 421 N.W.2d 141 (Iowa 1988).

1. Independent contractor which repaired and rebuilt grain auger could not be held strictly liable for injuries sustained by grain elevator employee when he slipped into pit while attempting to cross over hopper box and was mangled by auger; contractor's replacement of sections of auger beneath open hopper boxes did not create deceptive appearance of safety, as both injured employee and employer were aware that auger remained unguarded in those locations.

2. However, contractor's installation of auger sections beneath open hopper boxes involved supplying of chattel with dangerous propensities, and whether contractor was liable for negligent supplying of that chattel was for jury in action by injured grain elevator employee; contractor alone had benefit of manufacturer's safety instructions concerning dangers of unguarded openings for feeding grain into auger system.

   a. Manufacturer's literature pertaining to shielding of grain auger was admissible. Evidence was relevant on issue of superior knowledge, and any deficiency in foundation concerning when information was supplied to contractor was obviated by testimony of contractor's job superintendent concerning knowledge of general elements contained in literature at times material to litigation.

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D. ECONOMIC DAMAGES ARE NOT RECOVERABLE UNDER STRICT LIABILITY.

1. For the first time in a strict liability case, the Iowa Supreme Court held that purely economic losses without accompanying physical injury to the user or consumer or to the user or consumer's property is not recoverable. Nelson v. Todd's LTD., 426 N.W.2d 120 (Iowa 1988.

2. In this case, the plaintiffs were owners of a butcher shop which purchased a curing agent from the defendants to skill bacteria in its meat to prevent spoilage. The plaintiff used the product successfully for one and one half years and then received a batch which did not have the curing agent causing substantial quantities of meat prepared and sold by the plaintiffs to spoil. Plaintiffs claimed damages for loss of the spoiled meat, lost profits in their business and consequential loss in the value of the meat processing equipment and property.

3. A claim was submitted under express warranty and strict liability and the plaintiffs recovered a verdict which indicated the award could have been under either theory. A specific issue addressed by the Court was whether strict tort liability was applicable where a manufacturer produces a product designed to prevent harm to a purchaser's property, and the product fails to work resulting in the very harm sought to be prevented.

4. The Court analyzed the difference between tort and contract law and determined this was a case where the expectation-bargain protection policy of warranty law applied rather than the safety-insurance policy of tort law.

5. The tort theory did apply where the harm is due to a sudden or dangerous occurrence which frequently involved some violence or collision with external objects resulting from a genuine hazard in the nature of a product defect.

E. The plaintiff must prove that the product was defective and unreasonably dangerous at the time of sale. Patterson v. Woolworth Co., 786 F.2d 874 (8th Cir. 1986).

1. It was not inconsistent for a jury to find that an electric fan, while defective, was not unreasonably dangerous and they could have concluded that the ordinary consumers would expect that a fan which was obviously not functioning properly could start a fire if use of the fan continued.

2. Factors that the District Court should consider in deciding whether to exclude testimony of a witness which was not made known in a matter complying with a pretrial order include (a) the reason for failing to name the witness, (b) the importance of the witness' testimony, (c) the opposing party's need for time to prepare for the testimony, and (d) whether a continuance would be useful.

3. This ability of experimental evidence is within the discretion of the Court and does not depend on perfect identity between the actual and the experimental conditions.

F. Summary judgment will not lie under a statute of limitations defense in an asbestos case where the plaintiff knew he had asbestosis within two years before the filing of the lawsuit but did not know the asbestosis was caused by his exposure to asbestos products manufactured by defendants and that these products were defective and unreasonably dangerous or that defendants' wrongful acts caused his conditions. Foster v. Johns-Manvile Sales Corporation, 787 F.2d 390 (8th Cir. 1986).

1. The case contains good discussion of the "discovery rule" and indicates that a motion for summary judgment will not lie in latent disease cases where the facts do not show as a matter of law that the plaintiff knew his condition was caused by his exposure to asbestos products manufactured by defendants and that these products were defective and unreasonably dangerous.

G. The plaintiff in a products liability action has no obligation to reasonably inspect the product. Rolfs v. International Harvestor Co., 817 F.2d 471 (8th Cir. 1987).

1. A tractor operator was injured when he fell into the path of a tractor due to the tipping of the tractor seat to determine if the seat bolts were loose or missing. The jury returned a verdict in favor of the plaintiff but assessed 80% negligent to him. The plaintiff appealed arguing that the District Court errored in submitting the assumption of the risk defense to the jury because there was no evidence to support it.

2. This Court upheld the loss set forth in Hughes v. Magic Chef, Inc., 288 N.W.2d at 544 where the Court concluded that a manufacturer of a defective product was not relieved of liability by the negligent failure of the consumer or user to discover the defect in the product.

3. The appeals Court held that since the Court errored in submitting the assumption of the risk defense since there was no facts to support it and in giving the instruction on plaintiff duty to inspect that the plaintiff was entitled to the full amount of the verdict.

H. ADMISSIBILITY OF EXPERT OPINIONS:

1. In the case of Bornn v. Madagan, 414 N.W.2d 646 (Iowa App. 1987) involving a motorcyclist collision with the operator of a grain wagon, the Court upheld its earlier pronouncements that standing objections are disfavored by the Court and that the objection that the qualified expert's testimony invades the province of a jury is not valid.

2. The Court allowed expert testimony giving a chronological description of the series of events leading up to the occurrence of the evidence because the expert did not testify as to either party's fault or negligence and because it "assisted the trier of fact to understand the evidence and to determine a fact issue." Iowa Rule of Evidence 702.

3. Since the expert did not testify as to a legal conclusion on domestic law nor did he state an opinion as to a legal standard or address the relative fault of the parties, his testimony was proper.

I. IMPLIED WARRANTIES: Act of God could not be assigned percentage of fault to reduce rather than alleviate manufacturer's liability. Renze Hybrids, Inc. v. Shell Oil Co., 418 N.W.2d 634 (Iowa 1988).

1. Recovery under §554.2315 - Implied warranty for a particular purpose depends upon a showing that:

   a. The seller had reason to know of the buyer's particular purpose.

   b. The seller had reason to know the buyer was relying on the seller's skill or judgment to furnish suitable goods.

   c. The buyer in fact relied on the seller's skill or judgment to furnish suitable goods.

2. Even though a product may be used to kill dozens of different species of insects if the user asks for the best product to deal with a specific problem such as infestation of European corn bores and the product is recommended then the implied warranty for a particular purpose applies.

3. A party may recover interest as an element of consequential damages if interest payments are made to third parties which are reasonably foreseeable and proximately caused by the defaulting party's breach.

4. Under Iowa Rule of Evidence 705, the Court may require an expert to give prior disclosure of the underlying facts or data upon which he basis his opinions or inferences and to exclude testimony where that is not done was not abuse of discretion.

5. It was not an abuse of discretion for the Court to not allow an exhibit excluding any

warranties of merchantability or fitness for a particular purpose where the defendant untimely produced the document.

6. While an act of God could be asserted as a sole proximate cause defense, it could not be used to apportion a percentage of fault since an act of God is not an act of a party under Chapter 668.

J. DAMAGES: A loss of yield of a corn crop for failure to deliver and install the correct size drum on a corn planter was not an economic loss and was recoverable in a negligence action under the products liability theory. Manning v. International Harvestor Co., 381 N.W.2d 376 (Iowa App. 1985).

1. When distinguishing between economic loss and property damage which will allow compensation, the Court emphasized that there must be a closer connection between the injured party and the defendant then tangential economic losses. The plaintiff must own the property. Since the plaintiff owned the crop and was directly damaged because his crop was not as large as it should have been, the Court determined that the damage suffered by the plaintiff to his crop was property damage and not the indirect purely economic damage of the type disallowed in Nebraska Innkeepers v. Pittsburg Des Moines Corporation, 345 N.W.2d 124, 126 (Iowa 1984). (See Van Wyk v. Norden Laboratories, Inc., 345 N.W.2d 81, 88 (1984) where the Court held damages compensable where cattle owner suffered damages when his cattle died or became sick after being vaccinated.)

K. INTOXICATING BEVERAGES - Manufacturer of beer which was ultimately sold to a person who was involved in an automobile accident due to intoxication was not liable for failure to warn or for selling an unreasonably dangerous product. Maguire v. Pabst Brewing Co., 387 N.W.2d 565 (Iowa 1986).

1. Plaintiff injured in an automobile accident with an intoxicated driver sued Pabst asserting a number of theories including a claim

that Pabst had supplied a "defective product" under Restatement of Torts, Second, §402A. The Court held that alcoholic beverages are not "defective products" for the reason that they are not dangerous to an extent beyond the contemplation of an ordinary consumer.

2. The Supreme Court rejected the products liability of claims because the sections relied upon by the plaintiff were not intended to apply to the factual content involved and because the risks of intoxication were sufficiently known to the consumers at large.

* Acknowledgment is given to Richard J. Sapp for his permission to use portions of his 1986 outline presented at the ISBA annual meeting. That outline should be referred to for additional information on products liability.

COMMITTEE ON UNIFORM COURT INSTRUCTIONS
PROPOSED PUNITIVE DAMAGE INSTRUCTIONS
OF AUGUST 24, 1988

100.19 CLEAR, CONVINCING AND SATISFACTORY EVIDENCE. Evidence is clear, convincing and satisfactory if there is no serious or substantial uncertainty about the conclusion to be drawn from it.

AUTHORITY

Raim v. Stancel, 339 N.W.2d 621, 624 (Iowa Appeals 1983)

Sinclair v. Allender, 26 N.W.2d 320, 326 (Iowa 1947)

210.1 PUNITIVE DAMAGES. Punitive damages may be awarded if the plaintiff has proven by a preponderance of clear, convincing and satisfactory evidence the defendant's conduct constituted a willful and wanton disregard for the rights or safety of another and caused actual damage to the plaintiff.

Punitive damages are not intended to compensate for injury but are allowed to punish and discourage the defendant and others from like conduct in the future.

There is no exact rule to determine the amount of punitive damages, if any, you should award. In fixing the amount of punitive damages, you may consider all the evidence including:

1. The nature of defendant's conduct.

2. The amount of punitive damages which will punish and discourage like conduct by the defendant in view of [his] [her] [its] financial condition.

3. The plaintiff's actual damages.

AUTHORITY

Iowa Code section 668A.1

Nelson v. Restaurants, 338 N.W.2d 881 (Iowa 1983)

Suss v. Schammel, 375 N.W.2d 252 (Iowa 1985)

COMMITTEE ON UNIFORM COURT INSTRUCTIONS
PROPOSED PUNITIVE DAMAGE INSTRUCTIONS
OF AUGUST 24, 1988

210.2 SPECIAL INTERROGATORIES - PUNITIVE DAMAGES

Question No. 1: Has the plaintiff proven by a preponderance of clear, convincing and satisfactory evidence the conduct of the defendant constituted willful and wanton disregard for the rights or safety of another?

Answer "Yes" or "No"

ANSWER: _____

[If your answer to Question No. 1 is "No" do not answer Questions 2 and 3]

Question No. 2: What amount of punitive damages, if any, do you award?

ANSWER: _____

[If your answer to Question No. 2 is "None" do not answer Questions 3]

Question No. 3: Was the conduct of the defendant directed especially at _____?

Answer "Yes" or "No"

ANSWER: _____

[If your answer to Question No. 3 is "Yes" any punitive damages you award will go to the plaintiff. If you answer "No" a portion of the punitive damage award to be fixed by the court will be paid into a civil reparation trust fund to be used for indigent civil litigation programs or insurance assistance programs.]

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AUTHORITY

Iowa Code section 668A.1

# DEFENDING PUNITIVE DAMAGE CLAIMS-CLOSING ARGUMENT

Bibb Allen
Rives & Peterson
Birmingham, Alabama

## INTRODUCTION

There's no successful way to make a "how to" speech but that's what I've been asked to do and that's what I'll try to do. I have freely plagiarized articles of three well-known trial lawyers; Clayton H. Farnham with the firm of Drew, Eckl, and Farnham, Winning Final Arguments in "Bad Faith Cases" For The Defense, January 1988, Albert H. Parnell, partner in the law firm of Freeman and Hawkins An Aggressive Defense Against Punitive Damages Claims, For The Defense, November 1987, both of Atlanta, Georgia, and attorney, Guy O. Kornblum with the firm of Kornblum and McBride of San Francisco, California, First-Party Insurance Bad Faith; A Defense Perspective, Monograph, DRI 1988. I've used 96% of their suggestions. If I could have found some other articles, I would have plagiarized those also.

After studying the matter, I have come to the conclusion that probably the best way to deal with punitive damages is to get the legislature to abolish them.

Please understand that this outline contains only suggestions. I have illustrated the way I might say it if I say it at all.

The primary problem with a bad faith or fraud case is in evaluation. There are no broken bones, loss of wages or other special damages. In the past it has been difficult for the attorney handling the file to explain to a client that jurors don't seem to equate the act of compensatory damages with

punitive awards. Another problem is it seems like it's impossible to evaluate a possible punitive award.

The object of a final argument where a declaration has been made to face the issue head on is to dampen as much as possible any "heat" that may have been generated during the course of trial or simply because "heat" is built into the case because of bad facts or the status of the client represented. Car dealers and insurance companies are not the best possible clients. This is not to say that such arguments are for preventive reasons also.

Suggested Arguments

1. It seems to me that the large verdicts that have been rendered, by supposedly honest jurors, are cases where damages have not been met head-on. They have been met in the presentation of the evidence but not in final argument. I think the reason for this is that it's often felt that to argue damages, especially punitive damages, weakens the entire case. Perhaps that's so. I don't agree. I am of the opinion that punitive damages should be met head-on in every case where they are contended for.

It may be done similar to this:

"They tell me not to argue damages because it admits my client owes something"."It's a poor lawyer who does not argue all of the issues in a lawsuit. Lawyers have a duty to their client to address every single issue in a lawsuit including damages. The plaintiff asks for vindictive damages. He's asking for money from my client to provide a windfall for his client who is not as a matter of right entitled to a penny.

3. Jurors, some way, must be reminded what money is. From the results I see in my own jurisdiction andfrom what I read is

happening over the rest of the country, jurors don't seem to know what a million dollars is.

a. Stan Starnes of Starnes & Atchison, a Birmingham law firm, successfully attacked the problem in the defense of a local doctor.

"Now, they throw around a million dollars like most people talk about a hundred dollars. And I think all of us would agree that a hundred dollars is a lot of money. And they talk about a million dollars because most of us can't really comprehend the difference between a thousand dollars and a million dollars. And they try to take advantage of that. I was trying to think last night what's the difference in a thousand dollars and a million dollars. A thousand one dollar bills is eight inches high, eight inches high, a thousand one dollar bills. A million one dollar bills is six hundred and sixty-six feet tall. That's taller than the biggest building in Birmingham, almost forty stories tall. That's the difference in a thousand and a million. Eight inches versus a stack of one dollar bills that would be one and a half times as tall as the SouthTrust building. But most of us have no comprehension of that, and there's no reason why we could. A thousand days ago was 2.7 years ago, 1984. A million days ago was 2,740 years ago, 753 years before Christ was born, the year they founded Rome. A thousand days is two years. A million days was 753 B.C. That's the enormous difference between a thousand and a million. And a thousand is a lot. This teaches us that 25,000, for example, is a large sum of money."

b. One might try something like this "Neal Newell speaks of a million dollars like it was nothing. He wants you to give a million dollars or more as a windfall to his client. Mr. Newell educated three beautiful children giving them the best education money could buy for less than $20,000.00 a piece. One can buy four Cadillacs and a Chevrolet for $100,000.00."

4. The problem with talking about a million dollars is that it gets the jury to think that $1,000,000.00 is expected. Jurors must be brought down to earth, that is, to reality.

"You know we get to the courthouse and for some reason we are expected to leave our common sense behind. It's a different world,a different life. It is the law of this state, ladies and gentlemen, as every state in the union that I know anything about, that you cannot leave your common sense at

home. The law requires you to bring it into that jury box. It's an indispensable element if you are going to render a true verdict. Don't get carried away with loud and seemingly sincere arguments by lawyers who are skilled in that. You are called on by law to use common sense and intelligence sometimes better termed as "horse sense".

5. Punitive damages might be a harsh word. Many successful lawyers call such damages "a windfall", "vindictive damages","exemplary damages", "smart money", "punishment damages". That approach seems to me to be a good idea.

6. Many lawyers call the plaintiff's attorney by his first name, or "my good friend".[1] It's probably a good idea to refer to your representative at the table by his first name. Newell always calls his client by his first name. The reason for this is to try to get the jury away from a formal setting into a "real life" setting. As to Newell, he does it hoping the jury will identify with his individual.

7. All attorneys agree that emphasis should be put on making the jury understand that punitive damages are not as a matter of right but a matter of discretion.

"Neal Newell argues his case as if his client is entitled as a matter of right to punitive damages. Not only is that not the law but it defies all reason and fairness. The law doesn't say you must punish your neighbor. That grave decision is left to you. If and when such a decision is made the amount to levy, again, is in your hands. The object is not to make the plaintiff rich but to do justice to your neighbors."

8. It might be well to remind the jury that a court of law is not a "give-away program".

"As to exemplary damages, I'd like to remind you as reasonable people that this isn't a give-away program. Man must live with man. He must live with reason. He must live with the fact that verdicts and numbers have a limit. That limit, thank

God, is in the hands of fair-minded people such as yourselves. Just because we are in the courthouse doesn't mean the plaintiff gets rich.

9. Most attorneys advise against suggesting a figure. It is fashionable for the plaintiff's lawyer to tell the jury that if the defense lawyer thinks punitive damages should be awarded, let him suggest a figure. As any defense lawyer knows, that's a first-class trap shrouded with what appears to be logic. It would have to be an exceptional case before one would ever get a recommendation from me that he should name a figure.

"Neal challenges me to suggest a figure as to what would be fair to award if, and I emphasis "if", punitive damages are in order. I've done a lot of things in the trial of a lawsuit, but I have never put myself in the jury box. I will not be presumptive enough to crawl over that rail and usurp your sworn duty. He can do so if he wants to but the law is very clear what lawyers say is not evidence and is not to be considered by you as evidence."

10. William J. McDaniel, in Birmingham, of the firm of McDaniel, Hall, Conerly & Lusk makes an argument that may be the best suggestion in this paper. Billy, at least, has found it very effective. "What's right is right and what's wrong is wrong. Billy says that four or five times an argument.Jurors want to be called responsible and fair.

"You, ladies and gentlemen, come from all walks of life. You have been raised by responsible parents. Maybe you didn't get an opportunity to attend law school but you don't need to attend law school to know that what's right is right and what's wrong is wrong. If something is wrong it shouldn't be done. It's your responsibility to do right after sifting through the sworn testimony."

11. Attorneys generally praise the jury system as every American's heritage. In my opinion, a little of that will not hurt the defendant's case. It doesn't hurt to remind the jury

that juries are sometimes unwilling to take their job seriously.

"There are people, because of an occasional jury that acts in an irresponsible manner, who want, apparently, to throw out the jury system and let scholars and bureaucrats take over. That's the last thing we want. Most juries do the best they can and try the best they can to mete out justice to both parties. I'll say to you,ladies and gentlemen, when you have done that, you have fulfilled your responsibilities to your neighbors and no one should dare say a word about it."

12. A must is to dwell on the conduct that the plaintiff, who has the burden of proof, must prove in order to receive punitive damages. It may be effective to have a written instruction in your hand that you know will be given and read it to the jury.

"My friend, Neal, speaks as though punitive damages are a matter of right. Vindictive damages are never a matter of right. I'll read to you what the Court will say: I charge you that before you can return a verdict against defendant to include punitive damages, you must be reasonably satisfied that the acts complained of were done intentionally or willfully or recklessly with disregard to the rights of others."

"Neal acts like his client is entitled to vindictive damages. I'll read to you the exact charge the Court will give: "The award of punitive damages is entirely discretionary."

"To give even a dollar, you must satisfy yourselves that Sara (she's your representative) acted maliciously and without concern for others. Neal says she did in the worst way. Well, I'll stick by her. I wish my client had a hundred Saras."

13. If you have a good witness like Sara build her up.

a. "You heard Sara. When it's over if you choose to punish her employer for her acts, she'll say to her boss I did the best I could. I'm sorry that my acts were so bad that ordinary people would choose to punish you for my acts."

b. "You have seen Sara Lindsey. How could Star Ins. Co. have hired anyone better. Admittedly, there are "bad apples" in every barrel but Sara is not one of them. Do you punish Star for hiring a woman of that caliber?"

14. "Changed Practices" Attorney Kornblum suggests that there may be times when the following argument will be effective. He points out the dangers.

"Another approach that should be used only in special cases, and even then with great care, is to introduce evidence' of "changed practices". The defense may admit that the subject claim was possibly not properly handled at times during its processing, but that the company has taken steps to change its practices in order to insure that future claims will not be processed in this manner. This may be combined with a further "admission" that the company was wrong in its claims decision. Accordingly, it would not be appropriate to award punitive damages to the plaintiff, as a windfall, to deter the defendant from doing that which it has already ceased to do. This approach can be very dangerous, for if the jury believes the insurer is not sufficiently sincere in its new practices or has used this approach in an attempt to head off a punitive damages award, the amount of punitives assessed may be substantial."

15. Anticipating remarks that may be made by plaintiff's attorney in closing.

"I'll not be back. Plaintiff's attorney has the last chance. I will be criticized and perhaps slandered a little. I don't mind what Neal says, he's said the same things before. I hope there are some people in this jury who will know that I could, if allowed, answer his criticisms and will think of what I would say. If there is a logical answer, I know you will think of it and give it credence in your deliberations."

16. It's very fashionable to argue that a corporation is nothing but a heartless shell with no heart and no soul.

"They say my client has no soul and no heart. It has many souls and many hearts. It's composed of real live people like Sara Lindsey. She has a heart and she has a soul. To punish her employer is punishing Sara."

17. If there is an effective way to call a juries' attention to the minimal amount of compensatory damages due the plaintiff as a matter of right and the large amount of punitive wanted as a windfall, it would be a good idea to do so.

18. Send out the message. This agrument by plaintiff's attorney is worrisome. Sam Franklin of Bradley, Arant, Rose & White in Birmingham, says that he gets his individual people back for final argument and puts them on the front row of the spectator's seats.

"Neal says send the message to the President of the Board in New York City or whatever big Northern city he is located in, that the people in Alabama don't cotton to fraud and deception. There on the front row are the folks who are interested in the outcome of this case. It's their lives that are affected by your verdict." [You might say "it's those people the plaintiff is asking you to put the lash to"].

## CONCLUSION

I'm through with a task I'll not undertake again. That is, to try in writing to tell a trial lawyer how to do. It can't be done. A good trial lawyer is going to do it "his way" and if he doesn't, he wouldn't last long in the kitchen.

Attorney Farnham [2]. says:

> "Any attempt to predesign a final argument immediately begins to tend toward the kind of specifics that have arisen from particular cases in one's past experience. That is why so many of the books on advocacy technique in the libraries are simply recitations of some aging warrior's reminiscences as he basks in the recollection of past victories."

I have tried to remember back to some of my past victories in "the pit". I find my recollections of such events are few. I wish I had not tried. I think all a defense lawyer can do is hope he can keep things reasonably balanced.

1. I will in this writing use the name Neal Newell, of the firm of Hare, Wynn, Newell & Newton. He's the dean of the Alabama plaintiff's lawyers. In the past when speaking to juries, I've used his name kindly more often than unkindly. I don't think he'll mind the "mild" reference in this paper.

2. Clayton is high on and recommends a book written by Richard A. Givens, The Art of Pleading A Cause (Shepard's/McGraw-Hill 1985). He says of the author: "Mr. Givens, although a lawyer, is schooled in the modern techniques of behavioral science, and speaks in terms of principles which can be well adapted to any situation."

# ANNUAL APPELLATE DECISIONS REVIEW

October 1987 - October 1988
410 N.W.2d through 427 N.W.2d

By
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## ADMINISTRATIVE LAW AND PROCEDURE

Pro Farmer Grain v. Department of Agriculture, 427 N.W.2d 466 (Iowa 1988).

Exhaustion of Remedies.

Department temporarily suspended grain dealer and warehouse operator's license for alleged record-keeping violations. After a contested case proceeding, the hearing officer issued a proposed decision calling for revocation. Agency rules gave the dealer 20 days to file an appeal within the agency. The dealer instead filed a petition for judicial review and requested a stay of further agency action, including the temporary suspension. HELD: The statutory provisions in § 17A.19 for review of intermediate agency action requires proof that adequate administrative remedies have been exhausted and that review of the final agency action would not provide an adequate remedy. Plaintiff failed to exhaust adequate administrative remedies. Court notes that plaintiff did not seek immediate judicial review of the temporary suspension itself.

Banos v. Shepard, 419 N.W.2d 364 (Iowa 1988).

Judicial Review.

District court lacked subject matter jurisdiction to entertain arrestee's equity petition requiring Department of Public Safety to expunge certain terms in his criminal history file. District Court exceeded its authority by requiring the Department of Public Safety to remove contested term from inmate's criminal history files, as arrestee had not yet exhausted administrative remedies or petitioned for judicial review.

P

Brown v. John Deere Waterloo Tractor Works, 423 N.W.2d 193 (Iowa 1988).

Judicial Review.

Mailing notice of petition for judicial review two days before petition was actually filed constitutes substantial compliance with statute requiring a copy of petition be mailed within ten days after filing.

Council Bluffs Community School District v. Council Bluffs, 412 N.W.2d 171 (1987).

Judicial Review.

In age-discrimination complaint against school district with the Council Bluffs Human Relations Commission, a hearing officer conducted an evidentiary hearing and submitted a proposed decision to the commission. The commission met to consider the decision, and thereafter issued its decision, which adopted with only minor modifications the decision proposed by the hearing officer.

The school district petitioned for judicial review to the district court and asked for leave to present additional evidence. The district asserted that it had learned, after the commission's decision, that certain members of the commission had conflicts of interests and were biased against the district. The district court ordered that the recording of the commission's meeting be transcribed. When the recording did not permit a completely accurate transcription, and the district court granted the school district permission to "depose each and every member of the commission and all persons in attendance."

HELD: Section 17A.19 defines the content of the "record" before the district court on a judicial review petition. It does not include the oral proceedings before an administrative agency in which the hearing officer's report is discussed and considered. 17A also fails to authorize the discovery ordered by the district court. Chapter 17A entrusts the disposition of claims of bias to the agency itself, at least initially.

Hollensbe v. Iowa Department of Job Service, 418 N.W.2d 77 (Iowa App. 1987).

Judicial Review.

P

District court has discretionary authority to allow party to present additional evidence not included in agency record, but appellant here was not entitled to present additional evidence in workers' compensation claim where evidence had been available to her prior to hearing and had not been requested through subpoena or discovery.

Dean v. IDOT, 415 N.W.2d 649 (Iowa App. 1987).

License Revocation.

IDOT properly considered Iowa resident drivers' out-of-state convictions for speeding in determining whether license revocation for habitual violator was necessary, as the out-of-state statute was similar to in-state statute where both provided for conviction of driver found to have exceeded an established speed limit.

Larsen v. Oakland Community School District, 416 N.W.2d 89 (Iowa App. 1987).

Teacher Termination.

When school board meets to discuss possible termination of teacher's contract it is exercising a quasi judicial function, thus board members may not sit in on a meeting where they have a prejudicial interest in the case. The trial court properly determined persons' attendance at meeting for discussion of termination, who had previously been appointed on committee to observe claimant's teaching habits, did not render board as impartial decision maker, as no evidence existed to show any board member based its decision on evidence other than that presented at the hearing.

Bruner v. Varley, 411 N.W.2d 150 (Iowa 1987).

Action to obtain disclosure of documents pursuant to chapter 22, Code of Iowa, was properly regarded as an original action in equity, not a judicial review proceeding.

Westover v. Board of Trustees of The Des Moines Water Works, 416 N.W.2d 691 (Iowa 1987).

Plaintiff's six day suspension was not the equivalent of being "removed from his position or employment" for purposes of Iowa Code Section 70.6, thus certiorari review as of right is not available under provisions of the statute.

Sioux City v. Greater Sioux City Press Club, 421 N.W.2d 895 (Iowa 1988).

Chapter 22, Code of Iowa, requires employment applications for city manager to be confidential unless applicants consent to public disclosure.

## AGENCY

Fort Dodge Creamery Company v. Commercial State Bank, 417 N.W.2d 245 (Iowa App. 1987).

Failure of principle to object to agent's practice of endorsing checks constituted a ratification of the action, creating implied authority of the agent to continue the practice. Thus, since defendant bank was not informed of verbal restrictions subsequently placed on agency's authority by principle, no liability lies with the bank for allowing the practice to continue.

## APPELLATE PROCEDURE

Matter of Estate of Willis, 418 N.W.2d 857 (Iowa 1988).

Finality.

Probate referee filed findings of fact and conclusions of law that dismissed plaintiffs' action to set aside the will. Plaintiffs appealed to the Supreme Court. HELD: Probate referee's report is not final for purposes of appeal. Before a party may invoke appellate jurisdiction regarding objections to a probate referee's report, party must first seek review in the district court pursuant to Iowa Rule of Civil Procedure 214.

P

Home-Crest Corp. v. Albright, 414 N.W.2d 89 (Iowa 1987).

Time for Appeal.

Clerk did not send copy of order overruling plaintiff's post-verdict motions, so 30 days for appeal passed unbeknownst to plaintiff. Plaintiff filed motion with district court to enlarge time for filing appeal. Motion was sustained. After filing notice of appeal within additional time given by district court,

plaintiff filed a motion with the supreme court for an extension of time in which to file notice of appeal. Motion was granted, but plaintiff did not file a second notice of appeal.

Rule of Civil Procedure 83(a), which provides authority for extending specified periods of time for certain acts to be done, does not authorize the district court to extend the time in which to file a notice of appeal. Supreme court's order granting additional time was effective, and plaintiff's failure to file second notice of appeal was of no significance.

## ATTORNEY AND CLIENT

In re J.P.B., 419 N.W.2d 387 (Iowa 1988).

Conflict of Interest.

District court terminated mother's parental rights of son and daughter. Mother and daughter appealed. Supreme Court found attorney's dual representation of both children, only one of whom favored termination of parental rights, did not prevent attorney from seeking best interests of children and was not a conflict of interest.

Committee v. LaPointe, 415 N.W.2d 617 (Iowa 1987).

Discipline.

Convictions for assault and tampering with a witness warrant suspension of license to practice law for 14 months.

Committee v. Minette, 424 N.W.2d 459 (Iowa 1988).

Discipline.

Four justices who dissent from a three-month suspension for neglecting several probate matters suggest a middle ground between reprimand and suspension: a sort of probation with supervision.

Ayala v. Center Line, Inc., 415 N.W.2d 603 (Iowa 1987).

Fees.

HELD: When a civil rights case is tried to a jury, assessment of reasonable attorney fees is reserved for the court. Attorney fees and court costs cannot be assessed until liability has been established.

Pettes v. State, 418 N.W.2d 53 (Iowa 1988).

Post-Conviction.

Criminal defense client alleged ineffective assistance of counsel for attorney's failure to present "diminished capacity" defense. HELD: In view of equivocal nature of doctor's reports supporting diminished capacity defense, possible adverse affect of doctor's testimony, and prior lack of success in asserting the defense, attorney's conduct was not found to be beyond range of normal competency.

Cuevas v. State of Iowa, 415 N.W.2d 630 (Iowa 1987).

Post-Conviction.

Defendant convicted of first degree murder filed for post-conviction relief based on ineffective assistance of appellate counsel. Trial counsel had objected to the trial court's refusal to submit to jury lesser included offenses. Appellate counsel, who was not trial counsel, did not raise this error on appeal.

HELD: Appellate counsel's erroneous judgment as to likelihood of reversal on this claim of error, and decision not to raise same in order to concentrate on other errors, did not amount to ineffective assistance of counsel. COMMENT: A co-defendant had won reversal of his conviction on the argument not raised, but the decision represented a clear break in existing law.

P

Wright v. Scott, 410 N.W.2d 247 (Iowa 1987).

Settlement.

Shortly before trial, one of several defendants in an action arising from a multi-car accident filed an offer to confess judgment. On the last day of the offer's duration, and pursuant to the direction of plaintiffs, counsel telephoned defendant's counsel to accept the offer. That evening, plaintiffs discussed the effect of this settlement on their claims against the remaining defendants and, upon being more fully advised as to the effect, changed their mind. Counsel advised defendant's counsel three days later that the settlement was off.

HELD: A party who has accepted a settlement cannot rescind that agreement later, based on the party's unilateral mistake of law.

COMMENT: Decision is per curiam but en banc, and opinion is published.

## CIVIL PROCEDURE

Raymon v. Norwest Bank, 414 N.W.2d 661 (Iowa App. 1987).

Counterclaim.

Bank sued to foreclose on property mortgaged by LT. LT assigned its interest to plaintiff after suit was commenced. Bank amended to add claim against plaintiff. LT later assigned to bank its rights to payments from plaintiff. Bank amended to show the assignment. Seven months later, plaintiff filed a counterclaim for breach of contract. Bank's motion to strike counterclaim was sustained on the ground that it was not timely filed. Bank proceeded to obtain judgment of foreclosure.

Thereafter, plaintiff commenced this action against bank for same breach of contract that was the basis of the counterclaim.

HELD: Counterclaim was compulsory. Decree of foreclosure constitutes an adjudication on the merits, and the motion to strike "should be treated as a motion to dismiss" for purposes of preclusion.

Galloway v. Zuckert, 424 N.W.2d 437 (Iowa 1988).

Counterclaim.

Tenant sued landlord for breach of lease agreement, resulting interference with contractual relationship, and libel. Landlord counterclaimed for unpaid rent and declaratory judgment that it had not breached lease. Tenant replied with its own counterclaim for abuse of process, directed against landlord's conduct in asserting the first counterclaim.

HELD: Reply to counterclaim may itself include a counterclaim. Because second counterclaim does not arise out of lease agreement or relationship, it is not compulsory. Rule 30 permits the assertion of counterclaims that a party holds "when the action was originally commenced," and that are mature "when pleaded." "Action" in this case means the first counterclaim, and the victim of abuse of process "holds" its claim (and it is mature) when the abusive action is commenced.

In other words, a litigant facing frivolous litigation, brought for inappropriate purposes, may counterclaim for abuse of process.

Croell Redi Mix, Inc. v. Schwickerath, 423 N.W.2d 898 (Iowa App. 1988).

Default.

Clerk has no authority to enter default against plaintiff on counterclaim. Clerk's authority under rule 231 extends only to defaults under rule 230, which in turn refers to a party who fails to file a motion or answer as required by rules 53 or 54. Since the time requirements for filing an answer to a counterclaim are found in rule 84, only the court can enter a default against a plaintiff who has failed to answer a counterclaim.

P

Phoenix Mutual Insurance Company, Inc. v. Galloway Farms, Inc., 415 N.W.2d 640 (Iowa 1987).

Removal.

Trial court granted summary judgment in a foreclosure action. At time of ruling, debtor sought petition for removal to federal court by filing a "motion to file petition to remove and

proceed as a poor person" and a notice of filing petition for removal of civil action. HELD: State court proceedings are not stayed until motion to proceed in forma pauperis is granted, and this rule does not deny equal protection to poor persons.

Federal Land Bank v. Gibbs, 412 N.W.2d 917 (Iowa 1897).

Summary Judgment.

In action for foreclosure of mortgage and with mortgagee's motion for summary judgment pending, district court abused its discretion in denying land owner's motion for continuance to permit discovery of facts in possession of mortgagee. Hearing on motion for summary judgment had been scheduled for a date less than two months after the action had been filed. Counsel had been representing land owners for less than one week at the time counsel filed the motion for continuance.

COMMENT: Decision was per curiam, and opinion is not published.

Graber v. Iowa District Court, 410 N.W.2d 224 (Iowa 1987).

179(b)

In response to mortgage foreclosure action and action for replevin by PCA, plaintiffs sued PCA for breach of fiduciary duty. Cases were consolidated for trial, and the jury found in favor of plaintiffs on its defenses to the replevin action and for plaintiffs on the merits of their tort action. The district court followed the jury's verdict in the replevin action and entered judgment for plaintiffs in the foreclosure action, but sustained PCA's motion for new trial in the tort action, because of duplicative and/or excessive damages.

PCA filed a 179(b) motion eight days after the court ordered a new trial. The sole relief requested was a determination of the scope of the new trial, with inquiry by PCA as to whether any issues of liability as well as those relating to damages would be tried. Twenty-six days after the order granting new trial, PCA notified the court and opposing counsel orally of a request that the court also determine whether the findings in the foreclosure action prevented PCA from enforcing certain promissory notes. After unreported hearing by telephone, the court

advised the parties that it intended to alter the foreclosure judgment with respect to the promissory notes, to the benefit of PCA. Plaintiffs subsequently advised the court that they contested the court's jurisdiction to alter that judgment. PCA filed an amendment to its 179(b) motion to memorialize its request with respect to the promissory notes.

HELD: The PCA's oral request and written amendment were both untimely and do not relate back to the original 179(b) motion. The original motion related only to the tort action and sought only clarification of the scope of the new trial ordered in the tort action.

COMMENT: The court also found the ultimate order with respect to modification of the judgment on PCA's foreclosure action did not constitute an order nunc pro tunc.

Berkley International Co. v. Devine, 423 N.W.2d 9 (Iowa 1988).

215.1.

Plaintiff and a defendant with counterclaims filed a joint request for a second continuance beyond the operation of 215.1. District court refused to continue the case, and it was dismissed on January 2, 1985. Defendant appealed and plaintiffs cross-appealed, but both appeals were voluntarily dismissed within the 6-month period for reinstatement. Defendant timely applied for reinstatement of the counterclaims, predicated on grounds nearly identical to those presented in the joint application for continuance. Plaintiffs resisted the application and, in the alternative, asked for reinstatement of the entire case. District court reinstated entire case. Both parties appealed.

HELD: Because the voluntary dismissal of the appeal constitutes a final adjudication with prejudice pursuant to appellate rule 12(f), subsequent motion for reinstatement is barred by issue preclusion.

P

Midthun v. Pasternak, 420 N.W.2d 465 (Iowa 1988).

Accused in state criminal prosecution filed federal civil rights claim against county judge and county, seeking monetary damages as a result of imposition of an improper sentence. District court entered summary judgment in favor of both

defendants. On appeal, court did not accept plaintiff's contention that a motion for change of venue takes precedence over a motion for summary judgment against the party seeking change of place of trial. Rule 167(a) provides that unless objection is to the judge, a change of venue shall not be allowed "until the issues are made up." In this case the grounds of the motion to change venue were entirely dependent upon whether the issues against the county would be tried to a jury.

## CIVIL RIGHTS

Ayala v. Center Line, Inc., 415 N.W.2d 603 (Iowa 1987).

HELD: When a civil rights case is tried to a jury, assessment of reasonable attorney fees is reserved for the court. Attorney fees and court costs cannot be assessed until liability has been established.

Annear v. State, 419 N.W.2d 377 (Iowa 1988).

Complainant may assert "continuing violation" theory with respect to 180-day period within which discrimination charge must be filed with civil rights commission and against employer. Thus, an employee who charges an employer with continuously maintaining an illegal employment practice may file a charge of discrimination until 180 days after the last instance of the practice.

Probasco v. Iowa Civil Rights Commission, 420 N.W.2d 432 (Iowa 1988).

Petitioner's employability due to poor respiratory condition and employer's inability to change work environment was not sufficient to qualify her as a "disabled person" within the protection of the Iowa Civil Rights Act.

United States Jaycees v. Civil Rights Commission, 427 N.W.2d 450 (Iowa 1988).

"Local organization member" of National Jaycees Organization filed complaint with the Civil Rights Commission for the

National Organization's refusal to admit women. The Commission awarded certain damages that the district court, on judicial review, set aside. HELD: Neither a national nor a state non-profit membership organization is a "public accommodation" within the meaning of § 601A.7.

Halsey v. Coca-Cola Bottling Co., 410 N.W.2d 250 (Iowa 1987).

Vending machine repairman who had to drive to customers' locations to service machines, to pick-up machines for in-house service, and to return repaired machines, lost his drivers' license as a result of an eye disease. HELD: Reasonable accommodation of disability not established by proof that employee could provide driver at his own expense. Employer not required to expose its property to drivers not controlled by employer.

B.A.A. v. University of Iowa Hospitals, 421 N.W.2d 118 (Iowa 1988).

Patient involuntarily hospitalized pursuant to Chapter 229 for "serious mental impairment" petitioned for writ of habeas corpus. HELD: Same standard for initial hospitalization applies to issue of whether hospitalization should continue.

Wing v. Iowa Lutheran Hospital, 426 N.W.2d (Iowa App. 1988).

Sixty-one-year-old billing supervisor in hospital's business office was laid off as part of hospital-wide job reduction program necessitated by decrease in patient census and in revenues over 2-year period. Court held that plaintiff's proof that all other business office employees retained were younger, had less time with the hospital, and were making substantially less pay per hour, was sufficient to establish prima facie case of discrimination. "Economic savings derived from discharging older employees cannot serve as a legitimate justification under the ADEA." Hospital's contention that plaintiff had not proved the "desperate impact" upon a protected class of persons from a facially neutral rule is rejected because evidence established that five of the seven layoffs in the department were of persons 40 years of age or older, and that the average age in the department dropped by one year as a result of the layoffs.

P

As to remedy, the court affirms the district court's failure to award "front pay."

## COMMERCIAL LAW

Thorp Credit, Inc. v. Wuchter, 412 N.W.2d 641 (Iowa App. 1987).

Art. 9.

Thorp loaned money to Mr. and Mrs. Wuchter, who signed a security agreement granting Thorp a security interest in all of the Wuchters' "livestock, milk cows, open and bred heifers, yearlings . . . whether now owned or hereafter acquired." The Wuchters' son, Eric, claimed that he owned some of the cows, and produced registration certificates issued before the date of the security agreement. After holding that the trial court properly found Eric to be the owner of a certain number of the milk cows, the court held that the security agreement was not broad enough to cover Eric's livestock. The Wuchters produced evidence that the cows could be registered, tagged, and otherwise identified, but that Thorp never made an effort to describe them in that fashion.

Davis County Savings Bank v. Production Credit Association of Midlands, 419 N.W.2d 384 (Iowa 1988).

Art. 9.

Bank brought action to recover proceeds received from public sale of farm equipment, asserting a security interest in the equipment granted by transferors to bank, under a future advances clause. Transferors had given possession of the covered equipment to their son and daughter-in-law pursuant to a "lease/purchase agreement." Transferees took immediate possession, and transferors purported to "retain title." HELD: Transferees took equipment free of bank security interest under future advances clause with respect to funds advanced more than 45 days after purchase.

First National Bank v. Lamoni Livestock Sales, 417 N.W.2d 443 (Iowa 1987).

Art. 9.

Plaintiff Bank entered into a blanket security agreement with farmer in 1976, giving bank a security interest in nearly all of farmer's assets, including present and future livestock. This security interest was perfected. Farmer defaulted on Bank's $160,000 note in 1984, and thereafter, without bank's permission, sold nearly all of his cattle to Lamoni Livestock for over $39,000, which he used to repay debts to another bank, Creston.

Defendants Creston and Lamoni were granted summary judgment on grounds that § 554.9307 extinguished the Plaintiff Bank's security interest in the cattle, because the cattle were sold to a buyer in the ordinary course of business.

The Iowa Supreme Court reversed and remanded for trial. The security interest of the bank did not extinguish when the cattle were sold in the ordinary course of business, because the cattle fit into the farm products exception of § 554.9307, and the bank's interest was perfected. Farm products are expressly excepted from the general rule that buyers in the ordinary course of business take free from any security interest created by the seller.

First State Bank v. Shirley Egg Service, Inc., 417 N.W.2d 448 (Iowa 1987).

Art. 9.

Bank had unperfected security interest in crops of farmer. The security agreement itself erroneously described the location of the secured crops by listing an incorrect range number. After farmer defaulted, bank served foreclosure notice. Farmer subsequently sold crops to the grain elevator, part for cash and part for satisfaction of farmer's debt to the elevator. In action against elevator by bank, elevator claimed that the bank did not have a secured interest in the grain. During prior course of dealings, bank had not objected to farmer selling the crops to a grain elevator.

HELD: Error in the security agreement itself did not render the agreement unenforceable. Both debtor and creditor knew which crops were actually secured; erroneous description was not misleading.

P

While prior course of dealing established that bank had waived contract rights in the past by not objecting to farmer's sale of crops to grain elevator, foreclosure gave notice that bank was reasserting its rights. Any subsequent sale of crops by farmer without bank consent as required by the contract was improper.

Elevator was a buyer in the ordinary course of business only in regard to the portion of the crops for which it paid cash. Since bank's interest was unperfected, it was extinguished as to that portion. Portion of crops which was applied to the antecedent debt by elevator were not purchased in ordinary course of business, so bank's security interest in this portion was intact.

Meyer v. Hawkeye Bank & Trust Co., 423 N.W.2d 186 (Iowa 1988).

Art. 9.

Landlord's lien, which takes priority over perfected security interest on crops grown on leased land under Perkins, 421 N.W.2d 533 (Iowa 1988), does not cover proceeds from crops grown on other land leased by same landlord to same tenant. Landlord's lien runs only to land covered by lease. Because owner of security interest accepted proceeds from farm two with full knowledge that landlord had lien on those proceeds, bank was deemed to be constructive trustee for landlord.

American Savings Bank v. Waschkat, 423 N.W.2d 202 (Iowa 1988).

Art. 9.

LaVern and Janice Waschkat executed a promissory note secured by property owned by them. Janice petitioned for dissolution of marriage. While the dissolution was pending, bank sued LaVern and Janice on the note, on which they were in default. Bank filed a motion for summary judgment. Dissolution decree was entered, pursuant to which LaVern received the assets that formed the collateral for the note. Some of this collateral was sold, and the bank applied the proceeds, with LaVern's approval, to other notes for which Janice was not jointly liable. Bank's motion for summary judgment was eventually sustained, and bank obtained a judgment against LaVern and Janice that they jointly and severally liable for the amount of the loan.

HELD: Jointly obligated debtor who has no ownership interest in collateral originally given as security has no legal complaint when the owner of the collateral acquiesces in applying collateral towards satisfaction of other debts of the owner.

Perkins v. Farmers Trust & Savings Bank, 421 N.W.2d 533 (Iowa 1988).

Art. 9.

In contest between landlord lien on crops grown by farm tenant, created by § 570.1, with security interest owned by financer of tenant, court adopts majority approach of resolving conflict outside uniform commercial code. Under pre-UCC case law, landlord's lien is superior to chattel mortgage with regard to crops not yet in existence at time of creation of chattel mortgage. Court also held that bank waived its claim of priority, created by an earlier express waiver by the landlord, by permitting payment of cash rent to landlord over a span of three years. Bank's change in position at the beginning of year in question was not communicated to landlord and therefore was ineffective.

Merchants National Bank v. Halberstadt, 425 N.W.2d 429 (Iowa App. 1988).

Art. 9.

Husband and wife who sought financing for meat processing in farm operations executed security agreements, the financing statements to which described the collateral "to include . . . all personal property now owned and hereafter acquired." Upon default of husband and wife, the fighting issue between creditors is whether or not jewelry and coins owned by the husband and wife were covered by the financing statements.

HELD: The words "all personal property" are not sufficiently specific to place a creditor on notice that the financing statements covered personal property not related to the business operations.

Creditor who perfected its security interest by taking possession of the jewelry and coins caused its interest to be unperfected by relinquishing possession of the items to an auctioneer, who by contract was an agent of the debtors, not the creditor.

FDIC v. Mount Pleasant Professional Building, 426 N.W.2d 126 (Iowa 1988).

Art. 9.

Extrinsic evidence of representations by bank, which sold 89-day repurchase agreements, that the bank's debt to the purchasers was secured by the underlying federal securities and that the buyers would be protected, was admissible and should have been considered on the issue of whether or not the buyers' security interests in the underlying federal securities had been perfected.

Affiliated Foods, Inc. v. McGinley, 426 N.W.2d 646 (Iowa App. 1988).

Art. 9.

Gold, owner of a grocery store, negotiated with McGinley over the sale of part of the store and its inventory by Gold to McGinley. Affiliated Foods, a food supplier, assisted and participated in these negotiations, but was not a signatory to the agreement. The sale agreement gave Gold a vendor's lien in inventory and merchandise superior to all claims except that of McGinley's financial institution. Before the sale and without Gold's knowledge, McGinley and Affiliated agreed that Affiliated would provide merchandise and services to McGinley in return for a security interest in the inventory. Affiliated filed before Gold. McGinley went into bankruptcy, Affiliated sued on the McGinley note, and the bank and Gold intervened.

HELD: Gold established a claim of equitable estoppel based on Affiliated's failure to disclose its own prior security agreement and Gold's reliance upon an agreement, negotiated with the assistance of Affiliated, that it would be second in line only to the bank.

Fiester v. Production Credit Ass'n, 426 N.W.2d 676 (Iowa App. 1988).

Art. 9.

Plaintiff had judgment against farmer, whose produce was covered by a security agreement with PCA. Plaintiff levied on produce, and PCA notified sheriff it had a lien on the

produce. Plaintiff delivered a demand for statement of indebtedness pursuant to Section 626.42, which required PCA as a party entitled to receive payment of the cured debt that is the subject of the levy to deliver to plaintiff a statement in writing and under oath, showing the nature and amount of the original debt, date and amount of each payment made on it, and an itemized statement of the amount due and unpaid. PCA did not respond, and the sale proceeded.

HELD: Although plaintiff knew that PCA had a security interest in the farmer's produce, PCA's failure to comply with 626.42 precludes PCA, by the express terms of the statute, from enforcing its priority.

U.S. v. Jensen, 418 N.W.2d 65 (Iowa 1988).

Art. 9.

For purposes of determining creditor's entitlement to deficiency judgment under § 554.9504(3), guarantor is a "debtor" entitled to notice of creditor's intended disposition of collateral.

Fort Dodge Creamery Company v. Commercial State Bank, 417 N.W.2d 245 (Iowa App. 1987).

Banking.

For purposes of conversion action under Iowa Code § 554.3419, a forged endorsement and an unauthorized endorsement are synonymous.

Clark v. Hawkeye Federal Savings Bank, 423 N.W.2d 891 (Iowa App. 1988).

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Banking.

The bank issued cashier's check at request of one of two owners of account. After issuance of cashier's check, receiver for that owner's unrelated business was appointed, and receiver instructed bank to dishonor drafts. Other owner of account sued. Court held that other owner of account had standing to sue, because cashier's check is a negotiable instrument

drawn by bank upon itself. The stop payment resulted in a debit to plaintiff's account with payee on cashier's check. Court also held that receiver had no right to require bank to dishonor check because it was cashier's check. Receiver's claim to the check was based on account owner's claim, and owner could not have stopped payment on check.

Security State Bank v. Taylor, 421 N.W.2d 877 (Iowa 1988).

Foreclosure.

The court affirms ex parte appointment of receiver over the statutory and constitutional requirements for a hearing in advance of the appointment of the receiver, because an adequate factual basis existed for the trial court's finding that an immediate appointment was necessary to prevent further depletion of procured assets.

Federal Land Bank v. Arnold, 426 N.W.2d 153 (Iowa 1988).

Foreclosure.

Legislature amended § 654.16 to retroactively extend redemption period for agricultural homesteads to two years, provided that the purchaser of the homestead at foreclosure sale was someone other than a member of the FDIC, FSLIC, or the NCUA. HELD: Classification denies equal protection.

Federal Land Bank v. Arnold, 426 N.W.2d 153 (Iowa 1988).

Foreclosure.

P

Legislature amended § 654.16 to retroactively revise the procedure for valuing a homestead subject to redemption, so that the court would determine its fair market value. HELD: Amendment violates the contract clause of the United States Constitution.

Gottschalk v. Simpson, 422 N.W.2d 181 (Iowa 1988).

Forfeiture.

Plaintiffs sold real estate to Pregler on installment contract. Pregler sold part of land to Simpson on installment contract. Pregler defaulted. Plaintiffs served Pregler and Simpson with notice of forfeiture. Pregler did not cure, but plaintiffs did not complete forfeiture. Instead, Pregler gave quit claim deed to plaintiffs. Deed assigned Simpson contract to plaintiffs. Meanwhile Simpson defaulted on his contract. Plaintiffs sued Simpson to foreclose on contract. HELD: Although statute and case law establish that forfeiture is complete upon passage of thirty days without cure (filing affidavit is required only for purposes of constructive notice), seller can waive right of forfeiture by conduct within the thirty days, demonstrating a desire for performance instead of forfeiture.

Jamison v. Knosby, 423 N.W.2d 2 (Iowa 1988).

Forfeiture.

Farm tenant executed lease with contract vendee just days before vendee defaulted on purchase of farmland. Then lease was recorded. Vendor initiated forfeiture proceedings several months later, but did not serve tenant with notice of forfeiture. Tenant first entered onto property several months later, in the spring, to start the crop season. HELD: Tenant was a person in possession, entitled to notice of forfeiture.

Although tenant was entitled to his share of the crop proceeds for the crop year covered by the lease, court rejected his claim for lost profits for the subsequent crop year as speculative.

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Williams v. Clark, 417 N.W.2d 247 (Iowa App. 1987).

Guarantee.

In a contract which contains a guarantee agreement, a provision requiring that the guarantor be given notice of the principal's default creates a conditional guarantee. Therefore, the guarantors became liable upon receipt of such notice, but not before.

Atlas Mini Storage, Inc. v. First Interstate Bank, 426 N.W.2d 686 (Iowa App. 1988).

Letter of Credit.

American Steel contracted to build mini storage buildings for Atlas in Des Moines. Agreement required Atlas to cause bank to issue a letter of credit for the benefit of American Steel. Payment on the letter of credit was triggered by submission of "a commercial invoice" with a signed statement by American Steel that the original invoice had not been paid and that it was beyond 40 days due.

Atlas cancelled contract. American Steel sent Atlas a document it denoted as an invoice for $100,000, representing its anticipated profit on the construction project. Within the 40 days, Atlas sought a temporary injunction against the bank from honoring the letter of credit.

HELD: Letter of credit requires bank to execute its promise, created by the letter of credit, to pay on the occurrence of the conditions described in the document creating the letter of credit. Issue in this case is where funds should be held, pending outcome of the controversy. Plaintiff has met its burden with respect to entitlement to a temporary injunction, and bank will continue to hold the funds.

Federal Land Bank v. Lower, 421 N.W.2d 126 (Iowa 1988).

Mortgage.

Debtors conveyed property "together with . . . rents" to bank via mortgage. Debtors defaulted and bank obtained foreclosure decree. Before appointment of receiver, debtors leased property. HELD: Execution of mortgage created lien on rents. Mortgages in which rent is pledged as secondary security were distinguished.

P

Decorah State Bank v. Zidlicky, 426 N.W.2d 388 (Iowa 1988).

Mortgage.

Husband and wife who were engaged in farming and who were obligated to bank signed a "spouse's joinder in and guarantee of indebtedness" in 1973. Document provided that it

would "continue in full force and effect until the undersigned shall give said bank written notice not to extend any further credit." In 1976, husband and wife sold their farm, paid off all debts to the bank, and moved into town. One month later, they again borrowed money from the bank to finance purchase of a home. The resulting mortgage contained a future advances clause. Six years later, husband signed a promissory note secured by the home mortgage. Wife did not sign, and testified she was unaware of it. Two years later, husband and wife filed for bankruptcy. Bank filed a mortgage foreclosure action.

HELD: The "joinder and guarantee agreement" expired with the satisfaction by husband and wife's of the original debt. Court noted that since "payment of the debt by the principal discharges the guarantor and terminates the obligation," the critical issue is "whether these parties intended to require a written notice not to extend any further credit even after the debt owed to the bank was paid off." Accordingly, the court considered extrinsic evidence to the effect that the reason husband and wife signed the guarantee was to permit one of them to sign a promissory note without both of them having to travel into town and away from the farming operation to handle financial transactions. With the move into town, "their purpose for the instrument no longer existed."

Welsh v. Citizens National Bank, 420 N.W.2d 473 (Iowa 1988).

Homestead.

"Person" as listed in § 561.16 must include a single person as well as others, absent language in the statute limiting the term. Thus, district court's dismissal of mortgagor's petition to set aside the sheriff's sale based on denial of homestead protection, because he had no dependents and had never been married, was improper.

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Zimmerman v. Kile, 410 N.W.2d 262 (Iowa 1987).

Landlord Lien.

Person designated by lease to be the landlord is the owner of the statutory landlord's lien, notwithstanding lack of ownership interest in property, so long as lease was for landlord's benefit for action on lien was brought to enforce

contract made in his name, but for benefit of actual property owners.

Griswold State Bank v. Milne, 416 N.W.2d 109 (Iowa App. 1987).

Mortgages.

Trial court erred in finding mortgage was not duly executed by mortgagors where mortgagor stated she did not recall signing the mortgage, but did not expressly deny same; that signatures were acknowledged on a date other than when they were signed; and that there were conflicting dates for notes, mortgages, acknowledgements and recordation. Trial court also erred in finding mortgage was not duly executed through false acknowledgement of the mortgage. Accuracy of acknowledgement affects only recordation of the mortgage, not validity between the parties.

Kaiser Agricultural Chemicals Inc. v. Peters, 417 N.W.2d 437 (Iowa 1987).

Usury.

Agreement between buyer and seller called for 18% annual interest on monthly balance due seller for any goods sold to buyer. HELD: This is an open-end account as defined in § 537.2202, and is thus governed by the maximum interest provisions of that section. Because the agreement meets the other three elements of usury (loan or forbearance of money, understanding that the principal shall be repayed absolutely, and intent to violate law), the fact that it calls for higher interest than is allowed by law triggers the statutory usury penalty of § 535.5.

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## CONSTITUTIONAL LAW

Federal Land Bank v. Arnold, 426 N.W.2d 153 (Iowa 1988).

Contract Clause.

Legislature amended § 654.16 to retroactively revise the procedure for valuing a homestead subject to redemption, so

that the court would determine its fair market value. HELD: Amendment violates the contract clause of the United States Constitution.

In the Interest of A.C., 415 N.W.2d 609 (Iowa 1987).

Due Process.

Mother suffered from bipolar mental illness causing anti-social personality. She voluntarily placed children in foster care. Placement of children later became involuntary and foster parents sought permanent placement while the DHS tried to rehabilitate mother. Guardian ad litem filed petition to terminate mother's parental rights. HELD: Neither Foster parents (nor foster children placed in their care for 18-month period) had no constitutionally protected liberty interest in their relationship such that due process attached to a decision to remove the children from foster home. Iowa law does not create the expectation that a foster family relationship will be permitted to continue after the children have resided with the foster parents for a certain period of time.

Roth v. Reagen, 422 N.W.2d 464 (1988).

Due Process.

Plaintiff was accused of sexually abusing his stepdaughter, but the investigation established that the accusation was unfounded. Nevertheless, a record of the accusation and its disposition were entered in the Central Registry for Child Abuse Information. The Department of Human Services (DHS) expunged the record six months after the date of the accusation, per section 235A.18(2), but refused to do so sooner. HELD: Claim of damage to reputation and violation of right of privacy does not create a property interest protected by the due process clause. Without defining the classification, the court also finds no equal protection violation.

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Phoenix Mutual Insurance Company, Inc. v. Galloway Farms, Inc., 415 N.W.2d 640 (Iowa 1987).

Equal Protection.

Trial court granted summary judgment in a foreclosure action. At time of ruling, debtor sought petition for removal to federal court by filing a "motion to file petition to remove and proceed as a poor person" and a notice of filing petition for removal of civil action. HELD: State court proceedings are not stayed until motion to proceed in forma pauperis is granted, and this rule does not deny equal protection to poor persons.

Iowa Automobile Dealers Association v. Iowa State Appeal Board, 420 N.W.2d 460 (Iowa 1988).

Equal Protection.

Plaintiff appealed from district court judgment that provision in Iowa motor vehicle registration statute was unconstitutional. HELD: Iowa Code § 321.46(3) directly discriminates against interstate commerce insofar as it denies a registration fee credit upon vehicles sold, traded, or junked outside Iowa.

Federal Land Bank v. Arnold, 426 N.W.2d 153 (Iowa 1988).

Equal Protection.

Legislature amended § 654.16 to retroactively extend redemption period for agricultural homesteads to two years, provided that the purchaser of the homestead at foreclosure sale was someone other than a member of the FDIC, FSLIC, or the NCUA. HELD: Classification denies equal protection.

Thomas v. United Fire & Casualty Co., 426 N.W.2d 396 (Iowa 1988).

Equal Protection.

Section 515.138, Code of Iowa, which provides that a fire insurance policy may require that suits for fire losses be brought within 12 months of the loss, does not violate equal protection.

Roth v. Reagen, 422 N.W.2d 464 (1988).

Equal Protection.

Plaintiff was accused of sexually abusing his step-daughter, but the investigation established that the accusation was unfounded. Nevertheless, a record of the accusation and its disposition were entered in the Central Registry for Child Abuse Information. The Department of Human Services (DHS) expunged the record six months after the date of the accusation, per section 235A.18(2), but refused to do so sooner. HELD: Claim of damage to reputation and violation of right of privacy does not create a property interest protected by the due process clause. Without defining the classification, the court also finds no equal protection violation.

Bell v. City of Des Moines, 412 N.W.2d 585 (Iowa 1987).

First Amendment.

Television station who secured videotape at scene of suicide appealed from district court order requiring news director to appear for deposition with "raw footage" (videotape not aired during newscast). HELD: District court failed to require plaintiffs to rebut the presumption of privilege. Party seeking videotapes must satisfy the court by a preponderance of the evidence that (1) there is a probability or likelihood that the evidence is necessary, and (2) it cannot be secured from any less intrusive source. Court adds a caveat that privilege does not protect reporter from observations made as an eyewitness, because to such extent the reporter is like any other citizen.

Des Moines Register & Tribune Co. v. Iowa District Court, 426 N.W.2d 142 (Iowa 1988).

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First Amendment.

Rule of Criminal Procedure 2(a)(d), which permits closure of preliminary hearing at the request of the defendant violated the first amendment. First amendment provides a "qualified right of public access" to preliminary hearings, and they can be closed only upon specific findings on the record that closure is essential to protecting the higher values of the defendant's right to a fair trial.

Junkins v. Branstad, 421 N.W.2d 130 (Iowa 1988).

Mootness.

Legislation increasing the required contribution by judges to their retirement program was subjected to line-item veto. Legislators filed petition for declaratory ruling as to constitutionality of veto. Legislature then amended statute to restore previous contribution level. HELD: Because contribution level for year before second amendment was still at issue, case was not moot. Also, likelihood of recurrence of item veto on alleged "appropriation" bill and public interest in resolving issue militated against mootness.

Roth v. Reagen, 422 N.W.2d 464 (Iowa 1988).

Mootness.

Plaintiff was accused of sexually abusing his step-daughter, but the investigation established that the accusation was unfounded. Nevertheless, a record of the accusation and its disposition were entered in the Central Registry for Child Abuse Information. The Department of Human Services (DHS) expunged the record six months after the date of the accusation, per section 235A.18(2), but refused to do so sooner. HELD: Because record was expunged, case meets traditional standards of mootness. Public interest exception, however, applies.

C. Mac Chambers Co. v. Iowa Tae Kwon do Academy, Inc., 412 N.W.2d 593 (Iowa 1987).

Piercing Corporate Veil.

First Tae Kwon do Corporation (Academy I) was in serious financial trouble. Sole shareholder, Kim, renamed Academy I but did not dissolve it. Kim then created second corporation, Academy II, and bought the accounts receivable and much of the assets of Academy I for $30,000. Academy II paid some of Academy I's expenses, such as rent, utility bills, and back wages. Academy II retained all of Academy I's employees, operated the business at the same location, and with the same equipment as before. The sole shareholder of Academy II, however, was Kim's son.

Court affirmed verdict based on piercing the corporate veil of Academy II. Kim's paid no consideration for his stock, and made no capital contribution to the venture. Academy II as well as Academy I paid expenses of the Kim family routinely, and family finances were not accounted for separately from corporate accounts.

Matter of Arthur, 415 N.W.2d 168 (Iowa 1987).

Privileges and Immunities Clause.

Minnesota attorney sought admission to practice law in Iowa without examination. Iowa Supreme Court Rules require an attorney seeking admission without examination to have the intent to maintain an office for the practice of law in Iowa. HELD: Requirement that attorney seeking admission to practice in Iowa without examination intend to maintain an office for the practice of law in Iowa does not violate the Privileges and Immunities clause.

C. Mac Chambers Co. v. Iowa Tae Kwon do Academy, Inc., 412 N.W.2d 593 (Iowa 1987).

Successor Corporation.

First Tae Kwon do Corporation (Academy I) was in serious financial trouble. Sole shareholder, Kim, renamed Academy I but did not dissolve it. Kim then created second corporation, Academy II, and bought the accounts receivable and much of the assets of Academy I for $30,000. Academy II paid some of Academy I's expenses, such as rent, utility bills, and back wages. Academy II retained all of Academy I's employees, operated the business at the same location, and with the same equipment as before. The sole shareholder of Academy II, however, was Kim's son.

Court held that identity of shareholders and existence of only one corporation upon completion of sale of assets are traditional indicia of a continuing corporation for purposes of holding the successor corporation liable for the debts of the predecessor, but they are not essential to proving such a cause of action.

Williams v. Clark, 417 N.W.2d 247 (Iowa App. 1987).

Anticipatory Repudiation.

Defendant, who purchased plaintiff's grocery business on contract, breached by anticipatory repudiation when attempting to tender the store back to plaintiff after sales were lower than expected. Plaintiff was thus allowed to recover as damages all sums due under the contract. Defendant's action constituted an anticipatory breach because the attempt at tender included a statement that he would quit operating the store in 30 days.

Dental East, P.C. v. Westercamp, 423 N.W.2d 553 (Iowa App. 1988).

Covenant Not To Compete.

Court of appeals enforced a covenant not to compete between two dentists. Dentists agreed not to practice dentistry within 20 miles of the location of employment for 2 years. Damages for breach were provided in agreement in the amount of 40% of any fees earned for 1 year on patients who had been patients at the original location.

Midwest Dredging Co. v. McAninch Corp., 424 N.W.2d. 216 (Iowa 1988).

Implied Warranty.

In action for breach of contract by subcontractor against DOT, court affirmed finding that DOT breached an implied warranty that its plans and specifications were accurate and that the work for which the subcontractor had agreed to do was economically feasible.

Renze Hybrids, Inc. v. Shell Oil Company, 418 N.W.2d 634 (Iowa 1988).

Implied Warranty.

Action by seed corn grower against insecticide producer for breach of implied warranty of fitness for particular purpose and merchantability. HELD: Evidence that seed corn grower asked for assistance from service company representative, who in turn sought assistance from insecticide producer for help with particularly described problem and who obtained information from insecticide producer that insecticide could control the problem was sufficient to create jury question whether insecticide producer was liable to grower for breach of implied warranty of fitness for particular purpose.

Chamberlain, Kirk & Cline, Inc. v. Irvine, 425 N.W.2d 681 (Iowa App. 1988).

Lease.

Iowa Real Estate Commission Rule 1.23, which requires written listing agreement with particulars as a condition to the enforcement of the right to a commission, applies to a lease.

Wright v. Scott, 410 N.W.2d 247 (Iowa 1987).

Mistake of Law.

Shortly before trial, one of several defendants in an action arising from a multi-car accident filed an offer to confess judgment. On the last day of the offer's duration, and pursuant to the direction of plaintiffs, counsel telephoned defendant's counsel to accept the offer. That evening, plaintiffs discussed the effect of this settlement on their claims against the remaining defendants, and upon being more fully advised as to the effect, changed their mind. Counsel advised defendant's counsel three days later that the settlement was off.

HELD: A party who has accepted a settlement cannot rescind that agreement later, based on the party's unilateral mistake of law.

COMMENT: Decision is per curiam but en banc, and opinion is published.

P

Pahre v. State, 422 N.W.2d 178 (Iowa 1988).

Third-Party Beneficiary.

Industrial Loan Thrift Guaranty Corporation, created in 1981 by Chapter 536B, Code of Iowa, sued an industrial lending company's independent accountants for overstating the lender's financial health. The accountants prepared the financial statements before the ILTGC even came into existence, and certainly before the lending institution used the financial statements to gain membership in the ILTGC. The accountants knew only that the financial statements were being used by the lending institution in the internal management of its fares and for filing requirements with the State Auditor's office. HELD: ILTGC cannot sue accountants. It was not within the class identifiable by the accountants at the time of the creation of the financial statements or a member of the class intended by the accountants to be users of the financial statements.

Midwest Dredging Co. v. McAninch Corp., 424 N.W.2d. 216 (Iowa 1988).

Third-Party Beneficiaries.

DOT executed contract for a construction of interstate highway with McAninch. McAninch subcontracted the required dredging to Midwest. DOT had tested area and had concluded that area for road was dredgible, and DOT's specifications and plans called for specific methodology for dredging. DOT and McAninch both understood that the dredging required by DOT was to be subcontracted. DOT and Midwest were in contact with each other before as well as after the execution of the subcontract.

HELD: Midwest had cause of action against DOT for breach of contract based on third-party beneficiary rules.

P

Potter v. Oster, 426 N.W.2d 148 (Iowa 1988).

Rescission.

Oster, "an agricultural journalist and recognized specialist in land investment strategies" who owns "a multi-million dollar publishing concern devoted to furnishing farmers the latest in commodity market analysis and advice on an array of farm issues," purchased 160 acres of farm land from Stark. Oster

sold the homestead and 9 acres of the farm to Charles and Sue Potter, who were "a farm laborer" and "a homemaker and substitute teacher" respectively. Oster sold the remaining 151 acres to Bishop. The Oster-Bishop transaction was part of a $5.9 million transaction involving 17 different farms.

Seven years later, Bishop failed to pay Oster, and Oster failed to pay Stark. Stark commenced forfeiture proceedings. Potters were financially unable to exercise their right to advance the sums due on the entire 160 acres in order to preserve their interest in the 9 acres and homestead, and they were forfeited along with Oster's and Bishop's interest.

Potters sued Oster for rescission. The district court awarded rescission and return of the down payment, principal and interest paid thereafter pursuant to the contract, cost of improvements, closing expenses, and taxes (minus a credit for 6 years' rental).

On appeal, Oster contended that in an era of declining land values, rescission results in a windfall. Oster contended that Potters' recovery should be limited to the difference between the market value at the time of breach and the balance due on the Oster-Potter contract.

Although the court acknowledged that "declining land values may have motivated [Potters] selection of remedies in this case, their motive for exercising a legal right to rescind is immaterial if the remedy is otherwise appropriate." Court notes standard rule that "legal remedies are considered inadequate when the damages cannot be measured with sufficient certainty," and then proceeds to hold that a remedy other than rescission would not recognize "the special value Potters placed on the property's location and residential features that uniquely suited their family. . . . [Oster's] characterization of the transaction as a mere market loss for Potters, compensable by a sum which would enable them to make a nominal down payment on an equivalent homestead, has no legal or factual support in this record. . . . [A]creages are not fungible goods. . . . [P]rofit measured by Wall Street standards was of little consequence to Potters. This was Potters' home, the place their first son was born, the place Charles Potter testified 'was worth everything we ever gave for it, because we planned on living there the rest of our lives'."

P

C & F Maintenance v. Eliasion, 418 N.W.2d 44 (Iowa 1988).

Motel owners filed third-party complaint against contractors for breach of contract and negligence for violation of building codes. Contractor's motion for summary judgment was granted.

HELD: District court failed adequately to distinguish between the ultimate intent of the contracting parties and testimony of a single witness concerning what that intent was. Contractors' responsibilities remained a matter of disputed fact where ambiguity existed in the contract, contractors' obligations under the contract could not be ascertained as a matter of law from the contract documents, and intent depended only upon extrinsic evidence.

## CONTRIBUTION

Schreier v. Sonderleiter, 420 N.W.2d 821 (Iowa 1988).

Plaintiff was assaulted by intoxicated persons and obtained favorable judgment in dram shop action. Dram shop then sought contribution from another dram shop where assailants had also consumed alcohol. Second dram shop appealed contribution claim. HELD: § 123.92 does not preclude cause of action for contribution by one dram shop against another.

NOTE: Second dram shop argued contribution claim could not lie against him because the assault victim never gave notice of the dram shop claims as required by § 123.92. Court found no reason existed to allow the action or inaction of the injured party to defeat a contribution claim.

AID Insurance Co. v. Davis County, 426 N.W.2d 631 (Iowa 1988).

AID paid its limits to the injured passenger on its insured's motorcycle and obtained a release that discharged "all other persons, firms, or corporations, known or unknown, who are, or might be claimed to be liable." AID had been unsuccessful in urging the passenger to sue the county for the condition of the roadway. In action by AID against county for contribution, jury found county 50% at fault.

The court refused to enforce the release. Boiler plate language that purported to release the entire population of

possible tort-feasors was not effective before Ch. 668, according to Community School District v. Gordon N. Peterson, Inc., 176 N.W.2d 169 (Iowa 1970), and court found nothing in Ch. 668 to abandon the precedent. "[W]e favor a rule which would require a written release to include some specific identification of the tort-feasors to be released." Court does not require that each tort-feasor be named, "if they are otherwise sufficiently identified in a manner that the parties to the release would know who was to be benefited."

## DAMAGES

Young v. Gibson, 423 N.W.2d 208 (Iowa App. 1988).

Adequacy.

Motorist who was struck from behind sued for property damage and personal injury. She adduced medical expert testimony of injury and causation. Other evidence established that plaintiff had suffered other injuries in recent past. Verdict for only property damage was affirmed. Evidence was sufficient to support finding that personal injuries complained of resulted from other accidents.

Miller v. Eichhorn, 426 N.W.2d 641 (Iowa App. 1988).

Adequacy.

Personal injury plaintiff with medical expenses of just less than $3,500 appealed from verdict for that amount on grounds that damages were inadequate. Court summarized the medical testimony from four different doctors, all called as witnesses by plaintiff. Court noted that only the doctor who had seen plaintiff more than two years after the accident made a finding of disability, whereas the doctor who saw her after the accident found minor injuries to be treated with aspirin. "The jury had the right to reject the later opinions and the expenses associated with the later doctor's treatments."

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Ryan v. Arneson, 422 N.W.2d 491 (Iowa 1988).

Attorney Fees.

In action for wrongful attachment under section 639.14, plaintiff can recover for attorney fees on appeal as well as at trial.

Cannon v. National By-Products, Inc., 422 N.W.2d 638 (Iowa 1988).

Breach of Contract.

Employee at will was terminated ostensibly for physical inability to perform his job. Plaintiff sought to modify contract of employment at will to include written personnel policies, unilaterally imposed by employer before discharge, that prevented discharge without a good cause. Under instructions, jury apparently found that the policies amended employment agreement, and that discharge for medical reasons was pretentious.

Over timely objection, plaintiff testified concerning the loss of his home by foreclosure as consequence of the termination of his employment. Court agrees that such economic loss would not constitute consequential damages, because it would not "reasonably be considered as arising naturally from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract."

Notwithstanding the above, the court did not reverse. Because the instructions limited the damages plaintiff could recover to those relating to employment, because the reference to foreclosure was not accompanied by any evidence as to the measure of the accompanying economic loss, and because the verdict was within the evidence presented as to lost wages, court found no reversible error.

Gail v. Clark, 410 N.W.2d 662 (Iowa 1987).

Consortium.

In a dram shop action by officer injured in high-speed chase of intoxicated driver, officer's spouse and children made claims for loss of consortium. HELD: Spouse's and child's rights to spousal and parental consortium respectively are claims

that they were "injured in . . . property" for purposes of §123.92. COMMENT: Opinion contains an extensive history on consortium claims.

Maisel v. Gelhaus, 416 N.W.2d 81 (Iowa App. 1987).

Crops.

Proper measure of damages for loss of growing crops is their value in field at time of injury or their value in matured condition less reasonable expense of maturing and marketing. Where plaintiff is lessor and not owner, however, proper damages are loss of cash-rent value of the land.

Strauss v. Cilek, 418 N.W.2d 378 (Iowa App. 1987).

Emotional Distress.

In action for intentional infliction of emotional distress, court found defendant's alleged romantic and sexual relationship with plaintiff's wife did not constitute outrageous conduct.

Nash v. Schultz, 417 N.W.2d 241 (Iowa App. 1987).

Excessiveness.

Jury award of $204,046 in damages to plaintiff held not to be excessive, notwithstanding fact that plaintiff had responded to interrogatory one year before trial, regarding damages for lost income, with figure of just $15,797.50. The court concluded that since plaintiff's answer was for past damages "to date," it should not be construed as a limit to her recovery.

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Sallis v. Lamansky, 420 N.W.2d 795 (Iowa 1988).

Excessiveness.

In automobile negligence action, verdict award of $626,000 for whiplash incurred while plaintiff was driving 3/4 ton pickup and defendant's sub-compact car rear-ended him going

15 to 20 mph was excessive, where no objective evidence existed that spinal or neck injuries were present.

Peterson v. First National Bank, 423 N.W.2d 889 (Iowa App. 1988).

Interest.

Second appeal that follows from judgments in favor of plaintiff for their claims against bank and in favor of bank on counterclaim. Plaintiffs' judgment is bigger, but bank's judgment is accruing interest at a higher rate due to its genesis in contract. Plaintiff claims that amount of offset should be computed as of date of plaintiffs' commencement of litigation, rather than date of entry of judgments. Rule 225, amended in 1984 to eliminate the necessity of combining judgments, was in effect as of the date of the entry of these judgments, and applies to this case.

HELD: Logical interpretation of the rule requires that the offset be taken as of the date of the entry of judgments. Since bank bargained for the higher rate, they are entitled to receive its benefit.

Sanders v. Ghrist, 421 N.W.2d 520 (Iowa 1988).

Lost Chance of Survival.

Court re-affirms and applies deBurkarte, 393 N.W.2d 131 (Iowa 1986), which is the lost chance of survival case. Instructions given by district court in this medical malpractice case arising out of an alleged failure to diagnose and treat a malignant tumor that proved fatal recognized the claim for increased risk due to failure to diagnose, but failed to focus on the value of the opportunity to survive, however small, if an earlier detection had occurred by a reasonable practitioner.

Bushman v. Cuckler Building System, 421 N.W.2d 145 (Iowa Ct. App. 1988).

Lost Profits.

In negligence and warranty action for defectively constructed hog confinement building, defendant contests award of

lost profits. Plaintiff testified that defective structure caused excessive moisture, which can cause hog diseases, and that his hogs died of such diseases. Court found plaintiff to be qualified to express such opinions due to 25 years in hog production. Court found his testimony to meet both alternative prongs of Tasco test, 283 N.W.2d 280 (1979): (1) causation is probable, and (2) causation is possible and the condition did not pre-exist.

Jamison v. Knosby, 423 N.W.2d 2 (Iowa 1988).

Lost Profits.

Farm tenant executed lease just days before contract vendee defaulted on purchase of farmland. Then lease was recorded. Vendor initiated forfeiture proceedings several months later, but did not serve tenant with notice of forfeiture. Tenant first entered on to property several months later, in the spring, to start the crop season. Although tenant was entitled to his share of the crop proceeds for the crop year covered by the lease, court rejected his claim for lost profits from the subsequent crop year as speculative.

Miller v. Eichhorn, 426 N.W.2d 641 (Iowa App. 1988).

Mitigation.

Defendant in personal injury case adduced evidence that plaintiff employed substitute labor in her business from the time of the accident to the time of trial, but did not consult a doctor regularly throughout the same time period for her injuries. Trial court instructed on failure to mitigate as a particular of comparative fault.

HELD: Failure to mitigate damages is an aspect of fault, pursuant to Section 668.1. Defendant's argument is insufficient to support an instruction on failure to mitigate, because defendant failed to adduce evidence that the failure to consult a doctor on a regular basis would have made a difference in the plaintiff's injuries and condition. On the other hand, testimony by one of the treating physicians that additional chiropractic treatments would have helped plaintiff's condition was sufficient to submit the issue of mitigation.

Bushman v. Cuckler Building System, 421 N.W.2d 145 (Iowa Ct. App. 1988).

Mitigation.

Court approved mitigation instruction in negligence and warranty action that "defendants may not use hindsight to claim that methods used by the plaintiffs [to mitigate damages] were not the cheapest or most effective." Court said that existence of better options "would not necessary [sic] negate a finding that plaintiffs . . . [exercised] reasonable diligence."

Mel Foster Co. v. American Oil Co., 427 N.W.2d 171 (Iowa 1988).

Nuisance.

Proper measure of damages for a nuisance that results in contamination of property (here, due to an underground gasoline leak) is diminution of the property's market value. Proof that nuisance has abated, in the sense that the source of the nuisance has been corrected, does not preclude finding of damage to property.

C. Mac Chambers Co. v. Iowa Tae Kwon do Academy, Inc., 412 N.W.2d 593 (Iowa 1987).

Punitives.

First Tae Kwon do Corporation (Academy I) was in serious financial trouble. Sole shareholder, Kim, renamed Academy I but did not dissolve it. Kim then created second corporation, Academy II, and bought the accounts receivable and much of the assets of Academy I for $30,000. Academy II paid some of Academy I's expenses, such as rent, utility bills, and back wages. Academy II retained all of Academy I's employees, operated the business at the same location, and with the same equipment as before. The sole shareholder of Academy II, however, was Kim's son.

Court affirmed verdict based on piercing the corporate veil of Academy II. Kim's paid no consideration for his stock, and made no capital contribution to the venture. Academy II as well as Academy I paid expenses of the Kim family routinely, and family finances were not accounted for separately from corporate accounts.

Court reversed awards of punitive damages. Although punitives may be awarded against fiduciaries of sham corporations when a corporate veil is pierced, the individuals' conduct here was insufficient to support punitive damages. "[D]efendants were acting on the advice of counsel on a straightforward attempt to stay in business. Counsel undoubtedly believed our cases made this possible. We think not, but our disagreement does not render this situation appropriate for punitive damages."

Ryan v. Arneson, 422 N.W.2d 491 (Iowa 1988).

Punitives.

In affirming a judgment for $120 compensatory and $18,600 in punitive damages for wrongful attachment of logs (which used to be trees growing on the losing litigant's property), the court refused to adopt any mathematical ratio as a test for the reasonableness of punitive damages. Court prefers to examine "whether the punitive damage award is reasonably related to the malicious conduct of the defendant which resulted in actual injury or damage to the plaintiff."

Peterson v. First National Bank, 423 N.W.2d 889 (Iowa App. 1988).

Punitives.

Old case law that prohibits the accrual of pre-judgment interest on an award of punitive damages was not superceded by the 1980 amendments to section 535.3, which allowed pre-judgment interest on damage awards.

State v. Van Hoff, 415 N.W.2d 647 (Iowa 1987).

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Restitution.

Defendant was in prison for life on two convictions of murder. He objected to restitution plan by filing application for modification. HELD: Determination of reasonableness of restitution plan in cases of long-term incarcerations is based on inmate's ability to pay current installment rather than his ability ultimately to pay total amount due.

## DISCOVERY

Kaiser Agricultural Chemicals Inc. v. Peters, 417 N.W.2d 437 (Iowa 1987).

Interrogatories.

Where plaintiff, at trial, noticed damaging typographical error in his answer to a interrogatory, trial judge had considerable discretion to allow amendment.

In re Marriage of Williams, 421 N.W.2d 160 (Iowa App. 1988).

Document Production.

Dissolution litigant required to produce financial documents in custody of his attorney and/or accountant.

Krugman v. Palmer College, 422 N.W.2d 470 (Iowa 1988).

Sanctions.

Supreme Court vacates Court of Appeals decision finding an abuse of discretion, and affirms the dismissal of a medical malpractice petition for plaintiff's counsel's failure to comply with discovery requests and pretrial orders on the subject of discovery of expert witnesses and their opinions.

Plaintiff's counsel failed to produce his first expert until a motion was filed for the deposition. Plaintiff failed to list her experts in accordance with the first scheduling order. After agreeing to a trial date in this case, counsel agreed to try a three-week case to start just two weeks before the trial date in this case. Counsel named three new experts on the deadline, but did not supplement the expert witness interrogatory answer to disclose their opinions. After the court ordered supplementation of the answer, plaintiff's supplementation was late. Counsel filed a motion for continuance on grounds of the trial conflict. Counsel failed to file the pretrial documents required by local rule. Counsel did not appear at time of trial, but sent local counsel who had been counsel of record since the beginning but who announced that he was not prepared to try the case.

COMMENT: How did the Court of Appeals find dismissal to be an abuse of discretion under this factual scenario?

In re Marriage of Williams, 421 N.W.2d 160 (Iowa App. 1988).

Sanctions.

Dissolution litigation produced three appeals in five years, and eleven motions for discovery sanctions. Court concluded that one litigant's conduct in responding to discovery was relevant "in assessing his credibility and in examining the issue of his responsibility for the loss of assets under his control."

The court noted the judicial system's inability to resolve voluminous discovery motions, congratulated the majority of attorneys for complying with EC 7-38, which requires an attorney to be courteous, to exceed to reasonable requests for accommodations not prejudicing the rights of clients, and to follow local practices unless timely notice of intent not to do so is given, and warned attorneys that it expected "not only cooperation between attorneys on discovery matters but also . . . a responsibility to assure compliance with the dictates requiring full disclosure of assets in dissolution actions."

COMMENT: Special concurrence notes with strong disapproval that the offending litigant's counsel was the recipient of some of the marital assets that the litigant had transferred during the litigation.

Kendall/Hunt Publishing Co. v. Rowe, 424 N.W.2d 235 (Iowa 1988).

Sanctions.

After months of being put off by defense counsel, plaintiff filed a motion for sanctions for failure to comply with a prior order compelling answers to interrogatories. By way of sanctions, plaintiff sought entry of default judgment against defendant. Although motion had been set for hearing, district court judge entered default judgment. With new counsel, defendant filed motion to set aside default and filed answers to interrogatories. Evidence adduced at hearing on motion to set aside default established that defendant's original counsel (as opposed to defendant itself) was entirely at fault for failure to respond to discovery and court orders. Different district court sustained motion to set aside default, on grounds that original

order of default was not correct because it had been entered without hearing and with hearing pending.

Supreme court affirmed. Rather than focusing on whether rule 236's requirements had been met for setting aside a default, new district court judge properly examined whether or not default order was binding, since it had been entered when another judge had already set the motion for hearing.

Court hastens to add that this result does not mean that the district court should never impose sanctions of dismissal or default on a client unless the client has willfully or in bad faith failed to comply with discovery orders. Court recognizes "the well-established rule that clients are responsible for the actions of their lawyers and in appropriate circumstances dismissal or default may be visited upon them because of the actions of their lawyers."

Court also affirmed an attorney-fee sanction against defendant's original counsel in the amount of $600, and rejected plaintiff's claim of sanctions in the amount of $4,000.

Amco Insurance Co. v. Stammer, 411 N.W.2d 709 (Iowa App. 1987).

Sanctions.

Supplementation of expert witness interrogatory answer to identify expert witness on the day before trial was properly met by the sanction of exclusion.

Schark v. Gorski, 421 N.W.2d 527 (Iowa 1988).

Costs.

The court holds that there is no authority to tax the costs of routine discovery when action is dismissed before trial.

## ESTATES

Hyman v. Peoples Bank & Trust Co., 415 N.W.2d 638 (Iowa 1987).

Bank, as executor, borrowed money from estate's widow to finance estate's farming operations. The farm deteriorated and the estate defaulted on the notes. Widow sued bank in its individual capacity. HELD: Loan agreement with signature line of named organization, followed by an authorized individual's name and office, is a signature made in the bank's representative capacity, and thus bank may not be sued individually on sole basis of loan agreement.

## EVIDENCE

De Bolt v. Daggett, 416 N.W.2d 102 (Iowa App. 1987).

Conviction.

In personal injury action against vehicle owner and minor nephew, arising out of collision when nephew placed truck in motion while operating heater, court did not err in admitting evidence that nephew had pled guilty to a series of moving violations in connection with the accident. The convictions were admissions against interest and in direct contradiction to his testimony that he started the truck only to use the heater.

Lala v. Peoples Bank and Trust Company, 420 N.W.2d 804 (Iowa 1988).

Curative Admissibility.

Safety deposit box owner recovered compensatory damages for bank's negligence in allowing his stamp collection to be removed from box. Supreme Court found bank's introduction of evidence about an unrelated lawsuit involving plaintiff and prior owner of stamp collection permitted trial court to invoke curative admissibility doctrine, allowing box owner to introduce responsive but otherwise inadmissible evidence addressing the same subject.

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Sallis v. Lamansky, 420 N.W.2d 795 (Iowa 1988).

Expert Testimony.

In personal injury claim by over-the-road trucker, trial court properly admitted testimony of economic expert regarding plaintiff's loss of earning capacity, even though expert did not consider effects of trucking deregulation on the earnings determination, and over defendant's claim that expert was unfamiliar with trucking industry. These factors affect the weight of testimony, not its admissibility.

Kaiser Agricultural Chemicals Inc. v. Peters, 417 N.W.2d 437 (Iowa 1987).

Foundation.

Where plaintiff alleges an improper mix of chemicals in fertilizer purchased from defendant, chemical analysis of fertilizer in same storage tank belonging to defendant is admissible, even though the test sample was taken 2 months after plaintiff's purchase, because foundation evidence showed that the remaining fertilizer in the tank had not been added to or altered between plaintiff's purchase and testing.

Anderson v. Glynn Construction Co., 421 N.W.2d 141 (Iowa 1988).

Foundation.

In product liability case, court held that evidence of manufacturer's literature on shielding auger was admissible against repair contractor, even though plaintiff did not adduce evidence that the contractor possessed the materials before its repair work. Court noted that contractor had timely "knowledge of the general requirements contained in the literature."

Anderson v. Glynn Construction Co., 421 N.W.2d 141 (Iowa 1988).

Foundation.

Court re-affirms Rinkleff v. Knox, 375 N.W.2d 262 (1985), to the effect that OSHA standards are admissible in products liability cases on adequate foundational proof of "identification and explanation."

Amco Insurance Co. v. Stammer, 411 N.W.2d 709 (Iowa App. 1987).

Impeachment.

At trial in declaratory judgment proceeding by insurer after arson, insured testified that he "did not know" how the arsonist entered his home. Insurer was permitted to impeach with prior testimony by insured that "Key would work pretty good." Although statements are not directly contradictory, there is an inconsistency in the belief of the witness as evidenced by the two statements.

Also, the suspected torch testified on direct that he had been offered money by the insureds to burn their home. On cross-examination, the torch admitted that he had a tape-recorded discussion with the insureds in which he had admitted that his statements to the authorities, implicating the insureds, were false, and that he had made the statements in order to avoid responsibility for his role in the arson. The torch also rationalized that he had been drunk when he made the tape-recorded statements. Nevertheless, the court affirmed the district court's refusal to admit the tape itself, which the insureds contended would impeach the torch's statement that he had been drunk. Counsel conceded during arguments at trial that intoxication during the tape-recorded statements was a "collateral" matter.

State ex rel. Wegman v. Schulz, 417 N.W.2d 228 (Iowa App. 1987).

Judicial Notice.

Alleged father's assertion that conception could not take place during menstruation was not proper subject of judicial notice; no authority existed to support finding that assertion was a well-known fact relating to human life.

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Beachel v. Long, 420 N.W.2d 482 (Iowa App. 1988).

Motion in Limine.

Plaintiff moved in limine to exclude evidence of certain of his medical records. During trial, defendant sought continuance to obtain additional evidence on the records. HELD: No surprise, no continuance.

Bell v. City of Des Moines, 412 N.W.2d 585 (Iowa 1987).

Privilege.

Television station who secured videotape at scene of suicide appealed from district court order requiring news director to appear for deposition with "raw footage" (videotape not aired during newscast). HELD: District court failed to require plaintiffs to rebut the presumption of privilege. Party seeking videotapes must satisfy the court by a preponderance of the evidence that (1) there is a probability or likelihood that the evidence is necessary, and (2) it cannot be secured from any less intrusive source. Court adds a caveat that privilege does not protect reporter from observations made as an eyewitness, because to such extent the reporter is like any other citizen.

Young v. Gibson, 423 N.W.2d 208 (Iowa App. 1988).

Privilege.

Letter from attorney representing personal-injury plaintiff to treating physician, with inquiries about doctor's willingness to testify as to causation and containing indications of trial strategy, was not rendered inadmissible by virtue of the attorney-client privilege. Once defendant obtained the document, the work product doctrine does not afford a basis for exclusion from evidence.

Erickson v. Des Moines Water Works, 421 N.W.2d 155 (Iowa App. 1988).

Relevance.

Polk County employee was injured in course of employment when she stepped into a water shut-off valve in street. City and water works submitted exhibit that suggested that duty of maintenance had been delegated to county. Parties agreed that duty was not delegable. HELD: Exhibits were relevant because they suggested that duty of maintenance was shared by defendants with county. Exhibit required instruction, however, that duty was not delegable. Instructions that defined defendants' duties of maintenance but failed to provide that duties could not be delegated were error.

Shawhan v. Polk County, 420 N.W.2d 808 (Iowa 1988).

Relevance - Prejudicial Effect.

Over plaintiff's objections, court admitted personal-injury plaintiff's past use of drugs, submitted by defendant as bearing on life expectancy. Evidence further showed that plaintiff had not used the drugs at any time proximate to her accident and that the past drug use did not contribute to the accident.

HELD: Even if evidence was relevant, district court abused its discretion in concluding that probative value outweighed danger of unfair prejudice.

Gail v. Clark, 410 N.W.2d 662 (Iowa 1987).

Settlement.

Officer injured in high-speed chase of intoxicated driver sued driver and dram shop. Intoxicated driver settled with officer before trial, then testified at trial that his deposition testimony, which was quite favorable to the dram shop, was a lie and that he had in fact consumed beer purchased from the dram shop defendant's convenience store. HELD: No abuse of discretion in refusing to permit defendant to introduce evidence of officer's settlement with driver and amount.

In re Marriage of Webb, 426 N.W.2d 402 (Iowa 1988).

Statute of Frauds.

In dissolution proceeding, husband claimed that he and wife executed a prenuptial agreement, which she destroyed while the dissolution was pending. Wife denied existence of agreement, and husband could produce only hearsay testimony by other witnesses as to its existence and its contents to support his own testimony.

HELD: Section 622.32 does not bar proof of a written contract alleged to have been destroyed. Moreover, prenuptial agreement is not necessarily "a contract made in consideration of marriage." Husband failed to prove by clear, satisfactory, and convincing evidence the existence and contents of the prenuptial agreement.

Young v. Gibson, 423 N.W.2d 208 (Iowa App. 1988).

Work Product.

Letter from attorney representing personal-injury plaintiff to treating physician, with inquiries about doctor's willingness to testify as to causation and containing indications of trial strategy, was not rendered inadmissible by virtue of the attorney-client privilege. Once defendant obtained the document, the work product doctrine does not afford a basis for exclusion from evidence.

De Bolt v. Daggett, 416 N.W.2d 102 (Iowa App. 1987).

In personal injury action, court did not err in allowing physician to testify regarding permanency. Fact that physician had not seen plaintiff for nearly three years, and that there were no hospital records goes to weight rather than admissibility.

## FAMILY

In the Interest of A.C., 415 N.W.2d 609 (Iowa 1987).

Termination of Parental Rights.

Mother suffered from bipolar mental illness causing anti-social personality. She voluntarily placed children in foster care. Placement of children later became involuntary and foster parents sought permanent placement while the DHS tried to rehabilitate mother. Guardian ad litem filed petition to terminate mother's parental rights. HELD: Neither foster parents (nor foster children placed in their care for 18-month period) had no constitutionally protected liberty interest in their relationship such that due process attached to a decision to remove the children from foster home. Iowa law does not create the expectation that a foster family relationship will be permitted to continue after the children have resided with the foster parents for a certain period of time.

In Interest of J.P.B., 419 N.W.2d 387 (Iowa 1988).

Termination of Parental Rights.

District court terminated mother's parental rights of son and daughter. Mother and daughter appealed. Supreme Court found attorney's dual representation of both children, only one of whom favored termination of parental rights, did not prevent attorney from seeking best interests of children and was not a conflict of interest.

In the Interest of A.C., 415 N.W.2d 609 (Iowa 1987).

Foster Parent.

Mother suffered from bipolar mental illness causing anti-social personality. She voluntarily placed children in foster care. Placement of children later became involuntary and foster parents sought permanent placement while the DHS tried to rehabilitate mother.

HELD: Temporary homes and temporary foster parents rationally further the state's legitimate interest in maintaining children in a relationship with natural parents. Removing children from foster home is necessary to achieve state's interest in preserving children's relationship with the natural parents.

State ex rel. Wegman v. Schulz, 417 N.W.2d 228 (Iowa App. 1987).

Paternity.

Trial court had proper authority to order a blood test on its own motion, but trial court should not have ruled on the order without providing both parties an opportunity to respond.

Alleged father's assertion that conception could not take place during menstruation was not proper subject of judicial notice; no authority existed to support finding that assertion was a well-known fact relating to human life.

In re Marriage of Gebhardt, 426 N.W.2d 651 (Iowa App. 1988).

Common-law Marriage.

Women established by clear and convincing evidence the existence of common-law marriage due to proof of continuous cohabitation for 16 years, man's acquiesce in woman's use of his name and in representations to the public that they were married, gifts of rings, payments by man of charge accounts incurred by woman in name of Mrs. Gebhardt, receipt of mail addressed to Mr. and Mrs. Gebhardt, and similar such public representations of marriage.

In re Marriage of Rosalez, 417 N.W.2d 226 (Iowa App. 1987).

Dissolution.

A modification of dissolution action, wife contended trial court lacked jurisdiction because father's refusal to allow child to move out of state with wife when wife had custody amounted to abduction; thus Iowa Code § 598A.8(1) dictated refusal of jurisdiction. Court said child's best interests required court to exercise jurisdiction, and thus trial court acted properly.

In re Marriage of Fortelka, 425 N.W.2d 671 (Iowa App. 1988).

Dissolution.

Court of appeals remands for appointment of "family mediator" to assist parties in communicating on issues of visitation. Costs to be shared equally by the parents.

In re Marriage of Behn, 416 N.W.2d 100 (Iowa App. 1987).

Custody.

In child custody modification proceeding, trial court transferred physical care from mother to father because mother's geographic location had changed since the decree and further moves were likely because of new husband's employment with U.S. Army. HELD: Wife's actual and/or potential moves as a result of new husband's employment did not justify change in physical care.

Lambert v. Everist, 418 N.W.2d 40 (Iowa 1988).

Custody.

Legal analysis employed in resolving custody question of a child born out of wedlock is the same as that which would be utilized if child's parents had been married and dissolution had resulted, in order to achieve best interests of the child.

Petition of Sturtz, 415 N.W.2d 173 (Iowa App. 1987).

Support.

Divorce court acted properly in setting aside to wife her inherited property, but considering its value (in income likely to be derived therefrom) in determining amount of alimony award.

In re Marriage of Armetta, 417 N.W.2d 223 (Iowa App. 1987).

Support.

Attempt by plaintiff-mother to levy against homestead of father to satisfy delinquent child support payments. Court held that the debt to support child is incurred on date of child's birth. For homestead acquired after child's birth, § 561.21 (which allows sale of homestead to satisfy debts incurred prior to the acquisition of the homestead) subjects father's homestead to judicial sale.

State v. Uebler, 417 N.W.2d 224 (Iowa App. 1987).

Support.

The state, acting under ch. 252A, obtained a judgment ordering defendant to pay $300 per month child support to relieve state of burden of providing public assistance to the mother. Subsequently, a divorce decree called for child support payments of only $200 per month.

After state began withholding father's wages to collect the $300 per month, father filed suit to quash the execution, claiming that the $200 per month divorce decree order superseded the prior $300 per month judgment.

The court disagreed, holding that the state was not a party to the divorce decree and was not bound by the $200 per month order.

In re Marriage of Lieberman, 426 N.W.2d 684 (Iowa App. 1988).

Support.

Evidence that divorced parents' adult child who attends college is receiving money from a trust established by a grandparent to provide for college expenses is relevant on the issue of how much money should be paid by the non-custodial parent for support of the adult child.

In re Marriage of McNerney, 417 N.W.2d 205 (Iowa 1987).

Property Distribution.

Proceeds of a personal injury claim are marital assets, which, like other assets, should be divided by a "mechanistic approach" on a case by case basis. Since both husband and wife were parties to the settlement agreement, court concludes that the claim covered both pain and suffering of the injured husband as well as the wife's loss of consortium. The district court properly gave a portion of the settlement to the wife.

In re Marriage of Woodward, 426 N.W.2d 668 (Iowa App. 1988).

Property Distribution.

Wife claimed right to one-half of present value of pension owned by husband. Evidence established that pension was vested, but that husband must live to retirement in order to draw pension. HELD: Decree properly provides that upon retirement, husband shall pay to wife one-half of the marriage portion of the value of the pension.

Midwest Dredging Co. v. McAninch Corp., 424 N.W.2d. 216 (Iowa 1988).

Sovereign Immunity.

DOT signed contract for construction of interstate highway. Plaintiff was subcontractor. Plaintiff sued DOT for breach of contract. Court held that DOT did not have immunity from suit by subcontractor, who was not in privity to government, when subcontractor sued on third-party beneficiary theories.

Builders Transport, Inc. v. State, 421 N.W.2d 519 (Iowa 1988).

Tort Claims Act.

Insured of Carriers sued insurance commissioner for negligent supervision during a period of rehabilitation. Insured filed action on same day that it filed claim with state appeal board, because chapter 25A had just been amended to exclude suits against state for negligent supervision. Insured acknowledged its failure to comply with requirements that claim be disposed of before filing suit, but claims it had no choice due to the imminent cutoff of suits for negligent supervision by new legislation. The court found no relief available to insured under standard rules of statutory construction, and rejected insured's due process claim because insured had no affected property right. State's consent to be sued for negligent supervision, now withdrawn, did not create a property right evoking due process protections.

McGruder v. State, 420 N.W.2d 425 (Iowa 1988).

Ch. 25A.

Iowa Code § 25A.13, requiring claim be "made in writing" within two years after its accrual means that mere mailing of the claim will not suffice to toll the statute; "made" means "filed."

Saunders v. Dallas County, 420 N.W.2d 468 (Iowa 1988).

Ch. 668.

Plaintiff alleged county was negligent for placement of a curve sign at an inappropriate distance from a highway curve. HELD: County was immune from liability pursuant to § 668.10(1), because challenge was to county's placement of signs, rather than their maintenance.

## INDEMNITY

Nelson v. Merchants Bonding Co., 425 N.W.2d 433 (Iowa App. 1988).

Surety.

Purchaser of vehicle parts was not entitled to recover under dealer's bond for failure to provide certificate of title.

## INSURANCE

Witcraft v. Sundstrand Health and Disability Group Benefit Plan, 420 N.W.2d 785 (Iowa 1988).

Coverage.

Couple's infertility problem was a covered "illness" within meaning of group health plan where "disease" was defined as a morbid condition of the body or a deviation from the healthy or normal condition of any of the functions or tissues of the body.

Altena v. United Fire & Casualty Insurance Co., 422 N.W.2d 485 (Iowa 1988).

Coverage.

Adult victim of forced sexual abuse brought declaratory judgment action seeking to obtain coverage under abuser's standard homeowner's umbrella liability insurance policies. Court reaffirms its adoption of the "majority view" of the intentional

injury exclusion, so as to require that the insured must have intended the act and to cause some kind of bodily injury. Court infers, however, as a matter of law that abuser intended to injure plaintiff.

AID Insurance v. Steffen, 423 N.W.2d 189 (Iowa 1988).

Coverage.

Two brothers engaged in an incorporated business named Harvestall Industries, Inc. Harvestall created agricultural and mechanical engineering designs. Harvestall and the brothers became involved in litigation over the validity of some patents on Harvestall designs. The lawsuit included tort claims against Harvestall and the brothers. They sought coverage under standard homeowner's policies and farm liability policies. All policies had standard "business pursuit" exclusions. HELD: Under either the standard reading given to the "business pursuits" exclusion of such policies, or under a claim of reasonable expectations, policies provided no coverage as a matter of law.

Farm Bureau Mutual Insurance Co. v. Milne, 424 N.W.2d 422 (Iowa 1988).

Coverage.

Farm Bureau insured Milne, 100/300 limits. Milne was involved in double-fatality accident. Parties agreed to settlement of $427,500.00. Milne paid $55,000.00, and Farm Bureau paid $372,500.00. Provisions in settlement agreement, signed by Milne as well as Farm Bureau, confirmed that part of payment by Farm Bureau was based on Milne's and plaintiffs' demands that Farm Bureau pay, in settlement, prejudgment interest. Milne and Farm Bureau agreed to reserve for adjudication between them the issue of whether Farm Bureau owed prejudgment interest in excess of policy limits.

Policy language defined Farm Bureau's obligation to pay amounts in excess of policy limits:

> [A]ll interest on the amount of any judgment which accrues after the entry of judgment and until the company has paid, tendered, or deposited in court such part of such judgment as does not exceed the limits of the company's liability thereon.

Farm Bureau's action for declaratory judgment was successful.

Court acknowledged cases from other jurisdictions that require insurer to pay interest on entire judgment, even that exceeding limits, but declined to say whether court would follow them. Cases are based on judgment, and this case settled before entry of judgment.

Court also refused to "re-write" policy language in light of statutory imposition of liability for prejudgment interest. Farm Bureau concedes that it is liable for prejudgment interest, in addition to the judgment itself, until limits were exhausted, "because interest on unliquidated claims constitutes an element of compensatory damages." Court adopts this position.

Court also held that Farm Bureau did not waive and was not estopped to assert its right to contest coverage by paying more than its limits. The agreement reserved the insurer's and insured's rights, and Farm Bureau was operating within its duty of good faith.

Thomas v. United Fire & Casualty Co., 426 N.W.2d 396 (Iowa 1988).

Reasonable Expectations.

Section 515.138, which provides that a fire insurance policy may require that suits for fire losses be brought within 12 months of the loss, does not violate equal protection. C & J Fertilizer does not apply because there was no evidence suggesting that insureds expected anything other than a 12-month period in which to commence suit.

Kartridg v. Travelers Indemnity Co., 425 N.W.2d 687 (Iowa App. 1988).

Duty to Defend.

Kartridg leased a mechanical deboner to Iowa Meat. Iowa Meat purchased pork loin backbones for a local packing house, which was designed to grind up the pork loin backbones and then separate the meat from the bone. Too much bone was left in the meat to allow it to be sold for human consumption. Iowa Meat sued Kartridg. Kartridg tendered defense to Travelers, who declined and instead brought a declaratory judgment action.

General liability policy defined its coverage for "property damage" by reference to "physical injury to or destruction of tangible property."

Court discussed 1973 revision of the comprehensive liability policy used by most insurance companies, which added the modifier "physical" to the definition of "property damage," and held that allegations against Kartridg constituted a claim for diminution in value of tangible property, not physical injury to or destruction of tangible property. Court acknowledged that pork loin backbones were ground up, but reasoned that this act was not the genesis of the litigation. Iowa Meat contends that the deboner failed, after the grinding phase, to separate the meat and bone components sufficiently to render the meat suitable for human consumption.

First Newton National Bank v. General Casualty Co., 426 N.W.2d 618 (Iowa 1988).

Duty to Defend.

Travelers provided comprehensive liability coverage for bank during calendar year 1983. Defendant insurers provided coverage under comprehensive liability policy, special multi-peril policy, and commercial umbrella policy for calendar year 1984. Two farm families sued bank in 1985 for fraud, negligent misrepresentation, and violation of the Iowa Uniform Securities Act in connection with these farm families' transaction with a third-party, who offered to assist them with their financial troubles with the bank.

All policies were of the "occurrence" type. Court adopts majority view that the time of the occurrence, for determining coverage between consecutive policies, "is when the claimant sustains actual damage and not when the act or omission that caused such damage was committed." Because the farm families' petition against the bank alleges that the bank started foreclosure proceedings against them in 1984 and that the third-party took their property in 1984, the allegations of the petition against the bank imposed a duty on the defendant insurers, not Travellers, to defend.

Defendant insurers also argued that farm families' claim against bank for negligent misrepresentation was directed to intentional conduct and would not trigger coverage. Following Altena, 422 N.W.2d 485 (Iowa 1988), the court finds no indication in the allegations that the bank, which no doubt acted

intentionally when it made certain representations, intended to make false representations or intended to cause injury. Court proceeds to hold that a claim for negligent misrepresentation would not be excluded from coverage and therefore a duty to defend under standard general liability policies.

Defendant insurers next argued that the farm families' allegations of damages did not trigger a duty to defend. The multi-peril policy covered property damage, which was defined as "physical injury to or destruction of tangible property . . . or loss of use of tangible property which has not been physically injured or destroyed." Court held that physical injury to tangible property was not a pre-condition to the coverage for loss of use, which was triggered by the farm families' allegations that they had lost all of their real and personal property and would lose the profits that would have been realized from the farming operations. The extended liability coverage endorsement on the multi-peril policy covered personal injury, which was defined to include those injuries arising out of any "invasion of the right of occupancy." The umbrella policy also covered personal injury which was defined more broadly to include "shock, mental anguish, and mental injury." The farm families' petition alleged claims for emotional distress. The court held that the extended liability coverage endorsement defined personal injury broadly enough "to encompass the petition's allegation that the [farm families] have and may be put out of their homes [sic]." The court held that the umbrella policy's definition of "personal injury" was broad enough to include emotional distress.

An endorsement to the umbrella policy excluded "claims arising out of error or omission or mistake . . . by . . . insured in the conduct of . . . insured's business activities or the rendering or failure to render professional service." Court held that if "read broadly," the exclusion could be interpreted to exclude any claim of negligence in connection with professional services. Court notes that exclusion uses the words "error, omission, and mistake" but not "negligence," and holds: "[W]e do not think a reasonable person would understand the words 'error,' 'omission,' and 'mistake' to include the concept of 'negligence'." Because the farm families' petition was grounded in allegations of negligence, the exclusion did not apply, at least for purposes of the insurers' duty to defend.

Last but perhaps most important, the court held that in accordance with what it perceived to be the majority position, an insurer who has coverage for at least one claim must defend the entire suit, even though there would be no duty to defend some of the other claims if they were the only claims being asserted. This position "assures that the insured will have a coherent,

coordinated defense aimed at defeating all of the claims, rather than separate defenses that might work at cross purposes, since the insurer will be interested primarily in defeating the covered claims." The court noted that an insured would "reasonably expect" that the insurer would defend the entire action, not just part of it. The court also noted that if the insurer fears a conflict of interest, it can permit the insured to retain its own counsel "and then reimburse it for the cost of the entire defense."

Kluiter v. State Farm Mutual Auto Insurance Co., 417 N.W.2d 74 (Iowa 1987).

Underinsured.

Insured, who was injured by an underinsured motorist, sought recovery from insurer despite clause in policy which denied coverage if insured was occupying a vehicle owned by insured but not insured by the policy in question. Supreme Court rejects insured's claim that the clause violates public policy, stating that the clause instead advances the policy of Iowa Code § 516A.2, which allows insurers to take steps to prevent duplication of coverage and benefits.

Kapadia v. Preferred Risk Mutual Insurance Company, 418 N.W.2d 848 (Iowa 1988).

Underinsured.

Plaintiff was involved in accident with underinsured driver. She settled for limits of driver's liability policy, and then sued her own insurer under underinsured motorist coverage. Insurer argued plaintiff violated consent-to-settlement clause in insurance policy.

P

HELD: Subrogation clauses and accompanying consent-to-settle clauses are not prohibited by ch. 516A. Insured's breach of consent-to-settlement clause may be pleaded as an affirmative defense. Insurer must prove that absent such breach, it could have collected from tort feasor under its rights created by contractual subrogation clause.

McClure v. Northland Insurance Co., 424 N.W.2d 448 (Iowa 1988).

Underinsured.

Plaintiff was injured while in the course of his employment. He received $100,000.00 from the tortfeasor and $250,000.00 from the worker's compensation insurer. He sued his own two insurers to recover his underinsurance limits of $100,000.00 and $25,000.00. Both policies purported to reduce those limits by the amounts received from "other" insurance.

HELD: Iowa's "broad coverage" view of underinsured motorist coverage, set forth in Tollari, 362 N.W.2d 519 (Iowa 1985), continues, and is not affected by the recovery of worker's compensation benefits. Worker's compensation is not the same as "stacking," the prohibition of which was approved in De Gooyer, 379 N.W.2d 16 (Iowa 1985).

Thomas v. United Fire & Casualty Co., 426 N.W.2d 396 (Iowa 1988).

Limitations of Action.

Section 515.138, which provides that a fire insurance policy may require that suits for fire losses be brought within 12 months of the loss, does not violate equal protection. C & J Fertilizer does not apply because there was no evidence suggesting that insureds expected anything other than a 12-month period in which to commence suit.

Wendt v. White Pidgeon Mutual Insurance Ass'n, 418 N.W.2d 374 (Iowa App. 1987).

Limitations of Actions.

P

Insurer's representation that claim for proceeds of fire policy would be paid upon favorable disposition of arson charges lodged against insured's wife equitably estopped insurer from asserting statute of limitations defense.

Grinnell Mutual Reinsurance Co. v. Globe American Casualty Co., 426 N.W.2d 635 (Iowa 1988).

Other Insurance Clause.

Kasal was driving a car owned by Jacobi when it was struck by an uninsured driver. Jacobi's insurer, Globe, paid Kasal pursuant to medical payments provisions but denied liability under its uninsured motorist coverage. Grinnell, who insured Kasal, paid Kasal $30,000 pursuant to its uninsured motorist coverage and sued Globe for contribution.

Grinnell's uninsured motorist limits were $50,000/$100,000, and its prorata "other insurance" clause contained the following exception: "But, any insurance for a vehicle you do not own is excess over any other applicable similar insurance." Globe's policy had underinsured limits of $20,000/$40,000, and a "prorata" clause.

HELD: In a contest between an "escape" clause and a "prorata" clause, the excess carrier pays only to the extent that the prorata carrier fails to satisfy the claim. Therefore, of the $30,000 paid to Kasal, Globe should pay its policy limits of $20,000 and Grinnell is entitled to contribution in that amount.

Also, Globe's policy does not have sufficient offset language as required by § 516A.2 to provide for a credit to Globe for the $1,000 paid by Globe under its medical payments clause. Globe's "other insurance" provision with respect to other medical payment insurance "does not even purport to deal with uninsured motorist coverage."

American Trust and Savings Bank v. U.S. Fidelity and Guaranty Co., 418 N.W.2d 853 (Iowa 1988).

Indemnity.

Bank purchased blanket bond from insurer, which protected that bank from employee's embezzlement scheme. Supreme Court found although designated as a bond, the bond was actually a contract of indemnity and governed by § 524.705. Court ruled "loss" for which insurer was liable referred to actual depletion of bank funds caused by employee's dishonest acts, and not to the eventual personal liability of the employee to the bank. Thus "loss" does not include portion of outstanding note that represent payments made to cover up prior embezzlements.

Tilley v. Home Insurance Co., 411 N.W.2d 686 (Iowa 1987).

Dram Shop.

In anticipation of insured's renewal, insurer sent a certificate of insurance to the beer and liquor control department, which issued a liquor license to the insured in reliance upon such certificate. Insured purchased insurance from another company and paid no double premium, and insurer-defendant never issued a policy. HELD: No insurance coverage by Home, because neither insured nor department relied upon certificate to its detriment. COMMENT: 5-4, even though it was clear that other insurer issued a policy, sent a certificate of insurance, and was "on the risk" in the underlying suit.

Vali-chek, Inc. v. Security-Connecticut Insurance Co., 423 N.W.2d 556 (Iowa App. 1988).

Life.

At time of application for life insurance, insurer knew that prospected insured was 65, was a smoker, was obese, and had suffered from high blood pressure, hypertension, and respiratory problems. Insurer knew that insured was possibly going to have hernia surgery. Before policy was issued, insured in fact was admitted to hospital where tests revealed acute pancreatitis, cholecystitis, chronic gastritis, a gastric ulcer, a hiatal hernia, and two incisional hernias. After the policy was issued, the insured returned to the hospital for surgery, and he died of surgical complications. Policy provided that it "shall not take effect if the insured's health as shown in the application has changed so as to increase the mortality rating or class of risk before delivery." Insurer agreed at trial that had insured undergone successful surgical treatment, insurance rating would not have changed.

P

HELD: No substantial evidence to support finding that insured experienced a significant change in health between date of application and date of delivery.

Amco Insurance Co. v. Stammer, 411 N.W.2d 709 (Iowa App. 1987).

First-Party Bad Faith.

Mr. and Mrs. Stammer were insureds on homeowner's policy issued by plaintiff, which policy extended to fire loss. House burned, and everyone agreed that it was arson. Amco brought action for declaratory relief, alleging that Mr. and Mrs. Stammer were responsible, either directly or indirectly, for the arson.

HELD: On motion for summary judgment by Amco, court properly ruled that, as a matter of law, Stammers' claim is "fairly debatable." Amco's failure to pay, therefore, cannot constitute first-party bad faith. Stammers' accompanying negligence claim for failure to perform good-faith duty to make reasonable and timely settlement, is a first-party bad faith claim in disguise, and was properly rejected on motion for summary judgment.

Department of Human Services v. Brooks, 412 N.W.2d 613 (Iowa 1987).

Subrogation.

Child injured in motor vehicle accident received jury verdict. Parents owned claim for medical expenses, and dismissed their lawsuit before trial. Child's guardian did not produce evidence of the medical expenses at trial. In the meantime, DHS was paying the child's medical expenses pursuant to Chapter 249A.

HELD: DHS not entitled to subrogation from jury verdict for child because verdict did not constitute a recovery for medical expenses.

P

JUDGMENTS

Selchert v. State, 420 N.W.2d 816 (Iowa 1988).

Preclusion.

In first lawsuit plaintiff obtained damages in personal injury suit arising out of an automobile accident. Plaintiff later filed suit against different defendants (utility pole owner, state and city) but for same accident. Summary judgment

was entered for defendants on ground that prior judgment barred the second suit. Supreme Court reversed, finding that while Iowa Comparative Fault Act contains incentives to join all potential defendants in one suit, the Act's language does not convey legislative intent to make joinder mandatory.

Struebin v. Illinois, 421 N.W.2d 874 (Iowa 1988).

Execution.

Owner of judgment against Illinois after wrongful death action litigated in Iowa garnished tax revenues owed to Illinois by corporation located in Iowa. The court had previously refused to permit garnishment in Iowa until after plaintiff attempted to enforce judgment in Illinois. Illinois successfully defended against an enforcement action on procedural grounds. The court finds no immunity for Illinois, no reasons under comity to refuse to exercise jurisdiction, and protection for the garnishee in the form of full faith and credit.

Klaes v. Scholl, 412 N.W.2d 178 (Iowa 1987).

Execution.

Judgment creditor executed upon defendant's vehicle and had it sold at sheriff's sale. Defendant then obtained a reversal of the judgment on appeal. HELD: Judgment debtor was entitled to recover market value of vehicle at time of sheriff's sale.

Bechtel Corp. v. Western Contracting Corp., 414 N.W.2d 130 (Iowa 1987).

Foreign Judgment.

Plaintiff received judgment of $3 million against defendants in federal district court in Maryland. Defendants appealed to the Fourth Circuit, but did not file a supersedeas bond or obtain a stay of execution. Plaintiff attempted to register the judgment in Woodbury County, and defendant's motion to strike or stay was sustained.

HELD: For purposes of Chapter 626A, "a court of the United States" shall be construed to include federal district courts. Federal law that prohibits enforcement of a judgment in another district while the appeal is pending, even though the judgment debtor may have failed to obtain a supersedeas bond or otherwise stay enforcement, does not pre-empt application of Chapter 626A.

Raymon v. Norwest Bank, 414 N.W.2d 661 (Iowa App. 1987).

Preclusion.

Bank sued to foreclose on property mortgaged by LT. LT assigned its interest to plaintiff after suit was commenced. Bank amended to add claim against plaintiff. LT later assigned to bank its rights to payments from plaintiff. Bank amended to show the assignment. Seven months later, plaintiff filed a counterclaim for breach of contract. Bank's motion to strike counterclaim was sustained on the ground that it was not timely filed. Bank proceeded to obtain judgment of foreclosure.

Thereafter, plaintiff commenced this action against bank for same breach of contract that was the basis of the counterclaim.

HELD: Counterclaim was compulsory. Decree of foreclosure constitutes an adjudication on the merits, and the motion to strike "should be treated as a motion to dismiss" for purposes of preclusion.

## JURISDICTION

Omaha Cold Storage Terminals v. Cunningham, 417 N.W.2d 254 (Iowa App. 1987).

P

Minimum Contacts.

Where defendant had resided and worked in Iowa in the past, and where transactions occurring during his in-state employment are the subject matter of plaintiff's suit (defendant built the disputed device while acting within the scope of his employment duties), district court erred in sustaining defendant's special appearance challenging personal jurisdiction. Defendant's contacts with the state were sufficient enough that

personal jurisdiction over him was consistent with due process, and maintaining the action in Iowa would not offend traditional notions of fair play and substantial justice.

## LIMITATIONS OF ACTIONS

Wendt v. White Pidgeon Mutual Insurance Ass'n, 418 N.W.2d 374 (Iowa App. 1987).

Insurer's representation that claim for proceeds of fire policy would be paid upon favorable disposition of arson charges lodged against insured's wife equitably estopped insurer from asserting statute of limitations defense.

Gibbs v. Illinois Central Gulf Railroad Co., 420 N.W.2d 446 (Iowa 1988).

Railroad employee brought action against employer to recover for personal injuries under FELA. Plaintiff's earlier filing of suit on same cause of action in another state was dismissed on the basis of forum non-conveniens. District court later dismissed present case as untimely upon defendant's motion for summary judgment.

HELD: Although out-of-state filing tolled statute of limitations during pendency of that action, plaintiff's subsequent filing in Iowa after dismissal was untimely, absent explanation for employee's failure to timely assert rights.

Kendall/Hunt Publishing Co. v. Rowe, 424 N.W.2d 235 (Iowa 1988).

Rowe was an editor for publisher Kendall. Rowe's job duties included securing publication contract with college professors who wanted to publish their materials for use in their own classes. While still employed by Kendall, Rowe and his wife and a Kendall author established their own publishing company, named Waveland. While still employed by Kendall, Rowe solicited some authors for Waveland. Two authors who had contracts with Kendall, the terms of which gave Kendall a right of first refusal with respect to publication of second editions, republished their books with Waveland.

HELD: Because more than five years had passed from time that Kendall had become aware that Rowe had published at least one book through Waveland while he was employed by Kendall, Kendall was placed on inquiry notice. Kendall asserted and therefore had to agree that Rowe was a fiduciary of Kendall. Kendall's conduct in publishing while an employee of Kendall was sufficiently inconsistent with his fiduciary obligations to Kendall that Kendall was obligated to investigate.

## NEGLIGENCE

Betsworth v. Morey's & Raymond's, 423 N.W.2d. 196 (Iowa 1988).

Ch. 668.

Plaintiff who timely sues first defendant adds claim against second defendant after statute of limitations has run. Plaintiff claims that section 668.8 permits her to add new defendants at any time as long as the original petition was filed timely. HELD: Section 668.2's reference to "party" does not include one who comes within the definition of "party" for the first time after the expiration of the statute of limitations. "There is always the possibility, of course, that such a defendant might be brought in as a third-party defendant, and in that case the statute of limitations would not be a barrier."

AID Insurance Co. v. Davis County, 426 N.W.2d 631 (Iowa 1988).

Ch. 668.

AID paid its limits to the injured passenger on its insured's motorcycle and obtained a release that discharged "all other persons, firms, or corporations, known or unknown, who are, or might be claimed to be liable." AID had been unsuccessful in urging the passenger to sue the county for the condition of the roadway. An action by AID against county for contribution, jury found county 50% at fault.

P

The court refused to enforce the release. Boiler plate language that purported to release the entire population of possible tort-feasors was not effective before Ch. 668, according to Community School District v. Gordon N. Peterson, Inc., 176 N.W.2d 169 (Iowa 1970), and court found nothing in Ch. 668 to abandon the precedent. "[W]e favor a rule which would require a

written release to include some specific identification of the tort-feasors to be released." Court does not require that each tort-feasor be named, "if they are otherwise sufficiently identified in a manner that the parties to the release would know who was to be benefited."

Miller v. Eichhorn, 426 N.W.2d 641 (Iowa App. 1988).

Ch. 668.

Defendant in personal injury case adduced evidence that plaintiff employed substitute labor in her business from the time of the accident to the time of trial, but did not consult a doctor regularly throughout the same time period for her injuries. Trial court instructed on failure to mitigate as a particular of comparative fault.

HELD: Failure to mitigate damages is an aspect of fault, pursuant to § 668.1. Defendant's argument is insufficient to support an instruction on failure to mitigate, because defendant failed to adduce evidence that the failure to consult a doctor on a regular basis would have made a difference in the plaintiff's injuries and condition. On the other hand, testimony by one of the treating physicians that additional chiropractic treatments would have helped plaintiff's condition was sufficient to submit the issue of mitigation.

Selchert v. State, 420 N.W.2d 816 (Iowa 1988).

Ch. 668.

In first lawsuit plaintiff obtained damages in personal injury suit arising out of an automobile accident. Plaintiff later filed suit against different defendants (utility pole owner, state and city) but for same accident. Summary judgment was entered for defendants on ground that prior judgment barred the second suit. Supreme Court reversed, finding that while Iowa Comparative Fault Act contains incentives to join all potential defendants in one suit, the Act's language does not convey legislative intent to make joinder mandatory.

Saunders v. Dallas County, 420 N.W.2d 468 (Iowa 1988).

Ch. 668.

Plaintiff alleged county was negligent for placement of a curve sign at an inappropriate distance from a highway curve. HELD: County was immune from liability pursuant to § 668.10(1), because challenge was to county's placement of signs, rather than their maintenance.

Peters v. Howser, 419 N.W.2d 392 (Iowa 1988).

Contributory Negligence.

Finding as a matter of law that plaintiff driver was not negligent, precluded finding of contributory negligence on part of passenger for failing to keep a proper lookout and/or to warn driver of oncoming car.

Erickson v. Des Moines Water Works, 421 N.W.2d 155 (Iowa App. 1988).

Duty.

Polk County employee injured in course of employment when she stepped into a water shut-off valve in street. City and water works submitted exhibit that suggested that duty of maintenance had been delegated to county. Parties agreed that duty was not delegable. HELD: Exhibits were relevant because they suggested that duty of maintenance was shared by defendants with county. Exhibit required instruction that duty was not delegable. Instructions that defined defendants' duties of maintenance but failed to provide that duties could not be delegated were error.

P

Martin v. Nash Finch Co., 426 N.W.2d 666 (Iowa App. 19880.

Slip and Fall.

Court of appeals affirmed, reluctantly and with notice of its disagreement with Weidenhaft, 165 N.W.2d 756 (Iowa 1969),

summary judgment for defendant in slip-and-fall case involving puddle of water created in store entrance by snow being tracked in from outside.

Byers v. Contemporary Industries Midwest, 419 N.W.2d 396 (Iowa 1988).

Standard of Care.

Convenience stores, who cater to persons in a hurry, do not owe a higher standard of care to invitees.

Miller v. Eichhorn, 426 N.W.2d 641 (Iowa App. 1988).

Sudden Emergency.

Two-vehicle accident occurred when defendant backed out of driveway into the path of plaintiff. There was evidence that plaintiff knew defendant might be backing out of his driveway, but nevertheless accelerated after rounding a curve 300 feet before reaching defendant's driveway. Plaintiff requested but did not receive an instruction on sudden emergency.

HELD: Although Iowa continues to authorize the instruction on sudden emergency, notwithstanding the adoption of comparative fault, the failure to give such an instruction is not prejudicial when the issue of the negligence of both parties is submitted to the jury.

Pahre v. State, 422 N.W.2d 178 (Iowa 1988).

Third-Party Beneficiary.

Industrial Loan Thrift Guaranty Corporation, created in 1981 by Chapter 536B, Code of Iowa, sued an industrial lending company's independent accountants for overstating the lender's financial health. The accountants prepared the financial statements before the ILTGC even came into existence, and certainly before the lending institution used the financial statements to gain membership in the ILTGC. The accountants knew only that the financial statements were being used by the lending institution in the internal management of its fares and for

filing requirements with the State Auditor's office. HELD: ILTGC cannot sue accountants. It was not within the class identifiable by the accountants at the time of the creation of the financial statements or a member of the class intended by the accountants to be users of the financial statements.

Gipson v. State, 419 N.W.2d 369 (Iowa 1988).

Per Se.

Violation of provision of the manual on uniform traffic control devices is evidence of negligence, but does not constitute negligence per se.

Galloway v. Bankers Trust Company, 420 N.W.2d 437 (Iowa 1988).

Shopping mall patron sued several parties based on an alleged failure of mall owner and its hired security firm to protect him from a homosexual rape in a mall restroom. District court sustained defendant's motion for summary judgment on grounds that the attack was not reasonably foreseeable.

HELD: Foreseeability of harmful acts by third persons necessary to render possessor of premises liable may be proven by history of criminal activity on the premises. The prior crimes, however, need not be of the same type as the crime in question. In this case sufficient evidence was raised for a jury question where it was revealed prior crimes had existed, even though they were not crimes against persons.

Diehl v. Diehl, 421 N.W.2d 884 (Iowa 1988).

P

Mother sued 14-year-old son with learner's permit for injuries received as a passenger after one-car accident. Son defended on provision in Chapter 321 making it unlawful for parent to permit him to drive unsupervised. HELD: Failure to comply with Chapter 321 should (and did, to the tune of 55%) relate to contributory fault, not the right to maintain the action. Instruction that conditioned imposition of duty of supervision upon awareness of statute or law was error. Because

jury found substantial contributory fault and because failure of supervision was the only ground of contributory fault asserted, error was harmless.

## PLEADING

Bremicker v. MCI Telecommunications Corp., 420 N.W.2d 427 (Iowa 1988).

District court did not abuse its discretion by refusing to permit plaintiff to amend his petition five months after it was filed and only three weeks before trial to include claim for punitive damages.

Stanton v. City of Des Moines, 420 N.W.2d 480 (Iowa 1988).

Facts alleged by defendants in their affirmative defenses are deemed denied and thus controverted by operation of law; material facts are thus in dispute and trial court errs by entering judgment on the pleadings on the basis of an affirmative defense.

## TORTS

Amco Insurance Co. v. Stammer, 411 N.W.2d 709 (Iowa App. 1987).

Abuse of Process.

Mr. and Mrs. Stammer were insureds on homeowner's policy issued by plaintiff, which policy extended to fire loss. House burned, and everyone agreed that it was arson. Amco brought action for declaratory relief, alleging that Mr. and Mrs. Stammer were responsible, either directly or indirectly, for the arson.

HELD: Stammers' counterclaim for abuse of process was properly dismissed by motion for summary judgment. As a matter of law, Amco had the right to determine coverage by declaratory judgment proceeding. Given the primary and proper motivation of

determining coverage rights and duties under the policy, the existence of spite or ulterior motive of benefit to Amco does not state a claim for abuse of process.

Royce v. Hoening, 423 N.W.2d 198 (Iowa 1988).

Abuse of Process.

Successful plaintiff in underlying forcible entry and detainer action sued tenants and their lawyer for malicious prosecution and abuse of process in connection with tenant's counterclaim, which was dismissed by court only after trial. Tenants and counsel moved for summary judgment.

HELD: Mere filing of a counterclaim, or the failure to prevail on a counterclaim, is insufficient to sustain an inference that the counterclaim was filed with only improper motives.

Reed v. Linn County, 425 N.W.2d 684 (Iowa App. 1988).

Abuse of Process.

Plaintiff sued county and county employees for abuse of process after a CHINA action alleging that plaintiff had sexually abused his daughter was dismissed. HELD: Investigative officials did not commence CHINA proceeding, and cannot be held to have abused process.

Reed v. Linn County, 425 N.W.2d 684 (Iowa App. 1988).

Alienation of Affections.

Plaintiff sued county and county employees for alienation of affections after a CHINA action alleging that plaintiff had sexually abused his daughter was dismissed. HELD: Wheeler v. Luhmin, 305 N.W.2d 466 (Iowa 1981), outlaws parent's cause of action for alienation of affections of a minor child.

P

Burke v. Roberson, 417 N.W.2d 209 (Iowa 1987).

Attorney Malpractice.

Proximate cause element requires plaintiff to show not only that he would have prevailed had the attorney not breached a duty but also that a judgment would have been collectible.

Amco Insurance Co. v. Stammer, 411 N.W.2d 709 (Iowa App. 1987).

Bad Faith.

Mr. and Mrs. Stammer were insureds on homeowner's policy issued by plaintiff, which policy extended to fire loss. House burned, and everyone agreed that it was arson. Amco brought action for declaratory relief, alleging that Mr. and Mrs. Stammer were responsible, either directly or indirectly, for the arson.

HELD: On motion for summary judgment by Amco, court properly ruled that, as a matter of law, Stammers' claim is "fairly debatable." Amco's failure to pay, therefore, cannot constitute first-party bad faith. Stammers' accompanying negligence claim for failure to perform good-faith duty to make reasonable and timely settlement, is a first-party bad faith claim in disguise, and was properly rejected on motion for summary judgment.

Kendall/Hunt Publishing Co. v. Rowe, 424 N.W.2d 235 (Iowa 1988).

Conversion.

Rowe was an editor for publisher Kendall. Rowe's job duties included securing publication contract with college professors who wanted to publish their materials for use in their own classes. While still employed by Kendall, Rowe and his wife and a Kendall author established their own publishing company, Waveland. While still employed by Kendall, Rowe solicited some authors for Waveland. Two authors who had contracts with Kendall, the terms of which gave Kendall a right of first refusal with respect to publication of second editions, republished their books with Waveland. One of Waveland's republications was simply a photo-reproduction of the Kendall book, with only minor changes.

HELD: Kendall did not prove conversion. While Rowe and Waveland used Kendall's design and layout, Kendall was not deprived of them. Conversion requires wrongful control or dominion over personal property in denial of or inconsistent with the owner's possessory rights.

Behr v. Meredith Corp., 414 N.W.2d 339 (Iowa 1987).

Defamation.

Farmer had insured his crop with Federal Crop Insurance Corporation (FCIC) and then had understated his crop's yield when he submitted insurance claims for losses in excess of $100,000. After investigation, farmer was charged with felony and convicted on guilty plea. Newspaper article reported the above and that farmer had received the insurance proceeds, which was not accurate. HELD: If the underlying facts as to the gist or "sting" of the defamatory charge are undisputed, the court may determine substantial truth as a matter of law. The test is whether the plaintiff would have been exposed to any more opprobrium had the publication been error-free. Whether or not farmer actually received the money is immaterial to the true statement that he was convicted of fraud, which is the gist of the defamatory charge.

Gail v. Clark, 410 N.W.2d 662 (Iowa 1987).

Dram Shop.

In a dram shop action by officer injured in high-speed chase of intoxicated driver, officer's spouse and children made claims for loss of consortium. HELD: Spouse's and child's rights to spousal and parental consortium respectively are claims that they were "injured in . . . property" for purposes of §123.92. COMMENT: Opinion contains an extensive history on consortium claims.

P

Also, court held that officer did not assume the risk of injury as a matter of law.

Ayers v. Straight, 422 N.W.2d 643 (Iowa 1988).

Dram Shop.

Semi-trailer operator who was intoxicated was involved in one-vehicle accident. Driver's employer and others who owned various portions of tractor-trailer and cargo sued taverns under section 123.92. Taverns sued driver, employer, and owners of tractor for contribution. Claims against employers were based on negligent supervision. Claims against owners of tractor were based on negligent maintenance. Because the plaintiffs and their insurer were seen by the district court to be insurers of the intoxicated driver, the district court barred plaintiffs' claims pursuant to section 123.94, which bars contribution from a licensee in favor of the insurer of an intoxicated person.

HELD: Because plaintiffs are seeking recovery for their own loss, rather than restitution for a loss paid on behalf of the intoxicated driver to a third person, plaintiffs' claims are not for contribution or indemnity. Fact that plaintiffs' losses have been reimbursed by insurance (minus deductible) is irrelevant. Insurer's involvement was not as insurer for intoxicated driver.

On issue of tavern's claims against driver, employer, and owner, Supreme Court affirmed district court's refusal to dismiss claims for trial. The right to assert contribution does not depend upon common liability arising out of identical legal theories. Common liability means the existence of legal remedies against both entities for the same injury. Issue of whether driver and taverns share common liability to employers and owners is a factual issue for trial. Because owners and employers each assert separate property claims, issue of their common liability is factual as well.

Atkins v. Baxter, 423 N.W.2d 6 (Iowa 1988).

Dram Shop.

Parents of minor who was involved in one-vehicle accident after drinking at tavern sued tavern for medical bills incurred by parents due to daughter's minority. Insurance covered most of the bills. HELD: Parents qualify as "persons injured in property" for purposes of section 123.92. Existence of rights to a collateral source are of no relevance to whether or not parents have suffered property loss.

Blesz v. Weisbrod, 424 N.W.2d 451 (Iowa 1988).

Dram Shop.

Plaintiffs injured in two-vehicle accident caused by intoxicated and under-age operator of other vehicle sued person who provided alcohol to minor.

In Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985), court recognized cause of action against "social host" for negligence in providing alcohol to intoxicated person. Legislature amended § 123.49, which provides that "person shall not sell, dispense, or give [alcohol] to an intoxicated person," expressly to overrule Mincks in favor of earlier cases holding that consumption, rather than serving, is the proximate cause of injury inflicted by intoxicated persons.

HELD: Plaintiffs' claim is based on § 123.47, which prohibits the supplying of alcohol to minors. § 123.47 was not amended to overrule Mincks, so prior cases recognizing a cause of action for violating § 123.47 are still valid. See Lewis, 256 N.W.2d 181 (Iowa 1977); Haafke, 347 N.W.2d 381 (Iowa 1984).

COMMENT: Decision was 6-3, but dissent was not published.

Unertl v. Bezanson, 414 N.W.2d 321 (Iowa 1987).

Duty.

Creditors of an industrial loan company, organized pursuant to Chapter 536A, stand in relationship to company as creditors and may not maintain an action against officers and directors for mismanagement and/or waste of assets. Chapter 536A, which regulates industrial loan companies, does not create a private cause of action. Kurth v. VanHorn, 380 N.W.2d 693 (Iowa 1986), which found a confidential relationship between a banker and a potential borrower, does not provide authority for imposing a fiduciary duty on officers and directors and in favor of all depositors.

P

Affiliated Foods, Inc. v. McGinley, 426 N.W.2d 646 (Iowa App. 1988).

Estoppel.

Gold, owner of a grocery store, negotiated with McGinley over the sale of part of the store and its inventory by Gold to McGinley. Affiliated Foods, a food supplier, assisted and participated in these negotiations, but was not a signatory to the agreement. The sale agreement gave Gold a vendor's lien in inventory and merchandise superior to all claims except that of McGinley's financial institution. Before the sale and without Gold's knowledge, McGinley and Affiliated agreed that Affiliated would provide merchandise and services to McGinley in return for a security interest in the inventory. Affiliated filed before Gold. McGinley went into bankruptcy, Affiliated sued on the McGinley note, and the bank and Gold intervened.

HELD: Gold established a claim of equitable estoppel based on Affiliated's failure to disclose its own prior security agreement and Gold's reliance upon an agreement, negotiated with the assistance of Affiliated, that it would be second in line only to the bank.

Gail v. Clark, 410 N.W.2d 662 (Iowa 1987).

Fireman's Rule.

Distinguishing the facts of Pottebaum v. Hinds, 347 N.W.2d 642 (Iowa 1984), in which the court adopted the fireman's rule and applied it to dram shop actions, the court affirmed legal rulings denying the applicability of the fireman's rule to a dram shop action for injuries suffered by an officer involved in a high-speed chase of an intoxicated driver. The officer's presence at the scene of the accident "was one step removed from defendant's dram shop conduct."

Robinson v. Perpetual Services Corp., 412 N.W.2d 562 (Iowa 1987).

Fraud.

Franchisor entered into agreement with plaintiffs, which granted them a franchise in the Waterloo area. Plaintiffs sought the exclusive franchise rights for the Waterloo area, but franchisor told them that such agreements were illegal.

Franchisor assured them, however, that an exclusive franchise was unnecessary because the franchisor would solicit no further potential franchises in the area. Three months later, plaintiffs noticed franchisor's representatives in town, and called to inquire as to their purpose. Franchisor again assured plaintiffs that they were not seeking additional franchises in that area. Four months later, franchisor completed negotiations with a competitor and granted the competitor a franchise.

Court affirmed verdict upon fraudulent misrepresentation. Jury was given sufficient circumstantial evidence to infer that promise not to create competitive franchises was false when made, as opposed to finding that franchisor had simply changed its position. Boilerplate language excluding any representations not part of the written agreement were not enforceable in the face of a fraudulently induced contract. Court declined to hold that plaintiffs' reliance on franchisor's statement that an exclusive agreement would be illegal was unreasonable as a matter of law, even though negotiations and agreement were strictly at arms' length. "[T]here is no indication plaintiffs were experts or even very knowledgeable in the area of franchises, which clearly cannot be said of [franchisor]."

Sinnard v. Roach, 414 N.W.2d 100 (Iowa 1987).

Fraud.

Wife sued second husband and bank for fraudulent misrepresentation in connection with granting the bank security interest in her certificates of deposit and her home to secure loans to husband's corporation.

Plaintiff's best evidence established that husband talked her into signing documents, the contents of which were not withheld from her. Bank was not party to her execution of security documents. Documents did not disclose to plaintiff the amounts of financing secured by the assets she pledged.

HELD: Plaintiff's sole request to bank, that proceeds from her pledge be used to purchase a certificate of deposit so that she would have the benefit of the interest for her living expenses, does not create confidential relationship between plaintiff and bank. Bank had no factual basis for concluding that plaintiff was ignorant of her true financial situation or that of her husband.

Hagan v. Liberty Loan Corp., 423 N.W.2d 886 (Iowa App. 1988).

Fraudulent Misrepresentation.

On jury verdict for plaintiffs in slander of title and fraudulent misrepresentation case, evidence supported the following version of facts.

Plaintiffs purchased real estate on contract from Liberty Loan. Liberty had previously sold same property to another buyer, who had defaulted and had subsequently surrendered the property to Liberty. In the course of such surrender, Liberty received a quit claim deed. Before recording the deed, and after executing the sale agreements to plaintiffs, Liberty altered the quit claim deed. The effect of the alteration was to convert it to a deed of trust, which gave the former buyers a remaining equitable interest. This defect in title was discovered when plaintiffs in turn tried to sell the property to yet another buyer who caused a title opinion to be issued. The original purchaser refused to sign away their equitable interest for free, and the plaintiffs' transaction eventually fell through.

HELD: Evidence was sufficient to submit claims of slander of title and fraudulent misrepresentation.

Hike v. Hall, 427 N.W.2d 158 (Iowa 1988)

Immunity.

Assistant county attorney was absolutely immune from liability for decision to defer criminal mischief prosecution conditioned upon potential criminal defendant's settlement with victim, who attorney was representing in another, but related civil matter.

County attorney is absolutely immune from liability for training, supervision, and control of assistant county attorney.

Tallman v. Hanssen, 427 N.W.2d 868 (Iowa 1988).

Immunity.

Employee who eventually received settlement pursuant to his claim for workers' compensation benefits then sued attorney

who represented compensation insurer for defamation arising out of statements in brief filed with industrial commissioner. HELD: Workers' compensation proceeding is judicial in nature, and attorney's statements in course of proceeding are absolutely privileged.

Diehl v. Diehl, 421 N.W.2d 884 (Iowa 1988).

Immunity.

Mother sued 14-year-old son with learner's permit for injuries received as a passenger after one-car accident. HELD: To the extent that parental immunity was abolished in Turner, 304 N.W.2d 786 (Iowa 1981), the immunity of children from suits by their parents should be abolished. Familial immunities should be reciprocal. Although there is retained parental immunity in Wagner, 340 N.W.2d 255 (Iowa 1983), so that the right of parents to control their children is protected, there is no reciprocal area of child immunity. "Permitting parents to recover damages from their children for injuries caused by the children's negligence does not impact unfavorably on the area of familial responsibility which Wagner seeks to protect."

Reed v. Linn County, 425 N.W.2d 684 (Iowa App. 1988).

Intentional Infliction of Emotional Distress.

Plaintiff sued county and county employees for intentional infliction of emotional distress after a CHINA action alleging that plaintiff had sexually abused his daughter was dismissed. HELD: Plaintiffs failed to establish that investigative officials engaged in "outrageous conduct . . . so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

P

Kendall/Hunt Publishing Co. v. Rowe, 424 N.W.2d 235 (Iowa 1988).

Interference.

Rowe was an editor for publisher Kendall. Rowe's job duties included securing publication contract with college professors who wanted to publish their materials for use in their

own classes. While still employed by Kendall, Rowe and his wife and a Kendall author established their own publishing company, Waveland. While still employed by Kendall, Rowe solicited some authors for Waveland. Two authors who had contracts with Kendall, the terms of which gave Kendall a right of first refusal with respect to publication of second editions, republished their books with Waveland.

HELD: Substantial evidence supported verdict for defendants. Rowe and Waveland adduced substantial evidence that defecting authors contacted Waveland (not the other way around) and did so because of dissatisfaction with Kendall. Tort of interference with existing contractual relation requires plaintiff to prove that conduct by Rowe or Waveland was the cause of the author's defection and breach of the contract containing the right of first refusal.

Theisen v. Miller, 427 N.W.2d 874 (Iowa App. 1988).

Legal Malpractice.

Miller owned real estate on which Northland held a mortgage. Northland initiated foreclosure proceedings against Miller. Miller transferred the real estate to Northland by a warranty deed. Attorney Christensen, on behalf of Northland, prepared the warranty deed after updating the abstract of title. Christensen did not perform any searches pertaining to Miller, and failed to discover incumbrances on the property in the form of tax liens and judgments against Miller. Northland later conveyed the property by warranty deed to HUD, who then conveyed the property by warranty deed to plaintiff. Plaintiff sued Miller, who sought contribution and/or indemnity from attorney Christensen.

HELD: Substantial evidence supported finding that Christensen did not know and should not have foreseen that Miller, a person adverse to his client, would rely on his continuation of the abstract. Miller was represented by her own attorney at all relevant times, and knew that she had tax liens and judgments asserted against her. Miller also was a licensed real estate agent.

COMMENT: Since Miller sought contribution, is not the pertinent inquiry whether Christensen owed a duty to HUD and/or eventually the plaintiff?

Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987).

Legal Malpractice.

Lawyer prepared will that contains specific bequest of real estate. Testator subsequently sold real estate. Lawyer helped her with that transaction as well. Beneficiary of specific bequest sued lawyer after testator's death, because proceeds of sale of real estate passed through residuary clause of will. District Court sustained lawyer's motion to dismiss.

HELD: Lawyer drafting will "owes a duty of care to the direct, intended, and specifically identifiable beneficiaries." Beneficiary's cause of action is limited to instances where the lawyer's malpractice frustrates the testator's intent as expressed in the will and the beneficiary's interest "is either lost, diminished, or unrealized." If the testator's intent is fully implemented, no cause of action will be allowed," unless "the lawyer concedes negligence."

COMMENT: Appeal was from order sustaining the lawyer's motion to dismiss. Court accepted as true the allegations that the lawyer had actively represented the testator in her sale of the real estate but had never told her what effect that sale would have on her testamentary intent. "In most cases separate transactions between lawyer and client will not be linked, nor should they be. No lawyer reasonably can be expected to keep track of the provisions in the wills of his or her clients, nor the effect on those instruments caused by changes in the clients' affairs. It follows that in most cases, post-will disposition of property will give rise to no cause of action." In this case, however, the sale was sufficiently close in time to the will that the lawyer's involvement in the sale would impose a duty of care.

Collins v. Federal Land Bank, 421 N.W.2d 136 (Iowa 1988).

Legal Malpractice.

P

Legal malpractice claims that accrued before plaintiffs filed for bankruptcy pursuant to Chapter 7 were held to be property of trustee, not debtors. Cause of action, at least in professional liability suits if not generally, accrues only when injury has occurred. Claim that attorney was negligent in advising plaintiffs to file Chapter 7 did not accrue prior to filing for bankruptcy, so this claim stayed with plaintiffs.

Hall v. Barrett, 412 N.W.2d 648 (Iowa App. 1987).

Legal Malpractice.

Criminal defense client sued his lawyer for malpractice, after conviction and sentence were imposed. Plaintiff alleged that attorney was negligent in failing to attack the validity of the search warrant that lead to incriminating evidence used against plaintiff at trial. HELD: Validity of the search warrant was decided adversely to plaintiff in his post-conviction proceeding.

Brown v. Monticello State Bank, 420 N.W.2d 475 (Iowa 1988).

Malicious Prosecution.

Executors of decedent's estate brought action against bank as conservator, for malicious prosecution and conversion. Bank prevailed on malicious prosecution claim because it asserted and established advice of counsel defense. Executors appealed on ground that an attorney's advice is not a defense to malicious prosecution claim if the attorney is a member of the board of directors or a shareholder of the defendant corporation.

HELD: Fact that corporation's attorney was also director and/or shareholder did not preclude corporation's reliance on the advice of counsel defense. The attorney's interest in a corporation should be considered, along with other evidence, to determine whether bank could properly rely on attorney's advice.

Royce v. Hoening, 423 N.W.2d 198 (Iowa 1988).

Malicious Prosecution.

Successful plaintiff in underlying forcible entry and detainer action sued tenants and their lawyer for malicious prosecution and abuse of process in connection with tenant's counterclaim, which was dismissed by court only after trial. Tenants and counsel moved for summary judgment.

HELD: Fact that tenants lost their counterclaim after trial does not constitute prima facie evidence of lack of probable cause. Adoption of rule 80 (sanctions for frivolous

pleadings or motions) does not serve as a basis for abandoning the "special injury" requirement in malicious prosecution cases.

COMMENT: In commenting on plaintiff's failure to prove "special injury" the court made this remark: "As a retiree, [plaintiff] could prove no loss of income attributable to the defense."

Reed v. Linn County, 425 N.W.2d 684 (Iowa App. 1988).

Malicious Prosecution.

Plaintiff sued county and county employees for malicious prosecution after a CHINA action alleging that plaintiff had sexually abused his daughter was dismissed. HELD: Absence of substantial evidence of actual malice on the part of a public official was fatal to plaintiff's claim. Also, defendants were investigative officials who did not make the decision to commence the CHINA proceeding.

Morgan v. Olds, 417 N.W.2d 232 (Iowa App. 1987).

Medical Malpractice.

If patient is incompetent, doctor's duty to obtain informed consent is discharged by obtaining same consent from patient's "Surrogate decision maker," usually a close family member. Duty, however, runs only to the patient, so breach of duty to obtain informed consent does not generate independent cause of action owned by family members.

Sanders v. Ghrist, 421 N.W.2d 520 (Iowa 1988).

P

Medical Malpractice.

Court re-affirms and applies deBurkarte, 393 N.W.2d 131 (Iowa 1986), which is the lost chance of survival case. Instructions given by district court in this medical malpractice case arising out of an alleged failure to diagnose and treat a malignant tumor that proved fatal recognized the claim for increased risk due to failure to diagnose, but failed to focus on the value of the opportunity to survive, however small, if an earlier detection had occurred by a reasonable practitioner.

Nash v. Schultz, 417 N.W.2d 241 (Iowa App. 1987).

Premises Liability.

Possessor of real estate normally is not liable for damages caused by open and obvious defects on the land, but, following Restatement (Second) of Torts § 343A, if there is reason to believe that the defect, though seemingly obvious, would not be discovered, a jury question may arise as to whether the premises are reasonably safe.

Galloway v. Bankers Trust Company, 420 N.W.2d 437 (Iowa 1988).

Premises Liability.

Shopping mall patron sued several entities based on alleged failure of mall owner and its hired security firm to protect him from a homosexual rape in a mall restroom. Bankers Trust held title to land pursuant to trust agreement, in which First National Bank was "trustee" and Bankers Trust was "ancillary trustee." First National received the profits from Bankers Trust's operation of the mall, but exercised no direct control or right of possession over mall. Agreement gave First National the right to remove Bankers Trust and "presumably regain the full incidents of ownership, including the right of possession."

First National Bank contended it could not be liable for premises injury under Restatement Section 344 because it was not in possession of mall at the time incident occurred, nor did it have control of its management. HELD: Absentee ownership of rental property is insufficient to impose liability for premises defect. One who owns possessory rights may transfer them to another, thereby "absolving oneself of responsibility."

P

Stessman v. American Black Hawk Broadcasting Company, 416 N.W.2d 685 (Iowa 1987).

Privacy.

On motion to dismiss, allegations that plaintiff, while dining in restaurant, requested television reporter not to film her, that he did so anyway, and that film was later broadcast on TV, was sufficient to state claim for invasion of privacy.

Anderson v. Glynn Construction Co., 421 N.W.2d 141 (Iowa 1988).

Product Liability.

Grain elevator employee lost leg in auger that had been rebuilt and repaired by defendant. Accident occurred in hopper box, and plaintiff knew auger was unguarded in box. Plaintiff's strict liability claim was directed out at trial.

Restatement section 403, which applies strict liability to one who "rebuilds or repairs a chattel," and who knows or should know that the work has made the product dangerous, does not afford a basis for liability in this case. Court distinguishes language from comment "b" to the effect that work need not make product's condition worse, if the repair gives the product a deceptively safe appearance. Here, defendant only replaced auger sections that had always been exposed, a fact known to plaintiff.

Negligence claim based on same facts and on Restatement section 404 also was properly directed out. Comment "b" of section 404 is the same as "b" in 403.

Under same evidence, however, district court should have submitted claim based on section 388, which imposes negligence standard on a supplier who

> knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition.

Court noted that defendant knew that plaintiff's employer had failed for 15 years to guard against injury in the hopper boxes. Court distinguished recent cases holding that independent contractor is not responsible for dangerous conditions outside scope of contractor's performance.

Court found question of fact as to whether defendant had superior knowledge. Court went beyond comparison of parties' knowledge and noted that contractor knew that users "might accidentally slip into the open auger box in spite of knowing the auger's propensities to maim them."

Anderson v. Glynn Construction Co., 421 N.W.2d 141 (Iowa 1988).

Product Liability.

Court re-affirms Rinkleff v. Knox, 375 N.W.2d 262 (1985), to the effect that OSHA standards are admissible in products liability cases on adequate foundational proof of "identification and explanation."

Nelson v. Todd's Ltd., 426 N.W.2d 120 (Iowa 1988).

Product Liability.

Plaintiffs owned and operated a butcher shop. They purchased a curing agent from defendant for use with smoked meats. One batch of the curing agent did not contain the active ingredient. Meat smoked with that batch spoiled, and was returned by butcher shop customers.

Plaintiffs sued for recovery of the value of the meat that spoiled, lost profits due to damage to business reputation, and loss in value of their facility. District court submitted a 402A count in strict liability as well as a claim for breach of express warranty.

HELD: "[P]urely economic injuries without accompanying physical injury to the user or consumer or to the user or consumer's property is not recoverable under strict liability." Court rejects plaintiffs' argument that the absence of the active ingredient in the particular curing batch caused physical damage to their property: the meat to be smoked. Court acknowledges the physical damage but rules that the appropriate remedy is contractual in nature.

Court defines the issue as follows: "[W]hether strict tort liability is applicable when a manufacturer produces a product designed to prevent harm to a purchaser's property, and the product fails to work, resulting in the very harm sought to be prevented." Court holds that the focus should be on the distinction between tort and contract as opposed to the comparison between physical harm and economic loss.

> When, as here, the loss relates to a consumer or user's disappointed expectations due to deterioration, internal breakdown, or non-accidental cause, the remedy lies in contract. Tort theory, on the other hand, is generally

> appropriate when the harm is a sudden or dangerous occurrence, frequently involving some violence or collision with external objects, resulting from a genuine hazard in the nature of the product defect. For example, had Quick Cure caused chemical burns to the Nelson's hands or damaged their meat processing equipment, an action would lie in strict tort liability.

Court also notes that few cases will involve facts that merit submission of both theories.

Brosamle v. Mapco Gas Products, Inc., 427 N.W.2d 473 (Iowa 1988).

Respondeat Superior.

Plaintiffs sued Mapco and a Mapco employee for personal injury caused by the employee's negligence in the course of his employment. Plaintiffs dismissed employee with prejudice, and Mapco argued that such a dismissal was preclusive against plaintiffs in their suit against Mapco on a theory of respondeat superior.

Court relied upon extrinsic evidence to determine that dismissal did not constitute an adjudication on the merits of plaintiffs' claim against the employee. Court distinguishes prior holdings to the effect that a dismissal with prejudice under Rule 217 are preclusive as follows:

> Where, as here, the employee is not a necessary party to an action against an employer, dismissal of the employee will not be construed as an adjudication on the merits of the employee's fault (and, hence, the employer's liability) unless the dismissal expressly so provides.

COMMENT: Only on-record explanation for dismissal of employee was that plaintiffs thought him to be judgment-proof. When plaintiffs dismissed the employee without prejudice, Mapco sought to remove the case to federal court. In the course of resisting the removal, plaintiffs dismissed the employee with prejudice in an effort to disavow any intention of suing the employee separately. Mapco then sought dismissal on grounds of preclusion.

P

Hagan v. Liberty Loan Corp., 423 N.W.2d 886 (Iowa App. 1988).

Slander of Title.

On jury verdict for plaintiffs in slander of title and fraudulent misrepresentation case, evidence supported the following version of facts.

Plaintiffs purchased real estate on contract from Liberty Loan. Liberty had previously sold same property to another buyer, who had defaulted and had subsequently surrendered the property to Liberty. In the course of such surrender, Liberty received a quit claim deed. Before recording the deed, and after executing the sale agreements to plaintiffs, Liberty altered the quit claim deed. The effect of the alteration was to convert it to a deed of trust, which gave the former buyers a remaining equitable interest. This defect in title was discovered when plaintiffs in turn tried to sell the property to yet another buyer who caused a title opinion to be issued. The original purchaser refused to sign away their equitable interest for free, and the plaintiffs' transaction eventually fell through.

HELD: Evidence was sufficient to submit claims of slander of title and fraudulent misrepresentation.

Nash v. Schultz, 417 N.W.2d 241 (Iowa App. 1987).

Standard of Care.

Following Restatement (Second) of Torts § 288, the court held that a municipal nuisance ordinance does not provide a standard of care under a negligence theory. The ordinance, however, was properly admitted because plaintiff also used nuisance as a theory of recovery, which is a valid claim. See Claude v. Weaver Construction Co., 261 Iowa 1225, 158 N.W.2d 139 (1968).

DeLapp v. Xtraman, Inc., 417 N.W.2d 219 (Iowa 1987).

Strict Liability.

Plaintiff's decedent was killed in an accident allegedly caused by a defective hoist. The hoist was manufactured by a Louisiana corporation which subsequently sold all of its assets to defendant, a Georgia corporation. Defendant was granted

summary judgment under the general rule that a purchasing company is not liable for the debts and liabilities of the transferor company.

The Supreme Court affirmed, stating that none of the four exceptions to the above general rule applied: (1) an agreement to assume such liabilities, (2) actual consolidation of the two corporations, (3) the purchasing corporation is a mere continuation of the selling corporation, and (4) the transaction was in fact fraudulent.

The Supreme Court refused to create a new "product-line" exception. This proposed exception would hold a purchasing corporation strictly liable for defects in products manufactured by the entity from which the business was acquired if the purchasing corporation continued to produce the same products. Such extended liability was inconsistent with strict liability theory; it held a corporation liable for defects in products over which it had no control.

Kendall/Hunt Publishing Co. v. Rowe, 424 N.W.2d 235 (Iowa 1988).

Trade Secrets.

Rowe was an editor for publisher Kendall. Rowe's job duties included securing publication contract with college professors who wanted to publish their materials for use in their own classes. While still employed by Kendall, Rowe and his wife and a Kendall author established their own publishing company, Waveland. While still employed by Kendall, Rowe solicited some authors for Waveland. Two authors who had contracts with Kendall, the terms of which gave Kendall a right of first refusal with respect to publication of second editions, republished their books with Waveland.

HELD: Kendall failed to establish misappropriation of trade secret. Kendall's list of current authors was not a trade secret because identities of current authors was openly disclosed to public. Kendall's list of prospective authors, while not necessarily public knowledge, does not constitute a "trade secret."

P

Cannon v. National By-Products, Inc., 422 N.W.2d 638 (Iowa 1988).

Wrongful Discharge.

Employee at will was terminated ostensibly for physical inability to perform his job. Plaintiff sought to modify contract of employment at will to include written personnel policies, unilaterally imposed by employer before discharge, that prevented discharge without good cause. Under instructions, jury apparently found that the policies amended employment agreement, and that discharge for medical reasons was pretentious.

Court held that a jury question had been generated as to "how these written personnel policies were perceived by plaintiff." Applying Young, 14 N.W.2d 844 (Iowa 1987), the court described test as based on plaintiff's reasonable expectations. "Even if it was not defendant's intention that these policies confer contractual rights, a contract may be found to exist if this was the plaintiff's understanding and defendant had reason to suppose that plaintiff understood it in that light."

The court rejected defendant's argument on consideration. "We find it to be particularly inappropriate to require an independent consideration for modification of an agreement which is conceded to have been a mere contract at will by defendant. . . . [T]he preferable approach is to view the issue as if an entirely new contract is being formed at the time of the alleged modification." The court distinguished Wolfe v. Graether, 389 N.W.2d 643 (Iowa 1986), and its requirement of additional consideration to support a claim of permanent employment as a case relating to "duration of employment." This case does not involve duration, but instead focuses upon the legal effect of a specific written guaranty that discharge may take place only for good cause.

After concluding that the policies providing protection for termination at will were incorporated into the contract, the court then declined to require that an accompanying provision in those policies relating to informal resolution of termination disputes be pursued by plaintiff prior to litigation. Because defendant showed no inclination to modify its position during the litigation, court found no prejudice from plaintiff's failure to follow in-house review procedures.

Overtimely objection, plaintiff testified concerning the loss of his home by foreclosure as a consequence of the termination of his employment. Court agrees that such economic loss would not constitute consequential damages, because it would not "reasonably be considered as arising naturally from the breach of

contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract."

Notwithstanding the above, the court did not reverse. Because the instructions limited the damages plaintiff could recover to those relating to employment, because the reference to foreclosure was not accompanied by any evidence as to the measure of the accompanying economic loss, and because the verdict was within the evidence presented as to lost wages, court found no reversible error.

Young v. Cedar County Work Activity Center, Inc., 418 N.W.2d 844 (Iowa 1987).

Wrongful Discharge.

Discharged employee sued former employer for wrongful discharge. Employee had been given an employee handbook along with a written contract. Plaintiff claimed the discharge was in violation of the written contract, because the employee handbook set forth a five-step disciplinary procedure which had not been followed. HELD: Written contract was a completely integrated employment agreement. Evidence that the employee manual existed at the time of the execution of the written contract of employment supported the finding that the handbook provisions were not intended to be contractual.

## TRIAL

Gail v. Clark, 410 N.W.2d 662 (Iowa 1987).

Instructions.

Police officer injured in high-speed chase of intoxicated driver filed dram shop action. At trial, intoxicated driver testified that he had lied in his pre-trial deposition when he denied purchasing beer at defendant dram shop, and then testified in a manner that was extremely prejudicial to dram shop's interest.

HELD: Because the jury gave stock instructions on the jury's exclusive duty to assess witness credibility, the weight to be accorded testimony of a witness who is impeached by prior and inconsistent statements, and the value of testimony with

regard to verbal statements, it was not error to refuse to instruct on the meaning of perjury and the caution to be exercised in considering the testimony of a witness who commits perjury.

Home-Crest Corp. v. Albright, 414 N.W.2d 89 (Iowa 1987).

Instructions.

Defendant contracted for the exclusive right to distribute plaintiff's kitchen cabinets within the Des Moines area. Plaintiff sued for defendant's failure to pay on its accounts, and defendant counterclaimed for breach of contract, fraud, and detrimental reliance. Jury returned a verdict in favor of defendant on counterclaim, but left the verdict forms for plaintiff's claim blank.

HELD: Verdict in favor of defendant shall remain intact, but plaintiff's claim on account should be retried.

Bushman v. Cuckler Building System, 421 N.W.2d 145 (Iowa Ct. App. 1988).

Instructions.

In negligence action, court instructed that jury was to consider "defendants' assurances" that they would repair the alleged defect in examining defendants' affirmative defenses. Because next instruction noted that defendant denied making such assurances, the first instruction was not error.

Erickson v. Des Moines Water Works, 421 N.W.2d 155 (Iowa App. 1988).

Instructions.

Polk County employee injured in course of employment when she stepped into a water shut-off valve in street. City and water works submitted exhibit that suggested that duty of maintenance had been delegated to county. Parties agreed that duty was not delegable. HELD: Exhibits were relevant because they suggested that duty of maintenance was shared by defendants with county. Exhibit required instruction that duty was not

delegable. Instructions that defined defendants' duties of maintenance, but failed to provide that duties could not be delegated, were error.

Diehl v. Diehl, 421 N.W.2d 884 (Iowa 1988).

Instructions.

Mother sued 14-year old son with learner's permit for injuries received as a passenger after one-car accident. Son defended on provision in Chapter 321 making it unlawful for parent to permit him to drive unsupervised. HELD: Failure to comply with Chapter 321 should (and did, to the tune of 55%) relate to contributory fault, not the right to maintain the action. Instruction that conditioned imposition of duty of supervision upon awareness of statute or law was error. Because jury found substantial contributory fault and because failure of supervision was the only ground of contributory fault asserted, error was harmless.

Evidence of falling asleep or dozing is sufficient to submit specifications on lookout and control.

Sinnard v. Roach, 414 N.W.2d 100 (Iowa 1987).

Jury.

At close of trial, counsel agreed that verdict was to be rendered without counsel present. Because all court rooms were occupied when the jury reached its verdict, the trial judge entered the jury room, examined the verdict to insure that all questions were properly answered, and then delivered the unsealed verdict to the clerk. HELD: Although Rule 203 was technically violated, there was no showing of prejudice.

P

Ryan v. Arneson, 422 N.W.2d 491 (Iowa 1988).

Jury.

Litigant suffering adverse jury verdict used juror affidavits to argue that jury utilized quotient verdict. HELD: Iowa Rule of Evidence 606(b), consistent with Federal Rule of Evidence 606(b), precludes use of juror affidavits or testimony relevant to any matter occurring in the course of deliberations.

Security State Bank v. Taylor, 421 N.W.2d 877 (Iowa 1988).

Jury.

Debtors in farm mortgage foreclosure suit counterclaimed and demanded a jury trial. Debtors did not appear at trial, however, and plaintiffs waived the jury. HELD: Rule 178 permits all parties appearing at trial to waive a jury previously demanded. Debtors' failure to attend trial permits other appearing parties to waive debtors' demand.

Riessen v. Neville, 425 N.W.2d 665 (Iowa App. 1988)

Jury.

Where a prospective juror noted on his questionnaire that he had a hearing impairment, and questionnaires were available to parties and counsel, any challenge on grounds of hearing impairment were waived by not asserting them before jury was sworn.

Also, plaintiffs submitted affidavits that jurors discussed in deliberations fact that county, which had not been sued, would be liable as the employer of the defendant employee. Jury asked the court during deliberations who the case was against, and whether it was against the county. The court answered by stating only the employee's name. Court found no jury misconduct.

Riessen v. Neville, 425 N.W.2d 665 (Iowa App. 1988)

Venue.

Plaintiffs' right to change of venue under Rule 167(a) because defendants were county employees was lost because motion for change of venue was filed after a 215.1 continuance.

## WITNESS

Amco Insurance Co. v. Stammer, 411 N.W.2d 709 (Iowa App. 1987).

Cross-Examination.

At trial of declaratory judgment proceeding by insurer after arson, state fire marshall's investigator testified as an expert that, in his opinion, the insureds hired Blumberg to set fire. Although investigator did not discuss it on direct, a written statement by Blumberg was one basis for the investigator's opinion. Insureds did not cross-examine investigator on the statement, but recalled the investigator in their own case in chief, re-elicited his opinion, and then attempted to introduce the document into evidence in order to impeach him.

HELD: District court did not abuse its discretion in refusing to admit the statement, due to insureds' failure to utilize the statement during cross-examination.

Bornn v. Madagan, 414 N.W.2d 646 (Iowa App. 1987).

Expert.

Mechanical engineer with extensive experience in accident reconstruction was permitted to express opinions as to the cause of the accident, so long as he did not express testimony allocating fault or negligence. Opinions as to cause also properly included opinion that plaintiff could have avoided the accident, given the sight-distance and speed of his vehicle.

In contrast, police officers called by plaintiff on rebuttal were properly prohibited from testifying as to their opinions that the accident was caused by defendant's failure to yield the right-of-way when he entered the highway from a farm driveway. "[Accident reconstructionist] testified as to 'how' the accident took place in terms of a chronological series of events; [the officers'] proposed testimony was directed towards 'why' the accident took place in terms of relative fault. Whereas the former opinion dealt only with the mechanical rendition of events, the latter opinion deals with a conclusion as to legal liability."

District court also did not abuse its discretion in determining that an investigating officer, with 30 years of experience, 20 years of accident investigation experience but

with little training in accident reconstruction, lacked the qualifications to opine that plaintiff was unable to take evasive action other than applying his brakes.

## WORKERS' COMPENSATION

Tussing v. George A. Hormel & Company, 417 N.W.2d 457 (Iowa 1988).

Appeal.

Claimant appealed district court decision affirming commissioner's decision denying him workers' compensation benefits. Court was unable to determine basis for commissioner's rejection of evidence that had convinced deputy commissioner a work-related injury occurred. Because commissioner should have, but did not, state reasons for rejecting the evidence, case is remanded to commissioner with instructions to reconsider evidence relating to work-related injury.

Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

Benefits.

District court erred in converting deputy's award into a money judgment in favor of claimant. Claimant is not entitled to be paid medical and hospital expenses personally, absent a showing that claimant paid the medical suppliers.

Eister v. Hahn, 420 N.W.2d 443 (Iowa 1988).

Co-employee/Gross Negligence.

Jury finding that combine operator was not grossly negligent with regard to co-worker who was injured when he attempted to clean corn head was sufficiently supported by evidence. Co-worker moved into danger zone without being requested to do so by operator. Plaintiff failed to show as a matter of undisputed fact that operator had knowledge injury was probable as opposed to possible.

Tuttle v. Micow Corp., 418 N.W.2d 364 (Iowa App. 1987).

Compensability.

Where over-the-road truck drivers are required by their employers to provide tractor and trailer equipment, the employees' efforts to place the equipment in a condition suitable for use in employer's business is work performed in the course of employment. Thus wife may recover death benefits under workers' compensation for husband's death which occurred while he was en-route to repair trailer purchased for exclusive use in employer's business.

John Deere v. Meyers, 410 N.W.2d 255 (Iowa 1987).

Discovery Rule.

Court affirms industrial commissioner's application of discovery rule to statute of limitations for claims arising under occupational hearing loss statute.

Tallman v. Hanssen, 427 N.W.2d 868 (Iowa 1988).

Exclusive Remedy.

Employee who eventually secured settlement of his workers' compensation claim sued compensation carrier for refusing to pay medical bills or provide him with a physician, which caused him physical damage, pain, and anguish. HELD: Because plaintiff's pro se petition might be read to communicate a bad-faith claim, district court erred in concluding that it lacked subject matter jurisdiction. COMMENT: Court expressed no opinion on whether such a claim was cognizable under Iowa law.

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Eister v. Hahn, 420 N.W.2d 443 (Iowa 1988).

Gross Negligence.

Koll v. Manatt's Transportation Co., 253 N.W.2d 265 (Iowa 1977), which provides that violation of OSHA regulations is negligence per se in an action by an employee against an employer, "does not apply to claims brought against a co-employee." Section 88.4's requirement that an employee comply

with OSHA standards "has only to do with actions and conduct of that employee, and [is] to be considered only in connection with any contributory fault or negligence in actions brought by that employee. It does not raise a duty of care between employees."

Riessen v. Neville, 425 N.W.2d 665 (Iowa App. 1988).

Gross Negligence.

Court properly dismissed co-employee gross negligence claim where co-employee was not shown to be at the work site or even aware that the construction project had commenced. Plaintiffs failed to prove that co-employee knew or should have known that an accident was probable.

Bertrand v. Sioux City Grain Exchange, 419 N.W.2d 402 (Iowa 1988).

Subrogation.

Employer and insurer are entitled to a credit on benefits owed to a deceased employee's spouse only to the extent the surviving spouse actually received payment from the wrongful death proceeds. Employer's liability to employee's spouse are not reduced by amount of damages recovered by estate but paid to someone else.

Johnson v. Harlan Community School District, 427 N.W.2d 460 (Iowa 1988).

Subrogation.

Employer and compensation carrier's right to subrogation in employee's action against third-party tort-feasor extends to compensation paid for the cost of medical and hospital services.

# ANNUAL LEGISLATIVE UPDATE

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# 1988 BILL SUMMARY

## PUBLIC INFORMATION OFFICE

### 1988 RECAPITULATION

72nd Iowa General Assembly
1988 Regular Sessions

### SESSION DATES

Regular Session: Monday, January 11 through
Sunday, April 19, 1988

### BILLS AND RESOLUTIONS INTRODUCED

REGULAR SESSION

| Senate Summary | | House Summary | |
|---|---|---|---|
| Files: | 344 | Files: | 478 |
| Joint Resolutions: | 6 | Joint Resolutions: | 5 |
| Concurrent Resolutions | 41 | Concurrent Resolutions | 34 |
| Resolutions: | 13 | Resolutions: | 6 |
| TOTAL | 404 | TOTAL | 523 |

TOTAL BILLS INTRODUCED: 1368

### BILLS AND RESOLUTIONS PASSED

REGULAR SESSION

| Senate Summary | | House Summary | |
|---|---|---|---|
| Files: | 139 | Files: | 150 |
| Joint Resolutions: | 2 | Joint Resolutions: | 0 |
| Concurrent Resolutions: | 2 | Concurrent Resolutions: | 0 |
| Resolutions: | 13 | Resolutions: | 2 |
| TOTAL | 156 | TOTAL | 152 |

TOTAL BILLS AND RESOLUTIONS PASSED: 308

Vetoes: 5
Item Vetoes: 13

# 1987 RECAPITULATION

72nd Iowa General Assembly
1987 Regular and Extraordinary Sessions

## SESSION DATES

Regular Session: Monday, January 12 through Sunday, May 10, 1987
First Extraordinary Session: Thursday, June 4 through Saturday, June 6, 1988
Second Extraordinary Session: Tuesday, October 27, 1988

## BILLS AND RESOLUTIONS INTRODUCED

### REGULAR SESSION

| Senate Summary | | House Summary | |
|---|---|---|---|
| Files: | 522 | Files: | 687 |
| Joint Resolutions: | 12 | Joint Resolutions: | 14 |
| Concurrent Resolutions | 45 | Concurrent Resolutions | 50 |
| Resolutions: | 14 | Resolutions: | 14 |
| TOTAL | 593 | TOTAL | 765 |

### FIRST EXTRAORDINARY SESSION

| Senate Summary | | House Summary | |
|---|---|---|---|
| Files: | 1 | Files: | 1 |
| Joint Resolutions: | 0 | Joint Resolutions: | 0 |
| Concurrent Resolutions: | 2 | Concurrent Resolutions: | 4 |
| Resolutions: | 1 | Resolutions: | 1 |
| TOTAL | 4 | TOTAL | 6 |

### SECOND EXTRAORDINARY SESSION

| Senate Summary | | House Summary | |
|---|---|---|---|
| Files: | 1 | Files: | 1 |
| Joint Resolutions: | 0 | Joint Resolutions: | 1 |
| Concurrent Resolutions: | 0 | Concurrent Resolutions: | 0 |
| Resolutions: | 0 | Resolutions: | 0 |
| TOTAL | 1 | TOTAL | 2 |

TOTAL BILLS INTRODUCED: 1371

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## 1987 RECAPITULATION
Continued

## BILLS AND RESOLUTIONS PASSED

### REGULAR SESSION

| Senate Summary | | House Summary | |
|---|---|---|---|
| Files: | 106 | Files: | 147 |
| Joint Resolutions: | 0 | Joint Resolutions: | 1 |
| Concurrent Resolutions: | 16 | Concurrent Resolutions: | 10 |
| Resolutions: | 9 | Resolutions: | 9 |
| TOTAL | 131 | TOTAL | 167 |

### FIRST EXTRAORDINARY SESSION

| Senate Summary | | House Summary | |
|---|---|---|---|
| Files: | 1 | Files: | 0 |
| Joint Resolutions: | 0 | Joint Resolutions: | 0 |
| Concurrent Resolutions: | 1 | Concurrent Resolutions: | 0 |
| Resolutions: | 1 | Resolutions: | 0 |
| TOTAL | 3 | TOTAL | 0 |

### SECOND EXTRAORDINARY SESSION

| Senate Summary | | House Summary | |
|---|---|---|---|
| Files: | 1 | Files: | 0 |
| Joint Resolutions: | 0 | Joint Resolutions: | 1 |
| Concurrent Resolutions: | 0 | Concurrent Resolutions: | 0 |
| Resolutions: | 0 | Resolutions: | 0 |
| TOTAL | 1 | TOTAL | 1 |

**TOTAL BILLS PASSED: 303**

| | |
|---|---|
| Vetoes: | 9 |
| Item Vetoes: | 6 |

FREQUENTLY REQUESTED BILLS

APPROVED BY THE 72ND GENERAL ASSEMBLY

AIDS
- Comprehensive AIDS Bill.....SF 2157
- Confidentiality in Testing.....HF 2294
- Drug Advertising.....HF 2128
- Prohibit Testing as Condition of Employment.....HF 2344

Animals
- Race Horses and Dogs - Drug Use.....SF 2263
- Regulation of Vicious Dogs and Cats.....HF 2462

Appropriations
- Department of Economic Development.....SF 2309**
- Human Rights, Blind, Elder Affairs, Public Health,.....SF 2310**
  Commission on the Status of Blacks
- Education.....SF 2312*
- Various State Agencies, Elected Officials, General.....SF 2311
  Services, Secretary of State, etc.
- Human Services.....HF 2447**
- Lottery Appropriations.....SF 2328
- Transportation.....SF 2314**

Auto Rental, Collision Damage Waiver.....HF 653
Blacks, Create Commission on the Status of.....SF 2316
Child Support Recovery Services.....HF 2452**
Community and Rural Development Loan Pgm.....SF 2092
Contract Law Enforcement Services County/City.....SF 2090
County Charter Commission.....HF 278
Credit Card Numbers for Check Verification.....HF 2127
EMS/E911 Surcharge.....HF 2400

Education
- Enrollment in Contiguous School Districts.....SF 323
- Home Schooling.....HF 650
- Human Growth Development Instruction.....SF 2094
- School Standards.....SF 2278
- School Starting Date.....SF 2234
- Teacher Preparation.....SF 2193
- Tuition Trust Fund.....HF 2377

Energy Assistance to Low Income Households.....HF 683

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IPERS
- Administration of IPERS Benefits.....HF 2405
- Early Retirement Incentives.....HF 2415

Juveniles in Adult Jails, Prohibiting Placement.....HF 2278
Legal Assistance to Farmers.....SF 2050
Legislators, Increase in Health Benefits for.....SF 2321
Liability Exemptions, Child Guardians and Others.....SF 2248
Medical Malpractice.....SF 484*
Physical Therapist Consult W/Out Referral.....SF 455
Regulating Student Athletes and Agents.....HF 2432

Taxes
- Catalogue Sales Tax.....HF 2459
- Cigarette Tax Increase.....HF 327
- General Tax Bill.....HF 2477*
- Extending 1987 Income Tax Reforms.....SF 2074
- Gas Tax.....SF 2196

## FREQUENTLY REQUESTED BILLS WHICH WERE NOT APPROVED

Brushy Creek Recreation Area, Funding For.....SF 2300
Cities to Provide Services to Annexed Areas.....HF 2426

Education
- Abolishing Area Education Agencies.....HF 2027
- Establishing Prekindergarten Programs.....HF 2208

Fireworks, Legalizing.....HF 624
Interstate Banking.....SF 2108
Juvenile Peer Court Pilot Project.....HF 2349
Prohibit Using Funds for Lobbying.....HF 2133
Riverboat Gambling.....HF 468

* Denotes a vetoed bill
** Denotes an item-vetoed bill

# SENATE FILES AND RESOLUTIONS PASSED

S.C.R. 103
A concurrent resolution congratulating the Greater Des Moines Chamber of Commerce Federation upon its centennial.

S.C.R. 104
A concurrent resolution relating to the Federal Conservation Reserve Program.

S.J.R. 1
A joint resolution proposing amendments to the Constitution of the State of Iowa relating to the Offices of the Governor and Lieutenant Governor.

S.J.R. 2006
A joint resolution to nullify an administrative rule of the Department of Human Services relating to the correction or expungement of information in the possession of the department concerning a case of alleged child abuse and providing an effective date.

S.F. 38
Effective 7-1-88
Approved 5-7-88
Relating to agricultural drainage wells.

S.F. 69
Effective 7-1-88
Approved 5-7-88
Relating to the investment of idle public funds by authorizing investment in drainage district warrants or improvement certificates.

S.F. 149
Effective 7-1-88
Approved 4-28-88
Relating to dentist's services under accident and sickness insurance policies.

S.F. 156
Effective 7-1-88
Approved 4-12-88
Relating to the exemption from liability of care review committee members and the state concerning actions undertaken by care review committee members in the performance of their duties.

S.F. 173
Effective 7-1-88
Approved 5-5-88
Establishing priorities for deductions from the earnings of residents of community-based correctional facilities.

S.F. 201
Effective 4-28-88
Approved 4-28-88
Relating to the Senate's review and confirmation of gubernatorial appointments, and providing an effective date.

S.F. 299
Effective 7-1-88
Approved 5-10-88
Relating to podiatry by broadening the scope of practice of podiatry, by including podiatrists in the definition of "physician" for certain purposes, by providing for data collection and utilization review, and by providing for other properly related matters.

S.F. 302
Effective 7-1-88
Approved 5-12-88
Relating to the disability of brain injury.

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S.F. 323
Effective 7-1-88
Approved 4-27-88
Providing a procedure for parents or guardians to enroll their children in the public schools of contiguous school districts and providing for the implementation of administrative rules and an effective date.

S.F. 348
Effective 7-1-88
Approved 3-3-88
Authorizing a state agency or a political subdivision of the state to contract to provide medical services.

S.F. 356
Effective 7-1-88
Approved 5-12-88
Relating to the regulation of home prepared foods and foods sold at farmers markets, and providing penalties.

S.F. 370
Effective 7-1-88
Some retroactive applicability, Section 13.2
Approved 4-27-88
Relating to museums, providing for the disposition of loaned or undocumented property in the possession of a museum, notice, reclamation of loaned or undocumented property and statutes of limitations for actions against museums; prescribing museum obligations; prescribing lender and claimant obligations to museums; and providing for the retroactive applicability of certain sections of the Act.

S.F. 387
Effective 7-1-88
Approved 2-18-88
Directing certain political subdivisions of the state to consider joint purchases of equipment.

S.F. 394
Effective 7-1-88
Approved 5-7-88
Relating to care of animals in commercial establishments.

S.F. 443
Effective 7-1-88
Approved 5-10-88
Defining and establishing redemption centers, dealer agents, and territory of service between dealer agents and distributors, and subjecting violators to a penalty.

S.F. 450
Effective 4-14-88
Approved 4-14-88
Relating to the regulation of the operation of trains and to the safety of transportation of railroad company workers and equipment and providing a penalty and effective date.

S.F. 452
Effective 7-1-88
Approved 5-13-88
Cancelling all personal property taxes not collected by July 1, 1988, including the removal of tax liens against personal property.

S.F. 455
Effective 7-1-88
Approved 2-5-88
Relating to physical therapy by providing that physical therapy evaluation and

treatment may be rendered without a prescription or referral and specifying limitations on the practice of physical therapy.

S.F. 456
Effective 7-1-88
Approved 4-12-88
Relating to support or service dogs for disabled or handicapped persons.

S.F. 464
Effective 7-1-88
Approved 5-12-88
Relating to the regulation of health clubs and providing penalties.

S.F. 484
Vetoed 5-13-88
Relating to health care providers, and patients by providing for the creation of a patient catastrophic injury fund for health care providers, establishing a limitation on the liability of the fund, establishing a study and certain other powers and duties of the Commissioner of Insurance, providing for structured settlements, establishing a mediation system to assist in the resolution of disputes, establishing certain mandatory reporting requirements for health care providers regarding acts which may constitute malpractice, providing for regional pricing of insurance, establishing a system for the reimbursement of certain amounts paid for medical liability insurance to ensure the availability of physicians to all citizens of this state, establishing a study to determine where the state is experiencing a shortage of needed medical services, establishing an effective date, providing for applicability and establishing penalties.

S.F. 2011
Effective 7-1-88
Approved 4-7-88
Relating to meat and poultry regulation and inspection, providing penalties, and providing for injunctive relief.

S.F. 2017
Effective 7-1-88
Approved 5-12-88
Relating to handicapped parking and the use, issuance, and display of handicapped identification devices, stickers, signs, and plates, providing a penalty and making penalties applicable; and providing an effective date.

S.F. 2018
Effective 7-1-88
Approved 4-27-88
Creating a family support subsidy program.

S.F. 2020
Effective 7-1-88
Approved 4-4-88
Relating to the return of cash or other qualified security deposited with the clerk of the district court as bail.

S.F. 2031
Effective 2-3-88
Approved 2-3-88
Relating to the reporting of results of the precinct caucuses.

S.F. 2036
Effective 7-1-88
Approved 3-3-88
Relating to moneys available to the first in the nation in education foundation.

S.F. 2037
Effective 7-1-88
Approved 2-15-88
Relating to certain scholarship and grant programs administered by the college aid commission, including the requirements for receipt of a state scholarship and the repeal of the supplemental grant program, and providing appropriations and an effective date for the repeal.

S.F. 2039
Effective 7-1-88
Section 1 effective 7-1-90
Approved 5-11-88
Allowing certain personalized vehicle registration plates to contain up to seven characters, relating to the issuance of registration plates by equalizing penalties for late renewals, relating to the issuance of registration plates by providing for the issuance of collegiate registration plates, relating to the issuance of registration plates by providing for the issuance of congressional medal of honor plates, relating to the titling and registration of motor vehicles, and by including an appropriation, and providing an effective date.

S.F. 2050
Effective 4-11-88
Approved 4-11-88
Appropriating funds to the Office of the Attorney General to fund the legal assistance for farmers program and providing an effective date.

S.F. 2051
Effective 7-1-88
Approved 5-9-88
Relating to the development of oil and water resource conservation plans by Soil and Water Conservation Districts and the Division of Soil Conservation of the Department of Agriculture and Land Stewardship.

S.F. 2055
Effective 5-9-88
Approved 5-9-88
Relating to the registration and use of certain pesticides.

S.F. 2058
Effective 5-4-88
Approved 5-4-88
Exempting the withholding agent from the requirement to withhold state income taxes from payments made to a nonresident, if the payments are from the sale of federal commodity certificates or agricultural commodities or products and the withholding agent submits needed information and providing for retroactive applicability and an effective date.

S.F. 2060
Effective 7-1-88, Sections 3 & 6 effective 3-9-88
Approved 3-9-88
Relating to the benefit ratio array system under the unemployment insurance law by making the benefit ratio array system permanent, by making a

change related to new construction employers, by resolving potential federal conformity issues concerning new nonconstruction experience-based rates and access to job service information by business and labor organizations, by abolishing the special employer contribution rate for employers with certain negative balance account histories with retroactive applicability, and by providing an effective date.

S.F. 2061
Effective 3-29-88
Approved 3-29-88
Relating to the extension of the Foreclosure Moratorium as provided in the governor's Declaration of Economic Emergency made on October 1, 1985, and providing for the retroactive applicability of the Act and an effective date.

S.F. 2062
Effective 7-1-88
Approved 4-12-88
Relating to the appointment and compensation of acting county attorneys.

S.F. 2063
Effective 4-26-88
Approved 4-26-88
Relating to the jurisdiction of magistrates, and providing an effective date.

S.F. 2064
Effective 7-1-88
Approved 4-4-88
Relating to the residency of an agent for an authorized company engaged in the business of becoming surety upon bonds in criminal cases.

S.F. 2069
Effective 7-1-88
Approved 3-3-88
Relating to the organizational meeting of the state board of education.

S.F. 2070
Effective 7-1-88
Approved 4-14-88
Relating to the application of certain transportation safety regulations.

S.F. 2074
Various effective dates, see bill
Approved 4-4-88
Relating to the extension of the applicability of House File 689, enacted during the Second Extraordinary Session of the Seventy-second General Assembly during 1987, updating references to the Internal Revenue Code, providing for retroactive applicability, taxing unrelated business income of certain nonprofit organizations, striking obsolete provisions, and providing an effective date.

S.F. 2075
Effective 7-1-88
Approved 5-15-88
Relating to child abuse by providing for examination of a child, by providing for filing complaints of alleged child sexual abuse, by requiring departmental coordination in cases of child abuse, by providing for the application of a penalty to persons who improperly use criminal history information obtained in the course of an

investigation, by allowing the Department of Public Safety the use of certain revenues generated by fees, and by expanding the definition of indecent contact with a child.

S.F. 2086
Effective 7-1-88
Approved 5-7-88
Relating to the procurement of starch-based plastics and soybean-based inks by the Department of General Services, the State Board of Regents, the Commission for the Blind, and the State Department of Transportation.

S.F. 2088
Effective 7-1-88
Approved 4-14-88
Relating to the eligibility date of certain military veterans for membership on a county commission of veterans affairs and certain military veteran benefits.

S.F. 2089
Effective 7-1-88
Approved 3-15-88
Establishing the eligibility of Iowans for inclusion of their names on the Iowa Vietnam veterans memorial.

S.F. 2090
Effective 4-11-88
Approved 4-11-88
Authorizing the provision of law administrative services by agreement between a county and a city and providing an effective date.

S.F. 2091
Effective 7-1-88
Approved 4-26-88
Relating to the offense of disorderly conduct and making a penalty applicable.

S.F. 2092
Item Vetoed, Sections 9 and 23
Sections 1-7 effective 7-1-88
Rest of bill, effective 5-11-88
Approved 5-11-88
Establishing a Community and Rural Development Loan Program and a Sewage Treatment Works Financing Program to assist communities in financing sewage treatment projects and in financing traditional and new infrastructure and housing for needy and elderly, authorizing the Iowa Finance Authority to issue bonds and notes for the program, and providing an appropriation from a revolving fund to be used for each program, and providing effective dates.

S.F. 2094
Effective 7-1-88
Section 4 effective 7-1-92
Approved 3-29-88
Relating to instructional requirements for human growth and development in grades kindergarten through twelve and providing an effective date.

S.F. 2106
Effective 7-1-88
Approved 4-27-88
Relating to the prohibition of the sale, offering for sale, purchase, application, or use of chlordane in this state, and making a penalty applicable.

S.F. 2107
Effective 7-1-88
Approved 5-12-88
Relating to the creation of a foster home insurance fund.

S.F. 2117
Effective 5-11-88
Approved 5-11-88
Relating to certain motor vehicle violations and providing an effective date.

S.F. 2126
Effective 7-1-88
Approved 5-9-88
Restricting the time period for the initiating of administrative or judicial actions to remove or eliminate certain structures, dams, obstructions, deposits, excavations, or stream straightenings to a floodway and providing for the act's applicability.

S.F. 2129
Effective 7-1-88
Approved 4-11-88
Relating to the issuance of warrants for drainage improvements.

S.F. 2135
Effective 5-3-88
Section 3 retroactive to 7-1-87
Approved 5-3-88
Relating to the issuance of grain bargaining permits and limiting the assets of the grain depositors and sellers indemnity fund, providing for penalties for certain delinquent payments, and providing for an early effective date and date of applicability.

S.F. 2142
Effective 7-1-88
Approved 4-11-88
Relating to recording, without fee, an acknowledgment of a mortgage foreclosure decree.

S.F. 2157
Effective 7-1-88
Approved 5-12-88
Relating to a comprehensive acquired immune deficiency syndrome (AIDS) prevention and intervention plan.

S.F. 2159
Effective 7-1-88
Approved 4-7-88
Relating to the provision of hospice care within health care facilities by Medicare certified hospice programs.

S.F. 2164
Effective 7-1-88
Approved 4-14-88
Relating to the composition of the Iowa Economic Development board.

S.F. 2167
Effective 7-1-88
Approved 4-11-88
Relating to definition and regulation of tip-up fishing devices, and providing a penalty.

S.F. 2168
Effective 7-1-88
Approved 3-31-88
Relating to the authority of the Treasurer of State to invest in United States government obligations.

S.F. 2169
Various effective dates, see bill
Approved 5-12-88

Relating to physician assistants, establishing a board of physician assistant examiners, providing for the registration and licensure of physician assistants, making penalties applicable, providing properly related matters, and providing an effective date.

S.F. 2170
Effective 7-1-88
Approved 5-3-88
Relating to the membership of the Commission on the Status of Women and other boards, commissions, committees, and councils.

S.F. 2171
Effective 7-1-88
Approved 4-28-88
Making nonsubstantive, noncontroversial statutory corrections to comply with reorganization changes, improve clarity, remove conflicts and inconsistencies, correct references, and correct grammar and syntax.

S.F. 2172
Effective 7-1-88
Approved 4-12-88
Relating to an appeal regarding the purchase of Iowa State Industry products.

S.F. 2174
Effective 7-1-88
Approved 4-11-88
Making changes in the state's labor laws relating to occupational safety and health, safety inspection of amusement rides, and elevator safety, and providing injunctive relief under certain of those laws.

S.F. 2180
Effective 7-1-88
Approved 4-12-88
Relating to the eligibility policies established the Commission of Elder Affairs.

S.F. 2182
Effective 7-1-88
Approved 4-12-88
Providing for the payment of costs of improvements in drainage districts by special assessment.

S.F. 2183
Effective 7-1-88
Approved 4-4-88
Relating to the publication of notice of a drainage district hearing.

S.F. 2188
Various effective dates, see bill
Approved 5-2-88
Relating to the mobile home annual tax, the property tax credit and rent reimbursement for elderly and disabled individuals by changing the formula used for determining the amount of the annual tax, credit and reimbursement and providing effective dates.

S.F. 2190
Effective 7-1-88
Approved 4-14-88
Creating an advancement and recruitment program to encourage administrative advancement of women and minorities and recruitment of minorities by school corporations.

S.F. 2192
Effective 7-1-88
Approved 4-28-88
Establishing a child development coordinating council for the promotion of child development services to certain at-risk children and to prescribe its duties.

S.F. 2193
Effective 7-1-88
Approved 5-17-88
Relating to requirements for approved teacher education programs and the establishment of a teacher certification advisory committee.

S.F. 2196
Various Effective Dates, see bill
Approved 3-29-88
Relating to transportation funding by providing for a network of commercial and industrial highways, increasing the excise taxes on motor fuel and special fuel, increasing the standing appropriation for public transit assistance, authorizing the transfer of RISE funds to the Primary Road Fund, providing for a study of highway financing, making appropriations from the Road Use Tax Fund, and providing effective dates.

S.F. 2201
Effective 7-1-88
Approved 4-15-88
Reducing the bond required for class "A", "B", "C", and "D" liquor control licenses and retail wine and beer permits.

S.F. 2202
Effective 7-1-88
Approved 4-11-88
Relating to the licensing of private investigators and private security officers, providing for the issuance of temporary permits to certain persons pursuant to reciprocal agreement, making penalties applicable, and providing other properly related matters.

S.F. 2203
Effective 4-27-88
Approved 4-27-88
Relating to the composition of the Engineering and Land Surveying Examining Board and providing an effective date.

S.F. 2205
Effective 7-1-88
Approved 4-12-88
Relating to interstate natural gas pipelines by establishing a new chapter to define jurisdiction over interstate natural gas pipelines, removing references to interstate natural gas pipelines from the current chapter relating to pipelines and natural gas storage, and adjusting fees.

S.F. 2216
Effective 7-1-88
Approved 4-11-88
Providing that the state fair board may make an agreement with the Department of Public Safety to provide security during the annual fair and exposition and interim events.

S.F. 2225
Effective 7-1-88
Approved 5-15-88
Relating to the establishment of a Family Development and

Self-sufficiency Council and defining the council's duties.

S.F. 2230
Effective 7-1-88
Approved 5-15-88
Relating to the sale of part of a gravel pit owned by a county.

S.F. 2232
Various effective dates, see bill
Approved 4-27-88
Relating to elections and election procedures and providing an effective date.

S.F. 2233
Effective 7-1-88
Approved 5-6-88
Relating to the registration of voters in state offices.

S.F. 2234
Effective 7-1-88
Approved 4-14-88
Relating to the starting date and the calendar for schools and providing a penalty.

S.F. 2236
Effective 7-1-88
Approved 4-7-88
Relating to the qualification for office by elected school board members and school officers.

S.F. 2238
Effective 7-1-88
Sections 67 and 78 effective 5-4-88
Approved 5-4-88
Relating to statutory corrections which adjust language to reflect current practices, insert earlier omissions, delete redundancies and inaccuracies, delete temporary language, resolve inconsistencies and conflicts, update ongoing provisions, remove ambiguities and providing effective dates. effective dates.

S.F. 2245
Effective 7-1-88
Approved 4-27-88
Relating to the certification of laboratories which perform analyses of specimens for the Department of Natural Resources.

S.F. 2246
Effective 7-1-88
Approved 4-14-88
Relating to the penalties for water pollution and hazardous waste disposal.

S.F. 2247
Effective 7-1-88
Approved 5-4-88
Relating to the regulation and reporting of certain pesticides.

S.F. 2248
Effective 7-1-88
Approved 5-6-88
Relating to indemnification and limitation of liability of directors and officers and to liability of persons who serve rural water districts, volunteer as guardians or conservators, or who provide child foster care.

S.F. 2250
Effective 7-1-88
Approved 5-6-88
Relating to environmental protection by exempting certain persons from pesticide application certification requirements, by correcting

the reference to the membership of the Advisory Committee for the Center for Health Effects of Environmental Contamination; by establishing requirements regarding sanitary disposal project inspections, the disposal of solid waste, and the solid waste tonnage fee; by making corrections relating to the collection and allocation of moneys within the solid waste account and the agriculture management account; by correcting a reference to the duties of the Department of Natural Resources regarding household hazardous materials; and by specifying the content and liability for the content of statements submitted with a declaration of value regarding the existence and location of wells, disposal sites, underground storage tanks, and hazardous waste.

S.F. 2253
Effective 7-1-88
Approved 4-28-88
Requiring that students in grades nine through twelve take history and government classes.

S.F. 2256
Effective 7-1-88
Approved 4-4-88
Relating to the admission of a report or findings of the Criminalistics Laboratory as evidence in a civil proceeding.

S.F. 2257
Effective 7-1-88
Approved 4-26-88
Relating to expenses for the State Judicial Nominating Commission.

S.F. 2258
Effective 7-1-88
Approved 4-4-88
Relating to the destruction and retention of court reporters' notes and certified transcripts in civil and criminal proceedings.

S.F. 2259
Effective 7-1-88
Approved 5-2-88
Relating to the disposal of abandoned mobile homes and abandoned personal property of the abandoned mobile home owner.

S.F. 2262
Effective 7-1-89
Section 3 effective 7-1-88
Approved 5-9-88
Relating to organically produced food by providing for the establishment of standards, enforcement measures, penalties and an effective date.

S.F. 2263
Effective 5-2-88
Approved 5-2-88
Relating to horse and dog racing by allowing the application of cold with ice, cold packs, or similar treatments to the limbs of a horse or a dog prior to the start of a race and by allowing the use of certain drugs on racing horses under rules adopted by the state racing commission, and providing an effective date.

S.F. 2267
Various effective dates, see bill
Approved 3-29-88
Relating to residential water treatment systems, incorporating a penalty, and providing effective dates.

S.F. 2269
Effective 7-1-88
Approved 4-12-88
Relating to the establishment of a drainage subdistrict.

S.F. 2270
Effective 7-1-88
Approved 4-4-88
Relating to the suspension of the collection of taxes, special assessments, and other assessments by the county board of supervisors.

S.F. 2271
Effective 7-1-88
Approved 4-4-88
Relating to claims against public corporations for nonpayment of moneys due on public improvements.

S.F. 2273
Effective 7-1-88
Approved 4-12-88
Relating to the establishment and construction of rest areas and rest area buildings.

S.F. 2274
Effective 7-1-88
Approved 4-27-88
Allowing the Board of Dental Examiners to revoke or suspend a license of a licensee where the licensee has been disciplined in another state, territory, or country, and revising other provisions relating to the suspension and revocation of licenses by the board.

S.F. 2278
Effective 7-1-88
Sections 1, 2, 7-10 effective 7-1-89
Chapter 256.17, 1987 Code Supplement is repealed 7-1-89
Approved 5-16-88
Relating to school standards, providing for implementation of educational standards developed and adopted by the state Board of Education, enactment of educational standards, providing a waiver procedure, providing for additional study of certain standards, and providing delayed effective dates for certain standards.

S.F. 2280
Effective 7-1-88
Approved 4-14-88
Relating to the time of filing a nonprofit corporation's annual report.

S.F. 2281
Effective 7-1-88
Approved 4-14-88
Relating to service of notice on a judgment debtor in garnishment proceedings.

S.F. 2284
Effective 7-1-88
Approved 5-12-88
Relating to the disclosure of mental health information and providing a peralty.

S.F. 2285
Effective 7-1-88
Approved 4-15-88
Relating to the enforcement of laws concerning motor vehicle fraud, salvage, and theft,

certificates of title, and transfer of ownership of foreign, wrecked, and salvage vehicles and making penalties applicable and providing effective dates.

S.F. 2289
Effective 7-1-88
Approved 5-3-88
Relating to the sale of certificates of deposit, issued by foreign associations, within the state.

S.F. 2291
Effective 4-27-88
Retroactive to 7-1-87
Approved 4-27-88
Providing that certain appropriations for retirement allowances be paid from the Iowa Public Employees' Retirement Fund rather than from the General Fund of the state retroactive to July 1, 1987, and providing an effective date.

S.F. 2295
Effective 7-1-88
Approved 4-27-88
Relating to the development of programs for the identification, educational methods, and staff qualifications for at-risk children.

S.F. 2296
Effective 5-4-88
Approved 5-4-88
Requiring the area education agencies to utilize federally funded health care programs to share in the costs of services provided to certain children requiring special education and providing an effective date.

S.F. 2301
Effective 7-1-88
Approved 4-28-88
Relating to the maintenance of local financial support by governmental subdivisions for operating expenses of local libraries.

S.F. 2302
Effective 7-1-88
Approved 4-14-88
Relating to the investment powers of state banks.

S.F. 2303
Effective 4-28-88
Approved 4-28-88
Relating to the Iowa Small Business New Jobs Training Act by providing for repayments to the permanent school fund, establishing a revolving loan account, and providing for departmental approval of certain projects by rule, and providing an effective date.

S.F. 2304
Effective 7-1-88
Section 18 effective 5-5-88
Sections 1-10; 12-14 & 19 effective 1-1-89
Approved 5-5-88
Relating to the administration of legal representation of indigent persons in criminal cases and proceedings under chapter 232 by local public defenders, and the state public defender's office, and providing an effective date.

S.F. 2306
Effective 7-1-88
Approved 4-26-88
Relating to the review by a juvenile court judge of a

juvenile court referee's decision by providing that review is on the record only and striking language providing that the juvenile judge may allow a rehearing at any time.

S.F. 2307
Effective 7-1-88
Approved 4-27-88
Providing for a study by the Department of Public Safety concerning the establishment of a physical criminal evidence registry.

S.F. 2309
Item Vetoed, part of Section 15
Effective 7-1-88
Approved 4-13-88
Relating to and making appropriations to the Department of Economic Development, providing for the creation and repeal of programs, and transferring administration of a program.

S.F. 2310
Item Vetoed, Sections 11 & 12
Effective 7-1-88
Approved 4-14-88
Relating to and making appropriations to the Iowa State Civil Rights Commission, the Department of Human Rights, the Department for the Blind, the Department of Elder Affairs, and the Department of Public Health and establishing a Division of Criminal and Juvenile Justice Planning.

S.F. 2311
Effective 7-1-88
Approved 4-13-88
Relating to and making appropriations to various state agencies including the elected officials, the Executive Council, the Department of General Services, the Department of Personnel, the Department of Revenue and Finance, the Office of State-Federal Relations, and the Department of Management appropriating certain membership fees, increasing fees collected by filing officers, transferring moneys in the Iowa Economic Emergency Fund to the General Fund of the state, and appropriating moneys to the County Assistance Fund, the Municipal Assistance fund, and the moneys and credits replacement fund.

S.F. 2312
Item Vetoed, Sections 5, 61, 63, 67-69
Effective 7-1-88
Sections 6, 18, 19, 40, 41, 45, 48, 53, 56, 65 and 70-82 effective 5-17-88
Approved 5-17-88
Relating to the funding of, operation of, and appropriation of moneys to agencies, institutions, commissions, departments, and boards responsible for educational, cultural, and rehabilitational programs of this state and providing an effective date.

S.F. 2313
Effective 7-1-88
Approved 4-27-88
Imposing additional hazardous waste fees with civil penalties applicable.

S.F. 2314
Item Vetoed, Section 53

Effective 7-1-88
Sections 7, 43, 45, and 61 effective 6-30-88
Sections 28, 31, 35-40; 42, 44, 47-49; 60 and 62 effective 4-15-88
Approved 4-15-88
Relating to and making appropriations to state agencies whose responsibilities relate to public defense, public safety, transportation, and enforcement, and including allocation and use of moneys from the road use tax fund and abstract fee fund, appropriating moneys to the permanent school fund, providing an increase in the abstract fee, mandating reports of certain agency purchases, mandating adoption of rules governing registration and titling of motor vehicles, renaming the Chief Executive Officer of the Department of Public Safety, changing provisions of the Code relating to application of certain transportation safety regulations, repealing provisions of the Code requiring woodlands, wetlands, public parks, and prime agricultural land to be protected in the design, construction, and reconstruction of highways, and providing effective dates.

S.F. 2315
Effecitve 7-1-88
Approved 4-27-88
Making an appropriation from the road use tax fund of the state to a certain person in settlement of claims made against the state of Iowa.

S.F. 2316
Effective 7-1-88
Approved 5-10-88
Relating to the establishment of a Division on the Status of Blacks within the Department of Human Rights.

S.F. 2318
Effective 7-1-88
For rulemaking and administrative matters
All others 2-15-89
Approved 5-5-88
Relating to the registration of construction contractors; providing for administration and enforcement of a system of registration by the Labor Commissioner; providing for administrative penalties; providing an effective date; and providing other properly related matters.

S.F. 2321
Effective 7-1-88
Approved 4-16-88
Relating to the compensation and benefits for public officials and employees by specifying salary rates and ranges, by providing adjustments for salaries, by providing coverage and adjustments for health, life, disability, and dental insurance, by making coordinating amendments to the Code, and by providing applicability dates.

S.F. 2322
Item Vetoed, Sections 3 & 11
Effective 7-1-88
Approved 5-15-88
Relating to and making appropriations for the compensation, training, and benefits for public officials

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and employees, and providing effective dates.

S.F. 2323
Effective 7-1-88
Approved 4-28-88
Appropriating federal funds made available from federal block grants, allocating portions of federal block grants, and providing procedures if federal funds are more or less than anticipated or if federal block grants are more or less than anticipated or if categorical grants are consolidated into new or existing block grants.

S.F. 2327
Effective 5-10-88
Retroactive to 1-1-88
Approved 5-10-88
Providing for a state individual income tax checkoff for the United States Olympic Committee, a portion of which shall be made available for amateur sports and special olympic programs in Iowa, and providing a retroactive effective date.

S.F. 2328
Effective 7-1-88
Aproved 5-15-88
Relating to the allocations and appropriations of lottery revenues and the programs for which the revenues may be used.

S.F. 2330
Effective 7-1-88
Approved 5-14-88
Relating to the provision of certain services to persons with mental retardation, a developmental disability, or mental illness.

S.F. 2331
Effective 7-1-88
Approved 4-28-88
Relating to the collection of fees for and the rights and duties of the sheriff regarding service of legal process and levy of execution.

S.F. 2333
Vetoed 5-15-88
Relating to a conflict between civil service laws and the terms and conditions of a collective bargaining agreement pertaining to the mandatory bargaining subject of seniority as it affects promotions and transfers.

S.F. 2335
Effective 7-1-88
Aproved 4-27-88
Relating to the formula used in valuing agricultural property.

S.F. 2338
Effective 7-1-88
Section 2 effective 5-5-88
Approved 5-5-88
Relating to the deduction of premiums received in connection with annuity contracts in computing the gross amount of premiums for purpose of the State Gross Premiums Tax, requiring related reports by the Commissioner of Insurance, and providing applicable and effective dates.

S.F. 2344
Effective 7-1-88
Approved 5-17-88
Appropriating funds to the Office of the Attorney General

for the fiscal year beginning July 1, 1988, and ending June 30, 1989.

H.F. 102
Effective 7-1-88
Approved 5-12-88
Relating to the prohibition of polygraph examinations as a condition of employment, and providing a penalty.

H.F. 105
Effective 5-12-88
Approved 5-12-88
Relating to the appointment of assessors.

H.F. 164
Effective 7-1-88
Aproved 2-19-88
Relating to notaries public.

H.F. 185
Effective 7-1-88
Approved 5-5-88
Relating to violations of a person's civil rights and providing penalties.

H.F. 209 **
Effective 7-1-88
Approved 4-12-88
Relating to the enforcement of protective orders and orders to vacate the homestead in dissolution cases, and providing for the application of penalties.
** Repealed by HF 2452. See below.

H.F. 278
Effective 7-1-88
Approved 5-12-88
Authorizing a city to establish an administrative agency to manage and control a city airport, and authorizing local government reorganization by the establishment of an alternative form of county government or city-county government, or by consolidating county governments, and making corresponding amendments to the Code.

H.F. 327
Effective 2-19-88
Sections 1 & 3 effective 3-1-88
Approved 2-19-88
Increasing the tax on tobacco products and on cigarettes and little cigars and imposing an inventory tax on cigarettes and little cigars, unused tax stamps and metered imprints, granting a one-time credit purchase of cigarette stamps, and providing effective dates.

H.F. 382
Effective 7-1-88
Approved 5-6-88
Reserving a specific amount of a claim payable on an insurance policy on property located within the corporate limits of a city for the cost of demolition of the property by the city.

H.F. 393
Effective 7-1-88
Approved 5-13-88
Relating to the regulation of the sale of alcoholic beverages by amending the definition of licensed premises, by changing certain procedures of the division of alcoholic beverages, by limiting the areas of licensed premises which may be searched without a warrant, common entrance, by changing the requirements for a class "E" liquor control license by providing for the assessment

of a civil penalty in lieu of a license suspension for an offense by a licensee, by allowing a person holding a special permit for the purchase of sacramental wine to purchase from a class (A) wine permittee, and relating to liquor control licenses and wine and beer permits by providing for adjustment of fees for certain businesses and permittees and by requiring all class (A) wine permit premises and class (A) beer permit premises to be located within the state.

H.F. 395
Effective 7-1-88
Approved 5-11-88
Relating to the taking of animals and subjecting violators to penalties.

H.F. 429
Effective 7-1-88
Approved 5-10-88
Relating to the investigation of a driver of a vehicle violating the warning lamps or stop arm of a school bus and requiring the issuance of a uniform citation in certain circumstances.

H.F. 431
Effective 7-1-88
Approved 4-26-88
Relating to the education, practice, and supervision of cosmetologists and barbers.

H.F. 433
Effective 7-1-88
Approved 3-31-88
Relating to an exemption from securities registration for securities traded or approved for trade on the National Association of Securities Dealers Automated Quotations -- National Market System (NASDAQ/NMS).

H.F. 470
Effective 7-1-88
Approved 4-12-88
Relating to the payment of expenses of merged area schools by the board secretary.

H.F. 498
Effective 7-1-88
Approved 5-5-88
Revising provisions relating to dangerous weapons and the carrying of dangerous weapons and knives, and providing penalties.

H.F. 529
Effective 7-1-88
Approved 5-12-88
Relating to governmental competition with and purchase of goods and services from private enterprise.

H.F. 578
Effective 7-1-88
Approved 5-10-88
Providing for the use of vintage Iowa registration plates.

H.F. 613
Effective 7-1-88
Approved 5-3-88
Relating to the licensing and examination of first mortgage bankers and mortgage brokers, and regulation of other mortgage lenders, and providing penalties.

H.F. 649
Effective 5-15-88
Approved 5-15-88

Relating to exemptions from execution and attachment by revising provisions governing the exemption of insurance policies, proceeds, and benefits, cash, and certain other personal property, and providing other properly related matters, providing for the applicability of the Act, and providing an effective date.

H.F. 650
Effective 5-16-88
Approved 5-16-88
Relating to school year duration and attendance requirements and providing for an effective date, a moratorium, and an interim study committee.

H.F. 653
Effective 7-1-88
Approved 5-3-88
Relating to motor vehicle rental insurance and issuance of collision damage waivers in motor vehicle rental agreements, making penalties applicable, and providing an effective date.

H.F. 665
Effective 7-1-88
Approved 5-11-88
Authorizing a tax levy for city libraries by petition and referendum.

H.F. 666
Effective 7-1-88
Approved 5-2-88
Providing that a homestead tax credit claim need not be refiled when the homestead is transferred to one of the spouses pursuant to a dissolution of marriage.

H.F. 678
Effective 7-1-88
Approved 5-9-88
Authorizing the establishment of a benefited recreational lake district and its dissolution, the election of trustees, the levy of a tax, and the contract of indebtedness.

H.F. 683
Effective 7-1-88
Approved 5-6-88
Relating to energy assistance to low income households by establishing a customer contribution fund, an emergency weatherization fund, an energy crisis fund and an affordable heating payment program pilot project, making civil penalties applicable, and providing an appropriation.

H.F. 2011
Effective 3-2-88
Approved 3-2-88
Relating to the ownership of certain vessels by defining vessel, by requiring a certificate of origin for certain vessels, by requiring the purchaser of a registered vessel to obtain a certificate of title, by providing for the perfection of a security interest, and by providing an effective date.

H.F. 2016
Effective 7-1-88
Approved 5-9-88
Relating to county conservation boards by providing for the creation of a county conservation board in certain counties and by

specifying the law enforcement authority of the director and other designated employees of a county conservation board, and by providing effective dates.

H.F. 2046
Effective 7-1-88
Approved 5-16-88
Relating to student membership on the State Board of Regents.

H.F. 2061
Effective 7-1-88
Approved 4-11-88
Requiring members of examining boards and board of review to be residents of the assessor jurisdiction.

H.F. 2063
Effective 4-12-88
Approved 4-12-88
Relating to bed and breakfast homes, by requiring smoke detectors and fire extinguishers, by providing for the testing of drinking water, by providing an effective date, and by subjecting violators to a penalty.

H.F. 2082
Item Vetoes, Sections 1-5,7-11
Effective 2-12-88
Approved 2-12-88
Relating to and making appropriations to the department of human services and to the Iowa finance authority for the remainder of the fiscal year ending June 30, 1988, allowing carryover of certain funds to the next fiscal year, and providing an effective date.

H.F. 2088
Effective 7-1-88
Approved 4-26-88
Relating to work release for prisoners in county jails by providing for intermittent sentencing.

H.F. 2102
Effective 7-1-88
Approved 5-7-88
Prohibiting the taking of a predominantly white deer and providing a penalty.

H.F. 2106
Effective 7-1-88
Approved 5-12-88
Prohibiting the advertisement, or sale in this state of home testing kits for human immunodeficiency virus antibody or antigen testing, and providing penalties.

H.F. 2113
Effective 7-1-88
Approved 5-12-88
Relating to the dispensing of prescription drugs.

H.F. 2117
Effective 7-1-88
Approved 5-2-88
Allowing certain name changes on an application for marriage or in divorce and annulment decrees.

H.F. 2123
Effective 7-1-88
Approved 4-12-88
Relating to the inheritance laws by providing for the power of a surviving spouse's conservator to elect to take or refuse to take under a will or to elect to occupy the homestead, eliminating the time requirement when the

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share of a surviving spouse may be set off by referees when the spouse elects to take against the will, and providing for a share of an estate of a child born or adopted after execution of a testator's last will.

H.F. 2127
Effective 7-1-88
Approved 4-12-88
Relating to the acceptance of checks and share drafts by prohibiting certain forms of identification as a condition of acceptance of a check or share draft, and providing penalties.

H.F. 2128
Effective 7-1-88
Approved 3-2-88
Relating to drugs, devices, and cosmetics.

H.F. 2129
Effective 7-1-88
Approved 4-11-88
Relating to brake requirements for certain trucks and truck tractors.

H.F. 2153
Effective 7-1-88
Approved 4-26-88
Expanding the time in which the utilities board may grant or refuse an application for rehearing in a contested case.

H.F. 2155
Vetoed 5-17-88
Relating to payment of costs of asbestos identification and removal by boards of directors of school districts.

H.F. 2156
Effective 7-1-88
Approved 4-12-88
Relating to the registration of aircraft, and making penalties applicable.

H.F. 2166
Effective 7-1-88
Approved 4-11-88
Relating to a disclaimer of interest by a beneficiary also acting as a fiduciary.

H.F. 2168
Effective 7-1-88
Approved 4-11-88
Relating to the recording of instruments by a county recorder.

H.F. 2170
Effective 7-1-88
Approved 5-12-88
Relating to foster care review, providing for the continued existence of the state and local foster care review boards, providing for the establishment of local foster care review boards throughout the state, providing for review in cases of children involuntarily hospitalized for mental illness, revising provisions relating to confidentiality and access to certain information, providing other procedural revisions, and providing properly related matters.

H.F. 2179
Effective 7-1-88
Approved 4-12-88
Extending civil service status to certain job classes funded by public grants or other temporary funds.

H.F. 2191
Effective 7-1-88
Approved 5-9-88
Relating to commercial concessions operated on certain state-owned lands.

H.F. 2192
Effective 7-1-88
Approved 5-7-88
Exempting certain vessels from displaying registration and passenger capacity numbers.

H.F. 2193
Effective 7-1-88
Approved 3-2-88
Increasing the time period for which in-transit stickers are valid.

H.F. 2226
Effective 7-1-88
Approved 4-26-88
Relating to the calculation of budget enrollment of a reorganized school district.

H.F. 2228
Effective 4-14-88
Approved 4-14-88
Relating to vacancies in civil service promotional grades and providing an effective date.

H.F. 2233
Effective 7-1-88
Approved 5-5-88
Relating to work programs for inmates of state correctional institutions.

H.F. 2237
Effective 3-3-88
Approved 3-3-88
Providing that the records of the purchase of alcoholic liquor from the alcoholic beverages division by individual class "E" liquor control licensees are confidential and providing an effective date.

H.F. 2247
Effective 7-1-88
Approved 4-11-88
Relating to an action for slander or libel for a report or statement made to the Division of Job Service of the Department of Employment Services.

H.F. 2255
Effective 7-1-88
Approved 4-26-88
Relating to the confidentiality of records of clients of advocacy services offered by the Department of Human Rights.

H.F. 2258
Effective 7-1-88
Approved 5-11-88
Relating to trespass upon the right-of-way of a public road or highway.

H.F. 2259
Effective 7-1-88
Aproved 4-11-88
Permitting persons who rebuild vehicles to be licensed as wholesalers.

H.F. 2260
Effective 7-1-88
Approved 4-26-88
Prohibiting employer sanctions against employees who refuse to work in unsafe conditions.

H.F. 2262
Effective 7-1-88
Approved 5-5-88
Relating to the deduction and disbursement of certain moneys from an allowance paid to an

inmate.

H.F. 2263
Effective 7-1-88
Approved 4-11-88
Relating to the use of the Iowa State Industries Revolving Fund.

H.F. 2264
Effective 7-1-88
Approved 3-31-88
Repealing a requirement that the Department of Corrections prepare a biennial report relating to the management of the community-based corrections programs.

H.F. 2265
Effective 7-1-88
Approved 4-11-88
Relating to reports to be submitted by superintendents of correctional institutions to the director of the department of corrections.

H.F. 2269
Item Vetoed Section 3
Effective 5-11-88
Approved 5-11-88
Relating to the operation and funding of rail lines including funds in the special railroad facility fund the rail assistance fund and an appropriation and providing an effective date.

H.F. 2277
Vetoed 5-16-88
Relating to the payment of moneys to teachers under the educational excellence program, including the frequency and manner of payments, eligibility for payments, deadlines for submission of plans and reports, and the issuance of supplemental contracts.

H.F. 2278
Effective 7-1-88
Approved 5-5-88
Relating to the issuance of citations to juveniles, the detention of juveniles and restrictions on the detention of juveniles in adult facilities, and providing penalties.

H.F. 2283
Effective 7-1-88
Approved 5-9-88
Relating to agricultural property holdings by providing certain definitions; restricting processors; establishing family farm limited partnerships; restricting the number of acres of agricultural land that other limited partnerships may acquire or otherwise obtain or lease; restricting persons from becoming limited partners, stockholders, or beneficiaries in more than a number of certain limited partnerships, authorized farm corporations, or authorized trusts; providing certain restrictions on family trusts; and requiring reporting of certain agricultural related property and the confidentiality of certain information; and providing penalties.

H.F. 2287
Effective 4-11-88
Approved 4-11-88
Relating to the filing date of the elderly or disabled property tax credit, providing for the recovery of erroneous

payments, and providing an effective date.

H.F. 2294
Effective 7-1-88
Approved 5-12-88
Relating to testing for and confidentiality of human immunodeficiency virus-related matters and providing penalties.

H.F. 2296
Effective 7-1-88
Approved 4-29-88
Providing coverage under the Iowa Life and Health Guaranty Association to the holders of unallocated annuity contracts.

H.F. 2303
Effective 7-1-88
Approved 4-26-88
Relating to nontraditional insurance arrangements by prohibiting the incorporation or reincorporation of a benevolent association, providing for the regulation of risk retention groups and purchasing groups, increasing surplus requirements for reciprocal insurers and repealing an exemption to the applicability of state law to certain reciprocal insurance contracts, and providing penalties.

H.F. 2306
Effective 7-1-88
Approved 3-31-88
Relating to regulation of the extraction of coal for commercial purposes from a site of one-half acre or less, and making penalties applicable.

H.F. 2307
Effective 7-1-88
Approved 4-26-88
Relating to the regulation of the state's insurance industry and the administration of the Insurance Division of the Department of Commerce.

H.F. 2313
Effective 7-1-88
Approved 4-26-88
Relating to child day care for sick children.

H.F. 2315
Effective 7-1-88
Approved 4-26-88
Relating to commercial paper by modifying the definition of "sum certain".

H.F. 2316
Effective 7-1-88
Approved 5-6-88
Requiring gas and electric public utilities to provide annual gas or electric energy costs for certain properties to certain persons when requested in writing and making civil penalties applicable.

H.F. 2317
Effective 7-1-88
Approved 4-29-88
Relating to the repeal of the Iowa Venture Capital Investment Act.

H.F. 2318
Effective 7-1-88
Approved 3-31-88
Providing for the acknowledgment of delivery of certain debt documents.

H.F. 2319
Effective 7-1-88
Approved 4-26-88

Q

Excluding Saturday as a banking day.

H.F. 2320
Effective 7-1-88
Approved 4-26-88
Relating to credit unions by amending the power to sell, participate in, or discount, or purchase the obligations of certain credit union members; by amending the authorization to appoint credit and auditing committees; and by permitting the superintendent to prescribe by rule the period of preservation of records or files for credit unions.

H.F. 2322
Effective 7-1-88
Approved 3-31-88
Relating to schedule I and schedule III controlled substances.

H.F. 2323
Effective 7-1-88
Approved 4-26-88
Relating to the pledge of United States government obligations or their functional equivalents as security for the deposit of puolic funds.

H.F. 2327
Effective 5-2-88
Approved 5-2-88
Relating to the use of certain revenues obtained from the transfer of property or taxes imposed in urban renewal areas for economic development purposes and providing an effective date.

H.F. 2336
Effective 7-1-88
Approved 5-15-88
Relating to the confidentiality of certain records and information concerning individual use of services provided by libraries and video rental businesses, and providing a penalty.

H.F. 2337
Effective 7-1-88
Approved 3-31-88
Relating to the jurisdiction of the employment appeal board.

H.F. 2338
Effective 7-1-88
Approved 5-9-88
Relating to environmental quality by creating an emergency response fund and by establishing and increasing fines and penalties.

H.F. 2339
Effective 7-1-88
Approved 5-12-88
Relating to grievances and discipline resolution for certain employees of the state.

H.F. 2344
Effective 7-1-88
Approved 5-12-88
Relating to the civil rights of persons with a condition relating to acquired immune deficiency syndrome, by prohibiting the testing, with respect to the employment of persons, for a condition related to acquired immune deficiency syndrome, and by making remedial provisions of the civil rights law applicable and amending the definition of disability.

H.F. 2346
Effective 7-1-88
Approved 5-11-88
Relating to the coordination of rural development programs by creating a Rural Development Coordinating Committee and the Office of Rural Resources Coordinator.

H.F. 2347
Effective 7-1-88
Approved 4-26-88
Relating to the calculation of special assessment installments, interest on unpaid installments, and interest penalties.

H.F. 2348
Effective 7-1-88
Approved 5-14-88
Relating to certain ambiguities and inconsistencies of the Code as they relate to city government.

H.F. 2352
Effective 7-1-88
Approved 5-11-88
Relating to right-of-way and relocation assistance provided to persons displaced by highway or urban renewal projects.

H.F. 2354
Effective 7-1-88
Approved 5-12-88
Relating to radon testing and providing a penalty.

H.F. 2355
Effective 7-1-88
Approved 3-31-88
Relating to cooperative associations by providing for their purposes and powers.

H.F. 2363
Effective 7-1-88
Approved 4-11-88
Relating to the control of certain parasitic infestations common to bees by the state apiarist.

H.F. 2367
Effective 7-1-88
Approved 5-12-88
Relating to training for mandatory reporters of dependent adult abuse and child abuse.

H.F. 2369
Effective 7-1-88
Approved 4-26-88
Relating to the duties and authority of the Board of Parole.

H.F. 2371
Effective 4-14-88
Approved 4-14-88
Authorizing the joint investment of funds by counties, cities, city utilities, and judicial district departments of correctional services, and providing an effective date.

H.F. 2374
Effective 7-1-88
Approved 4-27-88
Relating to the nomination of candidates for the office of Lieutenant Governor for the general election in the year 1990.

H.F. 2377
Effective 7-1-88
Approved 5-16-88
Relating to the establishment of programs for paying for college costs, including the provision for the State Board

of Regents to issue revenue bonds that are payable at times determined by the board and the preparation of an educational program and marketing strategies by the College Aid Commission in cooperation with the State Board of Regents.

H.F. 2381
Effective 7-1-88
Approved 5-9-88
Relating to carrying out water protection projects and practices within soil and water conservation districts, and providing for a water protection fund.

H.F. 2383
Effective 7-1-88
Approved 5-11-88
Relating to the movement of vehicles of excess size and weight, subject to penalties provided by law.

H.F. 2384
Effective 7-1-88
Approved 4-12-88
Relating to the notice to be given to a judgment debtor when the debtor's property is levied upon.

H.F. 2386
Effective 7-1-88
Approved 5-15-88
Relating to additional factors, requirements, and guidelines for providing assistance under the community economic betterment account of the Iowa Plan Fund and RISE program.

H.F. 2387
Effective 7-1-88
Approved 5-6-88
Relating to the construction of cable systems and telegraph and telephone lines in the state.

H.F. 2388
Effective 7-1-88
Approved 4-11-88
Relating to the petition signatures required to call an election to fill a vacancy in an elective city office.

H.F. 2395
Effective 7-1-88
Approved 5-6-88
Permitting certain water utilities to become cooperatives, restricting the exemption from the application of the provisions of chapter 476 for persons furnishing electricity to five or fewer customers, to those such persons who are furnishing the electricity by secondary line, from an alternate energy production facility, or small hydro facility, and expanding allowable purposes under Chapter 499.

H.F. 2396
Effective 7-1-88
Approved 5-11-88
Relating to the establishment of the Economic Development Finance Corporation to assist in providing financing for small business development by providing loan guarantees, letters of credit, equity financing, underwriting for public offerings, and creating a state assistance fund.

H.F. 2400
Effective 5-6-88
Approved 5-6-88
Relating to enhanced 911

emergency telephone communication systems, by requiring each county to prepare an enhanced 911 service plan for submittal to the office of disaster services on or before March 1, 1989, by requiring conversion of pay telephones to accept 911 calls without charge, by allowing a local E911 service surcharge, by providing certain liability exemptions in conjunction with the delivery of E911 services, and by providing a limited privacy waiver to permit nonlisted or unpublished numbers to be included in E911 service providing a penalty, and an effective date.

H.F. 2405
Effective 7-1-88
Some retroactive applicability; see bill
Approved 5-13-88
Relating to the administration and benefits for certain public retirement systems, making appropriations.

H.F. 2406
Effective 7-1-88
Approved 5-14-88
Relating to access by the Citizens' Aide to confidential records and proceedings.

H.F. 2407
Effective 7-1-88
Approved 5-3-88
Relating to the Iowa Housing Finance Authority, by modifying the title guaranty program requirements that participation fees be charged, that lenders be participants, that persons or lenders not receive a portion of the charge for title guaranty, and that financial institutions disclose the availability of the program, and by expanding the purposes of and renaming the commitment cost fund.

H.F. 2412
Effective 7-1-88
Approved 5-5-88
Relating to judicial sentencing options.

H.F. 2415
Effective 4-14-88
Approved 4-14-88
Relating to incentives to encourage certain state and local government employees to retire from employment by providing for monetary or insurance payment incentives, and providing an effective date.

H.F. 2416
Effective 7-1-88
Approved 4-26-88
Relating to establishing a case management assistance program to assist low-income persons in starting up or expanding small businesses.

H.F. 2419
Effective 7-1-88
Approved 5-16-88
Relating to enrollment of school pupils, including initiating and effecting school district dissolutions and whole-grade sharing agreements, setting maximum incentives.

H.F. 2423
Effective 7-1-88
Approved 4-26-88
Relating to sureties and surety bonds for public

officers and emplcyees.

H.F. 2427
Effective 7-1-88
Approved 4-11-88
Repealing certain health-related regulation responsibilities of the Department of Agriculture and Land Stewardship.

H.F. 2428
Effective 7-1-88
Approved 5-15-88
Increasing and establishing certain court filing fees.

H.F. 2430
Effective 7-1-88
Approved 4-26-88
Designating hearing officers as administrative law judges.

H.F. 2432
Effective 7-1-88
Approved 5-14-88
Relating to the registration and regulation of persons seeking to represent a student athlete for compensation in negotiations intended to result in employment with a professional sports team, prohibiting certain actions relating to student athletes and their families, and providing penalties.

H.F. 2433
Effective 7-1-88
Approved 5-16-88
Relating to public school vocational education in agriculture technology and creating a council for agricultural education.

H.F. 2437
Effective 7-1-88
Approved 5-6-88
Relating to utilization of energy resources in the state including the implementation of energy conservation measures.

H.F. 2440
Effective 7-1-88
Approved 4-12-88
Relating to and making appropriations to the Department of Agriculture and Land Stewardship and the Department of Natural Resources, and providing for an increase in certain fees.

H.F. 2441
Item Vetoed Sections 1,2,3.3 paragraph 1, 8, 10.6; and Sections 11-30
Effective 5-13-88
Approved 5-13-88
Relating to underground storage tanks, establishing certain fees, providing penalties, and providing an effective date.

H.F. 2443
Effective 7-1-88
Sections 9 & 11 effective 4-13-88
Approved 4-13-88
Relating to and making appropriations to the justice system and providing an effective date.

H.F. 2444
Item Vetoed, Sections 45 & 46
Effective 7-1-88, Sections 3 & 11 effective 4-13-88, Section 43 effective 6-30-88
Approved 4-13-88
Relating to regulatory bodies of state government by making appropriations to agencies, boards, commissions, departments, and programs of

state government including the Auditor of State, Campaign Finance, Employment Services, Labor Services, Industrial Services, Job Services, Inspections and Appeals, Commerce, Professional Licensing and Regulation, Insurance, Alcoholic Beverages, Banking, Credit Union, Savings and Loan, and Utilities, by mandating certain studies, policies, and other actions by certain regulatory bodies, by increasing certain fees, by allocating certain expenses between state agencies, and by exempting certain regulatory personnel from the merit pay system.

H.F. 2447
Item Vetoed, Section 1.5 and 1.6; 3.3, 3.7, 3.11; 6.2, 6.3; 7.2, 8.3, 17.4, 31, 45 and 47
Effective 7-1-88
Sections 6.3 and 41 effective 4-14-88
Approved 4-14-88
Relating to human services, and making appropriations to the department of Human Services for the fiscal years beginning July 1, 1987, and July 1, 1988, and providing effective dates.

H.F. 2449
Effective 7-1-88
Approved 5-16-88
Legalizing the proceedings of the board of directors of the M-F-L Community School District relating to the sale of certain real estate.

H.F. 2451
Effective 4-26-88
Approved 4-26-88
Relating to the treatment of interest and dividends from state and other political subdivisions and from regulated investment companies in determining the alternative minimum tax for corporations and providing for retroactive applicability and effective dates.

H.F. 2452
Item Vetoed Section 16.5
Effective 7-1-88
Sections 16 & 17 effective 5-12-88
Approved 5-12-88
Relating to the receipt and disbursement of support payments by transferring the collection and distribution of child support payment from the Department of Human Hervices Collection Services Center to the district court clerks, by making an exception for federal social security payments, to the statutory requirements regarding allowable payees, by providing appropriations.

H.F. 2453
Effective 7-1-89
Sections 4 & 5 effective by administrative rule; see bill
Approved 5-7-88
Relating to the sale and use of packaging products, providing sales and use tax incentives for the use of degradable packaging products, subjecting violators to a penalty, and providing an effective date.

H.F. 2456
Effective 7-1-88, Section 21

effective 5-14-88
Approved 5-14-88
Relating to programs for which appropriations to the Department of Human Services are required, providing an effective date, and providing penalties.

H.F. 2457
Effective 7-1-88
Approved 5-14-88
Relating to payments for local school districts, area schools, counties, cities, local conference boards, county hospitals, and county agricultural extension councils.

H.F. 2458
Effective 7-1-88
Approved 5-2-88
Relating to the exemption from the state sales, services, and use taxes of the gross receipts from the sales of modular homes which are not attributable to the cost of the tangible personal property used in the processing of the modular homes.

H.F. 2459
Effective 7-1-88
Approved 5-4-88
Relating to the imposition and collection of the state sales, services and use taxes by out-of-state retailers.

H.F. 2460
Effective 7-1-88
Approved 5-11-88
Relating to the treatment of rebates given on the sales of motor vehicles subject to registration for purposes of the state sales, services, and use taxes.

H.F. 2461
Effective 7-1-88
Approved 5-2-88
Relating to tax refunds paid by the county treasurer.

H.F. 2462
Effective 1-1-89
Approved 5-7-88
Relating to the licensing of dogs, subjecting violators to a penalty, and providing an effective date.

H.F. 2463
Effective 5-4-88
Approved 5-4-88
Relating to local option taxes by authorizing a city or county to receive tax return information relating to the taxes; changing the number of days notice must be given before a local hotel or motel tax is imposed, repealed, or its rate changed; legalizing the premature collection of a local hotel or motel tax; and providing an effective date.

H.F. 2464
Effective 7-1-88
Approved 5-7-88
Relating to the lease-purchase and disposal of real or personal property by the Department of General Services and providing a standing appropriation of proceeds previously deposited.

H.F. 2465
Effective 7-1-88
Approved 5-10-88
Relating to taxation establishing an excise tax on motor fuel used in aircraft, establishing an excise tax on special fuel used in aircraft,

eliminating the sales tax exemption for casual sales of aircraft, adding a sales and use tax exemption for the sale of certain aircraft, requiring a person first registering an aircraft to show evidence that the sales tax or use tax has been paid, prohibiting a motor fuel excise tax refund for motor fuel or special fuel taken out of the state in fuel supply tanks of aircraft or watercraft, prohibiting an income tax credit on fuel tax paid on motor fuel used in watercraft or aircraft, and providing an appropriation.

H.F. 2466
Effective 7-1-88
Approved 5-12-88
Relating to residential care facilities by requiring the inclusion of certain residential care facilities in a demonstration project and the extension of the exclusion of a residential care facility from certificate of need requirements.

H.F. 2469
Item Vetoed Section 1.2, paragraph d
Effective 5-6-88
Approved 5-6-88
Relating to energy development and conservation, making appropriations of the petroleum overcharge funds, and providing an effective date.

H.F. 2470
Effective 5-6-88
Approved 5-6-88
Legalizing and validating the proceedings for the organization and operation of the Resale Power Group of Iowa and declaring it to be legally established and declaring each and all of its acts to have been legally taken and declaring each and all of the actions taken by the Resale Power Group of Iowa and by the City of Burt, City of Dike, City of Dysart, City of Long Grove, City of Maquoketa, City of Marathon, City of Panora, City of Preston, City of Sibley, City of Stanhope, City of State Center, City of Tipton, City of West Liberty, City of Whittemore, City of Anita, City of Hopkinton, City of Grand Junction, City of Ogden, City of Story City, City of Traer, City of Vinton, the Amana Society Service Company, Amana, and the Board of Directors of the Farmers Electric Cooperative, Kalona, all in Iowa, in entering into, ratifying and confirming an agreement between the Resale Power Group of Iowa and its members dated November 3, 1987 and a certain joint transmission agreement dated November 3, 1987, to have been legally taken.

H.F. 2471
Effective 7-1-88
Approved 5-4-88
Relating to regulation of milk production and marketing by creating a fund for administration and appropriating the moneys in the fund, providing for inspection, raising fees relating to the milk industry, and providing for the establishment of milk production and processing standards.

H.F. 2473
Effective 7-1-88
Approved 5-4-88
Relating to and making appropriations directly from the state general fund for purposes of the military service tax credit and payment of the franchise tax to local governments, and providing an effective date.

H.F. 2474
Vetoed 5-14-88
Relating to financial institutions and the location of satellite terminals and the imposition of the franchise tax on financial institutions doing business within the state and providing an effective date.

H.F. 2476
Effective 7-1-88
Approved 5-14-88
Relating to administrative procedures to challenge the identification, classification, and exemption of property for taxation purposes.

H.F. 2477
Effective 7-1-88
Section 7 retroactive to 1-1-88
Approved 5-13-88
Relating to certain state taxes by providing for the statute of limitations for state individual and corporate tax purposes, the definition of investment counseling for state sales, services, and use tax purposes, the allowance of the military service tax credit for mobile homes, for the exemption from or the refund of state sales, services, and use taxes on the gross receipts from sales or rentals of replacement parts for farm machinery, equipment, and implements and to the issuance of fuel exemption certificates for state sales, services and use tax purposes for the purchase of fuel used in farm implements.

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# IOWA RULES OF APPELLATE PROCEDURE UPDATE

by Emil Trott, Jr.

Iowa Defense Counsel Association
1988 Annual Meeting
October 27-29, 1988

I. Abbreviated time limits effective July 1, 1988.

A. Time for docketing after notice of appeal.

1. Termination of parent-child relationship - 30 days.

2. Guilty plea or sentence only - 20 days.

3. Certiorari - 20 days after petition granted.

4. Certified question - 10 days after filing of certified question.

5. Lawyer discipline under Iowa Sup. Ct. R. 118.11 - 10 days.

6. No report of evidence or transcript unavailable - 10 days.

7. Administrative action under Iowa Code ch. 17A and no additional testimony in district court - 10 days.

B. Times for filing briefs and determining contents of appendix reduced by one-half; if deferred, time for filing appendix reduced to 15 days after appellee's initial brief, time for briefs in final form reduced to 7 days after deferred appendix; and transcription and submission priority.

1. Contest as to custody of children.
2. Adoption.
3. Termination of parent-child relationship.
4. Juvenile proceedings affecting child placement.
5. Guilty plea or sentence only.
6. Lawyer discipline.

II. Combined certificate.

A. Timeliness of notice of appeal.

B. Ordering transcript.

1. Date of ordering transcript.
2. Name and address of court reporter.
3. Done nothing to delay transcript.
4. Will pay for transcript.
5. Description of parts of proceedings ordered transcribed.

C. Transcript not ordered and statement of evidence.

D. If full transcript not ordered, statement of issues.

E. Identification of cases involving abbreviated docketing time or briefing times or both under Iowa R.App.P. 12(b), 17, or 105.

1. Contest as to child custody, adoption, or juvenile proceedings affecting child placement (briefing).
2. Termination of parent-child relationship (both).
3. Guilty plea or sentence only (both).
4. Original certiorari (docketing).
5. Certified question of law (docketing).
6. Lawyer discipline (both).
7. No transcript (docketing).
8. Administrative action with no additional testimony in district court (docketing).

F. Final judgment or interlocutory ruling.

G. Identification of parties and attorneys.

1. Parties.
   a. Names.
   b. Designations in district court.
2. Attorneys.
   a. Names.
   b. Law firms.
   c. Addresses.
   d. Telephone numbers.

H. Signature block.

I. Proof of service.

1. Date.
2. Method.
3. Names and addresses of parties and court reporter served.

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J. Certificate of filing.

1. District court.

a. Date.

b. Method of filing.

c. Name of county.

2. Supreme court.

a. Date.

b. Method of filing.

K. Signature of person serving and filing.

III. Supplemental certificate.

A. Parties encouraged to agree on parts of proceedings to be transcribed.

B. District court to settle disputes.

C. Party ordering additional transcript to file supplemental certificate.

1. Date of ordering additional transcript.

2. Court reporter's name and address.

3. Nothing to delay preparation of additional transcript.

4. Will pay.

5. Description of additional parts of the proceedings ordered transcribed.

6. Signature block.

7. Proof of service and certificate of filing.

IV. Cross-appeals.

A. Appellant (cross-appellee) may file a statement that a reply brief will not be filed because cross-appeal

issues have already been addressed in appellant's brief.

B. Failure of appellee (cross-appellant) to timely file brief in support of cross-appeal may result in dismissal of cross-appeal on appellant's motion.

V. Brief of intervenor or amicus curiae who is not an appellant or appellee to be in green cover.

VI. Appeals involving termination of parent-child relationship.

A. Docketing time reduced to 30 days.

B. Abbreviated briefing schedule.

C. No extensions of time.

D. Motion does not suspend timetable or protect against default or penalties under Iowa R.App.P. 19.

E. Automatic transfer to court of appeals without screening.

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IN THE SUPREME COURT OF IOWA

O R D E R

FILED
MAY 27 1988
CLERK SUPREME COURT

IN THE MATTER OF THE CHANGES IN THE IOWA RULES OF APPELLATE PROCEDURE

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By action of this court en banc, the attached exhibits reflect the changes to the corresponding Iowa Rules of Appellate Procedure which shall take place effective July 1, 1988:

| | |
|---|---|
| Exhibit "A" | Rule 10(b) |
| Exhibit "B" | Rule 11(a) |
| Exhibit "C" | Rule 12 |
| Exhibit "D" | Rule 13 |
| Exhibit "E" | Rule 16(a) |
| Exhibit "F" | Rule 17 |
| Exhibit "G" | Combined Certificate Form |
| Exhibit "H" | Supplemental Certificate Form |
| Exhibit "I" | Appellate Procedure Timetables. |

Effective July 1, 1988, existing Rule 17 is to be stricken.

The Combined Certificate Form, the Supplemental Certificate Form, and the Appellate Procedure Timetables shall be printed to follow the existing appellate rules.

Dated this 27th day of May, 1988.

THE SUPREME COURT OF IOWA

By Arthur A McGiverin
Arthur A. McGiverin, Chief Justice

Copies to:

Members of the Court
Members of the Iowa Court of Appeals
Judicial Council
State Court Administrator
District Court Administrators
Code Editor
West Publishing Company
Mead Data Central, Inc. (LEXIS)
Iowa State Bar Association

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R3/88-IRAP.1-2

EXHIBIT "A"

**Rule 10. Record on appeal.**

* * * *

**(b) Transcript; duty of appellant to order~~; notice if partial transcript ordered~~ and to file combined certificate.** Within ~~three~~ four days after filing the notice of appeal, appellant shall order in writing from the reporter a transcript of such parts of the proceedings not already on file as ~~he~~ appellant deems necessary for inclusion in the record. Appellant shall certify that the transcript has been ordered by using the combined certificate form found in the appendix of forms following these rules. Within four days after filing the notice of appeal, appellant shall complete the combined certificate, serve it on all parties to the appeal and on the reporter from whom the transcript was ordered, and file it with the clerks of both the district and the supreme court.

The combined certificate shall be deemed a professional statement by any attorney signing it that the transcript has been ordered in good faith, that no arrangements have been made or suggested to delay the preparation thereof, and that payment therefor will be made in accordance with these rules.

If appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to

the evidence, ~~he~~ appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless all of the proceedings are to be transcribed, appellant shall ~~also within such three days file with the clerk of the trial court and serve on appellee a description of~~ describe the parts of the proceedings ~~which he has~~ ordered transcribed~~. With that description appellant shall file and serve a statement of~~ and state the issues ~~he~~ appellant intends to present on appeal~~.~~, by using the combined certificate found in the appendix of forms following these rules.

[PARAGRAPH DIVIDED] If appellee deems a transcript of other parts of the proceedings to be necessary, ~~he~~ appellee shall, within ten days after the service of the ~~statement of appellant,~~ combined certificate, serve on all parties and the reporter, and file with the clerk of the ~~trial~~ district court ~~and serve on appellant~~ a designation of additional parts to be included. The parties are encouraged to agree on which parts of the proceedings are to be transcribed. Any disputes concerning which parts of the proceedings are to be transcribed and which party is to advance payment therefor to the reporter are to be submitted to the district court. If appellant shall within four days fail or refuse to order such parts, appellee shall either order the parts

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or apply to the ~~trial~~ district court to compel appellant to do so. The ordering party must make satisfactory arrangements with the reporter for payment of the transcript costs.

Within four days after appellee has served a designation of additional parts of the proceedings requested to be transcribed, the party ordering additional proceedings shall complete the supplemental certificate found in the appendix of forms following these rules, serve it on all parties to the appeal and on the reporter, and file the supplemental certificate with the clerks of both the district and the supreme court.

Pursuant to Iowa Code section 602.3202 ~~(Supp. 1983)~~, the compensation of shorthand reporters for transcribing their official notes is hereby fixed at two dollars and fifty cents per page for the original~~, twenty-five cents per page for the first copy,~~ and twenty-five cents per page for each ~~additional~~ copy.

A page of transcript shall consist of ~~not less~~ no fewer than twenty-five lines typewritten on paper 8 1/2 by 11 inches in size, prepared for binding on the left side, with margins of not less than 1 1/8 inches on the left and on the right. Typed matter shall be 6 by not less than 8 1/8 nor more than 9 1/4 inches. Type shall be standard pica with ten letters to the inch. Questions and answers shall each begin a new line. Indentations for speakers or paragraphs shall not be more than ten spaces from left margin. Pages shall be numbered consecutively in the upper right-hand

corner. Testimony of a new witness may be started on a new page where the prior witness' testimony ends below the center of the preceding page. Transcripts shall be indexed as to witnesses and exhibits. All transcripts shall ~~show upon their face~~ contain a certificate by the reporter showing the date the transcript was ordered, the name of the attorney or other person ordering the transcript, and the date it was delivered.

The reporter shall file the original of the completed transcript with the clerk of the ~~trial~~ district court within the time fixed or allowed for docketing the appeal~~,~~. ~~and~~ ~~t~~These rules relative to such transcript shall also apply to bills of exceptions under R.C.P. 241. The cost of the transcript shall be taxed in the ~~trial~~ district court.

* * * *

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R3/88-10B.1-4

EXHIBIT "B"

**Rule 11. Transmission of record.**

**(a) Time for transmission of notice of appeal, and docket and calendar entries.** Within ~~three~~ four days after the filing of the notice of appeal or a notice of cross-appeal, if any, the clerk of the ~~trial~~ district court shall transmit certified copies of the notice of appeal, the notice of cross-appeal, if any, and the docket and calendar entries in the proceeding in the ~~trial~~ district court to the clerk of the supreme court and all parties or their attorneys, and to the attorney general in juvenile cases and other cases in which the State of Iowa is an interested party although the attorney general has not appeared in the ~~trial~~ district court. The clerk of the supreme court shall thereupon prepare a docket page and assign a number to the case.

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R3/11A.1

**Rule 12. Docketing appeal~~; filing record~~.**

**(a) Docketing the appeal.** Within forty days after the filing of the notice of appeal, unless the time is shortened or extended by an order under ~~rule 20"a", rules of appellate procedure~~ Iowa Rule of Appellate Procedure 20(a) or shortened by subsection "b" of this rule, appellant shall pay the docket fee to the clerk of the supreme court, and the clerk shall thereupon enter the appeal upon the docket. If appellant is the State of Iowa, the clerk shall enter the appeal upon the docket at the written request of the attorney general within such forty days. If ~~a petitioner~~ an applicant appeals to the supreme court under Iowa Code section 663A.9 of the Uniform Postconviction Procedure Act, and the ~~trial~~ district court has found ~~petitioner~~ applicant to be indigent, the clerk shall enter the appeal upon the docket at the request of the ~~petitioner~~ applicant within such forty days. ~~Petitioner's~~ Applicant's request to docket without payment of the fee shall be in writing and accompanied by a copy of the ~~trial~~ district court's order finding ~~him~~ applicant indigent. If appellant is authorized by order of the ~~trial~~ district court or supreme court to prosecute the appeal without prepayment of fees, the clerk shall enter the appeal upon the docket at the request of the party within such forty days. An appeal shall be docketed under

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the title given to the action in the ~~trial~~ district court, with appellant identified as such, but if such title does not contain the name of appellant, ~~his~~ the name identified as appellant shall be added to the title. The clerk of the supreme court shall immediately give notice to all parties or their attorneys of the date on which the appeal is entered on the docket.

(b) **Cases in which docketing time is reduced:**

(1) **Termination of parent-child relationship.** If the appeal involves a termination of a parent-child relationship, the time for docketing is reduced to within thirty days after the notice of appeal is filed.

(2) **Guilty plea or sentence only.** If the appeal is from conviction and sentence upon a plea of guilty or from a sentence only under Iowa Rule of Appellate Procedure 105, the time for docketing is reduced to within twenty days after the notice of appeal is filed.

(3) **Certiorari.** If the matter is an original certiorari proceeding under Iowa Rule of Appellate Procedure 303, the time for docketing is reduced to within twenty days after the order granting the writ is filed.

(4) **Certified question.** If the matter is a certified question of law proceeding under Iowa Rule of Appellate Procedure 453, the time for docketing is reduced to within ten days after the certification order is filed.

(5) **Lawyer discipline.** If the appeal involves a lawyer disciplinary matter under Iowa Court Rule 118.11, the time for docketing is reduced to within ten days after the notice of appeal or the order granting permission to appeal is filed.

(6) **Case involving no transcript.** If the appeal involves a matter where the appellant certifies that there is no report of the evidence or proceeding or when the transcript is unavailable, the time for docketing is reduced to within ten days after the notice of appeal is filed.

(7) **Administrative action.** If the appeal involves judicial review of an administrative action pursuant to Iowa Code chapter 17A, where no additional testimony was introduced in district court, the time for docketing is reduced to within ten days after the notice of appeal is filed.

~~Certificate of ordering transcript and statement regarding child custody. Within four days after filing notice of~~

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~~appeal appellant shall file with the clerk of the supreme court and serve on appellee a certificate of ordering transcript. The certificate shall include the name of the reporter, the date on which the transcript was ordered, a description of the portions of proceedings ordered transcribed and a statement regarding the arrangements made with the reporter for payment of the cost of the transcript. The certificate shall be signed by appellant or his attorney. Also within such four days appellant shall file with the clerk of the supreme court and serve on appellee a statement as to whether the appeal does or does not involve a contest as to child custody to which rule 17, rules of appellate procedure, applies.~~

~~If for any reason a transcript has not been ordered within three days after the filing of the notice of appeal, appellant shall file with the clerk of the supreme court and serve on appellee within such four days a certificate so stating with a statement of the reason a transcript cannot or will not be prepared.~~

~~If, after the filing of a certificate of not ordering transcript or a certificate of ordering transcript, a transcript of portions or additional portions of the proceedings is ordered under rule 10"b", rules of appellate procedure, or otherwise, the party so ordering shall within~~

~~four days file with the supreme court clerk and serve on the other party a supplemental certificate of ordering transcript. The supplemental certificate shall include the name of the reporter, the date on which the transcript or additional transcript was ordered, a description of the portions or additional portions of proceedings ordered transcribed and a statement of the arrangements with the reporter for payment of the cost of the transcript or additional transcript.~~

**(c) Dismissal for failure to docket.** If appellant shall fail to pay the docket fee when required, any appellee may file a motion in the supreme court to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the ~~trial~~ district court showing the date and substance of the judgment or order from which the appeal was taken and the date on which the notice of appeal was filed. Appellant may respond by written resistance within fourteen days of service of the motion by appellee. The clerk shall docket the appeal for the purpose of permitting the supreme court to entertain the motion without requiring payment of the docket fee, but appellant shall not be permitted to respond without payment of the fee unless ~~he~~ appellant is otherwise exempt from prepayment.

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**(d) Dismissal for failure to transmit remaining record.** If appellant shall fail to cause ~~timely~~ transmission of the remaining portions of the record as required by ~~rule 11"b", rules of appellate procedure~~ Iowa Rule of Appellate Procedure 11(b), any appellee may file a motion in the supreme court to dismiss the appeal. The motion shall state on what dates required briefs and the appendix were served on the parties and filed with the clerk of the supreme court. The motion shall be supported by a certificate of the clerk of the ~~trial~~ district court showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, and the expiration date of any order retaining the record or parts thereof in ~~trial~~ district court or of any order extending the time for transmitting the record or parts thereof. Appellant may respond by written resistance within fourteen days of service of the motion by appellee.

**(e) Restoring ~~trial~~ district court jurisdiction.** After an appeal is taken, the filing with the clerk of the ~~trial~~ district court of a stipulation in which all parties agree to a dismissal of an appeal shall restore jurisdiction to the ~~trial~~ district court for the entry of an order of dismissal of the appeal, which will be a final adjudication. The clerk of the ~~trial~~ district court shall forward a copy of such stipulation and order to the clerk of the supreme court.

**(f) Voluntary dismissal.** A party may at any time, without order of the court, voluntarily dismiss ~~his own~~ that party's appeal. Upon the filing of a voluntary dismissal with the clerk of the supreme court and payment of the docket fee if it has not already been paid, the clerk shall issue procedendo forthwith unless there is another appeal or cross-appeal in the matter still pending. The issuance of procedendo shall constitute a final adjudication with prejudice.

**(g) Limited remand.** The appropriate appellate court during appeal or pending application for appeal may remand the cause to the ~~trial~~ district court, which shall have jurisdiction for such specific proceedings as may be directed by the appellate court. Notwithstanding such remand, jurisdiction of the appeal shall remain in the appellate court which ordered the remand.

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EXHIBIT "D"

**Rule 13. Filing and service of briefs and amendments.**

**(a) Time for serving and filing briefs** except in those cases expedited under Iowa Rule of Appellate Procedure 17 or 105. Appellant shall serve and file ~~his~~ a brief within fifty days after the date on which the appeal is docketed. Appellee shall serve and file ~~his~~ a brief within thirty days after service of ~~the brief of~~ appellant's brief. ~~If~~ An appellant may serve~~s~~ and file~~s~~ a reply brief~~,~~ ~~he shall do so~~ within fourteen days after service of ~~the brief of~~ appellee's brief. The supreme court may shorten these periods for serving and filing briefs, either by rule for all cases or for classes of cases or by order in specific cases.

**(b) Cross-appeals.** In the event of a cross-appeal, except in those cases expedited under Iowa Rule of Appellate Procedure 17 or 105, appellant shall serve and file ~~his~~ a brief within fifty days after the date on which the appeal is docketed. Appellee (cross-appellant) shall serve and file ~~his~~ a brief within thirty days after service of ~~the brief of~~ appellant's brief. Within thirty days after service of appellee's brief, ~~A~~appellant (cross-appellee) shall serve and file either ~~his~~ a responsive reply brief or a statement indicating that a reply brief will not be filed

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because the issues on cross-appeal have already been addressed in appellant's brief ~~within thirty days after service of the brief of appellee~~. Appellee (cross-appellant) may serve and file a reply brief under ~~rule 14"c",~~ Iowa ~~r~~Rules ~~of a~~Appellate ~~p~~Procedure~~,~~ 14(c) within fourteen days after service of appellant's reply brief.

**(c) Multiple adverse parties.** If the time for doing any act prescribed by these rules is measured from the date of service of a paper by an adverse party, then in the case of multiple adverse parties the time for doing such act shall be measured from the date of service of the last timely served paper by an adverse party or the date of expiration of time within which the adverse parties had to serve the paper.

**(d) Amendments.** An appellant may amend ~~his~~ a required brief once within fifteen days after serving the brief, provided no brief has been served in response to ~~his brief~~ it. The time for serving and filing of appellee's brief shall be measured from the date of service of the amendment to appellant's brief. An appellee's brief may be amended ~~his brief~~ once within ten days after ~~serving~~ service ~~his brief~~, provided no brief has been served in reply to ~~his brief~~ it. The time for serving and filing appellant's reply brief shall be measured from the date of service of the amendment to appellee's brief. A reply brief may be amended at any time prior to seven days before submission of the appeal to

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the appellate court. Any other or further amendments to the briefs may be made only with leave of the appropriate appellate court. An amendment may be conditionally filed with a motion for leave.

**(e) Number of copies to be filed and served.** Eighteen copies of each brief or amendment thereto shall be filed with the clerk of the supreme court, unless the court by order in a particular case shall direct a different number, and two copies shall be served on counsel for each party separately represented. ~~If a party is allowed by order of the supreme court to file typewritten ribbon and carbon copies of a brief, the original and eleven legible copies shall be filed with the clerk and one copy shall be served on counsel for each party separately represented.~~

**(f) Consequence of failure to file briefs.** If appellant fails to file ~~his~~ the appellant's brief within the time provided by this rule, or within the time as extended, appellee may move for dismissal of the appeal. If appellee fails to ~~timely~~ file ~~his~~ a timely brief, ~~he~~ appellee will not be heard at oral argument except by special permission of the appropriate appellate court. In the event of a cross-appeal, the appellee shall file a timely brief in support of it; a failure to do so shall render the cross-appeal subject to dismissal on appellant's motion.

R3/88-13.1-3

EXHIBIT "E"

**Rule 16. Form of briefs, appendix, and other papers.**

**(a) Form of briefs and appendix.** Briefs and the appendix may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. The appendix and briefs shall be printed or duplicated on both sides of the sheet. All printed or duplicated matter must appear in at least 11 point (small pica) type on opaque, unglazed paper, and be legible. When utilizing a process which duplicates or copies a typewritten original, lines of typewritten text shall be double-spaced. Briefs and the appendix shall be bound on the left in volumes having pages 8 1/2 by 11 inches and type matter 6 by not less than 8 1/8 inches nor more than 9 1/4 inches. Margins on the bound side of the sheets shall be not less than 1 1/8 inches suitable for permanent binding procedures. Copies of legal-sized pleadings and other papers may be reduced or enlarged to 8 1/2 by 11 inches by standard photocopying methods and inserted in the appendix. All such copies must be legible. Copies of the reporter's transcript of proceedings and other papers reproduced in a manner authorized by this rule may be inserted in the appendix, but not in such manner as to prevent subsequent uniform permanent binding. Such papers may be informally renumbered and asterisks may be added informally if necessary.

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The cover of the brief of appellant should be blue; that of appellee, red; that of an intervenor or amicus curiae who is not an appellant or appellee, green; that of a reply brief, gray. The cover of the appendix should be white. The cover of an amendment should be the same color as the document which it amends. The front covers of the briefs, appendix, and amendments thereto, shall contain: (1) The name of the court and the appellate number of the case; (2) the title of the case (~~see~~ Iowa rule of appellate procedure 12(a)); (3) the nature of the proceeding in court (e.g., Appeal, Certiorari) and the name of the court (and judge), agency, or board whose decision is under review; (4) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the name, address, and telephone number of counsel representing the party on whose behalf the document is filed.

* * * *

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R3/88-16.1-2

[NEW]

## EXHIBIT "F"

**Rule 17. Cases involving expedited times for filings.** The times prescribed in Iowa Rules of Appellate Procedure 13 and 15 for serving and filing the briefs and the appendix, the times prescribed in Iowa Rule of Appellate Procedure 15(b) for determining the contents of the appendix, the time prescribed in Iowa Rule of Appellate Procedure 15(c) for filing an election to defer the appendix, and the times prescribed in Iowa Rule of Appellate Procedure 15(f) for filing an agreed statement of the case shall be reduced by one-half in appeals involving the following: (1) a contest as to custody of children; (2) adoption; (3) termination of the parent-child relationship; (4) juvenile proceedings affecting child placement; or (5) lawyer disciplinary matters.* If filing of the appendix is deferred in the foregoing types of cases pursuant to Iowa Rule of Appellate Procedure 15(c), the appendix shall be served and filed not more than fifteen days after service or expiration of the time for service of appellee's initial brief, and printed or duplicated copies of all the briefs shall be served and filed within seven days after service of the appendix. Court reporters shall give priority to transcription of proceedings in these cases over other civil transcripts. These appeals shall be accorded submission precedence over other civil cases.

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*See Iowa Rule of Appellate Procedure 105 for criminal appeals.

R3/88-17.1

FORM

EXHIBIT "G"

IN THE SUPREME COURT OF IOWA
No. _____
_____ County No. _____

) **COMBINED CERTIFICATE**
)
) **[See Iowa R. App. P. 10(b)]**

---

1. Notice of appeal was filed in district court on _____ (Date), from a judgment or ruling filed on _____ (Date).

2A. I hereby certify that I (__now order)* (__have ordered) on the _____ day of _____, 19___, a transcript, or portions thereof, from:

(1) _____ (Court Reporter Name) _____ (Address)

(2) _____ _____.

No arrangements have been made or suggested to delay the preparation thereof. I will pay for the transcript in accordance with Iowa Rule of Appellate Procedure 10(b). The following proceedings (__are)* (__were) ordered:

(1) _____ (Describe parts ordered)

before _____ (Judge) on _____ (Date)

(2) _____.

before _____ on _____

-- OR --

*This certificate may be used as an order form.

2B. I need not order a transcript under Iowa Rule of Appellate Procedure 10(c) because:

_____

_____

_____.

I (___ will) (___ will not) prepare a statement of the evidence or proceedings pursuant to Iowa Rule of Appellate Procedure 10(c).

2C. [To be completed by appellant if less than full transcript is ordered] The issues appellant(s) intends to present on appeal are:

I.

II.

III.

3. If Iowa Rule of Appellate Procedure 12(b), 17, or 105 applies to this case, check category:

___ a contest as to custody of children, an adoption, or a juvenile proceeding affecting child placement;

___ a termination of a parent-child relationship;

___ a conviction and sentence on a plea of guilty or a sentence only;

___ an original certiorari proceeding;

___ a certified question of law;

___ a lawyer disciplinary matter;

___ proceedings which have not been recorded in such a manner that a transcript of those proceedings can be made;

___ judicial review of an administrative action pursuant to Iowa Code chapter 17A, where no additional testimony was introduced in district court.

4. I assert in good faith that this appeal meets jurisdictional requirements and is from:

_____ a final judgment, order, or decree and a timely notice of appeal has been filed;

-- OR --

_____ an interlocutory ruling where permission for appeal has been requested and granted by the supreme court.

4. The names of the parties involved in this appeal and their designations in district court are shown below under column A. Their respective attorneys' names, law firms, addresses, and telephone numbers are shown below under column B:

| Column A<br>Parties | Column B<br>Attorneys |
|---|---|
| Apppellant(s): | |
| Appellee(s): | |

Appellant's Name _____

By _____
_____
_____

(Name, address, and telephone number of attorney or, if none, of appellant.)

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on _____, 19___, I served this document by (__ personally delivering) (__ mailing) a copy to all other parties in this matter and to the court reporter(s) from whom the transcript has been ordered at their respective addresses as shown below:

I further certify that on _____, 19___, I will file this document by (__ personally delivering) (__ mailing) a copy of it to the Clerk of the District Court for _____ County.

I further certify that on _____, 19___, I will file this document by (__ personally delivering) (__ mailing) 3 copies of it to the Clerk of the Supreme Court, Statehouse, Des Moines, Iowa 50319.

_____
SIGNATURE OF PERSON SERVING AND FILING

R3/88-FORM.1-5

FORM

EXHIBIT "H"

IN THE SUPREME COURT OF IOWA
No. _____
_____ County No. _____

) **SUPPLEMENTAL CERTIFICATE**
)
) **[See Iowa R. App. P. 10(b)]**

---

I hereby certify that I (__now order)* (__have ordered) on the _____ day of _____, 19___, the following additional transcript which I believe is necessary for proper determination of this appeal from:

(1) _____ _____
(Court Reporter Name) (Address)

(2) _____ _____.

No arrangements have been made or suggested to delay the preparation thereof. I will pay for the additional transcript in accordance with Iowa Rule of Appellate Procedure 10(b). The following additional parts of the proceedings (__are)* (__were) ordered:

(1) _____
(Describe parts ordered)

before _____ on _____
(Judge) (Date)

(2) _____

before _____ on _____.

*This certificate may be used as an order form.

Party's Name _____

By _____

_____

_____

(Name, address, and telephone number of attorney or, if none, of party.)

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on _____, 19___, I served this document by (__ personally delivering) (__ mailing) a copy to all other parties in this matter and to the court reporter(s) from whom the transcript has been ordered at their respective addresses as shown below:

I further certify that on _____, 19___, I will file this document by (__ personally delivering) (__ mailing) a copy of it to the Clerk of the District Court for _____ County.

I further certify that on _____, 19___, I will file this document by (__ personally delivering) (__ mailing) 3 copies of it to the Clerk of the Supreme Court, Statehouse, Des Moines, Iowa 50319.

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_____

SIGNATURE OF PERSON SERVING AND FILING

R3/88-FORM.6-7

EXHIBIT "I"

-- APPELLATE PROCEDURE TIMETABLE --

PRE-DOCKETING PROCEDURE

Due Dates

1. **NOTICE OF APPEAL.** Appellant files notice of appeal with district court clerk, serves all parties, and sends copy to supreme court clerk. See Iowa R. App. P. 6(a).

4 days

2. **ORDERING TRANSCRIPT AND FILING COMBINED CERTIFICATE.** Appellant orders transcript from court reporter, completes combined certificate, and serves certificate on reporter and all parties. Appellant files combined certificate with district and supreme court clerks. See rule 10(b). District court clerk transmits certified copy of notice of appeal and docket and calendar entries to supreme court clerk and all parties. See rule 11(a).

10 days

3. **DESIGNATING ADDITIONAL TRANSCRIPT.** If appellee deems other parts of the proceedings necessary, appellee designates additional transcript, serves designation on all parties and the reporter, and files it with clerk of district court. See rule 10(b).

4 days

4. **ORDERING ADDITIONAL TRANSCRIPT AND SUPPLEMENTAL CERTIFICATE.** Appellant orders additional transcript from court reporter. Disputes concerning additional transcript are addressed to district court if appellant fails to, and appellee does not, order transcript. See rule 10(b). Party ordering additional transcript completes supplemental certificate, serves certificate on all parties and the reporter, and with clerks of district and supreme court. See rule 10(b).

40 days (see notes)

5. **DOCKETING AND FILING OF TRANSCRIPT.** Appellant dockets appeal by either:
   (A) paying $50 fee to supreme court clerk, OR
   (B) requesting waiver of fee and filing copy of district court order of indigency. See Rule 12(a).
Court reporter files transcript with district court clerk. See rule 10(b).

-- NOTES --

(A) The Iowa Rules of Appellate Procedure govern procedure in all appeals. These timetables are merely illustrative and may not cover every procedural situation.

(B) See rules 12(b) and 105 for cases in which docketing time is reduced:

| | |
|---|---|
| Termination of parental-child relationship | 30 days |
| Guilty plea or sentence only | 20 days |
| Certiorari | 20 days |
| Certified question | 10 days |
| Lawyer discipline | 10 days |
| Case involving no transcript | 10 days |
| Administrative action where no additional testimony was introduced in district court | 10 days |

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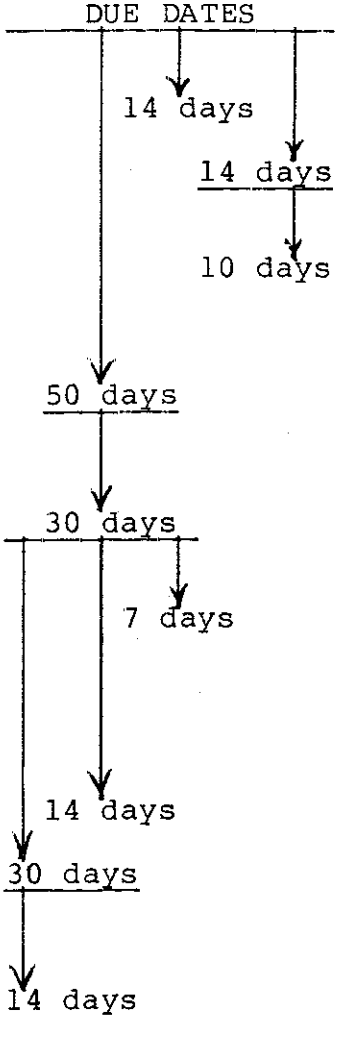
APT/88-0502.4

## -- APPELLATE PROCEDURE TIMETABLE --

### POST-DOCKETING PROCEDURE
### WHERE APPENDIX IS NOT DEFERRED
### (NOT FOR USE IN CRIMINAL CASES)




1. **DOCKETING DATE.** See rule 12(a).

2. **CONTENTS OF APPENDIX.**
   A. Parties agree on contents of appendix and file short memorandum of that agreement.
   B. If parties disagree, appellant files and serves designation of parts of record to be included in appendix and statement of issues. Appellee may file and serve designation of additional parts of record necessary for inclusion in appendix. See rules 15(b) and 17.

3. **APPELLANT'S BRIEF AND APPENDIX.** Appellant files and serves brief and appendix. See rules 13(a), 15(a), and 17.

4. **APPELLEE'S BRIEF.** Appellee files and serves brief. See rules 13(a), and 17.

5. **TRANSMISSION OF RECORD.** Appellant requests transmission and ensures that district court clerk transmits remaining record to supreme court clerk. See rule 11(b) and note (C) below.

6. **APPELLANT'S REPLY BRIEF.**
   A. Appellant may file and serve reply brief. See rules 13(a), 14(c), and 17.
   B. Where cross-appeal is involved, appellant shall file and serve reply brief or statement that brief will not be filed. See rule 13(b).

7. **APPELLEE'S REPLY BRIEF.** Where cross-appeal is involved, appellee may file and serve reply brief. See rule 13(b).

-- NOTES --

(A) The Iowa Rules of Appellate Procedure govern procedure in all appeals. These timetables are merely illustrative and may not cover every procedural situation.

(B) If rule 17 (priority cases) applies, the times for filing the above, except for step 5, are reduced by one-half.

(C) Suggestion: Document the request for transmission of the remaining record by sending letter to the district court clerk with a copy sent to the supreme court clerk.

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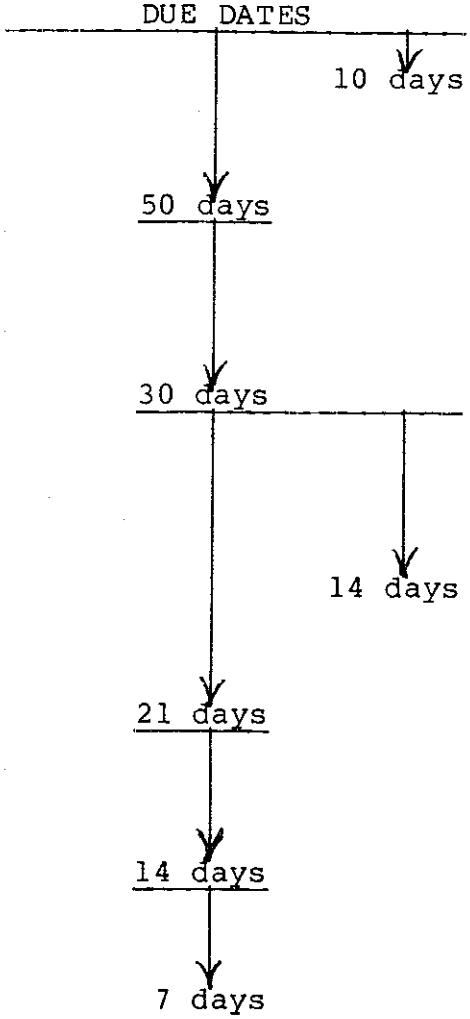
APT/88-0502.1

-- APPELLATE PROCEDURE TIMETABLE --

## POST-DOCKETING PROCEDURE
## WHERE APPENDIX IS DEFERRED BUT CROSS-APPEAL IS NOT FILED




1. **DOCKETING DATE.** See rule 12(a).

2. **ELECTION TO DEFER APPENDIX.** Appellant files and serves election to defer appendix. See rules 15(c), 17, 102, and 105.

3. **APPELLANT'S PROOF BRIEF AND DESIGNATION.** Appellant files 2 proof copies and serves 1 proof copy of brief and designation of parts of record to be included in appendix. See rules 13(a), 15(c), 17, and 105.

4. **APPELLEE'S PROOF BRIEF AND DESIGNATION.** Appellee files 2 proof copies and serves 1 proof copy of brief and designation of any additional parts of record to be included in appendix. See rules 13(a), 15(c), 17, and 105.

5. **APPELLANT'S PROOF REPLY BRIEF.** Appellant may file 2 proof copies and serve 1 proof copy of reply brief. See rules 13(a), 15(c), 17, and 105.

6. **APPENDIX.** If appellee has served proof brief, or if time for serving has expired, appellant files 18 copies and serves 2 copies of appendix. See rules 15(a), 15(c), 17, and 105.

7. **FINAL BRIEFS.** All parties file 18 copies and serve 2 copies of all briefs in final form. See rules 13(e), 15(c), 17, and 105.

8. **TRANSMISSION OF RECORD.** Appellant requests transmission and ensures that district court clerk transmits remaining record to supreme court clerk. See rule 11(b) and note (C) below.

-- NOTES --

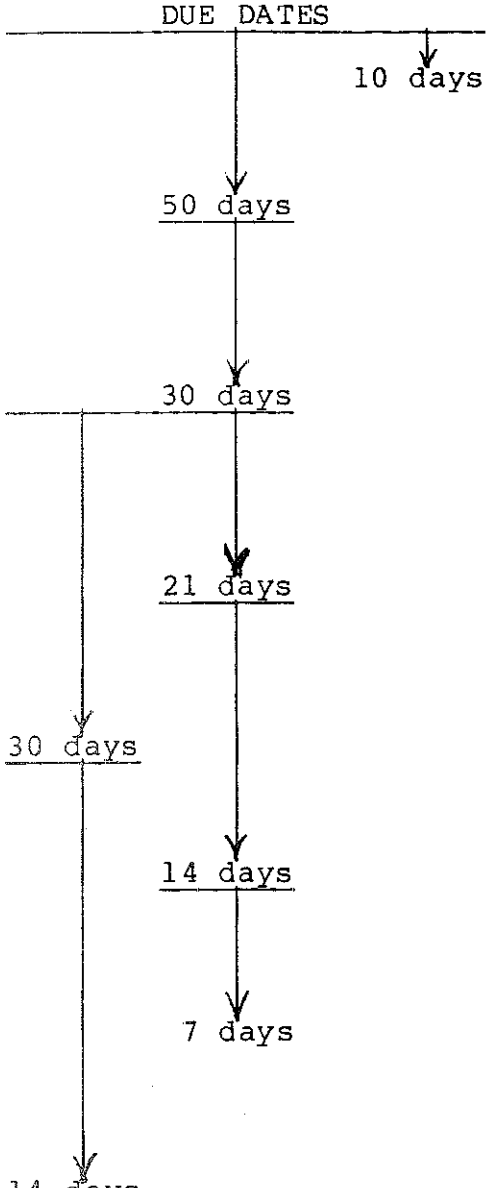
(A) The Iowa Rules of Appellate Procedure govern procedure in all appeals. These timetables are merely illustrative and may not cover every procedural situation.

(B) If rule 17 (priority cases) or 105 (guilty plea or sentence only cases) applies, the times for filing the above are reduced by one-half, except step 6, which is reduced to 15 days, and step 8 which remains 7 days.

(C) Suggestion: Document the request for transmission of the remaining record by sending a letter to the district court clerk with a copy to the supreme court clerk.

APT/88-0502.2

## POST-DOCKETING PROCEDURE
## WHERE APPENDIX IS DEFERRED AND CROSS-APPEAL IS FILED




1. **DOCKETING DATE.** See rule 12(a).

2. **ELECTION TO DEFER APPENDIX.** Appellant files and serves election to defer appendix. See rules 15(c), 17, 102, and 105.

3. **APPELLANT'S PROOF BRIEF AND DESIGNATION.** Appellant files 2 proof copies and serves 1 proof copy of brief and designation of parts of record to be included in appendix. See rules 13(b), 15(c), 17, and 105.

4. **APPELLEE'S PROOF BRIEF AND DESIGNATION.** Appellee files 2 proof copies and serves 1 proof copy of brief and designation of any additional parts of record to be included in appendix. See rules 13(b), 15(c), 17, and 105.

5. **APPENDIX.** If appellee has served proof brief, or if time for serving has expired, appellant files 18 copies and serves 2 copies of appendix. See rules 15(a), 15(c), 17, and 105.

6. **APPELLANT'S REPLY BRIEF.** Appellant files 18 copies and serves 2 copies of reply brief in final form. See rules 13(b), 15(c), 17, and 105.

7. **FINAL BRIEFS.** All parties file 18 copies and serve 2 copies of all other briefs in final form, except for appellee's reply brief. See rules 13(b), 13(e), 15(c), 17, and 105.

8. **TRANSMISSION OF RECORD.** Appellant ensures that district court clerk transmits remaining record t supreme court clerk. See rule 11(b) and suggestion (C) below.

9. **APPELLEE'S REPLY BRIEF.** Appellee may file 18 copies and serve 2 copies of reply brief in final form. See rule 13(b).

-- NOTES --

(A) The Iowa Rules of Appellate Procedure govern procedure in all appeals. These timetables are merely illustrative and may not cover every procedural situation.

(B) If rule 17 (priority cases) or 105 (guilty plea or sentence only cases) applies, the times for filing the above are reduced by one-half, except in step 5 which is reduced to 15 days, and step 8 which remains 7 days.

(C) Suggestion: Document the request for transmission of the remaining record by sending a letter to the district court clerk with a copy to the supreme court clerk.

APT/88-0502.3

IN THE SUPREME COURT OF IOWA

SUPERVISORY DIRECTIVE

FILED
MAY 27 1988
-CLERK SUPREME COURT

Effective July 1, 1988, all appeals involving the termination of the parent-child relationship will be exempted from screening review by a rotating panel of three justices as outlined by the Supreme Court of Iowa rule 4(b). These appeals shall be transferred directly to the Iowa Court of Appeals.

In each case involving termination of the parent-child relationship, an order shall be entered providing that these cases shall be given the highest priority at all stages of the appellate process, and that the litigants will not be given extensions of time in which to comply with the expedited docketing and briefing schedules. In these cases the filing of any motion is not to suspend or stay the appellate timetable for purposes of defaults or penalties assessed under Iowa Rule of Appellate Procedure 19.

Dated this 27th day of May, 1988.

THE SUPREME COURT OF IOWA

By Arthur A. McGiverin
Arthur A. McGiverin, Chief Justice

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# NOTES